JURIST

Contraceptives and the ACA: Going Over the Mandate Cliff

By: Illya Shapiro – January 14th, 2013

Soon after the the enactment of the Patient Protection and Affordable Care Act of 2010 (ACA), the Department of Health and Human Services (HHS) announced that qualifying health insurance plans under the ACA would have to cover contraceptives and "morning after" pills. Many religious institutions — most notably the Roman Catholic Church — objected to being forced to fund products and procedures that offend their religious beliefs. This particular mandate may be among the less costly parts of the ACA — as we learned from the Sandra Fluke imbroglio, birth control is not that expensive — but it certainly struck a nerve and is the subject of much of the "second wave" of ACA litigation.

In August 2011, HHS bowed to political pressure and provided exemptions to certain religious organizations — those that only serve people of their own faith and are engaged only in religious activities. That is, the exemption covers churches — presumably only churches that do not provide social services — but not the panoply of religious institutions, such as schools and hospitals, that are not purely worship institutions. Further, it certainly does not exempt businesses run by religious individuals, whose objections are identical: being forced by the government to do something against their religion as a condition of continuing in operation.

Accordingly, more than forty cases challenging the contraceptive mandate are now active across the country by various individuals, religious institutions, non-profit organizations and small businesses. District courts have split on the lawsuits, though many have dismissed them as being premature because final regulations have not yet been promulgated and the mandate only went into effect this past New Year's Day.

Two of those suits were consolidated late last year for the first appellate argument on the issue: onebrought by Wheaton College, a Christian liberal arts college in Illinois, and another brought by Belmont Abbey College, a North Carolina college based around a Benedictine abbey. The legal point here is somewhat technical but incredibly important for anyone who thinks his freedom of conscience may be violated by the government in the future (a category that includes essentially everyone).

As noted above, the contraception mandate came to include a narrow exemption for religious institutions, one that was not available to religiously affiliated colleges. After the strong backlash against even that "narrowed" mandate, HHS issued a "safe harbor

statement," saying that the government would not enforce the mandate for a year (until August 2013) against certain non-profit organizations religiously opposed to covering contraception. In other words, the contraception mandate is still in place but will not be enforced for the next eight months — individuals are still free to sue to enforce it against their religiously opposed employers.

HHS also issued an Advance Notice of Proposed Rulemaking (ANPRM) that announced the department's consideration of more permanent methods of accommodating religious institutions. Because of the safe harbor notice and the ANPRM, the district court dismissed the colleges' lawsuits for lack of standing and ripeness, holding that the colleges were not suffering any injury and it was too early to challenge the proposed rule. The case thus went to the US Court of Appeals for the DC Circuit, where the colleges argued at a December 14 hearing that they are, in fact, suffering a current injury — having to plan for a Hobson's choice — and that the mere possibility of a future accommodation is too remote to terminate their case.

The Cato Institute filed an amicus brief [PDF] supporting the colleges in that technical argument, joining the Center for Constitutional Jurisprudence and the American Civil Rights Union. We argued that the trial court misapplied the constitutional test for standing by not focusing on the facts that existed at the outset of the case; subsequent government actions, such as the ANPRM, are irrelevant to the preliminary question of standing. We also argued that the district court's ruling compromises the principle of separation of powers by allowing the executive branch to strip a court of jurisdiction merely by issuing a safe harbor pronouncement and an ANPRM (which does not legally bind an agency to act in any way). Thus, it was entirely speculative whether the agency would alleviate the harms that the colleges are suffering.

Without intervention from the courts, therefore, the colleges would be left in legal limbo while facing immediate and undeniable harms to their religious freedom. On one hand, they cannot challenge the constitutionality of a final regulation. On the other, they cannot rely on a proposed regulatory amendment that may be offered at some unknown point in the future. The trial court rulings in the Wheaton College and Belmont Abbey College cases were potentially frightening examples of judicial abdication that permit the expansion of executive power far beyond its constitutional limits.

Fortunately, the circuit bourt agreed. In a brisk three-page opinion [PDF] released December 18 (four days after argument), the *per curiam* court held as follows: (1) the colleges have standing because that is assessed at the time lawsuits are filed (here, before the ANPRM); (2) the government's representation that the rule would never be enforced in its current form is "binding"; and (3) the government must update the court every 60 days. Accordingly, the lawsuits should not have been dismissed and are instead to be held "in abeyance" pending "the new rule that the government has promised will be issued soon." Assuming that the government does not act in contempt of court, religiously affiliated non-profit organizations — or service organizations, or whatever the final wording will be —will thus join religious-worship institutions as exempt from the mandate.

However, that is not the end of the matter. Employers engaged in for-profit activity, including those who have the exact same objections as Wheaton College and Belmont Abbey College, will still be forced to choose between continuing their business and

maintaining their religious principles. Most notable among these companies is the Oklahoma-based Hobby Lobby, Inc., the art-and-crafts chain that employs 21,000 people and has well over $2 billion in annual revenues.

Hobby Lobby lost its motion for a preliminary injunction against the mandate; the US Court of Appeals for the Tenth Circuit declined to issue an injunction pending appeal and, on December 26, 2012 — coincidentally St. Stephen's Day, honoring Christianity's first martyr — Justice Sonia Sotomayor (acting in her capacity as circuit justice) declined to provide such an injunction as well. Thus, when the mandate went into effect last week, Hobby Lobby became potentially subject to over $1 million in daily fines.

That is a shame. If we are to respect religious belief, why does the motive of those espousing them matter for whether the government gets to trample them? The owners of Hobby Lobby donate plenty to charity out of the profits they make, possibly having greater impact than many of the non-profit organizations that are (or will be) exempt, and, even if they do not, this country was founded on ideals of religious liberty that went on to be enshrined in the First Amendment, so why would we just ignore them?

Indeed, when one of these lawsuits finally reaches the Supreme Court — which it will unless this part of the ACA is repealed — the plaintiffs should win without the Court having to reach the merit of constitutional claims. The Religious Freedom Restoration Act prohibits the government from placing a "substantial burden" on the exercise of religion unless it has a "compelling interest" and uses the "least restrictive means" to achieve it.

Americans understand that the essence of religious freedom is that government cannot force people to do things that violate their religious beliefs. Some may argue that there is a conflict between religious freedom and women's rights, but that is — as the president himself like to call such things — a "false choice." If the HHS rule is repealed, women will still be perfectly free to obtain contraceptives, abortions and whatever else is not against the law. They just will not be able to force others to pay for them.

However, there is an even larger issue. This is just the latest example of the difficulties in turning health care — or increasing parts of our economy more broadly — over to the government. As my colleague Roger Pilon has written, when health care (or anything) is socialized or treated as a public utility, we are forced to fight for every "carve-out" of liberty. Those progressive Catholics who supported the ACA, or the pro-life Democrats who voted for it, who are now appalled by certain HHS rules should have thought of the consequences before they used the government to make us our brother's keeper.

The more government controls — whether placed upon health care, education or even marriage — the greater the battles over conflicting values. With certain things, such as national defense, basic infrastructure, clean air and water and other "public goods," we largely agree within reasonable margins, but we have vast disagreements about social programs, economic regulation and so much else that government now dominatesat the expense of individual liberty. Those supporting Wheaton College, Belmont Abbey College and Hobby Lobby are rightly concerned that people are being forced to do what their religious beliefs prohibit, but that all comes with the collectivized territory.