Journal of Law and Religion (2023), 38: 2, 224–248

RESEARCH ARTICLE

Liberalism versus Liberalism: An Analysis of Muslim-American Amicus Curiae Arguments Concerning Complicity-Based Conscience Claims

Kamran S. Bajwa[1] and Samuel E. Miller[2]

[1]Lecturer, University of Chicago Law School, USA
[2]JD, University of Iowa College of Law; MA, University of Chicago, USA
Corresponding author: Samuel E. Miller; millersamuele@proton.me

doi:10.1017/jlr.2023.12

Abstract

In 2015, Douglas NeJaime and Reva Siegel identified complicity-based conscience claims as a subcategory of religious liberty claims, which feature objections to generally applicable laws based on religious convictions that harm third parties. Here, we observe that Muslim-Americans have filed or joined amicus curiae briefs in support of litigants on both sides of the recent complicity-based conscience cases of *Masterpiece Cakeshop v. Colorado* (2018), *Bostock v. Clayton County* (2020), and *Fulton v. City of Philadelphia* (2021). This divergence of legal views within the Muslim-American community points to a broader rift in society generally toward issues involving the navigation of identity and faith in the context of American liberalism. In this article, we show that opposing arguments by Muslim-Americans in these complicity-based conscience cases presuppose two different conceptions of liberalism: (1) liberalism as the pursuit of broad religious, cultural, and value pluralism (*modus vivendi*), and (2) liberalism as the pursuit of social cohesion, assimilation, and *fraternité* among diverse constituencies (*vivre ensemble*). Muslim-Americans who advance a *modus vivendi* vision of liberalism base their arguments mainly on the view that Islam and other minority religions involve specific beliefs, doctrines, and moral injunctions regarding, *inter alia*, rules of personal conduct in society that deserve distinctive legal protections. Muslim-Americans who support a *vivre ensemble* conception of liberalism prioritize the uniform enforcement of civil rights laws over religion-based objections and, in doing so, seek an overlapping consensus between their beliefs and prevailing conceptions of expansive civil liberties.

Keywords: liberalism; Islam and liberalism; overlapping consensus; *modus vivendi*; *vivre ensemble*; political liberalism; free exercise; complicity-based conscience claims; amicus curiae

Introduction

In a 2015 article, Douglas NeJaime and Reva B. Siegel identified an emerging category of religious liberty cases involving what they called "complicity-based conscience" claims.[1] Complicity-based conscience claims feature religious claimants who wish to avoid participating or being complicit in the conduct of third parties that they find to be in violation of

[1] Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 Yale Law Journal 2516, 2516 (2015).

their faith commitments. Relative to prior religious liberty cases (such as *Employment Division v. Smith*[2]), NeJaime and Siegel argue that *Burwell v. Hobby Lobby*[3] ushered in a new kind of religious liberty dispute in which requested religious exemptions from generally applicable antidiscrimination laws concerning sex, gender, reproduction, and marriage could inflict harms on third parties.

Complicity-based conscience claims, where religious parties seek exemptions from general laws[4] that compel religious believers to choose between violating their conscience and participating in certain societal activities, are divisive because they require balancing the conflicting interests of two protected classes: the religious liberty interests of religious claimants and the civil rights interests of other groups. When these rights claims collide, deciding in favor of religious claimants could result in dignitary harms to those who are protected by antidiscrimination laws, while a decision in the reverse could pose an affront to the dignity of religious claimants.

One way to balance the competing interests at play in complicity-based conscience disputes would be to enforce equal protection laws uniformly, irrespective of whether objections to those laws are based on religious convictions. Though the context is not identical, this position mirrors the majority opinion in *Smith*, where Justice Antonin Scalia argued that "because 'we are a cosmopolitan nation made up of people of almost every conceivable religious preference' … and precisely because we value and protect that religious diversity, we cannot afford the luxury of deeming *presumptively invalid*, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order."[5] Such a position emphasizing "freedom under" equal laws reflects a popular understanding of the relationship between religion and the liberal state, one that limits acceptable religious liberty to those expressions that do not contravene general laws. That said, as we show in our analysis of recent complicity-based conscience cases, problems arise when facially neutral laws of general applicability may compel religious constituents to violate their conscience if they choose to participate in social activities such as operating a business and hiring employees.[6]

[2] In *Smith*, plaintiffs were members of the Native American Church and worked at a private drug rehabilitation center. The clinic terminated the claimants because they ingested peyote for religious purposes during religious ceremonies. The Oregon Department of Human Resources denied plaintiffs' unemployment compensation because their termination was reported as work-related misconduct. The Court held that state laws that are neutral and generally applicable do not violate the Free Exercise Clause, and that allowing exceptions to every state law or regulation affecting religion "would open the prospect of constitutionally required exemptions from civic obligations of almost every conceivable kind." 494 U.S. 872, 872, 888 (1990).

[3] *Hobby Lobby* began when the owners of Hobby Lobby Stores, a privately held company, refused to comply with provisions of the Affordable Care Act, which required private businesses of a certain size to provide health insurance to their employees that covered abortion and contraceptives. The owners objected on the basis of their religious commitments involving reproduction, which prohibited abortion and the use of certain forms of contraception that they considered abortifacient. The Court held that the relevant provisions of the Affordable Care Act could not be applied to for-profit corporations with religious objections. Though the statute was found to pursue a compelling government interest, the Court did not consider it to be the least restrictive means of pursuing that interest. 573 U.S. 682, 682–83, 730 (2014).

[4] Scholars working in other disciplines have also observed the unique conflict animating complicity-based conscience claims. Political philosopher Cecil Laborde, for example, recently explored philosophical arguments that could permit exemptions from general laws in the context of political liberalism. See Cecil Laborde, *Legal Toleration and Rights to Do Wrong*, 4 Oxford Studies in Political Philosophy 161 (2021).

[5] 494 U.S. at 888 (1990).

[6] The relevant Affordable Care Act provisions in *Hobby Lobby* requiring businesses of a certain size to provide health insurance to employees that covered abortion and contraceptives, though facially neutral, imposed a burden on religious business owners who objected on the basis of religious conviction to abortion and contraceptives by requiring them to be complicit in the provision of products they found to be religiously objectionable.

https://doi.org/10.1017/jlr.2023.12 Published online by Cambridge University Press

Roughly coinciding with the *Smith* holding was the 1993 publication of John Rawls's influential *Political Liberalism*, in which Rawls articulated a similar principle of liberal tolerance toward religion in the manner that the majority in *Smith* presented three years earlier. As Rawls argued, the scope of religious diversity and the prospect of social stability in liberal societies depend on how well an "overlapping consensus" between particular religious doctrines and the essentials of a liberal democracy could be achieved.[7] Whether framed in Rawls's terms or in terms of *Smith*'s subjection of religious liberty to generally applicable laws, deciding complicity-based conscience disputes under a social cohesion principle narrows the scope of acceptable religious diversity in the liberal state.

The balancing act involved in the adjudication of complicity-based conscience disputes could, for example, be weighed in the opposite direction, with greater weight being afforded to the protection of substantial religious diversity and value pluralism—perhaps especially when those diverge from prevailing societal attitudes. Against both Rawls's "overlapping consensus" framework and the coherence principle implied in *Smith* are theories of liberal pluralism offered by political theorists such as Michael Walzer, William A. Galston, and John Gray that seek to erect minimal conditions of coexistence rather than pursue consensus, where values and ways of life that diverge from prevailing sensibilities deserve as much protection as other objects of civil rights legislation.

Thus, tension between two conceptions of liberalism in the American tradition is on display in complicity-based conscience disputes that underscore the fact of human differences on interests of great significance to self-determination: one that privileges coherence between groups and another that supports robust religious diversity under minimal conditions of basic coexistence. How the competing interests at play in complicity-based conscience disputes are balanced hinges, in no small part, on how liberal tolerance is understood.[8]

Muslim Participation in Complicity-Based Conscience Disputes

Muslim-Americans[9] have received little attention in the emerging complicity-based conscience literature, but they provide a clear example of a minority religious community[10] in the United States that, at least in its more traditional and doctrinally oriented[11] segments,

[7] *See generally*, John Rawls, Political Liberalism (expanded ed. 2005). For a concise summary of the issue, see *id.* xvi–xvii, xxxvii–xxxix. For detailed discussion of the overlapping consensus, see *id.*, 133–172.

[8] The tension observed here between different conceptions of the relationship between religion and liberalism is not new. In the American liberal tradition, it harkens back to debates during the mid-1770s, when the Quaker minority sought exemptions from general laws that were alleged to conflict with their religious conscience. Against the prevailing conception of "freedom under" general laws, the Quaker minority advocated for a system of "freedom from" laws that constrained religious liberty. *See* Philip A. Hamburger, *Religious Freedom in Philadelphia*, 54 Emory Law Journal 1603, 1604 (2005). This tension in interpreting religious liberty as understood in the context of American liberalism (between "freedom under" and "freedom from" general laws) continues and is seen animating opposing positions on contemporary complicity-based conscience controversies.

[9] Though the focus of this article is on patterns of reasoning employed by Muslim-Americans in amicus curiae arguments in recent complicity-based conscience issues, we use the less cumbersome term *Muslim* throughout. All such uses should be understood as referring to Muslim-Americans.

[10] According to a 2017 Pew Research Center estimate, Muslims account for 1.1 percent of the U.S. population. *See* Michael Lipka, Muslims and Islam: Key Findings in the U.S. and Around the World (2017).

[11] As we use it throughout this article, the phrase *doctrinally oriented Muslims* is not meant to necessarily imply that other groups of Muslims discussed in this article have no concern for Islamic doctrine. Rather, doctrinally oriented Muslims are distinguishable from the other Muslim groups in that their arguments in the amicus curiae briefs emphasize the issue of commitment to traditional Islamic doctrine regarding rules of conduct in society; whereas, the other Muslim groups emphasize their identity as a minority among other minority identities that span across religion, sex, gender, and other identity categories to emphasize the need for a common application of rules to all such groups.

https://doi.org/10.1017/jlr.2023.12 Published online by Cambridge University Press

holds beliefs and seeks to live in accordance with social practices that diverge from prevailing societal attitudes about sex, gender, and marriage that are increasingly being enshrined in equal protection statutes. The way that competing interests at play in complicity-based conscience cases are balanced is thus of consequence for this religious minority.

Western scholarship on the relationship between Islam and liberalism in the twenty-first century has focused on discerning cohesion between the two, perhaps because in the wake of September 11, 2001, Muslims have been looked upon in certain quarters of society as a suspect class with collective attitudes, values, and ways of life that did not appear to comport with those of the broader American public. Establishing a Rawlsian overlapping consensus between Islamic theological doctrines and liberal values captured the sustained intellectual energies of erudite scholars such as Andrew F. March and Mohammad Fadel, who have sought to demonstrate conceptual compatibility between the two with the goal, presumably, of defending this suspect group against ill-intentioned and at times prejudiced efforts to deny Muslim-Americans their place in the big tent of American liberalism.[12]

Yet there are reasons to question whether the interests of religious minorities such as doctrinally oriented Muslims are adequately protected under a regime of cohesion, where facially neutral laws of general applicability increasingly reflect values that conflict with traditional religious convictions about areas of life as fundamental as sex, gender, reproduction, and marriage. As applied to such religious constituents, these facially neutral laws require complicity with social norms that many religious believers consider unacceptable. Leveraging tools from within the liberal tradition that look favorably upon robust religious diversity would support "freedom from" laws that, though intending to protect certain classes of people, threaten traditional religious believers.

It should be no surprise then that certain Muslim and other religious groups have filed amicus curiae briefs in support of litigants in recent complicity-based conscience cases to argue that religious liberty extends to freedom *from* general laws that have the potential to constrain religious social practices. What may be surprising, however, is that other Muslim groups have presented arguments in support of the expansion of civil liberties in these cases against the interests of such groups, and thus we observe that arguments advanced by members of this religious minority reflect two distinct understandings of liberalism.[13]

[12] Andrew F. March has surveyed Islamic legal and political doctrine to assess the viability of a Rawlsian overlapping consensus between Islam as a "comprehensive doctrine" and "the essentials of a politically liberal state." *See* Andrew March, *Islamic Foundations for a Social Contract in Non-Muslim Liberal Democracies*, 101 American Political Science Review 235 (2007). *See also* Mohammad Fadel, The True, the Good and the Reasonable: The Theological and Ethical Roots of Public Reason in Islamic Law, 21 *Canadian Journal of Law and Jurisprudence* 5 (2015). *See also* Andrew F. March, *Theocrats Living under Secular Law: An External Engagement with Islamic Legal Theory*, 19 Journal of Political Philosophy 28 (2011) (arguing that *maqasid al-shari'a*—a method of "purposes-based" jurisprudence popular among certain modern Islamic legal scholars like Rashid al-Ghannushi and Tariq Ramadan—coheres with secular civil rights and international human rights concerns, and may be a way for observant Muslims to endorse secular, non-Muslim polities).

[13] Against our proposed framework involving two competing modalities of liberalism, we are aware of perspectives that question the liberal nature of observant Muslims living in non-Muslim societies. These perspectives take several forms, including a concern that conservative Muslims may reject the legitimacy of non-Muslim societies and their governmental structures if an overlapping consensus is not discovered. Another concern is that observant Muslims may be tactically engaging with the non-Muslim society in order to shape it in accordance with their own religious convictions, akin to proponents of Catholic integralism. The issue is further complicated given the prejudice and suspicion harbored against Muslims from some quarters in Western democracies after 9-11 and the rise of the specter of radical, violent, Islamist movements such that similar critiques are levied against conservative Muslim groups, incorrectly equivocating them with the radical, violent movements.

While a full analysis and rebuttal of such assumptions is not within the scope of this paper, we note that the overwhelming majority of observant Muslims living in Western liberal societies have no sympathy or adherence

https://doi.org/10.1017/jlr.2023.12 Published online by Cambridge University Press

In what follows, we present a formal framework of competing interpretive traditions within American liberalism. Our analysis of Muslim amicus curiae briefs filed in the recent complicity-based conscience cases of *Masterpiece Cakeshop v. Colorado* (2018),[14] *Bostock v. Clayton County* (2020),[15] and *Fulton v. City of Philadelphia* (2021)[16] reveals that these arguments are animated by competing conceptions of liberalism, with one involving the pursuit of broad religious, cultural, and value pluralism (*modus vivendi*) and the other involving the pursuit of social cohesion, overlapping consensus, assimilation, and *fraternité* among diverse constituencies in a shared civil sphere (*vivre ensemble*).

Finally, this article contributes to several bodies of scholarship. First, we contribute to the emerging literature on complicity-based conscience issues by examining how one religious minority interprets this kind of controversy. Second, this article also provides Muslims with representation in a growing body of scholarship on religious amici in the United States.[17] Third, we add to the literature on the relationship between Islam and liberalism (or on the relationship between religion and liberalism more broadly) which, as mentioned above, has been largely focused on Rawls's overlapping consensus framework to date.[18] To this last

with radical Islamic ideologies and, in fact, such radical ideologies that seek to fundamentally replace the structure of modern political orders are rejected as a violation of Islamic law, ethics, and norms. A 2017 Pew Research Center survey found, for example, that 82 percent of Muslims in America are either very or somewhat concerned about extremism in the name of Islam around the world (a percentage that mirrors the 83 percent share of the general American public who hold these concerns). The report's authors also observed that the vast majority of American Muslims (92 percent) say they are proud to be American. *See* Basheer Mohamed and Gregory A. Smith, U.S. Muslims Concerned about their Place in Society, but Continue to Believe in the American Dream (2017).

Rather than speculate about the prospect of hidden motivations, what we observe objectively is that the various Muslim amicus curiae surveyed here are not only advancing their interests within the shared structure of the American judicial process, but they are also formulating arguments in support of their own interests on the basis of case law, legal doctrine, and concepts like government neutrality toward religion, religious liberty, self-determination, and free expression that are constitutive of American liberalism. Accordingly, we consider the various arguments contained in these briefs to represent modalities of liberalism and not, say, a clash between liberalism and illiberalism.

[14] 138 S. Ct. 1719.

[15] 140 S. Ct. 1731.

[16] 141 S. Ct. 1868.

[17] This budding literature has focused on Christian and Jewish amici. For a recent study of Catholic amicus curiae arguments at the US Supreme Court, see Maria Doerfler, *Bishops & Friends: History and Legal Interpretation in Recent Amicus Curiae Briefs before the Supreme Court*, 38 Journal of Law and Religion 55 (2023). For an analysis of Jewish amicus curiae arguments reflecting a similar divergence of political positioning between Orthodox Jews and their Reformed and Conservative counterparts, see Michael A. Helfand, *Jews and the Culture Wars: Consensus and Dissensus in Jewish Religious Liberty Advocacy*, 56 San Diego Law Review 305 (2019).

[18] Rawls has been selected as a reference in this article for liberal theory from which to contrast other approaches, in part, because the primary academic works to date that attempt to provide a framework for Muslims to navigate liberalism have focused on Rawls's theory. March, *Islamic Foundations for a Social Contract in Non-Muslim Liberal Democracies*, *supra* note 11, at 237–52. Additionally, Rawls's overlapping consensus framework provides a theoretical grounding for the more recent developments in liberalism toward *vivre ensemble* and similar theories although such theories have likely moved beyond the balance that Rawls sought to find in that such theories seek to more aggressively limit religious freedom in certain social practices.

It is beyond the scope of this article to comment on how closely theories involving different modalities of liberalism today track Rawls's theory, but we note that given the ever-changing landscape of American social and political life, it is an open question for further research as to whether one of the central conditions of Rawls's overlapping consensus—that government and society shall equally not impose truth claims on religious citizens (as religious citizens shall not do so on society)—is truly upheld in the conflicts of interest that we examine in this article.

An alternative to Rawls's approach adopted in the important scholarly works of March and Fadel is observed in the emergence of a segment of Muslims who, through amicus curiae briefs, are willing to oppose expansions of specific civil liberties when such expansions would impose a burden of complicity on their part (by not providing adequate exemptions for contested issues). The emergence of this opposition suggests that new theories for Muslim

https://doi.org/10.1017/jlr.2023.12 Published online by Cambridge University Press

point, we examine an actual encounter[19] between Islam and liberalism that can ground what often amounts to abstract theorizing on the relationship and potential compatibility between religion and liberalism.

Theory

Normative works in the liberal canon (such as those presented by Locke, Mill, Rawls, and others) are distinct from theories about tensions *within* liberalism. Theories about what we may call varieties or modalities of liberalism have been identified by political and legal theorists since at least the mid-twentieth century. Here, we focus on frameworks that involve divergent understandings of liberalism as it pertains to the issue of social tolerance specifically (rather than, for example, different understandings of economic liberalism).[20]

One influential theory which identified a tension within liberalism on the question of tolerance specifically can be found in William A. Galston's 1995 essay "Two Concepts of Liberalism," in which he presents a framework containing two strands of liberal philosophy, which he labels *autonomy* and *diversity.* Galston uses those terms to reference competing interpretive traditions within liberalism, with autonomy referring to a tradition emphasizing individual self-determination and self-direction (as represented by John Locke, Immanuel Kant, and John Stuart Mill). By contrast, Galston uses *diversity* to mean a distinct liberal tradition that recognizes and seeks to accommodate "differences among individuals and groups over such matters as the nature of the good life, sources of moral authority, reason versus faith" and so forth.[21] Though Galston observes that the standard liberal hope is that these two frameworks will cohere, he maintains that they typically point in different directions regarding public policy and legal decision-making on disputed issues of cultural concern (such as those involving education, rights of association, and the free exercise of religion).

After providing a framework presenting a bifurcation within liberalism, Galston observes that many religious individuals and communities simply want to be left alone, and, as long as they comply with "shared liberal purposes" (such as the protection of human life),[22] he argues normatively in favor of liberalism as *modus vivendi* (a collection of different ways of

participation in American liberalism are needed based on the framework of William Galston's minimum conditions or John Gray's concept of *modus vivendi*, which focus on basic coexistence in liberal institutions rather than achieving an overlapping consensus.

[19] March acknowledges that ultimately the question of compatibility "can only be resolved empirically, that is, through examining the specific encounter between particular religious commitments at particular moments in time and a particular … legal order." March, *Theocrats Living under Secular Law*, *supra* note 11, at 37. We analyze one such encounter here and note its implications for theories of the relationship between religion and liberalism.

[20] An early theory presenting distinct interpretive traditions within American liberalism is found in legal scholar Cass Sunstein's argument that two opposed understandings of liberalism are implicit in American politics and constitutional thought: (1) liberalism as welfare, a tradition in which it is believed that government decisions in certain circumstances can and should shape preferences (when interventions would yield increases in welfare); and (2) liberalism as autonomy, in which preferences are treated as exogenous variables that government neither can nor should seek to influence. To illustrate liberalism as welfare, Sunstein adduces the example of addiction, where laws restricting the use of certain substances strive to ensure that preferences for certain drugs are not formed in the first place. Though Sunstein's framework discusses preference-shaping rather than liberal tolerance, it provides an example of how the purposes of liberal governance can be variously understood. *See* Cass R. Sunstein, *Two Faces of Liberalism*, 41 *University of Miami Law Review* 245 (1986).

[21] William A. Galston, *Two Concepts of Liberalism*, 105 Ethics 516 (1995).

[22] Galston's "shared liberal purposes" include (1) the protection of human life, (2) the promotion of normal development of basic capabilities, and (3) the development of social rationality that would allow one to participate in society if one so chooses. Galston argues that only these shared liberal purposes should be considered "compelling government interests" that would justify government intervention in religion. *Id.* at 525.

https://doi.org/10.1017/jlr.2023.12 Published online by Cambridge University Press

life in which valuing individual autonomy over local or religious communitarianism is one possible mode of existence among others). His support for *modus vivendi* is also motivated by his observation that John Rawls's concept of political liberalism fails to take diversity seriously enough. To Galston, Rawls unjustifiably limits the scope of pluralism to encompass only those citizens whose world views could be characterized as "reasonable" and that cohere with "the essentials" of a liberal democratic state.[23]

Another theory of competing varieties of liberal tolerance was presented by John Gray in his 2000 book *Two Faces of Liberalism*.[24] There, Gray argues that one face of liberalism reflects the Enlightenment project's effort to promote universal, cosmopolitan values—what he calls "political liberalism." The other tradition Gray identifies as *modus vivendi* is a system that "aims to find terms on which different ways of life can live well together." Gray emphasizes that this second face of liberalism does not attempt to be an ideal regime; instead, akin to what Galston noted about this modality of liberalism, *modus vivendi* is oriented toward facilitating basic coexistence between constituencies that disagree on fundamental values and who intend to live in accordance with different ways of life.[25]

Finally, in his 2015 book *La possibilité du cosmopolitisme*, Constantin Languille presents a framework incorporating two conflicting varieties of liberalism to explain the burqa controversies which made their way to the European Court of Human Rights that year.[26] Under Languille's framework, one variant of liberalism prioritizes self-determination (motivating those who supported the right to wear the burqa in public places). The other modality privileges social cohesion—what he calls *vivre ensemble* (living together on the basis of a set of shared social values and commitments). The government of France leveraged the concept to help justify its ban on public veiling before the European Court: "[t]he effect of concealing one's face in public places is to break social ties and to manifest a refusal of the principle of 'living together' (*le vivre ensemble*)."[27] We present this as an example of religious liberty being suppressed to the degree that it conflicts with prevailing or majoritarian societal values.

In this article, we employ a framework derived from this literature on varieties of liberalism to explain an observable divergence between Muslim amicus curiae arguments on recent complicity-based conscience issues.[28] Though others have commented on different conceptions of liberalism at play in the interpretation of complicity-based conscience

[23] *Id.* at 519.

[24] John Gray, Two Faces of Liberalism (2000).

[25] In *Two Faces of Liberalism*, Gray writes that "the ideal of [liberal] toleration we have inherited embodies two incompatible philosophies. Viewed from one side, liberal toleration is the ideal of a rational consensus on the best way of life. From the other, it is the belief that human beings can flourish in many ways of life. If liberalism has a future, it is giving up the search for a rational consensus on the best way of life." *Id.* at 1.

[26] *See* Constantin Languille, La possibilité du cosmopolitisme : burqa, droits de l'homme et vivre-ensemble [The Possibility of Cosmopolitanism: The Burqa, Human Rights, and Living Together] (2015).

[27] SAS v. France, 2014-III Eur. Ct. H.R. 341 ¶¶ 37–38.

[28] In providing such a framework, we follow other scholars who have presented similar models of competing modalities of liberalism as lenses to examine interactions between Islam and secular politics and law (though these scholars have presented this framework to study Islam in the European context). For example, when exploring how European Muslim elites understand the relationship between Islam and liberal politics, Jytte Klausen provides a model that distinguishes between liberalism as presented by Michael Walzer and John Rawls, respectively. To Klausen, Walzer's idea of "complex equality" would support religious minorities' rights to respect and self-determination. *See* Jytte Klausen, The Islamic Challenge: Politics and Religion in Western Europe (2005). Peter G. Danchin also presents a model of two competing liberal traditions as it has developed in the context of the European Court of Human Rights' Article 9 jurisprudence (dealing with religious liberty). To Danchin, liberalism contains both (1) an interpretive tradition deriving from "a civil philosophy that views the right to religious liberty in jurisdictional terms and the public sphere in terms of social peace," and (2) an interpretive tradition that derives from "a metaphysical philosophy that views the right to religious liberty in terms of freedom of conscience and the public

https://doi.org/10.1017/jlr.2023.12 Published online by Cambridge University Press

issues,[29] we formalize a model of competing modalities of liberalism involved in complicity-based conscience cases and show how this framework contextualizes Muslim advocacy on both sides of these issues.

The framework we rely on derives from Galston and Gray's articulation of *modus vivendi* and Languille's *vivre ensemble.*[30] Though importing a European concept into a discussion of American liberalism may seem lacking in relevance, we use the concept as a category intended to capture similar concerns expressed by American thinkers and addresses the cohesion paradigm at the heart of *Smith* and Rawls's overlapping consensus tradition.[31] We thus present *vivre ensemble* and the cohesion principle it represents as a major alternative to the *modus vivendi* tradition of liberal tolerance, which is less concerned with facilitating cohesion and more concerned with constructing minimal conditions of basic coexistence, in order to broaden the landscape of beliefs and ways of life as much as possible. For our purposes, this is a formal distinction intended to emphasize a tension between two interpretive traditions within liberalism regarding religious liberty and the accommodation of diverse constituencies.

Modus Vivendi

Arguments that reflect the *modus vivendi* modality of liberalism presume that, as Galston and Gray maintain, different ways of life are incommensurable. *Modus vivendi* seeks to accommodate maximal differences among individuals and groups "over such matters as the nature

sphere in terms of a comprehensive moral theory of justice." *See* Peter G. Danchin, *Islam in the Secular Nomos of the European Court of Human Rights*, 32 Michigan Journal of International Law 663, 745 (2011).

[29] Commenting on NeJaime and Siegel's piece on complicity-based conscience claims, Sherif Girgis argues that NeJaime and Seigel's concern about the moral stigma and political potency of religious objectors to general laws in the complicity-based conscience context are unwarranted. As for moral stigma, Girgis observes that "any side might feel deeply stigmatized by rival actions or policies." Sherif Girgis, *Nervous Victors, Illiberal Measures: A Response to Douglas NeJaime and Reva Siegel*, 125 Yale Law Journal Forum 399, 404 (2016). This is perhaps unavoidable in a multicultural society. As to the political potency of religious objectors in these disputes, Girgis argues that the open collision of moral views in the civil sphere is a process of moral confrontation that is *a feature rather than a bug of liberal politics*: "We shrink these fruits of freedom by treating the spread of political dissent as a reason to *prune* civil liberties; by winnowing conscience claims for *upsetting* mainstream sensibilities." Girgis, *supra*, at 400.

In addressing why he and NeJaime and Siegel interpret complicity-based conscience cases differently, Girgis argues that two different understandings of liberalism animate their respective evaluations of complicity-based conscience disputes. One understanding of liberalism is *a sanguine view of the messiness of civil society*, the "open clash between earnestly held ideals and opinions about the nature and basis of the good life" (as John Stuart Mill articulated this idea). *Id.* at 111. Another understanding of liberalism is akin to Rousseau's view that "it is impossible to live at peace with those whom we regard as damned," that common values should be imposed in an effort to foster social unity. *Id.* at 115.

[30] Although we present these two modalities of liberalism as mostly in conflict with one another for purposes of our analysis, we recognize that the two approaches are not necessarily exclusive to the other on all issues; that there may be overlap or agreement between the two in some cases. What these two modalities do represent, however, are differing priorities when balancing competing claims for social rights within liberalism.

[31] We have also chosen to use *vivre ensemble* as a major alternative to *modus vivendi* because it provides a clearer counterpoint to *modus vivendi* relative to Rawls's political liberalism, which itself has been variously interpreted by political theorists. Cecil Laborde, for instance, has argued that Rawls's political liberalism exhibits a "dualist structure" in that it can reasonably endorse two different models of the relationship between religion and the liberal state. Cecil Laborde, *Political Liberalism and Religion: On Separation and Establishment*, 21 Journal of Political Philosophy 67, 79 (2011). To sidestep ambiguities in Rawls's theory of political liberalism, we let the term *vivre ensemble* stand for the cohesion tradition in liberalism (which relegates religious self-determination to a position of deference to competing rights provided in generally applicable laws), reflected in the *Smith* holding, *S.A.S. v. France*, and at least some interpretations of Rawls's political liberalism.

https://doi.org/10.1017/jlr.2023.12 Published online by Cambridge University Press

of the good life, sources of moral authority, reason versus faith" and so forth.[32] As it applies to religion, the presumption of incommensurability extends not only to private belief and practice, but also to overt manifestations of faith in the public sphere. Accordingly, *modus vivendi* is less concerned about facilitating cohesion than erecting conditions for basic coexistence and, as one celebrated political theorist adeptly observed, a regime focused on accommodating maximal diversity "brings an end to persecution [but] is not a formula for social harmony."[33] Thus, where rights claims collide in a pluralistic society, *modus vivendi* does not presume that religious liberty claims should defer to competing rights claims provided under general laws.

Vivre Ensemble

Alternatively, the *vivre ensemble* modality of liberalism is oriented toward the facilitation of social cohesion under shared moral attitudes and viewpoints. According to this vision of liberalism, government neutrality toward religion means minimizing available religious exemptions to generally applicable laws (as seen in *Smith*). Under *vivre ensemble*, religious liberty is limited to expressions that do not contravene facially neutral laws (even if applying those laws has a disparate impact on traditional religious minorities), and it is often understood to pertain exclusively to the realm of private belief and practice.

Observations

We proceed by examining the patterns of reasoning presented in amicus curiae briefs filed or joined by Muslims in support of litigants on both sides of complicity-based conscience disputes at the US Supreme Court.[34] The presence of Muslim amici was observed in three recent cases: *Masterpiece Cakeshop*, *Bostock*, and *Fulton*, outlined in table 1.

[32] Galston, *supra*, note 21, at 521.

[33] Michael Walzer, On Toleration 98 (1997).

[34] We limited our analysis to the three cases of *Masterpiece Cakeshop* (2018), *Bostock* (2020), and *Fulton* (2021) because Muslim amici appeared on both sides of these disputes. Accordingly, these cases provide the clearest examples of how Muslim Americans differ in their views on how complicity-based conscience disputes should be resolved.

One recent case, *Yeshiva University v. YU Pride Alliance*, made its way to the United States Supreme Court on an application for a stay pending appeal of a permanent injunction in September 2022. Yeshiva University v. YU Pride Alliance, 143 S. Ct. 1 (2022). In this complicity-based conscience case, Yeshiva University sought emergency relief from a non-final order of a New York trial court requiring the Jewish university to treat an LGBTQ student group similarly to other student groups on campus, despite the university's leadership concluding, after consultation with religious leaders, that formal recognition of the LGBTQ student organization would have "implications that are not consistent with Torah." *Id.* at 2 (Alito, J., dissenting). The US Supreme Court denied Yeshiva University's application because it had not exhausted state court relief, but it explained that "if applicants seek and receive neither expedited review nor interim relief from the [state] courts, they may return to [the US Supreme Court]." *Id.* at 1. As of the time of writing, few amicus briefs were filed in *Yeshiva University*, and none have been authored or joined by Muslim parties. However, given the clear complicity-based conscience dispute at issue, we expect that Muslim parties may file amicus briefs if this case returns to the Court on the merits.

We excluded cases where Muslim amici appeared on one side of complicity-based conscience disputes heard by the US Supreme Court, including *Obergefell v. Hodges* (2015), *Whole Women's Health v. Hellerstedt* (2016), and *June Medical Services v. Russo* (2020). In *Obergefell*, Muslims for Progressive Values joined Brief for President of Deputies of the Episcopal Church and the Episcopal Bishops of Kentucky, Michigan, Ohio, and Tennessee et al. as Amici Curiae Supporting Petitioners, Obergefell v. Hodges, 576 U.S. 644 (2015) (No. 14-556). In *Whole Women's Health*, Imam Daayiee Abdullah, Ani Zonneveld, and Murshida Habiba Kabir joined Brief for Judson Memorial Church et al. as Amici Curiae Supporting Petitioners, Whole Women's Health v. Hellerstedt, 579 U.S. 582 (2016) (No. 15-274). In *June Medical*, Muslims for Progressive Values joined Brief for Catholics for Choice et al. as Amici Curiae Supporting Petitioners, June Medical Services L.L.C. v. Russo, 140 S. Ct. 1101 (2020) (No. 18-1323). Also in *June Medical*, the group

https://doi.org/10.1017/jlr.2023.12 Published online by Cambridge University Press

Table 1. Muslim amicus curiae briefs in support of litigants on both sides of *Masterpiece Cakeshop v. Colorado Civ. Rts. Comm'n* (2018)

Case Name	Title of Amicus Brief	Muslim Authors	Categorization of Logic
Masterpiece Cakeshop v. Colorado Civ. Rts. Comm'n (2018)	Brief for Ethics & Religious Liberty Commission of the Southern Baptist Convention et al. as Amici Curiae Supporting Petitioners	Imam Omar Ahmed Shahin	*Modus vivendi*
	Brief for The Central Conference of American Rabbis et al. as Amici Curiae Supporting Respondents	Muslims for Progressive Values, Imam Daayiee Abdullah, Ibtesam Barazi, Ani Zonneveld	*Vivre ensemble*
	Brief for 15 Faith and Civil Rights Organizations as Amici Curiae Supporting Respondents	Muslim Advocates, Capital Area Muslim Bar Association, Muslim Alliance for Sexual and Gender Diversity, Muslim Public Affairs Council, New Jersey Muslim Lawyers Association	*Vivre ensemble*

In *Masterpiece Cakeshop*, a same-sex couple requested that the owner of a Colorado bakery, Phillips, design and create a cake for their wedding. The owner refused because of his religious conviction against same-sex marriage. The same-sex couple then filed discrimination charges against Phillips with the Colorado Civil Rights Commission, alleging discrimination based on their sexual orientation—a protected class under Colorado's public accommodations law. Though the Supreme Court circumvented the heart of the matter—the issue of whether a law can compel a proprietor to create a message in contravention of his or her religious conviction (holding instead that the relevant Colorado ALJ failed to apply the law in a neutral manner toward Phillips)—amicus arguments, including those filed or joined by Muslim parties, directly addressed the substance of this complicity-based conscience dispute.[35]

Muslim Advocates joined Brief for Lawyers' Committee for Civil Rights under Law et al. as Amici Curiae Supporting Petitioners, June Medical Services L.L.C. v. Russo, 140 S. Ct. 1101 (2020) (No. 18-1323).

We also excluded recent cases such as *EEOC v. Abercrombie & Fitch Stores* (2015) that presented "traditional" religious discrimination issues as opposed to complicity-based conscience issues. 575 U.S. 768. In *EEOC v. Abercrombie & Fitch*, an Abercrombie store in Tulsa, Oklahoma chose not to hire a Muslim female, Samantha Elauf (Petitioner), because she wore a hijab, which the company's hiring personnel took to be a violation of the company's internal "look policy." *Id.* at 770. Unlike complicity-based conscience cases where the enforcement of generally applicable civil rights laws may compel religious believers to violate their religious convictions (as in *Masterpiece Cakeshop*), prohibiting religious discrimination in employment under Title VII of the Civil Rights Act of 1964 aligns Petitioner's religious interests with her civil rights under Title VII.

[35] Richard Epstein also noted that the Court dodged the controversial issue involving the scope of religious liberty in *Masterpiece Cakeshop*: "In a most unsatisfactory opinion, Justice Anthony Kennedy chastised the [Colorado] commission only for its boorish behavior, not its substantive actions." Richard Epstein, *Religious Liberty Should Prevail*, Hoover Institution (Nov. 9, 2020), https://www.hoover.org/research/religious-liberty-should-prevail.

https://doi.org/10.1017/jlr.2023.12 Published online by Cambridge University Press

Imam Omar Ahmed Shahin

Imam Omar Ahmed Shahin joined a brief in support of Phillips.[36] There are three components to the brief's argument. First, Abrahamic religions often consider vocation to be an expression of faith. The argument points to Islamic belief in particular: "Islam regards it as meaningless to live life without putting [one's] faith into action and practice," that believers should weave "everyday activities and their beliefs into a single cloth of religious devotion."[37] Analogously, the argument continues, we would not compel a Jewish merchant to sell a cheeseburger or a Muslim butcher to offer pork products—whether as a part of their regular business (i.e., off the shelf) or as a custom (i.e., off-menu) item, as the distinction was drawn by some justices in *Masterpiece Cakeshop*.[38] In those circumstances, Imam Omar Ahmed Shahin maintains, we recognize that there is an intimate connection between religious conviction and outward ways of conducting one's affairs.

The second component of this argument places religious objections to same-sex marriage within the sphere of protection announced by the majority opinion in *Obergefell v. Hodges* (specifically by what has been called the "Obergefell promise," that religious organizations and individuals would remain secure in their right to believe, teach, and express their sincere religious conviction that same-sex marriage should not be condoned).[39] Robust value pluralism, this brief maintains, requires that any one view about same-sex marriage does not dominate over particular religious views to the contrary. Value pluralism is protected when, for example, Orthodox Jewish and Qur'anic prohibitions on same-sex marriage (believing that marriage is a sacred bond between a man and a woman) do not face potential civil or criminal penalties.

This leads to the authors' third point, that Colorado's antidiscrimination law, as applied to merchants like Phillips, foists an unacceptable dilemma upon religious constituencies, who are either compelled to create a message that celebrates a union that violates their sincerely held beliefs, or they disobey the relevant law and face penalties.[40] Laws that force this decision upon believers, they argue, is a de facto religious test which, under *Lukumi Babalu Aye v. City of Hialeah*, need not be overt to violate the Free Exercise Clause.[41] The argument concludes by differentiating between government circumscribing conduct based on racist beliefs in the public sphere and compelling the violation of traditional religious beliefs about marriage which, the authors maintain, are "based on decent and honorable religious or philosophical premises" and are central to religious identity among a community of believers.[42]

[36] Brief for Ethics & Religious Liberty Commission of the Southern Baptist Convention et al. as Amici Curiae Supporting Petitioners, Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Commission, 138 S. Ct. 1719 (2018) (No. 16-111).

[37] *Id.* at 9–10.

[38] *Id.* at 11, 21. On the distinction between types of good, see *infra* note 50.

[39] The "Obergefell promise" that Imam Omar Ahmed Shahin refers to is as follows: "[I]t must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered." 576 U.S. 644, 679–80 (2015).

[40] Brief for Ethics & Religious Liberty Commission, *supra* note 33, at 5.

[41] *Id.* at 19 (referring to Church of the Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520 (1993)).

[42] *Id.* at 6 (quoting Obergefell v. Hodges, 576 U.S. 644, 672 (2015)).

https://doi.org/10.1017/jlr.2023.12 Published online by Cambridge University Press

Muslims for Progressive Values

The second brief was joined by Muslims for Progressive Values and Muslim religious leaders.[43] The logic presented in this brief contrasts with Imam Omar Ahmed Shahin's (which prioritizes religious objections to creating messages in contravention of sincerely held beliefs over the enforcement of generally applicable anti-discrimination laws). Here, Muslims for Progressive Values prioritizes the interests of minority groups protected by antidiscrimination laws over the interests of traditional religious constituencies. While Imam Omar Ahmed Shahin considered the issue in *Masterpiece Cakeshop* mainly to involve the First Amendment, the authors of this brief consider the issue to be primarily about discrimination against protected minorities.

This argument has two prongs. First, upholding religious liberty and protecting religious pluralism in public requires "evenhanded civil rights enforcement that declines to give special status to any one set of religious views."[44] In other words, no religious viewpoint or conviction should be exempt from general civil rights law enforcement. Second, compelling Phillips to create a cake for a same-sex wedding would not infringe on the rights of "religious people … to determine what and who satisfies the requisites for practice of their faith" when dealing with matters of belief and internal religious organizational standards, say, in a synagogue, church, or masjid.[45] Although religious constituencies have latitude to determine how their religious beliefs about marriage, for example, are implemented in the privacy of their own communities, they are not exempt from civil rights enforcement in the public sphere when their beliefs conflict with generally applicable and neutral laws.

Further, unlike the argument joined by Imam Omar Ahmed Shahin (which distinguished the exemption Phillips was seeking from acts of racial discrimination), Muslims for Progressive Values and their co-authors contend that there is no meaningful distinction between the refusal of service based on Phillips's objection to same-sex marriage and the refusal of service based on objections to serving persons of a certain race.[46] Allowing Phillips to opt out of creating a wedding cake for a same-sex couple because of a religious objection to same-sex marriage would be tantamount to providing Phillips with a license to opt out of generally applicable legal rules designed to protect against certain forms of discrimination and that have "little or nothing to do with his actual religious exercise."[47]

Muslim Advocates

The last brief joined by Muslim authors in *Masterpiece Cakeshop* features several Muslim advocacy organizations, including Muslim Advocates, Muslim Alliance for Sexual and Gender Diversity, and Muslim Public Affairs Council.[48] Like Muslims for Progressive Values, Muslim Advocates and their co-authors frame the dispute in *Masterpiece Cakeshop* as an instance of invidious discrimination against a protected minority, rather than as a collision of two competing but otherwise legitimate rights claims and argue that the Court should not provide the requested religious exemption.[49] As these amici maintain, Phillips's refusal to

[43] Brief for the Central Conference of American Rabbis et al. as Amici Curiae Supporting Respondents, Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Commission, 138 S. Ct. 1719 (2018) (No. 16-111).

[44] *Id.* at 5.

[45] *Id.* (referencing Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 195 (2012)).

[46] *Id.* at 32.

[47] *Id.* at 21.

[48] Brief for 15 Faith and Civil Rights Organizations as Amici Curiae Supporting Respondents, Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Commission, 138 S. Ct. 1719 (2018) (No. 16-111).

[49] Though the majority opinion focused on the Colorado Civil Rights Commission's treatment of Phillips, Justice Anthony Kennedy acknowledged the conflicting rights claims at play: "The case presents difficult questions as to

https://doi.org/10.1017/jlr.2023.12 Published online by Cambridge University Press

create a cake for a same-sex wedding (what they interpret as a denial of service rather than a refusal to express a message in contravention of his religious views on marriage[50]) is akin to a shopkeeper denying service to a customer because of the customer's racial or religious identity.[51] It is immaterial that Phillips is seeking an exemption to Colorado's general antidiscrimination law on religious grounds, they explain, because the Free Exercise Clause "does not allow religious believers engaged in activities open to the public to thwart generally applicable anti-discrimination laws."[52]

Supporting their argument that the Court should not provide a religious exemption from the relevant law, Muslim Advocates and their co-authors make a second point: enforcing antidiscrimination laws without exemption is necessary not only to protect vulnerable minorities in general but also to safeguard the rights of religious minorities in particular.[53] Religious minorities, amici observe, rely on antidiscrimination laws for protection,[54] and if those laws are not enforced uniformly, "individuals or groups who are outside the mainstream would not be able to fully participate in civil society and would be vulnerable to targeting."[55] Accordingly, as Muslim Advocates maintains, permitting a religious exemption in cases like *Masterpiece Cakeshop* would "harm the cause of religious liberty" by undermining statutory protections that benefit religious minorities.[56]

No matter that some religious minorities in the United States, including Imam Omar Ahmed Shahin, consider their religious interests to be best protected by exemptions from general laws that would otherwise in some cases require them to express views or act in ways that contradict their beliefs about marriage; to Muslim Advocates, protecting minorities in general and religious minorities in particular requires maintaining a "secular public sphere" by rejecting requests for religious exemptions from general laws.[57]

Below we present the amicus curiae arguments filed or joined by Muslim parties on *Bostock v. Clayton County* and *Fulton v. City of Philadelphia*, as outlined in tables 2 and 3, respectively. Our analysis of the arguments presented in *Masterpiece Cakeshop*, *Bostock*, and *Fulton* follows.

---

the proper reconciliation of at least two principles. The first is the authority of a state and its governmental entities to protect the rights and dignity of gay persons who are, or wish to be, married but who face discrimination when they seek goods or services. The second is the right of all persons to exercise fundamental freedoms under the First Amendment, as applied to the States through the Fourteenth Amendment." Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Commission, 138 S. Ct. 1719, 1723 (2018).

[50] The dispute about whether to understand Phillips's action as either a denial of service altogether or a refusal to design a cake expressing certain meanings was addressed in the amicus briefs examined here (with Imam Omar Ahmed Shahin identifying the issue as a refusal to express a certain message, and with Muslim Advocates framing the issue as a denial of service altogether), in oral argument, as well as in Justice Kennedy's majority opinion: "One of the difficulties in this case is that the parties disagree as to the extent of the baker's refusal to provide service. If a baker refused to design a special cake with words or images celebrating the marriage—for instance, a cake showing words with religious meaning—that might be different from a refusal to sell any cake at all." *Id.*

[51] Brief for 15 Faith and Civil Rights Organizations, *supra* note 45, at 24–25.

[52] *Id.* at 16.

[53] *Id.* at 17.

[54] "While constitutional and statutory protections against religious discrimination apply to all faiths equally, religious minorities have been the primary beneficiary of these laws." *Id.* at 21 (citing Department of Justice report which shows a "disproportionately high number of discriminatory incidents against Muslims and Jews in particular"). *See* U.S. Dep't of Justice, Update on the Justice Department's Enforcement of the Religious Land Use and Institutionalized Persons Act: 2010–2016, at 4 (2016).

[55] Brief for 15 Faith and Civil Rights Organizations, *supra* note 45, at 13.

[56] *Id.* at 14.

[57] *Id.* at 20. Muslim Advocates considers Phillips's request for an exemption on the basis of his religious beliefs to be an invitation for the Court to "upend our nation's efforts to ensure that a secular public sphere is available for all religious adherents." *Id.*

https://doi.org/10.1017/jlr.2023.12 Published online by Cambridge University Press

Table 2. Muslim amicus curiae briefs in support of litigants on both sides of *Bostock v. Clayton Cnty., GA* (2020)

Case Name	Title of Amicus Brief	Muslim Authors	Categorization of Logic
Bostock v. Clayton Cnty., GA (2020)	Brief for National Association of Evangelicals et al. as Amici Curiae Supporting Employers	American Islamic Congress	*Modus vivendi*
	Brief for Religious Freedom Action Institute's Islam & Religious Freedom Action Team and Islamic Scholars as Amici Curiae Supporting Employers	Abdullah Bin Hamid Ali, Sheikh Mohammed Amin Kholwadia	*Modus vivendi*
	Brief for Muslim Bar Association of New York et al. as Amici Curiae Supporting Employees	Muslim Bar Association of New York, Capital Area Muslim Bar Association, Council on American-Islamic Relations, Dallas Fort Worth Muslim Bar Association, Islamic Society of Basking Ridge, Muslim Advocates Muslim Caucus of America, Muslim Public Affairs Council, Muslim Urban Professionals Muslims for Progressive Values, New England Muslim Bar Association, New Jersey Muslim Lawyers Association	*Vivre ensemble*

Table 3. Muslim amicus curiae briefs in support of litigants on both sides of *Fulton v. City of Philadelphia* (2021)

Case Name	Title of Amicus Brief	Muslim Authors	Categorization of Logic
Fulton v. City of Philadelphia (2021)	Brief for the Bruderhof et al. as Amici Curiae Supporting Petitioners	The Religious Freedom Institute's Islam & Religious Freedom Action Team, Asma Uddin	*Modus vivendi*
	Brief for President of the House of Deputies of the Episcopal Church et al. as Amici Curiae Supporting Respondents	Muslims for Progressive Values	*Vivre ensemble*

At the Supreme Court, *Bostock* was consolidated from cases that came up through the Eleventh, Second, and Sixth Circuits involving disputes in which gay or transgender employees were terminated by both private and government employers.[58] The question

[58] The consolidated cases were *Altitude Express v. Zarda* (2020), *Bostock v. Clayton County* (2020), and *Harris Funeral Homes v. EEOC* (2020). In *Altitude Express*, a skydiving instructor told a female customer that he was gay to make her feel more comfortable while being attached to him during her initial skydive. The employee, Zarda, was terminated

https://doi.org/10.1017/jlr.2023.12 Published online by Cambridge University Press

presented was whether the language of Title VII of the Civil Rights Act of 1964 protected employees from termination because of their sexual orientation.

American Islamic Congress

The brief for *Bostock* was filed by the National Association of Evangelicals and joined by, among other groups, the American Islamic Congress.[59] The brief was authored in support of the employers, and the logic presented focuses on the dignitary harms that would be inflicted on certain religious employers if the Supreme Court extended Title VII's protections to include gay and transgender identities without providing accompanying exemptions for religious objectors.[60]

Like Imam Omar Ahmed Shahin's brief in *Masterpiece Cakeshop*, the American Islamic Congress and their co-authors appeal to the "Obergefell promise" ("it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned") as a basis for justifying the requested religious exemption.[61] They argue that those whose religious commitments reflect "fundamental and long-standing doctrines holding that sexual relationships are divinely sanctioned only between a man and a woman who are married," like amici and other religious organizations, will be unable to comply with nondiscrimination laws that require the recognition of expansive conceptions of sexual orientation and gender identity.[62]

Further, these amici argue that religion doesn't only pertain to private belief, but it also involves rules of personal conduct that extend into one's vocational pursuits. As they write, "religion includes how one lives, not merely what one believes [and, consequently,] a religious employer cannot form a workplace that truly reflects its faith unless it has the legal right to make employment decisions based on shared religious beliefs and compliance with those beliefs."[63] If the Court were to construe the term *sex* in Title VII broadly to include expansive conceptions of sexual orientation and gender identity, these amici argue, religious individuals seeking to affirm traditional conceptions of sex, gender, and marriage in the workplace would be compelled to violate their beliefs. Thus, to the American Islamic Congress, expanding Title VII without providing accompanying religious exemptions would

after the customer and her boyfriend expressed their discontent to the employer, Altitude Express, about Zarda's comments regarding his sexual orientation. The company then terminated Zarda, which led to litigation.

In *Harris Funeral Homes*, a male employee (Aimee Stephens) sent a letter to his employer, a religiously affiliated funeral home (Harris Funeral Homes), to prepare the employer for his gender reassignment surgery and that he would present as female following the procedure. Harris Funeral Homes terminated Stephens's employment. The District Court held that Title VII did not cover transgender persons and that, as a religious organization, Harris Funeral Homes had a right to terminate Stephens based on the religious employer exception to Title VII.

In *Bostock*, a child welfare services employee of Clayton County, GA (Gerald Bostock) who received positive evaluations throughout the duration of his career, was terminated after he expressed interest in participating in a gay softball league while at work, the grounds of his termination being conduct "unbecoming of [Clayton County's] employees." The Eleventh Circuit at the time did not construe Title VII to protect employees from discrimination on the basis of sexual orientation.

[59] Brief for National Association of Evangelicals et al. as Amici Curiae Supporting Employers, Bostock v. Clayton County, 140 S. Ct. 1731 (2020) (Nos. 17-1618, 17-1623, 18-107).

[60] *Id.* at 13.

[61] *Id.* at 2 (quoting Obergefell v. Hodges, 135 S. Ct. 2584, 2607 (2015)).

[62] *Id.* at 2–3 (maintaining that "the law should protect the right of religious organizations to hold their beliefs regarding sexuality and gender and to have those beliefs reflected in their employment practices. ... Government should not seek to coerce the abandonment of those beliefs and practices, or punish *amici* for upholding them in their religious employment standards.").

[63] *Id.* at 7.

https://doi.org/10.1017/jlr.2023.12 Published online by Cambridge University Press

unjustifiably constrain religious liberty and "threaten the free exercise rights and institutional integrity of religious employers."[64]

Islam & Religious Freedom Action Team and Islamic Scholars

The next brief joined by Muslim parties in *Bostock* was filed by the Religious Freedom Institute's Islam & Religious Freedom Action Team and two Islamic scholars, Abdullah Bin Hamid Ali and Sheikh Mohammed Amin Kholwadia.[65] Like the American Islamic Congress, these amici argue that broadening Title VII's definition of *sex* to include expansive conceptions of sexual orientation and gender identity without providing accompanying exemptions for religious objectors would suppress religious liberty, because traditional religious employers would be obligated to comply with a law that, though facially neutral, would require them to operate their businesses in ways that violate their religious beliefs about sex, gender, and marriage.[66] Implied in their argument is an understanding of religiosity that includes ways of conducting one's public life together with private belief and worship.

To support their claim that there is a rift between prevailing societal attitudes about expansive sexual orientation and gender identity norms (which are reflected in the proposed expansion of Title VII) on the one hand, and the views of traditional religious constituencies on the other,[67] these amici offer several examples of particular Islamic beliefs about sex, gender, and marriage which center on the ideas that God created human beings as male and female, that sex is binary, fixed, and immutable, and that Muslims must observe privacy norms as a matter of religious obligation.[68] The authors point to Qur'an 24:31,[69] the concepts of *ihtisham* (chastity), *hijab* (modesty), the seclusion of the sexes in certain social settings (*khalwa*), and distinctions between the male and female sexes.[70] If the scope of Title

[64] *Id.*

[65] Brief for Religious Freedom Action Institute's Islam & Religious Freedom Action Team and Islamic Scholars as Amici Curiae Supporting Employers, Bostock v. Clayton County, 140 S. Ct. 1731 (2020) (Nos. 17-1618, 17-1623, 18-107).

Abdullah Bin Hamid Ali earned his MA from the Graduate Theological Union and earned his PhD from Zaytuna College in Berkeley, California. He also holds a BA in Islamic Law from al-Qarawiyin University in Morocco. Abdullah Bin Hamid Ali is a scholar of Islamic law with field specialties in Islamic theology and race and Blackness studies in Muslim history. He is currently an associate professor at Zaytuna College.

Sheikh Mohammad Amin Kholwadia is the president and director of Darul Qasim, an Islamic institution of higher education in Glendale Heights, Illinois. Having studied at the Dar al-Ulum seminary in Deoband, India, and having received traditional licenses (*ijaza*) from Islamic scholars throughout the Indian Subcontinent, he is widely regarded as a leading expert in Islamic theology, Islamic philosophy, and Qur'anic studies.

[66] *Id.*

[67] *Id.* at 12–13 (explaining, for example, that "Islamic jurisprudence teaches that a person's sex cannot change. God's creation of male and female is determined by biology, by genitalia and by genetics, related to conjugal union and reproduction. Islam does recognize the rare abnormality of hermaphroditism, more commonly known as intersex (*khuntha*). A person with this biology is born with sexual ambiguity … [and] it is up to medical doctors to recognize the intersex condition and make an assignment, based on which sex is more apparent or dominant. Islam does not recognize 'transgender' [or] other gender identities.").

[68] *Id.* at 10–14.

[69] Mustafa Khattab's translation of Qur'an 24:31: "And tell the believing women to lower their gaze and guard their chastity, and not to reveal their adornments except what normally appears. Let them draw their veils over their chests, and not reveal their hidden adornments except to their husbands, their fathers, their fathers-in-law, their sons, their stepsons, their brothers, their brothers' sons or sisters' sons, their fellow women, those bondwomen in their possession, male attendants with no desire, or children who are still unaware of women's nakedness. Let them not stomp their feet, drawing attention to their hidden adornments. Turn to Allah in repentance all together, O believers, so that you may be successful."

[70] *Id.* at 11. As amici write, "Islam does not invidiously discriminate between men and women, but it does distinguish between the two. For example, in Surah al-Hujurat (49:13) of the Quran … : O Mankind!, We created you

https://doi.org/10.1017/jlr.2023.12 Published online by Cambridge University Press

VII were expanded, these amici argue, observant Sunni Muslim employers would "face [either the] compulsory contradiction of their fundamental religious conviction[s] or [the] abandonment of the business or vocation to which they feel called."[71]

The Islam & Religious Freedom Action Team and Islamic Scholars conclude by presenting a counterpoint to the issue at hand. In most cases, they maintain, observant Muslims in the United States find ways to practice their faith without resorting to the legal system to coerce non-Muslims to accommodate *their customs.*[72] For example, Muslim women who wear the hijab cannot receive hair services from most American salons because these businesses do not provide the degree of privacy required by the established rules of Islamic law (in the typical American hair salon, stylists or other customers may be male).[73] In order to live in accordance with their religious convictions about gender mixing (and without trying to coerce others to accommodate their customs), these Muslim women have opted to open their own hair salons, spas, and beautician services catering exclusively to observant Muslim women. As these amici suggest, coexistence in this context would be hampered by compelled integration: to require Muslim women's salons to hire or serve men would be an affront to the dignity of doctrinally observant Muslim constituencies in the United States who take seriously their commitment to established rules of Islamic law on sex, gender, and marriage.

Muslim Bar Association of New York

The third brief in *Bostock* was presented solely by Muslim parties, including the Muslim Bar Association of New York, Muslims for Progressive Values, and Muslim Advocates.[74] It differs from the first two in terms of its reasoning and reflects a different conception of liberal tolerance—one that seeks to minimize exemptions from general laws, even when those laws enshrine and enforce views about sex, gender, and marriage that are incompatible with certain religious commitments.

This argument proceeds in two parts. First, its authors provide a plain meaning argument, in which they assert that Title VII prohibits discrimination on the basis of sex, sexual orientation, and gender.[75] Discrimination based on sex as provided in the statute, they argue, entails discrimination on the basis of sexual orientation and transgenderism. As the authors note, "When an employer discriminates against an employee on the basis of … sexual orientation or transgender status, the employer necessarily consider[s] the employee's sex—even if that is not its sole (or even principal) consideration. This is because sexual orientation and transgender status are defined in terms of sex."[76] In other words, the authors argue that the language of Title VII necessarily extends to protections for sexual orientation and transgender status.

Second, beyond protecting LGBT employees from discrimination, the Muslim Bar Association of New York and its co-authors argue that including sexual orientation and transgender categories within the purview of Title VII is necessary to protect *religious minorities* who are subject to a disproportionate amount of workplace discrimination (notwithstanding that

all from a male and a female, and made you into nations and tribes so that you may know one another. Verily the noblest of you in the sight of God is the most God-fearing of you." *Id.*

[71] *Id.*

[72] *Id.* at 17.

[73] *Id.*

[74] Brief for Muslim Bar Association of New York et al. as Amici Curiae Supporting Employees, Bostock v. Clayton County, 140 S. Ct. 1731 (2020) (Nos. 17-1618, 17-1623, 18-107).

[75] *Id.* at 7.

[76] *Id.* at 9.

https://doi.org/10.1017/jlr.2023.12 Published online by Cambridge University Press

religion is already an enumerated category under Title VII).[77] They argue that Title VII protections benefit all marginalized groups (including LGBT and Muslim individuals in the United States)[78] and that, by strengthening protections for vulnerable groups in general, Muslims will also be protected from invidious discrimination.

The amicus curiae arguments filed or joined by Muslim parties on both sides of *Fulton v. City of Philadelphia* are outlined in table 3.

Fulton v. City of Philadelphia arose out of a dispute between a Catholic foster care organization and the City of Philadelphia in which the organization Catholic Social Services chose not to certify unmarried couples or same-sex couples as foster parents because it believed that doing so would violate their sincere religious beliefs about marriage and sexual orientation.[79] In response, Philadelphia froze its referral of foster children to Catholic Social Services, arguing that the organization violated a local nondiscrimination ordinance and contractual nondiscrimination provisions in its agreement with the City.

Catholic Social Services claimed that it experienced anti-religious prejudice by Philadelphia. The City argued alternatively that *Smith* supported the City's decision to terminate its relationship with Catholic Social Services because of the organization's violation of nondiscrimination regulations, irrespective of its religious motivations.[80] The complicity-based conscience issue at play in this dispute is clear: the Catholic organization's decision not to comply with the relevant Philadelphia nondiscrimination regulations based on its religious convictions arguably resulted in harms to third-party beneficiaries of Philadelphia's antidiscrimination laws (the same-sex couples who were seeking to adopt children through organizations like Catholic Social Services).

Islam & Religious Freedom Action Team and Asma Uddin

Writing in support of Catholic Social Services, the Islam & Religious Freedom Action Team and Asma Uddin advance a legal argument promoting a broad conception of religious liberty in which protections must be provided to minority, insular, and unpopular forms of religiosity.[81] Many of these forms of religiosity go beyond private belief and practice (what they call a "myopic conception of religious life" that few religious practitioners would actually defend) to include ways of life that often manifest in personal, though publicly visible commitments.[82] Amici argue that protecting the religious liberty of minority groups like the Amish, Sikh, and Muslim communities in the United States (whose views and ways of life are unpopular and often unfamiliar from the vantage point of majorities) requires

[77] Title VII of the Civil Rights Act of 1964 makes it an "unlawful employment practice for an employer … to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." Civil Rights Act of 1964, P.L. 88-352, §701, 78 Stat. 241. *EEOC v. Abercrombie & Fitch Stores* is an example of the Supreme Court upholding Title VII protections for religious minorities, in this case, a Muslim woman who was refused employment at an Abercrombie & Fitch location because she wore an Islamic headscarf. EEOC v. Abercrombie & Fitch Stores, 135 S. Ct. 2028 (2015).

[78] Brief for Muslim Bar Association of New York et al. as Amici Curiae Supporting Employees at 18, Bostock v. Clayton County, 140 S. Ct. 1731 (2020) (Nos. 17-1618, 17-1623, 18-107).

[79] 141 S. Ct. 1868 (2021).

[80] The Supreme Court held that Philadelphia's refusal to contract with Catholic Social Services for the provision of foster care services, unless Catholic Social Services agrees to certify same-sex couples as foster parents, is a violation of the First Amendment's free exercise clause.

[81] Brief for the Bruderhof et al. as Amici Curiae Supporting Petitioners, Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021) (No. 19-123).

[82] *Id.* at 5 (writing that "Much of the problem would be solved if religious people would be satisfied with the bare right to believe in their faiths. But few would really defend an attitude that carries such a myopic conception of religious life. On any realistic understanding, religion involves more than abstract belief in creedal propositions. It involves living one's life in accordance with those beliefs.").

https://doi.org/10.1017/jlr.2023.12 Published online by Cambridge University Press

overturning the *Smith* framework, which departed from prior First Amendment doctrine and continues to unduly constrain the scope of permissive religious self-direction.[83]

Their argument against the *Smith* framework proceeds in three parts, each showing how alternatives to overruling *Smith* would be suboptimal in the pursuit of protecting robust religious liberty. First, amici contend that efforts to secure religious exemptions under *Smith* often succeed only where there is a corresponding secular purpose being pursued.[84] They point to cases like *Fraternal Order of Police v. Newark*, in which Muslim police officers pursued exemptions from a policy which forbid beards.[85] Amici argue that the Muslim officers' victory in that case hinged on a preexisting medical exemption for officers with certain skin conditions, and that protections for minority religions should not depend on a corresponding secular exemption.

Second, they argue that legislative efforts to undermine the *Smith* doctrine through federal and state religious freedom restoration acts (known as RFRAs) are inconsistent and do not adequately protect religious minorities from laws that compel them to violate their religious convictions.[86] The federal RFRA only applies in disputes over federal law. There is variation among state RFRAs, and some states have even nullified their own versions of the statute.[87] RFRAs are thus an inconsistent basis for protecting robust religious liberty.

Third, amici argue that targeted religious exemptions by legislatures are also unworkable because they are often too narrow in scope.[88] They may also fail to anticipate all the religious objections that may arise in response to a single statute in a country home to myriad religious minorities. Such targeted religious exemptions also require the ability to effectively petition representatives, and religious minorities who may wish to petition their representatives and participate in the political process (especially those that are small, insular, or poor) may not have the funding or political capital necessary to garner legislative support.[89]

While each of these possible alternatives to overruling *Smith* would soften the doctrine in favor of broader religious self-determination, these amici argue that the alternatives do not do enough to protect religious liberty for religious minorities, dissenters, and insular groups who, they maintain, should be afforded the distinctive treatment and protection which the First Amendment entitles them to.[90] Amici's effort to overturn *Smith* presupposes a conception of liberal tolerance as something oriented toward maximizing religious dissent and diverse ways of life, reflecting a sanguine view of the messiness of civil society and a conception of religious pluralism in the liberal state as *modus vivendi.* It is predicated on the idea that, irrespective of what the prevailing consensuses of shifting majorities may be, constitutional religious protections are intended to protect minority beliefs and ways of life.

[83] *Id.* at 23. In *Wisconsin v. Yoder*, 406 U.S. 205 (1972), and *Sherbert v. Verner*, 374 U.S. 398 (1963), the US Supreme Court relied on an inquiry into whether a limitation on religious liberty served a compelling government purpose and amounted to the least restrictive means of pursuing that purpose. *Smith* replaced this least restrictive means test with an analytical framework that asked only whether contested laws are neutral and generally applicable. Without an exemption, the *Smith* doctrine subjects religious self-determination to the uniform enforcement of general laws, even where the application of these neutral and general laws compels religious constituencies to violate their sincere religious convictions.

[84] Brief for the Bruderhof, *supra* note 78, at 12.

[85] *Id.* (referring to 170 F.3d 359 (3d Cir. 1999)).

[86] *Id.* at 14, 16–17.

[87] *Id.* at 17.

[88] *Id.* at 19.

[89] *Id.*

[90] *Id.* at 24–25 (writing that the "text of the First Amendment does indeed give special solicitude to religious organizations … religion is singled out by the constitutional text, and … it deserves distinctive constitutional treatment as a result").

https://doi.org/10.1017/jlr.2023.12 Published online by Cambridge University Press

Muslims for Progressive Values

Writing in support of the City of Pennsylvania, Muslims for Progressive Values and their co-authors promote a different conception of religious liberty relative to the conception put forth by the Islam & Freedom Action Team and Asma Uddin.[91] To Muslims for Progressive Values, that Catholic Social Services' requested religious exemption would result in dignitary harms to third parties (in this case, to same-sex couples seeking to adopt children through Catholic Social Services) is enough to justify denying the requested religious exemption altogether. In accordance with the *Smith* framework, though religious objectors may participate in public debate about specific laws and their applications, they cannot expect to circumvent generally applicable and neutral laws designed to protect third parties.[92]

These amici also argue that Petitioners should not be granted an exemption to the Philadelphia law at issue because the relevant law does not require Catholic Social Services to violate its *beliefs* about marriage, nor does it encroach on religion's authority in its own domain (presumably referring only to homes and houses of worship).[93] They also argue that the relevant law does not require religious constituents to believe anything in particular; it does not require that they express any particular viewpoint, nor does it compel Catholic Social Services to "religiously endorse" unions they find offensive.[94] They grant no weight to Catholic Social Services' contention that being required to certify same-sex couples for foster care would violate its religious convictions about something as sacrosanct as marital relations.

Finally, a point that Muslims for Progressive Values emphasizes is that religion is exceptionally diverse in the United States, and that many religious Americans interpret their beliefs in ways that do in fact cohere with expansive conceptions of sexual orientation and marital arrangements enshrined in civil rights laws.[95] They support this point with references to public statements made by groups like the Evangelical Lutheran Church in America ("families are formed in many ways [including] where the parents are the same gender") and by adducing surveys of American religious communities which reveal varying but broad support for expansive conceptions of sex, gender, and marriage.[96]

Based on these observations, Muslims for Progressive Values argues that it is in the interest of both protected minorities and religious communities that requested exemptions from anti-discrimination laws should be denied.[97] To balance the competing interests in

[91] Brief for President of the House of Deputies of the Episcopal Church et al. as Amici Curiae Supporting Respondents, Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021) (No. 19-123).

[92] *Id.* at 12.

[93] *Id.* at 23.

[94] *Id.* at 26.

[95] *Id.* at 14–15.

[96] *Id.* at 15–16 (citing Public Religion Research Institute data collected in 2019 on support for nondiscrimination protections for LGBT individuals among different religious groups in the United States, including 75 percent of Jews, 75 percent of Hispanic Catholics, 74 percent of white Catholics, 74 percent of Buddhists, 74 percent of white mainline Protestants, 72 percent of black Protestants, 70 percent of Mormons, 68 percent of Hindus, 67 percent of Hispanic Protestants, 64 percent of Muslims, and 61 percent of white evangelical Protestants). Public Religion Research Institute, *Broad Support for LGBT Rights across all 50 States: Findings from the 2019 American Values Atlas* (April 14, 2020), https://perma.cc/V2XK-97P4. These amici also cite data from the same publication regarding opposition to religiously based refusals to provide business services to LGBT persons: 65 percent of Jews, 63 percent of Buddhists, 58 percent of Hispanic Catholics, 57 percent of Hindus, 54 percent of white mainline Protestants, and 53 percent of Muslims oppose such religious refusals.

Notwithstanding these consensuses, however, the object of constitutional religious protections is arguably to protect minority religious communities and insular groups whose views and ways of life diverge from those of the majority. Enshrining certain rights in the fundamental law of the Constitution is intended to insulate these interests from the prospect of being undermined by shifting majorities.

[97] *Id.* at 10–11.

https://doi.org/10.1017/jlr.2023.12 Published online by Cambridge University Press

favor of Catholic Social Services' requested religious exemptions would, they argue, eviscerate civil rights enforcement that benefits everyone: "the best way to ensure that all people retain the First Amendment right to speak, preach, pray, and practice their religious beliefs—including with respect to sexual orientation and marriage—is to prevent illegal discrimination in the civil sphere regardless of its basis."[98]

Their proposed resolution to *Fulton* thus reflects a different conception of liberal tolerance relative to what the Islam & Religious Freedom Action Team presented. To Muslims for Progressive Values, constitutional religious protections are intended to secure *private* belief and practice. And though they argue that religious diversity is something to be protected, they do not believe protections should extend to conscience-based objections advanced by religious minorities (like doctrinally oriented Muslims, Catholic Social Services, and others) who do not wish to be complicit in the affirmation of sex, gender, and marriage norms that contravene their religious commitments.

Discussion

Members of the Muslim community have filed amicus curiae briefs in support of litigants on both sides of complicity-based conscience disputes that set the enforcement of equal protection laws against conscience-based objections to certain applications of such laws that conflict with doctrinal Islamic viewpoints on sex, gender, and marriage. The arguments presented in these briefs reflect two conceptions of liberalism, animated by the Muslim experience in the United States which pulls these groups in opposing directions.

Doctrinally Oriented Muslims and Modus Vivendi

In one approach, Muslims understand themselves as a traditional religious group with specific beliefs and practices that strain (if not outright contravene) emerging norms about gender, sexuality, and identity in general. That their views on culturally sensitive issues like marriage and gender identity may diverge from prevailing social norms is something that they believe should be protected in the interest of securing robust religious diversity. Accordingly, these doctrinally oriented Muslims view themselves as a part of the diverse American religious landscape, deserving of strong protections for their right to religious self-determination and coexistence with others. Like other conservative religious communities, they view the right to religious self-determination to involve overt ways of living along with private belief. Prioritizing self-determination of religious beliefs and ways of life when they conflict with prevailing societal norms is an example of understanding tolerance in terms of basic coexistence rather than cohesion, reflecting a conception of liberalism as *modus vivendi.*

For doctrinally oriented Muslim amici (like Islamic Scholars and the American Islamic Congress), the word *Muslim* cannot be denuded of Islamic beliefs and established doctrine, nor is Islam simply reducible to a concern for social justice. Instead, Islam is a set of substantive beliefs and ways of life, which include convictions about sexual relations and identity, and which Muslims must not repudiate in words or deeds to the extent possible. In their *Bostock* brief, the Religious Freedom Action Team & Islamic Scholars emphasized this view, that doctrinal Islam is defined by a set of specific customs and beliefs that are constitutive of believers' religiosity, and which do not conform with the vision of sex and gender enshrined in the proposed expansion of the generally applicable Title VII provisions. In the interest of protecting their religious way of life, in support of robust religious

[98] *Id.* at 11.

https://doi.org/10.1017/jlr.2023.12 Published online by Cambridge University Press

pluralism, and against compulsion to be complicit in the violation of their convictions, this group argues that religious merchants should not be coerced into managing their organizations' operations (including hiring) under expansive conceptions of sex, gender, and marriage that conflict with their own religiously grounded viewpoints on these topics.

Further, doctrinally oriented Muslims not only hold substantive beliefs regarding acceptable forms of gender expression and marital arrangements, but they also consider it a religious imperative not to promote views that contravene these beliefs.[99] In light of the Islamic doctrine of "commanding the good and preventing evil," Muslims must not be complicit in the promotion and furtherance of expansive gender identities and marital arrangements; general laws that compel Muslims to do so (or that fail to provide religious exemptions) require Muslims to violate this fundamental religious obligation.[100]

Finally, unlike their progressive[101] counterparts, doctrinally oriented Muslims do not view the Islamic community as coextensive with a marginalized minority group, nor do doctrinally oriented Muslims advocate for their political and legal rights through this construct. To them, the category Muslim cannot be reduced to a minority identity because Islam is believed to be a universal religion which includes, in the United States, adherents from an exhaustive cross section of society (including white and other Americans from privileged backgrounds that do not fit into the minority or other popular social justice and identity politics rubrics in use today).[102]

Progressive Muslims and Vivre Ensemble

In another approach, Muslims emphasize their identity as a minority group in the United States that, especially after September 11, 2001, has faced prejudice and feels a great deal of public and internal pressure to conform with wider American culture. To this end, Muslims align themselves with progressive groups that champion issues of diversity, inclusion, social justice, and the protection of minority rights in general. In their amicus curiae arguments,

[99] One of the fundamental teachings of Islam is that Muslims have a general duty to "command the good and prevent evil." While there is lengthy discussion in the Islamic tradition around the details and application of this duty (especially for Muslim minorities) that are outside the scope of this article, one of the basic and uncontested applications of this duty is that a Muslim cannot participate in the promotion of anything deemed to be sinful from the religion's perspective (yet silence in the presence of, or mere coexistence with, sin would not necessarily be a violation of this duty; instead, the emphasis is on uttering words or taking actions that can be deemed to be a promotion or furtherance of the sin, or being complicit in sinful action). For an introduction to this Islamic doctrine, see Michael L. Cook, Commanding Right and Forbidding Wrong in Islamic Thought (2001).

In a similar vein, traditional Sunni Muslim theology teaches that committing a sin, even a grave sin, does not itself repudiate one's faith. Yet to declare lawful (that is, morally acceptable) something that clear, unambiguous teachings of Islam consider sinful can amount to the repudiation of one's faith, absent exculpatory circumstances. For this reason, Muslims concerned with fealty to Islamic doctrine have a heightened concern when their words or actions could be construed as promoting, condoning, or being complicit in what they view as sin, as this not only violates a fundamental duty of their religion but is something that, depending on the circumstances, could involve a repudiation of their faith.

[100] *See supra* note 99.

[101] As we use it in this article, the term *progressive Muslim* is simply meant to categorize the type of reasoning and arguments emphasized in such groups' amicus curiae briefs and does not imply necessarily that members of such groups ascribe to the broader usage and definition of the term *progressive* in today's social context, although clearly some Muslims in this category explicitly identify as progressive, such as Muslims for Progressive Values.

[102] A 2017 Pew Research Center report on Muslim-American demographics provides data on Muslim American diversity along several dimensions, including race, ethnicity, socioeconomics, and educational attainment. *Demographic Portrait of Muslim Americans*, Pew Research Center (July 26, 2017), https://www.pewresearch.org/religion/2017/07/26/demographic-portrait-of-muslim-americans/. *See also* Mohamed and Smith, *supra* note 12.

https://doi.org/10.1017/jlr.2023.12 Published online by Cambridge University Press

this group of Muslims emphasizes that their protection as a minority group depends on the uniform enforcement of equal protection laws.

By prioritizing uniform compliance with the equal protection paradigm over religious liberty-based objections, progressive Muslim amici offer a narrower conception of acceptable religious diversity relative to their doctrinally oriented counterparts, limiting protected religiosity largely to the realm of private belief and to those social practices that do not undermine expansive sex, gender, and marriage norms. For example, as Muslims for Progressive Values argues in *Masterpiece Cakeshop*, the Colorado Anti-Discrimination Act does not prevent Phillips from *believing* that marriage is a sacred union between a man and a woman or to express that belief in public or private,[103] and any penalty imposed as a result of Phillips's refusal to create a wedding cake for a same-sex couple does not encroach on his right to hold, express, or privately practice his understanding that marriage is limited to the union of one man and one woman. Even if Phillips were compelled to create a message in contravention of his beliefs, they argue, he would remain able to believe what he wants, express his views, and put his own understanding of marriage into practice in his own life. That Phillips does not wish to be complicit in creating a message in celebration of a conception of marriage he disagrees with is not considered to warrant protection.[104]

Thus, the logic presented in the arguments advanced by progressive Muslim amici is rooted in the idea that religious liberty is only protected where it involves private belief and practice, or public expressions and ways of conducting one's professional pursuits that cohere with prevailing sex, gender, and marriage norms. This is liberalism as *vivre ensemble.* To define acceptable religious diversity in this way narrows the scope of legitimate religious pluralism by crowding out certain traditional religious constituencies, such as the doctrinally oriented Muslim communities described by the American Islamic Congress, for whom the focus on private belief ignores conceptions of religiosity, common among these Muslims, that prioritize "how one lives"[105] and for whom a strong distinction between belief and overt ways of living is foreign.

In sum, rather than a contest between liberal and illiberal frameworks, both doctrinally oriented Muslims and progressive Muslims are interested in the core liberal value of government neutrality toward religion as a fundamental aspect of liberal tolerance and present their arguments within a broad framework of American liberalism and constitutional jurisprudence. At the same time, they appear to diverge over how they interpret government neutrality and the proper scope of religious liberty. If one holds a conception of liberalism as "a sanguine view of the messiness of civil society"[106] or "an open clash between earnestly held ideals and opinions about the nature and basis of the good life,"[107] expecting only basic coexistence among heterogenous constituencies (*modus vivendi*), then one may prioritize claims for religious exemptions from general laws that require violations of religious conscience. Alternatively, if one holds a conception of liberalism as an effort to facilitate cohesion under a set of ostensibly universal attitudes and values (*vivre ensemble*),

[103] Brief for The Central Conference of American Rabbis et al., *supra* note 40, at 21.

[104] We note that this line of reasoning fails to address the issue raised by doctrinally oriented Muslims that as a matter of belief and conscience, such laws could require an observant Muslim to violate a fundamental teaching of Islam which is the duty of Muslims not to promote, condone, or otherwise be complicit in what they sincerely believe is sinful activity.

[105] Brief for National Association of Evangelicals et al., *supra* note 56, at 7.

[106] Girgis, supra note 29, at 414.

[107] *Id.* at 410, quoting Andrew Koppelman, *A Free Speech Solution to the Gay Rights/Religious Liberty Conflict* 24–25 (unpublished manuscript 2015). Koppelman is quoting Jeremy Waldron, *Mill and the Value of Moral Distress*, in Liberal Rights: Collected Papers 1981–1991, at 115, 120 (1993). *Id.* at 410n53.

https://doi.org/10.1017/jlr.2023.12 Published online by Cambridge University Press

then complicity-based conscience claims will be balanced against religious claimants, constraining the scope of acceptable religious diversity.

Conclusion

Scholarship on the relationship between Islam and liberalism in America post 9-11 has largely relied on Rawls's framework to evaluate the prospect of coherence between Islamic theological doctrine and liberalism. One issue with this project is that establishing consistency between Islamic doctrine and the essentials of a liberal state hinges on how liberalism's essentials (such as government neutrality toward religion) are understood. As we have shown here, diverging positions taken by Muslims on complicity-based conscience cases are driven, at least in part, by different understandings of liberalism and its objectives. Another issue is that, if an overarching concern with perceived or real prejudice toward Muslims is a motivational force for such inquiries, the treatment of liberalism will be biased toward finding overlapping consensus with other groups and promoting social cohesion, at the expense of other possible solutions within liberal theory (such as simultaneously advocating for protection from discrimination *and* maximizing value pluralism in society).

Liberalism began as a search for *modus vivendi*, as Gray contemplated in his *Two Faces of Liberalism*,[108] a search that began after the Thirty Years' War (1618 to 1648)—a conflict between Catholics and Protestants that decimated roughly 30 percent of Germany's population at the time. It was a search that sought to accommodate the brute fact of religious difference and the plain observation that people were willing to engage in conflict rather than abandon their values, world views, and ways of living. The liberal solution as an effort to "turn down the temperature of politics"[109] centered, in part, on government neutrality toward diverse religious communities, whose values and ways of life were presumed to be incommensurable. Predicated on a posture of neutrality, liberalism ultimately refracted into two competing faces or modalities based on how neutrality toward religion was understood. One of these modalities has been called *modus vivendi*, a framework of neutrality that seeks minimal conditions for basic coexistence and broad tolerance for diverse ways of life. Another modality of liberalism, what we have here called *vivre ensemble*, is an effort to pursue neutrality toward religion not by considering different ways of life to be incommensurable, but instead through the uniform enforcement of neutral laws of general applicability, which seek to minimize exemptions from such laws for religious objectors.

The perhaps perennial tension in American liberalism between the pursuit of deep diversity of religious, cultural, and value pluralism on the one hand, and the pursuit of social cohesion and assimilation on the other is a contest between two competing visions of liberal pluralism, a tension which reemerged in the context of complicity-based conscience disputes at the United States Supreme Court. Among Muslims, these competing modalities of liberalism animate, at least in part, their support for litigants on both sides of cases that threaten to set orthodox Islamic doctrine against a prevailing equal protection paradigm regarding sex, gender, and marriage norms.

Far from requiring Rawls's overlapping consensus *ex ante*, the amicus curiae briefs surveyed here reveal that Muslims are active participants as Americans in an ongoing

[108] "The liberal state originated in a search for *modus vivendi*. Contemporary liberal regimes are late flowerings of a project of toleration that began in Europe in the sixteenth century. The task we inherit is refashioning liberal toleration so that it can guide the pursuit of *modus vivendi* in a more plural world." Gray, *supra* note 22, at 1–2.

[109] Francis Fukuyama commented relatively recently that liberalism began as a pragmatic tool, an effort to "lower the temperature of politics" following the mass casualties of the European Religious Wars. Francis Fukuyama, *Liberalism and its Discontents*, American Purpose (October 5, 2020), https://www.americanpurpose.com/articles/liberalism-and-its-discontent/.

https://doi.org/10.1017/jlr.2023.12 Published online by Cambridge University Press

negotiation over what liberal values include, how they should be interpreted and prioritized, and how such values should apply to the adjudication of contemporary disputes. Given the emergence in recent legal debates of Muslims whose arguments focus on traditional Islamic doctrine as the main feature of what it means to be Muslim, the *modus vivendi* approach to the complicity-based conscience issue is likely to be adopted and developed by such groups as an appropriate framework for advocacy within a commitment to American liberalism, as distinguished from the current predominance of a progressive, minority identity group framework among Muslim advocacy organizations.

Acknowledgments. The authors thank Silas Allard, the *Journal of Law and Religion*'s editorial team, and the anonymous reviewers for their insightful comments on earlier drafts of this article. Samuel E. Miller would like to thank Rick Shweder and Jeremy Singer for their invaluable feedback during the development of the argument, and he is ever grateful for his wife Izem Yener's unwavering support.

Cite this article: Bajwa, Kamran S, and Miller Samuel E. 2023. "Liberalism versus Liberalism: An Analysis of Muslim-American Amicus Curiae Arguments Concerning Complicity-Based Conscience Claims." *Journal of Law and Religion* 38: 224–248. https://doi.org/10.1017/jlr.2023.12