RELIGIOUS LIBERTY LAW SECTION

STATE BAR OF ARIZONA

Newsletter / DECEMBER 2021

FROM *the* EDITOR

Welcome to the December 2021 issue of the *Religious Liberty Law Section Newsletter*.

On April 16, 1963, Martin Luther King, Jr. wrote a letter while confined in the city jail of Birmingham, Alabama. He wrote it to "fellow clergymen" who were criticizing him for engaging in non-violent civil disobedience to the city's racial segregation laws, which had led to his arrest. In his letter, Dr. King explains the religious basis for his advocacy of non-violent civil disobedience to unjust laws – appealing to "the law of God," "eternal law," and "natural law" and citing to, among others, St. Thomas Aquinas. Dr. King's ideas of non-violent civil disobedience were clearly informed by his Christian faith, and followed in the footsteps of Henry David Thoreau, who's civil disobedience was informed by his Transcendentalist faith, and Mahatma Gandhi, who's civil disobedience was informed by his Hindu faith.

Because Dr. King's theory of non-violent civil disobedience to unjust laws was based on his Christian belief that a citizen's ultimate loyalty was to a transcendent God whose authority over man is higher than the state's, and against which human laws are measured, I have included selected excerpts from Dr. King's ***Letter From The Birmingham Jail*** as the Great Moments in Religious Liberty History entry for this issue of the Newsletter.

Also, I want to extend a personal note of thanks to John Bursch, the author of this issue's Feature Article addressing the U.S. Supreme Court's opinions, issued during the Court's most recent term, that address or impact religious liberty. This was another busy year at the Supreme Court for religious liberty law cases, and again John had a front row seat.

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

"Remember civil and religious liberty always go together: if the foundation of one be sapped, the other will fall of course."

— Alexander Hamilton

IN *this* ISSUE

Published by the Religious Liberty Law Section of The State Bar of Arizona.

FROM *the* CHAIR

You are needed!

One of the main objectives of the Religious Liberty Law Section of the State Bar of Arizona is "To promote throughout the State of Arizona the education of members of the State Bar and the public about issues related to religious liberty law, by organizing presentations on various topics relating to religious liberty law, by sponsoring and by presenting lectures, workshops, and publications such as newsletters, on religious liberty topics, and by presenting continuing legal education programs on topics related to religious liberty law." (Bylaws of the Religious Liberty Law Section of the State Bar of Arizona)

In the short time since its establishment, the Religious Liberty Law Section has provided excellent thought-provoking CLE presentations and newsletter articles. More is coming. For example, on November 5, 2021 Justice Andrew Gould presented "University Restrictions on Free Speech"; on December 2, 2021 David Garner discussed "the Ecclesiastical Abstention Doctrine"; and on February 15, 2022 Professor Carl Esbeck will help us understand "the Church Autonomy Doctrine."

Religious liberty law is often misunderstood, even by attorneys. After all, it is a complicated matter to sort through the fierce debate over this fundamental principle of constitutional law. Many believe it is one of the most important issues of our day. Different opinions and thoughts are needed to intelligently balance religious liberty with the other fundamental freedoms protected by our Constitution.

You are needed for this task. So, how can you help?

First, as busy as you are, take some time to increase your understanding about religious liberty law and the ongoing challenges in applying the First Amendment with other protected freedoms. Avoid the temptation to be complacent, believing this topic doesn't affect you or your current religious or non-religious (as some interpret it) beliefs. In his fight against racial discrimination, Dr. Martin Luther King, Jr. wrote from Birmingham Jail on 16 April 1963: "Shallow understanding from people of goodwill is more frustrating than absolute misunderstanding from people of ill will. Lukewarm acceptance is much more bewildering than outright rejection." I invite you to increase your understanding.

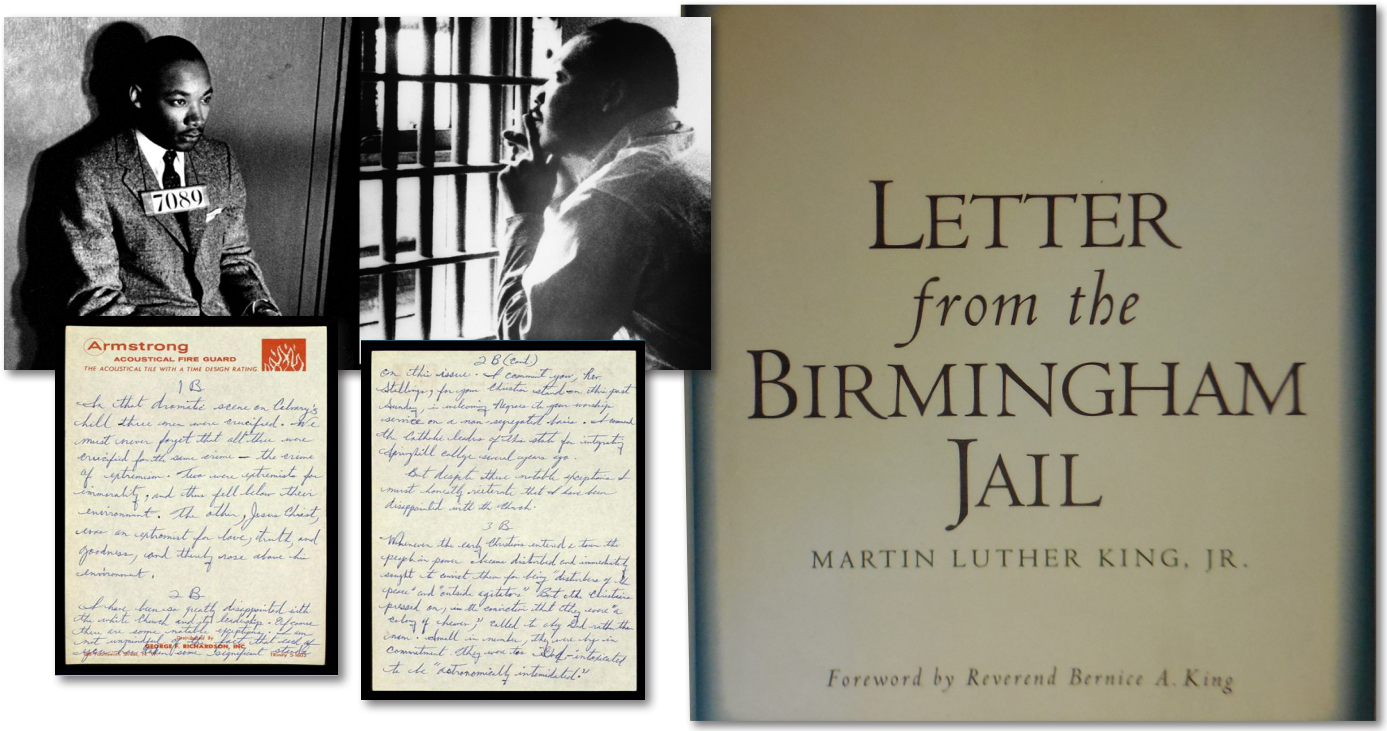
Secondly, support the Religious Liberty Law Section in its mission to provide education to both attorneys and the general public. Attend the Section's CLE programs. You will find them well worth your time and investment. Join the Religious Liberty Law Section. You are needed. The dues are only $35 per year and each member's dues help provide the excellent educational programs that are so valuable to understanding this complex fundamental principle of constitutional law.

You are also needed to help us grow by inviting your colleagues to learn about and consider joining the Religious Liberty Law Section.

Why you? If you believe, as I do, in the important role religious liberty issues play in society as a whole and in our individual lives, then we need you. If you believe, as I do, that religious liberty issues are under an intense debate that will shape and impact our society, stretching and influencing generations to come, then we need you.

Mark A. Winsor,
Chair

GREAT MOMENTS *in* RELIGIOUS LIBERTY HISTORY



Excerpts From *Letter From The Birmingham Jail**

"You express a great deal of anxiety *over our willingness to break laws. This is certainly a legitimate concern… One may want to ask: 'How can you advocate breaking some laws and obeying others?' The answer lies in the fact that there are two types of laws: just and unjust… Now, what is the difference between the two? How does one determine whether a law is just or unjust? A just law is a man-made code that squares with the moral law or the law of God. An unjust law is a code that is out of harmony with the moral law. To put it in the terms of St. Thomas Aquinas: An unjust law is a human law that is not rooted in eternal law and natural law… Thus it is that I can urge men to obey the 1954 decision of the Supreme Court* [outlawing segregation in the public schools]*, for it is morally right; and I can urge them to disobey segregation ordinances, for they are morally wrong.*

One who breaks an unjust law must do so openly, lovingly, and with a willingness to accept the penalty. I submit that an individual who breaks a law that conscience tells him is unjust and who willingly accepts the penalty of imprisonment in order to arouse the conscience of the community over its injustice, is in reality expressing the highest respect for law.

Of course, there is nothing new about this kind of civil disobedience. It was evidenced sublimely in the refusal of Shadrach, Meshach and Abednego [as recorded in the Biblical book of Daniel] *to obey the laws of Nebuchadnezzar, on the ground that a higher moral law was at stake. It was practiced superbly by the early Christians, who were willing to face hungry lions and the excruciating pain of chopping blocks rather than submit to certain unjust laws of the Roman Empire.*

If today I lived in a Communist country where certain principles dear to the Christian faith are suppressed, I would openly advocate disobeying that country's antireligious laws.

I hope this letter finds you strong in the faith. I also hope that circumstances will soon make it possible for me to meet each of you, not as an integrationist or a civil rights leader but as a fellow clergyman and a Christian brother. Let us all hope that the dark clouds of racial prejudice will soon pass away and the deep fog of misunderstanding will be lifted from our fear-drenched communities, and in some not too distant tomorrow the radiant stars of love and brotherhood will shine over our great nation with all their scintillating beauty."

Due to space limitations, only a small portion and selective parts of Dr. King's Letter are reproduced here. You are encouraged to read the Letter in its entirety.

SELECTED U.S. CASE LAW *Updates*

CASE 1

John Does 1-3, et al. v. Janet T. Mills, Governor of Maine, et al.

595 U.S. _____, (2021), 2021WL5027177

THE COURT DENIED AN APPLICATION FROM MAINE HEALTHCARE WORKERS MOUNTING AN EMERGENCY CHALLENGE TO MAINE'S REGULATIONS REQUIRING HEALTHCARE WORKERS TO BE VACCINATED AGAINST COVID-19 OR LOSE THEIR JOBS AND THE REGULATION DID NOT PROVIDE FOR RELIGIOUS ACCOMMODATIONS. A MINORITY OF JUSTICES DISSENTED.

In this case, the Court denied an application for emergency injunctive relief against an executive order from the Governor of Maine which required certain healthcare workers to be vaccinated against COVID-19 and which, although providing medical exemptions, did not recognize religious exemptions.

Justice Breyer explained the Court's denial on the grounds that to grant the plaintiffs' request would enable applicants to "use the emergency docket to force the Court to give a merits preview in cases that it would be unlikely to take – and to do so on a short fuse without benefit of full briefing and oral argument." which would be inappropriate in a case, such as this, of first impression.

Justice Gorsuch, joined by Justices Thomas and Alito dissented from the denial of application for injunctive relief, stating that Maine's law was subject to strict scrutiny because it was not generally applicable since it provided for medical accommodations but not religious accommodations. And by providing medical accommodations but not religious accommodations, the law treated a comparable secular activity more favorably than a religious exercise.

Applying strict scrutiny, the dissent questioned whether Maine had shown that its law served a compelling state interest, because although "stemming the spread of COVID-19 qualifies as a compelling interest … this interest cannot qualify as such forever… If human nature and history teach anything, it is that civil liberties face grave risks when governments proclaim indefinite states of emergency."

The dissent also indicated that Maine had not shown that its rule was the least restrictive means to accomplish its interests because Maine had failed to explain how denying exemptions to religious objectors is essential to its achieving its goal of having 90% of its healthcare workers vaccinated. Finally, the dissent noted that "This Court has long held

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that '[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury'" and that "Maine has so far failed to present any evidenced that granting religious exemptions to the applicants would threaten its stated public health interests any more than its medical exemption already does."

So, the dissent concluded, because "[t]his case presents an important constitutional question, a serious error, and an irreparable injury," relief should be granted.

CASE 2

In re: A.H.

999 F.3d 98 (2nd Cir. 2021).

A STATE MAY NOT EXCLUDE RELIGIOUS SCHOOLS FROM PARTICIPATING IN STATE FUNDED TUITION PROGRAMS.

In Vermont, a state-run "Town Tuition Program" paid independent schools for educating high school aged students residing in state school districts that did not operate public high schools. Despite the fact that the tuition program allowed each student to select the independent school he or she wanted to attend, the state was prohibiting religious high schools from participating in the program.

The parents of certain students sued Vermont, challenging the exclusion of religious high schools from the tuition program as a violation of the students' Free Exercise of religion rights. Although the trial court had enjoined the State, it limited its injunction so as to give the state the opportunity to develop alternative criteria for program eligibility – in particular, criteria that would have allowed the State to prohibit program funds from being used for "religious education."

The Court of Appeals began its analysis by noting that the U.S. Supreme Court "'has repeatedly confirmed that denying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion that can be justified only by a state interest of the highest order'" and that "'[s]tatus-based discrimination remains status based even if one of its goals or effects is preventing religious organizations from putting aid to religious uses'" and that "a state cannot justify discrimination against religious schools and students by invoking an 'interest in separating church and State more fiercely than the Federal Constitution.'"

The Court concluded that "The Supreme Court has made clear that the prevailing practice in Vermont – maintaining a policy of excluding religious schools from the T[own]T[uition] P[rogram] – is unconstitutional" and that the trial court was wrong in allowing the State time to develop criteria that would have restricted use of program funds to non-religious uses while the violation of the students' constitutional rights continued unabated.

In a concurring opinion, Judge Menashi articulated two additional reasons the trial court's injunctive relief was inadequate.

First, Judge Menashi pointed out that the State was wrong in concluding that public funds could not flow to what the State determined was a "pervasively religious" high school. Citing *Colorado Christian University v. Weaver* – a 2008 10th Circuit case – Judge Menashi pointed out that "[b]y conditioning access to a public benefit 'on the degree of religiosity of the institution and the extent to which that religiosity affects its operations, as defined by such things as the content of its curriculum,' a state actor 'discriminates among religious institutions on the basis of the pervasiveness or intensity of their belief … [which constitutes] discrimination on the basis of religious views or religious status.'" Therefore, "the district court's reliance on its *sua sponte* assessment of [the school's] mission and curriculum to support its decision exceeded 'a lawful exercise of its prescribed jurisdiction.'" And citing *Mitchell v. Helm*, Judge Menashi wrote that"'[n]othing in the Establishment Clause requires the exclusion of pervasively sectarian schools from otherwise permissible aid programs, and other doctrines of [the Supreme] Court bar it.'" He further wrote that "The Establishment Clause does not require Vermont to avoid funding religious education through the T[own]T[uition]P[rogram]" because "'[T]he Establishment Clause is not offended when religious observers and organizations benefit from neutral government programs.'"

Judge Menashi also pointed out that it was incorrect for the trial court to have concluded that the State could legitimately distinguish religious from secular uses of public funds, and that public tuition funds could be apportioned in way that would have prevented such funds from being used for religious education. The Judge pointed out that such an apportionment "would [itself] likely entail 'intrusive judgments regarding contested questions of religious belief or practice' and thereby raise additional concerns under the First Amendment."

CASE 3

Freedom From Religion Foundation, Inc. et al. v. Mack

4 F.4th 306 (5th Cir. 2021).

A STATE JUSTICE OF THE PEACE WAS LIKELY TO PREVAIL IN A CHALLENGE TO HIS COURTROOM PRAYER PRACTICES.

To solemnize the proceedings in his courtroom, Judge Mack regularly invites a volunteer chaplain to be recognized before

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the first case is called and many of those chaplains offer a prayer The chaplains are diverse, representing a broad range of faiths and denominations. No one is compelled to participate in the prayers. In fact, signs outside the courtroom that "It is the tradition of this court to have a brief opening ceremony that includes a brief invocation by one of our volunteer chaplains and pledges to the United States flag and Texas state flag. You are not required to be present or participate. The bailiff will notify the lobby when court is in session." The bailiff reiterates this policy before the judge Mack enters the courtroom.

The Freedom From Religion Foundation (FFRF) challenged Judge Mack's prayer practices as violations of the Establishment Clause of the U.S. Constitution.

The court began its substantive analysis with the observation that "The Supreme Court has held that our Nation's history and tradition allow legislatures to use tax dollars to pay chaplains who perform sectarian prayers before sessions … [and that i]f anything, Judge Mack's chaplaincy program raises fewer question under the Establishment Clause because it uses zero tax dollars and operates on a volunteer basis." The court further determined that, "given the abundant history and tradition of courtroom prayer" it was not clear that the Supreme Court's legislative prayer decisions should not be applicable to courtroom prayer practices as well.

The court then went on to reject the FFRF's arguments that courtroom prayer was not like legislative prayer. In particular, the court rejected the FFRF's argument that evidence of courtroom prayer was "spotty," citing Chief Justice John Jay's statement that courtroom prayer was an "ancient use" and "the custom." The court also rejected the FFRF's argument that the Supreme Court's invocation of "God save the United States and this Honorable Court" was different, because it did not invite participation and was not coercive, by stating that Judge Mack's prayer practices were less coercive than the Supreme Court's invocation because, unlike the Supreme Court, Judge Mack actually invites people to leave the courtroom if they do not want to be exposed to the chaplains' prayers. The court also rejected the FFRF's reliance on Justice Kagan's dissent in *Town of Greece*, pointing out that Justice Kagan was concerned about instructing parties to participate in prayers, which Judge Mack does not do. And, finally, the court rejected the FFRF's claim that Judge Mack's prayer practices ran afoul of the *Lemon* test, because *Town of Greece* was controlling and did not use the *Lemon* test.

Turning to the issue of irreparable injury, the court held that Judge Mack was irreparably harmed by an injunction against his prayer practices while litigation continued.

In conclusion, the court stated that, in light of the fact that "the public interest always lies 'in a correct application of the [First Amendment], and that Judge Mack was likely to prevail on the merits of the case, Judge Mack's prayer practices must be allowed to continue during the litigation.

CASE 4

Gerald Ackerman and Mark R. Shaykin v. Heidi E. Washington

16 F.4th 170 (6th Cir. 2021).

THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT REQUIRED THE MICHIGAN DEPARTMENT OF CORRECTIONS TO PROVIDE JEWISH PRISONERS WITH MEALS THAT COMPLIED WITH THE PRISONERS' RELIGIOUS BELIEFS.

In this case, two Jewish inmates of the Michigan Department of Corrections (MDOC) complained that the MDC's special dietary meals program – which provided kosher vegan meals in an attempt to satisfy all religious dietary requirements of the 28 religions represented in the prison regardless of the inmates particular religion – violated the Religious Land Use and Institutionalized Persons Act (RLUIPA) because it did not provide meals sufficient to enable the inmates to comply with certain dietary requirements of their religion. In particular, the plaintiffs asserted that they were required to eat a meal with kosher meat and one with dairy on the Jewish Sabbath and four Jewish holidays during the year, which the kosher vegan meals did not satisfy because they were meatless.

The court began its analysis with a review of RLUIPA, which "prohibits a state government from 'impos[ing] a substantial burden on the religious exercise of a person residing in or confined to an institution, … unless the government demonstrates that imposition of the burden on that person – (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.'"

The court then moved to the MDOC's contention that the plaintiffs' purported religious dietary beliefs were not sincere. In rejecting the MDOC's challenge, the court noted that "RLUIPA's sweep is not limited to reasonable or even orthodox beliefs – the reasonable and the unreasonable, the orthodox and the idiosyncratic all enjoy protection." And the sincerity inquiry is merely a question of the plaintiff's honesty. However, a plaintiff's sincerity can be questioned, particularly if the believer's beliefs differ from the orthodox beliefs of his faith or the believer has appeared to waver in his or her dedication to the belief – although "'even the most sincere

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practitioner may stray from time to time.'" In the end, the court concluded that, although there was evidence that could have led to a different conclusion, the plaintiffs' religious dietary beliefs were sincere.

Turning to the substantial burden question, the court noted that "'[T]he government substantially burdens an exercise of religion' under RLUIPA 'when it places substantial pressure on an adherent to modify his behavior and to violate his beliefs or effectively bars his faith-based conduct.'" And "a prison does so by putting a prisoner to the choice of either 'engag[ing] in conduct that seriously violates [his] religious beliefs' or 'fac[ing] serious disciplinary action or fines.'"

The court noted that "[i]n the religious-food context, precedent is clear that 'barring access to the practice' of eating specific ceremonial foods 'substantially burden[s] the practice.'" And "'allow[ing] the inmates' access to other religious foods does not 'make a difference.'"

The court then concluded that the MDOC's practices substantially burdened the plaintiffs' religious exercise because the religious exercise at issue was eating meat and dairy as part of meals and, under the MDOC's universal meals program, the plaintiffs were categorically prohibited from eating meat and dairy as part of their meals. The court pointed out that, under RLUIPA, a government may be required to incur operational expenses to avoid a substantial burden on religious exercise.

Turning to the compelling interest prong of RLUIPA, the court first rejected the MDOC's argument that if it made an exception for the plaintiffs it would have to make exceptions for all prisoners, noting that a "'no-exception policy' has no place as a stand-alone justification under RLUIPA because 'accommodations' or 'exceptions' are the entire point of the Act." The court also rejected the MDOC's arguments that, either, avoiding having to spend an additional $10,000 per year to meet the cost of the plaintiffs' dietary requests (which comprised "a tiny .02%" of the MDOC's annual $39 million food budget or (2) that the MDOC's interest in the orderly administration of meals, were compelling.

With respect to the "least restrictive means" element of RLUIPA, the court pointed out that the MDOC used to provide the sort of dietary accommodation the plaintiffs were requesting, and that the MDOC did not point to any security problems when that accommodation was in effect. The court also noted that the MDOC had failed to address the least restrictive means issue.

In conclusion, the court determined that "[t]he MDOC substantially burdens these prisoners' sincere religious beliefs, and the MDOC has not shown that the burdens serve a compelling interest in the least restrictive way."

CASE 5

Intervarsity Christian Fellowship/USA v. University of Iowa, et al.

5 F.4th 855 (8th Cir. 2021).

A PUBLIC UNIVERSITY VIOLATED THE CONSTITUTIONAL RIGHTS OF A CHRISTIAN STUDENT GROUP WHEN IT DEREGISTERED THE GROUP ON ACCOUNT OF THE GROUP'S CHRISTIAN BELIEFS.

The University of Iowa recognizes student groups as Registered Student Organizations (RSOs), to which the University provides support such as money, participation in University publications, use of the University's trademark, and access to campus facilities.

According to University policy, "all registered student organizations [are] able to exercise free choice of members on the basis of their merits as individuals, without restriction in accordance with the [Human Rights Policy]. … [T]herefore any individual who subscribes to the goals and beliefs of a student organization may participate in and become a member of the organization." In accordance with that policy, the University allows RSOs to base membership and leadership on traits protected under the University's Human Rights Policy, such as sex, race, and ideological viewpoint.

However, the University deregistered the Intervarsity Christian Fellowship (ICF) RSO because ICF required its leaders to affirm the group's Christian statement of faith, claiming that the ICF leadership policy was contrary to the University's Human Rights Policy.

ICF sued the University, alleging that, by deregistering ICF, the University violate the ICF's rights to free speech, free association, and free exercise of religion under the First Amendment.

In analyzing ICF's free speech claim, the court began by finding that – by recognizing RSOs – the University had created a limited public forum, access to which had to be viewpoint neutral, stating that "If a state university creates a limited public forum for speech, it may not 'discriminate against speech on the basis of its viewpoint'" and that "[t]he government must abstain from regulating speech when the specific motivating ideology or the opinion or the perspective of the speaker is the rationale for the restriction." But the court then found that "That is what the University … did to Intervarsity" because, after deregistering ICF for its faith-based leadership requirements, the University exempted sororities and fraternities from the Human Rights Policy and permitted other RSOs to base membership on sex, race, and even some religious beliefs – such as an RSO called Love-Works, which requires its members and leaders to sign a "gay-affirming statement of Christian faith." The court stated that "We are hard-pressed to find a clearer example of viewpoint

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discrimination" than the University's deregistration of ICF for its faith-based leadership requirement while allowing LoveWorks to impose a faith-based requirement on its members and leadership. As the court stated, "The University's choice to selectively apply the Human Rights Policy against Intervarsity suggests a preference for certain viewpoints – like those of LoveWorks – over Intervarsity's."

The court then went on to find that the University's deregistration of ICF failed strict scrutiny review because "Of course, the University has a compelling interest in preventing discrimination. But it served that compelling interest by picking and choosing what kind of discrimination was okay. Basically, some RSOs at the University of Iowa may discriminate in selecting their leaders and members, but others, mostly religious, may not… The University and individual defendants' selective application of the Human Rights Policy against Intervarsity was viewpoint discrimination in violation of the First Amendment. It cannot survive strict scrutiny."

The court also denied qualified immunity because "the law was clearly established that universities may not engage in viewpoint discrimination against RSOs based on a non-discrimination policy."

In conclusion, the court stated – "What the University did here was clearly unconstitutional. It targeted religious groups for differential treatment under the Human Right Policy – while carving out exemptions and ignoring other violative groups with missions they presumably supported. The University and individual defendants turned a blind eye to decades of First Amendment jurisprudence or they proceeded full speed ahead knowing they were violating the law."

FEATURE ARTICLE

2021 Supreme Court Religious LibertyLaw Round-Up

By John J. Bursch

What a difference a year makes! The U.S. Supreme Court's 2019 Term was a noteworthy one for religious liberty cases, including decisions (1) clarifying that so-called "Blaine Amendments" cannot be used to discriminate against religious schools or their students based merely on their religious status, ***Espinoza v. Montana Department of Revenue***, 140 S. Ct. 2246 (2020), (2) ruling for the Little Sisters of the Poor a second time in a dispute over the Affordable Care Act's contraceptive mandate, ***Little Sisters of the Poor v. Pennsylvania***, 140 S. Ct. 2367 (2020), and strengthening the ministerial-exception doctrine for religious employers, ***Our Lady of Guadalupe School v. Morrissey-Berru***, 140 S. Ct. 2049 (2020). But as that Term came to a close in June 2020, we had no way to know that the Court's 2020 Term—courtesy of the Covid-19 pandemic—would result in several Supreme Court decisions strengthening the Free Exercise Clause plus a blockbuster in disguise involving a Catholic adoption agency. The strength of this year's opinions continues to reflect that a majority of Justices share a strong conviction for upholding religious-liberty rights.

1 The Court's 2020 Term religious-liberty cases began with ***Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 62 (2020).**

The case came to the Court on an emergency application, seeking relief from the New York Governor's Covid executive order that severely restricted attendance at religious services in areas classified as "red" or "orange" zones involving high positive-Covid-test rates. In a red zone, no more than 10 people could attend a religious service, including at the Diocese's Cathedral, which has a capacity well in excess of 1,000. The Court granted emergency relief, and in doing so, developed significantly the free-exercise principle of neutrality and general applicability.

It has long been understood that government regulations must satisfy strict scrutiny if they are not neutral and generally applicable regarding religion. ***Church of Lukumi Babalu Aye, Inc. v. Hialeah***, 508 U.S. 520, 533 (1993). Traditionally, this has meant

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ABOUT THE AUTHOR

JOHN BURSCH is Senior Counsel and Vice-President of Appellate Advocacy with Alliance Defending Freedom. John has argued 12 U.S. Supreme Court cases and more than 30 state supreme court cases.

He frequently litigates on behalf of clients seeking to vindicate religious liberty, free speech, and the right to life and also owns and operates his own law firm, Bursch Law, PLLC.

John served as the Solicitor General of the State of Michigan from 2011 through 2013. Bursch earned his J.D., *magna cum laude*, from the University of Minnesota Law School, where he served as Chief Note and Comment Editor of the *Minnesota Law Review*. After law school Bursch served as a law clerk for the Hon. James B. Loken of the U.S. Court of Appeals for the 8th Circuit.

He has been inducted into the American Academy of Appellate Lawyers and serves as a member of the American Law Institute. Bursch is admitted to practice before numerous federal district and appellate courts, including the U.S. Supreme Court.

that government officials acted with religious animus, e.g., ***Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n***, 138 S. Ct. 1719 (2018), or treated religious organizations differently than secular organizations. But in ***Diocese of Brooklyn***, the Court concluded that the Governor's executive order was non-neutral because it "single[d] out houses of worship for especially harsh treatment" when compared to secular organizations. For example, while the Diocese of Brooklyn could not admit more than 10 persons for Mass at the Cathedral, businesses categorized as "essential" could admit as many people as they wished if they were masked and maintained social distancing. And the list of "essential" businesses on which the Court focused were, in numerous instances, very different than houses of worship, including "acupuncture facilities, camp grounds, garages, as well as many whose services are not limited to those that can be regarded as essential, such as all plants manufacturing chemicals and microelectronics and all transportation facilities." That disparate treatment was "even more striking in an orange zone," where a place of worship was limited to 25 persons at a service, whereas even ***non***-essential businesses could "decide for themselves how many persons to admit."

In the Court's view, these disparities rendered the Governor's restrictions neither "neutral" nor of "general applicability," requiring New York to satisfy strict scrutiny. And while the Court agreed that "[s]temming the spread of COVID-19 is unquestionably a compelling interest," it concluded that the Governor's regulations were not "narrowly tailored." To begin with, the regulations were "far more restrictive than any COVID-related regulations that ha[d] previously come before the Court." More importantly, "there are many other less restrictive rules that could be adopted to minimize the risk to those attending religious services," such as tying the maximum attendance at a religious service to the size of the place of worship.

The Court concluded by emphasizing the importance of safeguarding religious liberty during health and safety emergencies. "[E]ven in a pandemic, the Constitution cannot be put away and forgotten. The restrictions at issue here, by effectively barring many from attending religious services, strike at the very heart of the First Amendment's guarantee of religious liberty." Accordingly, the Court held "that enforcement of the Governor's severe restrictions on the applicants' religious services must be enjoined."

2 But *Diocese of Brooklyn* did not end the conflict between religious organizations and government officials involving the pandemic.

Less than three months later, the Court's Covid docket gave us ***South Bay United Pentecostal Church v. Newsom***, 141 S. Ct. 716 (2021). ***South Bay*** involved a series of California Covid-19 regulations that, among other things, prohibited indoor worship services while allowing most retail business to proceed indoors with up to 25% capacity and other businesses to operate at 50% occupancy or more. In a fractured series of orders, a majority of Justices concluded that this religious targeting was unconstitutional and therefore had to be enjoined. But a majority was unable to agree that the Court should also enjoin California's prohibition on singing and chanting during indoor services. In a partial concurrence, Justice Barrett, joined by Justice Kavanaugh, concluded that the applicants bore the burden of establishing their right to relief and did not carry that burden on the application record. Specifically, it remained "unclear" to these Justices "whether the singing ban applies across the board (and thus constitutes a neutral and generally applicable law) or else favors certain sectors (and thus triggers more searching review." "Of course, if a chorister can sing in a Hollywood studio but not in her church, California's regulations cannot be viewed as neutral. But the record is uncertain."

3 Only two months after South Bay, the Court concluded its Covid/worship trilogy with *Tandon v. Newsom*, 141 S. Ct. 1294 (2021), which substantially clarified the "comparability" analysis. *Tandon* involved yet another California Covid-19 regulation, this time a regulation that restricted at-home prayer meetings and Bible studies by limiting all gatherings in private residences to no more than three house holds at a time.

A 5-4 Court majority invalidated the regulation, summarizing and expanding on ***Diocese of Brooklyn*** and ***South Bay***.

To begin, the Court reiterated that "government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat ***any*** comparable secular activity more favorably than religious exercise." What's more, it's not an excuse "that a State treats ***some*** comparable secular businesses or other activities as poorly as or even less favorably than the religious exercise at issue."

As for comparability, the Court explained that "whether two activities are comparable for purpose of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue." In other words, it is not enough for a court to compare a restriction on a religious organization to restrictions on comparable kinds of conduct. "Comparability is concerned with the ***risks*** various activities pose, not the reasons why people gather."

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Again, California's regulation of secular businesses created the free-exercise problem. "California treat[ed] some comparable secular activities more favorably than at-home religious exercise, permitting hair salons, retail stores, personal care services, movie theaters, private suites at sporting events and concerns, and indoor restaurants to bring together more than three households at a time." California argued that Covid-19 precautions were likely to be less effective in a private home, but the Court majority admonished that the government may not "assume the worst when people go to worship but assume the best when people go to work."

4 And that brings us to the blockbuster in disguise, *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021).

As noted above, many religious-liberty supporters were hopeful that the Court would use ***Fulton*** as a vehicle to overrule ***Employment Division, Department of Human Resources of Oregon v. Smith***, 494 U.S. 872 (1990), one of the most damaging decisions for free-exercise rights in Supreme Court history. ***Smith*** established the standard that the government may enforce a neutral, generally applicable law no matter how much the government regulation impinges on religious liberty. The drafters and ratifiers of the First Amendment would have been aghast at such an outcome. If a "dry" county enacted an ordinance that prohibited the consumption of alcohol in any public place, with no exceptions, and did so without religious animus, then the county could enforce that law even against a church that used wine as part of a communion service. The decision was so controversial that Congress responded immediately by enacting RFRA, the Religious Freedom Restoration Act, which President Bill Clinton signed into law and essentially put pre-***Smith*** free-exercise protections back in place, at least as applied to federal-government regulation.

Fulton involved a foster-care agency, Catholic Social Services in Philadelphia. Despite a critical need for additional foster placements, the City stopped referring children to Catholic Social Services after "discovering" that the agency could not certify same-sex couples to be foster parents due to the Catholic Church's teachings about marriage. And the City refused to renew the agency's foster-care contract unless the agency agreed to certify same-sex couples in violation of those teachings.

Although Justices Thomas, Alito, and Gorsuch would have overruled ***Smith***, their view did not garner a majority. Instead, the Court used ***Smith*** to hold unanimously that Philadelphia's actions violated the Free Exercise Clause due to a lack of general applicability. ***Smith*** had clarified that "where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason.'" What's more, said the Court, a "law lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way," citing ***Lukumi***, though a citation to ***Tandon*** would have been equally effective.

The Court said that the City's anti-discrimination clause in its foster-care contract was not generally applicable under these standards. Specifically, the contract incorporated "a system of individual exemptions, made available in this case at the 'sole discretion' of the Commissioner." So, if an agency comprised of minority employees asked for the ability to place children only with minority couples, the Commissioner had the discretion to grant an exception to the anti-discrimination provision. But the Commissioner refused to grant an exception to Catholic Social Services. That was constitutionally problematic because "the inclusion of a formal system of entirely discretionary exceptions … renders the contractual non-discrimination requirement not generally applicable."

Philadelphia objected that the Commissioner had never actually granted an exemption. But the Court said "[t]hat misapprehends the issue." "The creation of a formal mechanism for granting exceptions renders a policy not generally applicable, regardless whether any exceptions have been given." Why? "Because it 'invite[s]' the government to decide which reasons for not complying with the policy are worthy of solicitude."

Turning to the application of strict scrutiny, the Court noted that the City advanced three compelling interests: "maximizing the number of foster parents, protecting the City from liability, and ensuring equal treatment of prospective foster parents and foster children." But the Court rejected those high-level asserted interests, reminding us that "the First Amendment demands a more precise analysis" under ***Gonzales v. O Centro Espírita Beneficente União do Vegetal***, 546 U. S. 418, 430–432 (2006). And once properly narrowed, the Court held the City's asserted interests were insufficient. While "[m]aximizing the number of foster families and minimizing liability are important goals," noted the Court, "the City fails to show that granting [Catholic Social Services] an exception will put those goals at risk." "If anything, including" the agency "in the program seems likely to increase, not reduce, the number of available foster parents." And the City's liability concerns were mere speculation.

– continued

"That leaves the interest of the City in the equal treatment of prospective foster parents and foster children," an interest that the Court did not doubt was "a weighty one." The problem—and here is the blockbuster—was that the "creation of a system of exceptions under the contract undermines the City's contention that its non-discrimination policies can brook no departures," citing ***Lukumi***. In other words, Philadelphia "offer[ed] no compelling reason why it has a particular interest in denying an exception to [Catholic Social Services] while making them available to others."

Though not an overrule of ***Smith***, this was a significant holding. Government officials want the discretion to grant exemptions because it allows them to cure unanticipated problems caused by broad policies. But even the very ***existence*** of such government discretion is now sufficient for a court to strike down the policy altogether if an official declines to exercise that discretion in favor of a religious organization that requests it. This result is likely to have a significant impact on religious-liberty litigation in a broad variety of contexts.

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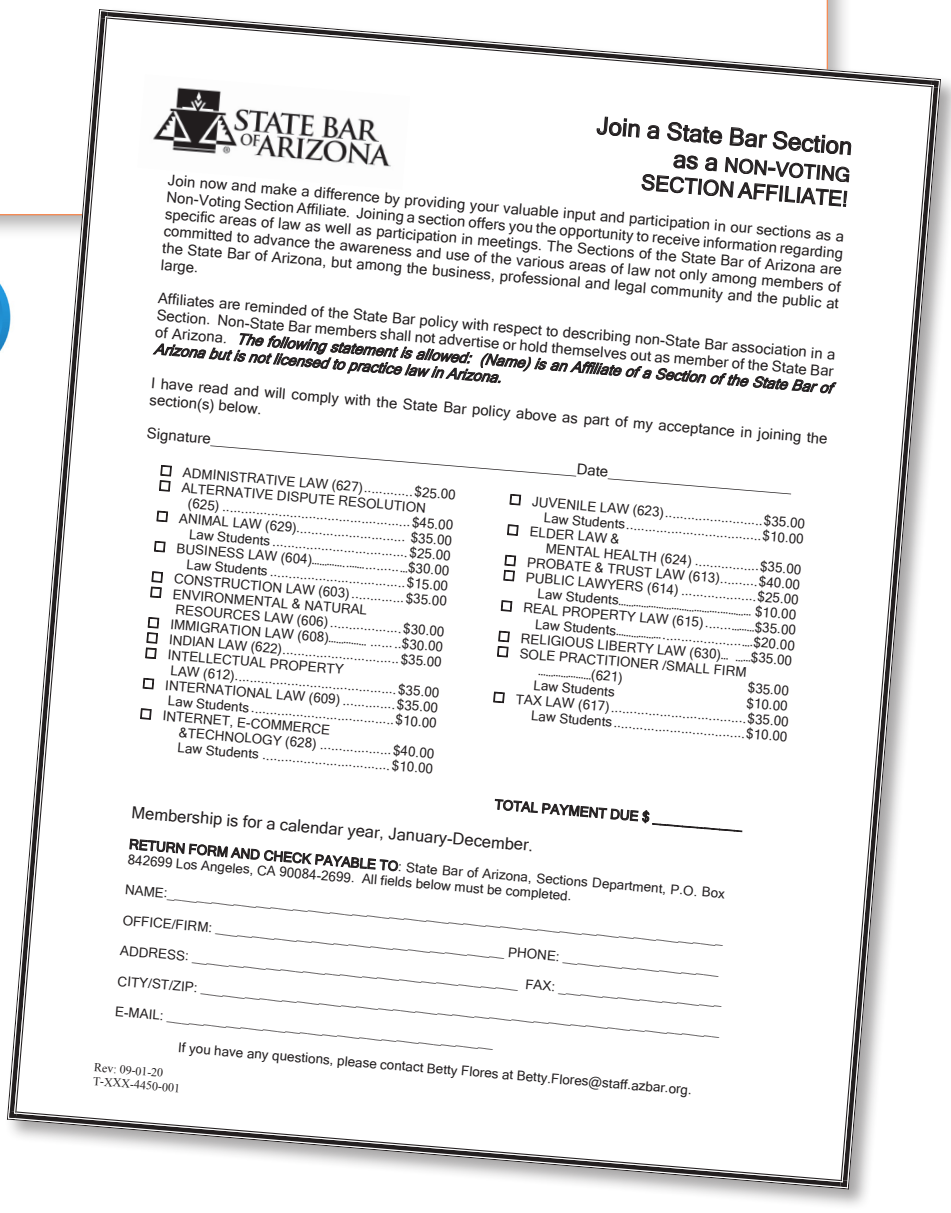

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RESOURCES

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)

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Panel Discussion: High profile religious liberty law issues

Moderator: Robert Erven Brown (Gallagher & Kennedy PA)
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)

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