PUBLICATION

May an Employer Object to the Affordable Care Act's Contraceptive Mandate Based Solely on Moral Grounds? Federal Court Rules a Private Employer Can Buck the Mandate Because It Objects on Moral - not Religious - Grounds

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March for Life, et al. v. Sylvia M. Burwell, et al., No. 14-CV-1149 (D.D.C. August 31, 2015) available at https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2014cv1149-30

Hobby Lobby took on the Affordable Care Act's mandate that it must provide female employees certain contraceptives on religious grounds and won. March for Life, a pro-life organization, is trying to reach the same result but on different grounds: It objects to providing certain contraceptives based solely on moral grounds. And it has successfully completed the first leg of its journey.

The Affordable Care Act (ACA) exempts religious organizations, like churches and synagogues, from its mandate that employers provide certain contraceptives to female employees. On August 31, U.S. District Judge Richard J. Leon ruled that the mandate violated the equal protection clause of the Fifth Amendment because objections to contraception are "not confined to religiously affiliated employers." March for Life, a non-profit advocacy organization, convinced the judge that the ACA's contraceptives mandate violates the equal protection clause because it treats March for Life differently than it treats similarly situated employers.

Judge Leon reasoned that the purpose of equal protection is to keep the government from treating similarly situated individuals differently without a rational basis for doing so. The defendants—three federal agencies and their Secretaries—defended the mandate by arguing that March for Life is not similarly situated to the exempted religious organizations because it "is not religious and is not a church." Judge Leon was less than persuaded. He explained that the question is not whether March for Life is generally similar to churches, but whether it is similarly situated with regard to providing contraceptives to its employees.

In determining whether March for Life was similarly situated, Judge Leon first made note of the federal regulation that states religious employers are exempt from the mandate because of the "unique relationship between a house of worship and its employees in ministerial positions." He then asked what it is about that particular employment relationship that is unique in this context. He found the government's answer—that employees of religious employers are less likely than other employees to use contraceptive services—"puzzling." In the government's own view, he explained, "it is not the belief or non-belief in God that warrants safe harbor" from the mandate, but rather "an employment relationship based in part on a shared objection to abortifacients;" an objection not necessarily connected to a belief in God. He noted that although moral objection to abortion is common among religiously affiliated employers, it is certainly not unique to them.

March for Life shares the same moral objection to abortion, but "is avowedly non-religious." Moreover, its employees are also less likely to use contraceptives than other employees given their staunch opposition to abortion. March for Life's employees, he explained, are therefore "*identically* situated" to religious organizations that are exempted from the mandate. March for Life has nevertheless been denied the exemption because it is not religious, which he found to be "nothing short of regulatory favoritism." Indeed, if "the purpose of the religious employer exemption is, as [the government] states, to respect the anti-abortifacient tenets of an

employment relationship, then it makes no rational sense—indeed, no sense whatsoever—to deny March for Life that same respect."

Judge Leon therefore found that the mandate violates the equal protection clause of the Fifth Amendment. But he didn't stop there. He also concluded that the mandate violates the Religious Freedom Restoration Act because it (1) puts a substantial burden on March for Life's employees by coercing them into acting contrary to their religious beliefs, and (2) is not the least restrictive means by which the government can implement this policy. He rejected March for Life's last argument—that the mandate also violated the free exercise clause of the First Amendment—though it was a hollow victory for the government since March for Life received the relief it sought on the other two claims.

As you might expect, Judge Leon's ruling has been characterized as a historic victory by pro-life groups and downright wacky by pro-choice advocates, but both sides agree that the fight is not over. The U.S. Court of Appeals for the D.C. Circuit will likely get to weigh in on his reasoning, and then the losing side of that argument will almost certainly appeal to the United States Supreme Court.