

## Lawsuits against HHS rules come with risk, win or lose

Jerry Filteau | Jun. 6, 2012



People gather in front of Federal Hall in New York March 23 to protest a federal health care mandate requiring most employers to provide coverage for contraception and sterilization. (Newscom/Richard B. Levine)

### *Analysis*

**WASHINGTON** -- Since May 21 -- when 13 Catholic dioceses and at least 30 other church organizations joined in lawsuits across the country (see Page 10) to overturn new federal Health and Human Services regulations requiring many Catholic institutions to provide or allow free contraceptive coverage in employee health care plans -- it has become increasingly clear that, whatever the constitutional merits of their case, the path these organizations have chosen is fraught with deep peril, legally and politically.

On the legal front, in a battle likely to go all the way to the U.S. Supreme Court, the plaintiffs could win and establish a clearer constitutional precedent on the extent of religious freedom.

A win could require HHS to recognize rights of conscience and religious liberty that cannot be infringed for a much wider variety of religiously run institutions, among them Catholic (and other religiously sponsored) universities, elementary and secondary schools, hospitals, charities and other social service agencies that are excluded from the current HHS religious exemption.

Such a win would be a major victory for what the plaintiffs consider the primary cause in this issue, defining broadly the nature of religious liberty in this country and constitutionally restricting the ways in which federal laws and regulations can narrow or even try to define what counts as a church or religious entity.

Or they could lose.

A loss could establish a very different legal precedent -- sharply eroding the broad definition of religious entities in most current federal law that is presently enjoyed by faith groups in areas of their ministry in education, health care, charity and social service -- areas that many religious bodies, including the Catholic church, consider themselves called to by their faith itself.

An important legal precedent in California, where the Catholic church lost a court challenge to an almost

identical issue of a narrowly drawn religious exemption from employer-provided contraceptive health care coverage, offers serious legal caution.

In 2004 the California Supreme Court ruled 6-1 that Catholic Charities of the Stockton diocese could not be exempted from the Women's Contraceptive Equity Act, a 1999 state law that requires nearly all employers to include contraceptives if they provide insurance coverage for prescriptions.

The California act offered an exemption for "religious employers" but defined those as only nonprofit institutions directly involved in inculcating religious beliefs and whose employees and beneficiaries of services are primarily members of the faith group. That excluded charitable, social service, educational and health care agencies of the Catholic church or other religious bodies. Mandatory contraceptive coverage laws enacted in New York and a number of other states in recent years have set similarly narrow definitions of religious employers who are exempt from their mandates.

The HHS regulation first published last August and finalized this January is explicitly modeled after the narrow definition of religious employers found in the California law as well as similar laws in New York and a number of the 26 other states that have mandated contraceptive health care coverage in prescription plans offered by all employers.



Bishop Stephen E. Blaire -- who has headed the Stockton diocese since

1999 and was thus intimately involved in the failed effort to overturn the narrowness of the religious exemption in the California law -- exposed the concern of some bishops about the current lawsuit strategy over the new HHS regulations in an interview with the national Jesuit magazine *America*.

"The bishops that I am in contact with in California are strong supporters of the importance of defending and strengthening religious liberty in our country," he told *America's* associate editor, Kevin Clarke. "I do think there are probably some different concerns with how it is being done."

Blaire went on to say that attorneys for California dioceses "did have some concerns with this strategy" of contesting the HHS regulation in court. Some bishops thought there should have been "a wider consultation" before taking that step, he said -- mainly by at least a thorough discussion of the issues, possible strategies and their ramifications at the upcoming meeting of the U.S. bishops in Atlanta in mid-June.

"I say that with some hesitation," he added, "because the California bishops very strongly support whatever action has to be taken to promote religious liberty."

He said he was also concerned that some groups "very far to the right" are trying to use the conflict between the bishops and the administration as "an anti-Obama campaign."

Another California bishop, who asked not to be named, told *NCR* that a significant number of bishops want to challenge the HHS definition of a religious employer "because that goes to religious free exercise in the purest sense."

But others do not wish to give a lesser priority to the question of individual conscience of secular employers, he said. There's a significant difference of opinion among groups of bishops on this question.

That bishop also said a number of bishops would like to have seen any action held off until the bishops could meet in June and hash out the issues together.

He also noted that by then it is possible that the Supreme Court will have ruled on the challenge by several states to the constitutionality of the law's mandate for everyone to have health insurance -- a ruling that could significantly affect the new lawsuits.

Within hours after Blaire's comments were posted online May 22, bloggers and prominent print media commentators began describing him as the first bishop to break ranks publicly with the leadership of the U.S. Conference of Catholic Bishops and with some outspoken conservative bishops who have portrayed the Obama administration as waging a war on religion.

In response, Blaire issued a statement of clarification that was released by the U.S. bishops' conference May 24. In it he said, "I stand solidly with my brother bishops in our common resolve to overturn the unacceptable intrusion of government into the life of the church by the HHS mandate. ... It is totally unacceptable to have the federal government decide that our religious ministries are not religious."

*Washington Post* columnist E.J. Dionne noted, however, that before the Blaire interview bishops who believed that their leadership was aligning the institutional church too closely with the political right had voiced their doubts internally. While the more moderate and liberal bishops kept their qualms out of public view, conservative bishops have been outspoken in condemning the Obama administration.



As a result of the move to the right by many bishops on many public

issues in recent years, it is not surprising that a number of Americans suspect that beneath the church's defense of religious freedom in the debate over the HHS mandate is a deep animosity toward Obama himself and an effort to get him thrown out of office this fall.

Notably, in a recent homily at a diocesan gathering of men, Bishop Daniel Jenky of Peoria, Ill., compared Obama to Hitler and Stalin as he urged the audience to vote their Catholic conscience in November.

It should be clear that the struggle to maintain religious freedom by defending the religious character of the church's schools, hospitals and charitable and social service agencies is a principled struggle. As many Catholic leaders have said rather succinctly, when the Catholic church serves the poor and needy or engages in its health care and educational ministries to people of all faiths or no faith, it does so not because they are Catholic, but because we are Catholic.

On the political front, however, the court challenge by so many Catholic organizations, including dioceses, to what detractors call Obamacare, carries such a strong undercurrent of what is perceived as opposition to the Obama administration itself, that it lends itself to Republican (and especially tea party Republican) exploitation

for political gain in an election.

This political undercurrent is so strong that it must be considered a major factor, quite apart from the legal ramifications of the lawsuits.

On that front, the dioceses and other plaintiffs could well gain a short-term victory if part of their aim is to defeat Obama this fall and install a Republican president and Congress that will simply repeal the 2010 Patient Protection and Affordable Care Act.

But success there might be a Pyrrhic victory if it comes at the cost of more and more Catholics perceiving their bishops as simply the Republican Party at prayer.

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## **ON THE WEB**

*America's* interview with Bishop Blaire

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