March for Life and the President

The forty-fifth annual March for Life, with hundreds of thousands of participants, took place in Washington, DC, on January 19. The theme was "Love Saves Lives." Political leaders such as Paul Ryan and Chris Smith spoke at the rally preceding the march down Constitution Avenue to the Supreme Court.

In previous years, Presidents Ronald Reagan, George H. W. Bush, and George W. Bush each spoke to the marchers via telephone or radio hookup from the Oval Office, and last year Mike Pence became the first vice president to address the march in person. This time, however, President Donald Trump spoke from the Rose Garden, surrounded by many pro-life White House staffers and invited guests. His message was broadcast live via jumbotrons to those gathered on the National Mall.

The President noted that his administration "will always defend the very first right in the Declaration of Independence, and that is the right to life."[1] The President underscored the sad and ironic fact—a fact that a fact checker at the *Washington Post* admitted was true—that the United States, despite substantial majorities who want strict laws, is one of only seven nations in the world that permit abortion without any restrictions.[2]

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1. Donald Trump, Address to March for Life Rally, C-SPAN, January 19, 2018, video, 07:59, https://www.c-span.org/.

2. "New Marist Polls Find That Americans of All Political Persuasions Favor Substantial Abortion Limits," Knights of Columbus, January 17, 2018, http://www.kofc.org/. See also Michelle Ye Hee Lee, "Is the United States One of Seven Countries That 'Allow Elective Abortions after 20 Weeks of Pregnancy?," *Washington Post*, October 9, 2017, https://www.washingtonpost.com/. The other countries are China, North Korea, Canada, the Netherlands, Singapore, and Vietnam.

President Trump's administration has, in fact, taken a number of steps during its first year to defend life. For instance, it reinstated the Mexico City Policy banning aid to organizations that promote or provide abortions abroad,[3] and it nominated and confirmed a judge, Neil Gorsuch, to the Supreme Court who is committed to applying the words of the Constitution. It revoked the Department of Health and Human Services contraception mandate, created a new office in HHS to protect the conscience rights of health care providers, and issued regulations to this effect.[4] (It should be noted that, although there are several different laws that protection health care conscience rights, none provides for a private cause of action by which an aggrieved party can file suit to force lax government officials to enforce the law, usually by denying federal funds to the offending entity. There is a bill pending in Congress to remedy this situation by providing a private cause of action to existing laws—the Conscience Protection Act, HR 644.)

In his remarks, the President thanked pro-lifers for saving "tens of thousands of lives," and he urged the Senate to pass the Pain-Capable Unborn Child Protection Act. The act, which the House of Representatives had already passed, bans abortion from the time a child can feel pain.

National Legislative Developments

Ten days after the March for Life, on January 29, the Senate rejected the President's call.

In a vote requiring sixty votes to proceed, the Senate failed to muster enough votes to bring the act forward for a vote on the merits. Although Democratic senators Joe Donnelly (IN), Joe Manchin (WV), and Bob Casey (PA) supported bringing the act to the floor for a vote, they were not joined by enough Democrats to reach the sixty-vote threshold. Fourteen self-identified Catholic Democratic senators voted against bringing the act to a vote, effectively defeating it.[5]

Among the fourteen Catholic Democrats opposing the act was Richard Durbin of Illinois. In response on February 22, Durbin's bishop, Thomas Paprocki, reiterated and continued the position of his predecessor bishop, George Lucas: "Because his voting record in support of abortion over many years constitutes 'obstinate persistence in manifest grave sin,' the determination continues that Sen. Durbin is not to be

3. A review of implementation of the new policy found, contrary to the predictions of abortion proponents, that it did not result in participating organizations refusing to continue to participate. "Abortion Funding Limits Get Priorities Right, Bishops Say," *Catholic News Agency*, February 10, 2018, https://www.catholicnewsagency.com/.

4. In May, President Trump issued an executive order requiring religious freedom/freedom of conscience to be treated the same as other civil rights. Following the issuance of detailed guidance by the Attorney General, HHS announced the creation of the new office to protect the conscience rights of health care professionals. See, for example, Ariana Eunjung Cha and Juliet Eilperin, "New HHS Civil Rights Division Charged with Protecting Health-Care Workers with Moral Objections," *Washington Post*, January 19, 2018, https://www.washingtonpost.com/.

5. Two Republican senators, Susan Collins (ME) and Lisa Murkowski (AK), joined Democrats in opposing a vote on the act.

admitted to Holy Communion until he repents of this sin. This provision is intended not to punish, but to bring about a change of heart."[6]

Nevertheless, Georgetown University presented Senator Durbin with its Timothy S. Healy, SJ, Award on February 28.[7] The award, given by the Georgetown Alumni Association, is conferred upon Georgetown alumni who have rendered "outstanding and exemplary … service in support of humanitarian causes and advancements for the benefit of mankind."

Supreme Court

The Supreme Court is considering two cases that have important ramifications for pro-life Americans.

The first is *Masterpiece Cakeshop v. Colorado Civil Rights Commission*.

The case involves a cake baker and a gay couple. The gay couple were planning to be married under Colorado law. They asked the baker to make a cake for the wedding. The baker refused. While the baker was willing to sell them a cake off the shelf, he was not willing to make a cake especially for the wedding, because he believed such weddings to be a violation of the law of God, in which he could not participate.

Although the case involves the actual range and meaning of the religious liberty assurances by the Supreme Court in its decision legalizing same-sex marriage[8]—in which the Court said that religious liberty would be protected for Americans who disagreed with the decision—speaking more precisely, the case involves the guarantees of freedom of religion in the First Amendment of the US Constitution.[9] Hence, the Court's ruling on the extent of religious freedom, and conscientious objection, could have far-ranging consequences in areas other than those involving same-sex marriage.

The test under the First Amendment[10] is whether the law at issue (the Colorado Anti-Discrimination Act, which, as interpreted by its Civil Rights Commission,

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6. "Change Your Heart, Change Your Abortion Votes, Bishop Paprocki Tells Sen. Durbin," *Catholic News Agency*, February 22, 2018, www.catholicnewsagency.com/.

7. Haley D'Alessio, "Sen. Durbin Receives Healy Award for Service to Humanitarian Causes," *Georgetown Voice*, March 16, 2018, http://georgetownvoice.com/.

8. *Obergefell v. Hodges*, 576 US ____ (2015).

9. "Amendment I. 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."

10. Some readers may notice that this test differs from that involved in the HHS mandate cases, which I have covered in prior columns. The reason is that the test in those cases was that of the Religious Freedom Restoration Act (RFRA), that is, substantial infringement of religious liberty by government must be justified by a compelling interest, using the least restrictive means possible. After its adoption, the Supreme Court restricted the reach of the statute (the statutory test) to actions of the *national* government—the Court held that constitutional requirements of federalism prevented the Congress from going further than the Constitution required vis-à-vis the states, but permitted it to restrict the national government as it deemed appropriate. *Masterpiece Cake* involves state, not national, law. Hence, the less demanding (!) constitutional test applies.

requires the baker to create the cake for the same-sex wedding) is "neutral" and "generally applicable."[11] The issue is not whether a commercial enterprise can refuse to serve same-sex couples. Rather, the issue is whether a baker must act contrary to his conscientious religious beliefs in preparing a special ("custom-made") cake for a same-sex wedding.

Is it "generally applicable"? In other cases, the Colorado Civil Rights Commission protected bakers who refused to put a message *against* same-sex marriage on a wedding cake; protecting bakers depending on whether they support or oppose same-sex marriage hardly seems "generally applicable" (some bakers covered, some not). Is Colorado being "neutral" as between religious conscience and secular conscience, as constitutionally required, or does it *favor* secular conscience (of the bakers who would not put an anti-same-sex-marriage message on a cake)? Is the law *targeted against* religious conscience? Obviously, there is a strong argument that it is. If so, the state law fails the test and will be overturned, permitting the baker to refuse to custom-bake a cake for a same-sex wedding.

The other case is *National Institute of Family and Life Advocates (NIFLA) v. Becerra*.

That case involves a California state law. The Reproductive FACT (Freedom, Accountability, Comprehensive Care, and Transparency) Act requires the posting of "informational" signs in the waiting rooms of pregnancy clinics. Plaintiffs (NIFLA) are pro-life pregnancy resource centers that offer various forms of assistance to women considering an abortion. Under the act, if the clinic offers medical services, it is required to post a large notice on the wall giving a phone number that can be called to obtain a free abortion. If it does not offer medical services, it must post a notice stating that it does not provide medical services. Depending on location, these various postings must be in many different languages.

The act provides exemptions for for-profit centers, for doctors in private practice, and for centers that participate in the state's family planning program (a program that provides, inter alia, contraception, abortifacients, and abortion). Since the plaintiffs are *nonprofit* pregnancy resource centers and refuse to provide abortifacients or abortions, none of them qualify for the exemptions. This point attracted the attention of several of the justices during oral argument on March 21. Justices Anthony Kennedy and Samuel Alito were skeptical of the law, seeming to feel that the exemptions indicated the law was *targeted against* pro-life pregnancy resource centers (since the law exempted everyone else). Under Supreme Court precedent, if the regulation discriminates on the basis of the content or the viewpoint of the speaker, strict scrutiny (the most demanding standard) is triggered, and there is very little likelihood the law will survive.[12]

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11. *Employment Division v. Smith*, 494 US 872 (1990). The Court might decide to overturn Smith in its decision and apply the same strict-scrutiny test required by RFRA, which was required by the Court before its decision in *Smith*.

12. For the law to survive, California would have to show that it has a compelling reason to target pregnancy resource centers and that it used the least restrictive means. The US Solicitor General, arguing on behalf of the plaintiffs, pointed out that if California alleged

Surprisingly, the Ninth Circuit had upheld the FACT Act, holding that this was "professional" (i.e., not private) speech that is entitled to less protection. However, the Supreme Court has never endorsed the concept of "professional speech."

Although most observers expect the Court to overturn the California law, the Court might send the case back for evidentiary hearings since it came to the Court on a "facial" challenge (i.e., without extensive fact-finding in the lower federal court).

Although the case is being argued under the free speech portion of the First Amendment, the issues raised are analogous to those being raised in *Masterpiece Cake*, which concerns the religious liberty portion of the First Amendment. In both cases, the question is whether someone is being targeted under state law because of their conscientious beliefs on a contentious social issue. It will be interesting to see if the Court will protect conscience regardless of the portion of the First Amendment involved.

One thing that is all but certain is that the Court will wait to announce decisions in these cases until the last day of its term, near the end of June. This is invariably the practice with highly contentious, hotly debated cases (such as *Obergefell*).

But will there be another announcement on that last day or soon thereafter? Will Justice Kennedy, the key swing vote between the liberal four and the conservative four, announce his retirement? It is widely anticipated that he will. If so, it will trigger a titanic confirmation fight over whomever President Trump nominates. He has promised to nominate another "originalist" like Gorsuch. Time will tell.

State Developments

Tennessee was one of several states whose state constitution has been interpreted by its state supreme court to provide for abortion rights as broadly as does *Roe v. Wade*. That means that, even when the US Supreme Court overturns *Roe*, abortion-on-demand would still be available in Tennessee *under state law*.

In 2014, Tennessee voters approved an amendment to the state constitution, stating that the state constitution does not provide for a right to abortion. Since then, the way the votes were tabulated has been challenged in federal court. However, in January, the Sixth Circuit held that Tennessee need not recount the votes and stated, "It is time for the uncertainty surrounding the people's 2014 approval and ratification of Amendment 1 to be put to rest."[13]

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that its compelling interest was fraud-prevention for women seeking abortions, it could have addressed that *more narrowly* through ordinary anti-fraud laws; hence, the means employed by California were overbroad, i.e., not the least restrictive. One issue not before the Court in this case, but which could be affected by the Court's ruling, concerns state laws requiring disclosure by abortion clinics. Pro-life states require abortion clinics to provide women with various kinds of information. Will such disclosure be effectively overturned as *targeting* abortion clinics or as being content- or viewpoint-based discrimination?

13. Jonathan Mattise, "US Appeals Court: Tennessee Abortion Amendment Vote Was OK," *Chicago Tribune*, January 9, 2018, http://www.chicagotribune.com/.

One may hope that this outcome will encourage other states with similar interpretations of their own state constitutions by their state supreme court to pass similar state constitutional amendments.

In March, Mississippi passed a law banning abortions after fifteen weeks. Litigation over the law will work its way to the Supreme Court, which makes the possible retirement of Justice Kennedy even more tantalizing, as the case would present a good opportunity for the Court, with a new "originalist" replacement, to overturn *Roe*.

Other Developments: FEMA and PAS

Readers may be aware that after the terrible hurricanes this summer and fall, FEMA (the Federal Emergency Management Agency) refused to reimburse churches, synagogues, and other houses of worship. In January, FEMA reversed itself, saying this was necessary following the decision in Trinity Lutheran (discussed in my Winter 2017 column). In February, Congress passed a law cementing this result.

The National Academy of Sciences (NAS) held a scandalous inquiry into "the facts" about physician-assisted suicide—only they forgot to invite any opponents of the practice! The event was organized by the prime advocates of the legalization of physician-assisted suicide, Compassion and Choices. Professor Daniel Sulmasy of Georgetown University is to be commended for forcing his way onto the program and for accurately and severely criticizing this biased inquiry.[14] As in the debate over human embryonic stem cell research and cloning a decade ago, NAS demonstrated that it is not to be relied on for objective inquiry.

William Saunders

14. A video recording of Dr. Sulmasy's presentation is available at http://nationalacademies.org/hmd/Activities/HealthServices/PADworkshop/2018-FEB-12/Videos/SessionI-Videos/5-Sulmasy.aspx.