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**By Email Transmission**

February 9, 2023

Hon. Senator Deb Patterson, Chair
Members, Senate Committee on Health Care
900 Court St. NE
Salem, OR 97301

Re: Religious Exemptions in Health Care Services and Insurance
(last year's SB1530 and current SB491)

Dear Chair Patterson and Members of the Committee:

I have been asked to review last year's Senate Bill 1530 and current Senate Bill 491 concerning potential inclusion of assisted reproductive technology (ART) in state health insurance coverage mandates, and to comment about whether current law would call for exempting health care providers and insurers that would object on religious grounds to providing that coverage. Without taking a position on the proposal to mandate coverage for ART, this letter shares our view that ***current law does not require an exemption for religiously affiliated insurers*** and that it would be problematic to make assumptions about what the law might require in the future.

The issue of religious exemptions in health care and insurance is of significant concern to our LGBTQ+ community members, especially in locations, such as Oregon, where religiously affiliated institutions are dominant in the health care and insurance fields. For years, we have seen a proliferation of religious objections to medically necessary care, employee benefits coverage, and nondiscrimination rules, which often disproportionately impact LGBTQ+ people. Indeed, it has become common that we encounter assertions of religious liberty rights to refuse to provide care, benefits, and equal treatment that go significantly beyond what we understand current law to provide. ***This causes real hardship*** to people denied care, equal benefits, and other fair treatment based on religious beliefs they do not share. It is especially troubling when those refusing service for religious reasons claim they serve the general public per professional standards, do receive public funding, and are dominant in a relevant market.

**The U.S. Supreme Court Twice Recently Has Declined to Create Religious Refusal Rights.**

In 1990, the U.S. Supreme Court established the federal constitutional rule that still answers the question here – whether there is a religious right to be exempt from rules that burden the free exercise of religion. Written by the late Justice Antonin Scalia, *Employment Div., Dept. of Human Resources of Ore. v. Smith*[1] held that laws that are religiously neutral and apply generally to everyone in the relevant situation are to be enforced as long as they serve legitimate purposes in a

[1] 494 U.S. 872, 110 S. Ct. 1595 (1990).

rational way. In other words, everyone must comply with valid laws, including those who object for religious reasons, as long as the laws treat everyone equally and do not treat those with religious objections less favorably. The Supreme Court has been asked repeatedly to change this rule and to date has declined to do so, most recently in 2021.[2] The Oregon Constitution uses the same rule.[3]

**Why the Confusion About Religious Refusal Rights?**

Some of the public confusion about the extent of religious refusal rights is because the U.S. Supreme Court has issued multiple, high-profile decisions that have been described in misleading ways. For example, in *Masterpiece Cakeshop v. Colorado Civil Rights Comm'n*,[4] the Court ruled in favor of Jack Phillips, the baker who refused service to a gay male couple based on his religious objection to gay couples marrying. The case has been mistaken as standing for the notion that religious beliefs excuse violation of civil rights laws. But that was not the Court's ruling. Instead, the decision in Mr. Phillips' favor was due to conduct on the part of government officials involved in the administrative hearing process, which the Court saw as evidencing improper anti-religion bias against Mr. Phillips. Concerning the usual rule in public accommodations cases, however, the Court majority of six justices observed that, while ***"religious and philosophical objections are protected, it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services*** under a neutral and generally applicable public accommodations law."[5]

The *Masterpiece* court supported that general rule by citing its 1968 decision in *Newman v. Piggie Park Enterprises, Inc.*[6] *Piggie Park* addressed a White proprietor of barbeque restaurants whose religious beliefs called for segregation of White and Black people.[7] Black would-be patrons generally were refused service, though occasionally were served from a kitchen window and told to take their food from the premises before eating.[8] The U.S. Supreme Court in *Piggie Park* not only affirmed the lower courts' rejection of the owner's religious liberty defense to the Civil Rights Act claim, but ***deemed the religious defense "patently frivolous."***[9] That is the precedent *Masterpiece Cakeshop* has refreshed for us all, this time in the LGBTQ context.

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[2] *Fulton v. City of Philadelphia*, 593 U.S. __, 141 S. Ct. 1868, 1877 (2021).

[3] *Klein v. Oregon Bureau of Labor and Industries*, 317 Or. App. 138, 141, 506 P.3d 1108 (Jan. 26, 2022).

[4] 584 U.S. __, 138 S. Ct. 1719 (2018).

[5] *Id*. at 1727.

[6] 390 U.S. 400 (1968).

[7] *See* 256 F. Supp. 941, 944 (D.S.C. 1966) (noting that the owner's "'religious beliefs compel him to oppose any integration of the races whatever'"), *rev'd in part*, 377 F.2d 433, 437-438 (4th Cir. 1967) (reversing to hold that the Civil Rights Act applied to defendant's restaurants), *aff'd*, 390 U.S. at 400.

[8] 256 F. Supp. at 944, 946-947.

[9] 390 U.S. at 402, n.5.

In the other recent example, Catholic Social Services, the plaintiff in *Fulton v. Philadelphia*,[10] asked the U.S. Supreme Court to rule that faith-based social service agencies have a religious free exercise right to refuse to consider same-sex couples when screening potential foster parents for the City. ***The Court declined to approve such a religious right, leaving that issue for another day.*** Instead, it ruled that the City's contract discriminated against the agency because it gave City officials unaccountable discretionary authority to grant exemptions from the nondiscrimination rules for various reasons, but not the agency's religious reason. In other words, as in *Masterpiece Cakeshop*, ***the religious party won but not because it had a religious right to disregard the law***, but because an unusual decision-making process in that case had not been religiously neutral.

**Avoid Unwarranted Religious Exemptions, Especially in Health Care**

A couple of examples of recent litigation about health care and health insurance further confirm the need for caution against overbroad claims of religious exemption rights. *City and County of San Francisco v. Azar*[11] addressed a rule change done by the U.S. Department of Health & Human Services (HHS) pursuant to President Trump's May 2017 Executive Order, entitled *Promoting Free Speech and Religious Liberty*.[12] HHS issued the final rule, entitled *Protecting Statutory Conscience Rights in Health Care*,[13] in May 2019. Multiple federal lawsuits immediately charged that the rule had improperly expanded the meaning of terms in federal law to allow healthcare institutions and employees to elevate their own religious interests above the health needs of patients and medical standards of care. Concluding that the entire HHS rule was invalid, the federal court explained:

> [T]he rule is "not in accordance with law," by reason of conflict with the underlying statutes and is in conflict with the balance struck by Congress in harmonizing protection of conscience objections vis-a-vis the uninterrupted flow of health care to Americans. When a rule is so saturated with error, as here, there is no point in trying to sever the problematic provisions. The whole rule must go.[14]

The mix of legal defects in this "Conscience Rule" – which came to be known popularly as the "Denial of Care Rule" – was unique to the Trump administration's efforts in this regard. But the Trump administration's overreach nonetheless fairly illustrates how ***overly broad religious exemption demands tend to disregard the needs of patients, insureds, and other involved parties, often leading to litigation.***

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[10] 141 S. Ct. at 1868.

[11] 411 F.Supp.3d 1001 (N.D. CA 2019).

[12] 82 Fed. Reg. 21,675 (May 4, 2017).

[13] 84 Fed. Reg. 23,170 (May 21, 2019).

[14] 411 F.Supp.3d 1025; see also *State of New York, et al. v. U.S. Dep't of Health & Human Servs.*, C19-04676 (Dkt. No. 248) (S.D.N.Y. Nov. 6, 2019) (similarly vacating the rule in its entirety on a nationwide basis).

Two additional cases, both of which I have had the privilege of participating in, focus relevantly on patient needs, insurance coverage, and nondiscrimination. First, Lambda Legal is co-counsel with the Sirianni Youtz Spoonemore Hamburger firm in Seattle on behalf of members of the Pritchard family, who represent a class of similarly situated persons, in *C.P., et al. v. Blue Cross Blue Shield of Illinois*.[15] The case concerns discriminatory denial of insurance coverage for gender-affirming care for teenagers with gender dysphoria. The coverage exclusion is administered by Blue Cross (which operates nationally and is not a religious entity) pursuant in this instance to a contract with Patricia Pritchard's employer, Catholic Health Initiatives. As the federal court explained when granting summary judgment to our clients and against Blue Cross last December, the existing protections for religious liberty are important but more limited than Blue Cross has asserted them to be.[16] We now are briefing remedies for the class.

Second, in one of the few cases to proceed to a comprehensive appellate ruling on the relationship between the religious rights of medical providers and the nondiscriminatory access rights of patients, the California Supreme Court held unanimously that self-identified Christian physicians who had chosen to specialize in infertility medicine did not have protected religious liberty rights to refuse equal treatment to lesbian patients.[17]

**Conclusion**

Everyone can agree that this area of law, like many areas, has open questions and is constantly evolving. No one can predict how particular courts will rule in future cases about religious objections to secular laws. However, according to our best reading of existing federal and state law, nothing currently prevents Oregon from enacting an insurance mandate which, ***in a religiously neutral and generally applicable manner, requires all state-regulated insurers to cover assisted reproductive services***.

Again, Lambda Legal takes no position on whether such a mandate is a wise policy choice for Oregon at this time. But as you consider the proposal, we encourage you to assess its benefits and burdens, and to make any decisions about religious exemptions, simply as policy choices with consequences, not as constitutional dictates.

I hope this analysis is useful as you and your colleagues consider SB 491.

Respectfully,

*Jennifer C. Pizer*

Jennifer C. Pizer
Chief Legal Officer

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[15] Case No. 3:20-cv-06145-RJB, 2022 WL 17788148 (WD WA Dec. 19, 2022).

[16] *Id.*

[17] *North Coast Women's Care Medical Group, Inc. v. Superior Court (Benitez)*, 44 Cal.4th 1145, 81 Cal.Rptr.3d 708, 189 P.3d 959 (2008).