FROM THE PAGE TO THE PILL: WOMEN'S REPRODUCTIVE RIGHTS AND THE LAW*

Panel 1 – The ACA's Other Mandate: Contraceptive Coverage, Conscientious Objection, and Reproductive Rights

REMARKS OF MICHAEL COSTELLO**

My perspective on the symposium topic stems from client representation and litigation in this area involving religious freedom, one of our most treasured liberties, the freedom to practice one's religion without government interference. Religious liberty is under constant scrutiny and ongoing challenges, in New York and on the Federal level. Within the context of health care, specifically reproductive health services and plans, religiously affiliated institutions including church entities are presented with a Hobson's Choice.[1] They either provide their employees with insurance coverage that provides

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[1] *See, e.g.*, Nancy Frazier O'Brien, Witnesses Disagree About HHS Rule's Effect on Conscience, Access, CATHOLIC NEWS SERVICE, (Nov. 2, 2011), http://www.catholicnews.com/data/stories/cns/1104308.htm; *See generally Hobson's Choice Definition,* Merriam-Webster Dictionary, http://www.merriam-webster.com/dictionary/hobson's%20choice (last visited May 23, 2013).

services that conflict with their religious beliefs, or they terminate their health care, educational, and human service programs all together.

I'd like to take a moment just to give you the landscape and the contours of religious freedom and how it's affected New York State, and what's on the table, and on the Federal level. In New York State, we are of course reminded of the Women's Health and Wellness Act, which was passed in 2002 and requires employers, including church entities, to incorporate contraceptives and prescription drug plans into the insurance that they provide for their employees.[2] This was challenged in *Catholic Charities v. Serio*,[3] which I will speak about later. There is a bill pending before the New York State Legislature which mandates abortion coverage, it's Assembly Bill 2945, and that would require all insurance plans that cover maternity care, including Catholic health plans, to provide coverage for abortion.[4] There is no religion-based exemption in that particular bill. There's another bill, known as 8949, which is the denial of pharmacist conscience, which would deny pharmacists the ability to exercise their conscience in the filling or refilling of prescriptions.[5] There's a [Senate] bill referred to as the Reproductive Health Act, 438 pending, which would define abortion as a federal medical statutory right in New York State, and would affect the right of conscience, and of religion-based institutional providers.[6] It would also allow for non-physicians to perform abortions, promote late-term abortions, and affect legislative reference for police regulation of abortion. There's another bill called the Emergency Contraception Bill, Assembly 85,[7] which allows the dispensing of emergency contraception by pharmacists, nurses, and midwives. Next we have disclosure by pregnancy care centers, and this is similar to a measure that was adopted by New York City counsel, Assembly bill 3328.[8] This would require pro-life pregnancy care centers to disclose the procedures they do not provide, namely abortion and

[2] N.Y. INS. LAW § 4303(cc) (2002).

[3] Catholic Charities of the Diocese of Albany v. Serio, 28 A.D.3d 115, 119-20 (2006).

[4] Assemb. B. 2945, 2011-12 Reg. Sess. (N.Y. 2011).

[5] Assemb. B. 8949, 2009-10 Reg. Sess. (N.Y. 2009).

[6] Reproductive Health Act, S. B. 438, 2013-14 Reg. Sess. (N.Y. 2013).

[7] Unintended Pregnancy Prevention Act, Assemb. B. 85, 2011-12 Reg. Sess. (N.Y. 2011).

[8] Assemb. B. 3328, 2011-12 Reg. Sess. (N.Y. 2011).

contraception. Finally, there is the expansion of the clinic access bill, Assembly 10788,[9] also known as the Reproductive Health Care Facilities Access Act. This would expand the New York 1999 clinic access law to create a new civil cause of action for persons who feel they were interfered with in any way coming in, and out of a clinic and within the property line.

On the Federal landscape, just briefly touching on, we have the ministerial exception, which was a victory for religious freedom in the case of *Hosanna-Tabor Evangelical Church and School v. E.E.O.C.*[10] This was a unanimous decision by the Supreme Court affirming religious freedom. There is an NLRB collective bargaining exception issue, that's pending right now, in which the NLRB has embarked on a course to exercise the authority of religious teachers, and in this case, these cases are dealing with higher education.[11] They involve schools like Duquesne University, Manhattan College, and Xavier, because they failed to meet the loose definition of what constitutes a religious institution for exemption of the Wagner Act.[12] Then we have the popular HHS mandate which everyone has been referring to, and we'll speak about that, but that mandate provides an exemption for religious employers only, and that mirrors the contraceptive mandate exemption in New York State which was passed from the Women's Health and Wellness Act.[13] It asserts the same narrow level of religion infused and espoused by the EEOC Department of Justice and the NLRB, namely that an employer to be religious must exist for the purpose of incorporating religious values. There are over 90 million people that are going to be exempt, because they belong to one of the over a million grandfathered health care plans. Then you have those employees

[9] Reproductive Health Care Facilities Access Act, Assemb. B. 10788, 2012 Assemb. (N.Y. 2012).

[10] Hosanna-Tabor Evangelical Church and School v. Equal Employment Opportunity Commission, 132 S. Ct. 694, 709 (2012) (holding that petitioner was a minister as defined by the ministerial exception of the First Amendment, and therefore her employment discrimination suit against her church must be dismissed, because a judgment would violate the Church's religious freedom).

[11] *E.g.*, Moshe Marvit, *The Continuing Struggle for College Adjunct Unions,* THE CENTURY FOUNDATION, http://tcf.org/blog/detail/the-continuing-struggle-for-college-adjunct-unions (Nov. 5, 2012).

[12] John H. Garvey, President, United States Conference of Catholic Bishops, The Catholic University of America Address at the USCCB General Assembly (June 2012).

[13] Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 8456 (proposed Feb. 6, 2013) (to be codified at 45 C.F.R. pt 147.131).

that work for exempt religious employers, and there's another exemption that deals with employers with under 50 employees, they don't have to provide the coverage. So, there are so many holes in this mandate that I will address later.

Next, we have the rule that HHS issued in August 2008 to protect doctors and hospitals that counsel pregnant women from being sued for not presenting abortion as a medical alternative.[14] This was repealed last spring in reaction to pressure from the American College of Obstetrics and Gynecology. Then finally in the area of human trafficking, the National Human Trafficking Victim Assistance Program requires that all participating organizations are required to provide a full range of reproductive services.[15] In sum, there is a lot on the horizon and it requires great schooling and reaction.

The religious beliefs at issue in these cases include, among others, those of the Catholic Church. They are articulated in the catechism of the Catholic Church, which contains a complete and systematic exposition of Christian law of teaching as well as what we call the ethical and religious directives from Catholic health care services, which declares the moral and theological precepts involving health care delivery. One of the central tenets of the faith is the belief in the sanctity of human life and the dignity of all persons. The Church believes that the dignity of the human person is rooted in their creation in the image and likeness of God. An outgrowth of this belief is that human life must be respected and protected absolutely from the moment of conception. Furthermore, Catholic teachings prohibit any action that renders procreation impossible. Specifically, sterilization and contraceptives as unacceptable. This represents the clear historic and theological teaching of the Catholic faith. Church entities cannot allow the violation of their sincerely held religious beliefs by subsidizing, facilitating, or sponsoring health coverage that provides sterilization services, contraceptives, and related counseling services because all of these services are inconsistent with the teachings of the Catholic Church.

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[14] Ensuring That Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Federal Law, 45 Fed. Reg. 78072 (proposed Dec. 19, 2008) (to be codified at 45 C.F.R. pt. 88).

[15] *Anti-Trafficking in Persons Programs,* OFFICE OF REFUGEE RESETTLEMENT, https://www.acf.hhs.gov/programs/orr/programs/anti-trafficking/about (last visited May 26, 2013).

The defense of religious liberty, I submit, does not involve whether people have a right to abortion, drugs, sterilization, or contraception. The right to such services does not authorize the government to force church entities to violate their own conscience by making them provide, pay for, and/or facilitate providing these services. Church entities do not seek to impose their religious rights on others. They expect, however, that the government will not impose its values and the policies on them, in direct violation of their religious beliefs. In 2002, New York passed the Women's Health Wellness Act, requiring all groups to provide coverage. The church commenced an action seeking a declaratory injunctive relief against the act's contraceptive mandate.[16] In order to address a broad mix of religious employers, the first Plaintiff's pool was assembled out of 10 organizations including Catholic and Baptist church entities that provide a full range of education, human services, and health care services. Relief was sought on grounds of the free exercise and establishment clauses, the First Amendment's protections of free speech and association, and especially the New York State Constitution, recognizing the impact of the case of *Employment Division v. Smith*.[17] We drafted the complaint to assert a free exercise claim and to urge the Court to provide a robust application of religious freedom under the New York State Constitution. New York's Constitutional guarantee of a freedom of religion is both older and broader than that of the United States Constitution's guarantee. It was incredible that New York's Constitution in 1777, more than a decade before the First Amendment to the U.S. Constitution, incorporated the free exercise and enjoyment of religious profession and worship without discrimination of preference shall forever be allowed in this state to all humankind and no person shall be rendered incompetent to be a witness on account of his or her opinions on matters of religious belief.[18] But the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace or safety of this State.

Our goal in that action was to really expand this dormant provision of the New York State Constitution. The Court of

[16] Catholic Charities of the Diocese of Albany v. Serio, 28 A.D.3d 115, 119 (2006).

[17] *Id.* at 128-30.

[18] N.Y. CONST. OF 1777 art. XXXVIII (1777).

Appeals had previously emphasized that Article I, Section 3[19] manifested the importance that the State of New York attaches to free exercise and religious beliefs, delivering an interest which it called a 'preferred right'.[20] Article I, Section 3 affirmatively protects the free exercise and enjoyment of religious profession and worship and provides the standards by which limitations are to be judged.[21] The right of free exercise in New York State cannot be invoked to justify practices that are inconsistent with peace and safety in the State. We submitted that the language of Article I, Section 3 was strained beyond recognition by contending that the provision of prescription drug coverage without contraceptives is inconsistent with these requirements.[22] Especially when the denial of the coverage altogether is not considered inconsistent with peace and safety under the Act, because as you may know, the Act had an opt-out provision for employers where the employee would have the ability to independently provide the right to secure and coverage.

The Court of Appeals obviously did not rule in connection with the First Amendment issues that we have raised, however.[23] What I consider the statutory effect of the *Serio* decision is that the Court of Appeals established a legal baseline for Constitutionally based claims for religious exemptions under the New York free exercise clause of the First Amendment. The Court explicitly declined the inflexible rule of *Employment Division v. Smith*, which held that the state imposes an incidental order on the right of free exercise and that two prongs are necessary to establish a religious exception. Additionally, the guidance the court gave substantial deference to the Legislature. So, this test and this view by the Court of Appeals are less strict than that of Smith. In conclusion, I respectfully submit that the HHS mandate would not and will not pass muster under the New York State Constitution, as well as under the U.S. Constitution First Amendment protections.

[19] N.Y. CONST. art. I, § 3 (2002).
[20] Rivera v. Smith, 63 N.Y.2d 501, 511 (1984).
[21] N.Y. CONST. art. I, § 3 (2002).
[22] *Serio*, 28 A.D.3d at 128-29.
[23] *Id.* at 130.