Recent Establishment Clause / Free Exercise Developments

Prepared by Amanda Karras, IMLA Executive Director / General Counsel

***Kennedy v. Bremerton School District,* 142 S. Ct. 2407, 213 L. Ed. 2d 755 (2022)**

The Supreme Court held in a 6-3 decision in *Kennedy v. Bremerton School District* that a school district violated the First Amendment's Free Speech and Free Exercise Clauses when it terminated the employment of a high school football coach for refusing to curtail his practice of praying at the 50-yard line after football games with students. Significantly, the majority also overruled *Lemon v. Kurtzman,* 403 U.S. 602 (1971) and the Establishment Clause's "endorsement test," though it does so without explicitly saying so (calling it "long ago abandoned"). This case is important for local governments to understand the limits of the Establishment Clause.

Though the majority and dissent disagree on the facts (just as the parties did), they do agree that Joseph Kennedy lost his job as an assistant football coach after engaging in prayer activity during high school football games. That's about where their agreement ends.

The majority characterizes Mr. Kennedy as offering a "quiet prayer of thanks" at midfield and that when students asked if they could join him, he indicated it was a "free country." Eventually, most of the team would join the prayer and some of the opposing players might join as well. Mr. Kennedy would also offer motivational speeches with prayer and would also pray in the locker game pre- and post-game with the players. (The dissent includes pictures of what the prayer activity looked like and paints a different picture of the facts through those pictures).

The prayer activity went on for 7 years until someone informed the School District (the "District"), at which point the District, wary of an Establishment Clause violation, told Mr. Kennedy that the inspirational talks with prayer, prayer with students at mid-field, and the locker room prayer practice would all need to cease. Mr. Kennedy stopped the locker room prayer and inspirational speeches involving prayer, but wished to continue praying at midfield and told the District he planned to continue his "private religious expression" at mid-field. The District offered alternative accommodations as it did not want him praying with students, but Mr. Kennedy insisted on praying at mid-field. At three subsequent games, Mr. Kennedy prayed at mid-field with students and other members of the community joining him (and as the dissent pointed out, Mr. Kennedy had informed the media about his prayer activity which created significant challenges for the school, including the community members rushing the field and knocking over other students in the process and a Satanist group requesting access to the field for religious purposes). The District ultimately did not renew Mr. Kennedy's contract, citing concerns of the Establishment Clause and his continued prayer activity while on duty instead of supervising students.

Mr. Kennedy sued, claiming a Free Exercise and Free Speech violation. The District responded that his speech was not private speech under Garcetti and Pickering, and it therefore could subject him to discipline. The District also argued that it was risking an Establishment Clause

violation if it did not terminate his contract given his refusal to curtail his prayer activity on the field with students.

In a 6-3 decision divided on ideological lines authored by Justice Gorsuch, the Supreme Court concluded that the District violated both the Free Speech and Free Exercise Clauses of the First Amendment when it terminated Mr. Kennedy's contract based on his religious conduct / speech. In dismissing the employer's Establishment Clause concerns, the majority explained "in no world may a government entity's concerns about phantom constitutional violations justify actual violations of an individual's First Amendment rights."

In terms of the Free Exercise claim, the Court explained that in "forbidding Mr. Kennedy's brief prayer, the District failed to act pursuant to a neutral and generally applicable rule." Here, the rule was not generally applicable given that the religious conduct was prohibited while secular conduct that was comparable was not subject to discipline, including staff being allowed to make personal calls and visit with friends after the game. Nor was the rule neutral, given that it was specifically singling out religious conduct as the prohibited practice. Thus, the District's decision was subject to strict scrutiny, a standard which it could not survive (discussed more fully below).

As this is a public employment case, the Court analyzed the Free Speech claim under *Pickering v. Board of Ed.* and *Garcetti v. Ceballos*. The first step in the inquiry is to determine the nature of the speech at issue and whether the public employee is speaking "pursuant to [his or her] official duties." If so, an employer is generally allowed to control and discipline the public employee and the speech at issue is generally not protected under the Free Speech clause as it is considered the government's own speech.

The Court's focus was whether Mr. Kennedy's prayer occurred as a private citizen or whether it was government speech attributable to the District. The Court concluded Mr. Kennedy was speaking as a private citizen when he was engaged in the prayer that resulted in his suspension and that "he was not engaged in speech 'ordinarily within the scope' of his duties as a coach." On this point, the Court underscored: "He did not speak pursuant to government policy. He was not seeking to convey a government-created message. He was not instructing players, discussing strategy, encouraging better on-field performance, or engaged in any other speech the District paid him to produce as a coach." The fact that coaches were free to engage in other secular conduct during this time including checking their phones underscored that this was private speech. The Court rejected an overly broad reading of Garcetti, explaining employers cannot utilize "excessively broad job description[s] and treat "everything [employees] say in the workplace as government speech subject to government control."

Once the majority concluded that Mr. Kennedy was speaking as a private citizen, it indicated that strict scrutiny would apply (citing Reed v. Town of Gilbert, because this would be a content-based regulation of speech), again, a standard that the District could not meet. Though the Court noted that the District also could not meet a more lenient standard under Pickering-Garcetti.

The District argued that it could meet the strict scrutiny standard under both the Free Speech and Free Exercise Clause because it had a compelling interest in avoiding an Establishment Clause

violation, relying on Lemon's "reasonable observer" standard. The majority flatly rejected this argument, explaining that the Free Speech, Free Exercise, and Establishment Clauses should be read as "complementary" and are not at "warring" purposes.

Moreover, the majority held that the Supreme Court "long ago abandoned Lemon and its endorsement test offshoot." The Court explained that "[a]n Establishment Clause violation does not automatically follow whenever a public school or other government entity "fail[s] to censor" private religious speech… Nor does the Clause 'compel the government to purge from the public sphere' anything an objective observer could reasonably infer endorses or 'partakes of the religious.'" Instead of Lemon, the majority explains that the Establishment Clause must be interpreted "by reference to historical practices and understandings," which will allow courts to "faithfully reflect the understanding of the Founding Fathers." (This was the test endorsed in Town of Greece and American Legion in the context of legislative prayer and monuments).

Justice Sotomayor, joined by Justices Breyer and Kagan dissented. As noted above, the dissent disagreed with the majority on not just the law, but the facts as well, arguing that the majority had "misconstrue[d] the facts." The dissent explains that:

> Properly understood, this case is not about the limits on an individual's ability to engage in private prayer at work. This case is about whether a school district is required to allow one of its employees to incorporate a public, communicative display of the employee's personal religious beliefs into a school event, where that display is recognizable as part of a longstanding practice of the employee ministering religion to students as the public watched. A school district is not required to permit such conduct; in fact, the Establishment Clause prohibits it from doing so.

The dissent accuses the majority of "paying almost exclusive attention to the Free Exercise Clause's protection for individual religious exercise while giving short shrift to the Establishment Clause's prohibition on state establishment of religion." The dissent also accuses the majority of overruling Lemon and calling into question "decades of subsequent precedents." On this point, the dissent explains: "The Court now says for the first time that endorsement simply does not matter, and completely repudiates the test established in *Lemon*… Both of these moves are erroneous and, despite the Court's assurances, novel."

Shurtleff v. City of Boston, 142 S. Ct. 1583 (2022)

In a unanimous decision in *Shurtleff v. Boston*, the Supreme Court held that Boston violated the First Amendment by refusing to fly a Christian flag in front of City Hall when it had approved hundreds of other third-party flags over the years prior to this one and never rejected one until now. This case centered on whether Boston was engaging in government speech or whether it had (inadvertently) created a public forum for private speech, whereby refusing to fly a flag because it is religious in nature would amount to viewpoint discrimination. Although Boston lost, the decision was not a blow to the government speech doctrine and it provides guidance to local governments, so it will likely prove helpful to local governments in crafting policies related to third party programs like the one at issue in this case. That said, governments should be careful to avoid religious discrimination in creating public forums. Relying on *Lemon* and the

endorsement test under the Establishment Clause will not be allowable for governments going forward if they deny religious speakers opportunities to participate in public forums.

Boston owns three flagpoles in front of City Hall. Boston flies the United States and the POW/MIA flag on one flagpole, the Commonwealth of Massachusetts flag on the second flagpole, and its own flag on the third flagpole. Third parties may request to fly their flag instead of the City's flag in connection with an event taking place near the flagpoles. Over a 12-year period, the City approved 284 flag-raising events and until the Camp Constitution request, never rejected one.

Camp Constitution asked the City to fly its Christian flag while it held an event near the flag. The City refused its requests, explaining that "the City's policy was to refrain respectfully from flying non-secular third-party flags in accordance with the First Amendment's prohibition of government establishment of religion."

Although the Camp Constitution request was the first it ever rejected, it was also the first request made by a religious organization to fly a flag at City Hall. Broadly speaking, the third-party flags that the City approved were for "the flags of other countries, civic organizations, or secular causes." Shortly after litigation commenced, Boston memorialized its policy to comport with its past practices.

Camp Constitution sued the City and the First Circuit held that the City was engaging in government speech when it flew third-party flags in front of City Hall and it therefore did not violate the First Amendment.

In a 6-3 opinion authored by Justice Breyer, the Supreme Court reversed, concluding that after balancing several factors, Boston was not engaging in government speech, and it therefore abridged Camp Constitution's freedom of speech by refusing to let it fly its flag based on religious viewpoint. The majority underscored the importance of the government speech doctrine: that a government is free to speak for itself, to formulate policies, and implement programs. And when it does so, "the First Amendment does not demand airtime for all views" as government would be unable to function otherwise. The crucial question then, was whether this was government speech.

The majority explained whether a government is engaged in its own speech can be difficult to determine where "a government invites the people to participate in a program." In these circumstances to determine if a message is government speech, the majority provided a "holistic inquiry," which looks to "the history of the expression at issue; the public's likely perception as to who (the government or private person) is speaking; and the extent to which the government has actively shaped or controlled the expression."

Although the first factor (history) favored Boston, the Court found that the second factor, whether the public would tend to view the speech as Boston's as being inclusive. However, on the issue of whether Boston controlled the message, the Court found the answer was "not at all" and ultimately concluded this factor was "the most salient feature of the case." Here the Court pointed to the fact that although Boston may have endorsed some messages associated with

certain flags like the Pride Flag, a local credit union flag's connection to the city was "more difficult to discern." Furthermore, the Court found the City had no policy (until after litigation commenced) on how to decide which flags it would fly and the City exercised no control over the flag raisings.

The Court also explained that if a local government wishes to speak for itself when it creates a program like Boston did here that involves third party speech they can "easily" do so. The Court helpfully pointed to the City of San Jose as an example, which provides in writing that its "'flagpoles are not intended to serve as a forum for free expression by the public,'" and lists approved flags that may be flown "'as an expression of the City's official sentiments.'" While the Court ultimately found Boston had not engaged in government speech in this case, it concluded by noting that nothing prevents the City from changing its policies going forward.

Chief Justice Roberts, Justice Sotomayor, Justice Kagan, Justice Kavanaugh, and Justice Barrett joined Justice Breyer's opinion. Justice Kavanaugh authored a concurrence to note that the Court has "repeatedly made clear" that," a government does not violate the Establishment Clause merely because it treats religious persons, organizations, and speech equally with secular persons, organizations…"

Justice Alito authored a concurrence in the judgment only, which Justices Thomas and Gorsuch joined. Justice Alito agreed that Boston should lose the case, but did not agree with the majority's rationale to rely on factors to determine if a message is government speech. Under his approach, "government speech occurs if – but only if – a government purposefully expresses a message of its own through persons authorized to speak on its behalf, and in doing so, does not rely on a means that abridges private speech."

Justice Gorsuch authored a separate concurrence in the judgment only, which was joined by Justice Thomas and criticized the *Lemon* test (which was not invoked by the majority). Of course, later in the term, Justice Gorsuch authored the majority opinion in the *Kennedy* decision (discussed above) which "abandoned" the *Lemon* test.

The decision is overall favorable to local governments on the government speech front. First, the decision did not erode the government speech doctrine. Second, it provided some guidance as to how local governments can avoid inadvertently creating a public forum (by for example, adopting the San Jose method of utilizing third party participation in government speech). That said, the decision also provides further evidence that courts will be skeptical of claims by government that they cannot allow religious entities or individuals to participate in government programs or speech due to potential Establishment Clause violations. Governments must understand the limits of the Establishment Clause in training their staff in order to avoid Free Exercise or Free Speech violations.

***Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 204 L. Ed. 2d 452 (2019)**

In a 7-2 opinion authored by Justice Alito, the Supreme Court held that the government did not violate the Establishment Clause by acquiring and maintaining a 40-foot tall cross which was erected over 90 years ago as a World War I memorial. In this case, historical context mattered, and the Court explained "retaining established religiously expressive monuments…is quite different from erecting or adopting new ones. The passage of time gives rise to a strong presumption of constitutionality."

In 1925, the American Legion and a group of bereaved mothers erected a memorial to honor the 49 residents of Prince George's County, Maryland, who perished in World War I. To evoke the grave markers on the battlefields in Europe, the memorial bears the shape of a cross. The cross is 40 feet tall and a large plaque affixed to the memorial dedicates it to and lists the names of the 49 county residents who fell in World War I. The sides of the memorial are inscribed with the words "valor," "endurance," "courage," and "devotion." The memorial is situated in Veterans Memorial Park, which also contains monuments to the War of 1812, World War II, the attack on Pearl Harbor, the Korean and Vietnam wars, and the events of September 11, 2001. The WWI memorial / cross is by far the largest memorial in the park.

In 1961, the Maryland-National Capital Park and Planning Commission acquired the memorial and the roadway median on which it sits due to traffic safety concerns arising from the placement of the Cross in the middle of a busy intersection. From that date until present, the Commission has expended $117,000 in costs associated with maintenance and repair of the memorial.

In 2014, the American Humanist Association and three individuals filed suit against the Maryland-National Capital Park and Planning Commission. They argued that, because of its cross shape, the memorial constitutes an unconstitutional endorsement of Christianity. The Fourth Circuit agreed, finding that under *Lemon v. Kurtzman*, the cross violated the Establishment Clause as its primary / principal effect was endorsing Christianity and because it represented excessive entanglement between the government and religion.

The Supreme Court reversed, explaining that "four considerations show that retaining established, religiously expressive monuments, symbols, and practices is quite different from erecting or adopting new ones" and that "the passage of time gives rise to a strong presumption of constitutionality." These four considerations are: 1) where monuments / symbols were established a long time ago, it is especially difficult to identify their original purpose; 2) the purpose associated with an older monument or symbol can have multiple meanings; 3) the meaning behind these monuments may change over time and something that may have had an originally religious meaning can now have a secular or historical one, for example, the names of many cities and towns throughout the United States; and 4) as these monuments gain historical and secular significance, removing them may not appear religiously neutral, particularly to the local community. Indeed, on this score, the Court noted that "a campaign to obliterate items with religious associations may evidence hostility to religion even if those religious associations are no longer in the forefront." The Court explains that the "role of the cross in World War I memorials is illustrative of each of [these] considerations."

Although the Court did not explicitly overrule *Lemon*, it refused to apply the test. Citing to *Marsh* and *Town of Greece,* the Court explained "[w]hile the Lemon Court ambitiously attempted to find a grand unified theory of the Establishment Clause, in later cases we have taken a more modest approach that focuses on the particular issue at hand and looks to history for guidance." Applying its analysis to the cross at hand, the Court concluded it did not violate the Establishment Clause. The cross carries a "special significance commemorating World War I" and with the passage of time, it has also acquired historical importance, according to the Court. Further, there was no evidence that monument was intended to disrespect other religions by for example, excluding Jewish soldiers. And, according to the majority, it had to matter that the monument was commemorating the death of particular individuals.

The decision involved a number of different opinions and Justice Alito's majority garnered five votes for most of the opinion (Justice Kagan did not sign on to the portion that was extremely critical of *Lemon*). Justice Breyer wrote a concurring opinion that Justice Kagan joined, explaining that for them, "[t]his case would be different…if the Cross had been erected only recently, rather than in the aftermath of World War I." In the concurrence, Justice Breyer indicates he does not believe the Court is adopting a "history and traditions test that would permit any newly constructed religious memorial on public land." This is an important qualification because without Justice Breyer and Justice Kagan, the Court lacked a majority (Justices Thomas and Gorsuch concurred in the judgment only). Justice Breyer explains that the Court in this case "look[ed] to history for guidance… but it upholds the constitutionality of the Peace Cross only after considering its particular historical context and its long-held place in the community." And, according to Justice Breyer, "[a] newer memorial, erected under different circumstances, would not necessarily be permissible under this approach." In his concurrence, Justice Kavanaugh seems to disagree with Justice Breyer, noting that the Court has adopted a "history and traditions test." That said, the change in composition of the Court coupled with the Court's adoption of "history and traditions tests" in other contexts, makes it likely that the Court would approach a newer monument with a history and traditions test as well. *See New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2130, 213 L. Ed. 2d 387 (2022) (adopting a history and tradition test to determine the constitutionality of gun regulations and citing to this case for the proposition that "when a litigant claims a violation of his rights under the Establishment Clause, Members of this Court "loo[k] to history for guidance.")

***Carson v. Makin,* 142 S. Ct. 1987 (2022)**

In *Carson v. Makin* the U.S. Supreme Court held 6-3 that Maine's refusal to provide tuition assistance payments to "sectarian" schools violates the First Amendment's Free Exercise Clause. Maine's constitution and statutes require that students receive a free public education. Fewer than half of Maine's school administrative units (SAUs) operate their own public secondary schools. If those SAUs don't contract with a particular public or private school, they must "pay the tuition . . . at the public school or the approved private school of the parent's choice." To be approved a private school must be "nonsectarian." Two sets of Maine parents argued that the religious schools where they send or want to send their children can't be disqualified from

receiving state tuition payments because they are religious. In an opinion written by Chief Justice Roberts the U.S. Supreme Court agreed. The Court began its analysis by noting that "we have repeatedly held that a State violates the Free Exercise Clause when it excludes religious observers from otherwise available public benefits." The Court then concluded that the "unremarkable" principles applied in two recent U.S. Supreme Court cases "suffice to resolve this case." In *Trinity Lutheran Church of Columbia v. Comer* (2017) the lower court held Trinity Lutheran Church's preschool wasn't allowed to receive a state playground resurfacing grant because it was operated by a church. The Supreme Court reversed holding the Free Exercise Clause did not permit Missouri to "expressly discriminate[] against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character." In *Espinoza v. Montana Department of Revenue* (2020) the Montana Supreme Court held that to the extent a Montana program providing tax credits to donors who sponsored private school tuition scholarships included religious schools, it violated a provision of the Montana Constitution which barred government aid to religious schools. The U.S. Supreme Court reversed stating: "A State need not subsidize private education. But once a State decides to do so, it cannot disqualify some private schools solely because they are religious." The U.S. Supreme Court opined that the facts of this case are very similar to those in *Trinity Lutheran* and *Espinoza*: "Just like the wide range of nonprofit organizations eligible to receive playground resurfacing grants in *Trinity Lutheran*, a wide range of private schools are eligible to receive Maine tuition assistance payments here. And like the daycare center in Trinity Lutheran, [the religious schools at issue in this case] are disqualified from this generally available benefit "solely because of their religious character." The U.S. Supreme Court concluded Maine's exclusion of religious schools doesn't comply with strict scrutiny because "a neutral benefit program in which public funds flow to religious organizations through the independent choices of private benefit recipients does not offend the Establishment Clause."

***Espinoza v. Montana Department of Revenue,* 140 S. Ct. 2246 (2020)**

In this case, the Supreme Court held 5-4 that the U.S. Constitution's Free Exercise Clause allows families to receive tax-credit funded scholarships to attend religious schools regardless of the Montana Constitution's no-aid to sectarian schools provision. The Montana legislature established a program offering tax credits for donations to "student scholarship organization," which give children scholarships to attend private schools, including religious schools. The Montana Department of Revenue adopted a rule disallowing the use of scholarships at religious schools based on the Montana Constitution which prohibits state aid to sectarian schools. The Montana Supreme Court struck down the entire scholarship program holding that it violated the Montana constitution. The U.S. Supreme Court, in an opinion written by Chief Justice Roberts, assumed that the Montana Constitution bars religious schools from participating in the scholarship program. The Court held that the U.S. Constitution's Free Exercise Clause allows religious schools to participate in the program; and that per the U.S. Constitution's Supremacy Clause the Free Exercise Clause trumps the Montana Constitution. Applying the reasoning of *Trinity Lutheran* to this case, the Court opined: "Here too Montana's no-aid provision bars religious schools from public benefits solely because of the religious character of the schools. The provision also bars parents who wish to send their children to a religious school from those

same benefits, again solely because of the religious character of the school." Applying strict scrutiny to Montana's no-aid provision, the Court rejected the Montana Supreme Court's argument that the state's interest in separating church and state "more fiercely" than the federal Constitution is a compelling interest. The Court also rejected the Montana Department of Revenue's arguments that the no-aid provision passes strict scrutiny because it promotes religious freedom and "advances Montana's interests in public education."

***Trinity Lutheran Church of Columbia, Inc. v. Comer,* 137 S. Ct. 2012 (2017)**

In this case, the Supreme Court held 7-2 that Missouri violated Trinity Lutheran Church's free exercise of religion rights when it refused, on the basis of religion, to award the Church a grant to resurface its playground with recycled tires. Trinity's preschool ranked fifth among 44 applicants to receive a grant from Missouri's Scrap Tire Program. Missouri's Department of Natural Resources (DNR) informed the preschool it didn't receive a grant because Missouri's constitution prohibits public funds from being used "directly or indirectly, in aid of any church, sect, or denomination of religion." Trinity sued the DNR claiming it violated the Church's First Amendment free exercise of religion rights. The Supreme Court sided with the church. As the policy expressly discriminated against otherwise eligible recipients on the basis of religion, the Court reached the "unremarkable" conclusion that it must be able to withstand "the most exacting scrutiny." It did not because the DNR "offers nothing more than Missouri's policy preference for skating as far as possible from religious establishment concerns."

***Fulton v. City of Philadelphia,* 141 S.Ct. 1868 (2020)**

In this case, the Supreme Court ruled in favor of Catholic Social Services (CSS) in its free exercise challenge to the City of Philadelphia's contract requirement that CSS agree to certify same-sex couples as potential foster parents in order to comply with the City's antidiscrimination laws and policies. The unanimous decision masked deeper divisions on the Court on the bigger issues and while the decision was technically a loss for the City, the decision was narrow and local governments dodged the bigger looming issue in the case when the Court declined to overrule *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U. S. 872 (1990).

Philadelphia contracted with outside agencies like CSS to place children who could not remain in their homes with foster families. CSS had a contract with the City for the placement of foster children for over 50 years. CSS would not certify same-sex couples as potential foster parents because of its religious views on marriage. In 2018, the City learned that CSS would not consider same-sex couples as prospective foster parents and informed CSS that such a refusal violated the nondiscrimination provision in the parties' contract as well as the City's Fair Practices Ordinance (FPO), which forbids discrimination because of sexual orientation in places of public accommodation.

Section 3.21 of the contract prohibits CSS from rejecting a child or family on the basis of protected characteristics, including sexual orientation "unless an exception is granted by the

Commissioner … in his/her sole discretion." The City's FPO forbids "deny[ing] or interfer[ing] with the public accommodations opportunities of an individual or otherwise discriminat[ing] based on his or her race, ethnicity, color, sex, sexual orientation, . . . disability, marital status, familial status," or several other protected categories. Phila. Code §9–1106(1) (2016).

When the City ceased referring foster children to CSS because CSS refused to certify same-sex couples as foster parents, CSS sued, arguing that the City was violating CSS's free exercise rights under the First Amendment.

By way of background, over 30 years ago, *Smith* held that neutral laws of general applicability that incidentally burden religion are not ordinarily subject to strict scrutiny under the First Amendment. The Third Circuit relied on *Smith* and concluded that the City was enforcing a neutral law of general applicability and therefore if CSS wished to continue working as a foster care agency for the City, it needed to comply with the City's anti-discrimination requirements.

In a decision authored by the Chief Justice, the Supreme Court reversed, concluding that Section 3.21 of the City's contract was not generally applicable under *Smith* because it allows for exemptions in the discretion of the Commission and the City therefore needed to meet heightened scrutiny for the requirement to survive, which it could not. Although CSS argued that the Court should overrule *Smith* (and as discussed below, three Justices agreed), the Court declined to do so, concluding that the case fell outside of *Smith's* parameters of general applicability. And under *Smith,* if a State or local government "has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reasons." The Court concluded that because of the ability to provide exemptions, the contract contained no generally applicable non-discrimination requirement. The Court also rejected the City's arguments that the non-discrimination provision is generally applicable because the City has never granted an exemption because it is the creation of the policy to provide exceptions that renders it not generally applicable not whether the exceptions were granted.

In terms of the City's Fair Practices Ordinance, which also prohibits discrimination on the basis of sexual orientation, the Court concluded that the ordinance does not apply to CSS "because foster care agencies are not acting as public accommodations in performing certifications." That is because a public accommodation must "provide a benefit to the general public allowing individual members of the general public to avail themselves of that benefit if they so desire" and "[c]ertification as a foster parent… is not readily accessible to the public" unlike, for example, hotels, restaurants, and pools.

Once the Court determined that the City's anti-discrimination policies in this case fell outside of *Smith*, the Court next weighed whether the policy could survive strict scrutiny under *Church of Lukumi Babalu Aye, Inc. v. Hialeah,* 508 U. S. 520 (1993). Under this rubric, a government policy / regulation can only survive strict scrutiny if it advances "interests of the highest order and is narrowly tailored to achieve those interests." (internal quotations omitted).

The City argued its non-discrimination policy should survive strict scrutiny as it serves three compelling interests: "maximizing the number of foster parents, protecting the City from

liability, and ensuring equal treatment of prospective foster parents and foster children." The Court outright rejected the first two reasons proffered because denying CSS the ability to serve as a foster agency might reduce the number of foster parents and the City's liability concern was only speculative. As to ensuring equal treatment for gay and lesbian foster parents, the Court agreed this is a "weighty" interest, but it stressed on the facts of this case where the ability to provide exemptions in the contract exists, that interest could not justify refusing to provide an exception to CSS to accommodate its religious beliefs.

The Chief Justice was joined by Justices Breyer, Sotomayor, Kagan, Kavanaugh, and Barrett in the majority.

Justice Barrett filed a concurring opinion which Justices Kavanaugh and Breyer joined (the latter except to the first paragraph), which questioned the workability of overruling *Smith* and similarly questioned what would replace *Smith* if the Court decides to overrule it. In Justice Barrett's view, because nine Justices could agree that in this case the City could not satisfy strict scrutiny, she saw no reason to tackle the thornier issue of overruling *Smith* though she did seem to leave open that possibility in another case.

Justice Alito, who was joined by Justices Thomas and Gorsuch issued a vociferous (and lengthy) concurrence in the judgment only, indicating they would overrule *Smith* given its "severe holding" and that its interpretation can result in "startling consequences." Justice Alito chides the majority, stating its "decision might as well be written on the dissolving paper sold in magic shops." This is because, according to Justice Alito, the City can easily sidestep today's decision by eliminating "the never-used exemption power.21 [and i]f it does that, then, voilà, today's decision will vanish—and the parties will be back where they started. The City will claim that it is protected by Smith; CSS will argue that Smith should be overruled." Justice Alito concludes by noting "t]hose who count on this Court to stand up for the First Amendment have every right to be disappointed—as am I."

***Tandon v. Newsom,* 141 S.Ct. 1294 (2021)**

This case was issued from the Court's so-called "shadow docket" (i.e., the emergency orders list). In a short per-curiam decision the Supreme Court indicated that laws are not neutral and generally applicable under *Employment Division v. Smith* when "they treat *any* comparable secular activity more favorably than religious exercise." In this case, the State of California had limited all gatherings in homes to no more than three household due to the COVID-19 pandemic regardless of whether the gatherings were for religious or secular purposes. In finding the regulation was not neutral and generally applicable, the per curiam decision compared at home religious gatherings of more than three households to hair salons, retail stores, and indoor restaurants, all of which allowed more than three households in the same room at the same time. The decision explained that to determine whether an activity is comparable under the Free Exercise Clause, one looks to the "asserted government interest that justifies the regulation" and here, because the secular activities the State allowed did not pose a lesser risk to the transmission of COVID-19, the State was impermissibly burdening the petitioner's free exercise rights.

***303 Creative v. Elenis,* No. 21-476 (pending)**

The Supreme Court has granted certiorari in this case to tackle an issue that has twice eluded it in recent terms in *Masterpiece Cakeshop v. Colorado Civil Rights Commission* and in *Fulton v. City of Philadelphia.* This case pertains to whether someone who sells their goods to the public can be exempted from a public accommodation law prohibiting discrimination based on their claim of free speech (they also had a free exercise claim but the Supreme Court did not grant certiorari on that question).

Lorie Smith designs websites for her company 303 Creative. She wants to start creating wedding websites, but she does not want to create websites that celebrate same-sex marriage due to her religious beliefs. She also wants to publish a statement on her website that she will not create wedding websites for same-sex couples as doing so would compromise her religious beliefs.

Colorado's Anti-Discrimination Act's (CADA) "accommodation clause" prohibits public accommodations from refusing to provide services based on a number of protected characteristics, including sexual orientation. CADA's "communication clause" prevents public accommodations from communicating that someone's patronage is unwelcome because of sexual orientation.

The Tenth Circuit ruled that Colorado's statute that requires Smith to create websites for same-sex marriages and prohibits her from publishing a statement explaining why doing so violates her religious beliefs does not violate the First Amendment's free speech or free exercise clauses.

Regarding free speech and the "accommodations clause" of CADA, the Tenth Circuit concluded the clause compels speech and is a content-based restriction, but that it is nevertheless constitutional and survives strict scrutiny. The court reasoned that the "accommodation clause" is "narrowly tailored to Colorado's interest in ensuring 'equal access to publicly available goods and services.'" The Tenth Circuit also concluded the "communication clause" did not violate Smith's free speech rights because, the court reasoned, the State could "prohibit speech that promotes unlawful activity, including discrimination."

The Tenth Circuit also concluded that CADA did not violate the free exercise clause, but the Supreme Court did not grant certiorari on this issue and that issue is therefore not before the Court.

The Supreme Court accepted certiorari on the following 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. The Court will hear oral argument this term and will issue a decision before the end of June 2023.