Speaking of Religious Freedom

RELIGIOUS LIBERTY IN THE SUPREME COURT'S NEW TERM

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As its new Term begins, the Supreme Court has on its docket two particularly notable cases. In one, the Court will review a Massachusetts law that criminalizes consensual speech near abortion clinics. In the other, the Court will determine whether a New York town's policy of opening council meetings with prayer violates the Establishment Clause.

WILL ABORTION CONTINUE TO TRUMP FREE SPEECH AND ASSEMBLY?

In *McCullen v. Coakley*,[1] the Court agreed to hear pro-life speakers' challenge to a pernicious Massachusetts law that prohibits persons from "knowingly enter[ing] or remain[ing] on a public way or sidewalk adjacent to a reproductive health care facility" within a "clearly marked and posted" 35 foot radius of the facility's "entrance, exit or driveway." The fine for violators is capped at $500 for a first offense and $5000 for each subsequent offense. A first offender may also be sentenced to three months imprisonment with each subsequent offense punishable by two and one-half years imprisonment. Various persons are not subject to the prior restraint, specifically: 1) "persons entering or leaving" the abortion clinic; 2) its "employees or agents;" 3) government employees "acting within the scope of their employment;" and 4) "persons using the public sidewalk or street . . . solely for the purpose of reaching a destination other than such facility."[2]

Within the prohibited zone, individuals are subject to fines or jail for entirely peaceful speech and conduct, including distributing pamphlets, holding a sign, or praying. As the peaceful sidewalk counselors who are challenging the law have observed, Massachusetts has made it "a crime to enter the zone even to continue a quiet conversation with a willing listener."[3]

Relying on *Hill v. Colorado*,[4] the First Circuit accepted Massachusetts' assertion that the law is a content neutral "time, place, and manner" restriction that is narrowly tailored to serve important state interests while leaving open ample alternative speech channels.[5] The Commonwealth claims the law is needed to ensure public safety and clinic access.

According to the pro-life speakers, the law is unconstitutional because it transforms a traditional public forum – sidewalks and streets -- "into a speech-free zone – or, more precisely, a zone open to clinic speakers, but closed to speech offering alternatives" to abortion, even when that speech is "wholly peaceful, non-obstructive speech with willing listeners."[6]

The case is an ideal vehicle for overruling the highly criticized *Hill* decision.[7] There the Court upheld a Colorado law that prohibited speakers from approaching within eight feet of another person *without that person's consent*. The Colorado law applied to all healthcare facilities, not only to abortion clinics, and to all persons, not just select speakers. In upholding the Colorado law, the Court emphasized that the law prohibited only close approaches to unwilling listeners, while allowing communication with willing listeners and permitting speakers to stand and offer leaflets to passersby.[8] As damaging as the Colorado law was to the freedoms of speech and assembly, the Massachusetts law's extreme provisions are even more troubling.

The Court could use the case to begin rebuilding an authentic jurisprudence for the freedom of assembly. To that end, the Christian Legal Society filed an *amicus* brief prepared by Professor John Inazu and Professor Michael McConnell.[9] Drawing upon Professor Inazu's book *Liberty's Refuge: The Forgotten Freedom of Assembly,* the brief argues that both the Massachusetts and Colorado laws violated the essence of the public forum doctrine, which is rooted in the freedom of assembly. The brief explains why it is important that public forum doctrine once again be understood as protecting not only freedom of speech but also freedom of assembly. The brief also remarks upon the close historical connection between religious liberty and freedom of assembly, beginning with William Penn's acquittal of charges of "unlawful assembly" after he preached a sermon to Quakers on a London public street. Attacking the *Hill*'s premise, the brief explains that free speech cannot survive if it confers on citizens the right to avoid unpopular speech in a public forum by suppressing the speech outright.

Instead, the First Amendment protects unpopular speech, "even hurtful speech on public issues to ensure that we do not stifle public debate."[10]

DOES *MARSH V. CHAMBERS* REMAIN GOOD LAW?

As in *McCullen,* the continued vitality of an earlier Supreme Court decision is at issue. In 1983, in *Marsh v. Chambers,*[11] the Supreme Court held that state legislatures did not violate the Establishment Clause when they opened with prayer. A Presbyterian minister had opened the Nebraska Legislature with prayer for approximately 16 years. The Court upheld the practice so long as the government did not act with "impermissible motive" in selecting the person who gave the prayer and did not use the prayer "to proselytize or advance anyone, or to disparage any other, faith or belief."[12]

In upholding the practice in *Marsh*, a fact that understandably weighed heavily with the Court was that the First Congress contemporaneously adopted the First Amendment and authorized hiring a chaplain to begin its sessions with prayer. For 224 years, Congress has continued this practice, as does the Supreme Court when it begins each public session with a Court official asking God to save the United States and the Court.

In the past decade, despite *Marsh,* local governments have been under sustained pressure to abandon longstanding traditions of opening their meetings with prayer. The lower federal courts have arrived at varying results. Some have ruled that the practice violates the Establishment Clause; others have upheld the practice; and others have allowed prayer but prohibited the use of Jesus' name in the prayers.[13]

The Supreme Court agreed to review *Town of Greece v. Galloway, et al.,*[14] in which the Second Circuit gave lip service to the *Marsh* analysis but then substituted an "endorsement" analysis that purported to determine whether a reasonable observer would believe that the town favored or disfavored certain religious beliefs.[15] For approximately fifteen years, the monthly board meetings of the Town of Greece, New York, have begun with prayer offered by citizens, including clergy from congregations within the town. The town does not provide guidelines for the prayers' content, nor does it review the prayers' wording in advance. In response to two residents' challenge, the Second Circuit found that the Town of Greece's policy violated the Establishment Clause due to the proportion of prayers with Christian content, even though the record showed that non-Christian prayers had been offered on occasion, including prayers by individuals who represented Buddhist, Native American, Baha'i, and Wiccan belief systems.

While the Court could strike down local governments' invocation policies without overruling *Marsh,* the case has been briefed on the supposition that *Marsh's* continued vitality is the main issue. The actual opinion in *Marsh* has sometimes been considered underdeveloped. The end result in *Town of Greece* may be a more firmly anchored ruling that legislative prayer does not violate the Establishment Clause.

The case drew 25 *amicus* briefs in support of the town, including briefs filed on behalf of 34 senators[16] and 85 House members.[17] But one *amicus* brief offered assistance from an unexpected quarter. An executive branch that has been conspicuously insensitive to religious liberty concerns filed an exemplary brief in support of the constitutionality of the town's policy.[18] The Solicitor General's Office that in *Hosanna-Tabor*[19] failed to find protection for a church's hiring decisions in the Free Exercise Clause[20] found sanctuary for a town council's prayer policy in the Establishment Clause.

The Solicitor General's argument is straightforward: *Marsh* remains good law and permits legislative prayer with sectarian content as long as the prayer neither proselytizes nor advances any one, nor disparages any other, faith. The government steadfastly insists that "*Marsh* neither requires nor permits a court to parse the sectarian content of prayers."[21] For that reason, the Second Circuit "erred by assessing the constitutionality of the town's prayer policy" by considering "the prevalence of Christians among the prayer-givers."[22]

Oral argument is set for November 6 in *Town of Greece* but has yet to be set in *McCullen*.

OTHER CASES TO WATCH

The Court likely will decide whether the Religious Freedom Restoration Act[23] ("RFRA") prevents the federal government from forcing religious business owners to provide insurance coverage for drugs they believe destroy human life in order to comply with the "HHS Mandate." A split in the circuits developed over the summer on the issue. The Tenth Circuit ruled that RFRA protected two family-owned businesses from the Mandate's onerous penalties (millions of dollars in fines) for noncompliance,[24] but the Third Circuit held that religious individuals forfeit their religious liberty once they incorporate as a for-profit, "secular" corporation.[25]

Other cert petitions awaiting the Court's return include a Hutterite colony's challenge to Montana's removal of their longstanding exemption from workmen's compensation laws to which they have religious objections.[26] Christian Legal Society filed a brief on behalf of numerous religious organizations urging the Court to take the case in part to clarify the free exercise test set forth in *Employment Division v. Smith.*[27]

The Court is holding, possibly awaiting its review of *Town of Greece,* a cert petition that would review a Seventh Circuit *en banc* decision that prohibited a school district from renting a church auditorium for graduation in order to accommodate the number of attendees.[28]

Finally, the Court granted the State of Oklahoma's petition[29] for review of its state supreme court's ruling that an Oklahoma law which regulates use of abortion-inducing drugs was facially unconstitutional under *Planned Parenthood v. Casey*.[30] That case is on hold while the Oklahoma Supreme Court responds to questions certified to it by the Supreme Court about the interpretation of the law.

Overall, the 2013 Term promises answers to some important religious liberty questions and provides hopeful signs that strategic ground may be recovered for the freedoms of speech and assembly in the context of pro-life speech.

ENDNOTES

1 *McCullen, et al., v. Coakley, et al.,* No. 12-1168 (cert. granted June 24, 2013).

2 Mass. Gen. Laws, ch. 266, § 120E1/2.

3 Pet. Br. at 9, *available at* http://www.clsnet.org/document.doc?id=521.

4 530 U.S. 703 (2000).

5 708 F.3d 1 (1st Cir. 2013).

6 Pet. Br. at 22, *available at* http://www.clsnet.org/document.doc?id=521.

7 Professor Laurence Tribe and Professor Michael McConnell criticized the Court's rationale not long after the *Hill* decision. *See Michael W. McConnell's Response,* 28 Pepp. L. Rev. 747 (2001). Professors Michael Paulsen, Rick Garnett, and Eugene Volokh filed an *amicus* brief urging the Court to grant cert in *McCullen* in order to limit the *Hill* decision. *See* http://sblog.s3.amazonaws.com/wp-content/uploads/2013/05/MCCullen-No.-12-1168-GarnettPaulsenVolokh-Amicus.pdf. *See* LeBlanc, Clark & Jamin B. Raskin, *Disfavored Speech About Favored Rights:* Hill v. Colorado, *The Vanishing Public Forum and the Need for an Objective Speech Discrimination Test,* 51 Am. U. L. Rev. 179 (2001).

8 530 U.S. at 707 n.1, 715-16, 718, 725-727.

9 Br. *Amicus Curiae* of National Hispanic Christian Leadership Conference, et al., No. 12-1168 (filed Sept. 16, 2013), *available at* http://www.clsnet.org/document.doc?id=523.

10 *Snyder v. Phelps,* 131 S. Ct. 1207, 1220 (2011).

11 463 U.S. 783 (1983).

12 *Id.*at 793-795.

13 Pet. at pp. 25-28 (collecting cases), *Town of Greece v. Galloway, et al.,* No. 12-696 (cert. granted May 20, 2013) *available at* http://www.clsnet.org/document.doc?id=524.

14 *Town of Greece v. Galloway, et al.,* No. 12-696 (cert. granted May 20, 2013).

15 681 F.3d 20, 30-32 (2d Cir. 2012).

16 Br. *Amicus Curiae* of Members of Congress, *Town of Greece v. Galloway,* No. 12-696 (filed August 2, 2013), *available at* http://www.clsnet.org/document.doc?id=526.

17 Br. *Amicus Curiae* of Senators, *Town of Greece v. Galloway,* No. 12-696 (filed August 2, 2013), *available at* http://www.clsnet.org/document.doc?id=527.

18 Br. *Amicus Curiae* for the United States, *Town of Greece v. Galloway,* No. 12-696 (filed August 2, 2013), *available at* http://www.clsnet.org/document.doc?id=529.

19 132 S. Ct. 694 (2012).

20 Br. of Federal Respondent, *Hosanna-Tabor v. EEOC,* No. 10-553 (filed August 2011), *available at* http://www.clsnet.org/document.doc?id=528.

21 21 Br. *Amicus Curiae* for the United States at p. 10.

22 *Id.* at 27.

23 42 U.S.C. § 2000bb *et al.* (2013).

24 *Hobby Lobby Stores, Inc., et al., v. Sebelius,* 2013 WL 3216103 (10th Cir. June 27, 2013) (en banc).

25 *Conestoga Wood Specialties Corp., et al., v. Secretary of HHS,* 2013 WL 3845365 (3d Cir. July 26, 2013).

26 *Big Sky Colony, et al., v. Montana Labor and Industry Dep't.,* No. 12-1191 (pet. filed Apr. 1, 2013), *available at* http://www.clsnet.org/document.doc?id=530.

27 Br. of The National Hispanic Christian Leadership Conference, *et al.*, *Big Sky Colony, et al., v. Montana Labor and Industry Dep't.,* No. 12-1191 (filed May 2, 2013), *available at* http://www.clsnet.org/document.doc?id=531.

28 *Doe v. Elmbrook Sch. Dist.,* No. 12- 755 (pet. filed Dec. 20, 2012).

29 Pet., *Cline, et al., v. Oklahoma Coalition for Reproductive Justice, et al.,* No. 12-1094 (cert. granted June 27, 2013), *available at* http://www.clsnet.org/document.doc?id=532.

30 505 U.S. 833 (1992).