RELIGIOUS LIBERTY LAW SECTION

STATE BAR OF ARIZONA

Newsletter / JUNE 2023

FROM *the* EDITOR

Welcome to the June 2023 issue of the *Religious Liberty Law Section Newsletter*.

Thirty years ago, Congress passed, by a unanimous vote of the House of Representatives and a nearly unanimous vote of the U.S. Senate, the federal Religious Freedom Restoration Act (RFRA). The purpose of RFRA was to reverse the U.S. Supreme Court's decision in *Employment Division v. Smith*, which upheld the State of Oregon's denial of unemployment benefits from a Native American employee fired for violating a state law prohibiting the possession of peyote, which the employee had used as part of a religious ritual. The opinion established the principle that laws that have an incidental adverse impact on a citizen's ability to exercise his or her Free Exercise rights under the First Amendment would pass constitutional muster so long as the law in question was a neutral law of general applicability, was rationally related to the government's purported interest in enacting the law, and not motivated by religious animus. In response to the *Employment Division v. Smith* decision, RFRA reinstated the principle that any law – even a general law of neutral applicability – that substantially burdens a citizen's Free Exercise rights, in order to pass Constitutional muster, must survive strict scrutiny by serving a compelling state interest and being narrowly tailored to serve that interest. Although the Supreme Court – in *City of Boerne v. Flores* – subsequently invalidated RFRA as it applied to the states, RFRA still applies in cases of federal law, and many states have now passed their own state RFRAs. When President Clinton signed the federal RFRA into law on November 16, 1993, in a ceremony on the south lawn of the White House, he made insightful remarks explaining his support of the law, and the importance of the law to religious liberty and to the country. For that reason, I have chosen a selection of President Clinton's remarks on RFRA as this issue's *Great Moments in Religious Liberty History*.

Also, I want to extend a personal note of thanks to Jordan Lorence who authored this issue's Feature Article, *The Demise of the Lemon Test: Good Riddance*, in which he discusses the *Lemon* test, its history, its recent demise, and what the demise of the *Lemon* test means for the future of religious liberty law.

As always, we hope you find this issue of the *Religious Liberty Law Section Newsletter* both informative and useful.

Bradley S. Abramson
Bradley S. Abramson, Editor

QUOTE DU JOUR

"Ditat Deus" ("God Enriches").

— State motto of Arizona

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FROM *the* CHAIR

Religious Liberty (Even When You Disagree With The Religion)

In 1993, the US Supreme Court considered whether a Florida ordinance forbidding animal sacrifice was unconstitutional, because the ordinance interfered with a ritual practiced by the adherents of Santeria, an Afro-Cuban religion that practices animal sacrifice.[1] At the time, I sat on the board of a Christian organization, considering whether we should file an amicus brief in support of the Santeria church. Though our religious beliefs differed significantly from the religious beliefs of those adhering to the Santeria religion – not only on the issue of animal sacrifice but also on many basic and significant theological issues – we decided that the constitutional protection of religious exercise compelled us to file an amicus brief supporting the Santeria church. In the end, the Supreme Court struck down the animal sacrifice ordinance as a violation of the Santeria church's constitutional Free Exercise rights.

Religious Liberty is like that. Either everyone's religious (or non-religious) beliefs are protected, or none are.

But the blessings of religious liberty are not universal. Recently our family foundation was providing assistance to a church in Bangalore, India. As part of that program, we were to speak at a Christian non-profit there which was helping women and orphaned children suffering from addiction. On the morning of the presentation, however, we learned that the Indian authorities had stopped the founder of the ministry at the airport, and had ordered him and his family to leave India and take the next flight back to the United States – despite the fact that this gentleman had lived in India for some 10 years. This action was taken because certain Hindus in India are attempting to stamp out Muslims, Christians, and other non-Hindu faiths in India, and the Indian government is assisting in that effort.

That is why religious liberty – and our Section's mission – is so important. Our Section's work is to keep these issues before the bar and the public, so that religious liberty is protected for all.

So, "thank you" to all our members for helping in this important mission.

Wallace L. Larson

Wallace L. Larson, Chair

1. *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 US 520 (1993)

GREAT MOMENTS *in* RELIGIOUS LIBERTY HISTORY

Selected Remarks of President William Jefferson Clinton on Signing the Religious Freedom Restoration Act of 1993

We all have a shared desire here to protect perhaps the most precious of all American liberties, religious freedom… Today this event assumes a more majestic quality because of our ability together to affirm the historic role that people of faith have played in the history of this country and the constitutional protections those who profess and express their faith have always demanded and cherished…

[T]his act reverses the Supreme Court's decision *Employment Division against Smith* and reestablishes a standard that better protects all Americans of all faiths in the exercise of their religion in a way that I am convinced is far more consistent with the intent of the Founders of this Nation than the Supreme Court decision.

More than 50 cases have been decided against individuals making religious claims against Government action since that decision was handed down. This act will help to reverse that trend by honoring the principle that our laws and institutions should not impede or hinder but rather should protect and preserve fundamental religious liberties.

The free exercise of religion has been called the first freedom, that which originally sparked the development of the full range of the Bill of Rights. Our Founders cared a lot about religion. And one of the reasons they worked so hard to get the first amendment into the Bill of Rights at the head of the class is that they well understood what could happen to this country, how both religion and Government could be perverted if there were not some space created and some protection provided. They knew that religion helps to give our people the character without which a democracy cannot survive. They knew that there needed to be a space of freedom between Government and people of faith that otherwise Government might usurp.

They have seen now, all of us, that religion and religious institutions have brought forth faith and discipline, community and responsibility over two centuries for ourselves and enabled us to live together in ways that I believe would not have been possible…

What this law basically says is that the Government should be held to a very high level of proof before it interferes with someone's free exercise of religion. This judgment is shared by the people of the United States as well as by the Congress. We believe strongly that we can never, we can never be too vigilant in this work…

We are a people of faith. We have been so secure in that faith that we have enshrined in our Constitution protection for people who profess no faith. And good for us for doing so. That is what the First Amendment is all about. But let us never believe that the freedom of religion imposes on any of us some responsibility to run from our convictions. Let us instead respect one another's faiths, fight to the death to preserve the right of every American to practice whatever convictions he or she has, but bring our values back to the table of American discourse to heal our troubled land.

SELECTED U.S. CASE LAW *Updates*

CASE 1 ***City of Ocala, Florida v. Rojas***
143 S.Ct. 764 (2023)

SOME JUSTICES HAVE SERIOUS DOUBTS ABOUT THE LEGITIMACY OF THE "OFFENDED OBSERVER" THEORY OF STANDING IN ESTABLISHMENT CLAUSE CASES.

On March 6, 2023 the U.S. Supreme Court denied a petition for writ of certiorari in a case in which atheists sued the City of Ocala, Florida after attending a community prayer vigil organized by the city in which local police chaplains participated, claiming that the event's religious themes violated the First Amendment's Establishment Clause because the atheists found the religious themes offensive.

Justice Gorsuch filed a statement respecting the denial of certiorari, in which he wrote that "[t]his Court has never endorsed the notion that an 'offended observer' may bring an Establishment Clause claim." He stated that the Lemon test "is no longer good law" and that "[i]n *Kennedy*,… [w]e held that claims alleging an establishment of religion must be measured against the Constitution's original and historical meaning, not the sensitivities of a hypothetical reasonable observer" … And with the demise of *Lemon*'s reasonable observer test, 'little excuse' now remains 'for the anomaly of offended observer standing.'"

And Justice Thomas dissented from the denial of certiorari, writing that "For decades members of the Judiciary have noted that offended observer standing appears to be flatly inconsistent with our opinion in *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*" … and that "[i]n that case, we held 'that the psychological consequence presumably produced by observation of religious conduct with which one disagrees' is 'not an injury sufficient to confer standing under Article III, even though the disagreement is phrased in constitutional terms'" … and that "[u]nder Article III, federal courts are authorized 'to adjudge the legal rights of litigants in actual controversies,' not hurt feelings." In conclusion, Justice Thomas wrote that the U.S. Supreme Court should not "continue to countenance the undermining of our well-reasoned *Valley Forge* precedent… " by recognizing offended observer standing in Establishment Clause cases.

CASE 2 ***Alive Church of the Nazarene, Inc. v. Prince William County, Virginia.***
59 F.4th 92 (4th Cir. 2023)

A COUNTY'S REQUIREMENT THAT A CHURCH COMPLY WITH THE COUNTY'S SPECIAL USE PERMIT REQUIREMENTS BEFORE WORSHIPING ON ITS PROPERTY LOCATED IN AN AGRICULTURALLY

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ZONED AREA DID NOT VIOLATE RLUIPA OR THE FIRST AMENDMENT.

In this opinion from the U.S. Court of Appeals for the 4th Circuit, the court determined that a church that knowingly purchased property in an agriculturally zoned area could not prevail on a claim that the county, by requiring the church to comply with its Special Use Permit process before using the property for worship purposes, violated the Religious Land Use and Institutionalized Persons Act (RLUIPA) and the First Amendment.

The pertinent facts were that Alive Church of the Nazarene (Church) purchased 17 acres of land, zoned primarily for agricultural use, on which it desired to conduct religious services. Prince William County (County) denied the Church's request to worship on the property until the Church complied with applicable zoning requirements, including its Special Use Permit (SUP) process. The Church claimed that the County's actions violated RLUIPA and the Church's Free Exercise and other constitutional rights.

The court pointed out that, in order to state an equal terms claim under RLUIPA, the Church must allege "that (1) it is a religious assembly or institution, (2) subject to a land use ordinance, and (3) [that] the land use ordinance treats the plaintiff on less than equal terms with (4) a nonreligious assembly or institution." However, the court stressed that "'[i]f a plaintiff offers no similarly situated comparator, then there can be no cognizable evidence of less than equal treatment, and the plaintiff has failed to meet its initial burden of proof.'" Under that analysis, the court found that the Church's equal terms claim failed, because the Church failed to identify a comparator that is "similarly situated with regard to the ordinance at issue."

The court rejected the Church's argument that, because the Church could not operate within the Agricultural District without a SUP, while farm wineries and limited-license breweries could, the County treated the Church worse than nonreligious assemblies. Instead, the court found that the County's different treatment of the Church was justified given that the aim of the Agricultural District was to "encourage farming and other agricultural pursuits" and that "allowing religious institutions to conduct worship services does not further the purpose of the Agricultural Zoning District" – thus the Church was not similarly situated to farm wineries and breweries, which did further agriculture.

The court then addressed the Church's RLUIPA discrimination claim. The court first pointed out that RLUIPA's discrimination provision "requires evidence of discriminatory intent to establish a claim." A plaintiff must demonstrate "that the challenged government decision was 'motivated at least in part by discriminatory intent," which can be shown by both direct and circumstantial evidence, such as "contemporary statements by decisionmakers indicating bias, derisive comments made to lawmakers by members of the community, the historical background of the decision, and any deviations from the standard decisionmaking process implying a decisionmaker's discriminatory intent." But the court found no such evidence of religious animus present in this case.

Turning its attention to the Church's substantial burden RLUIPA claim, the court noted that "[t]o determine whether an impermissible burden has been imposed, we ask (1) whether the impediment to the organization's religious practice is 'substantial,' and (2) whether the government is responsible for the impediment."

As to the first prong of the test, the court pointed out that "an impediment is substantial if 'the property would serve an unmet religious need, the restriction on religious use is absolute rather than conditional, and the organization must acquire a different property as a result.'" However, under the second prong of the test, "even if a religious institution can establish that it faces an absolute impediment to religious practice, its claim will fail if the burden was 'self-imposed.'" So, for example, the court said, "if a religious institution acquires land knowing that it is subject to certain restrictions, any burden resulting from those restrictions has not been imposed by the government; but rather, the burden is self-imposed."

Under that analysis, the court found that "the Church's complained-of burden is self-imposed … because [at the time the Church purchased the property] the Church did not have a reasonable expectation of religious land use without complying with [the County's] SUP [process] or the statutory requirements to become a farm winery or limited-license brewery."

The court also found that the Church's substantial burden claim failed because the impediment was not absolute. The Church could use the property for religious purposes once it complied with the SUP process.

Having disposed of the Church's RLUIPA claims, the court turned it attention to the Church's Free Exercise claim. However, the Court found that "nothing in the Church's Complaint suggests, nor does the Church articulate in anything but conclusory terms, that the object of the Ordinance is anything other than the one expressly stated therein – i.e[.], to promote farming. The SUP requirement is, therefore, neutral" toward religion. For that reason, the court found that the ordinance was subject to rational basis review, and under that standard the ordinance "does not contravene the Free Exercise Clause of the First Amendment."

The court also rejected the Church's peaceable assembly and equal protection claims.

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CASE 3 *Ciraci, et al v. J.M. Smucker Company*

62 F.4th 278 (6th Cir. 2023)

A PRIVATE EMPLOYER THAT INSTITUTED A COVID VACCINATION MANDATE IN COMPLIANCE WITH A PRESIDENTIAL EXECUTIVE ORDER AND THEN DENIED THE EMPLOYEES' RELIGIOUS ACCOMMODATION REQUESTS TO BE EXEMPT FROM THE VACCINATION MANDATE DID NOT VIOLATE THE EMPLOYEES' FREE EXERCISE RIGHTS UNDER THE FIRST AMENDMENT TO THE U.S. CONSTITUTION.

In this unanimous decision of the United States Court of Appeals for the 6th Circuit, the court rejected the claims of four employees of the J.M. Smucker Company (Company) that the Company violated the employees' First Amendment Free Exercise of religion rights when the Company denied their requests for religious accommodations so as not to have to comply with the Company's COVID-19 vaccination mandate.

In 2021, President Joseph Biden issued an Executive Order directing "all federal contractors to 'ensure that all [their] employees [were] fully vaccinated for COVID-19,' unless such employees were 'legally entitled to health or religious accommodations." Based upon that Executive Order, the J.M. Smucker Company instituted a vaccination mandate requiring its U.S. employees be vaccinated. Four of the Company's employees requested religious accommodations from having to comply with the vaccination mandate, but the Company denied them all. The four employees then sued the Company under the Free Exercise of religion clause of the First Amendment.

The court explained the issue before it as whether the Constitution's Free Exercise restrictions are applicable against private entities? It stated, that "[w]hether it is the Bill of Rights in general or the First Amendment in particular, these constraints typically protect citizens from the government, not from each other… Applying ordinary First Amendment rules beyond the government would warp traditional principles of ordered liberty – impairing individual liberty and offering little order in return."

In analyzing the plaintiffs' claim that, under these circumstances, the Company was a "state actor" for constitutional purposes, the court pointed out that "we often gauge state actor status by asking three questions: does a private company's conduct concern traditionally exclusive governmental functions, reflect entwinement, a nexus, or joint action with state officials, or involve compulsion by the government?"

As to the first question – whether in mandating vaccination or denying the employees' religious accommodation requests the Company was exercising a traditionally exclusive public function – the court stated that "[t]o qualify 'as a traditional, exclusive public function,' the government 'must have traditionally and exclusively performed the function.'" But the court pointed out that "[a] vaccine mandate does not count as 'a public function traditionally handled just by the State" because "[i]t is hardly unheard of for private companies to make vaccination a condition of employment."

As to the second question – whether 'the actions of the government and private entity [have] become so entwined as to amount to a form of collective state action?" – the court explained that "[e]ntwinement may arise when a private entity partners with, directs, or is controlled by government officials." But the court stated that "Smucker's [sic] has not partnered, conspired, or entered into a 'joint venture[]' with federal officials… It did not deny the claimants' request for an exemption using federal officials' assistance… Nor has it connected itself to joint action with the government in some other cognizable way." And the court stated that "federal contracts by themselves do not create the requisite entwinement."

And with respect to the third question – "[d]id Smucker's [sic] deny the claimants an exemption because the government 'compel[led]' it to do so, æ or offered it 'such significant encouragement … that [its] choice must in law be deemed to be that of the State? – the court answered "no." "[T]he Executive Order did not tell Smucker's [sic] to deny exemptions to anyone. It told Smucker's[sic] to grant religious exemptions to those legally entitled to them, and let Smucker's [sic] decide on its own who qualified. . . When Smucker's [sic] exercised that discretion, the government did not coerce it."

Further, the court held that the Company "did not become a state actor merely by complying with a generally applicable law," otherwise "every regulated private company would be a public entity … Not even 'extensive [government] regulation' of a private company makes it a 'state actor' by itself." "[C]onduct is not 'fairly attributable to the State,' … merely because a law or regulation induces it." "'[B]eing regulated by the State,' … or for that matter being subjected to a State's 'direct regulatory control,' did not make private corporations state actors. The contrary view, the court said, 'would significantly endanger individual liberty and private enterprise.'" Thus, the court held that "compliance with federal law, without more, does not make private firms state actors."

The court summarized its conclusion as follows: "When Smucker's [sic] denied the claimants' request for a religious exemption, did it do so as a state actor? Not in our view. Smucker's [sic] does not perform a traditional exclusive public function; it has not acted jointly with the government or entwined itself with it; and the government did not compel it to deny anyone an exemption. That Smucker's [sic] acted in compliance with a federal law and that Smucker's [sic] served as a federal contractor – the only facts alleged in the claimants' complaint – do not by themselves make the company a government actor."

In conclusion, the court determined that the employees had no First Amendment claims against Smucker because Smucker, (a) in complying with the President's Executive Order mandating vaccination, and (b) in denying the employees' request for religious accommodations from the vaccination mandate, was not acting as a state actor.

FEATURE ARTICLE

The Demise of the *Lemon* Test: Good Riddance

By Jordan Lorence

The Supreme Court last term significantly changed the legal test for the Establishment Clause by abandoning the notorious *Lemon* test, replacing it with a test rooted in the historic understanding of the Clause, dating back to the founding.

The problem with the *Lemon* test was that it was an arbitrary test, and was not based on a historical understanding of how state established churches actually operated. It also resulted in significant censorship of private religious speech because government officials believed, wrongly, that accommodating private religious expression would "look bad," like the government was endorsing religion, and for that reason private religious expression must be suppressed.

The *Lemon* test came from the U.S. Supreme Court's 1971 decision in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). In that case, the Supreme Court tried to fashion a "one size fits all" test for every case that could possibly arise under the Establishment Clause, whether it involved private religious meetings in a vacant government building, legislative prayer, government funding flowing to religious groups, passive religious displays like Ten Commandments monuments or nativity scenes, and other religious expression.

Under the *Lemon* test, government action violated the Establishment Clause if it did any one of the following three things:

- Lacked a secular purpose;
- had the primary effect of promoting or disparaging religion; or
- excessively entangled the government with religion.

In the 1980s, the Supreme Court created a gloss on the *Lemon* test that summarized the above-three prongs, by asking whether a "reasonable observer" would view the government's actions as endorsing religion. See, e.g., *Kennedy v. Bremerton School District*, slip op. at 22 (2022).

Over the years, the justices recognized problems with both the three prongs version and the "reasonable observer" version of the *Lemon* test. This caused the justices to apply the *Lemon* test in some cases, but totally ignore it in others. This led to Justice

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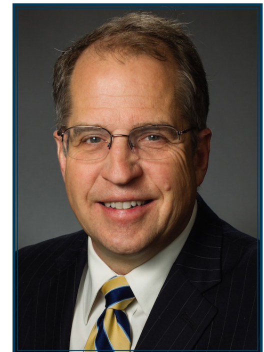

ABOUT THE AUTHOR

JORDAN LORENCE serves as Senior Counsel and Director of Strategic Engagement at Alliance Defending Freedom. His legal work over the last 40 years has encompassed a broad range of litigation, with a primary focus on religious liberty law. He argued before the U.S. Supreme Court in the precedent setting case of *Southworth v. Board of Regents of the University of Wisconsin* and was actively engaged in 24 other cases of religious liberty law before the U.S. Supreme Court. He also led the challenge to New York City's ban on private worship services in public school buildings in the long-running *Bronx Household of Faith v. Board of Education of the City of New York*. Due to his expertise in religious liberty law, Mr. Lorence has spoken on religious liberty law at many law schools, has appeared on Fox News, NBC's *Today Show*, and NPR's *All Things Considered*, and has published his commentaries in the *Wall Street Journal, USA Today, National Review*, and other publications. Mr. Lorence earned his B.A. from Stanford University and his J.D. from the University of Minnesota Law School.

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Scalia's colorful criticism of the *Lemon* test in *Lamb's Chapel* (1993) as a "ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad after being repeatedly killed and buried." Scalia said that "*Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys …" Justice Scalia went on to demonstrate how the *Lemon* test was unworkable and resulted in arbitrary results, because the Court would invoke the *Lemon* test in some cases, and ignore it in others. Indeed, since the 1993 *Lamb's Chapel* decision, the Supreme Court ignored the *Lemon* test in no fewer than 11 major Establishment Clause cases!

The Lemon Test

1) an action or a law must not lead to excessive government entanglement/involvement with religion (monitoring this boundary should not require extensive effort)
2) an action or a law cannot either inhibit (restrict) or advance (promote) a particular religious practice (it should be neutral when there is an affect on religion)
3) an action or a law must have a secular (non-religious) purpose or justification for the action or law

Finally, in June 2022, the Supreme Court announced the reality – that it had abandoned the *Lemon* test years earlier, and had adopted in its place an Establishment Clause test "interpreted by 'reference to historical practices and understandings.'" *Kennedy*, slip op. at 23-24.

The new historical test – which replaces the *Lemon* test – determines what constitutes an unconstitutional establishment of religion by looking, not to what a contemporary "reasonable observer" might think, but rather to the vast wealth of history of how state established churches actually operated. In 1791, at the time the First Amendment, which contains the Establishment Clause, was ratified, state churches existed throughout Europe, as well as in nine of the 13 states. For that reason, when the states ratified the First Amendment, people generally understood what a state established church did, and therefore, knew what they were banning under the Establishment Clause. They were banning what state established churches did.

State established churches generally did two things: (1) they operated under laws that coerced people into certain religious exercises and (2) they operated under laws that banned dissenters from participating in certain aspects of public life. As Professor Michael McConnell has explained, an historic "establishment of religion," as it existed at the time the First Amendment was ratified, had six common elements:

- Government control over the doctrine and personnel of the established church – including laws regulating who could preach and how worship would be conducted;
- Compulsory attendance in the established church – including laws imposing penalties for failing to attend church services;
- Government financial support of the established church – including taxes and land grants exclusively for the support and benefit of the church;
- Prohibitions on worship in dissenting churches – including laws imposing penalties for preaching outside the established church;
- Restrictions on political participation by dissenters – including laws barring dissenters from voting or holding political office; and
- Use of the established church to carry out civil functions – including laws giving the church authority to keep public records or prosecute moral offenses.

McConnell, Establishment and Disestablishment at the Founding, Part I, Establishment of Religion, 44 William and Mary Law Review, 2105 (2002-03).

What these historic and widespread practices of state-established churches did was use the power of government to coerce people, by formal laws, to participate in the state church's activities, or forbid them from aspects of public life if they dissented from the doctrines of the state church. Therefore, at the time the First Amendment was ratified, if this sort of legally-imposed coercion was absent, there was simply no violation of the Establishment Clause.

The *Lemon* test ignored these historical practices, meaning that the *Lemon* test would find unconstitutional, activities the framers of the Establishment Clause would have found acceptable.

For example, in the 1983 decision of *Marsh v. Chambers*, a 6-3 majority of the Supreme Court ignored the *Lemon* test to uphold the practice of legislative prayers given by a chaplain at the Nebraska Legislature, even though legislative prayers likely violated the *Lemon* test. The six-justice majority upheld the practice because the Congress that had approved the Establishment Clause when the First Amendment was established, also approved paid legislative chaplains to open congressional sessions with prayer. As the Court observed:

> "On September 25, 1789, three days after Congress authorized the appointment of paid chaplains, final agreement was reached on the language of the Bill of Rights, S.Jour., supra, at 88; H.R.Jour., supra, at 121. Clearly the men who wrote the First Amendment Religion Clauses did not view paid legislative chaplains and opening prayers as a violation of that Amendment, for the practice of opening sessions with prayer has continued without interruption ever since that early session of Congress. It has also been

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> followed consistently in most of the states, including Nebraska, where the institution of opening legislative sessions with prayer was adopted even before the State attained statehood. Neb. Jour. of Council, General Assembly, 1st Sess., 16 (Jan. 22, 1855). … In this context, historical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied to the practice authorized by the First Congress – their actions reveal their intent."
>
> *Marsh v. Chambers*, 463 at 789-91.

To be clear, the Establishment Clause does not *require* a state legislature to have a chaplain pray at legislative sessions, but it also does not *forbid* states from having paid chaplains. Only by ignoring the historic public meaning of the Establishment Clause and the practices of the framers could one conclude that legislative prayers were unconstitutional.

But not only did the *Lemon* test ignore history, it also resulted in inappropriate censorship of private religious expression merely because, to the contemporary "reasonable observer," government accommodation of private religious expression might "look bad." As a result, under the *Lemon* test, many government officials began to view private religious expression as something toxic – like asbestos in the ceiling tiles – that must be eradicated from public life. These officials discerned a mandate in the *Lemon* test requiring them to go on a "search and destroy mission" for all things religious.

Here is a hypothetical example, based on real facts, demonstrating how the "reasonable observer" test malfunctioned so as to threaten private religious speech. In New York City, Central Park is a beloved place for people to meet, jog, and walk their dogs. Its large open spaces have attracted major musicians, such as Taylor Swift, Simon and Garfunkel, and the Dave Matthews Band to perform. In those situations, no one even thought to raise the question of whether New York City officially endorsed the views expressed by Taylor Swift, Simon and Garfunkel or the Dave Matthews Band, simply because New York City allowed them to perform there. I think New York City would respond correctly that Central Park is available to all to rent for a major gathering on a first come, first served basis, and that the city government does not necessarily endorse the views expressed by anyone using the park. However, in October 1995 many became concerned that New York City was violating the Establishment Clause by allowing Pope John Paul II to conduct Mass in Central Park because, under the *Lemon* test, a "reasonable observer" might conclude that, by allowing the head of the Roman Catholic Church to perform the Church's central ritual, the Mass, in the Park, the City might be perceived as endorsing religion.

But the Supreme Court has ruled, not only that government accommodation of private religious speech does not violate the Establishment Clause, but that, in fact, is required by the Free Speech Clause. The Supreme Court first said as much in *Widmar v. Vincent* in 1981. But for decades since then, many government officials have thought there must be an Establishment Clause problem in these circumstances because it "looks bad" for a religious group to meet or advocate its beliefs on government property.

Coach Joseph Kennedy
(*Kennedy v. Bremerton School District*)

The organization I work for, Alliance Defending Freedom, was engaged in a 20-year long legal battle (1995-2015) challenging a New York City Department of Education rule prohibiting religious groups from conducting worship services in public schools during non-school time, usually weeknights and weekends, while allowing all other community groups to meet on school property. The city repeatedly invoked the *Lemon* test and its "reasonable observer" standard to defend its policy of singling out religious worship services for exclusion, while allowing even the most contentious and controversial expressions from other private speakers. The NYC school officials admitted the city did not endorse the views of the speakers who rented the schools to, say, criticize school officials, but nevertheless perceived an unconstitutional government endorsement of religion when a church rented an empty auditorium on Sunday mornings for its church service for people in the neighborhood.

Not only in New York City, but around the nation, the

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Establishment Clause kept showing up in these equal access cases like an uninvited guest that won't leave the party; which is why the Supreme Court has had to say six times since 1981 that government accommodation of religious speech does not violate the Establishment Clause, and that, in fact, the Free Speech clause requires the government to accommodate and not to discriminate against religious viewpoints. See *Widmar* (1981), *Mergens*, (1989), *Lamb's Chapel* (1993), *Rosenberger* (1995) and *Good News Club* (2001).

Just last term, the Supreme Court had to repeat, for the sixth time, that the Establishment Clause and the *Lemon* test do not require the government to single out religious groups for exclusion from a forum generally open to everyone else. In *Shurtleff v. City of Boston*, decided in May 2022, the Supreme Court had to repeat this point once again because the City of Boston, a major U.S. city with competent legal representation, still argued that the Establishment Clause required it to reject the flying of a Christian group's flag containing a cross. The Supreme Court rejected that view out of hand. After over 40 years of Supreme Court decisions standing for the proposition that the Establishment Clause does not require the government to single out religious speakers for exclusion from a forum generally open to everyone, one would think government officials and their legal counsel would get the message. But they didn't – and I think they didn't because of the *Lemon* test with its "reasonable observer" standard.

The Sixth Circuit clearly recognized this problem with the *Lemon* test when it opined that the reasonable observer standard can easily devolve into what the court called the "Ignoramus's Veto" of private religious speech.

The Sixth Circuit, when faced with a challenge to a Jewish menorah set up at Hanukkah at the City Hall of Grand Rapids, Michigan, said the government's use of the reasonable observer test "presents a new threat to religious speech in the concept of the 'Ignoramus's Veto.'" Id. "The Ignoramus's Veto lies in the hands of those determined to see an endorsement of religion, even though a reasonable person, and any minimally informed person, knows that no endorsement is intended, or conveyed, by adherence to the traditional public forum doctrine. The plaintiffs posit a 'reasonable observer' who knows nothing about the nature of the exhibit – he simply sees the religious object in a prominent public place and ignorantly assumes that the government is endorsing it. We refuse to rest important constitutional doctrines on such unrealistic legal fictions." *Americans United for Separation of Church and State v. City of Grand Rapids*, 980 F.2d 1538, 1553 (6th Cir. 1992).

Conclusion

Fortunately, the demise of the *Lemon* test should finally stop the singling out of religious groups and individuals for exclusion or censorship merely because they are religious. As Justice Brennan wrote in his concurrence to *McDaniel v. Paty*, 435 U.S. 618 (1978):

> "The Establishment Clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore, subject to unique disabilities." 435 U.S. at 641.

NEWS *and* ANNOUNCEMENTS

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If you have any questions, please contact Betty Flores at Betty.Flores@staff.azbar.org.

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RESOURCES

LAW RESOURCES

Federal Statutes

Religious Freedom Restoration Act of 1993 – 42 U.S.C. § 2000bb, et seq.

Religious Land Use and Institutionalized Persons Act (RLUIPA) – 42 U.S.C. § 2000cc, et seq.

Equal Access Act – 20 U.S.C. § 4071

Office of the U.S. Attorney General

October 6, 2017 Memorandum: Federal Law Protections for Religious Liberty.
https://www.justice.gov/crt/page/file/1006786/download

October 6, 2017 Memorandum: Implementation of Memorandum on Federal Law Protections for Religious Liberty.
https://www.justice.gov/crt/page/file/1006791/download

July 30, 2018 Memorandum: Religious Liberty Task Force.
https://www.justice.gov/opa/speech/file/1083876/download

U.S. Department of State

February 5, 2020 Declaration of Principles for the International Religious Freedom Alliance.
https://www.state.gov/declaration-of-principles-for-the-international-religious-freedom-alliance/

2019 Annual Report of the U.S. Commission on International Religious Freedom.
https://www.uscirf.gov/sites/default/files/2019USCIRFAnnualReport.pdf

July 26, 2019 2nd Annual Ministerial to Advance Religious Freedom: Remarks by Vice President Pence.
https://www.whitehouse.gov/briefings-statements/remarks-vice-president-pence-ministerial-advance-religious-freedom/

U.S. Department of Justice and U.S. Department of Education

January 16, 2020 Guidance on Constitutionally Protected Prayer and Religious Expression in Public Elementary and Secondary Schools.
https://www2.ed.gov/policy/gen/guid/religionandschools/prayer_guidance.html

U.S. Department of Labor

August 10, 2018 Directive 2018-03: To incorporate recent developments in the law regarding religion-exercising organizations and individuals.
https://www.dol.gov/ofccp/regs/compliance/directives/dir2018_03.html

May 2020 Guidance Regarding Federal Grants and Executive Order 13798 – Equal Treatment in Department of Labor Programs for Religious Organizations.
https://www.dol.gov/agencies/oasam/grants/religious-freedom-restoration-act

U.S. Department of Health and Human Services

Final Regulations Protecting Statutory Conscience Rights in Health Care 45 CFR Part 88
https://www.hhs.gov/sites/default/files/final-conscience-rule.pdf

U.S. Department of Veterans Affairs

VA Directive 0022, Religious Symbols in VA Facilities.

Arizona Statutes

Arizona Freedom of Religion Act – Ariz. Rev. Stat. § 41-1493.01

Other Resources

American Charter of Freedom of Religion and Conscience.
http://www.americancharter.org

RESOURCES

CLE VIDEOS

2017 ANNUAL CONVENTION CLE

Introduction: Religious Liberty Law Section CLE at the State Bar of Arizona 2017 Annual Convention, held on June 16, 2017

Presenter: David Garner (Osborn Maledon, P.A.)

[watch video]

Historical foundations of religious liberty law

Presenter: Professor Owen Anderson (Arizona State University)

[watch video]

Debate: Resolving conflicts between religious liberty and anti-discrimination laws

Participants: Jenny Pizer (Lambda Legal), Kristen Waggoner (Alliance Defending Freedom), Alexander Dushku (Kirton McConkie)

[watch video]

Panel Discussion: High profile religious liberty law issues

Moderator: Robert Erven Brown (Church & Ministry Law Group at Schmitt Schneck Even & Williams PC)
Panelists: Eric Baxter (The Becket Fund for Religious Liberty), Alexander Dushku (Kirton McConkie), Will Gaona (ACLU of Arizona), Jenny Pizer (Lambda Legal), Professor James Sonne (Stanford Law School), and Kristen Waggoner (Alliance Defending Freedom)

[watch video]

Religious Liberty Law Section

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