NATIONAL CATHOLIC REPORTER
Published on *National Catholic Reporter* (http://ncronline.org)

Courts urged not to dismiss Catholic lawsuits against HHS mandate

Nancy Frazier O'Brien Catholic News Service | Aug. 30, 2012

WASHINGTON -- In a dozen courts around the country, attorneys representing more than 40 Catholic dioceses or institutions have filed briefs arguing against the federal government's call to dismiss lawsuits against its contraceptive mandate.

The Catholic entities are seeking to overturn a requirement that most religious employers provide contraceptives and sterilization to their employees.

The simultaneous filings Monday were in response to an Aug. 6 brief in which the Obama administration asked the courts to summarily dismiss the suits, saying they were premature and that the plaintiffs had no standing to challenge the Department of Health and Human Services' mandate.

"This case is about important rights to religious freedom protected by our founders under the First Amendment, assured by Congress under the Religious Freedom Restoration Act, but trampled by Defendants under haphazard rulemaking," says the 36-page brief filed on behalf of the University of Notre Dame.

Forty-three Catholic dioceses, schools, hospitals, social service agencies and other institutions initially filed suit in federal court May 21 to stop three government agencies from implementing a mandate that would require them to cover contraceptives and sterilization in their health plans. The Diocese of Peoria, Ill., and Catholic Charities of Chicago have since joined the lawsuits.

Catholic organizations have objected to the contraceptive mandate since it was announced Aug. 1, 2011, by Kathleen Sebelius, HHS secretary. Unless they are subject to a narrow religious exemption or have a grandfathered health plan, employers will be required to pay for sterilizations and contraceptives, including some abortion-inducing drugs, as part of their health coverage.

In the briefs, filed by Jones Day, an international law firm with more than 2,400 attorneys on five continents, the dioceses and Catholic institutions rebut arguments that the courts should not hear the cases because a "temporary enforcement safe harbor" protects them from immediate government action against them if they fail to comply with the mandate.

In addition, the government argues that the final rule on the mandate will likely be amended before it takes effect in August 2013.

The University of Notre Dame argues in its brief that the federal government's "plans to make some as-yet-undefined amendment to the U.S. government mandate does not deprive Notre Dame of its ability to challenge the law as it exists now, particularly where, as here, it is imposing both imminent and current harms."

Included with the Notre Dame brief was a sworn deposition by John Affleck-Graves, executive vice president of the university, who said the school's budget for fiscal year 2013 had to be finalized by October 2012.

"Before its next budget is finalized in the coming months, Notre Dame will have to make difficult decisions about whether to budget for the potential of significant fines if it cannot, for any number of reasons, comply with the mandate's requirement that it provide the objectionable services in the next plan years," the deposition said.

With about 4,500 full-time employees, the university could face approximately $9 million in fines annually, Affleck-Graves said. The school has already placed $1 million in reserve to pay costs and fines associated with the mandate, he said.

Notre Dame also estimates that it will spend up to $50,000 in the next two months alone for actuarial services to determine the impact of the contraceptive mandate.

In a similar brief, the Archdiocese of Washington said it could incur penalties of nearly $145 million a year, "simply for practicing our faith," or could be forced to cancel health insurance benefits for its 4,000 archdiocesan employees and their dependents.

"Either scenario is unthinkable, and planning for such action is itself a grave burden, but in either case the mandate's impact would be so severe that the archdiocese must begin to prepare now," the archdiocese said in a news release.

"More important than the mandate's financial burden, though, is the blow it strikes to the fundamental issue of religious freedom," it added. "The Constitution allows for the full exercise of faith in the public square by ministries that translate belief into action, serving millions of people every day."

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