



ISSUE ANALYSIS

FAMILY RESEARCH COUNCIL: ADVANCING FAITH, FAMILY, AND FREEDOM IN AMERICA'S COURTS AUGUST 2012

Religious liberty is more than the right to attend a private worship service. Religious belief informs all areas of one's life, including private, professional, and public. Our Founders understood that one's duty to God comes before one's duty to the state and that, as our Declaration of Independence asserts, our rights are derived from Him, not any human government. For these reasons, Family Research Council's (FRC) Center for Religious Liberty aggressively works to defend our "first freedom" in federal courts across the country, including the Supreme Court of the United States.

In addition, FRC works to protect faith, family, and freedom in court cases dealing with marriage, parental rights, adoption, and other key legal issues, as is indicated below.

TO OVERTURN THE OBAMA HEALTHCARE LAW

November 19, 2010: Family Research Council filed an *amicus* brief in *Florida v. HHS*. FRC argued that President Obama's "Patient Protection and Affordable Care Act" (PPACA) Individual Mandate was unconstitutional and that the plan's sweeping Medicaid changes represent an impermissible expansion of federal power. FRC also joined the plaintiffs' arguments that these provisions cannot be severed from the remainder of the Act. Given the complexity and underdeveloped state of severability doctrine, FRC provided a thorough discussion of the development of severability and how it applied to the PPACA. The brief argued that the minimum essential coverage provision found in Section 1501 of the PPACA cannot be severed from the remainder of the Act, such that the district court should not invalidate the Individual Mandate while preserving the other provisions of the statute. **Our brief was cited in a federal court decision stating that mandate is unconstitutional and non-severable from President Obama's healthcare law.**

April 6, 2011: Family Research Council filed an *amicus* brief in the U.S. Court of Appeals for the Fourth Circuit in Virginia's healthcare lawsuit, *Virginia ex rel. Cuccinelli v. Sebelius*. FRC's brief expanded upon the brief filed in Florida's multi-state lawsuit on the same issue arguing that, under long-established precedent, since the Individual Mandate requiring all Americans to purchase health insurance was unconstitutional, the court should strike down the entire law as unconstitutional. The Family Research Council filed an *amicus* brief supporting Virginia's argument that Section 1501 of the PPACA was inseparable from the other 450 sections of the PPACA and, as a result, its unconstitutionality rendered the remaining sections of the law invalid.

May 11, 2011: Family Research Council filed an *amicus* brief in the U.S. Court of Appeals for the Eleventh Circuit in the multi-state 2010 healthcare lawsuit, *Florida v. HHS*. This was the next step following the January ruling by U.S. District Judge Roger Vinson that the Individual Mandate was unconstitutional, and the entire law must be invalidated. In his opinion in January, Judge Vinson twice quoted FRC Special

Counsel Ken Klukowski, and wrote that he borrowed "heavily" from FRC's *amicus* brief, noting that the brief "quite cogently and effectively sets forth the applicable standard and governing analysis of severability."

January 9, 2012: Joined by 27 Members of Congress, FRC filed an *amicus* brief with the U.S. Supreme Court in *National Federation of Independent Business v. Sebelius*. This is the case challenging the constitutionality of the PPACA. FRC's *amicus* brief was cited in the Supreme Court brief filed for the National Federation of Independent Business, an unusual move calling the Justices' attention to FRC's brief and making it very likely that the Court would carefully read and consider the argument it presented.

TO DEFEND RELIGIOUS LIBERTY IN UTAH AND ELSEWHERE WITH RESPECT TO THE EMPLACEMENT OF ROADSIDE CROSSES

May 23, 2011: Family Research Council filed an *amicus* brief in the U.S. Supreme Court case between Utah governmental officials and American Atheists, Inc., in *Davenport v. American Atheists*. The case was intended to determine whether 14 crosses bearing the names of fallen Utah state troopers that had been placed at the roadside locations where the troopers perished was an unconstitutional violation of the First Amendment's Establishment Clause. Three U.S. Senators and 12 Members of Congress joined in the brief. Although the Supreme Court denied certiorari in this case, Justice Clarence Thomas took the unusual step of writing a dissent from the denial, saying that the Court should take the case to consider the same issue that FRC highlighted in its brief.

TO PROTECT LOUISIANA'S RIGHT TO SUSTAIN HETEROSEXUAL ADOPTION POLICY

May 28, 2009: Family Research Council filed an *amicus* brief, in tandem with the Louisiana Family Forum (LFF), to protest efforts to force the State of Louisiana to recognize adoptions by same-sex couples as squarely at odds with the historic purpose of adoption in America: "the creation of family relationships that imitated and were intended to replicate the relationship that exists between parents and children in a birth (or natural) family." Lynn D. Wardle, *A Critical Analysis of Interstate Recognition of Lesbian and Gay Adoptions*, 3 Ave Maria L. Rev. 561, 564 (2005) (internal parentheses omitted). A birth family is self-evidently composed of a father and a mother, not two persons of the same sex. Accordingly, the traditional, imitative model of adoption that has long been the "dominant paradigm for adoption" in America "preclude[s] adoption by same-sex parents."

TO DEFEND THE RIGHTS OF PARENTS WITH RESPECT TO THEIR CHILDREN

January 31, 2011: Family Research Council filed an *amicus* brief in the case of *Camreta v. Greene*, in which the ruling by the Supreme Court was consolidated with the case *Alford v. Greene*. According to the Supreme Court, this case "disputed whether the traditional warrant/warrant exception requirements that apply to seizures of suspected criminals should apply to an interview of the child in light of reports of child abuse, or whether instead a balancing standard should apply." FRC's brief argued that the propriety of child abuse investigations is inextricably intertwined "with [...] the right of parents in the care, custody, control, and management of their child, and the right to maintain family integrity."

April 13, 2011: The case of *Adar v. Smith* was an effort by a homosexual couple in Louisiana to have both of their names placed on their adoptive child's birth certificate. The men alleged that the State of Louisiana treats children adopted by unmarried parents differently from adoptive children with married parents in an illegal manner. The Family Research Council and the Louisiana Family Forum filed a joint

amicus brief in this case in support of the appellant, the State Registrar and Director in the state's Department of Health and Hospitals, Darlene Smith. FRC and LFF argued that "[f]orcing the State of Louisiana to recognize adoptions by same-sex couples is squarely at odds with the historic purpose of adoption in America: 'the creation of family relationships that imitated and were intended to replicate the relationship that exists between parents and children in a birth (or natural) family'."

TO ALLOW RELIGIOUS LIBERTY IN GOVERNMENT SETTINGS

November 30, 2011: FRC submitted an *amicus* brief supporting the petition for a writ of certiorari of Forsyth County, North Carolina, to the United States Court of Appeals for the Fourth Circuit in the case of *Forsyth County v. Joyner*, a case involving the use of Jesus' name in prayers offered at government meetings. The Supreme Court upheld this practice—called legislative prayer—in the 1983 case *Marsh v. Chambers*. The Fourth Circuit held that *Marsh* does not protect prayers that mention Jesus "too frequently" or that makes "divisive" statements about Jesus Christ, such as his divinity, atoning death, receiving forgiveness of sin through Him, His resurrection, or His second coming. Fifteen Members of Congress joined FRC on this brief supporting the petition.

TO PROTECT RELIGIOUS SYMBOLS ON PUBLIC LANDS

March 14, 2012: Family Research Council filed an *amicus* brief supporting the petition for a writ of certiorari from Mt. Soledad Memorial Association, asking the Supreme Court to take what may yet be a historic religious liberty case, *Mt. Soledad Memorial Association v. Trunk*. The cross on Mt. Soledad has stood since 1913, and in 1954 was dedicated as part of a war memorial to all those who perished defending America in war. In 2006 Congress federalized it, making it a national veterans memorial. Because there is still a cross in the center of the memorial, the Ninth Circuit has held that it is an unconstitutional endorsement of religion, and must be removed.

FRC has been working very closely for more than a year with the lawyers representing Mt. Soledad Memorial Association. Through our brief, FRC wanted to send the clear message that the same Congress that federalized this memorial wants the Supreme Court to take this case and vindicate Congress' intent. We also have asked the Supreme Court to take this case as a perfect opportunity to set aside the "endorsement test" measuring stick for the First Amendment's Establishment Clause, which has been used to shut the public square to common expressions and displays of faith. Instead we have asked the Court to hold that the Establishment Clause is only violated when the government either directly declares a state religion or coerces citizens to participate in religion against their will.

The Supreme Court declined to grant certiorari at this time, but sent the case back to the lower courts for further proceedings, and taking the rare of step of issuing a statement written by Justice Samuel Alito indicating that the Court may welcome another petition at a later date after the options in the lower courts have been exhausted.

TO SAFEGUARD THE NATIONAL DAY OF PRAYER

July 7, 2010: The case *Freedom From Religion Foundation (FFRF) v. Obama* was a case wherein FFRF challenged the constitutionality of the National Day of Prayer in federal court and sought to prevent President Obama from initiating or participating in such an event in his official capacity as President of the United States. The U.S. District Court for the Western District of Wisconsin sided with FFRF. The *amicus* brief filed by the Family Research Council and many other organizations in the U.S. Court of Appeals for the Seventh Circuit argued that the court lacked jurisdiction to consider the merits of the

instant case. The Seventh Circuit agreed, and ordered the case dismissed because FFRF lacked standing to bring the challenge.

TO REQUIRE PLANNED PARENTHOOD TO IDENTIFY “SUICIDAL IDEATION”

January 25, 2010: The case of *Planned Parenthood of South Dakota v. Rounds* was a case brought by the South Dakota branch of Planned Parenthood against the governor of South Dakota, Mike Rounds. The case challenged the constitutionality of a statute in South Dakota that requires physicians to warn women considering abortion that suicide, or “suicidal ideation,” is a medical risk associated with undergoing an abortion procedure. FRC submitted an *amicus* brief that argued Planned Parenthood had no standing to initiate the action as Planned Parenthood cannot be considered “physicians” as defined within the statute. The briefs also argued that Planned Parenthood lacked “prudential standing” to represent “third party interests” of women contemplating abortion.

TO UPHOLD THE DEFENSE OF MARRIAGE ACT

December 24, 2010: *Gill v. Office of Personnel Management* and its companion case of *Massachusetts v. Department of Health and Human Services* challenged the constitutionality of the Section 3 of the Defense of Marriage Act (DoMA). DoMA was passed by overwhelming majorities in Congress in 1996 and was then signed by President Bill Clinton. Section 3 states in part that for federal purposes, “‘marriage means only a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife.” The Family Research Council and the Thomas More Society argued that DoMA’s definition of marriage furthers legitimate governmental interests in a rational manner and, therefore, is constitutional.

TO DEFEND MARRIAGE IN CALIFORNIA

January 15, 2009: The case *San Francisco v. Horton* concerns the issue of Proposition 8 and the redefining of marriage in the state of California. FRC’s *amicus* brief explored three primary points: first, the sovereignty of the people in a constitutional republic, including their inherent right to alter their charter document in whatever way they choose; second, the Founders’ understanding that the people’s right to change their Constitution is inalienable and cannot legitimately be withheld by any government official (including members of the judiciary); third, the history surrounding the people’s creation of the ballot initiative in California in 1911, as well as the historical understanding of that broad power. In light of these principles, FRC concluded that the voter-initiated enactment of Proposition 8 is a proper exercise of the people’s sovereign authority.

September 20, 2010: The case of *Perry v. Brown* is a federal case challenging the constitutionality of the California ballot initiative known as Proposition 8. Proposition 8 was enacted by the people of California, thereby amending the state constitution to say that “only marriage between a man and a woman is valid or recognized in California.” The Family Research Council and the Thomas More Society filed an *amicus* brief with the United States Court of Appeals for the Ninth Circuit arguing that Proposition 8 did not violate either the Due Process or Equal Protection Clauses of Fourteenth Amendment of the United States Constitution. (An *amicus* brief was also filed in the district court making similar arguments.)

TO DEFEND THE SECOND AMENDMENT

November 30, 2009: In the case of *McDonald v. City of Chicago*, the question presented was whether the Second Amendment right to keep and bear arms is incorporated against the States by the Fourteenth Amendment's Privileges or Immunities or Due Process Clauses. This case held that of the remaining questions regarding the Second Amendment, perhaps none is more consequential than whether the Fourteenth Amendment protects the right to bear arms from infringement by the states. FRC filed this *amicus* brief asserting that the right to keep and bear arms should instead be recognized as one of the "privileges or immunities" protected by the Fourteenth Amendment. At the same time, FRC argued that the Court should pursue that route without overturning the *Slaughter-House Cases*, since overruling that 1873 precedent would open the door for the Court to declare all manner of new constitutional rights, such as a right to same-sex marriage or abortion. It also claimed that this right was significantly different from the other rights in the Bill of Rights, and that there were several advantages (and no serious disadvantages) to this approach.

TO DEFEND AGAINST ASSISTED SUICIDE

April 28, 2009: The case of *Baxter v. Montana* dealt specifically with judicially mandating assisted suicide. FRC held that this was a drastic and unwarranted step under the Montana Constitution. Experience in the Netherlands shows that even a "regulated" assisted suicide regime engenders monumental abuses. Assisted suicide undermines patient autonomy, logically and practically. Nearly all requests for it are attributable to depression and are withdrawn upon proper treatment. Legalizing assisted suicide, the *amicus* brief claimed, diminishes compassionate treatment of pain because while palliative care is available, assisted suicide encourages the elimination of patients themselves rather than of their suffering.

TO DEFEND AGAINST LEGALIZED PROSTITUTION AND INCEST IN ROMANIA

April 15, 2009: FRC was informed by the Alliance of Romania's Families that the Romanian Parliament was considering the recommendations of the country's Ministry of Justice regarding criminal code reforms. FRC filed a brief with the Romanian Parliament expressing grave concerns about two of the Ministry's recommendations: legalizing prostitution and all legalizing consensual sexual acts between any related persons over the age of 18, including incest.

TO DEFEND THE FEDERAL INDECENCY REGULATIONS OF THE BROADCAST AIRWAVES

September 14, 2011: In this Supreme Court case, *Federal Communications Commission v. Fox Television*, the Family Research Council and Focus on the Family argued in an *amicus* brief that it is constitutional for the Commission to regulate indecent speech that falls short of being deemed obscene. FRC participated in *amicus* briefs in related cases in lower courts (*CBS v. FCC* (U.S. Court of Appeals for the Third Circuit, Sept. 21, 2009) and *Fox v. FCC* (U.S. Court of Appeals for the Second Circuit, Oct. 27, 2009)).