



Whose Faith Matters? The Fight for Religious Liberty Beyond the Christian Right

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Note

Much of the litigation described in this report is ongoing. We therefore apologize for any legal developments that occurred after our editing process was finalized, but before the report was released.

Cover Image

For Freedoms (Hank Willis Thomas and Emily Shur in collaboration with Eric Gottesman and Wyatt Gallery of For Freedoms), Freedom of Worship, 2018. Archival pigment print, 42 x 52.5 in.

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IV Charting a Path Forward: Protecting Religious Liberty for Everyone



Rally in support of LGBTQ rights before the Supreme Court, 2019. Courtesy of the Center for American Progress.

When and how religious practitioners should be exempted from secular laws and policies is undoubtedly a complicated question. How do we protect religious liberty for everyone—from the conservative Christian to the Satanist—while also protecting other fundamental rights and values? When are exemptions necessary to preserve a diverse and pluralistic society, and when do they become so overbroad or widespread that they threaten others’ rights—or the democratic process itself? While there may not be a single test that applies to every situation, courts have, over time, developed a number of rules and guidelines that are helpful in assessing which religious exemptions advance our constitutional commitments to liberty and equality, and which threaten them. This section outlines the fundamental values that are necessary to protecting religious freedom, not for some but for all.

Religious Liberty Must Be Neutral

One of the most foundational rules of religious liberty law is that it must apply neutrally to people of all faiths—from Jack Phillips, the owner of Masterpiece Cakeshop, to Scott Warren, the No More Deaths volunteer. Neutral application of religious liberty protections is mandated by both religion clauses of the First Amendment—as the Supreme Court has repeatedly held: “A proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of neutrality toward religion.”¹ Justice Elena Kagan has called this “the breathtakingly generous constitutional idea that our public institutions belong no less to the Buddhist or Hindu than to the Methodist or Episcopalian.”²

Among other things, the neutrality rule prevents the government from singling out certain theological communities or beliefs for special persecution or special protection. This principle was reaffirmed most recently in the Supreme Court’s decision in *Masterpiece Cakeshop*. Written by Justice Anthony Kennedy, the opinion repeatedly stressed the government’s duty to be respectful of all religious beliefs, and noted that the First Amendment “bars even ‘subtle departures from neutrality’ on matters of religion.”³ Unfortunately, it must be acknowledged that the Court quickly abandoned this commitment to religious neutrality in its opinion in *Trump v. Hawaii*, the Muslim travel ban case, wherein the Court refused to acknowledge the very clear evidence that the ban was motivated by animus against Muslims.⁴

Many exemption laws and policies advanced by the Christian right fail the religion clauses’ neutrality requirement. Rather than protecting religious practices related to marriage or reproduction generally, they instead single out anti-LGBTQ or anti-choice religious beliefs for exclusive, extraordinary protection from the enforcement of any other civil law or policy,

regardless of the consequences. They therefore put the government in the position of taking a theological stance on what religious beliefs entitle one to stand above the law. As a group of religion law scholars wrote about Mississippi's H.B. 1523, for example, the anti-LGBTQ bill:

“[D]id not address the subjects of marriage, sexuality, and gender, and attempt evenhandedly to accommodate religious beliefs and practices. Rather, it singled out only specific religious viewpoints on these subjects as worthy of legal sanctuary. Those with different religious views on the very same questions receive no protection... Mississippians who hold the Enumerated Beliefs receive extraordinary legal benefits, while those with a different viewpoint on the exact same questions of faith receive nothing.”⁵

Similarly, most religious exemption laws and policies related to healthcare that are embraced by the right provide extraordinarily broad protections to those opposed to abortion, sterilization, or other reproductive care but fail to protect the many healthcare providers whose religious faith motivates them to provide comprehensive sexual and reproductive healthcare. As discussed in Section II, people of faith who support the right to reproductive healthcare access—including Dr. Wilfred E. Watkins, “Mary” and “Judy Doe,” and members of the Clergy Consultation Service—have also had little success in court.

Even if some religious adherents may benefit from a proposed exemption, religious exemption laws and policies that clearly prefer one religious belief over others actually violate religious liberty principles. The government may not weigh in on highly contested theological disputes by singling out certain views for special and absolute protection, essentially placing the government's seal of approval on a select set of religious beliefs.

Just as the legislative and executive branches must respect the neutrality rule in *promulgating* religious exemptions, *applying* religious exemption laws neutrally is a daunting but essential task for the judiciary and anyone charged with enforcing such laws. The RFRA test in particular contains many nuanced components: courts are tasked with determining whether a particular claimant is sincere; whether their articulated beliefs are “religious” in nature; whether these beliefs are being substantially burdened; and whether the burden is nevertheless necessary to advance a compelling government interest. The complexity of the RFRA test provides many opportunities for conscious or unconscious bias—for example, assuming the sincerity of incarcerated plaintiffs to be more suspect than those outside prison; treating established faiths as more obviously “religious” than newer or smaller ones; or determining

that creating an exemption for a doctor opposed to performing abortions is more practical or necessary than one for a doctor who wants to provide abortions.

In one notable example, the plaintiffs challenging the contraceptive mandate of the ACA were universally accepted as being motivated by their sincere religious rather than political beliefs—despite the fact that some plaintiffs had in fact included coverage for contraceptives in their insurance plans prior to the ACA’s enactment, and only removed this coverage after being contacted by law firms seeking to bring a lawsuit.⁶ Even attorneys representing the government in those cases declined to challenge the companies’ religiosity or sincerity.

In contrast, DOJ attorneys have argued that the Kings Bay Plowshares protestors’ RFRA claim “reflect[ed] an effort to propagandize and obtain secular public policy revisions tinged with post-hoc religious justification.”⁷ The DOJ has also rigorously challenged the religious beliefs of the Safehouse board members and humanitarian aid workers like Scott Warren. As one commentator has noted, “[w]hen you pay close attention to the litigation strategy pursued by the federal government’s lawyers, what you see is that this administration is not committed to an overarching principle of religious liberty—or even rights for Christians, in general...but rather only for those who share the administration’s political perspective.”⁸

Judges have not generally accepted the government’s recent attempts to label progressive people of faith as irreligious or insincere. However, in one opinion, a magistrate judge belittled several of the No More Deaths volunteers’ RFRA arguments as a “modified Antigone defense,”⁹ prompting scholars of law and religion to publicly comment:

“[T]he defense raised in this case, unlike in Sophocles’ play *Antigone*, does not stage a tragic conflict between written positive law and unwritten, abstract morality. The law appealed to by the defendants is not outside of or above the laws of the state. Instead, the defendants ask the court to interpret a written, legislatively created right to religious liberty. The magistrate judge’s failure to offer a careful analysis of their RFRA defense reflects a mistake of law, passing under cover of a clever parry to Greek tragedy, that should be corrected on appeal.”¹⁰

Moreover, many media stories about the volunteers’ cases have framed their activities as primarily political in nature, frequently ignoring their deep-seated spiritual commitments and even failing to mention their RFRA defense.¹¹

In order to preserve religious freedom, it is critical that courts rise above this challenge and neutrally apply religious exemption laws to all faith practitioners—regardless of whether their beliefs may be deemed common or unusual, conservative or progressive. Of course, this does not mean that all religious exemptions should succeed or fail together. Exemptions that would harm others or reduce overall religious liberty and plurality should be treated with caution. Similarly, exemption claims that would threaten a larger government program or undertaking—such as tax collection—will be granted far less frequently than those that can be easily accommodated. However, courts must be conscious of the risk of bias when performing the RFRA test, and make a concerted effort to apply religious exemption laws with the neutrality that the Constitution’s religion clauses, and a national commitment to religious plurality, require.

Religious Liberty Must Be Noncoercive

The purpose of religious liberty protections are, of course, to allow individuals to follow their own consciences in determining which religious tenets, practices, and communities to embrace. Thus, religious exemptions may not have the effect of conscripting others into supporting religious beliefs or practices that they have not freely chosen. Another way to understand this principle is that religious exemptions reach their constitutional limit when they protect the religious liberty of one party by requiring another party to bear the cost of protecting those rights. The government cannot force a person to give up any legal or constitutional right, or change their behavior, in order to accommodate religious beliefs that they do not themselves hold.¹² In *Hobby Lobby*, for instance, the Supreme Court emphasized that “accommodating petitioner’s religious belief in this case would not detrimentally affect others who do not share petitioner’s belief.”¹³ This absence of third-party costs for the accommodation of religion is crucial to protecting everyone’s religious freedom, not just those seeking a religious exemption.

Many of the exemptions proposed and enacted by the religious right require a third party—someone other than the religious objector—to bear the cost of the exemption. For example, an exemption allowing doctors to withhold medical information from their patients if they think this might lead them to seek an abortion eliminates patients’ ability to make their own medical decisions, impacting not only their health but their personal religious and moral autonomy. A newly proposed federal rule that would exempt government contractors from antidiscrimination policies, allowing them to condition employment on “acceptance of or adherence to religious tenets as understood by the employer,”¹⁴ would put a large chunk of the labor force at risk of losing their job if they do not adopt the faith-based practices of their employers.

The First Amendment Defense Act would “accommodate” the religious beliefs of individuals and companies opposed to marriage equality by eliminating many health, labor, and antidiscrimination provisions that protect workers. For instance, while employers who deny health insurance coverage to their employees’ dependents would normally be subject to tax penalties, FADA would prevent the government from punishing employers who withhold coverage to the children of same-sex parents because of their religious beliefs. How would losing health insurance for one’s child burden a worker’s religious rights? It is obvious that losing this legal benefit imposes a significant *economic* hardship. The fact that the worker is losing the benefit because of an identity characteristic—her sexual orientation—imposes an additional *dignitary* harm. However, when the government eliminates someone’s legal rights in order to accommodate someone else’s theological beliefs, this also imposes a *religious* harm. It essentially requires the worker to subsidize religious beliefs that violate her own conscience.

Too often, religious exemption disputes are framed as pitting one person’s right to religious liberty against another’s right to secular equality. This is an important concern, but it obscures the fact that losing rights or benefits to accommodate another person’s religious beliefs is also an assault on their religious freedom.

Policymakers and judges should reject religious exemptions that push the economic, social, or legal costs of a religious belief onto those who do not hold that belief. Any exemption that requires people to subsidize religious beliefs they do not share—or even, in some cases, beliefs they do share—diminishes religious liberty for everyone.

Religious Liberty Must Be Nondiscriminatory

Laws prohibiting religious discrimination are indispensable to religious liberty and plurality, and any attempt to narrow the scope of such laws should be rejected. For over 50 years, the overwhelming public consensus has held that access to employment, housing, education, and public accommodations should not be restricted on account of certain identity characteristics, including religion. Civil rights laws banning religious discrimination have reduced religious segregation and protected religious minorities from state-sanctioned marginalization and persecution. Now, efforts to carve out religion-based exemptions from antidiscrimination law threaten to challenge this consensus.

Antidiscrimination laws are, of course, especially important to religious minorities, including

Muslims, Sikhs, Jews, and atheists. Both the Federal Bureau of Investigation and the Department of Justice consistently report a disproportionately high number of discriminatory incidents, including hate crimes, against Muslims and Jews.¹⁵ In the wake of the September 11th attacks in 2001, the Equal Employment Opportunity Commission (EEOC) witnessed a 250% increase in the number of religious discrimination charges involving Muslims.¹⁶ While this number has gone down somewhat since then, religious minorities continue to bring claims of discrimination at wildly disproportionate rates as compared with people from majority religious traditions. Despite making up only one percent of the population, over 25% of the EEOC charges of religious workplace discrimination in 2015 related to Muslims.¹⁷ The number of assaults against Muslims in recent years has actually surpassed the modern peak of 2001.¹⁸ Nonprofit organizations that track religious discrimination have also noted a recent rise in anti-Semitic incidents against Jews.¹⁹

A 2016 report issued by the DOJ noted that in recent years, “[c]ommunities reported an uptick in attacks and threats against mosques, gurdwaras, and other houses of worship, as well as acts of bullying, harassment, and violence against children and adults who are—or are perceived to be—Muslim.”²⁰ Muslims themselves report high levels of discrimination: nearly half of U.S. Muslims report having experienced at least one incident of discrimination in the past year, and half say it has become harder to be Muslim in the U.S. in recent years.²¹ In recognition of the disproportionate rates of discrimination faced by religious minorities, the EEOC’s strategic enforcement plan for the years 2017-2021 listed discrimination against Muslims and Sikhs as an emerging priority issue.²²

Despite rising levels of religious discrimination, many exemptions advocated by the Christian right explicitly permit discrimination against religious minorities by narrowing the scope of civil rights laws. For example, Texas’s H.B. 3859 allows religious foster care agencies to refuse to place children in non-Christian families, regardless of any state or local laws that prohibit such discrimination. Similarly, the Trump Administration’s decision to exempt Miracle Hill Ministries and other federally funded foster care agencies from antidiscrimination regulations allows such agencies to reject foster parents based on religion. Miracle Hill is currently being sued for turning away a Catholic foster parent, and it has refused to work with Jewish families.²³ In *Masterpiece Cakeshop*, the attorney for the bakery explicitly argued before the Supreme Court that the Free Exercise Clause should be interpreted to allow for-profit businesses to violate laws prohibiting religious discrimination—not just discrimination based on sexual orientation. In other words, not only should bakeries be allowed to deny wedding cakes to same-sex couples, they should also be allowed to deny them to Muslims, Jews, interfaith couples, or atheists.

While a small group of religious practitioners may benefit from being allowed to violate antidiscrimination laws, the overall impact of such a regime would be devastating to religious liberty and plurality more generally. Laws prohibiting religious discrimination have been a crucial factor in ensuring that people of all faiths are able to fully participate in civil society. If protections against religion-based discrimination may be ignored without consequence, adherents of minority religions will be chilled in exercising their faith for fear of experiencing bias in public accommodations, employment, housing, and in other sectors of public and private life.

Just as antidiscrimination laws protect religious liberty, religious liberty laws can shield people of faith—especially religious minorities—from discrimination. For example, Iknor Singh successfully used RFRA to challenge a university Reserve Officer Training Corps program’s claim that allowing him to maintain his long hair, beard, and turban, as required by his Sikh faith, would “have an adverse impact on unit cohesion and morale because uniformity is central to the development of a bonded and effective fighting force.”²⁴ Of course, such “uniformity” is modeled on Christian, rather than Sikh, norms of dress and grooming. Thus, at least for religious minorities, religious liberty and equality rights are mutually enforcing values, each dependent on the other.



Protest of the Muslim travel ban before the Supreme Court, 2018. Photograph by Victoria Pickering via flickr.

RFRA was originally understood to be a civil rights law, promulgated in order to reduce unintentional discrimination against religious minorities. Using exemptions in order to expand religious discrimination turns the purpose of such laws on their head. In order to protect religious liberty, we must protect religious communities' civil rights, including their fair and equal access to housing, employment, education, and public accommodations. Any attempt to advance religious liberty by allowing religious discrimination will ultimately destroy the very right it seeks to protect.

Religious Liberty Cannot Be Absolute

No constitutional right is absolute. Where the government has important policy considerations, or the legal or constitutional rights of others are at risk, limits on the individual right to free exercise, free speech, and even liberty are permissible, and sometimes required.

Some religious exemption laws embraced by the Christian right are written in absolute terms, leaving no room for consideration of the impact the exemption would have on others. The First Amendment Defense Act, for example, would place an absolute barrier on the enforcement of an enormous range of laws and policies on certain religious objectors, regardless of the consequences this would have on larger considerations of civil rights, labor, health, and tax policy. Such an unconditional exemption stands in stark contrast not only with RFRA, which requires consideration of important government interests, but with Supreme Court precedent. In *Cutter v. Wilkinson*, the Court upheld RLUIPA in part because it was clear that the law would not require the adoption of religious exemptions that “become excessive, impose unjustified burdens on other institutionalized persons, or jeopardize the effective functioning of an institution.”²⁵

Courts have not hesitated to deny religious exemptions to religious minorities as well as members of humanitarian and social justice movements where they have found compelling government interests at stake—from the early sanctuary movement volunteers to Rastafarians seeking to use marijuana for religious practice to Catholic nuclear war protestors. They should similarly ensure that they take careful account of competing individual and government interests in assessing claims brought by conservative Christians seeking exemptions from health, labor, and antidiscrimination laws.

This report posits that conflicts between religious exercise and other rights—specifically equality rights—are often misunderstood and over-emphasized in the current dialogue regarding

religious liberty. Nevertheless, when religious liberty rights do conflict with other legal or constitutional rights, courts and legislatures must make every effort to thoughtfully balance the competing interests, without awarding absolute and unconditional deference to any one constitutional value.

Religious Liberty Must Be Democratic

Pushed to their limit, religious exemptions have the potential to undermine democratic governance in serious ways. There is some truth to the Court's early warning in *U.S. v. Reynolds* that allowing unrestricted religious exemptions "would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself."²⁶ This concern for democratic lawmaking was echoed again in *Employment Division v. Smith* in 1990. In his majority opinion rejecting the right to religious exemptions under the Constitution, Justice Scalia wrote that "leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself."²⁷ Both decisions warn of the possibility that law will become ineffective if it cannot be applied to those who oppose it.

This concern for maintaining a functioning democracy may appear overblown when it comes to religious exemptions that require only modest accommodations, or apply to a small minority group. Permitting Sikhs in the military to wear a turban, or a small sect to use hoasca, will have little larger impact on the government's ability to pass and enforce laws. Typically, such exemptions are necessary because in promulgating the underlying law or rule, policymakers did not take into consideration the religious beliefs or practices of the community requesting an exemption. Allowing exemptions in the context of small or disfavored religious communities may therefore mirror other constitutional doctrines that seek to correct for democratic failure, such as the constitutional suspicion that is required when the state acts in a disfavored way toward discrete and insular minorities that do not have the power to avail themselves of the political processes that would otherwise protect their interests.²⁸

However, increasingly, religious exemption litigation is being brought on behalf of extremely large faith groups—such as conservative Evangelical and Catholic Christians—and in contexts in which the groups' religious beliefs were already extensively considered and debated, and an exemption was ultimately rejected in favor of other government priorities. In these contexts, we would not conclude that the democratic process has somehow failed these communities,

rather the democratic process produced a result with which they do not agree. The ordinary, democracy-respecting response to such a moment is to return to democratic institutions and seek a change in the law, rather than claim that the law does not, or should not, apply to them.

For example, in the case of Hobby Lobby's RFRA challenge to the contraceptive mandate of the ACA, the federal government had already engaged in extensive negotiations among religious, health, and other advocates, and had decided to adopt a religious accommodation to the mandate that applied to religious nonprofits, but not to for-profit corporations.²⁹ In successfully gaining a religious exemption through litigation after being denied an exemption by the executive administration, the for-profit claimants were able to essentially override the careful compromise that had been negotiated through the regular democratic process. Religious objectors are, of course, free to challenge such compromises if they believe them to be in violation of the Constitution or federal law. Nevertheless, it is worth considering as part of the debate over the scope of religious exemption law how such challenges may be used to give even large and politically powerful religious constituencies a second opportunity to win policy battles that they have lost at the legislative or administrative levels.

In hearing RFRA and other exemption claims, judges should be cognizant of the scale of the exemptions that are requested, and whether they might have a larger impact on the ability of policymakers to make and enforce law.

Religious Liberty Must Be Pluralistic

The majority of the rules outlined above are targeted primarily at those in government charged with promulgating, enforcing, and applying religious liberty laws. However, these are not the only actors responsible for the increasingly lopsided understanding of "religious liberty" in the U.S. Advocates, journalists, and others have played an essential role in shaping the way we discuss and protect religious liberty. Too often, this has meant focusing public attention on "religious liberty" rights as defined by those with a select set of conservative religious beliefs about sex, sexuality, and marriage.

To remedy this, advocates of religious liberty for all must cease conflating "religious liberty" with the Christian right, even if unintentionally. Legal measures that would in fact threaten the religious liberty of certain faith communities, or of non-practitioners, should not be referred to as efforts to advance "religious liberty." Indeed, such laws must be understood as an attack on religious neutrality and equality.

Specifically, it is critical that writers and advocates as well as policymakers reject a “religion vs. LGBTQ/reproductive rights” framework for understanding and describing religious liberty claims. For many people—like members of the Clergy Consultation Service who provided abortion referrals prior to *Roe*, and the clergymembers in *United Church of Christ v. Reisinger* who sought a religious right to perform same-sex wedding ceremonies—religious freedom is not in conflict with reproductive justice and LGBTQ equality. Positioning the protection of religion and other fundamental rights as a zero-sum conflict erases the experiences of many faith communities, including LGBTQ people of faith. Exemptions that protect anti-choice or anti-LGBTQ religious views may offer protections to certain religious believers, but they do not protect all—or even most—people’s right to religious liberty.



Protestors Waiting for the *Burwell v. Hobby Lobby* decision outside the Supreme Court, 2014. © 2014 American Life League via flickr.

As part of this commitment to respecting all religious beliefs, atheists and the nonreligious must be included among those in need of religious liberty protection. A large and growing percentage of the U.S. population identifies as unaffiliated with any religious group, though a slight majority (55%) of this population—often called the “nones”—still describe themselves as religious or spiritual.³⁰ Despite this trend towards non-affiliation, nonreligious people and atheists

continue to face widespread prejudice in the United States.³¹ This bias against atheists can have material consequences; studies have found that atheists are vulnerable to discrimination in a range of settings, including when seeking employment and running for office.³² In fact, while unenforceable, there are still laws or constitutional provisions on the books in eight states barring atheists from holding public office.³³

Those who think, speak, and write about religious liberty must take care to present a pluralistic view of religion and religious freedom, rather than essentializing “religious liberty” as an issue for conservative Christians. Moreover, they should acknowledge that religious liberty rights must apply to the nonreligious, or they are meaningless.

Conclusion

Religious liberty means many things to many people. To some, like Samantha Lauf—who lost a job opportunity because of her headscarf—it means the ability to practice one’s religion openly without fear of discrimination or persecution. To others, like atheist activist Dan Barker, it means the right to access government institutions, such as public schools and courthouses, that are free from religious prayer or symbols. To others still, like Scott Warren—who continues to face significant prison time for providing food and shelter to migrants—it means the right to act out their faith, even if doing so may conflict with criminal or civil statutes. And finally, to some, religious liberty means no less than the ability to enshrine their own personal beliefs into U.S. law, and impose these beliefs on others.

Legislators and courts cannot protect every individual’s own private understanding of religious liberty. While free exercise of religion is a fundamental right, it is not an unlimited one. Like the right to free speech, it must sometimes yield to larger governmental or public concerns—including rights of others to follow their own consciences. While no one would argue that the United States’ religious liberty doctrine has been a model of consistency and clarity, there have been a few longstanding guiding principles that have served us well: the responsibility to treat all religious communities and beliefs—including a lack of religious belief—with neutrality; the refusal to require that people subsidize religious beliefs they do not hold; and a commitment to nondiscrimination and religious plurality.

Unfortunately, both advocates and government actors are now attempting to rewrite the meaning of religious liberty in a way that favors only a subset of religious believers. While people of faith have been called by their religious beliefs to feed the hungry, welcome the stranger, serve

those who use drugs, protect our environment, symbolically disarm weapons of war, celebrate same-sex commitments, and protect the right to abortion, these acts have been purposefully overlooked in favor of a theory of “religious liberty” centered on opposition to sexual liberty and equality rights. This is an affront to the values that made the free exercise of religion and church-state separation two of the foundations of our constitutional democracy.

This report is not intended to offer an opinion on how each of the religious liberty cases discussed therein should be decided. Rather, it is intended to shine a spotlight on the ways in which conversations about religious liberty in the U.S. have focused almost exclusively on one religious community, to the detriment of other faith groups. By providing a reminder of the vast diversity of religious beliefs and believers that must be protected equally under the law, we hope to reclaim a deeper understanding of religious liberty and preserve this fundamental constitutional right for people of all faiths and none.

Endnotes, Section IV: Charting a Path Forward: Protecting Religious Liberty for Everyone

- 1 *Bd. of Educ. v. Grumet*, 512 U.S. 687, 696 (1994) (internal citations omitted). *See also*, *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 226, (1963) (“In the relationship between man and religion, the State is firmly committed to a position of neutrality.”); *Epperson v. Arkansas*, 393 U.S. 97, 103-04 (1968) (“Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or to the advocacy of noreligion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite.”).
- 2 *Town of Greece*, 572 U.S. at 616 (2014) (Kagan, J., dissenting).
- 3 *Masterpiece Cakeshop*, 138 S. Ct. at 1732 (2018). In addition, while many religion law experts and people of faith would dispute the idea that the presence of a 40-foot cross on government property displays neutrality towards religion, the Court’s recent decision upholding such a monument relied on the neutrality principle. *American Legion*, 139 S. Ct. at 2090 (2019) (“For many of these people, destroying or defacing the Cross that has stood undisturbed for nearly a century would not be neutral and would not further the ideals of respect and tolerance embodied in the First Amendment.”). *See also*, *id.* at 2094 (Kagan, J., concurring) (“Here, as elsewhere, the opinion shows sensitivity to and respect for this Nation’s pluralism, and the values of neutrality and inclusion that the First Amendment demands.”).
- 4 *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).
- 5 Brief for Church-State Scholars as Amici Curiae Supporting Appellees’ Petitions for Rehearing en Banc, *Barber v. Bryant*, 138 S. Ct. 652 (2018), available at <https://southernequality.org/wp-content/uploads/2017/07/Amicus-Brief-MATZ.pdf>.
- 6 Janet Adamy, *Are Firms Entitled to Religious Protections?*, WALL STREET J. (Mar. 21, 2014), <http://www.wsj.com/articles/SB10001424052702304026304579451342576281698>; Molly Redden, *Hobby Lobby’s Hypocrisy*, MOTHER JONES (Apr. 1, 2014), <http://www.motherjones.com/politics/2014/04/hobby-lobby-retirement-plan-invested-emergency-contraception-and-abortion-drug-makers>.
- 7 Petitioner’s Response to the Court’s Aug. 15, 2018 Order Directing Supplemental Briefing at 10, *United States v. McAlister*, No. 2:18-cr-00022-LGW-RSB (S.D. Ga. Sept. 5, 2018).
- 8 Katherine Franke, *Religious Freedom for Me, But Not for Thee*, WASH. POST (Sept. 28, 2018), https://www.washingtonpost.com/opinions/religious-freedom-for-me-but-not-for-thee/2018/09/28/297fffb4-c340-11e8-8f06-009b39c3f6dd_story.html.
- 9 Verdict at 2, *United States v. Hoffman*, No. M 17-00339-N/A(BPV) (D. Ariz. Jan. 18, 2019).
- 10 Brief for Professors of Religious Liberty as Amici Curiae in Support of Neither Party on Defendants’ Motion to Dismiss Under the Religious Liberty Restoration Act at 6, *United States of America v. Hoffman*, No. 4:19-CR-00693-RM (D. Ariz. Apr. 22, 2019).
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