RELIGIOUS LIBERTY LAW SECTION

STATE BAR OF ARIZONA

Newsletter / DECEMBER 2019

FROM *the* EDITOR

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

This year marks the 75th anniversary of the Allied invasion of Normandy. On June 6, 1944, out of over 10,000 casualties, more than 4,400 men – primarily from the U.S., the U.K., and Canada – perished as the Allies launched the largest amphibious invasion force in history in order to open a second front, in France which had been under Nazi occupation for four years. Although we now know that D-Day was a military success – at the time its success was anything but assured. Inclement weather, complicated logistics, and fierce German resistance all combined to hinder the Allied effort. And, of course, D-Day was just the beginning of a year-long battle and thousands more casualties before Germany finally surrendered to the Allies. In honor of that national sacrifice, I have chosen, as this issue's Great Moments in Religious Liberty History series, the radio address of President Franklin D. Roosevelt to the American people on D-Day, in which he offered – and asked all other Americans to join him in – a prayer for the nation and its armed forces at a time of uncertainty and great national peril. I hope this moving prayer will remind us all of the essentiality of religious faith – protected by religious liberty law – in America.

Also, I want to extend a personal note of thanks to Douglas Newborn, the author of this issue's Feature Article "Conscientious Objection – More Than Just A Military Issue." Douglas's article serves to remind us of this country's long and exemplary history of recognizing and extending protection to the conscience rights of its citizens – even in times of great national danger – based upon our Founders' axiom that governments are instituted precisely for the purpose of protecting its citizens' God-given rights to live all aspects of their lives in conformance with their sincerely held religious and moral beliefs; and that when government fails to respect and protect those rights and, instead, threatens or punishes its citizens for acting in accordance with their conscience, "[i]t is the Right of the People to alter or to abolish it, and to institute new Government" that will preserve and protect our natural and unalienable rights.

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 are a religious people whose institutions presuppose a Supreme Being"

— *Zorach v. Clauson*, 343 U.S. 306, 313 (1952)

IN *this* ISSUE

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FROM *the* CHAIR

As members of the Bar, we swore a duty to support and to bear true faith and allegiance to the Constitution of the United States of America and the laws of the State of Arizona; and to defend them against all enemies foreign and domestic. The Religious Liberty Law Section is highly motivated to uphold and support our profession in this vital call to action. About defending the freedoms and liberties of our country, Samuel Adams wrote:

> It will bring an everlasting *mark of infamy* on the present generation, enlightened as it is, if we should suffer them to be wrested from us by violence without a struggle; or be cheated out of them by the artifices of false and designing men. Of the latter we are in most danger at present: Let us therefore be aware of it. Let us contemplate our forefathers and posterity; and resolve to maintain the rights bequeath'd to us from the former, for the sake of the latter. – Instead of sitting down satisfied with the efforts we have already made, which is the wish of our enemies, the necessity of the times, more than ever, calls for our utmost circumspection, deliberation, fortitude and perseverance. Let us remember, that "if we suffer tamely a lawless attack upon our liberty, we encourage it, and involve others in our doom." It is a very serious consideration, which should deeply impress our minds, that millions yet unborn may be the miserable sharers in the event.

(CANDIDUS, Samuel Adams to Messieurs Edes & Gills, October 14, 1771, published Boston Gazette, [electronic edition], Adams Family Papers: An Electronic Archive, Massachusetts Historical Society, http://www.masshist.org/digitialadams. available *at http://www.masshist.org/dorr/volume/3/sequence/621)*

Let us not be that generation with a *mark of infamy*. The First Amendment establishes that: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." It seems simple enough, but in fact – it is not.

Across the country, challenges resist the original meaning and application of the First Amendment. They reject the underpinnings and the fundamental substance of the letter of the law and refer to the Constitution as a *living document*. They call for a loosened interpretation and flexibility in application – as the need be. Indeed, opponents have disputed the interpretation and intent of the First Amendment from the start. Still, the threat to religious liberty is perceived as never more caustic and the aim to eradicate religious liberty never so complete as today. Consequently, religious liberty litigation is rising and developing as never before.

The founders were mindful of their freedom and liberty, and they stood firm against impending challenges. The call to defend religious freedom, is a call to defend an inalienable natural human right. It is a universal right, not determined by any rule of law or government. *"The rights [to religious freedom] are of the natural rights of mankind, and… if any act shall be … passed to repeal [an act granting those rights] or to narrow its operation, such act will be an infringement of natural right."* (Thomas Jefferson, *A Bill for Religious Freedom*, 1779. (*) ME 2:303, Papers 2:546.)

Samuel Adams anticipated the attacks on our liberty by "*an enlightened*" generation. He warned that if we tamely allow attacks on our liberty, we not only encourage further attacks, but also raze the lives of others in our doom. History bears witness that most Americans believe that our freedoms and liberties are worth defending against all attacks and hostilities. A subtle hint of the hindering of a single liberty compels immediate and direct action to defend it from loss. The present-day call and duty to defend guaranteed religious liberty, is being met in the courtrooms of our nation. The outcomes of which will have long-lasting impact on all Americans.

We are now in our fourth year of the Religious Liberty Law Section – with so much ahead of us. Our focus and single-mindedness – *Religious Liberty Law*. Upholding the fundamental and plain meaning of the First Amendment is a weighty concern. New decrees and debatable applications and interpretations of existing laws and rules touch every aspect of our long-established religious liberty. The Section is diligently meeting our mission to educate, discuss, and to disseminate information regarding, as well as to advance and to protect, the basic human and constitutional right of religious liberty through law. Our Section continues to put on objective, current, thought-provoking, and *Keller*-pure, CLE seminars throughout the year and at the annual State Bar Convention.

Constitutional and religious liberty litigation is projected to remain in the forefront. This is an excellent time to join the Section and take part in this exciting area of law. Please visit the State Bar of Arizona website at https://www.azbar.org for information on how to join.

It is my pleasure to serve as 2019-2020 Chair of the Religious Liberty Law Section of the State Bar of Arizona. I look forward to an outstanding year in Religious Liberty litigation, education and discussion.

Francisca J. Cota

Francisca J. Cota, Chair

"Educate and inform the whole mass of the people... They are the only sure reliance for the preservation of our liberty."
— Thomas Jefferson

GREAT MOMENTS *in* RELIGIOUS LIBERTY HISTORY

Radio Address to the American People on June 6, 1944 –
By Franklin Delano Roosevelt, President of the United States of America.

My fellow Americans: Last night, when I spoke with you about the fall of Rome, I knew at that moment that troops of the United States and our allies were crossing the Channel in another and greater operation. It has come to pass with success thus far.

And so, in this poignant hour, I ask you to join me in prayer:

Almighty God: Our sons, pride of our Nation, this day have set upon a mighty endeavor, a struggle to preserve our Republic, our religion, and our civilization, and to set free a suffering humanity.

Lead them straight and true; give strength to their arms, stoutness to their hearts, steadfastness in their faith.

They will need Thy blessings. Their road will be long and hard. For the enemy is strong. He may hurl back our forces. Success may not come with rushing speed, but we shall return again and again; and we know that by Thy grace, and by the righteousness of our cause, our sons will triumph.

They will be sore tried, by night and by day, without rest – until the victory is won. The darkness will be rent by noise and flame. Men's souls will be shaken with the violences [sic] of war.

For these men are lately drawn from the ways of peace. They fight not for the lust of conquest. They fight to end conquest. They fight to liberate. They fight to let justice arise, and tolerance and good will among all Thy people. They yearn but for the end of battle, for their return to the haven of home.

Some will never return. Embrace these, Father, and receive them, Thy heroic servants, into Thy kingdom.

And for us at home – fathers, mothers, children, wives, sisters, and brothers of brave men overseas – whose thoughts and prayers are ever with them – help us, Almighty God, to rededicate ourselves in renewed faith in Thee in this hour of great sacrifice.

Many people have urged that I call the Nation into a single day of special prayer. But because the road is long and desire is great, I ask that our people devote themselves in a continuance of prayer. As we rise to each new day, and again when each day is spent, let words of prayer be on our lips, invoking Thy help to our efforts.

Give us strength, too – strength in our daily tasks, to redouble the contributions we make in the physical and the material support of our armed forces.

And let our hearts be stout, to wait out the long travail, to bear sorrows that may come, to impart our courage unto our sons wheresoever they may be.

And, Lord, give us Faith. Give us Faith in Thee; Faith in our sons; Faith in each other; Faith in our united crusade. Let not the keenness of our spirit ever be dulled. Let not the impacts of temporary events, of temporal matters of but fleeting moment – let not these deter us in our unconquerable purpose.

With Thy blessing, we shall prevail over the unholy forces of our enemy. Help us to conquer the apostles of greed and racial arrogancies [sic]. Lead us to the saving of our country, and with our sister Nations into a world unity that will spell a sure peace, a peace invulnerable to the schemings [sic] of unworthy men. And a peace that will let all men live in freedom, reaping the just rewards of their honest toil.

Thy will be done, Almighty God.
Amen.

President Franklin D. Roosevelt

SELECTED U.S. CASE LAW *Updates*

CASE 1 *Brush & Nib Studio, LC, et al. v. City of Phoenix*

448 P.3d 890 (Ariz. 2019). APPLICATION OF A PUBLIC ACCOMMODATION NONDISCRIMINATION ORDINANCE SO AS TO REQUIRE A BUSINESS TO CREATE CUSTOM WEDDING INVITATIONS CONTRARY TO THE OWNERS' SINCERELY HELD RELIGIOUS BELIEFS COMPELS SPEECH IN VIOLATION OF THE ARIZONA CONSTITUTION AND VIOLATES THE RIGHT TO FREE EXERCISE OF RELIGION UNDER ARIZONA'S FREE EXERCISE OF RELIGION ACT.

In *Brush & Nib Studio, LC, et al. v. City of Phoenix*, the Arizona Supreme Court – in a four to three decision – upheld, on free speech and free exercise grounds, the rights of two calligraphers to decline to create custom artwork for same-sex weddings. The Court stated that "today we hold that the City of Phoenix cannot apply its Human Relations Ordinance to force Joanna Duke and Breanna Koski, owners of Brush & Nib Studios, LC, to create custom wedding invitations celebrating same-sex wedding ceremonies in violation of their sincerely held religious beliefs."

The Court stated that "The rights of free speech and free exercise, so precious to this nation since its founding, are not limited to soft murmurings behind the doors of a person's home or church, or private conversations with like-minded friends and family. These guarantees protect the right of every American to express their beliefs in public. This includes the right to create and sell words, paintings, and art that express a person's sincere religious beliefs."

The Court began its analysis by noting certain basic principles, such as that "no law, including a public accommodations law, is immune from the protection of free speech and free exercise" and that "[t]he enduring strength of the First Amendment is that it allows people to speak their minds and express their beliefs without government interference."

The Court noted that government attempts to enforce uniformity of opinion has historically had pernicious results, quoting Justice Jackson in *West Virginia State B'd of Ed. v. Barnette*, who wrote that "'[s]truggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men,' but, inevitably 'those bent on its accomplishment must resort to an ever-increasing severity … Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.'"

Although Brush & Nib agreed it was a public accommodation as defined by the Phoenix public accommodation nondiscrimination ordinance, it argued that applying the ordinance to them would compel them to use their artistic talents and personal expression to create custom artwork celebrating same-sex weddings in violation of their free speech rights under article 2, section 6 of the Arizona Constitution and their free exercise rights under the Arizona Free Exercise of Religion Act (FERA).

The Court noted that "[t]he legal and factual questions underlying Plaintiffs' free speech and FERA claims require us to address the same basic issues: (1) whether the Ordinance, as applied by the City, compels Plaintiffs to express a message that violates their religious convictions, and (2) if so, whether Plaintiffs have a protected right to refuse to express that message in the operation of their business."

In analyzing the Free Speech claim, the Court noted, first that, although "the Arizona Constitution provides broader protections for free speech than the First Amendment … federal precedent conclusively resolves Plaintiffs' [free speech] claim."

Next, the Court applied the compelled speech doctrine to the case, noting that the doctrine "is grounded on the principle that freedom of speech 'includes both the right to speak freely and the right to refrain from speaking at all'" and that "an individual … may not be forced to speak a message he or she does not wish to say" because "'when

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speech is compelled" it "force[s] free and independent individuals to endorse ideas they find objectionable[, which] is always demeaning,' and coerces individuals 'into betraying their convictions.'"

The Court rejected the argument that free speech rights do not apply to speech for which the speaker is paid, stating that "A business does not forfeit the protections of the First Amendment because it sells its speech for profit," and citing *Riley v. Nat'l Fed'n of the Blind of N.C.*, 487 U.S. 781 (1988) for the proposition that "'a speaker's rights are not lost merely because compensation is received; a speaker is no less a speaker because he or she is paid to speak.'"

The Court found that – although not all of the Plaintiffs' business activities or products were protected by the First Amendment – "Plaintiffs' custom wedding invitations, and the creation of those invitations, constitute pure speech entitled to full First Amendment protection."

That being the case, the Court addressed some of the dissents' arguments that Brush & Nibs' artwork was not protected speech.

First, the Court rejected the idea that Brush & Nib's actions were based on the customer's sexual orientation – noting that Brush & Nib will make custom artwork for any customers, regardless of the customer's sexual orientation, but will not, regardless of the customer, make custom wedding invitations celebrating a same-sex marriage ceremony.

The Court also rejected the argument that Brush & Nib's speech was unprotected because it contained a combination of both Brush & Nib's speech and the customer's speech, citing *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995) where the U.S. Supreme Court rejected the argument that a parade did not include the personal expression of the parade-organizers because it incorporated speech originally created by others.

In answer to the City's objection that, to an objective observer, the custom wedding invitations do not necessarily convey a message which endorses same-sex marriage, the Court stated that "[w]hether a third party is able to discern any articulable 'message' in pure speech, especially artwork, is simply not relevant in terms of whether it is protected under the First Amendment."

Having concluded that Brush & Nibs' custom wedding invitations were protected speech, the Court then determined that the ordinance needed to be analyzed under a strict scrutiny standard, because "[w]hen a facially content-neutral law is applied by the government to compel speech, it operates as a content-based law."

Applying strict scrutiny, the Court acknowledged that ensuring equal access to publicly available goods and services for all citizens regardless of their status is, generally, a compelling governmental interest. However – the court said – "that interest is not sufficiently overriding as to justify compelling Plaintiffs' speech by commandeering their creation of custom wedding invitations" because – citing *Hurley* – "although the government may prohibit 'the act of discriminating against individuals in the provision of publicly available goods, privileges, and services,' it may not 'declar[e] [another's] speech itself to be [a] public accommodation' or grant 'protected individuals … the right to participate in [another's] speech.'"

For that reason, the Court determined that the City had failed to demonstrate that the ordinance, as applied to Brush & Nib's creation of custom wedding invitations, furthers a compelling governmental interest.

Turning to the second prong of strict scrutiny analysis, the Court found that – because the purpose of the ordinance is to regulate conduct, not speech – regulating Brush & Nib's speech is not narrowly tailored to accomplish that end.

Therefore, the Court concluded, application of the ordinance to Brush & Nib's creation of custom wedding invitations cannot survive strict scrutiny – and that the City's application of the ordinance to Brush & Nib's custom wedding invitations ran afoul of the First Amendment.

Before turning its attention to Brush & Nib's Free Exercise claim, the Court addressed some of the dissents' concerns over the majority's holding.

The Court first stated that "Nothing in our holding today allows a business to deny access to goods or services to customers based on their sexual orientation or other protected status."

And, second, the Court distinguished several decisions from other jurisdictions that the City relied upon to support application of the ordinance to Brush & Nib's custom artwork – calling them "either distinguishable or not persuasive."

Taking up Brush & Nibs' free speech claim under FERA, the Court applied FERA's requirements to the case. In doing so, the Court found, first, that it was undisputed that the Plaintiffs' refusal to express messages that celebrated same-sex marriages was substantially motivated by their religious belief that marriage is only between a man and a woman.

And the Court noted that the City conceded that the Plaintiffs' religious beliefs about marriage were sincere.

Therefore, the Court considered whether application of the ordinance to Brush & Nib imposed a substantial burden on the Plaintiffs. The Court determined that it did, finding that "The Ordinance, as applied by the City, presents Plaintiffs with a stark choice. On one hand, they can choose

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to forsake their religious convictions and create wedding invitations celebrating same-sex marriage. But, on the other hand, if they choose to remain faithful to their beliefs and violate the Ordinance by refusing to make such invitations, they face severe civil and criminal sanctions."

The Court rejected the City's argument that the Plaintiffs' religion says nothing about making wedding invitations and is too attenuated from the Plaintiffs' beliefs about marriage to place any burden on their free exercise. The Court stated that courts have no business addressing whether the religious beliefs asserted are reasonable and that such an inquiry is not a proper consideration in determining whether the ordinance imposes a substantial burden on the Plaintiff's free exercise of religion. The Court came to the same conclusion regarding the dissent's assertion that the Plaintiffs failed to identify any fundamental tenet of their faith prohibiting them from creating wedding invitations for same-sex weddings, stating that "under FERA, Plaintiffs are not required to show that their belief is a 'fundamental tenet' of their faith."

Thus the Court found that applying the ordinance to the Plaintiffs' creation of custom wedding invitations substantially burdened their free exercise.

The Court then determined that the City failed to bear its burden of showing that the ordinance furthers a compelling governmental interest and is the least restrictive means to further that interest, for the same reasons the City failed to do so under the Plaintiffs' speech claim, noting that the dissents' position that the City's nondiscrimination purpose simply overrides all conflicting individual rights and liberties is not the law – citing *Hobby Lobby* for the proposition that "[e]ven a compelling interest may be outweighed in some circumstances by another even weightier consideration."

The Court also noted that Phoenix's public accommodation nondiscrimination ordinance explicitly exempted religious organizations, and stated that "like the religious organizations exempt under the Ordinance, Brush & Nib was established, and is operated, to promote certain religious principles. Although Plaintiffs operate Brush & Nib for profit, this does not mean that they cannot, like a religious organization or church, also further their 'religious objectives as well.'"

In conclusion, the Court found that "the Ordinance, as applied to the Plaintiff's custom wedding invitations, and the creation of those invitations, unconstitutionally compels speech in violation of the Arizona Constitution's free speech clause" and also violates Plaintiffs' free exercise rights under FERA.

Justice Bolick filed a concurring opinion to further explore and emphasize the fact that the Arizona Constitution's free speech protections are broader than the First Amendment's protections. He noted that, whereas the First Amendment "is phrased as a constraint on government power and is applied through the Fourteenth Amendment to the states," Arizona's provision "is a categorical guarantee of the individual right to freely speak, write, and publish, subject only to constraint for the abuse of that right." He wrote, "The dissenters engage in unfortunate hyperbole when they invoke shameful historical examples of discrimination. … Plaintiffs do not seek to employ the coercive apparatus of government to impose disabilities on others. … Plaintiffs seek merely to vindicate their right not to engage in speech that offends their deeply held religious beliefs, a right not only protected by the Arizona Constitution and the Free Exercise of Religion Act, but also one of our nation's most cherished civil liberties – one that, as Justice Robert H. Jackson declared, is 'beyond the reach of majorities and officials.' … As the Court's opinion abundantly illustrates, that right does not evaporate upon enactment of a public accommodations law, no matter how beneficently inspired."

Justices Bales, Timmer, and Staring dissented.

The dissenting Justices rested their dissent primarily on the premise that the majority was wrong to conclude that the ordinance regulated speech. They also argued that the majority was wrong to conclude that Brush & Nib's custom artwork was, in fact, "pure speech."

With respect to the ordinance, the dissent wrote that "[t]he Ordinance is content neutral and does not purport to regulate speech, but rather conduct" and that "[b]ecause the Ordinance regulates conduct, and not speech, any burden on speech is incidental" – citing *Rumsfeld v. Forum for Acad. & Inst. Rights, Inc.*, 547 U.S. 47 (2006) for the proposition that "an incidental burden on speech … is permissible … so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation."

The dissent argued that "[t]he majority's analysis turns on labeling the conduct at issue 'pure speech,' but this legal formalism harbors two pernicious ideas: one is that a vendor's refusal to sell to certain customers is itself protected expression, the other is that the public interest in preventing discrimination does not suffice to require a vendor to serve all equally if the items sold involve expression by the vendor."

The dissent also stated that "[t]he majority's conclusion that requiring Brush & Nib to provide wedding invitations on a non-discriminatory basis would compel 'pure speech' by the owners endorsing same-sex marriage is strained and implausible" because "the expression of a wedding invitation, as 'perceived by spectators as part of the whole' is that

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of the marrying couple" not the makers of the invitations.

But "[e]ven if the Ordinance burdens speech," the dissent wrote, "it is a constitutionally permissible burden because the Ordinance is content neutral, serves a compelling governmental interest, and there is no less restrictive alternative."

Turning to the FERA claim, the dissent wrote that "[e]ven if we assume that the Ordinance places a substantial burden on the owners' exercise of their religious beliefs, they cannot prevail on their FERA claim because the City has a compelling interest in preventing discrimination and has done so through the least restrictive means. That interest would be thwarted if businesses can discriminate based on their owners' views … The goal of equal access cannot be achieved allowing ad hoc exemptions for businesses based on their owners' beliefs, even if they are sincerely held."

The dissent argued that "The prohibition on discrimination not only promotes equal access, but also serves to eradicate discrimination and the attendant humiliation and stigma that result if businesses can selectively treat some customers as second-class citizens … More broadly, if religious beliefs can allow discriminatory refusals of service to same-sex couples, there is no principled reason why FERA will not also protect discriminatory denials of goods or services in other contexts to other protected groups."

The dissent wrote that "This case is not about the government compelling individuals to create art or pure speech expressing a message with which they disagree. Instead, it involves a business, undisputedly a public accommodation, whose owners wish to deny the same goods and services for a same-sex wedding that they would provide for an opposite-sex wedding. Barring those who choose to offer goods and services to the public from discriminating does not impermissibly compel speech. A vendor may no doubt engage in a form of expression by refusing to sell things to customers it disfavors. But expression through such discriminatory conduct, even if motivated by sincerely held religious beliefs, is not legally protected."

Justice Timmer also filed a separate dissenting opinion.

He wrote, first, that the majority was wrong to conclude that the ordinance compels Brush & Nib to express messages supporting same-sex marriages. Instead, he wrote, the ordinance "only requires Plaintiffs to sell the same products equally to all customers, regardless of sexual orientation." So, for example – he wrote – if the Plaintiffs "always include language in wedding invitations for opposite-sex couples describing marriage as a union only between men and women, they can insist on doing so in same-sex wedding invitations without penalty. They can freely publish views opposing same-sex marriages or say nothing at all about marriages. But because they sell custom wedding invitations expressing requests for guests to 'share the joy,' 'celebrate,' or simply attend weddings, Plaintiffs cannot refuse to do so for same-sex couples."

Justice Timmer also disagreed with the majority that compelling the Plaintiffs to sell custom wedding products for same-sex weddings, compelled them to endorse same-sex marriages in violation of their beliefs, contending that wedding invitations do not endorse the idea of either opposite-sex or same-sex marriages.

Finally, Justice Timmer contended that the majority misapplied FERA's "substantial burden" requirement "by failing to consider how the Ordinance itself – before considering penalties for violations – substantially burdens Plaintiffs' exercise of their beliefs." In Justice Timmer's analysis, "[t]he majority's misapplication of FERA's 'substantial burden' requirement effectively eliminates it." He wrote that "[a] court's inquiry should focus on 'the nexus between religious practice and religious tenet; whether the regulation at issue forced plaintiffs to engage in conduct that their religion forbids or prevents them from engaging in conduct their religion requires.'"

But in Justice Timmer's view, "Plaintiffs have not shown that the Ordinance substantially burdens the exercise of their religious beliefs" because "[t]he Ordinance does not compel them to express approval of same-sex marriages, and they would not be penalized for refusing to design wedding products expressing such approval." In addition, "Plaintiffs do not claim that 'fundamental tenets of their religious beliefs, [citations omitted] require them to refrain from selling custom wedding products (as opposed to non-custom goods) related to same-sex weddings." Hence, Justice Timmer concluded that Plaintiffs "have only shown a de minimis burden and so FERA is not triggered."

Justice Staring also filed a separate dissenting opinion in which he expressed skepticism that the majority's opinion could be limited, stating that "[o]ur state's lower courts … will struggle with limiting today's holding when confronted with circumstances that are not meaningfully distinct. This case will sweep much more broadly than the majority expresses."

Justice Staring noted that "the task of showing a substantial burdening of sincerely held religious beliefs under FERA may be accomplished with relative ease" and that "[i]n fact, in light of [the plain language of A.R.S. § 41-14903.01(E), the holding in *Hobby Lobby*, and the axiomatic constitutional proscription against government evaluation of the validity of religious beliefs] I generally agree with the majority's conclusion that PCC § 18-4(B) substantially burdens its owners' free exercise of religion." But for that reason, Justice Staring

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argued that "the ease with which a party may establish a substantial burden places a premium on correctly analyzing the compelling state interest and least restrictive means elements of FERA, particularly in a circumstance like considering whether to grant an exception to public accommodation laws." Justice Staring then noted that "Justice Bales correctly analyzes those elements in his dissent, which, as noted, I join."

CASE 2 *American Legion, et al. v. American Humanist Assn., et al.*

139 S.Ct. 2067 (2019). A CROSS-SHAPED WORLD WAR I MEMORIAL ON PUBLIC PROPERTY AND MAINTAINED WITH PUBLIC FUNDS DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE OF THE U.S. CONSTITUTION.

In *American Legion, et al. v. American Humanist Assn., et al.* the American Humanist Society and others filed a lawsuit, claiming they were offended by the sight of an 89 year old WWI memorial in the shape of a cross on public land in Maryland and that, on account thereof, and the fact that public funds were expended to maintain it, the memorial violated the Establishment Clause of the U.S. Constitution. On June 20, 2019, the U.S. Supreme issued its long awaited opinion in the case, in which the Court concluded:

> *The cross is undoubtedly a Christian symbol, but that fact should not blind us to everything else that the Bladensburg Cross has come to represent. For some, that monument is a symbolic resting place for ancestors who never returned home. For others, it is a place for the community to gather and honor all veterans and their sacrifices for our Nation. For others still, it is a historical landmark. For many of these people, destroying or defacing the Cross that has stood undisturbed for nearly a century would not be neutral and would not further the ideals of respect and tolerance embodied in the First Amendment. For all these reasons, the Cross does not offend the Constitution.*

Due to the 87 page length of the opinion, and the fact that, in addition to the Opinion of the Court penned by Justice Alito, there were five concurring opinions – one by Justice Breyer in which Justice Kagan joined, one by Justice Kavanaugh, one by Justice Kagan, one by Justice Thomas, and one by Justice Gorsuch in which Justice Thomas joined – as well as a dissenting opinion by Justice Ginsburg in which Justice Sotomayor joined – any attempt to summarize the decision would run the risk of being nearly as long as the decision itself. For that reason, I have taken the somewhat unusual step of linking the entire Opinion here (https://www.supremecourt.gov/opinions/18pdf/17-1717_4f14.pdf) for you to review at your convenience, rather than attempting to summarize the Opinion.

CASE 3 *Freedom From Religion Foundation, Inc., et al. v. The County of Lehigh*

933 F.3d 275 (3rd Cir. 2019). A COUNTY SEAL DISPLAYING A LATIN CROSS DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE OF THE U.S. CONSTITUTION.

Following closely on the heels of the U.S. Supreme Court's *American Legion* decision, a unanimous decision of the U.S. Court of Appeals for the Third Circuit held that a 75 year old County seal prominently displaying a Latin cross was constitutional.

For almost 75 years, the official seal of Lehigh County, Pennsylvania has included a prominent canary yellow Latin cross, surrounded by the U.S. and Pennsylvania flags, a depiction of the Lehigh County Courthouse, a red heart, a map of the County's boundaries, two books, a lamp, red bunting, the Liberty Bell, a bison head, industrial buildings, grain silos, and a cow. The County seal appears on a wide variety of County property, including the County's website, tax bills, County flags, and County-owned vehicles – so residents encounter the seal frequently.

The Freedom From Religion Foundation (FFRF) and four of its members who reside in the County filed suit, alleging that the seal violated the Establishment Clause of the U.S. Constitution and requesting that the County stop using the seal.

In analyzing the FFRF's claim, the Court began by noting that, in *American Legion*, the U.S. Supreme Court "confirm[ed] that [the] *Lemon* [test] does not apply to 'religious references or imagery in public monuments, symbols, mottos, displays, and ceremonies.'" In fact, the Court said, the Supreme Court has recognized "'a strong presumption of constitutionality' for 'established, religiously expressive monuments, symbols, and practices'" informed by four considerations: (1) that identifying such symbols' original purposes is often difficult, (2) that the original purposes may multiply over time, (3) that the message conveyed may change over time, and (4) that removing a longstanding symbol imbued with familiarity and historical significance may appear hostile to religion.

The Court acknowledged that the Latin cross in the County seal "no doubt carries religious significance … And its designer – who also voted for its adoption as a Commissioner – said that significance motivated him, at least in part, to include [the cross] in the County seal. But more than seven decades after its adoption, the seal has become a familiar, embedded feature of Lehigh County, attaining

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a broader meaning than any one of its many symbols." Although the cross is "undeniably the focal point of the Lehigh County seal, the Latin cross does not stand alone." Consequently, the court found that "the seal as a whole falls well short of establishing a religion."

The Court also found that "The Lehigh County seal fits comfortably within a long tradition of State and municipal seals and flags throughout our Republic that include religious symbols or mottos, which further confirms its constitutionality."

In addition, the Court found that "Requiring the cross's extirpation … may very well exhibit 'a hostility toward religion that has no place in our Establishment Clause traditions,' inviting disputes over similar longstanding symbols nationwide."

The Court also found that the FFRF had failed to demonstrate a discriminatory intent in the Commission's adoption of the County seal or that the seal deliberately disrespects members of other faiths. In particular, the court noted that, although one of the Commissioners who took part in adopting the seal had stated that the cross "signif[ied] Christianity and the God-fearing people which are the foundation and backbone of our County," that statement "does not doom the cross's inclusion in perpetuity … because 'no matter what the original purpose[] for the [adoption of a symbol], a community may wish to preserve it for very different reasons.' And, here, "the Board's intent in retaining the seal [was] to continue 'recognizing the history of the County.'"

In conclusion, the Court held that "Our task turns on 'the ability and willingness to distinguish between real threat and mere shadow' [citation omitted]. The Establishment Clause's original public meaning and the Court's most recent interpretation of it make two things clear: the *Lemon*-endorsement test does not apply to Lehigh County's seal, and this 75-year-old seal casts only that mere shadow. 'It has become part of the community' [citation omitted]. And that community can retain or remove it in keeping with the First Amendment."

CASE 4 *Biel v. St. James School*

911 F.3d 603 (9th Cir. 2018).

THE MINISTERIAL EXCEPTION DOES NOT APPLY TO A 5TH GRADE CATHOLIC SCHOOL TEACHER WHO DID NOT MEET THREE OF THE FOUR CONSIDERATIONS OUTLINED BY THE SUPREME COURT IN *HOSANNA-TABOR*.

Biel, an elementary Catholic school teacher, sued the school after her teaching contract was not renewed following the announcement of her breast cancer diagnosis. The U.S. District Court granted the school's summary judgment motion on the ground that the school was protected by the ministerial exception. However, the 9th Circuit Court of Appeals – in a 2 to 1 decision – reversed the District Court after determining that the teacher did not constitute a minister under the ministerial exception.

In making its decision, the 9th Circuit applied the Supreme Court's guidance in *Hosanna-Tabor Evangelical Lutheran Church & School v. E.E.O.C.*

The Court recognized, first, that "[r]eligious organizations enjoy a broad right to select their own leaders" and that "[w]hen the ministerial exception applies, it categorically bars an employee's suit under otherwise generally applicable employment laws."

It then noted that, in *Hosanna-Tabor*, the Supreme Court "focused on four major considerations to determine if the ministerial exception applied: (1) whether the employer held the employee out as a minister, (2) whether the employee's title reflected ministerial substance and training, (3) whether the employee held herself out as a minister, and (4) whether the employee's job duties included 'important religious functions.'"

In applying those considerations to Biel, the Court determined that St. James School did not hold Biel out as a minister. The Court found that the school did not suggest to its community that Biel had any "special expertise in Church doctrine, values, or pedagogy beyond that of any practicing Catholic" and that she had no special training in religion or ministry, other than a half-day training conference "whose religious substance was limited." The Court also determined that Biel's title – "Grade 5 Teacher" – did not reflect ministerial substance or training.

Nor did Biel hold herself out as being a minister. The Court noted that "[s]he described herself [only] as a teacher and claimed no benefits available only to ministers."

Therefore, the Court reasoned that the only thing Biel had in common with Perich – the teacher in *Hosanna-Tabor* who was found to be a minister for purposes of the ministerial exception – was that they both taught religion in the classroom.

The Court stated that, in *Hosanna-Tabor*, the Supreme Court emphasized the importance of assessing both the amount of time spent on religious functions and 'the nature of the religious functions performed.'" In this case – the Court found – Biel's "role in Catholic religious education was limited to teaching religion from a book required by the school and incorporating religious themes into her other lessons. Whereas Perich [the teacher in *Hosanna-*

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Tabor] orchestrated her students' daily prayers, Biel's students themselves led the class in prayers. Biel gave students the opportunity to lead the prayers and joined in, but she did not teach, lead, or plan these devotions herself. Similarly, while Perich crafted and led religious services for the school, Biel's responsibilities at St. James's monthly Mass were only 'to accompany her students,' and '[t]o make sure the kids were quiet and in their seats.' These tasks do not amount to the kind of close guidance and involvement that Perich had in her students' spiritual lives."

For those reasons, the Court found that Biel bore little resemblance to the teacher who was found to be a minister in *Hosanna-Tabor*.

In concluding that Biel did not qualify as a minister for purposes of the ministerial exception, the Court stated that the ministerial exception "need not extend to every employee whose job has a religious component … We cannot read *Hosanna-Tabor* to exempt from federal employment law all those who intermingle religious and secular duties but who do not 'preach [their employers'] beliefs, teach their faith, … carry out their mission … [and] guide [their religious organization] on its way.'"

Judge Fisher filed a dissenting opinion.

Judge Fisher began his analysis with a recap of the purpose behind the ministerial exception, stating that "The purpose of the exception is to 'ensure[] that the authority to select and control who will minister to the faithful – a matter 'strictly ecclesiastical' – is the church's alone'" and that "Selection of such persons is a 'core matter of ecclesiastical self-governance with which the state may not constitutionally interfere.'" He noted, as well, that "The term 'minister' is a term of art broader than the word's ordinary dictionary meaning. It 'encompasses more than a church's ordained ministers.'"

Judge Fisher also noted that Justice Alito's concurrence – joined by Justice Kagan – in *Hosanna-Tabor*, made clear that, in determining who is a "minister" for purposes of the ministerial exception, "the employee's function … is the key" and that "the exception 'should apply to any "employee" who … serves as a messenger or teacher of [the organization's] faith.'"

Judge Fisher then applied the same four *Hosanna-Tabor* considerations as did the majority.

With respect to the first consideration – Biel's title – Judge Fisher relied upon more than the fact that Biel's official title was "Grade 5 Teacher." He noted that part of St. James's expression of Biel's role is her designation as a "Catholic school educator[] in the school's Code of Ethics" – which provided that "As Catholic school educators, we are *called* to … [p]romote the peace of Christ in the world." Hence, Biel was not just a teacher – she was a Catholic school teacher. However, given the procedural posture of the case, Judge Fisher drew all inferences in Biel's favor and concluded that Biel's title was secular.

Judge Fisher also concluded – with respect to the third consideration – that Biel did not present herself to the public as a minister.

However, with respect to the second factor – the substance reflected in the employee's title – Judge Fisher criticized the majority for focusing narrowly on Biel's educational and practical training, noting that doing so would interfere with application of the ministerial exception to different religions, because some religions do not require formal training for ministers, concluding that "If we expected all ministers to receive formal religious education, we would improperly restrict the exception." Judge Fisher also noted that "the substance of Biel's title as the Grade 5 Teacher encompasses her responsibility for all facets of her pupils' education, which unquestionably includes religion class and imparting the substantive teachings of the Catholic faith." He, therefore, concluded that "the substance of Biel's title of Grade 5 Teacher encompassed the role of religion teacher" in a way that satisfied the second *Hosanna-Tabor* consideration.

Judge Fisher also disagreed with the majority on the fourth *Hosanna-Tabor* consideration – whether Biel performed important religious functions. Judge Fisher noted that Biel "taught religion class four times a week based on the catechetical textbook *Coming to God's Life*" in which "she was responsible for instructing her students on various areas of Catholic teachings, including Catholic sacraments, Catholic Saints, Catholic social teaching, and Catholic doctrine related to the Eucharist and the season of Lent. She prayed Catholic prayers with her students twice each day and attended monthly school mass with her class," and the school evaluated her on her "infus[ing] [Catholic values] through all subject areas." "Biel was [also] 'expected to model, teach, and promote behavior in conformity to the teaching of the Roman Catholic Church' according to her employment contract, and was subject to termination if she failed to meet that expectation." Therefore, Judge Fisher concluded that Biel's job duties "'reflected a role in conveying the Church's message and carrying out its mission.'"

Judge Fisher rejected Biel's claim that she performed these religious tasks "in a secular manner" and that, therefore, they were not really religious – concluding that considering Biel's subjective attitude toward her religious tasks would impermissibly entangle the Court in the affairs of a

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religious organization in that it would require the Court to determine the significance of the organization's religious beliefs and practices.

Judge Fisher concluded by stating that "In light of these considerations, *Hosanna-Tabor*, and all the circumstances of this case, I would conclude that the ministerial exception does apply to Biel in her capacity as the fifth grade teacher at St. James because of the substance reflected in her title and the important religious functions she performed … Ultimately, Biel was 'entrusted with teaching and conveying the tents of the faith to the next generation [citation omitted].' Those responsibilities render her the 'type of employee that a church must be free to appoint or dismiss in order to exercise the religious liberty that the First Amendment guarantees."

Update – En Banc Review Denied, *Biel v. St. James School*, *926 F.3d 1238 (2019).*

On June 25, 2019, the 9th Circuit Court of Appeals denied a petition for rehearing en banc. Judge Nelson, joined by Judges Bybee, Callahan, Bea, M. Smith, Ikuta, Bennett, Bade, and Collins, filed a lengthy opinion dissenting from the denial of rehearing en banc. The substance of the dissent was that "By declining to rehear this case en banc, our court embraces the narrowest construction of the First Amendment's 'ministerial exception' and splits from the consensus of our sister circuits that the employee's ministerial function should be the key focus."

Update – U.S. Supreme Court Will Review the 9th Circuit's Decision in *Biel v. St. James School*.

On December 18, 2019, the Supreme Court of the United States granted cert. to review the 9th Circuit Court of Appeal's decision in *Biel v. St. James School*, combining it with another 9th Circuit Court of Appeals decision raising similar issues, *Our Lady of Guadalupe School v. Morrissey-Berru*.

CASE 5 *Sterlinski v. Catholic Bishop of Chicago*

934 F.3d 568 (3rd Cir. 2019). A CATHOLIC CHURCH ORGANIST IS A MINISTER FOR PURPOSES OF THE MINISTERIAL EXCEPTION.

In determining that an organist at a Catholic church was a minister for purposes of the ministerial exception, the 3rd Circuit Court of Appeals criticized the 9th Circuit's *Biel v. St. James School* decision discussed above.

After a parish priest, at Chicago's Saint Stanislaus Bishop & Martyr Parish, demoted the church's Director of Music to church organist and then terminated him, the organist sued the church, alleging his demotion and termination were due to his Polish heritage, in violation of Title VII. The church raised the ministerial exception as a defense.

The Court phrased the issue thus: "Sterlinski wants us to decide for ourselves whether an organist's role is sufficiently like that of a priest to be called part of the ministry." The Court then stated that "That's the path followed by a divided panel in *Biel v. St. James School* [citations omitted] … it holds that a court will decide for itself whether a given employee served a religious as opposed to a secular purpose."

But – the Court said – "Our circuit [has] adopted a different approach." That approach was to examine a variety of factors to determine whether an employee was serving a religious function. And one of the most important factors in that analysis is whether the religious organization itself believes the employee is serving a religious function.

With respect to the case before it, the Court stated "If the Roman Catholic Church believes that organ music is vital to its religious services, and that to advance its faith it needs the ability to select organists, who are we judges to disagree? Only by subjecting religious doctrine to discovery and, if necessary, jury trial, could the judiciary reject a church's characterization of its own theology and internal organization. Yet it is precisely to avoid such judicial entanglement in, and second-guessing of, religious matters that the Justices established the rule of *Hosanna-Tabor*."

The Court recognized that such a "hands-off" approach could present a problem – that a religious organization could claim that every one of its employees – including janitors and bus-drivers – were ministers. But the Court opined that the answer to that problem "lies in separating pretextual justifications from honest ones … Once the defendant raises a justification for an adverse employment action, the plaintiff can attempt to show that it is pretextual. The defense bears the burden of articulating the justification, but the plaintiff bears the burden of showing that the justification is pretextual."

In the case before it, the Court noted that the organist never claimed that the church's justification for calling the organist a minister was pretextual. And the evidence – including an 87-page document issued by the United States Conference of Catholic Bishops, which explained how music advances celebration of the mass and other devotional matters – supported the church's claim that the organist, in performing such music, was engaged in a religious function.

Similar to the dissent in *Biel*, the Court rejected the

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organist's claim that his organ playing was not religious because "he was just 'robotically playing the music he was given.'"

In conclusion, the Court found that "organ playing serves a religious function in the life of" the church and, therefore, the organist was a minister for purposes of the ministerial exception.

CASE 6 *Telescope Media Group, et al. v. Lucero, et al.*

936 F.3d 740 (8th Cir. 2019). A PUBLIC ACCOMMODATION NONDISCRIMINATION LAW UNCONSTITUTIONALLY VIOLATES THE FREE SPEECH RIGHTS OF THE OWNERS OF A VIDEO COMPANY WHO, BASED ON THEIR RELIGIOUS BELIEFS CONCERNING MARRIAGE, DECLINE TO CREATE WEDDING VIDEOS FOR SAME-SEX WEDDINGS. Telescope Media Group is a company that creates videos. Carl and Angel Larson, the owners of the company, are Christians who 'believe that God has called them to use their talents and their company to … honor God." For that reason, the Larsens want to decline any requests for their services that conflict with their religious beliefs, including any that "contradict biblical truth; promote sexual immorality; support the destruction of unborn children; promote racism or racial division; incite violence; degrade women; or promote any conception of marriage other than as a lifelong institution between one man and one woman."

Under its Human Rights Act (MHRA), Minnesota claimed that if the Larsens produced any wedding videos they must also produce wedding videos for same-sex couples, which would be contrary to the Larsons' religious beliefs.

The Court first determined that the Larsens had standing to bring a pre-enforcement challenge against the MHRA because the Larsens alleged a credible threat of enforcement against them should they decline to produce same-sex wedding videos.

Next, the Court determined that "[t]he Larsens' videos are a form of speech that is entitled to First Amendment protection" because their videos will serve as a medium for the communication of ideas about marriage and the Larsens will exercise substantial editorial control and judgment in making the videos. The Court rejected the argument that the Larsens videos are not protected speech because they are created through a for-profit enterprise – noting that the U.S. Supreme Court has expressly and repeatedly rejected that argument. The Court also rejected the argument that Minnesota was regulating the Larsens' conduct, not their speech, noting that "[i]f we were to accept Minnesota's invitation to evaluate each of the Larsens' acts individually [as opposed to the finished product – the video], then wide swaths of protected speech would be subject to regulation by the government. "The government could argue, for example, that painting is not speech because it involves the physical movements of a brush … Yet there is no question that the government cannot compel an artist to paint …"

The Court then reiterated the principle that "[t]he Supreme Court has 'held time and again that freedom of speech includes both the right to speak freely and the right to refrain from speaking at all'" and that "[t]o apply the MHRA to the Larsens in the manner Minnesota threatens is at odds with the 'cardinal constitutional command' against compelled speech." The Court stated that "Minnesota cannot 'coerce [][the Larsens] into betraying their convictions' and promoting 'ideas they find objectionable'" and that "[c]ompelling speech in this manner … 'is always demeaning.'"

The Court rejected the argument that the message of a wedding video would be the wedding-couple's speech, rather than the Larsens' speech, stating that "this argument does not get Minnesota far under the First Amendment doctrine. The Supreme Court has recognized that the government still compels speech when it passes a law that has the effect of foisting a third party's message on a speaker." The Court stated that "the First Amendment is relevant whenever the government compels speech, regardless of who writes the script."

The Court also found that the MHRA operated as an unconstitutional content-based regulation of the Larsens' speech because it mandates speech that the Larsens' would otherwise not make or imposes a penalty on the basis of the content of the Larsens' speech, pointing out that by threatening to apply the MHRA against the Larsens should they decline requests to create videos that celebrate same-sex weddings, Minnesota compels the Larsens to self-censor because "[h]ere, 'the safe course' for the Larsens would be to avoid the wedding-video business altogether" which 'dampens the vigor and limits the variety of public debate.'"

Having concluded that the MHRA, as applied to the Larsens, violated the Larsens' Free Speech rights, the Court applied strict scrutiny to the MHRA. In doing so, the Court acknowledged that Minnesota's interest in entitling all people in the state to the full and equal enjoyment of public accommodations was a compelling interest. "But" the Court said "that is not the point. Even antidiscrimination laws, as critically important as they are, must yield to the constitution. And as compelling as the interest in preventing discriminatory conduct may be, speech is

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treated differently under the First Amendment." The Court pointed out that, although the state may prohibit the act of discrimination in public accommodations, it cannot declare another's speech itself to be a public accommodation or grant protected individuals the right to participate in another's speech. Hence, the Court concluded that "[r]egulating speech because it is discriminatory or offensive is not a compelling state interest, however hurtful the speech may be."

The Court also found that the Larsens' Free Exercise claim had merit because the Larsens alleged that the MHRA burdens their religiously motivated speech, not their religious conduct, so that their Free Exercise claim fell within the hybrid-rights doctrine, in which the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech, can bar application of a neutral, generally applicable law.

However, the Court determined that the Larsens' other claims – expressive association, equal protection, vagueness, and the unconstitutional-conditions doctrine – fail.

Judge Kelly concurred in part and dissented in part.

Judge Kelly discussed the history of public accommodation nondiscrimination laws and the addition of sexual orientation as a protected classification under those laws.

Turning her attention to the MHRA and the Larsens, Judge Kelly found that, because of the Larsens' intent to create wedding videos, but to decline creating such videos if the wedding couple were a same-sex couple, such would constitute prohibited sexual-orientation discrimination under the MHRA and that no further factual development is needed so as to reach the question of law: "whether the Constitution compels Minnesota to exempt TMG from the MHRA's provisions."

Judge Kelly agreed with the majority that videos are a form of speech that the First Amendment protects. But Judge Kelly stated that "[t]he MHRA neither compels speech nor targets speech based on its content."

Judge Kelly based her dissent on the view that, in creating wedding videos, the Larsens' were not themselves speaking. She stated that "the Larsens cannot show that viewers of TMG's wedding videos would be likely to understand them to be expressions of the Larsens' 'particularized message' about marriage … Although the Larsens may exercise editorial control over TMG's services, it is still ultimately the couple's story that is being told, not that of the Larsens … By selling its services to the public, TMG 'functions, in essence, as a conduit for the speech of others,' necessarily subordinating the Larsens' own messages to those of their customers."

For that reason, Judge Kelly concluded that "[b]ecause the MHRA is content neutral and is not being applied in a manner that substantially burdens the Larsens' right to express their own message, it is subject to intermediate scrutiny." However, Judge Kelly also argued that the MHRA's application to the Larsens would survive even strict scrutiny.

Judge Kelly agreed with the majority that public accommodation nondiscrimination laws further compelling state interests, of eradicating discrimination and ensuring residents have equal access to publicly available goods and services. But, because unlike the majority, Judge Kelly concluded that the MHRA regulated only conduct, not speech, she disagreed with the majority's conclusion that the Larsens' free speech rights were implicated. On that basis, too, Judge Kelly concluded that the MHRA was narrowly tailored to serve the state's interest in eradicating discrimination, because the MHRA "targets only conduct, not speech."

For the same reasons, Judge Kelly rejected the Larsens' Free Exercise claim, concluding that the MHRA was a neutral law of general applicability and that prohibiting the exercise of religion was not the object of the law, so that the First Amendment was not offended.

Judge Kelly concluded by stating that "[b]y ruling that, under the Larsens' allegations, the MHRA is subject to and fails strict scrutiny, the court carves out an exception of staggering breadth. Under its logic, any time that a state's regulation of discriminatory conduct requires a person to provide services that 'express' something that they dislike, the law is invalid. That ruling cannot be easily limited … In this country's long and difficult journey to combat all forms of discrimination, the court's ruling represents a major step backward."

CASE 7 *State of Washington v. Arlene's Flowers, Inc., et al.*

441 P.3d 1203 (Wash. 2019). APPLICATION OF WASHINGTON STATE'S PUBLIC ACCOMMODATION NON-DISCRIMINATION LAW TO A FLORIST WHO, ON RELIGIOUS PRINCIPLE, DECLINED TO CREATE FLORAL ART FOR A SAME-SEX WEDDING DID NOT VIOLATE THE FLORIST'S FREE EXERCISE OF RELIGION RIGHTS.

This case continues the saga of a Washington State florist ("Arlene's") who – due to her religious beliefs about marriage – declined to create floral art for a long-standing customer's same-sex wedding, for which she was prosecuted under the Washington State Law Against Discrimination (WLAD).

Both the trial court and the Washington Supreme Court originally found against the florist, after which the florist

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appealed to the U.S. Supreme Court. After the U.S. Supreme Court issued its 2017 decision in the *Masterpiece Cakeshop* case – in which the high Court found in favor of a Colorado baker who had declined, due to his religious beliefs about marriage, to create a custom wedding cake for a same-sex wedding – the Supreme Court granted Arlene's cert. petition, vacated the Washington Supreme Court's decision against Arlene's, and remanded the case back to the Washington Supreme Court to reconsider the case in light of its *Masterpiece Cakeshop* decision.

After reconsidering its earlier decision in light of the *Masterpiece Cakeshop* decision, the Washington Supreme Court affirmed its earlier ruling against Arlene's Flowers.

First, the high court of Washington determined that – unlike in *Masterpiece Cakeshop* – the adjudicatory bodies hearing the case had been neutral and had not evidenced hostility toward Arlene's religious principles. The Court rejected Arlene's argument that Washington State's Attorney General had shown religious hostility when it prosecuted Arlene's while not prosecuting the owners of a Seattle coffee shop who expelled a group of Christian customers from the shop, on the grounds that *Masterpiece Cakeshop*'s neutrality principle applied only to adjudicatory bodies, not to the Attorney General, who was the lawyer representing the State. For those reasons, the Washington Supreme Court determined it had no reason to alter its original opinion.

Second, the Court determined that applying WLAD to Arlene's in this situation did not violate Arlene's owner's right to free exercise of religion under the Washington State Constitution's elevated protections, because WLAD is constitutional even under a strict scrutiny standard of review – observing that WLAD is a neutral and generally applicable health and safety law and that numerous other courts have heard religious free exercise challenges to laws like WLAD and have upheld them under strict scrutiny.

The Court also rejected Arlene's free speech and free association claims.

The decision has been appealed to the U.S. Supreme Court.

CASE 8 *Williamson, et al. v. Brevard County*

928 F.3d 1296 (11th Cir. 2019). A COUNTY BOARD OF COMMISSIONER'S PROCESS FOR SELECTING THOSE WHO PRAYED AT COMMISSION MEETINGS VIOLATED THE ESTABLISHMENT CLAUSE.

On July 8, 2019, the United States Court of Appeals for the 11th Circuit ruled that a government prayer practice that categorically excluded certain people from giving invocations based solely on the Commissioner's personal dislike of the invocation-givers' beliefs violated the Establishment Clause of the U.S. Constitution.

Under the challenged practice of the Brevard County Board of Commissioners, the Commissioners had the plenary authority, on a rotating basis, to invite whomever they wanted to deliver invocations at the beginning of the Commissioners' Board meetings. In response to the Commission denying the requests of certain secular humanists and atheists that they be allowed to give the invocations, the secular humanists and atheists filed suit raising six claims: violations of the First Amendment's Establishment, Free Speech, and Free Exercises Clauses; the 14th Amendment's Equal Protection Clause; and the Equal Protection and Establishment Clauses of the Florida Constitution.

In analyzing the case, the Court began by acknowledging that the U.S. Supreme Court's interpretation of the Establishment Clause has expressly permitted the long-standing practice of opening a legislative session with a prayer. The Court stated that "Since *March v. Chambers*, 473. U.S. 783 (1983), legislative prayer . . . has been found to be constitutional in most cases." And the Court noted that "The Court went further in *Town of Greece v. Galloway*, 134 S.Ct. 1811 (2014), explicitly permitting sectarian prayer."

The Court then turned its attention to what it called "the outer limits of permissible prayer practices," noting that "In *Marsh*, the Court told us that '[t]he content of prayer is not of concern to judges where … there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief.'"

In this part of its analysis, the Court noted that, although it had, in the past, upheld as constitutional several different government prayer practices, in *Pelphrey v. Cobb County*, 547 F.3d 1263 (11th Cir. 2008) it had struck down a prayer practice where – in drawing invitees from entries for "Churches" in a phone book – lines had been drawn through certain subcategories of churches, including Islamic, Jehovah's Witnesses, Jewish, and Latter-Day Saints entries, and no representatives of those faiths had been invited to speak – concluding that such evidenced a categorical exclusion of certain faiths based on their beliefs.

The Court's conclusion was that "The state of our law, then, is clear at least about this much: local governments have significant freedom to conduct legislative prayers at the start of their sessions, even prayers that are explicitly sectarian and predominantly Christian. They may even employ a single cleric from only one denomination to

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deliver their invocations. But there is an exception to this: local governments violate the Constitution if they organize and conduct their prayers in a way that discriminates against other religious beliefs."

Turning to the specific facts of the case before it, the Court noted that the fact that, of the 195 invocations given at the Commission's meetings between 2010 and 2016, 188 – or over 96% – were given by Christians, did not raise an Establishment Clause problem because such was reasonably reflective of the community's demographics. The Court also found that the content of the prayers were constitutionally unproblematic because there were no allegations that the prayers regularly disparaged or proselytized particular belief systems.

However, the Court found a problem with the Commission's procedure used to select prayer givers. The Court noted, in passing, the Commission's Resolution that appeared to favor faith-based monotheistic religions, but relied most heavily on the deposition testimony of the Commissioners.

Although the Court found constitutionally unproblematic the fact that the Commissioners had no written prayer policy as well as plenary power to select prayer givers, the Court found that "[t]he way this plenary power was exercised is at the core of the Establishment problem in Brevard County." Specifically, the Court found that every Commissioner but one had "indicated that the specific religious beliefs of a prospective invocation-giver would have a real impact on whether they would be invited or permitted to give an invocation or excluded from consideration." The Court stated that "Most troubling and plainly unconstitutional were the statements by numerous Commissioners that certain religions or types of religions would be flatly banned from giving an invocation." Included in that list – for one or more Commissioners – were Wiccans, Rastafarians, polytheists, and deists. Thus the Court found that "many members of the Board view the prayer opportunity in Brevard County as an opportunity reserved only for adherents of monotheistic religions, and only for some of them … Brevard County's haphazard selection process categorically excludes certain faiths – some monotheistic and apparently all polytheistic ones – based on their belief systems" – reflecting an aversion or bias against minority faiths.

In the end, the Court held that "[t]he law is abundantly clear that the County may allow sectarian prayer at the start of its legislative sessions, just as the Supreme Court approved prayer in *Marsh* and again in *Galloway*, and as we have in *Pelphrey* and in *Atheists of Florida*. But the County may not employ a discriminatory selection process in doing so."

The Court vacated the lower court's decision to the extent it went further than that, and explicitly declined to consider whether atheists and secular humanists – including the particular plaintiffs then before the Court – must be allowed to deliver non-theistic invocations. Having resolved the case under the First Amendment's Establishment Clause, the Court did not reach the plaintiffs' Free Speech and Free Exercises Clause claims, the 14th Amendment Equal Protection Clause claim, or the Equal Protection and Establishment Clause claims under the Florida Constitution.

CASE 9 *Fields, et al. v. Speaker of the Pennsylvania House of Representatives, et al.*

936 F.3d 142 (3rd Cir. 2019). A STATE LEGISLATURE'S POLICY OF RESTRICTING LEGISLATIVE PRAYER-GIVERS TO THEISTS IS NOT UNCONSTITUTIONAL.

In a 2-1 decision in *Fields v. Speaker of the Pennsylvania House of Representatives*, the U.S. Court of Appeals for the Third Circuit held that the Pennsylvania House of Representative's prayer policy preferring theistic over non-theistic prayers, and posting a sign asking visitors to stand for the prayers, do not violate the U.S. Constitution.

The Pennsylvania House of Representatives begin most legislative sessions with a prayer. The House invites guest chaplains to give the prayers. But the House excludes non-theists from serving as chaplain prayer-givers, on the ground that prayer presupposes a higher power. The House also has a sign asking visitors to stand for the prayers. A group of non-theists challenged the theist-only policy under the Establishment, Free Exercise, Free Speech, and Equal Protection Clauses of the U.S. Constitution. They also challenged the constitutionality of the "please stand" sign.

In analyzing the non-theists' objection to the theists-only prayer policy, the Court began by asking whether the House's prayer practice fits within the tradition long followed in Congress and the state legislatures, citing *Town of Greece v. Galloway*, 572 U.S. 565 (2014). The Court found that the prayer practice of the Pennsylvania House did, for two reasons. First, the Court found that "only theistic prayer can satisfy all the traditional purposes of legislative prayer." And, second, the Court found that "the Supreme Court has long taken as given that prayer presumes invoking a higher power."

As to the first point, the Court stated that "as a matter of traditional practice, a petition to human wisdom and the power of science does not capture the full sense of 'prayer,' historically understood" and that "at bottom, legis-

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lative prayers seek 'divine guidance' in lawmaking." The Court concluded that "history tells us that only theistic invocations can achieve all the purposes of legislative prayer" and, thus, "the historical tradition supports the House's choice to restrict its invocations to theistic prayer." As to the second point – that the Supreme Court has long taken as given that prayer presumes invoking a higher power – the Court noted that "the notion that prayer is definitionally theistic suffuses the opinions in *Town of Greece*" and that "[r]ecognizing that prayer has traditionally presumed a higher power does not amount to 'instituting a religious orthodoxy.'"

The Court then concluded that "because [nontheists] do not proclaim the existence of a higher power, they cannot offer religious prayer in the historical sense."

However, the Court went on to state that – although a legislative body may restrict its prayer practices to theistic prayer-givers, a legislative body cannot restrict its prayer-givers to a particular category of theists, and exclude other theists. Given the fact that the Court rested its decision on two pillars – (1) that the purpose of legislative prayer is to invoke divine guidance, and (2) that prayer presupposes a higher power – the Court stated that neither pillar supports excluding any group of theists. In a clarification of this principle, the Court stated that "a prayer by a Muslim is different in kind from one by a nontheist – different enough that a legislature may permissibly exclude the latter but not the former."

But the Court emphasized that legislative bodies need not impose an extreme nondiscrimination rule in their legislative prayer policies, because to do so would provide a "heckler's veto to voices on the fringe." As the Court stated – "If, in the name of nondiscrimination, the House must abide prayers from nontheists, Satanists, and groups that deride religion, it will stop accepting guest chaplains altogether" which "will result in less diversity of religious expression – a 'particularly perverse result' … In matters of promoting religious diversity, the perfect should not be the enemy of the good." In short, the Court stated that legislatures need not institute an "all comers" prayer policy.

For these reasons, the Court rejected the non-theists' Establishment Clause challenge.

The Court also rejected the non-theists' Free Speech challenge – because the Court found that legislative prayer is government speech and "[T]he Free Speech Clause does not regulate government speech," citing *Matal v. Tam*, 137 S.Ct. 1744, 1757 (2017).

The Court also rejected the non-theists' Free Exercise challenge on the same ground, stating that "[b]ecause legislative prayer is government speech, the Free Exercise Clause does not apply."

Finally, the Court also rejected the non-theists' Equal Protection challenge, stating that legislative prayer is government speech and that "private citizens 'have no personal interest in government speech on which to base an equal protection claim.'"

The Court then turned its attention to the non-theists' challenge to the sign outside the House chamber that read "All guests who are physically able are requested to stand during [the prayer]" as well as to the House Speaker's practice of introducing the prayer by requesting that "[m]embers and guests, please rise." The Court rejected the challenges to both these practices on the ground that neither practice was unconstitutionally coercive.

The Court stated that "the sign and statement were merely requests to rise, which on their own are permissible," noting that "The challengers here are adults, 'presumably not readily susceptible to religious indoctrination or peer pressure.'" The Court also noted that "this situation [is not] analogous to a request to stand in a school setting." Citing *Town of Greece*, the Court stated that "[L]egislative bodies do not engage in impermissible coercion merely by exposing constituents to prayer they would rather not hear and in which they need not participate" and concluded that "In sum, the … sign and Speaker statement were not coercive" and, therefore, were not unconstitutional.

However, Judge Restrepo filed a dissenting opinion on the ground that, in his view, "the Pennsylvania House's process of selecting guest chaplains violates the Establishment Clause of the First Amendment."

Judge Restrepo rested his opinion on the observation that the Supreme Court has recognized non-theists as members of "religions" for purposes of the First Amendment, citing *Torcaso v. Watkins*, 367 U.S. 488, 495 n.11 (1961). He then argued that "history demonstrates that legislative prayer, as envisioned by the First Congress and as subsequently practiced by Congress since then, never involved the purposeful exclusion of persons from consideration to serve as chaplains on the basis of their religions or religious beliefs." Based on these observations, he then concluded that "by virtue of the fact that the history and tradition of legislative prayer in this country is thus devoid of any history of purposeful exclusion of persons from serving as chaplains based on their religions or religious beliefs, the Pennsylvania House's guest-chaplain policy – which purposefully excludes adherents of Plaintiffs' religions and persons who hold Plaintiffs' religious beliefs from serving as guest chaplains – does not fit 'within the tradition long followed in Congress and the state legislatures' and therefore vio-

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lates the Establishment Clause."

In addition – Judge Restrepo stated that "In my view, even if the Pennsylvania House's exclusionary guest-chaplain policy fits within the history and tradition of legislative prayer in this country – which, for the reasons stated above, it does not – the policy nonetheless additionally runs afoul of the Establishment Clause by instituting a religious orthodoxy and by directing and controlling the content of legislative prayer."

He argued that the Pennsylvania House's guest-chaplain policy institutes a religious orthodoxy by subjecting "prospective guest chaplains to a litmus test of whether they believe in the existence of a 'higher power' or God," and, by so doing, "actively lends its power and prestige to the religious theory that a 'higher power' or God indeed exists, thus violating the Establishment Clause's neutrality principle and instituting belief in a supreme deity as 'religious orthodoxy'".

He further opined that the House's guest-chaplain policy "impermissibly directs and controls the content of the prayers delivered by guest chaplains by only permitting persons who profess a belief in a 'higher power' or God to serve as guest chaplains" – the practical effect of which is to insure that the content of chaplain prayers include references to a higher power or God.

CASE 10 *Olsen v. Rafn, et al.*

__ F.Supp.3d ____, 2019 WL 4393147 (E.D. Wisc. 2019). A PUBLIC COLLEGE VIOLATED STUDENT'S FIRST AMENDMENT RIGHTS WHEN IT PROHIBITED THE STUDENT FROM HANDING OUT VALENTINE CARDS CONTAINING RELIGIOUS MESSAGES AND BIBLE VERSES.

The U.S. District Court for the Eastern District of Wisconsin held that Northeast Wisconsin Technical College violated a student's First Amendment rights when it prohibited her from continuing to hand out on the college's campus Valentine cards that contained religious-themed messages such as "Jesus Loves You!" and "God is Love!" with accompanying Bible verses.

The college prohibited the student's activities after an anonymous complaint was lodged that someone was "passing out Valentine's Day cards with bible references on the cards." The college justified its prohibition on the grounds that handing out the cards constituted "solicitation" in violation of the college's policies and that some people could find the messages on the Valentine cards offensive.

After the student filed a lawsuit claiming that the college had violated her constitutional rights, the college instituted a new policy that limited expressive activity (which it defined as "demonstrations, picketing, vigils, rallies, performances, petitioning, gathering of signatures, distribution of literature, and other forms of outward communication") to four small internal and five small external Public Assembly Areas representing a minute area of the college's campus.

The Court determined, first, that "[t]here can be no doubt that in handing out her home-made Valentines to her fellow students, friends, and staff at NWTC, Olsen was engaged in a constitutionally protected form of expression." The Court analogized the Valentines to handbills and, citing *Lovell v. Griffen*, 303 U.S. 444 (1938), stated that "'handbilling is both a method of communication that has a long and venerable history that predates the birth of this nation, and is a form of speech that is protected under the First and Fourteenth Amendments.'"

The Court held that forum analysis was inapplicable to the case before it because the student was not seeking use of a public forum, traditional or otherwise. She was not communicating to the public generally but, rather, to individual recipients of her Valentine cards. Therefore, the student did not need a public forum in order to lawfully convey her messages.

The Court pointed out that, had the student been distributing her Valentine cards in a manner that was unruly or disruptive to the goals of the college, or if the messages were obscene or indecent, the college would have been justified in stopping her – but that the student had done none of those things.

The Court stated that the college "had no more right to prevent [the student] from handing out individual Valentines than it did to stop her from wishing each individual to have a 'good morning and a blessed day."

Consequently, the Court found that the college had violated the student's First and Fourteenth Amendment rights.

The Court also struck down the college's new expressive activity policy as unconstitutionally vague and overbroad.

CASE 11 *New Hope Family Services, Inc. v. Poole*

387 F.Supp.3d 194 (N.D. New York 2019).

A STATE LAW, APPLIED TO A CHRISTIAN ADOPTION SERVICE PROHIBITING THE SERVICE FROM OPERATING CONSISTENTLY WITH ITS RELIGIOUS BELIEFS, WAS NOT UNCONSTITUTIONAL.

New Hope Family Services is a Christian ministry providing adoption placement services. Based on its religious principles, New Hope will not place children with those

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living together without the benefit of marriage or with same-sex couples. Instead, New Hope would refer such prospective adoptive parents to county social services or other providers.

New Hope challenged the application to it of a state law that prohibits adoption agencies from discriminating in their placement services on the basis of, among other things, sexual orientation. New Hope alleged that the law violated New Hope's free exercise and free speech rights, violated equal protection, and constituted an unconstitutional condition.

Turning to New Hope's Free Exercise of Religion claim, the Court stated that "evolving First Amendment jurisprudence suggests that courts should consider the historical and social context underlying a challenged government action to determine whether the action was neutral or motivated by hostility toward religion." And citing the U.S. Supreme Court's *Masterpiece Cakeshop* decision, the Court stated that factors to consider in determining whether the state's action was neutral or hostile, included "'the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statement made by members of the decisionmaking body.'"

The Court noted that the challenged law was "on its face, 'neutral and generally applicable' and, therefore subject to rational basis review." In addition, the Court found that "Nothing before the Court supports the conclusion that [the law] was drafted or enacted with the object 'to infringe upon or restrict practices because of their religious motivation'" – noting that the complaint contained no allegations of the type of hostility or bias demonstrated in *Masterpiece Cakeshop* and other cases. Nor did the Court find any evidence in the record that the state had knowingly permitted other adoption placement agencies to discriminate against members of a protected class, while applying the law to New Hope, as had occurred in *Masterpiece*.

Therefore, the Court found that the challenged law was facially neutral, generally applicable, and that it had been neutrally and generally applied. Having determined that New Hope had failed to plausibly allege a free exercise claim, the Court dismissed that claim.

Turning its attention to New Hope's free speech claim, the Court found that the challenged law did not violate New Hope's free speech rights because the state's purpose in licensing adoption and foster care agencies was to authorize such agencies to perform governmental adoption and foster care functions for the state. Therefore, "New Hope's speech, to the extent any is required when performing its services as an authorized agency, constitutes governmental [not New Hope's] speech" and the government had the right to control its own message.

The Court, in addition, found that the challenged law did not, in fact, compel speech. The Court stated that "New Hope is not being forced to state that it approves of non-married or same sex couples. Rather, the only statement being made by approving such couples as adoptive parents is that they satisfy the criteria set forth by the state, without regard to any views as to the marital status or sexual orientation of the couple … nothing is preventing New Hope from continuing to share its religious beliefs throughout the entire process."

The Court also dismissed New Hope's expressive association claim, stating that "New Hope is not being required to hire employees that do not share their same religious values. They are not prohibited in any way from continuing to voice their religious ideals [and that] 'the enforcement of [the regulation] would not materially interfere with the ideas that the organization sought to express.'" In addition, the Court ruled that "even if the application of the regulation worked a significant impairment on New Hope's association rights, the state's compelling interest in prohibiting the discrimination at issue here far exceeds any harm to New Hope's expressive association."

The Court also dismissed New Hope's selective enforcement and intentional discrimination equal protection claims. Generally, the Court found that those claims were duplicative of New Hope's already dismissed First Amendment claims. Specifically, the Court rejected the selective enforcement claim on the ground that there were no allegations that other authorized agencies were being permitted to violate the nondiscrimination law and continue operating. And the Court rejected the intentional discrimination claim because there were no allegations that New Hope had suffered adverse treatment compared with other similarly situated individuals based on religion.

The Court also stated that "nothing in the complaint plausibly alleges that [the state] was motivated by a discriminatory animus" – noting that the state was also enforcing the law against other faith-based adoption and foster care providers, including Catholic, Jewish, LDS, and Muslim providers which had the same beliefs as New Hope "concerning life, marriage, the family, and human sexuality."

Finally, the Court dismissed New Hope's unconstitutional conditions claim, viewing the claim simply as "a mere repackaging of its various First Amendment claims."

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Update – Appeal:
The decision has been appealed to the U.S. Court of Appeals for the 2nd Circuit.

Update – Preliminary Injunction:
On November 11, 2019, the U.S. Court of Appeals for the 2nd Circuit entered a preliminary injunction that, pending a decision on New Hope's appeal, New Hope need not confirm its compliance with the challenged law, may continue the adoption study process for any individuals who completed New Hope's orientation prior to the commencement of the law suit, may continue to supervise placements of children in its legal custody, and may continue to accept surrenders of children and to place out children with approved adoptive applicants.

CASE 12 *Buck, et al. v. Gordon, et al.*

___ F.Supp.3d ___, 2019 WL 4686425 (W.D. Mich. 2019). CATHOLIC ADOPTION AND FOSTER PLACEMENT AGENCY IS ALLOWED TO OPERATE IN ACCORDANCE WITH ITS RELIGIOUS PRINCIPLES DURING LITIGATION.

The U.S. District Court for the Western District of Michigan, Southern Division, entered a preliminary injunction in favor of St. Vincent Catholic Charities, allowing it to continue its adoption and foster placement services in accordance with its traditional Catholic belief that marriage, as ordained by God, is for one man and one woman.

Due to St. Vincent's religious beliefs, it cannot provide written recommendations and endorsements for adoption or foster care for unmarried or LGBTQ couples. However, St. Vincent will refer such prospective parents to other agencies and does not prevent any couples, same-sex or otherwise, from fostering or adopting. In addition, same-sex couples, who other agencies certify, are able to adopt children in St. Vincent's care using the Michigan Adoption Resource Exchange (MARE).

Michigan's adoption services contract includes a non-discrimination provision, but a Michigan statute specifically protects child placement agencies' free exercise of religion, providing that child placement agencies may continue in operation while abstaining from conduct that conflicts with an agency's sincerely held religious beliefs, and prohibiting the government from taking any adverse action against an agency on the basis that the agency has declined or will decline to provide any services that conflict with the agency's sincerely held religious beliefs.

After the election of a state attorney general who, during her election campaign, stated that she would not defend the law protecting an agency's right to operate in accordance with its religious principles and who described proponents of the law as "hate-mongers," and after the State threated to terminate the State's contracts with St. Vincent, St. Vincent filed suit seeking a preliminary injunction that would enjoin the State from terminating or suspending the State's contracts with, or taking other adverse action against, St. Vincent based upon its religious exercise.

In analyzing the case, the Court acknowledged "the general principle that a law that is neutral and of general applicability need not be justified by a compelling interest even if the law has an incidental effect of burdening a particular religious practice." However, the Court noted that "[i]f the law appears to be neutral and generally applicable on its face, but in practice is riddled with exceptions or worse is a veiled cover for targeting a belief of a faith-based practice, the law satisfies the First Amendment only if it 'advance[s] interests of the highest order and [is] narrowly tailored in pursuit of those interests.'" The Court then determined that "[t]he exception applies here because the historical background, specific series of events, and statements of Defendant [state Attorney General] Nessel all point toward religious targeting."

Applying strict scrutiny analysis, the Court determined, first, that neither of the State's possibly compelling interests survived strict scrutiny.

The first compelling governmental interest the Court identified was the prevention of discriminatory conduct in services for which the State pays. However, the Court noted that although St. Vincent will not itself certify same-sex couples for placement, couples certified by other adoption agencies may access children in St. Vincent's care through MARE. Therefore, the Court, concluded, the State's threats against St. Vincent "strongly suggests the State's real goal is not to promote non-discriminatory child placements, but to stamp out St. Vincent's religious belief and replace it with the State's own."

The second possible compelling governmental interest the Court found the State might have is making available as many properly certified homes for placement as possible. But, the Court determined, the State's threatened actions against St. Vincent "actually undermines that goal" because St. Vincent's referral of prospective LGBTQ parents to other agencies does not in any way reduce the number of certified homes for placement. In fact, the Court pointed out, "[p]aradoxically, the State's course of action here would constrict the supply of C[hild] P[lacement] A[gencie]s and undermine the State's intent of getting certified placements for kids. Again, this strongly suggest that something else – namely, religious targeting – is the State's real purpose."

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In balancing the harms, the Court found that "[t]here is a strong likelihood of irreparable harm to St. Vincent absent the preliminary injunction" because "[t]he loss of rights under the First Amendment is inherently harmful" and, in addition, St. Vincent risks the loss of foster and adoption services licensing, which would shut St. Vincent's child placement services down, harming not only St. Vincent but also the children in its care, foster and adoptive parents who rely on St. Vincent for support, and the employees of St. Vincent who would lose their employment.

On the other hand, the Court determined that "[t]he risk of harm to the State … is not substantial" because "[a]llowing St. Vincent to continue its practice does not prevent any licensed same-sex couple from becoming certified, fostering, or adopting. Nor does it prevent any unmarried or same-sex couple from completing the certification process in the first place with an agency with different religious beliefs or no such beliefs at all."

In considering the public interest, the Court noted that "[p]reventing constitutional violations is always in the public interest" and "[e]nsuring that as many properly certified homes are available for prospective foster and adoptive children as possible, and that children in the system are placed quickly, is also in the public interest."

In conclusion, the Court determined that St. Vincent had established a likelihood of success on the merits, and that the balancing of harms and the public interest weighed in favor of granting St. Vincent its requested preliminary injunction, allowing it to continue operating in accordance with its sincerely held religious beliefs.

CASE 13 *Intervarsity Christian Fellowship/ USA, et al. v. The University of Iowa, et al.*

___ F.Supp.3d __, 2019 WL 5059854 (S.D. of Iowa 2019).

PUBLIC UNIVERSITY VIOLATED RELIGIOUS STUDENT ORGANIZATION'S CONSTITUTIONAL RIGHTS WHEN IT REVOKED THE ORGANIZATION'S OFFICIAL STATUS ON THE GROUNDS THAT THE ORGANIZATION'S STATEMENT OF FAITH AND REQUIREMENT THAT ITS LEADERS SUBSCRIBE TO THE FAITH STATEMENT VIOLATED THE UNIVERSITY'S HUMAN RIGHTS POLICY.

Intervarsity Christian Fellowship (ICF), a Christian student organization, registered with the University of Iowa as a Registered Student Organization (RSO), which entitled it to certain benefits, such as funding eligibility, inclusion in University publications, use of University trademarks, and use of campus meeting facilities. ICF sued the University after the University deregistered ICF as an RSO on the grounds that ICF's statement of faith – which endorsed the view that sexual activity should be limited to that between a husband and wife and that each person should embrace his or her God-given sex – and its requirement that, although its membership is open to all, ICF's leaders must accept and seek to live by ICF's religious beliefs, violated the University's Human Rights Policy.

ICF alleged that the University's deregistration violated ICF's free speech, free association, and free exercise rights under the First Amendment to the United States Constitution.

In considering ICF's claims, the Court first focused its attention on what level of scrutiny was appropriate. In doing so, the Court noted that, by granting recognition to student organizations, the University had created a limited public forum and that, although the University could constitutionally restrict access to its limited public forums, it could only do so if the access restrictions were reasonable and viewpoint neutral. The University could not discriminate against speech on the basis of its viewpoint.

The Court then noted that disparate application of a regulation governing what speech is permitted in a limited public forum can constitute viewpoint discrimination, and that nondiscrimination policies are not viewpoint neutral if they are selectively applied so as to restrict leadership or membership requirements of some student groups but not others. The Court found that the University did just that, because whereas ICF was prohibited from requiring or even encouraging its leaders to subscribe to its faith statement, other RSOs were allowed to limit their membership and leadership based upon the Human Rights Policy's protected characteristics.

So, for example, the Court noted that sports clubs and certain singing groups were allowed to limit their membership based on sex; another group was allowed to restrict its membership based on veteran status; another group was allowed to exclude members who did not share its political views; and another group was allowed to require its leaders to affirm those in the LGBTQ community.

The Court found that "[t]his disparate treatment constitutes viewpoint discrimination against Intervarsity" and was, therefore, subject to strict scrutiny review.

The Court found the same with regard to ICF's free exercise of religion claims. The Court stated that "strict scrutiny applies when: (1) the government declines to grant religious exceptions to facially neutral rules for which secular exceptions are permitted; and (2) circumstances indicate the government did so based on its judgment of the religious motivations in question."

In this case, the Court found that strict scrutiny applied to the University's deregistration of ICF because the Uni-

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versity allows exceptions to its Human Rights Policy for secularly motivated reasons, but denies exceptions for religiously motivated reasons and that, therefore, "the University's secular exceptions to the Human Rights Policy undermine some of the Policy's goals.

In short, the Court held that "[t]hese examples show that, by granting the [secular] exceptions it has to the Human Rights Policy and refusing to make a similar exception to Intervarsity, the University has made a value judgment that its secular reasons for deviating from the Human Rights Policy are more important than InterVarsity's religious reasons for the deviation it seeks. Because this reflects an impermissible value judgment in favor of secular motivations [citations omitted] the University's decision to deregister InterVarsity is subject to strict scrutiny."

Having determined that strict scrutiny analysis applied to ICF's free speech, free association, and free exercise claims, the Court applied strict scrutiny such that the University was required to show that its deregistration of ICF was necessary to serve a compelling state interest and was narrowly drawn to achieve that end.

The Court rejected the University's claim that its interest in preventing discrimination was compelling, because the University's disparate application of its Human Rights Policy evidenced that the University was willing to accept the harm associated with discrimination by a political or ideological group but not a religious group. The Court stated that "by choosing to accept some such harms while restricting InterVarsity's leadership requirements – conduct protected by the First Amendment – the University's interests that support the restriction are not compelling."

The Court also found that the University's deregistration of ICF was not narrowly tailored to serve the University's allegedly compelling interests because the evidence showed that the University did not meaningfully consider less restrictive alternatives to deregistration. For example, the Court said, the University could have adopted an all-comers policy applicable to all RSOs, but did not do so.

In conclusion, the Court held that the University and three of its officials violated ICF's First Amendment free speech, expressive association, and free exercise of religion rights when they deregistered ICF for failure to comply with the University's Human Rights Policy.

The Court denied ICF's ministerial exception claim because, the Court said, the ministerial exception doctrine does not apply to cases such as ICF's claims, in that the University did not actually select ministers for ICF or install them over ICF's objections, in violation of the Establishment Clause.

Finally, the Court awarded ICF nominal damages, entered a permanent injunction against the University, and denied qualified immunity to three of the individual University employees, finding them to have violated ICF's clearly established constitutional rights.

CASE 14 *Lexington-Fayette Urban County Human Rights Commission v. Hands On Originals*

___ S.W.3d ___, 2019 WL 5677638 (Kentucky 2019).

CONCURRING OPINION WOULD UPHOLD THE RIGHT OF A T-SHIRT COMPANY TO DECLINE PRINTING A T-SHIRT PROMOTING AN LGBTQ+ PRIDE FESTIVAL THAT SENT A MESSAGE CONTRARY TO THE BUSINESS OWNER'S RELIGIOUS BELIEFS.

Hands On Originals prints promotional materials such as shirts, hats, and mugs, and in doing so employs graphic design artists to implement its customers' expressive purposes on those promotional materials. The Gay and Lesbian Service Organization (GLSO) filed a discrimination complaint against Hands On Originals with the Lexington-Fayette Urban County Human Rights Commission, after Hands On declined to print t-shirts promoting GSLO's Pride Festival. Hands On's owners declined GSLO's request because GSLO promotes sexual relationships and sexual activities outside of a marriage between a man and a woman, contrary to Hands On's owner's sincerely held religious beliefs.

The Supreme Court of Kentucky affirmed the lower court's dismissal of the action on the ground that GSLO did not have standing to bring the claim because the ordinance under which the claim was brought only authorizes "individual[s]" to file discrimination claims with the Human Rights Commission – and GSLO did not qualify as an "individual" under the ordinance.

However, Justice Buckingham filed a concurring opinion because, he wrote, "in light of the overarching importance of the issues raised in this proceeding, I write separately to express my views on the principal issues raised in this case, with the objective that they may be of some assistance in the event these circumstances again arise, in a properly pled case, before the Lexington-Fayette Urban County Human Rights Commission or a similar tribunal."

Justice Buckingham began his analysis with the principle that "Courts have long recognized the ability of government to protect individuals from discrimination in places of public accommodation …" and cited the U.S. Supreme Court's *Masterpiece Cakeshop* decision to the effect that "Our society has come to the recognition that gay persons

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and gay couples cannot be treated as social outcasts or as inferior in dignity and worth."

However, Justice Buckingham also noted that "while government may validly proscribe conduct, i.e., discrimination in public accommodations, the government may not regulate expression, either by prohibiting disfavored expression or compelling favored expression." Citing the recent case of *Telescope Media Group v. Lucero*, 2019 WL 3979621 (8th Cir. 2019), Justice Buckingham wrote that "'The unmistakable message [from this line of cases] is that antidiscrimination laws can regulate conduct, but not expression.'"

Justice Buckingham then inquired whether Hands On's complained of action constituted conduct or speech – and concluded that the Commission had crossed the line from permissibly regulating conduct – that is, prohibiting discrimination – to impermissibly compelling expression. He noted, first, that "From a shirt displaying a presidential campaign, to that carrying the name of a middle school soccer team, t-shirts carry messages and thus, their creation is not simply conduct but is inherently expressive." Justice Buckingham then concluded that three conceded facts made it clear that Hands On declined GSLO's order request due to the content of the message being requested, rather than the identity of those requesting the order. "First, Hands On has an established practice of declining orders because of what Hands On perceives to be their morally-objectionable messages, no matter who requested them … Second, Hands On accepted and completed an order from a lesbian singer who performed at the 2012 Pride Festival. [And t]hird, at no time did Hands On inquire or know the sexual orientation or gender identity of the person with whom it dealt on behalf of GLSO." Justice Buckingham concluded that "[t]hese facts indicate that Hands On was in good faith objecting to the message it was being asked to disseminate."

Justice Buckingham rejected the Commission's argument that, if there was a message in the requested t-shirt order, it was GSLO's message, not Hands On's message. He noted that in *Hurley v. Irish American Gay, Lesbian & Bisexual Group of Boston, Inc., 515 U.S. 557 (1995)* the Supreme Court rejected the argument that – in prohibiting an LGBTQ+ group from marching in the parade as a separate participating unit – the parade organizer was merely a conduit of the LGBTQ+ group's speech, rather than itself a speaker, quoting *Hurley*: "… when dissemination of a view contrary to one's own is forced upon a speaker intimately connected with the communication advanced, the speaker's right to autonomy over the message is compromised."

In conclusion, Justice Buckingham stated: "… when expression is involved, whether a parade organizer, a newspaper, or a t-shirt company, 'a publisher may discriminate on the basis of content' even if that content relates to a protected classification."

CASE 15 *New Doe Child #1, et al. v. Congress of the United States of America, et al.*

139 S.Ct. 2699 (2019). "IN GOD WE TRUST" ON U.S. COINS AND CURRENCY DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE.

As was reported in the December 2018 issue of the *Religious Liberty Law Section Newsletter*, on August 28 2018 the U.S. Court of Appeals for the 8th Circuit unanimously affirmed a lower court's dismissal of the Plaintiffs' claims that federal statutes requiring the inscription of the national motto – "In God We Trust" – on U.S. coins and currency violated the Establishment, Free Speech, and Free Exercise Clauses of the U.S. Constitution, as well as the federal Religious Freedom Restoration Act.

On June 10, 2019, the U.S. Supreme Court denied review of that decision.

FEATURE ARTICLE

Conscientious Objection – More Than Just a Military Issue

By Douglas Newborn, Esq.

As a Judge Advocate General officer in the U.S. Air Force I encountered areas of the law that don't usually, if ever, apply to a traditional private civil practice. I was tasked with reviewing government contracts and responding to Freedom of Information Act requests. I worked with the Pentagon and the State Department to put together international agreements. And I even dealt with government ethics questions, such as whether the local minor league baseball team could give the Base Commander free tickets to a game (the answer, by the way, is "no").

Although those were all relatively unique issues, I usually had templates from my predecessors to guide me. However, with respect to one issue – conscientious objection to military service – I found there were no templates to use and none of my peers could even point me in the right direction.

An American History of Conscience Claims

America has a long history of recognizing the importance of an individual's religious beliefs and enshrining the protection of those beliefs in the law in a wide variety of contexts. Conscientious objection to military service is but one of those contexts – and one of the earliest. But there are many others.

Indeed, our Founders enshrined the principle of religious accommodation in the U.S. Constitution itself, by expressly accommodating – primarily Quaker – citizens who, for religious reasons, had conscientious objections to taking oaths, by allowing them to "affirm," rather than "swear," when taking federal oaths of office. U.S. Const. Art. I, Sec. 3; Art. II, Sec. 1; and VI. That accommodation also exists today in, among other laws, Part 337.1 of Title 8 of the Code of Federal Regulations, which allows naturalization applicants, who by reason of religious training and belief cannot take the prescribed naturalization oath as written, to substitute an affirmation in a modified form.

When, in 1919, the U.S. Constitution was amended to prohibit the manufacture, sale, or transportation of alcohol in the United States, Congress provided – in the Volstead

ABOUT THE AUTHOR

Douglas Newborn enlisted in the U.S. Navy as a Nuclear Machinist Mate when he was 19. After finishing the Navy Nuclear training program in Charleston, South Carolina, Doug was offered a scholarship to obtain his Bachelor of Science degree, which he earned at the University of Arizona. Doug met his wife in Tucson and they had the first of their four children before Doug graduated. After earning his degree in Mechanical Engineering in 2004, Doug was Commissioned as an Ensign in the Navy and served aboard the USS Tennessee (SSBN 734 Blue) in St. Marys, Georgia and Norfolk, Virginia. Doug then attended law school at the University of Arizona from 2009 – 2012, where he became a Blackstone Fellow, externed at the Federal Court level for a Federal District Judge and a Federal Bankruptcy Judge, argued a case in front of the Ninth Circuit Court of Appeals, received various awards and scholarships, and led several student advocacy groups. After finishing law school and passing the Arizona Bar Exam, Doug was commissioned a JAG Officer (Military Lawyer) in the U.S. Air Force, where he served with the 21st Space Wing in Colorado Springs, the International Security Assistance Forces in Kabul, Afghanistan, US Central Command (USCENTCOM) Forward Operating Base in Qatar, and at the U.S. Air Force Warfare Center at Nellis Air Force Base in Las Vegas, Nevada.

Doug finished his JAG career in September 2015, after which he worked for a small law firm before opening his own practice in May 2016. Doug now focuses on personal injury litigation, specializing in car crash cases, as well as probate/estate litigation and guardianship/conservatorship cases. When Doug is not at work, he is spending time with his wife and four children, and during football season you'll find him on the sidelines with the Pusch Ridge Christian Academy football coaching staff.

Act – an accommodation for the use of alcohol for sacramental purposes and in religious rites.

Religious accommodations have also become quite common in the context of public schooling. So, for example, in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), it was held that public school children having a conscientious objection to saluting and pledging allegiance to the flag of the United States may not be forced to do so under a school board regulation requiring – on pain of expulsion – that all students participate in the salute and pledge. In *Wisconsin v. Yoder*, 406 U.S. 205 (1972) the Supreme Court held that the First and Fourth Amendments of the U.S. Constitution prevented the state of Wisconsin from compelling Amish parents to cause their children to attend formal high school to age 16 – as the state's compulsory-attendance law required – against the parents' religious convictions. And 34 states currently provide exemptions from laws that require school-age children to be vaccinated if they or their parents have religious conscientious objections to vaccinations.

Title VII of the Civil Rights Act of 1964 established the principle of religious accommodation in employment, providing that, although employees must usually comply with the reasonable employment-related directives of their employers, employees having a religious conscientious objection to an otherwise valid employer directive must be excused from that directive, unless to do so would impose an undue hardship upon the employer. 42 U.S.C. § 2000e-2(a); 42 U.S.C. §2000e(j).

In the abortion context, Congress passed the Church Amendment in 1973, which prohibits the government from requiring a person or institution to perform abortions or sterilizations contrary to their "religious beliefs or moral convictions" and prohibits health care providers from discriminating against those who refuse to perform those procedures.

And following the U.S. Supreme Court's decision in *Employment Div. v. Smith*, 494 U.S. 872 (1990) – which held that the Free Exercise Clause does not generally protect religiously motivated conduct from neutral laws of general applicability – Congress passed the federal Religious Freedom Restoration Act (RFRA), restoring the pre-Smith law that any laws that substantially burden a citizen's religious exercise violated the Free Exercise Clause unless the law served a compelling governmental interest and the offending law was narrowly tailored to serve that interest. After the U.S. Supreme Court, in *City of Boerne v. Flores*, 521 U.S. 507 (1997), struck down that part of the federal RFRA that applied to the states, no fewer than 21 states – including Arizona – passed their own RFRAs in order to restore to their citizens conscientious objection protection from state laws that substantially burdened their religious exercise – and 10 other states did the same by judicial action.

Indeed, in light of relatively recent and highly-publicized cases, such as that of the county clerk in Kentucky who, due to her religious principles, could not in good conscience sign marriage licenses for same-sex couples and asked for a religious accommodation to avoid doing so, it is interesting to note that she was far from the first public employee to request an accommodation for her religious principles. In the 1980s, several courts concluded that Title VII required the U.S. Postal Service to try to accommodate postal workers whose jobs required them to process military draft registration forms presented to them by draft-age American men, if those postal workers had conscientious objections to doing so. *American Postal Workers Union v. Postmaster General*, 781 F.2d 772 (9th Cir. 1986); *McGinnis v. United States Postal Service*, 512 F.Supp. 517 (N.D. Ca. 1980). And this, despite the fact that, in granting such accommodations, the burden of processing the forms would fall upon other postal workers, and the young men registering for the draft may have suffered some degree of distress in being presented with the fact that the conscientiously objecting postal workers evidently believed that, in signing up for the draft, the men were participating in an immoral act.

It is interesting that, although a great deal of concern has been voiced over cases such as the Kentucky county clerk, as well as certain business owners who do not want to devote their artistic talents to same-sex wedding ceremonies, on the ground that allowing the exercise of religious conscience in those contexts will burden others – either imposing upon them an inconvenience or hurting their feelings – the recognition and granting of conscientious objection exemptions from military service have not appeared to garner the same sorts of concern, despite the fact that granting exemptions from military service clearly burden others in serious – and possibly life-threatening – ways. (See, for example, Brian Leiter, in his book *Why Tolerate Religion?* – in which he argues for a "No Exemptions" approach to religious conscience claims – noting that "[E]*xemptions from generally applicable laws often impose burdens on those who have no claim of exemption. Think of mandatory military service: if those with claims of conscience against military duty are exempted from service, then the burden (and all the very serious risks) will fall upon those who either have no conscientious objection or cannot successfully establish their conscientious claim.*" Brian Leiter,

Why Tolerate Religion?, page 99, Princeton University Press (2013).)

So, despite the fact that recognizing the conscientious objection claims of some will often put others in harm's way who would otherwise not be so exposed, the U.S. continues to accommodate the sincerely held religious beliefs of those who have conscientious objections to military service. And, in my opinion – as illustrated by our country's long history of protecting religious rights of conscience in a myriad of contexts – the U.S. is right in doing so.

Which brings me to my own experience with conscientious objection in the military.

The Case of an Air Force Conscientious Objector

Creech Air Force Base is home to some of the Air Force's flight crews who handle drone operations in the Middle East.[1] Drone Operators primarily come from pilot fields that conduct troop and cargo support missions. But make no mistake, once they finish their training and begin their missions, they understand what their new job entails, which is: (1) reconnaissance; (2) front line support; and (3) enemy neutralization. This is not an easy job for anyone, and as we understand from *On Combat*[2], one can easily understand the dual psychological toll of taking someone's life, even if for one's country and for what one believes to be a noble purpose, and doing so through what amounts to a 7,000 mile long sniper barrel.

Imagine if this was your day: you get up in the morning, stop on your way to work to grab yourself a coffee, sit in a device that controls a drone 7,000 miles away, continue the previous shift's job of tracking someone's movements for several hours, then get the order to end that person's life by touching a button, finish your shift, and go home to your family and fall asleep in your bed like nothing happened.[3] Then, you're expected to show up the next day and do it again. Consequently, there should be no surprise that Creech Air Force Base contributes to a disproportionate amount of active duty suicide cases.

It is through this lens that I found myself, for the first time in my up to then 12-year military career, reviewing a file of a serviceman who was seeking Conscientious Objector (CO) status. He didn't want to leave the military; he just wanted to contribute in another way besides being a Drone Operator.

Seeking Conscientious Objector status once already *in* the military is problematic, although not, as noted below, prohibited or doomed to failure. As I note in more detail below, anyone seeking CO status after having joined the military must claim that their CO status did not arise, or develop, until after entering the military. After all, anyone who's served in the military goes through either boot camp, officer candidate school, or some other form of training where everyone understands that the overall mission of the military is to neutralize the enemies of the United States. Sometimes the enemies wear uniforms and sometimes they don't; but the job is the same – defend the United States and its interests. And sometimes that requires that someone dies in the process. As General Patton famously stated:

> "Seeking Conscientious Objector status once already in the military is problematic, although not prohibited or doomed to failure.

> *"The object of war is not to die for your country but to make the other [person] die for his."*

It's not like anyone yearns to end the life of someone else. Think about the nuclear triad: we have nuclear missiles capable of being launched from the air, land, and sea at a moment's notice. The people involved in this, train incessantly while at the same time hoping that they never have to do what they're actually being trained to do, because thousands, if not millions, of lives will end if they ever have to launch a nuclear missile.

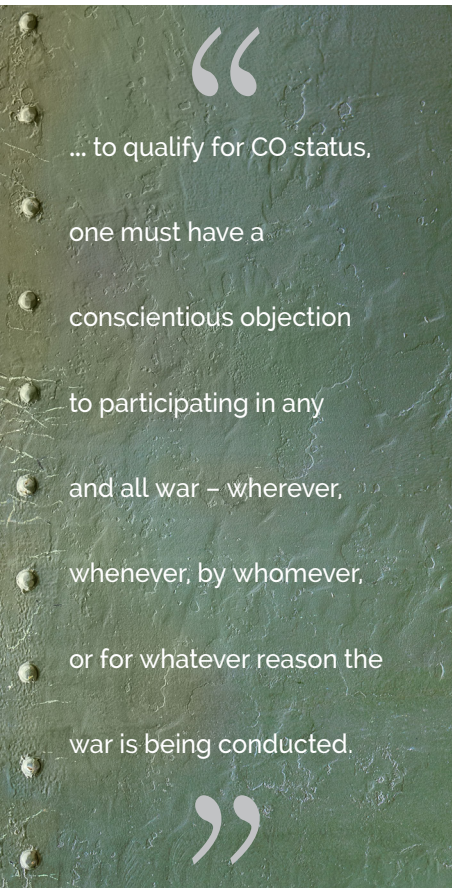
So when I was reviewing this drone pilot's CO package, I both: (1) questioned why someone would want to join the military, an all-volunteer fighting force, if they knew before they joined that taking the life of someone was always a possibility; and (2) tried to put myself in this person's shoes to under-

stand *why* this person couldn't do what was being asked of him and whether his reasons were sufficient to support his CO request.

This led me to research the law of conscientious objection, including Air Force Instructions (AFIs) and other Department of Defense publications, such as Department of Defense Instruction 1300.06, related to conscientious objection claims.

Conscientious Objection Claims – Law and Process

An entire book could be written on the nuances of the law concerning conscientious objection from U.S. military service. It is neither my intention, nor is it possible in this short article, to flesh out and discuss those nuances. Rather, it is my intention to give a basic overview of the law as well as the process of claiming conscientious objection status, particularly based upon my experience as a JAG in the U.S. Air Force.



All military rules and regulations relating to conscientious objection from U.S. military service arise – in the first instance – from 15 U.S.C. §3806(j), which provides that:

> *Nothing contained in this chapter* [Military Selective Service] *shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form."*

Importantly, the statute goes on to provide that

> *"As used in this subsection, the term 'religious training and belief' does not include essentially political, sociological, or philosophical views, or a merely personal moral code."*

Currently, the relevant Air Force instruction is AFI 36-3204, *Procedures for Applying as a Conscientious Objector.* The AFI is based on Department of Defense Instruction (DODI) 1300.06, *Conscientious Objectors*, which is applicable to all U.S. military services.

Basically, there are two kinds of recognized conscientious objectors: (1) those who conscientiously oppose participating in any involvement in war, whether in a combat role or not, and (2) those who are conscientiously opposed only to participating in a combat position, but are not opposed to serving in the military in a noncombatant position. My pilot was the latter.

One seeking to be recognized as a conscientious objector must apply for CO status, and DODI 1300.06, 4.1 sets forth what information needs to be included in an application.

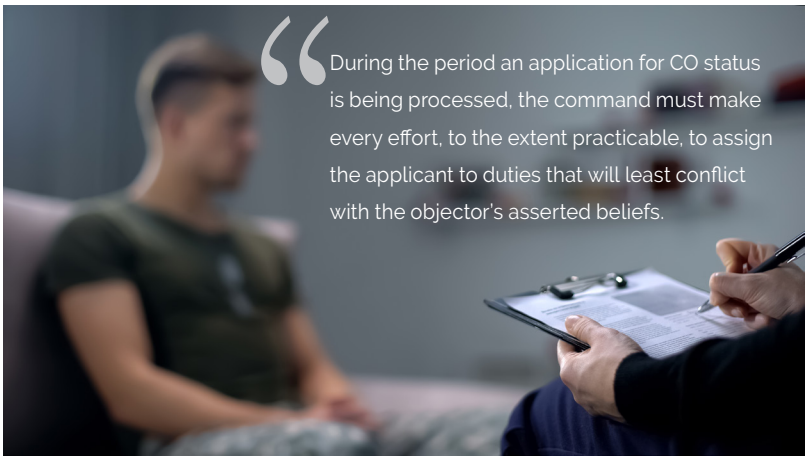
Applications for CO status are determined on a case-by-case basis, and an applicant bears the burden of establishing his or her claim through clear and convincing evidence. DODI 1300.06, 3.3.a. In order to qualify for CO status, the applicant must demonstrate to the satisfaction of the service: (1) that the nature or basis of the claim falls within the definition of and criteria prescribed for conscientious objection – that is, that the applicant is conscientiously opposed to participation in war in any form and whose opposition is based on a moral, ethical, or religious belief – and (2) that the applicant's belief is "firm, fixed, sincere, and deeply held." DODI 1300.6, 3.1 and 3.3.a.

It is important to note that the service does not recognize an applicant's objection to a *particular* war – referred to as selective conscientious objection – as grounds for CO status. AFI 36-3204 (3.1). This is in accord with the statutory requirement that a claimant be "opposed to participation in war *in any form*." In other words, to qualify for CO status, one must have a conscientious objection to participating in any and all war – wherever, whenever, by whomever, or for whatever reason the war is being conducted. Under current law, an objector cannot make a distinction between moral and immoral, or just and unjust, wars. If one is willing to participate in one war because, for example, one believes it is a defensive war arising out of an armed attack against the U.S. and, therefore, morally justified, but is conscientiously opposed to another war because, for example, one believes the latter is an offensive war of imperialism and, therefore, morally unjustified, one will not be entitled to CO status with respect to the second war. Although some have criticized this principle, under current U.S. law selective conscientious objection is not available. Conscientious objection to participating in war is an all or nothing proposition.

Further, as noted above, if an applicant claims to have had his or her CO beliefs *before* entering the service, but didn't ask at that time to be exempt from serving, the applicant is not eligible for CO status. AFI 36-3204 (3.1.1.1.1), DODI

1300.06, 1.2.b(1). Importantly, however, as noted above, this does not preclude a successful CO claim based on the allegation that the service person's conscientious objection did not arise, develop, or crystallize until *after* the objector was already in the military. This recognizes the fact that, sometimes, a service member may not have seriously considered or faced the moral ramifications of participating in war before being actually confronted with the realities of war as brought home to the service member while engaged in military training or service.

Also, an applicant will not be eligible for CO status if the applicant previously requested CO status, was denied, and the applicant's new CO request is based on substantially the same grounds. AFI 36-3204 (3.1.1.1.2), DODI, 1.2.b(2). This is essentially a rule akin to and serves the same purposes as the doctrine of res judicata.



The AFI and DODI add further context to the issue of the applicant's belief being "*by reason of religious training and belief.*"

The U.S. Supreme Court has expanded the application of this provision such that, although the belief must be akin to a religious belief, it need not be grounded upon a traditional theistic belief. See, for example, *United States v. Seeger*, 380 U.S. 163 (1965)(extending application of the conscientious objection statute to include those who have a sincere and meaningful belief that "occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption") and *Welsh v. United States*, 398 U.S. 333 (1970)(extending conscientious objector status to "all those whose consciences, spurred by deeply held moral, ethical, or religious beliefs, would give them no rest or peace if they allowed themselves to become a part of an instrument of war").

The AFI explains that "To approve a conscientious objection … the reviewing authorities must find that an applicant's moral and ethical beliefs oppose participation in war in any form and that the applicant holds these beliefs with the strength of traditional religious convictions." AFI 36-3204 (5.2.1). Further, "the applicant must show that these moral and ethical convictions, once acquired, have directed the applicant's life in the way traditional religious convictions of equal strength, depth, and duration direct the lives of those who have such beliefs." AFI 36-3204 (5.2.3).

The DODI is similar, providing that "A service member's objection may be founded on religious training and belief; it may also be based on personal beliefs that are purely moral or ethical in source or content and occupy to the Service member a place parallel to that filled by more traditional religious convictions." However, in order for moral or ethical beliefs not based on traditional religious convictions to qualify for CO protection, the applicant must demonstrate that such beliefs "have directed the applicant's life in the way traditional religious convictions of equal strength, depth, and duration have directed the lives of those whose beliefs are clearly found in traditional religious convictions" and "are the primary controlling force in the applicant's life." DODI 1300.06, 3.2.a.

So, although an objector's conscientious objection need not be dictated by a traditional religious belief, it must be a belief that is akin to a religious belief, both in nature and intensity. As the statute provides, "*essentially political, sociological, or philosophical views, or a merely personal moral code*" are insufficient.

DODI 1300.06, 3.2 sets forth factors to consider in determining whether the applicant's beliefs qualify as religious or that occupy a place sufficiently parallel to a religious belief so as to support a CO claim. As part of that analysis, the applicant must present evidence sufficient to convince the service that "expediency or avoidance of military service is not the basis of the applicant's claim." DODI 1300.06, 3.2.c.

During the period an application for CO status is being processed, the command must make every effort, to the extent practicable, to assign the applicant to duties that will least conflict with the objector's asserted beliefs. DODI 1300.06, 4.4.i. This directive reflects the seriousness with which conscientious objection claims are treated, because it amounts to a temporary presumption that the applicant's beliefs are, in fact, sincere and deserve protection until a final determination is rendered.

As part of the application process, the applicant must submit to an interview with a chaplain. AFI 36-3204 (3.8.1), DODI 1300.06, 4.2.b. This interview is required regardless

of the applicant's religious affiliation, or lack thereof. The chaplain is required to inform the applicant that their conversation is not privileged (as other chaplain-service member conversations could be under FRE 506) and will be used in the official report. AFI 36-3204 (3.8.1.1). The chaplain does not make a recommendation for approval or disapproval of the CO's application, but merely states the member's CO beliefs and whether such beliefs are religious or are akin to religious beliefs and the sincerity of the applicant's asserted beliefs. AFI 36-3204 (3.8.1.2); DODI 1300.06, 4.2.b.

The applicant must also participate in an interview with a credentialed mental health professional. AFI 36-3204 (3.8.2); DODI 1300.06, 4.2.c. As with the chaplain's report, the mental health professional does not make a recommendation as to whether or not the application should be approved or denied. AFI 36-3204 (3.8.2.2). Nor is the mental health professional interview privileged. The mental health professional's role is to determine whether the applicant has a psychiatric or personality disorder. AFI 36-3204 (3.8.2).

The file then gets routed to the investigating officer as well as the base Staff Judge Advocate to ensure procedural compliance and to provide a legal review. AFI 36-3204 (3.9 and 3.10.1); DODI 1300.06, 4.3.

The investigating officer reviews the application file and then conducts a hearing on the application, at which the applicant has the right to appear, present additional evidence, and, at the applicant's expense, be represented by counsel. DODI 1300.06, 4.3.b. and d.

At the conclusion of the investigation, the investigating officer files a written report, containing the investigating officer's recommended disposition of the application. The applicant has the right to submit a rebuttal to the investigating officer's report. DODI 1300.06, 4.4.a

After the investigating officer finishes the review with recommended disposition, the entire package is routed back to the Commander who appointed the investigating officer, and then the Commander routes the package – regardless of whether the CO application is recommended for approval or denial – up through the designated Chain of Command – for a final disposition.

If the application is denied, the service member will be returned to active duty and resume all normal military duties and requirements of military service.

If the application of an applicant whose objection is to participation in the military without regard to whether the participation is in a combat role or not is approved, the member will be discharged.

If the application of an applicant whose objection is only to participation in a combat role is approved, the member will either be reassigned to non-combatant duties or discharged, at the discretion of the Secretary concerned.

The Military Appears Quite Sensitive to Claims of Conscientious Objection

One might question the ability of the military to be sensitive to the claims of conscientious objections to military service. But available statistics suggest that such a viewpoint would be misplaced.

Although statistics can be hard to come by, a 1993 GAO Report on Conscientious Objectors determined that, during the fiscal years 1988-1990, over 80% of CO applications were approved. In fiscal year 1991, during the Persian Gulf War, about 61% of CO applications were approved. And in fiscal year 1992, the approval rate increased to about 76%.

Therefore, in every year surveyed, a majority of CO applications submitted were approved – and, in all but one of those years, the approval rate was higher than 75%.

Such a claim would also be contrary to the DODI itself. The DODI specifically instructs the reviewing authority not to judge the applicant's beliefs against the reviewing authority's beliefs (DODI 1300.06, 3.2.c.(2)("Particular care must be exercised not to deny the existence of authentic beliefs simply because those beliefs are incompatible with the reviewing authority's belief system") or by some standard of the national interest (DODI 1300.06, 3.2.d.)("An applicant who is otherwise eligible for conscientious objector status may not be denied that status simply because the applicant's conscientious objection influences the applicant's personal views concerning the nation's domestic or foreign policies"). Instead, the reviewing authority should decide the applicant's case based only on the nature and sincerity of the applicant's professed beliefs. (DODI 1300.06, 3.2.d.)(The task is to decide whether the beliefs professed are sincerely held, and whether they govern the claimant's action in both word and deed.").

Conscience Claims – The Bigger Picture

As can be seen, the military provides a great deal of due process for someone applying for CO status, and in the vast majority of cases applications for conscientious objector status are approved.

This appears to contrast sharply with many conscientious objection claims outside the military context, where Americans have been fired[4], sued and/or fined[5], and have been ordered by a judge to undergo "reeducation"[6] if they fail to participate in certain events that have gone against their deeply held religious beliefs. Such results have even expanded to include punish-

ment for those who have simply exposed the beliefs of others that they don't agree with but who were not asked to participate in anything.[7]

Conclusion

The U.S. has a long history of recognizing and accommodating the rights of those who have a conscientious objection to military service. This is in accord with this country's long history of protecting religious conscience generally, based on the principle that there is a transcendent authority higher than the state, to which citizens owe their ultimate allegiance and which the state must not transgress, and that forcing someone to violate their sincerely held religious and moral beliefs constitutes an egregious violation of their human dignity.

The approach of the military to conscientious objection claims is admirable, and one which should be extended to the conscience claims of all Americans.

ENDNOTES

1. https://www.airforcetimes.com/news/your-air-force/2019/02/11/creech-and-nellis-are-splitting-up-heres-why/
2. By Dave Grossman, a retired Army Ranger.
3. It is not every day, or anywhere close to every day, that a Drone Operator has the unenvious task of eliminating an enemy target, but the possibility exists just the same.
4. See Ex-Atlanta Fire Chief Kelvin Cochran's story, https://www.wsj.com/articles/a-fire-chief-burned-by-progressive-piety-1540335807.
5. See Barronelle Stutzman in Washington, https://www.washingtontimes.com/news/2019/jun/6/christian-florist-appealing-supreme-court-over-sam/; Brush and Nib Studio in Phoenix, https://www.azcentral.com/story/news/local/phoenix/2019/09/16/arizona-supreme-court-rules-phoenix-lgbtq-wedding-invitation-case-brush-nib/2332776001/; Blaine Adamson in Kentucky, https://www.dailysignal.com/2017/09/17/im-a-t-shirt-maker-with-gay-customers-and-gay-employees-i-still-was-sued/; and Jack Phillips in Colorado, https://www.nbcnews.com/feature/nbc-out/colorado-baker-back-court-over-second-lgbtq-bias-allegation-n949836.
6. https://www.cleveland.com/opinion/2017/12/colorado_wedding_cake_dispute.html.
7. https://www.nytimes.com/2019/11/15/us/planned-parenthood-lawsuit-secret-videos.html.

ARTICLE *of* NOTE

Mark L. Rienzi, *The Constitutional Right Not To Kill*, Vol. 62 Emory L. J. 121 (2012).

AUTHORS' ABSTRACT:

Federal and state governments either participate in or permit a variety of different types of killings. These include military operations, capital punishment, assisted suicide, abortion, and self-defense or defense of others. In a pluralistic society, it is no surprise that there will be some members of the population who refuse to participate in some or all of these types of killings.

The question of how governments should treat such refusals is older than the Republic itself. Since colonial times, the answer to this question has been driven largely by statutory protections, with the Constitution playing a smaller role, particularly since the Supreme Court's 1990 decision in *Employment Division v. Smith*.

This Article offers a new answer to this very old question: a federal constitutional right not to kill protected by the Due Process Clauses of the Fifth and Fourteenth Amendments.

The Court's substantive due process cases suggest that certain unenumerated rights can qualify for constitutional protection when they are "deeply rooted in the Nation's history and tradition." This Article reviews the government's historical ability to force unwilling citizens to participate in government-sanctioned killings across a variety of contexts and concludes that the right not to kill passes the Court's stated tests, and does so even better than previously recognized rights. The right not to kill also fits squarely within the zone of individual decision making protected by the Court's decisions in *Planned Parenthood v. Casey* and *Lawrence v. Texas*.

Recognition of a constitutional right, of course, does not mean that the right can never be infringed. Rather, as with most rights, the constitutional right not to kill can presumably be trumped by a sufficiently compelling government interest and a narrowly tailored law. In the vast majority of cases, however, the government will not be able to meet this test, leaving individuals free to decide for themselves whether they are willing to participate in government-sanctioned killings.

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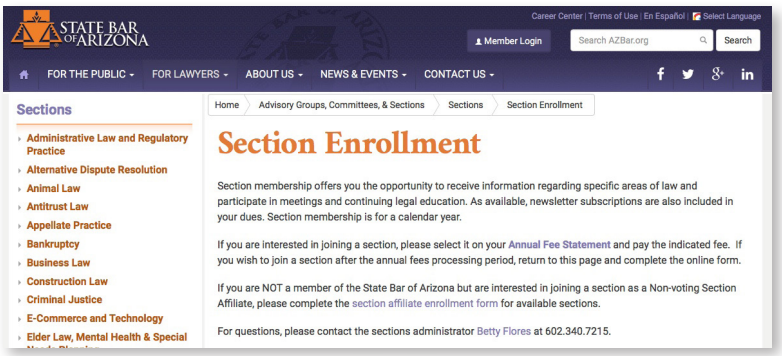

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GOVERNMENT ANNOUNCEMENT

VA | U.S. Department of Veterans Affairs

U.S. Department of Veterans Affairs

On July 3, 2019 the U.S. Department of Veterans Affairs announced that "The U.S. Department of Veterans Affairs (VA) recently revised its directives permitting religious literature, symbols and displays at VA facilities to protect religious liberty for Veterans and families while ensuring inclusivity and nondiscrimination. The move aims to simplify and clarify the department's policies governing religious symbols, and spiritual and pastoral care, which have been interpreted inconsistently at various VA facilities in recent years, resulting in unfortunate incidents that interrupted certain displays. Effective July 3, these changes will help ensure that patrons within VA have access to religious literature and symbols at chapels as requested and protect representations of faith in publicly accessible displays at facilities throughout the department… The new policies will: Allow the inclusion in appropriate circumstances of religious content in publicly accessible displays at VA facilities. Allow patients and their guests to request and be provided religious literature, symbols and sacred texts during visits to VA chapels and during their treatment at VA. Allow VA to accept donations of religious literature, cards and symbols at its facilities and distribute them to VA patrons under appropriate circumstances or to a patron who requests them. The U.S. Supreme Court recently reaffirmed the important role religion plays in the lives of many Americans and its consistency with Constitutional principles. This includes the following values: a display that follows in the longstanding tradition of monuments, symbols and practices; respect and tolerance of differing views; and endeavors to achieve inclusivity and non-discrimination." http://www.va.gov/opa/pressrel/includes/viewPDF.cfm?id=5279.

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

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 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 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 (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]

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