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**Academic Highlight: The Need for Transparency in State
Attorneys General Amicus Briefs**

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Academic highlight: The need for transparency in state attorneys general amicus briefs

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Today, the Supreme Court will, for the ninth time, consider whether to grant certiorari in *Klein v. Oregon Bureau of Labor and Industries*. Similar to *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, *Klein* concerns enforcement against a bakery that refused to provide a wedding cake to a same-sex couple of a state law prohibiting discrimination in public accommodations.

An important consideration for the Supreme Court is the potential impact that a ruling against Oregon could have on states' abilities to enforce their own civil rights laws. Forty-five states have laws prohibiting discrimination in public accommodations. Many local jurisdictions also have anti-discrimination laws. These laws generally define "public accommodation" more broadly than federal law, and they often cover protected categories not specified in federal law.

Nevertheless, state attorneys general (SAGs) from nine states with anti-discrimination laws have joined an amicus brief — filed on their states' behalf — that effectively supports the bakery's right to discriminate. The brief fails to mention that the nine states have their own public-accommodation laws. It does not acknowledge that arguments made in the brief could undermine enforcement of those laws, laws the SAGs are otherwise generally responsible to defend. In *Masterpiece Cakeshop*, 18 Republican SAGs and two Republican governors filed a similar brief, while 20 Democratic SAGs filed an amicus brief supporting the Colorado Civil Rights Commission. Increasing partisanship in SAG amicus briefs deserves new focus in light of another, more troubling phenomenon: SAGs taking positions in amicus briefs that may contradict their own states' laws, without saying so.

I call this phenomenon "hidden nondefense," and I discuss it in more detail in my recent *Fordham Law Review* article. "Nondefense" occurs when a SAG declines to defend, or attacks, a law in the SAG's state on the ground that it is unconstitutional. "Hidden" nondefense occurs when the SAG takes a position in an amicus brief before the Supreme Court that may undermine a law in the SAG's own state, without affirmatively disclosing this information to the court or the public. For the article I reviewed cases from the 2017-18 Supreme Court term that involved challenges to state laws or practices, in which partisan groups of SAGs filed amicus briefs on both sides of the case. In addition to *Masterpiece Cakeshop*, the cases included *Gill v. Whitford*, *Husted v. A. Philip Randolph Institute*, *Janus v. AFSCME* and *National Institute of Family & Life Advocates v. Becerra (NIFLA)*. The table below shows the number of SAGs from each party who participated in amicus briefs filed on each side of the case, as well as the number of participating states with related laws specifically cited and discussed in the briefs.

2017 Term Partisan Multistate SAG Amicus Briefs Filed on Opposite Sides in Supreme Court Challenges to State Law or Practice and Disclosure of Related State or Local Laws

Case	SAG Amicus Brief Supporting Challenged State				SAG Amicus Brief Opposing Challenged State			
	SAG Party Affiliation			Related Laws Discussed	SAG Party Affiliation			Related Laws Discussed
	Dem.	Rep.	Ind.		Dem.	Rep.	Ind.	
<i>Gill</i>	0	16	0	0	17	0	1	13
<i>Masterpiece Cakeshop</i>	0	17	0	0	13	0	0	11
<i>Janus</i>	20	0	1	21	0	20	0	1
<i>Masterpiece Cakeshop</i>	20	0	0	19	0	20*	0	1
<i>NIFLA</i>	17	0	0	9	0	22*	0	21

*Number includes two Republican governors in states with Democratic SAGs.

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As indicated in the chart, there was a complete partisan divide in amicus participation in these cases. Furthermore, only one of the briefs discussed laws specific to the states of all participating SAGs.

The SAG amicus brief opposing Oregon in *Klein* does not mention that nine of the 11 participating states — Arizona, Arkansas, Louisiana, Nebraska, Nevada, Oklahoma, South Carolina, Utah and West Virginia — have laws that define public accommodation more broadly than federal law, to include businesses that provide goods or services to the general public. In fact, Nevada specifically prohibits discrimination in “baker[ies].” The brief argues in part that “public-accommodation concerns of past eras are not present here; customized pieces of art are not public accommodations (like restaurants and hotels).” It suggests that states could “define ‘public accommodations’ like the federal government,” to encompass only “establishments such as hotels, restaurants, and stadiums.” The only SAGs whose state laws are not potentially at issue are those from Texas (the lead participant) and Alabama, because neither state has its own public-accommodation laws. However, certain municipalities within those two states do have laws prohibiting discrimination, so the problem remains.

Hidden nondefense raises serious questions of accountability and separation of powers. By appearing in front of the Supreme Court and attacking another state’s law, a SAG may seek and achieve results that could not be obtained politically within their own state. For example, any of the legislatures in the states joining the *Klein* brief could, in theory, adopt the brief’s proposal to narrow the scope of their public-accommodation laws. They have not done so. Similarly, in the *Janus v. AFSCME* litigation last term, which concerned whether public employees who did not belong to unions could be required to pay union “agency fees,” the Michigan and Wisconsin SAGs successfully argued to invalidate a law similar to laws in their own states, without informing the court of the connection. Of course, SAGs sometimes do publicly decline to defend laws; one example is pre-*Obergefell v. Hodges* prohibitions on same-sex marriage. But the problem with “hidden nondefense” is that it is hidden. In this time of increasingly partisan SAG coalitions, transparency and accountability are especially critical to ensuring that SAGs truly represent the interests of their states.

There is a simple solution to the problem of hidden nondefense. Rule 37(4) of the Supreme Court’s rules currently allows SAGs to file amicus briefs “on behalf of a State” without seeking leave of the court. However, the rules do not require SAGs to identify state laws relevant to the brief’s position.

The rules could be changed to require that SAGs filing amicus briefs identify laws within their states that could be adversely impacted by the position they take in a brief. Requiring disclosure would help to ensure that the court, other government officials and the public are fully advised of the reasons for the SAGs’ participation in the litigation and the implications of the ruling. It would encourage SAGs to carefully consider how the case might affect their own states’ laws, possibly influencing the content of the brief or even the decision of whether to participate in it. And finally, it would help to ensure that nondefense is not “hidden” but rather discussed in the open, consistent with the SAGs’ role to represent the interests of the people in their states.

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