

Episode: **Author Interview: *Should Employment Decision v. Smith Be Overturned?***

Guest: Jake Greenblum, PhD

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Transcript by: Cheryl Green

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TIM HOFF: Welcome to another episode of the Author Interview Series from the *American Medical Association Journal of Ethics*. I'm your host, Tim Hoff. This series provides an alternative format for accessing the interesting and important work being done by Journal contributors each month. Joining me on this episode is Dr Jake Greenblum, an Assistant Professor of Bioethics at The University of Texas Rio Grande Valley School of Medicine. He's with me to discuss his article, co-authored with Dr Ryan Hubbard, *Should Employment Decision v. Smith Be Overturned?* in the November 2021 issue of the Journal, *Health Care and Homelessness*. Dr Greenblum, thank you so much for joining me on the show. [music fades out]

DR JAKE GREENBLUM: Thank you, Tim.

HOFF: To begin with, what is the main ethics point of your article?

GREENBLUM: So, in two recent cases, *Fulton v. City of Philadelphia*, a case where a Catholic foster care agency objected to Philadelphia's requirement not to discriminate against LGBTQ families, and *Ricks v. Idaho Contractors Board*, a case where a contractor refused to comply with the law requiring the contractors to register with the state via their Social Security numbers because he, that is to say, Mr Ricks, believed this number was a "form of the mark," referring to Satan. So, in those two cases, the Supreme Court had the opportunity to overturn *Employment Division v. Smith*, a 1990 ruling that limits religious exemptions from laws that are neutral and generally applicable. As Justice Scalia stated in the majority's opinion in *Smith*, a system that limits exemptions is, "preferable to a system in which each conscience is a law unto itself." And the key ethics point, as Ryan Hubbard, my co-author, and I argued in our paper, is that overturning *Smith* would likely result in increased erosion to the rule of law and harm to and discrimination against patients. As it turns out, the court declined to overturn *Smith*.

HOFF: Great. Thank you. And what do you see as the most important thing for health professions students and trainees to take from your article?

GREENBLUM: The most important thing for students and trainees to take from our article is that had the Supreme Court overturned *Smith*, it could've given health professionals greater opportunity to exempt themselves from services they personally object to. And this would first be in conflict with the rule of law: the idea that persons in positions of power should behave according to public norms and that everyone is subject to the law. Overturning *Smith* would be in conflict with the rule of law by granting physicians greater power to ignore the medical profession's obligation to treat all patients in a manner that is legal and medically indicated. It would have, in essence, permitted physicians to be a law unto themselves by enabling physicians to arbitrarily deny not only legal and medically indicated services to patients, but services that stem from people's fundamental rights to reproductive autonomy like abortion and contraception.

Second, overturning Smith would likely have resulted in more harm to and discrimination against patients by denying them access to needed medical care. Here, the worry is that physicians will have greater power to deny medical care on the basis of morally irrelevant features like race, gender, and sexual orientation.

HOFF: Great. Thanks. And if you could add a point to your article that you didn't get the chance to fully explore, what would that be?

GREENBLUM: So, we would add that although the court declined to overturn Smith, their decision in *Fulton v. City of Philadelphia* relied on an earlier decision, *Lukumi v. Hialeah*, to decide in favor of the religious plaintiffs in that case, in the *Fulton* case. And as Linda Greenhouse of *The New York Times* points out, in relying on the earlier *Lukumi* decision, the court has essentially made it very easy to avoid Smith's limits on religious exemptions. So, unfortunately, we believe that we are likely to see greater erosion to the rule of law and more harm to patients, even though the court declined to overturn it. [bright theme music returns]

HOFF: Dr Greenblum, thank you so much for joining me on the show.

GREENBLUM: Thank you so much. It's been my pleasure.

HOFF: To read the full article and the rest of the November 2021 issue for free, visit our site, [JournalofEthics.org](https://www.journalofethics.org). We'll be back soon with more *Ethics Talk* from the *American Medical Association Journal of Ethics*.