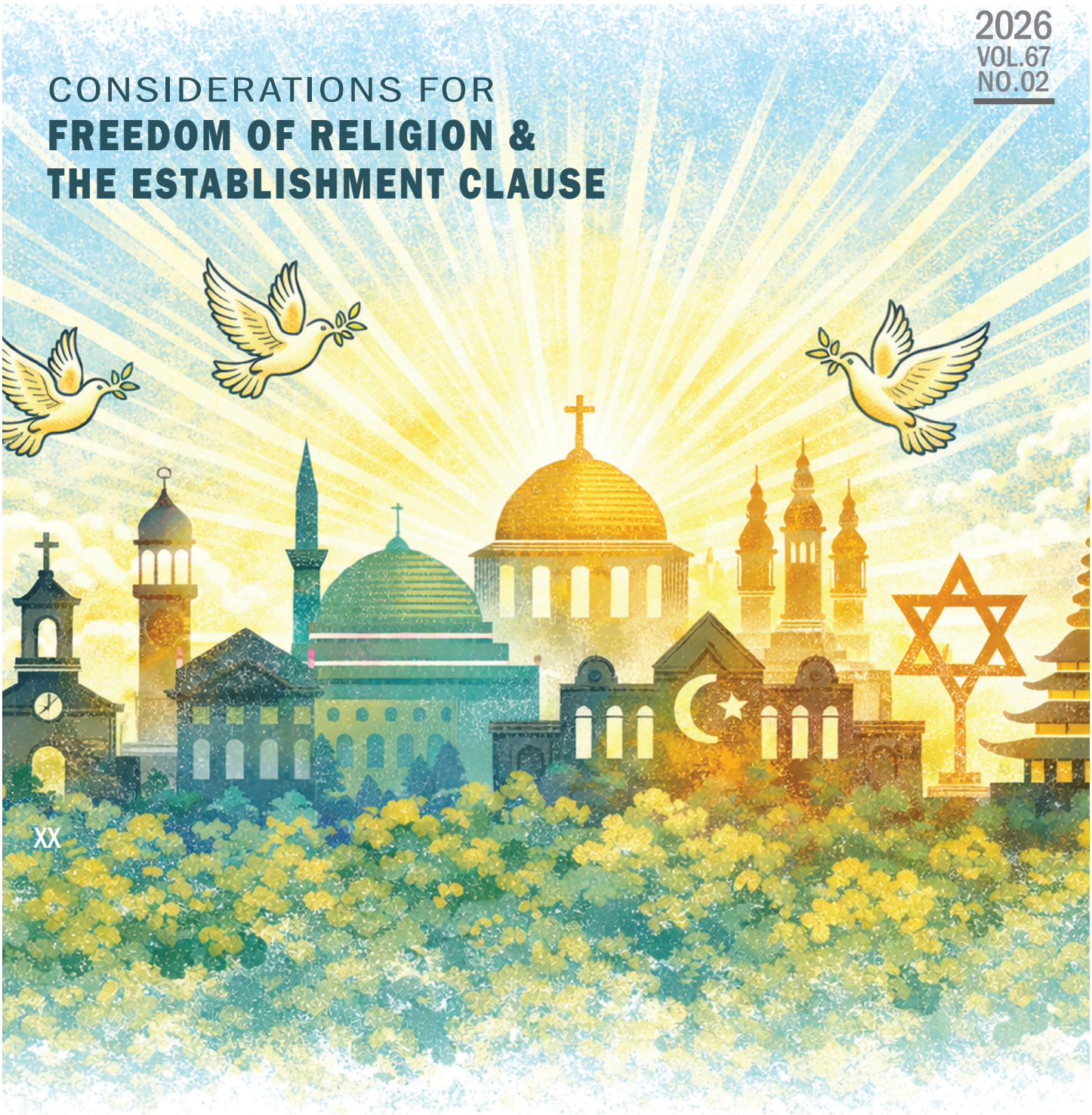
IMLA

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CONSIDERATIONS FOR FREEDOM OF RELIGION & THE ESTABLISHMENT CLAUSE



XX



2026 Mid-Year Seminar
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LETTER FROM THE PRESIDENT

By Susana Alcala Wood
City Attorney, San Jose, California

Expanding Roles (*capes optional*)

Colleagues,

As I sit to write this letter at my home in Northern California after a long week at my day job, I hope I can share something of value with this group that has given me so much. While there are many subjects that are worthy, at this moment the thought most front and center on my mind is the experiences of our colleagues in the twin cities of Minneapolis and St. Paul and Hennepin County that were shared with us in our various working group calls over the last month where they discussed the myriad challenges, both legal and operational that came with suddenly becoming the face of one of the most difficult chapters of our nation. One day, these attorneys are drafting contracts and advising clients on land-use matters – and the next day, they are rapidly addressing urgent legal questions to curtail the surge of federal immigration officers in their neighborhoods. Hearing those colleagues relate their experiences, understanding that they were working countless hours alongside all of the city and county officials to address the crisis, and knowing that they were also having to set aside the personal effect the events were having on them so that they could diligently help their clients – made me want to drop everything I was doing, show up at their offices and offer whatever services a city attorney not licensed in Minnesota could offer. I know we all felt the same.

When we describe what a local government lawyer does, it's easy to list our role and responsibilities. While we have ethical and professional responsibilities to the public as a whole, our client is the public entity itself, not the residents or businesses that rely on it for services within our respective local government agencies. In the day-to-day work of public entity attorneys, we focus on advancing and protecting the entity's legal interests. It's hard, complex, and often relentless work – but those are roles we know well. But serving on the front lines of what public commentators have called the 'rebel alliance'?* Or providing the "legal firewall" responding to rapidly evolving federal policies and actions? Not roles that we ever sought – yet in multiple news and media articles, that is exactly how many of the legal efforts of local government attorneys have been portrayed. As communities across the country demanded that their local government officials respond to federal matters, municipal legal officers found themselves thrust into increasingly expanded roles, having to quickly advise local elected officials on legal courses of action, draft ordinances to strengthen local control and utilize zoning, land use and existing laws to ensure that local elected bodies retain the authority to make decisions in the best interest of their communities. And of course, many jurisdictions filed multiple lawsuits challenging the constitutionality of federal orders, threats to local funding, and other actions that sought to attach unrelated political priorities — such as immigration enforcement or policy compliance — to life-saving funds meant for fire departments, transit safety, and disaster response. And yes, now those lawsuits also include actions seeking to prevent the deployment of federal troops in our cities and counties.

While courts will ultimately decide many of these cases, whether we sought it or not, the role of local government attorneys now includes being front-line defenders of local autonomy and priorities. Or perhaps that's always been our role, and we've just kept our capes securely tucked in our suits.

In the meantime, we have some excellent articles for everyone in this issue. An important article on the current state of the law defending religious freedoms and a timely discussion of the status of the *Pung v. Isabella County* case, which was just argued last week. What's at stake is billions of dollars in property taxes collected by public entities that fund everything from parks and playgrounds to law enforcement and hospitals. Very timely information to help keep you abreast of the impactful issues facing our clients.

Take care, and May the Force be with us all,

Susana Alcala Wood
City Attorney
San Jose, California

*The author is a lifelong *Star Wars* fan



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LETTER FROM THE EXECUTIVE EDITOR

By Amanda Karras
IMLA Executive Director
Rockville, Maryland

Advancing Local Government Law

As a membership organization, everything IMLA does is guided by one goal: providing value to local government attorneys. Many of those benefits are highly visible, such as low-cost CLE programs—both virtual and in person—and our numerous working groups addressing emerging legal issues, including federal funding, immigration, homelessness, DEI, technology, code enforcement, police advisory issues, and affirmative litigation.

Other benefits are less visible but equally important to local governments nationwide. Chief among these is IMLA's legal advocacy program.

Each year, IMLA files approximately 30–40 amicus briefs in support of our members and local government positions before the U.S. Supreme Court and state and federal appellate courts. While a particular jurisdiction may benefit directly from IMLA's participation in a particular case, all members benefit from advocacy that helps shape local government law nationally.

For example, last year, IMLA filed an amicus brief in *Bauer v. Marks* in support of the City of Minneapolis' petition for certiorari before the U.S. Supreme Court. The case arose after the Eighth Circuit denied qualified immunity to a police officer who used less-than-lethal force during a riot following the murder of George Floyd. The incident unfolded in seconds under highly volatile circumstances, after another officer's baton had been taken by a rioter moments earlier.

The Eighth Circuit concluded that qualified immunity was unavailable because its precedent clearly established that an officer may not use deadly force against an individual "who previously posed a threat to others, but no longer presents an immediate threat."

The Supreme Court subsequently granted, vacated, and remanded the case in light of *Barnes v. Felix*. In *Barnes*, the Court rejected the so-called "moment of threat" doctrine, which provided that any actions leading up to the moment of threat were not relevant to the analysis and reaffirmed that Fourth Amendment use-of-force claims must be evaluated under the totality of the circumstances, not based solely on the precise instant force was used.

By issuing a GVR in *Bauer*, the Court signaled that the Eighth Circuit's analysis may have failed to consider that broader context. Although IMLA's advocacy directly supported Minneapolis, the Court's action provides important nationwide guidance for local governments litigating Section 1983 cases. As *Bauer* demonstrates, the totality-of-the-circumstances framework can operate in ways that meaningfully support local government defendants.

In this issue of Municipal Lawyer, Erich Eiselt, IMLA's Director of Legal Advocacy, discusses another significant amicus brief filed through our partnership with the Local Government Legal Center in *Pung v. Isabella County*, a case involving the Takings and Excessive Fines Clauses. This may be the most consequential local government case before the Supreme Court this term—and potentially in years. IMLA's brief advances critical arguments supporting the county and addresses claims that could fundamentally alter longstanding tax-sale systems nationwide. As noted during oral argument, adoption of the petitioner's position could effectively end tax sales as they currently exist in many jurisdictions. (*To learn more, please see Erich's article on p. 22*)

When IMLA files amicus briefs, we are not simply supporting one member—we are advancing the legal framework upon which all local governments rely. These efforts are possible only because of the continued support of our members.

As budgets tighten across jurisdictions, we are especially grateful for the trust you place in IMLA. When considering the value of your membership, we hope you will also remember these less visible—but deeply consequential—advocacy efforts that help strengthen the practice of local government law nationwide.

Warm regards,
Amanda Karras
Executive Director, IMLA

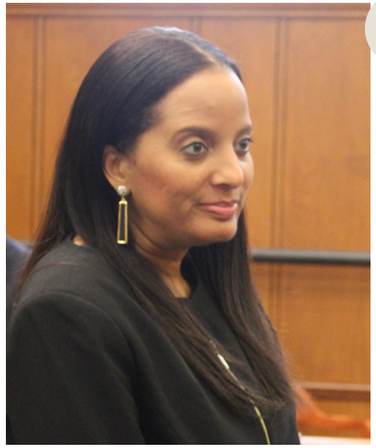
CASE STUDY

Birmingham's Drug Nuisance Abatement Team

An interview with City Attorney Nicole King

Contributed by Avery Morris





Top: King at Nuisance Property that was court ordered to be demolished
Bottom: King at MCBA seminar
Opposite Page: Part of the DNAT team on a site visit; L-R Emily Davis, Pierre Mede, Officer Shelby, Joseph Abrams.

1. How does your approach address addiction and drug nuisances?

Our work begins with accountability and ends with care. Through the Drug Nuisance Abatement Team, (DNAT) we focus on properties where drug activity has taken root, disrupting neighborhood safety. We use legal tools to require property owners to take responsibility and make real changes. When they do, crime decreases, and residents regain a sense of peace in their own communities.

At the same time, we understand that addiction is not only a legal issue. It is a human one. DNAT works alongside the Mayor's Office, non-profit partners, and public safety agencies to connect individuals to treatment and recovery resources. We also help fund NARCAN for first responders because saving lives must always be part of the solution. Every Birmingham resident deserves safety and compassion.

"We serve as a bridge between community concerns, public safety, and the legal process needed to address problem properties."

2. How long have you been involved in this effort?

With the support of Mayor Randall L. Woodfin and a task force rooted in community partnerships, I established the Drug Nuisance Abatement Team in 2020. What began as a focused initiative has continued to grow alongside our city's needs.



3. How has your approach changed with experience?

Initially, our work centered on drug-related and environmental nuisance cases. As we gained experience, we saw that many of the most dangerous situations facing neighborhoods extended beyond those categories. Our scope expanded to include public nuisance cases that pose serious threats to safety and quality of life, even when drugs are not involved.

That shift came from listening closely to residents and responding to what they were truly facing. It allowed us to intervene earlier and more effectively.

4. Was there a particular event, person, or other local government that inspired you to get involved in this way?

Mayor Randall L. Woodfin played a significant role in inspiring me to create DNAT. Early in my tenure as City Attorney, I spent time walking neighborhoods with him and listening to residents share their concerns about safety and their vision of what they wanted to see improved in their communities. Those conversations stayed with me.

After fourteen years of public service and experience as a prosecutor, I wanted to bring my legal background and passion for community service together to produce real, visible change. Through timing, faith, and collaboration, DNAT took shape.

5. Has your approach to the issue changed the way you view your/your office's role in the community?

It has reinforced that government works best when it works with the people it serves. Our office hears directly from residents asking for help, and we take that responsibility seriously.

We serve as a bridge between community concerns, public safety, and the legal process needed to address problem properties. While we cannot solve every issue, we can show up, listen, and act. Our goal is for residents to know they are not alone. We have a phone number and an email address for residents to report issues so that we may investigate their concerns. (problemproperty@birminghamal.gov)

6. Did you face any difficulties when building the program?

Yes. DNAT launched just as the COVID-19 pandemic began. Building a new initiative during a time of uncertainty required flexibility, persistence, and strong collaboration.

Those early challenges strengthened our partnerships and reinforced the importance of adaptability in public service.

7. What advice would you give to another local government attempting to build a similar program?

Strong leadership support is essential, as is collaboration across departments. DNAT relies on close partnerships with the Birmingham Police Department, the city's Planning, Engineering, and Permitting Department, Code Enforcement, and community stakeholders.

Equally important is trust. Building trust with residents takes time and consistency. When communities see that their concerns are heard and addressed, lasting change becomes possible.

8. Is there one success story from your program that stands out to you?

The transformation of the Norwood Plaza Apartments stands out most. For years, the complex was known for violence, drug activity, and neglect. It had become a symbol of harm and hopelessness for both residents and the surrounding neighborhood.

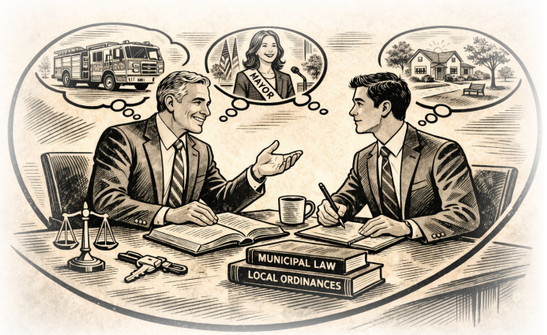
Through DNAT's legal action, residents were safely relocated and the owner ultimately demolished the property at their own expense. What once felt impossible became a turning point. That outcome restored hope and reminded the community that change is achievable.



MENTOR'S CORNER

Advice I Would Give My Younger Self

This Mentor's Corner is provided to you by the mentors from the following cities: Nathan M. Nickolaus, Of Counsel, Lauber Municipal Law; Chris Balch, Balch Law Group; Mandana D. Vidwan, Senior Assistant City Attorney, City of Charlotte, North Carolina; Marion C. Moore, Chief Assistant Corporation Counsel, Special Federal Litigation, City of Chicago Department of Law; Jeannine Williams, Chief Assistant City Attorney, City of St. Petersburg, Florida; Shaun Jacobs, Supervising Assistant City Attorney, Los Angeles, California; and Leann Guzman, Fort Worth, Texas.



They say the best experience to learn from is someone else's experience. To help newer practitioners of municipal law do just that, we share below some advice from our IMLA Mentor Team. They were asked, "If you could go back to when you were newly practicing as a municipal attorney and give yourself some advice, what would it be?"

Nathan M. Nickolaus, Of Counsel, Lauber Municipal Law: "My biggest regret is not joining my state association and IMLA earlier. I really did not realize how unique municipal law is, and as a result, I assumed a lot of things that turned out not to be correct. I also missed out on the opportunity to get help and guidance from my fellow municipal attorneys."

Chris Balch, Balch Law Group: "If I had advice for that young lawyer from 30+ years ago, now it would be find someone in the practice area that you respect and don't be afraid to ask them questions, to use them as a sounding board, and to learn all you can from them. Those I met in litigation over the years taught me all I know, but nowhere near all that they know. Be a sponge. Learn from others. You'll never know it all, and that's okay."

Mandana D. Vidwan, Senior Assistant City Attorney, City of Charlotte, North Carolina: "I would try harder to network with attorneys around the state and country. I've recently become better at networking and have found so much value in meeting new people and picking their brains."

"Don't be afraid to spend time researching and learning what you need to know to become an effective municipal lawyer"

Marion C. Moore, Chief Assistant Corporation Counsel, Special Federal Litigation, City of Chicago Department of Law: "My advice would be to take advantage of the very cool experiences you get to have as a municipal attorney: attending a police training course, touring a water plant or firehouse, getting an inside look at the airport, seeing what the 911 call center looks like - and really talking with the people who work there. Hands-on learning about all of the things a municipality does makes you not only a better attorney and better equipped to represent the municipality in court, but a better citizen. This also counts for going to observe your colleagues in court. You have at your fingertips the ability to observe incredibly experienced attorneys arguing all sorts of cases in all sorts of venues - do it! Opportunities like this are unique to working for a municipality. It is worth the time to do this, even if it means you end up having to stay late to finish up discovery responses, briefing, etc."

Jeannine Williams, Chief Assistant City Attorney, City of St. Petersburg, Florida: "I would advise myself to prioritize self-care. As young lawyers, we tend to focus heavily on our work and less on our own physical, mental, and spiritual health. It is imperative to prioritize spending time with family and friends, nutrition, exercise, mental health, and spiritual grounding. Our ability to serve our clients effectively depends on it."

Shaun Jacobs, Supervising Assistant City Attorney, Los Angeles, California: "Don't be afraid to spend time researching and learning what you need to know to become an effective municipal lawyer, and focus on what you need to do to move your case closer to trial, MSJ, or settlement. Especially for the attorneys directly employed by their municipality (as opposed to a firm). This advice is two-fold. In private practice, especially as a young attorney, I was always worried if I was taking too much time on a task, researching, writing a brief, etc. In government, you just put how much time it takes and don't cut your time. You have time to learn, research, etc., what you need to be effective.

"Secondly, the corollary to this is that since you work for the government and don't have to meet a billable hour requirement, focus on the work that will get you closer to your goal of getting a case dismissed (on the civil side) or to trial. So, for example, don't file a motion to dismiss or summary judgment for the sake of filing a motion to dismiss or motion for summary judgment. If you can get rid of a cause of action (or ideally the whole case), it will be worth it. If it just educates the plaintiff on what is wrong with the case, and they will amend anyway and fix the problem, it might not be worth the time. Be efficient and targeted with your work." ML

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MOVIE REVIEW

Is That Legal?

Marty Supreme

Contributed by Darren Shulman





Opposite Page: Timothée Chalamet, Credit: Courtesy of A24
This Page: (L-R) Timothée Chalamet, Josh Safdie, Credit: Atsushi Nishijima

Based on its hefty collection of award nominations, I may be the only person in America who hated Marty Supreme. Marty Supreme follows the title character's drive to achieve his dream of being the best table tennis player in the world.[1] Based on a true story, it's less about table tennis and more about the series of crises (all his own making) that Marty navigates.

This movie is full of unlikeable characters who constantly yell at each other and make bad choices. Marty (Timothee Chalamet) is the most unlikeable character of them all. He's a self-centered user who does dumb things for seemingly no reason. A morally ambiguous protagonist can be interesting (think Tony Soprano). Unfortunately, while Chalamet's performance is strong, the character lacked the magnetism needed to make me root for him. This is problematic because this movie is sort of a sports movie, and rooting for the character is a key element of that genre. Sports movies typically build up to a climactic match against an adversary we are supposed to root against. Marty's general jerkiness undermined any narrative drama because I really didn't care what happened in his matches, which were often against pretty decent guys. The way the climactic scene was filmed, I wasn't even sure if I was supposed to root for Marty. To the extent this movie is about the journey rather than the sports, any interest I had in seeing Marty self-sabotage his efforts with another poor decision wore off after the 10th time he did it. By the end of the movie, I was just tired.

Some of the table tennis scenes looked cool, but without context, it was hard to know why someone won a point. Was it luck? Strategy? Physicality? During the action, you don't know how a point is going until the rally ends. That may be how table tennis works, but without that understanding, you are basically watching a ball go back and forth … until it isn't. There were other filmmaking decisions that I didn't get – the non-period-appropriate music and a random CGI scene early in the movie were particularly jarring.

Marty Supreme isn't all bad. Chalamet effectively portrays the desperation and intensity of his character. His ability to persuade other characters wasn't entirely believable, but Chalamet definitely tried his best. The movie also effectively intertwines Marty's choices with the characters he encounters. All the stupid things Marty does throughout the movie end up coming back to the story.

Ultimately, I felt this movie was anything but supreme, but nine Oscar nominations, including best picture and best actor, show I'm likely in the minority. It's worth checking out for Chalamet's performance (the one Marty Supreme Oscar nomination I agree with), but don't go into this film expecting a feel-good sports movie.

Minor spoiler: Early on, Marty needs the money his uncle owes him for working in his shoe store. Unfortunately for Marty, his uncle left town before paying him. Marty then 'robs' the store to get the money by pulling out a gun and ordering his co-worker to open the safe. What possible defenses would Marty raise in a criminal prosecution?

Mistake of fact: Under this defense, Marty would argue that taking the money was all a mistake because his uncle was supposed to pay him before he left town. Mistake of fact is recognized as a defense to specific intent crimes like theft because "when the defendant has an honest purpose, such purpose provides an excuse for an act that would otherwise be deemed criminal."[2] Mistake of fact can negate either "knowingly" or "purposely" mental states.[3] In this case, a mistake of fact would likely not help Marty. Mistake of fact "applies only … when the defendant holds a mistaken belief of facts … which…if true, would render the defendant's otherwise criminal conduct lawful."[4] While Marty believed he was owed the money, there was no factual misunderstanding that would make using a gun to force an employee to open the safe lawful.

Claim of right: Marty would argue that he was collecting the money that his uncle owed him. Under a claim of right, the defendant argues that he/she believed they had the right to the property, which would negate the mental state element of the theft offense (purposefully). In *State v. Mills*, the Montana Supreme Court held:



(L-R) Sandra Bernhard, Fran Drescher, Credit: Courtesy of A24



Gwyneth Paltrow, Credit: Courtesy of A24

> "an honest good-faith belief, even if mistaken, that a defendant had a legal right to take or withhold the property of another to satisfy or secure a claimed debt remains a cognizable fact defense to theft…because it precludes the state's contrary assertion that the defendant acted with knowledge that he or she had no lawful authority to conditionally withhold the property for payment or as security on the debt."[5]

While a claim of right can be a defense to a theft charge,[6] many courts have rejected the claim-of-right defense in robberies involving forcible debt collection.[7] Courts tend to disfavor the claim of right defense in robbery cases because it "encourages forcible self-help in pursuing property."[8] The Wisconsin Supreme Court explained this distinction as follows:

> "The distinction between specific personal property and money in general is important. A debtor can owe another $150, but the $150 in the debtor's pocket is not the specific property of the creditor. One has the intention to steal when he takes money from another's possession against the possessor's consent, even though he also intends to apply the stolen money to a debt. The efficacy of self-help by force to enforce a bona fide claim for money does not negate the intent to commit robbery."[9]

Had Marty simply grabbed money out of the register, a claim of right defense might have worked. Unfortunately for Marty, using a gun to convince his coworker to open the safe introduces force. The use of force and the fact that he was taking money as opposed to a specific piece of property that he thought was his would likely defeat his claim-of-right defense.

While this is sad for Marty, the knowledge that Marty might end up in prison for his actions is the only thing about this movie that made me smile.

Grade: D+

ML

Darren Shulman is the city attorney for Upper Arlington, Ohio. A graduate of Northwestern University and Harvard Law School, Darren previously served as the City Attorney for Delaware Ohio, Associate Legal Counsel for the Ohio Department of Administrative Services, and as an Assistant Prosecuting Attorney for the Montgomery County Prosecutor's Office. When Darren was the Delaware City Attorney, he co-hosted a movie review show called Through the Lens on local radio, which is now a podcast. Writing movie reviews through a legal lens allows Darren to combine his love of movies with his profession.

Notes:

[1]With a set up like this, you'd think *Marty Supreme* would be a comedy. Sadly, it is not.

[2]State v. Snowden, 7 Ohio App. 3d 358, 363, 455 N.E.2d 1058, 1065 (1982)(a go-go dancer promised to pay $80 for damages resulting from a traffic accident with defendant but never paid; the bar manager told defendant to come to the bar for payment; after repeatedly getting "the runaround," defendant went to the register while the barmaid stepped away, and during a struggle over two pistols kept near the register, defendant shot the manager as he emerged from the back office).

[3]*Id*. *See also* Celis v. State, 416 S.W.3d 419, 432 (Tex. Crim. App. 2013)(holding mistake of fact inapplicable to falsely holding oneself out as a lawyer because the offense requires no culpable mental state).

[4]People v. Lawson, 215 Cal. App. 4th 108, 111, 155 Cal. Rptr. 3d 236, 239 (2013)(rejecting defendant's request to overturn a theft conviction for stealing a $20 hoodie from Walmart where defendant claimed he "simply forgot" the hoodie draped over his shoulder while leaving the store; defendant lacked a mistaken belief that would justify leaving without payment and had removed the sales tag and concealed it inside the hoodie).

[5]State v. Mills, 2018 MT 254, ¶ 24, 393 Mont. 121, 136, 428 P.3d 834, 844 (guy hired to oversee a lady's ranch developed feelings for her but ended up stealing her stuff when she rebuffed him. While the court recognized the defense, unfortunately for Mr. Mills, the court also found that there was no evidence that Mills actually believed he had a right to take the property.)

[6]*See* People v. Tufunga, 21 Cal. 4th 935, 938, 987 P.2d 168, 169 (1999)(noting that many courts have restricted the use of the claim-of-right defense, but finding it can negate the mental state "element of robbery where the defendant is seeking to regain specific property in which he in good faith believes he has a bona fide claim of ownership or title.").

[7]*Id*.

[8]People v. Green, 5 N.Y.3d 538, 545, 841 N.E.2d 289, 293 (2005)(When defendant held his hand out towards victim, victim gave him a 'high five.' Defendant clarified that his hand was not a greeting, it was a demand for victim to hand over his portable CD player. Defendant grabbed it and started listening to the Busta Rhymes CD inside it. Defendant claimed that he thought the CD player was his CD player with a Busta Rhymes CD that had been stolen previously.)

[9]Edwards v. State, 49 Wis. 2d 105, 113–14, 181 N.W.2d 383, 388 (1970). *See also* State v. McMillen, 83 Haw. 264, 264, 925 P.2d 1088, 1088 (1996)(Defendant punched victim in the face and stole his backpack. Defendant claimed he did this because he mistakenly thought his friend "was trying to claim something that was rightfully his," and that he intervened to help.)

BOOT CAMP

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Public Duty, Jurisdiction, Common Law Immunity, Public Interest, and More.



DUTY TO CONTINUE PURSUING BUSINESS LICENSE AND TO NOT OPERATE BUSINESS UNTIL LICENSE CONFIRMED.

Tan v Saskatoon (City), 2025 SKKB 169

https://canlii.ca/t/kfzfj

Tan operated two businesses in the City of Saskatoon ("City") in separate locations with different business licenses. In 2022, Tan submitted two applications to modify those business licenses because the businesses were moving to a single location. A City employee determined that since Tan owned both businesses, they were going to be operating out of the same premises, and this was really one business with two public-facing brands as opposed to two separate businesses sharing space, only one business license was required. The application proceeded as an application for a single business license. Tan was advised, however, that a building permit needed to be obtained before her business license application could be processed. Tan emailed the City that her landlord did not believe a building permit was required. Tan did not receive a response to this email, did not obtain the building permit, and operated her business at the new location for several months until she was charged with operating two businesses without a license. Tan was convicted on both charges and appealed.

HELD: Appeal allowed in part.

DISCUSSION: Tan argued that the justice of the peace erred in convicting her in relation to both businesses and by failing to find her duly diligent. The Court referred to the Supreme Court of Canada's decision in *R v Kienapple*, 1974 CanLII 14 (SCC) ("*Kienapple*"), where it was held that an accused cannot be convicted of more than one offence arising out of the same cause, matter, or delict, so the accused is not punished twice for the same offence. For the *Kienapple* principle to apply, there must be a sufficient factual and legal nexus between the charges. A factual nexus is established if the same act of the accused grounds each of the charges. A legal nexus will be established if there is no additional or distinguishing element that goes to guilt contained in the offence for which a conviction is sought to be precluded by the *Kienapple* principle. The City advised Tan that she only required one business license. The justice of the peace erred in law when she held that Tan could be convicted with respect to both businesses, and Tan's appeal on one conviction was allowed and a stay entered. With respect to the remaining charge, the fact that Tan did not receive a response to her last email to the City was irrelevant. The Court held that there was a positive duty on Tan to pursue her business license and to not operate her business until she had obtained it. Having done nothing for more than eight months to confirm that her business license had been granted, Tan was not duly diligent.



NEGLIGENCE OR BAD JUDGMENT IN PERFORMING A PUBLIC DUTY IS NOT MISFEASANCE IN PUBLIC OFFICE.

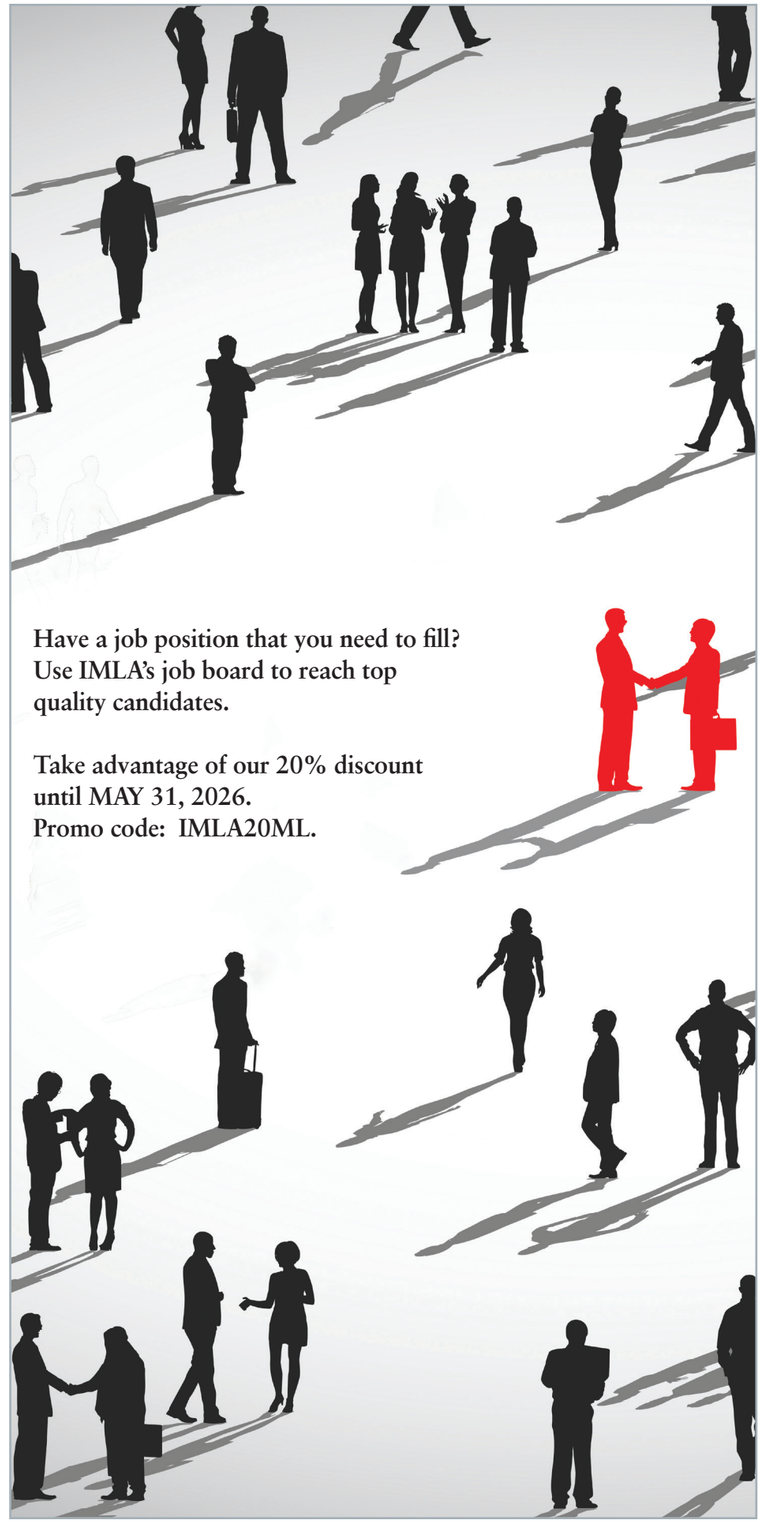
6165347 Manitoba Inc v Robinson, 2025 MBCA 33

https://canlii.ca/t/kbr3s

Gem was a developer in the City of Winnipeg ("City"). Smith was the City's chief planner, and Robinson was a senior planner. After a lengthy trial, the judge found that Smith was responsible for deliberate attempts to slow down or thwart Gem's development applications, and that both Robinson and Smith attempted to persuade another employee to deny Gem's application for a permit. The trial judge found them both liable for misfeasance in public office because they exercised their power as public officials for an improper purpose or in breach of their statutory and professional obligations, and with conscious or reckless disregard for the interests of Gem. The City was found vicariously liable for their actions. The City, Smith, and Robinson were found jointly and severally liable to pay compensatory and exemplary damages of $5 million and appealed.

HELD: Appeals allowed and claims dismissed.

DISCUSSION: The Court found that for Gem to succeed, it had to prove deliberate and unlawful conduct in the exercise of Smith's and Robinson's duties, along with their subjective awareness that their conduct is unlawful. It is not enough to show negligence or bad judgment in performing a public



duty. The Court held that there must be an assessment of the public officer's authority before assessing whether it was exceeded or the actions were in breach of the relevant duty. The Court found that the trial judge erred in failing to examine the parameters or framework within which Smith and Robinson as public officials were compelled to act, and by failing to address that Smith and Robinson must be subjectively aware of the unlawfulness of their conduct and the likelihood of harm to Gem. Palpable and overriding errors in certain findings of fact were made by the judge and in the inferences that she drew from the evidence to conclude Smith and Robinson engaged in deliberate and unlawful conduct in their capacity as public officers. The Court held that the evidence fell short of proving Smith and Robinson had the minimum required "subjective recklessness" or "conscious disregard" for the lawfulness of their conduct and the likely harm to Gem.



MUNICIPALITY'S AUDIT COMMITTEE IMMUNE FROM CIVIL LIABILITY UNDER COMMON LAW.

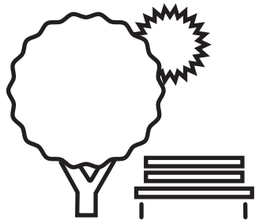
Leduc v Rioux, 2026 ONSC 92

https://canlii.ca/t/khfxv

The plaintiff was an incumbent municipal councillor in Greater Sudbury re-elected to represent Ward 11. The defendant Rioux resided in Ward 11. The defendant Greater Sudbury established the election compliance audit committee ("Committee") pursuant to the Municipal Elections Act, 1996, SO 1996, c 32, Sch ("MEA"). Rioux had concerns about an event advertised as sponsored by "Ward 11 CAN", which Rioux believed meant the event was sponsored by a publicly funded "Community Action Network" contrary to the campaign financing provisions of the MEA. Rioux brought an application pursuant to s. 88.33(1) of the MEA permitting an elector to apply for a compliance audit of a candidate's election campaign finances. The application was heard by the Committee, and a compliance audit of Leduc's election campaign finances was ordered. An independent auditor appointed by the Committee prepared a report that identified possible contraventions of the MEA by Leduc. Leduc applied for judicial review of the Committee's decision and then commenced this action for defamation against Rioux, and the tort of misfeasance in public office against Greater Sudbury. Rioux applied to have Leduc's case dismissed through what is commonly referred to as an anti-SLAPP ("strategic lawsuit against public participation") motion under the Courts of Justice Act, RSO 1990, c C.43. Greater Sudbury applied for dismissal on the basis that the Committee is immune from civil liability.

HELD: Applications allowed and case dismissed.

DISCUSSION: The purpose of the anti-SLAPP provision is to reduce the risk that participation by the public in debates on matters of public interest will be hampered by fear of legal action. To have a SLAPP dismissed, the defendant must first satisfy the court that the expression complained of was made in the public interest. The onus then shifts to the plaintiff to satisfy the Court that there are grounds to believe that the proceeding has substantial merit, that the defendant has no valid defence in the proceeding, and that the harm likely to be or that has been suffered by the plaintiff as a result of the defendant's expression is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting the defendant's expression. Although Leduc did not oppose motion, the Court was persuaded on the record available that the test would not have been met by Leduc. Regarding the action against Greater Sudbury, the Court explained that judicial immunity may be extended by statute or the common law to administrative decision-makers exercising quasi-judicial functions. While no statutory immunity clause protected the Committee, the Court found that the common law did. Relying on the decision in *Westlake v. The Queen* in right of the Province of Ontario, 1971 CanLII 680 (Ont. H.C.); aff'd 1972 CanLII 515 (Ont. C.A.), the Court determined that the Committee was a non-corporate body who is a legal entity in that their actions may be reviewed in proceedings brought against them by way of the extraordinary remedies of certiorari, mandamus, and prohibition. As such, the legislature could not have intended in these circumstances that this quasi-judicial body could be sued.



ACTION OF MUNICIPALITY DECLARED TO BE WITHOUT JURISDICTION EVEN THOUGH ACTION CANNOT BE RECTIFIED.

Stanley Park Preservation Society v Vancouver Board of Parks and Recreation, 2025 BCSC 2500

https://canlii.ca/t/kh4nl

In 2023, the City of Vancouver ("City") authorized large scale tree removal in response to a moth infestation that significantly impacted the forest in Stanley Park. This moth devours the leaves of conifers and typically leads to their death. The contract for removal was $1,900,000, removed 7000 trees, was substantially complete by April 2024, and considered phase 1 of the tree removal project ("Project"). In June 2024, the City entered a second contract to do further tree removal that began after October 8, 2024, and was considered phase 2 of the Project. The Vancouver Board of Parks and Recreation ("Board") authorized phase 2 of the Project on October 8, 2024. The City and the Board (collectively, the "Respondents") authorized the tree removal based on concerns that dead or dying trees in Stanely Park threatened public safety due to falling trees or branches, and increased the risk of wildfire. Stanley Park Preservation Society and several individuals (collectively, the "Petitioners") sought declarations that the Board did not properly authorize the supply contracts for the first two phases of the tree removal project and sought to quash the Board's third phase decisions. The Respondents argued that the declarations sought were moot because



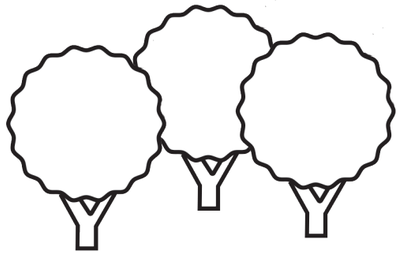
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the trees had already been removed, and that the Court should not exercise its discretion to review the decisions to enter into those agreements.

HELD: One of two declarations granted, application to quash dismissed.

DISCUSSION: Although courts do not generally grant declaratory relief unless it will have a practical effect, courts may elect to address a moot issue if the circumstances warrant it. With respect to phase 1 of the Project, the Court exercised its discretion to address the issue even though the work was complete and there was no longer a live controversy. The City is incorporated pursuant to the Vancouver Charter, SBC 1953, c 55, as amended, and the Board established pursuant to s. 485 of that charter. A publicly elected Board of Commissioners governs the Board and its staff, which is paid by the City but solely accountable to the Board. The City is also responsible for funding the Board. As a designated public park, the Board has exclusive jurisdiction over the custody, care, and management of Stanely Park. The Board's procurement policy required that the Board approve all contracts worth over $750,000. As there was no Board resolution authorizing phase 1 of the Project, the City entered the contract to cut down thousands of trees in Stanely Park without the required approval of the Board. The Court held at paragraph 65 that "[t]he spectre of these kinds of decisions being improperly made by the City ... followed by work being concluded within short timeframes, and then an argument advanced that the decision is not reviewable because it is moot, will not be countenanced." The Petitioners were entitled to a declaration that the City entered the phase 1 contract without jurisdiction. The Court declined to make a similar declaration with respect to the contract for phase 2 of the Project. Although this second contract was entered into in June 2024, the work did not begin until after the Board authorized this work on October 8, 2024, and could have been cancelled. The Court went on to determine that the Board did not breach the duty of procedural fairness owed to the Petitioners with respect authorizing phases 2 and 3 of the Project, and that the resolution authorizing phase 3 of the Project was reasonable.



HARM RELATED TO REMOVAL OF PUBLIC PARK TREES IS TO PUBLIC AT LARGE AND NOT SPECIFIC TO ANY INDIVIDUAL.

Stanley Park Preservation Society v Vancouver Board of Parks and Recreation, 2026 BCCA 21

https://canlii.ca/t/khmfs

Following the determination by the Court in *Stanley Park Preservation Society v Vancouver Board of Parks and Recreation*, 2025 BCSC 2500 that the resolution authorizing phase 3 of the Project was made fairly and was reasonable, the Petitioners filed an appeal with the British Columbia Court of Appeal and applied for an order prohibiting the Respondents from continuing phase 3 of the Project until their appeal is determined.

HELD: Application dismissed.

DISCUSSION: Both sides agreed that the application must be resolved in accordance with the test set out by the Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada* (Attorney General) 1994 CanLII 117 ("RJR"). The resolution authorizing the phase 3 work was passed by the Board at a public committee meeting. The record included multiple reports and presentations on the appropriate response and mitigation plan, as well as representations by members of the public, including the Petitioners. The accelerated phase 3 work was completed between January and April 2025. The remaining phase 3 work was temporarily halted by agreement pending the outcome of the judicial review of the resolution that authorized the work. The Court of Appeal justice sitting in chambers, Horsman J.A., determined that in accordance with RJR, the Petitioners had the onus to establish that there is merit to their appeal, that they will suffer irreparable harm if the stay is refused, and that the balance of convenience favours granting the stay. The Respondents conceded that the appeal met the low standard required to find it meritorious. Given that the harm related to the removal of trees in a public park is to the public at large and not specific to the Petitioners, Horsman J.A. considered this form of harm best assessed at the balance of convenience stage of the RJR test. The Court found that granting the stay could significantly impact public access to Stanley Park during the high tourist season and community organizations that planned events in the park. The Board, contractors, subcontractors, owners, and employees associated with businesses in the park would be disrupted and suffer financial losses, because portions of Stanley Park would have to be closed if the phase 3 work were halted after the Board accepted that there is a public safety and wildfire risk if the work were not done. The harm that trees may have been removed unnecessarily if the Petitioners were successful on this appeal was outweighed by the harm to the Respondents and the public interest if the phase 3 work was not completed. The Court found a presumption of harm to the public interest if the Board was prevented from carrying out its statutorily mandated public duty to manage Stanley Park. In Horsman J.A.'s view, the balance of convenience weighed against the issuance of a stay. ML

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Pung v. Isabella County

Property Taxes in the Crosshairs

Contributed by Erich Eiselt

Introduction

The Ever-Evolving Takings Clause: The authors of the Constitution presciently foresaw that as the new nation progressed, the federal government would require resources held by private citizens.

In the Bill of Rights, they added language that accommodated governmental interests while protecting those of the people: the Fifth Amendment's provision that "nor shall private property be taken for public use, without just compensation." That clause, including its extension to the States via the Fourteenth Amendment, has spawned a vast array of takings claims, from the basic—seeking recompense for physical appropriation of land—to more nuanced arguments that regulations improperly limit the use, enjoyment, or economic opportunity of real estate and other types of property.

The Supreme Court has been central to Takings Clause interpretation, providing touchstones to guide resolution of federal, state, and local disputes. Many of these have accommodated the government: shortly after the Civil War, the Court confirmed the fundamental right to take private property for public use;[1] a century ago, it upheld the validity of local zoning ordinances as a constitutional exercise of police powers;[2] and in 1978 it affirmed a local government's right to substitute transferable development rights in lieu of granting a building permit, providing a flexible calculus for evaluating takings, including factors such as the economic impact of the regulation, its interference with reasonable investment-backed expectations, and the character of the government action.[3]

But on the other side of the ledger, the Court has increasingly held in favor of property owners. Moving beyond early claimants whose real estate was clearly physically impacted, whether by low-level overhead flights,[4] uncontrolled flooding,[5] or cable tv wiring,[6] the Court five years ago held that a state law allowing even intermittent entry onto private land was also a prohibited *per se* physical taking.[7] Other holdings reveal a growing will to redress regulatory overreach, including the Court's *Nollan/Dolan/Koontz*[8] trilogy finding Takings Clause liability where governmental regulation did not bear an "essential nexus" and "rough proportionality" to the public good being protected. That principle recently reappeared in *Sheetz v. El Dorado County*[9] where a unanimous Supreme Court ruled for the property owner, holding that impact-based permitting fees, whether legislatively derived or administrative, must meet "rough proportionality." And four days after *Sheetz*, in *Devillier v. Texas*[10] the Court further expanded the reach of the Takings Clause, finding that inverse condemnation claims brought against a state under state law could also include Takings Clause claims, and intimating that even if state law did not specifically support such a claim, direct recourse to federal court could nevertheless be available.

A Precursor

The Court's Property Tax Scrutiny in Tyler.

Against that recent trajectory, a present-day Supreme Court grant of takings-based certiorari may rightly cause concern for governmental defendants. That focus is heightened in the case of property taxes, where a 2023 antecedent required realignment of state tax law to conform with the Takings Clause. *Tyler v. Hennepin County*[11] was a challenge to Minnesota's statutory property foreclosure scheme. There, Geraldine Tyler, an elderly County resident, had ceased paying property taxes on her condominium, failing to respond to overdue notices and not pursuing any of the multiple avenues afforded her to redeem her property or to protect her equity interest. After three years of default, Minnesota law provided that title to the condominium vested in the state and the accrued taxes and penalties were extinguished.[12] The County then sold the property at public auction, obtaining $40,000-significantly more than the $2,500 in taxes and $12,500 in penalties which were owed.

The County retained the full sales price pursuant to State law, which provided that the proceeds were to be applied first, to any expenses incurred for municipal improvements and environmental cleanup that increased the value of the property; second, to outstanding special assessments, third, a discretionary amount designated by the County to help fund forest development or county parks and recreational areas; and finally, 40 percent of the remainder to the County, 40 percent to the school district, and 20 percent to the town or city, as applicable.[13] Tyler sued, arguing that retention of the surplus violated the Takings Clause and amounted to an unlawful fine under the Eighth Amendment's Excessive Fines Clause.

The District Court dismissed the suit for failure to state a claim, noting that although Minnesota common law had once recognized an owner's interest in surplus equity in the tax-foreclosure context, that right had been abrogated by the state's statutory forfeiture scheme.[14] The Eighth Circuit affirmed, holding that "[w]here State law recognizes no property interest in surplus proceeds from a tax-foreclosure sale conducted after adequate notice to the owner, there is no unconstitutional taking."[15] The Circuit Court also rejected Tyler's claim under the Excessive Fines Clause, adopting the holding below that the forfeiture was not a fine because it was intended to remedy the State's tax losses rather than punishing delinquent property owners.[16]

The Supreme Court reversed, in a unanimous opinion authored by Chief Justice Roberts, which implicitly accepted the legitimacy of the tax sale process and the deduction of collection costs in addition to outstanding taxes and interest, but questioned the retention of excess value:

> Here there was money remaining after Tyler's home was seized and sold by the County to satisfy her past due taxes, along with the costs of collecting them. The question is whether that remaining value is property under the Takings Clause, protected from uncompensated appropriation by the State.[17]

To answer that query, said Roberts, the Court draws on "existing rules or understandings" about property rights. While State law could figure into that calculus, it could not be the only source: "Otherwise, a State could "sidestep the Takings Clause by disavowing traditional property interests' in assets it wishes to appropriate."[18] Thus, Roberts looked to "traditional property law principles," historical practices, and Supreme Court precedent to delineate the relevant analytical framework. He found an enduring principle, from the Magna Carta through *Blackstone's Commentaries*, that while the Crown had the power to seize property to satisfy a debt, any remaining surplus had to be returned to the original owner.[19] The same precept migrated to the colonies, where the new national government and ten states adopted laws limiting the retention of sales proceeds to the amount of the taxpayer debt, a policy that would become law in the majority of states today, where surplus must be returned to the taxpayer.[20]

Minnesota's scheme was not only out of step with the majority but also internally inconsistent, because in virtually every other context, such as where a private creditor sells the property, Minnesota law entitled the owner to any surplus.[21] In contrast, Justice Roberts observed, "The State now makes an exception only for itself, and only for taxes on real property.")[22] That inconsistency suggested an attempt by the Minnesota legislature to avoid paying compensation for its taking of property.[23] The Court unanimously held that Minnesota's retention of the surplus proceeds from the sale of Tyler's residence violated the Takings Clause, a decision requiring numerous jurisdictions to rewrite their property tax codes.

Given Tyler's acceptance of takings relief, the Court did not decide her excessive-fines claim.[24] But in an analysis that may have later resilience, Justice Gorsuch's concurrence saw Minnesota's tax-forfeiture scheme as punitive and would have found it in violation of the Excessive Fines Clause: "It matters not whether the scheme has a remedial purpose, even a predominantly remedial purpose. So long as the law 'cannot fairly be said solely to serve a remedial purpose,' the Excessive Fines Clause applies."[25]

Enter Pung

Beyond the Property Tax Surplus Issue

The *Tyler* decision was barely two years old when, in October 2025, the Court granted certiorari in another property tax case with potentially far greater implications for local government: *Pung v. Isabella County* sprang from a dispute about survivors' entitlement to a property



In granting certiorari, the Supreme Court will now consider a property tax issue more consequential than the discussion of surplus in Tyler: whether the government, when taking title to property due to unpaid property taxes, is liable to the defaulting owner for the property's fair market value.

tax exemption, in this case Michigan's Principal Residence Exemption (PRE), which provides that a property owner may claim an exemption from local school district taxes if the owner occupies the property as his or her principal residence.[26] In 1994, Timothy Pung had been granted a PRE exemption for his property in Union Township, Isabella County, Michigan. He died in 2004 and was survived by his wife and two children, who occupied the home as their primary residence (his wife died in 2008, but one of his children continued to reside there).

In 2010, the Union Township tax assessor retroactively denied the PRE for the Pung property for tax years 2007, 2008, and 2009, given that no one was listed on the deed after Pung's death and that no subsequent affidavits had been filed for a new PRE for the property. The tax assessor continued to deny the PRE for 2010 and 2011. Although Pung's son ultimately successfully appealed the PRE denials through 2011, the property's 2012 PRE was revoked because no new affidavit had been filed for that year. While the parties dispute whether Pung received written notice of the revocation of the 2012 PRE, they agree that he received verbal notice of the revocation when he paid his tax bill in February 2013. Pung challenged his 2012 tax assessment and refused to pay the resulting deficit, leading to an unpaid tax bill of $2,241.93. The County Treasurer initiated foreclosure proceedings in June 2014; when Pung failed to appear, the court entered judgment in favor of the County. While Pung moved to set aside the foreclosure, arguing he didn't hear about it until already finalized, the Michigan Court of Appeals ultimately ruled in favor of the County and upheld the foreclosure. The County, now record owner of the property, sold it at a public auction for $76,008. The District Court awarded Pung the surplus remaining after deducting the tax debt, which yielded slightly less than $74,000, but it deferred consideration of Pung's argument that compensation for the County's taking should have been far greater, based on the property's fair market value when title transferred to the County.[27]

On appeal, Pung resumed his fair market value argument, pointing to the fact that the auction purchaser rapidly resold his home for $195,000—a price slightly higher than the County's tax assessment for the property. He asserted that the County's failure to remit the fair market balance-based proceeds to him, nearly $120,000, violated the Takings Clause. The Sixth Circuit disagreed, affirming the court below and holding that a plaintiff whose property is foreclosed and sold at public auction for failure to pay taxes is entitled only to the auction price surplus after deducting taxes and expenses, not to reimbursement based on the property's fair market value.[28] The Circuit also rejected Pung's Eighth Amendment Excessive Fines claim, holding that the Michigan law does not punish property owners for failing to pay their taxes, but rather "its aim is to encourage the timely payment of property taxes."[29]

In granting certiorari, the Supreme Court will now consider a property tax issue more consequential than the discussion of surplus in *Tyler*: whether the government, when taking title to property due to unpaid property taxes, is liable to the defaulting owner for the property's fair market value. The questions presented are:

> (1) Whether taking and selling a home to satisfy a debt to the government, and clause of the Fifth Amendment when the compensation is based on the artificially depressed auction sale price rather than the property's fair market value; and
> (2) whether the forfeiture of real property worth far more than needed to satisfy a tax debt but sold for a fraction of its real value constitutes an excessive fine under the Eighth Amendment, particularly when the debt was never actually owed.

At stake in *Pung* are billions of dollars in property taxes collected annually by localities through tax lien and forfeiture sales. A holding that taxing authorities are responsible for the fair market value of properties sold in default scenarios would likely curtail tax sales and have a devastating impact on local government budgets, an argument made by IMLA and its associates in the Local Government Legal Center (LGLC): the National League of Cities, the National Association of Counties, the Government Finance Officers Association, and the International City/County Management Association. Our LGLC brief cited the many issues that would arise under a



Beyond valuation, the Justices seemed more concerned about an issue not specifically within the Question Presented: the fairness of the process that led to Mr. Pung's property being sold for roughly one-third of its eventual value.

fair market value system, including the risks assumed by the government to maintain the property prior to sale and the perverse incentives created for nonpayment of property taxes, where defaulting property owners would receive a windfall, burdening other taxpayers disproportionately. A primary contribution of the LGLC brief was IMLA's survey of property tax forfeiture systems across the nation, many of which include lengthy redemption periods, extensive notice of public sale, and other mechanisms to ensure fairness in the process.[30] The brief also highlighted the inherent disconnect between fair market valuation and amounts actually obtained at auction: in the latter, purchasers often have no chance to inspect the property, title insurance may not be available, and the sale is on an as-is basis, without warranty—limitations that naturally result in lower valuations, a proposition advanced mor than 30 years ago by Justice Scalia.[31] Additionally, the value that the Pung auction purchaser subsequently obtained would likely not be garnered without upgrades, refurbishment, staging, marketing by a licensed real estate agent, and other elements normally associated with commercial sale.

Implicit in the LGLC brief was the point that Michigan's system, which is analogized in only a minority of jurisdictions, cannot be viewed as defining the wide diversity of state and local property tax mechanisms nationwide. LGLC argued that, however the Court might analyze the Michigan property forfeiture and sale scheme, a one-size-fits-all solution forced on each state, city, and county across America was not appropriate--a judicial fiat imposing fair market value as the baseline for Takings Clause claims in every property tax default scenario would be catastrophic for local governments, no doubt leading to even further litigation about value. And mindful of Justice Gorsuch's Excessive Fines stance in *Tyler*, LGLC reiterated that a forfeiture process which merely delivers unpaid taxes to the government is not punitive; holding otherwise would provide defaulting property owners another rationale for circumventing their tax responsibilities. LGLC's baseline mission was to emphasize to the Court the overwhelming importance of property tax revenues to communities across the nation, which often provide more than half of a locality's budget. Without those funds, the entire spectrum of services upon which constituents rely, whether law enforcement, EMT, education, parks, and more, would be severely jeopardized.

Pung v. Isabella County was heard on February 25, days before this issue of Municipal Lawyer went to print. At oral argument, a majority of the Court appeared skeptical of the proposition that "just compensation" in a tax foreclosure derives from a property's fair market value rather than the surplus after public auction. The colloquy included repeated references to Justice Scalia's opinion in *BFP v. Resolution Trust Corp.*, 511 U.S. 531 (1994) which held that lower valuations are an inevitable and constitutionally acceptable incident of non-market sale scenarios. Justice Alito raised the prospect that if FMV applies, governments would be required to stockpile, insure, and maintain homes awaiting FMV sale. And along that theme, Justice Jackson pointed out that valuation in an eminent domain context was far different from a taking instigated by the taxpayer's inaction, in the latter, if FMV was not obtained at sale, the government would then become liable for the deficit—not only foregoing the unpaid taxes but taking from the public fisc to compensate the defaulting taxpayer.

Beyond valuation, the Justices seemed more concerned about an issue not specifically within the Question Presented: the fairness of the process that led to Mr. Pung's property being sold for roughly one-third of its eventual value. Justice Gorsuch expressed concern about a bureaucratic structure that did not afford more latitude to the plaintiff. Justice Barrett inquired whether the same foreclosure sale process would befall a taxpayer owing only $100. And as Justice Jackson framed it, this was more a case about Due Process than Takings, requiring greater attention to the fairness afforded the taxpayer to avoid foreclosure. On that score, Justice Kagan doubted that a procedure allowing for a long delay (more than a year) between foreclosure and public sale could reasonably be considered fair.

Notwithstanding those fairness concerns, the Court seemed disinclined to adopt the petitioner's just compensation arguments. While any prediction is risky, after roughly ninety minutes of oral argument it appears unlikely that *Pung* will result in a nationwide Fair Market Value benchmark for property tax foreclosures. The Court will rule before its current Term ends in early July. ML

NOTES:

[1]Kohl v. United States, 91 U.S. 367, 371 (1875). Upholding as "essential to its independent existence and perpetuity" the authority of the United States to condemn land for use as a customs house and post office building, and affirming that same right in the States: "No one doubts the existence in the State governments of the right of eminent domain,—a right distinct from and paramount to the right of ultimate ownership." *Id.*

[2]Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). Refuting a takings claim based on a finding that zoning scheme bore "substantial relation to the public health, safety, morals, or general welfare."

[3]Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978).

[4]United States v. Causby, 328 U.S. 256 (1946). While invalidating the common law doctrine ("*ad coelum*") that landowners' rights extend indefinitely into the airspace above the subject property, the Court ruled that low elevation flights, below the public airspace, worked a compensable Taking.

[5]Arkansas Fish and Game Comm'n v. United States, 568 U.S. 23 (2012). Reversing the Federal Circuit, the Court held that six consecutive years of Army Corps of Engineers-caused flooding, destroying more than 18 million board feet of hardwood timber was a compensable Taking.

[6]Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) Construed a New York state law requiring property owners to permit installation and maintenance of cable television wires on their premises. Jean Loretto, owner of a five-story apartment building on Manhattan's West Side, successfully argued that mandated installation of a ½-inch diameter cable and two 1½-cubic foot boxes on her roof was a Taking.

[7]Cedar Point Nursery v. Hassid, 141 S.Ct. 143 (2021).

[8]Nollan v. California Coastal Comm'n., 483 U.S. 825 (1987); Dolan v. City of Tigard, 512 U.S. 374 (1994); Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595 (2013).

[9]*Sheetz v. Cnty. of El Dorado*, 601 U.S. 267 (2024).

[10]*Devillier v. Texas*, 601 U.S. 285 (2024).

[11]*Tyler v. Hennepin Cnty.*, 505 F.Supp. 3d 879 (D. Minn. 2020).

[12]MINN. STAT. §§ 281.17(a), .18.

[13]*Tyler*, 505 F. Supp. 3d at 894.

[14]*Id.*

[15]Tyler v. Hennepin Cnty., 26 F. 4th 789, 793 (8th Cir. 2022).

[16]*Id.* at 794 (citing *Tyler* 505 F. Supp. 3d, at 895–899).

[17]Tyler v. Hennepin Cnty, 143 S. Ct. 1369, 1375 (2023).

[18]*Id.* (quoting Phillips v. Wash. Legal Found., 524 U.S. 156, 167 (1998)).

[19]*Id.* at 1376.

[20]*Id.* at 1378.

[21]*Id.* (quoting MINN. STAT. §§ 550.08, .20 (2022)).

[22]*Id.*

[23]*Id.* at 1376.

[24]*Id.* at 1381.

[25]*Id.*

[26]MICH. COMP. LAWS § 211.7cc(1).

[27]Pung v. Cnty. of Isabella, 632 F.Supp. 3d 743, 745 (E.D. Mich. Sep. 29, 2022) (citing Pung v. Cnty. of Isabella, no. 18-01334 (W.D. Mich. Sep. 29, 2020) "[T]here remains a potential dispute over whether the Fifth and Fourteenth Amendments require an accounting for not only the excess proceeds, but also for the full fair market value of the property, which could be a higher amount. The Court is not resolving that issue at this time. The parties may litigate the issue in the context of determining the proper amount of damages on these claims."

[28]Pung v. Kopke, Nos. 22-1919/1939 (6th Cir. Jan. 28, 2025) 2025 WL 31822 (en banc rehearing denied, Feb. 26, 2025).

[29]*Id.* The court also rejected Pung's other claims alleging Due Process and Equal Protection violations).

[30]Pung v. Isabella Cnty, No. 25-95 Amicus Br. of Local Government Legal Center, at Appx A. Fairness was also at the heart of the amicus brief of the United States in support of neither party, which argued that "[I]f the sale is conducted fairly, the taxpayer's just compensation is the surplus proceeds—that is, the total proceeds from the sale minus the tax debt (including interest, fees, and expenses)." At 10.

[31]BFP v. Resolution Tr. Corp., 511 U.S. 531, 548-549 (1994).

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

Contributed by Susan Keller

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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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.

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