

ACLU Kansas
Hot Topics Series

Using Religion to Discriminate



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Religious freedom is a fundamental constitutional right in the United States. Undoubtedly, “[t]he guarantee of religious freedom to people of all faiths—and to those who profess no faith—is essential to the American ideal.”¹ The First Amendment of the U.S. Constitution safeguards religious liberty with two clauses: first, the Establishment Clause prevents local, state, or federal government from promoting any religion or advancing one type of religion over another; and second, the Free Exercise Clause protects a person’s freedom to believe in and observe their own religion as they wish.

Because of these protections, religious freedom has flourished in the United States. It has often led to religious leaders being “at the forefront of social justice movements that stood up for marginalized and oppressed people, as in the abolition of slavery and the civil rights movement.”³ Nonetheless, religious rationales have also been used to justify discrimination throughout United States history and are still used to this day.⁴ This begs the question: what are the limits on the freedom of religion when it intersects with other constitutional rights?

The United States Has a Long History of Using Religion to Justify Discrimination

Much like the right to religious freedom, the right to equal protection under the law is a fundamental constitutional value.⁵ However, religious freedom has often been used to justify treating people unequally.

History is replete with examples of this. For example, slavery and segregation were originally justified by those in power as “God’s will.”⁶ Congressional records show that a passage from Genesis “portraying the story of Noah cursing Canaan as a biblical rationale” was used by Congress members to justify slavery.⁷

A century later, President Harry Truman was asked whether integration would lead to interracial marriage and said, “I hope not. I don’t believe in it. The Lord created it that way. You read your Bible and you’ll find out.”⁸

In the 1960s, the owner of a barbeque restaurant in South Carolina refused to desegregate his restaurant, claiming that his religious beliefs made him “oppose any integration of the races whatever.”⁹

Then, in the 1970s, Bob Jones University sued the IRS for revoking its tax-exempt status as a 501(c)(3) private university because the University had a policy of denying admission to applicants who were

in interracial marriages or known to advocate for interracial marriage or dating. Bob Jones University denied admission to these applicants, and also expelled enrolled students who entered into interracial relationships, because it believed that the Bible forbid these relationships.¹⁰

Religion has also been used to oppose women’s rights movements. Opponents of Women’s Suffrage cited their religious beliefs, saying that “those who supported women’s right to vote were not ‘lovers of God.’”¹¹ And in the 1970s, religion was used to argue against the Equal Rights Amendment (“ERA”), saying that the women’s liberation movement consisted of women who “have never accepted their

¹ The Leadership Conference Education Fund, *Striking a Balance: Advancing Civil and Human Rights While Preserving Religious Liberty*, 3, (March 2016) <http://civilrightsdocs.info/pdf/reports/Striking-A-Balance.pdf>.
² U.S. Const. amend. I. ³ The Leadership Conference Education Fund, *supra* note 1, at 4. ⁴ *Id.* ⁵ See, e.g., *Brown v. Bd. Of Educ.*, 347 U.S. 483, 495 (holding that “separate but equal” education deprived students “of the equal protection of the laws guaranteed by the Fourteenth Amendment”); see also, *Reed v. Reed*, 404 U.S. 71, 74 (explaining that arbitrary sex discrimination “cannot stand in the face of the Fourteenth Amendment’s command that no State deny the equal protection of the laws to any person within its jurisdiction”). ⁶ See, *The Leadership Conference Education Fund, supra* note 1 at 10. ⁷ *Id.* (citing Stephen R. Haynes, *Noah’s Curse: The Biblical Justification of American Slavery*, Oxford Univ. Press (2002) at 116). ⁸ *Id.* (citing James Fleming & Linda McClain, *Ordered Liberty: Rights, Responsibilities, and Virtues*, Harv. Univ. Press (2013) at 173). ⁹ *Newman v. Piggie Park Enter.*, 390 U.S. 400 (1968). ¹⁰ *Bob Jones Univ. v. U.S.*, 461 U.S. 574, 580-82 (1983). ¹¹ *The Leadership Conference Education Fund, supra* note 1, at 11.

God-given roles.”¹² Conservative religious groups branded the ERA as “anti-family and threatening to morality and traditional values.”¹³

These examples reflect a history of using religion to justify curtailing other people’s liberties. However, this issue does not simply live in the past. Modern laws have merely adapted to continue tolerating such discrimination in the twenty-first century.

“Religious Refusal” Laws and the Religious Freedom Restoration Act (“RFRA”)

At the state and federal levels, religious organizations and lawmakers have sought to pass “religious refusal” legislation that would allow individuals and businesses to claim that they are exempt from nondiscrimination laws, “effectively allowing them to discriminate against another individual by claiming a personal religious objection.”¹⁴

This issue is particularly pressing in Kansas, which has “one of the broadest state religious exemption laws in the country.”¹⁵ The Kansas Preservation of Religious Freedom Act (“KPRFA”) uses language that is intended to carve out even broader religious exemptions than those

provided under federal law.¹⁶

The prototype for many of these state laws, including Kansas’s KPRFA, is the federal Religious Freedom Restoration Act (“RFRA”). RFRA was passed after a Supreme Court case, *Employment Division v. Smith*, allowed for religion to be incidentally burdened by generally applicable laws. Many feared that *Smith* would open the door to further burdens on religious freedom, so Congress passed the federal RFRA in 1993.¹⁷ Under RFRA, for any law that would substantially burden a person’s free exercise of religion, “the government must show that the law is advancing a compelling governmental interest” and is doing so in “the least restrictive way possible.”¹⁸

Courts have interpreted religious refusal legislation broadly. In 2014, the Supreme Court case *Burwell v. Hobby Lobby*, ruled that Hobby Lobby may refuse to cover contraceptives through its employee health insurance plan because requiring Hobby Lobby to cover such contraceptives violated its right to religious freedom under RFRA. Justice Ginsberg wrote a strong dissent, saying that the Court has “ventured into a minefield” and under this opinion, employers could claim that their “sincerely held religious belief is offended by health

coverage of vaccines, or paying the minimum wage...”¹⁹ Ultimately, she argued, this ruling would allow employers to “opt out of any law (saving only tax laws) they judge incompatible with their sincerely held religious beliefs.”²⁰

The Supreme Court has since continued its trend of interpreting religious refusal legislation broadly. Three years after *Hobby Lobby*, in 2017, the Supreme Court case *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* allowed a cake shop owner to decline to make a wedding cake for a same-sex couple due to “his religious opposition to same-sex marriages.”²¹ Then, in 2021, the Supreme Court case *Fulton v. City of Philadelphia*, allowed foster care agencies to refuse to certify same-sex couples as foster parents due to the agencies’ religious beliefs about marriage.²²

All three cases demonstrate a common theme: The Supreme Court has interpreted RFRA and the Free Exercise Clause as a license to discriminate. From access to contraceptives, to wedding cakes, to providing a loving home to foster care children, over the past decade religious freedom has been used as a rationale to deny the basic dignity of women and LGBTQ+ people.

¹² Id. ¹³ Gilda Stopler, *The Free Exercise of Discrimination: Religious Liberty, Civic Community and Women’s Equality*, 10 *Wm. & Mary J. of Women & L.* 459, 481 (2004). ¹⁴ The Leadership Conference Education Fund, *supra* note 1, at 4. ¹⁵ D.C. Hiebert, *Patchwork Protections in Kansas: The Rise of Religious Exemption Laws Demands State-Level LGBTQ+ Antidiscrimination Protections*, 30 *Kan. J.L. & Pub. Pol’y* 128, 130 n.14 (2020) (discussing *Kan. Stat. Ann. § 60-5303* (2013)). ¹⁶ Id. at 131; *Kan. Stat. Ann. § 60-5303* (2013). ¹⁷ The Leadership Conference Education Fund, *supra* note 1, at 4; *Emp. Div. v. Smith*, 494 U.S. 872 (1990). ¹⁸ Id. ¹⁹ Id. at 767 (Ginsberg, J., Dissenting). ²⁰ Id. at 740 (Ginsberg, J., Dissenting). ²¹ *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 138 S. Ct. 1719, 1724 (2017). ²² *Fulton v. City of Phila.*, 141 S. Ct. 1868, 1874-75 (2021).

The expansive nature of the Free Exercise Clause was also on display in the most recent Supreme Court term, when the Court held in *Kennedy v. Bremerton School District* that the Clause permitted a public school football coach to lead his team in on-field Christian prayer following games. The Court was not concerned with how such prayer entangled the school district with religion, nor did they take issue with how such prayer would impact non-Christian players. This case represents an alarming trend, where Courts are willing to allow religion to justify conduct that is discriminatory in nature.

Religion Is Currently Being Used to Discriminate Against Marginalized Kansans

Throughout the COVID-19 pandemic, religious freedom been used as a basis to argue for an end to mask mandates. Religious schools across Kansas have sought exemptions to state-wide school masking policies.²³ Parents of school children in Kansas have also sued school districts, claiming that being required to wear masks in schools violates their rights under the Kansas Preservation of Religious Freedom Act.²⁴ During a global disease

pandemic, personal actions have the real impact of harming others. Refusing to protect students with compromised immune systems by wearing mask in schools has its own discriminatory implications. If students with compromised immune systems are unable to attend school safely because others refuse to comply with masking policies, it puts their right to equal access to education under Title II of the Americans with Disabilities Act at risk.²⁵

Religion is also being used as a justification to discriminate against transgender, non-binary, and gender non-conforming students in Kansas. A federal district court in Kansas recently allowed a lawsuit to continue where a public school teacher claimed the school’s “Preferred Names and Pronouns Policy” violated her First Amendment right to religious freedom.²⁶ This policy requires teachers to call students by their preferred name and pronouns.²⁷ The teacher says she is a “Christian who believes that God immutably creates each person as male or female; these two distinct, complementary sexes reflect the image of God; and rejection of one’s biological sex is a rejection of the image of God within that person.”²⁸ The court allowed the case to

continue in litigation because the teacher “demonstrated a substantial likelihood of success” on her religious freedom claim.²⁹ These cases reflects a growing trend across Kansas of religious freedom being used as a shield to discriminate freely against vulnerable groups of Kansans.

When Multiple Civil Rights Conflict: “First, Do No Harm”

The right to religious freedom is important and must be protected, but it should not be used as a shield to protect people from accountability for discriminatory conduct, nor as a sword, to allow people to impose their religious will on others. Legal and legislative tactics have been used as “an attempt to create expansive religious exemptions—far beyond the protections contemplated by the founding concept of religious liberty—to avoid compliance with nondiscrimination laws.”³⁰ Freedom of religion, just like other constitutional rights such as freedom of speech, is not absolute. Religious freedom in the United States “means that we all have a right to our religious beliefs, but this does not give us the right to use our religion to discriminate against and impose those beliefs on others who do not share them.”³¹

²³ See, e.g., Sharifa Jackson, Johnson County private school says it’s proof optional masking can be done successfully, Fox4 (Aug. 6, 2021) <https://fox4kc.com/news/education/johnson-county-private-school-says-its-proof-optional-masking-can-be-done-successfully/>; see, also, Matt McDonald, Mask Up? Many Catholic Schools Are Thinking Maybe Not, National Catholic Register (June 20, 2021) <https://www.ncregister.com/news/mask-up-many-catholic-schools-are-thinking-maybe-not-ulea3c4v>. ²⁴ Amended Complaint at 12, Baker v. Blue Valley Bd. Of Educ., No. 2:21-cv-02210-HLT:TJJ (D. Kan. June 24, 2021). ²⁵ Americans with Disabilities Act (ADA), 42 U.S.C.S. § 12132 (1990) (“no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity”). ²⁶ Ricard v. USD 475 Geary Cty., No. 5:22-cv-04015-HLT-GEB, 2022 U.S. Dist. LEXIS 83742 at *25-26 (May 9, 2022). ²⁷ Id. at *4 ²⁸ Id. at *5 ²⁹ Id. at *23.

³⁰ The Leadership Conference Education Fund, Striking a Balance: Advancing Civil and Human Rights While Preserving Religious Liberty, 4, (March 2016) <http://civilrightsdocs.info/pdf/reports/Striking-A-Balance.pdf>. ACLU, End the Use of Religion to Discriminate, Issues (2022) <https://www.aclu.org/issues/religious-liberty/using-religion-discriminate/end-use-religion-discriminate>.

Considering the United States' demographic diversity and religious pluralism, "the law must be crystal clear that each person's religious liberty ends where harm to another would begin."³² Civil rights attorneys argue that "[o]ur shared pledge that we are 'one nation, indivisible, with liberty and justice for all' demands nothing less."³³ Many people of faith agree with this principle. A majority of religious Americans are opposed to discrimination in many forms, including discrimination in jobs, housing, and public accommodations.³⁴

Ultimately, nobody should experience discrimination such as being turned away from a business, refused service by government officials, being misgendered in school, or denied access to education or healthcare based on someone else's religious beliefs.³⁵

Stand Up for Civil Liberties, Oppose using Religion to Discriminate

Our fellow Kansans have the power to resist legislation and policy choices that allow the right to religious freedom to override the right to be free from discrimination.

When bills or ordinances that promote religious freedom at the expense of marginalized Kansans come to the state legislature or local county and city commissions, Kansans can talk to their elected officials and demand an end to pitting constitutional rights against one another.

Kansans can also work with their local city officials or school board to instate stronger anti-discrimination policies in their own communities. Together, we can work to ensure that all Kansans feel valued and safe in this state, while still respecting every person's right to believe and practice their own religion.

³¹ ACLU, End the Use of Religion to Discriminate, Issues (2022) <https://www.aclu.org/issues/religious-liberty/using-religion-discriminate/end-use-religion-discriminate>. ³² Brief for Lambda Legal Defense, et al., as Amici Curiae Supporting Appellees, *Mullins v. Masterpiece Cakeshop*, 370 P.3d 272 (No. 2014CA1351) (2013). ³³ Id. ³⁴ Daniel Greenberg, et al., Americans Show Broad Support for LGBT Nondiscrimination Protections, Public Religion Research Institute (2019) <https://www.prrri.org/research/americans-support-protections-lgbt-people/>. ³⁵ See, ACLU, Religion-Based Discrimination Against LGBTQ People, Issues (2022) <https://www.aclu.org/issues/religious-liberty/using-religion-discriminate/religion-based-discrimination-against-lgbtq>