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Legal Sidebar

Religious Objections to Nondiscrimination Laws: Supreme Court October Term 2022

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The Supreme Court has been presented recently with multiple appeals from religious institutions that object to laws prohibiting discrimination on the basis of sexual orientation. A baker who objects to making a cake for a same-sex wedding filed a petition for Supreme Court review at the beginning of September in *Klein v. Oregon Bureau of Labor & Industries*. In mid-September, the Supreme Court denied an emergency appeal from a religious university claiming the state violated the Constitution's Free Exercise Clause by forcing it to officially recognize a "Pride Alliance" student group in *Yeshiva University v. YU Pride Alliance*. Briefs were also filed this summer in *303 Creative LLC v. Elenis*, a case in which the Supreme Court agreed to consider whether a state would violate the Free Speech Clause by applying its nondiscrimination laws to a website designer who does not want to create websites for same-sex weddings.

The intersection between First Amendment protections for speech and religion and the state's interest in prohibiting discrimination is not a new issue for the Court. However, the Court's rulings in earlier cases left open a number of larger doctrinal questions that are now presented by this new set of appeals. This Legal Sidebar briefly reviews the issues presented by these appeals and discusses their significance for Congress. Although the cases all involve the application of state or local nondiscrimination laws, the constitutional principles announced by the Court will also be relevant in assessing possible objections to federal nondiscrimination policies.

Legal Background

The U.S. Constitution's First Amendment prohibits the government from abridging "the free exercise" of religion or "the freedom of speech." The Supreme Court has invoked both the Free Exercise and Free Speech Clauses to grant protection to religious speech—although the Court uses different tests under those clauses to determine whether government action infringing on religious speech is unconstitutional.

Free Exercise Clause: Courts generally analyze Free Exercise Clause claims under a 1990 decision, *Employment Division v. Smith*. Under *Smith*, the government may apply neutral, generally applicable laws to religious objectors so long as burdening religious exercise "is not the object" of the law but is "merely the incidental effect." However, this rule governs only neutral and generally applicable policies. If the

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government discriminates against religion, it will trigger strict scrutiny, a heightened standard of review that requires the government to prove that its action is narrowly tailored to a compelling interest.

The Supreme Court found such discrimination in two recent decisions dealing with religious objections to nondiscrimination laws. First, in 2018's *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, the Court ruled in favor of a baker who refused to make a wedding cake for a same-sex wedding. The Court held that the state agency tasked with enforcing Colorado's nondiscrimination provisions had exhibited "clear and impermissible hostility" to the baker's religious beliefs, pointing to hostile comments in the administrative record and enforcement discrepancies. Accordingly, the state's adjudication of the baker's claim for an exception was not *neutral* with respect to religion. Second, in 2021's *Fulton v. Philadelphia*, the Court ruled in favor of a Catholic foster care agency seeking an exemption from city policies requiring contractors to comply with nondiscrimination laws. The Court concluded that the nondiscrimination policy included in the city's contracts was not *generally applicable* because it allowed for individual exemptions. In applying strict scrutiny, the Court went on to hold that although the city might have "a compelling interest in enforcing its non-discrimination policies generally," it had not shown a compelling interest specifically "in denying an exception" to the religious foster care agency.

The rulings in *Masterpiece Cakeshop* and *Fulton* were fact-specific. They left open questions regarding which government actions are neutral or generally applicable toward religion. Although the Court was asked in *Fulton* to overrule *Smith*, it declined to do so, and it avoided opining on whether the First Amendment might more broadly exempt religious objectors from antidiscrimination laws.

These rulings stand in some contrast to *Bob Jones University v. United States*, a pre-*Smith* case rejecting a free exercise challenge to a nondiscrimination policy. In that case, the Supreme Court concluded that the Internal Revenue Service could deny tax-exempt status to private schools that discriminated on the basis of race, even though the schools claimed that their religious beliefs required racial discrimination. Specifically, the Court held that the government's interest "in eradicating racial discrimination in education" was so compelling that it outweighed any burden imposed on the schools' religious exercise by the denial of the tax benefit. The Court did not explicitly discuss *Bob Jones University* in either *Masterpiece Cakeshop* or *Fulton*, but one lower court—in *Klein*, discussed below—cited *Bob Jones University* in a 2017 opinion rejecting a claim for a religious exemption.

Free Speech Clause: Some religious businesses have also claimed that states violated their free speech rights by ordering them to comply with nondiscrimination laws, arguably compelling them to engage in expressive activity such as making a wedding video. Broadly, the Free Speech Clause protects not only "the right to speak freely" but also "the right to refrain from speaking at all."

Many nondiscrimination laws primarily regulate *conduct* rather than pure speech, even if they burden speech incidentally. Accordingly, these conduct-focused nondiscrimination laws may trigger a lower level of constitutional scrutiny known as intermediate scrutiny, meaning that the Court is more likely to uphold the challenged law. For example, the government may be able to "require an employer to take down a sign reading 'White Applicants Only'" as part of its authority to regulate discriminatory conduct in hiring.

Supreme Court precedent, however, suggests that the First Amendment is more likely to prohibit the regulation of activity that is inherently expressive. The Supreme Court has clarified that conduct implicates the First Amendment when the speaker intends "to convey a particularized message" and it is likely that the message would be understood by those receiving it. Most relevant here, in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, the Supreme Court held that a state could not use its laws prohibiting discrimination in public accommodations to force a parade organizer to include a gay and lesbian group in a parade. The ruling rested on the Court's conclusion that parades—and the selection of parade participants—qualify as expressive conduct. Because this application of the state law "had the effect of declaring the [parade] sponsors' speech itself to be the public accommodation," the Court held that it violated "the fundamental rule ... that a speaker has the autonomy to choose the content

of his own message." The *Hurley* opinion did not expressly clarify whether intermediate or strict scrutiny applied to the state's action, but more recently, the Supreme Court has suggested that laws compelling speakers to alter the content of their speech will be subject to strict scrutiny.

Summary and Open Questions: If a business or other covered entity believes that complying with a nondiscrimination law would burden sincere religious activity or compel speech, it might challenge the law under the Free Exercise or Free Speech Clauses. The cases discussed above identify some open questions regarding how courts would analyze those constitutional claims.

Smith indicates that courts should generally reject free exercise claims for exemptions from neutral and generally applicable laws. However, the Court has identified several limiting principles to *Smith* without overruling it. Although most nondiscrimination laws are likely neutral and generally applicable to religion on their face, strict scrutiny might apply if there were hostility to religion in the state's application of the law, as in *Masterpiece Cakeshop*, or if the law contained certain types of exceptions, as in *Fulton*. Lower courts have expressed uncertainty in how, exactly, to apply these two cases to determine whether a policy is neutral and generally applicable.

In a free speech challenge, one key question would be whether the religious objector's activity was inherently expressive activity. If so, heightened scrutiny could apply. However, the nature of the activity being targeted and uncertainties in the case law could lead courts to disagree about whether to apply intermediate or strict scrutiny, as the cases below demonstrate. Multiple federal courts of appeals, though, have held that if states applied their nondiscrimination laws to force businesses to make expressive products for a same-sex marriage, those applications of the laws trigger strict scrutiny.

If strict scrutiny applies under either the Free Exercise or Free Speech Clauses, the government action will be "presumptively unconstitutional." Although *Bob Jones University* held that the government has a compelling interest in preventing discrimination in some circumstances, the more recent rulings in *Fulton* and *Hurley* suggest difficulties for justifying a decision to apply nondiscrimination laws in a way that regulates religious expression. Nonetheless, as discussed below, some lower courts have rejected religious objections to nondiscrimination laws, sometimes under heightened constitutional standards.

Klein v. Oregon Bureau of Labor & Industries

In *Klein*, an Oregon bakery has asked the Court to review an order to comply with state nondiscrimination laws. This is the second time this case has reached the Supreme Court. In 2013, a same-sex couple filed a complaint with a state agency arguing that by refusing to bake a cake for their wedding, the Kleins' bakery violated state law prohibiting sexual-orientation discrimination. The state agency agreed and entered an order enjoining the bakery from further violations. A state court affirmed that order in 2017, rejecting the Kleins' constitutional challenges. The court declined to apply strict scrutiny under the Free Exercise Clause, concluding that the state order enforcing the nondiscrimination law was neutral and generally applicable under *Smith*. It also held that the bakery's cake-making business was expressive conduct rather than fully protected speech under the Free Speech Clause. The court cited *Bob Jones University*, among other cases, to emphasize the state's compelling interests in ensuring equal access and preventing dignitary harms. As detailed in this earlier Legal Sidebar, the Supreme Court in 2019 vacated that state court opinion and remanded the case for reconsideration in light of *Masterpiece Cakeshop*.

In January 2022, the state court largely reaffirmed its prior ruling, concluding that (for the most part) neither *Masterpiece Cakeshop* nor *Fulton* required it to change its earlier decision. The court held first that unlike the nondiscrimination policy in *Fulton*, Oregon's statute did not allow discretionary exceptions and was therefore generally applicable. The court then considered whether the state agency's adjudication of the case involved the hostility to religion that was present in *Masterpiece Cakeshop*. Ultimately, the court said that hostility in one aspect of the adjudication required the court to vacate a damages award but not the rest of the order.

The Kleins have now appealed this 2022 ruling to the Supreme Court, reviving their claims under both the Free Exercise and Free Speech Clauses. Among other arguments, they ask the Court to overrule *Smith* and apply strict scrutiny to the Oregon nondiscrimination law under the Free Exercise Clause. As mentioned above, the Supreme Court declined to reconsider *Smith* in *Fulton*, although three Justices indicated that they would overrule the decision, and two more expressed doubt that *Smith* is consistent with the Constitution's "text and structure." *Klein* therefore presents the Court with another opportunity to consider whether the First Amendment shields noncompliance with nondiscrimination laws—and to more broadly reconsider its free exercise jurisprudence.

Yeshiva University v. YU Pride Alliance

In mid-September 2022, a case involving an Orthodox Jewish university gained media attention. Yeshiva University had decided not to approve a student Pride Alliance club, saying that doing so "would violate its sincere religious beliefs about how to form its undergraduate students in Torah values." The students argued that this decision violated New York City laws prohibiting discrimination on the basis of gender and sexual orientation. A state trial court eventually agreed and entered a permanent injunction requiring the university to recognize the group. The court cited *Smith* to reject Yeshiva University's free exercise defense, concluding that the city ordinance was a neutral and generally applicable law whose effect on religion was "only incidental" to its ban on discrimination. The court further held that applying the city ordinance this way would not violate the university's speech or association rights after concluding that recognition did not equate to endorsement of the group's message.

State appeals courts denied Yeshiva University's motions asking for a stay of this preliminary injunction, and the school filed an emergency application with the Supreme Court. Among its objections to the lower court's reasoning, the university also asked the Court to consider overruling *Smith*. The Court ultimately denied the application for a stay on September 14. The Court's order indicated that it did not believe relief was appropriate for procedural reasons. However, in an opinion dissenting from the denial, Justice Alito opined that the university "would likely win" if the Court were to agree to hear the case.

Following this Supreme Court denial, Yeshiva University reportedly halted all club activities but later reached a deal with the Pride Alliance club in which the group said it would agree to the stay if the school allowed other student club activities to resume. Litigation may continue in the state courts, possibly giving the Supreme Court another opportunity to weigh in on the scope of First Amendment protections.

303 Creative LLC v. Elenis

Finally, the Supreme Court has agreed to hear oral argument this upcoming term in *303 Creative*, a case in which a website designer brought a pre-enforcement challenge to Colorado's nondiscrimination law. The designer wants to offer wedding-related services only for opposite-sex marriages but is concerned that she would violate Colorado law prohibiting sexual-orientation discrimination in public accommodations. She challenged two separate clauses of the law: one that prohibits *refusing accommodations* on a discriminatory basis and a second that prohibits *publishing communications* indicating that a business will refuse accommodations on a discriminatory basis. The Supreme Court granted certiorari to consider "whether applying a public-accommodation law to compel an artist to speak or stay silent violates the Free Speech Clause."

In the decision below, a federal appeals court agreed with the designer that the "creation of wedding websites is pure speech" and, consequently, applying the accommodations provision of the law to her work would implicate the Free Speech Clause by compelling her to create speech celebrating same-sex marriages. Accordingly, the court applied strict scrutiny to this potential application of the law. Although a court applying that level of scrutiny usually invalidates the law, the court here concluded that the government had met its extremely high burden. The court held that the law was narrowly tailored to the

state's compelling interest in ensuring equal access to publicly available services. With respect to the communications provision of the law, the court ruled that it did not violate the designer's free speech rights because the state "may prohibit speech that promotes unlawful activity," including the denial of services it had just concluded was unlawful. One judge dissented.

On appeal to the Supreme Court, the designer claims that the lower court erred in concluding that the state could satisfy strict scrutiny, arguing instead that "Colorado lacks a compelling government interest to coerce or silence" her speech and "has numerous, less burdensome alternatives to achieve any legitimate interests it might articulate." She continues to assert that when applied to her business, the law would compel speech rather than regulate conduct because her websites would all convey messages celebrating the weddings. She claims that *no* state interest could justify "compelling or restricting speech contrary to conscience." Finally, she argues that the state has less speech-restrictive alternatives available to achieve its goals: granting limited exemptions to certain service providers. The Kleins have filed an amicus brief supporting the designer.

Colorado contends that, contrary to the lower court's opinion, its nondiscrimination law should not be subject to strict scrutiny. It says its law targets nonexpressive activity by regulating the "act of selling something," which "is not itself expressive conduct." In the state's view, it is not dictating the content of the designer's websites; she could choose to sell only websites with "biblical quotes describing marriage as the union of one man and one woman," but once she chooses to sell those websites, she cannot refuse to sell them to customers on the basis of protected characteristics. Accordingly, the state argues that at most, its law should be subject only to intermediate scrutiny. In the alternative, the state claims that it can satisfy any level of scrutiny, given its compelling interest in preventing discriminatory sales that cannot be achieved through less restrictive means. The United States has filed an amicus brief in support of Colorado and asked to share time at oral argument. The Solicitor General's brief echoes the state's claim that the law triggers only intermediate scrutiny but also emphasizes the broad, pre-enforcement nature of the designer's challenge seeking a categorical exemption from the law.

Considerations for Congress

The cases discussed above implicate open questions in First Amendment law, and how the courts decide those questions will govern constitutional claims for religious exemptions from state and federal nondiscrimination provisions. One critical question for litigants is whether a court will apply strict scrutiny to review a government's application of a nondiscrimination law. Looking first at free exercise jurisprudence, all three of the petitions above asked the Court to overturn *Smith*, raising questions about the continued viability of a constitutional rule that prevents most religious challenges to generally applicable laws. Even if the Court does not overturn *Smith*, it could expand on the exceptions to the *Smith* rule by ruling that certain government actions are not neutral or generally applicable to religion and therefore trigger strict scrutiny.

Turning to the Free Speech Clause, *303 Creative* could clarify when a law that generally targets conduct is subject to strict scrutiny based on its application to speech. The Court could also clarify when the Free Speech Clause protects a business creating expression on behalf of a third-party—that is, what types of business activities qualify as inherently expressive. This conflict between speaker autonomy and nondiscrimination provisions has also come up in the context of challenges to state laws regulating content moderation. Accordingly, an opinion in *303 Creative* could have jurisprudential implications for free speech claims outside the context of religious objectors.

If strict (or even intermediate) scrutiny applies to any given free exercise or free speech claim, future rulings from the Court could clarify when—or whether—a state has a sufficiently compelling interest to justify applying a nondiscrimination law to expressive goods and services. One question on this issue is whether the same principles apply to religious objections based on sexual orientation and those based on

race. In *Bob Jones University*, the Court upheld a federal policy disfavoring *racial* discrimination on the grounds that the government has a compelling interest in preventing such discrimination. In recent years, though, religious institutions have been more likely to claim that their religious beliefs require *sexual-orientation* discrimination. It is an open question whether *Bob Jones University* supports the conclusion that the government also has a compelling interest in preventing discrimination on the basis of sexual orientation. Because it also arises in the educational context, *Yeshiva University* may call for the Court to address how its modern free exercise jurisprudence squares with the reasoning in *Bob Jones University*.

The petitions above involve state nondiscrimination policies, but these disputes could also arise in the context of federal nondiscrimination policies. In *Bostock v. Clayton County*, the Court held that Title VII of the federal Civil Rights Act of 1964, which prohibits sex-based employment discrimination, also prohibits discrimination on the basis of sexual orientation or gender identity. *Bostock*'s reasoning, moreover, could potentially apply to other federal laws prohibiting sex discrimination, as the Biden Administration has proposed with respect to Title IX of the Education Amendments of 1972 (which applies to federally funded education programs) and the Affordable Care Act (which applies to certain health-care-related entities). Those executive-branch interpretations may raise new concerns about infringing on religiously motivated activity.

Federal statutes may already exempt religious institutions from certain applications of federal nondiscrimination policies. For example, Title VII allows religious employers to hire co-religionists. Title IX contains an exemption for religious educational institutions, if application of Title IX would conflict with a religious tenet of the institution. Further, the Supreme Court has recognized that the Religious Freedom Restoration Act (RFRA) could act as a "super statute" allowing religious exemptions to federal nondiscrimination laws. RFRA, in particular, could effectively supersede the need for a constitutional challenge to federal law, as it requires strict scrutiny of any federal government actions that substantially burden a person's exercise of religion. Nonetheless, if the Court conducts a strict scrutiny analysis of constitutional claims for exemptions to nondiscrimination laws, such a ruling could also be relevant to a RFRA analysis.

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