

Priests for Life v. U.S. Department of Health & Human Services

Overview

The HHS Mandate & “Accommodation”

Pursuant to 42 U.S.C. § 300gg-13, “[a] group health plan and a health insurance issuer offering group or individual health insurance coverage shall, at a minimum provide coverage for and shall not impose any cost sharing requirements for . . . (4) with respect to women, such additional preventive care¹ and screenings not described in paragraph (1) as provided for in comprehensive guidelines supported by the Health Resources and Services Administration for purposes of this paragraph.” 42 U.S.C. § 300gg-13(a)(4).

The government’s stated objective for mandating coverage for contraceptive services is as follows: “By expanding coverage and eliminating cost sharing for recommended preventive services, [the regulations are] expected to *increase access to and utilization of these services*, which are not at optimal levels today.” 75 Fed. Reg. 41,726, 41,733 (July 19, 2010) (emphasis added).

Pursuant to the final regulations, the only exemption from the mandate for organizations that object to it on religious grounds applies only to those religious organizations that fall under Section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code. 78 Fed. Reg. 39,870, 39,874 (July 2, 2013). These religious organizations are essentially churches and religious orders—a very narrow class of nonprofit organizations. And while Priests for Life is a nonprofit religious organization—an organization which exists *for the very purpose* of opposing what the government seeks to do through the challenged mandate—it does not qualify for the only exemption from the mandate.

The government rejected considering a “broader exemption” because it believes, without any empirical evidence, that such an exemption “would lead to more employees having to pay out of pocket for contraceptive services, *thus making it less likely that they would use contraceptives*, which would undermine the benefits [of requiring the coverage].” 77 Fed. Reg. 8725, 8728 (Feb. 15, 2012) (emphasis added). According to the government:

Employers that do not primarily employ employees who share the religious tenets of the organization are more likely to employ individuals who have no religious

¹ The “preventive care” required by the challenged mandate includes “[a]ll Food and Drug Administration approved contraceptive methods [and] sterilization procedures.” See IOM, *Clinical Preventive Services for Women: Closing the Gaps* (2011); 76 Fed. Reg. 46,621 (Aug. 3, 2011); 45 C.F.R. § 147.130. FDA approved contraceptive methods include devices and procedures, birth control pills, prescription contraceptive devices, Plan B (also known as the “morning after pill”), and ulipristal (also known as “ella” or the “week after pill”). Plan B and ella, as well as certain intrauterine devices (“IUD”), can prevent the implantation of a human embryo in the wall of the uterus, thereby causing the embryo’s death and thus operating as abortifacients.

objection to the use of contraceptive services and therefore are more likely to use contraceptives. Including these employers within the scope of the exemption *would subject their employees to the religious views of the employer, limiting access to contraceptives, thereby inhibiting the use of contraceptive services and the benefits of preventive care.*

77 Fed. Reg. at 8728 (emphasis added). Thus, as the government consistently acknowledges, the ultimate goal of the challenged mandate is to increase the use of contraceptive services by compelling *access* to these services and to ensure that employees, including employees of religious organizations such as Priests for Life, are not “subject” to the employer’s religious beliefs regarding such services. *Id.*

Consequently, instead of providing an *exemption* for organizations such as Priests for Life—an exemption that would have addressed Priests for Life’s religious objections to the mandate—the government devised a so-called “accommodation” scheme for “eligible organizations”—a scheme that has the *purpose and effect* of advancing the government’s objective of “increas[ing] access to and utilization of” contraceptive services by requiring, *inter alia*, coverage of such services *for the participants and beneficiaries of the religious organization’s healthcare plan so long as they are enrolled in the plan.* 78 Fed. Reg. at 39,870.

Pursuant to the final rules, an “eligible organization” that qualifies for the “accommodation” is an organization that satisfies all of the following requirements: (1) the organization opposes providing coverage for some or all of any contraceptive services required to be covered by the challenged mandate on account of religious objections; (2) the organization is organized and operates as a nonprofit entity; (3) the organization holds itself out as a *religious* organization; and (4) *the organization self-certifies*, in a form and manner specified by the government, that it satisfies the criteria in (1) through (3) above. The “eligible organization” must provide the “certification” to its insurer and make it available for examination upon request by the first day of the first plan year to which the “accommodation” applies. 78 Fed. Reg. at 39,874.

An insurer that receives a copy of the self-certification must, *inter alia*, provide separate payments for the required contraceptive services for the “eligible organization’s” plan participants and beneficiaries so long as they remain enrolled in the plan. 78 Fed. Reg. at 39,896. Thus, Priests for Life’s insurer’s obligation—an obligation triggered first by Priests for Life’s purchase of a healthcare plan and then by Priests for Life’s execution and delivery of the “certification”—to make direct payments for contraceptive services would continue only “for so long as the participant or beneficiary remains enrolled in [Priests for Life’s] plan.” 78 Fed. Reg. at 39,876.

Additionally, for each plan year to which the “accommodation” applies, Priests for Life’s insurer must provide *to Priests for Life’s plan participants and beneficiaries* written notice of the availability of separate payments for contraceptive services contemporaneous with (to the extent possible), but separate from, any application materials distributed in connection with enrollment (or re-enrollment) in group health coverage that is effective beginning on the first day of each applicable plan year. The notice must specify, *inter alia*, that the insurer chosen by Priests for

Life provides coverage for contraceptive services, and it must provide contact information for questions and complaints. 78 Fed. Reg. at 39,897.

Thus, pursuant to this “accommodation,” Priests for Life will play a *direct, central, and indispensable* role in facilitating the government’s objective of promoting the use of contraceptive services required by the mandate, contrary to Priests for Life’s religious beliefs.

Consequently, the government mandate directly forces Priests for Life to provide the means and mechanism by which contraception, sterilization, and abortion-inducing drugs and devices (as well as related education and counseling) are provided to its employees (*i.e.*, its healthcare plan participants and beneficiaries), which is unacceptable because it compels Priests for Life to violate its sincerely held religious beliefs.

Priests for Life’s refusal to cooperate with the government’s “accommodation” scheme subjects it to crippling fines of \$100 per employee per day. *See* 26 U.S.C. § 4980D. The only other “option” presented by way of this Hobson’s choice offered by the government is for Priests for Life to drop its healthcare coverage altogether, which will directly harm the individual Plaintiffs and Priests for Life as an organization.

Priests for Life’s Religious Objection to the Mandate & “Accommodation.”

Father Pavone, testifying on behalf of Priests for Life, summed up Priests for Life’s religious objection to the mandate and its “accommodation” as follows:

Priests for Life cannot and will not submit to any requirement imposed by the federal government that has the purpose or effect of providing access to or increasing the use of contraceptive services. This specifically includes the requirement under the so-called “accommodation” that Priests for Life provide its healthcare insurer with a “self-certification” that will then trigger the insurer’s obligation to make “separate payments for contraceptive services directly for plan participants and beneficiaries” of Priests for Life’s health care plan. This “self-certification” is the moral and factual equivalent of an “authorization” by Priests for Life to its insurer to provide coverage for contraceptive services to its plan participants and beneficiaries. *Priests for Life is prohibited based on its sincerely held religious beliefs from cooperating in this manner with the federal government’s immoral objectives.*

These sincerely held religious beliefs, which prohibit Priests for Life from executing the “self-certification,” are neither trivial nor immaterial, but rather central to the teaching and core moral admonition of our faith, which requires us to avoid mortal sin. Thus, neither Plaintiffs nor Priests for Life can condone, promote, or cooperate with the government’s illicit goal of increasing access to and utilization of contraceptive services—the express goal of the challenged mandate and the government’s so-called “accommodation.”

Indeed, Priests for Life, a Catholic organization, is morally prohibited based on its sincerely held religious convictions from cooperating with evil. Thus, Priests for Life objects to being forced by the federal government to purchase a healthcare plan that provides its employees with access

to contraceptives, sterilization, and abortion-inducing products, all of which are prohibited by its religious convictions. This is true whether the immoral services are paid for directly, indirectly, or even not at all by Priests for Life. Contraception, sterilization, and abortifacients are immoral regardless of their cost. Consequently, the burden imposed upon Priests for Life's religious exercise by the challenged mandate is precisely the same whether the government is forcing Priests for Life to authorize, enable, endorse, and facilitate "access to and utilization of" contraceptive services for its plan participants and beneficiaries via signing a "self-certification" or via payment to Priests for Life's insurance carrier.

The Religious Freedom Restoration Act (RFRA) & the Free Exercise Clause of the First Amendment

Under RFRA, the government "shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability." And RFRA protects "any exercise of religion." However, this general prohibition is not without exception. The government may justify a substantial burden on the free exercise of religion if the challenged law: "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." In other words, the resolution of this case turns on the answer to a straightforward question: absent interests of the highest order, may the government force Priests for Life to take actions that violate its sincerely held religious beliefs?

Under RFRA (and the Free Exercise Clause of the First Amendment as applied to laws that are not neutral or generally applicable, as in this case) the answer to that question is no. The mandate imposes a substantial burden on religious exercise by placing substantial pressure on Priests for Life to modify its behavior and to violate its beliefs.

Indeed, the judicial duty to decide substantial-burden questions under RFRA does not permit the court to resolve religious questions or decide whether Priests for Life's understanding of its faith is mistaken. The question for the court is not whether compliance with the contraception mandate can be reconciled with the teachings of the Catholic Church. That's a question of religious conscience for Priests for Life to decide, and it has concluded that its legal and religious obligations are incompatible: The contraception mandate forces Priests for Life to do what its religion tells it they must not do. That qualifies as a substantial burden on religious exercise, properly understood.

Establishment Clause of the First Amendment & the Equal Protection Guarantee of the Fifth Amendment

The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion. Even *subtle departures* from this neutrality are prohibited. Consequently, laws that discriminate—even if subtly—between religions run afoul of the First Amendment as well as the equal protection guarantee of the Fifth Amendment. Here, the government expressly gives preference to and thus exempts from the contraceptive services mandate one class of "religious employers," but yet refuse to extend this very same exemption to another class of "religious employers," such as Priests for Life, because the government claims, without any empirical evidence, that organizations such as Priests for Life "do not primarily

employ employees who share the religious tenets of the organization” and are thus “more likely to employ individuals who have no religious objection to the use of contraceptive services and therefore are more likely to use contraceptives.” Consequently, the challenged mandate makes explicit and deliberate distinctions between different *religious* organizations in violation of the Establishment Clause.

Moreover, laws, such as the challenged mandate, that discriminate on the basis of religion or that impinge upon the exercise of fundamental rights violate the pledge of the protection of equal laws guaranteed by the Fifth Amendment.

Rights to Freedom of Speech & Expressive Association under the First Amendment.

Because the Mandate is forcing Priests for Life to essentially affirm in one breath that which it denies in the next and compelling disclosure of its plan participants and beneficiaries *for an impermissible purpose*—the receipt of contraceptive coverage—the government is compelling speech and making group membership less attractive, thereby affecting Priests for Life’s ability to express its message in direct violation of Priests for Life’s rights to freedom of speech and expressive association protected by the First Amendment.