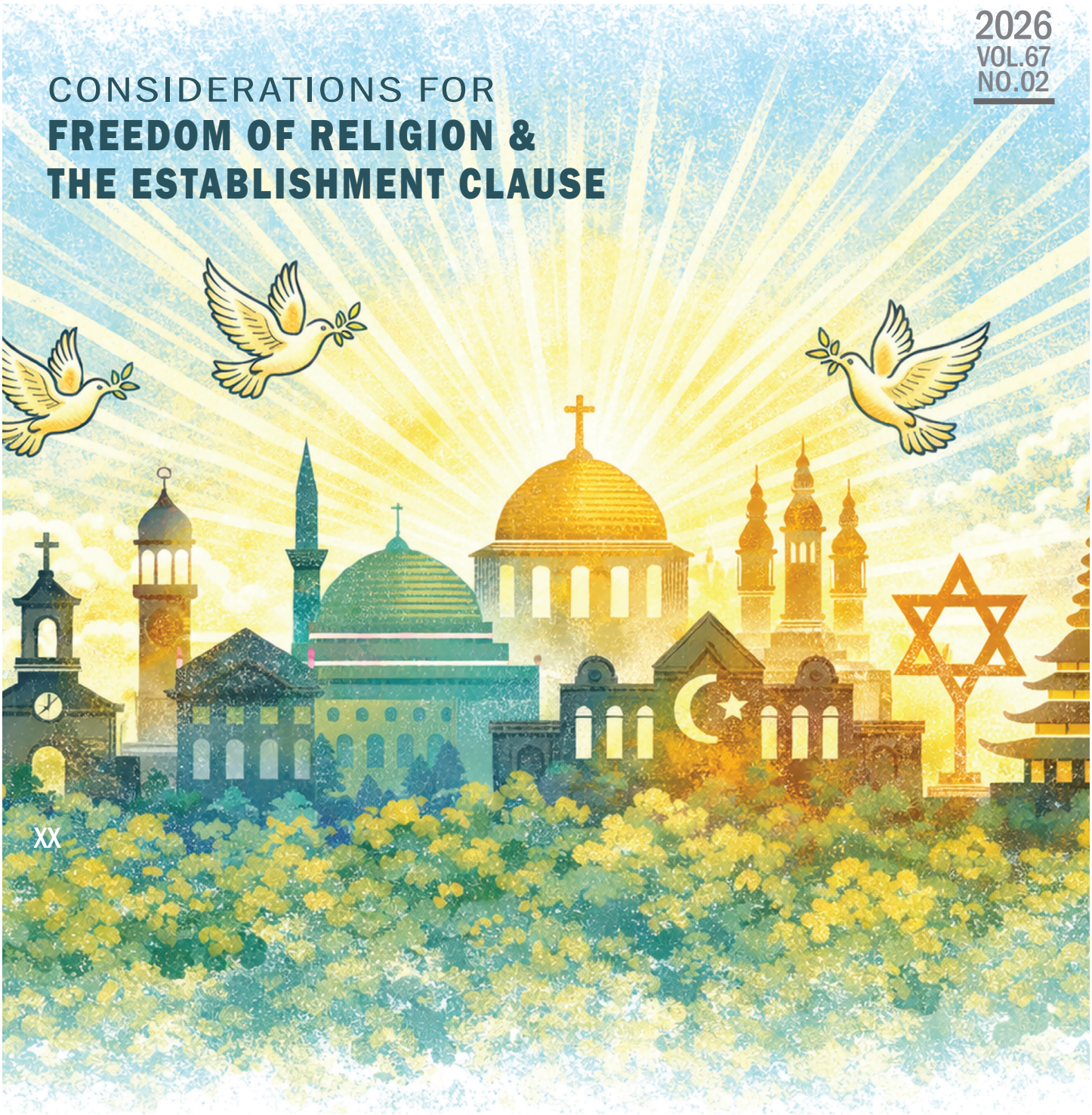
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CONSIDERATIONS FOR FREEDOM OF RELIGION & THE ESTABLISHMENT CLAUSE



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CONSIDERATIONS FOR **FREEDOM OF RELIGION & THE ESTABLISHMENT CLAUSE**

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The First Amendment of the United States says, "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

...the Court stated it was unnecessary to determine the "boundary of the Establishment Clause where history shows that the specific practice is permitted. Any test the Court adopts must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change."

This article will not specifically address free speech and peaceful assembly, nor will it discuss changes in interpretation over time.

The Establishment Clause prohibits the establishment of an official religion, and proscribes any kind of preference for any religion, while the Free Exercise Clause protects the rights of individuals to engage in and practice, or their right to choose not to believe or engage in, the religion of their choice, and also protects those individuals against regulations or other governmental interference that discriminate against their religious beliefs or suppresses religious freedom.[1]

As with other rights established by the U.S. Constitution, the clauses regarding religious freedom are applied to cities and states by the Fourteenth Amendment.[2] Because individuals are involved in a city's decisions, processes, and day-to-day activities, their beliefs are inevitably implicated in these matters, including religious beliefs. One of the roles of the municipal attorney is to ensure that their client is aware of the historical and legal implications of religious freedom under the First Amendment and of the limits and allowances provided in the U.S. Constitution. This article introduces some of the areas of municipal law where a practitioner will be called on to advise their client on how to accomplish their priorities while also protecting the interests of the city, preserving the rights of individuals, and doing so in compliance with the First Amendment.

FIRST AMENDMENT VIOLATIONS & STANDARD OF REVIEW

To successfully establish a violation of the religious freedoms provided by the Constitution, evidence of a sincerely held religious belief that is an essential part of the practice of a bona fide religion must be shown.[3] A sincerely held religious belief is one rooted in religion. Political, ideological, or secular beliefs are generally not considered protected religious beliefs.[4] Although there is no test or bright-line rule for what constitutes a religious belief, courts have discussed factors that tend to show a belief is religious.[5] However, a recent Fifth Circuit opinion holds that courts must tread lightly when analyzing whether a belief is sincerely held.[6]

Laws or policies enacted by a local government must be neutral with respect to religion and generally applicable,[7] and must not suppress religion or religious conduct.[8] Courts will review events and circumstances, legislative history, contemporaneous statements made by public officials, and a discriminatory impact.[9] All purposes and objectives of law or policy must be neutral, meaning secular interests of the local government are not granted preferential treatment over religious ones, nor can local governments favor one religion over another.[10] Failure to pass either the neutrality or the general applicability test triggers strict scrutiny.[11]

Except where federal or state law require a different standard of review (two examples are discussed below), the standard of review for regulations that are generally applicable and neutral is a rational basis review, so a law that is shown to be rationally related to a legitimate governmental purpose, even if there is an incidental effect on religion, will be upheld under a First Amendment analysis.[12] However, if the law is neither neutral nor generally applicable, strict scrutiny applies, and the local government must show a compelling governmental interest for the regulation, that it is narrowly tailored, and that it is the least restrictive means of advancing that interest.[13] Strict scrutiny is not necessarily fatal, but it is extremely difficult to satisfy, so lawmakers, including local government officials, should be aware of this when considering any law that involves or could affect either the establishment of or the free exercise of religion.[14]

RFRA & HEIGHTENED SCRUTINY

The Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb, was passed in 1993, to address a decision of the Supreme Court[15] which held in part that a compelling governmental interest is not required where a regulation is neutral and generally applicable,[16] and to broaden the protection of religious liberty by restoring the compelling interest test previously applied in religious freedom cases by the Supreme Court and prohibiting a governmental entity from substantially burdening the exercise of religion even where a regulation is generally applicable and neutral.[17] Instead, the governmental entity must show their action or regulation is the least restrictive means and a compelling interest in order to burden that person's religious freedom or that person is exempted from such action.[18] The Supreme Court has held that RFRA applies to the federal government but not to the states; however, practitioners should ensure that their state has not enacted a similar version of RFRA.

A cursory review of the states shows 29 or more have passed laws with either provisions similar to RFRA or other protections, as well as anti-discrimination laws similar to Title VII. Some of these provide more protection than RFRA, so practitioners must also familiarize themselves with these state and local laws to ensure their clients are aware of



potential infringements on religious liberties and advise them on proactive measures to ensure compliance. Additionally, practitioners should review applicable state and circuit decisions, as the cases discussed below are fact-specific; many decisions distinguish themselves from the holdings and should be considered when similar issues arise.

CITY HALL: COUNCILS, COMMISSIONS, COMMITTEES & PUBLIC DISPLAYS

Certain local government councils, boards, and committees may incorporate religious practices, such as prayer, into their meetings and activities. Similarly, religious symbols may be permitted or displayed on public property. In assessing the constitutionality of these actions, courts examine factors including the identity of the individual offering the prayer—whether it is a clergy member or a board member—the practice's alignment with historical traditions, and whether the practice is coercive.

In 1983, the Supreme Court considered issues related to the Nebraska Legislature's practice of opening its sessions with prayers rooted in the Judeo-Christian tradition, conducted by a Presbyterian chaplain who had served in this role for sixteen years with legislative approval. An action was brought alleging that the chaplaincy practice violated the Establishment Clause and seeking injunctive relief.[19] Although the District Court held the Establishment Clause did not prohibit the prayer, it held that paying the chaplain from public funds was prohibited. The Court of Appeals went further, holding that the entire chaplaincy practice was a constitutional violation and prohibited the State from engaging in it. On final appeal, the U.S. Supreme Court reversed both lower courts and held the Nebraska Legislature's chaplaincy practice did not violate the Establishment Clause because there was no proof of impermissible motive related to payment of the chaplain. The Court reasoned that since the Continental Congress paid its chaplain, and many states compensate their chaplains,[20] there was no indication the situation had been exploited to proselytize or advance, or disparage, any one faith or belief. Although one could sincerely believe this practice could be the beginning of an established religion, the Court stated such a concern is not well founded, and that it is not the job of the courts to analyze the content of a prayer, but it is the job of the courts to distinguish between a "real threat" and a "mere shadow"[21] and the "unbroken practice for two centuries in the National Congress, for more than a century in Nebraska and in many other states, gives abundant assurance that there is no real threat 'while this Court sits.'"[22] The court addressed the history of the practice, holding that the practice did not establish a religion, just an acknowledgment of widely held beliefs and stated, "In light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society."[23]

The Court went further to state that an opening prayer is permitted by the Constitution due not only to its historical foundation, but also through historical understanding that the



appointment of chaplains and opening legislative sessions with prayer by the First Congress was within days of approving language for the First Amendment which the Court determined demonstrates "the Framers considered legislative prayer a benign acknowledgment of religion's role in society."[24]

The Supreme Court revisited the issue of clergy prayer in 1999 in a challenge from citizens of Greece, New York, concerning the town's custom of opening its monthly meetings with a roll call, the Pledge of Allegiance, and a prayer delivered by clergy. Following a complaint from citizens that the prayers were overtly sectarian and predominantly Christian, the town invited a variety of creeds, including prayers by a Jewish layman and the chairman of the local Baha'i temple, and granted the request of a Wiccan priestess to deliver an invocation.

The Court disagreed with the citizens of Greece that in order to comply with the Establishment Clause, the prayers had to be all-inclusive and nonsectarian or that the custom compelled its citizens to engage in a religious observance, and held the First Amendment was not violated by opening town board meetings with prayer that comported with the tradition of the United States. Further, the Court stated it was unnecessary to determine the "boundary of the Establishment Clause where history shows that the specific practice is permitted. Any test the Court adopts must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change."[25]

Although the Court rejected the idea that any administrator or judge could interfere with a prayer giver's address to their deities, an invocation comports with the First Amendment when it serves the legitimate purpose when implemented in the opening of legislative sessions "to lend gravity to the occasion and reflect a tradition of "[p]rayer that is solemn and respectful in tone, that invites lawmakers to reflect upon shared ideals and common ends before they embark on the fractious business of governing." If there is evidence that the custom is used to establish a religion or to denigrate other religions or beliefs, that would not serve a legitimate purpose.[26]

Finally, the Court held the town was not required to go outside its town limits to ensure the representation of all religions were included, and the fact that the town made reasonable efforts to identify the congregations in the town and welcomed any minister or layman to give the prayer at the meeting was sufficient for Constitutional compliance and the congregations being mostly Christian denominations does not change that analysis.[27]

Prayers conducted by board members rather than clergy have been found to be both constitutional and unconstitutional in different factual and legal contexts, with two examples of such holdings shown below.

The Fourth Circuit en banc held the practice of praying to open the Rowan County Board of Commissioners' meetings unconstitutional because, rather than being led by clergy or providing an opportunity for others to lead an invocation, only the board's elected members led the prayers.[28] The members' prayers were overtly sectarian, at times proselytizing, and the Commissioners would request that meeting attendees rise and pray. The Court stated, "[t]he great promise of the Establishment Clause is that religion will not operate as an instrument of division in our nation," and it held the routine "served to identify the government with Christianity and risked conveying … a message of exclusion." Because the commissioners were the exclusive prayer-givers, the County's invocation practice fell well outside the more inclusive, minister-oriented practice of legislative prayer described in the *Town of Greece* case.[29]

…the Fifth Circuit reiterated that mere neutrality was insufficient and that Title VII gives religious practices favored treatment and a standard employer practice or policy gives way to the need for an accommodation.

However, the Sixth Circuit Court of Appeals held that exclusively Christian prayer invocations led by the Jackson County Commissioners did not in itself make the practice unconstitutional. Although sectarian and exclusively Christian, the prayers were respectful and benign, such as guidance for the commission's deliberations and blessing America's troops, and were not denigrating or proselytizing nonbelievers, and were unlikely to offend a reasonable person. It supported its conclusion by stating that the commissioners, as elected officials, were chosen as representatives of the County; that their beliefs reflect the County's demographics; and that it was immaterial that all the commissioners were Christian. Also, similar to the holding in Town of Greece, Jackson County does not have a duty to ensure all religions are represented.[30] The Sixth Circuit determined the Jackson County routine was not coercive, although the prayers were given by government officials, and went further to state that the hiring and payment of a chaplain, as was upheld in the Marsh case, could be considered an even greater entanglement of government and religion, and determining constitutionality based on who the speaker is would bring about absurd results.[31]

RELIGIOUS DISPLAYS AND SYMBOLS

In addition to the challenges posed by prayer routines, religious displays and symbols may also be challenged by individuals who object to religious expressions in municipal facilities or on public property. The Supreme Court held that allowing a 32-foot-tall Latin cross, installed in the county in 1918 as a war memorial honoring 49 soldiers who died in the war, but now located in the center of a busy intersection, did not constitute a constitutional violation. The Court said monuments, symbols, and practices established long ago are considered differently from new religious monuments, symbols, and practices. It is more difficult to identify their original purposes; an associated religious purpose at the time of installation can evolve into broader historical and cultural meanings, and when such evolution occurs over time, it gives rise to a strong presumption of constitutionality. Further, destroying or defacing the monument would not further the ideals of the First Amendment.[32]

The Supreme Court also held that a monument displaying the Ten Commandments on the lawn of the Texas Capitol, among 38 other monuments and historical markers, did not violate the Establishment Clause. The Court referenced the acknowledgment by all branches of government of the historical role of religion in American life, as well as the historical meaning of the Ten Commandments. The Court acknowledged its decisions point in two directions when applying the Establishment Clause, one being consideration of the strong role played by religion and religious conditions, and the other direction considers the "principle that governmental intervention in religious matters can itself endanger religious freedom" and that the Court has the difficult task of considering both in all Establishment Clause challenges. In this case, the Court stated that the monuments on the Capitol lawn reflected the State's political and legal history and encompassed both religion and government.[33]

Pleasant Grove City, Utah, was also challenged regarding the public display of monuments in a public park. A religious organization that was denied its request to place a monument in the park where at least 11 permanent, privately donated displays, including a Ten Commandments monument, were displayed brought a § 1983 case against the City when it denied its request explaining that the monuments in the park were limited to those directly related to the City's history or donated by groups with longstanding community ties.[34] The Court held that governments may create limited forums dedicated solely to the discussion of certain subjects and that, within such a limited forum, a government entity may impose reasonable, viewpoint-neutral restrictions. The Court further stated that although there may be situations in which it is difficult to tell whether a government entity is speaking on its own behalf or is providing a forum for private speech, but that generally monuments displayed on public property typically represent government speech, and that it was clear from the facts of the case including the history of the park that the monuments in Pleasant Grove's park represented government speech. The Court indicated that the history of the park and monuments, and their relationship to the City's identity, were factors to be considered in determining whether the monuments constituted government speech or private speech. As in other cases considered by the Court, it was noted that historical monuments and the meanings attached to them evolve over time, making it impossible to imbue a single message in them. Further, the Court discussed that unlike verbal speech



"Title VII requires an employer to reasonably accommodate the practice of religion, not merely that it assess the reasonableness of a particular possible accommodation."

done in a park or other forum, not all monuments that represent all viewpoints, must be permitted in the park, or If government entities must maintain viewpoint neutrality in their selection of donated monuments, they must either "brace themselves for an influx of clutter" or face the pressure to remove longstanding and cherished monuments." The Court held the City's decisions regarding the display of privately donated monuments was "best viewed as a form of government speech [and was] not subject to the Free Speech Clause."[35]

EMPLOYMENT

In addition to serving their communities, local governments also serve as employers. As an employer, a local government is required to comply with Title VII of the Civil Rights Act of 1964, as amended,[36] which prohibits religious discrimination against an employee or prospective employee and imposes an obligation on a labor organization to reasonably accommodate their religious practices unless an employer or other labor organization demonstrates the accommodation would result in undue hardship.[37]

Undue hardship was interpreted by courts for years as anything requiring more than a de minimis effort or cost, but a 2023 case decided by the Supreme Court presented a shift in the "undue hardship" analysis. In that case, a letter carrier prevailed in his religious accommodation claim against a United States Postal Service Postmaster who failed to accommodate the employee's religious observance of the Sabbath. The Supreme Court held that an employer or organization must show that accommodation would be a substantial burden, as opposed to more than a *de minimis* burden, to conducting an employer's business, considering all relevant factors, including both the accommodation requested and the overall operations of the business. The operations would include the size of the business, the number of employees, and whether alternatives such as swapping shifts or paying overtime to other employees could be implemented to make the accommodation. The Court emphasized that "Title VII requires an employer to reasonably accommodate the practice of religion, not merely that it assess the reasonableness of a particular possible accommodation." The Court stated the employer must show the burden of granting an accommodation would result in substantially increased costs in relation to the conduct of its particular business, and that more than a *de minimis* effort or cost[38] does not suffice to establish "undue hardship" under Title VII. Further, impacts on coworkers are "relevant only to the extent those impacts go on to affect the conduct of the business," and "employee animosity to a particular religion, to religion in general, or to the very notion of accommodating religious practice" is not sufficient to show an undue burden as "[b]ias or hostility to a religious practice or accommodation cannot supply a defense."[39]

In a subsequent case, where the Texas Department of Criminal Justice argued there was no Title VII violation because its reason for discriminating was neutral and based on legitimate safety concerns, the Fifth Circuit reiterated that mere neutrality was insufficient and that Title VII gives religious practices favored treatment, and a standard employer practice or policy gives way to the need for an accommodation.[40] The Fifth Circuit commented on the interpretation by other federal courts and the effect that interpretation has had on religious freedom, stating, "For decades, inferior federal courts read a single line from Hardison for more than it was worth. The de minimis test had no connection to the text of Title VII, and by blessing 'the denial of even minor accommodation in many cases,' the de minimis test made it 'harder for members of minority faiths to enter the job market.' No more. The decision in Groff enables Americans of all faiths to earn a living without checking their religious beliefs and practices at the door."[41]

VACCINES

COVID-19 highlighted a religious accommodation issue for consideration in the employment context.

The Fifth Circuit reviewed a case involving an employee who was terminated after the employee refused to be vaccinated due to both religious and non-religious motivations. The Court determined that the employee satisfied his summary judgment burden, finding that a reasonable jury could conclude the employee's refusal was driven by at least a combination of bona fide religious convictions, political beliefs, and personal preferences. The Court added that the salient inquiry was not whether his belief aligned with the Baptist faith, but whether, "in his own scheme of things, *[the] belief is religious*."[42]

In contrast, the Ninth Circuit found for an employer when an employee was denied an accommodation to a requirement that healthcare workers be vaccinated against COVID-19. The Court held that ultimately the employee's belief was personal and secular rather than religious, stating that Title VII protection is not limitless and does not extend to secular beliefs. The employee was a practicing Christian who believed her body to be a temple and believed introducing certain substances into her body was prohibited by the Bible. She also believed the vaccine contained harmful substances and had concluded fetal cell lines were used in vaccine development, which violated her beliefs on abortion. The Court rejected the argument that a general religious principle linked with personal, medical judgment was sufficient to state a claim and would unreasonably expand Title VII protections for beliefs.[43]

Finally, the Third Circuit addressed two policies of the Philadelphia District Attorney's Office and the denial of an employee's request for a religious accommodation regarding obtaining a vaccination. The Court held that the policies were generally applicable and remanded for fact development regarding the policy's neutrality under which the accommodation was denied. It is important to note that the policies exempted individuals at heightened risk of COVID-19 from receiving the vaccine, and the Court stated that a medical exemption did not alter the determination that the policies were generally applicable. The facts become complex, and the Court discusses several cases and many of the issues involved in religious accommodation in employment. An important takeaway from the Court's discussion was the Court's statement that "[t]he lesson of these cases is clear. When the government says that it cannot exempt religious exercise from a policy because doing so would undermine an important interest, but then exempts other groups or actions that undermine that same interest in the same way, its arbitrary distinction between religious and secular behavior raises an inference that it has targeted religious practice for distinctive treatment. But when a religious exemption would affect the government's interests in a different way or to a greater extent than another type of exemption, we draw no such inference."[44]

LAND USE

Similar to RFRA, the Religious Land Use and Institutionalized Persons Act (RLUIPA)[45] was passed in response to the decision by the Supreme Court that RFRA exceeded Congress's authority,[46] and it is also similar in its provisions, broadening the definition of religious exercise beyond that encompassed in the First Amendment and making the provisions specific to land use and institutionalized persons.

On March 19, 2024, the Department of Justice (Department) sent a comprehensive letter to state, county, and municipal officials nationwide, reminding them of their obligations under RLUIPA. Because the Department can investigate and enforce alleged RLUIPA violations, it is advisable that local counsel be aware of their positions.

The letter to the local leaders stated in part that:

1. Freedom to practice religion according to the dictates of one's conscience is a fundamental right
2. The Department steadfastly defends religious freedoms
3. RLUIPA's land use provisions provide several protections for places of worship, faith-based social service providers, and religious schools, as well as for individuals using land for religious purposes
4. RLUIPA provides for:
    - Protection against substantial burdens on religious exercise except where justified by a "compelling government interest" that is pursued using the least restrictive means
    - Protection against unequal treatment for religious assemblies and institutions, which must be treated at

The Alabama Religious Freedom Amendment (ARFA) closely mirrors the provisions of RFRA, with one significant distinction: ARFA consistently uses the term "burden" where RFRA uses "substantial burden." Considering ARFA was enacted after RFRA, the substitutions of "burden" in place of "substantial burden" make it evident the omission of "substantial" was intentional.

least as well as nonreligious assemblies and institutions
- Protection against religious or denominational discrimination
- Protection against the total exclusion of religious assemblies
- Protection against unreasonable limitation of religious assemblies

5. While the majority of RLUIPA cases involve places of worship, the "substantial burden" provision can also apply to an individual, and the remaining provisions apply to any religious "assembly or institution."

6. RLUIPA does not provide a blanket exemption from zoning or land use regulations, but it does have a number of safeguards that apply to places of worship, religious schools, religious camps, religious retreat centers, religious cemeteries, and religious social service facilities such as group homes, homeless shelters, and soup kitchens, as well as to individuals or families exercising their religion through the use of property, such as home prayer gatherings or Bible studies.[47]

Courts have addressed issues involving RLUIPA and land-use regulations, including the scope of zoning, the meaning of a substantial burden, and the effect of state statutes.

In considering water and sewer plan regulations in Prince George's County, the County argued that such regulations were not zoning and therefore did not contravene RLUIPA when the County denied Victory Temple's application to amend the regulations.[48] The Fourth Circuit stated the term zoning had the meaning provided in federal law, as opposed to each regulatory authority's decision as to what is included in zoning when determining whether RLUIPA has been violated, and despite how the regulation is labeled, it is the function of the regulation that determines whether RLUIPA applies or is violated. Although pinpointing the precise limitations of what zoning covers presents some difficulty, the Fourth Circuit cited the definition from Black's Law Dictionary (11th ed. 2019) and stated, "at its core [zoning] involves the division of a community into zones based on like land use."[49] Because the County's Water and Sewer Plan divided the subject area into categories that affected how the land could be used, the amendment to that plan sought by the applicant in this case constituted zoning. Additionally, because the County did not consider any alternatives to granting Victory Temple's application, the denial of the application failed to meet the strict scrutiny standard.[50]

The Eleventh Circuit discussed the meaning of the term "substantial burden" as used in RLUIPA. In that case, the congregants argued that relocation imposed a substantial burden because it would require them to walk farther to reach the synagogue, but the Court disagreed, holding that walking a few extra blocks was not a substantial burden. If it were, "cities would run the risk of impermissibly favoring religion over other secular institutions, or of favoring some religious faiths over others."[51] Substantial burden does not mean that a regulation must be so coercive or impose so much pressure as to result in a complete surrender of religious beliefs or a modification of behavior, but it must also impose more than an incidental burden on religious exercise.[52]

In a case with a state law provision similar to RFRA, landowners brought an action against the City of Mobile for denying their application to construct a Buddhist meditation and retreat center in a residential area. The Alabama Religious Freedom Amendment (ARFA) closely mirrors the provisions of RFRA, with one significant distinction: ARFA consistently uses the term "burden" where RFRA uses "substantial burden." Considering ARFA was enacted after RFRA, the substitutions of "burden" in place of "substantial burden" make it evident the omission of "substantial" was intentional. Pursuant to Alabama law, the Court's responsibility was to interpret ARFA's text precisely as written, and ARFA's language indicates that any burden is sufficient to invoke strict scrutiny; therefore, even an incidental or minimal burden meets the threshold for triggering strict scrutiny.[53] ARFA does not require a plaintiff to show that the government has "substantially" burdened religious exercise; it only requires that the government burdened it, so the state law was more restrictive than RFRA.

FINANCE & TAXES

Different levels and jurisdictions of government have provisions that exempt nonprofit religious organizations from various taxes. Wisconsin, for example, did not exempt the Catholic Charities Bureau (CCB) from paying unemployment taxes, even though other religious organizations were exempt. The U.S. Supreme Court overturned the Wisconsin Supreme Court, which had held against the CCB and determined the CCB's operations were secular in nature rather than being primarily for religious purposes because they did not serve only Catholics nor did they proselytize to non-Catholics. The United States Supreme Court held that denying a religious organization an otherwise available tax exemption because that organization does not meet the criteria for religious behavior violates the First Amendment.[54] The Court subjected the law to strict scrutiny because, as applied by the state, it gave denominational preference by distinguishing among religions based on theological choices made by an organization. It cited prior U.S. Supreme Court precedence by saying the Establishment Clause's "prohibition of denominational preferences is inextricably connected with the continuing vitality of the Free Exercise Clause,"[55] and an exemption provided only to organizations that engage in proselytization or serve only their denomination's constituents gives denominational preferential treatment, and the law was not able to pass strict scrutiny.

As with most subject areas involving the First Amendment, there are cases distinguishing the facts from the Wisconsin case and determining there is no constitutional violation such as: an exemption's applicability that is determined by the employee's work – for example, duties involving the core religious activities or a support function such as building maintenance;[56] a determination based only on the category or tax classification of the institutions provided for in a statute without considering whether its activities are secular in nature or lack religious purpose relative to other religions or denominations; and a state law providing greater protections than does the U.S. Constitution or RFRA by forbidding government actions that prohibit or limit any religious service with no preference to any religion or denomination.

GRANTS & PUBLIC BENEFITS

A district taxpayer filed suit challenging the right of a school board to reimburse parents of Catholic parochial school students for the use of public transportation to and from school, in the same manner as parents of public school students were reimbursed. The statute at issue allowed such reimbursement for any child to and from a school, including a nonpublic school, but excepted students from schools operated for profit. The State Court held the state legislature could not authorize such payment under the New Jersey State Constitution. The New Jersey Court of Errors and Appeals reversed, holding the practice was not in conflict with the State's constitution or the provisions of the Federal Constitution. The U.S. Supreme Court held the statute did not violate the First Amendment, stating the legislation did no more than provide a program that helped parents get their children to school. The Court compared this public welfare legislation to the provision of sewage disposal, police, and fire protection by cities and states, stating that the state could no more deprive religions than it could favor them, and so could not exclude individuals from public welfare benefits.[57]

The Supreme Court considered similar issues more recently involving Maine's tuition assistance program and its nonsectarian requirement, and in so doing, the Court relied on its previous holdings, reversed the First Circuit, and provided a good analysis and history of its two related previous decisions. It previously held that Missouri violated the Free Exercise Clause by offering grants to nonprofit organizations for cushioned playground surfaces, but denied those grants to religious entities.[58] Similarly, the Court previously held the Montana Constitution provision barring government aid to any school "controlled in whole or in part by any church, sect, or denomination" violated the Free Exercise Clause, stating that

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...First Amendment problems or challenges at the municipal level are likely more often inadvertent process failures rather than bad faith.

once Montana decided to subsidize private education, it could not disqualify religious private schools solely because they were religious."[59] The Court also held that Montana's interest in separating church and State was not a compelling interest and did not satisfy strict scrutiny.[60] In relying on these two previous decisions, the Court held Maine's "nonsectarian" requirement in the tuition assistance program violated the Free Exercise Clause of the First Amendment.[61]

CONTRACTING

The City of Philadelphia contracted with Catholic Social Services (CSS) for over fifty years as one of the City's private foster care agencies as part of the City's foster care system. The City conditioned CSS's participation on an agreement to comply with the City's requirements regarding who was eligible to adopt, rather than making that determination based on CSS's religious beliefs. The Court held the City could not end the foster-care placement contract with CSS on that basis, and the refusal to contract with CSS violated the Free Exercise Clause. The Court also determined the City's requirement was not generally applicable, that the pertinent question was not whether the City had a compelling interest that would support its position, but whether that interest supported denying an exception for CSS, and that if the City could achieve its interests without burdening religion, then it was required to do so.[62]

NON-DISCRIMINATION ORDINANCES

Some cities have ordinances that prohibit discrimination in various areas. Many times, these align with federal and state discrimination laws, but local governments must also keep in mind that, in creating, adopting, and enforcing these ordinances, they must also comply with the First Amendment and other religious freedom laws. The Supreme Court has held that in matters of church government, courts cannot interfere in employment matters involving important positions in a religious institution.[63] In a case where two teachers sued their schools under separate discrimination claims, the Court stated the circumstances under which the ministerial exception applied and, when the exception applied, that the Religion Clauses prohibited certain employment-discrimination claims against religious organizations.[64] The Court in this case cited the importance of avoiding judicial entanglement in religious issues, determined the teachers qualified for the ministerial exception, and held the "First Amendment's Religion Clauses foreclose the adjudication of [the employees'] discrimination claims."[65]

MUNICIPAL COURT

Like in courts in many other states, prosecutors and defendants in Texas municipal courts are provided with three preemptory challenges.[66] Prosecutors may want to consider, when exercising peremptory challenges or when questioning peremptory challenges made by a defendant, whether such challenges are based on religious beliefs. There are several lower court decisions that indicate such use of a preemptory challenge would violate Batson, which violates religious freedom and can result in a conviction being reversed.[67]

CONCLUSION

Religious freedoms are foundational rights provided by the U.S. Constitution, with challenges, interpretations, and applications that are varied, fact-specific, and complex, making them challenging to navigate as communities grow more numerous and diverse. Since First Amendment problems or challenges at the municipal level are likely more often inadvertent process failures rather than bad faith. It is the job of local attorneys to ensure, in advising their various departments, that they are intentional in both accomplishing the desired goals in governing their communities and respecting and protecting sincere religious expression without favoring any faith belief over others. ML

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NOTES:

[1]U.S. Const. amend I; Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993).
[2]*Lukumi* at 523-524, 531 (citing Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).
[3]Wright v. Honeywell Int'l, Inc., 148 F.4th 779 (5th Cir. 2025).
[4]Frazee v. Ill. Dep't of Emp't Sec., 489 U.S. 829, 833 (1989); Wisconsin v. Yoder, 406 U.S. 205, 215–216 (1972); but *see Wright at* 783–84 (5th Cir. 2025) (held in favor of an employee whose accommodation for a vaccine refusal was grounded on both religious and non-religious reasons).
[5]See United States v. Meyers, 906 F. Supp. 1494, 1502-03 (D. Wyo. 1995), aff'd, 95 F.3d 1475 (10th Cir. 1996); see also *Lukumi*, 508 U.S. at 531 (holding that religious beliefs are not required to be acceptable, logical, consistent, or comprehensible to others.)
[6]*Wright*, 148 F. 4th 779.
[7]*Lukumi*, 508 U.S. at 531.
[8]*Id*.
[9]*See* Locke v. Davey, 540 U.S. 712, 725 (2004); Tenafly Eruv Ass'n v. Borough of Tenafly, 309 F.3d 144, 165 (3d Cir. 2002).
[10]Tandon v. Newsom, 593 U.S. 61 (2021) (holding that state was not excused from explaining why it could not safely permit at-home worshipers to gather in larger numbers while using precautions used in secular activities).
[11]Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 526 (2022); Stormans, Inc. v. Wiesman, 794 F.3d 1064, 1075 (9th Cir. 2015).
[12]Ramirez v. Collier, 595 U.S. 411, 424, (2022).
[13]*Lukumi*, 508 U.S. at 546.
[14]Cent. Rabbinical Cong. of U.S. & Can. v. New York City Dep't of Health & Mental Hygiene, 763 F.3d 183 (2d Cir. 2014).
[15]*Ramirez,* 595 U.S. at 424; *see* Campos v. Coughlin, 854 F. Supp. 194, 204 (S.D.N.Y. 1994) (holding that the Act is of historical and legal significance because it reinstates the "compelling state interest" standard applicable to free exercise of religion claims previously eviscerated by the Supreme Court's decision in Emp. Div., Dept. of Human Res. of Or. v. Smith, 494 U.S. 872 (1990) (superseded by statute as stated in *Ramirez)*.
[16]*Smith,* 494 U.S. 872 (1990).
[17]Wisconsin v. Yoder, 406 U.S. 205 (1972).
[18]Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 694, 134 S. Ct. 2751, 2760, 189 L. Ed. 2d 675 (2014).
[19]Marsh v. Chambers, 463 U.S. 783 (1983).
[20]*Id*.
[21]*Id*. at 795.
[22]*Id*.(citing Panhandle Oil Co. v. Mississippi *ex rel.* Knox, 277 U.S. 218, 223 (1928) (Holmes, J., dissenting)).
[23]*Id*. at 792-794.
[24]Town of Greece, N.Y. v. Galloway, 572 U.S. 565 (2014) (relying on D. Currie, The Constitution in Congress: The Federalist Period 1789–1801, pp. 12–13 (1997)).
[25]*Greece,* 572 U.S. at 577.
[26]*Id*.
[27]*Id*. at 583.
[28]Lund v. Rowan Cnty., 863 F.3d 268, 272 (4th Cir. 2017).
[29]*Id*.
[30]Bormuth v. Cnty. of Jackson, 116 F. Supp. 3d 850, 854–55 (E.D. Mich. 2015), aff'd, 870 F.3d 494 (6th Cir. 2017); see *Greece*, 134 S.Ct. at 1824.
[31]*Id*.
[32]Am. Legion v. Am. Humanist Ass'n, 588 U.S. 29, 30 (2019).
[33]Van Orden v. Perry, 545 U.S. 677, 125 S. Ct. 2854, 162 L. Ed. 2d 607 (2005).
[34]Pleasant Grove City v. Summum, 555 U.S. 460 (2009).
[35]*Id*. at 479-480.
[36]42 U.S.C. §§ 2000e et seq.
[37]29 C.F.R. § 1605.1; *see* C.F.R. § T. 29, Subt. B, Ch. XIV, Pt. 1605, Refs & Annos.
[38]Groff v. DeJoy, 600 U.S. 447 (2023); *see* Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977).
[39]*Id*.
[40]E.E.O.C. v. Abercrombie & Fitch Stores, Inc., 575 U.S. 768, 775(2015).
[41]Hebrew v. Tex. Dep't of Crim. Just., 80 F.4th 717, 724–25 (5th Cir. 2023).
[42]*Wright*, at 783–84 (5th Cir. 2025) (citing Davis v. Fort Bend Cnty., 765 F.3d 480, 485 (5th Cir. 2014); Welsh v. United States, 398 U.S. 333, 339 (1970) (noting that, for Title VII, beliefs deemed religious "need not be confined in either source or content to traditional or parochial concepts of religion").
[43]Detwiler v. Mid-Columbia Med. Ctr., 156 F.4th 886, 890–91 (9th Cir. 2025).
[44]*Id*.
[45]Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §§ 2000cc–2000cc-5.
[46]City of Boerne v. Flores, 521 U.S. 507 (1997).
[47]https://www.justice.gov/d9/2024-03/2024_doj_letter_-_rluipa-final.pdf
[48]Redeemed Christian Church of God (Victory Temple) Bowie , Md. v. Prince George's Cnty., 17 F.4th 497, 500 (4th Cir. 2021).
[49]*Id*. (referencing 42 U.S.C. § 2000cc-5(5), relying on Fortress Bible Church v. Feiner, 694 F.3d 208, 216 (2d Cir. 2012) (citing City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 54-55(1986)).
[50]*Id*.
[51]Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1227 (11th Cir. 2004).
[52]*Id*.
[53]Thai Meditation Ass'n of Ala, Inc. v. City of Mobile, 980 F.3d 821, 831 (11th Cir. 2020).
[54]Catholic Charities Bureau, Inc. v. Wis. Lab. & Indus. Rev. Comm'n, 605 U.S. 238, 241 (2025).
[55]Larson v. Valente, 456 U.S. 228, 245 (1982).
[56]Gen. Conference of Seventh-Day Adventists v. Horton, 787 F. Supp. 3d 99, 126 (D. Md. 2025).
[57]Everson v. Bd. of Ed. of Ewing Twp., 330 U.S. 1, (1947).
[58]Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 U.S. 449 (2017).
[59]Espinoza v. Montana Dep't of Revenue, 591 U.S. 464 (2020).
[60]*Id*.
[61]Carson as next friend of O. C. v. Makin, 596 U.S. 767, 778 (2022).
[62]Fulton v. City of Philadelphia, 593 U.S. 522 (2021).
[63]Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 565 U.S. 171, 185 (2012).
[64]Our Lady of Guadalupe Sch. v. Morrissey-Berru, 591 U.S. 732, 733(2020).
[65]*Id*.
[66]Tex. Code Crim. Proc. Ann. art. 45A.159.
[67]*See* United States v. Brown, 352 F.3d 654 (2d Cir. 2003) (exercise of a peremptory strike due to a venire member's religious affiliation would violate Batson); United States v. DeJesus, 347 F.3d 500, 510 (3d Cir. 2003) (no violation of First Amendment as strikes were based on the jurors' heightened religious involvement rather than their religious affiliation); United States v. Stafford, 136 F.3d 1109 (7th Cir.), modified, 136 F.3d 1115 (7th Cir. 1998) (striking of juror on basis of religion did not amount to plain error, as constitutional status of peremptory challenges based on religion was unsettled). See also Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), holding modified by Powers v. Ohio, 499 U.S. 400, (1991); J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127 (1994) (intentional discrimination on the basis of gender by state actors in use of peremptory strikes in jury selection violates equal protection clause); Michigan Law Review Volume 94 Issue 1 1995 Religion-Based Peremptory Challenges After Batson v. Kentucky and J.E.B. v. Alabama: An Equal Protection and First Amendment Analysis, Benjamin Hoorn Barton.