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Notre Dame refiles suit against HHS mandate

Michael Sean Winters | Dec. 2, 2013 Distinctly Catholic

On Monday morning, the University of Notre Dame refiled its lawsuit against Kathleen Sebelius, Secretary of the Department of Health and Human Services, regarding the administration?s controversial contraception mandate. Notre Dame originally filed suit last year, but the suit was dismissed in January because the mandate had not yet taken effect. It is scheduled to take effect Jan. 1.

If the University of Notre Dame is not a ministry of the Catholic Church, what is it? This is the question the Obama administration has been unable or unwilling to answer the past couple of years in the seemingly endless back-and-forth over the HHS mandate. U.S. laws have long recognized a ?ministerial exemption? to the application of its laws. For example, the Civil Rights Act of 1964 exempted religious institutions from its requirements. And, in January, 2012, the U.S. Supreme Court upheld the ministerial exemption in a unanimous 8-0 vote in the case Hosanna-Tabor v. EEOC.

In its filing, Notre Dame makes clear that the core issue is whether or not government can or should be so entangled with religious institutions that, no matter its objectives in terms of public policy, it places those institutions in compromising situations. The complaint, filed in the U.S. District Court for Northern Indiana states:

> *This lawsuit is about one of America?s most cherished freedoms: the freedom to practice one?s religion without government interference. It is not about whether people have a right to abortion-inducing drugs, sterilization, and contraception. Those services are, and will continue to be, freely available in the United States, and nothing prevents the Government itself from making them more widely available. But the right to such services does not authorize the Government to force the University of Notre Dame (?Notre Dame?) to pay for, facilitate access to, and/or become entangled in the provision of products, services, practices, and speech that are contrary to its sincerely held religious beliefs. It does not authorize the Government to coerce Notre Dame to participate in a program whose central financial premise??cost neutrality? through reductions in the number of childbirths?is antithetical to Notre Dame?s faith. Finally, it does not authorize the Government to require Notre Dame to facilitate and appear to endorse practices that Catholic doctrine considers morally wrong.*

This is not about Taco Bell or Hobby Lobby, which may be led by people with deep religious convictions, but which are obviously not ministries. This is about a Catholic university that is permeated from top-to-bottom by its religious mission, despite what you might have heard about Notre Dame from its critics at the unfortunately named Cardinal Newman Society.

I regret the legal language in the complaint ?to pay for, facilitate access to, and/or become entangled in.? The mandate emphatically does not make a Catholic ministry pay for this coverage. I also remain unpersuaded that the mandate entails ?facilitation? to the controverted procedures or policies. I was delighted that last month, the

statement from the USCCB at the end of their meeting dropped the ?fund and/or facilitate? language, which is the language of illicit cooperation with evil. But, the last qualifier hits the mark. The mandate ?entangles? government with religion in ways that should make both Church and State wince. It is the excessive entanglement entailed in the enforcement of employment laws that justified the exemption of religious organizations from those laws. The same should hold regarding the HHS mandate.

In an interview with NCR yesterday, Father John Jenkins, Notre Dame?s President, said, ?It was a tough decision. Many people in the [Obama] administration worked with us. In the end, I wasn?t comfortable with where it placed Notre Dame.? Jenkins added, ?What I couldn?t get around was that a right found in the Constitution and in prior legislation is now being granted as an accommodation to us at the discretion of the administration. That diminishes our religious freedom.?

One can imagine that Fr. Jenkins? in-box will be full tomorrow with those claiming Notre Dame is trying to impose its beliefs on others. This is hogwash, but the issue is important and cuts to the heart of what is arguably most challenging about U.S. First Amendment jurisprudence and the ambient cultural understanding of religious freedom. The complaint states:

> *Through this lawsuit, Notre Dame does not seek to impose its religious beliefs on others. It simply asks that Notre Dame be permitted to act according to its faith and in ways that articulate the moral standards to which it adheres.*

In America, we do not view rights as inhering in groups. There is no libertas ecclesiae. Before the law, we are all individuals. (Fr. John Courtney Murray, S.J. was a little too quick to embrace the tenets of liberal jurisprudence in this regard too.) But, Notre Dame is not an individual and while it is incorporated, and Mitt Romney?s admonition that ?corporations are people too my friend? notwithstanding, the conundrum with the mandate from the beginning was that it did not recognize the right of Catholic, and other religious, institutions to define themselves by the lights of their faith without undue government interference. Notre Dame is not a church, it is a university. But, it is impossible to understand Notre Dame apart from the Church, with a capital ?C,? and as the complaint states, ?Notre Dame?s mission is just as central to Catholic faith and life as the mission of Catholic houses of worship.? The deeper issue of recognizing the rights of churches qua churches, not just as a collection of individuals - as well as the rights of unions - warrants careful attention from legal scholars of the kind Lew Daly began three years ago [1]. Notre Dame has a corporate board, to be sure, but Notre Dame is also animated by the memory of Fr. Sorin and Fr. Hesburgh, and, most fundamentally, by the memory, and more than memory, the lived relationship with the Blessed Mother and Her Son. The Blessed Mother may not enjoy First Amendment protection, but a university dedicated to the Seat of Wisdom should.

It is easy to understand why the administration wanted to draw a distinction between a house of worship and a ministry. They knew that if they applied the mandate to houses of worship, it would get tossed in the courts. But, they wanted to extend the coverage to as many people as possible, or at least the women?s groups that carry a lot of sway within this administration wanted that. Shame on Obama for not finding a different policy avenue to get the coverage he desired without invading the religious freedom of our institutions. If he returns to teaching after he leaves the White House, students are advised not to take his Constitutional Law class unless they have a heavy capacity for irony.

It gives those of us who support the Affordable Care Act no comfort that this fight is happening. It reflects poorly on the political judgment of Secretary Sebelius that she did not find a way to avoid this thoroughly avoidable fight. And, no one should consider Notre Dame?s lawsuit as an additional reason to question the ACA: The mandate is a federal rule, issued by Sebelius under the terms of the ACA. Nothing in the text of the law itself required this over-reach by Sebelius. If the Supreme Court overturns the mandate, it will have no

effect on the rest of the ACA.

I do not need to recapitulate all the arguments I have made before about the HHS mandate. I can say that I applaud Notre Dame for refiling the suit. I can also applaud the Catholic Health Association for concluding that while they might not like the law, they can live with it. These issues deserve their day in court, and the cases heading to the Supreme Court hopefully will give the high court a chance to break some order out of the ghoulash that is current First Amendment jurisprudence. The mandate is a bad rule. No one should fault Notre Dame for pointing that out.

Links:
[1] http://www.democracyjournal.org/22/the-church-of-labor.php?page=all