2023 Religious Freedom Plenary Workshop
CLS National Conference, October 2023

The Most Promising Tools for the Non-Specialist in Religious Freedom Defense

I. Current Trajectory of Religious Freedom Decisions from SCOTUS

The U.S. Supreme Court's strong protection of religious freedom continues.

A. Protecting religious gatherings from Covid restraints
Roman Catholic Diocese v. Cuomo, 141 S. Ct. 63 (2020) and *Tandon v. Newsom*, 141 S. Ct. 1294 (2021)
B. Protecting religious foster care agency
Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021)
C. Protecting religious inmate during execution
Ramirez v. Collier, 142 S. Ct. 1264 (2022)
D. Protecting rights of religious flag-raiser
Shurtleff v. City of Boston, 142 S. Ct. 1583 (2022)
E. Protecting religious schools regarding tuition aid
Carson v. Makin, 142 S. Ct. 1987 (2022)
F. Protecting prayer of football coach during non-instructional time
Kennedy v. Bremerton S.D., 142 S. Ct. 2407 (2022)
G. Protecting government employee seeking religious accommodation
Groff v. US Postal Service, 22-174, 600 U.S. ___ (Jun 29, 2023)
H. Protecting professional Internet designer not wishing to facilitate same-sex marriage
303 Creative LLC v Elenis, 21-476*,* 600 U.S. ___ (Jun 30, 2023)

II. First Amendment Defenses

The First Amendment gives "special solicitude to the rights of religious organizations." *Hosanna-Tabor Evangelical Church and Sch. v. EEOC*, 565 U.S. 171, 189 (2012).

A. Church Autonomy Doctrine
1. The Establishment and Free Exercise Clauses of the First Amendment guarantee religious organizations (not just houses of worship) the freedom "to define their own doctrine, membership, organization, and internal requirements without state interference." *Demkovich v. St. Andrew Apostle Parish*, 3 F.4th 968, 975 [(7th Cir. 2021). Autonomy is both Religion Clauses "work[ing] in unison" to protect "employment rights of religious organizations." *Id.*

2. This doctrine protects their right to "'select their own leaders, define their own doctrines, resolve their own disputes, and run their own institutions.'" *Korte v. Sebelius*, 735 F.3d 654, 677 (7th Cir. 2013) (quoting Laycock, *Towards a*

General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy, 81 Colum. L Rev. 1373, 1388-89 (1981)

3. "[T]he importance of securing religious groups' institutional autonomy, while allowing them to enter the public square, cannot be understated." *Whole Woman's Health v. Smith*, 896 F.3d 362, 374 (5th Cir. 2018) (forbidding intrusive discovery).

4. "Civil courts exercise no jurisdiction" over matters involving "theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them." *Watson v. Jones*, 13 Wall. 679, 733 (1872).

B. Ministerial Exception

1. Subset of Church Autonomy Doctrine; not co-extensive.

2. The First Amendment prevents Court from intervening in employment discrimination dispute between religious employer and certain of their key employees.

3. Turns on the religious nature of the job, not just the religious nature of the organizational employer. No rigid checklist (title, duties, formal religious training). "What matters is what an employee does…. A religious institution's explanation of the role of its employees in the life of the religion in question is important." *Our Lady of Guadalupe v. Morrissey-Berru*, 591 U.S. ___, 140 S. Ct. 2049 (2020) ("*OLG*"); *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U. S. 171 (2012).

4. All "employment claims are precluded by the ministerial exception." *Werft v. Desert Sw. Annual Conf.*, 377 F.3d 1099, 1100-01 (9th Cir. 2004); *see Starkey v. Roman Catholic Archdiocese of Indianapolis, Inc.*, 41 F.4th 931, 945 (7th Cir. 2022).

5. No compelling interest or balancing test is applicable. *See OLG*, 140 S. Ct. at 2060.

6. Warning: Ministerial Exception will probably preclude 12(b)6 dismissal

C. Freedom of Expressive Association

1. The Free Exercise Clause "work[s] in tandem" with the Free Speech Clause, "doubly protect[ing]" "expressive religious activities." *Kennedy*, 142 S. Ct.

2407, 2421; *Green v. Miss United States*, 52 F.4th 773 787 n.14 (9th Cir. 2022)[1]

2. The expressive association inquiry is controlled by:
    a. *303 Creative LLC v Elenis, 21-476,* (Jun 30, 2023)
    b. *Kennedy v. Bremerton School Dist*., 142 S. Ct. 2407 (2022)
    c. *Dale v. Boy Scouts of America*, 530 U.S. 640 (2000)
    d. *Hurley v. Irish American Gay, Lesbian and Bisexual Group of Boston, Inc.,* 515 U.S. 557 (1995)
    e. *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984).

3. This freedom prohibits "intrusion into the internal structure or affairs of an association," *Dale* at 648 (quoting *Roberts*), and "plainly presupposes a freedom not to associate." *Id*.

4. In both situations, courts "give deference to an association's assertions regarding the nature of its expression [and] must also give deference to an association's view of what would impair its expression." *Dale*, 530 U.S. at 653.

5. "[This rule] applies with special force [to] religious groups, whose very existence is dedicated to the collective expression and propagation of shared religious ideals." *Hosanna*, 565 U.S. at 200 (Alito/Kagan).

6. See *Slattery v Hochul*, 61 F 4th 278 (2d Cir 2023) - first time used in employment context

D. Free Exercise of Religion – Not Neutral as to Religion versus Secular

1. "Congress shall make no law respecting an establishment of religion nor prohibiting the free exercise thereof."

2. If the law or government action allegedly burdening religious exercise is neutral and generally applicable, the Free Exercise Clause affords no strict scrutiny or meaningful protection.

3. If, however, the burdensome law is demonstrably not neutral as between religious and secular persons or contexts, the Free Exercise Clause imposes on government the burden of proving that it has a compelling government interest to deny religious exemption to the claimant, which interest cannot be

[1] Indeed, "the First Amendment necessarily protects the right of those who join together to advance shared beliefs, goals, and ideas, which, if pursued individually, would be protected by the First Amendment." *Sullivan v. Univ. of Wash.*, 60 F.4th 574, 579 (9th Cir. 2023).

advanced in a manner less restrictive to the religious claimant. *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993).

4. Government cannot carry its burden by asserting a generalized government interest (e.g., in eliminating employment discrimination); rather, the federal government must prove that its interest in denying an exemption *to this particular religious claimant* is "compelling", "of the highest order." Rather than rely on broadly formulated interests, courts must scrutinize the asserted harm of granting specific exemptions to particular religious claimants." *Fulton v. City of Philadelphia*, 141 S.Ct. at 1881 (2021)

III. Federal Statutory Grounds

A. Religious Freedom Restoration Act of 1993, 42 USC 2000bb *et seq*

1. Excerpt from Text:

42 U.S. Code § 2000bb–1 - Free Exercise of Religion Protected

(a) *IN GENERAL*

Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).

(b) *EXCEPTION*

Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—

(1) *is in furtherance of a compelling governmental interest; and*

(2) *is the least restrictive means of furthering that compelling governmental interest.*

2. Unlike Ministerial Exemption and Church Autonomy affirmative defenses, RFRA is not an absolute bar; rather it puts the government to the strictest test in the law.

3. RFRA applies the same strict scrutiny as under the Free Exercise Clause when the government substantially burdens religious exercise. Therefore, the government cannot carry its burden under RFRA by asserting a generalized government interest (e.g., in eliminating employment discrimination); the federal government must prove that its interest in denying an exemption *to this particular religious claimant* is "compelling", "of the highest order". See II D above.

4. RFRA cannot be asserted against State law or State officials unless the program or action being challenged is funded in part by the federal government. *City of Boerne v. Flores*, 521 U.S. 507 (1997).

5. Most courts have held RFRA is not available to religious claimant if federal agent or actor is not involved or, if litigation, is not a party.

B. Religious Organization Exemption from Title VII of Civil Rights Act of 1964

1. Section 702 provides: "This subchapter shall not apply … to a religious corporation … with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation … of its activities." 42 USC 2000e-1(a)

2. Title VII tracks Free Exercise, which "protects religiously motivated conduct as well as belief." *FCA v. San Jose Unified Sch. Dist.*, 46 F.4th 1075 (9th Cir. 2022) ("FCA") (quoting McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1488 (1990)).

3. Thus, "with respect to the employment of individuals of a particular religion," Congress "'painted with a broad[] brush, exempting religious organizations from the *entire subchapter* of Title VII.'" *Garcia v. Salvation Army*, 918 F.3d 997, 1004 (citation omitted; emphasis in original); *Starkey v. Roman Catholic Archdiocese of Indianapolis, Inc.*, 41 F.4th 931, 946 (7th Cir. 2022) (Easterbrook, J.).

    a. "This *subchapter*" and "This *title*" both refer to "all of Title VII." *See also* Esbeck, *Federal Contractors, Title VII, and LGBT Employment Discrimination: Can Religious Organizations Staff on Religious Basis?*, 4 Oxford J.L. & Relig. 368 (2015).
    b. See unanimous Supreme Court decision in *Groff v USPS* (Jun 29, 2023): Title VII "means what it says"
    c. In such cases, sex-based claims are barred. *See, e.g*., *Curay-Cramer*, 450 F.3d at 141; *Mississippi College*, 626 F.2d at 485; *Bear Creek*, 571 F.Supp.3d at 590; *Maguire v. Marquette Univ*., 627 F. Supp. 1499, 1506-07 (E.D. Wis. 1986), *aff'd on narrower ground*, 814 F.2d 1213, 1216 (7th Cir. 1987); *Henry v. Red Hill Evangelical Lutheran Church*, 201 Cal.App.4th 1041 (2011).
    d. "[That] adherence to Roman Catholic doctrine produces a form of sex discrimination does not make the action less religiously based." *Starkey*, 41 F.4th at 947 (Easterbrook, J.).

4. Section 702 Exemption does not violate the First Amendment bar on establishment of religion. *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327 (1987).

C. Employer's Duty to Make Reasonable Accommodation of Religious Convictions or Exercise of Employee under Section 701j of Title VII, 42 USC 2000e(j)

1. “For the purposes of this subchapter . . .

   (j) The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.”

2. See Discussion of *Groff v. Dejoy* in Section V, paragraph A, below

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

1. Excerpt from Text:

   (1) General rule

   No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution—

   (A) is in furtherance of a compelling governmental interest; and

   (B) is the least restrictive means of furthering that compelling governmental interest.

   . . .

   (b) Discrimination and exclusion

   (1) Equal terms. No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.

   (2) Nondiscrimination. No government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination.

   (3) Exclusions and limits. No government shall impose or implement a land use regulation that—

   (A) totally excludes religious assemblies from a jurisdiction; or

   (B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.

   . . .

   (g) Broad construction. This chapter shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution.”

2. In RLUIPA, Congress clarified that a religious claim need not be central tenet of the religion[2]

E. Equal Access Act of 1984, 20 USC 4071

1. Excerpt from Text:

(a) RESTRICTION OF LIMITED OPEN FORUM ON BASIS OF RELIGIOUS, POLITICAL, PHILOSOPHICAL, OR OTHER SPEECH CONTENT PROHIBITED

It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.

(b)"LIMITED OPEN FORUM" DEFINED

A public secondary school has a limited open forum whenever such school grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time.

***(c) FAIR OPPORTUNITY CRITERIA** Schools shall be deemed to offer a fair opportunity to students who wish to conduct a meeting within its limited open forum if such school uniformly provides that—*

***(1)** the meeting is voluntary and student-initiated;*

***(2)** there is no sponsorship of the meeting by the school, the government, or its agents or employees;*

***(3)** employees or agents of the school or government are present at religious meetings only in a nonparticipatory capacity;*

***(4)** the meeting does not materially and substantially interfere with the orderly conduct of educational activities within the school; and*

***(5)** non-school persons may not direct, conduct, control, or regularly attend activities of student groups.*

***(d)CONSTRUCTION OF SUBCHAPTER WITH RESPECT TO CERTAIN RIGHTS.** Nothing in this subchapter shall be construed to authorize the United States or any State or political subdivision thereof—*

***(1)** to influence the form or content of any prayer or other religious activity;*

***(2)** to require any person to participate in prayer or other religious activity;*

***(3)** to expend public funds beyond the incidental cost of providing the space for student-initiated meetings;*

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[2] §2000cc–5. Definitions (7) "Religious exercise"

A) In general. The term "religious exercise" includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.

(4) *to compel any school agent or employee to attend a school meeting if the content of the speech at the meeting is contrary to the beliefs of the agent or employee;*
(5) *to sanction meetings that are otherwise unlawful;*
(6) *to limit the rights of groups of students which are not of a specified numerical size; or*
(7) *to abridge the constitutional rights of any person."* 20 USC 4071

2. Effectively codified for public secondary school students the same access right under the Free Speech Clause already recognized for college students to meet on college campuses where a public forum has been established.
   Widmar v Vincent, 454 U.S. 263 (1981)

3. Held constitutional by Supreme Court against claim that it violated the First Amendment Establishment Clause
   Board of Educ. v. Mergens, 496 U.S. 226 (1990)

4. Where it conflicts with state law, the EAA prevails under Supremacy Clause.
   Garnett v. Renton Sch Dist., 987 F.2d 641 (9th Cir.)[3]

5. Same true under Free Speech Clause.
   Widmar, 454 U.S. at 265 (questioning, but not reaching the issue, whether state constitution claim to a higher separation could ever supersede the demands of the First Amendment)

IV. State Laws Defending Religious Liberty

A. State Constitutions

E.g. First Covenant Church of Seattle v City of Seattle, 120 Wn.2d 203, 840 P.2d 174 (1992) (adopting Free Exercise strict scrutiny to be applied to government burdening of religion under Washington State religious freedom clause)[4]

B. State RFRAs

1. Enacted in 24 states[5]

   a. Alabama: Alabama's state RFRA is called the Alabama Religious Freedom Amendment (ARFA), Ala. Const. amend. 622,

[3] "The EAA provides religious student groups a federal right. State law must therefore yield."
[4] CLS' Center for Law & Religious Freedom on the briefing and made the constitutional oral arguments.
[5] CLS CLRF active in lobbying and testifying for many of them (e.g., Illinois, Texas, Arizona)

http://alisondb.legislature.state.al.us/alison/codeofalabama/constitution/1901/CA-170364.htm. The ARFA was ratified as part of the state constitution in 1999.

b. Arizona: Arizona's state RFRA, which was enacted in 1999, is called the Free Exercise of Religion Act (AFERA), Ariz. Re. Stat. Ann. §§ 41-1493 to 41-1493.02, https://law.justia.com/codes/arizona/2011/title41.
c. Arkansas: Arkansas enacted its state RFRA, Ark. Code. Ann. §§ 16-123-401-407, https://law.justia.com/codes/arkansas/2020/title-16/subtitle-7/chapter-123/subchapter-4/, in 2015.
d. Connecticut: Connecticut's state FRFA, Conn. Gen. Stat. Ann. § 52-571b, https://www.cga.ct.gov/current/pub/chap_925.htm#sec_52-571b, was enacted in 1993.
e. Florida: Florida enacted its state FRFA, Fla. Stat. Ann. §§ 761.01 et. seq, http://www.leg.state.fl.us/statutes/index.cfm?App_mode=Display_Statute&URL=0700-0799/0761/0761.html, in 1998.
f. Idaho: Idaho's state RFRA is called the Free Exercise of Religion Protected Act (IFERPA), Idaho Code Ann. §§ 73-401 to 73-404, https://legislature.idaho.gov/statutesrules/idstat/title73/t73ch4/sect73-402/. IFERPA was enacted in 2000.
g. Illinois: The Illinois state RFRA, 775 Ill. Comp. Stat. Ann. 35/1 to 35/99, https://www.ilga.gov/legislation/ilcs/ilcs3.asp?ActID=2272&ChapterID=64, was enacted in 1998.
h. Indiana: In 2015, Indiana enacted its state RFRA, Ind. Code Ann. § 1.IC34-13-9, https://iga.in.gov/laws/2021/ic/titles/34#34-13-9.
i. Kansas: Enacted in 2013, the Kansas state RFRA is called the Kansas Preservation of Religious Freedom Act, Kan. Stat. Ann. § 60-5301 to § 60-5305, http://www.kslegislature.org/li_2016/b2015_16/statute/060_000_0000_chapter/060_053_0000_article/060_053_0003_section/060_053_0003_k/.
j. Kentucky: Kentucky's state RFRA, Ky. Rev. Stat. Ann. § 466.350, https://apps.legislature.ky.gov/law/statutes/statute.aspx?id=42395, was also enacted in 2013.
k. Louisiana: The Louisiana state FRFA is known as the Free Exercise of Religion Protected Act (LFERPA). LFERPA, La. Rev. Stat. Ann. §§ 13:5231-5242, http://www.legis.la.gov/Legis/Law.aspx?d=725125, was enacted in 2010.
l. Mississippi: Mississippi's state RFRA, Miss. Code Ann. § 11-61-1, https://law.justia.com/codes/mississippi/2016/title-11/chapter-61/section-11-61-1/, was enacted in 2014.
m. Missouri: Missouri enacted it state RFRA, Mo. Ann. Stat. §§ 1.302-1.307, https://revisor.mo.gov/main/OneSection.aspx?section=1.302, in 2003.
n. Montana: Montana's state RFRA, Mont. Code Ann. §§ 27-33-101 to 27-33-105, https://law.justia.com/codes/montana/2022/title-27/chapter-33/part-1/, was enacted in 2021.

o. New Mexico: New Mexico's state RFRA, N.M. Stat. §§ 28-22-1 to 28-22-5, https://law.justia.com/codes/new-mexico/2021/chapter-28/article-22/, was enacted in 2000.
p. Oklahoma: Oklahoma's state RFRA is called the Oklahoma Religious Freedom Act (ORFA), Okla. Stat. Ann. Tit. 51, §§ 251-258, https://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=104672. The ORFA was enacted in 2000.
q. Pennsylvania: The Pennsylvania state RFRA is known as the Religious Freedom Protection Act (PRFPA), Pa. Const. Stat. Ann. tit. 71, §§ 2401-2407, https://casetext.com/statute/pennsylvania-statutes/statutes-unconsolidated/title-71-ps-state-government/part-v-miscellaneous/chapter-28-religious-freedom-protection-act/section-2401-short-title. The PRFPA was enacted in 2002.
r. Rhode Island: Rhode Island's state RFRA, R.I. Gen. Laws §§ 42-80.1-1 to 42-80.4, http://webserver.rilin.state.ri.us/Statutes/TITLE42/42-80.1/INDEX.HTM, was enacted in 1993.
s. South Carolina: South Carolina's state RFRA is called the South Carolina Religious Freedom Act (SCRFA). The SCRFA, S.C. Code Ann. §§ 1-32-10 to 1-32-60, https://www.scstatehouse.gov/code/t01c032.php, was enacted in 1999.
t. South Dakota: South Dakota's state RFRA, S.D. Codified Laws § 1-1A-4, https://sdlegislature.gov/Statutes/1-1A-4, was enacted in 2021.
u. Tennessee: The Tennessee state RFRA is called the Tennessee Preservation of Religious Freedom Act (TPRFA). The TPFRA, Tenn. Code Ann. § 4-1-407, https://law.justia.com/codes/tennessee/2010/title-4/chapter-1/part-4/4-1-407/, was enacted in 2009.
v. Texas: The state of Texas enacted its RFRA, Tex, Civ. Prac. & Rem. Code Ann. §§ 110.001-100.012, https://statutes.capitol.texas.gov/Docs/CP/htm/CP.110.htm, in 1999.
w. Virginia: Virginia's state RFRA is called the Act for Religious Freedom (VARF), Va. Code Ann. § 57-1 to 57-2.02, https://law.lis.virginia.gov/vacode/title57/chapter1/. VARF was enacted in 1986.
x. West Virginia: Signed into law in March 2023, West Virginia became the most recent state to enact state RFRA, https://legiscan.com/WV/bill/HB3042/2023.

2. Some state RFRAs have unfortunate carve-outs, e.g., Texas' RFRA includes a provision making the state RFRA not applicable in civil rights cases

Sec. 110.011. CIVIL RIGHTS.

(a) Except as provided in Subsection (b), this chapter does not establish or eliminate a defense to a civil action or criminal prosecution under a federal or state civil rights law.

(b) This chapter is fully applicable to claims regarding the employment, education, or volunteering of those who perform duties, such as spreading or teaching

faith, performing devotional services, or internal governance, for a religious organization. For the purposes of this subsection, an organization is a religious organization if:

(1) the organization's primary purpose and function are religious, it is a religious school organized primarily for religious and educational purposes, or it is a religious charity organized primarily for religious and charitable purposes; and

(2) it does not engage in activities that would disqualify it from tax exempt status under Section 501(c)(3), Internal Revenue Code of 1986, as it existed on August 30, 1999.

Added by Acts 1999, 76th Leg., ch. 399, Sec. 1, eff. Aug. 30, 1999.

B. Statutory Exemptions for Religious Persons and Organizations

e.g., Rev. Code of Wash. 49.60.040 (but see *Wood v. Seattle's Union Gospel Mission*, 197 Wn.2d 231, 481 P.3d 1060 (2021), *cert. denied*, 595 U.S. ___ (2022)

how state Privileges & Immunity Clause can narrow a statutory religious exemption (Woods v SUGM).

V. Those Legal Defenses in Common Contexts

A. Religious Rights of Public or Private Employee

Section 701j of Title VII after *Groff*:

"We therefore, like the parties, understand [*TWA v. Hardison,* the 1977 SCOTUS decision at issue] to mean that "undue hardship" is shown when a burden is substantial in the overall context of an employer's business."

"What matters more than a favored synonym for "undue hardship" (which is the actual text) is that courts must apply the test in a manner that takes into account all relevant factors in the case at hand, including the particular accommodations at issue and their practical impact in light of the nature, "size and operating cost of [an] employer."

". . a hardship that is attributable to employee animosity to a particular religion, to religion in general, or to the very notion of accommodating religious practice cannot be considered "undue." If bias or hostility to a religious practice or a religious accommodation provided a defense to a reasonable accommodation claim, Title VII would be at war with itself.

Cannot just weigh the employee's requested accommodation. "Consideration of other options, such as voluntary shift swapping, would also be necessary."

B. In Employment by Religious Ministries

1. *Wood v. Seattle's Union Gospel Mission*, 197 Wn.2d 213, 481 P.3d 1060 (2021), *cert. denied*, 595 U.S. ___ (2022)
2. *Maxon v. Fuller Theological Seminary*, 2021 WL 5882035 (9th Cir. 2021)
3. *Ratliff v. Wycliffe Assoc., Inc.*, 2023 WL 3688082 (M.D. Fla. 2023)

C. In Professional Services Open to the Public (Places of Public Accommodation)

1. Foster care services by faith-based organization: Held: Where law allowed secular exemptions but not religious, the law was not neutral as to religion and therefore failed Free Exercise Clause scrutiny.
   Fulton v City of Philadelphia, 593 U.S. ___, 141 S. Ct. 1868 (2021)

2. Free Speech Clause prevents State from requiring Web site designer to either design for a gay couple an expression of something contrary to her religious conscience or else refrain from designing for any couples.
   303 Creative LLC v Elenis, 21-476 (June 30, 2023)

D. In Equal Eligibility to Participate in Government Grants and Tax Benefits

1. Tax Credits for private school tuition

   a. *Carson v Makin*, 596 U.S. ___, 142 S. Ct. 1987 (2022)

      i. Background**.** The State of Maine has a tuition assistance program under which the state pays students' tuition to attend a different high school - public or private - if students live in a school district that lacks a high school, as is sometimes the case in rural Maine.
      Maine will not, however, pay tuition if students choose a "sectarian" school. Parents who wanted their children to attend accredited religious high schools sued the state, claiming violation of their Free Exercise rights.

      ii. Majority Opinion
      a) The Court ruled that Maine's tuition assistance program violated the Free Exercise Clause because it excluded religious schools from the program, overturning the previous U.S. Court of Appeals ruling. In a 6-3 decision by Roberts, and joined by Thomas, Alito, Gorsuch, Kavanaugh, and Barrett, the Court held that Maine's "nonsectarian" requirement for otherwise generally available tuition assistance payments violates the Free Exercise Clause. Speaking on behalf of a six-judge majority, the Chief Justice noted that Maine's tuition assistance program is available to a wide variety of schools, including single-sex and out-of-state schools, but not religious schools. It therefore denied religious schools a generally available benefit.
      b) Religious discrimination. "The state pays tuition for certain students at private schools – so long as the schools are not religious," Roberts wrote. "That is discrimination against religion."

c) Strict scrutiny. In so ruling, the Court held that Maine's program could not survive strict scrutiny, and that the principles the Court applied in *Trinity Lutheran Church of Columbia v. Comer* (2017) and *Espinoza v. Montana Department of Revenue* (2020) resolved the case at hand. The Court found that Maine's antiestablishment interest did not justify excluding members of the community from an otherwise generally available public benefit simply because of their religious exercise. The Court also found unpersuasive the First Circuit's attempt to distinguish between religious status prohibitions and the religious use prohibition, noting instead that the prohibition on status-based discrimination under the Free Exercise Clause does not justify use-based discrimination.

b. *Espinoza v. Montana Dept. of Revenue*, 591 U.S. ___, 140 S. Ct. 2246 (2022)
Federal Free Exercise Clause violated by application of Montana constitutional provision (a "Blaine Amendment") to prohibit state tax credit for donors to private scholarship organizations because some recipients may direct scholarships to private religious schools.

c. Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993)
Court held that the establishment clause of the First Amendment did not prohibit a school district from furnishing a taxpayer funded sign-language interpreter to a deaf student enrolled in a Catholic high school under provisions of the Individuals with Disabilities Education Act (IDEA) and its Arizona counterpart. In so doing, the Court overruled a Ninth Circuit Court of Appeals decision that such accommodation would violate the "primary effects" prong of the *Lemon* test, as established in *Lemon v. Kurtzman*, 403 U.S. 602 (1971).