

## SCOTUS 2022-2023: Religious Liberty Cases to Watch

### PETITION FOR CERT GRANTED

#### **303 Creative v. Elenis (No. 21-476)**

Lorie Smith is the owner and operator of a web design studio in Colorado, 303 Creative, that among other things designs and creates wedding websites. Colorado's Anti-Discrimination Act would force Smith to violate her religious beliefs by forcing her to design and publish websites celebrating same-sex weddings. Smith sued, arguing that the Act violates her rights to freedom of speech and the free exercise of religion. In July 2021, the Tenth Circuit rejected Smith's arguments. On February 22, 2022, the Supreme Court agreed to hear the appeal, but limited the issues to Smith's free speech claim only. Alliance Defending Freedom is representing Smith. Becket filed an amicus brief arguing that because the freedom of speech originated as freedom of religious speech, religiously motivated speech like Smith's is "core speech" entitled to the highest level of protection under the Free Speech Clause of the First Amendment.

**Status:** Briefing has been completed and oral argument is likely to be scheduled for November or December.

### PETITIONS SEEKING SUPREME COURT REVIEW

#### **Apache Stronghold v. United States**

Since before recorded history, Western Apache and other native tribes have gone to their sacred site at Oak Flat (known in Apache as Chi'chil Bildagoteel) in Arizona to worship, pray, and perform essential religious ceremonies. For decades, Oak Flat has been protected by the federal government from mining and other practices that would destroy the Apache land. But in 2014, the United States government decided to give the land away to Resolution Copper, a foreign-owned mining company with a history of cultural and environmental degradation. Resolution Copper has announced its plan to blow a 2-mile wide, 1,100-foot crater into the land, ending native religious practices forever. Apache Stronghold—a coalition of Apaches, other native tribes, and non-Native allies—sued the federal government in federal district court in Arizona, where the trial court denied the request to protect the sacred site. With the help of Becket, Apache Stronghold filed an emergency appeal to the Ninth Circuit Court of Appeals. In June 2022, the Ninth Circuit denied the Apache's request to save Oak Flat in a 2-1 decision. In August 2022, the Ninth Circuit ordered briefing on whether the appeal should be taken en banc.

**Status:** Should the en banc proceedings conclude without relief for Apache Stronghold, Becket plans to file a petition for writ of certiorari at the Supreme Court.

#### **Slockish v. U.S. Federal Highway Administration**

The Klickitat and Cascade Tribes of Yakama Nation have considered parts of the land around Mount Hood, Oregon, to be sacred sites for centuries. But in 2006, the U.S. Federal Highway Administration announced a plan to bulldoze one of these sites to expand U.S Highway 26, rendering it unusable for the tribes' rituals and destroying ancestral burial grounds. Tribal chiefs immediately alerted government officials about the threats posed to the natives' way of life, but in 2008 the government refused to halt the project and destroyed the ancestral burial grounds. Ever since, chiefs from the Klickitat and Cascade Tribes have been pursuing remedies for the demolition under RFRA, as well as assurances that they will be consulted if the government plans to build on the land again. After the district court denied relief in early 2021, the Ninth Circuit Court of Appeals followed suit, ruling that the government will not be held responsible for the destruction of sacred sites.

**Status:** Becket plans to file a petition for writ of certiorari to the Supreme Court in October 2022.



### ***Smith v. Ward (No. 21-1405)***

Lester Smith has been fighting for over a decade for his right to grow a religious beard in prison. As a devout Muslim, Smith believes that an untrimmed beard is required by his faith, so he filed a request for a religious accommodation to the Georgia Department of Corrections (GDOC). Even though 39 prison systems across America allow inmates to have untrimmed beards, the GDOC refused Smith's request over security concerns. In 2012, Smith filed a lawsuit to protect his religious exercise under the Religious Land Use and Institutionalized Persons Act (RLUIPA). His lawsuit was denied by both the District Court in Georgia and the Eleventh Circuit Court of Appeals. On April 28, 2022, Becket and the University of Virginia Appellate Litigation Clinic filed a petition to the Supreme Court for writ of certiorari, asking the Court to protect Smith's religious exercise under the precedent set by *Holt v. Hobbs* and *Ramirez v. Collier*.

**Status:** The petition is fully briefed and is scheduled to be considered at the Court's conference on September 28, 2022.

### ***YU Pride Alliance v. Yeshiva University (No. 22A184)***

Yeshiva University is the nation's flagship Jewish university that has educated students in the values of the Torah for over 130 years. Undergraduates spend up to five hours a day in religious studies, and all students are asked to uphold the values of the Torah, including the Jewish dietary laws. In 2020, a group of students asked Yeshiva to put its official stamp of approval on a "Pride Alliance" LGBTQ student club on campus. After consultation with senior rabbis, administrators, and students, Yeshiva decided that it could not sponsor the club because it would be inconsistent with the University's Torah values and the religious atmosphere it seeks to maintain on campus. In response, the students sued the school, and the New York trial court ruled that Yeshiva was not sufficiently religious to fall within the New York City Human Rights Law's exemption for religious universities. On behalf of Yeshiva, Becket filed a request for relief at the New York Appellate Division and the New York Court of Appeals, but both requests were denied. Becket then filed a motion for emergency relief in the United States Supreme Court. The Court denied a stay, but directed Yeshiva to again ask the New York courts for protection and to "come back" if relief were again denied. Four justices dissented, arguing that the Supreme Court should have directly granted relief.

**Status:** In early September, Becket followed the U.S. Supreme Court's instruction to exhaust the two legal remedies left in New York before returning to the high court. Becket also filed a motion for reconsideration.

### ***Zhang Jingrong v. Chinese Anti-Cult World Alliance (Nos. 21-1429 and 21-1556)***

Zhang Jingrong is an adherent of Falun Gong, a Chinese religion related to Buddhism. In China, the Falun Gong were labeled a "cult" by the Chinese government and have been subjected to severe persecution, including brutal imprisonment, torture, and organ harvesting. To spread their religious message and engage in public outdoor worship, Falun Gong members including Zhang set up an outdoor place of worship on a sidewalk in Queens, New York. But over the past decade, these Falun Gong practitioners have been threatened by agents of the Chinese government and even assaulted at their outdoor religious gatherings. In response, the Falun Gong members filed a lawsuit arguing that the harassment and abuse violated the FACE Act, which protects places of worship from interference. The plaintiffs lost their lawsuit in district court and then their appeal to the Second Circuit. Represented by the Stanford Law School Religious Liberty Clinic and Stanford law professors Michael McConnell and Jim Sonne, the Falun Gong plaintiffs are now seeking certiorari. The defendants have filed a cross-petition. Becket filed an amicus brief in support of certiorari, describing the long historical practice of outdoor religious worship.

**Status:** The petition and cross-petition are fully briefed and scheduled to be considered at the Court's conference on September 28, 2022.



### **Groff v. United States Postal Service (No. 22-174)**

Gerald Groff began working as a U.S. Postal Service carrier in Lancaster County, Pennsylvania in 2012. Groff's religious beliefs require that he keep the Sunday Sabbath holy. So, when his post office started to deliver packages for Amazon on Sundays, Groff asked to take on extra shifts during the week to avoid Sunday work and accommodate his religious beliefs. Initially, the postmaster granted this accommodation, allowing him to keep his job without violating his beliefs. But in 2016, the USPS changed its tune, implementing a policy that would have forced Groff to work on the Sabbath. Groff refused and received progressive discipline until 2019, when he faced termination and ultimately resigned. After the district court sided with the Postal Service, attorneys at First Liberty Institute appealed the decision to the Third Circuit Court of Appeals, which also sided with USPS, applying a 1970s Supreme Court precedent known as *TWA v. Hardison*, which significantly cut back on the protections religious employees have under federal law. One judge on the Third Circuit dissented, calling *Hardison* into question and arguing that the panel's decision was wrong.

**Status:** On August 23, 2022, Groff's attorneys filed a petition for writ of certiorari at the Supreme Court asking the Court to protect his religious beliefs and overturn *Hardison*. The Court will likely decide sometime during the winter or spring whether to take on the case.

### **Rojas v. City of Ocala (No. 22-278)**

After a spate of shootings in 2014, the police department in Ocala, Florida, reached out to its local community for assistance in bringing the perpetrators to justice. NAACP leaders suggested outreach to the local faith-based community for help in persuading witnesses to come forward. At a meeting between local faith leaders and the police department, a minister and local activist proposed a prayer vigil and asked the police chief to encourage residents to attend on the department's Facebook page, which he did. Two atheists—only one of whom resided in Ocala—learned about the vigil and attended in order to witness any alleged Establishment Clause violations. Following the vigil, plaintiffs sued the city, arguing that the action violated the Establishment Clause by endorsing and promoting religion. A magistrate judge recommended that official capacity claims against city officials be dismissed and noted that although plaintiffs must identify a specific injury caused by the vigil, Eleventh Circuit precedent permitted “offended observer” standing. The district court then ruled in favor of plaintiffs’ Establishment Clause complaints against the individual officials and held that they had standing because they saw the Facebook post and attended the event. On appeal, the Eleventh Circuit Court of Appeals held that plaintiffs had standing under existing precedent but vacated and remanded on the substance of plaintiffs’ Establishment Clause claims given new guidance from the Supreme Court in *Kennedy v. Bremerton School District*.

**Status:** On September 22, 2022, the city of Ocala filed a petition for writ of certiorari asking the Court to review so-called “offended observer” standing for Establishment Clause cases. The petition noted that the Supreme Court has never endorsed “offended observer” standing in Establishment Clause cases and that existing Supreme Court precedent precludes standing in such cases. The Court will consider whether to take up the case later this Term.