The Heritage Foundation
LEADERSHIP FOR AMERICA

LEGAL MEMORANDUM

No. 82 | JUNE 15, 2012

Obama v. Religious Liberty: How Legal Challenges to the HHS Contraceptive Mandate Will Vindicate Every American's Right to Freedom of Religion

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Abstract

James Madison once wrote that "Conscience is the most sacred of all property." Yet this sacred property is now under assault from an increasingly avaricious federal government. The contraceptive mandate—a regulatory mandate issued pursuant to Obamacare—requires that religiously affiliated institutions provide contraceptives or abortifacients. Providing such services would require these institutions to violate their religious convictions and would give unprecedented power to the federal government to dictate how religiously affiliated institutions must behave. If HHS does not reconsider its ill-advised decision or it is not overridden by Congress, or if the Supreme Court does not invalidate the entire health care law first, the courts should invalidate the contraceptive mandate and reaffirm every American's right to religious freedom.

This paper, in its entirety, can be found at **http://report.heritage.org/lm82**

Produced by the Center for Legal & Judicial Studies

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In his 1792 *Essay on Property*, James Madison wrote, "Conscience is the most sacred of all property."[1] Several years later, in 1809, Thomas Jefferson wrote that "No provision in our Constitution ought to be dearer to man than that which protects the rights of conscience against the enterprises of the civil authority."[2]

These prophetic words are at the heart of a series of lawsuits challenging one of the regulatory mandates issued by the U.S. Department of Health and Human Services (HHS) pursuant to the Obamacare law. Unless the regulation in question is rescinded or overridden by Congress, or the Supreme Court invalidates the entire health care law first, the legal challenges should prevail, vindicating this nation's cherished right to freedom of conscience.

Origin of the Contraceptive Mandate and Legal Challenges

In 2010, President Barack Obama signed into law the Patient Protection and Affordable Care Act and the Health Care and Education Reconciliation Act (better known as Obamacare). That law mandates that health plans must "provide coverage for and shall not impose

Talking Points

- Acting under Obamacare, HHS issued a regulation requiring employers to provide health plans that cover abortion-inducing drugs, sterilization, and contraceptives. HHS can grant an exemption to a "religious employer" only if the organization primarily employs and serves persons who share its faith.
- This extremely narrow exemption would not apply to most church-run institutions, such as hospitals, schools, and social service providers, that hire a range of people and provide services to needy people of all faiths.
- Twenty-three lawsuits challenge the legality of the contraceptive mandate, contending that it violates the First Amendment and the Religious Freedom Restoration Act. Although both claims are strong, the challengers' chance of success under RFRA seems particularly likely.
- Unless the regulation is rescinded or overridden by Congress, or the Supreme Court invalidates the entire Obamacare law, the legal challenges to the HHS contraceptive mandate should prevail, vindicating our cherished religious liberty.

any cost sharing requirements for ... with respect to women, such additional preventive care and screenings ... as provided for in comprehensive guidelines supported by the Health Resources and Services Administration." The law further directs the Secretary of HHS to determine what constitutes "preventive care" under the act.[3]

On August 1, 2011, HHS promulgated an interim final rule ("the contraceptive mandate"), which designated several services that must be provided under group health plans to women, including "All Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity."[4] At least three of the FDA-approved contraceptives—Plan B (better known as the "morning-after pill"); ulipristal acetate ("Ella" or the "week-after pill"); and intrauterine devices (IUDs)—use artificial means that may either prevent the implantation of a human embryo in the wall of the uterus or remove an implanted embryo from the uterine wall, thereby causing the death of that embryo—an act that constitutes an abortion in Catholic and other religious teaching.[5]

The act allows a system of individualized exemptions under which HHS may grant compliance waivers to employers and other health insurance plan issuers. Pursuant to this statutory authority, HHS declared in the contraceptive mandate that its Health Resources and Services Administration may grant, at its discretion, an exemption to a "religious employer" but only if the organization seeking the exemption:

1. Has the inculcation of religious values as its purpose;

2. Primarily employs persons who share its religious tenets;

3. Primarily serves persons who share its religious tenets; and

4. Is a nonprofit organization under sections of the Internal Revenue Code which "refer to churches, their integrated auxiliaries, and conventions or associations of churches, as well as to the exclusively religious activities of any religious order."[6]

The effect of this extremely narrow exemption is that while it might apply to traditional houses of worship and to seminaries which tend to hire and serve primarily people of their own faith, it almost assuredly would not apply to the myriad of other church-run institutions, such as religious hospitals, schools, and social service providers—organizations that hire a broad range of people and provide valuable services to needy people of all faiths and of no faith at all. To date, 23 lawsuits have been filed by religious institutions, businesses, and individuals challenging the legality of the contraceptive mandate and contending that the Obama Administration is seeking to coerce them to violate their religious convictions by providing services that run contrary to their moral convictions.

TO DATE, 23 LAWSUITS HAVE BEEN FILED BY RELIGIOUS INSTITUTIONS, BUSINESSES, AND THE CHALLENGERS CONTENT THAT THE OBAMA ADMINISTRATION IS SEEKING TO COERCE THEM TO VIOLATE THEIR RELIGIOUS CONVICTIONS BY PROVIDING SERVICES THAT RUN CONTRARY TO THEIR MORAL CONVICTIONS.

Ironically, but not surprisingly, critics of those trying to maintain their religious principles and identity have argued that the opposite is true. For instance, *The New York*

1. James Madison, *Property*, Nat'l Gazette, Mar. 27, 1792, *reprinted in* 14 The Papers of James Madison 266–68 (Robert A. Rutland et al. eds., 1983).
2. Letter from President Thomas Jefferson to the Society of the Methodist Episcopal Church at New London, Conn. (Feb. 4, 1809).
3. 42 U.S.C. § 300gg-13(a)(4) (2010).
4. 45 CFR § 147.130(a)(1)(iv) (2012).
5. *E.g.*, in 1968, in his encyclical Humanae Vitae (No. 14) (Latin for "human life"), Pope Paul VI stated that "any action which either before, at the moment of, or after sexual intercourse, is specifically intended to prevent procreation, whether as an end or as a means" is a grave sin involving the intentional destruction of innocent human life and that, in accordance with Pope John Paul II's 1995 Evangelium Vitae, "Causing death can never be considered a form of medical treatment ...."
6. § 147.130(a)(1)(iv)(B). On January 20, 2012, HHS announced that it would not broaden the religion exemption, although it would give nonprofit employers who, based on religious beliefs, do not currently provide contraceptive coverage in their health plans an additional year to comply with the Contraceptive Mandate. *See* Press Release, U.S. Department of Health and Human Services, A Statement by U.S. Department of Health and Human Services Secretary Kathleen Sebelius (Jan. 20, 2012), *available at* http://www.hhs.gov/news/press/2012pres/01/20120120a.html.

Times editorial board asserted that the real threat to religious liberty "comes from the effort to impose one church's doctrine on everyone."[7]

Yet the religious institutions in question are not forcing anyone to do anything. Their position would not preclude any women, including those who work for religious institutions, from using or obtaining contraception or abortifacients. Employers who favor providing contraceptive and abortion drug coverage to their employees would retain their right to do so, and employees who desire such coverage at no cost to themselves would, of course, be free to seek employment from institutions that provide it.

Strength of the Legal Challenges

The primary contention of the religious institutions filing suit is that the contraceptive mandate violates their rights under the First Amendment and the Religious Freedom Restoration Act of 1993 (RFRA).[8] Although both of these religious liberty claims are strong, the challengers' chance of success under RFRA seems particularly likely.

The First Amendment Challenge. The First Amendment provides, in pertinent part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech...." The plaintiffs contend that the contraceptive mandate violates their right to the free exercise of their religion and compels them, through their insurance plans, to provide counseling about contraception and abortion services in violation of their right to free speech.

IT IS HIGHLY QUESTIONABLE WHETHER THE PRESIDENT CAN, CONSISTENT WITH THE TAKINGS CLAUSE OF THE FIFTH AMENDMENT, TAKE THE PRIVATE PROPERTY OF INSURANCE PROVIDERS BY FIAT.

It seems likely that the Supreme Court would determine that, for purposes of the First Amendment, a person or institution engages in the "exercise of religion" when refusing for religious reasons to provide health insurance that covers contraception, abortifacients, or sterilization.[9] On numerous occasions, governmental authorities have sought to compel individuals to engage in activities that violated their religious tenets, only to be rebuked by the Supreme Court. For instance:

- In *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), the Court held that students, including Jehovah's Witnesses who consider a flag salute to be a form of idolatry, could not be compelled to say the Pledge of Allegiance.

- In *Sherbert v. Verner*, 406 U.S. 398 (1963), the Court held that an individual could not be denied unemployment insurance because her religious beliefs forbade her from working on Saturdays.

- Similarly, in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), the Court upheld the rights of parents whose religious beliefs prohibited them from sending their teenage children to high school.

Although the Supreme Court has also determined that the Free Exercise Clause does not require an exemption from a drug law for members of a Native American religion that used peyote in its religious services,[10] that decision likely will not govern the challenges to the contraceptive mandate. Indeed, the Court held that the Free Exercise Clause will not excuse the "incidental effect" of a neutral law of *general* applicability. Obamacare is not a law of general applicability, as exemptions are granted both to a narrow class of religious employers and to other employers for purely secular reasons.[11] Moreover, Congress reestablished the more stringent standard

7. Editorial, *The Politics of Religion*, N.Y. Times, May 27, 2012, *available at* http://www.nytimes.com/2012/05/28/opinion/the-politics-of-religion.html?_r=2.
8. A third, non-frivolous argument, which is not addressed in this paper, is that the mandate also violates various requirements of the Administrative Procedure Act.
9. Indeed, HHS tacitly acknowledges as much for the limited class of "religious employers" that it is prepared to exempt from the mandate.
10. Emp't Div. v. Smith, 494 U.S. 872, 880 (1990).
11. Exempted employers would include those whose health plans are "grandfathered" (defined as one that was in existence on March 23, 2010, and has not undergone any of a defined set of changes), as well as those with fewer than 50 full-time employees. 6 C.F.R. § 54.9815-1251T (2010); 29 C.F.R. § 2590.715-1251 (2010); 45 C.F.R. §§ 147.130(a)(1)(A) & (B) (2012) and § 147.140; 26 U.S.C. § 4980H(c)(2)(A) (2010); 42 U.S.C. § 18011(a)(2) (2010).
12. City of Boerne v. Flores, 521 U.S. 507 (1997) (holding that RFRA's protections could not be applied against the states but not questioning whether they apply against the federal government); Gonzales v. O Centro Espirita Beneficiente Uniao de Vegetal, 546 U.S. 418 (2006) (RFRA's protections apply against the federal government).

of deference to those with religious beliefs who challenge a federal (as opposed to state) action in RFRA.[12]

The Obama Administration has asserted that under a theoretical proposal it has offered as an alternative way of providing contraceptive coverage for plan participants and beneficiaries,[13] no employers' First Amendment rights would be violated because it is the insurance providers—not the religious institutions—that would be required to pay for the contested services. Such a proposal is, first and foremost, constitutionally suspect: It is highly questionable whether the President can, consistent with the Takings Clause of the Fifth Amendment, take the private property of insurance providers by fiat. But even if accepted at face value, this proposal would be unavailing for two reasons: (1) Many of the plaintiffs self-insure, and (2) the contraceptive mandate would still force religious institutions to sponsor, through their premiums, insurers that provide services they find morally repugnant and which run contrary to their religious teachings.

In an analogous setting, the Obama Administration offered an extremely narrow "religious minister" exemption when the Equal Employment Opportunity Commission (EEOC) sued a church school that fired a teacher for violating one of the church's tenets, asserting that church schools were not exempt from Title VII when hiring and firing their religious teachers. The Supreme Court ruled 9–0 against the Administration earlier this year. Writing for the Court, Chief Justice Roberts stated: "[T]he First Amendment has struck the balance for us. The church must be free to choose those who will guide it on its way."[14] It is likely that the Court would use similar reasoning when considering the contraceptive mandate's impact on the First Amendment rights of religious individuals and institutions.

The Challenge Under RFRA. Although the challengers' First Amendment claim is strong, their likelihood of success under RFRA is even greater. RFRA, which was enacted in direct response to the Court's opinion in *Employment Division v. Smith*, 494 U.S. 872 (1990), provides that the federal government "may substantially burden a person's exercise of religion *only* if it demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling government interest."[15]

The term "exercise of religion" is broadly defined to mean "any exercise of religion, whether or not compelled by, or central to, a system of religious belief,"[16] and this standard applies even to laws that purport to be of general applicability. The test in RFRA (least restrictive means of advancing a compelling government interest) has been described by the Court as "the most demanding test known to constitutional law."[17]

Even if the free exercise of religion has a more narrow meaning under the First Amendment, an employer who refuses to provide health insurance that covers contraception or abortifacients for religious reasons is engaging in the "exercise of religion" under Congress's broad definition in RFRA. It seems equally clear that HHS is "substantially burdening" the exercise of religion by those employers whose religious beliefs forbid them from providing contraception and abortifacients. In *Sherbert*, for instance, the Court stated that the "substantial burden" test is not limited to situations in which a law "directly compel[s]" a person to act in a way that is contrary to his religious beliefs; it extends to "indirect burdens" too, adding that "[g]overnmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship."[18]

Additionally, the Court has noted that a "substantial" burden does not have to pass a high threshold. For example, in *Yoder*, the two fathers who refused to send their children to high school prevailed even though the burden that each of them faced was a five dollar fine. In this case,

13. This theoretical future policy, which does not rescind the contraceptive mandate and is not part of the act itself, is outlined by the Administration in an "Advance Notice of Proposed Rulemaking," 77 Fed. Reg. 16501 (March 21, 2012).
14. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. __, 132 S. Ct. 694, 710 (2012).
15. 42 U.S.C. § 2000bb-1(b) (1993) (emphasis added).
16. Id. § 2000bb-2 (1993).
17. *See City of Boerne*, 521 U.S. at 534.
18. *Sherbert*, 374 U.S. at 404.

non-exempted employers who violate the HHS mandate would incur substantial penalties.[19]

THE CONTRACEPTIVE MANDATE DOES NOT FURTHER A COMPELLING GOVERNMENTAL INTEREST, NOR IS IT THE LEAST RESTRICTIVE MEANS OF FURTHERING THAT INTEREST.

On the other side of the ledger, the contraceptive mandate does not further a compelling governmental interest, nor is it the least restrictive means of furthering that interest. If the interest is increasing access to contraceptives, there is scant evidence that contraceptives are not readily available at drug stores, hospitals, and health clinics or that they are unaffordable. The slight, marginal increase in access from the contraceptive mandate cannot be compelling when other employers, whose plans cover over 100 million people, are exempted for purely secular reasons.

Moreover, even assuming that this is a compelling governmental interest and that the contraceptive mandate furthers that interest, it is not the "least restrictive way" of furthering that interest. One obvious and less restrictive way of accomplishing this governmental interest would be for the government to directly compensate the providers of contraceptives and abortifacients who provide such services to employees who work for "religious employers" (under the more expansive definition); alternatively, the government could provide those services themselves to such employees, as it already does to low-income families under its Title X Family Planning program.

Conclusion

The contraceptive mandate, if upheld, would give unprecedented power to the federal government to dictate how religiously affiliated institutions must behave, ignoring their religious identity and weakening the important role they play in society. If HHS will not reconsider its ill-advised decision on its own or through congressional action, the courts should, and most likely will, invalidate the contraceptive mandate and resoundingly reaffirm every American's right to religious freedom.

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19. In the case of an employer who fails to offer any health insurance coverage, there is an annual fine of $2,000 for each employee (after the first 30 workers) who is not offered a health plan of roughly $2,000 per employee, and the base amount can increase each year by the growth in insurance premiums.