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A CONTINUED SIGN OF THE COURT'S UNWILLINGNESS TO OVERRULE *SMITH*

By Gader Wren∗

"There is nothing talismanic about neutral laws of general applicability or general criminal prohibitions, for laws neutral toward religion can coerce a person to violate his religious conscience or intrude upon his religious duties just as effectively as laws aimed at religion."

Justice Sandra Day O'Connor[1]

INTRODUCTION

Since its inception, the Supreme Court's holding in *Employment Division v. Smith* has been attacked for diluting Free Exercise rights. In recent years, petitioners have asked the Court to reconsider *Smith's* soundness.[2] However, despite these challenges to *Smith's* legitimacy, it has remained the law of the land.[3]

On February 22, 2022, the Court granted certiorari on *303 Creative LLC v. Elenis*.[4] Although Petitioner asked the Court to overrule *Smith*,[5] the Court granted certiorari to answer only a single question: "[w]hether applying a public-accommodation law to compel an artist to speak or stay silent violates the Free Speech Clause of the First Amendment."[6] This move suggests that Justices Barrett and Kavanaugh remain hesitant to overrule *Smith*.

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1 Emp. Div., Dep't of Hum. Res. of Oregon v. Smith, 494 U.S. 872, 901 (1990) (O'Connor J., concurring) (Joined by Justices Brennan, Marshall, and Blackmun, Justice O'Connor argued that the *Smith* test is inconsistent with precedent and history).

2 *See* Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021).

3 *See id.*

4 *303 Creative LLC v. Elenis*, SCOTUSblog, scotusblog.com/case-files/cases/303-creative-llc-v-elenis/ [https://perma.cc/5WY3-6TZE] (last visited Mar. 22, 2022).

5 *See* Petition for Writ of Certiorari at 23, 303 Creative LLC. v. Elenis, No. 21-476 (U.S. May 26, 2022), scotusblog.com/case-files/cases/303-creative-llc-v-elenis/ [https://perma.cc/5WY3-6TZE] (last visited Mar. 22, 2023) [hereinafter Petition].

6 *303 Creative LLC v. Elenis*, *supra* note 4.

I. *EMPLOYMENT DIVISION V. SMITH*

For over thirty years, *Smith* has served as the law of the Free Exercise Clause and presented confusion in lower federal courts.[7] In *Smith*, the Court held that neutral laws of general applicability do not offend Free Exercise, even when such laws inhibit individuals from practicing their sincerely held beliefs.[8] Justice Scalia, writing for the Court, suggested that the Court had never before applied strict scrutiny to controversies *solely* involving the Free Exercise Clause.[9] However, in her concurrence, Justice O'Connor criticized the majority opinion as it "dramatically depart[ed] from well-settled First Amendment jurisprudence."[10] She further noted that the majority's holding was "unnecessary to resolve the question presented, and is incompatible with our Nation's fundamental commitment to individual religious liberty."[11]

For years, *Smith* has faced criticism from all sides. In response to the grossly unpopular opinion, Congress passed the Religious Freedom Restoration Act (the "Act") with bipartisan support.[12] The purpose of the Act was to "restore the compelling interest test as set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder* and to guarantee its application in all cases where free exercise of religion is substantially burdened[,]" and "to provide a claim or defense to persons whose religious exercise is substantially burdened by government."[13] However, the Court held that Congress exceeded its Fourteenth Amendment § 5 enforcement powers and struck down the Act as it applied to the states.[14]

II. *FULTON V. CITY OF PHILADELPHIA, PENNSYLVANIA*

In 2020, the Court granted certiorari in a case in which Petitioner asked for *Smith* to be overruled.[15] In *Fulton*, the Court held that laws providing discre-

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[7] The Second, Third, and Sixth circuits have held that *Smith's* hybrid-rights theory is merely dicta. *See* Combs v. Homer-Ctr. Sch. Dist., 540 F.3d 231, 245 (3d Cir. 2008); Leebaert v. Harrington, 332 F.3d 134, 143 (2d Cir.2003); Kissinger v. Bd. of Trs. of Ohio State Univ., Coll. of Veterinary Med., 5 F.3d 177, 180 (6th Cir.1993). Dissimilarly, the Eight and Eleventh Circuits have held that hybrid-rights theory is binding. *See* Telescope Media Grp. v. Lucero, 936 F.3d 740, 760 (8th Cir. 2019); Henderson v. McMurray, 987 F.3d 997, 1006 (11th Cir. 2021).

[8] Emp. Div., Dep't of Human Res. of Oregon v. Smith, 494 U.S. 872, 879 (1990).

[9] *Id.* at 881.

[10] *Id.* at 891 (O'Connor, J., concurring).

[11] *Id.*

[12] Religious Freedom Restoration Act (RFRA) of 1993, Pub. L. No. 103-141, 1993 U.S.C.C.A.N. (107 Stat.) 1488, *invalidated by* City of Boerne v. Flores, 521 U.S. 507 (1997).

[13] *Id.*

[14] City of Boerne v. Flores, 521 U.S. 507, 536 (1997). However, Justices O'Connor and Breyer stated that the Act was constitutional because *Smith* was wrongly decided. *Id.* at 544–45 (O'Connor J., dissenting). Similarly, Justice Souter suggested that the *Smith* rule may lack "soundness." *Id.* at 565 (Souter J., dissenting).

[15] *Fulton v. City of Philadelphia, Pennsylvania*, SCOTUSBLOG, https://www.scotusblog.com/case-files/cases/fulton-v-city-of-philadelphia-pennsylvania/ [https://perma.cc/872X-EZSU] (last visited Dec. 8, 2022).

tionary power to government actors are not generally applicable and thus are subject to strict scrutiny.[16] In holding that strict scrutiny applied, the Court "side-step[ped] the question" as to whether *Smith* should be overruled.[17]

In his concurring opinion, Justice Alito, joined by Justices Thomas and Gorsuch, argued that *Smith* should be overruled.[18] In language resembling a blistering dissent, Justice Alito proffered that *Fulton* and *Smith* leave the promise of Free Exercise as though it was "written on the dissolving paper sold in magic shops."[19] However, more important is Justice Barrett's concurring opinion.

Justice Barrett, joined by Justices Breyer and Kavanagh, stated that "the textual and structural arguments against *Smith* are . . . compelling."[20] However, because the Fulton holding did not require overruling *Smith*, Justice Barrett declined to do so.[21] Interestingly, she noted that overruling *Smith* would require a new standard and raised concerns about what standard should replace *Smith*.[22] Justice Barrett also raised a judicial economy concern indicating that overruling *Smith* would create a "garden-variety" of challenges that would potentially overwhelm federal courts.[23] Nevertheless, Justice Barrett's concurrence strongly suggests that she and Justice Kavanagh are willing to overrule *Smith* if presented with the right case.[24]

III. *303 CREATIVE LLC V. ELENIS*

Just two years after *Fulton*, Petitioner in *303 Creative* asked the Court to again revisit *Smith*.[25] Petitioner, a devout Christian and web designer, refused to customize a website for a same-sex couple's wedding.[26] However, the Colorado Antidiscrimination Act does not permit businesses to refuse service to customers on the basis of sexual orientation.[27] In addition to Free Speech argu-

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[16] Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1881 (2021).

[17] *Id.* at 1926 (Gorsuch J., concurring).

[18] *Id.* at 1883 (Alito J., concurring) ("This case presents an important constitutional question that urgently calls out for review: whether this Court's governing interpretation of a bedrock constitutional right, the right to the free exercise of religion, is fundamentally wrong and should be corrected.").

[19] *Id.* at 1887.

[20] *Id.* at 1882. (Barrett J., concurring). Justice Breyer did not join the first paragraph of the concurrence.

[21] *Id.*

[22] *Id.* at 1883. ("What forms of scrutiny should apply? Compare Sherbert v. Verner, 374 U.S. 398, 403 (1963) (assessing whether government's interest is 'compelling'), with Gillette v. United States, 401 U.S. 437, 462 (1971) (assessing whether government's interest is 'substantial').). Citations modified.

[23] *See id.*

[24] The same is true of Justice Breyer; however, he retired from the Court in June of 2022.

[25] *See* Petition, *supra* note 5.

[26] *Id.* at 5.

[27] COLO. REV. STAT. ANN. § 24-34-601 (West 2021).

ments, Petitioner argued on Free Exercise grounds that *Smith* should be overruled for a least two reasons.[28]

Petitioner first argued that lower courts have been unable to apply *Smith* consistently.[29] According to Petitioner, such inconsistent application leaves "little hope" for "religious adherence" and is "unworkable[,]" as noted by Justice Gorsuch in *Fulton*.[30] Secondly, Petitioner argued that *303 Creative* served as the "ideal vehicle to resolve the question" of overruling *Smith* for as Justice Gorsuch noted in his *Fulton* concurrence, Free Exercise questions "will keep coming until the Court" corrects course. [31] In short, Petitioner suggested that if the Court again sidestepped the *Smith* question, cases will continue to make their way through the federal courts.[32] Despite Petitioner's arguments, the Court did not grant certiorari to decide whether *Smith* should be overruled; rather, the Court instead granted certiorari to decide whether the statute violated the First Amendment's guarantee of Free Speech.[33]

The Court's decision not to grant certiorari on the *Smith* question speaks volumes. The Court's self-established rules require an affirmative vote from four of the nine Justices to grant a petition for certiorari.[34] Though speculative, it is extremely probable that Justices Thomas, Alito, and Gorsuch would have granted certiorari on the *Smith* question, given that they would have overruled *Smith* in *Fulton*.[35] If correct, this means that Justices Barrett and Kavanaugh remain unsure as to what standard would replace *Smith*.

When nominated to the Seventh Circuit, Justice Barrett faced harsh criticism in her confirmation hearings. Senator Dianne Feinstein told then-Professor Barrett that "[religious] dogma lives loudly within you. And that's of concern."[36] Similarly, then-Judge Kavanaugh faced some challenges related to his religion, to which he responded, "as I have written, we are all equally American no matter what religion we are or if we have no religion at all."[37] Perhaps the

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[28] Petition, *supra* note 5, at 10.

[29] *Id.* at 24–25; *see also supra* note 7 and accompanying text.

[30] Petition, *supra* note 5, at 29.

[31] *Id.* at 36.

[32] *See id.*

[33] *See 303 Creative LLC v. Elenis*, *supra* note 4.

[34] *Supreme Court Procedures*, UNITED STATES COURTS (last visited Mar. 17, 2023), https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1 [https://perma.cc/QX5A-RCLX].

[35] *See generally* Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021) (Alito J., concurring).

[36] Aaron Blake, *Did Dianne Feinstein accuse a judicial nominee of being too Christian?*, WASHINGTON POST (Sept. 7, 2017, 1:12 PM), https://www.washingtonpost.com/news/the-fix/wp/2017/09/07/did-a-democratic-senator-just-accuse-a-judicial-nominee-of-being-too-christian/ [https://perma.cc/PV2N-4NZ3].

[37] Veronica Rocha, Sophie Tatum and Brian Ries, *The Kavanaugh hearing*, CNN POLITICS (Sept. 7, 2018), https://www.cnn.com/politics/live-news/kavanaugh-hearing-dle/h_1f30e1d912b18024a3f5dddfaef7dbc7 [https://perma.cc/EX44-KEAX].

religious dogma does not live so loudly in Justices Barrett and Kavanagh after all.[38]

In *303 Creative*, questions from the bench during oral arguments shed additional light on Justices Barrett and Kavanaugh's unwillingness to address *Smith*. While Justice Alito compared religious protections to same-sex protections,[39] Justice Barrett focused on how freedom of speech protects a web designer's right to refuse a job promoting a same-sex wedding.[40] Similarly, Justice Kavanaugh's questions focused on whether a web designer is afforded the same freedom of speech protections as book authors.[41] These questions, shying away from religious protection, further suggest that Justices Barrett and Kavanaugh remain reluctant to overrule *Smith*.

IV. THE FUTURE OF *SMITH*

Though *Smith* remains the law of the Free Exercise Clause, its effect has diminished. Because of the Court's holding in *Fulton*, Free Exercise proponents now know that laws providing any degree of discretion are not subject to *Smith*, but to strict scrutiny.[42] Some legal scholars have even suggested that "what the *Fulton* Court did was arguably even more drastic than returning to the pre-*Smith* regime."[43] Regardless of whether this is true, it is clear that many cases now fall outside of the *Smith* analysis.[44]

Although the Court did not grant certiorari on the *Smith* question in *303 Creative*,[45] the days of *Smith* are numbered. Just as *Fulton* and *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* resulted in a win for the parties declining service to LGBT clients, *303 Creative* will almost certainly result in a victory for the web designer.[46] For as the Court indicated in *Obergefell v. Hodges*, "decent and honorable" people who have sincere religious or philosophical objections to same-sex marriage should not have their beliefs

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[38] Some may believe that Justices Barrett's and Kavanaugh's votes in *Dobbs* would suggest otherwise; however, as noted by many, including Democrat emeritus Harvard professor of law Alan Dershowitz, *Roe* was a mistake. Overruling Roe was not a religious correction, but a legal and constitutional correction. *See*, Jacqui Frank and Josh Barro, *ALAN DERSHOWITZ: Here's why the Supreme Court got Roe v. Wade wrong but gay marriage right*, BUSINESS INSIDER (Sept. 28, 2016), https://www.businessinsider.com/alan-dershowitz-supreme-courtt-roe-v-wade-wrong-2016-9 [https://perma.cc/Y46N-UTNZ].

[39] *See* Transcript of Oral Argument at 29, 303 Creative LLC. v. Elenis (No. 21-476).

[40] *See id.* at 19–20, 49, 98–99.

[41] *Id.* at 94–95.

[42] Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1881 (2021).

[43] Zalman Rothschild, *Individualized Exemptions, Vaccine Mandates, and the New Free Exercise Clause*, 131 YALE L.J. FORUM 1106, 1107 (2022) (arguing that *Fulton* opened the door to vaccine exemptions on religious grounds).

[44] *Fulton*, 141 S. Ct. at 1881.

[45] *See 303 Creative LLC v. Elenis*, *supra* note 4.

[46] *See generally Fulton*, 141 S. Ct. at 1881; Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n, 138 S. Ct. 1719 (2018).

"disparaged" by the government.[47] In *303 Creative*, the Court will almost certainly find that a website designer cannot be compelled to create a website that promotes a view with which the designer does not agree, because to do so would violate the First Amendment's Free Speech protection.

As cases continue to make their way to the Court, it is only a matter of time before Free Exercise cases will need to be settled on Free Exercise grounds, and not based on freedom of speech or some other constitutional provision. When such a case comes before the Court, Justices Barrett and Kavanaugh will hopefully have formulated a replacement standard for *Smith*.

CONCLUSION

The Court's refusal to grant certiorari on the *Smith* question indicates that Justices Barrett and Kavanaugh remain unwilling to overrule *Smith*. Although the Court will continue to sidestep the question of whether *Smith* should be overruled for as long as it can, *Smith* will eventually find itself in the rearview mirror. When such a day comes, the promise of Free Exercise will no longer be written on dissolving magic shop paper.[48]

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[47] *See* Obergefell v. Hodges, 576 U.S. 644, 672 (2015).

[48] *See Fulton*, 141 S. Ct. at 1887.