THE TRUTH SHALL MAKE YOU FREE: CURRENT ISSUES IN RELIGIOUS LIBERTY

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State Bar of Texas
28TH ANNUAL
ADVANCED GOVERNMENT LAW COURSE
July 28 - 29, 2016
Austin

CHAPTER 2

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PROFESSIONAL ACTIVITIES AND HONORS

Director, Fanning Harper Martinson Brandt & Kutchin, P.C.
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LICENSED TO PRACTICE

State Bar of Texas - 1985
Supreme Court of the United States - 1989
United States Court of Appeals for the Fifth Circuit - 1987
United States Court of Appeals for the Second Circuit - 2014
United States District Courts for the Northern District of Texas - 1985
United States District Courts for the Southern District of Texas - 1997
United States District Courts for the Eastern District of Texas - 1992
United States District Courts for the Western District of Texas – 2004

AREAS OF PRACTICE

Civil Litigation, School Law, Employment Law, Constitutional and Civil Rights, Local Government Defense, Appellate Practice, Land Use, Defense of Public Officials, Defense of Law Enforcement Officials

REPRESENTATIVE CASES

FW/PBS, Inc., v. City of Dallas, 493 U.S. 215 (1990) (upheld constitutionality of majority of municipal ordinance regulating sexually oriented businesses).

Morgan v. Swanson, 659 F.3d 359 (5th Cir. 2011) (en banc) (granted qualified immunity to elementary school principals on First Amendment challenge involving claims of viewpoint discrimination against student religious speech).

Lance v. Lewisville Indep. Sch. Dist., 743 F.3d 982 (5th Cir. 2014) (school district was not deliberately indifferent to the rights of disabled elementary school student who committed suicide at school).

Furley v. Aledo Indep. Sch. Dist., 218 F.3d 743 (5th Cir. 2000) (upheld decision dismissing student's First Amendment claims relating to the student's proposed commencement prayer).

Doe v. Rains County Indep. Sch. Dist., 66 F.3d 1402 (5th Cir. 1995) (held that teacher did not violate student's constitutional rights by failing to report alleged sexual abuse despite state law requiring report).

Fort Worth Indep. Sch. Dist. v. Palazzolo, No. 02-13-00006-CV, 2014 Tex. App. LEXIS 291 (Tex. App. Fort Worth Jan. 9, 2014) (court of appeals reversed the trial court's denial of summary judgment and held that the plaintiff failed to properly initiate the administrative grievance procedures jurisdictionally required by the Texas Whistleblower Act).

Midland Indep. Sch. Dist. v. Watley, 216 S.W.3d 374 (Tex. App. – Eastland 2006, no pet.) (reversed and rendered judgment for school district and public official in retaliation/Whistleblower case).

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THE TRUTH SHALL MAKE YOU FREE: CURRENT ISSUES IN RELIGIOUS LIBERTY

I. INTRODUCTION[1]

> "Ye shall know the truth, and the truth shall make you free."

A. Carved in Stone

As a young man attending the University of Texas at Austin many years ago, I had many occasions to walk past the main building on campus and look up and read the words, carved in stone, that spread across the front of the building:

> "Ye shall know the truth and the truth shall make you free."

I was always inspired by those words. I still am.

In addition to being inspired, I was intrigued. How could these words of Jesus Christ, lifted directly from the Gospel of John, Chapter 8 verse 32, be carved in stone and spread across the front of the main building of a public university? It caused me to wonder. Did they know these words were from Jesus? Did they have any idea what Jesus meant by these words? Did they just like the words and did not really care where they came from? Did the stone carver sneak one by the secular leaders of the University? The questions persisted for years; the answers were slow to unfold.

B. A Different Time

Recently, I learned a little about how those words came to be carved in stone on the main building. I learned that in 1935, Mr. Wood Hall, a stone carver from Bloomington, Indiana spent three weeks up on scaffolding as he carved the words into the face of the building. It is not likely that his work would have escaped the attention of the leaders of the university. What is more likely is that Mr. Hall was carrying out a conscious decision of the leaders of the university. It is very like that those in charge of the university at that time were Christians who had not yet encountered any teachings from the Supreme Court that would have given them any reason to hesitate in their desire to have the words of Jesus adorn their university's main building. It was a different time.

C. Still Carved in Stone

More than 80 years after Mr. Wood Hall completed his work and climbed down from his scaffold, the words remain and there has been no effort to remove them. Why? Perhaps one reason is that the words convey a concept with which everyone agrees, at least on the surface. Everyone agrees that truth is good, that freedom is good and that the two concepts are linked. The words possess a power to unite the atheist and the Christian. The words, on their surface, are a source of unity. Perhaps the atheist is not offended by the words because he agrees generally with them and he is not aware, or perhaps not constantly reminded, that they are the words of Jesus. The Christian agrees with them because they are true and they are the words of the Savior. Both agree but for very different reasons.

D. A Source of Unity and Division

While the words on the main building are a source of unity on one level, they are a source of division on a deeper level. The source of division comes from radically different ideas about both truth and freedom.

Christians understand the words to be referring to Christ himself. Christ said:

> "I am the Way, the Truth and the Life."

John 14.6. When he said "Ye shall know the Truth and the Truth shall make you free" Christ was referring to himself as the Truth. Pope John Paul II, in his encyclical *Veritatis Splendor* (the Splendor of Truth) reflected on Christ's words "the Truth shall make you free" by stating:

> "According to Christian faith and Church teaching, only the freedom which submits to the Truth leads the human person to his true good. The good of the person is to be in the truth and to do the Truth."

Christ was saying essentially:

> "if you know me and follow me you will be free."

This, of course is where the atheist or nonbeliever would part ways from the Christian. The deep conflict between the Christian view and the atheist view of truth and freedom has been apparent for many years but emerged starkly for me at a recent conference I attended.

[1] I would like to acknowledge with thanks the research assistance provided by William Davis and Christopher Brandt. I would also like to acknowledge with thanks the effort of Joshua Skinner, John Husted, Laura O'Leary, and Jennifer Kelley whose prior work provided the basis for substantial portions of this paper.

E. A Friendly Discussion about Religion in the Public Square

Religious freedom was the lunch panel discussion topic at the State Bar's seminar in Austin, Texas on July 26, 2012. The panel discussion was part of the State Bar's 24th Annual CLE course entitled "Suing and Defending Governmental Entities."

I was asked to serve as the moderator for an hour-long, wide-ranging discussion of Religious freedom. I was also to participate in the discussion in my capacity as one who has over the years represented a number of governmental entities and officials sued for allegedly violating various persons' rights of religious freedom. On my right side was a lawyer from the Liberty Institute. Liberty Institute, which recently changed its name to First Liberty, is a Texas-based non-profit law firm which focuses on litigating individual rights from a libertarian perspective and which draws its support largely form conservative, evangelical Christians. First Liberty tends to focus on religious liberty issues and tends to emphasize the Free Speech Clause in its litigation. On my left side was a lawyer from the Freedom from Religion Foundation (FFRF), a Wisconsin-based non-profit organization which advocates for atheists and promotes the separation of church and state. According to its bylaws, FFRF purposes are:

> "to promote the constitution principle of separation of state and church, and to educate the public on matters relating on non theism."

As the panel discussion progressed, each of us outlined our general approaches. The lawyer from the Liberty Institute outlined his organization's emphasis on freedom of speech and religion and freedom from government interference; the lawyer from FFRF outlined her organization's emphasis on the Establishment Clause and the separation of church and state. I emphasized how my clients were largely caught in the middle of the culture war battles being waged from the right and the left.

F. "Scrubbing Government Clean of Religion"

During the presentation by the FFRF lawyer, an off-hand remark was made concerning the FFRF's goal – that of "scrubbing government clean of religion." The phrase seemed to reveal an attitude that religion was a dirty stain on government that had to be removed. As it turns out, the phrase "*scrubbing government clean of religion*" appears to be consistent with FFRF's overall approach. For example, on its website on the "About FFRF" tab one can read the following:

> The history of Western civilization shows us that most social and moral progress has been brought about by persons free from religion. In modern times the first to speak out for prison reform, for humane treatment of the mentally ill, for abolition of capital punishment, for women's right to vote, for death with dignity for the terminally ill, and for the right to choose contraception, sterilization and abortion have been freethinkers, just as were the first to call for an end to slavery. The Foundation works as an umbrella for those who are free from religion and are committed to the cherished principle of separation of state and church.

G. A Battle for Hearts, Minds, Souls and Bodies

It is clear from both the phrase "scrubbing government clean of religion" and from the tone and content of its website that FFRF is not advocating tolerance for religious viewpoints and practices. FFRF's own language reveals a contempt for religion and for those who are not "free" from it. One can legitimately wonder whether this type of approach would support the notion that our nation's public life is meant for everyone and everyone has a duty to contribute to it. This approach might admit to the proposition that every reasonably intelligent person has something important to add to the discussion of our nation's future but would disqualify people of faith as not having a legitimate role to play in the project because they, by their adherence to "irrational faith", no longer qualify as "reasonable." The secularism which is commonly proposed today is not neutral toward religion, it is antireligious. It implies that the key qualities of Christianity and other major religions is both irrational and an impediment to true freedom and true progress.

H. A Refinement of an Old Bigotry

The current proposed secularism consists of nothing more than a refinement of an old bigotry. As one commentator noted:

> The crude anti-Catholic bigotry of the nineteenth and early twentieth centuries…has mutated into something different. In our age, it involves an elitist contempt for religion in general, but Christianity in particular.[2]

This old bigotry has been recognized and disavowed by Supreme Court.

Justice Clarence Thomas, in his majority opinion in *Mitchell v. Helms*, 530 U.S. 793 (2000) recognized that

[2] Render Unto Caesar, Charles J. Chaput (2008), pp. 7-8.

anti-Catholic bigotry distorted the Supreme Court's approach to the Establishment Clause in the past. Rejecting the old approach, Justice Thomas stated:

> "hostility to aid to pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow."

Id, at 828. He recounted the history of the Blaine Amendment and described how it was an open secret that "sectarian" was code for "Catholic." *Id.* He went on to explain how the Supreme Court in *Hunt v. McNair*, 413 U.S. 734 (1973) coined the term "pervasively sectarian" – a term which, at that time, could be applied almost exclusively to Catholic parochial schools. Justice Thomas stated:

> In short, nothing in the Establishment Clause requires the exclusion of pervasively sectarian schools from otherwise permissible aid programs and other doctrines of this Court bar it. *This doctrine, born of bigotry, should be buried now.*

I. "We are a Religious People."

In *Zorach v. Clauson*, 343 U.S. 306, 314 (1952) the Supreme Court declared that:

> "we are a religious people whose institutions presuppose a Supreme Being."

This phrase was repeated by the Court in numerous cases since.[3] The evidence for the role of Christianity in the founding and shaping of the United States is overwhelming.

J. "I have a Dream": A Healthy Church/State Relationship

Dr. Martin Luther King, Jr. is an American hero. We all recognize that. We all are united in praise of his work as a leader of the civil rights movement. But what must never be forgotten about him is that he was first and above all else a Christian minister who was guided by his faith in Jesus Christ. Although some may be tempted to dismiss the relevance of the faith of our founding fathers as something ancient which we have moved beyond, it is much harder to ignore the fact that the faith of Dr. King was the source of his enormous contribution to our society. Perhaps by focusing on Dr. King's thoughts we can recognize that people of faith have much to offer our society and that we should all work together to achieve a healthy relationship between church and state. I can think of no better way of making this proposal than to put before you Dr. King's own words which he wrote during his incarceration in a Birmingham jail. His famous "Letter from a Birmingham Jail" should be required reading for all lawyers as it speaks eloquently about justice and law. It speaks about unjust laws and how one can judge law itself. It also demonstrates how people of faith can make tremendously important contributions to our society. I close my introduction by setting forth excerpts from Dr. King's letter.

K. Excerpts from Rev. Dr. Martin Luther King, Jr.'s Letter from a Birmingham Jail

> April 16, 1963
>
> My Dear Fellow Clergymen:
>
> I am in Birmingham because injustice is here.… I am compelled to carry the gospel of freedom beyond my own home town.…Injustice anywhere is a threat to justice everywhere…. Birmingham is probably the most thoroughly segregated city in the United States. Its ugly record of brutality is widely known…
>
> Lamentably, it is an historical fact that privileged groups seldom give up their privileges voluntarily. Freedom is never voluntarily given by the oppressor; it must be demanded by the oppressed…. We have waited more than 340 years for our constitutional and God given rights.
>
> There are two types of laws: just and unjust. I would be the first to advocate obeying just laws. Conversely, one has a moral responsibility to disobey unjust laws. I would agree with St. Augustine that "an unjust law is no law at all."
>
> Now, what is the difference between the two? How does one determine whether a law is just or unjust? A just law is a man-made code that squares with the moral law or the law of God. An unjust law is a code that is out of harmony with the moral law. To put it in the terms of St. Thomas Aquinas: An unjust law is a human law that is not rooted in eternal law and natural law. Any law that uplifts human personality is just. Any law that degrades human personality is unjust….

[3] *Sch. Dist. of Abington Township v. Schempp*, 374 U.S 203, 213 (1963), *Marsh v. Chambers*, 463 U.S. 783, 792 (1983); and *Lynch v. Donnelly*, 465 U.S. 668, 675 (198).

One who breaks an unjust law must do so openly, lovingly, and with a willingness to accept the penalty. I submit that an individual who breaks a law that conscience tells him is unjust, and who willingly accepts the penalty of imprisonment in order to arouse the conscience of the community over its injustice, is in reality expressing the highest respect for law.

Of course, there is nothing new about this kind of civil disobedience. It was evidenced sublimely in the refusal of Shadrach, Meshach and Abednego to obey the laws of Nebuchadnezzar, on the ground that a higher moral law was at stake. It was practiced superbly by the early Christians who were willing to face hungry lions and the excruciating pain of chopping blocks rather than submit to certain unjust laws of the Roman Empire…. We should never forget that everything Adolf Hitler did in German was "legal" and everything the Hungarian freedom fighters did in Hungary was "illegal." It was "illegal to aid and comfort a Jew in Hitler' Germany. Even so, I am sure that, had I lived in Germany at the time, I would have aided and comforted my Jewish brothers….

Human progress never rolls in on wheels of inevitability; it comes through the tireless efforts of men willing to be co-workers with God, and without this hard work, time itself becomes an ally of the forces of social stagnation…. The time is always ripe to do right.

For there is the more excellent way of love and nonviolent protest.

Oppressed people cannot remain oppressed forever. The yearning for freedom eventually manifests itself…. But though I was initially disappointed at being categorized as an extremist, as I continued to think about the matter I gradually gained a measure of satisfaction from the label. Was not Jesus an extremist for love:

> "Love your enemies, bless them that curse you, do good to them that hate you, and pray for them which despitefully use you, and persecute you."

Was not Amos an extremist for justice:

> "Let justice roll down like waters and righteousness like an ever flowing stream."

Was not Paul an extremist for the Christian gospel:

> "I bear in my body the marks of the Lord Jesus."

Was not Martin Luther an extremist:

> "Here I stand; I cannot do otherwise, so help me God."

And John Bunyan:

> "I will stay in jail to the end of my days before I make a butchery of my conscience."

And Abraham Lincoln:

> "This nation cannot survive half slave and half free."

And Thomas Jefferson:

> "We hold these truths to be self-evident, that all men are created equal…"

So the question is not whether will we be extremists, but what kind of extremists we will be. Will we be extremists for hate or for love? Will we be extremists for the preservation of injustice or for the extension of Justice? In that dramatic scene on Calvary's hill three men were crucified. We must never forget that all three were crucified for the same crime – the crime of extremism. Two were extremists for immorality, and thus fell below their environment. The other, Jesus Christ, was an extremist for love, truth and goodness, and thereby rose above his environment. Perhaps the South, the nation and the world are in dire need of creative extremists….

I say this as a minister of the gospel, who loves the church; who was nurtured in its bosom; who has been sustained by its spiritual blessings and who will remain true to it as long as the cord of life shall lengthen….

There can be no deep disappointment where there is not deep love. Yes, I love the church.

How could I do otherwise? I am in the rather unique position of being the son, the grandson and the great grandson of preachers. Yes, I see the church as the body of Christ. But, Oh! How we have blemished and scarred that body through social neglect and through fear of being nonconformists….

Whenever the early Christians entered a town, the people in power became disturbed and immediately sought to convict the Christians for being "disturbers of the peace" and "outside agitators." But the Christians pressed on, in the conviction that they were "a colony of heaven," called to obey God rather than man. Small in number, they were big in commitment…. By their effort and example they brought an end to such ancient evils as infanticide and gladiatorial contests.

Perhaps I must turn my faith to the inner spiritual church, the church within the church, as the true ekklesia and the hope of the world. But again I am thankful to God that some noble souls from the ranks of organized religion have broken loose from the paralyzing chains of conformity and joined us as active partners in the struggle for freedom…. But they have acted in the faith that right defeated is stronger than evil triumphant. Their witness has been the spiritual salt that has preserved the true meaning of the gospel in these troubled times. They have carved a tunnel of hope through the dark mountain of disappointment. I hope the church as a whole will meet the challenge of this decisive hour…. If the inexpressible cruelties of slavery could not stop us, the opposition we now face will surely fail. We will win our freedom because the sacred heritage of our nation and the eternal will of God are embodied in our echoing demands….

One day the South will recognize its real heroes. They will be the James Merediths, with the noble sense of purpose that enables them to face jeering and hostile mobs, and with the agonizing loneliness that characterizes the life of the pioneer. They will be old, oppressed, battered Negro women, symbolized in a seventy two year old woman in Montgomery, Alabama, who rose up with a sense of dignity and with her people decided not to ride segregated buses, and who responded with ungrammatical profundity to one who inquired about her weariness:

> "My feets is tired, but my soul is at rest."

They will be the young high school and college students, the young ministers of the gospel and a host of their elders, courageously and nonviolently sitting in at lunch counters and willingly going to jail for conscience' sake. One day the South will know that when these disinherited children of God sat down at lunch counters, they were in reality standing up for what is best in the American dream and for the wells of democracy which were dug deep by the founding fathers in their formulation of the Constitution and the Declaration of Independence.

Never before have I written so long a letter. I'm afraid it is much too long to take your precious time. I can assure you that it would have been much shorter if I had been writing from a comfortable desk, but what else can one do when he is alone in a narrow jail cell, other than write long letters, think long thoughts and pray long prayers? …

I hope this letter finds you strong in the faith. I also hope that circumstances will soon make it possible for me to meet each of you, not as an integrationist or a civil-rights leader but as a fellow clergyman and a Christian brother. Let us all hope that the dark clouds of racial prejudice will soon pass away and the deep fog of misunderstanding will be lifted from our fear drenched communities, and in some not too distant tomorrow the radiant starts of love and brotherhood will shine over our great nation with all their scintillating beauty.

Yours for the cause of Peace and Brotherhood,
Martin Luther King, Jr.

II. GENOCIDE IN IRAQ AND SYRIA: AN INTERNATIONAL PERSPECTIVE ON RELIGIOUS FREEDOM

Before delving into the numerous religious freedom issues that arise in the courts of our country, we would do well to pause a moment to reflect on the more dire circumstances which exist in other countries. As we engaged in protracted litigation about candy canes and cheerleader banners, we should remember that those battles are nothing when compared to the battles for survival that many people are fighting across the globe. One such horrible battle is unfolding in Iraq and Syria.

The genocide[4] that is occurring in Iraq and Syria has been described as the greatest humanitarian crisis since World War II.[5] Ancient indigenous religious and ethnic communities have been the targets of this genocide and are threatened with extinction.[6] In Iraq, the Christian population has declined by more than 80 percent in in Syria by nearly 70 percent.[7]

A. U.S. Secretary of State: "ISIL's Violence Bears the Hallmarks of Genocide"

On August 7, 2014, Secretary of State John Kerry declared that:

> "ISIL's campaign of terror against the innocent, including Yezidi and Christian minorities, and its grotesque and targeted acts of violence bear all the warning signs and hallmarks of genocide."[8]

B. Pope Francis: "Christians are Suffering Inhuman Violence because of Their Religious Identity"

On December 6, 2014, Pope Francis issued a video-message to the Christians of Mosul and refugees in Erbil. In his message, Pope Francis addressed the fact that:

> "due mostly to a group of extremists and fundamentalists, entire communities, especially – but not only – Christians and Yazidis have suffered and are still suffering inhuman violence because of their ethnic and religious identity."[9]

C. U.N. High Commissioner for Human Rights: "Violence Perpetrated by ISIL may Constitute Genocide"

On March 13, 2015, a report was issued by the Office of the United Nations High Commissioner for Human Rights which detailed acts of violence perpetrated by ISIL against civilians:

> "because of their affiliation or perceived affiliation to an ethnic or religious group."

The report stated that it:

> "is reasonable to conclude that some of these incidents…may constitute genocide."[10]

D. Sister Diana Momeka: "ISIL is Engaged in Cultural and Human Genocide."

On May 13, 2015, Dominican Sister Diana Momeka, whose convent was driven from Mosul, Iraq, testified before the House Foreign Affairs Committee. She described the ISIL offensive as "cultural and human genocide." She stated that today:

> "the only Christians that remain in the Plains of Nineveh are those who are held as hostages."[11]

E. Pope Francis: "Genocide…is Taking Place."

On July 9, 2015, Pope Francis gave an address during his visit to Bolivia. Pope Francis stated:

> Today we are dismayed to see how in the Middle East and elsewhere in the world many of our brothers and sisters are persecuted, tortured and killed for their faith in Jesus. This

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[4] The United Nations Convention on the Prevention and Punishment of the Crime of Genocide, signed and ratified by the United States, defines genocide as:

Any of the following acts committed with the intent to destroy, in whole or in part, a national ethnical, racial or religious group, as such: (a) killing members of the group; (b) causing serious bodily or mental harm to members of the group; (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) imposing measures intended to prevent births within the group; (e) forcibly transferring children of the group to another group.

[5] Opening statement of Mr. Carl A. Anderson, Supreme Knight, Knights of Columbus, before the subcommittee on Africa, Global Health Global Human Rights and International Organizations of the Committee on Foreign Affairs U.S. House of Representatives at a hearing titled "The Isis Genocide Declaration: What Next?" May 26, 2016

[6] Id.

[7] Id.

[8] House Concurrent Resolution 75, March 15, 2016, p. 3

[9] Video-message of His Holiness Pope Francis to the Christians of Mosul, Refugees in Erbil, Saturday, December 6, 2014.

[10] House Concurrent Resolution 75, March 15, 2016, p. 4

[11] House Concurrent Resolution 75, March 15, 2016, p. 4

> too needs to be denounced: in this third world war, waged piecemeal, which we are now experiencing, a form of genocide – I insist on the word – is taking place, and it must end.[12]

F. The U.S. Commission on International Religious Freedom Calls for a Declaration of Genocide[13]

On December 7, 2015, the United State Commission on International Religious Freedom (USCIRF) called on the U.S. government to designate the Christian, Yazidi, Shi'a, Turkmen, and Shabak communities of Iraq and Syria as victims of genocide by ISIL. The USCIRF urged American leaders and other world leaders to condemn the genocidal actions and crimes against humanity of ISIL that have been directed at these groups and other ethnic and religious groups.

The USCIRF also urged world leaders to condemn the brutal persecution of, and crimes against humanity committed against, Sunni Muslims by the Assad regime in Syria and by ISIL in the case of Sunni Muslims who refuse to embrace their extremist ideology.

The USCIRF recommended that the U.S. government should support a referral by the UN Security Council to the International Criminal Court to investigate ISIL's atrocities against religious groups in both Iraq and Syria.

In its 2015 Annual Report, the USCIRF noted that the al-Assad regime has systematically targeted and massacred Sunni Muslims, thereby creating the environment in which ISIL could rise and spread, threatening the entire region and all religious communities that reject its violent religious ideology, with the smallest religious minority communities facing an existential threat.

Professor Robert P. George, the chairman of the USCIRF stated:

> The hallmark of genocide is the intent to destroy a national, racial, ethnic, or religious group, in whole or in part. ISIL's intent to destroy religious groups that do not subscribe to its extremist ideology in the areas of Iraq and Syria that it controls, or seeks to control, is evident in, not only its barbarous acts, but also its own propaganda.

G. The Simon-Skjodt Center: ISIL is Committing Ethnic Cleansing against Christians, Yezidis[14]

In December of 2015, the United States Holocaust Memorial Museum's Simon-Skjodt Center for the Prevention of Genocide issued a report which focused on the treatment of minorities in Nineveh from June to August 2014. The Simon-Skjodt Center found that ISIL had:

> "targeted civilians based on group identity, committing mass atrocities to control, expert, and exterminate ethnic and religious minorities."

The Simon-Skjodt Center concluded that ISIL had committed crimes against humanity, war crimes, and ethnic cleansing against Christian, Yezidi, Turkmen, Shabak, Sabean-Mandean, and KaKa'i communities in Nineva and perpetrated genocide against the Yezidi people."

H. The European Parliament: ISIL is Committing Genocide against Christians and Yezidis[15]

On February 3, 2016, the European Parliament expressed the view that ISIL:

> "is committing genocide against Christians and Yezidis, and other religious and ethnic minorities."

I. The U.S. House of Representatives: ISIL is Committing Genocide[16]

On March 14, 2016, the United States House of Representatives passed a resolution that stated as follows:

> (1) The atrocities perpetrated by ISIL against Christians, Yezidis, and other religious and ethnic minorities in Iraq and Syria constitute war crimes, crimes against humanity, and genocide;
> (2) All governments, including the United States, and international organizations, including the United Nations and the Office of the Secretary-General, should call ISIL atrocities by their rightful names: war crimes, crimes against humanity, and genocide;

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[12] Apostolic Journey of His Holiness Pope Francis to Ecuador, Bolivia and Paraguay (July 5-13, 2015). Participation at the Second World Meeting of Popular Movements, Address of the Holy Father, Expo Feria Exhibition Centre, Santa Cruz de al Sierra (Bolivia, Thursday, July 9, 2015, p. 9

[13] United States Commission on International Religious Freedom, USCIRF Statement on the Designation of Victims of Genocide, Persecution, and Crimes Against Humanity in Syria and Iraq, December 7, 2015.

[14] House Concurrent Resolution 75, March 15, 2016, pp. 4-5

[15] House Concurrent Resolution 75, March 15, 2016, p. 5

[16] House Concurrent Resolution 75, March 15, 2016

J. U.S. Secretary of State: "Daesh is Responsible for Genocide."

As of March 17, 2016, Secretary of State John Kerry appeared in the press briefing room in Washington, D.C. to deliver his "Remarks on Daesh and Genocide." Secretary Kerry said that Daesh is responsible for genocide against Yezidis, Christians, and Shia Muslims. Kerry stated that Daesh is genocidal by self-proclamation, by ideology, and by actions – in what it says, what it believes, and what it does. Kerry stated that Daesh is also responsible for crimes against humanity and ethnic cleansing directed at these same groups and in some cases also against Sunni Muslims, Kurds and other minorities.

Kerry pointed out what we know about the actions of Daesh. In Mosul, Qaraqosh, and elsewhere Daesh has executed Christians solely because of their faith. Daesh executed 49 Coptic and Ethiopian Christians in Libya. Daesh has also forced Christian women and girls into sexual slavery. Daesh massacred hundreds of Shia Turkmen and Shabaks at Tal Afar and Mosul. Daesh besieged and starved the Turkmen town of Amerli and kidnapped hundreds of Shia Turkmen women, raping many in front of their own families.

Kerry noted that the in areas under its control, Daesh has made a systemic effort to destroy the cultural heritage of ancient communities – destroying Armenian, Syrian Orthodox and Roman Catholic churches, blowing up monasteries and the tombs of prophets; desecrating cemeteries; and in Palmyra, even beheading the 83-year-old scholar who had spent a lifetime preserving antiquities there.

Kerry pointed out that Daesh's actions are animated by an extreme and intolerant ideology that castigates Yezidis as "pagans" and "devil-worshippers." Daesh has threatened Christians by saying that it will "conquer your Rome, break your crosses, and enslave your women."

III. THE LAWS CONCERNING RELIGION IN THE PUBLIC SQUARE.

A. The First Amendment to the U.S. Constitution

> "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 two "religion clauses", the Establishment Clause and the Free Exercise Clause, and also the Free Speech Clause, provide the initial legal framework for understanding the debates surrounding religion in public life.

B. The Establishment Clause

The Establishment Clause generally prohibits local governments and public officials, in their official capacities, from advancing, coercing, or endorsing one particular religion and also prohibits the endorsement of religion as opposed to non-religion. Courts have found that in order not to violate the Establishment Clause, a local government's or public official's actions must have a secular purpose, not have a primary effect of advancing or inhibiting religion and not foster an excessive government entanglement with religion. In the public school context, Courts have found that schools must not persuade or compel a student to participate in religious exercise. The courts' interpretations of the Establishment Clause has restricted the abilities of school officials to lead prayers with their students, teach religious material, and formally include support for religion in public schools. In *Mitchell v. Helms*, 530 U.S. 793 (2000) the Supreme Court openly acknowledged that many of the Supreme Court's prior Establishment Clause cases had been born out of anti-Catholic bigotry. The Court openly rejected the long history and "shameful pedigree" of the Court's anti-Catholicism. In doing so, the Court opened the door for a fresh look at what a healthy church/state relationship could be.

C. The Free Exercise Clause

The Free Exercise Clause prohibits local governmental entities from making rules or establishing practices specifically targeting adherents of particular faiths. Neutral laws and practices of general applicability are constitutional. There is considerable debate about whether the Supreme Court is correctly interpreting the Free Exercise Clause. Many people believe that the Free Exercise Clause provides greater protection to religious believers than is the case under current court decisions.

D. The Free Speech Clause

The application of the Free Speech Clause, like that of the Establishment Clause, has been a continual source of confusion. For instance, in the public school context, students have certain free speech rights in public schools. However, those rights are not coextensive with the rights of adults in public places and must be considered in light of the special circumstances of the school environment. What this general principle means in terms of student rights, student discipline, and what school personnel can and cannot do is a moving target and is highly dependent on the specific circumstances, including the age of the students, their grade level, when and where the actions in question take place, who are the actors, and any reactions or disturbance caused by an incident. In the context of the Free Speech Clause, public officials should be familiar with the type of "forum" that exists for various types of activities.

Depending on the type of forum that is created, local governments and public officials can impose different levels of reasonable restrictions on the time, place, and manner of speech, while not discriminating based on the viewpoint desired to be expressed.

E. The Equal Access Act

The federal Equal Access Act was passed by Congress in 1984 to give extra-curricular student groups equal access to school premises for meetings during non-instructional (usually after school hours) time.[17] The Act does not apply, however, to all schools. It applies exclusively to public secondary schools that receive federal financial assistance and also only applies if the school has a "limited open forum." which is created if the school allows at least one student led non-curriculum club (e.g., a chess club). Furthermore, the meetings must be student-initiated and non-students (e.g., a church's youth pastor) may not lead or be regular attendees at the meetings. School teachers, administrators, and officials may not promote, lead or participate in the meetings, although they may be assigned to the group "for custodial purposes." If a school fits within the Act, "school premises" includes not only classroom space, but also access to the school newspaper, bulletin boards, the public address system, and annual club fairs.

As a practical matter, The Equal Access Act reiterates and reinforces current First Amendment jurisprudence, which requires school district policies, including facility use policies, to be viewpoint neutral in limited public forums.[18] Furthermore, in Texas, the same principles are set forth in the Religious Viewpoint Anti-Discrimination Act, discussed below. Thus, even elementary schools must provide religious groups with the same access to their facilities that are provided to other community groups.

F. The Kerfuffle Regarding Religious Rights Legislation.

1. Introduction

The past twenty five years have seen something of a growth industry in legislation relating to religious rights. At the federal level, Congress enacted the Religious Freedom Restoration Act of 1994 (RFRA),[19] and the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA).[20] At the state level, at least sixteen states[21] have enacted their own versions of the Religious Freedom Restoration Act, whether through adoption of religious rights legislation (e.g., in Texas, through Texas Religious Freedom Restoration Act [TRFRA][22]) or through constitutional amendment to the state constitution (e.g., in Alabama). Other, more specialized forms of religious rights legislation have been passed at the federal and state levels to address more specific concerns, such as the Texas Religious Viewpoints Anti-Discrimination Act of 2007.[23]

2. Background

Texas did not enact TRFRA on a clean slate. The act is a response to a twenty-year federal kerfuffle over the level of scrutiny to apply to free exercise claims under the First Amendment of the United States Constitution.[24]

The First Amendment to the United States Constitution states, in pertinent part:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[25]

The Free Exercise Clause of the First Amendment was made applicable to the states by the Supreme Court in 1940,[26] but there was little case law interpreting the Free Exercise Clause until the Supreme Court decided *Sherbert v. Verner* in 1963.[27]

The current controversy surrounding the Free Exercise Clause and its protection of religious exercise stems from the Supreme Court's 1990 decision in *Employment Division v. Smith*.[28] Many academics and legislators believe that *Smith* gutted the Free Exercise Clause by holding that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice.[29] The critics of *Smith* generally argue that the

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[17] 20 U.S.C. §§ 4071-4074.

[18] *See Good News Club v. Milford Cent. Schs.*, 533 U.S. 98 (2001).

[19] 42 U.S.C. § 2000bb *et seq.*

[20] 42 U.S.C. § 2000cc *et seq.*

[21] Christopher C. Lund, *Religious Liberty After* Gonzales*: A Look at State RFRAs*, 55 S.D. L. Rev. 466, 477 (2010) (Connecticut, Florida, Illinois, Rhode Island, Alabama, Arizona, South Carolina, Texas, Idaho, New Mexico, Oklahoma, Pennsylvania, Missouri, Virginia, Utah, and Tennessee).

[22] TEX. CIV. PRAC. & REM. CODE §§ 110.001-.012.

[23] TEX. EDUC. CODE §§ 25.151-.157 (addressing viewpoint discrimination in public schools).

[24] *A.A. v. Needville Indep. Sch. Dist.*, 611 F.3d 248, 258 (2010)

[25] U.S. CONST. amend. I.

[26] *See Cantwell v. Connecticut*, 310 U.S. 296 (1940),

[27] 374 U.S. 398 (1963).

[28] 494 U.S. 872 (1990).

[29] *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508

compelling interest standard should apply whenever a law substantially burdens the free exercise of religion, regardless of whether the law is neutral and generally applicable.[30] The adoption of RFRA and RLUIPA by Congress and TRFRA by the Texas Legislature were direct responses to *Smith*.

3. Development of Religious Exercise Legislation

a. Pre-Smith Supreme Court Precedent Concerning the Free Exercise Clause.

The debate surrounding *Smith* centers on the question of whether the Free Exercise Clause is designed to grant religious individuals and institutions exemptions from generally applicable laws that incidentally burden religious exercise, absent a compelling state interest in the law's enforcement, or whether the Free Exercise Clause is designed to prevent intentional discrimination against religious exercise and religious believers.[31]

i. Before the Compelling Interest Test.

The earliest United States Supreme Court cases to discuss the Free Exercise Clause consistently held that the Free Exercise Clause does not exempt individuals from neutral laws of general applicability. In *Reynolds v. United States*, the criminal defendant sought to have his criminal conviction for bigamy vacated because, based on his religious beliefs, he believed that polygamy was right.[32] The Supreme Court rejected Reynolds' request for relief, holding that, through the First Amendment:

> "Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order."[33]

Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? Or if a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice?

So here, as a law of the organization of society under the exclusive dominion of the United States, it is provided that plural marriages shall not be allowed. Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.[34]

Throughout the following decades following the 1878 decision in *Reynolds*, the Supreme Court continued to reject claims that the Free Exercise Clause exempted religious believers from neutral laws of general applicability.[35] Up through at least 1940, when the Supreme Court first applied the Free Exercise Clause to state actions, the Supreme Court noted that neutral laws of general applicability will be upheld so long as they do not wholly deny the right to preach or to disseminate religious views. In *Cantwell v. Connecticut*, 310 U.S. 29 (1940) the U.S. Supreme Court reviewed the conviction of a Jehovah's Witness for soliciting without a certificate. In overturning the conviction, the Supreme Court noted that neutral laws of general applicability were permissible.

The freedom to act must have appropriate definition to preserve the enforcement of that protection. In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom. No one would contest the proposition that a State may not, by statute, wholly deny the right to preach or to disseminate religious views. Plainly such a previous and absolute restraint would violate the terms of the guarantee. It is equally clear that a State may by general and non-discriminatory legislation regulate the times, the places, and the manner of soliciting upon its streets, and of holding meetings

U.S. 520, 531 (1993) (citing *Smith*).

[30] *See, e.g.*, Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990); *City of Boerne v. Flores*, 521 U.S. 507, 544-65 (1997) (O'Connor, J., dissenting) (adopting McConnell's account of the original understanding of the Free Exercise Clause).

[31] Vincent Phillip Munoz, *The Original Meaning of the Free Exercise Clause: The Evidence from the First Congress*, 31 HARV. J.L. & PUB. POL'Y 1083 (2008).

[32] 98 U.S. 145, 162 (1878).

[33] *Id.* at 164.

[34] *Id.* at 166-67.

[35] *Miles v. United States*, 103 U.S. 304, 310-11 (1881) (permitting exclusion of jurors in bigamy trial when jurors practiced or supported polygamy); *Davis v. Beason*, 133 U.S. 333, 342-43 (1890) ("It was never intended or supposed that the [Free Exercise Clause] could be invoked as a protection against legislation for the punishment of acts inimical to the peace, good order and morals of society. … However free the exercise of religion may be, it must be subordinate to the criminal laws of the country, passed with reference to actions regarded by the general consent as properly the subjects of punitive legislation."); *Jacobson v. Mass.*, 197 U.S. 11, 29 (1905) (no constitutional exemption from military service based on religious convictions).

thereon; and may in other respects safeguard the peace, good order and comfort of the community, without unconstitutionally invading the liberties protected by the Fourteenth Amendment.[36]

ii. *Sherbert v. Verner*, 374 U.S. 398 (1963)

In *Sherbert*, the plaintiff, a member of the Seventh-day Adventist Church, was fired from her job because she was unwilling to work on Saturdays. She claimed that working on Saturday was a violation of her religious beliefs.[37] The plaintiff was unable to find other employment because she would not work on Saturdays.[38] As a result, the plaintiff filed an unemployment compensation benefits claim with the State.[39] The State agency responsible for administering the program concluded that the plaintiff had not accepted available employment and was thus barred from receiving benefits under the unemployment compensation program.[40] The plaintiff brought suit alleging that the State agency had violated her right to free exercise of her religion.[41]

The Supreme Court held that the State policy preventing the plaintiff from receiving unemployment benefits because she would not work on Saturday for religious reasons must either:

a) represent "no infringement by the State of her constitutional rights of free exercise"; or
b) be justified by a compelling state interest in the regulation of a subject within the State's constitutional power to regulate.[42]

The Court concluded that the State's policy imposed a substantial burden on the religious exercise of the plaintiff and that it was not justified by a compelling State interest.[43]

iii. *Wisconsin v. Yoder*, 406 U.S. 205 (1972)

In *Yoder*, the plaintiffs, members of Amish communities, were tried and convicted for failing to place their high-school age children in school, in violation of the State's compulsory education statute.[44] The plaintiffs contended that the State's compulsory education statute violated their rights under the First and Fourteenth Amendments because the plaintiffs believed, in accordance with the tenets of their faith generally:

> "that their children's attendance at high school, public or private, was contrary to the Amish religion and way of life."[45]

The Court concluded that:

> "the record in this case abundantly supports the claim that the traditional way of life of the Amish is not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living."[46]

The Court further held that the conclusion is inescapable that secondary schooling, by exposing Amish children to worldly influences in terms of attitudes, goals, and values contrary to beliefs, and by substantially interfering with the religious development of the Amish child and his integration into the way of life of the Amish faith community at the crucial adolescent stage of development, contravenes the basic religious tenets and practices of the Amish faith, both as to the parent and the child.[47]

Finally, the Court held that the State had failed to offer interests sufficiently compelling such:

> "that even the established religious practices of the Amish must give way."[48]

iv. The Court Analyzes Its Pre-1990 Decisions

In *Smith* and in the Court's 1997 decision *Boerne v. Flores*,[49] the Supreme Court made note of certain limitations that the Court considered important in analyzing its pre-1990 jurisprudence. To begin with, the Supreme Court noted that there have only been two types of situations in which the Court has invalidated neutral, generally applicable laws. First, the Court noted that it used heightened scrutiny in the context of cases involving more than one constitutionally protected right.[50] In *Boerne*, the Court specifically noted that the

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[36] *Cantwell*, 310 U.S. at 304.

[37] *Sherbert*, 374 U.S. at 399.

[38] *Id.*

[39] *Id.* at 399-400.

[40] *Id.* at 400-401.

[41] *Id.* at 401.

[42] *Id.* at 403.

[43] *Id.* at 406-408.

[44] 406 U.S. at 207-08.

[45] *Id.* at 208-09.

[46] *Id.* at 216.

[47] *Id.* at 218.

[48] *Id.* at 221.

[49] 521 U.S. 507 (1997).

[50] *Smith*, 494 U.S. at 881-82; *Boerne*, 521 U.S. at 513-14.

case of *Wisconsin v. Yoder* was such a situation because it:

> "implicated not only the right to the free exercise of religion but also the right of parents to control their children's education."[51]

Second, the Court noted that it had previously used the *Sherbert* analysis, a balancing test, in cases involving state unemployment compensation rules.[52] However, the Court indicated that, even if it did extend *Sherbert* beyond unemployment compensation cases, it was certainly not inclined to extend *Sherbert* beyond cases involving individualized assessments.[53]

Also, in the Court's consideration of the Religious Freedom Restoration Act, the Court noted in *Boerne* that pre-*Smith* jurisprudence did not require that a government's compelling interest be narrowly tailored such that it was the least restrictive means of furthering the government's compelling interest.[54]

b. Employment Division v. Smith, 494 U.S. 872 (1990)

In 1990, the United States Supreme Court issued its ruling in *Employment Division v. Smith*.[55] The case concerned whether the Free Exercise Clause of the First Amendment would permit the State of Oregon to include religiously inspired peyote use within the reach of its general criminal prohibition on use of that drug, and thus permit the State to deny unemployment benefits to persons dismissed from their jobs because of such religiously inspired use. The Court held that the law did not violate the Free Exercise Clause.

The Supreme Court held that the Free Exercise Clause does not exempt individuals from complying with laws that are neutral and generally applicable. The Court noted, however, that if the law requires some sort of individualized assessment, then there would be grounds for requiring greater scrutiny of the law in question. The Court further noted that courts should not be in the business of determining the centrality of an individual's beliefs, nor whether a particular burden is a substantial burden. Finally, the Court noted that the only times a neutral, generally applicable law had failed to pass constitutional scrutiny were cases in which the free exercise rights were coupled with some other constitutional protection (hybrid rights cases) or in certain unemployment compensation benefit cases.

c. Lukumi v. Hialeah, 508 U.S. 520 (1993)

In 1993, the United States Supreme Court issued its ruling in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*.[56] The case concerned a series of ordinances enacted by the City of Hialeah to prevent the Church of Lukumi Babalu Aye from practicing animal sacrifice. The applicable state law prohibited "cruelty to animals." The City concluded that all animal sacrifice is cruel because animal sacrifice does not serve a "useful" purpose. The Court concluded that the law was unconstitutional under the Free Exercise Clause.

The Supreme Court held that a law that burdens the free exercise of religion of an individual and is not a law that is neutral and of general applicability must be justified by a compelling interest and must be narrowly tailored to further that interest. The Court noted that the case required the use of an individualized governmental assessment. Thus, the Court concluded that when individualized exemptions are available, the government must have a compelling reason to exclude those claiming a "religious hardship."

d. The Federal Religious Freedom Restoration Act of 1993

The Religious Freedom Restoration Act of 1993 (RFRA),[57] was enacted as a result of the Supreme Court's 1990 ruling in *Employment Division v. Smith*. As part of its findings of fact, Congress concluded that:

> "governments should not substantially burden religious exercise without compelling justification"

and that the pre-*Smith* structure set forth by the federal courts struck a sensible balance:

> "between religious liberty and competing prior governmental interests."[58]

In light of the legislative findings, Congress enacted RFRA:

1) "to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened;" and
2) "to provide a claim or defense to persons

[51] *Boerne*, 521 U.S. at 514.

[52] *Smith*, 494 U.S. at 883-84; *Boerne*, 521 U.S. at 514.

[53] *Smith*, 494 U.S. at 884.

[54] *Boerne*, 521 U.S. at 535.

[55] 494 U.S. 872 (1990).

[56] 508 U.S. 520 (1993).

[57] 42 U.S.C. § 2000bb *et seq*.

[58] 42 U.S.C. § 2000bb(a).

> whose religious exercise is substantially burdened by government."[59]

In order to fulfill its goals, RFRA stated that:

> "government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability,"

unless the government demonstrates that application of the burden

1) "is in furtherance of a compelling governmental interest;" and
2) "is the least restrictive means of furthering that compelling governmental interest."[60]

RFRA also created a private right of action for enforcement of the rights created by the Act.

e. Boerne v. Flores, 521 U.S. 507 (1997)

In 1997, the United States Supreme Court issued its ruling in *Boerne v. Flores*.[61] The case concerned whether Congress had exceeded its authority under § 5 of the Fourteenth Amendment in enacting the Religious Freedom Restoration Act of 1993. In particular, the Court considered whether Congress was legitimately implementing the Free Exercise Clause through § 5 of the Fourteenth Amendment by the enactment of RFRA. The Court concluded that because RFRA extended beyond the principles enunciated in *Smith* and *Lukumi*, it was not a constitutional implementation of the Free Exercise Clause through § 5 of the Fourteenth Amendment.

The Supreme Court noted that § 5 of the Fourteenth Amendment grants Congress the authority to enact legislation in order to enforce the provisions of the Fourteenth Amendment, including the Free Exercise Clause in that it has been deemed to be incorporated into the Fourteenth Amendment protections. However, the Court noted that Congress does not have the authority to decree the substance of the Fourteenth Amendment restrictions on the states. Thus, legislation that alters the meaning of the Free Exercise Clause does not enforce the rights protected by that clause. The Court noted that Congress may go beyond the "enforcement" of the Fourteenth Amendment only in utilizing remedial legislation aimed at the:

> "widespread and persisting deprivation of constitutional rights."

In that context, the Court noted Congress' invalidation of literacy tests for voters because of the practice's history as a tool of racial discrimination.

The Court noted that while it is possible for Congress to enact legislation as a preventative to discrimination, it must be based on legislative findings that laws were enacted based on (in this case) religious animus. However, the Court noted that RFRA was primarily aimed at removing incidental burdens on religious freedom based on laws of general applicability (like zoning laws) that were not motivated by any animus towards religion. More importantly, however, the Court noted that RFRA has:

> "sweeping coverage [that] ensures its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter."[62]

The Court also objected to the stringent test required by RFRA and noted that it's:

> "demands of state laws reflect a lack of proportionality or congruence between the means adopted and the legitimate end to be achieved."[63]

The Court noted that claims that a law "substantially burdens" the exercise of religion are almost impossible to contest.[64] The Court further noted that the requirement that the law be justified by a compelling interest and narrowly tailored would be a nearly impossible hurdle for many laws. *Id.*

Finally, the Court noted that Congress' attempt to rewrite *Smith* and the Court's analysis of free exercise jurisprudence is in violation of the separation of powers.[65]

After *Boerne*, RFRA no longer applies to state and local governments. However, it does still apply to the federal government and federal laws. The most recent Supreme Court decision regarding RFRA is *Burwell v. Hobby Lobby* which is described below.

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[59] 42 U.S.C. § 2000bb(b).

[60] 42 U.S.C. § 2000bb-1(a)-(b).

[61] 521 U.S. 507 (1997).

[62] *Id.* at 532.

[63] *Id.* at 533.

[64] *Id.* at 534 (citing *Smith*, 494 U.S. at 887).

[65] *Id.* at 535-536.

f. Burwell v. Hobby Lobby Stores, Inc., 134 S.Ct. 2751 (2014)

For-profit corporations, like non-profit corporations, are entitled to assert religious exercise rights under the federal Religious Freedom Restoration Act (RFRA). If the religious exercise of the corporation (i.e., of the controlling members of its governing body) is "substantially burdened" by the federal government, the federal government carries the burden of proving that the government regulation or activity serves a compelling governmental purpose and that it is the least restrictive option. While the federal statute at issue in this only applies to federal laws and agencies, many states, including Texas, have similar religious freedom laws and it is likely that lower courts will look to this decision in applying, for instance, the Texas Religious Freedom Restoration Act.

Hobby Lobby and various other for-profit corporations owned and operated by Christian individuals or families challenged the application of a regulation issued by the Department of Health and Human Services ("the HHS mandate") as part of the Affordable Care Act ("the Act"). The HHS mandate sets out types of medication and drugs that employers are required to provide in health care plans under the Act. Specifically, the HHS mandate includes under the category of required women's health services various medications and drugs classified as contraceptives. However, some of the medications and drugs work not merely to prevent conception, but also can prevent implantation of a conceived embryo. The owners of Hobby Lobby and the other plaintiffs believe that the prevention of implantation is a form of abortion, to which they are opposed on religious grounds.

The plaintiffs brought suit, requesting an injunction against the portion of the HHS mandate that they assert violates their religious beliefs. They argued that the requirement that they provide insurance coverage for medications and drugs to which they have a religious objection violated their rights under RFRA. The federal circuits were split on the issue and the Supreme Court granted review.

In a narrow 5-4 decision, the Supreme Court held that the plaintiffs' religious exercise rights under RFRA were violated by the application of the HHS mandate to them. The federal government had argued that RFRA did not apply to the plaintiffs because they were for-profit corporations. The majority rejected the government's exclusion of for-profit corporations from RFRA coverage because the statute does not explicitly exclude them and prior precedents already permitted non-profit corporations to assert RFRA rights.

4. The Religious Land Use and Institutionalized Persons Act of 2000

In response to the *Boerne* decision, after years of debate regarding the scope of a successor statute to RFRA, Congress enacted the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA").[66] RLUIPA substantially narrows the scope of RFRA and focuses exclusively on land use and institutionalized persons.[67]

Below are summaries of several recent decisions which deal with RLUIPA.

a. Ali v. Stephens, ___ F.3d ___, 2016 WL 1741573 (5th Cir. 2016)

A challenged prison policy, which serves a compelling interest, cannot survive a challenge under RLUIPA if effective alternatives are available that are less restrictive of an inmate's religious exercise.

Plaintiff, a Muslim inmate in the custody of the Texas Department of Criminal Justice (TDCJ), brought suit against the Director of TDCJ, asserting that TDCJ's grooming and religious headwear policies violated RLUIPA. The policies in question required that inmates remained clean shaven and barred all from wearing religious headwear outside of their cells. These policies conflicted with Plaintiff's religious beliefs that required him to have a beard no shorter than fist's length, and to wear a kufi at all times. Following a five-day bench trial, the lower court granted declaratory and injunctive relief. Defendant appealed to the Fifth Circuit.

In discussing the "compelling interest" test, the Court stated that a policy may implicate the RLUIPA analysis if it is "substantially underinclusive." Quoting the Tenth Circuit, the Court indicated that in the RLUIPA context:

> "'[a] law's underinclusiveness—its failure to cover significant tracts of conduct implication the law's animating and putatively compelling interest—can raise with it the inference that the government's claimed interest isn't actually so compelling after all.'"

Defendant argued that:

> "a blanket prohibition on four-inch beards is the least restrictive means of furthering its compelling interest in
>
> (1) preventing the transfer of contraband within prison;
> (2) facilitating identification of inmates within prison and in the event an inmate escapes; and

[66] 42 U.S.C. § 2000cc *et seq.*

[67] *See* 42 U.S.C. §§ 2000cc and 2000cc-1.

> (3) controlling costs and, relatedly, maintaining orderly prison administration."

In analyzing Defendant's arguments, the court agreed that TDCJ's beard policy served a compelling interest; however, the Court did not agree that Defendant's policy was the least restrictive means of serving the compelling interest. The Court stated that the prison could serve the interest of preventing the transfer of contraband in the facility through the method the prison currently uses to inspect prisoners' hair. Addressing the issue of prisoner identification, the Court stated that the prison could easily maintain two photos of the inmate, one with the beard, one without. As for Defendant's argument that the policy was also a cost controlling measure, the Court stated that existing staff could absorb the task of checking beards, or new employees could be hired, with the expenses for such actions being:

> "an insignificant fraction of TDCJ's $3 billion budget."

Given these effective alternatives, the Court held that Defendant's beard policy was not the least restrictive means of serving their compelling interest.

Regarding Defendant's headwear policy, Defendant argued that the policy served the same compelling interests as the beard policy. The court held that the Defendant's policy was not the least restrictive means of serving their compelling interest, and because of this, Defendant's headwear policy violated RLUIPA.

b. Ben-Levi v. Brown, 136 S.Ct. 930 (2016)

Plaintiff brought suit against the North Carolina Department of Public Safety (NCDPS), challenging a prison policy that prevented him and other Jewish inmates from praying and studying the Torah together. The NCDPS policy imposed strict regulations on Jewish meetings that it did not impose on other religious groups. NCDPS denied Plaintiff's request to hold meetings on the basis that the Jewish study group did not meet the quorum of ten adult Jews required to hold a minyan, with Plaintiff's group only consisting of three adult Jews. NCDPS further argued that because no orthodox rabbi was available to supervise the study group, the minyan requirement could not be waived.

Following a ruling for the defendant by the Fourth Circuit, Plaintiff filed a petition for a writ of certiorari with the Supreme Court; Plaintiff's petition was denied. Justice Alito issued a dissent from the denial of certiorari.

In discussing the facts, Alito stated:

> "NCDPS's policy rests on its understanding of Jewish doctrine, the policy does not apply to other religions … [i]n fact, NCDPS intentionally treats different religions differently based on its perception of the importance of their various tenets."

NCDPS allowed for other religious groups to meet without a quorum or an outside volunteer, but Jewish groups were not. Alito further stated that:

> "because respondent was unable to find a rabbi or other qualified leader to serve the Jewish prisoners at Hoke … [Plaintiff] could not take advantage of the exception to the minyan requirement … [and] as a result, [Plaintiff] was completely deprived of the ability to pray or study with other Jewish inmates."

In his dissent, Alito focused on Plaintiff's free exercise argument but failed to address Plaintiff's RLUIPA claims. In the footnotes, Alito stated:

> "Because I would reverse the decision below on free exercise grounds, I have no occasion to consider whether Ben–Levi, proceeding pro se, adequately preserved an objection based on RLUIPA, which provides broader protection than the First Amendment. I would leave it to the lower courts on remand to address that question, if necessary."

c. Fountain v. Thaler, 629 Fed.Appx. 592 (5th Cir. 2015)

Plaintiff's claim that a TDCJ policy limiting inmates' use of indigent postage to five one-ounce general correspondence letters per month substantially burdened the practice of his religion because it forced him to choose between corresponding with his minor daughter and practicing his religion, was sufficient to state a plausible claim that the policy violated his rights under RLUIPA.

Plaintiff filed a motion for leave to proceed in forma pauperis (IFP) to appeal the district court's dismissal of his civil rights claims with prejudice. Plaintiff argued the district court erred in concluding that his claims based on RLUIPA were frivolous and failed to state a claim upon which relief may be granted. The Fifth Circuit held that the district court erred in dismissing Plaintiff's RLUIPA claims. The Court acknowledged Plaintiff's allegations that the only means by which he could practice his religion was through the mail and that the prison's policy:

> "repeatedly forced him to choose between corresponding with [his daughter] and practicing his religion."

The Court held:

> "Accepting [Plaintiff]'s allegations as true, they were sufficient to state a claim under the RLUIPA."

d. Tucker v. Livingston, 2015 WL 6560538 (E.D. Tex. 2015)

Plaintiff brought suit seeking to be allowed to congregate with other members of his Muslim faith group, the Nation of Gods and Earth (NOGE), separately from other Muslim inmates. Plaintiff claimed that only one Islamic service is held each week at the prison, with members of the Sunni faith controlling the service, and that the Sunni members often harass the non-Sunni practitioners.

The Court referred Plaintiff's complaint to a United States magistrate judge who then presented her findings and recommendations to the Court. In its motion for summary judgment, the Texas Department of Criminal Justice (TDCJ) argued that Plaintiff failed to state a claim under RLUIPA, because NOGE is not a religion, but instead a racial supremacist group assembling "under the guise of religion." TDCJ argued that they did not violate RLUIPA, because:

> "prohibiting racial supremacist groups from congregating is the least restrictive means possible while maintaining security, discipline, and order."

A principle tenet of NOGE is the racial superiority of its members, and TDCJ argued that this tenet:

> "has considerable potential for violence in the modern prison setting."

TDCJ argued that the key question in the case is whether NOGE is, in fact, a religion or a secular belief system, making the question one of first impression in the Fifth Circuit. The judge noted:

> "The Supreme Court has observed that the 'determination of what is a religious belief is more often than not a difficult and delicate task,' and that 'religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit protection.'"

Following this, the judge stated:

> "[t]he Fifth Circuit stressed that 'the Free Exercise Clause protects even an unreasonable belief that an affirmation is religious, so long as the belief is not "so bizarre, so clearly nonreligious in motivation."'"

Persuaded by similar Third and Fourth Circuit decisions that dealt with the religious nature of NOGE, the judge:

> "assume[d] without deciding, that Tucker's NOGE beliefs are entitled to protection of RLUIPA."

Following the recommendation that it be assumed that NOGE qualifies as a religious group under RLUIPA, the final question was:

> "whether the challenged regulation [was] the least restrictive means of furthering the compelling government interest."

TDCJ emphasized that the department:

> "does not permit activities that advocate racial or ethnic supremacy or purity, or that attacks a racial, religious or ethnic group, promotes hate crimes, or jeopardized the security and order of the institution."

TDCJ argued that the department declined Plaintiff's request for meetings because:

> "NOGE teachings or rhetoric referring to the white man as 'the devil' is not conducive to safe and secure prison facilities since prisons are multi-cultural environments."

> "TDCJ argue[d] that [their] policy of prohibiting racist or supremacy groups from congregating is the least restrictive means of preventing unnecessary and disruptive conflicts and fights."

The judge found TDCJ's arguments persuasive, stating:

> "A federal intelligence agency called the group a 'radical Islamic sect/criminal group' that 'is often boldly racist in its views, prolific in its criminal activities, and operates behind a façade of cultural and religious rhetoric.'"

Adding to this, the judge stated:

> "[T]he group has been described as 'one of the greatest threats to the social fabric' of prisons."

Taking all this into consideration, the judge recommended that the Court grant TDCJ's motion for summary judgment, and for the case to be dismissed with prejudice. The Court adopted the finding and recommendations of the magistrate judge, granting

TDCJ's motion for summary judgment. Plaintiff has appealed this decision to the Fifth Circuit.

e. McKnight v. MTC, 2015 WL 7730995 (N.D. Tex. 2015)

Plaintiff brought suit, claiming that the protections afforded to him under RLUIPA were violated by the defendant because he was confined to cell with an "active homosexual" inmate. Plaintiff asserted that Defendants:

> "compelled him 'to violate [his] human conscience by forcing [him] into a cell with an active homosexual or receive a major [disciplinary] case and therefore placing a substantial burden on [his civil rights/human rights.'"

Plaintiff received disciplinary sanctions for his conduct, thus delaying his parole consideration by one year.

The Court asserted that:

> "a prisoner's request for an accommodation must be sincerely based on a religious belief and not some other motivation."

In its analyzation of this, the Court stated that:

> "Plaintiff has pled no facts tending to show that Defendants' refusal to accommodate his housing request 'put a substantial pressure on him to modify his behavior and to violate his beliefs.'"

The Court further stated that Plaintiff's claims were merely conclusory and:

> "he does not claim that sharing a cell with a homosexual inmate put any pressure on him to change his religious conduct."

In light of all this, the Court held that the plaintiff could not:

> "make the initial showing that the assignment of a homosexual cellmate was a substantial burden on his religious exercise."

f. Cavanaugh v. Bartelt, ___ F.Supp. 3d ___ 2016 WL 1446447 (D.Neb. 2016)

Belief in and worship of divine flying spaghetti monster as creator of the universe and all life within it was not a belief system that addressed deep and imponderable matters as required to constitute a:

> "religion: within the meaning of RLUIPA, and therefore prisoner's claims that prison officials refused to accommodate his religious requests failed to state a cause of action under RLUIPA."

Plaintiff brought suit against Defendant after his prison officials denied his requests to:

> "afford his 'faith' the same rights and privileges as religious groups, including 'the ability to order and wear religious clothing and pendants, the right to meet for weekly worship services and class and the right to receive communion.'"

Prison officials denied his request on the basis that Plaintiff's religion, FSMism, was a parody religion. Plaintiff claimed he belonged to the Church of the Flying Spaghetti Monster (FSM), which bills itself as:

> "today's fastest-growing carbohydrate-based religion."

Adherents to FSM, or "Pastafarians", claim to believe that:

> "the universe and all life within it were created by a mystical and divine being: the Flying Spaghetti Monster."

According to FSM "gospel", FSM worship services are:

> "conducted in Pirate-Speak and attended by congregants in dashing buccaneer garb,"

influenced by the belief that pirates were the first Pastafarians, and the highest level of holiness a Pastafarian can reach is Pirate-level. Pastafarians also treat pasta colanders as religious headwear. The FSM belief system derived out of a satirical response by a graduate student to the Kansas State Board of Education after they decided that teaching of intelligent design should be allowed alongside the theory of evolution in Kansas public schools.

The Court reinforced the long established rule that:

> "Courts must not presume to determine the plausibility of a religious claim … [t]he 'truth' of a belief is not open to question; rather, the question is whether the objector's beliefs are truly held."

However, the Court asserted:

> "Because RLUIPA is a guarantor of sincerely held religious beliefs, it may not be invoked simply to protect any 'way of life, however, virtuous and admirable, if it is based on purely secular considerations."

Following this, the Court stated that in such instances when:

> "'an asserted belief might be so bizarre, so clearly non-religious in motivation, as not to be entitled to protection' … the initial inquiry is whether the belief at issue is genuinely 'religious.'"

Applying all this to the case at hand, the Court held that while:

> "the case is difficult because FSMism, as a parody, is designed to look very much like a religion … it is evident to the Court that FSMism is not a belief system addressing 'deep and imponderable' matters: it is, as explained above, a satirical joinder to a certain strain of religious argument."

Seeing the potential implications of its holding, the Court asserted:

> "This is not a question of theology: it is a matter of basic reading comprehension … [t]he FSM gospel is plainly a work of satire, meant to entertain while making a potential political statement … [t]o read it as religious doctrine would be little different from grounding a "religious exercise" on any other work of fiction."

The Court acknowledged that drawing the line for what constitutes a "religion" is a difficult one to draw because many would argue that such books as the Bible and the Quran are works of fiction. However, the Court asserted:

> "[T]here must be a line beyond which a practice is not 'religious' simply because a plaintiff labels it as such."

g. *Opulent Life Church v. City of Holly Springs, Miss., 697 F.3d 279 (5th Cir., 2012).*

A government may only exclude religious use of certain lands without violating RLUIPA and the First Amendment if it has a clear purpose for excluding religious use of that land, and other non-religious groups are also excluded from using that land because of the same purpose.

For purposes of injunctive relief, an allegation of a RLUIPA violation constitutes irreparable harm/injury. RLUIPA enforces First Amendment freedoms.

City of Holly Springs had a zoning ordinance which singled out churches, and no other religious facilities. Opulent Life Church, looking for a larger facility, found suitable property in the City's central business district and entered into a lease agreement. The Church applied for a renovation permit and the City's Planning Commission tabled their request on the grounds of the Church's failure to meet the City's zoning ordinance that applied only to churches (Section 10.8). The Church filed suit seeking a declaration that Section 10.8 of the City's Zoning Ordinance violates the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), the First Amendment, the Equal Protection and Due Process Clauses of the Fourteenth Amendment, and the Mississippi Constitution. The Church sought injunctive relief to prevent the City from enforcing Section 10.8 or the remainder of the Zoning Ordinance to impose limitations on churches not applicable to other non-religious entities.

The Church filed a motion for preliminary injunction to enjoin enforcement of Section 10.8 which was denied by the court on the grounds that the Church had not shown a substantial threat of irreparable harm. An interlocutory appeal was taken to the Court of Appeals. On the night before the oral argument, the City amended its Zoning Ordinance repealing Section 10.8 and replacing it with a new provision that categorically banned churches, temples, synagogues, mosques, and other religious facilities from the newly created business courthouse square district.

The Church argued that the City's Zoning Ordinance violated the Equal Terms Clause of RLUIPA which prohibits imposing or implementing a land use regulation so as to treat a religious assembly "on less than equal terms" than a nonreligious assembly. The Court found that an ordinance that expressly differentiates religious land uses from nonreligious land uses establishes a *prima facie* case for a facial Equal Terms Clause claim. The Court found that both the old and new versions of the City's Zoning Ordinance expressly distinguished between religious and nonreligious land uses. The Court held that the less than equal terms must be measured by the ordinance itself and the criteria by which it treats institutions differently. Courts must determine:

1) the regulatory purpose or zoning criteria behind the regulation at issue, as stated explicitly in the text of the ordinance or regulation and
2) whether the religious assembly or institution is treated as well as every other nonreligious assembly or institution that is similarly situated with respect to the stated purpose or criteria.

The City conceded, at the oral arguments, that the repealed sections of the Zoning Ordinance violated the Equal Terms Clause but argued ripeness and mootness as a result of changing the Zoning Ordinance. The Court rejected these arguments but found, as to the new

Zoning Ordinance, that the City had not yet had an opportunity to present the zoning criteria or regulatory objectives that it believed justified this ban, and thus, the case would be remanded to determine whether the Church was likely to succeed on the merits of its facial claims against the amended ordinance.

The Court found that the district court erred in that the Church had demonstrated that it would suffer irreparable harm absent the injunction it seeks. The Church satisfied the irreparable harm requirement because it has alleged violations of its First Amendment and RLUIPA rights. The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury. This principle applies with equal force to the violation of RLUIPA rights because RLUIPA enforces First Amendment freedoms, and the statute requires courts to construe it broadly to protect religious exercise. The Church asserts that its exclusion from its leased property signifies significant impairments to its free exercise of religion.

Finally, the Court found that Church had shown that a preliminary injunction will not disserve the public interest because injunctions protecting First Amendment freedoms are always in the public interest. This principle applies equally to injunctions protecting RLUIPA rights because RLUIPA enforces the First Amendment and must be construed broadly**.**

h. Garner v. Kennedy, 713 F.3d 237 (5th Cir. 2013)

Under the facts presented to the court, the Texas Department of Criminal Justice's ("TDCJ") policy of prohibiting prisoners from growing a beard for religious reasons violates the Religious Land Use and Institutionalized Persons Act ("RLUIPA"). The question was characterized as a mixed question of fact and law, subject to the Fifth Circuit's de novo review.

Garner, a Texas state prisoner in the custody of the TDCJ, claimed that as a Muslim he is required to wear a beard. TDCJ's rules prohibit most inmates from having a beard, except for a limited number who are allowed to grow beards up to a quarter of an inch if they have specific skin conditions. Garner filed a *pro se* complaint against TDCJ pursuant to RLUIPA and Section 1983, claiming that the TDCJ violated RLUIPA and his constitutional rights by prohibiting him from growing a beard. The district court initially denied Garner's request to appoint counsel and granted summary judgment in favor of TDCJ. Garner appealed, and the Fifth Circuit reversed the district court's judgment on Garner's request for declaratory relief and injunctive relief with regards to his RLUIPA claim. On remand the district court appointed counsel and held a bench trial on Garner's RLUIPA claim. The district court found that the TDCJ failed to meet its burden in showing that it's grooming policy regarding beards was the least restrictive means of furthering a compelling governmental interest. TDCJ appealed.

The Fifth Circuit affirmed the district court's findings. The Fifth Circuit articulated that the determination of whether the imposition of a burden on an individual's religious exercise is the least restrictive means of furthering a compelling governmental interest is a mixed question of fact and law, due to it being highly dependent on the underlying factors. In so finding, the Fifth Circuit applied a de novo review of the district court's findings, rejecting other circuits' holdings that the question is one of law and subject only to a review for clear error. The Fifth Circuit affirmed the district court's findings that the evidence presented by TDCJ in support of its contention that to alter its current grooming policy to allow for the growth of beards for religious preferences would create a significant economic impact on the TDCJ. The evidence presented by TDCJ was vague, conflicting, and speculative. The Fifth Circuit also found that the TDCJ did not present enough evidence to support a finding that the no-beard policy furthers the compelling governmental interest in promoting security at the prison. The Fifth Circuit was careful to say that based on the record before the court, the TDCJ had not met its burden to show that its no-beard policy is the least restrictive means of furthering a compelling government interest. In making that distinction, the Fifth Circuit left open the possibility that the TDCJ, based on a different record, might be able to meet its burden under RLUIPA.

i. Moussazadeh v. Tex. Dep't of Crim. Justice, 703 F.3d 781 (5th Cir. 2012)

The Prison Litigation Reform Act ("PLRA") does not require an inmate to re-exhaust the prison grievance process because of changed circumstances when the nature of the complaint has not changed and the Texas Department of Criminal Justice ("TDCJ") continues to be on notice of the complaint. Under the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), a showing of sincerity does not require perfect adherence to the beliefs held by the inmate. Finally, food is an "essential" benefit that is provided to all inmates, and denying kosher food to a Jewish inmate at no charge constitutes a substantial burden on the exercise of religion.

Moussazadeh, a Jewish inmate, exhausted the grievance process with the TDCJ when he appealed the TDCJ's denial of his grievances requesting kosher meals. He then filed suit, claiming violations of RLUIPA and the Texas Religious Freedom and Restoration Act. After more than seven years of litigation, the district court granted summary judgment to the TDCJ, holding that Moussazadeh's claim was barred by the PLRA for failure to exhaust the prison's administrative remedies before seeking judicial relief,

and under RLUIPA finding that Moussazadeh was not sincere in his religious beliefs.

The Fifth Circuit reversed the ruling of the district court on both grounds. With regards to the PLRA, the court found that Moussazadeh exhausted the prison's administrative grievance procedures when he filed a Step 1 grievance complaining of the denial of kosher meals, and appealed that denial by filing a Step 2 grievance, which was also denied. The court found that the change in circumstances over the seven years of litigation, which included a period where he was provided with kosher meals, but was subsequently denied them, did not warrant the necessity of re-exhausting the prison's administrative procedures. The court reasoned that throughout the entirety of the litigation proceedings, Moussazadeh's complaint had not changed, and therefore, the TDCJ had received the necessary notice of his complaint and was afforded an opportunity to address it without being subjected to the interference of the court. The court reasoned that at this stage in the litigation, dismissal of the complaint for failure to exhaust administrative procedures would not fulfill the purpose of the PLRA.

The court then turned to the second grounds for dismissal; the district court's finding that Moussazadeh did not have a claim under RLUIPA because he did not sincerely hold his beliefs that his religion required him to eat kosher meals. The court found that the district court, in determining the sincerity of a held belief, should have limited its inquiry to a credibility assessment instead of performing a deeper examination of Moussazadeh's religious convictions.

Finally, the court laid out the standard that should be applied on remand, directing the district court to find that the denial of kosher meals to Moussazadeh free of charge constituted a substantial burden on his exercise of religion. The court reasoned that food is an essential, generally available benefit that is freely given to all of the other inmates, and to deny food that complies with an inmate's sincerely held religious beliefs would constitute a substantial burden. The court additionally held, that based on the evidence presented to the court the TDCJ had not proven that there was a compelling interest in denying the kosher meals, nor that the TDCJ had adopted the least restrictive means of achieving its compelling interest.

It is likely that the issues raised by this case will continue to be a source of controversy and disagreement. The panel decision elicited a strong dissent from Judge Barksdale. When the TDCJ sought rehearing *en banc*, the panel denied the request, but elicited an even stronger dissent from the denial of rehearing from Judge Jolly, who was not a member of the panel. Judge Jolly not only explained the reasons for his disagreement with the panel decision, he specifically stated that the district court, on remand, should disregard the panel decision in favor of an earlier Fifth Circuit ruling: *Baranowski v. Hart*, 486 F.3d 112 (5th Cir. 2007).

j. Holt v. Hobbs, 135 S.Ct. 853 (2015)

A prison regulation prohibiting inmates from growing beards violated the religious rights of a Muslim inmate who wished to grow a ½-inch beard in accordance with his religious beliefs.

Holt, an Arkansas inmate and devout Muslim, wanted to grow a ½-inch beard in accordance with his religious beliefs. However, the Arkansas Department of Correction's grooming policy prohibits inmates from growing bears unless they have a particular dermatological condition. Holt filed a pro se complaint in federal district court. The district court entered a preliminary injunction and remanded to a magistrate judge for an evidentiary hearing. The Department called two witnesses who expressed the belief that inmates could hide contraband in a ½-inch beard, but could not point to any instances in which this had been done in Arkansas or elsewhere. The prison warden stated that a prisoner could change his appearance by shaving to help avoid capture if he escaped or snuck into other areas of the prison. The prison warden did not explain, however, why he could not solve the possibility of a change of appearance by taking a picture of Holt without a beard, as was done in other prison systems. The magistrate judge recommended dismissal, explaining that Holt could exercise his religion in other ways. The district court adopted the magistrate's recommendation and the Eighth Circuit affirmed. Holt sought review from the Supreme Court.

The Supreme Court held that the prison regulation violated the Religious Land Use and Institutionalized Persons Act (RLUIPA), which prohibits a state or local government from taking any action that substantially burdens the religious exercise of an institutionalized person unless the government demonstrates that the action constitutes the least restrictive means of furthering a compelling governmental interest. The Court held that the policy (1) substantially burdens Holt's religious exercise, and (2) is not the least restrictive means of furthering the compelling interest that the prison identified as justifying the restriction. The Court specifically rejected the lower courts' argument that Holt's religious exercise was not substantially burdened because he had alternative means of practicing his religion. In addition, the Court explained that the "substantial burden" component is based on the individual's religious beliefs, not the beliefs of other members of the same religion.

5. The Texas Religious Freedom Restoration Act of 1999.

Also in response to *Boerne*, various state legislatures enacted state religious liberty legislation.[68] In Texas, the legislature enacted the Texas Religious Freedom Restoration Act of 1999 (TRFRA).[69]

TRFRA provides broad protection for religious freedom in Texas, even broader than the freedom allowed by the Free Exercise Clause of the First Amendment. The law was enacted in 1999 after a decade of wrangling at the federal level over the extent to which the Constitution and the U.S. Congress can protect religious expression at the state level.

Under TRFRA, a governmental entity (including a public school) may not "substantially burden" a person's free exercise of religion unless it demonstrates that the application of the burden to the person is in furtherance of a "compelling governmental interest" and is the "least restrictive means" of furthering that interest.[70] "Free exercise of religion" is defined as:

> "an act or refusal to act that is substantially motivated by a sincere religious belief."[71]

Furthermore, it is not necessary to show that the adherent's "act or refusal to act" is motivated by a central part or central requirement of the person's sincere religious belief.[72]

Generally, the law comes into play when a policy or practice that is neutral on its face and applicable to all – such as a dress code or school attendance policy – is challenged by a religious adherent as imposing a "substantial burden" on the practice of his faith. There is still relatively little case law interpreting TRFRA. In one published case, the Fifth Circuit Court of Appeals applied TRFRA in the school setting regarding an elementary school dress code.[73] In that case, the Court showed great deference to the Plaintiff's religious claims. The Court held that a claimant's religious beliefs should be not be discounted even if those beliefs are not held by all adherents of the same faith, nor should they be discounted if there are facts that show that the believer has "struggled with", or been inconsistent in adhering to, the particular religious tenet.[74]

From a practical standpoint, a school should tread carefully and lightly when a general policy, seemingly unrelated to any type of religious practice, is challenged as imposing a "substantial burden" on the exercise of a student, teacher, or employee's religion. The tolerance of religious practice demanded by TRFRA is high. To the extent that the individual's religious belief is deemed sincere, even if unconventional, a court will frequently require a school to accommodate the practice.

In *Barr v. City of Sinton*, 295 S.W.3d 287 (Tex. 2009), the Texas Supreme Court applied the TRFRA to a city ordinance which effectively banned Mr. Barr from operating his ministry. Mr. Barr's ministry offered men recently released from prison free housing and religious instruction in two homes he owned. The Texas Supreme Court found that the City's ordinance burdened Mr. Barr's free exercise of religion as defined by TRFRA and that the burden was substantial. The Court further found that the City failed to establish a compelling governmental interest which supported its ordinance and failed to demonstrate that the ordinance was the least restrictive means of furthering the City's interest.

a. Morgan v. Plano Independent School District, 724 F.3d 579 (5th Cir. 2013)

Under the Texas Religious Freedom Restoration Act (Texas RFRA), plaintiffs must strictly comply with the Act's 60-day, certified mail pre-suit notice requirement, or else governmental immunity is not waived and a court has no jurisdiction.

The Morgans, parents of a former elementary school student in the PISD, brought various claims against certain governmental officials and the PISD, including a Texas RFRA claim, after the student was prevented from distributing a "candy cane ink pen" with a laminated card containing a religious message. The Texas RFRA states in part that a person may not bring an action to assert a claim under this chapter unless, 60 days before bringing the action, the person gives written notice to the government agency *by certified mail, return receipt requested*. The Morgans, through their attorney, delivered a pre-suit notice letter via fax and U.S. mail to the school's principal. The letter was also emailed to others. PISD sought partial summary judgment on Plaintiff's Texas RFRA claims, arguing that the Morgans' Texas RFRA claim was barred because their pre-suit notice was insufficient. The district court held that the Morgans' notice was sufficient, and PISD appealed.

The Fifth Circuit reversed and dismissed the Morgans' Texas RFRA claim, holding that the certified mail, return receipt requested notice requirement was not complied with and that this statutory requirement regarding the form of notice is jurisdictional.

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[68] Lund, *supra* note 5, at 477.

[69] TEX. CIV. PRAC. & REM. CODE § 110.001 et seq.

[70] TEX. CIV. PRAC. & REM. CODE § 110.001 et seq.

[71] *Id.* at § 110.001(a)(1).

[72] *Id.*

[73] *A.A. v. Needville Indep. Sch. Dist.*, 611 F.3d 248 (5th Cir. 2010).

[74] *Id.* at 261-262.

G. The Texas Religious Viewpoints Anti-Discrimination Act (2007).

The Texas Religious Viewpoints Anti-discrimination Act ("TRVAA")[75] protects students' expression of religious viewpoints in their schoolwork, mandates that schools permit students to organize religiously oriented clubs and activities to the same extent that students are able to organize other clubs and activities, and requires school districts to implement local policies creating limited public forums for student speech at school events and graduation ceremonies. The TRVAA was enacted in 2007 and purports to codify in Texas federal constitutional law regarding student religious expression.

With regard to student expression of religious viewpoints in schoolwork, the TRVAA provides that students may not be either penalized or rewarded for expressing a religious viewpoint in their homework, artwork, or other classroom assignment.[76] The student work must be judged only by ordinary academic standards concerning the substance and relevance of the work, and not according to the content of the religious expression or lack thereof.[77]

Further, the TRVAA requires that schools grant the same access to school facilities and advertising opportunities to student organized, religiously oriented clubs and activities as it grants to non-religious ones. The school district may disclaim school sponsorship of such activities and groups only in a manner that neither favors nor disfavors religiously oriented student clubs and activities.[78]

The TRVAA also mandates that school districts adopt a local policy providing for the use of neutral criteria for selecting student speakers at school events including graduation ceremonies. The school district is prohibited from discriminating against a student's voluntary expression of a religious viewpoint in such a student speech, but the school district must prevent students from engaging in obscene, vulgar, lewd or indecent speech. Further, whenever a student speaker is given access to such a forum, the school district must disclaim, orally or in written form, the content of the student's message.[79]

In order to comply with the TRVAA policy mandate, a school district may choose to implement a model policy provided within the statute itself[80], or it may adopt an alternative policy such as policy FNAA, provided by TASB. The model policy found within the TRVAA is a "safe harbor" provision that will enable a school district to be certain that it has complied with the TRVAA mandate.[81] However, the model policy may go too far and run afoul of federal constitutional limitations, leaving even a TRVAA compliant school district susceptible to a First Amendment challenge to their policy.

H. Texas Education Code Mandates

The Texas Education Code requires that all school districts require students to recite the Pledge of Allegiance to both the U.S. and Texas flags daily, unless a student's guardian has provided a written request for the student to be exempted.[82] In addition, following the recitation of the pledges, schools must provide a one-minute period of silence for each student to reflect, pray, meditate, or engage in any other silent activity that is not likely to interfere with or distract another student. Each teacher must ensure that the students remain silent during that period and do not interfere with or distract other students.

Reiterating federal law under the Free Exercise Clause, the Texas Education Code also specifically states that a public school student has an absolute right to individually, voluntarily, and silently pray or meditate in school in a manner that does not disrupt the instructional or other activities of the school. No one may require, encourage, or coerce a student to engage in or refrain from such prayer or meditation during any school activity.[83]

Finally, in 2007, the Texas legislature enacted a new section to the Texas Education Code, which h provides that school districts may offer high school students an elective course on the impact of the Old and New Testaments of the Bible.[84] The course must maintain religious neutrality and accommodate diverse religious views. An enrichment course offered pursuant to this law should be considered a special topic in Social Studies or an independent study in English, for purposes of the Texas Essential Knowledge and Skills (TEKS).[85] Also the legislature added a requirement that all school districts offering a K-12 curriculum must include:

> "religious literature, including the Hebrew Scriptures (Old Testament) and New

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[75] TEX. EDUC. CODE § 25.151-.155.

[76] *Id.* at § 25.153.

[77] *Id.*

[78] *Id.* at § 25.154.

[79] *Id.* at § 25.152.

[80] *Id.* at § 25.156.

[81] *Id.* at § 25.155.

[82] TEX. EDUC. CODE § 25.082.

[83] TEX. EDUC. CODE § 25.901.

[84] TEX. EDUC. CODE § 28.011.

[85] 19 TEX. ADMIN. CODE § 74.36.

> Testament, and its impact on history and literature,"

in its enrichment curriculum.[86] This mandated "enrichment curriculum" does not need to be an independent course; the content can be integrated with the content of other courses instead.[87]

IV. RELIGION IN SCHOOLS.

A. Religious Expression at School.

1. Religious Expression by Students.

a. Student Prayer

The Supreme Court has ruled that a school may not sponsor or direct a prayer at school or at a school related event, such as a football game or a graduation ceremony.[88] This restriction extends even to a team prayer led by a coach.[89] When a school or one of its faculty members sponsors or participates in a prayer at school, the activity generally will be deemed to be a violation of the Establishment Clause.

The United States Supreme Court has prohibited pre-game prayers given by students.[90] However, there is considerable confusion about the extent to which a school can permit students to vote upon the delivery by a student of a message, entirely of that student's choosing, as part of graduation ceremonies. The Eleventh Circuit has authorized such a policy.[91] However, at least one federal court in Texas has ruled that a similar policy was rendered unconstitutional by the Supreme Court's decision in *Santa Fe* in 2000.[92]

The TRVAA addresses some of the concerns raised in previous public student prayer cases, particularly through the TRVAA's mandates of a limited public forum, a neutral process for selecting student speakers, and content disclaimers by the school. The impact of these provisions remains to be seen, but challenges to public student prayer continue.

In 2011, the public student prayer issue once again reared its head in regards to a graduation ceremony at Medina Valley ISD. Pursuant to the TRVAA and the district's historical practice, the school district planned to allow its valedictorian and other students in positions of honor to give, among other talks, an invocation and benediction. These speeches were prepared by the students and reviewed by district officials to ensure that the students' speeches stayed on topic for the event. The school district was sued, with the plaintiffs arguing that student religious speech at the graduation and reference to it in the graduation program violated the Establishment Clause. The school district argued that the TRVAA makes graduation a limited public forum and that the district could not prohibit the students' speeches, even if they contained religious speech. Although the district court initially granted a temporary restraining order against the school district prohibiting any student prayer at the graduation ceremony, the Fifth Circuit promptly reversed, stating that the plaintiffs had not shown a substantial likelihood that they would prevail.[93]

Subsequently, the parties settled the case, with the school district agreeing not to permit its employees to initiate, solicit or direct prayers, join students in prayers, proselytize, or invite a third-party to engage in any of those actions during the school day or at school sponsored events.[94] The school district further agreed not to permit its employees to display religious symbols on school property except for non-religious pedagogical purposes, not to pre-screen the content of any student remarks to be given at school sponsored events, and not to stand during any student remarks.[95]

Due to this settlement agreement, the court did not ultimately address the effect of the TRVAA on the issue of public student prayer at a graduation ceremony or whether Medina Valley ISD complied with the provisions of the TRVAA.

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[86] TEX. EDUC. CODE § 28.002(a)(2)(H).

[87] Op. Tex. Att'y Gen. No. GA-0657 (2008).

[88] *Lee v. Weisman*, 505 U.S. 577 (1992).

[89] *Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402, 406 (5th Cir. 1995).

[90] *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000).

[91] *Adler v. Duval County Sch. Bd.*, 206 F.3d 1070 (11th Cir.) (en banc) ("Adler II"), *vacated by* 531 U.S. 801 (2000), *reinstated by* 250 F.3d 1330 (11th Cir. 2001) ("Adler III").

[92] *Does 1-7 v. Round Rock Indep. Sch. Dist.*, 540 F. Supp. 2d 735 (W.D. Tex. 2007).

[93] See *Schultz v. Medina Valley Indep. Sch. Dist.*, No. SA-11-CA-422-FB (W.D. Tex. June 1, 2011); *Schultz v. Medina Valley Indep. Sch. Dist.*, No. 11-50486 (5th Cir. June 3, 2011).

[94] *Schultz v. Medina Valley Indep. Sch. Dist.*, No. SA-11-CA-422-FB, 2012 U.S. Dist. LEXIS 19397, at *7 (W.D. Tex. February 9, 2012).

[95] *Id.* at *7-*9. The school district also agreed that its personnel will not disparage the plaintiffs. Id. at *17. This gave rise to a subsequent proceeding after the school district's superintendent gave a televised interview in which he called the lawsuit "a witch hunt" and a high school band director commented on a student's Facebook page, claiming that one of the plaintiffs had lied and made false accusations during the suit. In a document entitled, "Non-Kumbaya Order", the judge required school district personnel to apologize and the plaintiffs to accept their apologies. *Schultz v. Medina Valley Indep. Sch. Dist.*, No. SA-11-CA-422-FB, 2012 U.S. Dist. LEXIS 37130 (W.D. Tex. March 19, 2012). No further problems seem to have arisen.

b. Student religious speech in schools.

Prior to 1969, when the Supreme Court issued its decision in *Tinker v. Des Moines Independent Community School District*[96], public school students generally did not have the right to speak on topics of their own choosing in school.[97] Justice Thomas explained the situation a few years ago in one of his concurring opinions: early public schools:

> "were not places for freewheeling debates or exploration of competing ideas. Rather, teachers instilled 'a core of common values' in students and taught them self-control."[98]

In short, in the earliest public schools, teachers taught, and students listened. Teachers commanded, and students obeyed. Teachers did not rely solely on the power of ideas to persuade; they relied on discipline to maintain order.[99]

The Supreme Court's decision in *Tinker* effected a sea change in students' speech rights, expanding them beyond anything that had previously been considered. Arguably, due to the expansiveness of the rights created by *Tinker*, the Supreme Court and other courts have had to make a long series of (sometimes inconsistent) exceptions to *Tinker*'s general grant of free speech rights.

Whether or not the traditional understanding of the role of schools is best, it was part of the general understanding of the First Amendment that existed throughout most of the history of the United States. In *Tinker*, however, the Court was faced with student anti-war demonstrators who, rather than engage in disruptive protests, merely wore black armbands to indicate their support for an end to the Vietnam War. There was no indication that the students' actions caused any sort of disruption at the school, nor was there any real indication that the presence of the students wearing black armbands was likely to cause any problems. With a factual scenario of a peaceful, non-disruptive protest and in the midst of the growing disapproval for the Vietnam War during late sixties, the Supreme Court concluded that the (mostly high school) students in *Tinker* should have a free speech right under the First Amendment to wear their armbands. The Court held that school officials could not prohibit students from wearing an armband in protest of the Vietnam War, where the conduct at issue did not:

> "materially and substantially disrupt the work and discipline of the school."

Since *Tinker* in 1969, however, every time the Supreme Court has considered the issue of student speech rights, it has narrowed and limited those rights. Thus, in *Bethel School District v. Fraser*, the Court said that school officials could restrict a high school student's freedom to give a school assembly speech containing an elaborate sexual metaphor.[100] Similarly, in 1988, the Supreme Court concluded that a school district can restrict student contributions to a school-sponsored newspaper, even without threat of imminent disruption.[101] Most recently in *Morse v. Frederick*, the Court decided that schools may restrict a student's speech if it advocates drug use.[102] As Justice Thomas pointed out, the "exceptions" to *Tinker* have been ad hoc and lack almost any sense of consistency.[103]

Schools and school officials clearly may restrict student speech if it is:

- Materially and substantially disruptive;
- Lewd;
- School-sponsored; or
- Promotes drug use.[104]

The Supreme Court in *Morse* left open the possibility of additional bases for regulation of student speech, as did Justice Alito in his concurring opinion.[105] What those additional exceptions might be is unclear. Within our own circuit, the Fifth Circuit, the Court of Appeals has

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[96] *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969)

[97] There is some court of appeals precedent from earlier in the sixties for such rights, but, as a general matter, *Tinker* marked the beginning of any widespread belief or acceptance that public school students had affirmative speech rights. *Cf.* Kristi L. Bowman, *The Civil Rights Roots of* Tinker*'s Disruption Tests*, 58 AM. U.L. REV. 1129, 1130 (2009).

[98] *Morse v. Frederick*, 551 U.S. 393, 411-412 (2007) (Thomas, J., concurring).

[99] *Id.* at 412.

[100] *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 685-686 (1986).

[101] *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988)

[102] *Morse v. Frederick*, 551 U.S. 393 (2007).

[103] *Morse*, 551 U.S. at 421.

[104] *Morgan v. Swanson*, 659 F.3d 359, 407 (5th Cir. 2011) (en banc) (Elrod, J., majority opinion as to this issue).

[105] *Morse*, 551 U.S. at 404-406 (opi.), 422-423 (Alito, J., concurring). The Fifth Circuit has concluded that Justice Alito's concurring opinion is the controlling opinion in *Morse*. *See Morgan*, 659 F.3d at 374 n.46 (Benavides, J.) (citing *Ponce v. Socorro Indep. Sch. Dist.*, 508 F.3d 765, 768 (5th Cir. 2007)); *see also id.* at *98 n.1 and *120 (Elrod, J.). As the Seventh Circuit has noted, Justice Alito's concurring opinion should not have been classified as the controlling opinion since Justice Alito, as part of a majority of the Supreme Court, signed the primary/majority opinion. *Nuxoll v. Indian Prairie Sch. Dist.*, 523 F.3d 668, 673 (7th Cir. 2008).

added exceptions for viewpoint- and content-neutral regulations[106] and for situations that pose a danger to students.[107]

The various Supreme Court student speech cases did not involve any elementary school-age students and, prior to the Fifth Circuit's en banc decision in *Morgan v. Swanson*, it was unclear whether the First Amendment Free Speech Clause provided affirmative speech rights to elementary school students at school.[108] In *Morgan*, however, the Fifth Circuit concluded that the Free Speech Clause does apply to the speech of elementary school students while they are at school and that restrictions on religious speech *solely* because it is religious violate the First Amendment.[109] Unfortunately, the Fifth Circuit was unable to garner a majority as to how the Free Speech Clause applies in elementary schools. The only other substantive holdings from *Morgan* relate to "school-sponsored" speech and to the application of the Establishment Clause in elementary schools.

Under *Morgan*, the "school-sponsored" speech exception should be construed narrowly.[110] It only applies to activities that may fairly be characterized as part of the curriculum, which are supervised by faculty members, and designed to impart particular knowledge or skills so that the views of the individual speaker may not be erroneously attributed to the school. The classic examples are the school newspaper and school plays.[111] Neither in its discussion of *Hazelwood* nor in its application to the facts alleged in *Morgan* did the majority consider whether elementary school students might be more likely to attribute individual speech to a school. The Court merely concluded that the factual allegations, as alleged, did not indicate that they would be likely to misperceive the speech as coming from the school.[112]

The Court went on to state that the Establishment Clause draws a sharp distinction between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.[113] This conclusion is relatively uncontroversial. The significant part is relegated to a footnote:

> "The principals contend that elementary school students are more impressionable and therefore this case involves heightened Establishment Clause concerns. This is without merit."[114]

Leaving aside the fact that the principals in *Morgan* did not argue that there are heightened Establishment Clause concerns in elementary schools, numerous courts and judges *have* made that argument, repeatedly. Moreover, it is unclear whether there was a majority ruling from the Fifth Circuit on this footnote (or the proper interpretation of it), so the question of whether the Establishment Clause concerns permit greater restrictions in elementary schools likely remains open for the time being.

The following questions remain open within the Fifth Circuit:

1) Whether the "material and substantial disruption" standard applies differently in elementary schools than in high schools.

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[106] *Morgan*, 659 F.3d at 407 (quoting *Palmer v. Waxahachie Indep. Sch. Dist.*, 579 F.3d 502, 509 (5th Cir. 2009)).

[107] *Ponce*, 508 F.3d at 770-772. This exception is not mentioned in *Morgan*, but it does not appear that the court in *Morgan* intended to disapprove *Ponce* since it is otherwise cited with approval and is not specifically rejected or overruled by the *en banc* court. However, *Morgan* generally seems to indicate that only the exceptions listed in *Morgan* are permitted: "In short, what one child says to another child is within the protection of the First Amendment unless one of the narrow exceptions discussed above applies." *Morgan*, 659 F.3d at 412 (Elrod, J.).

[108] *Id.*, at 382 (Benavides, J.).

[109] *Id.* at 403-405 (Elrod, J.).

[110] *Id.* at 408.

[111] *Id.* at 408.

[112] This was precisely the issue raised by the Third Circuit Court of Appeals in *Walz v. Egg Harbor Township Board of Education*, 342 F.3d 271, 277 (3d Cir. 2003) (in the elementary school classroom, the "line between school-sponsored speech and merely allowable speech is blurred."). *Walz*, like *Morgan*, dealt with restrictions on the distribution of candy canes with an attached religious message, "Legend of the Candy Cane."

[113] *Morgan*, 659 F.3d at 409 (citing *Bd. of Educ. v. Mergens*, 496 U.S. 226, 250 (1990).

[114] *Id.* at *143 n.26 (relying on *Good News Club v. Milford Central Sch.*, 533 U.S. 98 (2001)). The extent to which this footnote should be applied outside the specific facts of *Morgan* is unclear. This portion of Judge Elrod's opinion is only the majority opinion because of its adoption by Judge Owen. Judge Owen, however, also adopted the portion of Judge Benavides' opinion, in which he states, "in *Good News Club*, the Supreme Court *reiterated* previous precedents assigning 'significance ... in the Establishment Clause context to the suggestion that elementary school children are more impressionable than adults.'" *Id.* at 381. Judge Elrod's opinion leave ambiguous whether the sentence "This is without merit," refers to the argument about elementary school students being more impressionable or whether that argument applies to the *Morgan* case. In light of Judge Owen's joining of the opinion, the best interpretation would appear to be that Judge Elrod's footnote is limited to the specific facts of *Morgan*.

Numerous courts have indicated that the "material and substantial disruption" standard would apply differently in elementary schools.[115]

2) Whether the ability of school districts to restrict lewd or inappropriate speech applies differently in elementary schools than in high schools.[116]
3) Whether the term "viewpoint discrimination" means hostility toward a particular viewpoint or merely a restriction on a certain type of viewpoint based on some other concern. For instance, some courts have distinguished between:

    a) restrictions on religious speech in public schools *solely* because it is religious, and
    b) restrictions on religious speech because it is likely to cause offense to other students.[117]

4) Whether school districts can practice "viewpoint discrimination" against student speech that is "school-sponsored." In cases where there is no hostility to the viewpoint, numerous courts have held that school districts may restrict student speech that is "school-sponsored," as they have variously interpreted the term "school-sponsored." *Morgan* indicates that some of the Fifth Circuit judges, perhaps a majority, might reject "viewpoint discrimination," even when applied to "school-sponsored" speech.[118]
5) Whether elementary-age students are more likely to (mis)perceive private speech as "school-sponsored" or "school-endorsed." While a majority of the Fifth Circuit concluded that the facts, as alleged in *Morgan*, did not indicate any likelihood that the private speech would be misperceived as "school-sponsored" or "school-endorsed," there is no clear majority ruling out the possibility that, under different factual allegations or based on evidence of what actually occurred or occurs in an elementary school, school officials might be able to impose greater restrictions under the "school-sponsored" exception or based on the Establishment Clause.
6) Whether there are additional circumstances that would justify schools districts in restricting or regulating student speech.

c. Religious speech in student work.

As noted above, the TRVAA provides that students may not be either penalized or rewarded for expressing a religious viewpoint in their homework, artwork, or other classroom assignment. However, the student must comply with the requirements of the assignment, and the student's expression of a religious viewpoint in an otherwise unacceptable piece of work will not support an unearned good grade. A student assigned to paint a portrait of someone they admire is certainly permitted to hand in a portrait of Jesus Christ, but if it is poorly rendered and not responsive to the requirements of the assignment, the teacher is justified in giving a low grade.

d. Religious expression and dress codes.

Religious dress code policies are increasingly subject to challenge under state laws such as the Texas Religious Freedom Restoration Act, but there are also Free Speech, Free Exercise, Establishment Clause and TRVAA implications in many of these challenges. Generally, in requiring religious exemptions from dress codes, the Courts are showing great deference to claims of a "sincerely held religious belief."[119]

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[115] *Id.* at 377 n.72 (Benavides, J.) (briefly discussing numerous cases questioning how to apply free speech guaranties in elementary schools); *see also id.* at 386-387.

[116] *Id.* at 387 ("[T]he threshold for what constitutes suggestive or lewd speech, as discussed in *Fraser*, might be lower in an elementary-school setting.").

[117] *Morgan* emphasizes that, "Accordingly, the principals were not permitted to discriminate on the basis of viewpoint; yet, in each incident the principals allegedly censored speech solely because it expressed a religious message." *Id.* at 409. *See also Hill v. Colorado*, 530 U.S. 703, 707-10 (2000) (finding no unconstitutional content-based discrimination where a statute restricting anti-abortion speech was not adopted "because of disagreement with the message [conveyed]"); *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (holding that "the principal inquiry in determining content-neutrality … is whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys").

[118] This discussion was, like some of Judge Elrod's other more controversial claims, relegated to a footnote. *See Morgan*, 659 F.3d at 407 n.23.

[119] Examples of such deference: A kindergartener boy was allowed to wear long hair in deference to his Native American heritage and even the school's attempt to require the hair to be in a bun or a braid tucked behind his shirt was deemed unacceptable (*A.A. v. Needville Indep. Sch. Dist.*, 611 F.3d 248 (5th Cir. 2010)); Wearing rosaries on the outside of a uniform deemed acceptable despite school's concern that the rosary was a gang symbol in that community (*Chalifoux v. New Caney Indep. Sch. Dist.*, 976 F. Supp. 659 (S.D. Tex. 1997)); A Muslim middle school girl was allowed to wear a hijab, or headscarf (*Hearn v. Muskogee Sch. Dist.*, No. 6:03-cv-00598 (E.D. Okla. filed Oct. 28, 2003)); and, in perhaps the most striking example, a high school girl was permitted to wear a nose stud, claiming membership in the Church of Body

2. Absence for Religious Worship or Instruction

Attendance policies are also an issue to be considered in light of TRFRA. Catholic students, for example, may request time off to worship on holy days of obligation. Similarly, Muslims may request accommodation to participate in the obligatory Friday prayers, or Jumu'ah. Some schools have attempted to accommodate this practice by providing an empty classroom for students, and time off from class to conduct the prayers. These might seem to be reasonable responses under TRFRA, but they could also pose problems in other areas, such as the Equal Access Act or the Establishment Clause.

3. Religious Expression by Teachers.

A teacher's right to engage in speech at school is reconciled with the employer's right to protect its own legitimate interests in performing its mission. On multiple occasions, courts have held that freedom of speech does not entitle teachers to cover topics, or advocate viewpoints, that depart from the curriculum adopted by the school system.[120] Recently, the Ninth Circuit held that a math teacher's freedom of speech rights were not violated when the school ordered him to take down banners in his classroom that displayed in large block type:

> "IN GOD WE TRUST"; ONE NATION UNDER GOD"; "GOD BLESS AMERICA";

and

> "GOD SHED HIS GRACE ON THEE."[121]

Similarly, the Fourth Circuit has held that a school board did not infringe the rights of a teacher when it ordered him to remove religious material from a classroom bulletin board.[122]

4. Religious Expression by Third-Parties.

Generally, if a school is asked to distribute any literature with religious content – by a student, parent or third party – the school must treat the request the same as any other request containing no religious content. The federal Equal Access Act applies here, and the school should treat a literature distribution request in the same manner it treats a request for use of its facilities: every request must be treated the same, regardless of the content. By permitting literature distribution on campus, the school is creating a "limited public forum," and it must be viewpoint neutral in its distribution of literature.[123] It can impose reasonable time, manner and place restrictions and it should prohibit school staff from being involved in the distribution.[124] For example, a school might require all materials to be set on a table in the front office, or that distribution can never take place during instructional time. However, as a word of caution, some courts have concluded that school districts may or, in some cases, must prohibit materials that contain "proselytizing" language. It does not appear that such restrictions will be permitted in the Fifth Circuit, though the issue is undecided.

B. Activities at School Related to Religion.

1. Instruction with Religious Content

In 2007, Texas adopted a law that authorizes schools to offer a high school course on the Bible;[125] however, the issue of what type of religious topics can and cannot be taught in the classroom remains controversial. In fact, the new Texas law itself requires that any course offered on the Bible comply with general constitutional law requirements. Thus, while such a course is optional, if offered, it must be for a secular purpose in an academic manner that neither fosters nor demeans any religious tenet, but instead fosters knowledge and appreciation of the role of religious heritage.[126] However, the law is relatively new, and

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Modification; the church has a website and claims 3,500 members nationwide (*Iacono v. Croom*, No. 5:10-CV-416-H, 2010 U.S. Dist. LEXIS 108153 (E.D.N.C. Oct. 8, 2010)).

[120] *Brammer-Hoelter v. Twin Peaks Charter Acad*., 492 F.3d 1192, 1204 (10th Cir. 2007); *Williams v. Dallas Indep. Sch. Dist.*, 480 F.3d 689, 694 (5th Cir. 2007); *Mayer v. Monroe Cnty. Cmty. Sch. Corp*., 474 F.3d 477, 479-80 (7th Cir. 2007).

[121] *Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 954 (9th Cir. 2011).

[122] *Lee v. York County Sch. Div*., 484 F.3d 687, 700 (4th Cir. 2007)

[123] Some examples: A school district's refusal to allow distribution of camp brochures expressing a religious viewpoint was unconstitutional (*Hills v. Scottsdale Unif. Sch. Dist. No. 48*, 329 F.3d 1044 (9th Cir. 2003) (per curiam)); A Christian youth group was permitted to access a school's distribution system for distributing and posting nonschool materials to students (*Child Evangelism Fellowship of N.J. v. Stafford Twp. Sch. Dist.* 233 F. Supp 2d 647 (D.N.J. 2002);

[124] For example, a Florida School District implemented guidelines for the distribution of books and literature that required them to be available to students only at a designated location, that all faiths be allowed to provide materials, and that school staff not be permitted to participate in any way in the distribution. *Meltzer v. Bd. of Public Instruction of Orange County, Florida,* 577 F.2d 311, 313-314 (5th Cir. 1978), *cert. denied,* 439 U.S. 1089 (1979).

[125] TEX. EDUC. CODE § 28.011 (the law is described above in the section entitled, "Texas Education Code Mandates").

[126] *See Abington Twp. v. Schempp,* 374 U.S. 203, 225 (1963) (Pennsylvania law mandating daily reading of a Bible passage declared a violation of the Establishment Clause); *Epperson v. Arkansas*, 393 U.S. 97 (1968) (Arkansas law prohibiting the teaching of evolution violated the Establishment Clause).

there are very few specific guidelines as to what can and cannot be included in the Bible curriculum.[127]

The same general guidelines apply to any religious content in any course: the content must have a secular purpose and not promote one religion over another. For example, the courts have held that a school may include religious literature, music, drama, and arts in its curriculum and its school activities when the material has secular value independent of its religious content. For example, a school choir can include religious songs in its repertoire if those songs have musical merit.[128]

2. Inviting Clergy to School or School Events

The entire line of "prayer in public schools" cases have made it clear that schools cannot invite clergy to say prayers at public events, nor can it sponsor a Baccalaureate service for graduating Seniors.[129] However, privately organized Baccalaureate services are clearly constitutional. A few cases have arisen wherein schools have invited clergy to some program or activity. For example, the Beaumont Independent School District had a "clergy in schools" program, which placed clerical volunteers from the community in the school district's primary and secondary schools to counsel and mentor students on secular topics. The program was held to violate the Establishment Clause because it did not include non-religious counselors in its program, and thereby favored religion over non-religion.[130]

3. Pledges of Allegiance and Moments of Silence

As noted above, the Texas Education Code now mandates daily recitation of the Pledges of Allegiance to the U.S. and Texas flags, followed by a one-minute moment of silence.[131] However, in accordance with Supreme Court precedent, students are permitted to opt-out of reciting the pledges of allegiance.[132]

During the moment of silence, a student:

> "may, as the student chooses, reflect, pray, meditate, or engage in any other silent activity that is not likely to interfere with or distract another student."

In order for a moment of silence to be Constitutional it must meet a three part test: it must have at least some secular purpose, its primary effect cannot be to advance or inhibit religion, and the law must not foster an excessive government entanglement with religion.[133] If there is no secular purpose, then a court need not analyze the remaining two factors.[134]

In 2010, the Fifth Circuit Court of Appeals upheld the pledge recitation requirement and also found that the recent addition of "under God" to the Texas pledge was constitutional.[135] The moment of silence is constitutional because it had secular purposes: fostering patriotism and providing a period for thoughtful contemplation.[136] The court found that the obvious purpose of the pledge was to foster patriotism.[137] Over the past twenty years, federal circuit courts have consistently upheld state pledge statutes.[138]

Additionally, the court also held that there was no evidence that the moment of silence's primary effect was to advance religion, as students could do other silent activities besides praying.[139] In another case from the Seventh Circuit in which a moment of silence statute was upheld, the court found that it was not required that the statute expressly allow for "other silent activity" in

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[127] California has developed a fairly comprehensive plan for instruction on religious topics, which might offer some guidance for Texans. *See* California Department of Education, *History-Social Science Framework for California Public Schools: Kindergarten through Grade Twelve* 207-11 (2005), *available at* http://www.cde.ca.gov/ci/cr/cf/documents/histsocsciframe.pdf.

[128] *Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402 (5th Cir. 1995); *Bauchman v. W. High Sch.*, 132 F.3d 542 (10th Cir. 1997).

[129] *See Lee v. Weisman*, 505 U.S. 577, and *Santa Fe Indep. Sch. Dist. v. Doe*, both discussed above.

[130] *Oxford v. Beaumont Indep. Sch. Dist.*, 224 F. Supp. 2d 1099 (E.D. Tex. 2002), following *Doe v. Beaumont Indep. Sch. Dist.*, 240 F.3d 462 (5th Cir. 2001).

[131] TEX. EDUC. CODE § 25.082.

[132] *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (state law requiring students to say pledge of allegiance unconstitutional because it compelled the speech of students).

[133] *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971); *Wallace v. Jaffree*, 472 U.S. 38, 55-56 (1985).

[134] *Wallace*, 472 U.S. at 56.

[135] *Croft v. Perry*, 624 F.3d 157 (5th Cir. 2010); companion case at *Croft v. Governor of Tex.*, 562 F.3d 735 (5th Cir. 2009).

[136] *Croft v. Governor of Tex.*, 562 F.3d at 746.

[137] *Id*. at 747.

[138] *Freedom from Religion Found. v. Hanover Sch. Dist.*, 626 F.3d 1, 15 (1st Cir. 2010), *cert. denied sub nom. Freedom From Religion Found. v. United States*, No. 10-1214, 131 S. Ct. 2992 (2011) (holding that a voluntary, teacher-led recitation of the Pledge by New Hampshire's public school students does not violate the Constitution). In *Wallace*, the Supreme Court struck down Alabama's moment of silence statute, but that was based on the unusual facts of that case – namely, that the State admitted that the *only* purpose of the statute was to reintroduce prayer into public schools. *Wallace*, 472 U.S. at 56-57, 61.

[139] *Croft v. Governor of Tex.*, 562 F.3d at 749-750.

order for the statute to be considered Constitutional.[140] Finally, the Fifth Circuit, in its review of the issue, found that having teachers enforce silence did not entail an excessive government entanglement with religion.[141]

In short, moments of silence are permissible if their purpose is not solely to allow prayer in schools.[142]

4. Prayer at School Board Meetings.

Many public school board meetings open with a prayer. Courts that have considered the issue have had to decide whether these prayers should be treated under the line of cases dealing with "school sponsored prayer," which is prohibited by the Establishment Clause (discussed above) or rather the prayer of a "legislative and deliberative body," which is generally permitted. Though there are cases that tend to treat these prayers the same as any other school sponsored prayer and to find them unconstitutional, it is still an open question in the Fifth Circuit whether these prayers are unconstitutional.[143]

5. Displays of the Ten Commandments

Many cases throughout the country have been brought against schools and other entities protesting the public display of the Ten Commandments or displays expressing founding principles of the law that make reference to God. There is no clear consensus among the courts, but the underlying principle is that the display must have been initiated and implemented with a secular purpose. Of note, a district court in Rhode Island recently ordered the immediate removal of a prayer mural from the auditorium of a public high school for violating the establishment clause.[144] The Supreme Court has noted (in a 10 Commandments Case originating in Texas) that courts should be "especially vigilant" in Establishment Clause cases in elementary and secondary schools.[145]

6. Holiday Ceremonies/Parties

The United States Supreme Court has determined that schools may celebrate the holidays and create displays as long as they do so within "the context of the Christmas season" and the religious component of their display does not dominate but simply represents one element of a holiday that has obtained secular status in our society.[146] Thus, Christmas programs that include Christmas carols such as "Silent Night" and "O Come All Ye Faithful" do not violate the Establishment Clause so long as the program is part of the educational efforts of the school.[147] Likewise, religious symbols:

> "may be used only as a teaching aid or resources and only if they are displayed as part of the cultural and religious heritage of the holiday and are temporary in nature."[148]

7. Cheerleader Run-through Banners

a. Kountze Independent School District v. Matthews, 484 S.W.3d 416 (Tex. 2016)

A school district's prompt voluntary action in adopting a policy that allowed high school cheerleaders to include religious content in run-through banners displayed at sporting events did not moot the Parents' dispute about whether the cheerleaders could put such messages on the run-through banners.

Parents of certain members of the Kountze High School cheerleading squad brought suit against Kountze ISD, after its former superintendent Kevin Weldon issued a statement prohibiting the cheerleaders from including religiously-themed messages on run-through banners used at the beginning of football games. The District appealed the denial of its plea to the jurisdiction, asserting that the trial court erred when it denied the plea because the Parents' claims are moot and the trial court, therefore, lacked subject matter jurisdiction.

In reversing the trial court's order, the Beaumont Court of Appeals found that the Parents' claims against the District were moot because the District adopted a new policy which states, in part, that:

> "school personnel are not required to prohibit messages on school banners, including run-through banners, that display fleeting expressions of community sentiment solely because the source or origin of such messages is religious."

The Beaumont Court of Appeals found further support in the fact that the District had made judicial admissions affirming its new policy and its future intentions

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[140] *Sherman v. Koch*, 623 F.3d 501, 516-517 (7th Cir. 2010).

[141] *I Croft v. Governor of Tex.*, 562 F.3d at 750.

[142] *Wallace*, 472 U.S. at 56-57, 61.

[143] See *Doe v. Indian River Sch. Dist.*, 653 F.3d 256 (3d Cir. 2011); *Marsh Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369 (6th Cir. 1999). The only time the issue has been presented to the Fifth Circuit Court of Appeals, the Court found that the Plaintiffs had no standing to sue because there was no evidence that they ever attended the school board meetings (*Doe v. Tangipahoa Parish Sch. Sys.*, 494 F. 3d 494 (5th Cir. 2007)).

[144] *Ahlquist v. City of Cranston*, C.A. No. 11-138L, 2012 U.S. Dist. LEXIS 3348 (D.R.I. Jan. 11, 2012).

[145] *Van Orden v. Perry*, 545 U.S. 677 (2005).

[146] *Lynch v. Donnelly*, 465. U.S. 668, 679, and 691 (1984).

[147] *Florey v. Sioux Falls Sch. Dist.*, 619 F.2d 1311 (8th Cir.), *cert. denied*, 449 U.S. 987 (1980).

[148] *Id.* at 1317.

regarding religious content on the run-through banners. Further, in light of the District's creation of the new policy, there was no evidence that a ban was capable of repetition, nor was there evidence of any collateral consequences where the cheerleaders never actually had a banner containing religious messages banned per the former superintendent's statement.

The Texas Supreme Court reversed the Beaumont Court of Appeals decision because:

> "the challenged conduct might reasonably be expected to recur."

The Texas Supreme Court remanded the case to the Beaumont Court of Appeals for further proceedings. As a result, the Beaumont Court of Appeals will address the remaining issues regarding governmental immunity and standing. The Beaumont Court of Appeals will also likely address whether the run-through banners are "government speech" (i.e., the school's banners) or "private speech" (i.e., entirely within the control of the cheerleaders).

b. Morgan v. Swanson, 755 F.3d 757 (5th Cir. 2014)

A school official is entitled to qualified immunity from an elementary school parent's First Amendment viewpoint discrimination claim arising from the discretionary decision to not allow a parent to distribute religious material to other adults at his son's in-class winter party.

In December, 2003, Mr. Morgan attended his son's elementary school in-class winter party. Principal Lynn Swanson prohibited Morgan's son from distributing candy canes bearing a religious message at the in-class party, and the family filed suit alleging a First Amendment violation. In *Morgan v. Swanson*, 659 F.3d 359 (5th Cir. 2011) (en banc), the Court held that Swanson's conduct was unconstitutional, but she was entitled to qualified immunity because relevant law was too "abstruse" and "complicated" for Swanson to have known how to handle the situation. Now, with this case, Mr. Morgan asserts that he, too, experienced viewpoint discrimination when Principal Swanson told him not to distribute the religious material to other consenting adults in the classroom.

A school official is entitled to qualified immunity from civil liability arising out of her discretionary decisions unless her conduct is "clearly established" as unconstitutional. The court found that:

> "educators are nearly always immune from liability arising out of First-Amendment disputes, except in the rare incidents when there is precedent directly on point."

Where, as here, there is no authority recognizing an asserted right, and where the area of law is abstruse and complicated, the asserted right is not clearly established for qualified immunity purposes. Therefore, the Court dismissed Mr. Morgan's claim.

V. LEGISLATIVE PRAYER

In general, government-sponsored prayer in opening legislative sessions is constitutionally permissible. In *Marsh v. Chambers*, the Supreme Court noted an exception to traditional Establishment Clause analysis: the Supreme Court upheld the Nebraska state legislature's practice of beginning each session with a prayer from a chaplain paid by the state, because the opening of legislative sessions with the recitation of prayer is deeply embedded in the "unique history" and tradition of this country.[149] The Court went on to observe that:

> "[t]he content of the prayer is not of concern to judges"

when:

> "there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief."[150]

In *County of Allegheny v. ACLU*, the Supreme Court noted that legislative prayers that have the effect of affiliating the government with a specific faith or belief do not pass constitutional muster under the *Marsh* analysis.[151]

In the one case where the Fifth Circuit was presented with the issue, *Doe v. Tangipahoa Parish School System*, the case was ultimately decided on standing grounds only.[152] In 2003, "John Doe" filed suit in federal court against the School System, alleging that their practice of opening School Board meetings with a prayer violated the Establishment Clause. The district court held that the School Board's practice was unconstitutional and enjoined them. On appeal, a three-judge panel was divided three ways, when it affirmed in

[149] *Marsh v. Chambers*, 463 U.S. 783, 790-93 (1983).

[150] *Id.* at 794-95.

[151] *County of Allegheny v. ACLU*, 492 U.S. 573, 603 (1989) ("not even the 'unique history' of legislative prayer…can justify contemporary legislative prayers that have the effect of affiliating the government with any one specific faith or belief.").

[152] *Doe v. Tangipahoa Parish Sch. Bd.*, 473 F.3d 188, 197, 205 (5th Cir. 2006), *vacated on reh'g en banc*, 494 F.3d 494 (5th Cir. 2007).

part, holding that the School Board's practice of opening its meetings with a sectarian Christian prayer fell outside the *Marsh* legislative prayer exception. But on rehearing *en banc*, the Fifth Circuit reconsidered and held that the district court record contained insufficient evidence that the plaintiff Doe had ever attended any Board meetings; the Court of Appeals vacated and remanded the divided panel decision on the single ground that the plaintiff had not proved standing to bring suit.[153]

Other Circuit courts have varied in how they have applied the *Marsh* decision. Some courts have applied *Marsh*, deciding that prayers must be nonsectarian.[154] Other courts have stopped short of holding that *Marsh* commands that legislative prayer must be nonsectarian or prohibits invocations of "particular concepts of God," but rather courts should focus on whether the prayer opportunity has been exploited to proselytize and/or disparage other religious views.[155]

A. *Town of Greece v. Galloway*, 134 S.Ct. 1811 (2014)

A municipality does not necessarily violate the First Amendment prohibition on establishments of religion by opening its monthly board meetings with a prayer.

The Town of Greece has a short prayer at the beginning of its monthly board meetings. The Town permits any minister or layperson (including an atheist) to give the invocation. However, since the practice was started in 1999 through 2007, all the participants were Christian. Similarly, nearly all of the congregations in town are Christian. The Town neither reviews in advance nor provides guidance as to their tone or content. Many prayers include explicitly Christian references. Two citizens brought suit alleging that the practice violates the First Amendment Establishment Clause. The Town moved for summary judgment, which the district court granted. On appeal, the Second Circuit reversed.

The Supreme Court upheld the invocations, holding that they do not violate the Establishment Clause. The Court further rejected claims that any prayers must be nonsectarian. However, if the course and practice over time shows that the invocations:

> "denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion,"

the Court might come to a different conclusion.

VI. PUBLIC DISPLAYS

The Supreme Court's most recent foray into the realm of Ten Commandments monuments illustrates, it remains remarkably unclear as to how local governments should evaluate the chance that a specific display will violate the Establishment Clause.

One June 27, 2005, the Supreme Court issued its rulings in two cases involving displays of the Ten Commandments on public property, holding one constitutional and the other not. *McCreary County, Ky. v. ACLU of Ky.*, 545 U.S. 844 (2005); *Van Orden v. Perry*, 545 U.S. 677 (2005).

In *McCreary*, a majority of the Supreme Court held that the Ten Commandments displays at two courthouses in Kentucky were unconstitutional, pursuant to the Establishment Clause. In so holding, the Supreme Court reaffirmed that one of the essential elements of determining constitutionality under the Establishment Clause is the purpose of the act. The Court held that:

> "the secular purpose required has to be genuine, not a sham, and not merely secondary to a religious objective."

The Court also held that the history of the community and the development of the display helps in determining the purpose. The Court even went so far as to admit that identical displays could have differing results depending on the surrounding historical circumstances they led to the display.

In *Van Orden*, there was no majority and Justice Breyer's opinion is controlling. Four justices, with Justice Breyer concurring in the judgment, held that the display of the Ten Commandments at the Texas State

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[153] *Doe v. Tangipahoa Parish Sch. Bd.*, 494 F.3d 494, 499 (5th Cir. 2007) (en banc).

[154] *See, e.g., Hinrichs v. Bosma*, 440 F.3d 393 (7th Cir. 2006) (citing *Doe v. Village of Crestwood*, 917 F.2d 1476, 1479 (7th Cir. 1990)), later reversed and remanded with instructions to dismiss for lack of standing, *Hinrichs v. Speaker of the House of Representatives of the Ind. Gen. Assembly*, 506 F.3d 584, 585 (7th Cir. 2007); *Bacus v. Palo Verde Unif. Sch. Dist. Bd. of Educ.*, 52 Fed. Appx. 355 (9th Cir. 2002) (unpublished)

[155] *See e.g., Turner v. City Council of the City of Fredericksburg, Va.*, 534 F.3d 352 (4th Cir. 2008); *Snyder v. Murray City Corp.*, 159 F.3d 1227, 1233-34, 1234 n.10 (10th Cir. 1998) (en banc) (city was "within its rights under *Marsh*" to deny permission to speaker to recite his proposed prayer, where prayer "aggressively proselytize[d] for his particular religious views and strongly disparage[d] other religious views"); *Pelphrey v. Cobb County, Georgia*, 547 F.3d 1263, 1271 (11th Cir. 2008) (to read *Marsh* as allowing only nonsectarian prayers "is at odds with the clear directive by the [Supreme Court] that the content of the legislative prayer "is not of concern to judges where. . .there is no indication that the prayer opportunity has been exploited to proselytize or advance any one. . .faith or belief'").

Capitol is constitutional under the Establishment Clause. In essence, Justice Breyer concluded that because the display had been on the Capitol grounds for approximately 40 years before any complaints were made, it is not perceived as an endorsement of religion and does not violate the Establishment Clause.

In light of these rulings, it is apparent that Justice Breyer is correct when he states that:

> "no exact formula can dictate [the] resolution"

of these sorts of cases. On this point, the Fifth Circuit has noted that:

> "[i]n determining the constitutionality of a religious display, the Supreme Court has made clear that 'under the Establishment Clause detail is key.'"[156]

In *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009), the Supreme Court considered a Free Speech Clause challenge to a display that included the Ten Commandments, and concluded that monuments on government property are government speech, which is not subject to the First Amendment Free Speech Clause.[157] In that case, a little-known religious organization requested permission to erect a stone monument in a park that contained several other donated monuments, including a stone Ten Commandments monument. The organization brought suit against the City and local officials claiming that defendants violated the Free Speech Clause by accepting the Ten Commandments monument while rejecting the organization's "Seven Aphorisms" monument.

The Court concluded that the City's decision to accept certain privately donated monuments while rejecting the plaintiff's monument was a form of government speech, and thereby not subject to the Free Speech Clause. The permanent monument displays, as opposed to the transitory expressive acts and traditional public forum speeches that commonly took place in the park, were government speech and not a form of expression to which the analysis applied.

The Supreme Court recently denied certiorari in the *Mount Soledad Memorial* case.[158] This case out of the Ninth Circuit concerns a 43-foot high cross that has stood atop the now federally-owned Mt. Soledad Memorial in San Diego since 1954. The Memorial was originally private, then it belonged to the City of San Diego, and now it belongs to the federal government. A three-judge panel originally held that the cross conveys a government endorsement of religion in violation of the Establishment Clause. The Ninth Circuit refused en banc review, and the plaintiff's petitioned for certiorari.

While the Supreme Court refused to hear the case due to its interlocutory posture, Justice Alito hinted that the Court might grant certiorari in the future, emphasizing that:

> "[t]his Court's Establishment Clause jurisprudence is undoubtedly in need of clarity,"[159]

and that:

> "[o]ur denial, of course, does not amount to a ruling on the merits, and the Federal Government is free to raise the same issue in a later petition following entry of a final judgment."

VII. EMPLOYMENT LAW ISSUES RELATING TO RELIGION

A. *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 132 S.Ct. 694 (2012)

Religious group employers are protected from employee anti-discrimination and anti-retaliation claims by the First Amendment's Establishment and Free Exercise Clauses, if the employee asserting the claim is one of the group's ministers.

Cheryl Perich was a teacher at a Lutheran school who claimed that she was retaliated against by the school based on her threatening to file a lawsuit under the Americans with Disabilities Act. Perich was a "called" teacher, a teacher who is considered to be called by God to the vocation of teaching. In order to be considered a "called" teacher, Perich completed eight theology courses, was endorsed by a local Lutheran Synod district, and pass an exam. After she completed

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[156] *Staley v. Harris County*, 485 F.3d 305, 308 (5th Cir. 2007) (en banc) (*quoting McCreary County, Ky. v. ACLU of Ky.*, 545 U.S. 844, 867-68 (2005) (citing *County of Allegheny v. ACLU*, 492 U.S. 573, 595 (1989)) (Fifth Circuit dismisses appeal of district court's order to remove a display of a Bible in a monument on the County's courthouse grounds as moot, because the County, without prior warning, put the display in storage for renovation of the courthouse just days before en banc oral argument).

[157] In his concurrence, Justice Scalia noted that the Ten Commandments display in this case would also pass muster under the establishment clause in light of *Van Orden*. *Id*, at 483 (Scalia, concurring).

[158] *Mount Soledad Memorial Ass'n v. Trunk*, Cause No. 11-990, and *United States v. Trunk*, Cause No. 11-1115, 132 S. Ct. 1810 (2012).

[159] See also Justice Thomas's dissent to denial of certiorari in *Utah Highway Patrol Ass'n v. Am. Atheists, Inc.*, 132 S. Ct. 12, 22 (2011) ("It is difficult to imagine an area of the law more in need of clarity").

the program, Perich received a "diploma of vocation" designating her as a "commissioned minister". As a teacher, Perich taught math, language arts, social studies, gym, art and music, as well as religion class four days a week. Perich also led the students in prayer and devotional exercises every day, and attended a school-wide chapel service every week. Twice a year, Perich led the school-wide service. In 2004, Perich developed narcolepsy and, during discussions with Church officials about her continued employment, Perich threatened to file suit. Perich was later terminated.

Perich filed a Charge of Discrimination and the EEOC filed suit alleging retaliation under the Americans with Disabilities Act. The Church argued that the EEOC's suit was barred by the First Amendment because the dispute concerned a religious institution and one of its ministers. According to the Church, Perich was a minister, and she had been fired for a religious reason:

> "her threat to sue the Church violated the Synod's belief that Christians should resolve their disputes internally."

In a unanimous decision, on an in issue of first impression for the Supreme Court, the Court held that both the Free Exercise and Establishment Clauses of the First Amendment bar the government from interfering with the decision of a religious group to terminate one of its ministers. The Court based its holding on history, its prior precedents concerning Church property, the uniformly recognized exception by the court of appeals of a ministerial exception, and the facts of the case. The Court did not decide which employees qualify as a "minister", though it held that Perich clearly was a minister because the Church held her out as a minister, her title reflected:

> "a significant degree of religious training followed by a formal process of commissioning,"

Perich held herself out as a minister, and her job duties reflected:

> "a role in conveying the Church's message and carrying out its mission."

The Court held that the ministerial exception is an affirmative defense and not a jurisdictional question.

B. *Cannata v. Catholic Diocese of Austin*, 700 F.3d 169 (5th Cir. 2012)

The U.S. Supreme Court's *Hosanna-Tabor* totality-of-the-circumstances analysis invalidates limiting the inquiry into whether someone is a minister for purposes of the ministerial exception to a rigid three-part test, modifying, if not invalidating the *Starkman* test, which had been the standard in the Fifth Circuit. Specifically, *Starkman*'s most heavily weighted factor of whether the plaintiff:

> "engaged in activates traditionally considered ecclesiastical or religious,"

may no longer apply.

Cannata was the Music Director at St. John Neumann Catholic Church from 1998 until 2007. His duties included rehearsing with the choir and cantors, playing along with them during Mass, and making music selections. Cannata filed suit alleging he had been terminated in violation of the Age Discrimination in Employment Act (ADEA) and the Americans with Disabilities Act (ADA). The district court dismissed the suit based on the ministerial exception, which bars employment-discrimination suits by ministers against their churches based on the religious organizations right under the First Amendment to control its own internal affairs.

The Fifth Circuit affirmed the district court's dismissal and took the opportunity to evaluate the ministerial exception for the first time since *Hosanna-Tabor*. The court made clear that there is no longer a bright-line, rigid formula for determining whether an employee is a minister for purposes of the ministerial exception. Instead, the court will now look at the totality-of-the-circumstances. By applying that standard, the court found that the ministerial exception applied to Cannata because he played an integral role in the celebration of the Mass by playing piano during services.

C. *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S.Ct. 2028 (2015)

In a religious discrimination claim, the question is whether the potential need for an accommodation for a religious practice is a "motivating factor" in an adverse employment action, not whether the employer had actual knowledge of the underlying religious practice. In other words, an employer may be held liable for an adverse employment action, if the employer takes such action because it suspects that an employee's religious practices will require an accommodation and it does not wish to provide such accommodation, regardless of whether the employee has told the employer of a religious practice that will require an accommodation or has asked for an accommodation.

Samantha Elauf, a Muslim, applied to work at Abercrombie and arrived for the job interview wearing a headscarf, which she believes to be required by her religion. Though the interview rating given to her indicated that she could be hired, the interviewer was concerned that the headscarf would conflict with Abercrombie's "Look Policy." At no time did the interviewer ask Ms. Elauf if the headscarf was worn as part of her religious practice, nor did Ms. Elauf at any time indicate the need to continue to wear the headscarf for religious reasons. The interviewer, however, in conversations with superiors indicated that she *believed* that the headscarf was being worn for religious reasons. Ultimately, the interviewer was instructed not to hire Ms. Elauf, as the headscarf would interfere with the Look Policy which barred religious and non-religious headwear. Ms. Elauf sued claiming violation of her Title VII rights not to be discriminated against based on her religion.

The E.E.O.C. brought suit against Abercrombie & Fitch ("Abercrombie") on behalf of a Muslim woman, Elauf, claiming that Abercrombie violated Title VII when they refused to hire Elauf over concerns that the traditional Muslim headscarf worn by Elauf would conflict with the company's "Look Policy", which prohibited "caps" of any kind. Defendants never inquired in the interview process of whether the "Look Policy" would be an issue for Elauf, nor did Elauf ever indicate that following the "Look Policy" would conflict with her religious views.

The District Court granted the E.E.O.C. summary judgment on the issue of liability, held a trial for damages, and awarded $20,000. On appeal, the Tenth Circuit reversed and granted Abercrombie summary judgment. The Tenth Circuit concluded that "ordinarily an employer cannot be liable under Title VII for failing to accommodate a religious practice until the applicant (or employee) provides the employer with actual knowledge of his need for accommodation." The Supreme Court granted certiorari.

Abercrombie's main argument was that an applicant cannot show disparate treatment under Title VII without first proving that an employer had "actual knowledge" of the applicant's need for accommodation. The Court, however, disagreed with this argument, stating:

> "[A]n applicant need only show that his need for an accommodation was a motivating factor in the employer's decision."

The Court further stated that Title VII prohibits certain motives, and that:

> "an employer who acts with the motive of avoiding accommodation may violate Title VII even if he had no more than an unsubstantiated suspicion that accommodation would be needed."

The Court emphasized that:

> "the rule for disparate-treatment claims based on a failure to accommodate a religious practice is straightforward: An employer may not make an applicant's religious practice, confirmed or otherwise, a factor in employment decisions."

The Court held that the Tenth Circuit misinterpreted Title VII's requirements in granting summary judgment to Abercrombie.

Justice Scalia issued the majority opinion. His opinion is, essentially, a close reading of Title VII. Justice Scalia noted that Title VII prohibits religious discrimination, with the term "religion" being defined as including:

> "all aspects of religious observance and practice, as well as belief."

An employer could discriminate against an employee's religion, but only if it showed that no reasonable accommodation was possible without the business suffering undue hardship.

Abercrombie's primary argument before the Court was that it could not have discriminated against Ms. Elauf without having "actual knowledge" of the need for an accommodation, which it claimed it did not have. Justice Scalia disagreed, relying on Title VII's text, which requires only that the need for an accommodation be a "motivating factor" in the employment decision in question. Title VII prohibits adverse actions against an employee or a prospective employee "because of" the employee's religion. In other words, an employee's religious practice may not be a motivating factor for taking an adverse employment decision against an employee. Title VII lacks the knowledge requirement that Abercrombie argued the Court should impose, but instead proscribes motives.

The Court ended its decision by noting that Title VII gives favored treatment to religious practices, going beyond requiring employers to merely have neutral policies. With regard to religion:

> "[t]itle VII requires otherwise-neutral policies to give way to the need for an accommodation."

D. *Nobach v. Woodland Village Nursing Center, Inc.*, 799 F.3d 374 (5th Cir. 2015)

When evaluating causation in a Title VII case, the question is not what the employer knew about the employee's religious beliefs, nor is the question whether

the employer knew that there would be a conflict between the employee's religious belief and some job duty, the critical question is what motivated the employer's employment decision.

Plaintiff brought suit after Defendant terminated her from her position as an activities aide following an incident where she refused to perform the Rosary with a resident of the nursing home. Before this incident, Plaintiff had received four negative employment write-ups, each recorded in her employment record. On the day in question, an employee asked that Plaintiff aid one of the residents who requested help performing the Rosary. Plaintiff refused, telling the employee it was against her religion to perform the Rosary, although she never specified the religious belief that prevented her from assisting the resident. Upon learning of the incident, Plaintiff's superiors decided to terminate her employment. It was not until after her termination that Plaintiff explained that she was a former Jehovah's Witness who had been expelled from the church following her refusal to repent for her sins when she was a teenager.

Plaintiff filed a charge against Defendant with the E.E.O.C., who issued Plaintiff a right to sue letter. Plaintiff alleged that defendant fired her in violation of Title VII. Following a jury verdict in favor of the plaintiff, Defendant moved for judgment as a matter of law. The district denied the motion, and Defendant appealed.

Defendant argued that the district court erred in denying their renewed motion for judgment as a matter of law because the evidence was insufficient to support a finding of a Title VII violation. The court stated that the critical question when evaluating causation in a Title VII case is what motivated the employer's employment decision, not whether the employer knew about an employee's religious beliefs or a conflict that could arise between an employee's religious beliefs and their job duties. The court stated that it found no evidence that Plaintiff ever informed anyone, before her discharge, that praying the Rosary was against her religion. The court further stated that no evidence could be found that showed that anyone involved in discharging Plaintiff:

> "suspected that [Plaintiff]'s refusal to pray the Rosary was motivated by a religious belief."

Taking all of this into consideration, the Court held that:

> "a reasonable jury would not have had a legally sufficient evidentiary basis to find that [Defendant] intentionally discriminated against [Plaintiff] because of her religion."

The court held that:

> "the district court erred by not granting [Defendant]'s Rule 50(b) motion for judgment as a matter of law because [Plaintiff] failed to put forth evidence that, before her termination, [Defendant] knew or suspected that her religious belief needed an accommodation, which necessarily means that there was no evidence that [Plaintiff]'s religious belief was the motive for [Defendant]'s termination decision."

VIII. THE ECCLESIASTICAL ABSTENTION DOCTRINE

A. *Jennison v. Prasifka*, 391 S.W.3d 660 (Tex. App.—Dallas 2013, no pet.)

The ecclesiastical abstention doctrine denies a trial court subject matter jurisdiction over claims that relate to internal matters of church governance and discipline. This doctrine extends to protect even parishioners, who are not officers of the church, from suit.

Jennison terms himself as a "bi-vocational" minister—an ordained Episcopal priest and a strockbroker employed by First Canterbury Securities. Parishioner Prasifka complained to the Episcopal Diocese of Dallas about Jennison, alleging that he was "churning" her brokerage account. As a result, Jennison was placed on inactive status as a priest. Jennison sued Prasifka for slander, tortuous interference with a contractual relationship, and wrongful discharge. In response, Prasifka filed a motion to dismiss and a plea to the jurisdiction, claiming that the dispute in the case involved ecclesiastical matters, and as such, the trial court had no jurisdiction. The trial court granted the motion to dismiss, and Jennison appealed, claiming that the ecclesiastical abstention doctrine does not extend to protect a parishioner who is not an officer of the church.

The court of appeals found that the ecclesiastical abstention doctrine denied the trial court subject matter jurisdiction and affirmed the trial courts dismissal of Jennison's claims. The court of appeals found that the Prasifka's complaint and the subsequent disciplinary action that was taken against Jennison were matters of church discipline, and were beyond the subject matter jurisdiction of a civil court. In order to determine the ecclesiastical implications of Jennison's complaint, the court of appeals focused its inquiry on the substance and effect of the complaint, not on the identity or the position held by the party being sued. Jennison's complaint arose from the statements made by Prasifka to the church itself that were in connection with the church's disciplinary process. The fact that Prasifka was a parishioner and not an officer of the church was not the focus of the court's inquiry. Instead, the fact that the substance of Jennison's suit related to internal matters of church governance and discipline brought it

within the purview of the ecclesiastical abstention doctrine. As a result, it was proper for the trial court to dismiss for lack of subject matter jurisdiction.

IX. BONA FIDE RELIGIOUS BELIEFS

A. *Davis v. Fort Bend County*, 765 F.3d 480 (5th Cir. 2014)

In a religious discrimination case, a court's inquiry as to a plaintiff's bona-fide religious belief is limited to focusing on the individual's motivation, or, in other words, to whether the plaintiff's beliefs are, in the plaintiff's scheme of things, religious.

Davis, a supervisor, was directed to work on Sunday, July 3, 2011. On June 28, 2011, Davis informed her employer that she would not be available to work on July 3rd "due to a previous religious commitment," and Davis was absent from work and terminated. Davis' commitment was the breaking ground for a new church and feeding the community, events that Davis strongly believed that she needed to attend, as a religious matter. Davis' employer, however terminated her, arguing that the reason for Davis' absence was not a religious belief or practice because Davis had described the events as a "request" from her Pastor that:

> "all members participate in the 'community service event.'"

At issue before the court was the first element of the prima facie case Davis was required to establish – that "she held a bona fide religious belief." The court of appeals noted that a court's inquiry as to this element is "limited to focusing upon the individual's motivation," or in other words, whether the individual's belief, as understood by the individual, is religious. Courts consider a belief to be religious:

> "if it is '[a] sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by…God.'"

Courts are not to question whether the stated belief is a true religious tenet, central to the religion. Courts are to examine the specific religious practice in question and the individual's sincerity in adhering to the practice "is largely a matter of individual credibility."

The Fifth Circuit held that the district court improperly focused on the nature of the activity itself, as opposed to focusing on whether Davis' religious belief was sincere. The Court of Appeals ultimately reversed the granting of summary judgment because a question of material fact existed as to one of Fort Bend's defenses.

X. OBERGEFELL AND ITS AFTERMATH

A. *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015)

States are required to permit civil marriage by individuals of the same sex on the same terms that they permit civil marriage by individuals of opposite sexes. In addition, states are required to recognize a civil marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state.

The plaintiffs came from various states, all of which defined marriage as a union between one man and one woman. The plaintiffs were over a dozen same-sex couples who sued claiming that the refusal of their respective states to permit them to marry or to recognize their marriages performed lawfully in other states violated their Fourteenth Amendment rights. The various district courts where the plaintiffs filed suit all ruled in favor of the plaintiffs, but the Sixth Circuit, in a consolidated opinion, held that a state has no constitutional obligation to license same-sex marriages or to recognize same-sex marriages performed out of state.

The Supreme Court reversed, holding that the state prohibitions on same-sex marriage and on recognizing out-of-state same-sex marriages violated the Fourteenth Amendment. The Court held that there is a constitutionally protected right to marry, which the Court described as a couples:

> "wish to define themselves by their commitment to each other."

The Court went on to conclude that the arguments put forth by the states to explain the exclusion of same-sex marriage, which were based on alternative understandings of the nature of marriage, were inconsistent with other aspects of the states' marriage laws, and thus could not serve as a basis for excluding same-sex marriage.

Recently, Ryan Anderson, senior research fellow at the Heritage Foundation, along with nine other academic and religious leaders, published an article in the *National Review* entitled "One Year after *Obergefell*." In the article, the authors stated:

> One year ago, the U.S. Supreme Court declared in *Obergefell v. Hodges* that the United States Constitution mandates same-sex marriage. But in doing so, the court improperly cut short the process of democratic debate that our Founders bequeathed to us and that the Constitution envisioned.

The authors argued that the Supreme Court ignored the text and meaning of the Constitution and its own prior jurisprudence. The authors argued that the Supreme

Court had traditionally been loath to create new constitutional rights because doing so:

> "places the matter outside the arena of public debate and legislative action."

The authors argued that the Supreme Court's use of substantive due process in *Obergefell* is reminiscent of its holding in *Roe v. Wade.* The authors wrote:

> By announcing a right the Constitution did not contemplate, the *Roe* court cut short an ongoing public debate on a matter of momentous public significance, and thus engendered decades of rancor and protracted constitutional litigation, even as to modest abortion reforms dedicated to ensuring maternal health and preventing fetal pain. *Roe* teaches us that when the Supreme Court creates a new right not found in the Constitution, it distorts the political process, prevents reasonable compromise, and inevitably crowds out other less fashionable rights.

The authors argued that a similar dynamic now presents itself in *Obergefell.* They argued that by preventing the use of the common tools of self-governance (i.e., debate, persuasion and compromise) *Obergefell*, as with *Roe* before it, has spawned not peaceful coexistence but more rancor and conflict. They wrote:

> Proponents of same-sex marriage had for years blithely dismissed concerns that imposing a new definition of marriage would endanger or eclipse the rights of Americans who continue to believe that marriage is the union of one man and one woman. But those dismissals ring hollow now, as it has become increasingly clear that same-sex marriage activists brook no dissent. Same-sex marriage and religious liberty, it turns out, represent a zero-sum game.

The authors mentioned three recent examples which they assert illustrate the conflict between same-sex marriage and religious liberty. The first example came just two days after *Obergefell* was decided when Mark Oppenheimer of the *New York Times* published an article in *Time* magazine suggesting that churches which:

> "dissent from settled public policy on matters of … sexuality"

should have their tax-exempt status abolished or greatly diminished. Oppenheimer suggested that although churches can still hew to their beliefs about marriages, punishment for those beliefs is now appropriate. The second example cited involved a law passed by the North Carolina General Assembly which provided reasonable accommodation for magistrates and other public officials who continue to hold to a religious belief in man-woman marriage. The North Carolina law permitted magistrates to opt out of solemnizing marriages altogether if they have religious objections but it also ensures that no citizen will ever be denied the right to marry or be inconvenienced in their desire to do so. This modest measure has been challenged in court by several plaintiffs who are relying on *Obergefell* to support their claims that the law violates the Establishment Clause, the Due Process Clause and the Equal Protection Clause. The final example involves Judge Ruth Neely of Pinedale, Wyoming who, responding to a question from a local reporter, said that her religious belief is that marriage is the union for one man and one woman and that she, therefore, could not perform same-sex wedding ceremonies. The Wyoming Commission on Judicial Conduct and Ethics learned about Judge Neely's religious beliefs and brought charges against her. The Commission alleged that Judge Needly should be removed from her judicial position because she communicated her religious beliefs about marriage. The Commissioner recommended to the Wyoming Supreme Court that she be removed from her position as a circuit-court magistrate and as a municipal judge.

After siting these three examples, the authors argued that after *Obergefell,* compromise and debate have been replaced by intolerance. They closed by arguing that if we are to contain and ultimately remedy the intolerance for religious liberty that has grown after *Obergefell*:

> "we must follow in the footsteps of those who opposed *Roe* and steadfastly insist that a continued belief in man-woman marriage does not exclude Americans who hold to that time-honored belief from the public square."