THE HHS MANDATE & the Pretense of Choice

BY KIM COLBY

For two years, religious individuals and organizations have tried to reason with the Administration, asking it to reconsider its requirement that some employers provide coverage for drugs that violate their religious beliefs, but to no avail. The "temporary enforcement safe harbor" put into place in January 2012, ostensibly to protect religious organizations while HHS responded to their concerns, will be closed and the Mandate fully implemented as to most religious employers.

A litigation stall tactic

Of course, the "temporary enforcement safe harbor" was never really about protecting religious organizations. Instead it was a deliberate litigation tactic that allowed the government to put the religious non-profits' legal challenges on the slow-track to the Supreme Court. For obvious reasons, the government did not want Wheaton College or Notre Dame University to be the first religious employers to arrive at the Supreme Court. The government preferred that the first arrivals be the for-profit employers, and the "safe harbor" served that purpose.

Relying on the "temporary enforcement safe harbor," many courts dismissed or "held in abeyance" the religious non-profits' lawsuits. Three district courts in New York, Texas, and Pennsylvania appropriately rejected the government's argument that the courts should give it an additional year to tinker with the Mandate. But most courts told the religious organizations to wait a year to see whether the government would find a solution to the problem the Mandate created: how to require employers to provide coverage for drugs to which they have strong religious objections without either the employers or the employees actually paying for the drugs.

The for-profit cases to the fore: About half of the sixty cases filed against the Mandate involve for-profit businesses and their owners. Most are family owned businesses that have been run for decades according to the family's religious beliefs in ways

that have benefitted not only the owners and their businesses, but their employees and communities. In nineteen of the thirty for-profit cases, twelve have obtained some form of preliminary injunctive relief, while seven have been denied preliminary relief. Oral argument will be heard on May 22 in the Seventh Circuit, May 23 in the Tenth Circuit (en banc), May 30 in the Third Circuit, and June 6 in the Sixth Circuit.

It is entirely conceivable that the Supreme Court could decide one of these challenges in the 2013 Term. A year from now we may well be awaiting a decision on whether the First Amendment and the Religious Freedom Restoration Act (RFRA) protect employers with religious convictions from governmental coercion.

Two key issues: As the for-profit cases have evolved, two issues have emerged as the keys to religious liberty victories. RFRA requires the government to have a compelling governmental interest, achieved by the least restrictive alternative, before it can require an individual claimant to violate his or her religious convictions. It's a powerful test, and in 2006, the Supreme Court made clear that the burden was on the government to show a compelling interest as to the specific individual claimant. The HHS Mandate does not have a compelling interest achieved by the least restrictive means. To avoid getting to the compelling interest part of the RFRA analysis, the government must deny that the religious claimant has shown that his or her religious exercise has been substantially burdened by the Mandate.

May a religious citizen retain religious liberty while earning a livelihood? The employer must first show that he or she is engaged in the exercise of his or her sincerely held religious beliefs. Although often conceding that religious exercise is sincerely held in other RFRA cases, in the Mandate cases, the government aggressively argues that businesses cannot "exercise religion," an argument accepted by some courts and rightly rejected by others. No one questions that a for-profit business can exercise other First Amendment rights. Turner Broadcasting and *The New York Times* have managed to hold onto both freedom of press and freedom of speech while turning a profit. In the 2010 Citizens United decision, the Supreme Court vindicated corporations' right of political speech.

Even when the courts have rejected the ability of a business to engage in religious exercise, they have almost always then found that the business owners, as individuals, were engaged in religious exercise. The government then falls back to the unsatisfying argument that an individual forfeits his or her religious exercise if he or she enters the "stream of commerce." But why a person should have to choose between feeding one's body and losing one's soul is not apparent. The Supreme Court did not rule that Ms. Sherbert or Mr. Thomas forfeited their religious liberty because their religious claims were tied to mundane jobs in the "stream of commerce."

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Furthermore, federal laws protecting conscience in the abortion context are not limited to non-profit religious conscientious objectors, but instead protect both non-profit and for-profit entities and individuals engaged in for-profit commerce. Hospitals, nurses, and doctors do not forfeit their federal conscience protections because they are paid for their services. The Hyde-Weldon Amendment and the Affordable Care Act (ACA) both protect health insurance plans (despite the Mandate's requirements), as well as hospitals, HMOs, and provider-sponsored entities. Nor does RFRA distinguish between for-profit and non-profit institutions in its scope.

Has the employer's religious exercise been substantially burdened? The second critical issue then emerges: does the HHS Mandate substantially burden the owner's religious exercise to the degree necessary to trigger RFRA's strict scrutiny requirements? The answer seems obvious. By its very existence, the unacceptably crabbed, extant exemption, which is limited to churches and their auxiliaries, demonstrates that the government itself recognizes that the Mandate creates a substantial burden on religious employers when it forces them to purchase objectionable coverage. Yet the Mandate places this identical substantial burden on many other employers with religious convictions against providing such coverage.

The courts have reached differing results depending on the particular way the court frames the issue. The Seventh and Eighth Circuits have correctly framed the burden inquiry as

whether requiring religious business owners to "purchase group health insurance with objectionable coverage provisions constitutes a substantial burden on their exercise of religion." The Seventh Circuit explained that "[t]he religious-liberty violation at issue here inheres in the coerced coverage of contraception, abortifacients, sterilization, and related services, not—or perhaps more precisely, not only—in the later purchase or use of contraception or related services." In contrast, in denying a preliminary injunction pending appeal, the Tenth and Third Circuits incorrectly framed the "substantial burden" inquiry by stating that "the line … delineating when the burden on a plaintiff's religious exercise becomes 'substantial' … does not extend to the speculative 'conduct of third parties with whom plaintiffs have only a commercial relationship.'"

Whether genuine choice and the bipartisan tradition of respecting religious conscience will survive the HHS Mandate: For forty years, federal law has protected religious conscience in the abortion context, in order to ensure that the "right to choose" includes citizens' right to choose not to participate in, or fund, abortions. Examples of bipartisanship at its best, the federal conscience laws have been sponsored by both Democrats and Republicans.

Before the ink had dried on *Roe v. Wade*, a Democratic Congress passed the Church Amendment to prevent hospitals that received federal funds from having to perform abortions, as well as to protect doctors and nurses who refuse to participate in abortion. The Senate vote was 92-1.

In 1976, a Democratic Congress adopted the Hyde Amendment to prohibit certain federal funding of abortion. In upholding its constitutionality, the Supreme Court explained that "[a]bortion is inherently different from other medical procedures, because no other procedure involves the purposeful termination of a potential life." Every subsequent Congress has reauthorized the Hyde Amendment.

In 1996, President Clinton signed into law Section 245 of the Public Health Service Act, to prohibit federal, state, and local governments from discriminating against health care workers and hospitals that refuse to participate in abortion. During the 1994 Senate debate regarding President Clinton's health reform legislation, Senate Majority Leader George Mitchell and Senator Daniel Patrick Moynihan championed the "Health Security Act" that included vigorous protections for participants who had religious or moral opposition to abortion.

Since 2004, the Weldon Amendment has prohibited HHS and the Department of Labor from funding government programs that discriminate against religious hospitals, doctors, nurses, and health insurance plans on the basis of their refusal to "provide, pay for, provide coverage of, or refer for abortions."

As enacted in 2010, the ACA itself provides that "[n]othing in this Act shall be construed to have any effect on Federal laws regarding (i) conscience protection; (ii) willingness or refusal to provide abortion; and (iii) discrimination on the basis of the willingness or refusal to provide, pay for, cover, or refer for abortion or to provide or participate in training to provide abortion." The ACA further provides that it shall not "be construed to require a qualified health plan to provide coverage of [abortion] services … as part of its essential health benefits."

Essential to ACA's enactment, Executive Order 13535, entitled "Ensuring Enforcement and Implementation of Abortion Restrictions in [ACA]," affirms 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." Former Representative Bart Stupak (D-Mich.), who voted for ACA based on his belief that Executive Order 13535 would protect conscience rights, has filed an amicus brief in some courts explaining how the Mandate violates the ACA itself, as well as the Hyde and Weldon Amendments.

At bottom, the Mandate is a challenge to this forty-year tradition that allows individuals to follow their consciences in the context of funding or participating in abortions. The question is whether a genuine "freedom to choose" will survive the Mandate's insistence that employers fund abortion drugs despite their religious objections.

One leading religious liberty scholar recently warned: "For the first time in nearly 300 years, important forces in American society are questioning the free exercise of religion in principle—suggesting that free exercise of religion may be a bad idea, or at least, a right to be minimized." Religious liberty is among America's most distinctive contributions to humankind. But it is fragile, too easily taken for granted and too often neglected. By sharply departing from our nation's historic, bipartisan tradition of respecting religious conscience, the Mandate poses a serious threat to religious liberty and pluralism.

Kim Colby is Senior Legal Counsel at the Center for Law and Religious Freedom. She is a graduate of Harvard Law School.