PUBLIC ADVOCATE OF THE UNITED STATES

DEFENDING CLAIMS BY HOMOSEXUAL AND "TRANSGENDER" ACTIVISTS

(June 27, 2023)

INTRODUCTION

If there were ever an illustration of the saying "If you give a mouse a cookie" it applies to the war that homosexual and transgender activists have been waging in American courts. In almost every case for the past 23 years, **Public Advocate of the United States** has filed an amicus brief defending traditional values against assault. Consider the following.

Homosexuals began by demanding that a state law banning local ordinances protecting homosexual rights be struck down.[1] Then, unmarried homosexuals sought the benefits of a marriage relationship through civil unions, as Vermont, though its state supreme court decision in *Baker v. State*,became the first state to mandate recognition of same-sex "civil unions" in 2001.[2] Then they wanted homosexual men to be able to volunteer to work with boys in Boy Scouts.[3] Then, homosexual activists claimed that all they wanted was to strike down laws criminalizing their behavior.[4]

Next, homosexuals sought the right to marry even though marriage is an institution created by God and is only between men and women.[5] After that, homosexual and transgender persons have demanded that private businesses such as bakeries and floral shops with moral scruples against their behavior cater to their immoral marriages.[6] Homosexual employees have

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[1] *Romer v. Evans*, 517 U.S. 620 (1996).

[2] *Baker v. State*, 170 Vt. 194 (Vt. 1999).

[3] *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000) (Public Advocate *amicus* brief filed on petition on Nov. 26, 1999; Public Advocate *amicus* brief filed on Feb. 28, 2000 on the merits).

[4] *Lawrence v. Texas*, 539 U.S. 558 (2003) overturning *Bowers v. Hardwick*, 478 U.S. 186 (1986) (Public Advocate *amicus* brief filed in *Lawrence* on Feb. 18, 2003).

[5] *United States v. Windsor*, 570 U.S. 744 (2013) (Public Advocate *amicus* brief on the merits filed on Jan. 29, 2013; Public Advocate *amicus* brief on jurisdiction and standing filed on Mar. 1, 2013); *Obergefell v. Hodges*, 576 U.S. 644 (2015) Public Advocate *amicus* brief filed on Apr. 3, 2015).

[6] *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018) (*amicus* brief filed in the Colorado Supreme Court on Oct. 23, 2015; Public Advocate *amicus* brief filed in the U.S. Supreme Court on September 7, 2017); *Klein v. Oregon Bureau of Labor and Industries* (Public Advocate *amicus* brief filed on petition on Nov. 26, 2018; second

sought broad immunity from being fired from their jobs.[7] Then, they demanded protection from adverse job actions from Title VII of the Civil Rights Act of 1964.[8] On almost all these demands, they have been successful.

Now, radical activists are demanding the nation's laws be changed to take children from parents who resist the surgical and chemical castration and sterilization of their children, and some state legislatures force child "sex changes" without parental consent.[9] And even Biblical preaching can cause those offended to demand that street pastors be arrested and jailed.[10]

Christians (and some from other faith traditions) have been under constant assault, with employees suing employers who will not bow to their demands. This paper provides an overview of the legal issues involved, and offers faith-based businesspeople a legal roadmap to be able to live out their faith in their business practices. It begins with a review and analysis of current case law, and concludes with suggestions for legal strategies faith-based businesses should use to defend their rights, based on the current state of the law. It also offers a listing of legal organizations that defend religious liberty in the workplace, as a resource for faith-based business people.

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amicus brief filed on petition on Oct. 7, 2022); *303 Creative v. Elenis*, 6 F.4th 1160 (2021) (Public Advocate *amicus* brief filed on petition on Oct. 28, 2021; Public Advocate *amicus* brief filed on the merits on June 2, 2022).

[7] *Zarda v. Altitude Express*, 883 F.3d 100 (2d Cir. 2018) (Public Advocate *amicus* brief filed in Second Circuit on July 26, 2017; *amicus* brief filed in the U.S. Supreme Court on July 2, 2018).

[8] *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020) (Public Advocate *amicus* brief filed on Aug. 23, 2019).

[9] California is one such state. (G. Hays, "Newly amended California bill could punish parents refusing to 'affirm' child's gender identity," *Fox News* (June 10, 2023)). Washington is another. (S. Arnold, "Washington To Allow Children to Be Legally Taken From Parents If They Don't Consent to Gender Transition," *TownHall.com* (Apr. 15, 2023)).

[10] E. Robertson, "Man arrested while citing Bible verse in protest of Pride event, then video evidence sinks case," *Fox News* (June 11, 2023).

I. *BOSTOCK V. CLAYTON COUNTY,* AND SUBSEQUENT CASES THAT UPHOLD TRADITIONAL VALUES.

Our analysis here begins with a 2020 Supreme Court decision which upheld special protected status for homosexuals and transgender persons in the workplace, which courts are now trying to determine how to apply.

***Bostock v. Clayton County*.**

In 2020, the U.S. Supreme Court issued a deeply flawed decision in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020) written by Justice Gorsuch, interpreting Title VII of the Civil Rights Act of 1964. Congress wrote Title VII to prohibit discrimination against women in employment, using the phrase "because of sex." Despite acknowledging that Congress never intended to protect homosexuals or transgender persons, Justice Gorsuch interpreted the word "sex" in the phrase "because of sex" to cover "sexual orientation and/or transgender status." Gorsuch claimed he was doing a "textual" analysis of the statute, stating that he was forced to reach the conclusion he did. But a "textual" analysis requires consideration of the context — which was to protect women, not homosexuals and transgenders in the workplace. Under *Bostock*, both homosexuals and so-called transgender persons are protected from adverse actions in covered workplaces. Fortunately, the scope of *Bostock* is in question; it may not apply to business owners who are following their deeply-held religious beliefs against government imposition of radical homosexual and "transgender ideology."

Two recent cases have provided positive strategies to limit the scope of *Bostock*, one from the Fifth Circuit, and one from a district Court in Texas.

Braidwood Mgmt. v. EEOC (Fifth Circuit).

On June 20, 2023, a panel of the Fifth Circuit decided *Braidwood Mgmt. v. EEOC*, 2023 U.S. App. LEXIS 15378 (5th Cir. 2023). Braidwood is a Christian pharmacy/health and wellness company in Texas. Based on its biblical beliefs, Braidwood forbids employee behaviors it considers immoral, including adultery, premarital sex, cross-dressing, "transgender" behavior "identifying" as the opposite sex, and genital mutilation surgeries. It requires employees to use the restroom of their biological sex. Braidwood sued the Equal Employment Opportunity Commission ("EEOC"), arguing that its interpretive enforcement of Title VII burdens both Braidwood's exercise of its religion, and its First Amendment right to expressive association.

> [E]ven before *Bostock*, the EEOC interpreted statutory prohibitions on sex discrimination to include sexual orientation and gender identity. The EEOC has stated that employers must treat homosexual marriage as the same as heterosexual marriage, and bathroom policy should be dictated by an

> employee's asserted gender identity as distinguished from his or her biological sex. [*Braidwood Mgmt. v. EEOC* at *8.]

The Fifth Circuit considered Braidwood's challenges under both the **First Amendment Free Exercise Clause**, and under the **Religious Freedom Restoration Act** ("RFRA"). The court affirmed the district court's holding that Braidwood was entitled to an exemption from Title VII requirements under RFRA.

1. Religious Freedom Restoration Act. The Fifth Circuit ruled that "compliance with Title VII post-*Bostock* would substantially burden its ability to operate per its religious beliefs about homosexual and transgender conduct…." *Id.* at *40.

> [I]n RFRA cases, the courts must "scrutinize[] the asserted harm of granting specific exemptions to particular religious claimants." *Fulton v. City of Philadelphia,* 141 S. Ct. 1868, 1881, 210 L. Ed. 2d 137 (2021) (alteration in original) (quoting *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431, 126 S. Ct. 1211, 163 L. Ed. 2d 1017 (2006)). Under RFRA, **the government cannot rely on generalized interests** but, instead, **must demonstrate a compelling interest in applying its challenged rule to "the particular claimant whose sincere exercise of religion is being substantially burdened**." [*Id*. at 44-45 (emphasis added).]

The court found that "the EEOC wholly fails to carry its burden to show that it has a compelling interest in refusing Braidwood an exemption, even post-Bostock." *Id*. at *40. The court decried *Bostock's* "nebulous description of the scope of its ruling," but noted that *Bostock* even recognized that '[b]ecause RFRA operates as a kind of super statute, displacing the normal operation of other federal laws, it might **supersede Title VII's commands** in appropriate cases.'" *Id.* at 9 (quoting *Bostock* at 1754) (emphasis added).

Thus, it would appear that, at least for now, **RFRA offers faith-based businesses a statutory defense to being forced to choose between their faith and making a living**.

2. First Amendment Free Exercise of Religion. Troublingly, the court vacated the district court's judgment that Braidwood was entitled to a Title VII exemption under the First Amendment's Free Exercise Clause, and did not clearly explain why. It may be the doctrine of "constitutional avoidance" — that if the Court can grant relief on a statutory basis alone, it will do so rather than address the constitutional issue. This is unfortunate, as the First Amendment is a much firmer ground than a mere statute for the protection of Americans' religious rights.

***Bear Creek Bible Church v. EEOC* (N.D. Tex.)**

Bear Creek Bible Church v. EEOC, 571 F. Supp. 3d 571 (N.D. Tex. 2021) involved both Bear Creek Bible Church and Braidwood as plaintiffs, and was eventually appealed to the

Fifth Circuit (see discussion of *Braidwood* case above). Judge Reed O'Connor carefully analyzed the *Bostock* decision, not just pointing out problems with the decision, but pointing out that it expressly did not purport to overturn protections for people of faith. The *Bostock* Court expressly left open the implications for religious liberties and other matters arising from its decision," the court noted. *Id.* at 586. The district court ruled in favor of Braidwood on Free Exercise, Free Association and RFRA grounds. It found that churches were exempt from Title VII, and therefore no ruling in the church's favor was needed, so it denied summary judgment to the church. *Id.* at 609. (On appeal, the Fifth Circuit also ruled in Braidwood's favor, but only on RFRA grounds, not constitutional ones).

Likewise, *Bostock* expressly stated it did not rule on issues such as sex-segregated bathrooms and dress codes, which Braidwood employs. "[U]nder Title VII itself, [the employers argued that] sex-segregated bathrooms, locker rooms, and dress codes will prove unsustainable after our decision today. But none of these other laws are before us; we have not had the benefit of adversarial testing about the meaning of their terms, and **we do not prejudge any such question** today." *Bostock* at 1753 (emphasis added).

Citing *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 725 (2014), which explained "the government's formulation of its compelling interest as 'public health' and 'gender equality' is overly broad," the district court stated, "[t]he relevant question, rather, is whether the government has a compelling interest in denying employers like Braidwood a religious exemption." *Id.* at 611. The court found that the EEOC did not have such a compelling interest.

The Supreme Court's 1990 decision in *Employment Div. v. Smith*, 494 U.S. 872 (1990) is often cited for the proposition that religious persons are still bound by a "valid and neutral law of general applicability" even if it infringes on a religious belief. *Id.* at 879. However, the Court has since made clear that **a law is not "generally applicable" to society as a whole if it contains exceptions** to its broad requirement.

In finding that the EEOC violated Braidwood's right to Free Exercise of Religion, the court cited to *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021), which reiterated that "[t]he creation of a system of exceptions under the contract undermines the [government's] contention that its non-discrimination policies can brook no departures."

The district court also cited to *Tandon v. Newsom*, 141 S. Ct. 1294 (2021), which held that "**government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat any comparable secular activity more favorably than religious exercise.**" *Id.* at 1296 (emphasis added).

Since Title VII contains exceptions for employers with less than 15 employees, and allows business on or near Native American reservations to favor Native Americans in hiring,

the court found that its prohibitions are not "generally applicable" despite *Bostock*. Since there are multiple exceptions to Title VII's "non-discrimination" provisions, Title VII is not generally applicable, and there must be a compelling interest in denying a religious business owner a similar objection – a particularly high bar to clear. **Thus, the Free Exercise argument is also likely to be a key defense for Christian businesses.**

3. First Amendment Freedom of Association.

The district court also held that the First Amendment's guarantee of Freedom of Association protects faith-based businesses against the assaults of "transgender" ideology. The court cited the Supreme Court's decision in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), that "freedom of association plainly presupposes a freedom not to associate." *Id.* at 647-648. Noting that *Boy Scouts of America* concluded that "[t]he First Amendment's protection of expressive association is not reserved for advocacy groups," (*id.* at 648), the court held that "for-profit businesses like Braidwood may pursue a right of association claim." *Bear Creek Bible Church* at 615. Holding that there was no compelling interest in forcing Braidwood to violate its beliefs, the court concluded that "[t]he Government can no more force an association that opposes homosexuality or transgender behavior to hire individuals engaged in that conduct than it can force a gay-rights organization to hire an avowed opponent of homosexuality." *Id.* at 616. Thus, Free Association should be another defense raised by faith-based businesses in future cases.

II. HOW FAITH-BASED BUSINESSES CAN DEFEND THEMSELVES

Based on the *Bear Creek Bible Church* and *Braidwood* decisions, faith-based businesses have at least three legal strategies available to defend their right to operate their businesses in accordance with their religious beliefs. None are guaranteed to be successful, but all offer some potential protection from the pervasive effects of *Bostock* and its attack on religious freedom.

A. The Free Exercise of Religion Constitutional Defense.

While leftist lawyers and judges disagree, **faith-based employers should have protection under the First Amendment's Free Exercise Clause**. First Amendment challenges by faith-based businesses should not be limited to arguing that a law requiring employment of "transgender" persons is not "generally applicable." **Faith-based businesses should argue that the Supreme Court's *Smith* decision, by its express language, applies only to "an otherwise valid law prohibiting conduct that the State is free to regulate."** *Smith*, at 879. **The Founders recognized that the exercise of religion is not a matter the State is free to regulate.** The Supreme Court expressly recognized, in another ruling against the EEOC, that the Constitution forbids the government from interfering in a church's selection of a minister, because such a decision is "an internal church decision that affects the faith and mission of the

church itself," and is accordingly beyond government's jurisdiction to regulate. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 190 (2012).

Because the Constitution does not define "religion," the Supreme Court has looked to founding-era history. In *Reynolds v. United States*, 98 U.S. 145 (1878), **the Court cited Madison's Memorial and Remonstrance, "in which he demonstrated 'that religion, or the duty we owe the Creator,' was not within the cognizance of civil government."** *Id.* at 163 (emphasis added). Madison went on to say:

> Religion or the duty which we owe to our Creator and the manner of discharging it, can be directed only by reason and conviction, not by force or violence. The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right… It is the duty of every man to render to the Creator such homage and such only as he believes to be acceptable to him. This duty is precedent, both in order of time and in degree of obligation, to the claims of Civil Society.[11]

The *Reynolds* Court also cited Jefferson's Statute for Religious Freedom, which declared that "to suffer the civil magistrate to … restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy which at once destroys all religious liberty…." *Reynolds* at 163.

Faith-based businesspeople should argue that their right to select employees who agree with and will convey their beliefs to customers is a "duty which we owe to our Creator" and that "this duty is precedent … to the claims of civil society." This is a proper understanding of the Free Exercise Clause, and is not subject to being superseded by Congress, as RFRA is. **Constitutionally, the Free Exercise argument should be the strongest for faith-based businesses.**

B. The Free Association Constitutional Defense.

Faith-based businesses should argue that the Freedom of Association protects their right to hire employees who share their values. *Boy Scouts of America*, discussed above, is one decision that upholds this principle. Another is *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995). The case was decided on free speech grounds, but in its facts was a free association case.

As with Boy Scouts of America, it involved homosexual activists attempting to require organizations that disagreed with them to nonetheless be subject to forced association. The Court overturned a Massachusetts decision that a private parade had to allow a homosexual

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[11] J. Madison, A Memorial and Remonstrance 5-6. Boston: Lincoln & Edmunds (1819).

organization to participate. The *Hurley* Court held, "[F]orbidding acts of discrimination toward certain classes … to produce a society free of the corresponding biases … is a decidedly fatal objective" under the First Amendment. *Id*. at 578-579. "While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government." *Id*. at 579.

The *Bear Creek Bible Church* court cited both cases in its free association decision, and **faith-based businesses should use these cases in their defense**.

C. The RFRA Statutory Defense.

In many ways, the Religious Freedom Restoration Act provides less protection than the Free Exercise Clause, as if the government has a "compelling state interest," it can impose its will on the people despite RFRA. Under the Free Exercise Clause, the government has no such jurisdiction. However, it is on the books, and can be tried, up to the point that it is repealed, or another law such as the "Equality Act," which would expressly deny any RFRA defense to employment of "transgender" identifying employees, is enacted.

The Supreme Court in *Hobby Lobby* stated that "[b]y enacting RFRA, Congress went far beyond what this Court has held is constitutionally required." *Hobby Lobby*, at 706. So this may be the easiest line of defense for faith-based businesses. Organizations whose mission is explicitly religious, such as a church and perhaps a Christian school or Christian radio station, are likely to qualify as a "religious employer," and may be able to argue for a categorical exception to Title VII.

Additionally, under the reasoning of *Hobby Lobby* and now *Bear Creek Bible Church*, for-profit businesses can plausibly argue that RFRA protects their religiously-based employment practices. "[T]here is no apparent reason why [corporations existing for profit] may not further religious objectives as well." *Hobby Lobby*, at 712.

These recent religious freedom decisions offer the first victory for religious employers after *Bostock*, and offer religious employers a roadmap for fighting back to defend their religious rights against radical "transgender" ideology. **Faith-based businesspeople should utilize all three arguments in seeking to harmonize their sincerely-held religious beliefs with their right to make a living.**

RESOURCE LIST

The following legal defense organizations have assisted employers in defending their religious liberties. Listing does not imply an endorsement.

1. America First Legal: https://aflegal.org/
(This organization represented the plaintiffs in *Braidwood*.)
https://aflegal.org/major-victory-afl-prevails-at-the-fifth-circuit-in-lawsuit-challenging-the-eeocs-extreme-transgender-guidance-documents/

2. First Liberty Institute: https://firstliberty.org/

3. Liberty Counsel: www.lc.org

4. Becket Fund for Religious Liberty: https://www.becketlaw.org/
https://www.becketlaw.org/case/sisters-mercy-v-price/

5. Freedom of Conscience Defense Fund: https://fcdflegal.org/
https://fcdflegal.org/fcdf-files-supreme-court-brief-on-behalf-of-scholar-ryan-t-anderson-in-support-of-womens-right-to-equal-opportunity-and-privacy/

6. National Legal Foundation: https://nationallegalfoundation.org
https://nationallegalfoundation.org/wp-content/uploads/2020/04/St-James-School-v-Biel-19-348-Amici-Br-BGEA-et-al-1.pdf

7. Pacific Justice Institute: https://pacificjustice.org/
https://pacificjustice.org/resources/others/transformed-a-discussion-of-the-transgender-movement-in-america/