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The HHS Mandate and Religious Liberty: A Primer

Adèle Auxier Keim

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Introduction

"We are in a war," Health and Human Services Secretary Kathleen Sebelius declared to cheers at a 2011 NARAL Pro-Choice America fund-raiser.[1] Secretary Sebelius was referring in part to the uproar caused by the "HHS Mandate," her agency's rule that employer-provided insurance cover all FDA-approved contraceptives, including those that may cause early abortions.

Two years and sixty-seven lawsuits later, Secretary Sebelius's war rages on. The two hundred plaintiffs include individuals, charities, family-owned businesses, and sixteen religious colleges and seminaries. Thousands more look on from the sidelines. And with good cause, for the HHS Mandate goes to "two vital propositions in the American conception of religious liberty: Religious believers get to tell us what their faith requires or forbids," and "believers have at least a presumptive right to live out the commitments of their faith across the whole range of human activity, including the world of business and commerce."[2]

[1]William McGurn, "The Church of Kathleen Sebelius," *Wall Street Journal*, December 13, 2011, http://online.wsj.com/article/SB10001424052970203518404577094631979925326.html.

[2]Perry Dane, "Doctrine and Deep Structure in the Contraception Mandate Debate" (working paper, Rutgers School of Law–Camden, July 21, 2013), 6–7, accessed September 13, 2013, available at http://ssrn.com/abstract=2296635.

Adèle Auxier Keim is counsel for The Becket Fund for Religious Liberty, 3000 K Street NW, Suite 220, Washington, DC 20007; akeim@becketfund.org.

The battle over these "vital propositions" is heating up. At this writing, the Supreme Court is considering petitions for certiorari in two cases, and facing the prospect of future petitions in three more.[3] To help you follow the debate, here's a short, unapologetically partisan primer on the Mandate, the lawsuits, and the arguments for and against each side.[4]

The HHS Mandate: What Is It?

In its most basic form, the HHS Mandate is a regulation that requires employer-provided group health insurance to cover all FDA-approved contraceptives.[5] FDA-approved contraceptives include the "emergency contraceptives" Plan B, Ella, and certain IUDs—which, the government admits, may prevent implantation of an embryo (this is why the HHS Mandate is sometimes called the "Contraceptive-Abortifacient Mandate").

Employers whose health plans do not cover these drugs and devices face severe fines—$100 per employee per day and $2,000 per employee per year—even if their health plans meet all the other Patient Protection and Affordable Care Act (ACA) requirements.[6] For large employers such as the arts-and-crafts chain Hobby Lobby, these fines could add up to half a billion dollars a year. For religious institutions like Wheaton College in Illinois, the fines come to over $27 million each year—an enormous sum for any school,

[3]For an up-to-date list of all the HHS Mandate cases, including those appealed to the Supreme Court, see "HHS Mandate Information Central," The Becket Fund for Religious Liberty, http://www.becketfund.org/hhsinformationcentral/. The Solicitor General filed a petition for certiorari in the HHS Mandate challenge *Hobby Lobby v. Sebelius* the same day that plaintiffs filed a petition in *Conestoga Wood v. Sebelius*. Hobby Lobby v. Sebelius, 732 F.3d 1114 (10th Cir. 2013), *petition for cert. filed* September 19, 2013 (No. 13-354); Conestoga Wood Specialties Corporation v. Secretary of the United States Department of Health and Human Services, 724 F.3d 377 (3d Cir. 2013), *petition for cert.* filed September 19, 2013 (No. 13-356). On October 15, the plaintiffs in Autocam v. Sebelius filed the third petition for certiorari in an HHS Mandate challenge. *Autocam Corp. v. Sebelius*, No. 12-2673, 2013 WL 5182544 (6th Cir. Sept. 17, 2013), *petition for cert. filed* October 15, 2013.

[4]The Becket Fund for Religious Liberty represents plaintiffs in eight HHS Mandate lawsuits, including Hobby Lobby, Mardel Christian Bookstores, and the Green family; Ave Maria University; Belmont Abbey College; Colorado Christian University; East Texas Baptist University; Eternal Word Television Network; GuideStone Financial Resources of the Southern Baptist Convention; Houston Baptist University; Little Sisters of the Poor; Reaching Souls International; Truett-McConnell College; and Wheaton College (Illinois).

[5]In the Patient Protection and Affordable Care Act, Congress required employer health insurance to cover without cost-sharing women's "preventive care and screenings," 42 U.S.C. § 300gg-13 (a)(4). HHS later passed regulations defining "preventive care" to include all FDA-approved contraceptive drugs, devices, and sterilization methods. *See* 76 Fed. Reg. 46621, 46626 (August 3, 2011).

[6]26 U.S.C. §§ 4980D, 4980H; 29 U.S.C. § 1185d, 1132.

but particularly devastating for the mostly small, liberal arts colleges that have challenged the Mandate.

In its final version, the HHS Mandate divides religious objectors into three broad categories: churches, other religious nonprofits, and everyone else:

- Churches and other houses of worship do not have to comply with the Mandate, because, according to HHS, church employees are more likely to agree with their employer's religious objections to contraceptives or abortifacients.[7]
- Religious colleges and other religious nonprofits do have to comply with the Mandate, but they can take steps to shift the task of actually paying for the morally objectionable drugs to a third party such as their insurer, who must reimburse employees directly.[8] The insurers may not seek direct repayment from the religious nonprofit, but they may recoup their costs by charging the religious employer higher premiums under certain limited terms.[9] HHS refers to this complex arrangement as the "accommodation."[10] These new requirements apply to the first health plan year that begins after January 1, 2014.[11]
- Everyone else—including family businesses and those with nonreligious moral objections to abortifacient drugs—must comply with the Mandate and pay for insurance policies that cover all FDA-approved contraceptives.

The Legal Controversy

HHS was aware that many religious people could not comply with the requirements imposed by the Mandate; by the time its regulations were finalized

[7] 78 Fed. Reg. 39,869, 39,874 (July 2, 2013) (estimating that the employees of "[h]ouses of worship and their integrated auxiliaries" are "less likely than other people to use contraceptive services even if such services were covered").

[8] *See* 45 C.F.R. § 147.131 (b) (describing the "accommodation" for religious nonprofits).

[9] 78 Fed. Reg. at 39,872, 877 (estimating that providing contraceptive coverage may save 15 to 17 percent in healthcare and employment costs, and authorizing insurers to recoup the cost of providing contraceptives by setting the religious nonprofit's premiums "as if no payments for contraceptive services had been provided to plan participants and beneficiaries" and keeping the cost savings for themselves).

[10] 45 C.F.R. § 147.131 (b).

[11] Centers for Medicare and Medicaid Services, Center for Consumer Information & Insurance Oversight, *Guidance on the Temporary Enforcement Safe Harbor for Certain Employers, Group Health Plans and Group Health Insurance Issuers with Respect to the Requirement to Cover Contraceptive Services Without Cost Sharing Under Section 2713 of the Public Health Service Act, Section 715(a)(1) of the Employee Retirement Income Security Act, and Section 9815(a)(1) of the Internal Revenue Code* (Washington, DC: Department of Health and Human Services, June 28, 2013), accessed September 13, 2013, http://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/preventive-services-guidance-6-28-2013.pdf.

in July 2013, HHS had received over 400,000 public comments, making the Mandate the most commented-on federal regulation government-wide.[12] Since HHS first introduced the Mandate in 2011, over two hundred plaintiffs have filed sixty-seven cases challenging its rules on religious freedom grounds.[13] Thirty of these lawsuits have been filed by religious nonprofits, including at least sixteen religious colleges and seminaries.[14] Thirty-seven have been filed by family business owners, including the Green family, owners of the arts-and-crafts chain Hobby Lobby and a chain of Christian bookstores called Mardel, who are clients of the Becket Fund.

Religious business owners have been largely successful in the courts. Twenty-nine out of thirty-seven family businesses have secured temporary relief from the Mandate.[15] Three federal Circuit Courts of Appeals, the Tenth, Third, and Sixth Circuits, have issued conflicting decisions.[16] And three more courts—the Seventh, Eighth, and D.C. Circuits—could issue decisions at any time.[17]

The thirty lawsuits brought by religious nonprofits, by contrast, were largely sidelined while HHS spent two years making changes to its proposed nonprofit

[12]78 Fed. Reg. at 39871 (noting that "over 400,000 comments" were submitted in response to HHS's 2013 proposed rules); Nancy Watzman, "Contraceptives Remain Most Controversial Health Care Provision," Sunlight Foundation Reporting Group, March 22, 2013, http://reporting.sunlightfoundation.com/2013/contraceptives-remain-most-controversial-health-care-provision/ (discussing the 147,000 comments filed prior to March 2013 and identifying the Mandate as the most commented on regulation government-wide).

[13]A list of all the cases filed to date is available at "HHS Mandate Information Central."

[14]The religious colleges and seminaries that have sued include Ave Maria University (Catholic), Belmont Abbey College (Catholic), Biola University (Evangelical Protestant), the Catholic University of America, College of the Ozarks (Evangelical Protestant), Colorado Christian University (Evangelical Protestant), Criswell College (Baptist), East Texas Baptist University, Franciscan University of Steubenville (Catholic), Geneva College (Presbyterian), Grace College and Seminary (Grace Brethren), Houston Baptist University, Louisiana College (Baptist), Truett-McConnell College (Baptist), the University of Notre Dame (Catholic), Wheaton College (Evangelical Protestant), and Westminster Theological Seminary (Presbyterian). Fourteen Catholic dioceses, operating dozens of religious elementary and secondary schools, have also filed suit. See "HHS Mandate Information Central."

[15]For a scorecard with links to the decisions, see "Current Scorecard for For-Profit Cases," HHS Mandate Information Central, The Becket Fund for Religious Liberty, http://www.becketfund.org/hhsinformationcentral/.

[16]*Hobby Lobby*, 723 F.3d at 1121 (holding that Hobby Lobby and Mardel were likely to win on the merits); *Conestoga*, 724 F.3d at 381 (holding that the plaintiffs—a family and their wholly owned business—were unlikely to win on the merits); *Autocam*, 2013 WL 5182544 at *1 (same).

[17]Grote v. Sebelius, No. 13-077 (7th Cir.) (oral argument held May 22, 2013); Korte v. Sebelius, No. 12-3841 (7th Cir.) (oral argument held May 22, 2013); Gilardi v. United States Department of Health and Human Services, No. 13-5069 (D.C. Cir.) (oral argument held Sept. 24, 2013); O'Brien v. Sebelius, No. 12-3357 (8th Cir.) (oral argument scheduled for Oct. 24, 2013).

accommodation.[18] Now that HHS has issued the final rules, nonprofit plaintiffs are returning to court ready to challenge the Mandate anew.[19]

Guide to the Arguments

The basic claims in the religious business and nonprofit cases are identical because the relevant law—the Religious Freedom Restoration Act (RFRA)—does not on its face distinguish between claims brought by for-profit and nonprofit entities.[20] The religious believers argue that the Mandate is a substantial burden on their religious liberty because it requires them to pay for or facilitate access to drugs they find morally objectionable, or face crushing fines.[21]

Under RFRA, once a religious person or organization has demonstrated that the Mandate substantially burdens religious practice, it is up to HHS to demonstrate that the Mandate serves a compelling governmental interest, and that it is the least restrictive means of advancing that interest.[22] This is known as "strict scrutiny," and it is the "most demanding test known to constitutional law."[23]

To meet this test, HHS must do more than assert generalized interests like "public health" and "uniformity": it has to show why it cannot exempt the

[18]See "HHS Mandate Information Central." Only one court has reached the merits of a nonprofit case: Geneva College v. Sebelius, No. 2:12-CV-00207, 2013 WL 3071481 (W.D. Pa. June 18, 2013) (granting preliminary injunction).

[19]For an up-to-date list of nonprofit organizations that have refiled or renewed their HHS Mandate challenges, see "HHS Mandate Information Central."

[20]42 U.S.C. § 2000bb-1 ("Government shall not substantially burden *a person's* exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section") (emphasis added).

In the family business cases, HHS has argued that "person" should be read to include natural persons and nonprofit religious organizations like churches, but exclude corporate "persons" that operate for profit. *See, e.g.*, HHS Merits Brief at 12, Hobby Lobby Stores, Inc. v. Sebelius, No. 12-6294 (10th Cir. Mar. 15, 2013). This textual argument has been largely unsuccessful in the courts. *See, e.g.*, *Hobby Lobby*, 723 F.3d at 1130 ("[HHS'] reading strikes us as strained."); *compare Conestoga*, 724 F.3d at 388 (holding on other grounds that "a for-profit, secular corporation cannot engage in the exercise of religion" but declining to decide whether a for-profit corporation is a "person" under RFRA); *but see Autocam*, 2013 WL 5182544 at *7 ("[W]e agree with the government that Autocam is not a 'person' capable of 'religious exercise' as intended by RFRA").

[21]*Hobby Lobby*, 723 F.3d at 1141 (holding that Hobby Lobby established a substantial burden on its religious practices).

[22]Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 423 (2006) (citing 42 U.S.C. § 2000bb-1(b)); *id.* at 429.

[23]City of Boerne v. Flores, 521 U.S. 507, 534 (1997).

particular person who has challenged the law.[24] If the government has already exempted other people from the same law, that is strong evidence that its interests in enforcing the law against the religious claimants are *not* compelling, and that the religious claimant is entitled to an exemption as well.[25] Thus, for example, the Supreme Court has held that if the government offers an exemption to drug laws for Native Americans who want to smoke peyote, it has to offer the exemption to another religious group that wants to use a different Schedule I narcotic in its religious ceremonies.[26]

This high standard presents a problem for HHS, because, as the Tenth Circuit has observed, "the contraceptive-coverage requirement presently does not apply to tens of millions of people," including millions employed by small businesses that do not have to provide any health insurance, and millions more whose employers have "grandfathered" health plans that are also exempt from the Mandate.[27] Not surprisingly, HHS's compelling interest arguments have not fared well in the courts: the Third and Sixth Circuits avoided reaching them when they found for HHS in *Conestoga* and *Autocam*, and the Tenth Circuit squarely rejected them in *Hobby Lobby*.[28]

Perhaps because the strict scrutiny standard is so difficult to meet, HHS's arguments have focused on establishing that the Mandate does not actually burden the religious plaintiffs.[29] In the nonprofit cases, HHS's primary argument is that its accommodation eliminates any burden on the religious institutions, because they are only required to do what they would have to do anyway—inform their insurance provider that they object to particular drugs.[30]

[24]*O Centro*, 546 U.S. at 430–31.

[25]*Id.*

[26]*Id.* at 432–33.

[27]*Hobby Lobby*, 723 F.3d at 1143. "[I]f a business does not make certain significant changes to its health plans after the ACA's effective date, those plans are considered "grandfathered" and are exempt from the contraceptive-coverage requirement. Grandfathered plans may remain so indefinitely[,]" and by some estimates "at least 50 million people, and perhaps over a 100 million, are covered by exempt health plans." *Id.* at 1124 (internal citations omitted).

[28]*Hobby Lobby*, 723 F.3d at 1143–45; *see also Conestoga*, 724 F.3d at 389 (failing to reach compelling interest); *Autocam*, 2013 WL 5182544 at *9 (same).

[29]More than one court has observed that HHS's compelling interest arguments are underdeveloped. *Hobby Lobby*, 723 F.3d at 1143 ("[T]he government offers almost no justification for not "granting specific exemptions to particular religious claimants."); *see also* Grote v. Sebelius, 708 F.3d 850, 855 (7th Cir. 2013) (holding, on a motion for injunction pending appeal, that "the government has not, at this juncture, made an effort to satisfy strict scrutiny").

[30]HHS Summ. J. Br. at 12–13, Diocese of New York v. Sebelius, No. 1:12-cv-02542 (E.D.N.Y. Sept. 11, 2013).

HHS's second argument—which it has made in both the for-profit and nonprofit cases—is that "an employee's decision to use her health coverage for a particular item or service cannot properly be attributed to her employer."[31] Under this view, the employee's choice to use her health insurance to obtain contraceptives or abortifacients breaks the moral chain of causation between the employer and the use of the objectionable drugs.

Interestingly enough, the "moral chain of causation" argument was conceived in the legal academy, not in litigation. University of Miami Law School professor Caroline Mala Corbin advanced it in a 2012 colloquium paper in which she asserted that, just as "private individual choice broke the chain of attribution linking the religious conduct and the state" for purposes of the Establishment Clause, so here "the female employee—often not even Catholic—who receives the employer-provided insurance breaks the chain" of moral causation.[32] But other progressive academics strongly disagree. Rutgers Law School professor Perry Dane, a self-described liberal, calls arguments like Corbin's "disheartening."[33] And St. Thomas Law School professor of law and public policy Thomas Berg, summarizing progressive arguments against the Mandate, observes that "[t]he logic of mandated access would allow the state to require Catholic organizations to cover not just contraception and Plan B but also second-term abortions" if employees and the government so desired.[34]

The sticking point for religious liberty is who gets to draw the moral lines. Dane observes that "for many religious employers, the act of providing insurance that covers contraception is *itself* religiously forbidden," and "for some of the nonprofit religious employers covered by the current 'accommodation,' even signing on to an insurance policy that ends up

[31]HHS Merits Brief at 29, Hobby Lobby v. Sebelius, No. 12-6294 (10th Cir. Mar. 15, 2013); *see also* HHS Summ. J. Br. at 19, Diocese of New York v. Sebelius, No. 1:12-cv-02542 (E.D.N.Y. Sept. 11, 2013) (arguing that the Mandate imposes only an indirect burden in part because "an employer has no right to control the choices of its employees, who may not share its religious beliefs, when making use of their benefits").

[32]Caroline Mala Corbin, "The Contraception Mandate," *Northwestern University Law Review Colloquy* (November 27, 2012): 151, 158–59, http://colloquy.law.northwestern.edu/main/2012/11/contraception-mandate.html. This reasoning has not persuaded any of the appellate courts that have reached the merits, but it has been accepted by at least one Court of Appeals judge: Judge Rovner, writing in dissent on the Seventh Circuit, stated that "[h]ow an employee independently chooses to use [health] insurance arguably may be no different in kind from the ways in which she decides to spend her take-home pay." *Grote*, 708 F.3d at 861 (Rovner, J., dissenting from the grant of an injunction pending appeal) (citing Corbin).

[33]Dane, "Doctrine and Deep Structure," 5.

[34]Thomas Berg, "Progressive Arguments for Religious Organizational Freedom: Reflections on the HHS Mandate," *Journal of Contemporary Legal Issues* (forthcoming), 14, accessed September 13, 2013, available at http://ssrn.com/abstract=2268824.

triggering separate contraceptive coverage by the insurer is religiously problematic."[35] Dane reminds us that "[t]he rest of us have no business second-guessing that religious judgment," because it is "a vital principle of religious freedom" that "the burden on religion is 'substantial' if the government requires believers to do something that their religion forbids or forbids them from doing something that their religion requires."[36]

So far, courts have largely agreed with the HHS plaintiffs and with Dane and Berg. *Hobby Lobby* flatly rejected HHS's chain of causation argument in part "because it assumes that moral culpability for the religious believer can extend no further than the government's legal culpability in the Establishment or Free Speech contexts."[37] And it emphasized that Hobby Lobby and its owners have "drawn a line at providing coverage for drugs or devices they consider to induce abortions, and it is not for us to question whether the line is reasonable."[38] *Conestoga* and *Autocam* avoided the government's invitation to moral line-drawing by holding that religious businesses and their owners could not bring religious liberty claims under RFRA at all.[39] It seems reasonable to hope that the courts considering the claims of religious nonprofits will be solicitous of the lines they draw as well.

Conclusion

The religious colleges and universities that have challenged the HHS Mandate are in good company: the thirty-five family businesses whose cases have progressed have established a 30-to-5 winning record. At least one of these for-profit cases is likely to wind up before the Supreme Court this term. When it does, the Court will have the chance to reaffirm the "vital proposition" that "[r]eligious believers get to tell us what their faith requires or forbids."[40] Let us hope that they do, because a ruling like that would be good for all of us.

[35]Dane, "Doctrine and Deep Structure," 5.

[36]Ibid., 5–6.

[37]*Hobby Lobby*, 723 F.3d at 1142.

[38]*Id.* at 1141.

[39]*Conestoga*, 724 F. 3d at 381 (declining to reach RFRA claim); *Autocam*, 2013 WL 5182544 at *7 (same).

[40]Dane, "Doctrine and Deep Structure," 5.

Editor's Note: By the time this article appears in print, the Supreme Court is very likely to have decided whether to take a case, and two to four more court of appeals cases are likely to have been decided. Adèle Auxier Keim has graciously offered to provide *Academic Questions* readers a follow-up to this article that will be posted on the National Association of Scholars website (www.nas.org) under this title: "The HHS Mandate and Religious Liberty: An Update."