ACA AND RELIGIOUS LIBERTY: THE FREEDOM TO SERVE

Lisa J. Gilden, JD

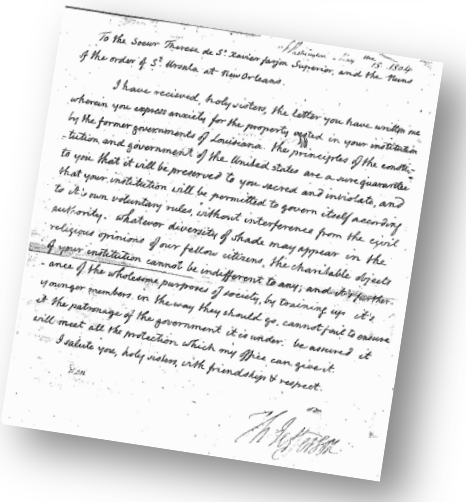
October 19, 2012

The Freedom to Serve

Letter from President Jefferson to Ursuline Sisters of New Orleans assuring them of their continued freedom to serve in accordance with their faith as Louisiana became part of the United States:

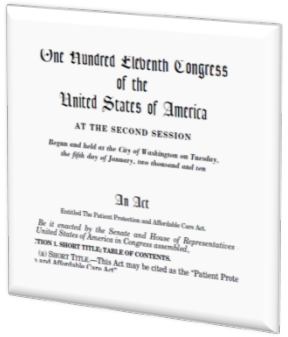
... that your institution will be permitted to govern itself according to it's [sic] own voluntary rules, without interference from the civil authority, whatever diversity of shade may appear in the religious opinions of our fellow citizens, the charitable objects of your institution cannot be indifferent to any; and it's [sic] furtherance of the wholesome purposes of society...cannot fail to ensure it the patronage of the government it is under. be [sic] assured it will meet all the protection which my office can give it.

May 15, 1804



How Did this Issue Arise?

- Under the Patient Protection and Affordable Care Act ("ACA"), group health plans and certain individual plans are required to provide coverage for, without cost-sharing, women's preventive services, as developed by the Health Resources and Service Administration ("HRSA").


One Hundred Eleventh Congress
of the
United States of America
AT THE SECOND SESSION
An Act

- HRSA published guidelines recommending coverage of "all Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for women of all ages" (the "Required Services").

- HHS then published regulations requiring all such plans to provide coverage of the Required Services. Although the regulations contain an exemption for "religious employers," many, including Catholic and other religious organizations, private employers and several states, have objected to the mandate itself, as well as the narrow scope of the exemption, on Constitutional and other legal grounds.

The "Religious Employer" Exception

- Under the final regulations, organizations that meet the following definition do not have to provide coverage of the Required Services:

"(B) For purposes of this subsection, a "religious employer" is an organization that meets all of the following criteria:

(1) The inculcation of religious values is the purpose of the organization.

(2) The organization primarily employs persons who share the religious tenets of the organization.

(3) The organization serves primarily persons who share the religious tenets of the organization.

(4) The organization is a nonprofit organization as described in section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended."

45 CFR 147.130 (a)(1)(iv)(B); 76 Fed. Reg. 46621, 46623 (Aug.3, 2011).

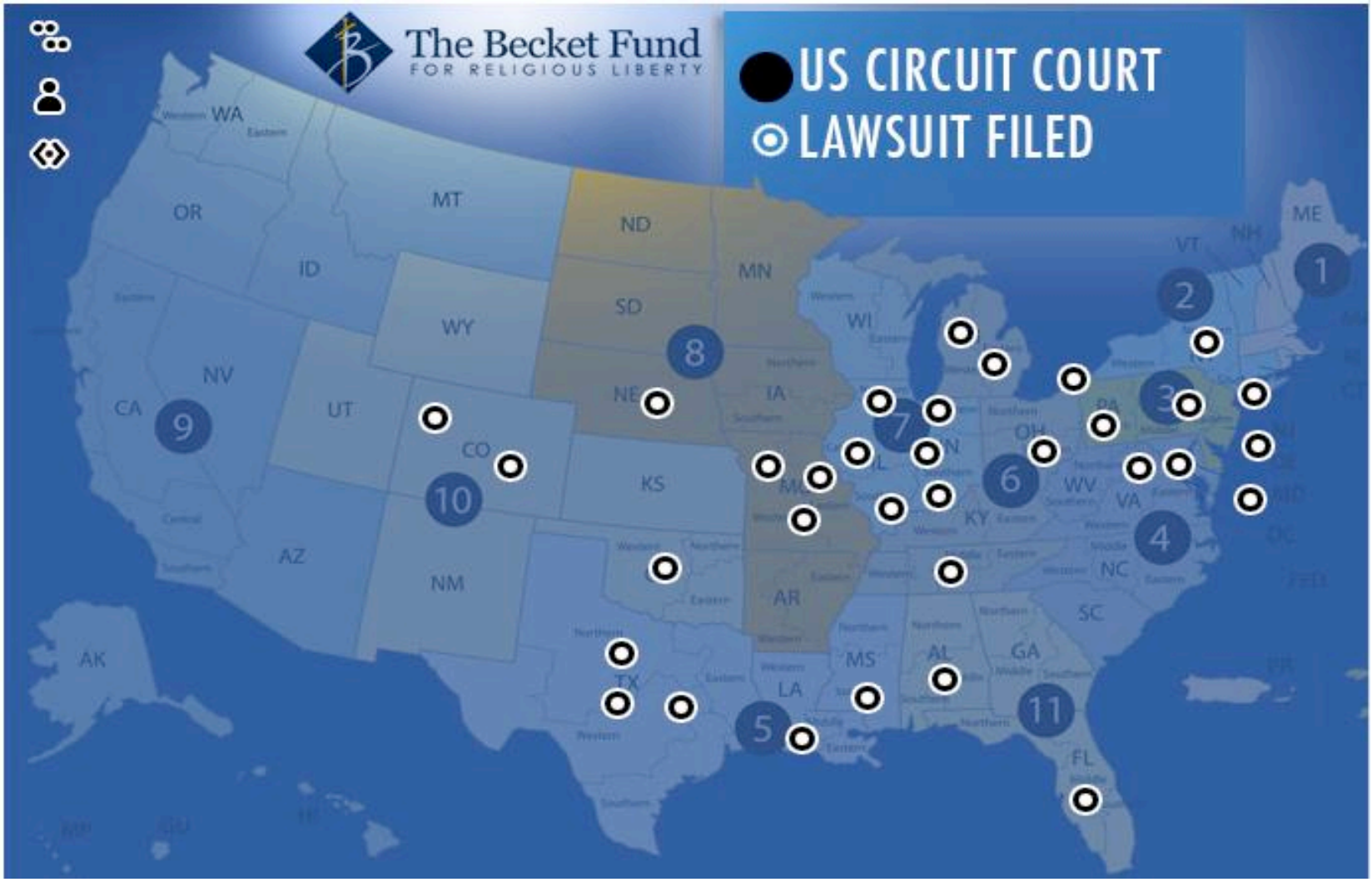
The Temporary Enforcement Safe Harbor

- To qualify for the "safe harbor," an organization must meet all of the following criteria:
  - The organization is organized and operates as a non-profit entity.
  - From February 10, 2012 onward, the group health plan established or maintained by the organization has consistently not provided all or the same subset of the contraceptive coverage otherwise required at any point, consistent with any applicable State law, because of the religious beliefs of the organization.
  - As detailed below, the group health plan established or maintained by the organization (or another entity on behalf of the plan, such as a health insurance issuer or third-party administrator) must provide to participants the attached notice, as described below, which states that some or all contraceptive coverage will not be provided under the plan for the first plan year beginning on or after August 1, 2012.
  - The organization self-certifies that it satisfies criteria 1-3 above, and documents its self-certification in accordance with the procedures detailed herein."

The Proposed "Accommodation"

- On March 12, 2012, HHS published an Advance Notice of Proposed Rulemaking setting forth various alternatives of how (after the safe harbor expires) employers with religious objections to the Required Services (but are not considered "religious employers") could fulfill the requirements without having to directly cover the Required Services.
- The options include having the insurance companies that already provide health insurance coverage to the employees of such organizations provide the coverage for the Required Services directly to such employees at no cost.
- How the "accommodation" would work for self-insured employers not yet clear

The Litigation



The Legal Theories

- Plaintiffs argue under the First Amendment, that the contraceptive mandate:

  (1) is neither neutral nor generally applicable and imposes a substantial burden in violation of the Free Exercise Clause,

  (2) intentionally discriminates against religious beliefs in violation of the Free Exercise Clause,

  (3) imposes its requirements on some religions but not on others in violation of the Free Exercise Clause,

  (4) prefers some denominations over others and places a selective burden on plaintiffs in violation of the Establishment Clause,

  (5) compels plaintiffs to provide counseling and education on subjects that violate their religious beliefs in violation of the Free Speech Clause,

  (6) unconstitutionally forces plaintiffs to associate with actions and beliefs that are against their religious convictions, and

  (7) gives a government agency the "unbridled discretion" to decide which organizations can be exempted from the mandate and thus have their First Amendment rights accommodated.

The Legal Theories

- Plaintiffs also argue that the mandate violates the Religious Freedom Restoration Act because it places a substantial burden on religious exercise without a compelling government interest that is narrowly tailored to meet that interest.

Source: http://www.becketfund.org/hhsinformationcentral/

Free Exercise

- Employment Div.,Dept. of Human Resources of Ore. v. Smith, 494 U.S. 872 (1990)

  - A neutral law of general applicability need only satisfy rational basis review, not strict scrutiny.

- Lukumi Babalu Ave v. City of Hialeah, 508 U.S. 520 (1993)

  - A law is not generally applicable if it "in a selective manner impose[s] burdens only on conduct motivated by religious belief."

Religious Freedom Restoration Act (RFRA)

(a) In general

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.

(b) Exception

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.

(c) Judicial relief

A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

42 USC § 2000bb.

The "Sherbert" Test

- For the individual, the court must determine:
  - whether the person has a claim involving a sincere religious belief,

    and
  - whether the government action is a substantial burden on the person's ability to act on that belief.
- If these two elements are established, then the government must prove:
  - that it is acting in furtherance of a "compelling state interest,

    and
  - that it has pursued that interest in the manner least restrictive, or least burdensome, to religion.

Amish Employer's Challenge

- United States v. Lee, 455 U.S. 252 (1982)
  - Amish employer's challenge under Free Exercise Clause to paying into social security on behalf of employees denied based on:
    - The exemption provided by statute for self-employed members of religious groups who oppose social security taxes is available only to self-employed individuals and does not apply to employers or employees, and thus Amish employer and his employees were not within exemption statute;
    - Because payment of taxes or receipt of benefits violated Amish religious beliefs, compulsory participation in social security system interfered with their free exercise rights; but
    - Religious belief in conflict with payment of taxes affords no basis for resisting tax imposed on employers to support social security system, which must be applied uniformly to all except as Congress provides explicitly otherwise.

Establishment Clause

- Larson v. Valente, 456 U.S. 228 (1982)
  - Held that under the Establishment Clause the government must not treat any religious denomination with preference over others.
- Lemon v. Kurtzman, 403 U.S. 602 (1971)
  - Held that the government must avoid excessive entanglement with religion.

Free Speech

- United States v. United Foods, Inc., 533 U.S. 405 (2001)
  - Held that statute cannot compel financial support to a cause with which one disagrees. (statute required mushroom producers to contribute towards advertisement promoting mushroom sales).

- Johanns v. Livestock Marketing Ass'n., 544 U.S. 550, 557 (2005)
  - Held that under the First Amendment, the government may neither compel persons to express a message nor subsidize a message with which they disagree.

Previous Cases on State Contraceptive Mandates

- Catholic Charities of Sacramento v. Superior Court of Sacramento County, 85 P.3d 67 (Cal. Sup. Ct. 2004), cert. denied, 543 U.S. 816 (2004)
  - California Supreme Court held that state contraceptive mandate statute that contained similar "religious employer" exception did not violate Free Exercise Clause or Establishment Clause.

Previous Cases on State Contraceptive Mandates (continued)

- Catholic Charities of the Diocese of Albany v. Serio, 859 N.E.2d 459 (N.Y. 2006), cert. denied, 552 U.S. 816 (2007)
  - New York's highest court affirmed the validity of a state contraceptive mandate case under: (1) the Free Exercise Clause of the United States Constitution, (2) the Free Exercise Clause of the New York Constitution, and (3) the Establishment Clause of the United States Constitution.

What's Next?

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