



February 26, 2020

The Honorable Carolyn Maloney
Chairwoman
Committee on Oversight and Reform
U.S. House of Representatives
2157 Rayburn House Office Building
Washington, D.C. 20515

The Honorable Jim Jordan
Ranking Member
Committee on Oversight and Reform
U.S. House of Representatives
2105 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairwoman Maloney and Ranking Member Jordan:

My name is Walter Olson and I am a senior fellow at the Cato Institute's Robert A. Levy Center for Constitutional Studies. I have written numerous articles on LGBT rights, discrimination law, and the intersection of both with foster care and adoption, and have convened conferences of academics and others on the topic. I appreciate the chance to submit my personal views, which do not necessarily represent those of others at Cato.

Issues of religious exceptions to discrimination law in the marketplace, employment, and social services have stirred heartfelt public discussion for years already and are likely to do so well into the future, especially given the unsettled law and rapidly changing developments both in litigation and policy. This week the U.S. Supreme Court granted certiorari in the case of *Fulton v. City of Philadelphia*, which may clarify some circumstances in which municipal anti-discrimination law can oust a long-practicing provider, Catholic Social Services, from foster care in one city. Litigation over wedding services continues unabated since the Supreme Court's Masterpiece Cakeshop ruling.

Assault, conflict, or good-faith disagreement? The announced title for today's hearing is "The Administration's Religious Liberty Assault on LGBT Rights." I will return later to why I think that title is an unfortunate one. For now, I would like to set the stage by mentioning a couple of the important cases of constitutional law that suggest that this topic is not well approached with an all-or-nothing spirit.

In the 2012 case of *Hosanna-Tabor Evangelical Lutheran Church*, a unanimous Supreme Court – liberal and conservative justices side by side – rejected the maximalist view that the autonomy of religious believers must always give way to the anti-discrimination principle. Church institutions have a core constitutional right to at least some internal employment decisions.

On the other hand, the 1990 case of *Employment Division v. Smith*, written by Justice Antonin Scalia, rejected a general claim that rights to religious accommodation against everyday laws are of



constitutional dimension. There is, the Court ruled, no constitutional entitlement to be exempted on religious grounds from otherwise applicable and neutrally intended laws.

In between *Hosanna-Tabor* and *Employment Division*, and consistent with both cases, is the principle that there is a broad terrain over which accommodation of minority (or for that matter majority) religious views is permissible and legitimate even if not constitutionally required, and that it will be allowed to work itself out through the give-and-take of the political process. In this process, both groups and individuals are free to petition for and sometimes obtain accommodation and exemption for their religious observances, conscience rights to abstain from otherwise imposed duties, and so forth.

It is unfair to dismiss all who favor broad and liberal approaches to exemption and accommodation as “anti-gay,” just as it is unfair to dismiss those whose instincts are otherwise as “anti-religion.” Indeed, some who favor a liberal regime for religious objectors are themselves gay, just as some who oppose such a liberal regime are themselves religious.

The case of children’s services. Each request for religious exemption or accommodation raises different issues, and many types of accommodation – from allowing churches in residential neighborhoods, with attendant problems of parking congestion, to exempting employees from work on sabbath days – involve measurable costs to others. In the case of children’s services, we should be wary of the danger that children will suffer from granting an exemption, but also that they will suffer from withholding one.

Eight years ago, when I first wrote about this problem, I cited a cautionary example: the well-known litigation in *Wilder v. Bernstein*. New York City was sued because it permitted religious agencies to run large parts of its foster care system, with each group often allowed to handle its “own” kids.

The litigation dragged on for 26 years and was harmful to almost everyone involved. Some high-performing agencies lost their edge as their religious mission was blunted and volunteers scattered. Before long the city’s foster care system, its performance nothing to brag about in the first place, had begun to lurch from crisis to crisis. Thoughtless and absolutist application of anti-discrimination norms drove out dedicated and skilled providers, and the result was to leave kids worse off.

Both adoption and foster care are hard work and all hands are needed on deck, as Prof. Robin Fretwell Wilson has said. Just as it would be a humanitarian calamity to lose gay adopters and fosterers – who have often been in the forefront of tough placements for kids who have few other options – so it would be a humanitarian calamity to lose conservative religious agencies many of which also have long track records of success and may bring special advantages such as an intimate bond with birthmothers thinking over the relinquishment of legal rights to their newborns.

If conservative religious agencies are driven out, which children will wait longer for a family, or age out of the system without finding one? Can we in good conscience dismiss their interests as collateral damage in the pursuit of the anti-discrimination principle?

I do agree that there are very real problems with declaring (as some would do) an absolute and infeasible right of religious agencies to 1) participate in public social services contracts and 2) follow conscience rules of their choosing while 3) being free from “adverse action” of any kind. For example, as



of not too long ago it was reported that the state of Kansas contracts with exactly two (2) agencies to run its foster care system. If both of those agencies demand religious exemptions, is Kansas to grant both? Now you've got a placement problem in the other direction, because qualified families might have no way into the system. So I agree that there are genuine dangers here of bottlenecks and monopolies: both for the sake of successful placement and for the sake of legal equality, a state can reasonably require that the overall mix of agencies provide opportunity to all. That is different from requiring that each individual agency offer universal service.

HHS's retreat from imposing national uniformity. We should also be wary of a heavy federal hand. We in this country do not have, and should not want, a single national entity to administer foster care. Local knowledge counts and awareness of local culture can contribute to successful placement.

In November, the Department of Health and Human Services proposed to rescind some regulations issued in the final days of the Obama Administration that required recipients of HHS program funds to observe nondiscrimination on the basis of sexual orientation and gender identity. One of the hotly contested issues is whether church-affiliated agencies would be allowed to participate in placements touched by the federal dollar even if they decline to serve same-sex couples as clients. (The rules apply to a range of HHS programs including elder care, refugee resettlement, youth services, and others.)

A preliminary, but important, question is that of legal grounding. The Obama rules proposed to enforce as regulation a body of federal law that... doesn't exist. Congress has had many chances to attach funding strings of this sort to federal aid recipients. It hasn't done so. On what basis does a federal department begin enforcing such rules anyway? Because appointees decide it would be a nice idea?

With the federal rules withdrawn, there will remain room for a wide range of local approaches. Some states and localities, like Massachusetts and Philadelphia, will enforce strict anti-discrimination rules even if that excludes some long-established religious agencies that are proficient at their jobs. Other states and localities will be highly accommodating to religious objectors.

How will kids fare in placement? Both sides express sincere interest in this, but the arguments are often made by simple assertion. An officer with the Family Equality Council says rescinding the Obama rule will "allow child-placing agencies to reduce the pool of qualified potential foster and adoptive parents." Yet opponents can counter by rewording that formula only slightly: leaving the Obama rule in place would reduce the pool of qualified child-placing agencies, and some qualified parents (and perhaps birthmothers too) will be lost with them. (So far as I know, in every state there are agencies that participate in public adoption and foster care placement that are happy to work with gay parents.) Caution – and a strong dose of federalism – are indicated.

Mismatch between foster parents and children. Sometimes it is argued that religiously conservative agencies must be curbed or excluded because they will be bad at handling the needs of particular children. An example often given is the placement of a child who is, or turns out to be, gay with religiously conservative parents.



It is important to note that conflicts of this sort will arise whatever decisions the law makes about working with religious agencies. Parents holding conservative religious views will remain free, at least for now, to apply for foster care service whether or not there are religious agencies.

It should also be noted that clashes between parents and children are not limited to this fact pattern (and of course are not limited to foster and adoptive households, but are common with biological parents as well). A foster child may hold, or develop, religious views that clash with those of foster parents, and this can work either way: the parents may be more devout than the child, or vice versa. The child may wish to attend religious services frequently or observe dietary restrictions associated with a religion, only to find that the parents do not cooperate.

When these difficult situations have a solution, it will often depend on the judgment and skill of a trained social worker who can be on the lookout for a serious mismatch between foster family and a particular child, being alert to signals that the child may not herself be able to articulate well. Foster parents should always be aware that their rights are more limited than those of natural or adoptive parents, and that a layer of oversight in the child's interest will be present.

What is *not* a good solution to this set of problems is to exclude whole categories of foster parents and agencies from participation because their religious views are deemed too intense or too lax or too conservative or too liberal. One practical concern is the likelihood that parents of each sort might make excellent matches for some placements even if not all.

The last thing we should want is the promulgation of ideological screening tests for foster parents. This would send the official message that some religious views are simply wrong, a shocking message for a government to endorse, as well as one open to constitutional challenge. Instead, we can uphold the more limited and traditional message that a public foster care system has a legitimate interest in seeking harmonious rather than conflict-ridden or alienating matches for each child. In doing so, it should rely not on stereotypes about religion but on the individualized judgment of social workers on the scene.

The *Masterpiece Cakeshop* DOJ brief. Critics of the administration's concern for religious exemption sometimes treat it not as a sincere concern in itself, but as a sort of pretext, a Trojan Horse to conceal a wider ambition to eliminate coverage of gay persons as a protected class in discrimination, or even to challenge and reverse Supreme Court decisions like *Obergefell* and *Lawrence*.

But there is much evidence inconsistent with this view.

Consider the administration's participation in the high-profile *Masterpiece Cakeshop* case. The case provided an opportunity for the Department of Justice, had it wished, to signal its disapproval of existing Supreme Court precedent on gay rights. Or it could have asserted sweeping, maximalist formulations of conscience rights, so broad as to bring into question whether such laws retained any bite.

It did none of these things. Far from teeing up an assault on existing gay rights doctrine, the Department of Justice brief took a cautious view not dissimilar to that of my own Cato Institute (which has supported a constitutional right to marry in *Obergefell* and other cases). In fact DOJ did not couch



the case as one of free exercise of religion at all, but (like Cato) pursued the idea that the constitutional principle at stake was that of free expression, whether impelled by religious belief or not.¹

Because of its emphasis on expression, it explained that there would be no First Amendment problem applying public accommodation law to the provision of routine wedding services such as hall or limousine rental, as opposed to the creation of an expressive service. This is a careful and middle-of-the-road legal approach, not a maximalist attempt to run the table on behalf of religious conservatives.

Revamping federal contracting rules. The domain of federal contract compliance labor regulations, administered through the Office of Federal Contract Compliance Programs (OFCCP) can be especially helpful in gauging an administration's frame of mind because the executive branch has so much discretion over those programs. Most were created by – and could be ended by – a stroke of the Presidential pen. Changes in these rules are not ordinarily negotiated with the courts or Congress.

The Obama administration used executive orders and OFCCP aggressively to engineer the addition of LGBT workers as a protected class across many of the nation's largest corporations. Had the Trump administration been pursuing an aim of ending protected-group status, or even merely of reversing as many Obama actions as it could, its course was clear: simply revoke what Obama had done. The move it actually did make, in August 2019, was far narrower: it generally let the Obama effort stand, but proposed to introduce accommodation of the concerns of religious employers, who make up a small fraction of the universe of employers regulated by OFCCP.

Once again, the simplest explanation is the best: the administration was pursuing its announced goal of finding religious accommodations suited to the small percentage of federal contractors that might seek them, such as colleges, hospitals, and social service agencies with conservative religious affiliations. As in the *Masterpiece* instance, its proposed exception would in no way swallow the protected-group rule. In this case, the great majority of federal contracting is done by secular organizations that are to remain so. There is no chance that Lockheed, IBM, or Comcast are going to recharacterize themselves as religious entities in order to slip out of the rules. Again the administration's actions are inconsistent with the notion that it is plotting to overthrow the social advances for gays of the past 40 years.

Similar examples could be multiplied in other areas. Where the administration opposes particular ideas such as reading Title VII's "because of sex" language to include gay employees, it argues on traditional legal grounds such as precedent, rather than by deploying the sorts of arguments – heard occasionally from amicus filers in such cases – that genuinely oppose the aspirations of gay persons and seek a broad legal rollback of gays' legal rights.

Epilogue: Assault, conflict, or good-faith disagreement? Let me now restate and elaborate my original concern about the title announced for this hearing. Conceiving of support for religious exemptions as an "assault on LGBT rights" is as wrongheaded as conceiving of the opposite school of opinion as an assault

¹ The DoJ brief also argues that creative expression aside, the law must not force "participation in an expressive event" under First Amendment precedents such as *Barnette v. West Virginia Board of Education* (public school students may not be compelled to take part in Pledge of Allegiance, flag salutes, or similar ceremonies), absent a more compelling state interest than Colorado had shown.



on religious rights. In both cases, the rhetorical trope tends to conceal the truth that the other side might hold its views in good faith. To be sure, there is genuine animus out there that sometimes motivates policy, an issue that Justice Anthony Kennedy made a theme of his jurisprudence in cases from *Romer* to *Masterpiece*. Just as surely, to assume that *only* animus can motivate one's opponents is to declare an end to all debate.

I appreciate the chance to share my views.

Sincerely,

/s/

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