



AMICUS CURIAE

CASE NO. 93-22-IN
PUBLIC ACTION OF UNCONSTITUTIONALITY

Presented by

Notre Dame Law School – Global Human Rights Clinic

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This *Amicus Curiae* brief is submitted to this Honorable Constitutional Court by the undersigned, to provide assistance and information in the just resolution of the dispute pending before this Court. submitted to you, and for purposes of clarity, are structured as follows:

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I. PRESENTATION

The *Notre Dame Law School - Global Human Rights Clinic* (hereinafter, "GHRC"), is the experiential learning unit of the University of Notre Dame Law School's Human Rights Program that is open to all students (Juris Doctor, LL.M. and JSD). The GHRC builds on the Human Rights Program's half-century-long track record of experience in training human rights lawyers worldwide, while building on our established pedagogy in Natural Law, Jurisprudence, and International Human Rights Law.

The GHRC engages in three core functions essential to the professional training of our students: legal representation, education, and advocacy, in collaboration with our alumni network and partner organizations around the world, and provides Notre Dame Law students with: actual advocacy experiences in representing individuals, organizations, and groups fighting human rights violations around the world; human rights training and education with national courts and judiciaries, international organizations, and Human Rights Program alumni partners; and the opportunity to help promote human rights legislative implementation and human rights-driven legal reform in states around the world.

II. STATEMENT OF THE OBJECT OF THE *AMICUS CURIAE*.

The purpose of this presentation is to enable this Honorable Court when

hearing CAUSE NO. 93-22-IN, PUBLIC ACTION OF UNCONSTITUTIONALITY, to adequately weigh the legitimate exercise of the rights at stake, allowing not only natural persons but also legal persons, especially religious denominations and their dependent institutions, to exercise their religious freedom, allowing health services dependent on or otherwise affiliated with such denominational organizations, to refrain from performing abortions based on their mission and vision, and to prohibit the Republic of Ecuador from forcing them to do so.

In this line, the *Amicus Brief* seeks to illustrate the context of the norms of international human rights law applicable to the State of Ecuador, which not only establish direct and immediate obligations at the international level, but which, in turn, constitute norms applicable to the domestic legal system under the provisions of Articles 417 and 426 of the Constitution of Ecuador. In this sense, discrimination on religious grounds and the violation of the collective exercise of religious freedom, together with the coercive imposition of obligations that go against the mission and vision of religious organizations, is prohibited both *de jure* and *de facto*.

Likewise, we, the undersigned, seek to expose to this Honorable Court the way and manner in which the Constitution and the Supreme Court of the United States of America have harmonized the separation of church and state, the duty of neutrality, and the effective guarantee of religious freedom on the part of legal persons and that these are not forced by the public authorities to carry out activities, through their other institutions, that are directly contrary to their ideology, mission, vision, and in short, to their religious beliefs. We, the undersigned, believe that the arguments about to be developed may be helpful as a subsidiary interpretative criterion to the norms of international human rights law applicable to the case.

In this sense, it is worth clarifying that this presentation does not seek to take charge of the right to institutional conscientious objection that could be understood as incorporated in Article 66.12 of the Political Constitution of Ecuador, but rather the collective exercise of religious freedom and its prohibition of coercion, by Article 66.8 of the same Ecuadorian Constitution, which is added to the provisions expressly enshrined in international human rights treaties, and which, by provision of the Constitution itself, are an integral part of it and are directly applicable in the constitutional controversy being heard in this venue.

By the preceding, this presentation seeks to account for cases in which legal entities that invoke religious freedom collectively are not born as a result of the exercise of individual rights but rather collectively, as is the case of religious denominations and their dependent institutions, marking a difference between

two different concepts, (i) the collective exercise by religious denominations, concerning (ii) institutional conscientious objection exercised by a legal entity that arises to the life of the law by the actions of natural persons.

Finally, this presentation seeks to develop the particular case of the Catholic Church and its special regulation through the *Modus Vivendi*, which is the instrument that grants legal personality not only to the Catholic Church but to **all its organizations and institutions, including its health services. This legal personality** arises from an international agreement between the State of Ecuador and the Holy See and not through exercising the "right of association" of natural persons. In this sense, the legal persons dependent on the Catholic Church, that is, the organizations and institutions of the Church, cannot carry out any action independently and separately from the intention and direction of the Catholic Church itself, so it is possible to conclude that the obligation to perform abortions in the health institutions of its dependence, directly affects the collective exercise of religious freedom contained in Article 66.8 of the Political Constitution of Ecuador and in the international human rights treaties in force, which are part of the constitutional block according to articles 417 and 426 of the Ecuadorian Constitution itself.

III. MAIN SOURCES OF INTERNATIONAL HUMAN RIGHTS LAW THAT ESTABLISH OBLIGATIONS PROHIBITING DISCRIMINATION ON RELIGIOUS GROUNDS AND THE COLLECTIVE EXERCISE OF RELIGIOUS FREEDOM CURRENTLY BINDING ON ECUADOR.

Individual and collective religious freedom and non-discrimination on religious grounds are expressly prohibited in the vast majority of international human rights treaties, whether regional or universal. Many of them, in turn, have been ratified by Ecuador and therefore impose international obligations of direct and immediate effect, i.e., not subject to progressive implementation. But, in addition, and applying articles 417¹ and 426² of the Constitution of Ecuador, this Honorable Court has held that human rights contained in international treaties are part of the *block of constitutionality*,³ and therefore, represent an obligation not only internationally, but also domestically.

Having said the above, it is relevant to give an account of the various binding sources of the Ecuadorian State on the matter, as well as those that, without being binding, may be considered as subsidiary sources for the correct and adequate interpretation of Ecuadorian domestic law.

Among the international human rights treaties ratified by Ecuador, whose norms guarantee the collective exercise of religious freedom and, in turn, prohibit discrimination on religious grounds, we can point out the following:

¹ Political Constitution of Ecuador, Article 417, "International treaties ratified by Ecuador shall be subject to the provisions of the Constitution. **In the case of treaties and other international human rights instruments, the pro-human being, non-restriction of rights, direct applicability and open clause principles established in the Constitution shall apply.**" (emphasis added)

² Political Constitution of Ecuador, Article 426, "The rights enshrined in the Constitution and international human rights instruments shall be **immediately complied with and applied** (...)" (emphasis added).

³ Constitutional Court of Ecuador Judgment No. 1 1 - 1 8-CN/19 Paragraph 141, "*By the constitutional block, the rights enumerated in the Constitution are not exhaustive and their recognition is enunciative. **The rights that do not appear in the Constitution are incorporated into the text in two ways: by reference to international instruments** or by express recognition of unnamed rights, among the latter are "other rights derived from the dignity of individuals, communities, peoples and nationalities, which are necessary for their full development" (Article 1 1 .7 of the Constitution) (...) They are sources of law. The sources of law include **international human rights conventions, human rights declarations, the jurisprudence of the Inter-American Court, the general observations of the human rights committees, the advisory opinions of the Inter-American Court, the reports of the thematic rapporteurs and working groups of the United Nations, the recommendations of the United Nations High Commissioner for Human Rights, among others**" (emphasis added).*"³ (emphasis added)

1) Universal Declaration of Human Rights, article 7, in relation to article 18.

Although the Universal Declaration of Human Rights does not constitute a legally binding treaty per se, this Honorable Constitutional Court has recognized its incorporation to the block of constitutionality,⁴ and therefore it is part of Ecuadorian domestic law.

Along these lines, Article 7 of the Declaration states, "*All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.*"⁵ Clearly, in speaking of all discrimination, the prohibition itself includes discrimination on religious grounds. This is further supported by Article 2 of the Declaration, which itself explicitly prohibits distinctions in the enjoyment of rights, on the basis of religion: "*Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, **religion**, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.*"⁶ (Emphasis added.)

Next, Article 18 of the Constitution states that "*Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.*"⁷ (emphasis added). Thus, as it is possible to appreciate, the Universal Declaration already frames a right to manifest one's religion not only individually but collectively, opening the way to the necessary extension of religious expression through legal entities, especially religious denominations.

⁴ Constitutional Court of Ecuador, Resolution 0043-07-TC, Official Gazette Supplement 286, 3-III-2008. "In this sense, the provisions of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights of 1966 and particularly the provisions of the American Convention on Human Rights are part of the constitutional order in force in Ecuador with a normative hierarchy superior to the rest of the legal system".

⁵ UN General Assembly, *Universal Declaration of Human Rights*, 217 A (III), 10 December 1948, Article 7.

⁶ *Id.*, article 2.

⁷ *Id.*, article 18.

2) International Covenant on Civil and Political Rights, Articles 4 and 18

In similar terms to the provisions of the Universal Declaration of Human Rights, Articles 4⁸ and 18⁹ of the International Covenant on Civil and Political Rights expressly prohibit discrimination on the grounds of religion, guaranteeing freedom of religious expression in a collective manner, in addition to the prohibition of coercion that seeks to undermine this freedom. As emphasized by the United Nations Human Rights Committee's General Comment No. 22, para. 4 (on Article 18 rights to freedom of thought, conscience and religion), "the freedom to manifest religion or belief may be exercised either individually **or in community with others** and in public or private."¹⁰ (Emphasis added.)

In this regard, it is interesting to note that the authorization to the state parties, contained in Article 18.3 of the Covenant on Civil and Political Rights, refers exclusively to limitations established by law that are *necessary* to guarantee other rights. However, the text of the treaty speaks of *limitations*, preceded by the word "only", so that the Covenant implies that **religious freedom is not susceptible to absolute derogation or deprivation of its exercise**, even when other rights are at stake, in line with the provisions of Article 5 of the International Covenant on Civil and Political Rights itself, which states that "*Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized in the present Covenant or at their limitation to a greater extent*

⁸ UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, United Nations, Treaty Series, vol. 993, p. 3, 16 December 1966. Article 4 states "In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such provisions are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, color, sex, language, religion or social origin"

⁹ *Id.*, article 18. "Everyone shall have the right to freedom of thought, conscience and religion; this right shall include freedom to have or to adopt a religion or belief of his choice, and **freedom, either alone or in community with others and in public or private, to manifest his religion or belief in** worship, observance, practice and teaching. **No one shall be subject to coercion which would impair his freedom** to have or to adopt the religion or belief of his choice. Freedom to manifest one's religion or beliefs shall be subject only to such **limitations as** are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions" (emphasis added).

¹⁰ UN Human Rights Committee (HRC), CCPR General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion), CCPR/C/21/Rev.1/Add.4, 30 July 1993, parr. 4.

than is provided for therein."¹¹ The United Nations Human Rights Committee likewise affirms this absolute prohibition in interpreting Article 18, stating: "Article 18 distinguishes the freedom of thought, conscience, religion or belief from the freedom to manifest religion or belief. It does not permit any limitations whatsoever on the freedom of thought and conscience or on the freedom to have or adopt a religion or belief of one's choice. **These freedoms are protected unconditionally, as is the right of everyone to hold opinions without interference in Article 19(1).** In accordance with articles 18(2) and 17, no one can be compelled to reveal his thoughts or adherence to a religion or belief."¹² (Emphasis added.) Any State requirement specifically compelling any person to perform any acts in open violation of the freedom of religion or freedom to manifest one's religion would violate the State's duty to unconditionally protect these freedoms.

3) American Convention on Human Rights of 1969, Article 12.

The American Convention on Human Rights enshrines religious freedom in Article 12, which states:

- "1. Everyone has the right to freedom of conscience and of religion. This right includes freedom to maintain or to change one's religion or beliefs, and **freedom to profess or disseminate one's religion** or beliefs, either individually or **together** with others, **in public** or in private.
2. No **one shall be subject to restrictions that might impair his freedom** to maintain or to change his religion or beliefs.
3. Freedom to manifest one's religion and beliefs is subject **only to such limitations** as are prescribed by law and are necessary to protect public safety, order, health, or morals or the rights or freedoms of others.
4. Parents, and where appropriate guardians, have the right to have their children or wards receive such religious and moral education as is in accord with their own convictions."¹³ (emphasis added)

As can be seen, the language used by the American Convention is practically identical to that of the International Covenant on Civil and Political Rights, guaranteeing freedom of religious expression in a collective and not only individual manner, in addition to the prohibition of restrictive measures that undermine this freedom.

In this sense, we find the same authorization to the States Parties, contained in Article 12.3 of the American Convention, which refers exclusively to **limitations** established by law and which are necessary to guarantee other rights, but which,

¹¹ UN General Assembly, International Covenant on Economic, Social and Cultural Rights, United Nations, Treaty Series, vol. 993, p. 3, 16 December 1966. Article 5.

¹² UN Human Rights Committee (HRC), CCPR General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion), CCPR/C/21/Rev.1/Add.4, 30 July 1993, par. 3.

¹³ *Organization of American States (OAS), American Convention on Human Rights, "Pact of San Jose", Costa Rica, November 22, 1969, Article 12.*

as we have already pointed out with respect to the Covenant on Civil and Political Rights, prevent **religious freedom** from **being susceptible to absolute suspension or deprivation in its exercise**, even when other rights are at stake. This is even clearer in the American Convention, since Article 29 paragraphs a and b provide that "No provision of this Convention may be interpreted as meaning that: (a) permitting any State Party, group or person to suppress the enjoyment and exercise of the rights and freedoms recognized in the Convention or to limit them to a greater extent than is provided for herein; (b) restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party;".¹⁴

4) Religion as a prohibited basis of discrimination in the rest of Ecuador's international human rights treaty obligations

Ecuador is a State Party to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (signed on 4 February 1985, ratified on 30 March 1988). Article 1(1) of this Convention defines "torture" to include "*any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as... intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity...*"¹⁵ (Emphasis added.) Persons that would be forced to violate their religious beliefs by being required to perform abortions on pain of State penalty or sanction, would be subjected to such mental suffering (and potential, if not actual, deprivations of liberty or property through any punishment inflicted for non-compliance with the State requirement to all health services to perform abortions), due to a discriminatory reason inflicted at the instigation of the Republic of Ecuador.

Ecuador is also a State Party to the International Covenant on Economic, Social and Cultural Rights (signed on 29 September 1967, ratified on 6 March 1969). Article 2(2) is the non-discrimination clause of this treaty which also prohibits discrimination on the enjoyment of economic, social and cultural rights on the basis of religion. The United Nations Committee on Economic, Social and Cultural Rights General Comment No. 14, para. 3 stresses that the right to health "*is closely related to and dependent upon the realization of other human rights...including the rights to...human dignity, life, non-discrimination, equality...these and other rights and freedoms address integral components of the right to health.*"¹⁶ Most importantly, the

¹⁴ *Id.*, Article 29.

¹⁵

¹⁶ UN Economic and Social Council, *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)*, E/C.12/2000/4, par. 3.

Committee also stressed that health facilities, goods, and services “*must be respectful of medical ethics and culturally appropriate, i.e. respectful of the culture of individuals, minorities, peoples, and communities...*”¹⁷ To this end, the Republic of Ecuador’s imposition of a requirement for religious institutions’ health services to provide abortions does not in any way respect the culture of individuals and peoples that adhere to their religious beliefs proscribing the taking of unborn human life through abortion. This State requirement also is incompatible with the non-derogable freedom of religion and freedom to manifest religion under Article 18 of the International Covenant on Civil and Political Rights, and thus is a limitation that is **NOT in accordance with law**, which, as required by the United Nations Committee on Economic, Social and Cultural Rights, “*includ[es] international human rights standards.*”¹⁸

IV. COMPARATIVE CONSTITUTIONAL PRACTICE AND THE EXERCISE OF RELIGIOUS FREEDOM FOR LEGAL ENTITIES: THE CASE OF THE UNITED STATES OF AMERICA

The U.S. Supreme Court declared, in *Burwell v. Hobby Lobby Inc.*,¹⁹ that commercial enterprises have standing to claim the right to religious freedom. In doing so, the Court clarified the correct interpretation of the *Religious Freedom Restoration Act* (RFRA).

Hobby Lobby sought an exception to the obligation to pay its employees for contraceptives that can have abortifacient effects. The origin of these claims can be traced back to the Federal Government's decision to include emergency contraception among the basic health benefits to be covered by health insurance.²⁰ Since it is usually the companies or corporations that ensure their employees' health, this obligation falls directly on them.

Hobby Lobby Stores Inc. is a family-owned company of stores operated by the evangelical, deeply religious Green family, who conduct their business in

¹⁷ *Id.*, par 12(c).

¹⁸ *Id.*, par 28, interpreting the general limitations clause under Article 5 of the International Covenant on Economic, Social and Cultural Rights.]

¹⁹ *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

²⁰ The 2010 law, called the *Affordable Care Act* (ACA), delegated to the U.S. Department of Health and Human Services the task of specifying the basic preventive women's health care that should be covered by health insurance. The Department gave the task to a subordinate agency, the *Health Resources and Services Administration* (HRSA), which suggested including all contraceptives approved by the *Food and Drug Administration* (FDA). The Ministry of Health endorsed the suggestion and implemented it through an administrative act known as the *HHS Mandate*. The text at <https://www.federalregister.gov/articles/2013/07/02/2013-15866/coverage-of-certain-preventive-services-under-the-affordable-care-act/>

accordance with their religious convictions. For example, all *Hobby Lobby* stores close on Sundays because that is the Lord's Day; the stores employ three ministers to guide to the spiritual needs of its employees; the company has donated large sums to faith-based educational initiatives; it frequently funds newspaper inserts glorifying God.²¹ Its website states that it is "by God's grace and providence that Hobby Lobby has stood the test of time" and that the company is committed to "honoring the Lord in all we do, managing in a manner consistent with the teachings of the Bible."²²

Emergency contraception is contrary to the religious beliefs of the Green family. To the extent that such devices can act by preventing the nesting of the zygote, they are further understood to be abortifacients. And abortion is contrary to their religious belief that life begins at conception.²³ Next, the obligation imposed by the *HHS Mandate* to fund potentially abortifacient contraceptives for its employees prevents them from freely practicing their religion and living in accordance with their conscience. For the Greens, disobeying the law was an unfeasible possibility since the penalty for non-compliance was such that, in one year, *Hobby Lobby* would have had to pay nearly \$475 million in fines (\$1.3 million a day).²⁴

Faced with the alternative of violating its religious beliefs or paying fines that would have bankrupted the company, *Hobby Lobby*, as a legal entity, decided to sue for an exception to the *HHS Mandate*, invoking the *Religious Freedom Restoration Act*, and the *Free Exercise Clause* contained in the First Amendment to the U.S. Constitution, which provides that *Congress shall make no law prohibiting the exercise of religion.*²⁵

For the State of Oklahoma district court that first heard the case brought by *Hobby Lobby*, it was not novel that religious freedom was invoked to obtain an exception to the rule of general application: this had long been a precedent.²⁶ Nor was it novel that the exception was requested by a legal person because there was also precedent in the matter.²⁷ What was new was the fact that the plaintiff was a

²¹ *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014), p. 14.

²² See, http://www.hobbylobby.com/our_company/

²³ *Burwell v. Hobby Lobby*, p. 14.

²⁴ *Burwell v. Hobby Lobby*, p. 32.

²⁵ United States Federal Constitution, First Amendment, "*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.*" (emphasis added)

²⁶ *Sherbert v. Verner*, 374 U.S. 398 (1963) opened the line of religious exemptions that, after the *Smith* decision, RFRA continued.

²⁷ *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993).

commercial enterprise.²⁸

The district court dismissing *Hobby Lobby's* suit said, "[Commercial enterprises] do not pray, may not praise God, may not observe the sacraments, nor, in short, perform any other religiously inspired action independently and separately of the intent and direction of individuals acting on their behalf."²⁹ In other words, the practice of religion is exclusive to human beings. Therefore, legal persons, who are not human beings but artificial ones, are essentially prevented from practicing religion.³⁰ And if they cannot practice religion, it is nonsense to attribute religious freedom to them. This position emphasizes the fictitious character of legal persons and, consequently, their radical dependence on the law to recognize their rights.³¹

In this sense, the district court's approach was curious, since there were already cases in which the U.S. Supreme Court had recognized religious corporations, which are legal persons, the right to religious freedom.³² In this sense, the fact that churches or religious organizations, as legal persons, cannot pray or praise God, has not hindered the recognition of their legitimacy to invoke the constitutional and legal protection of religious freedom under the First Amendment.³³

Finally, the Supreme Court of the United States, hearing the case, decided that commercial enterprises, at least those that can be qualified as *close corporations* or limited liability companies, were entitled to the right to religious freedom and, therefore, deserving of the protection that RFRA assures to all persons.³⁴ This decision rests on two premises: (i) the corporate form does not inhibit the associates' right to religious freedom, and (ii) commercial activity is not incompatible with religion.

In the first place, the Supreme Court recognizes that the legal person is a subject of law distinct from the natural persons related to it. Still, the distinction should not be understood as a separation. In short, says the Court, "*When the law or the Constitution protects the rights of legal persons, they do so to protect the rights of*

²⁸ SILVA IRARRAZAVAL, Luis Alejandro. LUCRO, EMPRESA Y RELIGIÓN: EL CASO HOBBY LOBBY. *Rev. chil. derecho* [online]. 2016, vol.43, n.1

²⁹ *Id.* p. 44

³⁰ *Id.* p. 45

³¹ *Id.* p. 45

³² It is the line of precedent established by *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993), *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006), and *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, 565 U.S. (2012).

³³ SILVA IRARRAZAVAL, Luis Alejandro. *Ob. Cit.* p. 45.

³⁴ *Burwell v. Hobby Lobby*, p. 49.

*the natural persons related to them.*³⁵ Therefore, invoking the distinction between the corporation and its owners to explain the limitation of the latter's rights ignores the basic foundation of all rights enjoyed by corporations (or any other organization).³⁶ Ultimately, *"a corporation is simply a form of organization that human beings use to achieve certain ends."*³⁷ It would be absurd, then, that by associating human beings, they would see their rights limited, and perhaps precisely those rights for whose fullest satisfaction they associated.³⁸

³⁵ *Burwell v. Hobby Lobby*, p. 18.

³⁶ SILVA IRARRAZAVAL, Luis Alejandro. Ob. Cit. p. 54.

³⁷ *Burwell v. Hobby Lobby*, p. 18.

³⁸ SILVA IRARRAZAVAL, Luis Alejandro. Ob. Cit. p. 54.

V. APPLICATION TO THE SPECIFIC CASE OF THE STANDARDS AND CRITERIA SET FORTH ABOVE

- 1) **The State of Ecuador by preventing the collective exercise of religion through the obligation to perform abortions, which violates the provisions of International Human Rights Law.**

A. The obligation to perform abortions imposed on institutions dependent on religious denominations is contrary to international human rights law in an intersectional and simultaneous manner. It impacts several of Ecuador's treaty obligations, which are of direct and immediate effect.

As noted in this presentation, non-discrimination on religious grounds is expressly prohibited in the vast majority of international human rights treaties, whether regional or universal, as discussed in detail.

Also, many of these treaties have been ratified by Ecuador, and therefore impose international obligations of direct and immediate effect, i.e., not subject to progressive implementation. But in what is relevant, and in the application of articles 417 and 426 of the Political Constitution of Ecuador, this Honorable Court has held that the human rights contained in international treaties are part of the block of constitutionality and, therefore, represent an obligation not only internationally, but also domestically.

Thus, the violation of the collective exercise of religious freedom by health institutions linked to religious corporations constitutes a manifest violation of the provisions contained in:

- Universal Declaration of Human Rights, Article 7 (prohibition of non-discrimination, including cases based on religion) in conjunction with Article 18 (freedom of religion and collective exercise).
- International Covenant on Civil and Political Rights, Article 4 (non-discrimination, including cases based on religion) in conjunction with Article 18 (freedom of religion collectively, prohibition of coercion).
- American Convention on Human Rights, Articles 18 and 29.

The above provisions are all operative obligations of Ecuador. They are of immediate effect, without prejudice to other applicable provisions, and are

intended to protect and guarantee religious freedom, without using the rules of church-state separation to violate the right to equality, whether *de jure* or *de facto*.

It is clear from the facts that we are dealing with the exercise of religious freedom by legal entities, i.e., religious denominations, which, in turn, to fulfill their mission and vision, create other legal entities to provide health services, but always in compliance with their religious vision and mission.

Thus, in this opportunity, **we are NOT invoking the right to institutional conscientious objection that could be understood as incorporated in article 66.12 of the Constitution of Ecuador**, a matter that has a different treatment. Instead, we are invoking the **collective exercise of religious freedom and its prohibition of coercion**, in accordance with article 66.8 of the same Ecuadorian Constitution, which is added to the provisions expressly enshrined in two international treaties on Human Rights and which, by provision of the Constitution itself, are an integral part of it and are directly applicable in the constitutional controversy ventilated in this venue.

B. The actions of the State of Ecuador deviate from comparative constitutional practice and violate the exercise of religious freedom by religious legal persons.

As noted in the U.S. context, discrimination on religious grounds, under the guise of a defense of church-state separation, constitutes **non-neutral treatment against a religious organization, setting additional requirements that other organizations do not have to meet.**

In addition, as the U.S. Supreme Court decided in *Carson* and *Kennedy*, it is not possible to infringe on religious freedom merely because of a suspicion of a potential violation of the principle of separation of church and state, on the understanding that "*In no world can a governmental entity's concerns about phantom constitutional violations justify actual violations of an individual's First Amendment rights.*"³⁹

Finally, as stated in *Hobby Lobby*, "*When the law or the Constitution protects the rights of legal persons, it does so to protect the rights of natural persons linked to them.*"⁴⁰, it is impossible to separate legal persons from natural persons. As we will see in

³⁹ *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2432 (2022)

⁴⁰ *Burwell v. Hobby Lobby*, p. 18.

the following paragraph, the same argument applies to legal persons dependent on religious denominations.

C. The Health Services, as institutions dependent on religious denominations, have the collective right to exercise religious freedom in accordance with the Constitution of Ecuador.

There are cases in which legal entities that invoke religious freedom in a collective manner have not been born as a result of the exercise of individual rights, but instead of collective rights whose holders are established institutions.

This is the case of religious denominations and their dependent institutions, marking a difference between two different concepts, (i) the collective exercise of religious freedom by religious denominations, and (ii) institutional conscientious objection exercised by a legal person that emerges into the life of the law due to the actions of natural persons.

In the particular case of the Catholic Church, the regulations governing the relationship between the State of Ecuador and the Church is *Modus Vivendi*, signed in 1937. This document, and not the voluntary act of a mere natural person, grants the Catholic Church (as a legal person) the free exercise of the activities that correspond to it within its own sphere.

In addition, *Modus Vivendi* is a document by which Ecuador **grants legal personality to all Catholic organizations and institutions**. Indeed, Article 5 states in pertinent part that "*The Dioceses and other Catholic organizations and institutions in Ecuador have the character of legal persons filling the formalities indicated in the first, second, third, fourth and fifth articles of Supreme Decree No. 212, (Published in Official Register No. 547 of July 23, 1937) issued on July 21 of the present year*".⁴¹

In this sense, although in practice it is clear that the Catholic Church **can only act as a legal person**, and it does not arise from the exercise of natural persons to organize themselves as such, in the case of Ecuador, this has express legal support, since the granting of legal personality to the Catholic Church and **all its organizations and institutions, including its health services**, arises from an international agreement between the State of Ecuador and the Holy See, and **not from the exercise of the "right of association" of natural persons**.

⁴¹ *Modus Vivendi*, article 5, Supreme Decree 46, Official Gazette 30 of September 14, 1937.

In this sense, the legal persons dependent on the Catholic Church, that is, the organizations and institutions of the Church, cannot carry out any action independently and separately from the intention and direction of the Catholic Church itself, so that the obligation to perform abortions in the health institutions of its dependence, directly affects the collective exercise of religious freedom contained in Article 66.8 of the Political Constitution of Ecuador and in the international human rights treaties in force, which are part of the constitutional block according to articles 417 and 426 of the Ecuadorian Constitution itself.

VI. CONCLUSIONS

As it has been possible to appreciate by this Honorable Constitutional Court, the participants have provided the context of the norms of international human rights law applicable to the State of Ecuador, which not only establish direct and immediate obligations at the international level, but which, in turn, constitute norms applicable to the internal order by the provisions of Articles 417 and 426 of the Constitution of Ecuador. In this sense, it has become clear that discrimination on religious grounds and the violation of the collective exercise of religious freedom, together with the coercive imposition of obligations that go against the mission and vision of religious organizations, is prohibited both *de jure* and *de facto*.

To a greater extent, we, the undersigned, have wanted to expose to this Honorable Court the way and manner in which the Constitution and the Supreme Court of the United States of America have harmonized the separation of church and state, the duty of neutrality, and the effective guarantee of religious freedom by legal persons and that they are not forced by the public authorities to carry out activities, through their other institutions, that are directly contrary to their ideology, mission, vision, and ultimately to their religious beliefs. We, the undersigned, believe that the arguments developed may be helpful as a subsidiary interpretative criterion to the international human rights law norms applicable to the case.

Additionally, we have noted how this presentation does not seek to take charge of the right to institutional conscientious objection that could be understood as incorporated in Article 66.12 of the Political Constitution of Ecuador. Still, instead, we come to invoke the collective exercise of religious freedom and its prohibition of coercion in accordance with Article 66.8 of the same Ecuadorian Constitution, which is added to the provisions expressly enshrined in Ecuador's international human rights treaties, and which, by provision of the Constitution itself, are an integral part of it and are directly applicable in the constitutional controversy aired in this venue.

Next, we have developed the cases in which legal entities that invoke religious freedom in a collective manner are not born as a result of the exercise of individual rights but rather collective, as is the case of religious denominations and their dependent institutions, marking a difference between two different concepts, (i) the collective exercise by religious denominations, concerning (ii) institutional conscientious objection exercised by a legal entity that arises to the life of the law by the actions of natural persons.

Finally, we echo the particular case of the Catholic Church and its special regulation through *Modus Vivendi*, which is the instrument that grants legal personality not only to the Catholic Church but to **all its organizations and institutions, including its health services**, the legal personality that arises from an international agreement between the State of Ecuador and the Holy See, and not by the exercise of the "right of association" of natural persons. In this sense, the legal persons dependent on the Catholic Church, that is, the organizations and institutions of the Church, cannot carry out any action independently and separately from the intention and direction of the Catholic Church itself, so it is possible to conclude that the obligation to perform abortions in the health institutions of its dependence, directly affects the collective exercise of religious freedom contained in Article 66.8 of the Political Constitution of Ecuador and in the international human rights treaties in force, which are part of the constitutional block according to articles 417 and 426 of the Ecuadorian Constitution itself.

For all the preceding before this Honorable Constitutional Court, we respectfully request the rejection of CAUSE NO. 93-22-IN, PUBLIC ACTION OF UNCONSTITUTIONALITY.

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