

FIRST AMENDMENT DEFENSES TO ALIEN TRANSPORTATION CRIMES

Charquia Wright*

ABSTRACT

Florida law now prohibits the transportation of undocumented aliens into the state. Briefings characterize these laws as unconstitutionally preempting federal immigration law and federal due process rights. Despite this emphasis on due process, field, and conflict preemption unconstitutionality, few have addressed the First Amendment implications of human smuggling prosecutions of natural and some corporate persons. The Supreme Court’s Free Exercise precedent protects the religious freedoms of natural persons and some corporations. Under state alien transportation laws, these freedoms cease to exist. Because the Supreme Court has extended these religious protections to some corporations, they too are entitled to First Amendment protection from transportation crimes when religious principles motivated such crimes.

INTRODUCTION

The alien who resides with you shall be to you as the citizen among you; you shall love the alien as yourself, for you were aliens in the land of Egypt: I am the Lord your God.

—Leviticus 19:34[†]

‘Cursed is anyone who withholds justice from the foreigner, the fatherless or the widow.’

—Deuteronomy 27:19^{††}

Effective July 1, 2023, Florida Statute SB 1718—now Chapter 2023-40—prohibits individuals from transporting into Florida “an individual whom the person knows, or reasonably should know, has entered the United States in violation of law

* Assistant Professor of Law, Florida State University College of Law. Many thanks to Andy Koppelman, Michelle Rodriguez, Venessa G. Wright, Curtis H. Wright Jr., and Michael L. Fegins Jr. Thanks also to the American Association of Law Schools.

[†] *Leviticus* 19:34 (NRSV).

^{††} *Deuteronomy* 27:19 (NIV).

and has not been inspected by the Federal Government since his or her unlawful entry from another country”¹

The speech-chilling effects of this law are myriad. Take, for example, the 60th Anniversary of the March on Washington. In August 2023, churches nationwide (including Florida churches) chartered buses to drive their parishioners to Washington, D.C., for this anniversary. These buses transported families, including minors and college students, some of whom may also have been minors. Many Florida church leaders required that interested community members sign their names and pay a small fee to go on the trip. In accordance with biblical mandates, these churches did not require any documentation that would have differentiated non-citizens from citizens.

In the future, Florida churches will be chilled from chartering buses for out-of-state First Amendment activity, including marches. SB 1718 could foreseeably require bus companies to elicit proof of citizenship from all travelers, thereby requiring churches to differentiate between undocumented community members and documented community members in violation of Mosaic Law—though it is not at all clear what will be required of the private sector, because of the law’s vagueness.² Violators face up to fifteen years imprisonment and \$10,000 in criminal fines per “separate offense for each individual he or she transports.”³ Even though churches may be exempt from the prohibitions contained in SB 1718, the speech-chilling effects of the law are so pervasive that they trickle down from the private companies that the churches patronize to the churches themselves.

Most concerning, the law applies to individuals with undocumented family members.⁴ In the seventh chapter in the Gospel of Mark, Jesus accosted the Pharisees for encouraging people to dishonor their parents under the guise of godly piety:

You get rid of God’s command so you won’t be inconvenienced in following the religious fashions! Moses said, “Respect your father and mother,” and, “Anyone denouncing father or mother should be killed.” But you weasel out of that by saying that it’s perfectly acceptable to say to father or mother, “Gift! What I owed you I’ve given as a gift to God,” thus relieving yourselves of obligation to father or mother. You scratch out God’s Word and scrawl a whim in its place. You do a lot of things like this.⁵

¹ 2023 Fla. Laws 2023-40, 11.

² See *id.* at 2; *Leviticus* 19:34 (NRSV); *Deuteronomy* 27:19 (NIV).

³ 2023 Fla. Laws 2023-40, 11; see FLA. STAT. § 775.084 (2023); FLA. STAT. § 775.083 (2023).

⁴ See *Federal Lawsuit Challenges Florida’s New Immigration Law*, CBS NEWS (July 17, 2023, 4:35 PM), <https://www.cbsnews.com/miami/news/federal-lawsuit-challenges-floridas-new-immigration-law/> [<https://perma.cc/M4HJ-MNGB>].

⁵ *Mark* 7:9–13 (MSG).

Florida's law is no different. Under the guise of human trafficking prevention, Florida now prohibits citizens from transporting their undocumented relatives into the state.⁶ Paul the Apostle further warns in 1 Timothy 5:8 that: “[I]f any provide not for his own, and specially for those of his own house, he hath denied the faith, and is worse than an infidel.”⁷ This denial of faith is inevitable for Christian Floridians with undocumented family, church, and community members. It will be impossible for those with sincerely held religious beliefs concerning the sanctity of the family to observe those beliefs in the state of Florida if they associate with undocumented relatives. Sincerely held religious beliefs notwithstanding, people of all creeds will face criminal penalties for transporting undocumented relatives and friends into the state.⁸

The question then becomes: To what degree can one abide by biblical commandments under Florida's new immigration regime? If one were to take literally the dictates of Levitical and Deuteronomic law and treat undocumented foreigners (biblically indistinguishable from any other foreigner) as “the citizen among you”⁹ by transporting them as you would any other citizen, federal and state prosecutions could result.¹⁰ Attempting to avoid preconditions for biblical curses under current immigration laws in Florida may end in significant criminal fines and imprisonment.¹¹

For these and other reasons, litigants in Florida have challenged these laws as impermissibly preempting federal immigration laws and as being void for vagueness.¹² Few, however, have considered the repercussions of the Court's Free Exercise jurisprudence on the validity of Florida's new immigration laws. Most recently, in *Masterpiece Cakeshop* and *303 Creative LLC*, the Court deployed both Free Exercise and Freedom of Expression arguments in favor of plaintiffs challenging same-sex marriage public accommodation laws.¹³ *Masterpiece Cakeshop* and *303 Creative LLC*, for the first time, extended First Amendment protections to certain public accommodation law violations.¹⁴

Some have criticized *303 Creative LLC* for how broadly it applies. Andy Koppelman argues that the decision is “best understood as one of a series of decisions

⁶ See *Federal Lawsuit Challenges Florida's New Immigration Law*, *supra* note 4.

⁷ 1 Timothy 5:8 (KJV).

⁸ See 2023 Fla. Laws 2023-40, 11.

⁹ Leviticus 19:34 (NRSV).

¹⁰ See 2023 Fla. Laws 2023-40, 11.

¹¹ Florida statute SB 1718 criminalizes transporting undocumented immigrants into Florida. See *id.* Texas criminalizes alien smuggling. See TEX. PENAL CODE § 20.05. Federal immigration transportation law criminalizes transporting undocumented immigrants for the purpose of furthering their crime. See 8 U.S.C. § 1324.

¹² See *Federal Lawsuit Challenges Florida's New Immigration Law*, *supra* note 4.

¹³ See *303 Creative LLC v. Elenis*, 600 U.S. 570, 580–81, 603 (2023); *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 584 U.S. 617, 621, 638 (2018).

¹⁴ See Andrew Koppelman, *Why Gorsuch's Opinion in '303 Creative' Is So Dangerous*, THE AM. PROSPECT (July 12, 2023), <https://prospect.org/justice/2023-07-12-gorsuch-opinion-303-creative-dangerous/> [<https://perma.cc/55PY-LVMW>].

laying down massively overbroad rules with anarchical implications that cannot possibly be followed consistently.”¹⁵ Ironically, these rules are so massively overbroad that they make room for not only the anarchical, but also the sound and the just. One of these myriad implications is that *303 Creative LLC* prohibits the states from passing immigration legislation that compels any speech or compromises the sincerely held beliefs of natural and some corporate persons.

I. CORPORATE FREE EXERCISE JURISPRUDENCE

A. Masterpiece Cakeshop

In *Masterpiece Cakeshop*, the Court describes Jack Phillips’s Christian devotion, explaining that his “‘main goal in life is to be obedient to’ Jesus Christ and Christ’s ‘teachings in all aspects of his life.’”¹⁶ Phillips equated providing a cake for a gay wedding to participating in a ceremony that rejects his own belief system.¹⁷

Should another business owner with similarly forceful convictions argue that his faith justifies disobeying Florida’s immigrant transportation prohibition, the Court’s precedent supports finding in his favor. Denying transportation services to folks lacking proof of citizenship may clearly run afoul of biblical precepts mandating equal treatment of non-citizens.

B. 303 Creative LLC

The Supreme Court’s decision in *303 Creative LLC* significantly broadened the reach of the Court’s ruling in *Masterpiece Cakeshop*.¹⁸ Like the plaintiff in *Masterpiece Cakeshop*, the plaintiff in *303 Creative LLC* objected to the same public accommodation laws, but in addition to basing their ruling on the plaintiff’s sincerely held religious beliefs, the Court held that Colorado’s public accommodation laws compelled the plaintiff to create speech.¹⁹

In *303 Creative LLC*, the Supreme Court prohibited compelling an individual to create speech.²⁰ Justice Gorsuch explained:

If [Ms. Smith] wishes to speak, she must either speak as the State demands or face sanctions for expressing her own beliefs, sanctions that may include compulsory participation in “remedial . . . training,” filing periodic compliance reports as officials deem

¹⁵ *Id.*

¹⁶ *Masterpiece Cakeshop*, 584 U.S. at 626.

¹⁷ *See id.*

¹⁸ *See* Koppelman, *supra* note 14.

¹⁹ *See* *303 Creative LLC v. Elenis*, 600 U.S. 570, 580–81, 603 (2023).

²⁰ *See id.* at 580, 602–03.

necessary, and paying monetary fines. Under our precedents, that “is enough,” more than enough, to represent an impermissible abridgment of the First Amendment’s right to speak freely.²¹

Here too, with SB 1718, Florida puts individuals in a similar catch-22, essentially demanding that its citizens order their associations in violation of their sincerely held religious beliefs or face criminal sanctions.²²

II. FREE EXERCISE DEFENSES TO ALIEN TRANSPORTATION CRIMES

Florida’s criminal human smuggling law is repugnant to the United States Constitution. Namely, these laws violate the Free Exercise Clause of the First Amendment under the Court’s pure speech jurisprudence and expressive conduct jurisprudence.

A. Pure Speech

Florida’s human smuggling law compels “pure speech” under the Supreme Court’s Free Exercise jurisprudence. *303 Creative LLC* created the “pure speech” category, but did little to define it.²³ Just as “Colorado s[ought] to compel this speech in order to ‘excis[e] certain ideas or viewpoints from the public dialogue,’” Florida too is attempting to “excise certain ideas or viewpoints from the public dialogue,” namely that it is acceptable to associate with undocumented immigrants.²⁴ Florida’s human smuggling law impedes the Free Exercise of religion by potentially compelling religious speech diametrically opposed to the sincerely held religious beliefs of many subject to it. It is unclear whether individuals or organizations are under a duty to ask about another individual’s immigration status before transporting them into the state.

B. Not Pure Speech/Expressive Conduct

Even if the Court does not consider SB 1718 to compel pure speech, the Court may still conclude that “[t]he decision to exclude”²⁵ is “an expressive association,”²⁶ similar to that in *Boy Scouts of America v. Dale* and *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, and that the state may not compel individuals to make exclusionary expressive associations.²⁷ As the Court reiterated in *303*

²¹ *Id.* at 589.

²² *See* 2023 Fla. Laws 2023-40, 11.

²³ *See 303 Creative LLC*, 600 U.S. at 587.

²⁴ *Id.* at 588.

²⁵ *Id.* at 586.

²⁶ *Id.* (quoting *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 656 (2000)).

²⁷ *See id.* at 585–86.

Creative LLC, “the government may not compel a person to speak its own preferred messages.”²⁸ The state of Florida currently compels exclusionary expressive associations by forbidding individuals from transporting the undocumented across state lines.

III. IMPORTANCE OF FIRST AMENDMENT CLAIMS IN ALIEN SMUGGLING CHALLENGES

Requiring that individuals who know or should know that others are undocumented deny transportation to those persons raises a plethora of constitutional questions. The most recent lawsuit against Florida omitted any First Amendment challenges;²⁹ instead, it focused on field preemption, conflict preemption, and due process challenges.³⁰ Many believe field preemption challenges are becoming disfavored.³¹ Conflict preemption challenges may similarly fail if the Court finds that the law does not conflict with federal immigration enforcement.³² Due process challenges are also not guaranteed success.³³ A First Amendment challenge may help shore up preemption and due process challenges, given the Court’s propensity to rule favorably on such claims.

IV. UNINTENDED CONSEQUENCES OF SUBVERSIVELY LEGITIMIZING *303 CREATIVE LLC*

There may be a concern that subversively legitimizing³⁴ *303 Creative LLC* in this way would make it harder to overturn. Realistically, however, these cases are

²⁸ *Id.* at 586.

²⁹ See generally Complaint, Farmworker Ass’n of Fla., Inc. v. DeSantis, No. 1:23-cv-22655-RKA (S.D. Fla. July 17, 2023).

³⁰ See *id.* at 28, 30.

³¹ See, e.g., Steven Ferrey, *The Supreme Court’s Constitutional “Bright Line”: Preempting Authority of 47 of 50 States*, 10 NE. U. L. REV. 143, 198–203 (2018); Matthew R. Christiansen & Joshua C. Macey, *Long Live the Federal Power Act’s Bright Line*, 134 HARV. L. REV. 1360, 1398–99 (2021).

³² See Memorandum of Petitioner at 6–7, Farmworker Ass’n of Fla., Inc. v. DeSantis, No. 1:23-cv-22655-RKA (S.D. Fla. July 17, 2023).

³³ See *id.* at 13, 16.

³⁴ Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, in CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT 103, 111 (Kimberlé Crenshaw et al. eds., 1995) (“[P]opular struggles are a reflection of institutionally determined logic and a challenge to that logic. People can demand change only in ways that reflect the logic of the institutions they are challenging. Demands for change that do not reflect the institutional logic—that is, demands that do not engage and subsequently reinforce the dominant ideology—will probably be ineffective. The possibility for ideological change is created through the very process of legitimation, which is triggered by crisis.”).

not likely to be overturned by the Supreme Court or by constitutional amendment and they should be applied evenhandedly across the political spectrum.

CONCLUSION

Currently, under federal law, it is a crime to transport an undocumented immigrant within the United States for the purpose of furthering a crime. Recently, Florida criminalized transporting an undocumented immigrant into the state. Many of the briefs on the issue emphasize the federal preemption and due process complications of these new state laws. None of these briefs, so far, have addressed potential First Amendment defenses to transportation crimes. Namely, individuals and closely held transportation companies, which are entitled to certain religious liberties, may not be able to carry out their biblical duties to immigrants (called foreigners and aliens in the Bible) because of these laws. This Essay highlights potential religious liberty arguments to state alien transportation crimes by subversively legitimizing *303 Creative LLC*.

If the Supreme Court allows conservatives to use the Bible to justify denying public accommodations, they should be similarly amenable to allowing non-conservatives to justify providing public accommodations, like transportation, to legally disfavored groups such as undocumented immigrants. At bottom, Florida's new human smuggling prohibitions are a constitutionally deficient attempt to force the undocumented to live in the shadows by preventing them from traveling with citizens. This sort of limit on associations violates the First Amendment and should be struck down expeditiously.