RELIGIOUS LIBERTY LAW SECTION

STATE BAR OF ARIZONA

Newsletter / JUNE 2019

FROM *the* EDITOR

Welcome to the June 2019 issue of the *Religious Liberty Law Section Newsletter*.

The first half of 2019 was an exciting time for religious liberty law. The Arizona Supreme Court heard oral arguments in *Brush & Nib Studios v. City of Phoenix*, addressing the intersection of the constitutional right of religious exercise and antidiscrimination laws. And the U.S. Supreme Court heard oral argument in *American Legion v. American Humanist Association*, addressing the issue of whether a veterans monument in the shape of a cross on public property violates the Establishment Clause of the First Amendment. The decisions in those cases were not handed down in time to address them in this issue of the *Religious Liberty Law Section Newsletter*, but will certainly be discussed in the next issue. In addition, as can be seen from the 'Selected Case Law Updates' included in this issue, there has been a lot of other activity on the religious liberty law front as well.

Also, we are pleased to introduce in this issue of the *Religious Liberty Law Section Newsletter* the "Great Moments in Religious Liberty History" series, in which we will present events, documents, proclamations, and addresses that illustrate the existence and importance of religious faith and religious liberty in the history of the United States and the world. The first document presented in this issue is President George Washington's Thanksgiving Proclamation of 1789, which George Washington issued during his first year serving as the first President of the United States under the U.S. Constitution. The second is an excerpt from Washington's Farewell Address, which he issued as he departed the Presidency. We hope this series serves to remind us all of the essentiality of religious faith – protected by religious liberty law – in America.

I also want to extend a personal thank you to Alan Reinach, the author of this issue's Feature Article – *Damage Caps in Religious Discrimination Employment Cases – The Illusory $21.5 Million Dollar Verdict* – in which he addresses a little known, but very significant, wrinkle in the law governing damages in religious discrimination employment cases. Thank you Alan.

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

"The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right."

— James Madison

IN *this* ISSUE

FROM *the* CHAIR

As the Religious Liberty Law Section completes its third year of existence – and my term as Chair of the Section comes to an end – I am happy to report that the Section continues to grow, both in terms of membership and in the depth and quality of its programming.

The Section has important work to do, as our society continues to struggle with protecting and preserving the historic constitutional right of religious liberty through law. As it does so, the legal profession is in a unique position to help its fellow citizens understand the origin, rationale, function, and significance of this fundamental freedom. Establishing a forum for a reasoned and thoughtful examination of this area of the law – and providing Arizona lawyers with the knowledge, information, and background to competently engage in it – is a critical purpose of the Religious Liberty Law Section.

Being a member of the Baby Boomer generation, I feel compelled, in one of my last acts as Chair of the Section, to highlight what I consider to be an important issue – preserving the historical record of how fragile these fundamental liberties – including religious liberty – are and how important it is for us to protect them.

Due to our temporal proximity to World War II – as well as having grown up during the post-war proliferation of tyrannical states, gulags, the Iron Curtain, and the Cold War – we Baby Boomers gained a visceral appreciation of core freedoms, such as freedom of speech, freedom of association, and the free exercise of religion, because so many around the world were deprived of these freedoms – not to mention their very lives – in the second half of the 20th Century.

More recent generations, not having experienced many of the horrors of the mid to late 20th Century, do not necessarily share this appreciation of fundamental freedoms, and I'm afraid may not appreciate how easily they can be lost. For them, Pearl Harbor may just be an interesting place to visit. Most of them did not hear firsthand accounts from sailors and airmen who fought there, whose shipmates died there, and whose parents, brothers, and sisters are buried in national cemeteries as casualties of a war so clearly fought for the establishment and preservation of our fundamental freedoms.

Indeed, the History News Network reported on January 27, 2019 that *"Ignorance about the Holocaust is growing, particularly among young people. In the United States, a 2018 survey showed that 66% of millennials could not identify what the Auschwitz concentration and death camp was… The concern isn't only that the Holocaust is fading from memory, it's that the lessons that can be applied to the ongoing human rights abuses and threats to democracy are also being lost."* If younger generations no longer know about the Holocaust, I feel quite confident in concluding that they don't know about the Soviet gulags, the Berlin Wall, the Chinese Cultural Revolution, or the atrocities of the Khmer Rouge, either.

The hearts and minds of the next generation have been shaped by other historic and cultural forces, which deny as absolute truth the existential threats to the freedoms we enjoy. Taking these freedoms for granted insures that we will eventually lose them.

So before Boomers, like me, fade into the sunset, forums – such as our Section provide – must host discussions of these constitutional and human rights priorities, including the fundamental liberties secured and paid for – as Winston Churchill stated – in "blood, toil, tears, and sweat" by those who came before us.

There always have been – and always will be – those who seek to deprive us of these fundamental freedoms. And it falls to us, as members of the legal profession, to protect and preserve these freedoms from all attacks – from whomever they may come, from wherever they may come, whenever they may come, and in whatever guise they may come. The fundamental human and constitutional right of free exercise of religion must not be surrendered to those who want to drive religious expression from the public square because they find those expressions offensive, intolerable, or outdated. I have faith that the legal profession will continue to be what it always has been – the protector of our fundamental liberties, including religious liberty. Each of us did take an oath, after all, to support the Constitutions of the State of Arizona and of the United States when we accepted the privileges afforded by our Arizona Bar license.

Finally, thank you for the privilege of having served as the third Chair of this important Section. I would be remiss if I did not thank the State Bar of Arizona staff for their tireless and consistent support in helping the Section operate during my Chairmanship. Their efforts were invaluable in helping the Section grow and improve. Thank you.

Robert E. Brown

Robert Erven Brown, Chair

GREAT MOMENTS *in* RELIGIOUS LIBERTY HISTORY

Thanksgiving Proclamation of 1789 – By the President of the United States of America, a Proclamation.

Whereas it is the duty of all Nations to acknowledge the providence of Almighty God, to obey his will, to be grateful for his benefits, and humbly to implore his protection and favor – and whereas both Houses of Congress have by their joint Committee requested me to recommend to the People of the United States a day of public thanksgiving and prayer to be observed by acknowledging with grateful hearts the many signal favors of Almighty God especially by affording them an opportunity peaceably to establish a form of government for their safety and happiness.

Now therefore I do recommend and assign Thursday the 26th of November next to be devoted by the People of these States to the service of that great and glorious Being, who is the beneficent Author of all the good that was, that is, or that will be – That we may then all unite in rendering unto him our sincere and humble thanks – for his kind care and protection of the People of the Country previous to their becoming a Nation – for the signal and manifold mercies, and the favorable interpositions of his Providence which we experienced in the course and conclusion of the late war – for the great degree of tranquility, union, and plenty, which we have since enjoyed – for the peaceable and rational manner, in which we have been enabled to establish constitutions of government for our safety and happiness, and particularly the national One now lately instituted – for the civil and religious liberty with which we are blessed; and the means we have of acquiring and diffusing useful knowledge; and in general for all the great and various favors which he hath been pleased to confer upon us.

And also that we may then unite in most humbly offering our prayers and supplications to the great Lord and Ruler of Nations and beseech him to pardon our national and other transgressions – to enable us all, whether in public or private stations, to perform our several and relative duties properly and punctually – to render our national government a blessing to all the people, by constantly being a Government of wise, just, and constitutional laws, discreetly and faithfully executed and obeyed – to protect and guide all Sovereigns and Nations (especially such as have shewn kindness unto us) and to bless them with good government, peace, and concord – To promote the knowledge and practice of true religion and virtue, and the increase of science among them and us – and generally to grant unto all Mankind such a degree of temporal prosperity as he alone knows to be best.

Given under my hand at the City of New York the third day of October in the year of our Lord 1789.

— G. Washington

Farewell Address of President George Washington. September 17, 1796.

Of all the dispositions and habits, which lead to political prosperity, Religion and Morality are indispensable supports. In vain would that man claim the tribute of Patriotism, who should labor to subvert these great pillars of human happiness, these firmest props of the duties of Men and Citizens. The mere Politician, equally with the pious man, ought to respect and to cherish them. A volume could not trace all their connexions [sic] with private and public felicity. Let it simply be asked, Where is the security for property, for reputation, for life, if the sense of religious obligation desert the oaths, which are the instruments of investigation in Courts of Justice? And let us with caution indulge the supposition, that morality can be maintained without religion. Whatever may be conceded to the influence of refined education on minds of peculiar structure, reason and experience both forbid us to expect, that national morality can prevail in exclusion of religious principle.

It is substantially true, that virtue or morality is a necessary spring of popular government. The rule, indeed, extends with more or less force to every species of government. Who, that is a sincere friend to it, can look with indifference upon attempts to shake the foundation of the fabric.

— George Washington

SELECTED U.S. CASE LAW *Updates*

CASE 1 ***Joseph A. Kennedy v. Bremerton School District****, 586 U.S. ___ (2019)* – PUBLIC SCHOOL FACULTY PRAYER.

This case involved the claims of a public high school football coach who was fired for praying silently on the 50-yard line of the football field after each game. The school superintendent wrote that the coach's conduct would lead a reasonable observer to think that the district was endorsing religion because the coach had prayed while "on the field, under the game lights, in BHS-logoed attire, in front of an audience of event attendees."

In *Kennedy v. Bremerton School District*, 849 F.3d 813 (9th Cir. 2017) the Ninth Circuit – applying the case of *Garcetti v. Ceballos*, 547 U.S. 401 (2006) – had held that the school was justified in terminating the coach for praying when and as he did because, when he did so, the coach was acting in his professional, rather than his personal, capacity and, therefore, his speech was unprotected. The Ninth Circuit found that the coach's job "involved modeling good behavior while acting in an official capacity in the presence of students and spectators."

In a statement accompanying the denial of a *writ of certiorari* to the Supreme Court of the United States, Justice Alito, joined by Justices Thomas, Gorsuch and Kavanaugh, agreed with the high Court's denial of *certiorari*, on the ground that the case presented unresolved factual questions that made it difficult if not impossible for the Court to decide the issues before it, but wrote separately to voice concerns about the Ninth Circuit Court of Appeals' apparent misunderstanding of the free speech rights of public school teachers, which Justice Alito called "troubling and may justify review in the future."

Justice Alito wrote that "According to the Ninth Circuit, public school teachers and coaches may be fired if they engage in any expression that the school does not like while they are on duty, and the Ninth Circuit appears to regard teachers and coaches as being on duty at all times from the moment they report for work to the moment they depart, provided that they are within the eyesight of students. Under this interpretation of *Garcetti*, if teachers are visible to a student while eating lunch, they can be ordered not to engage in any 'demonstrative' conduct of a religious nature, such as folding their hands or bowing their heads in prayer. And a school could also regulate what teachers do during a period when they are not teaching by preventing them from reading things that might be spotted by students or saying things that might be overheard."

But Justice Alito wrote: "This Court certainly has never read *Garcetti* to go that far. While *Garcetti* permits a public employer to regulate employee speech that is part of the employee's job duties, we warned that a public employer cannot convert private speech into public speech 'by creating excessively broad job descriptions.'"

Justice Alito also wrote: "What is perhaps most troubling about the Ninth Circuit's opinion is language that can be understood to mean that a coach's duty to serve as a good role model requires the coach to refrain from any manifesta-tion of religious faith – even when the coach is plainly not on duty. I hope that this is not the message that the Ninth Circuit meant to convey, but its opinion can certainly be read that way."

CASE 2 ***Morris County Board of Chosen Freeholders v. Freedom From Religion Foundation/The Presbyterian Church in Morristown v. Freedom From Religion Foundation****, 586 U.S. ___ (2019)* – HISTORIC PRESERVATION FUNDING FOR PROPERTY OWNED BY RELIGIOUS ORGANIZATIONS.

In a denial of *writs of certiorari*, Justice Kavanaugh, with whom Justice Alito and Justice Gorsuch joined, penned an

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opinion which – although agreeing that the writs should be denied because of an insufficient factual record and the lack of an, as yet, robust post-*Trinity Lutheran* body of case law – opined that "At some point, this Court will need to decide whether governments that distribute historic preservation funds may deny funds to religious organizations simply because the organizations are religious."

Both cases involved the New Jersey Supreme Court's holding that Morris County, New Jersey was barred from dispensing historic preservation funds to preserve historic religious buildings. Justice Kavanaugh wrote: "As this Court has repeatedly held, governmental discrimination against religion – in particular, discrimination against religious persons, religious organizations, and religious speech – violates the Free Exercise Clause and the Equal Protection Clause…. That same principle of religious equality applies to governmental benefits or grants programs in which religious organizations or people seek benefits or grants on the same terms as secular organizations or people – at least, our precedents say, so long as the government does not fund the training of clergy, for example."

Justice Kavanaugh noted that, in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. _ (2017), "The Court minced no words: Discriminating against religious schools because the schools are religious 'is odious to our Constitution.'" Relying upon that principle, Justice Kavanaugh concluded that "Barring religious organizations because they are religious from a general historic preservation grants program is pure discrimination against religion" and that "In my view, prohibiting historic preservation grants to religious organizations simply because the organizations are religious would raise serious questions under this Court's precedents and the Constitution's fundamental guarantee of equality."

CASE 3 ***Barker v. Conroy***, *___ F.3d ___ (D.C. Cir. 2019)* – LEGISLATIVE PRAYER.

On April 19, 2019, the U.S. District Court for the District of Columbia upheld the constitutionality of the U.S. House of Representatives' Rule that limits guest chaplains to giving *religious* prayers in Congress.

Daniel Barker – co-president of the Freedom From Religion Foundation – sought to be the first self-professed atheist to serve as a guest chaplain in the U.S. House of Representatives. Barker's request was denied after he provided the Chaplain's Office with "a copy of his draft secular invocation, which invoked 'the "higher power" of human wisdom,' but no God or other religious higher power."

Barker sued, alleging that the Rule violated the Establishment Clause by creating a preference for religion over non-religion and discriminated against those whose religious beliefs do not include a belief in a supernatural higher power.

The court started its analysis with the Supreme Court's *Marsh v. Chambers* opinion, which the court found stood for the proposition that "Given its 'unique history,' … legislative prayer did not run afoul of the Establishment Clause." The Court then moved on to the more recent *Town of Greece v. Galloway* case, in which the Supreme Court found that "neither the sectarian content of the town's prayers nor their predominantly Christian character was inconsistent with 'the tradition long followed by Congress and the state legislatures.'"

The Court stated that the question before it was whether "the House's decision to limit the opening prayer to religious prayer fit 'within the tradition long followed in Congress and the state legislatures?" and concluded that it did.

The court noted that, in *Marsh*, "the Supreme Court took as a given the religious nature of legislative prayer" – noting that "the Court explained that '[w]e are a religious people whose institutions presuppose a Supreme Being.'" The court noted that – in *Town of Greece* too – "the Supreme Court recognized legislative prayer's religious roots."

The Court ended by stating that "although the Court has warned against discriminating among religions or tolerating a pattern of prayers that proselytize or disparage certain faiths or beliefs, it has never suggested that legislatures must allow secular as well as religious prayer," and concluded that "In the *sui generis* context of legislative prayer, then, the House does not violate the Establishment Clause by limiting its opening prayer to religious prayer." As a result, the Court dismissed Barker's Establishment Clause claim.

CASE 4 ***Gaylor v. Mnuchin v. Peecher***, *___ F.3d ___ (7th Cir. 2019)* – MINISTERIAL HOUSING ALLOWANCE.

On March 15, 2019, the U.S. Court of Appeals for the Seventh Circuit upheld the constitutionality of the ministerial housing allowance against the Freedom From Religion Foundation's claims that the tax exemption violates the Establishment Clause of the U.S. Constitution.

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26 U.S.C. § 107(2) of the Internal Revenue Code excludes from the taxable gross income of "ministers of the gospel" "the rental value of a home furnished to him as part of his compensation" or "the rental allowance paid to him as part of his compensation, to the extent used by him to rent or provide a home …"

The court analyzed the Freedom From Religion Foundation's claim, that § 107(2) violated the Establishment Clause, under both the three-pronged *Lemon* test as well as the "historical significance" test of *Town of Greece v. Galloway*, noting that the U.S. Supreme Court has not clarified which test should take precedence.

Under the *Lemon* test analysis, the court found that § 107(2) satisfied all three prongs of the test.

The court found the statute satisfied the first prong of the *Lemon* test because the statute had a secular legislative purpose. In fact, the court found that the statute had three secular legislative purposes: (1) it eliminated discrimination against ministers, (2) it eliminated discrimination among ministers, and (3) it avoided the government's excessive entanglement with religion.

The court found the statute satisfied the second prong of the *Lemon* test because the statute has a principal or primary effect that neither advances nor inhibits religion, noting that a tax exemption is not the same as a government subsidy of religion, since the grant of a tax exemption does not transfer government revenue to a religion but simply abstains from demanding that the religion support the state.

And the court found the statute satisfied the third prong of the *Lemon* test because the statute does not foster an excessive government entanglement with religion. In fact, the court found that, but for the statute, ministers would be forced to comply with the far more detailed and particular – and, thus, more entangling – requirements of § 119(a)(2) of the Internal Revenue Code.

Therefore, the court found that the statute does not violate the Establishment Clause under the *Lemon* test.

Turning to the "historical significance" test set forth in the legislative prayer case of *Town of Greece v. Galloway*, the court noted, first, that the Freedom From Religion Foundation had offered no evidence that provisions like § 107(2) were historically viewed as an establishment of religion. The court then looked at the long history of federal tax exemptions for religious organizations, stretching as far back as 1802, and also noted that Congress moved to exclude parsonages from income within just a few years of income becoming taxable. Based on that history, the court held that the statute does not violate the Establishment Clause under the historical significance test.

In conclusion, the court stated that "this tax provision falls into the play between the joints of the Free Exercise Clause and the Establishment Clause: neither commanded by the former, nor proscribed by the latter" and that "§ 107(2) is constitutional."

CASE 5 ***Ray v. Commissioner, Alabama Dept. of Corrections****, ___ F.3d ___ (11th Cir. 2019)* – CLERGY AT EXECUTIONS.
On February 6, 2019, the U.S. Court of Appeals for the Eleventh Circuit entered an emergency stay on behalf of a Muslim inmate of a state correctional facility who was scheduled to be executed the next day, after the inmate alleged that the state's refusal to allow a Muslim Imam – rather than a Christian Chaplain – to be present in the execution chamber violated the Establishment Clause of the First Amendment.

The court noted that the prison's policy was to have the prison's Chaplain – a Christian and an employee of the prison – present in the execution chamber at all executions, regardless of the prisoner's faith. If the inmate desired the Chaplain's pastoral care, the Chaplain would provide it. If not, the Chaplain would remain in the execution chamber standing unobtrusively by the wall.

Inmate Ray – a Muslim – asked that the Chaplain be excluded from the execution chamber, and that the inmate's Imam be in the chamber at the time of execution instead so that he might receive spiritual guidance and comfort from a cleric of his own faith. The Dept. of Corrections agreed to exclude the prison Chaplain from the execution chamber, and made clear that the inmate's Imam could provide spiritual guidance to Ray on the day of execution and be present *outside* the execution chamber visible through a window, but it denied inmate Ray's request to have his Imam in the chamber during the execution. The Department cited security as the reason for its position – specifically, that the Imam, unlike the Chaplain, was not an employee of the prison, was unfamiliar with the execution process, and was not versed in the practices and safety concerns of the prison.

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The court relied on the First Amendment Establishment Clause – and to a lesser extent RLUIPA – in reversing the trial court and entering an emergency stay of execution.

The court stated that Ray's claim "touches at the heart of the Establishment Clause," citing the U.S. Supreme Court case of *Larson v. Valente*, 456 U.S. 228 (1982) for the proposition that "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." The court determined that "in the face of this limited record, it looks substantially likely to us that Alabama has run afoul of the Establishment Clause of the First Amendment" because "only a Christian chaplain may go into the death chamber and minister to the spiritual needs of the inmate, whether the inmate is a Christian, a Muslim, a Jew, or belongs to some other sect or denomination."

Applying strict scrutiny review, the court acknowledged that "states have a compelling interest in security and order within their prisons" and that "the prison's concerns may be at their apex during the most consequential act of carrying out an execution." Therefore, the court noted that the case turned not so much on whether the state had a compelling interest, but rather on whether the state's policies are the least restrictive means or narrowly tailored to further that compelling interest. It was on that prong of strict scrutiny review that the court held the state had failed to meet its burden.

The court stated that "[] it does not jump off the page at us that there aren't other less restrictive means to accomplish [the state's] ends… Alabama did not provide the Court with any affidavit from the Warden or from any other prison official addressing in any way why there were not lesser measures available to protect its interests and provide the same faith-based benefits to Christians and non-Christians alike. Nor did Alabama offer anything from its Chaplain or from anyone else about the perceived risks or the things that a cleric might need to learn in order to undertake this solemn and sensitive task. Alabama has presented us with nothing in support of its claims." The court noted that "At the end of the day, it is possible that there are no less restrictive means, but the government must show us how and why that is so" – and the government had failed to do that.

The court went on to note that the inmate's claim might also fit under the rubric of RLUIPA – which the inmate also raised – but stated that the claim seemed to be more naturally framed by the Establishment Clause. And, in any event, the court noted that "RLUIPA's strict scrutiny would – just like in the Establishment Clause context – squarely place the burden on the government to demonstrate that its policy is narrowly tailored to serve a compelling governmental interest."

In the end, the court found that Alabama had failed to carry its burden to show that its policy of restricting death chamber access to the prison's Chaplain was narrowly tailored and the least restrictive means to serve its compelling security interests. The court also found that the equities weighed "as they often do in death cases" in the inmate's favor, and rejected the state's position that the inmate's claims should be denied for unreasonable delay in asserting them.

*On February 7, 2019, in ***Jefferson S. Dunn, Commissioner, Alabama Dept. of Corrections v. Ray, 586 U.S. ___ (2019)***, the U.S. Supreme Court vacated the 11th Circuit's stay of execution "[b]ecause Ray waited until January 28, 2019 to seek relief." Justice Kagan, joined by Justices Ginsburg, Breyer, and Sotomayor dissented.

*On March 28, 2019, in ***Patrick Henry Murphy v. Brayan Collier, Exec. Dir., Tex. Dept. of Criminal Justice, 587 U.S. ___ (2019)***, the U.S. Supreme Court stayed the execution of a Buddhist inmate because he was only allowed to have his Buddhist religious advisor present in the viewing room, not the execution room, at the time of execution, whereas Texas policy allowed Christian and Muslim inmates to have their religious advisers present in either the execution room or the viewing room. In staying the execution, the Court stated that "the Constitution prohibits such denominational discrimination." The Court stated that, although states "have a strong interest in tightly controlling access to an execution room in order to ensure that the execution occurs without any complications, distractions, or disruptions" and, therefore, could either allow all inmates to have a religious adviser of their religion in the execution room or allow inmates to have a religious adviser only in the viewing room, not the execution room, "[w]hat the state may not do … is allow Christian or Muslim inmates but not Buddhist inmates to have a religious advisor of their religion in the execution room." (In a possible reference to the *Dunn v Ray* case, determined less than two months before, the court stated that "Under all the circumstances of this

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case, I conclude that Murphy made his request to the State in a sufficiently timely manner, one month before the scheduled execution.") In response, the State of Texas is now banning all clergy from execution chambers.

CASE 6 ***Business Leaders in Christ v. The University of Iowa****, ___ F.Supp.3d ___ (S.D. Iowa 2019)* – RELIGIOUS STUDENT GROUPS AT PUBLIC UNIVERSITIES.

In *Business Leaders in Christ v. The University of Iowa* the U.S. District Court for the Southern District of Iowa ruled that the University violated the Business Leaders in Christ student group's constitutional rights to free speech, expressive association, and free exercise of religion when the University revoked the student group's status as a Registered Student Organization (RSO) on the ground that the group's Statement of Faith violated the University's Human Rights Policy.

Business Leaders in Christ is a religious student group founded to help Christians learn "how to continually keep Christ first in the fast-paced business world." The group's Statement of Faith provides that "We believe God's intention for a sexual relationship is to be between a husband and a wife in the lifelong covenant of marriage. Every other sexual relationship beyond this is outside of God's design and is not in keeping with God's original plan for humanity. We believe that every person should embrace, not reject, their God-given sex."

The group requires its officers to agree with the group's faith statement so that they can represent the group's religious beliefs and lead group members with "sound doctrine and interpretation of Scripture." Based on that principle, the group rejected a student who applied for a position on the group's executive board when the student revealed he was gay, was struggling with the Bible's teachings on homosexual behavior, and refused to commit to refraining from engaging in romantic same-sex relationships. The student filed a complaint with the University.

The University found that the Business Leaders in Christ "Statement of Faith, on its face, does not comply with the [Human Rights Policy] since its affirmation, as required by the Constitution for leadership positions, would have the effect of disqualifying certain individuals from leadership positions based on sexual orientation or gender identity, both of which are protected classifications," and revoked the Business Leaders in Christ's RSO status because the group would not remove from its Statement of Faith the offending language about sexual relationships and gender identity.

The court first determined that "A university program that grants student organizations official registration or recognition amounts to a limited public forum" and that universities may constitutionally restrict access to limited public forums only if the access restrictions are "reasonable and viewpoint neutral."

Noting that "Generally, the disparate application of a regulation governing speech can constitute viewpoint discrimination," the court homed in on two facts it deemed important.

First, the University allowed certain RSOs to be exempt from the University's Human Rights Policy "for compelling reasons which support the educational and social purposes of the forum." So – the court found – although the University's Human Rights Policy was facially neutral, it was not neutrally applied.

And, second, Business Leaders in Christ was prevented from expressing its viewpoints on protected characteristics while other student groups espousing another viewpoint were permitted to do so

In particular, several University RSOs were allowed to do exactly what the Business Leaders in Christ were not – such as the RSO Love Works, a student group which required its leaders to sign a "gay-affirming statement of Christian faith"; the Chinese Students and Scholars Association, which limited it membership to Chinese students and scholars; and Hawkapellas, which was an all-female a cappella group.

The court also found that "laws that burden religious activity, and that are not neutral or generally applicable, can violate the First Amendment because their discretionary application involves a negative judgment on religious activity."

In applying strict scrutiny review, the court found that the interests the University's Human Rights Policy was meant to address were compelling interests the University was entitled to pursue. However, the court found the fact that the University did not enforce the policy against other groups whose practices produced the same harm for which the University enforced the policy against the Business

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Leaders in Christ group, rendered the interest purportedly served by the Human Rights Policy not compelling.

The court also found that the University's action was not narrowly tailored, because the University could have enforced the Human Rights Policy against all groups equally by adopting an all-comers policy, but did not.

The court thus found that the University engaged in viewpoint discrimination, thereby violating the Business Leaders in Christ group's constitutional free speech, expressive association, and free exercise of religion rights.

But the court rejected the Business Leaders in Christ group's ministerial exception claim because – the court held – the ministerial exception has traditionally been used as a defense to claims asserted against a religious organization; not – as here – as its own cause of action against outsiders.

The court entered a permanent injunction against the University, prohibiting the University from enforcing its Human Rights Policy against the Business Leaders in Christ based on the content of the group's Statement of Faith and leadership selection policies, provided the University continues to allow other RSOs exceptions to the Human Rights Policy for their membership or leadership criteria, and the group preserves its Statement of Faith and otherwise maintains its eligibility for RSO status.

CASE 7 ***Hope Lutheran Church, et al. v. City of De Pere (Brown County, Circuit Court, State of Wisconsin)****, – CHURCHES AS PUBLIC ACCOMMODATIONS UNDER ANTIDISCRIMINATION LAWS.*

Four churches challenged the application to them of the City of De Pere, Wisconsin's public accommodation nondiscrimination law. The City maintained that all the churches were "places of public accommodation" under its *Non-Discrimination in Housing, Public Accommodation and Employment* ordinance and, therefore, were prohibited from engaging in "any intentional act, policy, advertisement or practice which has the effect of subjecting any person to differential treatment as a result of that person's actual or perceived … family status, gender identity and/or gender expression, marital status, … religion, … sex, [or] sexual orientation …." The churches all held theological and doctrinal positions that sexual relations are confined to a man and woman married to each other.

The court held that – despite the fact that the churches have a variety of programs and activities, including providing groceries to the needy, marriage and premarital counseling and seminars, veterans' lunches, water for community runs, a preschool, transportation for the homeless, serving as a venue for community events or groups (including, at times, charging rent), blood drives, educational activities, serving as a polling station, serving as a place to park for parents to pick their children up from school, hosting Boy Scouts, and serving as a venue for weddings and funerals – the churches were not public accommodations for purposes of the City's ordinance.

The court found that the churches were not subject to the City's public accommodations ordinance, first, because "as a matter of law, churches are not places of public accommodation. This holding is consistent with every court that has occasion to visit the issue."

Second, the court held that – even if the City's stated policy behind the nondiscrimination ordinance could be deemed compelling – the ordinance was not narrowly drawn, noting that the ordinance's definition of "public accommodation" demonstrated that the legislative intent was to sweep into the ordinance as many persons, entities and activities as possible, which the court stated "is the antithesis of crafting a law that is narrowly tailored and uses the least restrictive means of furthering a compelling state interest."

Third, the court held that, in determining whether a church is a public accommodation, one must look to the primary purpose of a religious institution. "If its core purpose is religious, other limited activities that it may undertake do not convert the institution into a place of public accommodation" and that that is true regardless of whether the church's programs and activities are generally open to the public without consideration of religious affiliation, or involve an exchange of money, such as renting out church facilities for weddings or funerals. The court stated that "Whether such programs and activities can be construed as commercial or open to the public does not transform the nature of a church. For purposes of public accommodation laws, a church that provides food and drink does not change the entity into a restaurant, nor does it become a medical clinic because it operates a blood drive."

Fourth, the court held that applying a public accommodation nondiscrimination law to churches "would require

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an unconstitutional scrutiny into the beliefs and practices of a religious institution." As the court stated, "It is problematic for a state actor to review an activity of a church to discern whether a religious motive is behind the activity … neither the judiciary nor any other branch of government can sit as a magisterium to evaluate whether a given church program or activity lies within the exercise of religion."

Further, the court held that the ordinance's employment discrimination provisions relating to sex, religion, gender identity, marital status and sexual orientation, could not be applied to the churches because to do so would be to require government officials to review the religious beliefs and practices of faith-based institutions. "It is well-settled that excessive governmental entanglement with religion will occur if a court is required to interpret church law, policies, or practices."

And, finally, the court held the ordinance's prohibition on publishing, circulating, displaying or mailing any written communication to the effect that the place of public accommodation will be denied to any person belonging to a protected class or that their presence is unwelcome, objectionable, or unacceptable, was unconstitutional as applied to the churches. The court stated that such a prohibition was "an archetypal prior restraint on speech" and constitutes viewpoint discrimination. The court stated that "The viewpoint discrimination in the ordinance is straightforward. Churches and religious entities may speak, advertise and otherwise publish their religious beliefs, including expectations of members, attendees and employees, and use of the facilities and services provided – so long as those beliefs are in agreement with the City's sexual orthodoxy. But if these plaintiffs publish or advertise millennia-old Christian positions on sexuality, their communication stands as a violation subjecting them to forfeiture in such amount as determined by resolution of the common council. Viewpoint discrimination has long been anathema in free speech jurisprudence … Giving offense is a viewpoint" and "try as they might to communicate with truth and love and grace, [these churches'] refusal to conform to secular sexual orthodoxy, disguised here as a nondiscrimination ordinance, inevitably causes offence." It will chill the churches' speech and is vague. Therefore, "the ordinance is incompatible with the First Amendment."

For these reasons the court entered Summary Judgment in the churches' favor, holding that the ordinance does not apply to the churches and cannot be enforced against them.

INTERNATIONAL
CASE 1

Altinkaynak, et al. v. Turkey

[2019] – FREEDOM OF RELIGIOUS ORGANIZATIONS UNDER THE EUROPEAN CONVENTION OF HUMAN RIGHTS. On January 15, 2019 the European Court of Human Rights ruled that Turkey violated the European Convention of Human Rights when it denied legal recognition to a Seventh Day Adventist church under a Turkish law prohibiting minority religions from attaining legal recognition for foundations intended to serve the needs of their communities.

The case stems from a 2004 attempt by a Seventh Day Adventists church, represented by Mr. Erkin Altinkaynak, his wife, and four others, to register a religious foundation as a legal entity under Turkish law. The Turkish authorities denied the application and, upon appeal, that denial was upheld by two Turkish courts.

In the appeal, the European Court of Human Rights ruled that Turkey – a signatory of the European Convention on Human Rights – in denying the Seventh Day Adventists' application for recognition, violated the plaintiffs' right to the freedom of association guaranteed under the Convention, stating that "like political parties, associations and foundations created for various purposes, including the … proclamation and teaching of a religion, … or the affirmation of a minority conscience are important for the proper functioning of democracy."

ARTICLE *of* NOTE

Michael W. McConnell, *The Origins And Historical Understanding Of Free Exercise Of Religion*, 103 Harv. L. Rev. 1409 (1990).

AUTHORS' ABSTRACT:

"The question whether the free exercise clause requires the granting of religious exemptions from generally applicable laws with secular purposes has generated lively debate. Beyond a few narrow circumstances, the Supreme Court and legal commentators have rejected claims to free exercise exemptions. In this Article, Professor McConnell argues that this debate has largely proceeded in an ahistorical fashion and has ignored the unique American conception of religious freedom from which the free exercise clause emerged. Professor McConnell discusses the approaches to church-state relations in the American colonies and traces the development of free exercise provisions in both the colonies and the post-independence states. Contrary to modern perceptions, he argues, the impetus for free exercise provisions came from the evangelical religious movements of the period, movements that espoused the primacy of religious conscience over secular laws and that viewed the constitutional guarantee of free exercise as protecting the right actively to fulfill religious duties without state interference. He contends, moreover, that the framers adopted the terminology 'free exercise of religion' in place of the alternative, 'rights of conscience,' to ensure protection for religiously motivated conduct and to make clear that protection would not extend to secular claims of conscience. After discussing early nineteenth-century judicial interpretations, Professor McConnell concludes that an interpretation of the free exercise clause that mandates religious exemptions was both within the contemplation of the framers and consonant with popular notions of religious liberty and limited government that existed at the time of the framing."

FEATURE ARTICLE

Damage Caps In Religious Discrimination Employment Cases – The Illusory $21.5 Million Dollar Verdict

By Alan J. Reinach

The Case of the Illusory Verdict

In January, 2019, a Florida jury awarded $21.5 million in damages to a Roman Catholic woman who was fired, for religiously discriminatory reasons, from her job as a dishwasher and housekeeper at a Miami Hilton Hotel.

Marie Jean Pierre – a Catholic missionary – worked at the hotel for more than 10 years. Due to her religious conviction that Sunday is the Lord's Day, on which she is prohibited from working, she does not work on Sundays. Many people of faith, of course, share this idea of a particular day of the week being sacred and dedicated to religious worship.

In fact, throughout her employment with the hotel, her religious observance of Sunday had been respected and accommodated. The hotel had accommodated her religious beliefs by not scheduling her to work on Sundays. However, a few months prior to her termination, this changed when hotel management began to schedule her to work on Sundays. At first, Ms. Jean Pierre was able to avoid desecrating her Sabbath day by securing voluntary shift-swaps from coworkers. But then hotel management prohibited Ms. Jean Pierre from shift-swapping. Not long thereafter, the hotel terminated her for misconduct, negligence and unexcused absences. (Note that it is not unusual for employers to "juice up" a termination – in this case of simple attendance issues – by adding additional charges in order to obfuscate an otherwise illegal termination.)

Ms. Jean Pierre filed suit against the hotel and her claims of employment discrimination, retaliation, and failure to accommodate, proceeded to trial in Federal District Court approximately three years after her termination.

In the end, the jury awarded Ms. Jean Pierre $36,000 in economic loss, $500,000 in emotional distress damages, and $21 million in punitive damages.

It is not difficult to see from these facts why a jury awarded such a large punitive damage amount. The employer's motivation in terminating Ms. Jean Pierre was clear and intentional: to get rid of Ms. Jean Pierre – who was by all accounts a faithful and capable employee – on religiously discriminatory grounds.

However, that's not the end of the story, because Ms. Jean Pierre will never see the full amount of the damages she was awarded. In fact – thanks to damage caps in

ABOUT THE AUTHOR

Alan J. Reinach is an attorney who has served as Executive Director of the Church State Council – the religious liberty educational and advocacy organization of the Seventh-day Adventist Church in the western United States – since 1994. The Council advocates a commitment to vigorous protection for the free exercise of religion. The Council primarily represents individuals who experience religious discrimination in employment, and represents persons of all faiths.

Reinach's legal practice emphasizes representation of workers in religious discrimination, harassment, retaliation, and failure to accommodate cases.

A graduate of the University of North Carolina, Chapel Hill School of Law, Reinach is admitted to practice law in New York, California, and in various Federal courts and the U.S. Supreme Court. He has published articles on religious freedom in legal journals, regularly publishes in religious periodicals, and is in demand as a speaker on issues of religious freedom and religious discrimination, lecturing frequently on religious discrimination topics for legal conferences.

Reinach hosts *Freedom's Ring*, a weekly radio program about religious freedom issues syndicated nationally and internationally.

state and federal laws – she will see only a small fraction of the damages she was awarded.

Damage Caps in Federal Employment Discrimination Claims

When the Civil Rights Act was first enacted in 1964, it only provided for economic damages. Therefore, had Ms. Jean Pierre brought her case back in the 1970s, her award would have been limited to the $36,000 in lost earnings.

In 1991, however, Congress amended Title VII of the Civil Rights Act of 1964 to provide for the awarding of both compensatory and punitive damages to claimants.

Compensatory damages cover, among other things, the emotional distress people suffer when they experience employment discrimination. Indeed, plaintiffs who suffer discrimination in the workplace frequently report symptoms such as insomnia, weight gain or loss, anxiety, depression, loss of interest in social activities, loss of interest in marital intimacy, and feelings of helplessness, hopelessness and loss of self-worth. Those who suffer religious discrimination face an even greater challenge – the nagging fear that God has abandoned or rejected them, and that their faith in God is misplaced. Many ask the "W hy, God?" question.

However, the 1991 amendments to Title VII cap a combination of emotional distress and punitive damages – to $300,000 for the largest employers, those with more than 500 employees, and for smaller employers on a sliding scale, based on the size of the employer, with such damages against the smallest employers – those with 100 or fewer employees – being capped at just $50,000. These damage caps have not been adjusted for inflation in nearly 30 years. For purposes of comparison, adjusted for inflation a $300,000 award in 1991 dollars would be worth about $550,000 today, slightly more than just the emotional distress damages the jury awarded Ms. Jean Pierre in her case. (Thankfully for Ms. Jean Pierre, because this is a discrimination case, as opposed to a personal injury matter, there is a separate statutory provision for attorneys' fees. So her attorneys will have the opportunity to submit a fee petition to the court such that their fees will not reduce her capped award.)

So, under federal damage caps, Ms. Jean Pierre will be limited to her $36,000 in economic damages, and only $300,000 of the $21.5 million she was awarded in emotional distress and punitive damages, along with whatever prejudgment and post judgment interest she may be entitled to receive on those amounts. But she will not receive the additional $200,000 in emotional distress damages, or any of the $21 million in punitive damages she was awarded. So, the federal system will impose no "punishment" on the employer for having engaged in conduct the jury determined to be egregious. The only "damage" the employer will suffer for that conduct is, perhaps, some bad press coverage.

Damage Caps in Employment Discrimination Claims Under State Law Generally

In light of the damage caps under federal law, many states have taken a different route on the issue of damages. In states with strong state non-discrimination laws, like New York and California, plaintiffs complaining of harassment or discrimination face no or fewer caps on damages. For example, although Florida imposes a cap on punitive damages in employment discrimination cases of $100,000, it imposes no cap on emotional distress damages.

Also, under certain states' laws, plaintiffs in employment discrimination cases do not face the federal requirement of a unanimous jury verdict. This important difference between state and federal law usually favors plaintiffs' claims because the unanimous jury verdict requirement under federal law tends to reduce damage awards, as well as settlement valuations.

Damage Caps in Employment Discrimination Claims In Arizona

Ms. Jean Pierre's illusory verdict highlights the importance of preserving state law claims in religious discrimination in employment cases – especially in states, like Arizona, that do not impose caps on certain sorts of damages.

In general, Arizona law largely tracks with Title VII, such as applying only to employers of 15 or more employees. A.R.S. § 41-1461 (6). And with respect to religious discrimination in the workplace, Arizona law – like Title VII – not only prohibits religious discrimination, generally, such as for claims of disparate treatment based on religion, but, like Title VII, also requires employers to provide reasonable accommodations for employees' religious beliefs, short of an "undue hardship."

However, a critical distinction between Arizona law and Title VII is the legal definition of what constitutes "undue

hardship" on an employer. When Congress enacted Title VII, it did not focus on the need to define that term. So when the Supreme Court heard a challenge to the constitutionality of the religious accommodation provision of Title VII in *TWA v. Hardison*, 432 U.S. 63 (1977), it chose to resolve the perceived Establishment Clause concerns by "dumbing-down" the standard of reasonable religious accommodation, so that in order to qualify as an undue hardship, the hardship need only be "*de minimus*." Of course, the Court did not explicitly admit that this was its rationale. Nevertheless, this standard sent an erroneous signal to employers that they really didn't have to do much to provide religious accommodations to employees. But, at least here in the Ninth Circuit, this erroneous conclusion – that employers can routinely deny religious accommodation requests – has resulted in employers losing far more religious accommodation cases than they win.

To make matters worse, after the Supreme Court's *Employment Division v. Smith*, 494 U.S. 872 (1990) decision, rejecting strict scrutiny as the prevailing standard to evaluate alleged free exercise of religion violations in laws of general applicability, employers and their attorneys frequently confused the constitutional First Amendment "rational basis" standard set forth in *Smith* with the undue hardship requirements of Title VII – again, wrongly believing they need do very little to provide religious accommodations to their employees.

However, Arizona employers should not suffer such confusion, because Arizona has adopted the much stronger "significant difficulty or expense" standard of reasonable religious accommodation. In other words, in Arizona, an employer must provide an employee with a religious accommodation, unless to do so would impose upon the employer a "significant difficulty or expense." Clearly, this is a much higher standard than the *de minimus* standard and, at a minimum, is a standard very difficult to satisfy, unless an employer has made a good faith effort to provide the accommodation and simply cannot do so without incurring significant difficulty or expense.

But returning to the damages issue – Arizona law does not cap the damages a worker can seek when alleging employment discrimination, whether religious or otherwise. A.R.S. 41-1472. Although Arizona law does not provide for an award of punitive damages in employment discrimination cases, under Arizona law a plaintiff can be awarded actual and compensatory damages, including damages for emotional distress, in religious discrimination employment claims, without any cap.

So, had Ms. Jean Pierre's case been brought in Arizona, she would have been able to receive her entire combined actual and emotional distress damage awards of $536,000, for a total of $200,000 more than she was eligible for under federal law.

Conclusion

Even though, because of damage caps, Ms. Jean Pierre will receive only a fraction of the damages the jury awarded to her, her case provides a teachable moment and some important lessons.

First, all the damages Ms. Jean Pierre suffered – and for which the hotel was found liable – were entirely avoidable. Hotel management clearly made a series of bad decisions that should have been spotted and rectified early on. The

hotel could and should have simply continued permitting Ms. Jean Pierre to have Sundays off, in accordance with her sincerely held religious beliefs, as it had in the past.

Although defense firms often conduct discrimination training, and there is excellent online discrimination and harassment training available, such programs do not typically analyze the economic costs to employers of failing to obey the law. Ms. Jean Pierre's case should alarm employers in states, such as Arizona, that do not cap damages. It is far easier to avoid or remedy discrimination early on, than to proceed to trial, and roll the dice on a jury. This is especially true in cases such as Ms. Jean Pierre's, involving a low wage worker and low economic loss. Such cases can usually be settled far more economically than by risking trial.

But any discussion of damages should point out that the human costs of employment discrimination cannot simply be reduced to money damages. It is impossible to "make whole" someone who has suffered illegal discrimination or harassment in their employment, because monetary awards cannot totally compensate for the damage suffered. But it sure can help. Juries can determine how much a wronged worker should be awarded – but Congress has put the federal system in a strait jacket, on account of which courts cannot fully implement the jury's determination of the loss truly suffered by a religious discrimination in employment claimant. Both the justice system and worker's rights are bound up in the same strait jacket. As a result, whether a worker has meaningful rights depends – in large part – upon where they live.

Finally, it is important to note that religious discrimination claims are rising nationally. Some of this is attributable to the rising number of claims filed by Muslims and Sikhs in the post 9/11 era. And perhaps the recent media spotlight on white nationalism and the political polarization of American society has contributed as well. The media covers shootings in sacred spaces – Pittsburgh, Christ Church, and Poway, California – but the epidemic of ordinary Americans being forced to choose between their religion and their jobs is a daily tragedy flying under nearly everyone's radar. Thanks to a Florida jury, at least one such story garnered its 15 minutes of fame, and gave everyone an opportunity to think about how people of all faiths can be included in the American workplace. After all, America's greatness includes the opportunity for people of all faiths to say "this land is my land, this land is your land." And none of us are – or should be – required to leave our faith at home when we go to work.

NEWS *and* ANNOUNCEMENTS

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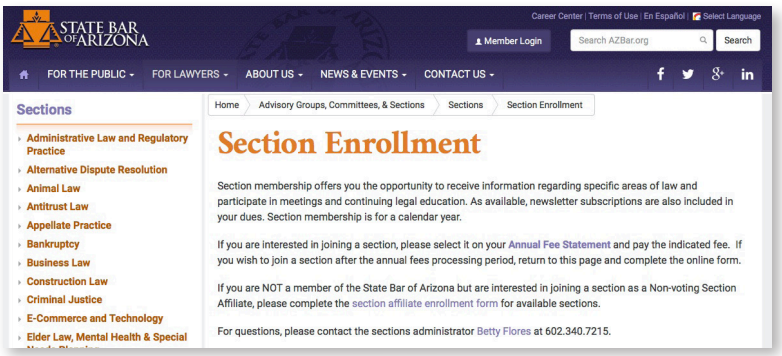

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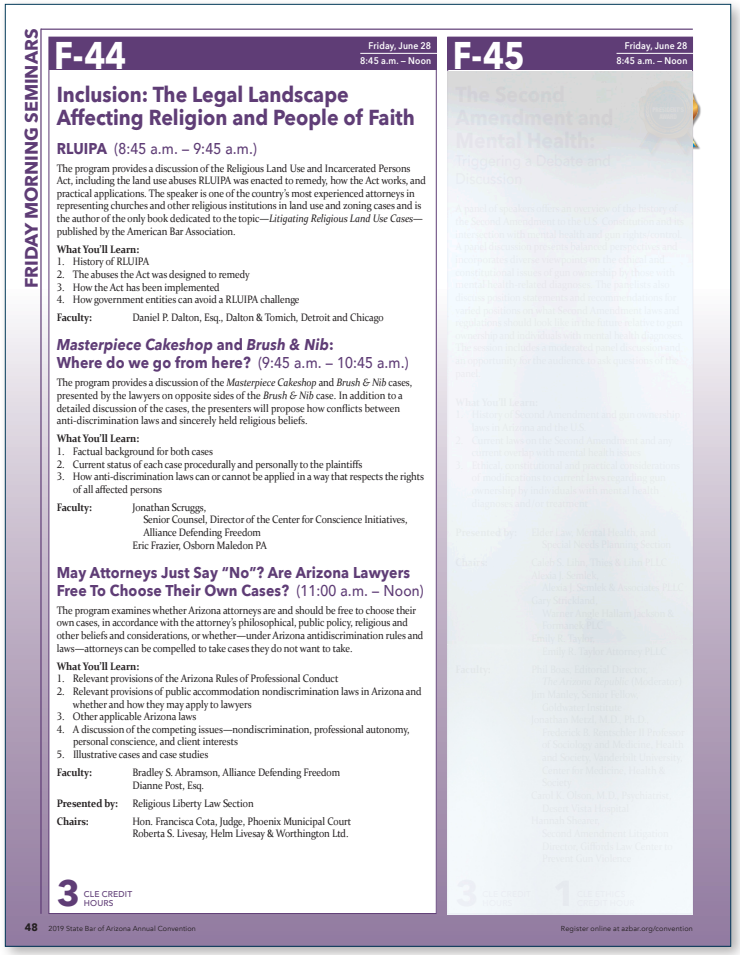

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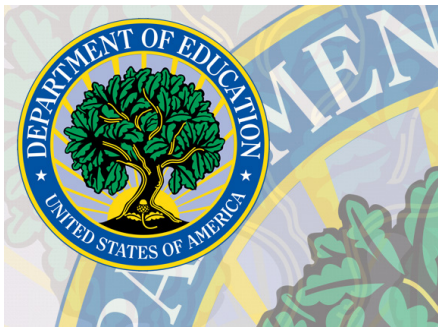
GOVERNMENT ANNOUNCEMENT

U.S. Department of Education

On March 11, 2019 the U.S. Department of Education announced that "The U.S. Dept. of Education, in consultation with the U.S. Dept. of Justice, determined that the statutory provisions in Section 1117(d)(2)(B) and 8501(d)(2)(B) of the Elementary and Secondary Education Act (ESEA) that require an equitable services provider to 'be independent of … any religious organization' are unconstitutional because they categorically exclude religious organizations based solely on their religious identity. These provisions run counter to the U.S. Supreme Court decision in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S.Ct. 2012 (2017) that, under the Free Exercise Clause of the First Amendment of the U.S. Constitution, otherwise eligible recipients cannot be disqualified from a public benefit solely because of their religious character."



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

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

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

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

Arizona Statutes

Arizona Free Exercise of Religion Act – Free Exercise – 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 (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)

[watch video]

Access the entire program for CLE credit at:

https://azbar.inreachce.com/Details/Information/c39d8585-55ce-47d1-bd18-e419e259f33e

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