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February 8, 2016

Rev. Harlan Limpert
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24 Farnsworth Street
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Re: Summary of UUA Amicus Participation

Dear Harlan:

I am pleased to present the following summary of the cases in which the UUA joined in filing an *amicus curiae* brief. This report will cover briefs filed during the period from March 15, 2013 (the date of the last report), to the present.

United States Supreme Court

1. *Obergefell, et al. v. Hodges, Director, Ohio Department of Health, et al.*

In 1996, the UUA formally resolved to support equal civil marriage rights. In 2004, the UUA further affirmed that “civil marriage is a civil right.” The UUA joined an amicus brief in *Obergefell* advocating that the Supreme Court hold that all states must grant marriage licenses to same-sex couples. The amicus brief in *Obergefell* was the culmination of several the UUA had joined in the circuit courts.

In *Obergefell*, the Supreme Court concluded (5-4) that the Fourteenth Amendment requires States to license marriages between people of the same sex. The Court grounded its decision in the fundamental liberties protected by the Fourteenth Amendment’s Due Process and Equal Protection Clauses. It reasoned that these clauses extend to certain personal choices central to individual dignity and autonomy, including intimate choices defining personal identity and beliefs.

The Supreme Court grounded its decision in four principles and traditions that demonstrate that the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples. The first premise is that the right to personal choice regarding marriage is inherent in the concept of individual autonomy. The second principle is that the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals. The third basis for protecting the right to marry is that it safeguards children and families and thus draws meaning from the related rights of child-rearing, procreation, and

education. The final principle is that marriage is a keystone of the Nation's social order. States have contributed to the fundamental character of marriage by placing it at the center of many facets of the legal and social order.

(We have not summarized below the amicus briefs the UUA joined in the circuit courts because *Obergefell* is binding nationally.)

2. *Town of Greece, New York v. Galloway, et al.*

Since 1999, the monthly town board meetings in Greece, New York, have opened with a roll call, a recitation of the Pledge of Allegiance, and a prayer given by clergy selected from the congregations listed in a local directory. While the prayer program was open to all creeds, nearly all of the local congregations were Christian; thus, nearly all of the participating prayer givers were Christian as well.

The UUA joined an amicus brief opposing the prayer, arguing that the town violated the First Amendment's Establishment Clause by preferring Christians over other prayer givers and by sponsoring sectarian prayers.

In another 5-4 decision, the Court held that Legislative prayer, while religious in nature, has long been understood as compatible with the Establishment Clause. The Court observed that the First Congress had voted to appoint and pay official chaplains shortly after approving language for the First Amendment, and both Houses have maintained the office virtually uninterrupted since then. Further, a majority of the States have had a consistent practice of Legislative prayer. It reasoned that the Nation's history and tradition have shown that prayer in this limited context could coexist with the principles of disestablishment and religious freedom.

3. *Burwell, Secretary of Health and Human Services, et al. v. Hobby Lobby Stores, Inc., et al.*

The Patient Protection and Affordable Care Act of 2010 required specified employers' group health plans to furnish "preventive care and screenings" for women without "any cost sharing requirements." The Department of Health and Human Services promulgated regulations that required non-exempt employers to provide coverage for the twenty contraceptive methods approved by the Food and Drug Administration, including the four that have the effect of preventing an already fertilized egg from developing any further by inhibiting its attachment to the uterus. Religious employers, such as churches, are exempt from this contraceptive mandate, and HHS has effectively exempted religious nonprofit organization with religious objections to providing coverage for contraceptive services.

The owners of *Hobby Lobby* and two other closely held for-profit corporations claim to hold the sincere belief that life begins at conception. They aver that it would violate their

religions for their companies to facilitate access to contraceptive drugs or devices that operate after that point. They challenged HHS' regulations requiring that their companies offer such drugs under the Religious Freedom Restoration Act (RFRA).

The UUA joined an amicus brief filed by faith-based organization that argued that they supported a robust interpretation of the RFRA that safeguards the deeply personal right to the free exercise of religion. The brief contended that, if accepted, the companies' argument would undermine—not promote—religious liberty, by allowing employers to impose their owners' religious beliefs on the companies' employees, many of whom hold different moral and religious views on the use of contraception.

The Supreme Court held that, as applied to closely held corporations, the HHS regulations imposing the contraceptive mandate violate RFRA. The Court reasoned that RFRA applies to regulations that govern the activities of closely held for-profit corporations like Hobby Lobby and the other two corporations that brought the case. In so doing, it employed the familiar legal fiction of including corporations within RFRA's definition of "persons," reasoning that the purpose of extending rights to corporations is to protect the rights of people associated with the corporations. The Court concluded that the contraceptive mandate imposed a "substantial burden" on the objecting parties' ability to conduct business in accordance with their religious beliefs.

4. *McCullen, et al. v. Coakley, Attorney General for the Commonwealth of Massachusetts*

In 2007, Massachusetts amended its Reproductive Health Care Facilities Act (the "Act") to make it a crime to knowingly stand on a "public way or sidewalk" within 35 feet of an entrance or driveway to any "reproductive health care facility," defined as "a place, other than within or upon the grounds of a hospital, where abortions are offered or performed." McCullen and other plaintiffs were individuals who attempt to engage women in "sidewalk counseling," which involves offering information about alternatives to abortion and help pursuing those options. They claimed that the 35-foot buffer zones displaced them from their previous positions outside the clinics, considerably hampering their counseling efforts. McCullen and others sued Attorney General Coakley seeking to enjoin the Act's enforcement, arguing that it violated the First and Fourteenth Amendments.

The UUA joined an amicus brief filed by faith-based organizations arguing that, given the severe violence, obstruction, and harassment targeting reproductive healthcare facilities, the States have a strong interest in securing the safety of their citizens and women's safe access to reproductive healthcare by appropriately tailored buffer zone laws. It argued that the Act was a constitutional time, place and manner regulation that was narrowly tailored to serve significant State interest in safety and access, while providing ample alternative channels of communication.

The Supreme Court held, unanimously, that the Act violated the First Amendment. It reasoned that the Act restricts access to “public ways” and “sidewalks,” places that have traditionally been open for speech activities and that the Court has labeled “traditional public fora.” It concluded that the government’s ability to regulate speech in such locations is “very limited,” and that the “buffer zones” burdened substantially more speech than necessary to achieve the Commonwealth’s asserted interests.

5. *King v. Burwell, Secretary of Health and Human Services*

This was the second challenge to the Affordable Care Act a/k/a Obamacare. The question in this case was whether plaintiffs, who did not want to purchase health care insurance, were entitled to tax credits purchased on “an exchange” regardless of whether the exchange was operated by a State or the Federal government.

The UUA joined a brief filed by the National Women’s Law Center that argued that many of the ACA’s key provisions were designed to provide women with more affordable access to health insurance and health care, and that over nine million women, who would otherwise go without affordable health insurance, are eligible to benefit from the tax credits.

The Supreme Court (6-3) found that the word “exchange,” as used in the ACA, was ambiguous. It nevertheless concluded that because the ACA would not work in a State with a Federal exchange, Congress must have intended for the tax credits to be available to all persons who purchased insurance on any exchange.

6. *Whole Women’s Health v. Cole*

Texas House Bill No. 2 requires that: (1) physicians must have admitting privileges at a hospital within 30 miles of the location where they are going to perform an abortion; and (2) abortion facilities must qualify as ambulatory surgical centers.

The UUA joined an amicus brief arguing that these requirements impose high costs and lengthy delays that make safe abortion less accessible for all women, particularly for needy women who are marginalized and most vulnerable. It cited the trial Court’s statement, H.B. 2’s “practical impact on Texas women due to the clinics’ closure statewide would operate for a significant number of women in Texas just as drastically as a complete ban on abortion,” in support of its position.

The Court is likely to decide *Whole Women’s Health* before July 1, 2016.

Seventh Circuit

Freedom from Religion Foundation, Inc. v. Lew

The Freedom from Religion Foundation and its co-presidents filed suit to challenge the constitutionality of section 107 of the Internal Revenue Code, also known as the parsonage exemption. The exemption excludes the value of employer-provided housing benefits from gross income of any “minister of the gospel.” These benefits can be provided in either of two ways: directly, by giving the minister access to a church-owned residence, or indirectly, by giving the minister a rental allowance to obtain housing. Non-clergy must generally pay income tax on the value of their employer-provided housing unless they meet certain requirements, including that such housing be provided “for the convenience of the employer.”

Freedom from Religion Foundation is a Wisconsin-based organization of atheists and agnostics. Its co-presidents receive a portion of their salaries from FFRF in the form of a housing allowance, but because they are not ministers, they paid income tax on this portion of their salaries. Importantly, the taxpayers did not seek to exclude this income on their federal income tax returns nor filed a claim for a refund after paying taxes on it.

The UUA joined an amicus brief supporting the constitutionality of the exemption provided by section 107. It argued that the Supreme Court has long distinguished between affirmative assistance to religious organizations and merely lifting government-imposed burdens so as to allow those organizations to exercise their religious missions more freely: “When Congress chooses not to impose a burden on religious organizations—whether by means of tax exemption or regulatory exception—it honors, rather than transgresses this Nation’s long tradition of separation between church and state.” The brief noted that while section 107 refers to a “minister of the gospel,” the IRS has always interpreted it as applying to persons holding an equivalent status in other religions.

The Court did not reach the merits of plaintiffs’ claims that section 107 violated the First Amendment, because it concluded that the plaintiffs lacked “standing,” i.e., that the plaintiffs failed to show that they suffered a concrete and particularized injury-in-fact that was fairly traceable to the challenged action of the defendant and that was likely to be redressed by a favorable judicial decision. Here, the Court concluded that the plaintiffs were never denied the parsonage exemption because they never asked for it: “Without a request, there can be no denial. And absent any personal denial of a benefit, the plaintiffs’ claim amounts to nothing more than a generalized grievance about § 107(2)’s unconstitutionality.”

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State of Illinois

People of the State of Illinois v. Adolfo Davis

The Supreme Court in *Miller v. Alabama* held that “the Eighth Amendment forbids a sentencing that mandates life in prison without possibility of parole for juvenile offenders.” The Court held that no child could receive the sentence of life without parole unless the sentencing judge had been permitted to consider mitigating factors such as age and capacity for rehabilitation.

The UUA joined a faith-based amicus brief in *Davis*, arguing that *Miller* should be applied retroactively to the at least eighty individuals in Illinois who had committed crimes as juveniles for which they had been sentenced to life without parole. It reasoned that the world’s faith-based traditions consistently recognize values fundamental to a moral society that are at odds with a system that allows mandatory life without parole. The brief made specific reference to UU principles when it wrote, “the Unitarian faith recognizes ‘justice, equity, and compassion in human relationships’ as one of its seven principles.” It also cited to the Qu’ran and the Bible for support for the importance of forgiveness and mercy.

The Supreme Court of Illinois agreed with the UUA’s position. It reasoned that the Supreme Court’s holding in *Miller* was a new substantive constitutional rule that applied retroactively on post-conviction review, and that *Miller* provided “cause and prejudice” for defendant’s inability to previously assert challenges to his mandatory life sentences, as required to obtain successive post-conviction review.

It is a pleasure to assist the UUA with amicus briefing. We are pleased that courts have adopted so many of the positions advocated by the UUA in recent years.

Very truly yours,

Thomas O. Bean