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New York Supreme Court

APPELLATE DIVISION – THIRD DEPARTMENT

Case No. 529350

THE ROMAN CATHOLIC DIOCESE OF ALBANY, NEW YORK; THE ROMAN CATHOLIC DIOCESE OF OGDENSBURG; TRUSTEES OF THE DIOCESE OF ALBANY; SISTERHOOD OF ST. MARY; CATHOLIC CHARITIES, DIOCESE OF BROOKLYN; CATHOLIC CHARITIES OF THE DIOCESE OF ALBANY; CATHOLIC CHARITIES OF THE DIOCESE OF OGDENSBURG; ST. GREGORY THE GREAT ROMAN CATHOLIC CHURCH SOCIETY OF AMHERST, N.Y.; FIRST BIBLE BAPTIST CHURCH; OUR SAVIOR'S LUTHERAN CHURCH, ALBANY, N.Y.; TERESIAN HOUSE NURSING HOME COMPANY, INC.; RENÉE MORGIEWICZ; AND MURNANE BUILDING CONTRACTORS, INC.,

Plaintiffs-Appellants,

--against--

MARIA T. VULLO, ACTING SUPERINTENDENT, NEW YORK STATE DEPARTMENT OF FINANCIAL SERVICES; et al.,

Defendants-Respondents.

Action No. 1

THE ROMAN CATHOLIC DIOCESE OF ALBANY, NEW YORK; THE ROMAN CATHOLIC DIOCESE OF OGDENSBURG; TRUSTEES OF THE DIOCESE OF ALBANY; SISTERHOOD OF ST. MARY; CATHOLIC CHARITIES, DIOCESE OF BROOKLYN; CATHOLIC CHARITIES OF THE DIOCESE OF ALBANY; CATHOLIC CHARITIES OF THE DIOCESE OF OGDENSBURG; ST. GREGORY THE GREAT ROMAN CATHOLIC CHURCH SOCIETY OF AMHERST, N.Y.; FIRST BIBLE BAPTIST CHURCH; OUR SAVIOR'S LUTHERAN CHURCH, ALBANY, N.Y.; TERESIAN HOUSE NURSING HOME COMPANY, INC.; RENÉE MORGIEWICZ; TERESIAN HOUSE HOUSING CORPORATION; DEPAUL HOUSING MANAGEMENT CORPORATION; AND MURNANE BUILDING CONTRACTORS, INC.,

Plaintiffs-Appellants,

--against--

MARIA T. VULLO, SUPERINTENDENT, NEW YORK STATE DEPARTMENT OF FINANCIAL SERVICES; AND NEW YORK STATE DEPARTMENT FINANCIAL SERVICES,

Defendants-Respondents.

Action No. 2

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

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1. THE STATE HAS FAILED TO REBUT THE ARGUMENT THAT THE PLAINTIFFS' FREE EXERCISE RIGHTS HAVE BEEN SUBSTANTIALLY AND UNREASONABLY BURDENED

We begin by addressing one of the State's more extraordinary claims - the assertion that abortion is "analogous" to contraception and therefore Plaintiffs' right of free exercise has not been substantially and unreasonably burdened.

The incongruity of the State's argument comes into sharp focus by its assertion that the "factual differences" in the *Catholic Charities v. Serio* case, 7 N.Y. 3d 510 [2006], which involved a statutory contraception mandate, and the instant case involving a regulatory abortion mandate are "analogous" and therefore become "immaterial to the relevant legal analysis." State's Brief, at 12-14. Can it credibly be asserted that contraception and abortion are "analogous" in mandating religious and religiously affiliated employers to provide coverage for abortion services? Can it be reasonably argued that balancing contraception and abortion is an "analogous" process with an identical outcome? Can it be credibly suggested and concluded there is no difference between contraception and abortion?

The Supreme Court has described the steps of a surgical abortion.

> A doctor must first dilate the cervix at least to the extent needed to insert surgical instruments into the uterus and to maneuver them to evacuate the fetus… The steps taken to cause dilation differ by physician and gestational age of the fetus... A doctor often begin the dilation process by inserting osmotic dilators, such as luminaria (sticks of seaweed), into the cervix. The dilators can be used in combination with drugs, such as

misoprostol, that increase dilation. The resulting amount of dilation is not uniform, and a doctor does not know in advance how an individual patient will respond… In general the longer dilators remain in the cervix, the more it will dilate. Yet the length of time doctors employ osmotic dilators varies. Some may keep dilators in the cervix for two days, while others use dilators for a day or less.

After sufficient dilation the surgical operation can commence. The woman is placed under general anesthesia or conscious sedation. The doctor, often guided by ultrasound, inserts grasping forceps through the women's cervix and into the uterus to grab the fetus. The doctor grips a fetal part with the forceps and pulls it back through the cervix and vagina, continuing to pull even after meeting resistance from the cervix. The friction causes the fetus to tear apart. For example, a leg might be ripped off the fetus as it is pulled through the cervix and out of the woman. The process of evacuating the fetus piece by piece continues until it has been completely removed. A doctor may make 10 to 15 passes with the forceps to evacuate the fetus in its entirety, though sometimes removal is completed with fewer passes. Once the fetus has been evacuated the placenta and any remaining fetal material are suctioned or scrapped out of the uterus. The doctor examines the different parts to ensure the entire fetal body has been removed.

Some doctors, especially later in the second trimester, may kill the fetus a day or two before performing the surgical evacuation. They inject digoxin or potassium chloride into the fetus, the umbilical cord, or the amniotic fluid. Fetal demise may cause contractions and make greater dilation possible. Once dead, moreover, the fetus' body will soften, and its removal will be easier. Other doctors refrain from injecting chemical agents, believing it adds risk with little or no medical benefit.

Gonzales v. Carhart, 550 U.S. 124, 135-136 [2007]; see also *National Abortion Federation v. Ashcroft,* 330 F.Supp.2d 436, 465 [2d Circuit 2004]; *Parenthood Federation of Am. v. Ashcroft,* 320 F.Supp.2d 957, 962 [2d Circuit 2004].

The State is wrong. The "factual differences" are not "analogous" and "immaterial." In the first place, it is not for the State (or the Courts) to determine what does or does not constitute illicit or immoral cooperation in the eyes of a religious tradition. In the Plaintiffs' religious teaching, the provision and funding of insurance coverage for abortion would involve moral complicity and neither the legislature nor the courts may substitute their judgement on this point for that of the Plaintiffs. *Thomas v. Review Bd. of Indiana Employment Security Div.,* 450 U.S. 707, 714 [1981]; *Holy Spirit Asso. for Unification of World Christianity v. Tax Com. of New York,* 55 N.Y. 2d 512, 522 [1982]. The Catholic Church explicitly teaches that abortion is "gravely contrary to moral law" and an "unspeakable crime" Opening Brief, at 22-23. This theologically-based teaching is not peripheral, but fundamental and central. (R. 422-425).

The State fails to grasp the significant holding of *Holy Spirit.* "Neither the courts nor the administrative agencies of the State or its subdivisions may go behind declared content of religious beliefs any more than any more than they may

examine into their viability. *Holy Spirit,* 55 N.Y.2d at 521 (emphasis added); see also *Ware v. Valley Stream High School District,* 75 N.Y.2d 114, 137 [1989] ("no need for the courts to go behind the declared content of [plaintiffs'] religious beliefs"). Religious liberty must never be compromised by intrusive and offensive classifications. See *Griffin v. Coughlin,* 88 N.Y.2d 674, 694 [1996] ("[G]overnment may not use religion as a basis of classification for the imposition of duties, penalties, privileges or benefits…") (internal quotation marks and citations omitted).

The State claims that *Catholic Charities of the Diocese of Albany v. Serio,* is dispositive of Plaintiffs' claims with the exception of the separation of powers constitutional claim. State's Brief, at 12-15, 18-19. *Catholic Charities* in addition to being distinguishable (see Plaintiffs' Opening Brief, at 27-30; New York State Catholic Conference Amicus Curiae Brief, at 13-17) provides no guidance on the balancing test or clarification for evaluating the seriousness of a religious belief, the degree of interference by the State and as well as the reasonableness of the burden imposed. The abortion mandate is not a "legislative enactment" presenting an "incidental burden" on the right to free exercise of religion warranting "substantial deference." 11 NYCRR § 52.16(o)(1). It is an unsupported regulatory mandate placing an enormous burden on Plaintiffs' right to free exercise. The balancing test of *Catholic Charities* should easily confirm a direct and

unreasonable interference with Plaintiffs' religious freedom by the State's abortion mandate *Catholic Charities,* 7 N.Y.3d at 525.

The infringement upon the Plaintiffs' beliefs becomes more vivid when one transposes their objection to some other "service" objection. For example, nine States and the District of Columbia permit physician-assisted suicide. Can the Plaintiffs, which oppose suicide, be forced under a neutral law of general applicability to fund physician-assisted suicide or setup for its employees an insurance fund for suicides all the while teaching that suicide is contrary to the sanctity of human life? The principle of religious autonomy is the same, of course, whether one is speaking of suicide or abortion. The point here is that the Plaintiffs are being compelled to subsidize private conduct they explicitly condemn, and that the State is thereby directly interfering with the Plaintiffs' religious message and beliefs.

The State seeks to subject Plaintiffs to a far higher burden to outweigh its interests in "providing women with better health care and fostering equality between the sexes." State's Brief at 17-18, 21. Demonstrating a substantial burden is "not a particularly onerous task." *McEachin v. McGuinnis,* 357 F.3d 197, 202 [2d Cir. 2004]; see also *Ford v. McGinnis,* 352 F.3d 582, 592-94 [2d Cir. 2003] (explicitly rejecting strict approach to substantial burden inquiry).

The State invokes the options of "self-fund health insurance coverage" or "forego the provision of health insurance coverage" in an effort to neutralize Plaintiffs' substantial burden. States' Brief, at 19. The State's attempt to vitiate the substantial burden Plaintiffs face is unpersuasive. Dropping health insurance coverage does not eliminate the substantial burden that the State's abortion's mandate imposes. The Supreme Court has held that employers have legitimate religious reasons for providing health insurance coverage for their employees. The religious dimension of the decision by an employer to provide insurance to its employees is grounded on religious beliefs that govern their relations with their employees. *Burwell v. Hobby Lobby Stores, Inc.* 573 U.S. 682, 721-723 [2014]. (R. 196-204, 383-390, 499).

Plaintiffs' documented impact of the draconian penalties incurred by dropping health coverage is inaccurately characterized and dismissed by the State. The State provided no evidence to rebut the extensive forensic analysis and documentation in the record reflecting that the penalty for one of the Plaintiffs as an employer dropping health insurance for its employees would be a fine of over $2 million dollars a year and that a family of four, looking at the individual mandate can expect a nearly $3,000.00 fine plus an additional $707.00. Opening Brief, at pg. 29 (R. 453-455).

The State says nothing whatsoever about the State's authority to invade the treasury of the Plaintiffs and rewrite their mission by requiring them to fund private conduct that contradicts their religious teachings. Instead, it makes the facile claim that the lower Court's judgment should be affirmed simply because the challenged law is one of general applicability. This argument is not dispositive even if one accepts that the abortion mandate at issue is generally applicable, which it is not. Under the State's view of the federal and New York State Constitutions, the State can do essentially whatever it wishes, even to the point of preventing Plaintiffs from providing services to the public, as long as it does so under the banner of neutrality. That is not right. Religion and religious practice can be vanquished just as easily by a law of general applicability as by a law targeting religious practice specifically. There is nothing talismanic about neutrality even if it were a neutral law (regulation) of general applicability, which it is not.

In sum, there should be no mistaking how sweeping the State's claim is here. In principle, its argument will permit the State to require every employer in New York, including the Plaintiffs, to participate in or fund any type of conduct or service wherever legalized. There is no logical stopping point to this slippery slope and, of course, the only real question is when and which item on the list that

the Plaintiffs teach to be immoral will be the State's next attempt to force upon them.

2. THE STATE HAS FAILED TO REBUT THE ARGUMENT THAT THE ABORTION MANDATE VIOLATES THE CONSTITUTIONAL LIMITS OF ADMINISTRATIVE RULEMAKING

The State argues that its specific grant of authority for the issuance of the challenged abortion mandate is grounded on Insurance Law § 3217 and a regulation, the so-called "non-exclusion regulation." 11 NYCRR § 52.16(c). State Brief, at 3-4, 43-44. The statute provides the superintendent the authority to "issue regulations --- to establish minimum standards of full and fair disclosures, for the form, content and sale of accident and health insurance policies..." Insurance Law, §3217 (a). The regulation states that "No policy shall limit or exclude coverage by type of illness, accident, treatment or medical condition." The regulation has four stated exceptions, viz., (1) preexisting conditions or diseases; (2) mental or emotional disorders, alcoholism and drug addiction; (3) pregnancy and except for complications of pregnancy; and (4) illness, accident, treatment or medical condition arising out of war, suicide and aviation. 11 NYCRR § 52.16 (c). Neither the statute nor the regulation make reference to abortion or reproductive health services.

The State has exclusively premised and directly pegged its justification for the 2017 Abortion Mandate Regulation on a neutral statute adopted in 1984 and on a so-called "non-exclusion" regulation adopted in 1982.

The State's 2017 abortion mandate is a regulation based on a negative statute and regulation. In a further remarkable and unusual assertion, the State attempts to bolster its justification for the abortion mandate as "merely making explicit what was already implicit in the non-exclusion rule." State Brief, at 45 (emphasis added). The State is treating the 1984 statute and the 1982 so-called "non-exclusion" regulation as a broad gateway to compel abortion insurance coverage without legislative authority.

The most instructive guidance for the analysis of the challenged regulation here is this Court's decision in *Health Ins. Ass'n v. Corcoran*, 154 A.D. 2d 61 [3d. Dept. 1990], affd 76 N.Y. 2d 995 [1990]. This Court examined the legislative history, purpose and application of Insurance Law § 3217 and held that the authority extended by the statute to the superintendent to enact regulations thereunder was "consumer protective in orientation" to provide "simplification of coverages to facilitate understanding and comparisons... eliminate: misleading or confusing provisions... deceptive practices in connection with the sale of policies... coverages... so limited in scope as to be of no substantial economic value to the holders." Id., at 72. The authority available to the superintendent

under § 3217 is "to issue regulations governing undesirable underwriting practices." Id., at 72.

Following review of the legislative history and purpose of § 3217 this Court invalidated a regulation which would have banned HIV testing by insurance in determining an applicant's insurability. This Court found that it was "unreasonable and clearly not supported by the legislative history, to construe Insurance Law § 3217(b) (4) as giving respondent and the Commissioner of Health *carte blanche* to drastically disturb long-standing principles of accepted insurer underwriting practices in order to further the Commissioner of Health's own objective in public health policy…such a construction, in our view, would at least move § 3217 (b) (4) toward, if not bring it directly into, conflict with the teachings of *Boreali v. Axelrod. Id.,* at 72 (citation omitted). Similarly the "non-exclusion" regulation at § 52.16 (c) is structured as a generic underwriting guidance which also serves as "consumer protection in orientation" and not an authoritative source to adopt a regulation to affirmatively compel abortion coverage insurance in underwriting policies.

The State concedes that its abortion mandate regulation represents the advancement of a public policy objective. ("The Department has authority to prescribe regulations and in doing so may interpret statues: the amendment is entirely consistent with § 3217 and with the public policy of ensuring and

advancing women's full access to health care services, in particular reproductive care, which the Legislature has consistently set forth in the Insurance Law."). (R.655). In fact, the Insurance Law does not address abortion insurance coverage.

The challenged abortion mandate represents social engineering by the State in violation of the constitutional limits on rule making. *Matter of LeadingAge N.Y., Inc. v. Shah*, 32 N.Y. 3d 249, 260 [2018]. ("Thus, in promulgating regulations, an agency may rely on a general but comprehensive grant of regulatory authority. To be sure, a broad grant of authority is not a license to resolve – under the guise of regulation – matters of social or public policy reserved to legislative bodies.") (*Boreali v. Axelrod*) (citation omitted).

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court should be reversed. A judgment should be entered declaring the DFS abortion mandate a unconstitutional, under the New York and United States Constitutions, as applied to these Plaintiffs.

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