

Constitutional and Legal Requirements Pertaining to Religious Exemptions in Government Contracting

Submitted by American Atheists, Center for Inquiry, Freedom From Religion Foundation, and Secular Coalition for America.

In August 2018, the Department of Labor issued a Directive¹ to provide guidance to federal contractors and staff concerning enforcement of applicable federal non-discrimination requirements. While this Directive purported set forth recent legal developments applicable to enforcement, in fact the Supreme Court cases cited were not relevant to the application of federal non-discrimination requirements and should not meaningfully affect the enforcement activities of the Office of Federal Contract Compliance Programs (OFCCP). Instead, the Directive pulled misleading quotes from a variety of inapplicable Supreme Court decisions to call into question whether non-discrimination requirements for government programs are applicable if they conflict with an individual's or organization's religious beliefs.

The Department now seeks to issue regulations pursuant to this Directive.² Presumably, these proposed regulations will alter or expand upon the allowance for government contractors that are religious organizations to prefer "the employment of individuals of a particular religion to perform work connected with the carrying on by such [religious organization]... of its activities."³ In anticipation of this proposed rule, we submit the following materials to call attention to the misapplication of the recent legal developments by the Directive and to clarify constitutional requirements pertaining to religious exemptions.

Analysis of Relevant Statutes and Their Interpretation in Recent US Supreme Court Decisions

1. In the *Hobby Lobby*⁴ decision, the US Supreme Court does make clear that the Religious Freedom Restoration Act (RFRA) applies to federal regulations of for-profit closely held corporations. However, this decision was based on statutory construction of RFRA rather than on constitutional principles. In fact, the strict scrutiny test established by RFRA goes beyond constitutional requirements,⁵ and any exemption granted through this law is subject to constitutional restrictions.⁶
2. The Hobby Lobby decision expressly pertains only to closely held corporations, and the logic the court used in expanding the protection of RFRA to closely held corporations does not pertain to

¹ U.S. Dept. of Labor, Office of Federal Contract Compliance Programs, Directive (DIR) 2018-03 (10 Aug. 2018).

² U.S. Dept. of Labor, Office of Federal Contract Compliance Programs, Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious-Organization Exemption, Pending EO12866 Regulatory Review, RIN: 1250-AA09 (Apr 20, 2019).

³ E.O. 11246 § 204(c), codified in OFCCP's regulations at 41 C.F.R. § 60-1.5(a)(5).

⁴ *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

⁵ See *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990) ("The "compelling government interest" requirement seems benign, because it is familiar from other fields.... What it produces in those other fields -- equality of treatment, and an unrestricted flow of contending speech -- are constitutional norms; what it would produce here -- a private right to ignore generally applicable laws -- is a constitutional anomaly.... The First Amendment's protection of religious liberty does not require this.")

⁶ See, e.g., *City of Boerne v. Flores*, 521 U.S. 507, 544 (refusing to enforce RFRA against the states because doing so would be unconstitutional).

publicly traded corporations.⁷ Absent statutory support and court precedent, it would be clearly improper for the Department to issue regulations that extended RFRA protections to publicly traded corporations.

3. Moreover, there has never been substantive legal support for the idea that RFRA allows for religious exemptions to federal non-discrimination laws or implementing regulations. Instead, using discrimination based on race as an example, the Court in *Hobby Lobby* again confirmed that efforts to provide an equal opportunity to participate in the workforce through non-discrimination laws will meet strict scrutiny tests.⁸ Circuit courts which have squarely considered this issue have agreed that the RFRA strict scrutiny test does not limit enforcement of non-discrimination laws applicable to LGBTQ people.⁹

Analysis of Constitutional Requirements Pertaining to Freedom of Religion

4. The Supreme Court has established a three-tier approach to application of the constitutional requirements of the Free Exercise Clause.¹⁰ 1) “The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires” such that “[t]he government may not compel affirmation of religious belief, punish the expression of religious doctrines it believes to be false, impose special disabilities on the basis of religious views or religious status, or lend its power to one or the other side in controversies over religious authority or dogma.”¹¹ 2) When the “‘exercise of religion’ ... involves not only belief and profession but the performance of (or abstention from) physical acts ... a state would be ‘prohibiting the free exercise [of religion]’ if it sought to ban such acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display.”¹² 3) Conversely, however, “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).’”¹³ This test displaced the earlier, inconsistently applied *Sherbert* test.¹⁴

⁷ *Burwell* at 702 (“The idea that unrelated shareholders—including institutional investors with their own set of stakeholders—would agree to run a corporation under the same religious beliefs seems improbable.”).

⁸ *Id.* at 733 (“The principal dissent raises the possibility that discrimination in hiring, for example on the basis of race, might be cloaked as religious practice to escape legal sanction.... Our decision today provides no such shield. The Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal.”)

⁹ See, e.g., *Equal Employment Opportunity Commission v. R.G. & G.R. Harris Funeral Homes*, No. 16-2424 (6th Cir. 2018).

¹⁰ *Employment Division*, 494 U.S. 872.

¹¹ *Employment Division* at 877 (internal citations omitted).

¹² *Id.*

¹³ *Id.* at 879 (citing *United States v. Lee*, 455 U.S. 252, 263, n. 3 (1982)).

¹⁴ *Sherbert v. Verner*, 374 U.S. 398 (1963).

5. The Supreme Court has also discussed the scope of the religious freedom protections created by the Establishment Clause.¹⁵ In so doing, the Court clarified that “[the government] may not be hostile to any religion or to the advocacy of no-religion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite. The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.”¹⁶ Therefore, any regulation established by the Department to accommodate religion must not unconstitutionally favor religion over nonreligion or religious organizations over secular ones. For example, the Department may not establish exemptions from programmatic requirements that would provide a material advantage to religious contractors or grantees that are unavailable to secular ones.

6. Further, the government may implicate the Establishment Clause by going too far to accommodate religious organizations. Specifically, the Establishment Clause requires the consideration of any impact an accommodation or religious exemption would have on third parties. Specifically, the Constitution bars the government from crafting “affirmative” accommodations within its programs if the accommodations would harm any program beneficiaries.¹⁷ The Constitution commands that “an accommodation must be measured so that it does not override other significant interests;”¹⁸ “impose unjustified burdens on other[s];”¹⁹ or have a “detrimental effect on any third party.”²⁰ Therefore, any regulations established by the Department to accommodate religion must do so without significantly burdening third parties.

¹⁵ “Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa.” *Everson v. Board of Education*, 330 U.S. 1, 15-16 (1947).

¹⁶ *Epperson v. Arkansas*, 393 U.S. 97, 103-04 (1968).

¹⁷ U.S. Const. Amend. I; *Cutter v. Wilkinson*, 554 U.S. 709, 720, 722 (2005) (to comply with the Establishment Clause, courts “must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries” and must ensure that the accommodation is “measured so that it does not override other significant interests”) (citing *Estate of Thornton v. Caldor*, 472 U.S. 703, 710 (1985)); see also *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2781 n.37 (2014); *Holt v. Hobbs*, 135 S. Ct. 853, 867 (2015) (Ginsburg, J., concurring).

¹⁸ *Cutter v. Wilkinson*, 544 U.S. at 722.

¹⁹ *Id.* at 726.

²⁰ *Id.* at 720, 722; See also *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2781; *Estate of Thornton v. Caldor*, 472 U.S. at 710 (“unyielding weighting” of religious exercise “over all other interests...contravenes a fundamental principle” by having “a primary effect that impermissibly advances a particular religious practice.”); *Texas Monthly, Inc. v. Bullock*, 480 U.S. 1, 18 n.8 (1989) (religious accommodations may not impose “substantial burdens on nonbeneficiaries”); *United States v. Lee*, 455 U.S. 252 (1982) (“the limits [followers of a particular sect] accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity.”).

7. Finally, consistent with the Establishment Clause, courts have found that, while there is not a requirement for the government to provide funding to religious organizations,²¹ if the government does so, it must do so in a way which does not violate the Establishment Clause. Specifically, for the government to provide funding to religious organizations, (1) the primary purpose of the assistance must be secular, (2) the assistance must neither promote nor inhibit religion, and (3) there must be no excessive entanglement between church and state.²²
8. To ensure that the government meets these constitutional obligations while funding religious organizations to provide programs, various agencies have established basic rules pursuant to court guidance to protect program beneficiaries.²³ For example:
 - a. Religious organizations that receive federal funds are subject to all financial reporting, accounting, and audit requirements required by other grantees.
 - b. Organizations may not use government funds to support inherently religious activities, including religious worship, instruction, or proselytization, or to purchase religious materials.
 - c. Organizations may not require program participants to attend or take part in any religious activities. Any such participation must be completely voluntary.
 - d. Federal funds may not be used to pay the salary of a person engaged in inherently religious activities.
 - e. Religious organizations receiving federal funds cannot discriminate against or provide preference to program beneficiaries on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to actively participate in a religious practice.
 - f. Religious organizations must meet the same eligibility requirements as other organizations to receive federal grants (including, for example, board composition and capacity to complete the scope of the grant).

We strongly recommend that any proposed rule issued by the Department reinforce these protections for religious freedom.

Applicability of Recent US Supreme Court Decisions Pertaining to Religion and Free Speech

9. In the recent *Masterpiece Cakeshop*²⁴ decision, the Supreme Court reaffirmed the position taken in *Lukumi Babalu Aye*²⁵ and *Employment Division*,²⁶ that the government may not take an apparently neutral government action based upon impermissible religious hostility. Courts that have since examined *Masterpiece* have clarified that this means “a challenger under the Free

²¹ See discussion of *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. ____ (2017), below.

²² *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Note that the recently decided *American Legion v. American Humanist Association*, Slip Op. (2019), is critical of the *Lemon* test being asserted in contexts relating to symbols and monuments, but the Courts’ analysis is not applicable to government funded programs.

²³ See, e.g., 42 CFR Part 54A; 45 CFR 87.3.

²⁴ *Masterpiece Cakeshop, Ltd. V. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018).

²⁵ *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

²⁶ *Employment Division* at 877-878.

Exercise Clause must show that it was treated differently because of its religion. Put another way, it must show that it was treated more harshly than the government would have treated someone who engaged in the same conduct but held different religious views.²⁷ Other courts have clarified that the heightened requirement for religious neutrality described in *Masterpiece Cakeshop* applies only to adjudicatory bodies hearing a particular case, not executive branch discretion.²⁸

10. Moreover, *Masterpiece Cakeshop* reaffirmed the Supreme Court's position that, while "religious and philosophical objections [to same-sex marriage] are protected, it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law."²⁹ While we were disappointed that the Administration took the opposite position in this case,³⁰ a proposition which contravened 50 years of precedent,³¹ we hope and expect that the Department will follow the Court's guidance on this matter.

11. The Directive³² issued by the Department that serves as the basis for this proposed rulemaking mischaracterizes the Supreme Court's decision in *Trinity Lutheran Church of Columbia, Inc. v. Comer*.³³ This decision was expressly limited to discrimination based on religious identity with respect to playground resurfacing,³⁴ and therefore this case has precisely zero effect on regulations pertaining to federal contractors. However, even if we take this case at its broadest possible interpretation, which is 'religious organizations may compete equally for government funding for a secular purpose,' the Establishment Clause still prohibits the government from awarding funds for a religious purpose or with an effect of advancing religion.³⁵ If a potential contractor would include religious activities or would otherwise promote religion while performing its government-funded service, the funding would be unconstitutional. Further, the decision must be read in harmony with *Employment Division* so that religiously motivated conduct enjoys no special constitutional protections or exemptions from general, neutrally applied legal requirements.³⁶ There is no legal, constitutional, or historical basis to misconstrue such requirements, such as non-discrimination protections, as an attack on the religious character of religious organizations nor as constituting anti-religious hostility. *Trinity Lutheran* does not set aside the fundamental protections for religious liberty, guaranteed by the Establishment Clause and the Free Exercise Clause, as well as any applicable statutory requirements that apply to government funding.

²⁷ *Sharonell Fulton, et al. v. City of Philadelphia*, No. 18-2574, 27 (3rd Cir. 2019).

²⁸ *State v. Arlene's Flowers, Inc.*, ___ P.3d ___ (Wash. 2019).

²⁹ *Masterpiece Cakeshop* at 1727.

³⁰ Brief for the United States as Amicus Curiae Supporting Petitioners, *Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Commission*, 584 U.S. ___ (2018) (No. 16-111).

³¹ See *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968).

³² Directive (DIR) 2018-03.

³³ 137 S. Ct. 2012 (2017).

³⁴ *Id.* at Footnote 3.

³⁵ *Mitchell v. Helms*, 530 U.S. 793, 840, 857 (2000) (O'Connor, J., controlling opinion).

³⁶ See *Fulton* at 36-37.

12. Finally, we note that while the government may legitimately place conditions on the use of public grant monies³⁷ and contracts,³⁸ it may not require recipients to adopt the government's views as their own. The government would only violate this principle if it forced religious organizations to take a particular religious position (for example, approving of same-sex marriage) to enter into a grant or contract, not by merely enforcing contractual and statutory requirements, particularly if the religious organization voluntarily entered into the contractual agreement.³⁹

³⁷ *Agency for International Development v. Alliance for Open Society International*, 570 U.S. 205 (2013).

³⁸ *Rust v. Sullivan*, 500 U.S. 173 (1991).

³⁹ See *Fulton* at 39-41;