

Thomas O. Bean
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Carey McDonald
Chief Operating Officer
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24 Farnsworth Street
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Re: Summary of UUA *Amicus* Participation

Dear Carey:

I am pleased to present the following summary of the cases in which the UUA joined in filing an *amicus curiae* brief. This report will cover briefs filed during the period from May 1, 2017 (the date of the last report), to the present.

United States Supreme Court

Espinoza v. Montana Department of Revenue

This case concerns a Montana tuition-tax-credit program under which taxpayers receive a 100% tax credit for donations to scholarship organizations, which then pay students' tuition at private schools, the vast majority of which are religious schools. In effect, the program uses tax credits as a mechanism of funding a school-voucher program. The Supreme Court of Montana struck down the program because it violated a Montana constitutional provision prohibiting aid to religious education. The U.S. Supreme Court granted review of the case.

The proponents of the program argue that the Free Exercise, Equal Protection, and Establishment Clauses of the U.S. Constitution *require* states to provide funding for religious education on the same terms as funding for secular private education. A broad ruling upholding the program by the U.S. Supreme Court could greatly weaken or even completely nullify state constitutional provisions in approximately thirty-seven states that restrict public funding of religious activity more strictly than does the U.S. Constitution (as currently interpreted by the Supreme Court). As a result, it could become extremely difficult to challenge school-voucher programs and other public funding of religious activity in any court system, state or federal; in addition, governmental bodies could be required to provide public funding for religious institutions and activities on an equal basis with funding for secular institutions and activities.

The UUA joined a brief filed by religious and civil rights organizations. The brief draws on historical sources to argue that states may decline to fund religious private education even when they fund secular private education. It maintains that refraining from funding religious education vindicates traditional state interests in preventing establishment of religion, and that

use of tax credits to support religious education harms religion and religious institutions. It concludes that to require states to fund religious education on an equal basis with secular education would turn long-standing Supreme Court precedent on its head.

The Supreme Court is expected to hear the case during the 2019-2020 term.

State of Hawaii v. Trump

In September 2017, President Trump issued a Proclamation (the “Third Travel Ban”) placing entry restrictions on the nationals of eight foreign states whose systems for managing and sharing information about their nationals he deemed inadequate. The Third Travel Ban imposed a range of entry restrictions that varied based on the “distinct circumstances” in each of the eight countries. It also directed the Department of Homeland Security to assess on a continuing basis whether the restrictions should be modified or continued, and to report to the President every 180 days. At the completion of the first such review period, the President determined that one country had sufficiently improved its practices; he lifted restrictions on its nationals.

The UUA joined a brief arguing that the Third Travel Ban violated the First Amendment’s Establishment Clause because the President’s stated concerns about vetting protocols and national security were but pretexts for discriminating against Muslims. The brief supported this argument by relying on numerous statements made by candidate and then President Trump about keeping Muslims out of the United States.

In rejecting the Establishment Clause challenge to the Third Travel Ban, the Supreme Court limited its review to whether the President gave a “facially legitimate and bona fide” reason for the ban. It concluded that when the Executive exercises its delegated power over admission of foreign nationals, the Court would neither look behind the exercise of that discretion, nor test it by balancing its justification” against the asserted constitutional interests of U.S. citizens.

Masterpiece Cakeshop, Ltd. V. Colorado Civil Rights Commission

A Colorado bakery owned by a devout Christian refused to create a cake for a same-sex couple’s wedding celebration because of his religious opposition to same-sex marriages—marriages that Colorado did not then recognize. The couple filed a charge with the Colorado Civil Rights Commission (Commission) pursuant to the Colorado Anti-Discrimination Act (CADA), which prohibits, as relevant here, discrimination based on sexual orientation in a “place of business engaged in any sales to the public and any place offering services . . . to the public.” An administrative law judge rejected the owner’s/baker’s First Amendment claims that requiring him to create a cake for a same-sex wedding would violate his right to free speech by compelling him to exercise his artistic talents to express a message with which he disagreed and would violate his right to the free exercise of religion.

The UUA joined an amicus brief joined by numerous faith-based organizations and over 1,300 individual faith leaders supporting the same-sex couple. The brief argued that while the owner had every right to his religious beliefs concerning marriage and to lawfully act on those beliefs in his personal and religious life, once he held himself out as a baker marketing wedding cakes to the general public, he became subject to public accommodation laws like CADA, and that he could not refuse to make a cake for the couple based on his personal religious beliefs.

The Supreme Court declined to address the owner's claim that his First Amendment rights were violated by the Commission's decision. Rather, it concluded that the Commission's treatment of his case showed elements of a clear and impermissible hostility toward the sincere religious beliefs motivating his objection. It found that some of the commissioners at the Commission's formal, public hearings endorsed the view that religious beliefs cannot legitimately be carried into the public sphere or commercial domain, disparaged the baker's faith as despicable, and compared his invocation of his sincerely held religious beliefs to defenses of slavery and the Holocaust. As a result, it held that the Commission's treatment of the baker's case violated the State's duty under the First Amendment not to base laws or regulations on hostility to a religion or religious viewpoint.

Bostock v. Clayton County Georgia
Altitude Express, Inc. v. Melissa Zarda, as executor
R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC

In this trio of cases, the Supreme Court has been asked to construe the scope of Title VII's ban on sex discrimination in the workplace as it applies to LGBTQ people. Many federal courts have ruled that anti-LGBTQ discrimination is a form of sex discrimination that violates federal law, and many of the federal non-discrimination protections that presently cover LGBTQ communities are based on this now-established understanding of sex discrimination. The plaintiffs in the cases are a trans woman who was fired for her gender identity and two gay men who were fired for their sexual orientation. Their former employers are asking the Supreme Court to decide that Title VII's ban on discrimination on the basis of "sex" does not apply to discrimination on the basis of gender identity or sexual orientation and that if Title VII does prohibit such discrimination, such prohibition interferes with their religious freedom.

The UUA joined an amicus brief filed by a broad cross-section of religious organizations who represent traditions rooted in centuries of American history and who affirm the religious liberty, human dignity, and equal rights. The brief argues that the phrase "sex discrimination," as used in Title VII, applies to LGBTQ persons, and that recognition of the inherent dignity of LGBTQ people and workplace discrimination protections for such persons does not undermine or interfere with religious freedom guaranteed by the Constitution.

The Supreme Court heard oral argument in this case last fall, and is expected to rule before the end of June 2020.

Second Circuit

*Ragbir v. Homan, in his official capacity as Deputy
Director and Senior Official Performing the duties of the
Director of U.S. Immigration and Customs Enforcement*

ICE detained Ragbir, a native and citizen of Trinidad & Tobago, and sought to deport him after he was released from prison based on convictions for wire fraud and conspiracy to commit wire fraud. ICE released him from immigration detention after it determined that he was not a flight risk; it permitted him to remain and work in the United States provided that he complied with supervision conditions.

After his release from immigration detention, Ragbir became an outspoken activist on immigration issues, including publicly criticizing ICE. In March 2017, Ragbir appeared for a scheduled check-in with ICE officials in New York. He was accompanied by clergy and elected officials. At the check-in, ICE confronted Ragbir and attempted to send away the individuals who had accompanied him. The confrontation garnered negative press coverage for ICE in prominent news outlets.

Less than a year after the March 2017 check-in, after ICE had deported a colleague of Ragbir's, and just days before his stay of removal was set to expire, it informed Ragbir that it would deny his application for a renewed stay of removal and that ICE would now enforce the removal order against him.

The UUA joined an amicus brief of faith-based organizations arguing that the First Amendment barred ICE from retaliating against Ragbir for his criticism of ICE. The Second Circuit, accepting Ragbir's allegations as true based on the procedural posture before it, found that a plausible clear inference could be drawn that Ragbir's public expression of his criticism and its prominence played a significant role in ICE's attempts to remove him. It remanded the matter to the District Court for further consideration.

Third Circuit

Fulton v. City of Philadelphia

The City of Philadelphia declined to renew contracts with two licensed foster care agencies that refused to work with same-sex couples as foster parents because the City considered the agencies' position a violation of its anti-discrimination laws. One of those agencies, Catholic Social Services ("CSS"), brought an action claiming that the City's refusal to contract with it violated the Free Exercise and Establishment Clauses of the First Amendment,

the Free Speech Clause of the First Amendment, and the Pennsylvania Religious Freedom Act. It sought to enjoin the City from refusing to contract with them.

The UUA joined an amicus brief with other religious organizations that affirm religious liberty and equal rights. The brief argued that it is both morally correct and constitutionally permissible to require that foster care agencies comply with neutral and generally applicable antidiscrimination laws when providing taxpayer funded, child welfare services to children, and that a government may refuse to contract with foster care agencies that refuse to certify same-sex couples as foster parents, regardless of the proposed foster parents' qualifications.

The Third Circuit held that CSS was not entitled to a preliminary injunction because the City's nondiscrimination policy was a neutral, generally applicable law, and that the religious views of CSS did not entitle it to an exception from that policy.

Fifth Circuit

Whole Woman's Health v. Smith

Texas adopted a law providing that after the loss or termination of any pregnancy, health care facilities must ensure that the embryonic or fetal tissue be treated in the same manner as human remains, i.e., be either cremated or buried. The sole stated purpose of the law – which applied regardless of the woman's circumstances and preferences – was to “express the state's profound respect for the life of the unborn by providing for a dignified disposition of embryonic and fetal tissue remains.”

The UUA joined a brief filed by religious leaders from a broad range of traditions who acknowledge the diversity of views regarding when life begins, and accordingly support the right of women to decide, in accordance with their beliefs, how to dispose of fetal tissue following the loss or termination of pregnancy. The brief argued that the Texas law encroaches on religious freedom by requiring cremation or burial to the exclusion of any other choice, and harms women spiritually and emotionally.

The Fifth Circuit has yet to render a decision in this case.

Ninth Circuit

California v. U.S. Department of Health & Human Services

Thirteen States and the District of Columbia filed a petition for a preliminary injunction that sought to prevent the implementation of rules creating a religious exemption and a moral exemption to the contraceptive mandate in the Affordable Care Act. The exemption was designed to permit employers and educational institutions not just to refuse to provide or pay for

insurance that provides coverage for contraception, but also affirmatively to block provision of coverage to employees and students.

The UUA joined an amicus brief filed by religious and civil liberties organizations that represent diverse faiths and beliefs but are united in respecting the important but distinct roles of religion and government in the United States. The brief argued, among other things, that the religious and moral exemptions would impermissibly harm countless women, and would burden their free exercise of their religion.

The Ninth Circuit enjoined implementation of the rules.

City and County of San Francisco v. Trump

California counties brought action against President Trump and others challenging the constitutionality of the enforcement of a provision of an Executive Order purporting to prevent “sanctuary jurisdictions” from receiving federal grants. The Counties argued that under the principle of Separations of Powers and in consideration of the Spending Clause of the Constitution, which vests exclusive power in Congress to impose conditions on federal grants, the Executive Branch may not refuse to disburse the federal grants without congressional authorization.

The UUA joined an amicus brief filed by religious organizations, congregations, and churches. The brief argued that the communities they serve include immigrants and persons who rely on federally funded assistance programs, and that the faiths of *amici* dictate that they care for those in need in their communities by operating food banks, and providing emergency funds, housing, and shelter services. The brief quoted Jewish, Christian and Muslim teachings in support of its assertion that the world’s major faiths emphasize helping those in need.

The Ninth Circuit upheld an injunction as to the Executive Order’s effect in California, but declined to affirm the District Court’s entry of a nationwide injunction.

D.C. Circuit

Barker v. Conroy

Since 1789, the House of Representatives has begun each legislative day with a prayer, a practice the Supreme Court has found compatible with the Establishment Clause. Although a House-appointed chaplain has traditionally delivered the opening prayer, at some time in the past, the House began allowing members to nominate other individuals to give a prayer as “guest chaplain.” After a member of the House asked the Chaplain, Father Patrick J. Conroy, to invite Daniel Barker—a former Christian minister turned atheist—to serve as guest chaplain and

deliver a secular invocation. Conroy denied the request. Barker sued alleging that Conroy unconstitutionally excluded him from the guest chaplain program because he is an atheist.

The UUA joined a brief prepared by Americans United for Separation of Church and State arguing that the Establishment Clause's general requirement that the government be "neutral in its relations with groups of religious believers and non-believers," prohibited Conroy from excluding atheists like Barker from the guest chaplain program.

The Court accepted the House's interpretation of its own rules as requiring a religious prayer and concluded, "in the *sui generis* context of legislative prayer, the House does not violate the Establishment Clause by limiting its opening prayer to religious prayer."

State of Washington

State of Washington v. Arlene's Flowers

Washington sued a florist who refused to sell wedding flowers to a same-sex couple under a Washington law that prohibits discrimination. After the Supreme Court of Washington ruled against the flower shop owner, the florist appealed to the U.S. Supreme Court. The U.S. Supreme Court directed the Washington Supreme Court to reconsider its decision in light of that Court's decision in *Masterpiece Cakeshop* – a case that considered whether a baker could refuse to provide a wedding cake for a same-sex couple.

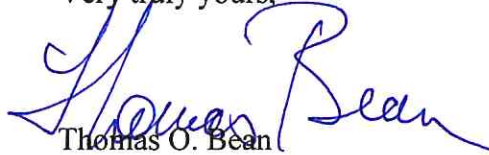
The UUA joined an amicus brief filed by American United for Separation of Church and State arguing that the First Amendment's "free exercise" clause was not a license to discriminate against others, and that nothing in *Masterpiece Cakeshop* altered that analysis. The brief argued, "[f]ar from interfering with, impeding, or frustrating the enjoyment of free exercise, antidiscrimination laws extend essential protections to religious groups . . . [and that] granting the flower shop an exemption would be to erode these protections for minority faiths."

The Supreme Court of Washington accepted the arguments in the brief the UUA joined, and held that nothing in *Masterpiece Cakeshop* constituted grounds for reconsideration of its earlier decision.

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It is a pleasure to assist the UUA with amicus briefing. We are pleased that courts have adopted so many of the positions advocated by the UUA in recent years.

Very truly yours,



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