RELIGIOUS LIBERTY LAW SECTION

STATE BAR OF ARIZONA

Newsletter / DECEMBER 2022

FROM *the* EDITOR

Welcome to the December 2022 issue of the *Religious Liberty Law Section Newsletter*.

We currently live in a divided nation. In the mid-19th Century our nation was also divided – to the extent that we had actually taken up arms against one another. In the midst of that civil war, President Abraham Lincoln wrestled with the meaning of the conflict, and was anxious about its ultimate resolution. He, and others, concluded that the war was not merely the result of political differences, but that it had a transcendent religious import that went to the heart of who we are as a nation and a people. As a result, on March 30, 1863, President Lincoln, at the request of the U.S. Senate, issued a Proclamation, based on his concern that we, as a nation, had turned our backs on God, and calling Americans to a day of humiliation, fasting, and prayer. Americans at the time would not have found anything remarkable about the President's Proclamation. And no one would have thought President Lincoln's expressly religious action inappropriate, let alone unconstitutional. They would have been very familiar with the concept of national sinfulness, repentance, and calls for Divine mercy – which are recurring themes throughout the Bible, with which nearly all Americans would have been intimately familiar. It was a part of the American religious psyche, embedded in both its culture and its law. For that reason, President Lincoln's Proclamation is a good example of how religion, politics, and law were, and have been, historically intertwined in America's national life. Therefore, I have chosen President Lincoln's *Proclamation Appointing a Day of Humiliation, Fasting, and Prayer* as this issue's "Great Moments in Religious Liberty History". Perhaps there is a lesson for us too, at this time of national division, in President Lincoln's Proclamation.

Also, I want to extend a personal note of thanks to John Bursch, who has for the third year in a row, authored the "Religious Liberty Law Supreme Court Round-Up" Feature Article, in which he summarizes and discusses for our readers the opinions of the U.S. Supreme Court handed down over the past term that addressed religious liberty law issues.

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

"We the people of the State of Arizona, grateful to Almighty God for our liberties, do ordain this Constitution."

— Preamble to the Arizona State Constitution

IN *this* ISSUE

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

FROM *the* CHAIR

Religious Liberty and the Public Square

Since this is my first written communication as Section Chair, let me take this opportunity to give thanks to Brad Abramson for his tireless work on these newsletters, which are always a highlight in keeping these issues in front of us, as well his formative work in forming our Section and as Chair of our Nominating Committee these many years.

One of the exciting aspects of our Section membership is the diversity of points of view and various religious groups that our Section represents. As an example of this, I thought I would highlight my involvement in the public square in working with other groups in bringing about changed religious liberty policy in our state.

As many of you know, in *Employment Division of Oregon v. Smith*, Justice Scalia writing the majority opinion, the U.S. Supreme Court rendered a decision removing the strict scrutiny standard required previously to restrict the Constitution's First Amendment free exercise of religion. Instead, he ruled, joined by the majority, that a generally applicable religiously neutral criminal law did not violate the Free Exercise clause of the First Amendment.

As the result of the *Smith* decision, efforts to legislate a remedy culminated in states having to pass Religious Freedom Restoration Acts in order to reinstate the strict scrutiny standard in religious liberty cases. In 1999, with the help of Nathan Sproul, at that time head of the Christian Coalition, we approached the then speaker of the Arizona House, the late Jeff Groscost, and encouraged him to pass the Religious Freedom Restoration Act (hereafter "RFRA") in Arizona. Speaker Groscost, who was a member of the Church of Jesus Christ of Latter-Day Saints, agreed it should be passed and we were able to coalesce a movement of Mormons, 7th Day Adventists and other Protestants, as well as Roman Catholics, to support the passage of RFRA in Arizona. It passed in 1999 and was signed into law by Governor Jane Hull that year.

Steve McFarland, at that time head of the Center for Religious Freedom of the Christian Legal Society, was instrumental in providing technical help in drafting the RFRA bill that finally passed.

Mr. Steve McFarland

CHRISTIAN LEGAL SOCIETY
CENTER FOR LAW AND RELIGIOUS FREEDOM

The 1999 Arizona RFRA is a clear example of the power of the Public Square, where groups from different theological views can come together to enact legislation helpful to the cause of religious freedom.

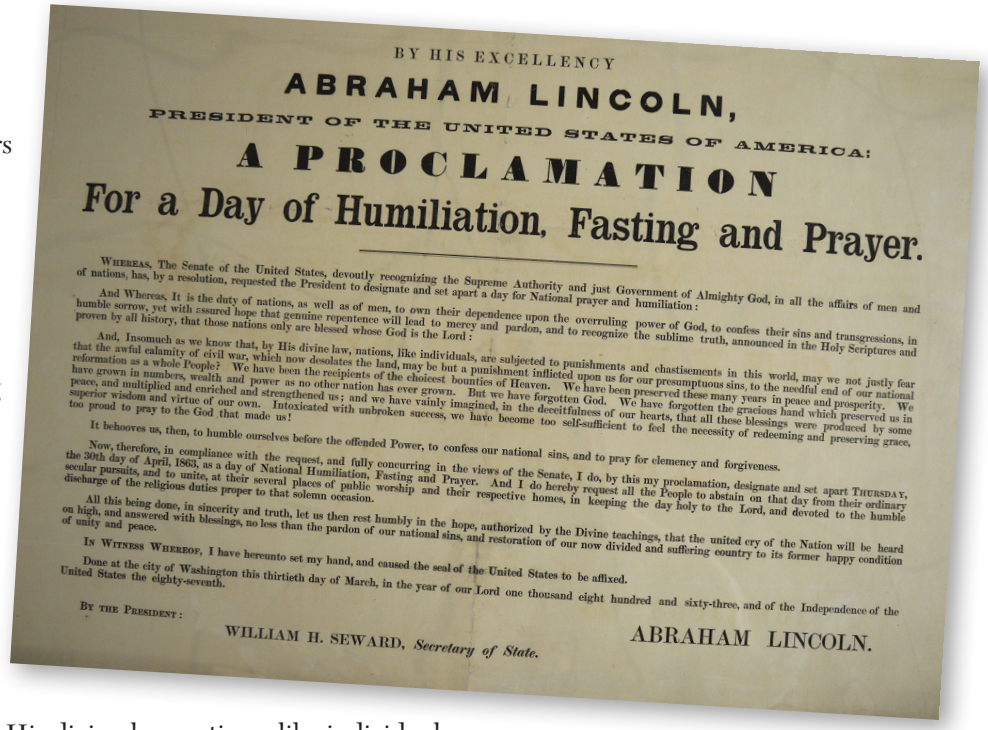
Wallace L. Larson

Wallace L. Larson, Chair

1. 494 U.S. 872 (1990)
2. A.R.S. 41-14493.01. I was not involved in later attempts to amend RFRA vetoed by Governor Jan Brewer.

GREAT MOMENTS *in* RELIGIOUS LIBERTY HISTORY

President Abraham Lincoln's March 30, 1863 Proclamation 97 – Appointing a Day of National Humiliation, Fasting, and Prayer



BY HIS EXCELLENCY

ABRAHAM LINCOLN,

PRESIDENT OF THE UNITED STATES OF AMERICA:

A PROCLAMATION

For a Day of Humiliation, Fasting and Prayer.

WHEREAS, The Senate of the United States, devoutly recognizing the Supreme Authority and just Government of Almighty God, in all the affairs of men and of nations, has, by a resolution, requested the President to designate and set apart a day for National prayer and humiliation:

And Whereas, It is the duty of nations, as well as of men, to own their dependence upon the overruling power of God, to confess their sins and transgressions, in humble sorrow, yet with assured hope that genuine repentence will lead to mercy and pardon, and to recognize the sublime truth, announced in the Holy Scriptures and proven by all history, that those nations only are blessed whose God is the Lord:

And, Insomuch as we know that, by His divine law, nations, like individuals, are subjected to punishments and chastisements in this world, may we not justly fear that the awful calamity of civil war, which now desolates the land, may be but a punishment inflicted upon us for our presumptuous sins, to the needful end of our national reformation as a whole People? We have been the recipients of the choicest bounties of Heaven. We have been preserved these many years in peace and prosperity. We have grown in numbers, wealth and power as no other nation has ever grown. But we have forgotten God. We have forgotten the gracious hand which preserved us in peace, and multiplied and enriched and strengthened us; and we have vainly imagined, in the deceitfulness of our hearts, that all these blessings were produced by some superior wisdom and virtue of our own. Intoxicated with unbroken success, we have become too self-sufficient to feel the necessity of redeeming and preserving grace, too proud to pray to the God that made us!

It behooves us, then, to humble ourselves before the offended Power, to confess our national sins, and to pray for clemency and forgiveness.

Now, therefore, in compliance with the request, and fully concurring in the views of the Senate, I do, by this my proclamation, designate and set apart THURSDAY, the 30th day of April, 1863, as a day of National Humiliation, Fasting and Prayer. And I do hereby request all the People to abstain on that day from their ordinary secular pursuits, and to unite, at their several places of public worship and their respective homes, in keeping the day holy to the Lord, and devoted to the humble discharge of the religious duties proper to that solemn occasion.

All this being done, in sincerity and truth, let us then rest humbly in the hope, authorized by the Divine teachings, that the united cry of the Nation will be heard on high, and answered with blessings, no less than the pardon of our national sins, and restoration of our now divided and suffering country to its former happy condition of unity and peace.

IN WITNESS WHEREOF, I have hereunto set my hand, and caused the seal of the United States to be affixed.

Done at the city of Washington this thirtieth day of March, in the year of our Lord one thousand eight hundred and sixty-three, and of the Independence of the United States the eighty-seventh.

BY THE PRESIDENT:

WILLIAM H. SEWARD, *Secretary of State.*

ABRAHAM LINCOLN.

Whereas, The Senate of the United States, devoutly recognizing the Supreme Authority and just Government of Almighty God, in all the affairs of men and of nations, has, by a resolution, requested the President to designate and set apart a day for National prayer and humiliation;

And Whereas, It is the duty of nations, as well as of men, to own their dependence upon the overruling power of God, to confess their sins and transgressions, in humble sorrow, yet with assured hope that genuine repentance will lead to mercy and pardon, and to recognize the sublime truth, announced in the Holy Scriptures and proven by all history, that those nations only are blessed whose God is the Lord;.

And, Insomuch as we know that, by His divine law, nations, like individuals, are subjected to punishments and chastisements in this world, may we not justly fear that the awful calamity of civil war, which now desolates the land, may be but a punishment inflicted upon us for our presumptuous sins, to the needful end of our national reformation as a whole People? We have been the recipients of the choicest bounties of Heaven. We have been preserved these many years in peace and prosperity. We have grown in numbers, wealth and power as no other nation has ever grown. But we have forgotten God. We have forgotten the gracious hand which preserved us in peace, and multiplied and enriched and strengthened us; and we have vainly imagined, in the deceitfulness of our hearts, that all these blessings were produced by some superior wisdom and virtue of our own. Intoxicated with unbroken success, we have become too self-sufficient to feel the necessity of redeeming and preserving grace, too proud to pray to the God that made us!

It behooves us, then, to humble ourselves before the offended Power, to confess our national sins, and to pray for clemency and forgiveness.

Now, therefore, in compliance with the request, and fully concurring in the views of the Senate, I do, by this my proclamation, designate and set apart THURSDAY, the 30th of April, 1863, as a day of National Humiliation, Fasting and Prayer. And I do hereby request all the People to abstain on that day from their ordinary secular pursuits, and to unite, at their several places of public worship and their respective homes, in keeping the day holy to the Lord, and devoted to the humble discharge of the religious duties proper to that solemn occasion.

All this being done, in sincerity and truth, let us then rest humbly in the hope, authorized by the Divine teachings, that the united cry of the Nation will be heard on high, and answered with blessings, no less than the pardon of our national sins, and restoration of our now divided and suffering country to its former happy condition of unity and peace.

IN WITNESS WHEREOF, I have hereunto set my hand, and caused the seal of the United States to be affixed.

Done at the city of Washington this thirtieth day of March, in the year of our Lord one thousand eight hundred and sixty-three, and of the Independence of the United States the eighty-seventh.

BY THE PRESIDENT: ABRAHAM LINCOLN

SELECTED U.S. CASE LAW *Updates*

CASE 1 ***Freedom From Religion Foundation v. Mack***

49 F.4th 941 (5th Cir. 2022)

THE PRAYER PRACTICES OF A JUSTICE OF THE PEACE DID NOT VIOLATE THE ESTABLISHMENT CLAUSE OF THE U.S. CONSTITUTION.

(*This case – at an earlier stage of the proceedings, where the plaintiffs requested and were denied an injunction of the Justice of the Peace's prayer practices while the litigation proceeded – was previously discussed in the December 2021 issue of the* Religious Liberty Law Section Newsletter.)

In this opinion on the merits from the U.S. Court of Appeals for the 5th Circuit, the court determined that a Justice of the Peace's practice of having chaplains offer prayers before the opening of the court's business did not violate the Establishment Clause of the U.S. Constitution.

The pertinent facts were that Justice of the Peace Mack instituted a prayer practice in his courtroom pursuant to which a notice was posted on the courtroom door and a television screen outside the courtroom that read: "It is the tradition of this court to have a brief opening ceremony that includes a brief invocation by one of our volunteer chaplains … You are not required to be present or participate. The bailiff will notify the lobby when court is in session." In addition, before each court session the bailiff read a script to the audience that stated "[I]t is the tradition of the U.S. Supreme Court, Texas Supreme Court[,] and this Justice Court to have a brief opening ceremony that includes [an] invocation by one of our volunteer chaplains … You are NOT required to be present during the opening ceremonies, and if you like, you may step out of the [courtroom] before the Judge comes in. Your participation will have no effect on your business … or the decisions of this court." When Justice of the Peace Mack entered the courtroom he greeted the audience and began the prayer ceremony, introducing the chaplain and thanking him for his service in the chaplaincy program. Justice of the Peace Mack then permitted the chaplain to speak, and other than asking that the chaplain's remarks be brief, gave the chaplains no instructions. The bailiff then directed the audience members to stand and bow their heads during the prayer. After the prayer ceremony, the bailiff announced to anyone in the lobby that the court was about to start.

The plaintiffs complained that Justice of the Peace Mack could see who was in the audience during the prayers and, therefore, lawyers, parties before the court, and visitors, might assume that their business before the court could be affected by whether or not they attended the prayers. The plaintiffs also complained that most of the chaplains were Protestant Christian chaplains, that most of the prayers were

– continued

Christian prayers, and that some of the prayers were "highly religious," "addressed to the Christian God," and were made in Jesus' name.

The court began its analysis by noting that "It is now well established that public, government-sponsored prayer has long enjoyed a place in American life" and that the question before the court was whether the challenged prayer policy is, from an historical perspective, consistent with a broader tradition of public, government-sponsored prayer – stating that "[o]ur analysis depends on 'original meaning and history,' with particular attention paid to 'historical practices." In that regard, the court identified four categories of historical evidence relevant to its analysis.

The first category of evidence was the behavior of early federal judges and Justices in court-related proceedings. In this regard the court noted "[w]hile riding circuit, early Supreme Court Justices often presided over the opening of new court terms or new grand jury terms [and] in some circuits, though far from all, such proceeding opened with a chaplain-led prayer." And the court observed that the difference between opening court terms, as opposed to ordinary court days, did not provide a basis for distinguishing these practices from that before the court here.

The second category of evidence was the in-court behavior of those judges and Justices. In that regard, the court noted that "the most recognizable item in this category is the Supreme Court's – and our court's – ancient and ongoing tradition of opening court with some version of the cry, 'God save this honorable court!'" And the court refused to write this sort of proclamation off as something other than a prayer, or merely a form of "ceremonial deism," noting that it was a supplication to a divine being and, therefore, a form of prayer – a difference of degree, not of kind.

The third category of evidence was the in-court behavior of non-federal judges. In that regard, the court noted the English practice of accompanying death sentences with the declaration "[M]ay the Almighty God have mercy on your souls," with some American courts having similar practices, as well as evidence of pre-court prayers throughout the 19th and 20th centuries.

And the fourth category of evidence as indirect evidence of the prevalence of court-room prayer. With regard to this category of evidence, the court noted Chief Justice Jay's acknowledgment that it was the "ancient us[e]" and "custom" of some New England states to open court terms with a prayer, as well as an 1835 prayer book which provided a model prayer for courts, as well as legislative bodies.

Based on this evidence, the court concluded that "the evidence establishes that courtroom prayer 'fist within' [citation omitted] and is 'consistent with the tradition."

After having so concluded, the court turned its attention to whether Justice of the Peace Mack's practices were consistent with that tradition, with the plaintiffs having argued that they were not because Justice of the Peace Mack's practices (1) included prayers that are decidedly sectarian, (2) failed to maintain a policy of non-discrimination, and (3) coerced attendees' participation.

With respect to the allegation that the prayers were sectarian, the court stated that is immaterial, stating that "[t]he Supreme Court has instructed that the 'content of prayer is not of concern to judges'" unless "the course and practice over time shows that the invocations denigrate nonbelievers or religious minorities, threatens damnation, or preach conversion." And the court concluded that none of the prayers delivered in Justice of the Peace Mack's courtroom did that.

With respect to whether Justice of the Peace Mack's practices failed to maintain a policy of non-discrimination, the court determined that, because the policy included prayer-eligible chaplains identifying as Protestant, Catholic, Islamic, Buddhist, Hindu, Jewish, and Mormons and that there was no evidence that Justice of the Peace Mack discriminated based on belief, Justice of the Peace Mack's policy satisfied non-discrimination requirements. Further, the court stated that Justice of the Peace Mack had no obligation to actively search for diversity or to try to achieve religious balancing.

Finally, with respect to coercion, the court noted that "[f]ar from being dissuaded from leaving the [court]room during the prayer [or] arriving late," … "attendees are expressly, repeatedly invited to do either of those things." In addition, the court noted there was no evidence that someone's participation or non-participation in the opening prayers affected their business before the court. Thus, the court concluded, Justice of the Peace "Mack's practice is noncoercive."

In conclusion, the court found that the history, character, and context of Justice of the Peace Mack's prayer ceremony "show that it is no establishment [of religion] at all."

Judge Jolly concurred in part and dissented in part.

CASE 2 *West v. Radtke, Warden, et al.*

48 F.4th 836 (7th Cir. 2022)

A MUSLIM PRISONER WITH A SINCERE RELIGIOUS BELIEF AGAINST HAVING A MEMBER OF THE OPPOSITE SEX OBSERVE HIS NAKED BODY IS ENTITLED, UNDER RLUIPA, TO AN ACCOMMODATION FROM HAVING A PRISON OFFICER WHO IS A TRANSGENDER MAN CONDUCT OR OBSERVE A STRIP SEARCH OF THE PRISONER.

In this unanimous decision of the United States Court of

– continued

Appeals for the 7th Circuit, a Muslim prisoner objected to a transgender man (a biological female identifying as a man) strip searching him because being strip searched by a woman violated the moral tenets of his faith, which prohibited him from exposing his body to a woman who was not his wife. When the prisoner objected to having the transgender man participate in the strip search, the prison refused to accommodate the prisoner on the ground that "[T]he officer in question is a male" and {T]his person is a male."

The court analyzed the case under RLUIPA, the Religious Land Use and Institutionalized Persons Act, which the court summarized as providing that "a government may not substantially burden a person's religious exercise unless doing so is the least restrictive means to further a compelling state interest" and "generously protects the religious exercise of those confined in penal institutions." The Court went on to state that "a substantial burden on religious exercise occurs when a prison attaches some meaningfully negative consequence to an inmate's religious exercise, forcing him to choose between violating his religion and incurring that negative consequence." And by forcing him to either violate his religious duties by submitting to cross-sex strip searches or be disciplined, the prison substantially burdened the prisoner's religious exercise.

Turning to the "compelling interest" prong of RLUIPA's test, the court considered the prison's two justifications for its cross-sex strip-search policy – (1) that granting an accommodation to the prisoner would violate the equal-employment rights of the prison's transgender employees and (2) that granting an accommodation to the prisoner would violate the Equal Protection Clause of the U.S. Constitution. The court rejected both.

With respect to the first argument – that granting an accommodation to the prisoner would violate the equal-employment rights of the prison's transgender employees – the court acknowledged that complying with Title VII is a compelling governmental interest and that, under the U.S. Supreme Court's *Bostock v. Clayton County* decision transgender-status discrimination amounts to sex-based discrimination for Title VII purposes. However, the court concluded that the prison offered no argument that exempting the prisoner from cross-sex strip searches would inflict an adverse employment action on the prison's transgender employees and that, even if it did, "Title VII permits sex-based distinctions in employment where sex 'is a bona fide occupational qualification reasonably necessary to the normal operation of [a] particular business or enterprise." With respect to the BFOQ issue, the court noted that "[t]he distinctive needs of prisons … often allow sex-based adjustments to employment duties," and that "[s]ex is a bona fide occupational qualification for performing strip searches of prisoners with sincere religious objections to cross-sex strip searches." The court went on to note that "Courts have long recognized that sex is a trait relevant to inmate privacy" and that "'While all forced observations or inspections of the naked body implicate a privacy concern, it is "generally considered a greater invasion to have one's naked body viewed by a member of the opposite sex'" and that "[t]hat 'basic fact of human behavior' sometimes allows or even requires sex-based adjustments to prison guard duties."

With respect to the prison's argument that there was no "cross-sex" body search in this case because the prison employee conducting the search was "a transgender man" – the court stated that "a prisoner's right to be free from highly invasive intrusions on bodily privacy by prison employees of the opposite sex – whether on religious or privacy grounds – does not change based on a guard's transgender status."

Turning to the prison's Equal Protection Clause argument, the court observed that "[p]hysical differences between men and women … are enduring," and that the prisoner's "request for an exemption from cross-sex strip searches is substantially related to the important governmental objective of respecting the RLUIPA and constitutional-privacy rights of prison inmates." "Indeed" the court noted – "the prison already prohibits female guards from strip-searching male prisoners except in exigent circumstances. If that is constitutionally permissible – and it is – so too is [the prisoner's] requested accommodation" here.

In conclusion, the court determined that "the prison will not violate any employee's Title VII or equal-protection rights by exempting [the prisoner] from cross-sex strips[sic] searches."

CASE 3 *Johnson v. Baker*

23 F.4th 1209 (9th Cir. 2022)

A PRISON REGULATION BARRING A MUSLIM PRISONER'S ABILITY TO USE SCENTED OIL IN HIS PRAYER PRACTICES – AS REQUIRED BY HIS RELIGIOUS BELIEFS – VIOLATED THE PRISONER'S RELIGIOUS EXERCISE RIGHTS UNDER RLUIPA.

In this case a Nevada prison refused to allow the Plaintiff prisoner to use scented, purified, and blessed oil to anoint himself in his five daily Muslim prayers, unless the prisoner was in the prison chapel, which prevented the prisoner from using scented oil in 34 of his 35 weekly prayers. The prison's explanation for its policy was that scented oil could mask the odor of contraband, such as drugs.

– continued

The prisoner sued under RLUIPA.

In analyzing the case, the court first determined that Nevada's scented oil regulation implicated the prisoner's religious exercise because RLUIPA protects "'any exercise of religion, whether or not compelled by, or central to, a system of religious belief.'" The court noted that "[b]y the plain language of RLUIPA, we are forbidden from evaluating the centrality of a religious practice or belief … Instead, we may only scrutinize the sincerity of the prisoner's beliefs." For that reason, the court rejected Nevada's contention that the use of scented oil was not really an important aspect of the prisoner's religious practice. The court also rejected Nevada's contention that, in order for the prisoner's belie fs about the use of scented oil in his prayer to be valid, the prisoner must be able to point to textual support or oral history proving that Muhammed used scented oil in prayer. As the court noted, "[i]t makes no difference that a religious belief is 'idiosyncratic' or not 'shared by all of the members of a religious sect.' If the belief is sincerely held, it falls within the protection of RLUIPA."

The court then concluded that Nevada's scented oil prohibition substantially burdened the prisoner's religious exercise because the prohibition prohibited the prisoner from using scented oil in accordance with the prisoner's beliefs, for 34 out of his 35 weekly prayers. The court rejected Nevada's argument that, because the prisoner could use unscented oil in his prayer practices, the scented oil prohibition did not substantially burden the prisoner's religious exercise. As the court stated, the prisoner's "access to unscented oil is immaterial when his faith requires scented oil."

The court then turned its attention to whether Nevada's scented oil prohibition furthered a compelling governmental interest and was the least restrictive means of serving that interest.

Although the court recognized that prison security is a compelling state interest, the court noted that a general interest in prison security is insufficient. Instead, "RLUIPA requires a 'more focused' inquiry that looks at the challenged regulation's application to 'the particular claimant whose sincere exercise of religion is being substantially burdened.'" On that score, the court found that the state failed to provide evidence of what amount of scented oil would be necessary to mask the smell of contraband. The court also noted that Nevada's scented oil proscription was undermined by the fact that prisoners were allowed to keep many other sorts of scented products in their cells, "such as Irish Spring soap, Tide detergent, Bounce dryer sheets, cocoa butter lotion, deodorants, and cosmetics like nail polish," which all have powerful scents. This, the court noted, was a "sure sign that [the state] is not using the least restrictive means of furthering its security interest" because "when a prison's 'proffered objectives are not pursued with respect to analogous non-religious conduct,' it 'suggests that those interests could be achieved by narrower ordinances that burdened religion to a far lesser degree."

In conclusion, the court held that Nevada's scented oil prohibition violated RLUIPA.

FEATURE ARTICLE

2022 Supreme Court Religious Liberty Law Round-Up

By John J. Bursch

Religious liberty and free-speech rights are on an incredible run at the U.S. Supreme Court. The 2019 Term brought us *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246 (2020), *Little Sisters of the Poor v. Pennsylvania*, 140 S. Ct. 2367 (2020), and *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020). The 2020 Term followed that up with *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 62 (2020), *South Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716 (2021), *Tandon v. Newsom*, 141 S. Ct. 1294 (2021), and *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021). Could the 2021 Term possibly top the previous two Terms? The answer is an unqualified yes, with four new decisions that continue to show the Court majority's strong conviction for upholding religious-liberty rights. Let's dive in.

1 The Court's 2021 Term religious-liberty cases began with *Ramirez v. Collier*, 142 S. Ct. 1265 (2022)[1]

The case came to the Court on an emergency application for an injunction, seeking to stop the State of Texas from executing death-row inmate John Ramirez unless he was allowed to have his pastor present in the execution chamber, laying hands on him and praying for him. Mr. Ramirez claimed that the prison's contrary policy violated his rights under RLUIPA, the Religious Land Use and Institutionalized Persons Act. The Court stayed the execution and immediately granted emergency review, ultimately issuing a unanimous opinion, authored by Chief Justice Robert, that vindicated Mr. Ramirez's rights.

Congress enacted RLIUPA and its more well-known companion statute, the Religious Freedom Restoration Act, after the Supreme Court's ill-fated decisions in *Employment Division v. Smith* and *City of Boerne v. Flores*. Relevant here, RLUIPA provides that "[n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution"—including those held in state prisons—"even if the burden results from a rule of general applicability, unless the government

1. Alliance Defending Freedom filed an amicus brief in support of Mr. Ramirez.

– continued

ABOUT THE AUTHOR

JOHN J. BURSCH John Bursch is Senior Counsel and Vice-President of Appellate Advocacy with Alliance Defending Freedom.

He also owns and operates his own law firm, Bursch Law, PLLC. He has argued 12 cases before the U.S. Supreme Court and more than 30 cases before state supreme courts. He 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.

demonstrates that imposition of the burden on that person" (1) furthers a compelling government interest, and (2) is the least restrictive means of doing so. 42. U.S.C. § 2000cc-1(a). In other words, after a prisoner shows that a prison policy implicates religious exercise and substantially burdens a sincere religious belief, then the government must satisfy strict scrutiny for its policy to be sustained.

After first concluding that Mr. Ramirez was likely to succeed in proving that the prison policy substantially burdened his sincere religious belief, the Court turned to the strict-scrutiny analysis and held that the Texas prison officials could not satisfy it with respect to the audible prayer or the laying on of hands. Regarding audible prayer, the Court began by pointing to the "rich history of clerical prayer at the time of a prisoner's execution, dating back well before the founding of our nation." 142 S. Ct. at 1278. That practice continues today, with the Federal Bureau of Prisons allowing "religious advisors to speak or pray audibly with inmates during at least six federal executions" in 2020 and 2021 alone. *Id.* at 1279.

The Court acknowledged the compelling nature of the prison officials' asserted interests in monitoring the execution and "responding effectively during any potential emergency." *Id.* But the prison officials failed to show that their no-prayer policy was the least restrictive means of furthering those interests, particularly when the federal government and other state jurisdictions allow speech during executions without issue. *Id.* Similarly, while conceding that prison officials had a compelling interest in ensuring that the audible prayer did not further traumatize the victim's family (assuming they were present), the Court said there was no indication that Mr. Ramirez's pastor would cause such sorts of disruption, and there were less restrictive ways to "handle any concerns," including "limiting the volume of any prayer" and requiring spiritual advisors to agree, on penalty of removal from the execution chamber, to follow any rules imposed by prison officials. *Id.* at 1280.

Turning to the laying on of hands, the Court noted that the prison officials' goals in security, preventing unnecessary suffering, and avoiding further emotional trauma to victim family members were all "commendable." *Id.* at 1280. But again, the Court concluded that the officials failed to show that less restrictive means could not accomplish these goals, emphasizing that the burden of proof was on the government. *Id.* at 1281. Accordingly, an injunction was appropriate.

For religious-liberty practitioners, there are three important takeaways. First, RLUIPA's strict-scrutiny standard is indeed strict, and it requires government officials to offer more than mere speculation and argument to sustain a policy that substantially infringes sincere religious beliefs. Second, once a plaintiff carries the initial burden of proving that a policy substantially infringes a sincere religious belief, the burden shifts to the government to prove why the policy satisfies RLUIPA. Third, the courts must look to history to determine the contours of religious-liberty rights.

❷ In a religious-liberty adjacent decision, the Court next upheld the free-speech rights of a Christian organization in *Shurtleff v. City of Boston*, 142 S. Ct. 15832 (2022)[2]

The controversy arose out of the City of Boston's practice of occasionally opening up one of the flagpoles near its city hall to outside groups. Between 2005 and 2017, the City approved roughly 50 unique flags, raised at 284 ceremonies. and had never once denied a request—until Harold Shurtleff, the director of Camp Constitution, asked to hold a flag raising event that included a flag composed of "a red cross on a blue field against a white background." 142 S. Ct. at 1588. The City expressed concern that flying such a flag "could violate the Constitution's Establishment Clause." *Id.*

In a unanimous opinion authored by Justice Breyer, the Court held that the City of Boston violated the First Amendment's Free Speech Clause. And the key to reaching that conclusion was to determine whether the flag flying constituted government speech or the expression of private speakers' views. As an analytical framework, Justice Bryer set forth a "holistic inquiry" centered around three factors: "the history of the expression at issue; the public's likely perception as to who (the government or a private person) is speaking; and the extent to which the government has actively shaped or controlled the expression." *Id.* at 1589–90.

Justice Breyer concluded that this holistic inquiry generally favored Camp Constitution and Mr. Shurtleff. Because flags flown over government buildings frequently speak a government message, "history favors Boston." *Id.* at 1591. As for public perception, "even if the public would ordinarily associate a flag's message with Boston, that is not necessarily true for the flags at issue here," so this factor "does not resolve whether Boston conveyed a *city* message with these flags." *Id.* (emphasis added).

But the "most salient feature of this case," said Justice Bryer, is that Boston did not actively shape or control the expression of the flags it allowed to fly: "Boston could easily have done more to make clear it wished to speak for itself by raising flags," but its "lack of meaningful involvement in the selection of flags or the crafting of their messages" led the court "to classify the flag raisings as private, not government,

2. Alliance Defending Freedom filed an amicus brief in support of Mr. Shurtleff.

– continued

speech." *Id.* at 1592–93. Those facts were dispositive.

In a concurrence, Justice Alito, joined by Justices Thomas and Gorsuch, rejected a holistic approach, explaining that by treating the three factors as a test, the Court "obscures the real question in government-speech cases: whether the government is *speaking* instead of regulating private expression. *Id.* at 1595 (Alito, J., concurring). In his view, "government speech occurs if—but only if—a government purposefully expresses a message of its own through persons authorized to speak on its behalf, and in doing so, does not rely on a means that abridges private speech." *Id.* at 1597. Having created a forum with virtually no "policy restricting access," Justice Alito concluded that the raising of a private flag was private speech, not government speech, and the City was wrong to reject Mr. Shurtleff's application "on account of the religious viewpoint he intended to express." *Id.* at 1603.

3 Completing a free-exercise trilogy, the Court struck down a government school-funding scheme in *Carson v. Makin*, 142 S. Ct. 1987 (2022).[3]

In 2017, the Supreme Court held that it violated the Free Exercise Clause for Missouri to apply its so-called Blaine Amendment to exclude religious schools from the government's playground-resurfacing reimbursement scheme. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017). Two years later, in *Espinoza*, the Court applied *Trinity Lutheran* and held that the Free Exercise Clause also prohibited Montana from applying a Blaine Amendment to exclude religious schools from a scholarship fund that provided state tax benefits for donors. That should have made the *Carson* case easy, since Maine was imposing a "nonsectarian" requirement for participation in the State's tuition assistance program.

Think again. Maine defended its exclusion of religious schools by arguing that *Trinity Lutheran* and *Espinoza* only applied to government discrimination based on religious *status*. Maine's interest, its officials said, was in preventing public dollars from being put to religious *uses*. So a school that is religious in name only could participate, but a school that actually practiced religion by incorporating religion into the school curriculum was not.

In a 6-3 opinion authored by Chief Justice Roberts, the Court emphatically rejected the status-use distinction. The Court explained that *Trinity Lutheran* and *Espinoza* "never suggested that use-based discrimination is any less offensive to the Free Exercise Clause." 142 S. Ct. at 2001. And "[a]ny attempt to give effect to such a distinction by scrutinizing whether and how a religious school pursues its educational mission would also raise serious concerns about state entanglement with religion and denominational favoritism." *Id.* "In short, the prohibition on status-based discrimination under the Free Exercise Clause is not a permission to engage in use-based discrimination." *Id.* Full stop.

4 And that brings us to the Court's most significant religious-liberty case, *Kennedy v. Bremerton*, 142 S. Ct. 2407 (2022), which involved a high school football coach who was suspended for kneeling at midfield after games to offer a quiet, personal prayer.[4]

The reason? Like the City of Boston in the *Shurtleff* case, school officials thought that allowing Coach Kennedy to pray after games could lead a reasonable observer to conclude that the school endorsed Coach Kennedy's religious beliefs. The Court used the case not only to affirm the right of public employees to engage in private prayer when not engaged in work duties, it also effectively overturned *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and its progeny, a precedent that government officials had long used to perpetuate policies that discriminated against religious individuals and organizations.

Like many football coaches and players, Coach Kennedy had a practice of giving "thanks through prayer on the playing field" at the end of each game. He did so by "taking a knee at the 50-yard line and praying 'quiet[ly]' for 'approximately 30 seconds.'" 142 S. Ct. at 2416. At first, Coach Kennedy prayed alone. But then some of his players asked if they could pray alongside him. He told them, "This is a free country. You can do what you want." *Id.* Soon, most of the team joined him after at least some games. This practice continued without issue for more than seven years until an employee from another school made a positive comment about it to Bremerton's principal. Then the District acted quickly to shut the prayers down, telling Coach Kennedy that he was forbidden "from engaging in 'any overt actions' that could 'appea[r] to a reasonable observer to endorse … prayer … while he is on duty as a District-paid coach." *Id.* at 2416–17. This directive would have prevented Coach Kennedy from even bowing his head and saying a short prayer before a meal in the school cafeteria.

Applying the Free Exercise Clause, the Court, in a 6-3 opinion authored by Justice Gorsuch, held that the District's policy was "neither neutral nor generally applicable." *Id.* at 2422. "By its own admission, the District sought to restrict Mr. Kennedy's actions at least in part because of their religious character." *Id.* And the "District permitted other

3. Alliance Defending Freedom filed an amicus brief in support of the Carsons and successfully litigated the *Trinity Lutheran Church* decision discussed herein.
4. Alliance Defending Freedom filed an amicus brief in support of Coach Kennedy and successfully litigated the *Town of Greece* decision referenced herein.

– continued

members of the coaching staff to forgo supervising students briefly after the game to do things like visit with friends or take personal phone calls." *Id.* at 2423. Accordingly, "any sort of postgame supervisory requirement was not applied in an evenhanded, across-the-board way." *Id.* The Court also agreed that Coach Kennedy's speech "was private speech, not government speech," and that the District violated his free-speech rights as well. *Id.* at 2423–32.

In so ruling, the Court rejected the District's defense based on *Lemon*, holding that the Court had "long ago abandoned" both the decision "and its endorsement test offshoot." *Id.* at 2427. "In place of *Lemon* and the endorsement test, this Court has instructed that the Establishment Clause must be interpreted by 'reference to historical practices and understandings.'" *Id.* at 2428 (quoting *Town of Greece, N.Y. v. Galloway*, 572 U.S. 565 (2014)).

The Court concluded by reaffirming that "[r]espect for religious expressions is indispensable to life in a free and diverse Republic—whether those expressions take place in a sanctuary or on a field, and whether they manifest through the spoken word or a bowed head." *Id.* at 2432–33. And with the *Lemon* test finally relegated to the dustbin of history, the path to preserving religious freedom for people of faith is undeniably clearer.

NEWS *and* ANNOUNCEMENTS

connect

JOIN THE SECTION

Sections

The State Bar of Arizona has **30 sections** organized around specific areas of law and practice. Sections sponsor conferences, educational programs, publish newsletters, monitor legislation, and make recommendations to the State Bar Board of Governors.

We recognize how important networking and communication opportunities are to Section members, and the desire to share information throughout the membership of the Section. Create your online community profile to connect, engage, share best practices, and ask for advice from other Section practitioners in the members-only environment.

Section Member? Click on the logo below to create your community account.

Interested in joining a section? Join now to start networking and collaborating with members in your practice area!

STATE BAR OF ARIZONA ONLINE COMMUNITY

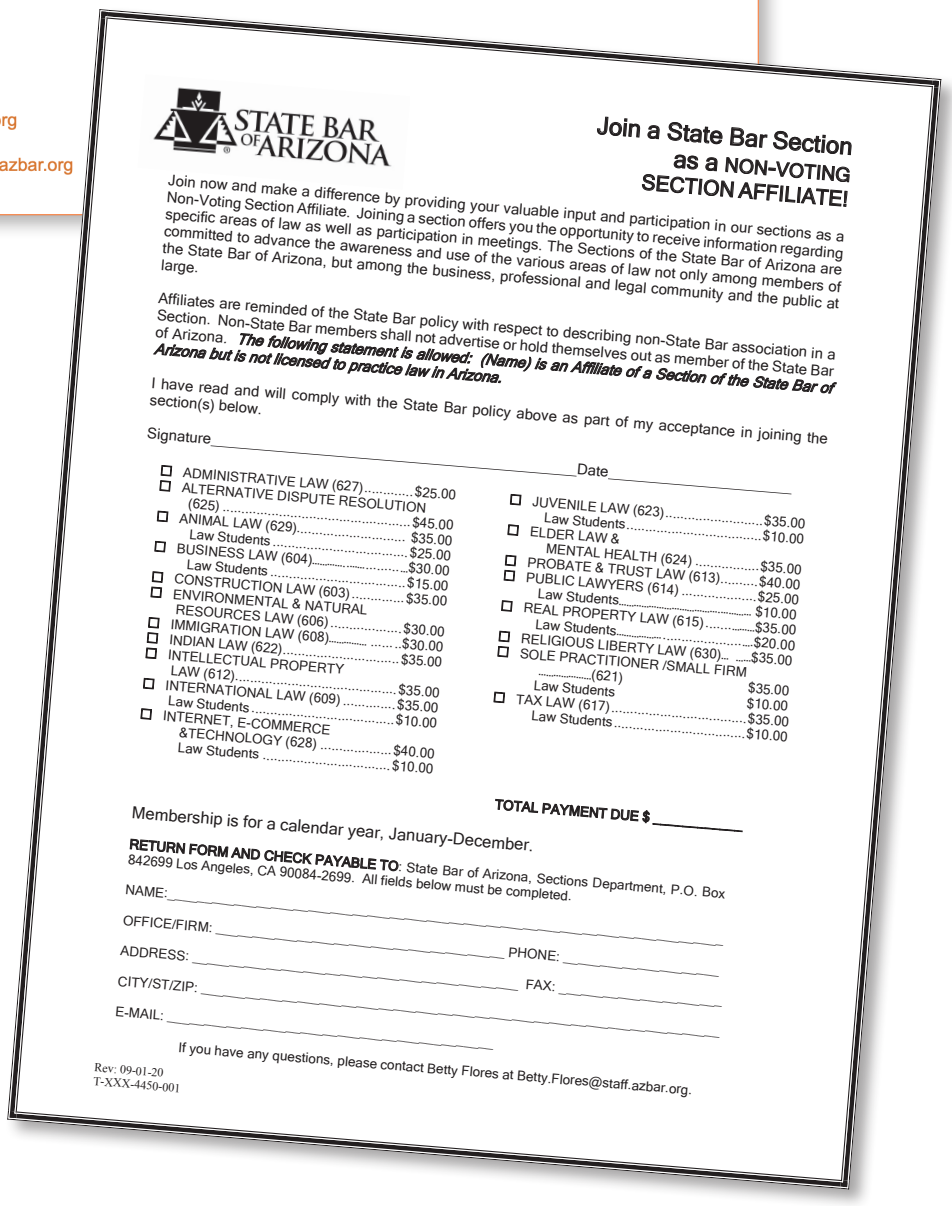
SBA Sections Administrators

Betty Flores - 602.340.7215, betty.flores@staff.azbar.org

Wendell Chin - 520.623.9944, wendell.chin@staff.azbar.org

Sarah Schneider - 602.340.7304, sarah.schneider@staff.azbar.org

JOIN NOW



STATE BAR OF ARIZONA

Join a State Bar Section as a NON-VOTING SECTION AFFILIATE!

Join now and make a difference by providing your valuable input and participation in our sections as a Non-Voting Section Affiliate. Joining a section offers you the opportunity to receive information regarding specific areas of law as well as participation in meetings. The Sections of the State Bar of Arizona are committed to advance the awareness and use of the various areas of law not only among members of the State Bar of Arizona, but among the business, professional and legal community and the public at large.

Affiliates are reminded of the State Bar policy with respect to describing non-State Bar association in a Section. Non-State Bar members shall not advertise or hold themselves out as member of the State Bar of Arizona. ***The following statement is allowed: (Name) is an Affiliate of a Section of the State Bar of Arizona but is not licensed to practice law in Arizona.***

I have read and will comply with the State Bar policy above as part of my acceptance in joining the section(s) below.

Signature_____ Date_____

- ☐ ADMINISTRATIVE LAW (627).....$25.00
- ☐ ALTERNATIVE DISPUTE RESOLUTION (625).....$45.00
- ☐ ANIMAL LAW (629).....$35.00
  - Law Students.....$25.00
- ☐ BUSINESS LAW (604).....$30.00
  - Law Students.....$15.00
- ☐ CONSTRUCTION LAW (603).....$35.00
- ☐ ENVIRONMENTAL & NATURAL RESOURCES LAW (606).....$30.00
- ☐ IMMIGRATION LAW (608).....$30.00
- ☐ INDIAN LAW (622).....$35.00
- ☐ INTELLECTUAL PROPERTY LAW (612).....$35.00
- ☐ INTERNATIONAL LAW (609).....$35.00
  - Law Students.....$10.00
- ☐ INTERNET, E-COMMERCE &TECHNOLOGY (628).....$40.00
  - Law Students.....$10.00
- ☐ JUVENILE LAW (623).....$35.00
  - Law Students.....$10.00
- ☐ ELDER LAW & MENTAL HEALTH (624).....$35.00
- ☐ PROBATE & TRUST LAW (613).....$40.00
  - Law Students.....$25.00
- ☐ PUBLIC LAWYERS (614).....$10.00
  - Law Students.....$35.00
- ☐ REAL PROPERTY LAW (615).....$20.00
- ☐ RELIGIOUS LIBERTY LAW (630).....$35.00
- ☐ SOLE PRACTITIONER /SMALL FIRM (621).....$35.00
  - Law Students.....$10.00
- ☐ TAX LAW (617).....$35.00
  - Law Students.....$10.00

TOTAL PAYMENT DUE $_____

Membership is for a calendar year, January-December.

RETURN FORM AND CHECK PAYABLE TO: State Bar of Arizona, Sections Department, P.O. Box 842699 Los Angeles, CA 90084-2699. All fields below must be completed.

NAME:_____

OFFICE/FIRM:_____ PHONE:_____

ADDRESS:_____ FAX:_____

CITY/ST/ZIP:_____

E-MAIL:_____

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

Rev: 09-01-20
T-XXX-4450-001

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

EXECUTIVE COUNCIL

CHAIR
Mr. Wallace L. Larson
Carson Messinger PLLC
wlarson@carsonlawfirm.com

VICE-CHAIR
Mr. Bradley L. Hahn
Bradley L. Hahn PC
brad@bradleylhahn.com

SECRETARY/BUDGET OFFICER
Mr. Raj N. Gangadean
Spencer Fane LLP
rgangadean@spencerfane.com

IMMEDIATE PAST CHAIR
Mr. Mark A. Winsor
Winsor Law Group
Mark@WinsorLaw.com

MEMBER AT LARGE
Ms. Katherine L. Anderson
Alliance Defending Freedom
kanderson@adflegal.org

MEMBER AT LARGE
Mr. David P. Brooks
Brooks & Affiliates, PLC
dbrooks@brooksandaffiliates.com

MEMBER AT LARGE
Mr. Robert Erven Brown
Church and Ministry Law Group
Schmitt Schneck Even & Williams PC
Bob@ChurchLaw.US

MEMBER AT LARGE
Hon. Francisca J. Cota
Phoenix Municipal Court
francisca.cota@phoenix.gov

MEMBER AT LARGE
Ms. Roberta S. Livesay
Carden Livesay, Ltd.
roberta@cardenlivesay.com

MEMBER AT LARGE
Ms. Abigail J. Mills
Schmitt Schneck Even & Williams PC
Abigail@azbarristers.com

MEMBER AT LARGE
Mr. Andrew J. Petersen
Humphrey & Petersen PC
apetersen@humphreyandpetersen.com

MEMBER AT LARGE
Mr. Joseph P. Infranco
Provident Law
jpin73437@gmail.com

MEMBER AT LARGE
Mr. Bradley J. Pew
Fennemore Craig PC
BPew@fenneorelaw.com

MEMBER AT LARGE
Mr. Brian M. Bergin
Bergin, Frakes, Smalley & Oberholtzer, PLLC
bbergin@bfsolaw.com

SECTION ADMINISTRATOR
Ms. Mona Fontes
State Bar of Arizona
mona.fontes@staff.azbar.org