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INTRODUCTION

In mid-January 2012, in its ruling in *Hosanna-Tabor Evangelical Lutheran Church v. Equal Employment Opportunity Commission*,[1] the Supreme Court unanimously rejected the Obama administration's position that the Constitution does not require a "ministerial exception" to the employment-discrimination laws.[2] The Court specifically repudiated what even Justice Elena Kagan called the Obama administration's "amazing" argument that the Religion Clauses had no bearing on the matter.[3]

Unchastened, the Department of Health and Human Services (HHS) Secretary Kathleen Sebelius one week later renewed her declared "war"[4] against the Catholic church in America and against faithful Catholics (as well as against other religious organizations and believers who share the Catholic opposition to contraceptives and/or abortifacients). Specifically, she announced that HHS, in implementing President Obama's signature healthcare legislation,[5] would require most health-insurance plans to include in the preventive ser-

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1 132 S. Ct. 694 (2012).

2 *See id.* at 706.

3 Adam Liptak, *Religious Groups and Bias Get the Justices' Attention*, N.Y. TIMES Oct. 6, 2011, at A21.

4 *See* Mark L. Rienzi, *Sebelius' War Lands Her in Court*, NAT'L CATHOLIC REGISTER (Nov. 10, 2011), http://www.ncregister.com/daily-news/sebelius-war-lands-her-in-court/.

5 Patient Protection & Affordable Care Act (PPACA), Pub. L. No. 111-148, 124 Stat. 119 (2010).

vices they cover all FDA-approved forms of contraception (including contraceptives that sometimes operate as abortifacients).[6]

The HHS rule would allow (but not require) the HHS bureaucracy to establish exemptions from this mandate only for an extremely narrow category of "religious employers"[7]: an organization qualifies as a "religious employer" only if its purpose is the "inculcation of religious values," it "primarily employs persons who share the religious tenets of the organization," *and* it "primarily serves persons who share the religious tenets of the organization."[8] As the head of Catholic Charities USA observed, "the ministry of Jesus Christ himself" would not qualify for the exemption.[9] Nor will Catholic Charities, Catholic Relief Services, Catholic hospitals, food banks, homeless shelters, most Catholic schools, and even many or most diocesan offices, much less Catholic business owners who strive to conduct their businesses in accordance with their religious beliefs.

The HHS rule properly aroused criticism across the political spectrum for its trampling of religious liberty, including a vehement "J'Accuse" essay by Catholic thinker Michael Sean Winters, who describes himself as "a liberal and a Democrat."[10] Unlike Winters, I am not at all surprised that, when President Obama goes beyond talk to action, he sides with his "friends at Planned Parenthood and NARAL" and "treat[s] shamefully those Catholics who went out on a limb to support" him.[11]

What I do find remarkable—even amazing (to reprise Justice Kagan's term)—is that the HHS mandate is so clearly unlawful. In

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6 *See* Press Release, Kathleen Sebelius, Sec'y, U.S. Dep't of Health & Human Servs. (Jan. 20, 2012) [hereinafter Sebelius Press Release], *available at* http://www.hhs.gov/news/press/2012pres/01/20120120a.html.

7 Group Health Plans & Health Insurance Issuers Relating to Coverage of Preventative Services Under the Patient Protection & Affordable Care Act, 77 Fed. Reg. 8725 (Feb. 15, 2012) (to be codified at 45 C.F.R. pt. 147).

8 *Id.*

9 Press Release, Rev. Larry Snyder, President, Catholic Charities USA (Jan. 20, 2012), *available at* http://www.catholiccharitiesusa.org/page.aspx?pid=2516.

10 Michael Sean Winters, *J'ACCUSE! Why Obama is Wrong on the HHS Conscience Regulations*, NAT'L CATHOLIC REPORTER (Jan. 21, 2012), http://ncronline.org/print/28565.

11 *Id.* After this essay was submitted, the White House, on February 10, proposed a revision to the mandate. Nothing in that proposed revision would materially alter the analysis in this essay. Just as with the original mandate, once an employer selects an insurance company to provide coverage to its employees, that insurance company will include contraceptive services (including abortifacients) in its coverage. The employer who objects on religious grounds to facilitating the use of contraceptives and abortifacients remains obligated to do so.

particular, the HHS mandate violates the federal Religious Freedom Restoration Act (RFRA).[12]

RFRA 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 governmental interest."[13]

This standard applies "even if the burden results from a rule of general applicability."[14] The term "exercise of religion" is, in turn, defined broadly to mean "any exercise of religion, whether or not compelled by, or central to, a system of religious belief."[15]

RFRA provides that a later-enacted federal law, along with its regulatory implementation, is subject to RFRA "unless such law explicitly excludes such application by reference to this chapter."[16] In other words, RFRA bolsters the already robust presumption against implied repeal by stating that any repeal or override of its protections must be explicit. There is nothing in PPACA that explicitly overrides RFRA. (Nor is there anything that impliedly does so with respect to the HHS mandate.) So the HHS mandate must comply with RFRA.

There are thus four questions involved in determining whether the HHS mandate violates RFRA: (1) Does a person engage in an "exercise of religion" when he, for religious reasons, refuses to provide health insurance that covers contraceptives and abortifacients?; (2) Does the HHS mandate "substantially burden" such exercise of religion?; (3) Does application of the burden to the person further a "compelling governmental interest"?; (4) Is application of the burden to the person the "least restrictive means" of furthering a compelling governmental interest?

I. "Exercise of Religion"

Does a person engage in an "exercise of religion" when he, for religious reasons, refuses to provide health insurance that covers contraceptives and abortifacients?

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12 42 U.S.C. § 2000bb (2006). The Supreme Court held in *City of Boerne v. Flores*, 521 U.S. 507 (1997), that Congress lacked the power to apply RFRA *against the states*, but the Court recognizes, as its decision in *Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal*, 546 U.S. 418 (2006), makes clear, that RFRA applies against the federal government.

13 42 U.S.C. § 2000bb-1(b).

14 42 U.S.C. § 2000bb-1(a).

15 42 U.S.C. §2000cc-05(7)(A).

16 42 U.S.C. § 2000bb-3(b).

There can be no serious dispute that a person engages in an "exercise of religion" under RFRA when, for religious reasons, he performs, or abstains from performing, certain actions. (This issue is distinct from the question whether and when a prohibition on that exercise of religion amounts to "prohibiting the free exercise [of religion]"[17] in violation of the First Amendment.)

Consider the "exercise of religion" involved in some leading Supreme Court cases. In *Sherbert v. Verner*,[18] an individual's religious beliefs forbade her from working on Saturdays.[19] In *Wisconsin v. Yoder*,[20] the parents of teenaged children had religious beliefs that prohibited them from sending their children to high school.[21] In *Thomas v. Review Board of the Indiana Employment Security Division*,[22] a worker's religious beliefs barred him from participating in the production of armaments.[23]

While the Court's decision in *Employment Division v. Smith*[24] altered the standard for assessing which laws will be deemed to "prohibit[ ] the *free* exercise [of religion]" (and thus violate the First Amendment), it reaffirmed that "the 'exercise of religion' often involves not only belief and profession but the performance of (or abstention from) physical acts: assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, *abstaining from certain foods or certain modes of transportation.*"[25] (And, of course, even if *Smith* had narrowed the constitutional definition of "exercise of religion," the very point of RFRA was to restore the pre-*Smith* regime, so there would be no reason that *Smith*'s constitutional definition would narrow the meaning of RFRA's statutory term "exercise of religion.")

Indeed, HHS, in explaining its decision to allow the HHS bureaucracy to establish exemptions from the mandate for an extremely narrow category of "religious employers," states that "it is appropriate [for the bureaucracy to take] into account *the effect on the religious beliefs of certain religious employers* if coverage of contraceptive services were required in the group health plans in which employees in certain

17 U.S. CONST. amend. I.
18 374 U.S. 398 (1963).
19 *See id.* at 398.
20 406 U.S. 205 (1972).
21 *See id.* at 209.
22 450 U.S. 707 (1981).
23 *See id.* at 709.
24 494 U.S. 872 (1990).
25 *Id.* at 877 (emphasis added).

religious positions participate."[26] HHS is thus acknowledging that these employers are engaged in an "exercise of religion" (within the meaning of RFRA) when they refuse to provide health insurance that covers contraceptives. (Why else even contemplate a religious exemption?) Although HHS does not see fit to allow exemptions to take into account the effect on the religious beliefs of *other* employers, that does not change the fact that it implicitly concedes that other employers who refuse, for religious reasons, to provide health insurance that covers contraceptives are likewise engaged in an "exercise of religion."

In short, it is clear, for purposes of RFRA, that a person engages in an "exercise of religion" when he, for religious reasons, refuses to provide health insurance that covers contraceptives and abortifacients.

II. "Substantially Burden"

Does the HHS mandate "substantially burden" the "exercise of religion" by those persons and organizations who have religious beliefs that forbid them from providing contraceptives and abortifacients? Again, the answer is clearly yes.

I will begin with what the "substantial burden" test means under the pre-*Smith* regime that RFRA restored statutorily. As the Court made clear in *Sherbert v. Verner*,[27] the question is not limited to whether a law "directly compel[s]" a person to act contrary to his religious beliefs but extends as well to "indirect" burdens.[28] Adell Sherbert was denied unemployment benefits because she refused to work Saturdays. The state was not directly compelling her to work on Saturdays—or to seek employment at all. Nevertheless, as the Court put it:

> The [agency] ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of

26 Group Health Plans & Health Insurance Issuers Relating to Coverage of Preventative Services Under the Patient Protection & Affordable Care Act, 76 Fed. Reg. 46623 (Aug. 3, 2011) (to be codified at 45 C.F.R. pt. 147) (emphasis added); *accord* Group Health Plans & Health Insurance Issuers Relating to Coverage of Preventative Services Under the Patient Protection & Affordable Care Act, 77 Fed. Reg. 8725 (Feb. 15, 2012) (to be codified at 45 C.F.R. pt. 147).

27 374 U.S. 398 (1963).

28 *See id.* at 403–04.

> religion as would a fine imposed against appellant for her Saturday worship.[29]

It is likewise clear that "substantial" is a very low threshold. In *Wisconsin v. Yoder*,[30] for example, Jonas Yoder and Wallace Miller, the two fathers who refused to send their children to high school, "were fined the sum of $5 each."[31]

Employers who violate the HHS mandate, and who thereby fail to provide the coverage HHS deems necessary under PPACA, incur an annual penalty of roughly $2000 per employee.[32] More precisely, as I understand it, the base penalty is $2000 x (number of full-time employees minus 30), and the base is increased each year by the rate of growth in insurance premiums.[33] So, for example, Belmont Abbey College (one of the two plaintiffs already challenging the HHS mandate), which has 200 full-time employees,[34] is facing an annual base penalty of $340,000. Colorado Christian University (the other plaintiff) has 280 full-time employees[35] and is facing an annual base penalty of $500,000.

It's true, of course, that employers who object to the HHS mandate could avoid any fine by shutting down their operations. Likewise, Adell Sherbert could have stayed out of the labor market or worked part-time, and Jonas Yoder and Wallace Miller could have moved their families out of Wisconsin. The availability of an exit option plainly does not negate the "substantial burden" that each is subject to. To apply the *Sherbert* passage above to the HHS mandate:

> The [HHS mandate] forces [Catholic employers] to choose between following the precepts of their religion and [incurring huge fines], on the one hand, and abandoning one of the precepts of their religion in order to [stay in business], on the other hand. Government imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed

29 *Id.* at 404.

30 406 U.S. 205 (1972).

31 *Id.* at 208.

32 *Penalties for Employers Not Offering Affordable Coverage Under the Affordable Care Act Beginning in 2014*, THE HENRY J. KAISER FAMILY FOUND., http://healthreform.kff.org/~/media/Files/KHS/Flowcharts/employer__penalty_flowchart_1.pdf (last visited Mar. 13, 2012).

33 *See id.*

34 *Belmont Abbey College Sues Government Over Contraception Mandate*, CATHOLIC NEWS HERALD (Dec. 5, 2011, 8:11 a.m.), http://news.charlottediocese.net/n/features/local/53-roknewspager-local/1062-belmont-abbey-college-sues-federal-government-over-new-contraception-mandate.

35 Complaint at 6, Colo. Christian Univ. v. Sebelius, No. 11-CV-03350 (D. Colo. Dec. 22, 2011).

against [Catholics] for their opposition to [contraceptives and abortifacients].

III. "Least Restrictive Means"

The HHS mandate imposes a "substantial burden" on the "exercise of religion" of those individuals and organizations who, for religious reasons, oppose covering contraceptives and abortifacients in the health insurance plans they provide. Under RFRA, the HHS mandate can be applied to those employers only if the government can demonstrate 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 governmental interest."[36] If the HHS mandate cannot satisfy *both* these prongs, it violates RFRA.

I will start with the "least restrictive means" prong.

The governmental interest that the HHS mandate is asserted to advance is increased access to contraceptives.[37] For purposes of applying the "least restrictive means" test, assume *arguendo* that the governmental interest is compelling and that imposing the HHS mandate on an objecting employer furthers that compelling governmental interest.

The question, then, under the "least restrictive means" test is whether imposing the HHS mandate on an employer who has religious objections to providing insurance coverage for contraceptives and/or abortifacients furthers the governmental interest in increasing access to contraceptives *via the means that is least restrictive of the religious liberty of the objecting employer.* The obvious answer to this question is no.

HHS Secretary Sebelius's own announcement of the HHS mandate acknowledges that "contraceptive services are available at sites such as community health centers, public clinics, and hospitals with income-based support."[38] Pharmacies and doctors also provide contraceptive services. An enrollee who has insurance coverage for contraceptives and abortifacients will go to one of these providers to receive the covered services. All that the HHS mandate does is force objecting employers to subsidize these services through the insurance plans they sponsor.

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36 42 U.S.C. § 2000bb-1(b) (2006).

37 Sebelius Press Release, *supra* note 6 ("This rule will provide women with greater access to contraception by requiring coverage and by prohibiting cost sharing.").

38 *Id.*

One simple alternative means by which the government could increase access to contraceptives is to directly compensate the providers for the services. In other words, an individual would receive the services from a provider for free, and the government would compensate the provider. This means would clearly be less restrictive of the religious liberty of the objecting employer, as the employer would not be required to sponsor an insurance plan that subsidizes services that he has religious objections to. (It is true, of course, that the employer would have an interest as a taxpayer in not subsidizing objectionable services, but the obligation on an individual to pay a general income tax is far less restrictive of his religious liberty than is the HHS mandate.)

There are various other means of increasing access to contraceptives that are less restrictive of religious liberty than the HHS mandate is. For example: direct government provision of contraceptives; mandates on contraceptive providers; and tax credits or deductions or other financial support for contraceptive purchasers. (To be sure, there are plenty of reasons why someone might oppose these alternatives. But the dispositive point under RFRA is that they are available as less restrictive means.).

Because the HHS mandate does not satisfy the "least restrictive means" test, it violates RFRA.

IV. "COMPELLING GOVERNMENTAL INTEREST"

The fact that the HHS mandate flunks RFRA's "least restrictive means" test suffices to establish that the mandate violates RFRA.[39] But in the interest of completeness, I will address the other prong of the RFRA test: whether the government can demonstrate that application of the HHS mandate to an objecting employer "is in furtherance of a compelling governmental interest."

The governmental interest that the HHS mandate is asserted to advance is increased access to contraceptives. For purposes of applying RFRA, I readily take for granted the legitimacy of that governmental interest. But there remain the interrelated questions (a) whether that governmental interest is "compelling," and (b) whether imposing the HHS mandate on an objecting employer "is in furtherance" of a compelling interest.

According to a June 2010 Guttmacher Institute "fact sheet" on contraceptive use in the United States, "Nine in 10 employer-based

39 *See supra* note 36 and accompanying text (noting that the HHS mandate must satisfy both prongs of § 2000bb-1(b) to comply with RFRA).

insurance plans cover a full range of prescription contraceptives."[40] Further, HHS Secretary Sebelius's announcement acknowledges that even when employers "do not offer coverage of contraceptive services" to their employees, "contraceptive services are available at sites such as community health centers, public clinics, and hospitals with income-based support."[41] Not to mention, of course, the countless pharmacies and doctors who dispense contraceptives. It cannot be seriously maintained that there is a general problem of lack of access to contraceptives.

In this context, it is difficult to see how the government has a "compelling" interest in *marginally increasing* access to contraceptives by requiring employers to provide coverage of them in their health-insurance plans. As the Supreme Court stated just last year in an analogous context in the violent video-games case: "Even if the sale of violent video games to minors could be deterred further by increasing regulation, *the government does not have a compelling interest in each marginal percentage point by which its goals are advanced*."[42]

Further, the proposition that the governmental interest in marginally increasing access to contraceptives is compelling is severely undercut by the fact that many employers have, for purely secular reasons, been exempted from the obligation that the HHS mandate imposes.[43] Specifically, so-called "grandfathered" plans need not comply with the "minimum essential coverage" provisions of PPACA, including the HHS mandate to cover contraceptives and abortifacients.[44] In July 2010, in the very order in which HHS first set forth its interim final rules for coverage of preventive services under PPACA (as well as in this contemporaneous HHS publication),[45] HHS projected (as its "mid-range estimate") that fifty-five percent of large-employer plans would remain grandfathered in 2013 and that thirty-four percent of small-employer plans would remain grandfathered for that year.[46] Large-employer plans accounted for 133 million enroll-

40 GUTTMACHER INSTITUTE, FACTS ON CONTRACEPTIVE USE IN THE UNITED STATES (2010), *available at* http://www.guttmacher.org/pubs/fb_contr_use.html.

41 Sebelius Press Release, *supra* note 6.

42 Brown v. Entm't Merchs. Ass'n , 564 U.S. 1, 16 n.9 (2011) (emphasis added).

43 *See* Press Release, U.S. Dep't of Health & Human Servs., Keeping the Health Plan You Have: The Affordable Care Act and "Grandfathered" Health Plans (June 14, 2010), *available at* http://www.healthcare.gov/news/factsheets/2010/06/keeping-the-health-plan-you-have-grandfathered.html.

44 *See id.*

45 *See id.*

46 *See* Interim Final Rules for Group Health Plans & Health Insurance Issuers Relating to Coverage of Preventative Services Under the Patient Protection & Affordable Care Act, 75 Fed. Reg. 41726, 41732 (July 19, 2010) (to be codified at 45 C.F.R. pt.

ees, and small-employer plans accounted for forty-three million enrollees, so HHS's "mid-range" projections anticipated that roughly *eighty-eight million* Americans would not be subject to PPACA's "minimal essential coverage" provisions in 2013.[47]

If the government genuinely regarded marginally increased access to contraceptives to be a compelling interest, what possible sense would it make to exempt grandfathered plans from the obligation to provide insurance coverage for contraceptives?

Similarly, under RFRA, how can the "application of the burden to the person"—that is, the application of the HHS mandate to an objecting employer—be deemed to be "in furtherance of a compelling governmental interest" when the government has found it unnecessary to apply the same burden to employers who do not have religious objections to the mandate? After all, employers who employed fewer than fifty full-time employees during the preceding calendar year are not obligated to make any healthcare insurance coverage available to their employees under PPACA.[48] Like employers with grandfathered plans, they thus have no obligation to provide insurance that covers contraceptives and abortifacients, and they face no penalty for not doing so. (Unlike with grandfathered plans, if these employers do not provide qualifying insurance, their employees will be channeled into health exchanges, where the HHS mandate will apply.)

It would seem that HHS has a greater interest in punishing religiously based opposition to contraception and abortion than it has in increasing access to contraceptives. And that punitive interest is not legitimate, much less compelling, under RFRA.

(For the same reasons set forth in this section, the HHS mandate is not a neutral and generally applicable law for purposes of Free Exercise analysis under *Employment Division v. Smith*.)

V. Closing Observations

As Bishop David Zubik of the Diocese of Pittsburgh sums up the HHS mandate that requires most employers to cover contraceptives and abortifacients in their health-insurance plans: The Obama admin-

147), *available at* http://www.healthcare.gov/law/resources/regulations/prevention/regs.html.

47 *See id.*

48 26 U.S.C. § 4980H(c)(2) (2006).

istration has just told the Catholics of the United States, "To Hell with you!"[49]

Beyond being an assault on general principles of religious liberty, the HHS mandate is an open-and-shut violation of the Religious Freedom Restoration Act.

RFRA might often be violated inadvertently, when legislators or policymakers neglect to give adequate attention to how a law or regulation will affect an obscure religious minority or when the consequences are genuinely difficult to foresee in advance. Here, by contrast, the Obama administration knew exactly what it was doing. Both in advance of its August 2011 interim final rule and before its recent final announcement, the administration received thousands and thousands of comments about the impact that its rule would have on employers who had religious objections to covering contraceptives and abortifacients.[50] The Obama administration's violation of RFRA is knowing and willful conduct that displays contempt for the religious views of those it seeks to coerce.

One must wonder what legal advice, if any, HHS Secretary Sebelius sought before finalizing the mandate. Did HHS lawyers actually advise whether the mandate violated RFRA? And, if so, what was their advice? Did HHS solicit the advice of the Department of Justice's Office of Legal Counsel? Or was it not important enough, or too inconvenient, to get well-informed legal advice?

Secretary Sebelius claims in her announcement that the HHS mandate "strikes the appropriate balance between respecting religious freedom and increasing access to important preventive services."[51] The Obama administration made a similar claim in the *Hosanna-Tabor* case, when it contended that its novel position that there was no "ministerial exception" to the employment-discrimination laws struck a proper balance.[52] But as Chief Justice Roberts concluded his unanimous opinion, "the First Amendment has struck the balance for us. The church must be free to choose those who will guide it on its way."[53]

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49 David A. Zubik, *Decision Unchanged on HHS Exemptions*, PRIESTS FOR LIFE (Feb. 1, 2012), http://www.priestsforlife.org/articles/4027-decision-unchanged-on-hhs-exemptions.

50 *See id.* (encouraging readers to contact their political representatives to protest the rule).

51 Sebelius Press Release, *supra* note 6.

52 *See* Hosanna-Tabor Evangelical Lutheran Church v. EEOC, 132 S. Ct. 694, 710 (2012).

53 *Id.* at 710.

So too, here on the HHS mandate, the Religious Freedom Restoration Act has struck the balance: Employers whose religious convictions forbid them from providing coverage for contraceptives and abortifacients must be free not to do so.