ETBU and HBU appeal to Supreme Court for protection from mandate

July 8, 2015

Two Baptist General Convention of Texas-affiliated universities and a seminary in Pennsylvania are appealing to the U.S. Supreme Court a religious liberty case regarding the Health and Human Services mandate of the Affordable Care Act, popularly known as "Obamacare."

East Texas Baptist University, Houston Baptist University and Westminster Theological Seminary object specifically to providing—directly or indirectly—emergency contraceptive drugs they believe cause abortions.

Although a federal judge ruled in favor of the schools in 2013, a three-member federal panel ruled against them last month.

'Not substantially burdened'

The 5th U.S. Circuit Court of Appeals asserted the schools' free exercise of religion is not substantially burdened by a requirement they formally opt out of HHS-mandated emergency contraceptive coverage and shift responsibility to a third-party provider.

"Although the plaintiffs have identified several acts that offend their religious beliefs, the acts they are required to perform do not include providing or facilitating access to contraceptives. Instead, the acts that violate their faith are those of third parties," the court ruled.

"Because RFRA (the national Religious Freedom Restoration Act) confers no right to challenge the independent conduct of third parties, we join our

sister circuits in concluding that the plaintiffs have not shown a substantial burden on their religious exercise."

Attorneys representing the three schools filed a petition to the Supreme Court July 8 that disputes the 5th Circuit Court ruling.

"Because this regulatory option for complying with the contraception mandate has the same legal and practical consequences as complying with the mandate directly, it is not surprising that numerous religious employers find it no more compatible with their religious beliefs," the petition states.

"They sincerely believe that fulfilling the contraceptive mandate via this regulatory option facilitates the provision of contraceptives and abortifacients and makes them complicit in actions that violate their religious beliefs."

The Becket Fund for Religious Liberty is representing ETBU and HBU, and Houston attorney Ken Wynne is representing Westminster Theological Seminary. Other attorneys filing the petition included former Solicitor General Paul Clement of Washington, D.C., and Joshua Hawley of Columbia, Mo. All except Wynne also were involved in the Hobby Lobby case against the HHS mandate last year.

'Second-guessing' religious beliefs

The petition to the Supreme Court specifically cites *Burwell v. Hobby Lobby* in asserting "courts are not free to second-guess the sincerity of those religious beliefs by suggesting that the degree of involvement deemed sufficient by the government is insufficient to violate religious scruples."

"Thus, especially after *Hobby Lobby*, there should be no doubt that the contraceptive mandate imposes a substantial burden on petitioners' religious exercise," the document states.

If the schools fail to comply with the contraceptive mandate, they could face up to $23.1 million in annual fines, the petition asserts.

“We didn’t go looking for this fight,” HBU President Robert Sloan said. “But here we stand and can do no other.

‘Potentially life-threatening drugs’

“We cannot help the government or anyone else provide potentially life-threatening drugs and devices. The government has many other ways to achieve its goals without involving us. It ought to pick one of those and let us go back to the business of educating our students.”

The HHS mandate discriminates against religious beliefs on which ETBU was founded, President Blair Blackburn said.

“We are seeking relief from the Supreme Court so that the university may continue educating our students honoring these same fundamental principles,” Blackburn said. “We shouldn’t be forced to make the choice of unlawful governmental regulation over our religious beliefs.”

ETBU and HBU first filed a lawsuit in October 2012, taking issue with a requirement that female employees be provided access to all Food and Drug Administration-approved preventive birth-control methods, including four emergency contraceptive drugs they assert cause abortions. The faith-based schools insisted they could not offer them in good conscience.

Final HHS regulations include an accommodation for faith-based organizations, stipulating they are not required to contract, arrange, pay or refer for contraceptive coverage they oppose on religious grounds.

Would make the schools ‘morally complicit’

But the schools insisted the self-certification process, in which they would notify the government they were opting out of the provision, would result in

employees automatically receiving the drugs through a third-party administrator, and that would make the universities morally complicit in facilitating abortions.

A federal district judge in Houston ruled in favor of the schools in 2013, saying the mandate violated the universities' rights guaranteed by the federal Religious Freedom Restoration Act.

However, the 5th U.S. Circuit Court of Appeals overturned that decision June 22, ruling the self-certification process does not substantially burden the universities but shifts the burden to a third-party administrator, who is reimbursed by the government.

"The Supreme Court should step in and tell the federal government that separation of church and state is a two-way street," said Diana Verm, legal counsel at the Becket Fund. "The state should not be able to take over parts of the church—including these religious ministries—just so it has an easier way of distributing life-terminating drugs."

The Supreme Court likely will consider petitions in late September or early October. If the petition is granted, the case would be decided before the end of the court's term next June.