RELIGIOUS LIBERTY LAW SECTION

STATE BAR OF ARIZONA

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FROM the EDITOR

Welcome to the December 2023 issue of the *Religious Liberty Law Section Newsletter*.

On October 23, 1992, the 102nd Congress of the United States passed a *Joint Resolution* establishing January 16, 1993 as "Religious Freedom Day." The Resolution was passed in honor of the fact that December 15, 1991, was the 200th anniversary of the completion of the ratification of the Bill of Rights, as well as in recognition of Thomas Jefferson's Bill for Establishing Religious Freedom and the Statute of Virginia for Religious Freedom which inspired the First Amendment's religious freedom clauses. In addition to establishing Religious Freedom Day, the Resolution authorized and requested the President of the United States to issue "a proclamation calling on the people of the United States to join together to celebrate their religious freedom and to observe the day with appropriate ceremonies and activities." In accordance with that Resolution, President George Bush issued the first Religious Freedom Day Proclamation. Although U.S. Presidents have now issued Religious Freedom Day Proclamations every year for over 30 years, I have chosen President Bush's inaugural Proclamation as this issue's *Great Moments in Religious Liberty History*.

Also, I want to, again, extend a personal note of thanks to John Bursch who authored this issue's Feature Article – *2023 Supreme Court Religious Liberty Law Round-Up* – in which, for the third year in a row, he discusses the most important religious liberty law-related decisions rendered by the U.S. Supreme Court during the Court's most recently completed term.

As always, we hope you find this issue of the *Religious Liberty Law Section Newsletter* both informative and useful

Bradley S. Abramson

Bradley S. Abramson, Editor

QUOTE DU JOUR

"The First Amendment of the Constitution was not written to protect the people from religion; that amendment was written to protect religion from government tyranny."

— Ronald Reagan

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FROM *the* CHAIR

Every day the headlines scream of wars and rumors of wars; of protest marches and counter-protests; of members of one religion persecuting another.

ROBERTA LIVESAY is a partner in the firm of Carden Livesay, Ltd. in Mesa where she litigates property valuation and catastrophic riverine flooding cases. She is a founding member of the Religious Liberty Law Section of the State Bar. She is also the Vice Chairman of Fellowship for Performing Arts, a professional nonprofit theatre located in New York that produces theatre and film from a Christian worldview.

There was even a story on X (formerly known as Twitter) of New Zealand Maoris coming out en masse in support of Israel and performing a Haka that frightened off an opposing protest in support of folks from a different religion. And of course, we have cake baker Jack Phillips, endlessly prosecuted by the State of Colorado, our own Arizona case of *Brush and Nib*, and the recent Supreme Court decision in *303 Creative LLC v Elenis*, 143 S Ct 2298 (2023). Employee rights are at the forefront with *Groff v. DeJoy*, 22-174 (Jun 29, 2023) the newest citation to guide decision-making.

But what about religious liberty for lawyers? We tend to think of ourselves as protecting the religious liberties of clients, but what about our own religious liberties? In Michigan, many judges and lawyers are looking at 2024 as a year when they might have to take a stand in court on behalf of their own religious liberty, not that of someone else.

Unless something happens between now and December 31, 2023, an amendment to Michigan Court Rule (MCR) 1.109 will take effect requiring courts to use a person's preferred pronouns unless the record will be confusing, whatever that means. It would allow parties and attorneys to identify their personal pronouns and would require courts to use those pronouns both verbally and in writing unless doing so would result in an unclear record.

Here's the Rule:

> *Parties and attorneys may also include any personal pronouns in the name section of the caption, and courts are required to use those personal pronouns when referring to or identifying the party or attorney, either verbally or in writing. Nothing in this subrule prohibits the court from using the individual's name or other respectful means of addressing the individual if doing so will help ensure a clear record.*

As you can imagine, this proposed rule change received a lot of attention and many comments – 444 to be exact. Religious organizations, denominations, and individuals from all walks of life wrote to protest the rule change proposal. The Religious Liberty Law Section of the Michigan Bar voted against the rule change and submitted its vote to the court as an objection. Judges wrote against the rule change, saying requiring them to use a pronoun that is not consistent with the person's biological sex would violate their religious beliefs. Many others wrote in favor of the rule change. The ACLU responded to the Catholic Lawyers Society of Metropolitan Detroit's concern for the religious rights and freedom of speech of judges by stating, "When judges and their staff speak from the bench, issue opinions and orders, or otherwise communicate on the record or in connection with a case before them, they do so in their judicial capacity and not in their capacity as private citizens. […] In other words, judges and their staff speak pursuant to their official duties as officers of the court when they use pronouns to refer to or identify parties or attorneys in the proceedings before them." (August 2, 2023 letter from Michigan ACLU to Chief Justice Elizabeth T. Clement, Michigan Supreme Court.) In other words, judges check their individual civil liberties at the door of the courthouse, at least according to the ACLU. Do they? Should they? What about lawyers? It would seem inconsistent to require judges and court staff to use a person's preferred pronouns but allow attorneys to use whatever pronouns they thought were appropriate.

Courtrooms should be places of respect for the law, the legal process, and the people appearing in front of the court or on behalf of the parties. Opinions as to what that means are changing rapidly. It also seems that what constitutes respect in the use of pronouns is easier to determine in the abstract than in practice. This rule provides no sanctions for its violation. It doesn't state what happens if a person uses a common pronouns instead of a preferred pronoun, nor does it explicitly provide that a person can waive that right if such person "violates" the rule oneself, either inadvertently or intentionally.

One thing is for sure, religious liberty law is dynamic and endlessly interesting as discussed in more detail herein. Join us in the Section to be sure to know of upcoming seminars and keep abreast of what's happening in religious liberty law.

Roberta S. Livesay

Roberta S. Livesay, Chair

GREAT MOMENTS *in* RELIGIOUS LIBERTY HISTORY

Religious Freedom Day, 1993 – Proclamation 6514 of President George Bush

We Americans have long cherished our identity as one Nation under God. To this day American law and institutions have been shaped by a view of man that recognizes the inherent rights and dignity of individuals. The Framers of our Government shared this view, and they never forgot the political and religious persecution that had forced their ancestors to flee Europe. Thus, it is not surprising that the first of all freedoms enumerated in our Bill of Rights is freedom of religion. The first amendment to our Constitution states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

As we reflect on our Constitution and Bill of Rights, we do well to acknowledge our debt to Thomas Jefferson and James Madison. These two men were instrumental in establishing the American tradition of religious liberty and tolerance. Thomas Jefferson articulated the idea of religious liberty in his 1777 draft Bill for Establishing Religious Freedom in Virginia. In that bill, he wrote:

> *…all men shall be free to profess, and by argument to maintain, their opinion in matters of religion, and that the same shall in no wise … affect their civil capacities.*

James Madison later introduced and championed this bill in the Virginia House of Delegates, where it passed in 1786. Following the Federal Constitutional Convention in 1787, James Madison led the way in drafting our Bill of Rights.

The religious freedom that James Madison and Thomas Jefferson helped to secure for us has been integral to the preservation and development of the United States. Over the years the exercise of our religious freedom has been instrumental in preserving the faith and the traditional values that are this Nation's greatest strengths. Moreover, the free exercise of religion goes hand in hand with the preservation of our other rights. As Thomas Jefferson noted, the first amendment "guard[s] in the same sentence, and under the same words, the freedom of religion, of speech, and of the press; insomuch as that whatever violates either throws down the sanctuary which covers the others." That sanctuary is the spirit of life, liberty, truth, and justice.

In that spirit, the United States has continued to champion religious liberty and tolerance around the world. We decry as reprehensible the persecution of ethnic and religious minorities, and we likewise condemn the resurgence of anti-Semitism and other forms of religious bigotry. The United States calls on all nations to respect the fundamental rights of individuals, in accordance with international human rights agreements and in recognition of the direct and inexorable relationship between freedom and justice and the achievement of lasting peace in the world.

The Congress, by House Joint Resolution 457, has designated January 16, 1993, as "Religious Freedom Day" and has requested the President to issue a proclamation in observance of this day.

Now, Therefore, I, George Bush, President of the United States of America, do hereby proclaim January 16, 1993, as Religious Freedom Day. I urge all Americans to observe this day with appropriate ceremonies and activities in their homes, schools, and places of worship as an expression of our gratitude for the blessings of liberty and as a sign of our resolve to protect and preserve them.

In Witness Whereof, I have hereunto set my hand this ninth day of December, in the year of our Lord nineteen hundred and ninety-two, and of the Independence of the United States of America the two hundred and seventeenth.

George Bush

SELECTED U.S. CASE LAW *Updates*

CASE 1 *Groff v. DeJoy*

600 U.S. 447 (2023)

THE UNDUE HARDSHIP TEST UNDER TITLE VII'S RELIGIOUS ACCOMMODATION PROVISION REQUIRES A FINDING THAT THE HARDSHIP WOULD BE SUBSTANTIAL IN THE CONTEXT OF AN EMPLOYER'S BUSINESS.

For a discussion of this case see the Feature Article *2023 Supreme Court Religious Liberty Law Round-Up* by John J. Bursch beginning on page 8.

CASE 2 *303 Creative LLC v. Elenis*

600 U.S. 570 (2023)

A PUBLIC ACCOMMODATION ANTI-DISCRIMINATION LAW CANNOT BE APPLIED TO FORCE A BUSINESS OWNER TO SPEAK MESSAGES CONTRARY TO THE OWNER'S RELIGIOUS BELIEFS.

For a discussion of this case see the Feature Article *2023 Supreme Court Religious Liberty Law Round-Up* by John J. Bursch beginning on page 8.

CASE 3 *Fellowship of Christian Athletes, et al. v. San Jose Unified School District Board of Education, et al.*

82 F.4th 664 (9th Cir. 2023)

A PUBLIC SCHOOL'S DENIAL OF RECOGNITION TO A STUDENT GROUP BASED ON THE STUDENT GROUP'S RELIGIOUS BELIEFS VIOLATED THE FIRST AMENDMENT.

In this *en banc* opinion from the U. S. Court of Appeals for the 9th Circuit the court determined that San Jose Unified School District (School District) violated the constitutional rights of the Fellowship of Christian Athletes (FCA) when it revoked FCA's status as a recognized student organization because of the FCA's religious views and its Christian leadership requirements.

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

The School District's revocation of FCA's student club status began when a District teacher complained about FCA's

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religious beliefs as being "objectionable". He said "I feel that there's only one thing to say that will protect our students who are so victimized by religious views that discriminate against them … these views are bullshit to me. They have no validity. It's not a choice and it's not a sin. I'm not willing to be the enabler for this kind of 'religious freedom' anymore [and] attacking these views is the only way to make a better campus."

Following the teacher's complaint the District stripped the FCA club of its status as a school-approved student group.

The FCA sued for relief under (1) the Equal Access Act, (2) free speech, free expressive association, and free exercise of religion under the First Amendment, and (3) equal protection under the Fourteenth Amendment.

After disposing of the School District's contention that FCA lacked standing, the court addressed the merits of the case.

In addressing FCA's free exercise claim the court first considered the standard of review and concluded that strict scrutiny was the correct standard to apply, stating that "[u]nder the strict scrutiny standard, the government must demonstrate that 'a law restrictive of religious practice must advance interests of the highest order and must be narrowly tailored in pursuit of those interests.'" The court, for the following reasons, rejected the District's argument that the strict scrutiny standard did not apply to the District's revocation of the FCA's student group status.

First, the court concluded that the District's action was not neutral and generally applicable because "targeting [religion] is not required for a government policy to violate the Free Exercise Clause. Instead, favoring comparable secular activity is sufficient."

The court explained that "Supreme Court authority sets forth three bedrock requirements of the Free Exercise Clause that the government may not transgress, absent a showing that satisfies strict scrutiny. First, a purportedly neutral 'generally applicable' policy may not have 'a mechanism for individualized exemptions' [citation omitted]. Second, the government may not 'treat … comparable secular activity more favorably than religious exercise' [citation omitted]. Third, the government may not act in a manner 'hostile to … religious beliefs' or inconsistent with the Free Exercise Clause's bar on even 'subtle departures from neutrality' [citations omitted]. The failure to meet any one of these requirements subjects a governmental regulation to review under strict scrutiny. [And][o]n the record before us, the District's implementation of its non-discrimination policies fails all three."

The court rejected the District's position that its non-discrimination policy was neutral and generally applicable because the District retained discretion to grant individualized exemptions for its own and student programs. The court noted that the District's policy allowed it to decide which student groups qualified for the equity policies objectives, based upon certain characteristics. The court stated that that authority rendered the policy not generally applicable, requiring the application of strict scrutiny review.

The court also concluded that the District's anti-discrimination policy was subject to strict scrutiny because, under the policy, the District treated comparable secular activity more favorably than religious activity. In coming to this conclusion, the court noted that the District recognized a Girls' Circle organization even though it admitted only female-identifying students, a Big Sister/Little Sister club even though it excluded members of the opposite gender, and a Senior Women Club even though its members had to identify as females. The court stated that the fact that each of these secular student groups was allowed to expressly discriminate on the basis of sex treated secular groups more favorably than religious groups and undercut the District's purported goal of ensuring equal access to the District's programs.

Third, the court found that the District's actions evinced hostility to the FCA's religious beliefs, thereby violating the Free Exercise principle that forbids even subtle departures from neutrality. In particular, the court found that the District's hostility to FCA's religious beliefs was obvious, both because of the different treatment the District applied to secular student groups and the FCA group as well as statements of District employees and officials condemning the FCA's religious beliefs. Hence, the court concluded that the District's actions "were motivated by 'animosity to religion or distrust of its practices'" thereby subjecting the District's actions to strict scrutiny review.

The court also rejected the District's argument that its actions were justified by its desire to further inclusiveness through its anti-discrimination policies. Stating that "[w]hile the District's asserted interest in inclusiveness may be important, the Constitution prohibits the District from furthering that interest by discriminating against religious views." The court also stated that "[a]nti-discrimination laws and policies serve undeniably admirable goals, but when those goals collide with the protections of the Constitution, they must yield – no matter how well-intentioned."

In conclusion, the court determined that FCA was likely to succeed on its Free Exercise, Free Speech, and Equal Access claims, thereby entitling it to an injunction reinstating it as a recognized student group.

Judge Forrest filed a concurring opinion, Judges Smith and Sung both filed separate partial concurring and partial dissenting opinions, and Judge Murguia filed a dissenting opinion.

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CASE 4 *Fitzgerald v. Roncalli High School, Inc.*

73 F.4th 529 (7th Cir. 2023)

A GUIDANCE COUNSELOR WHOSE EMPLOYMENT AT A CATHOLIC HIGH SCHOOL WAS TERMINATED BECAUSE SHE WAS IN A SAME-SEX MARRIAGE WAS BARRED BY THE MINISTERIAL EXCEPTION FROM BRINGING AN EMPLOYMENT DISCRIMINATION SUIT.

In this case, the U.S. Court of Appeals for the Seventh Circuit addressed whether a guidance counselor at a Catholic high school was a "minister" for purposes of the ministerial exception to employment discrimination claims.

The plaintiff was a guidance counselor and Co-Director of Guidance at Roncalli High School for 14 years. When the school declined to renew her employment agreement on the ground that her same-sex marriage was contrary to the Catholic faith the plaintiff sued.

The court noted that "[t]here is no dispute that the defendants fired Fitzgerald because of her same-sex marriage and that Title VII prohibits this kind of sex discrimination." However, the court explained that the First Amendment's religion clauses "bars employment discrimination suits 'when the employer is a religious group and the employee is one of the group's ministers … This is what has long been called 'the ministerial exception.'"

The court noted that the purpose of the ministerial exception is to prevent the state from interfering with the internal governance of religious organizations. Otherwise, the state could deprive religious organizations of control over those who personify the religious organization's beliefs.

In applying the ministerial exception, the court stressed that whether or not an employee is a minister is "a multi-factored, fact-specific inquiry" and that the religious organization raising the defense bears the burden of proof.

The court explained that applying the ministerial exception demands, among other things, consideration of the employee's formal title, the substance of the employee's duties as reflected by that title, the employee's own use of the title, and the important religious functions the employee performs for the religious organization. Although deference is shown to the religious organization in determining whether the employee served a religious role, a religious organization cannot demonstrate that an employee is a minister merely by asserting that everyone on the organization's payroll is a minister or by requiring all its employees to sign a ministerial contract.

In finding that the plaintiff in this case was a minister for purposes of the ministerial exception, the court noted several factors. First, the court noted that the plaintiff sat on the school's Administrative Council and, in that role, she participated in religious planning and discussion, including the planning of religious details of religious services. The court noted that sitting on the Administrative Council made the plaintiff a "key, visible leader" of the school. Second, in her role as a guidance counselor, the plaintiff "helped implement the Catholic Educator Advancement Program" under which the school evaluates guidance counselors as to how well they embody the "Spirit of Roncalli" including identifying the particular ways in which the "teacher/guidance counselor is living out the mission of [the] school, supporting the fulfillment of the mission of [the] school, and living out the charisms of Saint John XXIII." Third, the court noted that the plaintiff herself held herself out as a minister by emphasizing her participation in the school's religious services and the ways in which she used her religious beliefs in her guidance counseling duties.

Based on these findings, the court concluded that the plaintiff was a "minister" for purposes of the ministerial exception and that, therefore, her employment discrimination suit against the school was barred.

CASE 5 *Thai Meditation Association of Alabama, Inc. v. City of Mobile*

83 F.4th 922 (11th Cir. 2023)

A CITY'S GENERAL INTEREST IN PRESERVING THE CHARACTER OF A NEIGHBORHOOD AND TRAFFIC CONCERNS WERE INSUFFICIENT, UNDER THE STATE CONSTITUTION'S RELIGIOUS FREEDOM AMENDMENT, TO JUSTIFY DENYING A RELIGIOUS ORGANIZATION'S ZONING APPLICATION TO CONSTRUCT A BUDDHIST MEDITATION CENTER IN A RESIDENTIAL ZONE.

In this case, the Thai Meditation Association of Alabama (TMAA) sought to convert a property zoned for residential use into a center for Buddhist meditation. The City of Mobile's Planning Commission and City Council denied TMAA's application. The TMAA sued under the Religious Land Use and Institutionalized Persons Act (RLUIPA), the Free Exercise Clause of the First Amendment, and the Religious Freedom Amendment (ARFA) of the Alabama Constitution.

Although the court denied summary judgment under RLUIPA and the Free Exercise Clause, it entered summary judgment in favor of TMAA on its Alabama Constitution Religious Freedom Amendment claim.

In doing so, the court first noted that the ARFA provides that the city "'shall not burden a person's freedom of religion' unless the city can demonstrate that the burden is the least restrictive means of achieving a compelling government interest: Thus, ARFA, like RLUIPA, requires the government's action to satisfy strict scrutiny to survive review."

However, the court noted that, unlike RLUIPA which

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requires a "substantial burden" on religion, ARFA applies against "any burden" on religion, "even an incidental or insubstantial one." Therefore, ARFA provides more protection than does RLUIPA.

The court first determined that TMAA's desire to establish a Buddhist meditation center on a site conducive to its religious practices implicated TMAA's religious liberty rights. Therefore, the court concluded that ARFA applied to Mobile's zoning application decision because the decision restricted TMAA's right to practice its religion as TMAA conceives it.

The court then concluded that the reasoning behind the City's denial of TMAA's application failed strict scrutiny review because it did not evidence a compelling government interest – a government interest of the "highest order."

The City had asserted two interests as compelling – (1) the City's interest in preserving the character of the residential neighborhood in which TMAA's property was located and (2) concerns over increased traffic. But, as the court noted, "'generalized statement[s] of interests, unsupported by specific and reliable evidence' will not do," pointing out that "generalized, high-level invocations" in the zoning context "are often used to target minority faith's land use applications … [and] underscore why it is necessary to hold government entities to their burden to state and support a well-defined government interest."

With respect to the City's interest in preserving the residential character of the neighborhood, the court noted that "we have never held that neighborhood character or zoning are compelling government interests sufficient to justify abridging core constitutional rights." In fact the court stated that it had previously held that aesthetics and traffic safety concerns were not compelling government interests in the context of First Amendment cases. Therefore, the court concluded, "[t]he generalized invocations of neighborhood character and zoning fail as a matter of law."

With respect to the City's traffic concerns, the court found that there was no evidence in the record supporting a contention that any substantial increase in traffic on the streets to and from the proposed meditation center would occur if the TMAA's application were approved. Therefore, the government's contended interest in traffic concerns failed as well.

For all these reasons the court entered summary judgment in TMAA's favor on its ARFA claim.

FEATURE ARTICLE

2023 Supreme Court Religious Liberty Law Round-Up

By John J. Bursch

As I noted last year, the U.S. Supreme Court 2021–22 Term was a blockbuster for religious liberty, as the U.S. Supreme Court decided four significant cases upholding important First Amendment religious liberty law-related rights, including a criminal defendant's right to a minister's prayers in the execution chamber, *Ramirez v. Collier*, 595 U.S. 411 (2022), a religious organization's right to raise a religious flag in front of city hall when the city allows a multiplicity of other political and cultural flags to be flown, *Shurtleff v. City of Boston*, 596 U.S. 243 (2022), a religious school's right to public funding when that funding is made generally available to secular entities, *Carson v. Makin*, 142 S. Ct. 1987 (2022), and a public employee's right to offer private prayer on his own time even though on work premises, *Kennedy v. Bremerton*, 142 S. Ct. 2407 (2022).

The Court decided fewer cases related to religious liberty in its 2022–23 Term, but both of those cases were whoppers. Read on.

❶ The award for the Court's most significant 2022 Term religious-liberty case goes to *Groff v. DeJoy*, 600 U.S. 447 (2023).[1]

Mr. Groff is an Evangelical Christian who believes, for religious reasons, that Sunday should be devoted to worship and rest rather than to work. When he first took a job with the U.S. Postal Service in 2012, that wasn't a problem because his position generally did not involve Sunday work. However, that changed after the Postal Service began handling Sunday deliveries for Amazon.

To avoid being assigned to work Sundays on a rotating basis, Mr. Groff requested and received a transfer to a rural Postal Service station that did not make Sunday deliveries. Eventually, however, Amazon deliveries on Sunday came to that location, too. And after Groff received "progressive discipline" for declining to work on Sundays, he was eventually forced to resign.

1. Alliance Defending Freedom filed an amicus brief in support of Mr. Groff.

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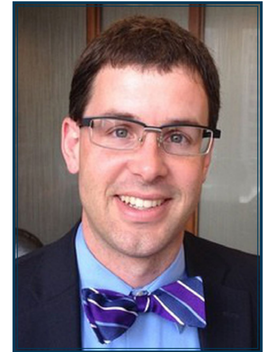

ABOUT THE AUTHOR

JOHN J. BURSCH serves as Senior Counsel and Vice-President of Appellate Advocacy with Alliance Defending Freedom. He also owns and operates his own law firm, Bursch Law, PLLC. He has argued 12 cases before the U.S. Supreme Court and more than three dozen cases before state supreme courts. He served as the Solicitor General of the State of Michigan from 2011 through 2013. Bursch earned his J.D., magna cum laude, from the University of Minnesota Law School, where he served as Chief Note and Comment Editor of the *Minnesota Law Review*.

After law school Bursch served as a law clerk for the Hon. James B. Loken of the U.S. Court of Appeals for the 8th Circuit. He has been inducted into the American Academy of Appellate Lawyers and serves as a member of the American Law Institute. Bursch is admitted to practice before numerous federal district and appellate courts, including the U.S. Supreme Court. He frequently litigates on behalf of clients seeking to vindicate religious liberty, free speech, and the right to life, and was part of the merits team involved in briefing and oral argument preparation in *303 Creative LLC v. Elenis*.

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Mr. Groff sued under Title VII of the Civil Rights Act of 1964 which requires employers to make religious accommodations unless doing so would cause "undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j). But Mr. Groff lost in the district court and the United States Court of Appeals for the Third Circuit, based on the Supreme Court's 46-year-old decision in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977). In *Hardison*, the Court construed the "undue hardship" standard in the context of a collective-bargaining-agreement seniority system and held that an employer need not offer a religious accommodation if doing so caused the employer "more than a de minimis cost." *Id. at 84*. That low standard doomed many Title VII religious accommodation claims, including Mr. Groff's.

On review, though, the Supreme Court unanimously reversed the Third Circuit in *Groff*, limited *Hardison* to its facts, and reaffirmed the plain text of Title VII's religious accommodation provision. As the Court put it, "showing 'more than a de minimis cost,' as that phrase is used in common parlance, does not suffice to establish 'undue hardship' under Title VII." 600 U.S. at 468. Rather than attempting to redefine what constitutes an "undue hardship," the Court directed lower courts to "resolve whether a hardship would be substantial in the context of an employer's business in the common-sense manner that it would use in applying any such test." *Id. at 471*.

The Court then clarified the contours of that standard in two concrete contexts.

First, while an undue hardship inquiry might include how a possible accommodation will impact coworkers, that impact must "have ramifications for the conduct of the employer's business." 600 U.S. at 472 (emphasis added). Accordingly, "a coworker's dislike of 'religious practice and expression in the workplace' or 'the mere fact [of] an accommodation' is not 'cognizable to factor into the undue hardship inquiry.'" *Id*. In other words, a "hardship that is attributable to employee animosity to a particular religion, to religion in general, or to the very notion of accommodating religious practice cannot be considered 'undue.'" *Id*.

Second, "Title VII requires that an employer reasonably accommodate an employee's practice of religion, not merely that it assess the reasonableness of a particular possible accommodation." 600 U.S. at 473. When "[fa]ced with an accommodation request like Groff's, it would not be enough for an employer to conclude that forcing other employees to work overtime would constitute an undue hardship. Consideration of other options, such as voluntary shift swapping, would also be necessary." *Id.* Whether voluntary shift swapping constitutes an undue hardship might depend on factors like company size and number of locations.

In the end, the Court left it to the lower courts to resolve Mr. Groff's case. Suffice it to say that the newly reinvigorated "undue hardship" standard will need to be resolved in a variety of contexts in future cases. For example, Alliance Defending Freedom represents John Kluge, a former high school music teacher who was forced to resign when a public school revoked his accommodation to use students' last names rather than preferred pronouns that Mr. Kluge believed to be a lie that caused students harm. Now, after *Groff*, federal courts must determine whether granting such an accommodation is an undue hardship to the school district's business where the evidence suggests that the accommodation worked, Mr. Kluge's students performed well, and complaints about the accommodation appeared to be ideologically motivated.

Cases like Mr. Kluge's are only the tip of the post-*Groff* iceberg. Suffice it to say that the *Groff* ruling has reinvigorated religious employees' claims for Title VII accommodations.

❷ In a religious-liberty adjacent decision, the Court resoundingly upheld the free-speech rights of creative professionals in *303 Creative LLC v. Elenis*, 600 U.S. 570 (2023).[2]

Though not, strictly speaking, a religious liberty law holding – because the Supreme Court's holding was based on the Free Speech, rather the Free Exercise, clause of the First Amendment – the Supreme Court issued one of its most important free-speech rulings in years in *303 Creative v. Elenis*, holding that government officials may not use a public accommodations law to compel a business owner to speak in a way that violates her conscience. Despite the Free Speech basis of the decision, it qualifies as a religious liberty law-related decision because Ms. Smith's objection to the challenged law was based on the claim that it compelled her to speak in a way that was contrary to her religiously informed conscience.

Lorie Smith is the sole member-owner of 303 Creative, a limited liability company that provides website and graphic design services. Lorie left her job at a large company so that she could start her own independent design studio to promote causes close to her heart. Lorie decides which commissions to accept based on what the message is, not who is requesting it. Indeed, Colorado agreed that Lorie will work with clients regardless of race, creed, sexual orientation, or gender, and strives to serve them with honesty and transparency. The question is always what message will be expressed. Lorie will

2. Alliance Defending Freedom represented Petitioners 303 Creative, LLC and Lorie Smith.

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decline any request – no matter who makes it – to create content that contradicts the truths of the Bible, demeans or disparages someone, promotes atheism or gambling, endorses the idea of taking unborn life, incites violence, or promotes a concept of marriage that is not solely the union of one man and one woman.

Since creating custom designs for her own wedding, Lorie wanted to enter the wedding website business so that she could celebrate God's plan for marriage. But because she and her business reside in Colorado – the same state where Jack Phillips and Masterpiece Cakeshop are located – she would be subjected to prosecution by Colorado and citizen complainants under CADA, the Colorado Anti-Discrimination Act. Having observed how Colorado treated Jack Phillips for respectfully declining to create cakes that conflict with his religious beliefs (Mr. Phillips is now mired in his third lawsuit, which the Colorado Supreme Court recently agreed to review), Lorie decided to file a pre-enforcement lawsuit to protect her constitutional rights. Such suits have been a hallmark of the Civil Rights movement for decades.

After the district court dismissed her case, the Tenth Circuit affirmed. It held that Lorie had standing to pursue her pre-enforcement claims, that her work as a commercial artist was protected by the First Amendment, and that the Constitution required the court to apply strict scrutiny to Colorado's speech compulsion. Yet the Tenth Circuit held that Colorado had a compelling interest to force Lorie to create speech in violation of her beliefs and that because her speech was "unique," compulsion was the most narrowly tailored way to advance that interest.

The Supreme Court emphatically reversed in a 6–3 decision, holding that "the First Amendment protects an individual's right to speak his mind" and equally protects "acts of expressive association." *600 U.S. at 586* (citations omitted). Conversely, the Court held that "the government may not compel a person to speak its own preferred messages." *Id.* (citations omitted). In so holding, the Court dispensed with many of the arguments that government officials commonly advance to justify their use of public accommodations laws to justify speech compulsion.

To begin with, the Court found that "the wedding websites Ms. Smith seeks to create qualify as 'pure speech'" covered by the Free Speech Clause. *600 U.S. at 587.* "All manner of speech – from 'pictures, films, paintings, drawings, and engravings,' to 'oral utterance and the printed word' – qualify for the First Amendment's protections; no less can hold true when it comes to speech like Ms. Smith's conveyed over the Internet." *Id.* (citations omitted).

Next, the Court noted that the wedding websites that Lorie seeks to create "involve her speech." *600 U.S. at 588.* "Of course, Ms. Smith's speech may combine with the couple's in the final product," the Court observed. *Id.* "But for purposes of the First Amendment that changes nothing. An individual 'does not forfeit constitutional protection simply by combining multifarious voices' in a single communication." *Id.* (citation omitted).

As for Colorado, the Court found that it "seeks to compel speech Ms. Smith does not wish to provide." *600 U.S. at 588.* Moreover, "Colorado seeks to compel this speech in order to 'excis[e] certain ideas or viewpoints from the public dialogue.' Indeed, the Tenth Circuit recognized that the coercive '[e]liminati[on]' of dissenting 'ideas' about marriage constitutes Colorado's 'very purpose' in seeking to apply its law to Ms. Smith." *Id.* (citation omitted). Colorado's forcing Lorie to choose between remaining silent or speaking as Colorado demands "'is enough,' more than enough, to represent an impermissible abridgment of the First Amendment's right to speak freely." *Id. at 589* (citation omitted).

"[N]o public accommodations law is immune from the demands of the Constitution," the Court concluded. *600 U.S. at 592.* "In particular, this Court has held, public accommodations statutes can sweep too broadly when deployed to compel speech." *Id.* "When a state public accommodations law and the Constitution collide, there can be no question which must prevail." *Id.*

In these circumstances, it makes no difference that Lorie "offers her speech for pay" and does so through a corporate form. *600 U.S. at 594.* "Does anyone think a speechwriter loses his First Amendment right to choose for whom he works if he accepts money in return?" *Id.* No. "Many of the world's great works of literature and art were created with an expectation of compensation. Nor, this Court has held, do speakers shed their First Amendment protections by employing the corporate form to disseminate their speech." *Id.*

In sum, the Court held that the "First Amendment envisions the United States as a rich and complex place where all persons are free to think and speak as they wish, not as the government demands." *600 U.S. at 603.* "Colorado seeks to deny that promise." *Id.*

NEWS *and* ANNOUNCEMENTS

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If you have any questions, please contact Betty Flores at Betty.Flores@staff.azbar.org.

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RESOURCES

LAW RESOURCES

Federal Statutes

Religious Freedom Restoration Act of 1993 – 42 U.S.C. § 2000bb, et seq.

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

Equal Access Act – 20 U.S.C. § 4071

Office of the U.S. Attorney General

October 6, 2017 Memorandum: Federal Law Protections for Religious Liberty.
https://www.justice.gov/crt/page/file/1006786/download

October 6, 2017 Memorandum: Implementation of Memorandum on Federal Law Protections for Religious Liberty.
https://www.justice.gov/crt/page/file/1006791/download

July 30, 2018 Memorandum: Religious Liberty Task Force.
https://www.justice.gov/opa/speech/file/1083876/download

U.S. Department of State

February 5, 2020 Declaration of Principles for the International Religious Freedom Alliance.
https://www.state.gov/declaration-of-principles-for-the-international-religious-freedom-alliance/

2019 Annual Report of the U.S. Commission on International Religious Freedom.
https://www.uscirf.gov/sites/default/files/2019USCIRFAnnualReport.pdf

July 26, 2019 2nd Annual Ministerial to Advance Religious Freedom: Remarks by Vice President Pence.
https://www.whitehouse.gov/briefings-statements/remarks-vice-president-pence-ministerial-advance-religious-freedom/

U.S. Department of Justice and U.S. Department of Education

January 16, 2020 Guidance on Constitutionally Protected Prayer and Religious Expression in Public Elementary and Secondary Schools.
https://www2.ed.gov/policy/gen/guid/religionandschools/prayer_guidance.html

U.S. Department of Labor

August 10, 2018 Directive 2018-03: To incorporate recent developments in the law regarding religion-exercising organizations and individuals.
https://www.dol.gov/ofccp/regs/compliance/directives/dir2018_03.html

May 2020 Guidance Regarding Federal Grants and Executive Order 13798 – Equal Treatment in Department of Labor Programs for Religious Organizations.
https://www.dol.gov/agencies/oasam/grants/religious-freedom-restoration-act

U.S. Department of Health and Human Services

Final Regulations Protecting Statutory Conscience Rights in Health Care 45 CFR Part 88
https://www.hhs.gov/sites/default/files/final-conscience-rule.pdf

U.S. Department of Veterans Affairs

VA Directive 0022, Religious Symbols in VA Facilities.

Arizona Statutes

Arizona Freedom of Religion Act – Ariz. Rev. Stat. § 41-1493.01

Other Resources

American Charter of Freedom of Religion and Conscience.
http://www.americancharter.org

RESOURCES

CLE VIDEOS

2017 ANNUAL CONVENTION CLE

Introduction: Religious Liberty Law Section CLE at the State Bar of Arizona 2017 Annual Convention, held on June 16, 2017

Presenter: David Garner (Osborn Maledon, P.A.)

[watch video]

Historical foundations of religious liberty law

Presenter: Professor Owen Anderson (Arizona State University)

[watch video]

Debate: Resolving conflicts between religious liberty and anti-discrimination laws

Participants: Jenny Pizer (Lambda Legal), Kristen Waggoner (Alliance Defending Freedom), Alexander Dushku (Kirton McConkie)

[watch video]

Panel Discussion: High profile religious liberty law issues

Moderator: Robert Erven Brown (Church & Ministry Law Group at Schmitt Schneck Even & Williams PC)
Panelists: Eric Baxter (The Becket Fund for Religious Liberty), Alexander Dushku (Kirton McConkie), Will Gaona (ACLU of Arizona), Jenny Pizer (Lambda Legal), Professor James Sonne (Stanford Law School), and Kristen Waggoner (Alliance Defending Freedom)

[watch video]

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