



ALLIANCE *of*
Health Care Sharing Ministries

**First Amendment Protections for Health Care Sharing Ministries:
Risks for Overly Burdensome State Regulation**

Prepared by





Health Care Sharing Ministries

- HCSMs allow faith-centered people to come together as a community to share each other's medical expenses
- Each Health Care Sharing Ministry has a statement of religious beliefs that everyone in the community agrees to uphold
- HCSMs are not insurance (31 states exempt HCSMs from their insurance code)
- Defined in / members exempted from the Affordable Care Act's individual mandate



Statistics

9

9 of the 107 Health Care Sharing Ministries have large, open membership.

\$2.0B

\$2.0 billion of medical expenses shared by Health Care Sharing Ministries in 2021.

1+M

<1 million Americans are active members of a Health Care Sharing Ministry

107

HHS has certified 107 Health Care Sharing Ministries as meeting the federal definition.

50

Members of Health Care Sharing Ministries live in all 50 states.



The Alliance of HCSMs

- Non-profit, non-partisan coordinating body among the majority of ACA-defined ministries with a nationwide membership
- Issue advocacy, PR/awareness
- HCSMs have CMS certification and meet standards posted on website
- Accreditation (with robust standards) as the new ticket for membership

First Amendment Protections

Bill of Rights

Congress OF THE United States,
began and held at the City of New York, on
Wednesday, the fourth of March, one thousand seven hundred and eighty nine.

That the Congresses of a number of the States, having, at the time of their adopting the Constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added: And as extending the ground of public confidence in the Government, will best ensure the benevolent ends of its institution:

Resolved, by the SENATE and HOUSE OF REPRESENTATIVES of the UNITED STATES of AMERICA in Congress assembled, Two thirds of both Houses concurring, That the following Articles be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States; all or any of which articles, when ratified by three fourths of the said Legislatures, to be valid to all intents and purposes, as part of the said Constitution, viz.

Articles In addition to, and Amendment of the Constitution of the United States of America, proposed by Congress, and ratified by the Legislatures of the several States, pursuant to the Ninth Article of the Original Constitution.

Article the first After the first enumeration required by the first Article of the Constitution, there shall be one Representative for every thirty thousand, until the number shall amount to one hundred, after which, the proportion shall be so regulated by Congress, that there shall be not less than one hundred Representatives, nor less than one Representative for every fifty thousand persons, until the number of Representatives shall amount to two hundred, after which, the proportion shall be so regulated by Congress, that there shall not be less than two hundred Representatives, nor more than one Representative for every fifty thousand persons. [Not Ratified]

Article the second No Tax, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened. [Not Ratified]

Article the third Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Article the fourth A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

Article the fifth No Soldier shall, in time of peace, be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by Law.

Article the sixth The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Article the seventh No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or Naval services, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Article the eighth In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

Article the ninth In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact, tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Article the tenth Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Article the eleventh The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Article the twelfth The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

ATTEST,

James M. Smith Speaker of the House of Representatives
John Adams Vice President of the United States, and President of the Senate
John Beckley Clerk of the House of Representatives
Samuel B. Hart Secretary of the Senate

Establishment Clause: No Excessive Entanglement

- Government action may not “foster an excessive entanglement with religion”

-*Lemon v. Kurtzman*, 403 U.S. 602 (1971)

- Example: Subjecting church employee benefit plans to ERISA is not permissible because it would subject churches to continuous monitoring

-*Medina v. Catholic Health Initiatives*, 877 F.3d 1213 (10th Cir. 2017)

- Example: Subjecting religious organization to requirement that it report the percentage of funds it expends on particular activities

-*Church of Scientology Flag Serv. Org., Inc. v. City of Clearwater*, 2 F.3d 1514 (11th Cir. 1993)



Establishment Clause: No Excessive Entanglement (cont.)

Government can run afoul of the Establishment Clause if it:

- Requires HCSMs to report to the government for inspection detailed operational and financial information as a condition of operation
- Requires HCSMs to be accredited through the submission of detailed operational and financial information



Free Exercise Clause: Two Types of Violations

- Government may not “prohibit the free exercise” of religion
- Government may run afoul of this Free Exercise Clause by either:
 - Burdening religious practice pursuant to a policy that is not neutral and generally applicable
 - Burdening religious practice due to animus towards religious exercise or belief



Free Exercise Clause: Neutral and Generally Applicable

- Government may not subject religious organizations to policies that are not “neutral” and “generally applicable”
 - Kennedy v. Bremerton School District*, 142 S. Ct. 2407 (2022);
Fulton v. Philadelphia, 141 S. Ct. 1868 (2021)
- Example: Government takes religious nature of organization into account “at least in part” in determining policy
- Example: Government grants “individualized exemptions” from policy or provides government officials with the discretion to grant exemptions



Free Exercise Clause: Neutral and Generally Applicable (cont.)

Government can run afoul of the neutral and generally applicable requirement of the Free Exercise Clause if it:

- Subjects HCSMs to regulation in part based on religious beliefs that affect operations or programs
- Interprets the insurance code broadly to subject HCSMs to regulation but does not apply the same broad interpretation to other organizations that pay medical bills



Free Exercise Clause: Animus

- Government “cannot impose regulations that are hostile to the religious beliefs of affected citizens and cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices”

-Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm’n, 138 S. Ct. 1719 (2018)

- Example: Government cannot take action against religious organizations that are motivated by bias against, distrust of, or bigotry regarding religious belief



Free Exercise Clause: Animus (cont.)

Government can run afoul of the animus prohibition of the Free Exercise Clause if it:

- Targets HCSMs because of skepticism over their religious beliefs and their ministry
- Chooses to impose requirements only on HCSMs or create a safe harbor only for HCSMs while not regulating similar secular or for-profit organizations

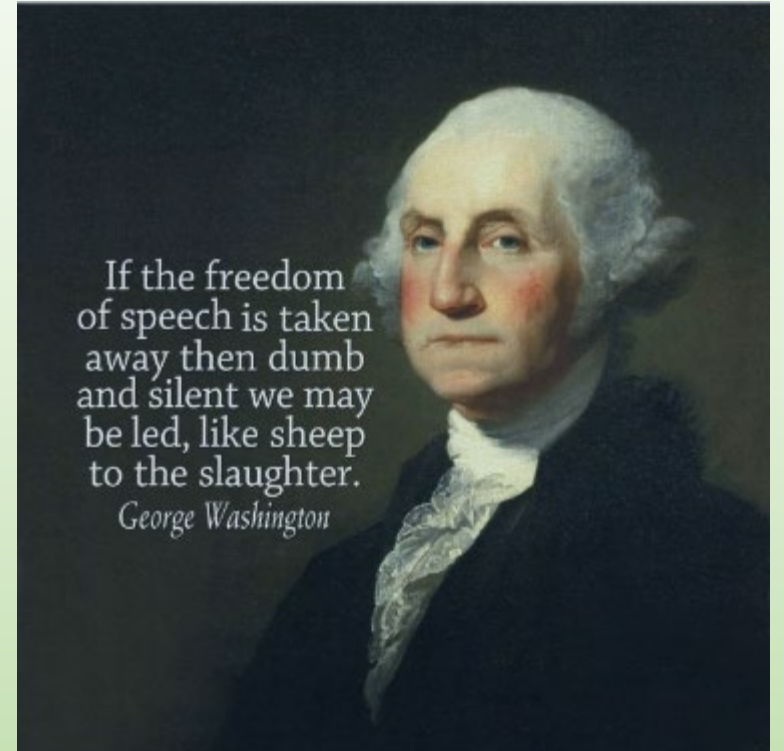


Freedom of Speech

- Government may neither forbid nor compel speech absent a compelling interest narrowly served by the regulation

-Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753 (1995)

- Example: Government may not condition an organization's right to speak based on how its organizes its operations or finances
- Example: Government may not require an organization to speak anything other than uncontroversial or factual information



Freedom of Speech (cont.)

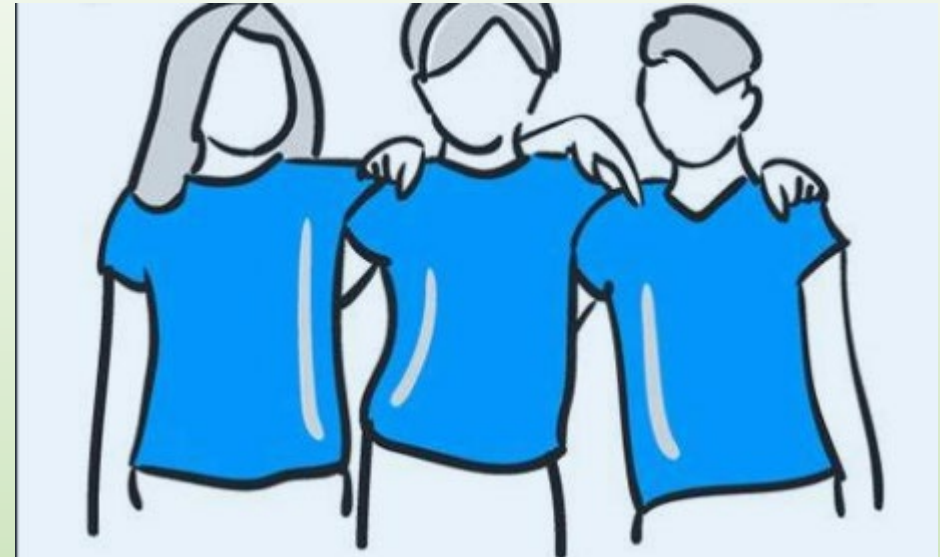
Government can run afoul of the Free Speech Clause if it:

- Requires HCSMs to state that they do not comply with the Affordable Care Act
- Requires HCSMs to state that health insurance is better for most people



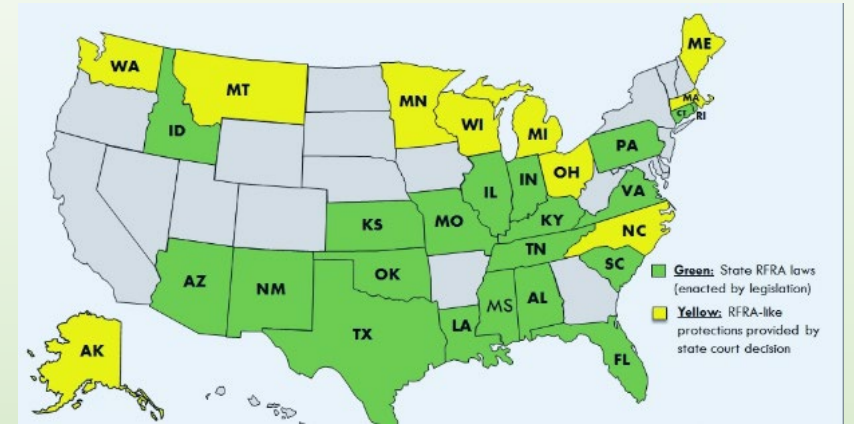
Freedom of Association

- Government cannot compel the disclosure of individuals or organizations that associate with another organization without a compelling interest
 - NAACP v. Alabama*, 357 U.S. 449 (1958)
- Example: Requiring charities to disclose donors or affiliates runs afoul of the right to freedom of association
 - Am. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373 (2021)
- Government can run afoul of the freedom of association if it:
 - Requires HCSMs to disclosure of vendors, contractors, or health care providers
 - Requires HCSMs to disclose contractual arrangements, such as payments, to third parties



Statutory Protections: Religious Freedom Restoration Acts (RFRAs)

- In jurisdictions with RFRAs, any burden on the exercise of religion, including those imposed by neutral and generally applicable laws, is subject to strict scrutiny
 - The government must demonstrate a compelling government interest, such as national security
 - The government must demonstrate that the burden on religious exercise is the least restrictive means to furthering that compelling interest, i.e., there is no other way
 - Strict scrutiny is “strict in theory, fatal in fact”
- Dozens of states have enacted RFRAs or RFRA-like protections





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Point of Contact
AHCSM

Darcie Johnston

Darcie@AHCSM.org