THE INTERSECTION OF LAW AND RELIGION: AVOIDING COLLISIONS

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I am Jeffrey Moon, the Director of Legal Affairs and Solicitor of the U.S. Conference of Catholic Bishops, and I am very pleased to have been invited to present at this symposium. At the same time, anyone presuming to speak in the context of a lecture series at which Professors Douglas Laycock and Michael McConnell have recently presented, should do so only with great care and particularly with great humility, which I assure you is precisely what I feel.

To set the stage, let me first give you a highly condensed version of what the U.S. Conference of Catholic Bishops (the "Conference") is, and then of what my office, the Office of General Counsel, does for it. The Conference really has several roles. First, it acts as the rough equivalent of a "trade association" for Catholic dioceses and organizations in the United States. All the active bishops in the United States belong to the Conference. They are the members of it, and they vote on what it will do. So from time to time we may communicate with the public and with government about issues important to the bishops, perhaps immigration issues, prolife issues or antipoverty programs. Second, the Conference is a sort of centralized "staff office" for all the bishops, to pursue programs they want conducted that really cannot be done on a local basis. An example is our Office of Migration and Refugee Services, one of the largest nongovernmental providers of services to immigrants and refugees in the United States. Obviously, that is not the sort of thing that can be managed on a local basis. What we are not is also important. Because of the polity and structure of the Catholic Church, we are not in a "chain of command" between parishes and dioceses, and the Holy See in Rome. We have no power to control what bishops or dioceses do. We cannot hire or

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fire bishops, and for all practical purposes they each report directly to the Pope through various Vatican administrative structures.

So – why does the Conference need lawyers and what do we do? One can see why dioceses need lawyers – they need to buy property, defend against employment suits by terminated employees, and litigate contract disputes, just as any other organizational actor in the world does. But why does the Conference need lawyers?

My office represents the Conference itself, as a corporate entity, in all of those same sorts of issues. For example, the Conference owns a good deal of intellectual property and we need to protect it from encroachment. We do that. We represent the Conference in employment and contract matters, and advise on legislation in areas important to the bishops. We also offer special kinds of legal expertise for lawyers for dioceses around the country – for example, in regard to immigration and refugee–related legal issues, expertise in church-related non-profit tax issues, and litigation advice in cases in which dioceses are defendants. Also, like the Baptist Joint Committee, we write amicus briefs, mostly for the Supreme Court, on a variety of issues. We write on issues that implicate the Church's underlying moral and religious beliefs, like the many briefs we have filed opposing the death penalty. We also file amicus briefs in cases where the proper understanding of statutory and constitutional protections for religious liberty are at issue, cases like *Hosanna-Tabor*[2], and *O Centro Espirita*[3], where we argued that the federal government had to make exceptions to the laws prohibiting possession and use of Schedule 1 controlled substances for members of a syncretic Central American religion who used an hallucinogenic "tea" as part of their sacraments. Often, we file those amicus briefs for coalitions of religious denominations that share our views either on the underlying social issue, or on the constitutional or statutory interests that are implicated in the case. That, in brief, is who we are and what we do.

The real point of our being here at this symposium is to speak to issues where law and religion "intersect." I would like to mention just two where they may threaten to – but need not – collide at that intersection.

The first is an issue the Conference has been concerned about for some time, and that is the so-called "contraceptives mandate"

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2. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694 (2012).

3. Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal, 546 U.S. 418 (2006).

that is contained in regulations issued by the Department of Health and Human Services ("HHS"), in the course of implementing the Affordable Care Act. You are probably aware that some time ago the Administration issued what seemed to be final regulations in this area, which were then followed by the issuance of an "Advance Notice of Proposed Rulemaking," followed by the taking of comments in response to that Advance Notice. The Conference filed comments in August 2011 and May 2012 which, for those interested, are on our website.[4]

After that, the Administration issued a "Notice of Proposed Rulemaking" on February 6th of this year, and the Conference has similarly submitted comments in response to that Notice.

The provision of the proposed regulation that most concerns the bishops is a requirement that employers' health plans provide "preventive care and screenings" to women covered by plans, without cost sharing. Guidelines issued by HHS stated that this phrase meant *all* FDA-approved contraceptive methods and sterilization procedures. This would include what the bishops view as some drugs that cause abortions. So, the starting point for this discussion is that the Catholic Church has a firm religious position that the use of such drugs and indeed all artificial contraceptives is immoral, and also that to facilitate *another* to use them is similarly immoral.

The rule initially proposed by HHS had a narrow exception in it, the "religious employer exemption." To qualify, the inculcation of religious values had to be the purpose of the organization, the organization had to primarily employ people who shared the religious tenets of that organization, the organization had to serve primarily people who shared the religious tenets of that organization, and the organization had to be a non-profit organization as described in Section 6033 (a)(1) or (a)(3)(A)(i) or (iii) of the Internal Revenue Code ("IRC").

A vast number of obviously religious entities could not have met this original test. Leaving aside the impossibility of deciding, for example, whether recipients of food from a soup kitchen shared

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4. Anthony R. Picarello, Jr. & Michael F. Moses, *Comments on Advance Notice of Proposed Rulemaking on Preventive Services*, U.S. CONF. OF CATHOLIC BISHOPS (May 15, 2012), ; Anthony R. Picarello, Jr. & Michael F. Moses, *Comments on Interim Final Rules Imposing Contraceptive Mandate*, U.S. CONF. OF CATHOLIC BISHOPS (Aug. 31, 2011), http://www.usccb.org/about/general-counsel/rulemaking/upload/comments-to-hhs-on-preventive-services-2011-08-2.pdf.

a church's religious views, our position was that the requirement violated the Religious Freedom Restoration Act ("RFRA") and the Religion Clauses of the Federal Constitution. This proposed exception's language was subsequently changed, and the February 6, 2013 Notice of Proposed Rulemaking proposed to modify the "religious employer" exemption in a somewhat attractive way, but one that was not very substantive. It left in place the underlying requirement that many religious organizations are still going to be required to pay for insurance that would provide services that these organizations have an absolute and unwavering religious objection to. That is, the new test for the "religious employer" exemption would simply be whether the organization is a non-profit organization as described in the identified portions of Section 6033 of the IRC. That means only "churches, their integrated auxiliaries, conventions or associations of churches, and the exclusively religious activities of a religious Order." That is all. So, most religious organizations – Catholic hospitals, Catholic Charities branches and Catholic schools, to say nothing of religiously-opposed individuals or for-profit employers, or any religious non-profits that are anything *other* than "churches, integrated auxiliaries of churches, associations of churches or the exclusively religious activities of a religious Order" – would legally be required to provide insurance coverage for drugs and procedures that are contrary to their deepest religious convictions.

So with apologies for this long Statement of the Case, what is the problem here? Are people and organizations not often forced to do such things? Polygamists cannot marry five people at the same time. People with absolute religious objections to all wars are, in fact, forced to pay taxes to support wars. The problem is that this mandate violates the RFRA, and even absent the RFRA, impinges improperly on Free Exercise and Establishment Clause guarantees.

The RFRA prevents the federal government from substantially burdening the exercise of religion unless it demonstrates that application of the burden to the person is in furtherance of a compelling governmental interest, and is the least restrictive means of furthering that compelling governmental interest. A plaintiff makes out a *prima facie* case under the RFRA whenever it shows the government substantially burdens its sincere religious exercise.

The RFRA broadly defines "religious exercise" to include any exercise of religion, whether or not compelled by, or central to, a system of religious belief. Clearly the Catholic Church's belief sys-

tem is that using or facilitating the use of contraceptives or sterilization is wrong, and that paying for it is wrong. Abstaining for religious reasons from providing such items easily qualifies as "religious exercise," certainly as much as abstaining from work on certain days, as in *Sherbert v. Verner,*[5] or refusing to manufacture military equipment as in *Thomas v. Review Bd.*[6] *This* mandate substantially burdens church organizations' and believers' religious exercise by forcing them to choose between following their convictions and paying enormous fines.

Consequently, in our view the government must demonstrate that application of this burden to church-related entities represents the least restrictive means of advancing a compelling governmental interest, which it clearly cannot do because the government has issued numerous exceptions already, covering many millions of people, and because contraception is already widely available.

In fact, the government has chosen *not* to mandate contraceptive coverage in millions of policies. A vast number of "grandfathered" plans are not required to comply with the mandate; neither are "small employers." There are other readily available means that the government could use to enhance contraception coverage, that are far less burdensome to church organizations.

The Conference also believes the mandate violates the Free Exercise Clause. The mandate violates the Free Exercise Clause at least because it is not "neutral" or "generally applicable," as required under *Employment Division v. Smith.*[7] So, the mandate is subject to strict scrutiny, which for the reasons just outlined, it cannot meet.

The mandate fails neutrality at the most basic level by explicitly discriminating among organizations on a religious basis. The "religious employer" exemption divides religious objectors into favored and disfavored classes. It protects only certain limited sorts of religious entities, which it defines by reference to their internal *religious* characteristics.

In our view, this mandate also violates the Establishment Clause of the First Amendment. The mandate's "religious employer" exemption, as discussed above, sets out the government's view of what qualifies as "religion," and what does not. However, the government may not provide different levels of protection to differ-

5. 374 U.S. 398, 404 (1963).
6. 450 U.S. 707, 716 (1981).
7. 494 U.S. 872, 879 (1990).

ent religious organizations when it imposes a governmental burden. Instead it must, at the very least, "treat individual religions and religious institutions 'without discrimination or preference.'"[8] In our view, it is also an Establishment Clause violation for the government to draw distinctions in treatment between different *sorts* of religious organizations. It seems to us that a Catholic homeless shelter, or an evangelical Christian small business owner, has the same rights to act in accordance with their religious principles, as a Presbyterian Church does. They do not, under this mandate.

Many members of the Conference – dioceses – and related organizations are involved in litigation around the country arising out of this mandate. At this point, I believe about forty-eight suits have been filed to challenge the mandate, with about 140 plaintiffs. Many plaintiffs are for-profit entities, as well. Many of the Catholic, especially non-profit, plaintiffs are represented by a private law firm, and our role is to advise and consult with them as the matters go forward, and to advise bishops and dioceses. However, we, the Conference, are not ourselves in litigation in any of these matters.

What else is the Conference doing? We have filed responses to the Notice of Proposed Rulemaking on behalf of all the bishops of the United States, outlining our objections to this mandate. You can all read our comments. I believe that, once filed, they are available on the U.S. Office of Personnel Management and HHS websites.[9] Here are three of our major legal concerns:

First, for many "stakeholders," the proposed regulation offers no exemption or accommodation of any kind. Those without an exemption or accommodation include conscientiously-opposed individuals, for-profit employers (whether secular or religious), non-profit employers that are not explicitly religious organizations but have religiously-based objections to facilitating this coverage, insurers, and third-party administrators.

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8. Colo. Christian Univ. v. Weaver, 534 F.3d 1245, 1257 (10th Cir. 2008) (citing N.Y. CONST. of 1777, art. XXXVIII, *reprinted in* 5 THE FOUNDERS' CONSTITUTION 75 (Philip B. Kurland & Ralph Lerner, eds., 1987)). *See also* Larson v. Valente, 456 U.S. 228, 244 (1982) (noting that the "clearest command of the Establishment Clause is that one religious denomination cannot be preferred over another.").

9. *See U.S. Office of Personnel Management*, OPM.GOV, http://www.opm.gov/ (last visited Mar. 18, 2013); *U.S. Department of Health & Human Services*, HHS.GOV, http://www.hhs.gov/ (last visited Mar. 18, 2013).

To take one example, even a publisher of Bibles is forbidden to offer its employees a health plan that complies with the publisher's espoused Biblical values. The contraceptive mandate has been preliminarily enjoined in just such a case.[10]

At least ten other for-profit plaintiffs with religious objections to the contraceptive mandate, or some aspect of the mandate, have obtained either preliminary or temporary injunctive relief against its enforcement. They generally obtained that relief precisely because the RFRA and the Religion Clauses of the First Amendment prevent the government from substantially burdening the free exercise of religion, unless the policy can survive strict scrutiny.

Second, the "religious employer" exemption itself continues to exclude many religious organizations, and this exclusion is not reasonably related to a legitimate governmental interest. Under the exemption proposed in February 2012, an exempt "religious employer" was one that met all of four criteria. The current proposed regulation would eliminate three prongs of this four-pronged test. Nevertheless, the regulation continues to define "religious employer" in a way that subjects a wide array of organizations, which are undeniably religious, to the mandate.

The test proposed in the Notice of Proposed Rulemaking pertains to certain Form 990 filing exemptions available under Section 6033 of the IRC. Those filing exemptions have no rational relationship to the purpose of either the mandate or the proposed exemption. Moreover, religious employers that do not fit the regulation's definition of "religious employer" include religious hospitals, colleges, universities, and charities. Therefore, the availability of an exemption from the contraceptive mandate will often depend upon, as it were, an accident of corporate form, rather than what a church believes and does.

Third, the "accommodation" described in the Notice for nonprofit religious employers that fall outside the "religious employer" exemption does not meaningfully accommodate even those organizations that qualify for it. Under the proposed regulation, the employer and enrollees could apparently pay for a group health plan that excludes contraceptive coverage. The insurer who issues the plan would then issue a separate individual policy to each enrollee, that would cover contraceptives, and the proposed rule declares that the issuer would have to do that without any "cost sharing,

10. *See, e.g.,* Tyndale Home Publishers v. Sebelius, 2012 WL 5817323, at *1 (D.C. Cir. Nov. 16, 2012).

premium, fee, or other charge" to plan participants or beneficiaries or employing organizations. This seems to me to ignore basic economic principles. For insured plans, there *is* only one funding stream from which contraceptives and sterilization procedures can be paid, and that is premium payments made by the sponsors of the health insurance plan and its enrollees. So, even though contraceptive coverage may seem to be provided by "separate" individual plans, the objecting employer and enrollees are ultimately paying for and facilitating the objectionable services. And for self-insured plans, the plan *itself* would continue to facilitate access to items and procedures to which the employer has a moral and religious objection.

These regulations have not yet been finalized by the Administration, but if none of these issues is adequately dealt with, either in text, or by adopting a broad conscience exemption sufficient to protect religious objectors, then clearly the legal challenges I outlined above will go forward.

I also wanted to speak to another related area, one in which the Conference was directly involved as a litigant. That is the degree of autonomy to which a religious organization is entitled when it acts as a contractor for a government agency, to do secular activities. It involves some foundational issues about the meaning of the Free Exercise and Establishment Clauses, and the RFRA.

This involves a case called *ACLU of Massachusetts v. Sebelius,*[11] and first let me provide some background about the statute at issue, the relationship of the government to the Conference, and the suit which arose out of it. Then I will touch on the heart of the matter—what the court decided about whether HHS actually violated the Establishment Clause by awarding a government contract to the Conference. Then third, whether that decision was correct or not.

In 2000, Congress passed the Trafficking Victims Protection Act (the "TVPA"), which authorized HHS to protect human trafficking victims by expanding benefits and services available to them, without regard to the immigration status of those victims. In furtherance of that objective, HHS began providing support to human trafficking victims through a series of competitively awarded grants that went to organizations that provided direct services to victims. After a few years, HHS decided to contract

11. 821 F. Supp. 2d 474 (D. Mass. 2012), *vacated sub nom.*, ACLU of Mass. v. U.S. Conference of Catholic Bishops, 705 F.3d 44 (1st Cir. 2013).

with a single non-government entity to manage the provision of these services on a nationwide basis, and in November 2005, it issued a formal Request for Proposals ("RFP") for that service.

The RFP identified several tasks to be performed under the contract, and explained that contract funds could be used to provide assistance to victims for expenses related to housing, health screening, medical care, mental health screening and therapy, and other forms of assistance. The RFP also provided that contract funding could be used for food, public transit passes, translation services, and other things. The RFP did not require the contractor to use contract funds to provide abortions, nor did the authorizing legislation include such a requirement.

HHS received proposals from the Conference and another bidder. In its proposal, the Conference explained that it would not permit contract funds to be used for activities contrary to its religious and moral beliefs, and so the Conference would not use contract funds to pay for abortions or contraceptives.

A technical review panel considered the applications and some evaluators penalized the Conference for its stance on abortion and contraception, but ultimately the panel strongly favored its proposal. HHS concluded that the Conference presented the best value for the government, offering the best proposal at the lowest evaluated price, and it awarded the contract to the Conference.

The record was clear that during the contract review process, HHS was not partial toward the Conference due to its religious affiliation. The technical evaluators all testified that their evaluations were not influenced by any favoritism for religion, let alone Catholicism, and no contrary evidence existed.

In selecting its subcontractors, which were the direct service providers, the Conference did not discriminate on the basis of religion. It also assisted trafficking victims without regard to their religious beliefs. In addition, contract funds were not used for any religious items or religious purposes, as ACLU agreed at the summary judgment stage. All expenditures of government funds, managed by the Conference, were for secular goods or services.

The Conference did not bar subcontractors from providing abortion or contraception with other funding. It also did not even purport to prevent victims from obtaining abortions. Discovery uncovered no instance in which a trafficking victim desired an abortion or contraceptive services but ultimately did not receive them due to the contract's funding restrictions.

After the Conference had performed the contract for four years, the ACLU sued HHS, claiming that the award of this contract to

the Conference violated the Establishment Clause of the First Amendment. The Conference intervened as a defendant. ACLU argued – primarily – two things. First, it argued that the award of the contract itself to a religious organization that had placed religiously-motivated limits on what it would use government funds for, effectively "endorsed" that religion or those religious beliefs, which government is prohibited from doing. Second, it argued that by permitting the Conference to manage the provision of anti-trafficking services, but declining to use contract funds to pay for abortions or contraception, HHS had improperly "delegated governmental functions" to the Conference. I will tell you in advance that the District Court agreed with both of those arguments, and it granted summary judgment against HHS and us.[12] But I will tell you why I believe that was statutorily and constitutionally dead wrong.[13]

The classic test for whether a challenged governmental action violates the Establishment Clause, as you probably know, is set out in *Lemon v. Kurtzman,* and has been modified in subsequent decisions.[14] The *Lemon* test asks whether the challenged governmental action has a secular purpose, whether its primary effect is to either inhibit or advance religion, and whether the challenged action creates excessive governmental entanglement with religion. However, the ACLU's argument was not primarily that the contract award violated the *Lemon* test itself. Rather, the primary argument was that the government had actually endorsed Catholic beliefs by awarding the Conference the contract subject to this proviso, and second, that by doing so the government had delegated governmental functions to the Conference.

As to the so-called "endorsement test," we first argued that the major cases ACLU depended upon all involved religious displays and expression, not government contracting decisions. This "endorsement test" was primarily crafted by Justice O'Connor, and

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12. On appeal, the United States Court of Appeals for the First Circuit vacated the District Court decision as moot, since the contract had been fully performed and had expired. ACLU of Mass. v. U.S. Conference of Catholic Bishops, 705 F.3d 44, 58 (1st Cir. 2013). The matter was remanded to the District Court with instructions to dismiss the suit with prejudice. *Id.*

13. There was a separate, very interesting standing question involved in this suit that is beyond the scope of this discussion. *Id.* at 48. This question implicated the *Flast v. Cohen*, 392 U.S. 83 (1968), exception to the bar to broad taxpayer standing, as well as *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436 (2010).

14. 403 U.S. 602 (1971).

has been used mainly in the so-called "crèche cases."[15] Those cases do not deal with whether governmental funding for particular social services runs afoul of the Establishment Clause.

Even if an endorsement analysis were applicable, the test for it is whether a reasonable objective observer, who is aware of all the relevant circumstances, would view the government's actions as endorsing a particular religious view or endorsing religion generally. Here, a reasonable observer who was truly familiar with all the circumstances would not perceive any governmental endorsement of religion. First, the contract plainly furthers the purely secular goal of assisting human trafficking victims, and it has no inherently religious content. And neither the underlying legislation nor HHS's RFP required the provision of abortions or contraceptives in the first place. Thus, HHS's decision not to fund abortion services is not an endorsement of religion.

Further, there was no evidence that HHS, or any of the government decision makers, had any religious motivation in awarding the contract. All evidence was to the contrary. The Conference's proposal was subject to a competitive evaluation, and as part of that process, HHS subtracted points from the Conference's proposal due to its funding restriction. The Conference's scores showed that it simply provided the best proposal for assisting human trafficking victims, at the best value. Third, all government funding was, in fact, used to pay for secular goods and services.

Fourth, the administration of the contract involved no religious content. The Conference provided benefits to victims regardless of their religion, no victim was denied services on the basis of religion, and no subcontractor was selected based on religion.

ACLU's other challenge to the contract rested on a so-called "government delegation" argument. ACLU argued that HHS had delegated a governmental function to the Conference by accepting its contract proposal, which did not fund abortions. Therefore, the argument is that the Conference was placed in the position of deciding for itself how to use federal funding provided for by the TVPA. ACLU argued that the contract had the effect of advancing religion and created excessive governmental entanglement with religion.

This argument relies principally on a case called *Larkin v. Grendel's Den, Inc.*[16] *Larkin* involved a Massachusetts statute that

15. Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000); County of Allegheny v. ACLU, 492 U.S. 573 (1989).

16. 459 U.S. 116 (1982).

vested the power to effectively veto applications for liquor licenses in certain areas, in the governing bodies of nearby churches and schools. The statute in *Larkin* enabled churches to use that veto power to serve their own religious goals. Because there were no standards for ensuring that the veto power conferred on churches would be used in a religiously neutral manner, the Supreme Court held that the statute had the primary effect of advancing religion, and created an excessive entanglement of government and religion.

Here however, HHS had not given the Conference the power to exercise any form of governmental authority, let alone discretionary authority. The decision whether a trafficking victim does or does not have an abortion is not a governmental decision in the first place. And nothing in the contract gave the Conference or its subcontractors control over that decision. So the government delegation argument fails at the outset, as a matter of fact. In addition, the contract provided the Conference with no discretion, either. HHS decided to award the contract, implement the funding, and decide what its limitations were. The Conference had no discretionary power thereafter.

There was no evidence that the Conference had ever used the contract to promote goals other than those of HHS, and HHS monitored the Conference's administration of the contract to ensure that was the case.

We also argued that the case fell squarely within the holdings of two decisions from the Supreme Court that decided – specifically in connection with federal abortion funding – that it is not unconstitutional for the government to decide *not* to fund such services, even if the decision whether to have an abortion is constitutionally protected, and even where the government decides to fund a broad range of other related services. Those cases are *Harris v. McRae*[17] and *Maher v. Roe*.[18] The Court in *Harris* applied the *Lemon* test and concluded that the decision not to governmentally fund abortion had a secular purpose, did not have the primary effect of advancing religion, and did not excessively entangle government with religion. Government simply has no obligation to support or fund every activity, specifically abortion, that an individual person may have a constitutionally-protected right to pursue. *Harris* also rejected the idea that government action violates

17. 448 U.S. 297 (1980).
18. 432 U.S. 464 (1977).

the Establishment Clause just because it happens to coincide or harmonize with the tenets of some or all religions. There *is* no constitutional problem with a religious organization being motivated by religion, after all – it is only *government* action that is limited by the Establishment Clause. The government here did not share the Conference's religious beliefs or motivation. In fact, it scored the Conference's bid lower *because* of those beliefs. What the government did was simply pick the best overall bidder.

I would also suggest that even *if* HHS's agreement to our proviso was an accommodation of religious beliefs, that accommodation would not violate the Establishment Clause. Both the Establishment and the Free Exercise Clauses permit, and in some cases require, such accommodations. Additionally, the TVPA did not require government funding of abortions in the first place. If anything, HHS's decision was no sort of favor or accommodation to the Conference. It was a decision not to impose additional burdens on it as a matter of contract, which the underlying statute did not even require in the first place.

So, what ties my comments about these two very different situations together? And how, if at all, is that consistent with the legal principles the Supreme Court just enunciated in *Hosanna-Tabor*? I think it is the same fundamental concept: under our Religion Clauses, religious people *and* religious organizations have the legally enforceable freedom to decide for themselves what their standards are, and to conduct their own affairs in compliance with their own belief system. Additionally, there is a concomitant – I would suggest the government is *required* to treat religious organizations as they would treat other organizations similarly situated, and not disfavor them.

In the HHS mandate situation, I think these principles mean that government cannot order religious organizations to do that which their most basic religious principles proscribe. Remember, I am not talking about what government might be able to force one *not* to do, per *Employment Division v. Smith*. In the *ACLU* context, I suggest these principles mean that the government can deal with religious organizations as government contractors on the same basis as it would deal with a purely secular organization, and that government does *not* have to hold a religious organization's characteristics or beliefs against it in that contract selection process. That is why it is irrelevant whether government funds are flowing to a religious entity where that funding is demonstrably being used only for secular purposes, and in full accordance with the government's contract requirements.

I suggest that this same unifying theme is also one key to *Hosanna-Tabor*. That church school got to decide who it was, and what its own belief system was. As such, it was entitled to decide for itself who its ministerial employees would be, and what the standards for selecting and removing them would be. Honoring those decisions is required by the Religious Clauses and the constitutional interest does trump the government's generic interest in enforcing anti-discrimination laws.

This same "collision avoidance" principle – the due regard for religious autonomy, and scrupulous attention to what sorts of decisions a religious organization must be permitted to make for itself – is or should also be at work in a wide variety of other legal contexts. From issues about whether the National Labor Relations Board should be able to exercise jurisdiction over religious schools and colleges, to defamation suits brought by clergy against their own religious superiors and employers, to church property ownership disputes, and even to when the "alter ego doctrine" may be applied to hold one religious entity responsible for another's misconduct. Each of those has been the subject of recent, significant judicial decisions, each with their own lines of underlying case law. Any one of them could be the subject of yet another full-length presentation, which is an issue for another time.

The views expressed in this paper are those of the author and do not necessarily reflect the position or views of the U.S. Conference of Catholic Bishops, or any of its members.