RELIGIOUS LIBERTY LAW SECTION

STATE BAR OF ARIZONA

Newsletter / DECEMBER 2024

FROM *the* EDITOR

Welcome to the December 2024 issue of the *Religious Liberty Law Section Newsletter.*

On July 15, 1663, King Charles the Second issued the *Charter of Rhode Island and Providence Plantations*, which governed the colony and then the State of Rhode Island for nearly two centuries. The Charter was unique in that, among other things, it extended a degree of religious freedom to inhabitants of the colony nearly unheard of elsewhere at the time. Most, if not all, other English colonies had established state-sponsored churches, which inhabitants were required to attend and financially support. Thomas Bicknell, the author of a six-volume *History of Rhode Island and Providence Plantations* stated that the *Charter* was "the grandest instrument of human liberty ever constructed." For these reasons, I have chosen select portions of the *Charter of Rhode Island and Providence Plantations* as this issue's Great Moments in Religious History.

Also, I want to, again, extend a personal note of thanks to John Bursch who authored this issue's Feature Article – *2024 Supreme Court Religious Liberty Law Round-Up* – in which, for the fourth year in a row, he discusses the most important religious liberty law-related decisions rendered by the U.S. Supreme Court during the Court's most recently completed term.

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

Bradley S. Abramson

Bradley S. Abramson, Editor

QUOTE DU JOUR

"No provision in our constitution ought to be dearer to man than that which protects the rights of conscience against enterprises of civil authority."

— Thomas Jefferson (Letter to Methodist Episcopal Church, New London, CT, Feb. 1809)

IN *this* ISSUE

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FROM *the* CHAIR

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Look, I can be as turned off as the next person by trite messages. I have always been impatient with reading newsletter introductions, and I usually skip them and get to the real stuff. Brehm's research on psychological reaction theory (PRT) explained why when someone is told what to do, they often resist or do the opposite. This motivation has much to do with freedom, free will, and autonomy. When something impinges on our freedom, we are motivated to restore the loss. Thus, rather than tell you what I think you should read in addition to this newsletter, here is a short list of twelve books you may not want to add to your reading list:

- *Thomas C. Berg, Religious Liberty in a Polarized Age (2023)*
- *Nathan Chapman and Michael McConnell, Agreeing to Disagree: How the Establishment Clause Protects Religious Diversity and Freedom of Conscience (2023)*
- *Louis Fisher, Religious Liberty in America: Political Safeguards (2002)*
- *Edwin Gaustad, Mark Noll, and Heath Carter (editors), A Documentary History of Religion in America (2018)*
- *Phillip Hamburger, Separation of Church and State (2004)*
- *Kevin Seamus Hasson, The Right to Be Wrong: Ending the Culture War Over Religion in America (2012)*
- *William Lee Miller, The First Liberty: American's Foundation in Religious Freedom (2003)*
- *Vincent Phillip Munoz, Religious Liberty and the American Founding (2022)*
- *Ken Starr, Religious Liberty in Crisis (2021)*
- *Steven D. Smith, The Rise and Decline of American Religious Freedom (2014)*
- *Steven Waldman, Founding Faith: Providence, Politics, and the Birth of Religious Freedom in America (2009)*
- *John Witte, Jr., Religion and the American Constitutional Experiment (2016)*

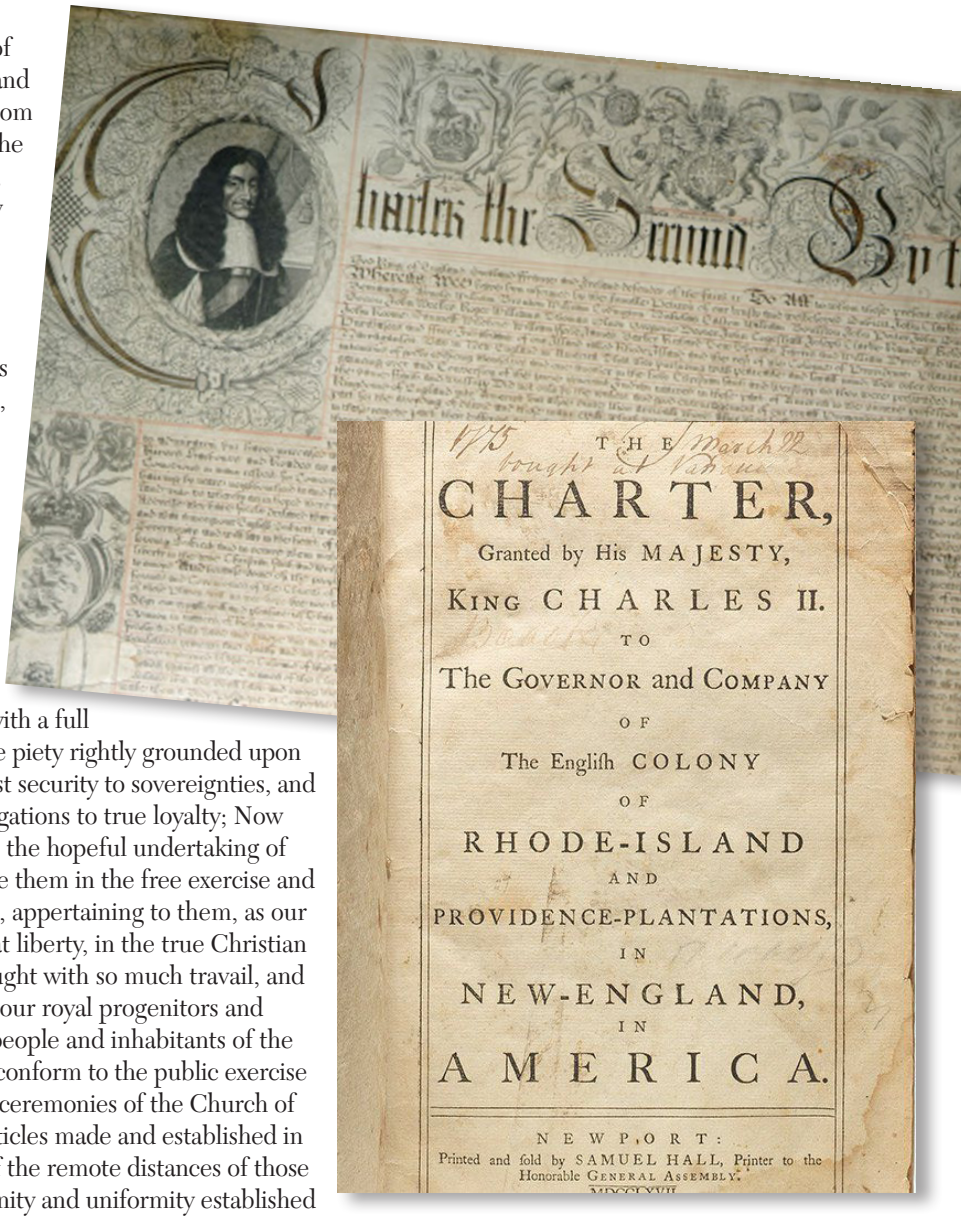
With gratitude,

Andrew J. Petersen

Andrew J. Petersen, Chair

GREAT MOMENTS *in* RELIGIOUS LIBERTY HISTORY

Charter of Rhode Island and Providence Plantations – July 15, 1663[1]



CHARLES THE SECOND, by the grace of God, King of England, Scotland, France and Ireland, Defender of the Faith, &c … to all whom these presents shall come … and the rest of the purchasers and free inhabitants of our island, called Rhode-Island, and the rest of the colony of Providence Plantations, in the Narragansett Bay, in New England, in America, … edifying themselves, and one another, in the holy Christian faith and worship … by the good Providence of God, from whom the Plantations have taken their name … whereby, as is hoped, there may, in due time, by the blessing of God upon their endeavors, be laid a sure foundation of happiness to all America:

And whereas, in their humble address, they have freely declared, that it is much on their hearts (if they may be permitted), to hold forth a lively experiment, that a most flourishing civil state may stand and best be maintained, and that among our English subjects, with a full liberty in religious concernments; and that true piety rightly grounded upon gospel principles, will give the best and greatest security to sovereignties, and will lay in the hearts of men the strongest obligations to true loyalty; Now know thee, that we being willing to encourage the hopeful undertaking of our said loyal and loving subjects, and to secure them in the free exercise and enjoyment of all their civil and religious rights, appertaining to them, as our loving subjects; and to preserve unto them that liberty, in the true Christian faith and worship of God, which they have sought with so much travail, and with peaceable minds, and loyal subjection to our royal progenitors and ourselves, to enjoy; and because some of the people and inhabitants of the same colony cannot, in their private opinions, conform to the public exercise of religion, according to the liturgy, forms and ceremonies of the Church of England, or take or subscribe the oaths and articles made and established in that behalf; and for that the same, by reason of the remote distances of those places, will (as we hope) be no breach of the unity and uniformity established in this nation; Have therefore thought fit, and do hereby publish, grant, ordain and declare, That our royal will and pleasure is, that no person within the said colony, at any time hereafter, shall be any wise molested, punished, disquieted, or called in question, for any differences in opinion in matters of religion, and do not actually disturb the civil peace of our said colony; but that all and every person and persons may, from time to time, and at all times hereafter mentioned; they behaving themselves peaceably and quietly, and not using this liberty to licentiousness and profaneness, nor to the civil injury or outward disturbance of others; any law, statute, or clause, therein contained, or to be contained, usage or custom of this realm, to the contrary hereof, in any wise, notwithstanding. And that they may be in the better capacity to defend themselves, in their just rights and liberties against all the enemies of the Christian faith, and others, in all respects, we have further thought fit, and at the humble petition of the persons aforesaid are graciously pleased to declare, That they shall have and enjoy the benefits of our late act of indemnity and free pardon, as the rest of our subjects in other our dominions and territories have, and to create and make them a body politic or corporate with the powers and privileges hereinafter mentioned.[2]

1. The full text of the Charter *may be found at the Yale Law School Lillian Goldman Law Library website* *2. Spelling has been modernized*

SELECTED U.S. CASE LAW *Updates*

CASE 1 ***Apache Stronghold v. The United States of America***

101 F.4th 1036 (9th Cir. 2024)

U.S. DECISION TO TRANSFER PUBLIC PROPERTY TO A MINING CONCERN THAT WOULD DESTROY THE SITE DID NOT VIOLATE NATIVE AMERICANS' CONSTITUTIONAL RIGHT TO THE FREE EXERCISE OF RELIGION EVEN THOUGH THE TRANSFERRED LAND ENCOMPASSED LAND UNIQUELY SACRED TO NATIVE AMERICANS.

In this case, Apache Stronghold, a group representing the Western Apache, challenged a law that transferred U.S.-owned public land to a copper mining interest because the transferred land included land that the Western Apache had used for religious purposes for at least 1,000 years. The site was uniquely sacred to the Western Apache, who claimed the land provided them with a spiritual connection to the creator which they could not have anywhere else on earth. The mining process would eventually destroy the land by causing the surface to subside, creating a large surface crater 1.8 miles in diameter and more than 800 feet deep.

Apache Stronghold claimed that the transfer of the land would violate its members' rights under the Free Exercise Clause of the First Amendment as well as under the federal Religious Freedom Restoration Act (RFRA).

In analyzing Apache Stronghold's claims, the court relied upon *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988), finding *Lyng* to be indistinguishable and precedentially decisive.

Citing *Lyng*, the court noted that, in *Lyng*, just as here, it was undisputed that the "'projects at issue in this case could have devastating effects on traditional Indian religious practices' and the Court therefore accepted the premise that the challenged project [in the case of *Lyng* a road that traversed land sacred to several Native American nations] will virtually destroy the Indians' ability to practice their religion.'" However, "[d]espite these acknowledged severe impacts, the Court [in *Lyng*] nonetheless held that the Government was *not* required to demonstrate a 'compelling need' or otherwise to satisfy strict scrutiny" because "the plaintiffs would not 'be coerced by the Government's action into violating their religious beliefs,' nor would that action 'penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens'".

As the Court explained in *Lyng*, "'[t]he Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens …

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The Free Exercise Clause affords an individual protection from certain forms of governmental compulsion; it does not afford an individual a right to dictate the conduct of the Government's internal procedures.' … But the Court [in *Lyng*] held that the Free Exercise Clause's protection against government conduct 'prohibiting' the free exercise of religion … does not protect against the 'incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs' … "Although the resulting effect on the religious practices of the Indian plaintiffs would 'virtually destroy' their 'ability to practice their religion,' those religious impacts nonetheless did not implicate the Free Exercise Clause because the governmental actions that caused them had 'no tendency to coerce individuals into acting contrary to their religious beliefs' … Nor was this a situation in which the Government had 'discriminate[d]' against the plaintiffs … '"

The court then stated that "The project challenged here [in *Apache Stronghold*] is indistinguishable from that in *Lyng*" so that "[u]nder *Lyng*, Apache Stronghold's Free Exercise Clause claim must be rejected."

For the same reasons the court rejected Apache Stronghold's Free Exercise claim, it also rejected its RFRA claim.

There were several partial dissents and concurrences.

CASE 2 *Meinecke v. City of Seattle*

99 F.4th 514 (9th Cir. 2024)

CITY POLICE VIOLATED THE CONSTITUTIONAL FREE SPEECH RIGHTS OF A CHRISTIAN EVANGELIST WHEN, RATHER THAN PROTECTING THE EVANGELIST FROM HOSTILE LISTENERS, THEY DIRECTED THE EVANGELIST TO RELOCATE AND ARRESTED HIM FOR REFUSING TO DO SO.

In this case, a Christian evangelist held up signs and read from the Bible while on public property at two public events. At the first event – a protest of the U.S. Supreme Court's *Dobbs* decision overturning *Roe v. Wade* – the evangelist was surrounded by Antifa and other protesters, who physically moved the evangelist across a street and dropped him on the pavement. One protestor grabbed the evangelist's Bible and ripped pages from it. When he returned, protestors knocked him down and took one of his shoes. At the second event – a PrideFest – listeners crowded around the evangelist, danced near him, held up a flag to keep people from seeing him, made loud noises so the evangelist could not be heard, howled and barked like dogs, mocked and yelled at the evangelist as he read from the Bible, and poured water on the evangelist's Bible. In both situations, when the crowd abused and physically assaulted the evangelist, rather than protecting the evangelist or taking action against the perpetrators, the Seattle police asked the evangelist to move to another location and, when he refused, arrested him.

In analyzing the case, the court first reviewed basic First Amendment free speech principles, noting that "the First Amendment protects religious speech" like the evangelist's. The court also noted that the evangelist was speaking in both instances in traditional public fora – a public sidewalk and a public park.

The court then determined that, because the police directed the evangelist to leave the area because of the reaction his Bible reading provoked in listeners, the police officers' enforcement actions against the evangelist were "content-based heckler's vetoes" because in both instances the police targeted the evangelist's speech only after listeners manifested hostile reactions. The court noted that "'[t]he prototypical heckler's veto case is one in which the government silences *particular* speech or a *particular* speaker 'due to an anticipated disorderly or violent reaction of the audience' [and that] [a]s such, it 'is a form of content discrimination, generally forbidden in a traditional or designated public forum.'"

The court rejected the city's argument that the police officers' actions did not amount to a violation of the evangelist's constitutional rights because the police only sought to relocate the evangelist's speech rather than banning it outright, explaining that "the government cannot escape First Amendment scrutiny simply because its actions 'can somehow be described as a burden rather than outright suppression'" and that the officers' directions that the evangelist relocate burdened the evangelist's free speech rights, stating that the evangelist had a right to use public sidewalks, streets, and parks for the peaceful dissemination of his views. As the court stated, "[w]hen police single out a nonthreatening speaker for discipline, the government is simply choosing sides in the debate and using the obstruction statute to enforce its choice."

The court also found that the police did not use the least restrictive means to serve the government's interest in keeping the peace, stating that "[c]urtailing speech based on the listeners' reaction is rarely – if ever – the least restrictive means to achieve the government's interest in safety. 'If speech provokes wrongful acts on the part of hecklers, the government must deal with those wrongful acts directly; it may not avoid doing so by suppressing the speech.'"

The court then set forth several less speech-restrictive measures the police could have taken, rather than suppressing the evangelist's speech, including (1) requiring the protesters to stop crowding the evangelist, (2) calling for additional officers, (3) erecting a barricade between the protesters and the evangelist, (4) warning the protesters that their

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physical altercations would result in their arrests, and (5) arresting the individuals who assaulted the evangelist. The court then noted that the police did none of those things. Instead, the police punished the evangelist.

Finally, the court concluded that the balance of equities and the public interest favored the evangelist because "[i]t is always in the public interest to prevent the violation of a party's constitutional rights" and, although "[t]he government always has an interest in maintaining public order", that interest must yield when it collides with the Constitution.

For all these reasons, the court remanded the case to the District Court with instructions to enter a preliminary injunction in the evangelist's favor.

CASE 3 *Fellowship of Christian Athletes v. District of Columbia*

2024 WL 3400104 (D. D.C. 2024)

A PUBLIC SCHOOL VIOLATED THE FREE EXERCISE AND RFRA RIGHTS OF A CHRISTIAN STUDENT CLUB WHEN IT PUNISHED THE CLUB FOR REQUIRING THAT ITS LEADERSHIP ADHERE TO THE CLUB'S STATEMENT OF FAITH.

In this case, a public high school denied official student-group recognition to the Fellowship of Christian Athletes (FCA), an international Christian ministry that envisions "the world transformed by Jesus Christ through the influence of coaches and athletes" because the FCA requires its student leaders to affirm agreement with the FCA's Christian Statement of Faith, including that marriage is a life-long covenant relationship between a man and a woman and that homosexual relationships are immoral, which the school claimed violated the school's antidiscrimination policy. The FCA sued, alleging that the school's refusal to recognize the FCA violated the Religious Freedom Restoration Act (RFRA) as well as the Free Exercise Clause of the U.S. Constitution.

The court initially considered the FCA's RFRA claim. In doing so, the court found, first, that the FCA's requirement that student leaders affirm the FCA's Statement of Faith "constitutes the exercise of religion because, in enacting RFRA, Congress 'mandated' a broad conception of 'exercise of religion' …that undoubtedly covers a religious group's selection of its leaders." The court stated that it had "no trouble finding that a religious group's requirement that its leaders 'live up to … religious precepts that he or she [must] espouse [ ]' is a core facet of religious exercise covered under RFRA … In short, control over the selection of ministerial leadership is a core feature of religious practice."

The court then determined that the school's conduct imposed a "substantial burden" on the FCA because the school made students choose between their religious principles and a place on campus. The court rejected the school's argument that its actions did not substantially burden the FCA's religion because the FCA was still allowed to engage in meetings and pray on campus, stating that "the Supreme Court has expressly rejected the suggestion that the government may burden some religious practice as long as it allows other practices to proceed" so that "[p]ermitting FCA to continue worshipping and praying on campus does not make up for the inability to control the selection of its leaders."

Because the FCA met its burden of showing that the school's application of its antidiscrimination policy substantially burdened its religious exercise, the court turned to whether the school's actions passed strict scrutiny – serving a compelling state interest and furthering that interest in the least restrictive way.

Applying strict scrutiny, the court rejected the school's argument that it had a compelling interest in "protecting the safety and well-being of its students by promoting an equitable environment free of discrimination." The court found that that interest was "'standardless' and 'not sufficiently coherent for purposes of strict scrutiny" because "the Court has no way to 'measure' the equity of the school environment." Instead, the court stated, to pass muster under strict scrutiny, the government "'must specifically identify an actual problem in need of solving,' and the curtailment of rights 'must be actually necessary to the solution.'" The court found that the school failed to do that.

In addition, the court found that the school's exclusion of the FCA as a means of eliminating discrimination was "'fatally underinclusive' because the school had not pursued that objective with respect to nonreligious conduct. In particular, the court found that the school had treated comparable secular groups more favorably than the FCA by allowing the secular student groups to limit membership based on a variety of discriminatory criteria, such as sex, sexual orientation, and racial and ethnic heritage, thereby applying its antidiscrimination policy selectively, punishing the FCA while not punishing secular student groups for similar conduct.

For these reasons, the court found that the FCA had shown a likelihood of success on the merits of its RFRA claim.

The court then turned its attention to the FCA's Free Exercise claim. In this part of its analysis, the court concluded that, because the school did not apply its antidiscrimination policy equally – allowing secular student groups to discriminate while punishing the FCA for doing so – strict scrutiny was triggered. And for the same reasons the court found the school had failed to pass strict scrutiny under the FCA's RFRA claim, the school also failed strict scrutiny under the FCA's Free Exercise claim.

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Because "'[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury'" the court found that the school's application of its antidiscrimination policy to the FCA violated and would continue to violate both the U.S. Constitution's Free Exercise Clause and RFRA. The court also found that "'enforcement of an unconstitutional law is always contrary to public policy.'"

In conclusion, the court stated that, although antidiscrimination laws "'have done much to secure the civil rights of all Americans'"… "antidiscrimination laws, like all other laws, must be applied evenhandedly and not in violation of the Constitution."

CASE 4 *St. Timothy's Episcopal Church, by and through the Diocese of Oregon v. City of Brookings*

2024 WL 1303123 (D.Or. 2024)

A CITY ORDINANCE THAT RESTRICTED THE NUMBER OF DAYS A CHURCH COULD PROVIDE FREE MEALS TO THE HUNGRY VIOLATED RLUIPA. In this case, St. Timothy's Episcopal Church challenged, as a violation of the Religious Land Use and Institutional Persons Act (RLUIPA), a city ordinance that amended the zoning code to restrict how often "benevolent meal services" (defined as providing food to the public without charge) could occur and requiring organizations providing benevolent meal services to obtain conditional use permits subject to a condition that benevolent meals not be served more than two days a week.

In analyzing the case, the court first found that the challenged ordinance constituted a land use regulation to which RLUIPA applies because "on its face and in its application [the ordinance] limits Plaintiffs' use of the land … including the church affixed to that property."

Next, the court determined that St. Timothy's feeding ministry, which the ordinance restricted, is a religious exercise, stating that "There is no genuine dispute that Plaintiffs' feeding ministry is a 'religious exercise" under RLUIPA" because "[c]ourts across the country have recognized that ministering to the poor is an exercise of a sincerely held "religious duty to feed the hungry and clothe the naked.'"

Third, the court determined that the ordinance substantially burdened the church's religious exercise by limiting the number of days benevolent meal services could be provided because limiting the number of days the church can provide benevolent meal services "forces the Plaintiffs to choose between acting in accordance with their faith or facing a fine of $720 per day. The Ordinance thus puts 'substantial pressure' on Plaintiffs 'to modify their behavior and to violate their beliefs.'"

Fourth, the court concluded that the school had failed to identify any compelling government interest in limiting the number of benevolent meals that can be provided. The city failed to articulate how limiting meal service to two days per week protected public welfare, maintained peace and order, or prevented crime, which were the interests the city said the ordinance was designed to serve. The court also noted that the city had not restricted the number of days that non-benevolent meal services could be provided by other non-residential use types – such as golf courses, daycare facilities, or hospitals – so that it was not clear why churches were being treated differently. And, finally, the court noted that the city's asserted interest in limiting benevolent meals to two days per week was compromised by the fact that the city had long permitted St. Timothy's to provide benevolent meal services without limitation.

Fifth, the court concluded that, even if the city's stated interest was compelling, the ordinance was not the least restrictive means to achieve that interest because the city failed to proffer any evidence that it had considered and rejected other less restrictive ways to serve its alleged interests.

In conclusion, the court found that the ordinance violated RLUIPA.

FEATURE ARTICLE

2024 Supreme Court Religious Liberty Law Round-Up

By John J. Bursch

As I've written previously in these pages, the U.S. Supreme Court's 2021 and 2022 Terms were absolute blockbusters for religious liberty, as the U.S. Supreme Court decided six significant cases upholding important First Amendment religious liberty law-related rights, including a criminal defendant's right to a minister's prayers in the execution chamber, *Ramirez v. Collier*, 595 U.S. 411 (2022), a religious organization's right to raise a religious flag in front of city hall when the city allows a multiplicity of other political and cultural flags to be flown, *Shurtleff v. City of Boston*, 596 U.S. 243 (2022), a religious school's right to public funding when that funding is made generally available to secular entities, *Carson v. Makin*, 596 U.S. 767 (2022), a public employee's right to offer private prayer on his own time even though on work premises, *Kennedy v. Bremerton*, 597 U.S. 507 (2022), an employee's right to generous religious accommodations under Title VII, *Groff v. DeJoy*, 600 U.S. 447 (2023), and the right of a creative professional to decline creating or speaking messages that contradict her faith, *303 Creative LLC v. Elenis*, 600 U.S. 570 (2023).

As for the Court's 2023 Term, advocates for religious liberty are likely to be disappointed. In a Term that was immediately followed by a fall presidential election, the Justices fastidiously avoided many cases involving socially controversial issues, and that meant not a single case with clear free-exercise implications. But if you look more closely, the Court decided three cases that should provide religious-liberty advocates encouragement. And some lower-court rulings vindicated free-exercise rights in stunning ways. Let's dive in.

1 *United States v. Rahimi, 602 U.S. 680 (2024)*

In *Rahimi*, an 8–1 Supreme Court upheld a state statute that prohibited an individual from possessing a firearm while subject to a domestic-violence restraining order. What does this

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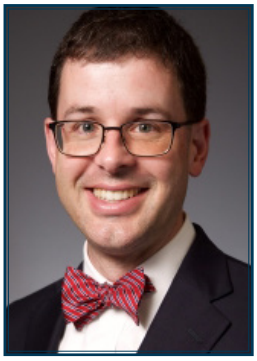

ABOUT THE AUTHOR

JOHN BURSCH serves as Senior Counsel and Vice-President of Appellate Advocacy with Alliance Defending Freedom. He also owns and operates his own law firm, Bursch Law, PLLC. He has argued 12 cases before the U.S. Supreme Court and more than three dozen cases before state supreme courts. He served as the Solicitor General of the State of Michigan from 2011 through 2013. Bursch earned his J.D., magna cum laude, from the University of Minnesota Law School, where he served as Chief Note and Comment Editor of the Minnesota Law Review. After law school Bursch served as a law clerk for the Hon. James B. Loken of the U.S. Court of Appeals for the 8th Circuit. He has been inducted into the American Academy of Appellate Lawyers and serves as a member of the American Law Institute. Bursch frequently litigates on behalf of clients seeking to vindicate religious liberty, free speech, parental rights, marriage and families, and the right to life.

have to do with religious liberty? It was certainly not the right at issue—a Second Amendment right to keep and bear arms. It was the Court's reasoning.

To analyze the validity of a firearm regulation, the Court relied on its decision in *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. 1 (2022): once it is clear that a law's prohibition falls within the scope of a constitutional amendment's text, "the Government must show that the restriction 'is consistent with the Nation's historical tradition of firearm regulation.'" *Rahimi*, 602 U.S. at 689, quoting *Bruen*, 597 U.S. at 24.

In other words, "the appropriate analysis involves considering whether the challenged regulation is consistent with the principles that underpin our [country's] regulatory tradition." *Id.* at 692. To do that, a "court must ascertain whether the new law is 'relevantly similar' to laws that our tradition is understood to permit, 'applying faithfully the balance struck by the founding generation to modern circumstances.'" *Id.* (cleaned up). Eight of nine Justices joined this opinion, and the only dissenter, Justice Thomas, did not disagree with the approach, only the historical analysis in this particular case. (Justice Thomas would have held the state law violates the Second Amendment.)

This matters to religious-liberty advocates because in *Bruen*, the Court made clear that this history-and-tradition approach to constitutional interpretation "accords with how [the Court] protect[s] other constitution rights." *Bruen*, 597 U.S. at 24. Pointing to the First Amendment's Free Speech Clause, the Court in *Bruen* noted that it is the government's burden to show whether "expressive conduct falls outside of the category of protected speech," such as obscenity or threats of violence, and "to carry that burden, the government must generally point to *historical* evidence about the reach of the First Amendment's protections." *Id.* at 24–25. Applying a balancing test that requires an individual to justify her rights "is not how the First Amendment works when it comes to unpopular speech or the free exercise of religion." *Id.* at 70.

Moving from tiers of scrutiny to a history-and-tradition approach should greatly benefit those asserting free-exercise rights in a broad variety of contexts. As Justice Kavanaugh explained in his *Rahimi* concurrence, no "purpose in ratifying the Bill of Rights was clearer than that of securing for the people of the United States much greater freedom of religion, expression, assembly, and petition than the people of Great Britain had ever enjoyed." 602 U.S. at 722 (Kavanaugh, J., concurring), quoting *Bridges v. California*, 314 U.S. 252, 265 (1941).

A history-and-tradition test would be a great improvement over *Employment Division v. Smith*, 494 U.S. 872 (1990), which generally allows the government to infringe the free exercise of religion provided that the law is neutral and generally applicable and was enacted without evidence of religious animus. Under *Bruen* and *Rahimi*, the Free Exercise Clause would protect an individual's religious exercise unless the government can show an unbroken historical tradition of laws that restrict the religious exercise at issue. Time will tell how robustly the Court will use such an approach to protect people of faith. But *Rahimi* is certainly a good sign.

❷ *Lindke v. Freed*, 601 U.S. 187 (2024); *O'Connor-Ratcliff v. Garnier*, 601 U.S. 205 (2024)

In *Lindke* and *O'Connor-Ratcliff*, the Supreme Court confronted government officials who used their personal (as opposed to professional) social media accounts to discuss public business and to censor those with opposing views. When the censored citizens sued, the government officials claimed that they had a First Amendment right to post content on their personal accounts. Alliance Defending Freedom filed a brief in support of the censored citizens and proposed a fact-specific test that would examine the purpose and appearance of government officials' posts to examine whether each post was public or personal. Otherwise, government officials could hide behind technology to pick and choose which viewpoints are allowed on issues of public concern. At the same time, government officials retain their own free speech rights to voice their personal views, including religious views.

The Supreme Court agreed with that approach. In a unanimous opinion authored by Justice Barrett, the Court ruled that a social media post qualifies as state action when the official "(1) possessed actual authority to speak on the State's behalf, and (2) purported to exercise that authority when he spoke on social media." *Lindke*, 601 U.S. at 191. That ruling stops government officials from avoiding First Amendment scrutiny by engaging in government censorship on their personal accounts. Simultaneously, the nuanced approach reflects the reality that "these officials too have the right to speak about public affairs in their personal capacities." *Id.* at 203.

❸ *National Rifle Association of America v. Vullo*, 602 U.S. 175 (2024).

In an even more insidious case of government action, the NRA sued the former superintendent of the New York Department of Financial Services for pressuring regulated entities—like insurance companies and financial institutions—to de-platform the NRA and other gun-promotion advocacy groups. In response to the NRA's First Amendment claims, the superintendent's defense was that government officials did not directly punish the NRA and other disfavored groups; private companies chose to do that, and those are not public actions. Alliance Defending Freedom filed an amicus brief urging the

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Court to reject that defense. In a unanimous opinion authored by Justice Sotomayor, the Court did so.

"At the heart of the First Amendment's Free Speech Clause," the Court wrote, "is the recognition that viewpoint discrimination is uniquely harmful to a free and democratic society … [while] a government official can share her views freely and criticize particular beliefs … in the hopes of persuading others[, she may not] use the power of [her office] to punish or suppress disfavored expression … The First Amendment prohibits government officials from wielding their power selectively to punish or suppress speech, directly or (as alleged here) through private intermediaries." *Vullo*, 602 U.S. at 187–88, 198 (cleaned up).

This is a striking victory for the NRA and for many churches and religious organizations which similarly face the threat of de-banking or de-platforming by major corporations at the behest of government officials. The Court's decision rightly affirms that government officials cannot engage in censorship-by-proxy schemes like the pressure the former superintendent placed on banks and insurance companies to deny the NRA service on account of the group's constitutional expression. As we know, our democracy is at its best when every viewpoint is respected and religious ideas in particular are allowed to flourish in the marketplace of ideas.

4 *Other significant free exercise decisions*

Looking past the Supreme Court and its Term, there have been several notable free-exercise decisions in lower courts. In *Vlaming v. West Point School Board*, 895 S.E.2d 705 (Va. 2023), Alliance Defending Freedom represented high school French teacher Peter Vlaming, who was fired for declining to refer to a female student using male pronouns. Although Mr. Vlaming consistently accommodated the student by avoiding the use of pronouns altogether in the student's presence, the school insisted that he use the student's preferred pronouns, and it fired him when he could not comply in good conscience. Mr. Vlaming asserted free-exercise, free-speech, and due-process rights under the Virginia Constitution and Virginia's state RFRA.

After the trial court dismissed the entire case without an opinion, the Supreme Court of Virginia reinstated it. Notably, the Court held that Virginia's constitutional free-exercise protections are not coextensive with the federal constitution's free-exercise protections. That means *Employment Division v. Smith*'s neutral-and-generally applicable test does not apply to Virginia free-exercise claims.

What's more, the Court declined to apply ordinary strict scrutiny and instead adopted a history-based strict scrutiny that asks whether the religious claimant's "sincerely held religious beliefs caused him to commit overt acts that invariably posed some substantial threat to public safety, peace or order, and if so, whether the government's compelling state interest in protecting the public from that threat, when examined under the rigors of strict scrutiny, could be satisfied by less restrictive means." *Vlaming*, 895 S.E.2d at 723 (cleaned up). This is a powerful example of how state constitutions can provide robust free-exercise protections.

On the other side of the ledger is the Oklahoma Supreme Court's decision in *Drummond v. Oklahoma Statewide Virtual Charter School Board*, 558 P.3d 1 (Okla. 2024). There, the Oklahoma Statewide Charter School Board approved St. Isidore of Seville Catholic Virtual School as a statewide virtual charter school. Attendance at the school was completely voluntary and open to anyone in the state, the school was privately owned and operated, and all state funding would be controlled by parents of prospective students.

Oklahoma's Attorney General filed suit in the Oklahoma Supreme Court, which ordered the Board to rescind the contract. Oddly, the court held that St. Isidore—a privately owned and operated entity—was a government entity and state actor. 558 P.3d at 13. And to the extent "St. Isidore could assert free exercise rights, those rights would not override the legal prohibition under the Establishment Clause." *Id.* at 14–15. Alliance Defending Freedom has appealed the decision to the U.S. Supreme Court, and we expect the petition to be conferenced in January. If the decision is allowed to stand, religious schools and religious parents who wish to send their children to schools that align with their values will continue to be penalized for their beliefs.

Ending the year-in-review on a positive note, the en banc Ninth Circuit in *Fellowship of Christian Athletes v. San Jose Unified School District Board of Education*, 82 F.4th 664 (9th Cir. 2023) (en banc) ("*FCA*"), held that the Fellowship of Christian Athletes student club was entitled to a preliminary injunction after a school district harassed and belittled the club for its beliefs and stripped its student-group recognition.

Applying *Fulton v. City of Philadelphia*, 593 U.S. 522 (2021), the Ninth Circuit held that the school district's policies were not generally applicable. "Most notably, the District exercises its discretion to allow student groups to discriminate based on sex or ethnic identity. For example, the District recognizes the Senior Women Club and the South Asian Heritage Club, which facially discriminate on the basis of sex and ethnicity." *FCA*, 82 F.4th at 688.

Applying *Tandon v. Newsom*, 593 U.S. 61 (2021) (per curiam), the court also held there were "significant concerns with the District's lack of neutrality" because the district treated comparable secular activity better than religious activity. *FCA*,

– continued

82 F.4th at 688–90. "Under *Tandon*, the District's acceptance of comparable selective secular organizations renders its decision to revoke and refuse recognition to FCA subject to strict scrutiny." *Id.* at 689–90.

Finally, applying *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 584 U.S. 617 (2018), the Ninth Circuit held that "the District's hostility toward FCA was neither subtle nor covert and its decision to revoke FCA's ASB recognition [was] therefore subject to strict scrutiny." *FCA*, 82 F.4th at 690. In addition to various school officials' disparagement of the club's Christian beliefs, the court highlighted the school principal's statement—to the entire school in a newspaper article—that "FCA's views were of a discriminatory nature." *Id.* at 692 (cleaned up).

In sum, even in a year when the Supreme Court has not engaged on any free-exercise issue, lower courts are still stepping up to protect religious liberty. And every religious-liberty advocate should carefully read *Vlaming* and *FCA* before filing their next case.

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RESOURCES

LAW RESOURCES

Federal Statutes

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

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

Equal Access Act – 20 U.S.C. § 4071

Office of the U.S. Attorney General

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

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

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

U.S. Department of State

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

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

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

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

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

U.S. Department of Labor

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

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

U.S. Department of Health and Human Services

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

U.S. Department of Veterans Affairs

VA Directive 0022, Religious Symbols in VA Facilities.

Arizona Statutes

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

Other Resources

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

RESOURCES

CLE VIDEOS

2017 ANNUAL CONVENTION CLE

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

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

[watch video]

Historical foundations of religious liberty law

Presenter: Professor Owen Anderson (Arizona State University)

[watch video]

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

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

[watch video]

Panel Discussion: High profile religious liberty law issues

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

[watch video]

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