

Baptist schools raise RFRA defense in federal appeals court

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HOUSTON (BNG)—A lawyer representing two [Baptist General Convention of Texas](#)-affiliated Christian universities asked a federal appeals court to affirm a lower court ruling that mandated contraceptive coverage in employee insurance plans violates the Religious Freedom Restoration Act.

[East Texas Baptist University](#) and [Houston Baptist University](#) won a case in December 2013 claiming an opt-out provision in Obamacare for qualifying religious nonprofits doesn't adequately safeguard their religious liberty.

The federal government appealed the ruling, and lawyers on both sides argued the case before a three-judge panel of the 5th U.S. Circuit Court of Appeals in Houston.



Eric Rassbach, deputy general counsel for the [Becket Fund for Religious Liberty](#), said the universities don't object to a requirement to notify the government they are opting out through a process called self-certification. But by doing so, they trigger a process by which their employees automatically get the objectionable services through a third-party administrator.

"Moral complicity" is a religious belief, not something to be decided by the courts, Rassbach asserted.

“That’s not the job we want courts to do,” he said. “We don’t want courts going around deciding who is morally complicit or not, from a religious point of view.”

United States District Judge Lee Rosenthal in Houston ruled Dec. 27, 2013, the contraceptive mandate violated rights of the universities guaranteed by the federal Religious Freedom Restoration Act.

RFRA requires ‘compelling reason’

Passed by Congress in 1993, RFRA prevents the government from placing a substantial burden on a person’s exercise of religion unless it is for a compelling reason and by the least burdensome means.

The law has been in the news in recent weeks, as states including Indiana and Arkansas considered state versions with language added to apply similar protection to disputes between individuals rather than only cases involving the state.

Supporters of those efforts say business owners like bakers or florists who believe homosexuality is morally wrong should not be forced to participate in same-sex weddings against their conscience. Opponents say such legislation gives businesses a license to discriminate against customers because of their sexual orientation.

The purpose of RFRA is to create “exemptions in specific little places” to generally applicable laws that unnecessarily burden a person’s religious exercise, Rassbach said.

“You don’t strike down statutes using RFRA,” he said. “All you do is make little carve-outs for specific claimants.



Morgan St. John, a junior at Houston Baptist University, speaks during a news conference outside the 5th U.S. Circuit Court of Appeals in Houston. (Photo: HBU Facebook Page) “The whole idea of RFRA is that it forces the government to make tiny exceptions for a few people who will complain about a particular rule.”

Government attorney Adam Jed said Rassbach’s interpretation of RFRA is so broad it could be used to nullify almost every scheme of religious accommodation.

“If you don’t want to work on the Sabbath and you think it’s wrong to work on the Sabbath, you raise your hand,” Jed said. “You say to your boss, ‘I don’t want to work on the Sabbath.’ The consequence may be that your boss says, ‘OK, fine. You don’t have to work on the Sabbath,’ but then assigns somebody else to work on the Sabbath.

“It’s a different matter entirely to say not only is it that I’m not going to work on the Sabbath, but also I’m essentially going to sort of filibuster the process of someone substituting for me. I’m not going to raise my hand. I’m just not going to show up for work.”

Rassbach commented on “the weirdness of treating churches differently than Christian universities” in implementing Obamacare.

BGCT exempted from mandate

The BGCT automatically is exempted from the contraceptive mandate, because it is considered a religious employer, Rassbach observed. The BGCT controls East Texas Baptist University, but the school is expected to provide the coverage unless it goes through the opt-out procedure, he noted.

Rassbach insisted the easiest remedy would be to apply the same rationale for exempting churches from the requirement to institutions like colleges and hospitals that hold the same moral views.

Doing that would shift the burden on women to sign up for a new government program to obtain contraceptive coverage, Jed said.

“The whole point of having the contraception coverage requirement is that where there are those burdens—even burdens that may seem a little bit small to you—the result is that women don’t get necessary preventative services,” he said.