Speaking of Religious Freedom

MIDWAY

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We are witnessing one of the great religious liberty battles in American history. A year ago, in August 2011, the federal executive branch embarked on a deliberate campaign to force religious employers to pay for drugs and medical procedures to which they hold longstanding religious objections. This article offers a brief review of how the battle unfolded over the past year and where the lines have been drawn as the struggle enters its second year.

A Synopsis of the HHS Mandate Controversy

The Patient Protection and Affordable Care Act of 2010 ("PPACA") requires all employers to provide employees with insurance coverage of certain drugs and procedures identified as women's "preventive care" with no cost sharing. Congress left to HHS the task of identifying the specific drugs and procedures to be deemed "preventive care."

July 2011: HHS announces that "preventive services" include, ***inter alia***, all FDA-approved contraceptives (including Plan B and ***ella***), sterilization procedures, and reproductive education and counseling. Many persons consider Plan B and ***ella*** to be abortifacients.

August 2011: Suspending normal rulemaking procedures, HHS announces an interim final rule, now known as the "HHS Mandate," that requires employers to provide the above drugs and procedures without cost sharing. The Mandate includes an extraordinarily limited exemption for a small set of "religious employers." To qualify, a "religious employer" must meet all four criteria: 1) its purpose must be to inculcate religious values; 2) it must primarily employ members of its own faith; 3) it must serve primarily members of its own faith; and 4) it must be a nonprofit organization described in Internal Revenue Code § 6033(a)(1) and § 6033(a)(3)(A)(i) or (iii) (***i.e.***, churches, their integrated auxiliaries, and conventions or associations of churches, as well as the exclusively religious activities of a religious order).

January 2012: In response to the sustained outcry from the Catholic, Evangelical Christian, and Orthodox Jewish communities against the Mandate and its too-narrow definition of "religious employer," HHS Secretary Sebelius announces that religious employers who do not qualify for the exemption will have an additional year to come into compliance with the Mandate, if they qualify for a "temporary enforcement safe harbor" -- but only if the religious employer takes affirmative action to certify that it meets all of the following criteria:

> 1) It is organized and operated as a non-profit entity;
> 2) It has not provided contraceptive coverage as of February 10, 2012, because of its religious beliefs;
> 3) It provides notice to its employees that contraceptive coverage is not provided; and
> 4) By the first day of its plan year, it self-certifies that the first three criteria have been met.[1]

Secretary Sebelius' announcement merely intensifies the religious liberty community's objections because the Administration seems to believe that religious employers will abandon their religious convictions after considering the consequences of resistance.

February 2012: President Obama announces that the objectionable definition of "religious employer" will be finalized into law. He also announces that HHS will propose, at a future date, an undefined accommodation for some additional, unspecified religious employers. The Administration claims that religious employers' insurance issuers, or third-party administrators, will furnish free contraceptive coverage to employees without any cost to the employer or the employees.

March 2012: The Administration issues an Advance Notice of Proposed Rulemaking (ANPRM) that fails to propose specific language, but rather seeks comments on how to structure an accommodation that provides free contraceptives to employees of religious employers without any cost sharing or cost to the employer. The ANPRM asks two basic questions: 1) ***who*** among religious employers should be given an accommodation, and 2) ***which*** third-party should be required to pay for the accommodation.

May 2012: Beginning in November, some Catholic and Evangelical institutions and individuals file lawsuits seeking injunctive relief from the Mandate. The number of lawsuits cascades in May when

1 Department of Health & Human Services, Guidance on the Temporary Enforcement Safe Harbor for Certain Employers, Group Health Plans and Group Health Insurance Issuers with Respect to the Requirement to Cover Contraceptive Services Without Cost Sharing Under Section 2713 of the Public Health Service Act, Section 715(a)(1) of the Employee Retirement Income Security Act, and Section 9815(a)(1) of the Internal Revenue Code, February 10, 2012, at 3.

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numerous Catholic organizations simultaneously file a dozen lawsuits nationwide. By August, 26 separate lawsuits against the Mandate have been filed in federal court.

June 2012: The United States Supreme Court upholds the constitutionality of the PPACA's Individual Mandate as a legitimate exercise of Congress' power to tax.[2] The ruling does not address the HHS Mandate's constitutionality.

July-August 2012: One federal court in Colorado grants a family-owned business preliminary injunctive relief from compliance with the HHS Mandate because the Mandate does not satisfy the "least restrictive alternative" requirement required by the Religious Freedom Restoration Act.[3] Two other federal courts, in the District of Columbia and Nebraska, grant the government's motions to dismiss on ripeness grounds "[b]ecause the government has indicated its intention to amend the regulations to better take into account religious objections and because Plaintiff is protected in the interim by a safe-harbor provision, . . . [Plaintiff]'s injury is too speculative to confer standing and [] the case is also not ripe for decision."[4]

August 2012: Beginning August 1, 2012,[5] the Mandate takes effect for most religious organizations. A religious employer may avoid the Mandate only if it 1) has a grandfathered plan,[6] 2) qualifies for the too-narrow exemption for religious employer, or 3) qualifies for the temporary safe harbor.[7]

On August 15, HHS releases "revised" guidance on the "temporary enforcement safe harbor," which successfully moots the Wheaton College challenge to the Mandate.[8] The revised guidance extends the temporary enforcement safe harbor to otherwise qualified "non-profit organizations with objections to some but not all contraceptive coverage," a matter which had been in some doubt. It also extends temporary protection to group health plans that took some action to try to exclude or limit contraceptive coverage before February 10, 2012, even if unsuccessful.[9]

The Mandate is Fundamentally Flawed

The Mandate marks an extreme and troubling departure from the Nation's historic – and bipartisan -- protection of religious conscience rights, particularly in the context of participation in, and funding of, abortion. Indeed, the PPACA itself provides conscience protections.[10] President Obama's Executive Order 13535, without which the PPACA would not have been enacted, also affirmed that "longstanding Federal Laws to protect conscience . . . remain intact and new protections prohibit discrimination against health care facilities and health care providers because of an unwillingness to provide, pay for, provide coverage of, or refer for abortions."[11]

By plucking a controversial definition of "religious employer" from two states' laws, the Administration bypassed time-tested federal definitions of "religious employer" -- most notably the decades-old, preeminent federal definition of "religious employer" found in Title VII of the Civil Rights Act of 1964. Because Title VII protects religious educational institutions, hospitals, associations, and other religious employers, which the Administration's definition excludes, the controversy would have been avoided by simply incorporating the Title VII definition of "religious employer." The Administration's protests that it simply drew the Mandate from California and New York contraceptive mandates, and that those laws were upheld in state court challenges brought by Catholic charities, actually demonstrate that the Administration knew from the start that Catholic institutions could not live with its excessively narrow definition of "religious employer." In states with contraceptive mandates, religious employers can structure their insurance coverage to avoid providing objectionable coverage. Even in New York and California, religious employers could avoid objectionable coverage by self-insuring, dropping prescription drug coverage, or offering ERISA plans not subject to state regulation. The PPACA forecloses these options.

In addition, while the exemption purportedly covers all churches, some churches, in fact, may

2 *National Federation of Independent Business v. Sebelius,* 132 S. Ct. 2566 (2012).

3 *Newland v. Sebelius,* 2012 WL 3069154 (D.Colo. 2012).

4 *Belmont Abbey College v. Sebelius,* 2012 WL 2914417 (D.D.C. 2012). *See also, Nebraska ex rel. Bruning v. U.S. Dep't of Health & Human Servs.,* 2012 WL 2913402 (D. Neb. 2012); *Wheaton College v. Sebelius,* 2012 WL 3637162 (D.D.C. 2012).

5 An employer must comply with the Mandate when its next insurance plan year begins after August 1, 2012.

6 Grandfathered health plans," that is, plans that are materially unchanged since PPACA's enactment on March 23, 2010, are exempt from most of PPACA's provisions. 42 U.S.C. § 18011. According to HHS estimates, 98 million individuals will be covered by grandfathered group health plans in 2013. Interim Final Rules for Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 75 Fed. Reg. 41,726, 41,732 (July 19, 2010). However, government estimates suggest that half of the grandfathered plans will lose that status by 2013. Bernadette Fernandez, Cong. Research Serv., RL 7-5700, Grandfathered Health Plans under the Patient Protection and Affordable Care Act (PPACA) (2012) at 6-7.

7 An employer with fewer than 50 full-time employees may drop all health insurance coverage for employees; however, the employees are then required by the individual mandate to purchase health insurance that includes contraceptive coverage, even if they have religious objections. If employees do not purchase the objectionable insurance, they must pay a costly penalty. Employers of 50 or more full-time employees do not have the option of dropping coverage without paying heavy penalties.

8 *Wheaton College v. Sebelius,* 2012 WL 3637162 (D.D.C. 2012).

9 HHS, Guidance on the Temporary Enforcement Safe Harbor, August 15, 2012, *available at* http://cciio.cms.gov/resources/files/prev-services-guidance-08152012.pdf.

10 42 U.S.C. § 18023 (a)(2)(A); Id. § 18023(b)(1)(A)(i).

11 75 Fed. Reg. 15599 (Mar. 24, 2010).

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fail to meet all four criteria. Churches with robust community outreach programs may be disqualified. Moreover, the current definition fails to specify which tenets, or what percentage of the employer's tenets, a beneficiary or employee must hold in order to qualify for the exemption. Nor is it certain that the exemption covers all church employees.

For that reason, CLS joined 125 other Christian organizations to object to the federal government's bifurcation of the religious community into two classes: churches (supposedly protected by the exemption) and faith-based service organizations (unprotected by the exemption). As the letter explains:

> [B]oth worship-oriented and service-oriented religious organizations are authentically and equally religious organizations. To use Christian terms, we owe God wholehearted and pure worship, to be sure, and yet we know also that 'pure religion' is 'to look after orphans and widows in their distress' (James 1:27). We deny that it is within the jurisdiction of the federal government to define, in place of religious communities, what constitutes both religion and authentic ministry.[12]

Of course, now that such a narrow definition of "religious employer" has wormed its way into federal law, it is likely to spread to other federal and state laws. Any State is free to adopt the exemption in any context it chooses.

Finally, the arguments advanced for making religious employers pay for contraceptives and abortifacients – women's economic equality and avoidance of childbirth – are the core arguments used to justify all abortions. If the Administration succeeds in forcing religious employers to pay for contraceptives and abortifacients, the Mandate can be easily amended at a later date to compel religious employers to pay for all abortions. Indeed, the Institute of Medicine report that recommended coerced coverage of contraceptives and abortifacients suggests that coverage of "abortion services" was also considered, when it notes: "Finally, despite the potential health and well-being benefits to some women, abortion services were considered to be outside of the project's scope, given the restrictions contained in the ACA."[13]

The Mandate violates federal statutory and constitutional protections for religious liberty. The Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. 2000bb, exemplifies our national commitment to exemptions for religious individuals and institutions. RFRA places the burden on the federal government to demonstrate a compelling interest unachievable by less restrictive means to justify burdening citizens' religious practices.

12 Letter to Secretary Sebelius from Stanley Carlson-Thies, Institutional Religious Freedom Alliance, and 25 religious organizations, June 11, 2012, http://www.clsnet.org/document.doc?id=367.

13 Institute of Medicine, Clinical Preventive Services for Women: Closing the Gaps (July 19, 2011) at 22.

The government cannot meet this burden because the Mandate and PPACA exempt approximately 100 million employees that are covered by grandfathered plans. Employers with fewer than 50 employees need not provide coverage.[14] Employers who are members of a 'recognized religious sect or division' that objects, on conscience grounds, to acceptance of public or private insurance funds are exempt.[15] Of course, the Mandate's own exemption of some religious employers demonstrates that the government's interest is not compelling.

Nor is the Mandate the least restrictive means of achieving the government's purported interests of gender equality and childbirth avoidance. No one seriously disputes that contraceptives are widely available. For example, on January 20, 2012, Secretary Sebelius announced that religious employers would have to give specific information to employees, specifically that "contraceptive services are available at sites such as community health centers, public clinics, and hospitals with income-based support."[16] For similar reasons, the Mandate also violates the Free Exercise Clause.

The battle lines are drawn for a lengthy battle for religious liberty. But this past year's fight has created unity among the religious liberty community and refined the arguments that should eventually prevail in the courts.

Kim Colby has worked for the Center for Law and Religious Freedom since graduating from Harvard Law School in 1981. She has represented religious groups in numerous appellate cases, including two cases heard by the United States Supreme Court, as well as on dozens of amicus briefs in federal and state courts. She was involved in congressional passage of the Equal Access Act in 1984.

14 26 U.S.C. § 4980H(c)(2)(A).

15 26 U.S.C. §§ 1402(g)(1), 5000A(d)(2)(a)(i) and (ii).

16 Statement by U.S.Dep't of Health and Human Serv's Secretary Kathleen Sebelius, *available at* http://www.hhs.gov/news/press/2012pres/01/20120120a.html.

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