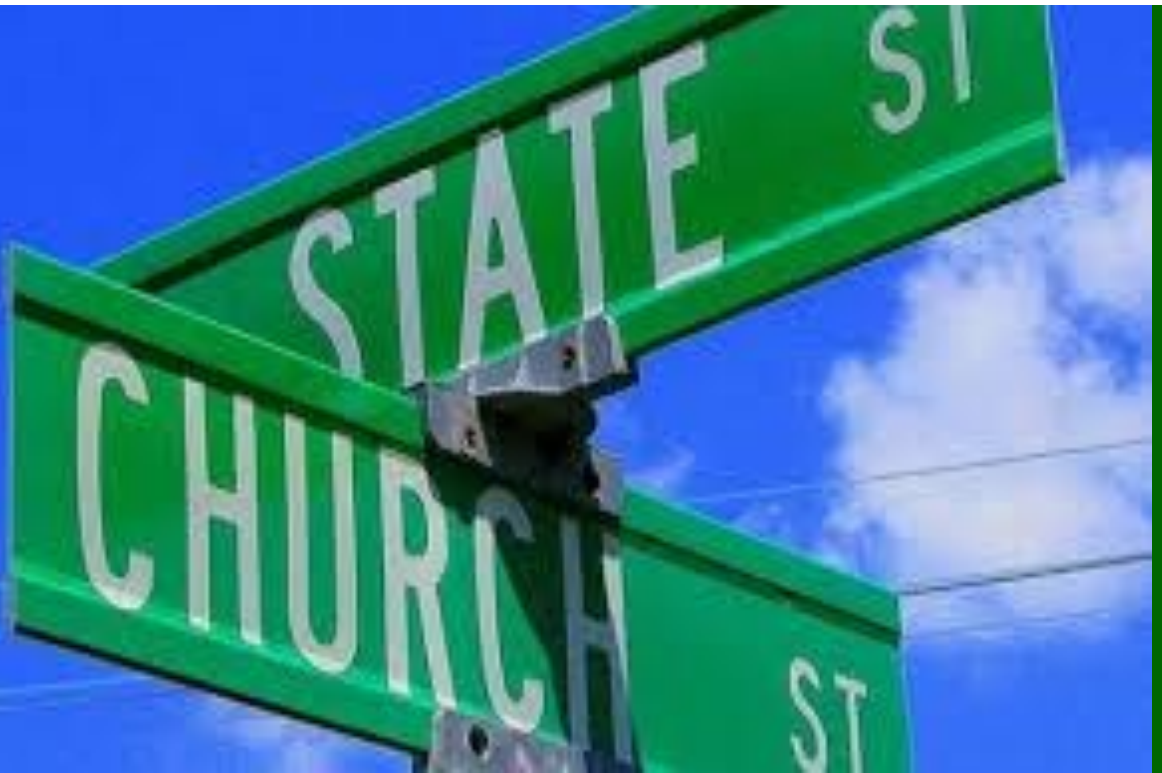
VERMONT
HUMAN RIGHTS COMMISSION

This issue explores the intersection of the "exercise of religious freedom" under the First Amendment of the U.S. Constitution and federal statutes passed to "protect religious exercise" and whether those mandates allow a person or corporation to impose their religious beliefs on others or trump anti-discrimination protections for women or the LGBTQIA community. The First Amendment protects the right to exercise religion without government interference. Where is the appropriate balance? We hope you will find the information contained in this newsletter informative. - Karen Richards

"No, you can't deny women their basic rights and pretend it's about your 'religious freedom', If you don't like birth control, don't use it. Religious freedom doesn't mean you can force others to live by your own beliefs."

- Barack Obama



In This Issue

Did you know?

On September 17, 1787 the U.S Constitution was signed. The Bill of Rights , was adopted on September 25, 1789. Amendment I reads: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Religion was one of the first of five legally protected classes of people covered under the Civil Rights Act of 1964.

On November 16, 1993 the Religious Freedom Restoration Act of 1993 (RFRA) was passed. It's purpose was (in part) "...to guarantee application in all cases where free exercise of religion is substantially burdened; and provide claim or defense to persons whose religious exercise is substantially burdened by government."

On June 30, 2014 the U.S. Supreme Court ruled in favor of the defendant in an employment case Burwell v. Hobby Lobby holding that "imposing that the contraceptive mandate [under the Affordable Care Act, specifically Preventative Services Guidelines] violates the Religious Freedom Restoration Act and that the DHHS contraceptive mandate substantially burdens the exercise of religion under the RFRA."

On October 6, 2017, the Trump administration issued guidance regarding women's access to birth control through their employers. This guidance dramatically expanded the exemption for all employers and insurers allowing them to refuse coverage for contraceptives if they object based on religious beliefs or moral convictions.

Burwell v. Hobby Lobby Stores, Inc .

In 2012 David and Barbara Green, their children, and for-profit corporations they owned including Hobby Lobby, Inc. and Mardel Christian & Education Stores, Inc. filed suit in U.S. District Court naming (then) U.S. Secretary of Health and Human Services (HHS), Kathleen Sebelius and others as defendants. The original cases were called Sebelius v. Hobby Lobby Stores, Inc. and Conestoga Wood Specialties Corporation v. Sebelius changing to Burwell v. Hobby Lobby Stores, Inc. and Conestoga Wood Specialties Corporation v. Burwell following the confirmation of HHS secretary, Sylvia Burwell in June 2014.

The Green's alleged that enforcement of regulation of the Patient Protection and Affordable Care Act (PPACA) infringed on their rights under the Religious Freedom Restoration Act (RFRA) and that this regulation violated their free-speech under the First Amendment.

The Greens argued that four of twenty contraceptive methods approved by the Food and Drug Administration (FDA) were abortifacients therefore providing coverage to their employee's health insurance plans would be 'tantamount to facilitating abortion' which was inconsistent with the tenets of their Christian faith and that the penalties imposed by HHS ($100 per day per affected employee) for failure to provide this coverage would be a "substantial burden" on their exercise of religion.

DHSS appealed to the U.S. Supreme Court and after arguments, the Court issued a majority 5-4 opinion in which five male Catholic justices held that for-profit corporations are persons that can have religious beliefs, that the contraceptive mandate violated statutory rights under the RFRA and that the government had failed to prove that the contraceptive mandate was the least restrictive alternative. It held that the regulation substantially burdened religious exercise and that the contraceptive mandate was therefore unlawful under the RFRA.

The majority was careful to say this decision applied only to contraceptives and did not necessarily mean that a person or corporation's religious exercise would extend to refusing to pay for transfusions or vaccinations which some religions is oppose. But if it is a sincerely held religious belief, then what would be the basis for drawing the distinction? Alluding to just such scenarios, Justice Ruth Bader Ginsburg in a dissenting opinion, offered the observation: "The court, I fear, has ventured into a minefield." She went on to characterize the courts' decision as one of "startling breadth" and further accused the majority of ignoring the "disadvantages that religion-based opt-outs impose on others in that the exemptions override interests of the corporations' employees and covered dependents" by denying women not holding the same religious beliefs access to contraceptive coverage.

This raises the issue of discrimination based on sex and whether RFRA rights related to the exercise of religion trump public accommodations laws. That question will likely be answered by the Supreme Court this term in the "wedding cases" discussed in the next section.


Photo Credit Peter Dazeley/Getty

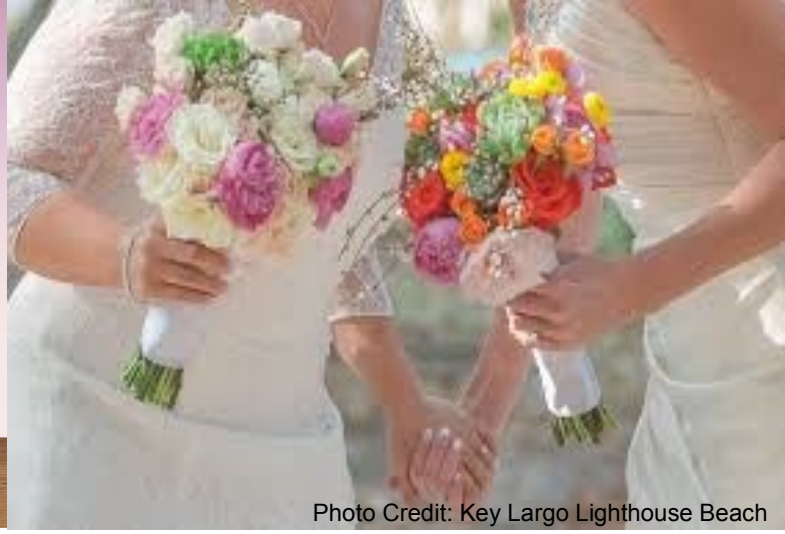


Photo Credit: Key Largo Lighthouse Beach

Charlie Craig and David Mullens v. Masterpiece Cakeshop

In 2012 same sex couple, David Mullins and Charlie Craig, began planning their wedding. Their plans were to marry in the state of Massachusetts with a celebration to follow with family and friends in Colorado. The couple wanted a cake to share with guests at their reception and chose Masterpiece Cakeshop as the baker. But before the couple could even begin talking design, cake or frosting flavor the owner, Jack Phillips, refused them service based on his religious belief.

The couple then contacted the American Civil Liberties Union (ACLU) which filed a complaint with the Colorado Civil Rights Division alleging discrimination on the basis of sexual orientation. On May 30, 2014, in its Final Order, the Colorado Civil Rights Division ordered (in part) that Masterpiece Cakeshop "cease and desist from discriminating against the Complainants and other same-sex couples by refusing to sell them wedding cakes or any product Respondents would sell to heterosexual couples."

In January 2015 Masterpiece Cakeshop appealed this decision to the Colorado Court of Appeals which affirmed the Order of the Colorado Civil Rights Division in August of that year. Not to be deterred, in October 2015 Masterpiece Cakeshop filed a Petition for Certiorari with the Colorado Supreme Court which declined to hear the case. So in August 2016 Masterpiece asked the U.S. Supreme Court to hear the case and the Court agreed to review the decision of the Colorado Court of Appeals. A decision is expected from the high Court by June of 2018 that could resolve the conflict between rights under RFRA and the right of individuals to access places of public accommodation free from discrimination based on protected status.

State v. Arlene's Flowers & Ingersoll and Freed v. Arlene's Flowers, Inc.

In 2012, same sex couple, Curt Freed and Robert Ingersoll chose to marry in their home state of Washington. Mr. Ingersoll, a long-standing customer of Arlene's Flowers, went to owner Barronelle Stutzman to discuss flower design arrangements for his and Mr. Ingersoll's celebration. Before Mr. Ingersoll could discuss what type of arrangements they would like, Ms. Stutzman declined to provide flowers for his same-sex wedding due to her religious beliefs and "relationship with Jesus." The Washington ACLU filed suit on behalf of the couple with the Superior Court which ruled in favor of Mr. Freed and Mr. Ingersoll awarding injunctive relief and monetary damages. Arlene's Flowers, Inc. appealed to the Washington Supreme Court which affirmed the lower court's decision.

"Discrimination is not merely dollars and cents, hamburgers and movies; it is the humiliation, frustration and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public." - Louise Melling, ACLU Deputy Legal Director and Center for Liberty.

HISTORY OF RELIGIOUS PROTECTIONS UNDER THE FIRST AMENDMENT AND RFRA

The law is always evolving. When the founding fathers established the Bill of Rights, they sought to create specific rights for citizens in the privacy and protection of their beliefs and in their homes, upon which the federal government could not encroach except under limited circumstances. The Fourteenth Amendment made these same rights applicable to state government actions.

Religious freedom and the right to the free exercise of one's religion was at the time of initial drafting of the Bill of Rights, a response to the state-sponsored Church of England in Great Britain. Colonists settling in the new world wanted to ensure that the new country would "make no law respecting an establishment of religion, or prohibiting the free exercise thereof." What this language means has evolved over the years.

For many years, the U.S. Supreme Court used a balancing test to determine the limits of religious freedom under the first amendment. In determining whether challenged government actions violated the Free Exercise Clause of the First Amendment, early decisions used a balancing test that took into account whether the challenged action imposed a substantial burden on the practice of religion, and if it did, whether it was needed to serve a compelling government interest. *Sherbert* v. *Verner*, 374 U. S. 398 (1963)[employee fired for refusing to work on the Sabbath granted unemployment] and *Wisconsin* v. *Yoder*, 406 U. S. 205 (1972) [Amish children could not be compelled to attend school beyond age 16]. In *Employment Div., Dept. of Human Resources of Ore.* v. *Smith*, 494 U. S. 872 (1990) [a case involving the granting of unemployment in Oregon to two individuals fired for using religious peyote], the Court largely repudiated the balancing method for analyzing free-exercise claims used in the earlier cases reasoning that if the test applied whenever a person objected on religious grounds to the enforcement of a generally applicable law, it "would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind." 494 U. S., at 888. The Court therefore held that, under the First Amendment, "neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest."

Congress responded to *Smith* by enacting the Religious Freedom Restoration Act (RFRA) in 1993. "[L]aws [that are] 'neutral' toward religion," Congress found, "may burden religious exercise as surely as laws intended to interfere with religious exercise." RFRA provides that "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability." If the Government substantially burdens a person's exercise of religion under the Act that person is entitled to an exemption from the rule unless the Government "demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.

This provides the background for the current debate concerning what if any limitations the Court will impose on RFRA rights. Stay tuned.

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ACLU Statement on So-Called 'Religious Freedom' Executive Order

Executive Order Addresses Religious Freedom in the Workplace

What the Hobby Lobby Ruling Means for America

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ACLU, Vermont

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U.S. Equal Employment Opportunity Commission

Vermont Commission on Women

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