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What Next Year's Attack on Obamacare Will Look Like

Houses of worship don't have to offer employees contraceptive coverage. But other religious employers do. Supreme court, here we come.

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As the Supreme Court returns for another term, it has some housekeeping to do: deciding whether to accept the myriad petitions for review that came in over the summer.

None stand out more than a challenge to the implementation of Obamacare that's similar to the *Hobby Lobby* case of two terms ago. Here, the Court's June ruling in *King v. Burwell* could actually help the religious nonprofits seeking relief from what has become Obamacare's most litigated provision, the so-called contraceptive mandate. After a series of government wins on this issue, earlier this month the St. Louis-based Eighth Circuit split with its sister courts and virtually guaranteed that the high court would have to review the matter.

When Congress enacted the Affordable Care Act (ACA), it took great pains to protect religious liberty. The infamous individual mandate/tax, for example, has a religious-conscience exemption. Further, the law reinforced the Hyde Amendment so federal funding would not be used for abortion. But Congress was conspicuously silent on the functioning of the contraceptive mandate vis-à-vis religious objections.

Indeed, it may come as a surprise to even the most fervent critics (and fans) of Obamacare that the law *doesn't have a contraceptive mandate*. Instead, the requirement that employers pay for a long list of contraceptives—some of which are controversial because they are arguably abortifacients—is a regulatory creation. The ACA's statutory text merely requires coverage for "preventive care" and directs the Department of Health and Human Services (HHS) to decide what the mandate covers.

The ACA unquestionably authorizes HHS to make such health-care related decisions. But the law conveys not even a hint that the agency can make the delicate judgments about how to treat religious objections to certain contraceptives. This absence of authority dooms the Justice Department's latest defense of Obamacare on an issue that has now divided the lower courts.

In July 2011, more than a year after President Obama signed his signature legislation, HHS interpreted "preventive care" to include all FDA-approved contraceptives, from condoms to the morning-after pill. Over the next two years, it worked with the Treasury and Labor Departments to develop two approaches for balancing religious-liberty interests with the congressional charge to expand access to "preventive care."

First, HHS automatically exempted houses of worship from the contraceptive-mandate regulation altogether. Second, it created an "accommodation" for certain religious employers. This accommodation, unlike the exemption, neither excuses employers from the mandate nor operates automatically. Instead, it requires the employer to notify HHS that it objects to providing contraceptive coverage and explain why. If the government determines that the employer qualifies for the accommodation, it reimburses its insurer directly rather than having the employer pay for the contraceptives.

It's this accommodation that's now at issue. Groups like the Little Sisters of the Poor—the order of nuns whose convent the Pope recently visited—claim that forcing them to contract with contraceptive providers (if not pay for the actual contraceptives) imposes a substantial burden on their free exercise of religion. In other words, they invoke the Religious Freedom Restoration Act (RFRA), the same law that ultimately helped Hobby Lobby.

The Little Sisters requested an exemption from the mandate, like the government gave to churches. HHS refused, reasoning that their employees "are less likely than individuals in plans of [houses of worship] to share their employer's… faith and objection to contraceptive coverage on religious grounds." In other words, the agency supposed that people who work for the Little Sisters—a group of nuns vowing obedience to the Pope!—are less likely than church employees to adhere to the teachings of the Roman Catholic Church. This blinkered approach to faith serves as a testament to how out of its league HHS was.

Accordingly, in a brief we filed for the Cato Institute, we asked the justices to resolve an additional, threshold question: whether HHS has the authority to craft religious accommodations—rather than grant faith-based exemptions. Congress didn't authorize executive agencies to pick and choose which religious groups—churches yes, cloisters no—can be exempted from parts of the "preventive care" mandate. In the absence of this authority, the administration's only recourse is to exempt groups whose religious exercise is substantially burdened by the mandate.

Ironically, the precedent that most supports the Little Sisters' claim is *King v. Burwell*, in which the Supreme Court upheld the payment of billions of dollars of subsidies in states that declined to establish health-care exchanges. But in doing so, Chief Justice John Roberts' majority opinion rejected the Treasury Department's interpretation of Obamacare that gave itself such awesome power. Roberts found that Congress could not have delegated this vast authority to the IRS in an

area of "deep 'economic and political significance,'" in light of the fact that the agency has "no expertise in crafting health insurance policy."

If the nation's tax authority lacked the power to interpret a statutory provision regarding tax credits, then—to use the chief justice's own words—"[i]t is especially unlikely that Congress would have delegated this decision" on crafting religious accommodations to HHS, "which has no expertise in crafting" them. To quote another recent case where the Court refused to defer to an administrative agency,*UARG v. EPA* (2014), here the agencies are "laying claim to an extravagant statutory power" affecting fundamental religious liberty interests—a power that the ACA "is not designed to grant."

HHS's regulatory incompetence prevents it from forcing the Little Sisters to be complicit in what they view as sin. If executive agencies lack the interpretive authority to craft accommodations, then RFRA (and *Hobby Lobby*) dictate that religious employers must be exempted from the contraceptive mandate.

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