

Religious Liberty Spring?

Spring 2012 may be America's "Religious Liberty Spring." Citizens have begun to demand a renewed respect for religious liberty in the face of unreasonable demands by officials who pay lip service to religious liberty while repressing it. Four situations may be the harbingers of this spring.

The Supreme Court's Decision in *Hosanna-Tabor*

On January 11, 2012, the Supreme Court unanimously ruled that nondiscrimination laws could not prohibit a church school from firing a teacher whom it deemed a "minister." Relying on free exercise and nonestablishment principles, the masterful opinion in *Hosanna-Tabor v. EEOC*, 132 S. Ct. 694 (2012), secures a church's right to decide who its leaders will be without governmental interference.¹

The Court condemned the Obama Administration's argument that the First Amendment does *not* provide any special protection to churches' employment decisions. Describing the Administration's position as "untenable" and "hard to square with the text of the First Amendment itself," the Court rejected the "remarkable view that the Religion Clauses have nothing to say about a religious organization's freedom to select its own ministers." The ruling revitalizes some religious exercise rights that were damaged two decades ago in *Employment Division v. Smith*, 494 U.S. 872 (1990), and has borne immediate fruit for New York City churches in the *Bronx Household* case.

NYC's Assault on Religious Liberty

The "Methuselah" of religious liberty litigation, *Bronx Household* has been the subject of four opinions by the Second Circuit over sixteen years. The Board of Education rents school facilities to hundreds of groups on weekends and evenings. But the Board has created policies to exclude churches, despite numerous Supreme Court decisions requiring government to grant religious groups equal access.

Conceding that religious speech, instruction, discussion, and worship cannot be banned from public property, the Board policy's latest iteration excludes only "religious worship services." The Second Circuit upheld the policy in *Bronx Household v. Board of Education*, 650 F.3d 30 (2d Cir. 2011).

After the Supreme Court denied review in December 2011, the curtain seemed to fall for the last time on this perennial lawsuit. But NYC churches did not accept defeat and instead held several peaceful street protests throughout the City.

When the Supreme Court issued *Hosanna-Tabor*, Bronx Household seized upon its free exercise lifeline. Previously, the courts had ruled on the church's free speech, but not free exercise, claim. In mid-February, the district court issued a preliminary injunction

¹ The Center's *amici curiae* brief is at <http://www.clsnet.org/document.doc?id=244>.

prohibiting enforcement of the policy because it violated the church's religious exercise. After a ruling on a permanent injunction, expected by mid-June, the case will likely return to the Second Circuit.²

Vanderbilt's Ban on Leaders' "Personal Commitment to Jesus Christ"

In April 2011, Vanderbilt University administrators denied recognition to four religious student groups who required their leaders to agree with their core religious beliefs. The Administration informed the CLS student chapter that its registration was deferred because its constitution provided that "[e]ach officer is expected to lead Bible studies, prayer, and worship at Chapter meetings." The Administration wrote: "This would seem to indicate that officers are expected to hold certain beliefs. Again, Vanderbilt policies do not allow this expectation/qualification for officers."³

This academic year, the leaders of 13 religious groups repeatedly met with school administrators to explain why a Christian group must be led by Christians. They sent letters to the Board of Trustees. Hundreds attended a "town hall" meeting where the students patiently explained why it is common sense, not discrimination, for religious groups to expect their leaders to agree with their religious beliefs. The students held respectful rallies, worship services, and prayer walks.

On March 9, 2012, Vanderbilt announced a new, facially self-contradictory, policy. First, Vanderbilt states that *all* groups must accept any student as a leader. But in the next breath, Vanderbilt explicitly allows fraternities and sororities to continue to discriminate in their leadership and membership selection. Thus, Vanderbilt grants the Greek groups a broad exemption (membership and leadership) while denying the religious groups a narrow exemption (leadership).

On March 16, the Vanderbilt Catholic student organization announced it could not stay on campus because its leaders must be Catholic. In response, the Administration demanded that it delete "Vanderbilt" from its name. On April 9, 11 evangelical student groups, calling themselves "Solidarity," announced that they would request recognition with religious leadership requirements. Official denials have not yet been received.

On April 17, the Administration withdrew recognition from a small Christian group, which had not joined the Solidarity groups. Instead this group had met with two university officials who assured it that its constitution was fine. But on April 17, the Administration ordered the group to remove the requirement that its leaders have a "personal commitment to Jesus Christ." The group has chosen to leave campus rather than deny its commitment to Jesus Christ.

² The Center's *amici curiae* briefs in both courts are at <https://www.clsnet.org/document.doc?id=348&erid=190698> and <https://www.clsnet.org/document.doc?id=287&erid=190698>.

³ Materials regarding Vanderbilt's treatment of the CLS chapter and other religious groups are at <http://www.clsnet.org/page.aspx?pid=746>.

The HHS Mandate

The Center is nonpartisan in its work to defend religious liberty. Within that context, it seems clear that the Obama Administration has chosen to adopt a policy detrimental to religious liberty, by refusing to change, in any meaningful way, the Health and Human Services mandate that religious employers provide insurance coverage for contraceptives in violation of their religious convictions.

The 2010 health care law required employers' insurance plans to provide certain preventive services to be unveiled in future regulations. In July 2011, HHS announced these services included all FDA-approved contraceptives, including some that many believe induce abortions.

In August 2011, HHS announced that an exemption would be given only to religious employers who met an exceedingly narrow definition. To qualify, a religious organization, whose primary purpose is to inculcate religious values, must primarily employ *and serve* only members of its faith. The Administration has been quite clear that the definition is intended to cover churches (although it is questionable whether all churches can meet this definition) but not religious schools, hospitals, or other ministries.

Unprecedented in federal law, the narrow exemption was defended by the Administration as derived from California's and New York's contraceptive mandates. Catholic charities had lost state court challenges to those mandates. In other words, the Administration chose an exemption knowing Catholic social ministries could not qualify and would object.⁴

CLS joined Catholic, Jewish, and Evangelical religious groups in two letters to the Administration, asking it not to finalize, but to broaden, the narrow exemption.⁵ In February, while claiming the Administration would work on a broader accommodation, the President finalized the narrow exemption as law.

The controversy has continued unabated. A week before the Supreme Court held oral arguments regarding the overall constitutionality of the health care law, the Administration announced it would take several months (presumably past the election) to contemplate broader protection for religious groups.

It's been a spring to remember. Whether a fruitful summer or a long winter will follow remains to be seen. Pray for summer.

⁴ Groups could avoid the state mandates by self-insuring, an option unavailable under the federal health law.

⁵ The Center's efforts may be found at <http://www.clsnet.org/page.aspx?pid=461>.