ANNUAL REVIEW ARTICLES

ANNUAL REVIEW UPDATE MEMO

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Each year, the *Georgetown Journal of Gender and the Law* publishes an Annual Review, in which we update several long articles previously published by the *Journal* that cover certain topics in the legal field pertinent to gender and sexuality. As the laws and cases in these areas are constantly being updated, there is often more information pertinent to our Annual Review articles than can be published in a particular edition. With that in mind, this Update Memo covers relevant updates to our articles and gender and sexuality law that are otherwise not discussed in this year's Annual Review. These topics will likely be incorporated into future editions of the Annual Review. In this memo, we discuss Texas's Senate Bill 8, *Fulton v. City of Philadelphia*, *State v. Arlene's Flowers*, and legal sex change in Utah.

TEXAS'S SENATE BILL 8

On May 19, 2021, Texas's Senate Bill 8 was signed into law as the Texas Heartbeat Act ("the Act").[1] The Act bans abortions in Texas beginning six weeks from conception.[2] More specifically, according to the text of the law, abortions are prohibited after a "fetal heartbeat" is detectable.[3] The Act is controversial and likely unconstitutional for several reasons. First, many women[4] do not know that

1. Shannon Najmabadi, *Gov. Greg Abbott Signs into Law One of Nation's Strictest Abortion Measures, Banning Procedure as Early as Six Weeks into a Pregnancy*, TEX. TRIB. (May 19, 2021), https://www.texastribune.org/2021/05/18/texas-heartbeat-bill-abortions-law/.

2. *Id.*

3. Texas Heartbeat Act of 2021, TEX. HEALTH & SAFETY CODE ANN. §§ 171.201, 171.204 (West 2021) (defining fetal heartbeat as "cardiac activity . . . of the fetal heart within the gestational sac").

4. The *Georgetown Journal of Gender and the Law* acknowledges that people of all gender identities may seek abortion and thus are also forced to navigate the same restrictive thicket of policies surrounding abortion. Abortion is not just a cisgender women's issue, but that of any pregnant person, independent of their gender identity. Because the vast majority of case law and statutory code regarding abortion refers exclusively to cisgender women, the *Journal* uses the terms "woman" or "women" when directly discussing statutes and case law that refer only to cisgender women, and otherwise seeks to use more gender-inclusive language. While a more robust discussion of the particular difficulties that transgender and nonbinary people face in obtaining abortion is beyond the scope of this Memo, it is worth noting that particularly because most

they are pregnant at six weeks, meaning that by the time a woman in Texas realizes that she is pregnant and wants to get an abortion, she may already be prohibited from doing so.[5] Second, this six-week ban directly contradicts Supreme Court precedent which prohibits "states from banning abortion before fetal viability, usually between 22 and 24 weeks of pregnancy."[6] Third, the Act has an atypical enforcement mechanism: private citizens can sue anyone who performs an abortion or aids and abets in the performance of an abortion in Texas.[7] If a private citizen claimant is successful, the court awards at minimum $10,000 in damages.[8]

The Supreme Court declined to enjoin the Act in *Whole Woman's Health v. Jackson*.[9] The 5-2 majority opinion found that the abortion providers who challenged the law failed to carry the burden for injunctive relief in light of the "complex and novel" procedural questions involved.[10] Chief Justice Roberts, in his dissent, called the Act's enforcement mechanism "not only unusual, but unprecedented," reasoning that the desired consequence of the law "appears to be to insulate the State" from enforcement responsibility.[11] On November 1, 2021, the Supreme Court justices, during hours of arguments over the Act, specifically voiced their skepticism regarding its enforcement mechanism.[12] Justices Coney Barrett and Kavanaugh, though part of the majority in the decision to block the enjoinment of the Act, were critical of the Act's enforcement mechanism.[13]

FULTON V. CITY OF PHILADELPHIA

The Supreme Court delivered its opinion on *Fulton v. City of Philadelphia* on June 17, 2021.[14] Petitioner Catholic Social Services (CSS) is a foster care agency

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laws and decisions only refer to cisgender women, those who are not cisgender may experience additional difficulties in seeking abortion care. *See generally* Heidi Moseson et al., *The Imperative for Transgender and Gender Nonbinary Inclusion*, 135 OBSTETRICS & GYNECOLOGY 1059, 1059–68 (2020); Caitlin van Horn, *Trans and Nonbinary People Get Abortions Too*, ALLURE (July 30, 2019), https://www.allure.com/story/abortion-gender-neutral-language-transgender-men-nonbinary.

5. Planned Parenthood v. Casey, 505 U.S. 833, 876 (1992) (defining an "undue burden" as "a state regulation [that] has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus"); *see also* Jaclyn Diaz & Nina Totenberg, *Texas Law That Bans Abortion Before Women Know They're Pregnant Takes Effect*, NPR (Sept. 1, 2021, 12:48 PM), https://www.npr.org/2021/09/01/1033171800/texas-abortion-ban-supreme-court-.

6. Diaz & Totenberg, *supra* note 5.

7. *See* Alan Feuer, *The Texas Abortion Law Creates A Kind of Bounty Hunter. Here's How it Works.*, N.Y. TIMES, (Nov. 1, 2021), https://www.nytimes.com/2021/09/10/us/politics/texas-abortion-law-facts.html; Texas Heartbeat Act § 171.208.

8. Texas Heartbeat Act § 171.208(b)(2).

9. Whole Woman's Health v. Jackson, 141 S. Ct. 2494 (2021).

10. Adam Liptak et al., *Supreme Court, Breaking Silence, Won't Block Texas Abortion Law*, N.Y. TIMES, (Nov. 1, 2021), https://www.nytimes.com/2021/09/01/us/supreme-court-texas-abortion.html; *Whole Woman's Health*, 141 S. Ct. at 2494.

11. 141 S. Ct. at 2496 (Roberts, J., dissenting).

12. Reese Oxner, *Key U.S. Supreme Court Justices Express Concern About Texas Abortion Law's Enforcement*, TEX. TRIB. (Nov. 1, 2021, 6:00 PM), https://www.texastribune.org/2021/11/01/texas-abortion-law-supreme-court/.

13. *Id.*

14. Fulton v. City of Phila., 141 S. Ct. 1868 (2021).

based in Philadelphia, Pennsylvania, which has a policy of not certifying same-sex couples as foster parents due to its religious position on homosexuality.[15] Upon learning about CSS's policy, Philadelphia stopped referring children in need of foster care to CSS, citing a breach of a non-discrimination provision in the foster care contract.[16] The city also informed CSS that it would not renew its contract with CSS unless the agency changed its policy to certify same-sex couples as foster parents.[17] CSS, along with three foster parents, sued the city, alleging that the city had violated its free exercise and free speech rights under the First Amendment.[18]

The Supreme Court ruled in favor of CSS in a unanimous agreement that the city's actions were unconstitutional.[19] The majority opinion, written by Chief Justice John Roberts, began by noting that it was "plain" that the city's actions had burdened CSS by forcing it to choose between "curtailing its mission or approving relationships inconsistent with its beliefs."[20] The Court held that *Employment Division v. Smith*, which held that laws that incidentally burden religious practices do not violate the Free Exercise Clause as long as they are neutral and generally applicable, did not apply here because the city's standard foster care contract is not generally applicable.[21] A law is not generally applicable when it provides a "mechanism for individualized exemptions" that enables the government to consider particular circumstances behind a person's actions.[22] The city's standard foster care contract provides such a system of individual exemptions with its language that exceptions to the non-discrimination requirement may be granted at the "sole discretion" of the Commissioner.[23]

The non-discrimination provision of the contract was therefore subject to strict scrutiny.[24] To survive strict scrutiny, the city had to show the provision advanced compelling government interests and was "narrowly tailored" to accomplish those interests.[25] The majority concluded the city had failed to demonstrate a compelling interest in not granting an exception to CSS.[26] In particular, the Court pointed out that while the city argued its non-discrimination policy applies to everyone, it also carved out a "system" of exceptions in the foster care contract, and that the city did not offer a compelling, particularized interest in not granting such an exception to CSS while making it available to others.[27]

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15. *Id.* at 1874.
16. *Id.* at 1875.
17. *Id.* at 1875–76.
18. *Id.* at 1876.
19. *Id.* at 1871, 1882.
20. *Id.* at 1876.
21. *Id.*
22. *Id.* at 1877 (quoting Emp. Div. v. Smith, 494 U.S. 872 (1990)).
23. *Id.* at 1878.
24. *Id.* at 1881.
25. *Id.*
26. *Id.*
27. *Id.* at 1882. The city has never granted an exception under this provision, but the Court is more focused with the mere existence of a "formal mechanism" that "invite[s]" the government to consider and grant exceptions. *See id.* at 1879.

CSS urged the Supreme Court to overrule *Smith* and make strict scrutiny the standard for reviewing all government actions challenging religious practices—a sweeping effect on religious exemption jurisprudence.[28] However, the Court declined to consider the issue, reasoning that because the city's policies were not generally applicable and therefore subject to strict scrutiny, *Fulton* fell outside the scope of *Smith*.[29] Justices Alito, Gorsuch, and Thomas would have overruled *Smith*.[30]

Professor Steve Vladeck remarked that the ruling is "another victory for religious groups, but not the major one that they sought."[31] While the Supreme Court ruled in favor of CSS, it did so based on narrow grounds, relying primarily on the availability of individual exemptions in Philadelphia's foster care contract.[32] The Court certainly did not go as far as to require religious exemption clauses in government contracts.[33] As Justices Alito and Gorsuch noted in their concurring opinions, governments can rewrite their laws and contracts to remove exemption provisions and make them generally applicable.[34] The narrowness of the decision also raises further questions on religious exemptions, starting with the question of what other kinds of discriminatory practices based on religious beliefs would trigger the requirement of a religious exemption.[35] Therefore, more cases seeking clarifications from the Court are likely to arise.[36]

STATE V. ARLENE'S FLOWERS

In *State v. Arlene's Flowers*, the owner of a flower shop in Richland, Washington refused to provide a custom flower arrangement for a same-sex couple's wedding because of her religious beliefs.[37] The State sued the flower shop and its owner, Barronelle Stutzman, under the Consumer Protection Act and the Washington Law Against Discrimination (WLAD).[38] Stutzman argued that her refusal to serve the same-sex couple was protected by the free speech, free exercise, and free association rights under the state and federal constitutions.[39] The Washington Supreme Court ruled that the flower shop's refusal was

28. Reply Brief for Petitioners at 25, Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021) (No. 19-123), 2020 WL 5578834, at *25; *Fulton*, 141 S. Ct. at 1882–83 (Barrett, J., concurring).

29. *Fulton*, 141 S. Ct. at 1877–78, 1881.

30. *Id.* at 1926 (Alito, J., concurring), 1931 (Gorsuch, J., concurring).

31. Ariane de Vogue, *Supreme Court Rules in Favor of Catholic Foster Care Agency that Refused to Work with Same-Sex Couples*, CNN (June 17, 2021, 1:44 PM), https://www.cnn.com/2021/06/17/politics/supreme-court-fulton/index.html.

32. *Id.*; Holly Hollman, *Court Requires Religious Exemption but Leaves Many Questions Unanswered*, SCOTUSBLOG (June 22, 2021, 3:02 PM), https://www.scotusblog.com/2021/06/court-requires-religious-exemption-but-leaves-many-questions-unanswered/.

33. Hollman, *supra* note 32.

34. *Fulton*, 141 S. Ct. at 1887 (Alito, J., concurring), 1930 (Gorsuch, J., concurring).

35. Hollman, *supra* note 32.

36. *Fulton*, 141 S. Ct. at 1930 (Gorsuch, J., concurring); Hollman, *supra* note 32.

37. State v. Arlene's Flowers, Inc., 441 P.3d 1203, 1211 (Wash. 2019).

38. *Id.* at 1212.

39. *Id.*

discrimination based on sexual orientation and violated the WLAD.[40] The Supreme Court granted certiorari and subsequently remanded, asking the highest court of Washington to further consider the case in light of the recent Supreme Court decision in *Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Commission*.[41] A year later, the Washington Supreme Court affirmed its original holding.[42] The florist filed another petition for writ of certiorari, and the Supreme Court denied that petition on July 2, 2021.[43]

The 2019 decision of the Washington Supreme Court began by analyzing *Masterpiece* and its applicability to the present case.[44] *Masterpiece* was also about a same-sex couple acquiring wedding servies, involving a bakery that refused to make a wedding cake for a same-sex couple.[45] The Supreme Court ruled in favor of the bakery on the narrow basis that the Colorado Civil Rights Commission failed to act with "religious neutrality that the Constitution requires" when the commissioners made disparaging comments to the bakery owner and treated him differently than similarly situated bakers who refused to create cakes with messages disapproving same-sex marriages.[46] Based on *Masterpiece*, the Washington Supreme Court reviewed its own records in addition to the lower state court's decision to determine whether there was any hostility towards the baker's religion in the adjudication process.[47] The Washington Supreme Court concluded that "the two courts gave full and fair consideration to this dispute and avoided animus toward religion."[48] Therefore, *Masterpiece* did not affect the outcome of the court's original decision in 2017.[49]

The 2019 decision mostly reproduced verbatim the court's 2017 decision in discussing why Stutzman's actions violated the WLAD, and why the WLAD did not violate her state and federal rights to free speech, free exercise, and free association.[50] First, the court established that the WLAD prohibits discrimination based on sexual orientation, among other protected characteristics, in public accommodations. A flower shop constitutes a public accommodation under the WLAD; therefore, Stutzman violated the WLAD when she refused to offer her services as a wedding flower vendor based on the couple's sexual orientation.[51]

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40. *Id.* at 1212–13 (citing State v. Arlene's Flowers, Inc., 389 P.3d 543 (Wash. 2017)).
41. Arlene's Flowers, Inc. v. Washington, 138 S. Ct. 2671 (2018).
42. *Arlene's Flowers*, 441 P.3d at 1210.
43. Petition for Writ of Certiorari, Arlene's Flowers, Inc. v. Washington, 138 S. Ct. 2671 (2018) (No. 19-333), 2019 WL 4413355; Arlene's Flowers, Inc. v. Washington, 141 S. Ct. 2884 (2021).
44. *Arlene's Flowers*, 441 P.3d at 1214.
45. *Id.* at 1214.
46. *Id.* at 1215–16 (citing Masterpiece Cakeshop Ltd. v. Colo. Civ. Rts. Comm'n, 138 S. Ct. 1719, 1724 (2018)).
47. *Id.* at 1210.
48. *Id.*
49. *Id.* at 1216.
50. *Id.* at 1210 n.1, 1238.
51. *Id.* at 1219–22.

The court in *Arlene's Flowers* next considered whether the shop owner's refusal qualified as protected free speech, religious free exercise, or free association under the state and federal constitutions. It rejected Stutzman's claim that her floral arrangements were protected speech involving her "artistic expressions."[52] Instead it classified the floral arrangements as conduct, which did not fall under protected speech because they were not inherently expressive, in and of themselves, of her opinion on marriage.[53]

On Stutzman's free exercise claim under the First Amendment, the court assumed that the WLAD burdened her free exercise of religion.[54] But the court went on to hold that the WLAD is a neutral, generally applicable law that is subject to rational basis review rather than strict scrutiny.[55] The WLAD's blanket exemption for religious organizations—as opposed to secular establishments like flower shops—to refuse same-sex marriage services is neutral and does not target religion because it shows the government's effort to reduce the legal burden of such organizations against free exercise claims.[56] The WLAD is also generally applicable because the available exemptions do not deliberately and prejudicially target religions by only offering exceptions for nonreligious reasons.[57]

In contrast, on Stutzman's free exercise challenge based on the Washington state constitution, the court explained that its jurisprudence has applied strict scrutiny to free exercise claims brought under Article I, Section 11 of the state constitution.[58] Stutzman argued the WLAD did not survive strict scrutiny because there was no compelling government interest served by the law, since other florists were willing to offer their services to the couple and no harm resulted from her refusal.[59] However, the court held that the WLAD survives strict scrutiny because public accommodation laws like the WLAD have a "broader societal purpose" of ensuring "equal treatment of all citizens in the commercial marketplace," and Stutzman is not entitled to a religious exemption.[60]

In November 2021, the parties in *Arlene's Flowers* reached a settlement agreement whereby Stutzman withdrew her petition to the Supreme Court for rehearing.[61] Although this case has concluded and its results are binding on Washington state courts, the Supreme Court will once again take up the issue of whether application of sexual orientation non-discrimination laws to religious

52. *Id.* at 1224.
53. *Id.* at 1225.
54. *Id.* at 1237.
55. *Id.* at 1229–31.
56. *Id.* at 1229 (citing Elane Photography, LLC v. Willock, 309 P.3d 53 (2013)).
57. *Id.* at 1230.
58. *Id.* at 1231–33.
59. *Id.* at 1235.
60. *Id.*
61. Jimmy Hoover, *Christian Florist Drops High Court Appeal Over Gay Wedding*, LAW360 (Nov. 18, 2021, 4:19 PM), https://www.law360.com/articles/1234370.

businesses engaged in expressive activity violates their free speech rights when it hears oral argument in *303 Creative LLC v. Elenis* next term.[62]

LEGAL SEX CHANGE IN UTAH

In May of 2021, the Utah Supreme Court published *In re Gray and Rice*, which stated that individuals could change their sex on their birth certificate to match their current gender identity.[63] When Sean Childers-Gray was born, the hospital gave him a birth certificate that identified him as female.[64] Angie Rice was assigned male at birth.[65] Both Childers-Gray and Rice petitioned the district court to change their names and sex on their birth certificates.[66] The Utah Supreme Court found that the district court should have granted this petition and that "a person has a common-law right to change facets of their personal legal status, including their sex designation."[67] This decision offers "a plain-meaning interpretation of the duly enacted law allowing individuals to change their sex designations."[68] The duly enacted law mentioned by the opinion is Utah Code § 26-2-11, which states, in part, "(1) When a person born in this state has a name change or sex change approved by an order of a Utah district court or a court of competent jurisdiction of another state or a province of Canada, a certified copy of the order may be filed with the state registrar with an application form provided by the registrar."[69] The court determined that a sex change petition is a petition for a change in legal status, and that such changes in legal identification are within the court's jurisdictions.[70] To counter the dissent's conception of "sex" as an immutable and biological category, rather than a legal one, the court asks: "[I]f 'sex' on a birth certificate indicates a purely biological trait and not an identifier of legal status, then why does one need a court order to change it?"[71] The court provides a two-prong test for determining whether a change via court order is permissible. First, the sex-change petition must not be "sought for a fraudulent or unlawful purpose,"[72] and second, the petitioner must supply "evidence of appropriate clinical care or treatment for gender transitioning or change provided by a licensed

62. 303 Creative LLC v. Elenis, SCOTUSBlog, https://www.scotusblog.com/case-files/cases/303-creative-llc-v-elenis/ (last visited Mar. 11, 2022).
63. *In re* Childers-Gray, 487 P.3d 96, 99 (Utah 2021).
64. *Id.* at 100.
65. *Id.* at 101.
66. *Id.* at 99.
67. *Id.*
68. *Id.* at 100.
69. UTAH CODE ANN. § 26-2-11 (West 1995).
70. *Childers-Gray*, 487 P.3d at 102.
71. *Id.* at 121.
72. *Id.* at 123 (quoting *In re* Porter, 31 P.3d 519 (Utah, 2001)).

medical professional."[73] The court does "not require any specific procedure or treatment."[74] The second prong of this test is based on both Utah statutes and common law, as well as on federal requirements for sex change.[75] District courts in Utah have thus been instructed to grant sex change petitions, based on the above test, for the purpose of conforming legal documents to a petitioner's gender identity.[76]

73. *Id*. at 125–26.
74. *Id*. at 126.
75. *Id*.
76. *Id*. at 129–30.