2023 Religious Freedom Update Workshop:
Developments in the Practice of Religious Freedom Law in 2022-23
CLS National Conference, October 5-8, 2023

Cases are followed by Legislation, Regulations, and an Appendix on State RFRAs.
All items herein are numbered sequentially from #1 thru #29.

CASES: U.S. SUPREME COURT

1. *Groff v. DeJoy*, 600 U.S. 447 (June 29, 2023):

Background: "Gerald Groff is an Evangelical Christian who believes for religious reasons that Sunday should be devoted to worship and rest[.]'" *Id* at 454. Groff began working for the U.S. Postal Service (USPS) in 2012. In 2013, USPS contracted with Amazon to deliver packages, including on Sundays. Due to a union agreement, Groff would be required to work Sundays. Groff transferred to another location but in 2017 that location began Sunday Amazon deliveries. USPS arranged for co-workers, "including the postmaster," to cover Groff's Sunday shifts, but began "progressive discipline" of Groff for absence. *Id*. at 455. Groff requested a transfer that would not require Sunday work but no such position was available. Groff's refusal to report on Sundays led to resentment among coworkers, one of whom filed a grievance. "Finally, in January 2019, he resigned." *Id*.

Groff sued USPS chief Louis DeJoy under Title VII, asserting "that USPS could have accommodated his Sunday Sabbath practice 'without undue hardship on the conduct of [its] business.'" *Id*. at 456. "The District Court granted summary judgment to USPS, and the Third Circuit affirmed. The panel majority felt that it was bound [by] *Hardison*, which it construed to mean 'that requiring an employer to bear more than a de minimis cost to provide a religious accommodation is an undue hardship.'" *Id*. (citing *Trans World Airlines v. Hardison*, 432 U.S. 63, 84 (1977)). The panel held "this low standard was met [since e]xempting Groff from Sunday work … had 'imposed on his coworkers, disrupted the workplace and workflow, and diminished employee morale.'" *Id*.

Key Issues: Whether employers may: (1) refuse Title VII religious accommodations that impose more-than-de-minimis cost, as stated in *Hardison*, 432 U.S. at 84 ("To require TWA to bear more than a de minimis cost in order to give Hardison Saturdays off is an undue hardship."); and (2) show "undue hardship on the conduct of the employer's business" merely by showing that a proposed religious accommodation for an employee burdens his/her co-workers rather than the employer's business itself?

Held (9-0): "We hold that showing 'more than a *de minimis* cost' … does not suffice to establish 'undue hardship' under Title VII…. In describing an employer's 'undue hardship' defense, *Hardison* referred repeatedly to 'substantial' burdens, and that formulation better explains the decision. We therefore, like the parties, understand *Hardison* to mean that 'undue hardship' is shown when a burden is substantial in the overall context of an employer's business." *Groff*, 600 U.S. at 468. Thus, "an employer must show that the burden of granting an accommodation would result in substantial increased costs in relation to the conduct of its particular business." *Id*. at 470.

Opinion (Alito, J.): The Court took this opportunity, after nearly 50 years, to explain *Hardison*. Relying on *Hardison*, many lower courts had mistakenly interpreted "undue hardship" as anything "more than *de minimis*, *i.e.*, something that is 'very small or trifling.'" *Id.* at 469. Though *Hardison* contained such language—"To require TWA to bear more than a de minimis cost in order to give Hardison Saturdays off is an undue hardship."—it was not intended as an exhaustive interpretation of "undue hardship." To the contrary, *Hardison* stated "three times that an accommodation is not required when it entails 'substantial' 'costs' or 'expenditures.'" *Id.* at 464.

A more demanding standard is consistent with the plain meaning of "undue hardship." Under "any definition, a hardship is more severe than a mere burden." *Id.* at 469. And an "undue" hardship must mean "something greater than hardship." *Id.* (quoting Government's Brief). The use of "the modifier *undue* means that the requisite burden, privation, or adversity must rise to an 'excessive' or 'unjustifiable' level." *Id.*

The Court rejected alternative formulations of the test. "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.'" *Id.* at 470–71.

The Court left "the context-specific application of [its] clarified standard to the lower courts …. The Third Circuit assumed that *Hardison* prescribed a 'more than a de minimis cost' test, and this may have led the court to dismiss a number of possible accommodations, including those involving the cost of incentive pay, or the administrative costs of coordination with other nearby stations with a broader set of employees." *Id.* at 473.

Concurrence (Sotomayor & Jackson, JJ.): Noting that some accommodations might pose "undue hardships" due to their "effects on co-workers." *Id.* at 476.

Practice Pointer: *Groff* makes it easier for employees to obtain, and harder for employers to refuse, religious accommodations. But the inquiry is fact-sensitive.

2. *303 Creative LLC v. Elenis*, 600 U.S. , 143 S.Ct. 2298 (June 30, 2023):

Background: In this "pre-enforcement" challenge, Lorie Smith sought judicial assurance that she could expand her website-design business to include custom wedding websites, and post her reasons for not creating websites that violate her religious beliefs, without risking liability under Colorado's antidiscrimination law. "Laws along these lines have done much to secure the civil rights of all Americans. But in this particular case Colorado does not just seek to ensure the sale of goods or services on equal terms. It seeks to use its law to compel an individual to create speech she does not believe." 143 S.Ct. at 2307–08.

"While Ms. Smith has laid the groundwork for her new venture, she has yet to carry out her plans. She worries that, if she does so, Colorado will force her to express views with which she disagrees. [She] provides her … services to customers regardless of their race, creed, sex, or sexual orientation. But she has never created expressions that contradict her own views for anyone—whether that means generating works that encourage violence,

demean another person, or defy her religious beliefs by, say, promoting atheism. [S]he worries that, if she enters the wedding website business, the State will force her to convey messages inconsistent with her belief that marriage should be reserved to unions between one man and one woman. [She asserts the] Free Speech Clause protects her from being compelled to speak what she does not believe [and] protects her right to differ." *Id*. at 2308.

Proceedings Below: A Tenth Circuit panel ruled against Smith. It found that her "planned wedding websites qualify as 'pure speech' protected by the First Amendment." 143 S.Ct. at 2310. But it ruled that Colorado met "strict scrutiny" by showing that "forcing Ms. Smith to create speech would serve a compelling governmental interest and that no less restrictive alternative exists to secure that interest." *Id*. "As the majority saw it, Colorado has a compelling interest in ensuring 'equal access to publicly available goods and services,' and no option short of coercing speech from Ms. Smith can satisfy that interest because she plans to offer 'unique services' that are, 'by definition, unavailable elsewhere.'" *Id*. The state's purpose was "to eliminate ideas that differ from its own." *Id*. at 2318.

In the panel majority's own words, it rested its "analysis [on] the custom and unique nature of [the] services." 6 F.4th 1160, 1176. It found that "LGBT consumers may be able to obtain wedding-website design services from other businesses; yet, LGBT consumers will never be able to obtain wedding-related services of the same quality and nature as those [Smith offers]. Thus, there are no less intrusive means of providing equal access to those types of services." *Id*. at 1180. (The panel dissent criticized this as "describing custom artists as creating a monopoly of one." *Id*. at 1204.)

The panel majority also denied Smith's Free Exercise claim, finding the law both neutral and generally applicable. Regarding the latter, the majority found not an anti-religious bias but a "pro-LGBT gerrymander," which was "likely inevitable given CADA's purpose and its content-based restrictions on speech." *Id*. at 1186. It also found that "[m]essage-based refusals are not an 'exemption' from CADA's requirements [but] a defense," *id*., without offering any meaningful distinction between "exemption" and "defense."

Key Issue: Whether applying a public accommodation law to compel an artist to speak or stay silent violates the Free Speech Clause of the First Amendment.

Held (6-3): The First Amendment prohibits Colorado from forcing a website designer to create expressive designs that express messages with which the designer disagrees.

Majority (Gorsuch, J.): "Colorado seeks to force an individual to speak in ways that align with its views but defy her conscience about a matter of major significance. [A]s this Court has long held, the opportunity to think for ourselves and to express those thoughts freely is among our most cherished liberties and part of what keeps our Republic strong. Of course … all of us will encounter ideas we consider 'unattractive,' 'misguided, or even hurtful[.]' But tolerance, not coercion, is our Nation's answer. The First Amendment envisions the United States as a rich and complex place where all persons are free to think and speak as they wish, not as the government demands." 143 S.Ct. at 2321–22.

The Court noted that Smith was not hostile to LGBT people. She welcomed "all people regardless of ... sexual orientation," 143 S.Ct. at 2309, but will "not violate [her] beliefs," *id*. at 2317, and "contradict[] biblical truth," *id*. at 2309. First Amendment "protections

belong [not] only to speakers whose motives the government finds worthy [but] to speakers whose motives others may find misinformed or offensive." *Id.* at 2317. Lawsuits may not force speakers to "accommodate other views" by forcing them to promote same-sex marriage against their religious beliefs. *Id.* at 2318.

"As surely as Ms. Smith seeks to engage in protected … speech, Colorado seeks to compel speech Ms. Smith does not wish to provide. [I]f Ms. Smith offers wedding websites celebrating marriages she endorses, the State intends to 'force her to create custom websites' celebrating other marriages she does not." *Id.* at 2313. This would place Smith in an untenable position. "If she wishes to speak, she must either speak as the State demands or face sanctions for expressing her own beliefs, sanctions that may include compulsory participation in 'remedial ... training,' filing periodic compliance reports as officials deem necessary, and paying monetary fines. Under our precedents, that 'is enough,' more than enough, to [violate the] right to speak freely." *Id.*

"Under Colorado's logic, the government may compel anyone who speaks for pay on a given topic to accept all commissions on that same topic—no matter the underlying message—if the topic somehow implicates a customer's protected trait. [It could] force all manner of artists, speechwriters, and others whose services involve speech to speak what they do not believe[. It] could require 'an unwilling Muslim movie director to make a film with a Zionist message,' or 'an atheist muralist to accept a commission celebrating Evangelical zeal,' so long as they would make films or murals for other members of the public with different messages. [It] could force a male website designer married to another man to design websites for an organization that advocates against same-sex marriage. Countless other creative professionals, too, could be forced to choose between remaining silent, producing speech that violates their beliefs, or speaking their minds and incurring sanctions for doing so. [T]he First Amendment tolerates none of that." *Id.* at 2313–14.

Dissent (Sotomayor, Kagan, & Jackson, JJ.): The majority holds the Free Speech Clause "shields the business from a generally applicable law that prohibits discrimination in the sale of publicly available goods and services. That is wrong. Profoundly wrong. [T]he law in question targets conduct, not speech, [and] the *act* of discrimination has never constituted protected expression under the First Amendment. Our Constitution contains no right to refuse service to a disfavored group." 143 S.Ct. at 2322.

Practice Pointers: (1) Be wary of stipulations: those here regarding the nature of the expression were pivotal. (2) Be aware of the Tenth Circuit's narrow Free Exercise analysis here, which the Supreme Court did not address and thus left intact. Compare the Ninth Circuit's better/broader Free Exercise analysis in *FCA* (Item #10 below).

3. *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. ___, 142 S.Ct. 2407 (June 27, 2022):

Background: "Joseph Kennedy lost his job as a high school football coach because he knelt at midfield after games to offer a quiet prayer of thanks. [He] prayed during a period when school employees were free to speak with a friend, call for a reservation at a restaurant, check email, or attend to other personal matters. He offered his prayers quietly [but his employer] disciplined him anyway. It did so because anything less could lead a reasonable observer to conclude (mistakenly) that it endorsed [his] beliefs. That reasoning

was misguided. Both the Free Exercise and Free Speech Clauses [protect such religious expressions]. Nor does [the] Establishment Clause require the government to single out private religious speech for special disfavor. The Constitution and the best of our traditions counsel mutual respect and tolerance, not censorship and suppression, for religious and nonreligious views alike." 142 S.Ct. at 2415–16.

Proceedings Below: The district court ruled against Kennedy. It found that a "'reasonable observer ... would have seen him as ... leading an orchestrated session of faith' [contrary to the] Establishment Clause." *Id.* at 2419. The Ninth Circuit affirmed and the Supreme Court denied cert. "But Justice Alito, joined by three other Members of the Court, issued a statement stressing that 'denial of certiorari does not signify that the Court necessarily agrees with the decision [below],'" *id.*, under whose logic "teachers might be 'ordered not to engage in any *demonstrative* conduct of a religious nature' within view of students, even to the point of being forbidden from 'folding their hands or bowing their heads in prayer' before lunch." *Id*. The case then resumed in district court with discovery.

On summary judgment, the court ruled for the School District, finding "the '*sole reason* for [its] decision to suspend Mr. Kennedy was its perceived 'risk of … liability' under the Establishment Clause[.]" *Id.* at 2420. "Rejecting [Kennedy's] free speech claim, the court concluded that because [he] 'was hired precisely to occupy' an 'influential role for student athletes,' any speech he uttered was offered in his capacity as a government employee[.]" *Id*. "[Even if his] speech qualified as private speech … the District properly suppressed it" to avoid an Establishment Clause violation. *Id*. "Turning to [his] free exercise claim, the [court] held that, even if the District's policies restricting his religious exercise were not neutral [or] generally applicable, the District had a compelling interest in prohibiting his postgame prayers, because [allowing them] 'would have violated the Establishment Clause.'" *Id*. Kennedy again appealed, and a Ninth Circuit panel again affirmed.

The panel agreed that Kennedy's speech was "government rather than private speech." *Id*. "'[Even if he] spoke as a private citizen,' [his] 'on-field religious activity,' coupled [with] 'his pugilistic efforts to generate publicity in order to gain approval of those on-field religious activities,' [would] lead an 'objective observer' to conclude that the District 'endorsed [his] religious activity by not stopping the practice.'" *Id*. The panel denied the "free exercise claim for similar reasons." *Id*. Though the District *conceded* that "its policy that led to Mr. Kennedy's suspension" restricted his "conduct because [it was] religious," *id*., the panel ruled that "the District 'had a compelling state interest to avoid violating the Establishment Clause,' and its suspension was narrowly tailored to vindicate that interest." *Id*. The court later denied rehearing "en banc over the dissents of 11 judges." *Id*. "Several dissenters noted that the panel [relied] on *Lemon v. Kurtzman*, 403 U.S. 602 (1971) [for the since-discarded notion that] the Establishment Clause is implicated whenever a hypothetical reasonable observer could conclude the government endorses religion." *Id*.

Key Issue: May government target religious practice in violation of the Free Exercise and Free Speech Clauses in order to diminish risks under the Establishment Clause?

Held (6-3): "Respect for religious expressions is indispensable to life in a free and diverse Republic—whether those expressions take place in a sanctuary or on a field, and whether they manifest through the spoken word or a bowed head. Here, a government entity sought to punish an individual for engaging in a brief, quiet, personal religious observance doubly

protected by the Free Exercise and Free Speech Clauses of the First Amendment. And the only meaningful justification the government offered for its reprisal rested on a mistaken view that it had a duty to ferret out and suppress religious observances even as it allows comparable secular speech. The Constitution neither mandates nor tolerates that kind of discrimination." 142 S.Ct. at 2432–33.

Majority (Gorsuch, J.): The "Free Exercise and Free Speech Clauses … work in tandem. Where the Free Exercise Clause protects religious exercises, whether communicative or not, the Free Speech Clause provides overlapping protection for expressive religious activities. [Thus,] the First Amendment doubly protects religious speech[.]" *Id*. at 2421.

The Free Exercise Clause "protects not only the right to harbor religious beliefs inwardly and secretly. It does perhaps its most important work by protecting the ability of those who hold religious beliefs of all kinds to live out their faiths in daily life through 'the performance of (or abstention from) physical acts.'" *Id*. "The exercise in question involves … giving 'thanks through prayer' briefly and by himself 'on the playing field' at the conclusion of each game …. [This] does not involve leading prayers with the team or before any other captive audience." *Id*. at 2422. In "forbidding Mr. Kennedy's brief prayer, the District failed to act pursuant to a neutral and generally applicable rule." *Id*. "A government policy will not qualify as neutral if it is 'specifically directed at ... religious practice.' A policy can fail this test if it 'discriminate[s] on its face,' or if a religious exercise is otherwise its 'object.'" *Id*. A "policy will fail the general applicability requirement if it 'prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way,' or if it provides 'a mechanism for individualized exemptions.' Failing either the neutrality or general applicability test is sufficient to trigger strict scrutiny. In this case, the District's challenged policies were neither neutral nor generally applicable. By its own admission, the District sought to restrict Mr. Kennedy's actions at least in part because of their religious character." *Id*. at 2422–23.

Under the Free Speech Clause, Kennedy's speech was "private speech, not government speech. When [he] uttered the three prayers that resulted in his suspension, he was not engaged in speech 'ordinarily within the scope' of his duties as a coach." *Id*. at 2424. "The timing and circumstances of [his] prayers confirm the point." *Id*. at 2425. But "a second step remains where the government may … prove that its interests as employer outweigh even an employee's private speech on a matter of public concern." *Id*.

"Whether one views the case through the lens of the Free Exercise or Free Speech Clause, at this point the burden shifts to the District. Under the Free Exercise Clause, a government entity normally must satisfy at least 'strict scrutiny,' showing that its restrictions on the plaintiff's protected rights serve a compelling interest and are narrowly tailored to that end. A similar standard generally obtains under the Free Speech Clause. The District [seeks] the more lenient second-step *Pickering–Garcetti* test, or alternatively intermediate scrutiny. Ultimately, however, it does not matter which standard we apply." *Id*. at 2426.

"The Ninth Circuit [insisted] that the District's interest in avoiding an Establishment Clause violation 'trumped' Mr. Kennedy's rights to religious exercise and free speech." *Id*. at 2426. "But how could that be? [All] three Clauses appear in the same sentence of the same Amendment. A natural reading of that sentence would seem to suggest the Clauses have 'complementary' purposes, not warring ones …." *Id*.

The "District relied on *Lemon* and its progeny" for an "endorsement test" this Court has abandoned. 142 S.Ct. at 2427. The "Establishment Clause does not include anything like a 'modified heckler's veto, in which ... religious activity can be proscribed' based on 'perceptions' or 'discomfort.'" *Id*. "In place of *Lemon* and the endorsement test, [we have] instructed that the Establishment Clause must be interpreted by 'reference to historical practices and understandings.'" *Id*. at 2428. "'[T]he line' that courts and governments 'must draw between the permissible and the impermissible' has to 'accord with history and faithfully reflect the understanding of the Founding Fathers.'" *Id*.

While the District maintains that "its Establishment Clause concerns trump Mr. Kennedy's free exercise and free speech rights," it now adds that it *had to* suppress his religious exercise to avoid "coercing students to pray," since "coercing worship" violates that Clause on any analysis of its "original meaning." *Id*. at 2428–29. "As it turns out, however, there is a pretty obvious reason why the Ninth Circuit did not adopt this theory in proceedings below: The evidence cannot sustain it." *Id*. at 2429. "Naturally, [praying] quietly by himself on the field would have meant some people would have seen his religious exercise. Those close at hand might have heard him too. But learning how to tolerate speech or prayer of all kinds is 'part of learning how to live in a pluralistic society,' a trait of character essential to 'a tolerant citizenry.'" *Id*. at 2430. "Of course, some will take offense to certain forms of speech or prayer they are sure to encounter in a society where those activities enjoy such robust constitutional protection. But 'offense ... does not equate to coercion.'" *Id*.

"The absence of evidence of coercion in this record leaves the District to its final [argument] that *any* visible religious conduct by a teacher or coach should be deemed—without more and as a matter of law—impermissibly coercive on students. In essence, the District asks us to adopt the view that the only acceptable government role models for students are those who eschew any visible religious expression." *Id*. at 2430–31. "Such a rule would be a sure sign that our Establishment Clause jurisprudence had gone off the rails. In the name of protecting religious liberty, the District would have us suppress it. Rather than respect the First Amendment's double protection for religious expression, it would have us preference secular activity. Not only could schools fire teachers for praying quietly over their lunch, for wearing a yarmulke to school, or for offering a midday prayer during a break before practice[—]a school would be *required* to do so. It … would defy this Court's traditional understanding that permitting private speech is not the same thing as coercing others to participate in it…. We are aware of no historically sound understanding of the Establishment Clause that begins to 'make it necessary for government to be hostile to religion' in this way." *Id*. at 2431.

The "District's case hinges on the need to generate conflict between an individual's rights under the Free Exercise and Free Speech Clauses and its own Establishment Clause duties—and then develop some explanation why one of these Clauses in the First Amendment should 'trump' the other two. But the project falters badly. Not only does the District fail to offer a sound reason to prefer one constitutional guarantee over another. It cannot even show that they are at odds. In truth, there is no conflict between the constitutional commands before us. There is only the 'mere shadow' of a conflict, a false choice premised on a misconstruction of the Establishment Clause. And in no world may a government entity's concerns about phantom constitutional violations justify actual violations of an individual's First Amendment rights." *Id*. at 2432.

Dissent (Sotomayor, Breyer, & Kagan, JJ.): "This case is about whether a public school must permit a school official to kneel, bow his head, and say a prayer at the center of a school event. The Constitution does not authorize, let alone require, public schools to embrace this conduct. [T]his Court consistently has recognized that school officials leading prayer is constitutionally impermissible. Official-led prayer strikes at the core of our constitutional protections for the religious liberty of students and their parents, as embodied in both [Religion Clauses] of the First Amendment." 142 S.Ct. at 2434.

Practice Pointers: (1) *Kennedy* is as vital for bolstering Free Exercise and Free Speech claims as for limiting Establishment Clause defenses. (2) Where this *double protection* for Free Exercise and Speech applies, the government "must satisfy *at least* 'strict scrutiny.'" *Id*. at 2426 (italics added). (3) The latter point underlines a trend: the Court is replacing some tiered-scrutiny and other balancing tests with categorical/historical/textual ones. The autonomy doctrine (below) provides a categorical test, as does the Court's current Establishment Clause doctrine (here) and Second Amendment doctrine.[1] (4) Arguing for such bright-line tests (at least in the alternative) may be needed for good lawyering.

4. *Klein v. Oregon Bureau of Lab. & Indus.*, 143 S.Ct. 2686 (June 30, 2023), *vacating*, 317 Or.App. 138 (Jan. 26, 2022), *rev. denied*, 369 Or. 705 (May 5, 2022):

Background: In *Klein*, the Supreme Court granted certiorari, vacated the judgment of, and remanded the case to the Oregon appeals court "for further consideration in light of *303 Creative v. Elenis*, 143 S.Ct. 2298 (2023)."

Melissa and Aaron Klein owned a bakery, "Sweet Cakes by Melissa," which specialized in custom-designed cakes. The Kleins created wedding cakes partly to celebrate marriages, which, as Christians, they viewed as sacred unions of one man and one woman. They graciously attended all who entered their shop but would not create cakes with messages conflicting with their faith, e.g., cakes that celebrated divorce, advocated harm to others, or included profanity. They were asked to make a custom cake for a same-sex wedding. They declined because they believed that creating a cake to celebrate a same-sex wedding would send a message of support for the wedding in violation of their faith.

Proceedings Below: A state agency (BOLI) found that the Kleins' refusal to design and create a wedding cake celebrating a same-sex marriage violated state antidiscrimination

[1] "[Our recent cases eschew a] means-end scrutiny in the Second Amendment context. Instead, the government must affirmatively prove [its] regulation is part of the historical tradition that delimits the outer bounds of the right[.]" *NY State Rifle & Pistol v. Bruen*, 142 S.Ct. 2111, 2127 (2022). "[T]he Second Amendment (and other protections in the Bill of Rights) 'are enshrined with the scope they were understood to have *when the people adopted them.*'" *Duncan v. Bonta*, 2023 WL 6180472, at *20 (S.D.Cal. Sept. 22, 2023) (quoting *Bruen*). Such a desire for bright lines may be part of what drove Scalia to write *Empl'mt Div. v. Smith*, 494 U.S. 872 (1990) ("***Smith***"). Other key Free Exercise cases cited herein: *Fulton v. City of Phila.*, 141 S.Ct. 1868 (2021) ("***Fulton***"); *Tandon v. Newsom*, 141 S.Ct. 1294 (2021) ("***Tandon***"); *Roman Cath. Diocese v. Cuomo*, 141 S.Ct. 63 (Nov. 25, 2020) ("***Cuomo***"); *Masterpiece Cakeshop v. Colo. Civ. Rts. Comm'n*, 138 S.Ct. 1719 (2018) ("***Masterpiece***"); *Church of Lukumi v. City of Hialeah.*, 508 U.S. 520 (1993) ("***Lukumi***").

law and imposed damages of $135,000. "BOLI's commissioner[,] 'the ultimate decision-maker in this case,'" 289 Or.App. at 550, had made comments indicating the Kleins used religion as "an excuse" and needed to "learn from [the] experience" and be "rehabilitated," *id*. at 554. In 2017, the state appeals court upheld BOLI's discrimination finding, and the state supreme court denied review. In *Klein*, 139 S.Ct. 2713 (June 17, 2019), the U.S. Supreme Court issued an order of "**GVR**" (Granted, Vacated, & Remanded) to the state appeals court "for further consideration in light of *Masterpiece Cakeshop* [2018]."

On January 26, 2022, the state appeals court issued its decision. "The [U.S. Supreme] Court vacated and remanded our previous decision 'for further consideration in light of *Masterpiece*[.]' It subsequently decided *Fulton* [and] petitioners argue that *Fulton* too requires reconsideration of our prior analysis." *Klein*, 317 Or.App. at 140. "Ultimately, we reaffirm our prior decision except insofar as it upheld the damages award. [Thus], we adhere to our prior decision upholding BOLI's determinations that Aaron unlawfully discriminated against the Bowman-Cryers based on sexual orientation [and] concluding that neither the state [nor] federal constitution precludes the enforcement of the statute against Aaron, even though [its] enforcement … burdens Aaron's practice of his faith." *Id*.

Specifically, after analyzing *Fulton*, the court reaffirmed its prior holding that the state's actions were neutral and generally applicable. But after analyzing *Masterpiece*, the court found evidence of non-neutrality: The "prosecutor's closing argument apparently equating the Kleins' religious beliefs with 'prejudice,' [plus BOLI's] reasoning for imposing damages in connection with Aaron's [Bible quote], reflect that the agency acted in a way that passed judgment on the Kleins' religious beliefs[.]" *Id*. at 161.

Ruling "that BOLI at least subtly departed from the requirement of strict neutrality in its damages award," *id*. at 164, the court vacated that award. But it still ruled the Kleins had discriminated. "[Re] liability—our conclusion that BOLI properly determined that Aaron violated ORS 659A.403 by refusing service to the Bowman-Cryers and that neither the state nor federal constitution prohibits the application of that neutral, generally-applicable law to his conduct of denying cake-making services based on sexual orientation—we adhere to our prior decision in its entirety. We do so for two reasons." *Id*. at 166.

"First, the liability issues were resolved on summary determination before the agency on undisputed facts. As a result, any non-neutrality on the part of the agency did not affect a fact-finding process." *Id*. at 166. "Second, as for the law, our court reviewed all the legal questions concerning liability for legal error[,] we did so without deference to BOLI on those questions of law, and we do not understand the Kleins to contend that we conducted that nondeferential [de novo] review in a non-neutral way." *Id*. "[B]y noting in *Masterpiece Cakeshop* that the [state appeals court] failed to address the statements by the members of the [state agency] that the Court found concerning, the Court implicitly indicated that, at times, appellate-level [judicial] review can ensure that a proceeding is neutral in the face of potential non-neutrality by an agency adjudicator." *Id*. We "do not view [our] failure to anticipate the approach [in *Masterpiece*], and to conduct the review that case now appears to require, as indicative of non-neutrality" in this adjudicatory process. 317 Or.App. at 167.

Thus, the court appeared to think its "neutral" review of BOLI's "non-neutral" proceedings cured any constitutional defect. Ultimately, the court held that it had taken "appropriate corrective action" to address the non-neutrality of BOLI on the issue of liability, but that it

could not do so on the issue of damages. "[N]on-neutrality in the damages portion of the decision is not something we can remedy through appellate review." *Id.* at 167. Thus, the court returned the case to the same biased BOLI to reconsider damages. (In July 2022, and without a new hearing, BOLI reduced the damage award from $135,000 to $30,000.)

9/2/22 Cert. Petition: In the *Klein* filings at www.supremecourt.gov, the cert. petition asks three questions: "1. Whether, under *Masterpiece*, the Oregon Court of Appeals should have entered judgment for Petitioners after finding that Respondent had demonstrated anti-religious hostility. 2. Whether, under [*Smith*], strict scrutiny applies to a free exercise claim that implicates other fundamental rights; and if not, whether this Court should return to its pre-*Smith* jurisprudence. 3. Whether compelling an artist to create custom art for a wedding ceremony violates the Free Speech Clause of the First Amendment."

Current Status: In response to the above cert. petition, the Supreme Court issued another GVR to the state appeals court, this time to reconsider its decision in light of *303 Creative*. It is unclear whether that state court will consider any other issues (e.g., #1 and #2 from the cert. petition above). Will it risk full Supreme Court review? Or a third GVR?

5. *Yeshiva Univ. v. YU Pride All.*, 143 S.Ct. 1 (Sep. 14, 2022) (5-4) (Alito, J., joined by Thomas, Gorsuch, & Barrett, JJ., dissenting from denial of stay), *vacating stay*, 2022 WL 4127422 (Sep. 9, 2022) (Sotomayor, J.), *granting stay*, 2022 WL 2158381 (N.Y. Sup.Ct. June 14, 2022), *aff'd*, 211 A.D.3d 562 (N.Y. App.Div. Dec. 15, 2022):

Background: This case could signal a vital shift in precedent in sexual autonomy cases the way that *Cuomo* (2020) and *Tandon* (2021) did in Covid lockdown cases. Those two 5-4 decisions, issued on emergency appeals for injunctions, dramatically improved prospects for religious challenges to Covid (and other kinds of government) restrictions.

On June 24, 2022, a justice of New York's Supreme Court—its trial court—found Yeshiva University (Yeshiva or YU), a traditional Jewish school, in violation of the city's human rights law (NYCHRL), for refusing to officially recognize a gay rights student group called YU Pride. 2022 WL 2158381 (N.Y. Sup.Ct. June 14, 2022). The court rejected Yeshiva's defenses based on the First Amendment and ordered Yeshiva to recognize YU Pride. Yeshiva sought an emergency stay of that decision while it appealed. But the trial court, the Appellate Division of the Supreme Court (NY's intermediate appeals court), and Court of Appeals (NY's highest court) all declined the request, the latter two without comment.

Stay Granted by Justice Sotomayor: Yeshiva then sought an immediate stay from Justice Sotomayor as Circuit Justice for the Second Circuit. She granted the stay while referring the matter to the full Court. 2022 WL 4127422 (Sep. 9, 2022).

Stay Denied by Court (5-4): The entire opinion follows. "The application for stay pending appeal of a permanent injunction entered by the New York trial court, presented to Justice Sotomayor and by her referred to the Court, is denied without prejudice to applicants again seeking relief from this Court if, upon properly seeking expedited review and interim relief from the New York courts, applicants receive neither. The order heretofore entered by Justice Sotomayor is vacated. Applicants Yeshiva University and its president seek emergency relief from a non-final order of the New York trial court requiring the

University to treat an LGBTQ student group similarly to other student groups in its student club recognition process. The application is denied because it appears that applicants have ***at least two further avenues for expedited or interim state court relief***. First, applicants may ask the New York courts to expedite consideration of the merits of their appeal. Applicants do not assert, nor does the Appellate Division docket reveal, that they have ever requested such relief. Second, applicants may file with the Appellate Division a corrected motion for permission to appeal that court's denial of a stay to the New York Court of Appeals, as the Appellate Division clerk's office directed applicants to do on August 25. Applicants may also ask the Appellate Division to expedite consideration of that motion. ***If applicants seek and receive neither expedited review nor interim relief from the New York courts, they may return to this Court***." 143 S.Ct. 1 (Sep. 14, 2022) (emphasis added).

Four-Justice Dissent (Alito, Thomas, Gorsuch, & Barrett, JJ.): "Yeshiva University hosts our nation's largest Jewish undergraduate institution [which] is structured to help students embrace the Jewish faith and engage with the secular world from a foundation of Torah values.' Thus, Yeshiva expects its undergraduate students 'to live in accordance with halachic norms and Torah ideals.'" 143 S.Ct. at 1. "A student group, the YU Pride Alliance (the Alliance), 'vehemently disagreed' with Yeshiva's interpretation of Torah with respect to sexual relations between members of the same sex, so it applied for recognition as an official student group in order to 'make a statement' and promote 'cultural changes' in the institution." *Id*. at 1–2. "Perfunctorily dismissing [Yeshiva's] First Amendment arguments, the court ordered Yeshiva to recognize the group and to 'immediately' grant it 'the full and equal … privileges afforded to all other student groups.' The court denied Yeshiva's request for a stay pending appeal, and when the University applied to the Appellate Division and the Court of Appeals for interim relief, those courts refused without providing a single word of explanation. As a last resort, Yeshiva turned to this Court, but the majority—for no good reason—sends the University back to the state courts." *Id*. at 2.

"A State's imposition of its own mandatory interpretation of scripture is a shocking development that calls out for review." *Id*. "The Free Exercise Clause protects the ability of religious schools to educate in accordance with their faith. Restrictions on religious exercise that are not 'neutral and of general applicability' must survive strict scrutiny, and the NYCHRL treats a vast category of secular groups more favorably than religious schools like Yeshiva. The NYCHRL exempts any 'corporation incorporated under the benevolent orders law or described in the benevolent orders law.' It is therefore inapplicable to large groups like the American Legion and the Loyal Order of Moose, as well as smaller groups like the United Scottish Clans of New York and New Jersey. But Yeshiva was denied an exemption, and there has been no showing that granting an exemption to Yeshiva would undermine the policy goals of the NYCHRL to a greater extent than the exemptions afforded to hundreds of diverse secular groups." *Id*. at 2–3 (citations omitted).

"Unless a stay is granted, Yeshiva will be required to recognize the Alliance as an official student group[, forcing] Yeshiva to make a 'statement' in support of an interpretation of Torah with which [it] disagrees. The loss of First Amendment rights for even a short period constitutes irreparable harm, [citing ***Cuomo***, above], and the appellate process in the state courts could easily drag on for many months." *Id*. at 3. "The majority … suggests that we cannot grant a stay because the New York courts have not entered a final order. But the state courts' denial of interim relief constitutes a final order under [*Skokie*]. *Id*.

"The majority instructs Yeshiva to pursue two avenues of relief in state court before filing another application here. First, the University is told to seek 'expedit[ed] consideration of the merits of [its] appeal.' But even expedited review could take months, and during all that time, the University would be required to continue to make the statement about Torah that it finds objectionable. Thus, an expedited appeal in and of itself would not be sufficient to protect Yeshiva's First Amendment rights." *Id*. "Second—and more to the point—the majority seems to think that it is still possible for the University to persuade the Court of Appeals to grant a stay. Of course, the Court of Appeals has *already* denied Yeshiva's application for interim relief, but the majority interprets a case comment written by a court clerk employed by the Appellate Division to mean that the Court of Appeals may give Yeshiva a second bite at the apple notwithstanding its previous denial. That interpretation is dubious, yet the majority seizes upon it as dispositive. I doubt that Yeshiva's return to state court will be fruitful, and I see no reason why we should not grant a stay at this time. It is our duty to stand up for the Constitution even when doing so is controversial." *Id*.

Four-Justice Warning: "At least four of us are likely to vote to grant certiorari if Yeshiva's First Amendment arguments are rejected on appeal, *and Yeshiva would likely win if its case came before us*." *Id*. at 2 (italics added). If the state courts resist, and if the case returns to the Court, the state likely will lose. Why did Roberts or Kavanaugh not provide the fifth vote for emergency relief? The answer may be sensitivity to criticism of overuse of the emergency or "shadow" docket (especially during the pandemic).

Update: When the case resumed at the state appeals court, the parties agreed to a Stay of Trial Court Order (filed Sep. 26, 2022): "The parties to the above-referenced appeal hereby stipulate and agree that the June 24, 2022 Order entered by the [state trial court] shall be stayed pending the exhaustion of all appeals, including any appeals to this Court, the Court of Appeals, or the Supreme Court of the United States." This agreed stay was entered by Order of 9/29/22, and followed by Order of 11/10/22 recognizing the withdrawal/mootness (due to the agreed stay) of Yeshiva's request to appeal to NY's highest court. This agreed stay provided breathing room for the judicial process, but perhaps not in Yeshiva's favor.

Late last year, the state appeals court affirmed the trial court, on mostly the same grounds. *YU Pride v. YU*, 211 A.D.3d 562 (N.Y. App.Div. Dec. 15, 2022). Then, by Order of 3/30/23, that court denied "leave to appeal" its decision to the state's highest court (Court of Appeals). Evidently, the appeals "court denied YU's request to move the case to the Court of Appeals since the question of what damages YU is liable to for discrimination against the four plaintiffs has yet to be decided in trial court." Campus story.

Current Status: State trial court issues evidently have stalled a case that likely would have (and still might) generate useful religious freedom precedent from the Supreme Court.

6. ***Seattle's Union Gospel Mission v. Woods*, 142 S.Ct. 1094 (Mar. 21, 2022) (Statement of Alito, J., joined by Thomas, J., respecting denial of cert.), *denying cert.*, 197 Wash.2d 231 (Mar. 4, 2021) ("*SUGM*"):**

Background from Alito/Thomas: "The Mission … requires its paid staff to affirm its statement of faith, which declares 'the Bible is the inspired, infallible, authoritative Word of God.' Its employee handbook also requires staff to abide by the Mission's understanding

of the Bible by refraining from 'acts or language which are considered immoral or indecent according to traditional biblical standards,' including 'extra-marital affairs, sex outside of marriage, [and] homosexual behavior.'" 142 S.Ct. at 1095.

"In 2016, respondent Matthew Woods, a former summer intern and volunteer for the Mission, saw a job posting for a staff attorney position in the Mission's legal aid clinic. He disclosed to the legal aid clinic's staff that he identified as bisexual and was in a same-sex relationship, and he asked whether that would pose an obstacle to employment with the Mission." *Id*. "The clinic's director quoted the employee handbook and explained that Woods was not 'able to apply,' but the director wished him well …. Woods nevertheless applied for the Mission's staff attorney position to 'protest' the Mission's employment policy…. Woods's cover letter asked the Mission to 'change' its religious practices." *Id*.

"After he applied, the clinic's director met Woods for lunch and confirmed that the Mission could not change its theology. He explained that Woods's employment application was not viable because he did not comply with the Mission's religious lifestyle requirements, did not actively attend church, and did not exhibit a passion for helping clients develop a personal relationship with Jesus. The Mission hired a co-religionist candidate instead." *Id*.

"In 2017, Woods filed suit against the Mission in [for violations of] Washington's Law Against Discrimination (WLAD), which forbids discrimination against sexual orientation in employment decisions. The Mission answered that entertaining the suit would violate the First Amendment's Religion Clauses. The Mission also argued that it fell into an express statutory exemption from the WLAD, which excludes 'any religious or sectarian [nonprofit]' from its definition of 'employer.'" *Id*. "The Washington state trial court agreed, noting that the Mission 'put applicants on notice' that employees must 'accept the Mission's Statement of Faith' and that the staff attorney's duties would 'extend beyond legal advice to include spiritual guidance and praying with the clients.' The trial court thus dismissed the suit based on the WLAD's statutory exemption." *Id*.

"The Washington Supreme Court … reversed. The court held that as applied to Woods's lawsuit, the WLAD's religious exemption would violate protections for sexual orientation and same-sex marriage implicit in the [State] Constitution's Privileges and Immunities Clause, unless [it] narrowed the scope of the WLAD religious exemption. It [held] the State Constitution would not be 'offended if WLAD's [religious exemption] is applied concerning the claims of a 'minister' as defined by [*Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S.Ct. 2049 (2020) ("***Our Lady***") and *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012) ("***Hosanna***")]." *SUGM*, 142 S.Ct. at 1095. The court remanded the question whether the Mission's "staff attorneys can qualify as ministers." *Id*. at 1096.

Alito/Thomas Rationale: "The Washington Supreme Court's reasoning presumes that the guarantee of church autonomy in the Constitution's Religion Clauses protects only a religious organization's employment decisions regarding formal ministers. But … church autonomy is not so narrowly confined. As early as 1872, our church-autonomy cases explained that '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.' That is so because the Constitution protects religious organizations 'from secular control or manipulation.' The

[protected entities] include churches, religious schools, and religious organizations engaged in charitable practices, like operating homeless shelters, hospitals, soup kitchens, and religious legal-aid clinics similar to the Mission's—among many others." *Id*.

"Such religious groups' 'very existence is dedicated to the collective expression and propagation of shared religious ideals,' and 'there can be no doubt that the messenger matters' in that religious expression. To force religious organizations to hire messengers and other personnel who do not share their religious views would undermine not only the autonomy of many religious organizations but also their continued viability. If States could compel religious organizations to hire employees who fundamentally disagree with them, many religious non-profits would be extinguished from participation in public life—perhaps by those who disagree with their theological views most vigorously. Driving such organizations from the public square would not just infringe on their rights to freely exercise religion but would greatly impoverish our Nation's civic and religious life." *Id*.

"This case illustrates that serious risk. Woods applied for a position with the Mission not to embrace and further its religious views but to protest and fundamentally change them. The Washington Legislature sought to prevent its employment laws from being used in such a way by exempting 'any religious or sectarian organization [nonprofit]' from its definition of a covered 'employer.' The Washington Supreme Court's decision to narrowly construe that religious exemption to avoid conflict with the Washington Constitution may, however, have created a conflict with the Federal Constitution." *Id*.

Alito/Thomas Warning: The state court's "decision may warrant our review in the future, but threshold issues would make it difficult for us to review this case in this posture. The state court did not address whether applying state employment law to require the Mission to hire someone who is not a co-religionist would infringe the First Amendment. Further, respondent claims that the Washington Supreme Court's decision is not a final judgment because of its interlocutory nature, while petitioner contends that we have jurisdiction under *Cox Broadcasting Corp*[.] Given respondent's admission that 'there is no prospect that this Court would be precluded from reviewing' these First Amendment questions 'once there is a final state judgment,' I concur in the denial of certiorari." *Id*. at 1096-97.

Current Status: The Alito/Thomas warning won't get tested because Woods voluntarily dismissed his case prior to decision on remand. The final ruling at 197 Wash.2d 231 stands.

7. ***Gordon Coll. v. DeWeese-Boyd*, 142 S.Ct. 952 (Feb. 28, 2022) (Statement of Alito, J., joined by Thomas, Kavanaugh, & Barrett, JJ., respecting denial of cert.), *denying cert.*, 487 Mass. 31 (Mar. 5, 2021):**

Background from Alito, Thomas, Kavanaugh, & Barrett, JJ.: "Petitioner Gordon College is a Christian college [whose] bylaws state that it 'strives to graduate men and women distinguished by intellectual maturity and Christian character.' As 'a Christian community of the liberal arts and sciences,' the college 'is dedicated to: The historic, evangelical, biblical faith; Education, not indoctrination; Scholarship that is integrally Christian; People and programs that reflect the rich mosaic of the Body of Christ; Life guided by the teaching of Christ and the empowerment of the Holy Spirit; The maturation

of students in all dimensions of life: body, mind and spirit; The application of biblical principles to transform society and culture.'" 142 S.Ct. at 953.

"The college requires all of its faculty to sign a 'Christian Statement of Faith,' which affirms that the '66 canonical books of the Bible as originally written were inspired of God' and that there 'is one God, the Creator and Preserver of all things, infinite in being and perfection.' The faculty handbook explains [that] professors are expected 'to engage students in their respective disciplines from the perspectives of Christian faith' and 'to participate actively in the spiritual formation of its students into godly, biblically-faithful ambassadors for Christ.' The handbook also states that the most important task of the 'Christian educator' is the 'integration' of faith and learning." *Id*.

"Respondent Margaret DeWeese-Boyd was hired as a faculty member in Gordon College's department of social work in 1998. [Her employment application] acknowledged 'personal agreement with [GC's] Statement of Faith …. In 2009, when [she] applied for tenure, she submitted a paper titled 'Reflections on Christian Scholarship' that discussed her 'integration of the Christian faith into her work.' In 2016, [she] applied for promotion to full professor, [explaining that] the 'work of integration' required 'pursuing scholarship that is faithful to the mandates of Scripture, the vocational call of Christ, and the dictates of conscience.' Student evaluations [praised her for] 'connecting class materials with Christian faith' and 'calling our thoughts to a higher level of Christian responsibility.'" *Id*.

"[GC] denied her 2016 application for a promotion, citing lack of scholarly productivity[. She sued, alleging her promotion was denied] because of 'her vocal opposition to [GC's] policies and practices regarding individuals who identify as lesbian, gay, bisexual, transgender, or queer.'" *Id*. "The trial court ruled in favor of DeWeese-Boyd [and the state supreme court] affirmed. It concluded that [she] was not a 'minister' under [*Our Lady* and *Hosanna* since she] did not 'undergo formal religious training, pray with her students, participate in or lead religious services, take her students to chapel services, or teach a religious curriculum.' Though the court recognized that she was required to 'integrate the Christian faith into her teaching, scholarship, and advising,' the court reasoned that this integrated teaching was 'different in kind' from religious instruction." *Id*. at 954.

Four-Justice Rationale: In *Our Lady*, we said the "'ministerial exception' protects the 'autonomy' of 'churches and other religious institutions' in the selection of the employees who 'play certain key roles.' We recognized that 'educating young people in their faith, inculcating its teachings, and training them to live their faith are responsibilities that lie at the very core of the mission of a private religious school.' Because the teachers [there were] 'entrusted most directly with the responsibility of educating their students in the faith,' we concluded that the ministerial exception applied to such educators. The [state court] thought that DeWeese-Boyd was not a religious educator because she did not 'teach religion, the Bible, or religious doctrine.' Though it acknowledged her responsibility 'to integrate the Christian faith into her teaching, scholarship, and advising,' the state court asserted that this responsibility was 'different in kind' from the kind of religious education at issue in [*Our Lady*] and insufficient to make DeWeese-Boyd a minister." *Id*. at 954.

"That conclusion reflects a troubling and narrow view of religious education. What many faiths conceive of as 'religious education' includes much more than instruction in explicitly religious doctrine or theology. [Many] ask their teachers to 'show students how to view the

world through a faith-based lens,' even when teaching nominally secular subjects. [A] professor teaching … the civil rights movement at a secular college might concentrate on the political, economic, and sociological aspects of the struggle for racial justice, while a professor at a Christian college might also highlight [MLK] Jr.'s faith and the biblical arguments in his famous Letter from Birmingham Jail. Similarly, an English professor at a secular college might see nihilism and skepticism in Shakespeare's King Lear, while a professor at a Catholic school might present it as a pilgrimage to redemption." *Id*.

"Faith-infused instruction of this kind might complement student instruction in explicitly religious subjects. For example, [GC] requires all of its students to take required courses on the Old Testament, the New Testament, and Christian Theology; they must also earn 'Christian Life and Worship' credits for attending chapel services (or other similar faith-based events). But religious education … does not end as soon as a student passes those required courses and leaves the chapel. Instead, the college asks *each* member of the faculty to 'integrate' faith and learning, *i.e.,* 'to help students make connections between course content, Christian thought and principles, and personal faith and practice.'" *Id*. at 955.

Four-Justice Warning: "[We doubt the] court's understanding of religious education and, accordingly, its application of the ministerial exception. But DeWeese-Boyd argues that because [her] summary-judgment ruling [was affirmed] in an interlocutory posture, [it was] not a 'final judgment' under 28 U.S.C. §1257. Gordon College responds that the decision is a reviewable final judgment under *Cox Broadcasting*[. At] the very least this threshold jurisdictional issue would complicate our review. [But as the opposition brief notes,] 'if DeWeese-Boyd prevails in the trial court, there is nothing that would preclude [GC] from appealing at that time, including seeking review in this Court when the decision is actually final.' On that understanding, [we] concur in the denial of certiorari." *Id*. at 955.

Current Status: This warning also won't be tested, since GC settled the case prior to any more court decisions. *See* story. The final state-court ruling, 487 Mass. 31, stands.

8. *Kincaid v. Williams*, 143 S.Ct. 2414 (June 30, 2023) (Alito, J., joined by Thomas, J., dissenting from denial of cert.), *denying cert*., 45 F.4th 759 (4th Cir. Aug. 16, 2022) (2-1), *denying reh'g en banc*, 50 F.4th 429 (4th Cir. Oct. 7, 2022) (8-6):

Background from Alito/Thomas: The Americans With Disabilities Act "is far-reaching, but like all other statutes, it has its limits. It expressly excludes coverage for [a] group of traits, habits, and mental conditions, including sexual orientation, conditions arising from drug use, and gambling addiction. [T]he ADA also excludes mental dispositions and conditions that relate to gender expression or gender identity. *See* §12211(b)(1) (referring to 'transvestism, transsexualism, ... gender identity disorders not resulting from physical impairments, or other sexual behavior disorders'); *accord*, §12208." 143 S.Ct. at 2416.

"In this case, the plaintiff, Kesha Williams, brought suit against Stacey Kincaid, the sheriff of Fairfax County, Virginia, based on alleged mistreatment during a stay in a county detention center. [In this Court, Sheriff Kincaid argues] that she cannot be sued under the ADA for failing to accommodate Williams's 'gender dysphoria,' by, among other things, placing Williams in men's housing, failing to offer hormone therapy, and permitting 'persistent and intentional misgendering and harassment.' The Fourth Circuit panel

majority found that Williams had pleaded a covered disability, notwithstanding the exclusions noted above, and it relied on two separate rationales." *Id*.

> **Special Note**: This is not a "religious freedom" case per se. It might be described as "religious freedom adjacent," as it is part of the same "culture war" legal battlefield on which religious freedom cases are being fought. This and several similar cases analyzed in this outline are precedential for doctrines that either help or hinder religious freedom claims and defenses.

Alito/Thomas Rationale: "This case [is] of great national importance …. The Fourth Circuit has … invalidated a major provision of the [ADA in a decision with] far-reaching and highly controversial effects. The ADA provides that 'transvestism,' 'transsexualism,' 'gender identity disorders not resulting from physical impairments,' and 'other sexual behavior disorders' are not 'disabilities' within the meaning of its terms. Nevertheless, the Fourth Circuit held that because 'gender identity disorder' is a 'now-obsolete' term in the field of psychiatry, that statutory category '*no longer exists*[.' Under this rationale], all entities covered by the ADA must make 'accommodations' for any 'feeling[s] of stress and discomfort' that result from a person's 'assigned sex.'" *Id*. at 2414-15.

"This decision will raise a host of important and sensitive questions regarding such matters as participation in women's and girls' sports, access to single-sex restrooms and housing, the use of traditional pronouns, and the administration of sex reassignment therapy (both the performance of surgery and the administration of hormones) by physicians and at hospitals that object to such treatment on religious or moral grounds." *Id*. at 2415.

Alito/Thomas Warning: "If the Fourth Circuit [is] correct, there should be no delay in providing the protection of the ADA to all Americans who suffer from 'feeling[s] of stress and discomfort' resulting from their 'assigned sex.' But if the Fourth Circuit [is] wrong … then the 32 million residents of the Fourth Circuit should not have to bear the consequences while other courts wrestle with the same legal issue. There are times when it is prudent for this Court to deny review of a questionable … decision because we may learn from the way in which other courts … handle the same question, but in this case that prudential consideration is not sufficient to justify the denial of prompt review. The majority and dissenting opinions below lay out the opposing arguments, and if we granted review, we would undoubtedly receive thorough briefing from the parties and in *amicus* briefs filed by experts and other interested parties …. Under these circumstances, in my judgment, there is no good reason for delay." *Id*.

Current Status: These issues will continue to percolate in the lower courts.

9. *Faith Bible Chapel v. Tucker*, 143 S.Ct. 2608 (June 12, 2023), *denying cert.*, 36 F.4th 1021 (10th Cir. June 7, 2022) (2-1), *reh'g en banc denied*, 53 F.4th 620 (Nov. 15) (6-4) AND *Synod of Bishops v. Belya*, 143 S.Ct. 2609 (June 12, 2023), *denying cert.*, 45 F.4th 621 (2d Cir. Sep. 16, 2022) (3-0), *reh'g en banc denied*, 59 F.4th 570 (Feb. 8) (6-6):

Background: These cases denied immediate (interlocutory) appeal from trial-court denials of Religion Clause defenses under the Church Autonomy and Ministerial Exception doctrines. In explaining his sixth vote for rehearing en banc, resulting in a 6-6 deadlock

against it, Judge Cabranes explained the stakes: "I write separately simply to underscore that the issues at hand are of 'exceptional importance' and surely deserve further appellate review. The denial of *en banc* review in this case is a signal that the matter can and should be reviewed by the Supreme Court." *Belya*, 59 F.4th at 573 (citation omitted). An overview of each case below will provide context for these issues of "exceptional importance."

Tucker: As school chaplain, Gregory Tucker was responsible for the spiritual wellbeing of students, and for communicating the biblical worldview, of Faith Bible Chapel's Faith Christian School. He also taught Bible classes. One of his duties was leading weekly chapel services, which included planning religious teaching, coordinating worship, and often personally leading prayer. But during one of these services in 2018, Tucker allowed a chapel service on racial reconciliation to become too political. And after he failed to handle the situation in a way that restored trust with parents and students, Tucker left Faith Christian, and later sued the school under Title VII, alleging he was fired for opposing racial discrimination. The district court rejected the school's argument for summary judgment based on the Ministerial Exception of the broader Church Autonomy doctrine.

Belya: Alexander Belya was a priest in the Russian Orthodox Church Outside of Russia until September 2019, when he was suspended pending an internal investigation. In 2020, he sued church officials for "defamation, contending that they defamed him when they publicly accused him of forging a series of letters relating to his appointment as the Bishop of Miami. Defendants moved to dismiss based on the 'church autonomy doctrine,' arguing that Belya's suit would impermissibly involve the courts in matters of faith, doctrine, and internal church government. The district court denied the motion." *Belya*, 45 F.4th at 625.

At Issue: Both cases present the "exceptionally important" issue of whether a trial court's pretrial denial of a First Amendment defense of Church Autonomy—or its Ministerial Exception (ME) component—constitutes an immediately appealable final order under the collateral order doctrine. If not, then the religious party must await a final outcome in the trial court, after enduring full pretrial/trial procedures. The Church Autonomy doctrine is also known as Religious Autonomy or Ecclesiastical Abstention.

Implications: Whether these doctrines qualify for interlocutory appeal is bound up with their jurisdictional attributes. A footnote in *Hosanna*, 565 U.S. at 195 n.4, "conclud[ing] that the [ME] operates as an affirmative defense [and] not a jurisdictional bar," has hardly settled the matter for *the ME*, let alone the broader Religious Autonomy/Ecclesiastical Abstention doctrine. "Most district courts to consider [this issue] have treated it as jurisdictional." *Moon v. Moon*, 431 F.Supp.3d 394, 404 (S.D.N.Y., 2019), *aff'd as modified*, 833 Fed.Appx. 876 (2d Cir. 2020), *cert. denied*, 141 S.Ct. 2757 (2021); *accord McRaney v. N. Am. Mission Bd.*, 2023 WL 5266356, *5 (N.D.Miss. Aug. 15, 2023) (issue is jurisdictional). One problem is that "jurisdiction" can mean many different things. *See* Lael Weinberger, *Is Church Autonomy Jurisdictional?*, 54 LOY. U. CHI. L.J. 471 (2022).

Current Status: The Supreme Court denied cert. in both cases, without comment, on June 12, 2023. These exceptionally important issues will continue percolating in lower courts.

CASES: LOWER FEDERAL COURTS

10. ***Fellowship of Christian Athletes v. San Jose Unified Sch. Dist. Bd. of Educ.*****, F.4th , 2023 WL 5946036 (9th Cir. Sep. 13, 2023) (En Banc) (9-2 Result; 7-4 Majority),** ***injunction pending appeal granted*****, 64 F.4th 1024 (Apr. 3, 2023) (10-1 vote),** ***reh'g en banc granted*****, 59 F.4th 997 (Jan. 18),** ***vacating*****, 46 F.4th 1075 (Aug. 29, 2022) ("*****FCA*****"):**

Notes: (1) With 29 active judges, the Ninth Circuit uses 11-judge en-banc panels composed of the Chief Judge and ten other randomly assigned active judges. Of the 29 judges, 16 are Democratic appointees and 13 are Republican appointees. Nine of the latter were randomly assigned to this 11-judge panel. (2) The en-banc decision here is of great value. (3) The panel opinion retains some value despite being vacated for rehearing. "Vacated opinions remain persuasive, although not binding, authority." *Doe I v. Cisco Sys.*, 73 F.4th 700, 717 n.10 (9th Cir. 2023). It's all the more cite-worthy since its holdings were largely confirmed.

Background: "The Fellowship of Christian Athletes [FCA], as its name suggests, is a ministry group formed for student athletes to engage in various activities through their shared Christian faith. FCA holds certain core religious beliefs, including a belief that sexual intimacy is designed only to be expressed within the confines of a marriage between one man and one woman. In order for FCA to express these beliefs, it requires students serving in a leadership capacity to affirm a Statement of Faith and to abide by a sexual purity policy. Because of these religious beliefs, however, the San Jose Unified School District (District) revoked FCA's status as an official student club on multiple campuses for violation of the District's non-discrimination policies." 2023 WL 5946036, at *3.

Key Facts: Two teachers at Pioneer High School who served on the Climate Committee—"a school leadership committee composed of several school department chairs … and administrators"—had made disparaging remarks about FCA's religious views on sexual intimacy and marriage. *Id.* at *5-7. "Two days after the Climate Committee meeting … Principal Espiritu informed the student leaders of Pioneer FCA that the District had decided to strip the club of its ASB approval. In a comment for a column posted in Pioneer's school newspaper … Principal Espiritu was quoted as stating: 'The pledge is of a discriminatory nature. We decided that we are no longer going to be affiliated with them.' Principal Espiritu later testified that … it was 'sufficient to deny ASB approval' 'simply because the sexual purity statement existed' and that 'FCA holds' those beliefs. In essence, based on the documents provided to [Teacher] Glasser and the discussion of the Climate Committee, the District concluded that because 'a student could not be an officer of [FCA], if they were homosexual,' FCA had violated the District's 'Non-Discrimination Policy.'" *Id.*

Key Issues: Whether Free Exercise and Free Speech protect FCA from de-recognition by school officials due to FCA's religious policy on sexual intimacy and marriage.

Proceedings Below: A federal court in California ruled against FCA, but a Ninth Circuit panel reversed in a 2-1 decision based on the Free Exercise Clause. 46 F.4th 1075 (Aug. 29, 2022). The full court granted rehearing en banc, vacating the panel opinion. 59 F.4th 997 (Jan. 18, 2023). An 11-judge en-banc panel heard argument on March 23, 2023, and ten days later, it issued an injunction pending appeal, 64 F.4th 1024 (Apr. 3, 2023) (10-1 vote), ordering recognition of FCA and thus implicitly finding FCA's likelihood of success.

En-Banc Result (9-2): The First Amendment protects FCA from de-recognition. Seven judges based this decision on three independent Free Exercise grounds. One concurring judge, who had joined the Free Exercise holdings of the 3-judge panel, would instead base the decision on Free Expression/Expressive Association. Another concurring judge would base the decision solely on the first Free Exercise ground, seeing no need to go further.

Majority Opinion (7-4, by Judge Callahan): The en-banc majority opinion opens with these observations: "The Constitution … protects the right for minorities and majorities alike to hold certain views and to associate with people who share their same values. Often, anti-discrimination laws and the protections of the Constitution work in tandem to protect minority views in the face of dominant public opinions. However, this appeal presents a situation in which the two regrettably clash." 2023 WL 5946036, at *3.

"[A]nti-discrimination policies certainly serve worthy causes [but] may not themselves be utilized in a manner that transgresses or supersedes the government's constitutional commitment to be ***steadfastly neutral*** to religion. Under the First Amendment's protection of ***free exercise of religion and free speech***, the government may not 'single out' religious groups 'for special disfavor' compared to similar secular groups." *Id*. (quoting *Kennedy*, 142 S.Ct. at 2416) (italics added). "The District, rather than treating FCA like comparable secular student groups whose membership was limited based on criteria including sex, race, ethnicity, and gender identity, penalized it based on its religious beliefs. Because the Constitution prohibits such a double standard—***even in the absence of any motive to do so***—we reverse the district court's denial of FCA's motion[.]" *Id*. (emphasis added).

Standing: Defendant's "behavior has frustrated [FCA's] mission and caused it to divert resources in response to that frustration of purpose.'" *Id*. at *12. "In addition, FCA National has also had to 'divert resources' in 'counteracting the problem' posed by the derecognition both at the time the complaint was filed and since then. [It] has diverted 'a huge amount of staff time, energy, effort, and prayer that would normally have been devoted to preparing for school or ministry' in '[w]orking to support the FCA student leaders' after the derecognition. [It] has also diverted extensive time 'from working on ministry-advancing activities to instead address' the impact of the derecognition on the students." *Id*. at *13. "Lost money and 'staff time spent responding' to a challenged government action are directly redressable and, under our precedent, vest direct organizational standing." *Id*.

Free Exercise: "Distilled, Supreme Court authority sets forth three bedrock requirements of the Free Exercise Clause that the government may not transgress, absent a showing that satisfies strict scrutiny. First, a purportedly neutral 'generally applicable' policy may not have 'a mechanism for individualized exemptions.' Second, the government may not 'treat ... secular activity more favorably than religious exercise.' Third, the government may not act in a manner 'hostile to ... religious beliefs' or inconsistent with [the] bar on even 'subtle departures from neutrality.' The failure to meet any one of these [is subject to] strict scrutiny." *Id*. at *16 (citing *Fulton*, *Tandon*, *Masterpiece*, *Lukumi*, *Smith*).

"In relying on *Alpha Delta* [9th Cir. 2011], the District argues that Plaintiffs' Free Exercise claims fail because they do not 'contend that the purpose of the District's nondiscrimination policy is to suppress or discriminate against particular viewpoints or content.'" *Id*. at *15. "In *Alpha Delta*, we found no Free Exercise violation because the policy incidentally burdening religion did 'not target religious belief or conduct.' Since [then], the Supreme

Court has clearly rejected such a 'targeting' requirement[.] This is most evident in *Tandon v. Newsom*, in which the Court held that 'treat[ing] *any* comparable secular activity more favorably than religious exercise' [failed the test of] 'neutral and generally applicable.' Thus, *Fulton* and *Tandon* clarify that ***targeting is not required*** for a government policy to violate the Free Exercise Clause. Instead, favoring comparable secular activity is sufficient. To the extent that *Alpha Delta* stands for the proposition that a Free Exercise violation requires a showing of more, we overrule it[.]" *Id*. (emphasis added).

"Properly interpreted, *Fulton* [holds] the mere existence of a discretionary mechanism to grant exemptions can be sufficient to render a policy not generally applicable, regardless of the actual exercise. And this case steps beyond [this] mere existence [and Defendant]'s alleged ***good intentions do not change the fact*** that it is treating comparable secular activity more favorably than religious exercise." *Id*. at *17 (emphasis added).

"[I]n addition to a lack of general applicability, there are significant concerns with the District's lack of neutrality [as] 'regulations are not neutral ... whenever they treat *any* comparable secular activity more favorably than religious exercise.'" *Id*. (citing *Tandon*, which cites *Cuomo*, 141 S.Ct. at 67–68). "At bottom—***and regardless of design or intent***—the government may not create 'religious gerrymanders.'" *Id*. (emphasis added).

"The District's asserted interest here is in ensuring equal access [and] in prohibiting discrimination on protected enumerated bases, including sex, race, and ethnicity." *Id*. at *18. But it allows discriminatory preferences for other groups. *Id*. "Individual preferences … serve important purposes for these groups. [T]he Senior Women club benefits from having all female members [and] other clubs [benefit from] requir[ing] 'good moral character.' But at the same time, it makes equal sense that a religious group be allowed to require that its leaders agree with the group's most fundamental beliefs." *Id*. "Simply put, there is no … acceptable distinction between the types of exclusions at play here. Whether … based on gender, race, or faith, each group's exclusionary membership requirements pose an identical risk to … ensuring equal access for all student to all programs. Under *Tandon*, the District's acceptance of comparable selective secular organizations renders its decision to revoke and refuse recognition to FCA subject to strict scrutiny." *Id*.

In addition, and independently, "the Free Exercise Clause 'forbids subtle departures from neutrality,' and 'covert suppression of particular religious beliefs.'" *Id*. "Although the district court made no findings in this regard, the District's hostility toward FCA was neither subtle nor covert[.]" *Id*. "Like the Commission in *Masterpiece Cakeshop*, the Climate Committee [provided advice] that was ratified by the District. While there is some confusion as to whether the District or Principal Espiritu had the final say on derecognition, there is no dispute … the decision closely followed the Climate Committee's determination that FCA violated certain 'core values' such as 'inclusiveness [and] open-mindedness.' There is no indication that any member of the Climate Committee or District official thought otherwise [or] pushed back on these views in any way." *Id*. at *20.

"[We] focus on the animus exhibited by the members of the Climate Committee. One teacher and Climate Committee member disparaged FCA's beliefs [as] 'bullshit' [and] without 'validity.' Another teacher and Climate Committee member accused FCA of 'choos[ing] darkness' and 'perpetuat[ing] ignorance,' calling them 'charlatans,' who 'conveniently' forget what tolerance means,' and 'twisting the truth.' ***And perhaps most***

tellingly, the school's principal stated to the entire school in a newspaper article that FCA's views were 'of a discriminatory nature.'" *Id.* at *20 (emphasis added). "[A]t the preliminary injunction stage these actions sufficiently show that the District's decisions were motivated by 'animosity to religion or distrust of its practices.'" *Id.* at *21.

"Under each of the three criteria set forth [above], the District's non-discrimination policies are subject to strict scrutiny. The District essentially concedes that it cannot meet this standard as it has offered no arguments to the contrary…. Because the District has failed to offer any showing that it has even considered less restrictive measures than those implemented here, it fails at least the tailoring prong of the strict scrutiny test." *Id.* at *22.

"[T]he District's application of its non-discrimination policies to FCA [likely has] violated their Free Exercise rights, and will continue to violate those rights absent an injunction. In particular, the deprivation of ASB recognition has and will continue to hamper FCA's ability to recruit students, constituting an enduring harm that will irreparably risk the club's continued existence on campus." *Id.* at *23. "Finally, without injunctive relief, FCA's ability to recruit new students … will continue to be harmed, to the degree that the club may cease to exist District-wide. While the District's asserted interest in inclusiveness may be important, the Constitution prohibits the District from ***furthering that interest by discriminating against religious views***." *Id.* (emphasis added).

"Anti-discrimination laws and policies serve undeniably admirable goals, but when those goals collide with the protections of the Constitution, they must yield—***no matter how well-intentioned***." *Id.* (citing *303 Creative*, 143 S.Ct. at 2315) (emphasis added). "Even if the views held by FCA may be considered to be out-of-date by many, the First Amendment 'counsel[s] mutual respect and tolerance ... for religious and non-religious views alike.'" *Id.* (citing *Kennedy*, 142 S.Ct. at 2416). "[The] Free Exercise Clause guarantees protection [of] religious viewpoints even if they may not be found by many to 'be acceptable, logical, consistent, or comprehensible.'" *Id.* (citing *Fulton*, 141 S.Ct. at 1876).

Free Speech: Due to overlap in Free Exercise and Free Speech analysis, the court required only a footnote to hold that FCA was "likely to prevail on their Free Speech claim as well." *Id.* at *15 n.8. "In *Alpha Delta*, our court found that the nondiscrimination policy was not subject to strict scrutiny because it was not implemented 'for the *purpose* of suppressing plaintiffs' viewpoint.' But that standard ***requiring a purpose or intent to suppress a viewpoint*** is incompatible with *Reed v. Town of Gilbert*, 576 U.S. 155 (2015). In reversing our court, *Reed* held that '[a] law that is content based on its face is subject to strict scrutiny ***regardless of the government's benign motive, content-neutral justification, or lack of animus*** toward the ideas contained in the regulated speech.' Thus, even if the District were correct that there ***was no intent to suppress FCA's religious viewpoint***—a contention that is dubious based on these facts—the District's ***intent is irrelevant*** in the Free Speech analysis. Because *Alpha Delta* is no longer good law, Plaintiffs are likely to prevail on their Free Speech claim as well." *Id.* at *15 n.8 (emphasis added).

Equal Access Act: Also due to overlap, a footnote disposed of EAA: "[Defendant cannot deny] any student club equal access to ASB recognition based on the 'religious, political, philosophical, or other content' of the club's speech. Even if a law is facially 'content-neutral,' the government still impermissibly regulates based on content if it selectively enforces its laws. In examining content-neutrality under the EAA, we borrow the First

Amendment analysis. Because Plaintiffs are also likely to succeed on the merits of their Free Exercise claim, in part due to the selective enforcement and discrimination based on religious viewpoint, they are also likely to prevail on their EAA claim." *Id.* at *22 n.12.

Concurrence by Judge Forrest: "The [District's] treatment of students participating in the [FCA] student club is shocking and fundamentally at odds with bedrock principles that have guided our Republic since the beginning. I strongly agree with the court that FCA is entitled to a preliminary injunction. I write separately only because, after further consideration, I see this as a free-speech case more than a religious freedom case, and I would resolve it under the [EAA] and the Free Speech Clause[.]" *Id.* at *24.

Concurrence by Judge Smith: "I agree [to an injunction since the] District treats religious activities differently than secular ones, in violation of [*Tandon*, but the majority] sweeps well beyond what is needed to resolve this case[.]" *Id.* at *37. Part of this "sweep" was ***overruling sub silentio*** *Tingley v. Ferguson*, 47 F.4th 1055 (9th Cir. 2022), *reh'g en banc denied*, 57 F.4th 1072 (Jan 23, 2023), *cert. filed* (Mar. 28, 2023). Thus, *FCA* has partially abrogated *Tingley*—which had narrowly interpreted *Fulton* and *Masterpiece* in order to subject a Christian therapist to a state's ban on "practicing conversion therapy on children … which seeks to change [their] sexual orientation or gender identity." *Tingley*, at 1063.

Dissent by Chief Judge Murguia (joined in part by Judge Sung): "This case presents challenging constitutional questions of a significant nature. But this appeal requires us only to decide a narrow issue …. [Instead], the majority hands down a sweeping opinion with no defined limiting principle that ignores our standard of review and carte-blanche adopts Plaintiffs' version of disputed facts. But even before resolving the limited appeal before us, we must have jurisdiction to do so. We do not. I would dismiss this appeal because Plaintiffs fail to make the necessary 'clear showing' of Article III standing." *Id.* at *40.

Practice Pointers: (1) Free Exercise cases often hinge on the *Smith/Lukumi* rule against religious discrimination. Many are lost for lack of clear argument on key issues, including the independence of the various grounds of discrimination: (a) non-general applicability; (b) simple non-neutrality; and (c) animus. (2) The en-banc decision usefully describes these three categories of religious discrimination. (3) It also makes clear that *animus* is but *one category* and *need not* be shown to prevail. (4) As government must remain "steadfastly neutral to religion," *id.* at *3, *non-neutral* actions are *non-neutral* regardless of "any motive," *id.*, or any "design or intent," *id.* at *17, and "no matter how well-intentioned," *id.* at *23. (5) Thus, it is irrelevant if "faith-based bigotry did not motivate" a government action, since the "constitutional benchmark is 'government neutrality,' not 'governmental avoidance of bigotry.'" *Roberts v. Neace*, 958 F.3d 409, 415 (6th Cir. 2020) (quoting *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1260 (10th Cir. 2008) (McConnell, J.). (6) The predicate for non-neutrality often is "merely the intent to treat differently." *Weaver*, at 1260. (7) Many cases are lost because courts misapprehend the role of animus and refuse to find any form of religious discrimination without evidence of animus—or a synonym, e.g., animosity, bigotry, hostility, or invidious intent. All such evidence is powerful—but optional. (8) There is an argument here that the government's mere labeling of a sincere religious policy as "discriminatory" is itself "discriminatory" in violation of Free Exercise and Speech: "And perhaps most tellingly, the school's principal stated to the entire school in a newspaper article that FCA's views were 'of a discriminatory nature.'" *Id.* at *20.

11. *Starkey v. Roman Cath. Archdiocese of Indianapolis*, 41 F.4th 931 (7th Cir. July 28, 2022) (Brennan, J., for himself, Easterbrook, & St. Eve, JJ.):

Background: Lynn Starkey was the Co-Director of Guidance counseling at Roncalli High School, a Catholic school operated by the Archdiocese of Indianapolis. To accomplish its religious mission, Roncalli asks all its administrators, teachers, and guidance counselors to sign a contract agreeing to uphold Catholic Church teachings in word and deed. In August 2018, Starkey informed the school she was in a same-sex marriage, which violated both her contract and Catholic teaching. When Roncalli declined to renew her contract for the next school year, Starkey sued for discrimination based on sexual orientation. Her Co-Director of Guidance, Michelle Fitzgerald, brought a similar suit (discussed next).

In a case of "first impression" after *Bostock v. Clayton County*, 140 S.Ct. 1731 (June 15, 2020), the district court initially denied the Catholic defendants' Motion to Dismiss on several dubious grounds. *Starkey*, 496 F.Supp.3d 1195 (S.D.Ind. Oct. 21, 2020), *appeal dismissed*, 2021 WL 9181051 (7th Cir. July 22, 2021).[2] But the court later granted summary judgment to the defendants on the Ministerial Exception (ME). Starkey appealed.

Key Issues: Whether the co-director of guidance counseling at a Catholic school qualifies for the ME and whether the ME also applies to certain state law claims.

Held (3-0): (1) "We affirm the district court's decision that Starkey was a minister under the First Amendment's ministerial exception, as well as its ruling that the exception bars Starkey's three federal Title VII claims for discrimination, retaliation, and hostile work environment." 41 F.4th at 942. (2) "[W]e hold that the ministerial exception applies to state law claims, like those for breach of contract and tortious conduct, that implicate ecclesiastical matters." *Id.* at 944.

Opinion by Judge Brennan: "Starkey was a minister because she was entrusted with communicating the Catholic faith to the school's students and guiding [its] religious mission. The ministerial exception bars all her claims, federal and state." *Id.* at 945. "What matters, at bottom, is what an employee does," *id.* at 941 (quoting *Our Lady*, 140 S.Ct. at 2064), and "[w]hat an employee does involves what an employee is entrusted to do, not simply what acts an employee chooses to perform," 41 F.4th at 941. What matters are the plaintiff's "job duties" and "responsibilities," *id.*, as defined by "her employment documents," *id.*, including job description, contract, and handbook, *id.* 937-41, and by any sworn statements or testimony from her employer. The question is: What employer-defined job duties was the plaintiff *responsible for*? *OLG*, 140 S.Ct. at 2066.

Concurrence by Judge Easterbrook: This concurrence, for reasons that should be plain, may end up having more significance than the court's decision.

"Designating the position as a minister by contract cannot be called pretextual [under constitutional ME analysis, but we should begin] with the statute, which is the proper sequence." *Starkey*, 41 F.4th at 945. Title VII's Religious Organization Exemption (ROE) in 42 U.S.C. §2000e–1(a) begins: "This subchapter shall not apply." *Id.* "'This subchapter'

[2] The district court's motion-to-dismiss ruling remains intact and influenced *Billard* (Item #13).

refers to … all of Title VII…. Any temptation to limit this [ROE] to authorizing the employment of co-religionists, and not any other form of religious selectivity, is squelched by the definitional clause in §2000e(j), which tells us that religion includes 'all aspects of religious observance and practice, as well as belief.'" 41 F.4th at 946.

"A straightforward reading of §2000e–1(a), coupled with §2000e(j), shows that the Diocese was entitled to fire Starkey without regard to any of the substantive rules in Title VII. It is undisputed that the Roman Catholic Church deems same-sex marriages improper on doctrinal grounds and that avoiding such marriages is a kind of religious observance. Same-sex marriages are … forbidden by many religious faiths. [Section 2000e–1(a)] permits a religious employer to require the staff to abide by religious rules. A religious school is entitled to limit its staff to people who will be role models by living the life prescribed by the faith, which is part of 'religion' as §2000e(j) defines that word." *Id*.

"[Some courts say §2000e–1(a)] permits religious discrimination but no other kind. That the [ROE] permits religious associations to discriminate on religious grounds is plain enough. But where does the 'no other kind' limitation come from? Decisions such as *Kennedy v. St. Joseph's* … do not explain why 'this subchapter' means something less than all of Title VII…. Some decisions, such as *Rayburn* … mention legislative history, but not any that illuminates the meaning of 'this subchapter.'" *Id*.

"Maybe what these decisions are getting at is that [§2000e–1(a)] does not exempt all employment decisions by religious organizations. The decision must itself be religious, as that word is defined in Title VII. This means, for example, that sex discrimination unrelated to religious doctrine falls outside the scope of [§2000e–1(a)]. But when the decision is founded on religious beliefs, then all of Title VII drops out. I cannot imagine any plausible reading of 'this subchapter' that boils down to 'churches can discriminate against persons of other faiths but cannot discriminate on account of sex.' One function of [§2000e–1(a)] is to permit sex discrimination by religions that do not accept women as priests." *Id*.

"Anyway, how could one distinguish religious discrimination from sex discrimination in Starkey's situation? Firing people who have same-sex partners is sex discrimination, *Bostock* holds. But it is also religious discrimination. The Diocese is carrying out its theological views; that its adherence to Roman Catholic doctrine produces a form of sex discrimination does not make the action less religiously based." *Id*. at 947.

"[§2000e–1(a) also says this] subchapter 'shall not apply to an employer with respect to the employment of aliens outside any State.' That language [is] understood to mean what it says: *none* of Title VII's substantive rules applies to aliens covered by [§2000e–1(a)]. What is true for the alien exemption must be true for the religious exemption as well. [As we have never held that §2000e–1(a)] permits religious discrimination but not sex discrimination that has a religious footing, [we are free to resolve such claims] by employees of religious organizations … including Starkey's." *Id*.

Practice Pointers: (1) The panel's decision is valuable ME precedent. Among other things, it makes clear that, "what an employee does," *id*. at 941 (quoting *Our Lady*, 140 S.Ct. at 2064), "involves what an employee is entrusted to do, not simply what acts an employee chooses to perform," 41 F.4th at 941. (2) The concurrence marks the first time that any judge (let alone one as respected as Easterbrook) has squarely and fully addressed the plain-

language argument of Title VII's ROE: "This subchapter shall not apply." This Easterbrook concurrence was swiftly followed by one of his colleagues in the next case.

12. *Fitzgerald v. Roncalli High Sch.*, 73 F.4th 529 (7th Cir. 2023) (St. Eve, J., for herself, Flaum, & Brennan, JJ.):

Background: Like Lynn Starkey above, Michelle Fitzgerald was Co-Director of Guidance at Roncalli. In 2018, Fitzgerald confirmed she was in a same-sex marriage (not with Starkey) in violation of her contract and Catholic teaching. When Roncalli declined to renew her contract, she sued for discrimination based on sexual orientation. The same district judge as in *Starkey* issued a similar ME ruling against Fitzgerald. She appealed.

Key Issue: Whether the co-director of guidance counseling at a Catholic school qualifies for the ME. It's the same issue as in *Starkey*, and was also decided on summary judgment.

Held (3-0): Same as *Starkey*. This *Fitzgerald* panel had two of the same judges as *Starkey*: Brennan, who wrote *Starkey*, and St. Eve, who wrote *Fitzgerald*. This panel relied on *Starkey*, and Judge Brennan concurred to expand on Easterbrook's concurrence in *Starkey*.

Opinion by Judge St. Eve: The panel began with this bare statement: "There is no dispute that the defendants fired Fitzgerald because of her same-sex marriage and that Title VII prohibits this kind of sex discrimination. *See Bostock*[.]" *Fitzgerald*, 73 F.4th at 531. This statement has no supporting analysis and may just be an observation about a matter the parties chose not to dispute on summary judgment. If treated as a holding, it is troubling.

"In determining whether an employee served a religious role, we show deference to the church. That said, a church cannot show entitlement to the [ME] simply by asserting that everyone on its payroll is a minister or by requiring that all employees sign a ministerial contract. In such circumstances, like in other Title VII cases, the plaintiff can defeat summary judgment [by showing] the church's justification is pretextual." *Id.* at 531–32.

"As with Starkey … Fitzgerald played a crucial role on the Administrative Council, which was responsible for at least some of Roncalli's daily ministry, education, and operations. And like Starkey, Fitzgerald 'helped develop the criteria used to evaluate guidance counselors, which included religious components like assisting students in faith formation and attending church services.' Additionally, Fitzgerald held herself out as a minister …. Considered together, these undisputed facts [show] Fitzgerald was [a] minister." *Id.* at 532.

"Just like Starkey's role on the Council, Fitzgerald's membership in this group made her one of a handful of 'key, visible leaders' of the school…. Fitzgerald attempts to characterize her contributions as logistical rather than religious, but under Supreme Court precedent, a school's explanation of ministry issues is entitled to deference. For these reasons, it is undisputed that Fitzgerald was a member of and participated in a religious leadership committee at Roncalli as the Co-Director of Guidance." *Id.* at 532-33.

"Also supporting the [ME, she] concedes that she helped implement the Catholic Educator Advancement Program (CEAP) for evaluation of guidance counselors [but says that its] 'religious components' [don't] reflect guidance counselor duties and that these components

were only included because Principal Weisenbach believed it would 'not be fair to the teachers' for the guidance counselors not to have the same standards. But Weisenbach's statement can only reasonably be interpreted in one way: he believed it would not be fair for guidance counselors to have different standards because he believed teachers and guidance counselors shared religious job responsibilities. If he did not believe that religious criteria were relevant for guidance counselors, it is hard to imagine why [he] would have thought that omission of these standards would have been unfair to teachers." *Id.* at 533.

"Lastly, the record supports that [she] held herself out as a minister in her 2016 CEAP self-evaluation. In it, she emphasized her participation in the school's religious services [and how] she used her religious beliefs in her counseling duties[.] 'In a faith-based school, I feel this definitely is a strength when working with young people … seeking direction.' These statements confirm that [she] was conveying religious teachings in her work." *Id.*

"[But she] now contends that she exaggerated her involvement in the religious components of the school because 'it was part of the rubric' and she 'wanted to get a raise in pay.' But this does not help her case. Even if we accept that she exaggerated on her evaluation and did ***not actually perform*** these religious duties, ***the fact that she mentioned these activities*** in her self-evaluation to get a raise supports that ***she understood these criteria to be important to the school***. As the defendants persuasively explain, 'the very fact that she would exaggerate about performing religious tasks to get a raise only ***underscores that it was Roncalli's expectation that she perform them***.'" *Id.* (emphasis added).

"Considering all the evidence in the record, we conclude that there is no daylight between this case and *Starkey.* Our precedent makes clear that Fitzgerald was a minister at Roncalli and that the ministerial exception bars this suit." *Id.* at 534.

Concurrence by Judge Brennan: "Some district courts in our circuit have applied an atextual reading of [§2000e–1(a)], so I offer some thoughts to correct course." *Id.* at 534. "'This subchapter' … comprises all of Title VII." *Id.* (quoting Easterbrook). "So when the exemption applies, 'all of Title VII drops out,' including the provisions prohibiting discrimination on non-religious bases and providing for mixed-motive liability." *Id.*

"Fitzgerald posits that the 'religion' referenced in [42 USC §2000e–1(a)] is the individual's religion. But were that the focus, the exemption would read differently, as the 'individual's religion.' Instead, the exemption states, 'individuals *of* a particular religion.'" *Id.* at 535. "The term 'particular' … already hints at a religious employer's selectivity in employment. Considered as a whole, the exemption's text applies only to a religious employer and only 'with respect to the employment of individuals ... to perform work connected with the carrying on by such [religious employer] of its activities.' … The focus is on a religious employer's ability to perform its religious activities…. All arrows point one way: 'of' is descriptive, and 'individuals of a particular religion' means individuals whose beliefs, observances, or practices align with the employer's religious expectations." *Id.* at 535.

"When an employer provides a religious reason for an adverse employment decision that implicates a protected class other than religion, the circuits apply this exemption in various ways." *Id.* at 535-56 (analyzing various circuit precedent). "The textual reading of [§2000e–1(a)] is not far from that of the Third, Fourth, Fifth, and Sixth Circuits…. So, when a covered employer demonstrates that an adverse employment decision was made

because the relevant individual's beliefs, observances, or practices did not conform with the employer's religious expectations, the [§2000e–1(a)] exemption would apply and bar a Title VII claim on that employment decision." *Id*. at 536.

"But as in our sister circuits, a pretext inquiry—akin to step three of [*McDonnell Douglas*]—should apply to the employer's proffered religious rationale…. Such a pretext inquiry would mitigate concerns raised by Fitzgerald and amici that religious employers would have license to violate Title VII should they manufacture a religious reason for an adverse employment decision. As always, the pretext question would not be 'whether the employer's stated reason was inaccurate or unfair, but whether the employer honestly believed the reason it has offered to explain the discharge.'" *Id*. at 536-37.

"Fitzgerald contends that Roncalli's assignment of ministerial labels and duties to her were pretextual. But the parties do not dispute that Roncalli and the Archdiocese had a non-pretextual religious policy against employees entering into same-sex marriages and that Fitzgerald was terminated because she did so. As such, Fitzgerald's Title VII claims would be barred by the religious employer exemption. Here, [§2000e–1(a)] overlaps with the protections of the ministerial exception. But, no doubt, our circuit and its district courts will have occasion to address the statutory exemption in another case where a non-minister plaintiff asserts Title VII claims against a religious employer." *Id*. at 537.

Practice pointers: (1) For the Ministerial Exception, lawyers should focus on what the *religious employer expected or entrusted* its staff to do. (2) Lawyers should ensure each religious-employer client has explained (a) its religious character its governing documents such as its articles, bylaws, constitution, operating agreement, and/or key policies, and (b) its expectations for each job in documents such as job postings/descriptions, offer letters, contracts, policies, handbooks, and training materials. (3) Re §2000e–1(a), lawyers should include and argue the ROE textual analysis of Judge Easterbrook and Judge Brennan.

13. *Billard v. Charlotte Cath. High Sch.* 2021 WL 4037431 (W.D.N.C. Sept. 3, 2021), *appeal argued* (4th Cir. Sep. 20, 2023) (Niemeyer, King, & Harris, JJ.):

Background: Lonnie Billard taught English and drama at Charlotte Catholic High School for 12 years before retiring and transferring to a substitute role. To teach at Charlotte Catholic, he signed a contract agreeing to uphold teachings of the Catholic Church. But in 2015, he entered a same-sex marriage in violation of Catholic teaching and made public statements on social media advocating against Church teaching. When the school chose not to keep calling Billard as a substitute teacher, he and the ACLU sued the school and the Diocese. 2021 WL 4037431, at *2-5.

District Court's Overview: "[C]harlotte Catholic High School seeks a variety of First Amendment and statutory protections to enable the school to terminate the employment of a substitute drama teacher—Mr. Lonnie Billard ('Plaintiff'). The school claims that he was fired for his support of gay marriage—something the Catholic Church opposes. Plaintiff claims he was fired, or at least suffered a more severe employment action, because of who he is as a gay man. The Court respects the sincerity of the Catholic Church's opposition to Plaintiff's actions. ***With a slightly different set of facts, the Court may have been compelled to protect the church's employment decision***. However, where as here, Plaintiff

lost his job because of sex discrimination and where he was working as a substitute teacher of secular subjects without any responsibility for providing religious education to students, the Court must protect Plaintiff's civil and employment rights." *Id.* at *1 (emphasis added).

"Defendants have stipulated that Plaintiff was not a minister, and the Court agrees. But even if they had not made such a stipulation, the Court would find that Plaintiff was not a minister for the purposes of the ministerial exception." *Id.* at *14.

"[T]he Court concludes that Defendants' employment action against Plaintiff violates Title VII's prohibition on sex discrimination and because the Court finds that [the ROE], church autonomy, RFRA,[3] and freedom of association do not shield Defendants from liability[, they] are liable for sex discrimination under Title VII. This case will now proceed to trial to determine the appropriate relief that should be granted." *Id.* at *25.

Notes: (1) This decision—although just a district court decision and thus not binding on anyone[4]—represents substantial precedential risk to religious employers. Its analysis is unsupportive of religious hiring rights in practically every way and the appeal is pending with what likely has become the least-sympathetic circuit for religious employers to litigate these cases. (2) The judge here relied on dubious holdings in *Starkey*, 496 F.Supp.3d 1195 (motion-to-dismiss, as discussed above), even though that same *Starkey* judge later ruled in favor of the religious employer based on the Ministerial Exception (ME). (3) As noted in the excerpts above, the religious employer here made an understandable but unfortunate concession: To avoid invasive discovery into religious matters, it ***stipulated that it would not assert the ME***. (On the plus side, it did preclude a harmful ME holding.) (4) This judge also ruled that RFRA—by its own terms—is inapplicable to this "private litigation" (no government party or counsel), as most other courts addressing the issue have held.

Fourth Circuit Argument: On September 20, 2023, the appeal was argued before Judges Niemeyer, King, and Harris. (Listen at https://www.ca4.uscourts.gov/OAarchive/mp3/22-1440-20230920.mp3.) Judge Niemeyer typically is friendly to religious freedom defenses but Judges King and Harris much less so. Yet, a remarkable thing happened. Moments after Judge Niemeyer called the case, Judge Harris asked why the Ministerial Exception was not in play, since it seemed to her the most logical defense in this case. Counsel for the religious employer explained that trial counsel had stipulated not to raise it. But Judge Harris persisted that the ME likely is not waivable and parties likely cannot restrict the court's power by stipulation in this way. Judge Niemeyer joined in, strongly supporting the notion that the ME was not capable of being stipulated away, particularly in light of the intervening Supreme Court decision in *Our Lady*. Even counsel for Billard jumped on this bandwagon, indicating that if he "had to lose" he'd rather lose on the ME—even if it meant ignoring the stipulation—than lose on a broader defense.

Practice pointers: (1) Be careful what you stipulate away. (2) This case reflects a growing trend in "culture war" employment cases. Advocates for religious employers have many

[3] Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. §§2000bb to 2000bb-4.

[4] "'A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case.'" *Camreta v. Greene*, 563 U.S. 692, 709 (2011).

potential defenses based on federal and state constitutional and statutory law. But their opponents may be trying to "limit the damage" by steering courts toward the Ministerial Exception, since it represents the lesser of evils in their view. (3) In our *Smith/Lukumi* world, the opposition's best strategy may be to confine Free Exercise to two defenses—(a) religious discrimination and (b) the ME—each defined as narrowly as possible.

14. *Green v. Miss USA*, 52 F.4th 773 (9th Cir. Nov. 2, 2022), *reh'g en banc denied*, 61 F.4th 1095 (March 14, 2023):

Overview: "Anita Green, who self-identifies as 'an openly transgender female,' sued the Miss United States of America pageant, alleging that the Pageant's 'natural born female' eligibility requirement violates the Oregon Public Accommodations Act ('OPAA'). The district court granted the Pageant's motion for summary judgment, holding that the First Amendment protects the Pageant's expressive association rights to exclude a person who would impact the group's ability to express its views. We conclude that the district court was correct to grant the Pageant's motion for summary judgment, but reach this conclusion not under the First Amendment's protection of freedom of association but rather under the First Amendment's protection against compelled speech." 52 F.4th at 777.

Opinion (2-1): Judge VanDyke wrote the majority opinion. He also separately concurred to explain why the Pageant not only was protected against Compelled Speech but also was affirmatively protected by the Expressive Association doctrine. The analysis of these two doctrines overlap to the point that both often rely on the same cases, especially: *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984) ("***Jaycees***"); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp.*, 515 U.S. 557 (1995); ("***Hurley***"), and *Boy Scouts v. Dale*, 530 U.S. 640 (2000) ("***Dale***"). All three cases are closely associated with Expressive Association.

Practice Pointers: Religious groups should remember Expressive Association for several reasons: (1) It applies to nearly all groups in nearly all settings and thus has nearly universal support. Since it protects the right of every association "to exclude anybody who does not share in its values," *Apilado v. N. Am. Gay Amateur Athletics*, 792 F.Supp.2d 1151, 1156 (W.D.Wash. 2011) (excluding non-gay softball players), it has few opponents. (2) It often is the most logical defense available and enjoys strong Supreme Court support. (3) As the next case shows, it applies to employment law as much as public-accommodations law.

15. *Slattery v. Hochul*, 61 F.4th 278 (2d Cir. Feb. 27, 2023):

Overview: "The Evergreen Association [dba] Expectant Mother Care and EMC FrontLine Pregnancy Centers, and its president, Christopher Slattery (collectively, 'Evergreen'), bring this action against New York state officials to enjoin their enforcement of New York Labor Law §203-e against Evergreen. The statute prohibits employers from taking adverse employment actions against employees for their 'reproductive health decisions.' Evergreen argues that the statute unconstitutionally burdens its right to freedom of expressive association—as guaranteed by the First and Fourteenth Amendments—by preventing it from disassociating itself from employees who, among other things, seek abortions. Evergreen contends that the statute undermines its anti-abortion message as a crisis pregnancy center because associating with such employees contradicts its central message.

Evergreen also raises freedom of speech, free exercise of religion, and void for vagueness challenges to the statute. The district court granted the state's motion to dismiss all claims at the pleading stage. We hold that Evergreen stated a plausible claim that the labor law unconstitutionally burdens its right to expressive association." 61 F.4th at 283.

Opinion (3-0): "The district court acknowledged that Evergreen 'engages in expressive association' and that §203-e imposes limitations on its expressive associational rights [but it] characterized those limitations as 'incidental' and held that §203-e was subject only to rational basis scrutiny. We agree … Evergreen is engaged in expressive association. But we hold that the district court erred in concluding that §203-e does not significantly affect Evergreen's expressive activity. Instead, the district court should have applied strict scrutiny. And because the state has not at this stage demonstrated that §203-e is the least restrictive means to achieve a compelling governmental interest, we reverse the district court's dismissal of Evergreen's expressive association claim." *Id.* at 286.

"The district court recognized that under the state law, the plaintiffs would be 'forced to associate with employees or prospective employees whose actions indicate that they do not share their views.' But the district court decided that this burden on Evergreen's expressive association rights was incidental rather than severe. We disagree." *Id.* at 287.

"The statute forces Evergreen to employ individuals who act or have acted against [its] very mission[.] Evergreen … 'provides counseling, education,' and 'information to ... women during their decision-making processes in an untimely pregnancy' and … it provides such counseling 'from a life-affirming, abstinence-promoting perspective only.' To that end, Evergreen 'hires or retains only personnel' who 'effectively convey' its 'mission and position regarding 'reproductive health decisions.' ***The right to expressive association allows Evergreen to determine that its message will be effectively conveyed only by employees who sincerely share its views***. To decide whether someone holds certain views—and therefore would be a reliable advocate—Evergreen asks whether that person has engaged or will engage in conduct antithetical to those views. Evergreen has plausibly alleged that, ***by foreclosing Evergreen's ability to reject employees whose actions suggest that they believe the opposite of the message it is trying to convey, §203-e severely burdens*** Evergreen's First Amendment right to freedom of expressive association. For this reason, strict scrutiny applies." *Id.* at 288–89 (emphasis added).

"Freedom of expressive association vindicates the 'important structural role' that [such] 'associations play ... in our civil society and discourse.' For an … association that opposes certain conduct, the government's general interest in bolstering the legal right to engage in that conduct gives way to the freedom of those in the association to join together to express a different view. ***Here, Evergreen has a right to limit its employees to people who share its views and will effectively convey its message***. Thus, the district court erred in dismissing Evergreen's expressive association claim." *Id.* at 290–91 (emphasis added).

Practice Pointers: (1) This *Slattery* decision relies heavily on *Jaycees*, *Hurley*, and *Dale*, the hallmark cases for Expressive Association (**EA**). (2) EA "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 concurrence). (3) Although EA is more familiar in the public-accommodations arena, applies equally to the employment arena, as *Slattery* holds. (4) EA may be even more vital

in the employment arena where a foe or skeptic does not merely associate with/in a religious group but actually operationalizes and personifies it. (5) An employer claiming EA must show its business/ministry includes meaningful "expressive activity."

16. ***Bear Creek Bible Church v. EEOC*, 571 F.Supp.3d 571 (N.D.Tex. Nov. 22, 2021), *aff'd & vacated in part by Braidwood Mgmt. v. EEOC*, 70 F.4th 914 (5th Cir. June 20, 2023):**

Overview at District Court: "In this declaratory judgment class action lawsuit, a Christian church and a Christian-owned [for-profit] business seek to protect their ability to require their employees to live by the teachings of the Bible on matters of sexuality and gender. They, individually and on behalf of those similarly situated, seek religious exemption from, and a declaration that they do not violate, the anti-discrimination provisions of Title VII of the Civil Rights Act of 1964 so they may hire and fire in accordance with sincerely held religious beliefs and employment policies." 571 F.Supp.3d at 585.

Effect of Decision: This district court decision is immensely useful for defending religious hiring rights. It provides solid analytical support for most of the key religious freedom defenses available. But it provides very little in the way of precedential support. As noted above, a district court decision does not bind anyone, not even the judge who issues it. Still, its key holdings—most of which survived the appeal (below)—remain worth citing.

Overview at Fifth Circuit: Religious freedom advocates hoped for a resounding victory on appeal, but the panel affirmed narrowly and only on RFRA—which applied here only because the EEOC was a party. Most courts that have addressed RFRA's applicability to "private litigation" (i.e., no government party or counsel) have held RFRA inapplicable. Since most litigation in this arena is "private," the Fifth Circuit decision may have even less value. Still, the district court's decision remains valid and citable on most of its points.

Practice Pointers: (1) It's hard to fight a government, especially the federal government, due to its resource advantage. But it might be strategic to ensure government involvement in some cases. (2) Instead of waiting to defend against Title VII lawsuits in "private litigation," the employers here proactively sought declaratory judgment against a federal actor: the EEOC. This ensured that (a) RFRA would apply, (b) all applicable constitutional defenses would apply fully and robustly, and (c) government counsel would be present to defend interests/tailoring and to offer or approve exemptions or other negotiated solutions.

17. ***Peltier v. Charter Day Sch., Inc.*, 37 F.4th 104 (4th Cir. June 14, 2022) (en banc), *cert. denied*, 143 S.Ct. 2657 (June 26, 2023):**

Overview from En Banc Majority: "Charter Day School (CDS), a public charter school in North Carolina, requires female students to wear skirts to school based on the view that girls are 'fragile vessels' deserving of 'gentle' treatment by boys (the skirts requirement). The plaintiffs argue that this sex-based classification grounded on gender stereotypes violates the Equal Protection Clause [and] subjects them to discrimination and denial of the full benefits of their education in violation of Title IX …. [D]espite CDS' status as a public school under [state] law, CDS and its management company disavow accountability … by maintaining that they are not state actors. These entities also assert that Title IX, the

federal statute designed to root out gender discrimination in schools, categorially does not apply to dress codes. [We affirm the] judgment for the plaintiffs on their Equal Protection claim against CDS [and] the judgment in favor of the management company on that claim. We also vacate the court's summary judgment award in favor of all defendants on the plaintiffs' Title IX claim and remand for further proceedings[.]" 37 F.4th at 112.

Held (10-6) (8-6 Among the Active Judges): "In sum, we hold that CDS, a public school under North Carolina law, is a state actor for purposes of Section 1983 and the Equal Protection Clause. By implementing the skirts requirement based on blatant gender stereotypes about the 'proper place' for girls and women in society, CDS has acted in clear violation of the Equal Protection Clause. We further hold that sex-based dress codes like [this one] are subject [to] the anti-discrimination provisions of Title IX." *Id*. at 130–31.

Overview of Six-Judge Dissent by Judge Quattlebaum: "The question is not whether we like or don't like [the rule] that female students wear skirts, skorts or jumpers …. We face a legal question—is [CDS] a state actor? It's a question of our legal judgment, not our will. If [CDS] is not a state actor, 42 U.S.C. §1983 cannot be used to prevent it from requiring female students to wear skirts, skorts or jumpers[.] If it is a state actor, it is subject to a §1983 claim. Prior to today, neither the Supreme Court nor any federal appellate court had concluded that a publicly funded private or charter school is a state actor under §1983. The majority, however, breaks that new ground…. [At stake here is just] a small part of a dress code at [one] school. [But the majority's rationale] transforms all charter schools … into state actors. As a result, the innovative alternatives to traditional public education [available in Charter Schools], and thus the choices available to parents, will be limited. But the implications of the majority's decision [go further and] significantly broadens the scope of what it means for the actions of a private party to be attributed to the state for purposes of a §1983 claim. Frankly, it is hard to discern, much less define, the limits of what constitutes 'state action' after the majority's decision." *Id*. at 137.

Practice Pointers: (1) Don't forget the threshold requirement of "state action" (or "federal action") for most religious freedom and other civil rights protections. (2) Also bear in mind that constitutional challenges to federal or state law may require notice to the relevant federal/state Attorney General, under 28 U.S.C. §2403, giving them a chance to defend the law's constitutionality. (3) But §2403 might not apply to "as-applied" challenges, since it exists to give an AG "a fair opportunity" to "save" a "statute," not each and every application of it. *Dynamics Corp. v. CTS Corp.*, 794 F.2d 250, 259-60 (7th Cir. 1986), (Posner, J.), *rev'd on other grounds*, 481 U.S. 69 (1987). "The validity of a statute is not drawn in question every time rights claimed under such statute are controverted …." *U.S. v. Lynch,* 137 U.S. 280, 285 (1890); *accord Peruta v. County of San Diego*, 771 F.3d 570, 575 (9th Cir. 2014), *rev'd on other grounds*, 824 F.3d 919 (2016) (en banc).

18. *Parents 1 v. Montgomery County Bd. of Educ.*, 78 F.4th 622 (4th Cir. Aug. 14, 2023):

Overview by the Majority. "The Montgomery County [MC] Board of Education adopted Guidelines for Gender Identity … that permit schools to develop gender support plans for students. The Guidelines allow implementation of these plans without the knowledge or consent of the students' parents. They even authorize the schools to withhold information about the plans from parents if the school deems the parents to be unsupportive. [T]hree

parents with children attending [MC] schools challenged the portion of the Guidelines that permit school officials to develop gender support plans and then withhold information about a child's gender support plan from their parents. Terming it the 'Parental Preclusion Policy,' the parents allege the policy unconstitutionally usurps the parents' fundamental right to raise their children under the Fourteenth Amendment. [First,] we must decide whether the parents have alleged [the] Policy caused an injury to them sufficient to give them … 'standing.' And this case begins and ends with standing. The parents have not alleged that their children have gender support plans, are transgender or are even struggling with issues of gender identity. As a result, they have not alleged facts that [MC] public schools have any information about their children that is currently being withheld or that there is a substantial risk information will be withheld in the future." 78 F.4th at 626.

Held (2-1) (Quattlebaum & Rushing, JJ.): Case dismissed for lack of standing.

Dissent by Judge Niemeyer: "[W]hether and how grade school and high school students choose to pursue gender transition is a family matter, not one to be addressed initially and exclusively by public schools without the knowledge and consent of parents. Yet, the [Board] preempts the issue to the exclusion of parents with the adoption of its 'Guidelines for Student Gender Identity,' which invite all students in [MC] schools to engage in gender transition plans with school Principals *without the knowledge and consent of their parents.* This policy implicates the heartland of parental protection under [the] Fourteenth Amendment. And parents whose children are subject to the policy must have access to the courts to challenge such a policy." *Id.* at 636 (emphasis in original).

"The majority reads the Parents' complaint [in] an unfairly narrow way and thus denies the Parents the ability to obtain relief, concluding [they] have no standing to challenge the Guidelines until they learn that their own children are *actually considering* gender transition. [As a result], the majority [is] unnecessarily subjecting the Parents by default to a mandatory policy that pulls the discussion of gender issues from the family circle to the public schools without any avenue of redress by the Parents. In reaching such a conclusion, the majority totally overlooks material allegations of the complaint about the Parents' injury, which are sufficient to give the Parents standing." *Id.* (emphasis in original).

Practice Pointers: (1) The panel majority clearly indicated its sympathy for the Parents' case but felt bound to dismiss for lack of standing, even though, as the dissent pointed out, the Complaint appeared to contain sufficient allegations of injury to satisfy standing. Whether or not the Parents argued standing as well as possible, this case stands as a stark reminder of the importance of such pre-merits issues in these cases. (2) By all indications, this panel would have delivered a useful precedent for parental rights and religious freedom if it had reached the merits. Thus, this case may represent a lost opportunity.

19. *Parents Defending Educ. v. Linn Mar Cmty. Sch. Dist.*, F.4th , 2023 WL 6330394 (8th Cir. Sept. 29, 2023) (Colloton, Benton, & Kelly, JJ.):

Background by the Majority: "Parents Defending Education, an association of parents, brought this action to challenge a policy adopted by the Linn Mar Community School District in Iowa." *Id.* at *1. "Parents A and B," "Parent C," and "Parents D-G" joined as individual plaintiffs. "The disputed policy … sets forth regulations for the District that

'address the needs of transgender students, gender-expansive students, nonbinary, gender nonconforming students, and students questioning their gender to ensure a safe, affirming, and healthy school environment where every student can learn effectively.'" *Id*.

"One section of the policy [requires the] "Establishment of Gender Supports[, as an] accommodation for 'transgender students regarding names/pronouns, restroom and locker facilities, overnight accommodations on school trips, and participation in activities.' The school may create a 'Gender Support Plan' at the request of a student." *Id*. "When a student requests a Gender Support Plan, 'the school will hold a meeting with the student within 10 school days.' [The] student should agree with who is a part of the meeting, including whether their parent/guardian will participate' [and any] student in seventh grade or older will have priority of their support plan over their parent/guardian." *Id*.

"A second section ['Confidentiality' states] 'conversations between students and school counselors are protected, confidential conversations under applicable [laws and the District] shall not disclose information that may reveal a student's transgender status to others including but not limited to other students, parents, and school staff unless legally required to do so ... or unless the student has authorized such disclosure.'" *Id*.

"A third section ['Names and Pronouns'] provides that a student has 'the right to be addressed by a name and pronoun that corresponds to their gender identity.' [Among other things, it] states that 'an intentional and/or persistent refusal by staff or students to respect a student's gender identity is a violation of school board policies,' including 'anti-bullying' and 'anti-harassment' policies…. A student who violates the policy 'shall be disciplined by appropriate measures, which may include suspension and expulsion.'" *Id*.

Held (2-1) (Colloton, J.): "[W]e conclude that Parents Defending is likely to succeed on the merits of its First Amendment challenge to a portion of the policy … prohibiting an intentional or persistent refusal 'to respect a student's gender identity.'" *Id*. at *6.

Majority Opinion: "Parents Defending first [assert] a substantive due process claim that the policy violates a right of parents to direct the care, custody, and control of their children. They [say] the District's policy prevents a school from notifying parents whether their child has been given a gender support plan or assumed a transgender status. [But a new Iowa statute] provides Parents Defending [and] Parents A-C all of their requested relief." *Id*. at *2-3. "[While the new law] requires only 'licensed practitioners,' not other school employees, to report a student's request for gender accommodation[,] administrators, teachers, and counselors [*are*] 'licensed practitioners' under Iowa law. [So, it] applies to a request by a student to meet with 'school administrators and/or school counselors' to receive support. Even if a student requests a gender accommodation from another school employee, and there is no gender support plan, the challenged policy dictates that 'school administrators and/or school counselors shall work with the student to identify and coordinate support.' The Iowa statute thus requires a report to a parent when a student requests gender support under the challenged policy." *Id*. at *3. Thus, that claim is moot.

"Parents Defending next [argue the] First Amendment [claim] that Parents D-G are injured because the policy violates their children's rights to freedom of speech." *Id*. at *3–4. "Under the policy, '[a]n intentional and/or persistent refusal by staff or students to respect a student's gender identity ['shall' result in 'discipline'] which may include suspension and

expulsion." *Id.* at *4. "[T]he children of Parents D-G wish to express certain opinions … but fear that their speech may be considered 'disrespectful' of … gender identity. We conclude that at least Parent G [has] standing [since] her son wants to 'state his belief that biological sex is immutable,' 'disagree with another student's assertion about whether they are male or female,' 'state that a biological male who identifies as female should not be allowed to compete in women's sports,' and 'express discomfort about sharing bathrooms with teachers or students of the opposite biological sex.' [Parent G's] son remains silent in school 'when gender identity topics arise' to avoid violating the policy." *Id.*

"The District argues that … harassment or bullying on the basis of gender is not protected speech[. But it cannot avoid] the First Amendment simply by defining certain speech as 'bullying' or 'harassment.' Parent G['s] child wishes to engage in an 'open exchange of ideas' and to express beliefs that others might find disagreeable or offensive." *Id.* "The policy broadly prohibits a refusal to 'respect a student's gender identity' [but] does not define 'respect[.]'" *Id.* "When a course of action is within the plain text of a policy, a 'credible threat' of enforcement exists." *Id.* at *5. "The District argues that the injury is not redressable because Iowa law and the policy prohibit similar conduct…. But the [policy arguably goes] beyond existing law [via] 'respect[ing] a student's gender identity.'" *Id.*

"[We] conclude that Parents Defending is likely to succeed on its claim that this portion of the policy is void for vagueness." *Id.* "Because the policy does not define or limit the term [*respect*], it could cover any speech about gender identity that a school administrator deems 'disrespectful[.]' A student thus cannot know whether he is violating the policy when he expresses discomfort about sharing a bathroom with someone who is transgender, argues that biological sex is immutable during a debate in social studies class, or expresses an opinion about the participation of transgender students on single-sex athletic teams." *Id.* at *6. "[This] creates a substantial risk that school administrators may arbitrarily enforce the policy. [Thus,] we conclude that Parents Defending is likely to succeed on the merits of its First Amendment challenge to a portion of the policy, and that the other preliminary injunction factors are satisfied as to that claim. [This] case is remanded with directions to grant a preliminary injunction against enforcement of the portion of the policy prohibiting an intentional or persistent refusal 'to respect a student's gender identity.'" *Id.*

Partial Concurrence by Judge Kelly: "I agree that schools are limited in their ability to regulate speech that is 'merely offensive to some listener.' However, I write separately [to emphasize that what ultimately is before us is the] School District's efforts to abide by the requirements imposed on it by federal and state law." *Id.*

Practice Pointers: (1) Beware of standing and justiciability requirements. (2) And claim damages—even if only nominal—whenever supportable to help prevent mootness.

20. *L.W. by Williams v. Skrmetti*, F.4th , 2023 WL 6321688 (6th Cir. Sept. 28, 2023):

Overview from Panel Majority: "At issue in these two cases is whether the United States Constitution prohibits Kentucky and Tennessee from limiting certain sex-transition treatments for minors experiencing gender dysphoria." *Id.* at *1. By a 2-1 vote, the panel upheld these laws as not violating the Due Process or Equal Protection Clauses.

Majority Opinion by Judge Sutton: "The claimants face several initial headwinds in obtaining relief. *First*, they do not argue that the original fixed meaning of the due process or equal protection guarantees covers these claims. That prompts the question whether the people of this country ever agreed to remove debates of this sort—over the use of innovative, and potentially irreversible, medical treatments for children—from the conventional place for dealing with new norms, new drugs, and new public health concerns: the democratic process. Life-tenured federal judges should be wary of removing a vexing and novel topic of medical debate from the ebbs and flows of democracy by construing a largely unamendable Constitution to occupy the field." *Id.* at *5.

"*Second*, while the challengers do invoke constitutional precedents of the Supreme Court and our Court in bringing this lawsuit, not one of them resolves these claims. In each instance, they seek to extend the constitutional guarantees to new territory. There is nothing wrong with that, to be certain. But this reality does suggest that the key premise of a preliminary injunction—a showing of a likelihood of success on the merits—is missing. Constitutionalizing new areas of American life is not something federal courts should do lightly, particularly when 'the States are currently engaged in serious, thoughtful' debates about the issue." *Id.* at *6. "*Third*, the States are indeed engaged in thoughtful debates over this issue, as the recent proliferation of legislative activity across the country shows. By our count, nineteen States have laws similar to those in Tennessee and Kentucky, all of recent vintage. At least fourteen other States, meanwhile, provide various protections for those seeking treatments for gender dysphoria, all too of recent vintage." *Id.*

"*Bostock does not alter this conclusion.* Moving from constitutional to statutory cases, the plaintiffs and the federal government invoke a Title VII case[.]" *Id.* at *16 (citing *Bostock v. Clayton Cty*, 140 S.Ct. 1731 (2020))…. "Differences between the language of the statute and the Constitution supply an initial reason why one test does not apply to the other." *Id.* "Importing the Title VII test for liability into the Fourteenth Amendment also would require adding Title VII's many defenses to the Constitution: bona fide occupational qualifications and bona fide seniority and merit systems, to name a few." *Id.* at *17. "Even aside from the differences in language between this statute and the Constitution, there is a marked difference in application of the anti-discrimination principle. In *Bostock*, the employers fired adult employees because their behavior did not match stereotypes of how adult men or women dress or behave. In this case, the laws do not deny anyone general healthcare treatment based on any such stereotypes; they merely deny the same medical treatments to all children facing gender dysphoria if they are 17 or under, then permit all of these treatments after they reach the age of majority. A concern about potentially irreversible medical procedures for a child is not a form of stereotyping." *Id.*

"No one [here] debates the existence of gender dysphoria or the distress caused by it. And no one doubts the value of providing … related care to children facing it. The question is whether certain additional treatments—puberty blockers, hormone treatments, and surgeries—should be added to the mix of treatments available to those age 17 and under. As to that, we return to where we started. This is a relatively new diagnosis with ever-shifting approaches to care over the last decade or two. Under these circumstances, it is difficult [to predict] the long-term consequences of abandoning age limits of any sort for these treatments. That is precisely the kind of situation in which life-tenured judges construing a difficult-to-amend Constitution should be humble and careful about

announcing new substantive due process or equal protection rights that limit accountable elected officials from sorting out these medical, social, and policy challenges." *Id.* at *23.

Dissent by Judge White: "The statutes we consider today discriminate based on sex and gender conformity and intrude on the well-established province of parents to make medical decisions for their minor children." *Id.* at *23.

Practice Pointers: Be prepared for more legal battles on this ever-shifting terrain.

21. *Singh v. Berger*, 56 F.4th 88, 103 (D.C. Cir. 2022) (Millett, Rao, & Childs, JJ.):

Overview: "Jaskirat Singh, Milaap Singh Chahal, and Aekash Singh wish to serve their Nation by enlisting in the United States Marine Corps. They are each fully qualified to enlist, having satisfied the Corps' pre-enlistment criteria. There is just one barrier to their entry. Jaskirat, Milaap, and Aekash are members of the Sikh faith, which requires them, as relevant here, to maintain unshorn hair and beards and to wear certain articles of faith. Those religious practices conflict with the Marine Corps' standard grooming policy for the initial training of newly enlisted recruits, commonly known as boot camp. The Corps has agreed to accommodate Plaintiffs' religious commitments (with some limitations not relevant here) *after* each of them finishes basic training. But it will brook no exception for the Sikh faith during those initial thirteen weeks of boot camp. The district court denied Plaintiffs' request for a preliminary injunction …." 56 F.4th at 91.

Held (3-0, by Millett, J.): "We reverse [and] remand for the prompt issuance of a preliminary injunction in favor of Jaskirat Singh and Milaap Chahal, and for reconsideration of Aekash Singh's request for a preliminary injunction[.]" *Id.*

> **Special Note**: Since this decision is among the best RFRA precedents available, and since it is the only RFRA decision discussed herein, it is excerpted below at length. It exemplifies the kind of rigorous or searching scrutiny that ***strict*** *scrutiny* requires but that often is lacking in practice.

Opinion (3-0): "This case arises at the intersection of weighty competing interests. '[No] military [can] function without strict discipline and regulation that would be unacceptable in a civilian setting.' [Thus, courts] 'give great deference to the professional judgment of military authorities[.]' [Even so,] RFRA, with its demanding compelling-interest and least-restrictive-means test, 'undoubtedly applies in the military context.'" *Id.* at 91, 95, 92.

"'RFRA challenges should be adjudicated in the same manner as constitutionally mandated applications of the test,[5] including at the preliminary injunction stage.' … As under the First Amendment[:] If the Government can achieve its interests without burdening religion,

[5] RFRA's test actually mirrors the one in *Thomas v. Review Bd.*, 450 U.S. 707 (1981) (8-1): "The state may justify an inroad on religious liberty by showing that it is the ***least restrictive means of achieving some compelling state interest***." *Id.* at 718 (emphasis added). "However, it is still true that 'the essence of all that has been said and written on the subject is that only those interests of the highest order ... can overbalance legitimate claims to the free exercise of religion.'" *Id.*

'it must do so.' By subjecting military decisions to RFRA scrutiny, the Political Branches determined, in their expert judgment, that Americans need not surrender their faith to fight for their Nation absent demonstrated necessity." *Id.* at 92–93.

"[T]aking ***full account of the additional headwinds*** the Plaintiffs' request for status-quo-altering and potentially claim-concluding relief faces, we hold that Jaskirat Singh and Milaap Chahal [clearly qualify for] preliminary injunctive relief. They have shown ***not just a likelihood of success, but an overwhelming one***, on the merits of their RFRA claim. The balance of equities and the public interest weigh ***strongly in favor*** of issuing the injunction. And they are now suffering and will continue to suffer ***grave, immediate, and ongoing injuries to the exercise of their faith***." *Id.* at 97 (emphasis added).

"Plaintiffs [are so likely to succeed]—***it is difficult to imagine them losing***.' RFRA forbids the federal government—including the Marine Corps—from 'substantially burden[ing] a person's exercise of religion' unless it shows that burden is 'in furtherance of a compelling governmental interest' and is the 'least restrictive means' of doing so. In meeting that standard, the Marine Corps cannot rely on 'broadly formulated interests.' Instead, [it] must demonstrate the specific harm that ***'would'—not could***—result from '***granting specific exemptions to particular religious claimants***.' *Id.* at 97 (emphasis added).

"The Plaintiffs are, in effect, penalized through the outright denial of their desired military careers solely for practicing their faith. So the Plaintiffs' likelihood of success comes down to whether the Marine Corps has demonstrated a compelling interest accomplished by the least restrictive means in refusing to accommodate their faith for the thirteen weeks of boot camp. The Marine Corps has failed to meet its burden on both fronts." *Id.* at 97–98.

"The [Corps] stands ready to accommodate Plaintiffs' unshorn hair and religious articles after boot camp and throughout their careers [but it] argues that excepting the Plaintiffs [during boot camp] from the repeated ritual of shaving their faces and heads alongside fellow recruits, and permitting them to wear a head covering, will impede its compelling interest in forging unit cohesion and a uniform mindset during boot camp." *Id.* at 98.

"[T]he Marine Corps' interest in fostering cohesion and unity among its members … surely qualifies as compelling. But even giving the widest berth to the Corps' compelling interest in enforcing its grooming and appearance policies generally, RFRA requires us to ask the ***more particularized question*** of whether the Corps 'has such an interest in ***denying an exemption' to these specific plaintiffs***. 'Once properly narrowed,' the Marine Corps' explanation founders. [Its] claimed compelling need for inflexible grooming uniformity does not stand up against the 'system of exceptions' to boot camp grooming rules that the Corps has already created and that seriously 'undermine' the Corps' contention that it 'can brook no departures' for Plaintiffs." *Id.* at 98–99 (emphasis added).

"***First***, the Marine Corps makes medical exemptions from the required shaving of facial hair during boot camp. [R]ecruits with [PFB] develop painful pustules and lesions when shaving. PFB is a 'common' condition 'that occurs mainly in men of African descent.' … Recruits with PFB routinely will go days or weeks—or almost all of boot camp in some cases—without shaving alongside fellow recruits." *Id.* at 99. "Yet the Marine Corps nowhere … suggests that Marines who endure the rigors of recruit training while also managing painful PFB come out of boot camp with any less commitment to unit cohesion,

self-sacrifice, or discipline than those who shave daily." *Id.* at 99-100. "[It] fails to explain why allowing these three recruits to tightly tie up their beards would interfere with the necessary development of a Marine mindset during boot camp in a way that growing or clipping beards does not. Instead, [it says] medical exemptions are different because … [but] fails to explain …. So [its] proffered rationale fails to establish the 'direct causal link between the restriction imposed and the [compelling-interest] injury to be prevented' required by RFRA's strict scrutiny test. Of course, the ***reason for exemption would differ*** between medically exempt and religiously exempt recruits. ***But that is RFRA's point***: Government ***must, if able, afford religious exercise equal stature with other interests that it accommodates***." *Id.* at 100–01 (citing *Tandon* and *Lukumi*) (emphasis added).

"***Second***, the … Corps ***exempts female recruits from shaving and from cutting their hair*** altogether. Women are allowed instead to wear their hair in several styles [and] may dye their hair [and] may wear a natural-looking wig that otherwise complies with regulations. [W]omen's hairstyles within these categories are regulated in various ways [but] what matters here is that female recruits plainly do not engage in the same daily or weekly grooming rituals as one another—let alone as male recruits do…. Women, in other words, do not engage in a daily facial shaving ritual or even a common-among-females hair styling regimen. ***Nonetheless, they emerge from boot camp as full-fledged Marines*** who are as committed to unit cohesion, stripped of individuality, and ready to defend the Nation as are male recruits. [The Corps] nowhere addressed how denying Plaintiffs an exemption to shaving and haircut rituals can be a compelling necessity for developing Marines when male recruits either already do or soon will train alongside [female] recruits that neither shave nor conform to a single buzzcut hair style." *Id.* at 101 (emphasis added).

Third, [the Corps says it] has a compelling interest in minimizing exemptions to its grooming policies because the 'most important element in the Marine Corps' conduct of expeditionary operations is … a ***team-oriented state of mind' at a 'whole-of-force level***.'" *Id.* "While … we take as given the Corps' judgment about the need for a singular whole-of-force mindset, that claimed interest is ***troublingly disconnected*** from the ***Corps' own leadership recruitment process***. [The] Corps is part of the Navy. So many [Marines] are educated and train[ed] at the Naval Academy. Yet the … Academy accommodates beards, unshorn hair, and the wearing of the same Sikh religious articles at issue here. Notably, those accommodations make no apparent exception for the arduous initial months of the Naval Academy's plebe summer. [And] the other military Academies' accommodation policies do not change during the Army's and Air Force's basic training for cadets, or the Coast Guard's swab summer. [A]fter graduating from the Naval Academy, cadets who wish to enter the Marine Corps must go through a four-week Leatherneck training program and then six months at The Basic School. Yet in denying Plaintiffs their accommodations, the Marine Corps never addressed the fact that those expeditionary officers might be accommodated through their training." *Id.* at 102 (emphasis added).

"***Fourth***, the Marine Corps has chosen to moderate its grooming requirements when [it] advances recruitment …. [T]he Corps ***permits tattoos*** anywhere on a recruit's body except for their head, neck, or hands—and even that latter restriction is subject to exceptions. Yet tattoos are a quintessential expression of individual identity. Still, the Corps permits them during boot camp not because tattoos comport with the Corps' interest in stripping recruits of individuality, but because '***their prevalence*** in society creates a potential problem for recruitment,' ***and they 'cannot be readily removed***[.]'" *Id.* "If the need to develop unit

cohesion during recruit training can accommodate some external indicia of individuality, then whatever line is drawn cannot turn on whether those indicia are prevalent in society or instead reflect the faith practice of a minority. Nor can the Marine Corps tenably rely on the ***difficulty of tattoo removal*** to justify the differential treatment. Sikhs have historically endured persecution, torture, and death rather than surrender their faith indicia. So the removal of a religiously commanded article of faith could be far more 'difficult' for Plaintiffs than the ***temporary physical discomfort of a tattoo's excision***. In short, even fully crediting [the Corps] overarching compelling interests in developing unit cohesion, stripping individuality, and building a team-oriented state of mind, the ***Government has not come close to meeting its burden*** of showing 'why it has a particular interest' in denying hair, beard, and religious article exceptions to these Plaintiffs 'while making them available to others' in the same or analogous form." *Id*. at 103 (emphasis added).

"Plaintiffs' ***prospects of success are even greater*** because the Marine Corps has failed to demonstrate that denying Plaintiffs the same accommodations during boot camp that they would be ***given during later service*** in the Corps is the ***'least restrictive means'*** of advancing its interest in developing unit cohesion and a team-oriented mindset…. [A] policy is not narrowly tailored when it is either overinclusive or underinclusive—and on this record, the Corps' policy is both. The Corps likewise has wholly failed to explain how its asserted national security harms ***'would'*** result just from accommodating these Plaintiffs in a manner similar to exemptions already made on a daily basis." *Id*. "[T]he Corps' claimed inability to depart from uniform shaving and haircuts is ***materially undermined*** by the already noted ***exemptions*** for ***medical beards, women's hairstyles, at least some aspects of officer training, and tattoos.*** That itself is powerful evidence [the] policy is not narrowly tailored. [Also, the] Corps has provided no evidence that it ***even considered less restrictive alternatives***. While the Corps need not refute every conceivable option to show its policy is the least restrictive means of advancing a compelling interest, it must at minimum explain why obvious and available alternatives are not workable. ***Even when RFRA requires great deference, as it surely does here, the Government still must provide 'persuasive reasons' for rejecting readily at hand alternatives***, especially those that have been proven to work in analogous circumstances. *Id*. at 103–04 (emphasis added).

"The Plaintiffs have convincingly shown that the Marine Corps has failed to grapple with that aspect of the least-restrictive-means requirement. For example, nowhere [does the Corps] explain why [it] cannot apply the same or similar accommodations that the Army, Navy, Air Force, and Coast Guard provide in recruit training, both at boot camp and in the Academies. The Navy, for example, allows members to seek an accommodation to wear unshorn hair and a beard for religious reasons, provided that the beard is neatly groomed or tied, and it permits Sikhs to retain their other articles of faith." *Id*. at 104.

"Given that the Marine Corps is part of [the] Navy and designed for 'service with the fleet,' [its] failure to consider the accommodations made by the Navy takes much air out of its least-restrictive-means claim. We are left with no explanation why accommodations work for sailors but not Marines serving on the same ships or at the same bases. Perhaps there is a reason [but the] Corps has not voiced it [and] has no apparent plans to do so. That void leaves [no explanation why] similar accommodations would be inimical to developing excellent and team-oriented Marines. [The Corps also] relies on its status as the only fully 'expeditionary' unit within the military…. [But no] one in boot camp is deploying on a military expedition…. [The Corps fails to explain] why accommodating Sikh beards that

are neatly groomed and tied, or unshorn hair neatly wrapped in a *patka* or turban, would impair the development of the Marine expeditionary mindset in a way that beards grown by individuals with PFB or unshorn hair worn by women recruits or officers has not." *Id.* at 105. "[The Corps] likewise offers no support for [the] concern that accommodating these Plaintiffs could have a 'cumulative impact' on the Corps' 'whole-of-force' expeditionary mindset, that would outstrip the effects of the exemptions already allowed." *Id.* at 105–06.

"On top of that, the Corps nowhere wrestles with its own history of flexible grooming and uniform requirements. The Marine Corps has been an 'expeditionary' force since its creation in 1775. Yet [its] current policy forbidding facial hair has been in place only since 1976. For at least the first 150 years of the Corps' history, including through the Revolutionary War and two World Wars, beards were fully compatible with the Marine Corps' mission success and expeditionary mindset. That is not to say that military practices cannot evolve over time. They certainly can. But RFRA requires that a claim of inflexible necessity not completely ignore past practice. Said another way, the Marine Corps' admission that the grooming policy being enforced against Plaintiffs has only been part of developing Marine recruits for 'decades,' raises least-restrictive-means question marks that the Corps, on this record, has left unaddressed and seemingly unconsidered." *Id.* at 106.

"Finally, the Plaintiffs have shown that the Corps' flat refusal to permit Plaintiffs' other articles of faith, even those that are invisible to the eye because they are worn under clothing or head wear (the comb, ceremonial knife, and undershorts), similarly fails narrow tailoring. The Marine Corps has not offered a single word of defense for that aspect …. In addition, the other military branches and the Corps' own regulations have long permitted the wearing of discreet religious wristbands and other articles of faith during military service. Such silence does nothing to meet RFRA's demanding burden of least-restrictive-means justification for substantial burdens on religious exercise." *Id.* at 106.

"To sum up, Plaintiffs have demonstrated ***not just a likely, but an overwhelming, prospect*** of success [on RFRA]. At a general level, the Government has certainly articulated a compelling national security interest in training Marine Corps recruits … committed to the military mission and defense of the Nation. But ***RFRA requires more than pointing to interests at such a broad level***. [The Corps must] show that its substantial burdening of these Plaintiffs' religion furthers that compelling interest by the least restrictive means. That is where [it] has come up very short given (1) the series of exemptions for unshorn head and facial hair already allowed; (2) the absence of any particularized explanation as to why regulating Plaintiffs' maintenance [of] their beards and hair would interfere with the development of Marines' fitness in a way that other analogous exemptions have not; and (3) the failure [to] even consider, let alone refute, that less restrictive alternatives would serve [its] recruit-training interests." *Id.* at 106–07 (emphasis added).

"Because RFRA claims 'should be adjudicated in the same manner as constitutionally mandated applications' of the strict scrutiny test, we need not address the Plaintiffs' … First Amendment claim, which would at most require the application of the standard that RFRA already imposes on the Corps' denial of accommodations." *Id.* at 107. "On the Plaintiffs' side of the balance is the weighty public interest in the free exercise of religion that RFRA protects. Though we do not address the Plaintiffs' … First Amendment claim, when it comes to the balance of interests, we can fairly take note of the parallelism between RFRA and the First Amendment[.]" *Id.* at 107–08.

"[N]ational security is an interest of paramount concern. And courts are loath to second-guess the judgments of the Political Branches in that regard. [But] three different Presidents have joined with four different Congresses over the last 35 years to codify [the] imperative that military commanders make military service compatible with diverse religious traditions, 'including Christian, Hindu, Jewish, Muslim, [and] Sikh' faiths." *Id.* at 108.

"[Plaintiffs] Jaskirat Singh and Milaap Chahal [are] suffering continuing irreparable harm. [They are] fully qualified to enlist [and] would join the Corps immediately but for [its] refusal to extend existing hair and shaving exemptions to their exercise of faith or to accommodate their religious articles. Each day [the] Corps refuses to let them take the oath of enlistment unless they surrender their faith inflicts an irreversible and irreparable harm. They are forced daily to choose between their religion and 'the performance of [the] supreme and noble duty of contributing to the defense of the rights and honor of the nation,' and are subjected to the 'indignity' of being unable to serve for reasons that, on this record, 'bear no relationship to their ability to perform[.]'" *Id.* at 109-10.

"Plaintiffs have shown ***both an overwhelming likelihood of success*** on the merits and that the balance of the equities and public interest weigh in their favor. Jaskirat Singh and Milaap Chahal have also shown ongoing irreparable injury. [Thus], we reverse the district court's denial of preliminary injunctive relief for Jaskirat Singh and Milaap Chahal and remand to the district court for the ***prompt entry of a preliminary injunction*** requiring the Marine Corps to allow them to enlist without shaving their heads or beards and while bearing those articles of faith that the Government failed to argue against on appeal. We remand for further consideration of Aekash Singh's [case]." *Id.* at 110 (emphasis added).

Practice Pointers: (1) If RFRA can limit national security and the United States Marine Corps, it surely can limit a civilian agency. (2) Likewise, a "State RFRA" can limit a zoning or school board. (3) Based on prior opinions of these judges, this panel did not appear likely to deliver a powerful precedent for religious freedom. (a) One reason it did so may be the jarring facts. (b) Another reason may be the federal actor involved—the Military—which can provoke judges who otherwise might lean toward the government in these kinds of cases. (c) Another reason is this: the minority status of the religious claimants. (4) Key religious freedom precedent has come from the cases of religious minorities such as Amish, Jehovah's Witness, Mennonite, Native American, Santeria, Seventh-Day Adventist, Sikh. Judges who may be inclined to accept defenses for them may not be so inclined to accept them for a large church denomination. Pro-religious-freedom precedent is pro-religious-freedom precedent. Advocating religious freedom for all should benefit religious freedom for all. (5) Of course, RFRA *clearly* applied here because the Marine Corps *clearly* is "the government." But in other cases, as a prelitigation strategy, the opposition may try to avoid or limit government involvement (e.g., EEOC) to try to take RFRA out of play.

22. *Thai Meditation Ass'n v. City of Mobile*, F.4th , 2023 WL 6386801 (11th Cir. Oct. 2, 2023) (Wilson & Pryor, JJ., & Conway, District Judge):

Background: As if on cue, here is a new example of the value of State RFRAs and of defending the freedom of religious minorities, here Buddhists. "In this long-running property use dispute, the plaintiffs, the Thai Meditation Association …. (collectively,

TMAA), seek to convert a property zoned for residential use into a meditation center. In *Thai Meditation Association v. City of Mobile*, 980 F.3d 821 (11th Cir. 2020) (*TMAA I*), we reviewed the outcome of a bench trial that ended in judgment for the City of Mobile on all counts. We affirmed in part but remanded three counts for further consideration. The vacated and remanded claims consisted of: (1) a substantial burden challenge under the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. §2000cc(a)(1); (2) a Free Exercise challenge under the First Amendment; and (3) a state law challenge under the [Alabama] Religious Freedom Amendment (ARFA). On remand, the district court granted summary judgment to the City on all three counts, and this appeal followed. After careful review of the record and with the benefit of oral argument, we conclude that summary judgment was improper, for either party, on the RLUIPA claim; summary judgment was proper on the Free Exercise claim; and the City has failed to carry its burden to satisfy strict scrutiny on the ARFA claim." 2023 WL 6386801, at *1.

Held (3-0): (1) The Free Exercise claim fails since this zoning process is neutral and generally applicable. (2) While a RLUIPA claim may be tenable, disputed facts preclude judgment on it. (3) But a clear violation of the State RFRA requires judgment for TMAA.

Opinion: (3-0, by Wilson, J.): This panel might not have been expected to favor religious freedom in this kind of case. But it did, on fairly narrow grounds, as follows.

RLUIPA: The panel vacated summary judgment for the city on this federal claim. "Because factual disputes like these preclude the issuance of summary judgment to either party, we vacate the entry of summary judgment on the RLUIPA count." *Id.* at *3.

Free Exercise: With relatively sparse analysis, the panel affirmed summary judgment for the city. "[Since] Mobile's R-1 zoning designation process is both neutral and generally applicable, subjecting it to rational basis review[, which] is 'highly deferential to government action,' we agree that the City's asserted interests in traffic safety and zoning are 'rationally related to a legitimate government interest.'" *Id.* at *4. In so ruling, the panel narrowly construed *Fulton* and did not even mention *Tandon*. *But see FCA*, Item #10 above (doing the opposite, by construing *Fulton* accurately and applying *Tandon*).

State RFRA: On the Alabama RFRA, the panel reversed summary judgment for the city and required judgment for TMAA. "ARFA applies to local governments, like the City of Mobile, and provides that they 'shall not burden a person's freedom of religion' unless the city [proves] the burden is the least restrictive means of achieving a compelling government interest." *Id.* at *5. "[But] under ARFA, '*any* burden—even an incidental or insubstantial one—suffices to trigger strict scrutiny.' … While it is still uncertain at this stage whether the City's planning decision is a *substantial* burden on TMAA's rights, it clearly is *a* burden. It therefore clears [the] low bar to trigger ARFA's strict scrutiny review." *Id.*

"To begin, we have never held that neighborhood character or zoning are compelling government interests sufficient to justify abridging core constitutional rights." *Id.* at *6. "[While] 'zoning objectives' may be 'significant' [interests that] justify government action in a different balancing context … ARFA requires that the government's interest be 'compelling,' and vague, generalized invocations of government interests in 'zoning' and 'neighborhood character' are insufficient to carry the government's burden." *Id.* at *6.

"Here, the City has failed to carry its burden to demonstrate a compelling government interest. The ***generalized invocations*** of neighborhood character and zoning ***fail as a matter of law*** [while] invocation of traffic concerns fare slightly better because they are specific to the [property]. The City discusses at length the statements of neighbors … to substantiate its concerns about traffic. But review of these statements reveals that they are the ***same generalized, sometimes speculative, concerns*** that we have cautioned are inappropriate. To carry its burden to demonstrate a compelling government interest, the City must present ***more evidence of its interest, and that evidence must be specific***. The City must ***link its concerns to the particular details***, and alleged ills, posed by TMAA's application. Because it failed to do so, it was not entitled to summary judgment in this matter…. Accordingly, we reverse the entry of summary judgment on this count and direct the district court to enter judgment for TMAA." *Id.* at *7 (emphasis added).

Practice Pointers: (1) Avoid even subtle conflation of strict scrutiny's two prongs. The panel ruled for the Buddhist group here solely because of the city's failure to meet the "compelling interest" prong and did not even reach the "least restrictive means" prong. (2) Lawyers should clearly argue each prong and insist on rigorous scrutiny of each prong addressed to the specific facts. *See* Singh, Item #21, above. (3) "Generalized" "interests" or "tailoring" can no longer satisfy strict scrutiny. *See* Singh. (4) Don't forget ***state law***: properly plead and argue all claims and defenses under state statutes and constitutions. (5) As of today, 23 states (plus D.C.) are bound by "State RFRAs." Another ten or so states provide comparable strict-scrutiny protection via state court decision. ***See Appendix, below***. (6) Alabama achieved its State RFRA by constitutional amendment, not statute. (7) Advocating religious freedom for minority religions advances religious freedom for all.

FEDERAL LEGISLATION

23. Respect for Marriage Act, Pub. L. 117-228 (Dec. 13, 2022):

Late last year, President Biden signed the Respect for Marriage Act (RMA), which requires states to legally recognize marriages performed in other states, even if such recognition would violate the public policy of the state required to give the recognition. This new law means that same-sex marriages would remain protected if the Supreme Court were to overrule its decision in *Obergefell v. Hodges*, 576 U.S. 644 (2015). That decision recognized a constitutional right same-sex marriage.

In its congressional findings section, RMA does state that: "Diverse beliefs about the role of gender in marriage are held by reasonable and sincere people based on decent and honorable religious or philosophical premises. Therefore, Congress affirms that such people and their diverse beliefs are due proper respect." Pub. L. 117-228, §2(2).

24. Pregnant Workers Fairness Act (PWFA), Pub. L. 117-328, Div. II (Dec. 29, 2022):

Even later last year, as part of the Omnibus Appropriations Law,[6] President Biden signed the Pregnant Workers Fairness Act, which fills certain *gaps* in employment law:

- Though Title VII prohibits employment discrimination based on "sex," and the Pregnancy Discrimination Act (PDA) added "pregnancy, childbirth, or related medical conditions," there were no mandated *accommodations* for the above.

- Though the Americans with Disabilities Act (ADA) mandates accommodations for disabilities, and though certain physical conditions related to pregnancy might be classified as disabilities, pregnancy itself is not considered a disability.

PWFA fills these gaps with mandatory accommodations. PWFA does not create disparate treatment claims such as for hiring or firing outside of a requested accommodation. Such claims would fall under Title VII and ADA. An adverse action taken against an employee for requesting an accommodation might support a PWFA retaliation claim.

PWFA is sensible, requiring employers to give women reasonable accommodations for "pregnancy, childbirth, or related medical conditions." But it has troubling aspects. Its text never mentions "woman." It requires abortion-related accommodations. It does not include religious exemptions under Title VII. And it gives the EEOC binding rule-making authority, a power the agency does not possess under Title VII.[7]

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[6] Division II of the Consolidated Appropriations Act of 2023, Pub. L. 117-328, 136 Stat. 6089 (Dec. 29, 2022), codified at 42 U.S.C. §§2000gg to 2000gg-6 (Effective June 27, 2023).

[7] For information on **CLS** positions, see www.christianlegalsociety.org/center/news.

FEDERAL REGULATIONS

25. Rescinding the "Free Inquiry Rule" of the Department of Education (DOEd):

(a) Current Rule/Regulations on "Free Inquiry":

In 2020, the Department of Education issued regulations to protect religious student organizations by ensuring that those on public college campuses have the same access as other student organizations on their campus. The two nearly identical provisions follow.

34 C.F.R. §75.500(d): "As a material condition of the Department's grant, each grantee that is a public institution shall not deny to any student organization whose stated mission is religious in nature and that is at the public institution any right, benefit, or privilege that is otherwise afforded to other student organizations at the public institution (including but not limited to full access to the facilities of the public institution, distribution of student fee funds, and official recognition of the student organization by the public institution) because of the religious student organization's beliefs, practices, policies, speech, membership standards, or leadership standards, which are informed by sincerely held religious beliefs."

34 C.F.R. §***76***.500(d): "As a material condition of the Department's grant, each State or subgrantee that is a public institution [remainder is same as §75.500(d) above]."

(b) What the Current Rules/Regulations Do:

The above regulations protect all religious student groups that wish to retain their distinctive religious identities via their religious standards governing belief, practice, and leadership. Religious student groups simply wish to do this in the same way that their secular peers are able to retain their unique identities via shared beliefs and goals and chosen leadership.

On August 19, 2021, DOEd explained in a blog post: "Protecting First Amendment freedoms on public university and college campuses is essential…. For some, expressing their faith is an important aspect of their identity as well as their college experience. The … Constitution provides strong protections for students to express and practice their faith on public college and university campuses. In particular, the First Amendment requires that public colleges and universities not infringe upon students' rights to engage in protected free speech and religious exercise, such as associating with fellow members of their religious communities and sharing the tenets of their faith with others…. Additionally, all institutions of higher education receiving Federal financial assistance must comply with applicable Federal statutes and regulations that prohibit discrimination. Where these important principles intersect, complex questions may arise…. In 2020, [we] issued regulations addressing these topics, commonly referred to as the 'Free Inquiry Rule.' Certain aspects of these regulations, codified in 34 CFR parts 75 and 76, impose additional requirements on [DOEd] higher education institutional grant recipients."

(c) Proposed Rule/Regulations (Notice of Proposed Rule Making or NPRM):

Earlier this year, DOEd issued a Proposed Rule (or NPRM) to rescind the 2020 regulations above. *See* ***Direct Grant Programs, State-Administered Formula Grant Programs***, 88 Fed.

Reg. 10857 *et seq.* (Feb. 22, 2023).[8] DOEd's Summary states: "The Department proposes to rescind regulations related to religious student organizations at certain public institutions of higher education (IHEs) that prescribe a novel role for [us] in enforcing grant conditions related to religious student organizations. These regulations apply to public IHEs that receive a direct grant from [us] or a subgrant from a State-administered … program [of ours. We propose] to rescind the regulations because they are not necessary to protect the First Amendment right to free speech and free exercise of religion; have created confusion among institutions; and prescribe an unduly burdensome role for [us] to investigate allegations regarding IHEs' treatment of religious student organizations." *Id*.

(d) Effect of the Proposed Rule/Regulations:

On February 21, 2023, DOEd provided an "Update on the Free Inquiry Rule" in a blog post: "After its thorough review, [we] issued a Notice of Proposed Rulemaking proposing to rescind a portion of the regulation related to religious student organizations …. Where complex questions over the First Amendment arise, Federal and State courts are best equipped to resolve these matters. [We are] proposing to return to this longstanding practice of deferring to courts…. Today, [we] also issued a request for information on other portions of the rule related to public institutions' compliance with the First Amendment and private institutions' compliance with their stated policies … on free speech and free inquiry."

In sum, DOEd now says that the Free Inquiry Rule is unnecessary, because there's no real evidence of discrimination against religious groups or speech on campuses, and because students can always file lawsuits. But the current Rule helps both university administrators and religious groups avoid lawsuits that cost enormous sums and take many years to litigate. Can affected students even obtain any meaningful judicial relief before they graduate?[9]

Whereas the current Rule gives administrators a clear understanding of their duty to respect religious student groups, the Proposed Rule would muddy the water and expand the number of lawsuits. The Proposed Rule will enable administrators to apply their nondiscrimination policies to exclude religious groups that consider their faith in their selecting leaders, even while their secular peers expect and require agreement with their purposes and beliefs when selecting their leaders. Advocacy groups seek student leaders who are passionate advocates for their cause. Athletic groups seek exemplary student athletes. Singing groups seek students who can sing well. LGBT groups seek those committed to their cause. Whereas the current Rule protects religious students who want the leaders of their religious groups to reflect their faith traditions with authenticity and integrity, the Proposed Rule would eliminate them. It would put thousands of student groups serving Buddhist, Christian, Jewish, Latter-day Saint, Muslim, Sikh, and other religious students at risk.[10]

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[8] *See also* www.federalregister.gov/documents/2023/02/22/2023-03670/direct-grant-programs-state-administered-formula-grant-programs for this Notice of Proposed Rule Making (**NPRM**).

[9] *See generally, e.g.*, CLS Comment Letter (Mar. 24, 2023) and its 232 pages of Attachments.

[10] Over 58,000 comments were submitted within 30 days. *See* www.regulations.gov/docket/ED-2022-OPE-0157 ("Comments Received: 58,027"). *See, e.g.*, CLS Letter (Mar. 24, 2023), above.

26. Enhancing Title IX Sex-Discrimination Enforcement by DOEd:

Title IX of the Education Amendments Act of 1972 bans discrimination on the basis "sex" in any educational program or activity receiving "Federal financial assistance." 20 U.S.C. §§1681 *et seq*. DOEd had enforced Title IX according to a biological definition of "sex"—a person's status as male or female based on immutable biological traits.

On July 12, 2022, DOEd issued a Proposed Rule that would redefine "sex" to include "sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity." *See* ***Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance***, 87 Fed. Reg. 41390 *et seq*. (July 12, 2022).[11] One reason is "to clarify that sex discrimination under Title IX includes discrimination on the basis of sex characteristics, including intersex traits." *Id*. at 41532. This Proposed Rule also weakens due process for those accused in sexual-harassment and sexual-assault grievance proceedings by removing or diluting their presumption of innocence and their rights to counsel, to introduce evidence, and to cross-examine witnesses. *See, e.g.*, *id*. at 41407-41423 (Revised Definitions of §106.2) and *id*. at 41458-41492 (Revised Grievance Procedures of §106.45 & §106.46).[12]

On April 13, 2023, DOEd issued another Proposed Rule to "govern a recipient's adoption or application of sex-related criteria that would limit or deny a student's eligibility to participate on a male or female athletic team consistent with their gender identity." *See* ***Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance: Sex-Related Eligibility Criteria for Male and Female Athletic Teams***, 88 Fed. Reg. 22860 et seq. (Apr.13, 2023).[13]

On May, 26, 2023, DOEd updated the "July 2022 NPRM" and the "April 2023 Athletics NPRM" in a blog post: "The Title IX proposed regulations … are historic. They would strengthen protections for students who experience sexual harassment and assault at school, and they would help protect LGBTQI+ students from discrimination. [We] received more than 240,000 public comments on the proposed rule ….[14] Carefully considering and reviewing these comments takes time …. That is why [we are updating our] Spring Unified Agenda to now reflect an anticipated date of ***October 2023 for the final Title IX rule*** [and for the] ***proposed Athletics regulation***, which received over 150,000 comments ….[15] You can access the July 2022 NPRM here, view submitted comments here and find a fact sheet about the July 2022 NPRM here. You can access the Athletics NPRM here, view submitted comments here, and find a fact sheet about the Athletics NPRM here." (Emphasis added.)

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[11] Also at https://www.federalregister.gov/documents/2022/07/12/2022-13734/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal.

[12] *See also* CLS Comment Letter (Sep. 9, 2022) (explaining key legal and practical problems).

[13] Also at www.federalregister.gov/documents/2023/04/13/2023-07601/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal.

[14] *See also* www.regulations.gov/docket/ED-2021-OCR-0166 ("Comments Received: 240,203").

[15] *See also* www.regulations.gov/docket/ED-2022-OCR-0143 ("Comments Received: 156,159").

These new DOEd interpretations of Title IX appear to provide transgender students with access to the teams, locker rooms, and restrooms of their choice. Such changes put girls and women at risk and appear to promote a certain gender ideology. These changes also contradict laws in over a dozen states that are trying to protect student privacy and fair competition in women's sports.[16]

Practice Pointer: The volume of public comments submitted during the comment period on a Proposed Rule/NPRM can influence the outcome.

27. Implementing the Pregnant Workers Fairness Act (PWFA) by EEOC:

The PWFA has a laudable purpose: effectuating Title VII protections for female employees by requiring employers to reasonably accommodate women for their health and the health of their unborn children. But EEOC's Proposed Rule goes beyond that purpose in ways that Congress did not intend: including abortion as a pregnancy-related medical condition that triggers a duty to grant leave or other accommodations. *See* ***Regulations to Implement the Pregnant Workers Fairness Act***, 88 Fed. Reg 54714 *et seq*. (Aug. 11, 2023).[17] And unlike EEOC *guidelines* on Title VII, this *Rule* will have binding force as to PWFA.

In planned comments, CLS argues that including abortion in these Title VII regulations would conflict with the Title VII's Religious Organization Exemption (ROE), which arguably denies the EEOC any power over the hiring practices of qualifying religious organizations.[18] The EEOC itself cites religious exemptions under the Ministerial Exemption, RFRA, and ROE and requests comment on how the Proposed Rule would affect them. *See id*. at 54746-54747. Applying the Proposed Rule to religious employers may violate all these legal protections, and others.

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[16] A battle also exists in the courts. Compare *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 616-20 (4th Cir. 2020) (citing *Bostock's* ruling on Title VII in ruling that Title IX sex discrimination is not limited to "biological sex"); *id*. at 620 (The school board "insisted" on separate restrooms "despite advances in the medical community's understanding [of] being transgender and the importance of gender affirmation. It did so after a major nationwide survey [and after] schools [everywhere] were successfully implementing trans-inclusive [policies]."); with *Kasper v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 815 (11th Cir. 2022) (en banc) ("When we read 'sex' in Title IX to mean 'biological sex,' as we must, the statutory claim resolves itself [and allows separate] facilities on the basis of [biological] sex.'"). *See also A.C. by M.C. v. Metro. Sch. Dist.*, 75 F.4th 760, 770–71 (7th Cir. 2023) (explaining circuit split on Title IX); *Hecox v. Little*, 79 F.4th 1009, 1025 (9th Cir. 2023) (invalidating a state law whose "classification of 'biological sex' [was] carefully drawn to target transgender women and girls, even if it does not use the word 'transgender'").

[17] Also at https://www.federalregister.gov/documents/2023/08/11/2023-17041/regulations-to-implement-the-pregnant-workers-fairness-act.

[18] The Section 702 ROE (42 U.S.C. §2000e-1(a)) provides: "This subchapter [i.e., all of Title VII] shall not apply to … a religious [entity] with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such [entity] of its activities." For further discussion of the ROE, see *Starkey* and *Fitzgerald* (Items 11 & 12, above).

In its comments, CLS argues that, under the Proposed Rule, the EEOC could punish a religious employer that 'retaliates' against an employee by enforcing its sincerely religious employee-conduct standard against killing unborn human life. This would affect both the employee's performance of work consistent with the employer's religion and the employer's ROE right to employ only those employees who share the same religious observances, practices, and beliefs that it professes. Employees might violate codes of conduct with impunity, posing legal risk to any employer that did anything about it.

The Proposed Rule could usurp from religious employers their power (a) to decide whether an employee's choice of abortion complied with the employer's religious standard of conduct; and (b) to evaluate and to reward or penalize the employee's work performance accordingly. In effect, the Rule would remove abortion from a religious employer's religious conduct standards, irrespective of its specific convictions on abortion.

28. Updating Guidance on Religion in Public Schools by DOEd:

On May 15, 2023, DOEd issued its "Updated Guidance on Constitutionally Protected Prayer and Religious Expression in Public Elementary and Secondary Schools." *See* https://www2.ed.gov/policy/gen/guid/religionandschools/prayer_guidance.html ("***2023***") This is a revision of prior versions of this guidance—by the same or similar names—dating back at least to the 1990s. Two immediate prior versions are located at 85 Fed. Reg. 3257 *et seq*. (Jan. 21, 2020) ("***2020***") and 68 Fed. Reg. 9645 *et seq*. (Feb. 28, 2003) ("***2003***").

The 2023 version largely tracks 2020 and 2003 but includes some troubling differences. For example, 2023 removes from the 2020 EAA discussion the right of religious student groups to require their leaders to agree with the groups' religious beliefs. *Compare* 2020 at §IV ("Equal Access Act / Leadership of Religious Student Groups"). And 2023 defines the freedom of religious expression for teachers too narrowly, starting with this overbroad statement: "Teachers, school administrators, and other school employees may not encourage or discourage private prayer or other religious activity." 2023 at §II(A). This statement was insupportable even before *Kennedy*, 142 S.Ct. 2407 (2022) (Item 3 above) and is all the more so now. Compare this qualifying language from 2020: "***When acting in their official capacities as representatives of the State*****,** teachers, school administrators, and other school employees are prohibited … from encouraging or discouraging prayer, and from actively participating in such activity with students. ***Teachers, however, may take part in religious activities where the overall context makes clear that they are not participating in their official capacities***." 2020, §II(C) (emphasis added); *accord Kennedy*.

29. Implementing Executive Order 13988 by HHS in Proposed Grants Regulation:

Executive Order 13988, ***Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation***, 86 Fed. Reg. 7023 (Jan. 20, 2021),[19] essentially

[19] Also at https://www.federalregister.gov/documents/2021/01/25/2021-01761/preventing-and-combating-discrimination-on-the-basis-of-gender-identity-or-sexual-orientation.

orders the Administration to implement broadly, across the federal government, the holdings of *Bostock v. Clayton County*, 140 S.Ct. 1731 (2020) (a Title VII case).[20]

As one example, the Department of Health & Human Services (HHS) issued a Proposed Rule on ***Health and Human Services Grants Regulation***, 88 Fed. Reg. 44750 *et seq*. (July 13, 2023).[21] This Rule would prohibit discrimination on the basis of sexual orientation or gender identity (SOGI) in any HHS grant. Like all Rules, however, it must follow 45 C.F.R. §75.300(a), which provides: "The Federal awarding agency must manage and administer the Federal award in a manner so as to ensure that Federal funding is expended and associated programs are ***implemented in full accordance with*** U.S. statutory and ***public policy requirements: Including, but not limited to, those protecting public welfare, the environment, and prohibiting discrimination***." *Id*. (emphasis added).

In a comment letter submitted September 5, 2023, CLS argues that HHS, as an agency of the Executive Branch, has no authority to determine what is "in full accordance with … public policy," which is the role of the Legislative Branch. CLS also argues against other specific implementations of this Executive Order. For example, CLS argues:

- for providing religious exemptions where comparable secular exemptions exist;[22]
- against applying the rationale of *Bostock*—which only interpreted Title VII of the Civil Rights Act of 1964—broadly to other or even all federal statutes;[23]
- against imposing a general duty on federal-funding recipients to prevent third-party harm (e.g., mental distress, embarrassment, or inconvenience) to SOGI-identified beneficiaries who are denied services and/or must seek them elsewhere;
- against using incidental harm to third-parties as a factor in considering religious exemptions under strict scrutiny.

[20] *See also* Executive Order 14075, https://www.federalregister.gov/documents/2022/06/21/2022-13391/advancing-equality-for-lesbian-gay-bisexual-transgender-queer-and-intersex-individuals.

[21] Also at https://www.federalregister.gov/documents/2023/07/13/2023-14600/health-and-human-services-grants-regulation.

[22] See Items #3-22 above (reviewing cases that apply *Fulton*, 141 S.Ct. 1868 and *Tandon*, 141 S.Ct. 1294). To extend secular exemptions while denying comparable religious exemptions is to elevate the secular over the religious (thus devaluing religious exercise), which is presumptively illegal.

[23] *Bostock* stressed its own narrowness, indicating its holding did not "sweep beyond Title VII to other federal or state laws that prohibit sex discrimination." *Bostock*, 140 S.Ct. at 1753.

APPENDIX: STATE RFRAs

Since *City of Boerne v. Flores*, 521 U.S. 507 (1997) held RFRA inapplicable to state and local governments, many states have responded. To date, 23 states have enacted a RFRA, and D.C. is bound by the federal RFRA, for a total of 24 state-level RFRAs: Alabama, Arizona, Arkansas, Connecticut, D.C., Florida, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, New Mexico, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, & Virginia. Another ten or so states have achieved similar results by court decision: Alaska, Maine, Massachusetts, Michigan, Minnesota, Montana, Ohio, North Carolina, Washington, and Wisconsin. *See* State Standards of Free Exercise Review Under State RFRAs and State High Court Decisions, 1 Religious Orgs. & The Law §3:27 (2d) (Dec. 2022). This list of ten might be adjusted up or down, since some state court decisions are unclear on the level of protection.

As of 10/1/2023, here are the 24 state-level RFRAs with Westlaw cite & link: Ala. Const. §3.01 (West 1998); Ariz. Rev. Stat. Ann. §§41-1493 et seq. (West 1999); Ark. Code Ann. §§16-123-401 et seq. (West 2015); Conn. Gen. Stat. Ann. §52-571b (West 1993); 42 U.S.C. §§2000bb et seq. (West 1993) (D.C. is bound by federal RFRA per §2000bb-2(2)); Fla. Stat. Ann. §§761.01 et seq. (West 1998); Idaho Code Ann. §§73-401 et seq. (West 2000); 775 Ill. Comp. Stat. Ann. 35/1 et seq. (1998); Ind. Code Ann. §§34-13-9-0.7 et seq. (West 2015); Kan. Stat. Ann. §§60-5301 et seq. (West 2013); Ky. Rev. Stat. Ann. §446.350 (West 2013); La. Stat. Ann. §§13:5231 et seq. (West 2010); Miss. Code. Ann. §11-61-1 (West 2014); Mo. Ann. Stat. §1.302 (West 2003); Mont. Code Ann. §§27-33-101 et seq. (West 2021); N.M. Stat. Ann. §§28-22-1 et seq. (West 2000); Okla. Stat. Ann. tit. 51, §§251 et seq. (West 2000); 71 Pa. Stat. Ann. §§2401 et seq. (West 2002); R.I. Gen. Laws §§42-80.1-1 et seq. (West 1993); S.C. Code Ann. §§1-32-10 et seq. (West 1999); S.D. Codified Laws §1-1A-4 (West 2021); Tenn. Code Ann. §4-1-407 (West 2009); Tex. Civ. Prac. & Rem. Code Ann. §§110.001 et seq. (West 1999); Va. Code Ann. §57-2.02 (West 2007).

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