

**Affordable Care Act**

Legal challenges to the Affordable Care Act are plentiful. Hannah Smith, of the Becket Fund for Religious Liberty, discusses one of the act's more embattled requirements—the “contraceptive mandate.”

In a two-part series, Smith explains this controversial mandate, the government's accommodation for those with religious objections, and the newest Obamacare challenges to hit the U.S. Supreme Court: attacks on that accommodation.

Read the first interview below.

## **Little Sisters Against Big Brother: Nuns' Obamacare Challenge Hits High Court**

INTERVIEW BY KIMBERLY ROBINSON

**Bloomberg BNA:** I'm Kimberly Robinson, Bloomberg BNA's Supreme Court reporter. And I'm here with Hannah Smith of the Becket Fund for Religious Liberty. Thank you for joining me today.

**Hannah Smith:** Thank you so much for having me.

**Bloomberg BNA:** So, as Supreme Court watchers will know, the Affordable Care Act is being attacked on many different fronts.

And originally it came under fire in *NFIB v. Sebelius*, which challenged the constitutionality of the entire act. But in recent years, the legal challenges have really focused on certain provisions of the act, or certain regulations.

*Hannah Smith is Senior Counsel at the Becket Fund for Religious Liberty. She was part of the legal team that secured a Supreme Court victory in Burwell v. Hobby Lobby, involving the Affordable Care Act's contraceptive mandate.*

And one aspect of the law that has come under fire most recently is the so-called contraceptive mandate. Now your organization says that it's the subject of 56 cases with 140 plaintiffs. Can you tell me a little bit about this controversial mandate?

**Hannah Smith:** Absolutely. You know, there are religious groups all over the country that object to this HHS contraceptive mandate. And that's because the government here is forcing them to include drugs and devices in their health care plans that violate their religious beliefs.

So for example, there are religious colleges, universities, religious ministries, organizations all over the country that have filed suit challenging this mandate because they can't include these contraceptives in their health plans.

**Bloomberg BNA:** Now is this contraceptive mandate—the requirement that they include these certain contraceptives—is this something that's in the act itself, or is it something that came after the law?

**Hannah Smith:** So the law itself provides for preventive services, but Congress left to the Department of

Health and Human Services the authority to define what that meant.

So the Department of Health and Human Services actually turned to a private organization, the Institute of Medicine, and they convened a panel and came up with recommendations of what should constitute preventive services. And then their recommendations were adopted in full by the Department of Health and Human Services.

**Bloomberg BNA:** Okay, so there's about two dozen drugs that the Affordable Care Act requires to be covered. What is it about these drugs that your clients find religiously objectionable?

**Hannah Smith:** Well there are religious objections from different religious groups.

So, for example, Evangelical Christians only object to about four of the 20 drugs and devices that are on the list. So for Evangelical Christians, like the Green family in [*Burwell v. Hobby Lobby Stores, Inc.*, 82 U.S.L.W. 4636, 2014 BL 180313 (U.S. June 30, 2014)], they only object to the two emergency contraceptives on the list—that's Plan B, the morning after pill, and Ella, the week after pill—and two forms of IUDs that prevent the implantation of a fertilized egg. So, there are objections from Evangelical Christians that are more limited.

There are of course other objections from Catholic groups that are broader in scope, to contraception generally. So it depends on which faith group you are looking at as to which objection is more narrow or more broad.

## Don't Trample Religion.

**Bloomberg BNA:** You mentioned *Burwell v. Hobby Lobby*, and your organization was involved in that case. Can you tell me a little bit about what the court held there and what was specifically being challenged?

**Hannah Smith:** Sure. In *Hobby Lobby*, it was a really significant case because you had three family-owned businesses that challenged the HHS contraceptive mandate under the Religious Freedom Restoration Act, [42 U.S.C. § 2000bb et seq.] which is a federal statute that prohibits government from imposing these sorts of substantial burdens on religious exercise.

And RFRA says that if the government imposes these kinds of substantial burdens, then the government has to show that it has a compelling governmental interest and that it's forwarding that interest in the least restrictive means to the religious exercise at issue.

So in *Hobby Lobby*, we won a very significant decision at the Supreme Court, where the Supreme Court said not only does RFRA, this federal statute, apply in this context to family-owned businesses, but also that under the provisions of RFRA, the HHS mandate does constitute a substantial burden and that the government here does have other options that are available to it to forward its interest that are less restrictive on the religious practice involved. And so therefore they have to utilize those other less restrictive means.

And so it was a very significant victory for the Green family, for Hobby Lobby, for the family-owned business in that case, because the Supreme Court told the government, "Look, you can't trample on religious exercise like this."

**Bloomberg BNA:** What's happened with those cases following the Supreme Court's decision? What happened to those employees? Are they receiving those contraceptives through other methods or are they not receiving them at all?

**Hannah Smith:** Following *Hobby Lobby*, the government went back and amended its rules with respect to the so-called accommodation. The government had created an accommodation for nonprofit religious organizations that basically allowed the nonprofits to—in the government's view—transfer responsibility from the religious organization onto its insurer.

So that accommodation would require that the religious organization sign a very important document that transfers this responsibility onto its insurance company and then the insurance company would then provide contraceptives to the employees.

Now before *Hobby Lobby*, the government had never made that accommodation available to for-profit businesses. Before we won the case in *Hobby Lobby*, the government just said for-profit businesses have no religious liberty rights. So after the *Hobby Lobby* decision, the government went back and engaged in some additional administrative rulemaking to craft a new rule whereby it would offer this accommodation to certain for-profit family-owned businesses.

## Supreme Court Stepping In.

**Bloomberg BNA:** And the fact that that accommodation wasn't available to the closely held corporations in the *Hobby Lobby* case was one thing that the justices looked to to say that this law really wasn't narrowly tailored to its own interest.

And almost immediately that accommodation came back to the Supreme Court after the *Hobby Lobby* decision, with the court prohibiting the federal government from enforcing the Affordable Care Act against a religious college, is that right?

**Hannah Smith:** Yes, so it was just about three days after the *Hobby Lobby* decision that Wheaton College, which is an evangelical college, was forced to seek emergency relief from the Supreme Court asking the Supreme Court to protect them from these ruinous fines that would be imposed on the college during the pendency of their case in the lower courts if the Supreme Court did not intervene and provide some protection to them.

And so just three days after *Hobby Lobby*, the Supreme Court did grant rather extraordinary relief under the All Writs Act to protect Wheaton College during the pendency of this case in the lower courts.

**Bloomberg BNA:** And so now several of those cases have been heard and decided in the circuit courts, and those cases have now come back to the Supreme Court.

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There are five petitions involving this accommodation. Can you tell me about one of the ones that you guys are involved in, involving the Little Sisters of the Poor?

**Hannah Smith:** Absolutely. So there are currently now actually six petitions—there was one filed just the other day—so there are currently six cert. petitions that are pending before the Supreme Court involving challenges to the HHS nonprofit contraceptive mandate.

Our case that we have filed a cert. petition in—the *Little Sisters of the Poor*—is a really important case out of the 10th Circuit that involves a group of Catholic nuns that have been put in this horrible position by the government of being forced to include contraceptives in their health care plan, which is of course against their religious beliefs.

So unfortunately they did not prevail in the lower courts and so we have asked the Supreme Court to take up their case during the next term.

**Bloomberg BNA:** What did the 10th Circuit hold in that case?

**Hannah Smith:** Well, the 10th Circuit wrongly, in our view, last week told a group of Catholic nuns that their theology is wrong. So essentially they said that the Little Sisters are not morally complicit in grave sin if they participate in this government scheme that uses their health care plan to distribute contraceptives.

Now there's lots of things wrong with that decision, but most fundamentally what's wrong is that courts have no business making those sorts of religious judgments.

**Bloomberg BNA:** You guys point to the decision in *Hobby Lobby* to say that that's something that the Supreme Court said that the courts should stay out of, is that right?

**Hannah Smith:** That's exactly right because the court in its decision in *Hobby Lobby* engaged in a very thorough analysis of what RFRA requires in a substantial burden analysis. And *Hobby Lobby* said, look it's up to the religious believer to draw the line of what their religious faith requires and courts are not allowed to second-guess the line that religious believers have drawn.

So here, the 10th Circuit did exactly the opposite of what the Supreme Court said they're supposed to do.

The 10th Circuit questioned and called into doubt whether or not the line that the Little Sisters have drawn on the issue of moral complicity is accurate. And that's just not something that federal courts are allowed to do. It's something that *Hobby Lobby* specifically says they can't do.

## Arbitrary Line?

**Hannah Smith:** First of all, we've never heard of a case where a Little Sisters employee has asked to use contraceptives. I mean, this is an order of nuns that runs a home to care for the elderly poor.

**Bloomberg BNA:** That's interesting that you mention that none of the employees in this case have ever really asked for these contraceptive methods, because I know that was an issue in *Hobby Lobby*—certainly in the dissent—that the employees of these closely held corporations, many thousands of individuals, would not have access to these contraceptive methods that they themselves might not find morally objectionable. But it's interesting that here the employees and employers are so closely tied together with their religious objection.

**Hannah Smith:** Right, and that really goes to the whole point of why it's ridiculous that the government has not included religious organizations like the Little Sisters in its exemption for churches, because the government has in fact exempted churches and houses of worship from the contraceptive mandate.

And so it's drawing a very arbitrary line between the churches on the one hand and religious organizations on the other. I mean, what's the difference between a group of nuns that's running a home for the elderly poor and the bishops? Really that's a very arbitrary line that the government has drawn to distinguish between those two.

**Bloomberg BNA:** Well, that's all the time we have in this podcast. Next time Hannah will talk about what steps the Supreme Court has already taken in these accommodation challenges, and how likely it is that the Supreme Court will step in once again to decide the merits of these disputes.

Full interview here: <http://link.brightcove.com/services/player/bcpid82272000001?bctid=4390481259001>.