On November 4, 2020, the Supreme Court heard arguments in Fulton v. Philadelphia, in which foster parents and Catholic Social Services of Philadelphia (CSS) challenged the city’s decision to cancel CSS’s contract and revoke the charitable agency’s ability to certify foster parents. The city took the action in response to learning of CSS’s religious objection to certifying same-sex couples as foster parents. No same-sex couple had ever asked to use CSS’s certification services, and there are 29 other agencies in Philadelphia that are willing to help same-sex couples attain certification, but the city nonetheless canceled the contract in the name of combating discrimination. In 2019, the Third Circuit affirmed a lower court order dismissing the challenge.

Life Legal filed an amicus brief in the case, taking aim at two aspects of the lower court’s ruling of concern to pro-lifers.

The first was the assumption that local government can monopolize a broad area of human activity, transforming it into a “public service” for which it then gets to set the rules for all participants. Some decades ago, the government of Philadelphia moved into a field (care of neglected children) in which the church had been serving for over two hundred years. The government eventually attained a monopoly position on child welfare services, relegating private agencies, including religiously-based agencies, to the position of mere contractors that must follow all city dictates.

With the government’s expansion into the area of health care, it is easy to see how the same scenario could play out there, with the government claiming for example, that all hospitals are performing a “public service” for which the government sets the rules, and one
of those rules is that all hospitals must provide abortions.

Both newly-seated Justice Barrett and Justice Alito posed that very question to the attorneys opposing CSS. One responded that it was “really hard to imagine exactly how that would work,” but Alito shot back, “I don’t think it’s hard to imagine at all.” Ultimately, the attorney ran out the clock without explaining how such a scenario would differ from Philadelphia requiring CSS to betray its religious principles as a condition of continuing its work in the area of child welfare.

The second area of concern for pro-lifers is the Third Circuit’s declaration that the government has a compelling interest in “eliminating discrimination,” without making any distinction as to the type of “discrimination” at issue. Supreme Court precedents have identified a compelling interest (the highest level of government interest) in combating anti-discrimination laws and policies can be used to intimidate pro-lifers into silence, under threat of losing their jobs, contracts, professional licenses, etc.

Already, pro-abortion groups in the District of Columbia, New York State, and other locales have pushed legislation to prohibit employers from “discriminating” against employees, because of their or their dependents’ “reproductive health care decisions.” Simply as a matter of logic, treating people differently because of their “decisions” (and actions) is categorically unlike discrimination based on an immutable characteristic such as race or ethnicity. The Supreme Court needs to clarify that, at least as to federal constitutional law, the “compelling interest” in eradicating discrimination does not extend to any and every category that a state or city chooses to create.

The Supreme Court oral argument revealed another link between the

religious exercise and belief right, obviously, in the First Amendment, and the same-sex marriage right, as recognized in Obergefell….

And it seems like we and governments should be looking, where possible, for win-win answers, recognizing that neither side is going to win completely on these issues given the First Amendment on the one hand and given Obergefell on the other….  

[W]e need to find a balance that also respects religious beliefs. That was the promise explicitly written by the Court in Obergefell and in Masterpiece [Cake Shop], explicitly promised that respect for religious beliefs.

And what I fear here is that the absolutist and extreme position that you’re articulating would require us to go back on the promise of respect for religious believers.

In that plaintive statement, Justice Kavanaugh seemed to be channeling Justice Kennedy, for whom he clerked and whose seat on the court he now fills. Almost 30 years ago, Justice Kennedy believed that the Court had managed to broker a final compromise on an issue of great moral significance, only to learn, when it was too late, that he was the only justice thinking in those terms.

In Planned Parenthood v. Casey (1992), Kennedy, along with Justices O’Connor and Souter, authored a joint opinion that affirmed Roe v. Wade and created the “undue burden” standard. As Justice Kennedy later described it,

In [Casey], the Court reaffirmed its prior holding that the Constitution protects a woman’s right to terminate her pregnancy in its early stages. The majority opinion in Casey considered the woman’s liberty interest and

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put the full weight of our nation’s commitment to atone for centuries of maltreatment of racial minorities at the service of whatever newly-minted victim class the state decides to favor this decade.

This deliberate weaponizing of “discrimination” is a threat to pro-lifers, whose defense of human life is frequently mischaracterized as sexist by pro-aborts and their allies in the media. Should pro-abortion groups succeed in equating opposition to abortion with discrimination against women, the weight of anti-discrimination laws and policies can be used to intimidate pro-lifers into silence, under threat of losing their jobs, contracts, professional licenses, etc.

Fulton case and pro-life issues. Justice Kavanaugh used his time‘ with the attorney for Philadelphia to express, as he put it, “a bigger-picture thought”:

It seems like this case requires us to think about the balance between two very important rights recognized by this Court, the
principles of *stare decisis*, but took care to recognize the gravity of the personal decision: “[Abortion] is an act fraught with consequences for others: for the woman who must live with the implications of her decision; for the persons who perform and assist in the procedure; for the spouse, family, and society which must confront the knowledge that these procedures exist, procedures some deem nothing short of an act of violence against innocent human life; and, depending on one’s beliefs, for the life or potential life that is aborted.”

Eight years later, Justice Kennedy seemed genuinely shocked when, in *Hill v. Colorado*, the justices who voted to affirm *Roe in Casey* also voted to uphold Colorado’s bubble zone statute, which criminalized approaching women outside abortion clinics without their consent. He acknowledged that, in *Casey*, the Court had made it virtually impossible to legislate against abortion. Thus, “[t]he Court now strikes at the heart of the reasoned, careful balance I had believed was the basis for the opinion in *Casey*. The vital principle of the opinion was that in defined instances the woman’s decision whether to abort her child was in its essence a moral one, a choice the State could not dictate. Foreclosed from using the machinery of government to ban abortions in early term, those who oppose it are remitted to debate the issue in its moral dimensions. In a cruel way, the Court today turns its back on that balance. It in effect tells us the moral debate is not so important after all and can be conducted just as well through a bullhorn from an 8-foot distance as it can through a peaceful, face-to-face exchange of a leaflet.”

One has to wonder how Justice Kennedy got the idea that his fellow justices, particularly O’Connor and Souter, had agreed to that bargain. They signed onto an opinion stating their intent to “call the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution,” but nowhere did they express Kennedy’s view that this meant that the private sphere of persuasion against abortion was off-limits for government regulation and suppression.

Even if they had, why did Justice Kennedy think that the Supreme Court has the authority to fashion such a Great Compromise on the abortion issue? “The Imperial Judiciary lives,” remarked Justice Scalia in dissent, and quoted Abraham Lincoln’s First Inaugural Address: “The candid citizen must confess that if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, ... the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal.”

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HEK293 cells were created when Canadian biologist Frank Graham genetically modified human embryonic kidney (HEK) cells that were cultured by Dutch biologist Alex van de Eb. The cell lines used today were the result of Graham’s 293rd HEK experiment, hence the name HEK293. There is little known about the child from whom the cells derived, but according to Dr. van de Eb, the child was “completely normal” and the mother may have requested an abortion because she did not know who the father was. HEK293 cells have since been used for experimentation and research, including development and testing of vaccines.

There are over 35 different COVID-19 vaccines in development and testing across the globe, but only two of these are set for approval in the United States by the end of the year (2020). Both Pfizer and Moderna are American pharmaceutical companies who have applied for Emergency Use Authorization from the United States Food and Drug Administration (FDA). Neither Pfizer nor Moderna used fetal cells to develop their vaccines, but both report that fetal cell lines from HEK293 cell line may be used in their testing of the vaccines.

Because other vaccines have been developed using aborted fetal cells and because both Pfizer and Moderna may use fetal cell lines to test their vaccines, some pro-lifers may wish to opt out of the vaccine altogether. One reason for this is that using vaccines that involve exploiting unborn children at any stage of the vaccine’s development sends the wrong message about the so-called benefits of abortion to society. In other words, regardless of the positive ends medical researchers have arrived at, the means to those ends must be ethical. In the case of past vaccines that use cell lines originating from aborted babies, an evil process cannot result in a good outcome. Moreover, use of the vaccine may be interpreted as approval of the evil of abortion and may encourage future abortions.

Other pro-lifers weigh the scales a bit differently and consider several factors when deciding whether it is ethically or morally permissible to receive a vaccine that uses aborted fetal cells. Among these considerations are whether the cells are in the vaccine itself or used only in testing; whether other alternatives to the cell lines exist; whether there is a proportionally strong reason to use the vaccine; and whether use of the vaccine is likely to encourage further unethical practices. After weighing these considerations, bioethicists, including the National Catholic Bioethics Center, and some Catholic physicians have determined that it is ethically and morally permissible to take the vaccine.

Beyond concerns related directly to the use of aborted fetal cells, those charged with administering the vaccine may run into additional issues. Even though the vaccines are currently authorized
for emergency use, they are not yet FDA approved.

The difference here is notable: FDA approval acts as an official statement that the FDA determined the drug to be effective and safe; Emergency Use Authorization only indicates that the FDA believes the benefit of using an unapproved drug in an emergency situation outweighs the risks known from the limited available evidence. Nevertheless, distribution of the vaccines is already underway, with a focus on front-line health care workers and vulnerable individuals, such as nursing home residents.

But the vaccines haven’t been tested on the vulnerable elderly and we do not yet know the effects of the “Operation Warp Speed” vaccines on elderly people with underlying conditions. The very ailments that make nursing home residents susceptible to serious or deadly COVID infections may also put them at risk for negative side effects from the vaccine. Because there has not been testing for this group of people, some health care workers may find themselves in a moral dilemma as to whether they should administer the vaccine to nursing home residents.

Elderly individuals are not the only people that may have unknown side effects. Because of the quick pace under which these vaccines were developed and tested, long-term effects of the vaccine are unknown. As vaccine distribution ramps up in Europe, new information is trickling out about negative effects for individuals with certain medical histories. The Centers for Disease Control (CDC) advises people not to take the vaccine if they have had allergic reactions to the ingredients in the past. The CDC also requires vaccine providers to have “appropriate medications and equipment,” e.g., a “crash cart,” at all COVID vaccination sites.

Life Legal has received calls from health care workers who have been told they must take the vaccine or lose their jobs, as well as from individuals who are concerned that they may be forced to administer the vaccine, which they view as a violation of conscience.

While guidelines released by the United States Department of Health and Human Services (HHS) have authorized particular health care professionals to administer the vaccine, they have failed to give guidance to employers about respecting the ethical decisions of health care workers who wish to not participate in vaccine administration. With this gap in official guidance, it will be increasingly important for such health care workers to understand their perspectives and their rights at work in order to advocate for themselves if they face pressure from employers.

Physicians in the U.S. can refer to both the American Medical Association’s tradition and Code of Ethics which give them freedom to object to providing certain treatments based on their conscience. However, this tradition and Code does not necessarily extend to other health care professionals—such as pharmacists or nurses—who may be expected to administer the vaccine. Individuals in these categories, therefore, may face a conflict with their employer if they wish to forgo the vaccine or reject participation in administering the vaccine.

Employees also have conscience protections under state and federal law. Title VII of the Civil Rights Act (the Equal Employment Opportunity Act) protects employees from harassment or other discrimination by employers based on their religious beliefs. Pro-lifers whose moral beliefs about the vaccines are directly related to their religious convictions may be able to rely on Title VII if they choose to opt out of the vaccine.

In a case involving the flu vaccine, the U.S. Equal Employment Opportunity Commission has ruled that “Title VII requires employers to make a real effort to provide reasonable religious accommodations to employees who notify the company that their sincerely held religious beliefs conflict with a company’s employment policy.” Pro-lifers whose objections are based in their religious beliefs may not have as clear a case if they choose not to receive the vaccination. Still, healthcare workers who refuse to receive or administer the vaccine may be able to turn to their state law, as many states have conscience clauses in their laws that apply not only to doctors, but also to other health care workers. Some of these clauses have specific limitations, and not all state laws will apply to vaccinations, so it is important for health care workers to know the law in their states.

If you are an employee interested in conscientious objection to receiving or administering the COVID-19 vaccines, you can take the following steps to protect your rights.

1. Document your Objections and all Communications.

   Keep track of any work assignments that violate your beliefs and keep copies of any correspondence with your employer. If your employer talks with you, make sure to follow up with a written summary of your conversation.

2. Request Accommodation.

   In writing, ask to be excused from the job duty or duties that violate your beliefs. Describe your belief and what you need as far as accommodation. Be respectful of your employers’ legitimate business concerns—try to find a way to do your job well without violating your beliefs.

3. Contact Life Legal.

   You can reach out to Life Legal Defense Foundation for any questions you may have regarding your pro-life beliefs. If your employer chooses not to accommodate your belief, you should seek legal advice as to what next steps you can take. Call (707) 224-6675 or email info@lldf.org.

[The author has provided web addresses to further document individual points in this article. These web addresses are lengthy to enter in your browser and are most easily accessed/ utilized by the reader by clicking hyperlinks as found in the LLDF web page presenting content of Lifeline online: https://tinyurl.com/LLDF-Lifeline (https://lifelegaldefensefoundation.org/resources/lifeline-newsletter/)]
PATIENT VISITATION DURING COVID

Alexandra Snyder

In the wake of COVID-19, hospitals have enacted policies severely restricting patients from receiving visitors in order to prevent the spread of the virus. While limiting patient exposure to a potentially deadly virus is important, prohibiting visitation without providing accommodations for vulnerable patients has significant legal and ethical implications.

Draconian COVID-19 restrictions on hospital visitation not only deprive patients of time spent with loved ones; they also deprive patients of essential advocacy. Family members and friends often serve as zealous patient advocates for their loved ones.

In-person visits are especially critical for patients who are incapacitated or otherwise not able to speak. It is difficult for advocates to discern a patient's condition and comfort level without spending time with them in the hospital. Moreover, patient advocates serve to facilitate communication between patients and health care providers to ensure that patients' needs are addressed. For this reason, the Centers for Medicare & Medicaid Services (CMS) has issued guidance urging hospitals to allow in-person visits for particularly vulnerable patients, including those with chronic or prolonged illnesses, patients with cognitive or developmental disabilities, and patients who are receiving end of life care.

The American Bar Association reports that many health care providers hold negative views of disabled patients that compromise their care and treatment. Hospital visitation and patient advocacy are essential to protect patients from being denied medical care because of this pervasive bias.

Prohibiting visitation for vulnerable patients is tantamount to denying access to medical care and services. Federal laws, including the Americans with Disabilities Act, Section 1557 of the Affordable Care Act, and Section 504 of the Rehabilitation Act prohibit discrimination in federally funded health care settings, yet many hospitals have refused to accommodate the need for disabled and other vulnerable patients to have a patient advocate who can communicate their health care needs and ensure that they receive the same quality of care as other patients. These laws remain in full effect during COVID-19.

The demands placed on our health care system because of COVID are exposing a shift in our culture that values death over the protection of life. This can be seen in the use of triage provisions, in some cases not to assess the distribution of scarce resources, but to justify the withdrawal of medical care for critically ill patients. We do not deny the very real pressures on hospital staff in communities overwhelmed by COVID cases, but we have seen hospital administrators use triage as a rationale for clearing ICU beds even when staff admits they have capacity for additional patients. In Los Angeles County, ambulance drivers have been instructed not to transport patients with a poor chance of survival, regardless of the actual availability of beds at local hospitals.

Tragically, many health care providers do not believe that human beings possess inherent dignity. They do not believe that we are endowed by our Creator with certain inalienable rights, preeminent among those being the right to life. Instead, they fight for the “right to die” and even the right to kill others who they perceive to be a drain on the health care system and whose capacity to contribute something of material value is in some way diminished.

So how can you protect yourself and your loved ones to ensure that you receive the treatment you need?

You need a written document that expresses your wishes in the event you...
should become incapacitated. This is called an advance health care directive. Advance directives typically have four components:

1. Name a designated health care agent or proxy whom you authorize to make health care decisions on your behalf.

You will need to discuss your wishes in great detail with this person. Ideally, this individual will share your beliefs—but he or she should at least be very familiar with the specifics of the type of care you want to receive.

2. Specify what type of care you wish to receive if you become incapacitated through an injury or illness.

We encourage people to be very specific about the care you want in the event you can no longer make your own health care decisions. Please be aware that the default position of many health care providers is to withdraw or withhold care unless a patient has expressly stated that they wish to receive long-term treatment, including ventilator support and artificial nutrition and hydration.

3. Identify the extent of pain relief you would like to receive and whether you authorize pain relief drugs that may hasten your death.

Certain pain relievers and anti-anxiety medications can suppress breathing and cause premature death. This is known as “terminal sedation.” Often these drugs are used to mitigate pain at the very end of life, but we have seen cases where patients are heavily sedated even when they have not requested pain relief.

4. Provide instructions regarding the disposition of your organs and other body parts upon your death.

If you are a registered organ donor—through a check box on your driver’s license application or renewal—please familiarize yourself with the details of organ donation. Vital organs are typically harvested from patients who have been declared “brain dead,” which means they have suffered a profound brain injury but their hearts are still beating. Many people do not believe death can be determined solely on the basis of neurological criteria.

You can leave the decision regarding organ donation to your health care proxy to be made in real time rather than registering as an organ donor in advance. If you have changed your mind about being a registered organ donor, please be aware that you have to take steps to remove your name from the registry. These steps vary from state to state.

Finally, your advance directive must be properly signed, and in some states witnessed and notarized, in order to be legally valid. Please familiarize yourself with the signature requirements in your state. Provide your designated health care agent and your doctor with a signed and dated copy of your advance directive.

As soon your advance health care directive is duly signed and/or notarized, it is a legally binding document. If you change your mind about your designated health care agent or health care wishes, we recommend that you execute a new advance directive and destroy all copies of the previous document.

Life Legal provides additional guidance on advance directives here: https://tinyurl.com/LLDF-Adv-Directive

No one wants to believe that they could become incapacitated—even temporarily. But we urge you to take action to protect yourself and your loved ones.

(The author has provided web addresses to further document individual points in this article. These web addresses are lengthy to enter in your browser and are most easily accessed/utilized by the reader by clicking hyperlinks as found in the LLDF web page presenting content of Lifeline online: https://tinyurl.com/LLDF-LifeLine (https://lldf.org/resources/lifeline-newsletter/))
CONTINUED FROM PAGE 3

If Justice Kavanaugh was correct in his remarks during the *Fulton* argument, then Justice Kennedy entered into this same sort of unilateral compact when casting the deciding vote and writing the majority opinion in *Obergefell v. Hodges*, the 2015 case finding a constitutional right to same-sex marriage. He stripped states of their ability to define marriage as being between a man and a woman, but thought he had a deal—a “promise”—that the religious beliefs of individual citizens and private entities would be respected.

But the only legally binding precedent from the *Obergefell* decision is the holding that states cannot prohibit same-sex marriage; the extras about religious freedom are dicta, which the justices, lower courts, liberal states, cities, universities, medical schools, credentialing agencies, etc. are free to disregard. And clearly they are intent on doing so.

Several of the other justices, including Justice Breyer, expressed similar discontent with Philadelphia unnecessarily creating this clash between the free exercise of religion—a right explicitly found in the Constitution—and judicially-created rights against various types of “discrimination.” One can only hope that the justices have learned from Justice Kennedy’s mistakes that there is no dealing with the Devil.

1 Since last spring, Supreme Court arguments have been held remotely. Chief Justice Roberts’ practice is to allow each side’s attorney to make a brief opening statement, and then call the roll of the justices, allowing each about two minutes to ask questions of the attorney.