

Thomas O. Bean
Attorney at Law

March 11, 2013

Ms. Kathleen C. Montgomery
Executive Vice President
Unitarian Universalist Association
25 Beacon Street
Boston, MA 02108

Re: Summary of UUA Amicus Participation

Dear Kay:

I am pleased to present the following summary of the cases in which the UUA joined in filing an *amicus curiae* brief. This report is for the period from October 14, 2011 (the date of the last report) to the present.

United States Supreme Court

1. *United States of America v. Windsor*

The substantive question before the Court in this potentially landmark case is whether the Defense of Marriage Act (“DOMA”) is constitutional. Enacted by Congress in 1996, DOMA nullifies the marriages of gay and lesbian couples for all purposes of federal law.

The UUA joined an amicus brief filed by dozens of religious organizations arguing that a broad cross-section of religious denominations recognize the dignity of lesbian and gay people and their relationships, recognize the necessary distinction between civil and religious marriage, and recognize that civil marriages of same-sex couples will not impinge upon religious beliefs or practices, but rather will prevent one set of religious beliefs from being imposed on others through civil law.

Oral argument is scheduled for March 27, 2013. A decision from the Supreme Court is expected by the end of June.

2. *Hollingsworth v. Perry*

Enacted in November 2008, Proposition 8 eliminated the right of gay and lesbian Californians to marry. The United States Court of Appeals for the Ninth Circuit upheld the District Court’s determination Proposition 8 was unconstitutional. The Supreme Court agreed to consider whether Proposition 8 violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution.

The UUA joined an amicus brief submitted by dozens of religious organizations that made essentially the same arguments made in the amicus brief filed in *Windsor*. Oral argument is scheduled for March 26, 2013. Again, a decision from the Supreme Court is expected by the end of June.

3. *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*

Hosanna-Tabor addresses the scope of the “ministerial exception” to laws prohibiting discrimination in employment. The ministerial exception is designed to allow religious bodies to practice their religion and convey their message without government interference.

In *Hosanna-Tabor*, an elementary school teacher at a religious school alleged that her employment had been terminated due to her disability in violation of the Americans with Disabilities Act. The school argued that, under the ministerial exemption, the employee’s suit should be dismissed. The teacher was a “called” minister who taught math, language arts, social studies, science, gym, art, and music. The teacher also, for a total of approximately forty-five minutes per seven-hour school day, taught a religion class, led a chapel service, led prayer, and engaged in a devotional.

The UUA joined an amicus brief with, among others, the American Civil Liberties Union Foundation and the Americans United for Separation of Church and State. The brief made three arguments: that (a) application of the ministerial exception to immunize employment-related conduct unrelated to religion would undermine the enforcement of important nondiscrimination laws; (b) the ministerial exception should not prevent courts from assessing whether an employer’s asserted religious motivation for employment action is pretextual; and (c) even if the ministerial exception were to apply to the teacher, the ministerial exception should protect the church only if the challenged employment decision arose from religious concerns rather than from secular animus or retaliation.

The U.S. Supreme Court recognized broadly the ministerial exception to the employment discrimination laws, and did not distinguish between employment actions taken for religious rather than secular purposes. The decision thus appears to immunize employers from employment decisions taken against ministers who would otherwise be able to prosecute actions under the anti-discrimination laws. The Court found that the teacher, who had been “called” to the profession, qualified as a minister for purposes of the ministerial exception.

Ms. Kathleen Montgomery
Unitarian Universalist Association
March 11, 2013
Page 3

4. *National Federation of Independent Business et al. v. Sebelius, Secretary of Health and Human Services, et al.*

In this landmark case, the National Federation of Independent Business and numerous States challenged the constitutionality of the Affordable Care Act (“ACA”) as exceeding Congress’ powers. The States, challenged, among other things, what they claimed was an unauthorized mandate to expand their Medicaid programs.

The UUA joined with other faith organizations in filing an amicus brief arguing that the ACA does not force states to continue to participate in Medicaid. Rather, states must continue to participate in Medicaid, and indeed expand their programs, because it is the right and moral thing to do. In so doing, amici argued that while the groups had different perspective on many issues, they have long agreed that it is the calling of government to bring justice and protection to the poor and the sick.

The Supreme Court, in a mixed decision, ruled that the key provision in question, the so-called individual mandate requiring all Americans to buy insurance or pay a fine, failed to pass constitutional muster under the Commerce Clause, which was the heart of the administration’s arguments in favor of it. But the chief justice declared that the fine amounted to a tax that the government had the power to impose, and that the mandate could survive on that basis. The decision did significantly restrict one major portion of the law: the expansion of Medicaid, the government health-insurance program for low-income and sick people. The ruling gives states some flexibility not to expand their Medicaid programs, without paying the same financial penalties that the law called for. While, after the decision, many Republican governors initially indicated that they would not expand their Medicaid programs, several have changed their position and decided to expand them.

First Circuit

Commonwealth of Massachusetts v. United States Department of Health and Human Services, et al.

Gill, et al. v. Office of Personnel Management, et al.

After Massachusetts legalized same-sex marriages in 2004, the federal government advised the Commonwealth that DOMA did not give the state the discretion to recognize same-sex marriage for purposes of the Federal portion of Medicaid reimbursement. The Commonwealth estimated that the federal government’s refusal to provide federal funding to individuals in same-sex couples cost it as much as two million dollars in lost federal funding. Similarly, the Commonwealth was required to pay a 1.45% Medicare tax for the same-sex spouse’s share of health insurance premium benefits because such benefits were treated, under federal law, as taxable income.

The Massachusetts sued the federal government seeking a declaration that DOMA was unconstitutional. It argued that DOMA exceeded Congress' power under the Spending Clause, and violated the Tenth Amendment. In sum, Massachusetts argued that the federal government had wrongfully intruded on the exclusive province of the state to regulate marriage.

In a related case, *Gill*, seven same-sex couples married in Massachusetts, and three surviving spouses of such marriages, brought suit to enjoin pertinent federal agencies and officials from enforcing DOMA to deprive the couples of federal benefits available to opposite-sex married couples in Massachusetts. The plaintiffs argued that DOMA violated the equal protection principles.

The District Court ruled in the Commonwealth's and the Gill plaintiffs' favor.

On the federal government's appeal to the First Circuit, the UUA joined an amicus brief submitted by a broad array of religious organizations arguing for affirmance. The brief, like the brief submitted in *Windsor*, argued that civil and religious marriage are distinct, as the Constitution requires, and DOMA favors one form of religious marriage over another without a secular purpose. The brief argued further that DOMA was adopted based on moral disapproval of same-sex marriage, and was therefore unconstitutional. Notably, the federal government reversed course after filing an initial brief defending DOMA, but a Bipartisan Legal Advisory Group of the House of Representatives intervened in the appeal to support DOMA.

The First Circuit held that DOMA was unconstitutional, but stayed its decision pending a likely appeal to the Supreme Court. As noted above, the cases the Supreme Court accepted, and may use to decide the constitutionality of DOMA, are *Windsor* and *Perry*.

Third Circuit

Cradle of Liberty Council, Inc., Boy Scouts of America v. City of Philadelphia

In 1928, the City of Philadelphia granted to the Philadelphia Council of the Boy Scouts of America permission to build its headquarters on a parcel of land owned by the City. The City enacted an ordinance that permitted the Boy Scouts to occupy the property rent-free as long as it maintained the building and the lot; the ordinance did, however, permit the City to terminate the arrangement on one year's notice.

Because of the BSA's discrimination against homosexuals, the City passed a resolution evicting the BSA from the property unless the BSA began to pay fair market rent. The BSA sued the City alleging that the City's resolution violated, among other things, its First and Fourteenth Amendment rights.

Ms. Kathleen Montgomery
Unitarian Universalist Association
March 11, 2013
Page 5

The District Court entered a decision enjoining the City from evicting the BSA, and a jury found that the City Council's resolution violated the BSA's First Amendment right of freedom of expression.

The UUA joined with multiple religious organizations and faith leaders in submitting a brief to the United States Court of Appeals for the Third Circuit urging reversal, arguing that the City was not required to subsidize an organization that practiced invidious discrimination.

The case is pending.

Seventh Circuit

Korte v. United States Department of Health and Human Services

In this case, *O'Brien* (discussed below), and *Newland* (discussed below), employers challenged the federal contraceptive rule. They argued that this rule, which requires employers to offer contraception as part of their health insurance plans, substantially burdens their exercise of religion under the Religious Freedom Restoration Act ("RFRA").

A divided panel of the Seventh Circuit granted the employers' request for an injunction preventing implementation of the Rule. Panels of the Sixth and Tenth Circuits had previously denied requests for such injunctions. Justice Sotomayor, sitting as a Circuit Justice, refused to overturn the Tenth Circuit's denial of the requested injunction.

The UUA joined an amicus brief filed by the ACLU and multiple religious organizations, arguing that the federal contraceptive rule does not substantially burden plaintiffs' exercise of religion under RFRA, RFRA does not grant employers the right to impose their religious beliefs on their employees, and the plaintiffs cannot demonstrate that the contraceptive rule imposes a substantial burden on their exercise of religion because Illinois law requires that their group health plan cover contraception.

The Seventh Circuit has not yet scheduled oral argument in *Korte*, and HHS is reportedly considering revising the rule.

Eighth Circuit

O'Brien v. United States Department of Health and Human Services

O'Brien raises substantially the same issues concerning the federal contraceptive rule as *Korte*.

Ninth Circuit

1. *Stormans, Inc. d/b/a Ralph's Thriftway, et al. v. Selecky*

The state of Washington adopted a rule providing that it is unprofessional conduct for a pharmacist to, among other things, destroy an unfilled lawful prescription and refuse to return unfilled lawful prescriptions. A related rule requires pharmacies to "deliver lawfully prescribed drugs or devices to patients," except under certain limited circumstances.

Certain pharmacists and pharmacies challenged the two rules arguing that that, to protect their religious freedom, the law must allow pharmacy employees to refuse to fulfill certain prescriptions if those prescriptions interfere with their religious beliefs. For example, they maintained that issuance of emergency contraception contravened their Christian religious beliefs. A District Court ruled in their favor.

The UUA joined an amicus brief submitted to the Ninth Circuit Court of Appeals by a broad range of religious organizations and individual clergy arguing that the First Amendment protects all religious beliefs, and thus while the pharmacists were certainly entitled to their beliefs, they were not entitled to impose them on persons holding valid prescriptions. The brief argued that a pharmacy's or pharmacist's refusal to fill a lawful prescription is not solely the concern of the pharmacy or pharmacist: it is also concerns the patient, his or her doctor, and society as a whole, which has a vested interest in ensuring the health and welfare of the citizenry.

The case remains pending before the Ninth Circuit.

2. *Golinski v. United States Office of Personnel Management, et al.,*

Karen Golinski, a federal employee, challenged DOMA as unconstitutional because it burdened her and her relationship with her spouse. Specifically, she alleged that DOMA discriminated in terms of health benefits by forcing her employer and employee to treat the health benefits afforded the same-sex spouse as taxable income, prevented an employee for paying for her spouse's share of the health insurance premium with pre-tax dollars, and barred same-sex spouses from enjoying benefits under COBRA; she also alleged that DOMA discriminated in other ways.

The UUA joined an amicus brief signed by large corporations around the country arguing that DOMA imposed administrative burdens on employers by requiring them to administer dual systems of benefits and payroll, and imposing on them the cost of the workarounds necessary to protect married colleagues.

Ms. Kathleen Montgomery
Unitarian Universalist Association
March 11, 2013
Page 7

Oral argument was held in mid-September, 2012. Whether the Ninth Circuit will issue a decision before the Supreme Court decides *Windsor* is unclear. It may very well be that the Ninth Circuit will defer ruling on *Golinski* until the Supreme Court decides *Windsor*.

Tenth Circuit

Sebelius v. Newland

Newland raises substantially the same issues concerning the federal contraceptive rule as *Korte*.

Eleventh Circuit

Farina v. Secretary, Florida Department of Corrections

This case concerns the propriety of the “biblical strategy” used by the prosecution during the penalty-phase trial of convicted murder, Anthony Farina. Highlighted by an extensive colloquy with a prison pastor on the Southern Baptist understanding of the teachings of the Christian Bible, and bookended by religious references at the beginning and the end of the resentencing trial, the prosecutor’s reliance on religious doctrine permeated the proceedings. In his closing argument, the prosecutor adverted to the supposed biblical injunction against showing mercy to those who have committed crimes and calling for submission to the views of those in authority. Paraphrasing a from Romans 13:2 that those who “rebel[] against the authority . . . will bring judgment on themselves,” he told the jury that Farina and his codefendant had “brought this judgment upon themselves.” The jury unanimously recommended a sentence of death. The Supreme Court of Florida, while condemning the invocation of religious authority in capital sentencing proceedings, affirmed Farina’s death sentence by a vote of 4-3.

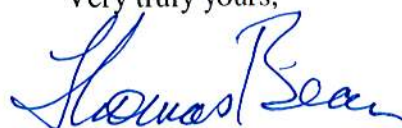
The UUA joined an amicus brief filed by religious groups, civil rights groups, former Florida Supreme Court Justices, and other leaders, arguing that the prosecutor’s reliance on religious doctrine--and his selection of the Southern Baptist interpretation of that doctrine to the exclusion of all other interpretations--drew on the jurors’ most parochial and inflammatory biases, thereby grossly compromising Farina’s death sentence, and undermining the jury’s sentencing discretion.

This case remains pending.

Ms. Kathleen Montgomery
Unitarian Universalist Association
March 11, 2013
Page 8

It is a pleasure to assist the UUA with amicus briefing.

Very truly yours,

A handwritten signature in blue ink that reads "Thomas O. Bean". The signature is written in a cursive style with a large, prominent "B".

Thomas O. Bean