Legal Sidebar

Supreme Court Vacates Another Opinion Applying Antidiscrimination Laws to Religious Objectors

Valerie C. Brannon
Legislative Attorney

June 19, 2019

On June 17, 2019, in *Klein v. Oregon Bureau of Labor & Industries*, the Supreme Court vacated a state court decision rejecting an Oregon bakery's claim to a religious exemption from state antidiscrimination laws. The bakery's owners had refused to make a cake for a same-sex wedding. The state claims that this refusal violated statutes barring discrimination of the basis of sexual orientation. The bakers responded by arguing that the protections of the First Amendment's Free Speech and Free Exercise Clauses limit the reach of the state law. The facts of *Klein* echo the circumstances presented in 2018's *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, in which a Colorado baker had similarly argued that applying state antidiscrimination laws to compel him to make a cake for a same-sex wedding violated the First Amendment. The Supreme Court apparently viewed the similarities between the cases as significant, leading it to vacate *Klein* in a short per curiam order and remand the case to the state court with instructions to reconsider its decision "in light of" *Masterpiece Cakeshop*. (This action is typically referred to as a "grant, vacate, and remand order" or a "GVR.") The Court took a similar action in 2018, issuing an almost identical GVR in *Washington v. Arlene's Flowers, Inc.*, a case involving a florist who raised religious objections to serving a same-sex couple. Following the Supreme Court's remand, the state court in *Arlene's Flowers* issued its own decision on June 6, 2019, affirming its previous decision against the florist. Although the Supreme Court has once again declined to resolve the competing claims presented by these disputes between religious business owners and states seeking to enforce antidiscrimination laws, it is likely that the Court will be presented with the issue again, through an appeal of *Arlene's Flowers*, *Klein*, or any number of similar cases. This Sidebar reviews the First Amendment principles at issue in these disputes, then discusses *Masterpiece Cakeshop*, *Arlene's Flowers*, and *Klein*.

Congressional Research Service
7-5700
www.crs.gov
LSB10311

Free Speech and Free Exercise Clauses of the First Amendment

Many of the plaintiffs raising religious objections to complying with state and local antidiscrimination laws claim the protections of both the Free Speech and Free Exercise Clauses of the First Amendment. With respect to the Free Speech Clause, they argue that their creative services—making cakes or floral arrangements for a wedding, or photographing the event—are speech, and that by forcing them to provide these services for weddings, state governments are unlawfully compelling them to speak in support of those weddings.

This Sidebar, however, primarily focuses on the free exercise claims raised by these litigants. Generally, the First Amendment protects the "free exercise" of religion and prohibits governments from targeting religious beliefs. However, in 1990 the Supreme Court clarified in *Employment Division v. Smith* that "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." In so holding, the *Smith* Court recognized that it had previously "held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action," but distinguished these prior cases, saying that they had not presented freestanding free exercise claims. Instead, these cases involved "the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press." Accordingly, as a key defense to free exercise challenges, states seeking to force religious business owners to comply with state laws have argued that the laws are "neutral" and "generally applicable" because they apply to the religious and non-religious alike, and therefore do not violate the Free Exercise Clause under *Smith*. Nonetheless, the Court has recognized that facially neutral laws may sometimes violate the First Amendment if there is other evidence that the government is targeting religious conduct.

Masterpiece Cakeshop and *Arlene's Flowers*

In its 2018 decision in *Masterpiece Cakeshop*, the Supreme Court sidestepped the question of whether the Free Speech or Free Exercise Clauses may generally exempt religious business owners who object to serving same-sex weddings from antidiscrimination laws. Instead, as described in this Sidebar, the Court issued a relatively narrow decision tied to the facts of that particular case. Specifically, the *Masterpiece Cakeshop* Court said that the state agency tasked with enforcing Colorado's antidiscrimination provisions had exhibited "clear and impermissible hostility" to the baker's religious beliefs in adjudicating his claim, pointing to several discrete comments in the record and apparent discrepancies in enforcement of the antidiscrimination law. Consequently, the Court concluded that the state had not treated his case with "the neutral and respectful consideration" that it deserved. Notwithstanding the fact-specific nature of the decision, Justice Kennedy's opinion for the Court did make some broad pronouncements regarding the baker's claims. In dicta, the Court noted that "religious and philosophical objections to gay marriage are protected views and in some instances protected forms of expression"—but nonetheless emphasized that "it is a general rule that such objections do not allow business owners . . . to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law." Because the Court resolved the case on free exercise grounds, it did not address the baker's free speech claims. Neither did it clarify whether the Free Exercise or Free Speech Clause could more broadly exempt religious objectors from antidiscrimination laws.

After issuing *Masterpiece Cakeshop*, the Supreme Court entered a GVR in *Arlene's Flowers*, remanding the case for reconsideration in light of *Masterpiece Cakeshop*. In the Washington case, a florist had appealed a state court decision ruling that she had violated state antidiscrimination laws and rejecting her First Amendment defenses to those claims. On remand, the Washington Supreme Court interpreted the Supreme Court's instruction to reconsider the case relatively narrowly, adhering closely to the Court's biased-adjudicator rationale. The state court rejected what it characterized as the florist's attempts "to

relitigate issues resolved in [its] first opinion," which were, in the court's view, "outside the scope of this remand." Instead, the court asked whether the state courts that adjudicated the florist's claims had exhibited hostility towards her religious beliefs. Reviewing the record before it, the Washington High Court found no evidence that the state courts were impermissibly biased. Arlene's Flowers submitted additional evidence that it said showed that the attorney general, tasked with enforcing the state's antidiscrimination laws, had exhibited such bias. According to the florist, the attorney general had taken less extreme enforcement measures against a coffee shop owner who expelled a group of Christian customers, apparently on the basis of the customers' beliefs. The state court, however, said that this evidence about the alleged bias of a *party* to the litigation was "irrelevant" to its consideration of the case because *Masterpiece Cakeshop* required the *adjudicator* to be neutral and did not address the question of prosecutorial discretion. The Washington court emphasized that the Supreme Court has long declined to second-guess prosecutorial discretion in many contexts. The Court recognized that even after *Masterpiece Cakeshop*, plaintiffs have to satisfy the same high standards to show that the government selectively enforced a law in an unconstitutional manner. The florist's attorneys have indicated that she will again appeal this decision to the Supreme Court.

The *Klein* Appeal

In *Klein*, another bakery, owned by Melissa and Aaron Klein, declined to sell a custom-designed cake to Rachel Cryer and Laurel Bowman for their wedding once the Kleins learned that the wedding would have two brides, rather than a bride and a groom. Laurel and Rachel filed a complaint with the state agency responsible for enforcing Oregon's antidiscrimination law, the Bureau of Labor and Industries (BOLI). BOLI ultimately concluded that the Kleins had violated state law by denying service on the basis of sexual orientation, and a state court agreed with that decision.

On appeal to the U.S. Supreme Court, the Kleins raised First Amendment objections to the state's decision, arguing that compelling them to make a custom cake would violate their rights to free speech and free exercise of religion. The Kleins also raised significant questions about *Employment Division v. Smith*, first calling on the Court to overrule this decision entirely, but in the alternative, asking the Court to "reaffirm" *Smith*'s statement that certain "hybrid" claims that combine both Free Exercise and Free Speech claims should be evaluated differently from First Amendment claims involving free exercise rights alone. Although the Kleins' appeal was filed after the Supreme Court issued its decision in *Masterpiece Cakeshop*, the petitioners did not argue that BOLI was biased against religion. They had claimed in the lower court proceedings that one of the BOLI commissioners had prejudged their claim and was impermissibly biased, but the state court rejected these claims, and the Kleins apparently did not revive these claims on appeal.

Ultimately, the Supreme Court declined to take up this case, instead remanding *Klein* to the Oregon courts for reconsideration in light of *Masterpiece Cakeshop*. It is possible that the Oregon courts could view this remand as presenting a relatively narrow issue, as the Washington Supreme Court did in *Arlene's Flowers* when it reconsidered only the question of whether the state adjudicators exhibited hostility to religion. This approach might allow the Kleins to revive their allegations of agency bias, although the state court might also conclude that the Kleins waived their arguments on this point by failing to raise them before the Supreme Court. Alternatively, the Oregon courts might view the remand as more broadly reopening the issues presented in this case, given that the Court vacated the existing opinion in full.

Considerations for Congress

The Supreme Court's GVR in *Klein* may reflect a reluctance to consider the broader issue of whether business owners may raise religious objections to avoid complying with state antidiscrimination laws. However, it seems likely that the Justices will be presented with the question again in future appeals, in

Arlene's Flowers or another case. The service providers in *Masterpiece Cakeshop* and *Arlene's Flowers* were represented by the same legal organization, which also represents a number of other litigants in similar cases and has demonstrated a commitment to appealing these cases to the Supreme Court. There are also other types of cases involving religious objections to complying with state and local antidiscrimination laws percolating in the lower courts. For example, a few adoption and foster care agencies have raised religious objections to laws that would require them to place children with same-sex couples and unmarried adults. At least two federal courts have rejected these First Amendment claims, concluding that localities can require these agencies to comply with antidiscrimination provisions.

These disputes over the application of state laws may hold significant implications for federal antidiscrimination laws, particularly as Congress considers H.R. 5, the Equality Act, which would add sexual orientation as a protected class under federal law. In addition, the Supreme Court has agreed to hear two cases next term that ask whether the provision of Title VII of the Civil Rights Act of 1964 that prohibits employers from discriminating on the basis of "sex" also encompasses sexual orientation. If the Court rules that Title VII protects employees from discrimination on the basis of sexual orientation, these cases about same-sex couples may set the stage for further litigation in the employment sphere: religious business owners may protest the application of federal law to religiously motivated firings or other adverse employment actions. (Title VII essentially allows some religious entities to discriminate on the basis of religion, but this likely would not cover all religiously motivated employment actions on the basis of sexual orientation.)

Given that the Court has declined to take up these broader questions, Congress could clarify this issue, at least for purposes of federal statutory regimes, by enacting legislation that either prevents or expressly allows such religious objections to antidiscrimination laws. For example, 2018's First Amendment Defense Act would have provided that the federal government cannot "take any discriminatory action against a person" because that person believes that marriage should be only between "one man and one woman." By contrast, this term's Equality Act would expressly provide that litigants could not invoke the Religious Freedom Restoration Act, which limits the federal government's ability to burden a person's religious exercise, to challenge the enforcement of the federal Civil Rights Act. Any such legislation would have to comply with constitutional principles.