Study I-100 May 10, 2023

Memorandum 2023-26

Equal Rights Amendment: Potential Constitutional Conflicts for Sex Equality Protections

In 2022, the Legislature adopted a resolution assigning the Commission[1] to "undertake a comprehensive study of California law to identify any defects that prohibit compliance with the [Equal Rights Amendment.]"[2] More specifically:

> [The] Legislature authorizes and requests that the California Law Revision Commission study, report on, and prepare recommended legislation to revise California law (including common law, statutes of the state, and judicial decisions) to remedy defects related to (i) inclusion of discriminatory language on the basis of sex, and (ii) disparate impacts on the basis of sex upon enforcement thereof. In studying this matter, the commission shall request input from experts and interested parties, including, but not limited to, members of the academic community and research organizations. The commission's report shall also include a list of further substantive issues that the commission identifies in the course of its work as topics for future examination….[3]

The Commission commenced work on this topic in 2022, considering an introductory memorandum describing a proposed approach for the study.[4] The proposed approach has two stages: first, the Commission will examine the possibility of codifying a provision in state law to achieve the effect of the Equal Rights Amendment ("ERA") (such a provision is referred to hereafter as a "sex equality provision"); and second, the Commission would use the sex equality provision to evaluate existing California law, to identify and remedy defects (i.e., provisions that have discriminatory language or disparate impacts).

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1. Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission's website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission's staff, through the website or otherwise.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting. However, comments that are received less than five business days prior to a Commission meeting may be presented without staff analysis.

2. 2022 Cal. Stat. res. ch. 150.
3. *Id*.
4. Memorandum 2022-51.

This memorandum discusses federal constitutional provisions that could be in conflict with protections focused on sex equality.[5]

EFFECT OF THE EQUAL RIGHTS AMENDMENT

The ERA provides that "[e]quality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex."[6]

In order to codify a sex equality provision to achieve the effect of this language, the Commission has previously considered the scope of the ERA's sex equality guarantee.[7]

SCOPE OF MEMORANDUM

At a prior meeting, the staff was asked to consider whether there might be legal obstacles or limitations to consider when crafting a sex equality provision for California law. This memorandum addresses that issue.

The staff notes that the analysis in this memorandum focuses broadly on federal constitutional protections that could be in tension with sex equality protections. This memorandum does not seek to exhaustively describe the relevant constitutional doctrines, but rather to provide a general survey and identify broad areas of possible (or actual) tension between these constitutional protections and protections for equality and liberty.

Aside from constitutional obstacles, the Commission should also be aware that there may be federal statutory law that could preempt state action. Further, even in the absence of legal obstacles, there may be practical considerations that could preclude state action in certain instances. For instance, the federal government can condition the availability of funding on complying with certain rules.[8] Aside from the items noted in the memorandum, the staff is not aware of any specific federal

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5. For this study, the Commission concluded that the term "sex" should be understood broadly, consistent with federal discrimination law, to include issues related to pregnancy, sexual harassment, sexual orientation, and gender identity. See Minutes (Feb. 2023), p. 3; see also generally Memorandum 2023-10.

6. H.J. Res. 208 (1972), 86 Stat. 1523.

7. Memoranda 2023-10, 2023-17.

8. See generally V.L. Killion, Congressional Research Service, Funding Conditions: Constitutional Limits on Congress's Spending Power, R46827 (Jul. 1, 2021), *available at* https://crsreports.congress.gov/product/pdf/R/R46827; J.M. Lawhorn, Congressional Research Service, Federal Grants to State and Local Governments: A Historical Perspective, R40638 (Updated May 22, 2019), *available at* https://crsreports.congress.gov/product/pdf/R/R40638.

funding conditions that might affect the Commission's work on this issue, but simply notes this as a potential limitation.

For the most part, the case law discussed in this memorandum is from the U.S. Supreme Court. References to "the Court" refer to the U.S. Supreme Court, unless otherwise indicated.

FIRST AMENDMENT

The First Amendment of the U.S. Constitution provides:

> 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.

While this provision specifically restricts the federal government (i.e., Congress), the U.S. Supreme Court has found that these limitations also apply to restrict the actions of the state governments.[9]

The case law for certain First Amendment protections — those for free exercise, free speech, and free association — suggests that these constitutional protections may be in tension with generally applicable laws or specific efforts to protect sex equality.

This memorandum provides general background on these different constitutional doctrines and identifies key cases that relate to anti-discrimination laws or sex equality more broadly.

ESTABLISHMENT CLAUSE

As indicated above, the First Amendment prohibits the making of a law "respecting the establishment of religion."

It is important to note that the Establishment Clause and Free Exercise Clause can be somewhat in tension.[10] And, the case law demonstrates the challenges of reconciling both of these provisions.[11]

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9. See generally https://constitution.congress.gov/browse/essay/amdt14-S1-4-3/ALDE_00013746/.

10. See generally https://constitution.congress.gov/browse/essay/amdt1-5/ALDE_00000039/; but see Kennedy v. Bremerton School District (2022) 142 S.Ct. 2407, 2426 ("A natural reading of [the First Amendment] would seem to suggest the [Free Exercise and Establishment] Clauses have 'complementary' purposes, not warring ones where one Clause is always sure to prevail over the others." (citation omitted)).

11. See *supra* note 10.

While the staff does not believe that the Establishment Clause will be directly relevant to this study, the memorandum discusses the Establishment Clause briefly to provide more context about the Court's view of religious protections.

Test for Assessing Establishment Clause Claims

Until recently, the Establishment Clause had been understood to: (1) require that government acts have a legitimate secular purpose, (2) preclude government acts that either promote or inhibit religion, and (3) require that government acts avoid excessive entanglement between government and religion.[12]

In a 2022 case, the U.S. Supreme Court shifted the focus of the Establishment Clause jurisprudence, plainly stating that the Establishment Clause "must be interpreted by reference to historical practices and understandings."[13]

In discussing the new historically-focused test, the Court suggested that, due to the historical acceptance of things like laws requiring businesses to close on Sundays and providing church tax exemptions, these practices could not be understood to violate the Establishment Clause.[14] In assessing an Establishment Clause claim, the Court also considers the level of coercion that others might feel to participate in religious conduct, although the Court seems to take a narrow view as to what would constitute coercion.[15]

12. See generally Lemon v. Kurtzman (1971) 403 U.S. 602.

13. Kennedy v. Bremerton School District (2022) 142 S.Ct. 2407, 2428 (internal quotation marks omitted), *quoting* Town of Greece v. Galloway (2014) 572 U.S. 565; see also *Kennedy*, 142 S.Ct. at 2434 (Sotomayor, J., dissenting) ("The Court overrules *Lemon v. Kurtzman*, and calls into question decades of subsequent precedents that it deems 'offshoot[s]' of that decision. In the process, the Court rejects longstanding concerns surrounding government endorsement of religion and replaces the standard for reviewing such questions with a new 'history and tradition' test. In addition, while the Court reaffirms that the Establishment Clause prohibits the government from coercing participation in religious exercise, it applies a nearly toothless version of the coercion analysis, failing to acknowledge the unique pressures faced by students when participating in school-sponsored activities. This decision does a disservice to schools and the young citizens they serve, as well as to our Nation's longstanding commitment to the separation of church and state." (citations omitted)).

14. *Kennedy*, 142 S.Ct. at 2428.

15. *Id.* at 2428-32. The Court ends the discussion by noting that "[t]he prayers for which Mr. Kennedy was disciplined were not publicly broadcast or recited to a captive audience. Students were not required or expected to participate. And, in fact, none of Mr. Kennedy's students did participate in any of the three October 2015 prayers that resulted in Mr. Kennedy's discipline." *Id.* at 2432.

In a dissenting opinion, Justice Sotomayor notes "the direct record evidence [showing] that students felt coerced to participate in Kennedy's prayers," as well as the Court's non-acknowledgement of "the unique coercive power of a coach's actions on his adolescent players." *Id*. at 2452 (Sotomayor, J., dissenting).

Presumption of Mutual Respect for Beliefs

Seemingly at the heart of the Establishment Clause jurisprudence is the idea that religious conduct in governmental settings would necessarily include respect for those of different beliefs. For instance, in a case where the Court upheld ceremonial legislative prayer, the Court suggests, without any explanation, that such prayers would "always [include] due respect for those who adhere to other beliefs."[16]

More specifically, this idea of mutual respect for beliefs seems to suggest that the government need not worry about an association with religious conduct or speech because religious conduct or speech will not risk harm or disrespect to those of other religious faiths or those who are not religious.

Individual religious beliefs, even within the same religious belief system, can vary widely, as can the value that those religions place on respect for other belief systems and the importance of their religious values being reflected through or required by civil laws.

While this sentiment of mutual respect for other beliefs is a hopeful one, this mutual respect can be strained or impossible to reconcile when religious beliefs are set against not just different spiritual beliefs, but civil rights, equal participation in civil society, and protection of the laws.[17] To the extent that a religious belief involves the inferiority or incapability of a certain class of citizens on the basis of sex, it is not clear how such a belief could be reconciled with according due respect to others (let alone the beliefs of others).

Limitations on State Authority Regarding Religious Institutions

Consistent with the Establishment Clause's fundamental concept of ensuring separation between church and state, some states have made efforts to preserve a strict separation, particularly as it relates to the distribution of government funding.[18] In recent years, the Supreme Court has severely restricted these governmental efforts to avoid public subsidies of religious institutions.

Recent Supreme Court jurisprudence has concluded that government efforts to preclude the distribution of public funds to religious institutions run afoul of the

16. See City of Greece v. Galloway (2014) 572 U.S. 565, 591.
17. See *infra* note 19.
18. See generally V.C. Brannon, Congressional Research Service, Evaluating Federal Financial Assistance Under the Constitution's Religion Clauses, R46517 (Sept. 9, 2022), *available at* https://crsreports.congress.gov/product/pdf/R/R46517 (noting in Summary that "governments concerned about the separation of church and state have imposed restrictions to prevent government funds from aiding religious entities.").

Free Exercise Clause.[19] In particular, a few cases have concluded that the government is compelled to offer governmental funding to religious institutions in the same manner as it does for secular institutions,[20] effectively requiring that religious institutions be eligible to receive public funding. Further, the decisions do not address the many ways that religious institutions are different from secular institutions, including that religious institutions do not abide by the same rules and restrictions as secular institutions (e.g., employment discrimination protections) and may promote misogynist and discriminatory values.[21]

In general, the current Court seems receptive to the idea that religious institutions should be treated exactly as secular institutions when it comes to accessing government benefits and funds, but not subject to the same obligations as secular institutions due to Free Exercise concerns (as described in more detail below).

General Direction of Establishment Clause Jurisprudence

As the discussion above suggests (and the dissenting opinions in the cases related to government funding of religious institutions describe more thoroughly), the Court has been moving in the direction of not just permitting, but requiring, that religious actors have access to public resources and funds to promote their ideals, over the interest of the government and the citizens at large in ensuring that there is a strict separation between the government and religious institutions.

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19. See generally V.C. Brannon, Congressional Research Service, Carson v. Makin: Using Government Funds for Religious Activity, LSB 10785 (July 6, 2022), *available at* https://crsreports.congress.gov/product/pdf/LSB/LSB10785.

20. See, e.g., Carson v. Makin (2022) 142 S.Ct. 1987; Trinity Lutheran Church of Columbia v. Comer (2017) 582 U.S. 449.

See also *Carson*, 142 S.Ct. at 2006 (Breyer, J., dissenting) ("We have never previously held what the Court holds today, namely, that a State must (not may) use state funds to pay for religious education as part of a tuition program designed to ensure the provision of free statewide public school education."); *Trinity Lutheran Church*, 582 U.S. at 471-72 (Sotomayor, J., dissenting) ("The Court today profoundly changes th[e] relationship [between religious institutions and the civil government] by holding, for the first time, that the Constitution requires the government to provide public funds directly to a church.").

21. See, e.g., discussion of "Ministerial Exception" *infra*; see also A. Chung, *U.S. Supreme Court Backs Public Money for Religious Schools*, Reuters (Jun. 21, 2022), *available at* https://www.reuters.com/legal/government/us-supreme-court-backs-public-money-religious-schools-maine-case-2022-06-21/ (Schools at issue in *Carson* case "refuse to hire gay teachers or admit gay and transgender students. Bangor Christian Schools teaches that a 'husband is the leader of the household' and includes a class in which students learn to 'refute the teachings of the Islamic religion with the truth of God's Word.'").

As indicated above, the U.S. Constitution forbids the federal (and state) governments from making a law that prohibits the free exercise of religion.

In a 1940 case, *Cantwell v. Connecticut*, involving this first amendment protection, the U.S. Supreme Court described its character:

> [T]he Amendment embraces two concepts[] — freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society. 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 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.[22]

Those two aspects of religious free exercise, freedom to believe and freedom to act, are discussed separately below.

Freedom to Believe

Regarding the freedom to believe, the quote from the *Cantwell* opinion above notes that this freedom is "absolute." In a later case, the U.S. Supreme Court struck down a state statute requiring a religious test for public office, stating:

> [N]either a State nor the Federal Government can constitutionally force a person 'to profess a belief or disbelief in any religion.' Neither can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions

22. 310 U.S. 296, 303-04 (footnotes omitted). This case involved a state statute that prohibited the solicitation of money or valuables for a religious cause without a certificate from a designated official. This case is also important as it made clear that the free exercise protection applied to state, as well as federal action. See *id.* at 303 ("The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws."); see also https://constitution.congress.gov/browse/essay/amdt1-4-1/ALDE_00013221/.

> based on a belief in the existence of God as against those religions founded on different beliefs.[23]

In general, this protection prevents government from "compelling 'the acceptance of any creed[,] the practice of any form of worship[,]' … [or] requir[ing the declaration of] a specific religious belief."[24] This protection focuses on beliefs and "does not apply to laws that are 'directed primarily at status, acts, or conduct.'"[25] Given the scope of this protection, the staff does not anticipate that this protection will be at issue in the Commission's work on sex equality.

Freedom to Act

Regarding the second aspect of religious free exercise, the freedom to act, the legal doctrine is more complicated. The quoted language from *Cantwell,* above, indicates that the government is permitted to regulate conduct "for the protection of society." The contours of when and to what degree the government can impose a burden on the free exercise of religion under the U.S. Constitution have been explored somewhat in the case law.

The following discussion highlights some significant developments in the free exercise case law.

Law Requiring Business Closures on Sundays

In 1961, the Court considered a case, *Braunfeld v. Brown*, involving a Free Exercise challenge to a law that required businesses to close on Sundays.[26] The law was challenged by merchants who were members of the Orthodox Jewish faith; their faith required total abstention of work from Friday at sundown to Saturday at sundown.[27] This law, combined with their faith, would require these merchants to close their businesses for two days a week, which would be a significant economic hardship. In the case, the Court found that the law "imposes only an indirect burden on the exercise of religion" and upheld the law.[28] Further, the Court stated:

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23. Torcaso v. Watkins (1961) 367 U.S. 488, 495 (footnote omitted). The state requirement in question obligated an appointee for state office to "declare [a] belief in God" prior to receiving a commission to serve. *Id.* at 489.
24. https://constitution.congress.gov/browse/essay/amdt1-4-2/ALDE_00013222/ (referencing U.S. Supreme Court opinions: Braunfeld v. Brown (1961) 366 U.S. 599, 603 and Torcaso v. Watkins (1961) 367 U.S. 488, 495–96).
25. *Id.* (*quoting* plurality opinion in McDaniel v. Paty (1978) 435 U.S. 618, 627).
26. 366 U.S. 599.
27. 366 U.S. at 602.
28. 366 U.S. at 606.

> Of course, to hold unassailable all legislation regulating conduct which imposes solely an indirect burden on the observance of religion would be a gross oversimplification. If the purpose or effect of a law is to impede the observance of one or all religions, or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect. But if the State regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State's secular goals, the statute is valid despite its indirect burden on religious observance unless the State may accomplish its purpose by means which do not impose such a burden.[29]

The Court went on to consider whether the law must have an exemption from the law for those whose religious convictions require observation of a day of rest on a day other than Sunday.[30] The Court, after discussing several practical concerns with such an approach, concluded the Constitution did not require such an exception (i.e., the law was constitutionally sound without the exception).[31]

Denial of Unemployment Benefits Due to Religious Restrictions on Workdays

Starting in the 1960s, the U.S. Supreme Court began to accord Free Exercise Clause claims a higher level of scrutiny. One of the most significant cases of that era was the 1963 case of *Sherbert v. Verner*, where the court laid out a test for evaluating a free exercise claim.

Sherbert v. Verner involved the denial of unemployment benefits to a member of the Seventh-Day Adventist church who was fired because she would not work on Saturdays (the Sabbath day for her faith) and she later refused to accept employment that would require Saturday work.[32] She was then denied unemployment benefits and challenged the denial of those benefits as a violation of the Free Exercise Clause.[33]

In *Sherbert v. Verner*, the Court set out a multi-step inquiry to evaluate a free exercise claim.

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29. 366 U.S. at 607 (citation omitted).
30. 366 U.S. at 608.
31. 366 U.S. at 608-09.
32. (1963) 374 U.S. 389.
33. *Id.* at 400. To be eligible for benefits, the law requires that the claimant "must be 'able to work and … is available for work'; and, further, [provides] that a claimant is ineligible for benefits '(i)f … he has failed, without good cause … to accept available suitable work when offered him by the employment office or the employer ….'" *Id.* at 400-01. The benefits were denied on the ground that, due to the claimant's Saturday work restriction, she failed to accept suitable work without good cause and was, therefore, disqualified from receiving benefits. *Id.* at 401.

(1) First, the Court considered whether the state action "imposes any burden on the free exercise of [] religion."[34]

(2) Next, if the first test is satisfied, the Court then evaluates whether the infringement on the free exercise of religion is justified by a "compelling state interest."[35]

(3) Finally, the Court would consider whether the state action is properly tailored to achieve the compelling interest without unduly burdening free exercise rights (narrow tailoring).[36]

Although this strict scrutiny test appears to be very stringent, legal scholarship suggests that, in practice, few generally-applicable laws were deemed unconstitutional under the *Sherbert* test, even though the strict scrutiny test should be difficult to satisfy.[37]

Denial of Unemployment Benefits Due to Participating in Religious Practice Prohibited by Law

More recently, in a 1990 case, *Employment Division, Department of Human Resources of Oregon v. Smith*, the Court limited the application of the *Sherbert* test to situations, like unemployment compensation, where an individualized determination must be made.[38] The Court also described a different test for assessing whether generally-applicable laws ran afoul of the Free Exercise Clause.

The *Smith* case involved two individuals who were fired because they used peyote, as part of their religious practice; the individuals were ineligible for

34. 374 U.S. at 403.

35. *Id.* at 406.

The Court found no such compelling interest in the present case. *Id.* at 407-09. In spite of the issue not being raised in the lower court, the Court discussed the state's concern about the "possibility that the filing of fraudulent claims by unscrupulous claimants feigning religious objections" could impair the unemployment compensation fund. Overall, the Court found this concern unconvincing and insufficient "to warrant a substantial infringement of religious liberties." *Id.* at 407.

36. 374 U.S. at 407-09.

37. See A. Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 Vanderbilt L. Rev. 793, 858-59 (2006) ("Strict scrutiny has had a troubled history in the area of religious liberty. The Court first held that strict scrutiny applied in constitutional free exercise cases in 1963's *Sherbert v. Verner*, where the Court declared unconstitutional the denial of unemployment benefits to a woman fired for her unwillingness to work on the Saturday Sabbath. In the 1970s and 1980s, however, the courts granted very few religion-based exemptions to generally applicable laws despite applying strict scrutiny in many decisions. The Supreme Court, for instance, upheld against free exercise challenges the uniform application of minimum wage laws, social security laws, and sales taxes —- providing lower courts ample room to refuse exemptions to other laws under strict scrutiny. As James Ryan found, under this regime the federal appellate courts turned away a remarkably high percentage of free exercise challenges between 1980 and 1990: 87 percent. In these free exercise decisions, strict scrutiny was, in the memorable words of Christopher Eisgruber and Larry Sager, 'strict in theory but feeble in fact.'" (footnotes omitted)); see *infra* note 43.

38. 494 U.S. 872.

unemployment compensation because the state concluded that they had been discharged for misconduct.[39] In this decision, the Court concluded that a valid, neutral law of general applicability (like the state's prohibition against the use of peyote) did not violate the Free Exercise Clause simply because the law prohibited conduct prescribed by religion.[40]

More generally, the Court's opinion described potential problems with requiring that generally-applicable laws satisfy a strict scrutiny test when those the application of those laws is objected to on religious grounds:

> If the "compelling interest" test is to be applied at all, then, it must be applied across the board, to all actions thought to be religiously commanded. Moreover, if "compelling interest" really means what it says (and watering it down here would subvert its rigor in the other fields where it is applied), many laws will not meet the test. Any society adopting such a system would be courting anarchy, but that danger increases in direct proportion to the society's diversity of religious beliefs, and its determination to coerce or suppress none of them. Precisely because "we are a cosmopolitan nation made up of people of almost every conceivable religious preference," and precisely because we value and protect that religious divergence, we cannot afford the luxury of deeming presumptively invalid, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order. The rule respondents favor would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind—ranging from compulsory military service, to the payment of taxes, to health and safety regulation such as manslaughter and child neglect laws, compulsory vaccination laws, drug laws, and traffic laws; to social welfare legislation such as minimum wage laws, child labor laws, animal cruelty laws, environmental protection laws, and laws providing for equality of opportunity for the races. The First Amendment's protection of religious liberty does not require this.[41]

The decision concluded that the Constitution did not require a religious exemption to a generally-applicable law (and the failure to provide such an exemption need not be justified by a compelling state interest).[42]

The *Smith* decision was controversial and led Congress to enact the federal Religious Freedom Restoration Act (discussed in more detail below). However, as

39. *Id.* at 874.
40. *Id*. at 879-882. However, the decision suggests that a generally-applicable rule could violate the Free Exercise Clause if it "represents an attempt to regulate religious beliefs, the communication of religious beliefs, or the raising of one's children in those beliefs[.]" *Id.* at 882.
41. *Id*. at 888-89 (citations omitted).
42. *Id*. at 882-890.

indicated above, the legal scholarship suggests that *Smith* may not have been as dramatic a change in the doctrine (and outcomes in the cases) as the comparative stringency in the language of the *Sherbert* and *Smith* tests suggests.[43]

Federal Religious Freedom Restoration Act

In 1993, the federal government enacted the Religious Freedom Restoration Act ("RFRA").[44] According to the bill summary authored by the Congressional Research Service, this Act:

> Prohibits any agency, department, or official of the United States or any State (the government) from substantially burdening a person's exercise of religion even if the burden results from a rule of general applicability, except that the government may burden a person's exercise of religion only if it demonstrates that application of the burden to the person: (1) furthers a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.[45]

RFRA was an effort to broadly apply the *Sherbert* compelling interest test to free exercise claims, as Congress concluded that the *Sherbert* is "more workable for 'striking sensible balances between religious liberty and competing prior governmental interests.'"[46]

However, the U.S. Supreme Court concluded in *City of Boerne v. Flores* that Congress exceeded its power in seeking to apply RFRA to state and local governments (because RFRA is not simply enforcing a constitutional protection, but seeking to change its scope).[47] The decision also indicates that RFRA's least

43. See *supra* note 37; see also, e.g., Z. Rothschild, *Free Exercise Partisanship*, 107 Cornell L. Rev. 1067, 1089-90 ("In most other cases, both before and after *Sherbert*, the Court upheld laws and governmental actions challenged under the Free Exercise Clause, often without bothering to apply strict scrutiny." (footnote omitted)); C.C. Wolanek & H. Liu, *Applying Strict Scrutiny: An Empirical Analysis of Free Exercise Cases*, 78 Mont. L. Rev. 275 (2017) ("To be sure, religious claimants did not always win during the so-called '*Sherbert* era.' Instead, it is generally accepted that courts actually applied something akin to intermediate scrutiny. The Court also exempted two significant sectors (prisons and the military) from strict scrutiny altogether. Still, from a doctrinal standpoint, strict scrutiny was required." (footnotes omitted)).

44. See generally W.K. Novak, Congressional Research Service, The Religious Freedom Restoration Act: A Primer, IF11490 (Apr. 3, 2020), *available at* https://crsreports.congress.gov/product/pdf/IF/IF11490.

45. See generally https://www.congress.gov/bill/103rd-congress/house-bill/1308.

46. See Novak, *supra* note 44, at 1.

47. City of Boerne v. Flores (1997) 521 U.S. 507, 519 ("Congress' power under § 5 [of the Fourteenth Amendment], however, extends only to 'enforc[ing]' the provisions of the Fourteenth Amendment. The Court has described this power as 'remedial.' The design of the Amendment and the text of § 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States. Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not

restrictive means requirement goes beyond what has been required in Free Exercise jurisprudence. For this reason, the test set forth in RFRA (regarding laws of general applicability that substantially burden religion) would not apply to state laws.

A number of states enacted state versions of RFRA, but California is not one of those states.[48]

Although the federal RFRA does not apply to state actions, the Court's interpretation of RFRA may nonetheless provide helpful context for understanding religious protections (particularly in light of dissenting opinions in the Supreme Court case, *Fulton v. City of Philadelphia*, questioning the holding in *Smith*[49]).

Since the enactment of the federal RFRA, the Court has considered several cases clarifying the scope of the RFRA's protections.[50] In *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, the Court emphasized that RFRA's test is satisfied only if the government demonstrates a compelling interest in the specific application of the law to the particular claimant whose religious rights are burdened rather than a compelling interest in the uniform application of the law as a whole.[51]

More recently, a number of RFRA claims were brought by religiously-affiliated employers or health care institutions related to the federal Patient Protection and Affordable Care Act ("ACA").[52] Such claims involved the obligation to provide

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enforce a constitutional right by changing what the right is. It has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation." (citation omitted)).

48. See https://en.wikipedia.org/wiki/State_Religious_Freedom_Restoration_Acts; see also generally D. Pone & D. Liebert, Counsel for California Assembly Judiciary Committee, *The Impact of* Boerne v. Flores*: Must California Act to Protect Religious Freedom?* (Oct. 8, 1997), *available at* https://ajud.assembly.ca.gov/sites/ajud.assembly.ca.gov/files/reports/0197%20rfra.pdf.

Between the enactment of RFRA and the *City of Boerne* case, the California Supreme Court decided a case involving housing discrimination against an unmarried couple (based on marital status) under California's Fair Employment and Housing Act and claims that the discrimination prohibition violated the landlord's rights under Free Exercise Clauses of the federal and state constitutions and the federal RFRA. See Smith v. Fair Emp. And Housing Comm'n (1996) 12 Cal.4th 1143.

49. See discussion of "Assessing Whether Laws are Generally Applicable for Free Exercise Analysis" *infra*.

50. See generally Novak, *supra* note 44.

51. (2006) 546 U.S. 418, 430-31 ("RFRA, and the strict scrutiny test it adopted, contemplate an inquiry more focused than the Government's categorical approach. RFRA requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person' — the particular claimant whose sincere exercise of religion is being substantially burdened." (citation omitted)).

52. See generally A.R. Gluck et al., *The Affordable Care Act's Litigation Decade*, 108 Georgetown L. Rev. 1471, 1500-09 (2020), *available at* https://www.law.georgetown.edu/georgetown-law-journal/wp-content/uploads/sites/26/2020/06/Gluck-Reagan-Turret_The-Affordable-Care-

health insurance coverage or health care services for contraception, abortion, and gender affirming care, which the entities allege is in conflict with their religious beliefs.[53] These cases include *Burwell v. Hobby Lobby*, where the Court concluded that for-profit closely held corporations had protected religious rights under RFRA and that those rights were substantially burdened by a requirement to provide health insurance coverage for contraceptives.[54] In the case, the Court concluded that subjecting these employers to the requirement was not the "least restrictive means" to serve the government's interest of ensuring contraceptive coverage. Specifically:

> [The federal Department of Health and Human Services ("HHS")] has already devised and implemented a system that seeks to respect the religious liberty of religious nonprofit corporations while ensuring that the employees of these entities have precisely the same access to all FDA-approved contraceptives as employees of companies whose owners have no religious objections to providing such coverage. The employees of these religious nonprofit corporations still have access to insurance coverage without cost sharing for all FDA-approved contraceptives; and according to HHS, this system imposes no net economic burden on the insurance companies that are required to provide or secure the coverage.
>
> Although HHS has made this system available to religious nonprofits that have religious objections to the contraceptive mandate, HHS has provided no reason why the same system cannot be made available when the owners of for-profit corporations have similar religious objections. We therefore conclude that this system constitutes an alternative that achieves all of the Government's aims while providing greater respect for religious liberty. And under RFRA, that conclusion means that enforcement of the HHS contraceptive mandate against the objecting parties in these cases is unlawful.[55]

In a more recent case, the Supreme Court upheld the enactment of "sweeping exemptions to the ACA's contraceptive mandate without discussing third-party harms."[56] In a dissenting opinion, Justice Ginsburg described the effect of these exemptions:

Act's-Litigation-Decade.pdf; A. Rodriguez, *Culture War Politics & the Rise of Religious Exemptions Against Reproductive Health Access: Pitting Patients Against Religious Freedom is a Losing Game*, 25 J. Gender Race & Justice 1 (2022).

53. See sources cited in *supra* note 52.
54. (2014) 573 U.S. 682.
55. 573 U.S. at 692.
56. Case Note for *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 134 Harv. L. Rev. 560 (Nov. 2020); see also Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania (2020) 591 U.S. __, 140 S.Ct. 2367.

> Under new rules …, any "non-governmental employer" — even a publicly traded for-profit company — can avail itself of the religious exemption previously reserved for houses of worship. More than 2.9 million Americans — including approximately 580,000 women of childbearing age — receive insurance through organizations newly eligible for this blanket exemption. Of cardinal significance, the exemption contains no alternative mechanism to ensure affected women's continued access to contraceptive coverage.[57]

A case note discussing this decision indicates that the failure to consider third-party harms is a dramatic turn in favor of religious objectors:

> For decades, the Court's approach to religious accommodations has been to balance the interests on both sides, rather than "defer entirely to [objectors'] religious beliefs."…
>
> The need to balance religious accommodations against harms to third parties also played a key role in each of the Court's previous cases dealing with the contraceptive mandate. …
>
> In *Little Sisters* [the present case], however, the Court abandoned the balance it struck in *Hobby Lobby* and abstained from the third-party harm analysis that has long shaped its religious accommodation jurisprudence. … By the government's own estimation, the exemptions will cause up to 126,400 people to lose insurance coverage for crucial medications, but the real number could be much higher. Without insurance coverage, the cost of contraceptives can put an enormous, sometimes prohibitive, burden on women and people of all gender identities who utilize contraceptives. The new exemptions are likely to have a particularly devastating effect on Black women and people of color and exacerbate existing health and economic disparities.
>
> Yet Justice Thomas [author of the Court's opinion in the case] treated this harm as an irrelevant — and even inappropriate — consideration for the Court, dismissing it as a mere "policy concern," better directed at Congress. … This about-face is striking, not only because of *Hobby Lobby*, but also because of what it signals in a larger sense — that the Court is moving away from its longstanding commitment to balancing religious accommodation against resulting harm to third parties.[58]

The staff has not fully evaluated the status and outcomes of the different cases involving the RFRA and the ACA,[59] but notes that there may be additional developments on this topic.

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57. *Little Sisters of the Poor*, 140 S.Ct. at 2403 (Ginsburg, J., dissenting) (citations omitted).

58. Case Note for *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 134 Harv. L. Rev. 560, 565-68 (Nov. 2020) (footnotes omitted).

59. See, e.g., Religious Sisters of Mercy v. Becerra (8th Cir. 2023) 2023 WL 2586217 (denial of petitions for rehearing on March 21); Franciscan Alliance v. Becerra (5th Cir. 2022) 47 F.4th 368.

Federal Religious Land Use and Institutionalized Persons Act

In response to the *City of Boerne* decision (limiting the application of RFRA to the states), Congress enacted the federal Religious Land Use and Institutionalized Persons Act ("RLUIPA").[60] This law applies the strict scrutiny test to land use regulations that impose a substantial burden on religious exercise and to substantial burdens on the religious exercise of institutionalized persons.[61]

The U.S. Department of Justice provides examples on its website of what types of land use actions are prohibited by RLUIPA. That site indicates "RLUIPA prohibits zoning and landmarking laws that:

(1) treat churches or other religious assemblies or institutions on less than equal terms with nonreligious assemblies or institutions;
(2) discriminate against any assemblies or institutions on the basis of religion or religious denomination;
(3) totally exclude religious assemblies from a jurisdiction; or
(4) unreasonably limit religious assemblies, institutions, or structures within a jurisdiction."[62]

The U.S. Department of Justice also provides information about the types of protections sought by institutionalized persons under RLUIPA. Those protections include providing meals and permitting hair length consistent with religious practices, as well as providing access to religious texts.[63]

While the staff does not see any immediate conflicts between the Commission's study and the provisions of the federal RLUIPA, the staff does want to note that, if the Commission's work does address issues related to land use or

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See also generally Hon. V.S. Kolakowski, *The Role of Religious Objections to Transgender and Nonbinary Inclusion and Equality and/or Gender Identity Protection*, 47 ABA Civil Rights and Social Justice Group Human Rights Magazine No. 3/4 (July 5, 2022), *available at* https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/intersection-of-lgbtq-rights-and-religious-freedom/the-role-of-religious-objections-to-transgender-and-nonbinary-inclusion-and-equality/.

60. See Holt v. Hobbs (2015) 574 U.S. 352 ("Congress responded to *City of Boerne* by enacting RLUIPA, which applies to the States and their subdivisions and invokes congressional authority under the Spending and Commerce Clauses. RLUIPA concerns two areas of government activity: Section 2 governs land-use regulation; and Section 3 — the provision at issue in this case — governs religious exercise by institutionalized persons." (citations omitted)).

See also generally U.S. Dep't of Justice Civil Rights Div., Report on the Twentieth Anniversary of the Religious Land Use and Institutionalized Persons Act (Sept. 22, 2020), *available at* https://www.justice.gov/crt/case-document/file/1319186/download.

61. 42 U.S.C. §§ 2000cc, 2000cc-1; see also 42 U.S.C. § 1997 (defining "institution" as a facility that is owned, operated or managed on behalf of a state or local government that falls into a specified list of categories, including facilities for the mentally ill, correctional facilities, juvenile detention facilities, and skilled nursing or long-term care facilities).

62. https://www.justice.gov/crt/religious-land-use-and-institutionalized-persons-act.

63. https://www.justice.gov/crt/religious-land-use-and-institutionalized-persons-act-0.

institutionalized persons, the protections offered by RLUIPA should be taken into account.

Assessing Whether Laws are Generally Applicable for Free Exercise Analysis

In a 2021 free exercise case, the Court provided some clarification on how to assess whether a provision was generally applicable (and thereby subject to the *Smith* test).

The case, *Fulton v. City of Philadelphia*, involved the City's foster care program, which relied on contracting with private agencies to certify prospective foster families.[64] The City found that one of those private agencies, Catholic Social Services ("CSS") refused to consider prospective foster parents in same-sex marriages.[65] In the events leading up to the litigation,

> [Philadelphia's] Department [of Human Services, which administers the foster care program,] informed CSS that it would no longer refer children to the agency. The City later explained that the refusal of CSS to certify same-sex couples violated a non-discrimination provision in its contract with the City as well as the non-discrimination requirements of the citywide Fair Practices Ordinance. The City stated that it would not enter a full foster care contract with CSS in the future unless the agency agreed to certify same-sex couples.[66]

Following this, CSS and a few foster families certified by CSS sued the City, claiming a violation of their free exercise and free speech rights.[67] The Court discussed whether the non-discrimination requirements at issue were generally applicable. The decision described two situations in which a law would lack general applicability, where the law either: (1) "'invite[s]' the government to consider the particular reasons for a person's conduct by providing '"a mechanism for individualized exemptions"'"[68] or (2) "if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way."[69]

In *Fulton*, the Court concluded that the contractual non-discrimination policy at issue was not generally applicable, as it provided for individual discretionary

64. 141 S.Ct. 1868.
65. *Id.* at 1874.
66. *Id.* at 1875-76.
67. *Id.* at 1876.
68. *Id.* at 1877 (citation omitted).
69. *Id.* (citation omitted).

exceptions.[70] The Court went on to assess whether the City had a compelling interest in denying an exception to CSS and concluded that the City did not.[71]

Two concurring opinions (comprising a majority of the Justices) raised broader questions about whether the holding in *Smith* should be revisited, citing "compelling" arguments against the holding in *Smith*[72] and "startling consequences" that result from applying the holding in *Smith*.[73]

Free Exercise Doctrine Today

As indicated above, the *Smith* case currently sets forth the test to assess whether generally-applicable laws violate the Free Exercise Clause. In short, generally-applicable laws can burden religious conduct or practices without violating the Free Exercise Clause, so long as those laws are valid and neutral.[74]

The *Smith* test was controversial at the time it was decided (leading to the enactment of the RFRA) and its continued application has recently been questioned by a majority of the Justices on the Court.

Where the law provides for individualized exceptions, the Free Exercise doctrine requires a more stringent level of review with respect to someone who seeks an exception on religious grounds.

In the areas of land use and institutionalized persons, the federal RLUIPA requires the more stringent strict scrutiny test be satisfied where regulations or rules burden religion.

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70. *Id.* at 1878. The Court also concluded that foster family certification was not a public accommodation and therefore not subject to the City's public accommodation ordinance, which prohibits discrimination; based on that finding, the Court declined to consider whether the public accommodation ordinance was generally applicable. *Id*. at 1879-81.

71. 141 S.Ct. at 1881-82.

72. 141 S.Ct. at 1882 (Barrett, J., concurring). The first paragraph of the concurring opinion, which refers to compelling arguments against *Smith*, was joined by Justice Kavanaugh. Justice Breyer joined the concurring opinion, with the exception of the first paragraph.

73. 141 S.Ct. at 1883 (Alito, J., concurring). The concurring opinion was joined by Justices Thomas and Gorsuch.

74. 494 U.S. at 879 ("Subsequent decisions have consistently held that the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" (citation omitted)), 881 ("The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press, or the right of parents … to direct the education of their children[.]" (citations and footnote omitted)).

Case Law Involving Anti-Discrimination Laws and Religious Protections

The staff identified a few lines of cases that involve both anti-discrimination laws and religious protections. These cases help to highlight considerations that the Court may take into account when anti-discrimination laws and religious protections might be in tension.

Free Exercise Protection Does Not Permit Race Discrimination that is Purportedly Religiously Motivated

In the 1960s, the Supreme Court considered race discrimination cases that included constitutional claims seeking to invalidate or limit the federal Civil Rights Act.[75] In one of those cases, *Newman v. Piggie Park Enterprises, Inc.*, the business owner (Bessinger) claimed that the Civil Rights Act's prohibition on race discrimination interfered with his Free Exercise rights.[76]

> In his defense, Bessinger tried to invoke a higher law. "Bessinger believes as a matter of faith that racial intermixing or any contribution thereto contravenes the will of God," his lawyers wrote in their answer to Mungin's complaint, which was joined by two other black Americans who had been turned away. "As applied to this Defendant, the instant action and the Act under which it is brought constitute State interference with the free practice of his religion, which interference violates The First Amendment of the United States Constitution."[77]

The merits of the case were resolved in the lower courts. The Supreme Court's consideration of the case focused on the propriety of the award of attorney's fees against the business owner (who had been enjoined from discriminating against patrons on the basis of race). The Court's *per curiam* opinion noted attorney's fee awards should normally be available for these type of injunction cases, except when special circumstances render such awards unjust.[78] The Court concluded no such circumstances were at issue in the present case and, in a footnote, stated:

> Indeed, this is not even a borderline case, for the respondents interposed defenses so patently frivolous that a denial of counsel fees to the petitioners would be manifestly inequitable. Thus, for example, the "fact that the defendants had discriminated both at

75. See Katzenbach v. McClung (1964) 379 U.S. 294, 305 (concluding that Act was within Congress' Commerce Clause authority); Newman v. Piggie Park Enterprises, Inc. (1968) 390 U.S. 400.

76. (1968) 390 U.S. 400.

77. C. Farias, *We've Already Litigated This*, Slate (Dec. 4, 2017), *available at* https://slate.com/news-and-politics/2017/12/the-key-principle-in-the-masterpiece-cakeshop-case-was-litigated-in-1968.html.

78. 390 U.S. at 402.

> [the] drive-ins and at [the sandwich shop] was … denied … [although] the defendants could not and did not undertake at the trial to support their denials. Includable in the same category are defendants' contention, twice pleaded after the decision in *Katzenbach v. McClung*, 379 U.S. 294, . . . that the Act was unconstitutional on the very grounds foreclosed by McClung, and defendants' contention that the Act was invalid because it 'contravenes the will of God' and constitutes an interference with the 'free exercise of the Defendant's religion.'"[79]

In 1982, the Supreme Court considered the Internal Revenue Service's decision to revoke the tax-exempt statuses of Bob Jones University and Goldboro Christian Schools due to racially discriminatory policies.[80] In particular, Bob Jones believes "that the Bible forbids interracial dating and marriage," while Goldboro would only admit Caucasian students (but occasionally accepted students with one Caucasian parent).[81] Both schools claimed these discriminatory policies were grounded in their reading of the Bible and, therefore, the revocation of their tax-exempt statuses violated the Free Exercise clause.[82] The Supreme Court discussed the tax law's charitable exemption provisions and concluded that, in order to qualify for those provisions that "an institution must fall within a category specified in [Section 501(c)(3)] and must demonstrably serve and be in harmony with the public interest."[83] And, the Supreme Court then stated that "there can no longer be any doubt that racial discrimination in education violates deeply and widely accepted views of elementary justice."[84] The Court then evaluated the Free Exercise claim, concluding:

> The governmental interest at stake here is compelling. [T]he Government has a fundamental, overriding interest in eradicating racial discrimination in education — discrimination that prevailed, with official approval, for the first 165 years of this Nation's constitutional history. That governmental interest substantially outweighs whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs. The interests asserted by petitioners cannot be accommodated with that compelling governmental interest; and no "less restrictive means" are available to achieve the governmental interest. [85]

79. 390 U.S. at 402 n. 5 (citation omitted).
80. Bob Jones Univ. v. United States (1983) 461 U.S. 574.
81. *Id*. at 580-81, 583.
82. *Id*.
83. *Id*. at 592 (footnote omitted).
84. *Id*. at 592.
85. *Id*. at 604 (footnotes and citations omitted).

Ministerial Exception

The Supreme Court has recognized that the Free Exercise Clause limits the government's ability to intercede in decisions regarding employment of certain personnel at religious institutions.[86] This legal doctrine is designated as the "ministerial exception."

The ministerial exception does not simply apply to those who have the title of minister, but requires looking specifically at the circumstances of an individual's employment.[87] Certain justices have (in concurring opinions) suggested that the term minister should be construed broadly or that the religious organization itself should be able to decide who its ministers are.[88]

The doctrine effectively insulates "employment disputes involving those holding certain important positions with churches and other religious institutions" from regulation by the government and scrutiny by the courts. [89] In short, these religiously-affiliated employers are not required to abide by employment discrimination laws with respect to employees that are considered to be "ministers."

The Court has considered the application of this doctrine in two recent cases involving teachers at religious schools. Those cases are described briefly below.

In 2012, the Court considered the case of Cheryl Perich, a former teacher at a Lutheran school who claimed to have been fired in violation of the federal Americans with Disabilities Act.[90] In the view of her employer, Perich was a "called" teacher (as opposed to a "lay" or "contract" teacher). "'Called' teachers are regarded as having been called to their vocation by God through a congregation."[91] After teaching at the school for roughly five years, Perich became

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The Court also considered and dismissed, in a footnote, a claim that the tax-exempt status rules violate the Establishment Clause by "preferring religions whose tenets do not require racial discrimination over those which believe racial intermixing is forbidden. It is well settled that neither a State nor the Federal Government may pass laws which 'prefer one religion over another,' but '[i]t is equally true' that a regulation does not violate the Establishment Clause merely because it 'happens to coincide or harmonize with the tenets of some or all religions.'" *Id.* at fn. 30 (citations omitted).

86. See generally https://constitution.congress.gov/browse/essay/amdt1-2-3-4/ALDE_00013117/.

87. See Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission (2012) 565 U.S. 171, 190-95.

88. See Our Lady of Guadalupe School v. Morrissey-Berru (2020) 140 S.Ct. 2049, 2062-63 (summarizing majority and concurring opinions in *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*).

89. *Id.* at 2060.

90. Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission (2012) 565 U.S. 171.

91. *Id.* at 177.

ill and was later diagnosed with narcolepsy.[92] She was treated and sought to return to the classroom after getting medical clearance, however the school and the congregation refused to allow her to return.[93] Instead, the congregation offered a "peaceful release" where the congregation would continue paying her health insurance premiums in exchange for her resignation. Perich refused to resign and was terminated.[94]

After deciding Perich was a minister for the purposes of the ministerial exception, the Court described the broad sweep of the ministerial exception:

> The purpose of the exception is not to safeguard a church's decision to fire a minister only when it is made for a religious reason. The exception instead ensures that the authority to select and control who will minister to the faithful — a matter "strictly ecclesiastical" — is the church's alone.[95]

In a more recent case, the Supreme Court has expanded the scope of who might be classified as a minister for the purposes of this doctrine. In *Our Lady of Guadalupe School v. Morrissey-Berru*, the Court considered two consolidated matters involving the termination of teachers from private Catholic schools.[96] The decision describes the need for the ministerial exception:

> But it is instructive to consider why a church's independence on matters "of faith and doctrine" requires the authority to select, supervise, and if necessary, remove a minister without interference by secular authorities. Without that power, a wayward minister's preaching, teaching, and counseling could contradict the church's tenets and lead the congregation away from the faith. The ministerial exception was recognized to preserve a church's independent authority in such matters.[97]

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92. *Id.* at 178.

93. *Id.* at 178. (Upon being notified that Perich would be able to return the following month (Feb.), "[school principal Stacey] Hoeft responded that the school had already contracted with a lay teacher to fill Perich's position for the remainder of the school year. Hoeft also expressed concern that Perich was not yet ready to return to the classroom. On January 30, Hosanna–Tabor held a meeting of its congregation at which school administrators stated that Perich was unlikely to be physically capable of returning to work that school year or the next.").

94. *Id.* at 179 ("As grounds for termination, the letter cited Perich's 'insubordination and disruptive behavior' on February 22 [when she came to the school after being medically cleared to work and refused to leave until she received written documentation that she had reported to work], as well as the damage she had done to her 'working relationship' with the school by 'threatening to take legal action.'").

95. *Id.* at 194-95 (citation omitted).

96. Our Lady of Guadalupe School v. Morrissey-Berru (2020) 140 S.Ct. 2049.

After termination, teacher Morrissey-Berru filed suit against her school alleging age discrimination. *Id.* at 2058. Teacher Biel "alleged she was discharged because she had requested a leave of absence to obtain treatment for breast cancer." *Id.* at 2059.

97. 140 S.Ct. at 2060-61 (footnote omitted).

The Court concluded that the ministerial exception applied to the teachers at issue in the case (who were both described as lay teachers),[98] discussing their roles in the schools:

> As elementary school teachers responsible for providing instruction in all subjects, including religion, they were the members of the school staff who were entrusted most directly with the responsibility of educating their students in the faith. And not only were they obligated to provide instruction about the Catholic faith, but they were also expected to guide their students, by word and deed, toward the goal of living their lives in accordance with the faith. They prayed with their students, attended Mass with the students, and prepared the children for their participation in other religious activities. Their positions did not have all the attributes of Perich's. Their titles did not include the term "minister," and they had less formal religious training, but their core responsibilities as teachers of religion were essentially the same. And both their schools expressly saw them as playing a vital part in carrying out the mission of the church, and the schools' definition and explanation of their roles is important. In a country with the religious diversity of the United States, judges cannot be expected to have a complete understanding and appreciation of the role played by every person who performs a particular role in every religious tradition. A religious institution's explanation of the role of such employees in the life of the religion in question is important.

Further, the Court indicated that the ministerial exception applies regardless of whether the teacher at issue is a practicing member of the faith at issue (suggesting that it would be impossible to assess whether someone meets that standard).[99]

In short, this doctrine appears to insulate certain employment decisions (i.e., those related to people with a responsibility to teach or convey the religious faith) made by religious institutions from governmental scrutiny or standards.

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98. See 140 S.Ct. at 2071 (Thomas, J., concurring) ("Here, the record confirms the sincerity of petitioners' claims that, as lay teachers, Morrissey-Berru and Biel held ministerial roles in these parish schools.").

99. *Id.* at 2068-69

"Respondents argue that Morrissey-Berru cannot fall within the *Hosanna-Tabor* exception because she said in connection with her lawsuit that she was not 'a practicing Catholic,' but acceptance of that argument would require courts to delve into the sensitive question of what it means to be a 'practicing' member of a faith, and religious employers would be put in an impossible position. Morrissey-Berru's employment agreements required her to attest to 'good standing' with the church. Beyond insisting on such an attestation, it is not clear how religious groups could monitor whether an employee is abiding by all religious obligations when away from the job. Was [Our Lady of Guadalupe School] supposed to interrogate Morrissey-Berru to confirm that she attended Mass every Sunday?" *Id.* at 2069 (citation omitted).

Accommodation of Sincerely Held Religious Beliefs - Employment

Earlier in this study, Memorandum 2023-10 discussed Title VII of the federal Civil Rights Act ("Title VII") governing employment discrimination. That memorandum focused on Title VII's prohibition on discrimination on the basis of sex. Title VII also prohibits employment discrimination on the basis of religion.

A 9th Circuit opinion describes how courts assess a religious discrimination claim involving a failure to accommodate religious practices:

> To establish religious discrimination on the basis of a failure-to-accommodate theory, [the employee-claimant] must first set forth a prima facie case that (1) [the employee] had a bona fide religious belief, the practice of which conflicts with an employment duty; (2) [the employee] informed [the] employer of the belief and conflict; and (3) the employer discharged, threatened, or otherwise subjected [the employee] to an adverse employment action because of [the employee's] inability to fulfill the job requirement. If [the employee] makes out a prima facie failure-to-accommodate case, the burden then shifts to [the employer] to show that it "initiated good faith efforts to accommodate reasonably the employee's religious practices or that it could not reasonably accommodate the employee without undue hardship."[100]

Although the staff did not find an instance of the Supreme Court considering a religious accommodation claim where an employee sought accommodation for religious conduct directed towards their coworkers and colleagues, appellate courts have considered litigation involving employees who claim religious discrimination when they are disciplined or fired for posting signs with passages from the Bible with the intent to "condemn[] 'gay behavior'"[101] or writing letters to coworkers accusing them of immoral conduct (e.g., adultery) and suggesting that they need to seek forgiveness from God.[102] In both cases, the appellate courts concluded that the law does not require employers to accommodate these employees' religious practices.[103]

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100. Peterson v. Hewlett-Packard Co (9th Cir. 2004) 358 F.3d 599, 606 (citations omitted).
101. *Peterson*, 358 F.3d at 602.
102. Chalmers v. Tulon Co. of Richmond (4th Cir. 1996) 101 F.3d 1012, 1015-17.
103. *Peterson*, 358 F.3d at 608 ("Because only two possible accommodations were acceptable to Peterson and implementing either would have imposed undue hardship upon Hewlett–Packard, we conclude that the company carried its burden of showing that no reasonable accommodation was possible, and we therefore reject Peterson's failure-to-accommodate claim."); *Chalmers*, 101 F.3d at 1021 ("In a case like the one at hand, however, where an employee contends that she has a religious need to impose personally and directly on fellow employees, invading their privacy and criticizing their personal lives, the employer is placed between a rock and a hard place. If Tulon had the power to authorize Chalmers to write such letters, and if Tulon had granted Chalmers' request to write the letters, the company would subject itself to possible suits from [the letter

The staff notes that there are a variety of disputes involving employees (in particular, teachers) who are challenging their employer's preferred name and pronoun policies.[104] The staff has not reviewed these in detail, but notes that, at least some of those cases, the purported reason the employee offers for refusing to abide by the policy is the employee's religious convictions.[105]

Freedom of Speech

The First Amendment of the U.S. Constitution also prohibits Congress (and the states[106]) from enacting a law "abridging the freedom of speech."

It is worth emphasizing for this discussion, the memorandum does not seek to describe the legal doctrine related to freedom of speech exhaustively. Rather, this memorandum focuses specifically on a subset of free speech case law involving compelled speech and describes several cases involving issues of sex equality and compelled speech claims.

Beyond the doctrine of compelled speech, there are a number of additional free speech issues that the Commission may want to consider in more detail going forward. One area to note for the Commission's purposes is the free speech issues that arise in criminal and tort law matters, related to crimes and torts that often involve targeting people based on sex (e.g., stalking and harassment).[107]

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recipients] claiming that Chalmers' conduct violated their religious freedoms or constituted religious harassment. Chalmers' supervisory position at the Richmond office heightens the possibility that Tulon (through Chalmers) would appear to be imposing religious beliefs on employees." (citation omitted)).

104. See, e.g., Meriwether v. Hartop (6th Cir. 2021) 992 F.3d 492; A. Sheeler, Sacramento Bee, *California Lawsuit Alleges Teachers Have a First Amendment Right to Out Transgender Students* (May 2, 2023); R. Riess & A. Elassar, CNN, *Teacher Gets $95,000 to Settle Lawsuit over Refusal to Use Student's Preferred Name* (Sept. 1, 2022), *available at* https://www.cnn.com/2022/09/01/us/kansas-teacher-suspend-settle/index.html; Associated Press, *Court Backs a Teacher Who Refused to Use Transgender Students' Pronouns*, (Aug. 31, 2021), *available at* https://www.npr.org/2021/08/31/1032929550/virginia-teacher-transgender-pronoun-supreme-court.

105. See, e.g., *Meriwether*, 992 F.3d at 498.

106. See *supra* note 9; see also https://constitution.congress.gov/browse/essay/amdt1-7-2-4/ALDE_00013541/ (noting that the U.S. Supreme Court has found that the free speech protection can apply to some private actors, when, for example, they undertake a "traditional, exclusive public function").

107. See generally, e.g., E.A. Vogels, Pew Research Center, *The State of Online Harassment* (Jan. 13, 2021), *available at* https://www.pewresearch.org/internet/2021/01/13/the-state-of-online-harassment/; R.G. Wright, *Cyber Harassment and the Scope of Freedom of Speech*, 53 U.C. Davis L. Rev. Online (Apr. 2020), *available at* https://lawreview.law.ucdavis.edu/online/53/files/53-online-Wright.pdf; J. Fenrich et al., *Gender Equality and the First Amendment: Foreword*, 87 Fordham L. Rev. 2313, 2313 (2019) ("Gender equality demands equal opportunity to speak and be heard. Yet, in recent years, the clash between equality and free speech in the context of gender has intensified--in the media, the workplace, college campuses, and the political arena, both online and offline. The internet has given rise to novel First Amendment issues that particularly affect women, such as nonconsensual pornography, online harassment, and online privacy."); R.E. Morgan & J.L. Truman, U.S. Department of Justice Bureau of Justice Statistics, Stalking Victimization 2019, p. 1

Freedom of Speech, Generally

In general, the free speech protection is not absolute. Certain types of speech are not granted protection.[108] In addition, the free speech jurisprudence recognizes that speech can be subject to certain procedural and administrative requirements (time, place, and manner restrictions), so long as those requirements are applied in a nondiscriminatory manner.[109]

The free speech protection provides both an affirmative right to say what the speaker wishes, but also a negative right that protects the speaker from being compelled to say something that the speaker does not wish to say. It is that negative right that is at issue in cases discussed below. Specifically, this memorandum describes several cases involving compelled speech[110] claims on issues related to sex.

Compelled Speech Related to Reproductive Health Care

In 2015, California enacted legislation that would require certain pregnancy centers to provide certain notices to their clients.[111] A bill analysis noted concerns

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NCJ301735 (Feb. 2022), *available at* https://bjs.ojp.gov/content/pub/pdf/sv19.pdf ("In 2019, females (1.8%) were stalked more than twice as often as males (0.8%)."); https://www.stalkingawareness.org/wp-content/uploads/2021/09/SPARC_Stalking-LGBTQ-Fact-Sheet.pdf ("Generally, research shows that LGBTQ+ individuals are more likely than heterosexual and cisgender individuals to experience stalking.").

See also, e.g., Elonis v. United States (2015) 575 U.S. 723; Docket for Counterman v. Colorado (Case No. 22-138), https://www.supremecourt.gov/docket/docketfiles/html/public/22-138.html.

108. See https://constitution.congress.gov/browse/essay/amdt1-7-5-1/ALDE_00013702/ ("While content-based restrictions on protected speech are presumptively unconstitutional, the Supreme Court has recognized that the First Amendment permits restrictions upon the content of speech falling within a few limited categories, including obscenity, child pornography, defamation, fraud, incitement, fighting words, true threats, and speech integral to criminal conduct."); https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/what-does (indicating that free speech does not provide the following rights: "to incite imminent lawless action[,]" "to make or distribute obscene materials[,]" and "to permit students to print articles in a school newspaper over the objections of the school administration[.]" The page also notes two limitations on free speech rights applicable to students at a school-sponsored event – no right to make an obscene speech or advocate for drug use).

109. See, e.g., Cox v. New Hampshire (1941) 312 U.S. 569, 576 ("If a municipality has authority to control the use of its public streets for parades or processions, as it undoubtedly has, it cannot be denied authority to give consideration, without unfair discrimination, to time, place and manner in relation to the other proper uses of the streets.").

110. C. Savage, *What is the Compelled Speech Doctrine?*, N.Y. Times (Dec. 5, 2022), *available at* https://www.nytimes.com/2022/12/05/us/politics/compelled-speech-first-amendment.htm.

111. AB 775 (Chiu 2015); 2015 Cal. Stat. ch. 700. This bill enacted an article of the Health & Safety Code entitled "Reproductive FACT (Freedom, Accountability, Comprehensive Care, and Transparency) Act or Reproductive FACT Act." Health & Safety Code § 123470; see also *id.* §§ 123470-123473.

that crisis pregnancy centers were disseminating medically inaccurate information about pregnancy options.[112]

The bill required different notices be provided, depending on whether a covered facility was licensed to provided medical care or not. If the center is not licensed to provide medical services, the law required that the client be informed of the unlicensed status.[113] And, if the center is licensed, to provide the following notice about the availability of free and low-cost family planning services:

> California has public programs that provide immediate free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and abortion for eligible women. To determine whether you qualify, contact the county social services office at [insert the telephone number].[114]

These notice requirements were challenged on First Amendment grounds and the case went up to the U.S. Supreme Court. In 2018, the Court concluded that both of these notice requirements (i.e., those applicable to the unlicensed and the licensed facilities) violate the First Amendment.[115] Further, a concurring opinion suggests that California may have engaged in viewpoint discrimination, by "requir[ing] primarily pro-life pregnancy centers to promote the State's own preferred message advertising abortions."[116]

As the dissenting opinion notes, the Court, in a prior case, permitted required disclosures for pregnant persons who are seeking an abortion (including information about availability of adoption services).[117] The majority opinion seeks to distinguish those disclosures as simply a matter of informed consent.[118] One commentor discussing the contrast in these case results suggests that the Court has not applied the compelled speech doctrine in a content-neutral way, "seems to

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112. See Senate Health Committee Analysis of AB 775 (Jun. 22, 2015), p. 4. Crisis pregnancy centers are "pro-life (largely Christian belief-based) organizations that offer a limited range of free pregnancy options, counseling, and other services to individuals that visit a center." *Id.*

113. Health & Safety Code § 123472(b)(1). The notice is required to state: "This facility is not licensed as a medical facility by the State of California and has no licensed medical provider who provides or directly supervises the provision of services." *Id.*

114. Health & Safety Code § 123472(a)(1).

115. Nat'l Institute of Family and Life Advocates v. Becerra (2018) 138 S.Ct. 2361, 2366 ("In short, petitioners are likely to succeed on the merits of their challenge to the licensed notice."), 2378 ("Taking all these circumstances together, we conclude that the unlicensed notice is unjustified and unduly burdensome under *Zauderer* [case involving required disclosures in professional speech]. … We hold that petitioners are likely to succeed on the merits of their claim that the FACT Act violates the First Amendment.").

116. 138 S.Ct. at 2379 (Kennedy, J., concurring).

117. 138 S.Ct. at 2384-85 (Breyer, J., dissenting).

118. 138 S.Ct. at 2373.

provide more speech protection when the state is endorsing an antiabortion rather than a pro-choice perspective, even though the application of free speech doctrine is supposed to be content neutral."[119]

Compelled Speech Related to Parade Participation

In 1995, the Court considered a case involving the South Boston Allied War Veterans Council ("Council"), which was responsible for conducting the Boston's St. Patrick's Day-Evacuation Day Parade.[120] The Council sought to deny the Irish-American Gay, Lesbian, and Bisexual Group of Boston ("GLIB") the ability to participate in the parade as an organization.

In its opinion, the Court notes that no individual was denied the right to participate in the parade as part of any group that has been approved to march in the parade, but rather "the disagreement goes to the admission of GLIB as its own parade unit carrying its own banner."[121]

Given that, the Court, after some discussion about the expressive nature of the parade, held that the First Amendment did not permit requiring the Council to include a group whose message they disagreed with.

> [T]he Council clearly decided to exclude a message it did not like from the communication it chose to make, and that is enough to invoke its right as a private speaker to shape its expression by speaking on one subject while remaining silent on another. The message it disfavored is not difficult to identify. Although GLIB's point (like the Council's) is not wholly articulate, a contingent marching behind the organization's banner would at least bear witness to the fact that some Irish are gay, lesbian, or bisexual, and the presence of the organized marchers would suggest their view that people of their sexual orientations have as much claim to unqualified social acceptance as heterosexuals and indeed as members of parade units organized around other identifying characteristics. The parade's organizers may not believe these facts about Irish sexuality to be so, or they may object to unqualified social acceptance of gays and lesbians or have some other reason for wishing to keep GLIB's message out of the parade. But whatever the reason, it boils down to the choice of a speaker not to propound a

119. See, e.g., R. Colker, *Uninformed Consent*, 101 B.U. L. Rev. 431, 452 (2021). ("And the *Casey/Becerra* distinction seems to provide more speech protection when the state is endorsing an antiabortion rather than a pro-choice perspective, even though the application of free speech doctrine is supposed to be content neutral."); K. Harris, *Ultra-Compelled: Abortion Providers' Free Speech Rights After* NIFLA, 85 Alb. L. Rev. 97 (2021-22).

120. Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston (1995) 515 U.S. 557.

121. 515 U.S. at 572.

> particular point of view, and that choice is presumed to lie beyond the government's power to control.[122]

Compelled Speech Related to Same-Sex Weddings

Recently, the Supreme Court has considered cases of business owners who provide (or want to provide) wedding-related services, but object to having to provide such services for weddings involving two individuals of the same sex.[123] These business owners cite their religious beliefs and raise claims about compelled speech and the expressive nature of their work (cake decorating and website design).

Both of these cases arose in Colorado and involve the state's anti-discrimination law applicable to public accommodations. The current language of that provision provides, in part:

> It is a discriminatory practice and unlawful for a person, directly or indirectly, to refuse, withhold from, or deny to an individual or a group, because of disability, race, creed, color, sex, sexual orientation, gender identity, gender expression, marital status, national origin, or ancestry, the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation ….[124]

In 2018, the Court decided *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, involving a baker who refused to make cakes for same-sex weddings or commitment ceremonies.[125] The Court notes:

> One of the difficulties in this case is that the parties disagree as to the extent of the baker's refusal to provide service. If a baker refused to design a special cake with words or images celebrating the marriage — for instance, a cake showing words with religious meaning — that might be different from a refusal to sell any cake at all. In defining whether a baker's creation can be protected, these details might make a difference.
>
> The same difficulties arise in determining whether a baker has a valid free exercise claim. A baker's refusal to attend the wedding to ensure that the cake is cut the right way, or a refusal to put certain religious words or decorations on the cake, or even a refusal to sell a cake that has been baked for the public generally but includes certain

122. 515 U.S. at 574-75.
123. See Masterpiece Cakeshop v. Colo. Civil Rights Comm'n (2018) 138 S.Ct. 1719; 303 Creative v. Elenis (10th Cir. 2021) 6 F.4th 1160, *cert. granted.* (2022) 142 S.Ct. 1106 (Case No. 21-476).
124. Colo. Rev. Stat. § 24-34-601(2)(a).
125. 138 S.Ct. at 1725-26.

> religious words or symbols on it are just three examples of possibilities that seem all but endless.[126]

This seems to suggest that the Court would be receptive to a claimant that sought to provide a lower level of service for same-sex weddings, due to religious objections. However, the Court sidestepped answering the central question of how to reconcile a religious-based speech objection to a generally-applicable public accommodations law.

Instead, the Court's opinion focused on the treatment of the baker by the Colorado Civil Rights Commission. The Court concluded that the Colorado Civil Rights Commission's consideration of the baker's objection was "inconsistent with the State's obligation of religious neutrality."[127] In particular, the Court described the Civil Rights Commission's "clear and impermissible hostility toward the sincere religious beliefs"[128] of the baker:

> That hostility surfaced at the Commission's formal, public hearings, as shown by the record. On May 30, 2014, the seven-member Commission convened publicly to consider Phillips' case. At several points during its meeting, commissioners endorsed the view that religious beliefs cannot legitimately be carried into the public sphere or commercial domain, implying that religious beliefs and persons are less than fully welcome in Colorado's business community. One commissioner suggested that Phillips can believe "what he wants to believe," but cannot act on his religious beliefs "if he decides to do business in the state." A few moments later, the commissioner restated the same position: "[I]f a businessman wants to do business in the state and he's got an issue with the—the law's impacting his personal belief system, he needs to look at being able to compromise." Standing alone, these statements are susceptible of different interpretations. On the one hand, they might mean simply that a business cannot refuse to provide services based on sexual orientation, regardless of the proprietor's personal views. On the other hand, they might be seen as inappropriate and dismissive comments showing lack of due consideration for Phillips' free exercise rights and the dilemma he faced. In view of the comments that followed, the latter seems the more likely.
>
> On July 25, 2014, the Commission met again. This meeting, too, was conducted in public and on the record. On this occasion another commissioner made specific reference to the previous meeting's discussion but said far more to disparage Phillips' beliefs. The commissioner stated:

126. 138 S.Ct. at 1723.
127. *Id.*
128. *Id.* at 1729.

> "I would also like to reiterate what we said in the hearing or the last meeting. Freedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust, whether it be—I mean, we—we can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others."
>
> To describe a man's faith as "one of the most despicable pieces of rhetoric that people can use" is to disparage his religion in at least two distinct ways: by describing it as despicable, and also by characterizing it as merely rhetorical—something insubstantial and even insincere. The commissioner even went so far as to compare Phillips' invocation of his sincerely held religious beliefs to defenses of slavery and the Holocaust. This sentiment is inappropriate for a Commission charged with the solemn responsibility of fair and neutral enforcement of Colorado's antidiscrimination law—a law that protects against discrimination on the basis of religion as well as sexual orientation.
>
> The record shows no objection to these comments from other commissioners. And the later state-court ruling reviewing the Commission's decision did not mention those comments, much less express concern with their content. Nor were the comments by the commissioners disavowed in the briefs filed in this Court. For these reasons, the Court cannot avoid the conclusion that these statements cast doubt on the fairness and impartiality of the Commission's adjudication of Phillips' case.[129]

Later last year, the Court heard arguments in a similar case, *303 Creative v. Elenis*, brought by a website designer.[130] The Court's decision in that case has not yet been issued. A short summary of the facts of that case is below.

> Lorie Smith is the sole owner of 303 Creative, a for-profit company that creates websites and other designs. Smith would like to expand her portfolio and create custom websites for weddings. She designed a web page to announce this service, with a disclaimer that she will only create websites for marriages between one man and one woman, consistent with her religious beliefs. She has not posted the page, however, because she believes that Colorado's antidiscrimination law would prohibit this message. She sued, arguing that Colorado's antidiscrimination law violates her First Amendment right to free speech.[131]

129. 138 S.Ct. at 1729-30 (citations omitted).
130. See Supreme Court Docket for *303 Creative v. Elenis*, https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/21-476.html.
131. https://www.americanbar.org/groups/public_education/publications/preview_home/303-creative-v-elenis/.

The question that the Court granted review on is "whether applying a public-accommodation law to compel an artist to speak or stay silent violates the free speech clause of the first amendment."[132]

Compelled Speech Related to Use of Preferred Names or Pronouns

As noted above (in the employment context), there have been cases involving disputes about preferred name and pronoun policies.[133] Such cases may also involve claims related to compelled speech.[134]

The staff did not find any Supreme Court opinions on preferred name and pronoun policies, but wanted to note that this issue has been raised in pending litigation in other federal and state courts.

Freedom of Association

The Supreme Court has also considered whether the constitutional protection of freedom of association permitted private actors to exclude, counter to anti-discrimination protections, persons based on their sex or sexual orientation. Similar to the freedom of speech claims above, the organizations bringing these claims are effectively arguing that they cannot be compelled to associate with someone (regardless of whether the organization's decision not a to associate specifically involves protected characteristics under anti-discrimination laws).

Associational Claims Related to the Admission of Women

In 1984, the Court decided *Roberts v. United States Jaycees*, a case involving the desire of the national Jaycees organization (the Junior Chamber of Commerce) to exclude women from becoming voting members of the organization.[135] In that case, the Court described the freedom of association protection:

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132. https://www.supremecourt.gov/qp/21-00476qp.pdf.

133. See Meriwether v. Hartop (6th Cir. 2021) 992 F.3d 492; *supra* notes 104 and 105 and associated text; see also description of *Taking Offense v. State* in California Supreme Court Pending Issues: Civil Summary, *available at* https://supreme.courts.ca.gov/sites/default/files/supremecourt/default/2023-05/pendingissues-civil%20-%20050523_0.pdf ("This case presents the following issue: Did the Court of Appeal err in declaring the provision of the Lesbian, Gay, Bisexual, and Transgender (LGBT) Long-Term Care Facility Residents' Bill of Rights (Health & Saf. Code, § 1439.51) that criminalizes the willful and repeated failure to use a resident's chosen name and pronouns unconstitutional on its face under the First Amendment?").

See also generally C.M Corbin, *When Teachers Misgender: The Free Speech Claims of Public School Teachers*, 1 J. Free Speech L. 615 (2022); C.T. McNamarah, *Misgendering*, 109 Cal. L. Rev. 2227 (2021).

134. See, e.g., *Meriwether*, 992 F.3d at 503 ("Since Meriwether has plausibly alleged that Shawnee State violated his First Amendment rights by compelling his speech or silence and casting a pall of orthodoxy over the classroom, his free-speech claim may proceed.").

135. 468 U.S. 609.

> Our decisions have referred to constitutionally protected "freedom of association" in two distinct senses. In one line of decisions, the Court has concluded that choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme. In this respect, freedom of association receives protection as a fundamental element of personal liberty. In another set of decisions, the Court has recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment — speech, assembly, petition for the redress of grievances, and the exercise of religion. The Constitution guarantees freedom of association of this kind as an indispensable means of preserving other individual liberties.[136]

After deciding that the Jaycees membership was neither small, nor selective (and therefore not protected under the first line of decisions above), the Court considered the second prong and was "persuaded that Minnesota's compelling interest in eradicating discrimination against its female citizens justifies the impact that application of the statute to the Jaycees may have on the male members' associational freedoms."[137]

In 1987, the Court considered a similar case involving a dispute related to a local Rotary Club's decision to admit women.[138] In response to that decision, the international Rotary organization revoked the local club's charter and terminated its membership.[139] The local club sued the international Rotary organization. This case arose in California and included claims involving California's Unruh Civil Rights Act.[140] The Court concluded:

> Even if the Unruh Act does work some slight infringement on Rotary members' right of expressive association, that infringement is justified because it serves the State's compelling interest in eliminating discrimination against women. On its face the Unruh Act, like the Minnesota public accommodations law we considered in *Roberts*, makes no distinctions on the basis of the organization's viewpoint. Moreover, public accommodations laws "plainly serv[e] compelling state interests of the highest order." In *Roberts* we recognized that the State's compelling interest in assuring equal access to women extends to the acquisition of leadership skills and business contacts as well as tangible goods and services. The Unruh

136. *Id.* at 617-18.
137. *Id.* at 623; see also *id.* at 618-22 (analyzing whether the first line of cases, regarding intimate association, would apply to the Jaycees).
138. Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte (1987) 481 U.S. 537.
139. *Id.* at 541.
140. *Id.* at 541-42.

> Act plainly serves this interest. We therefore hold that application of the Unruh Act to California Rotary Clubs does not violate the right of expressive association afforded by the First Amendment.[141]

Limits of Associational Freedoms

While the preceding cases seem to suggest that the Court would be receptive to recognizing that the freedom of association would accommodate the application of generally applicable anti-discrimination laws, the Court left room for groups to exclude on the basis of associational messaging (which, as seen in later cases discussed below, could be inconsistent with anti-discrimination protections).

In 1988, the Court considered a facial challenge to a local New York City law (Local Law 63) prohibiting discrimination in certain private clubs.[142] While the facial challenge to the law was unsuccessful, the Court's opinion suggests that the application of anti-discrimination laws may yield to associational freedoms in some instances:

> On its face, Local Law 63 does not affect "in any significant way" the ability of individuals to form associations that will advocate public or private viewpoints. It does not require the clubs "to abandon or alter" any activities that are protected by the First Amendment. If a club seeks to exclude individuals who do not share the views that the club's members wish to promote, the Law erects no obstacle to this end. Instead, the Law merely prevents an association from using race, sex, and the other specified characteristics as shorthand measures in place of what the city considers to be more legitimate criteria for determining membership. It is conceivable, of course, that an association might be able to show that it is organized for specific expressive purposes and that it will not be able to advocate its desired viewpoints nearly as effectively if it cannot confine its membership to those who share the same sex, for example, or the same religion. In the case before us, however, it seems sensible enough to believe that many of the large clubs covered by the Law are not of this kind. We could hardly hold otherwise on the record before us, which contains no specific evidence on the characteristics of any club covered by the Law.[143]

In 1994, the Court briefly considered a free association claim from a group of anti-abortion protesters subject to an injunction that sought to prevent the group from impeding access to a clinic that provided abortion services.[144] The injunction extended to those acting "in concert" with the protesters, which the protesters

141. *Id.* at 549 (footnote and citations omitted).
142. New York State Club Ass'n, Inc. v. City of New York (1988) 487 U.S. 1.
143. *Id.* at 13-14 (citations omitted).
144. Madsen v. Women's Health Ctr. (1994) 512 U.S. 753.

claimed violated their associational rights.[145] The Court found the protesters "are not enjoined from associating with others or from joining with them to express a particular viewpoint. The freedom of association protected by the First Amendment does not extend to joining with others for the purpose of depriving third parties of their lawful rights."[146]

Associational Claims Related to the Admission of People on the Basis of Sexual Orientation

In more recent cases, the Court has considered cases where organizations raised expressive associational claims, seeking to be exempted from having to comply with anti-discrimination laws that protect against discrimination on the basis of sexual orientation.

As described above, in 1995, the Court considered a case involving Boston's St. Patrick's Day-Evacuation Day parade.[147] The organizers refused to allow a group of gay, lesbian, and bisexual Irish-Americans (group is designated as "GLIB" below) to participate in the parade.[148] In the lower court, the case involved claims of "expressive association."[149] In the Supreme Court, however, the case focused on free speech issues (and the expressive nature of the parade).[150] The Court's opinion calls attention to the focus on expression, noting that it was the inclusion of the message of the group as a whole (versus the participation of any of the individual members of the group) that was at issue in the case:

> In the case before us, however, the Massachusetts law has been applied in a peculiar way. Its enforcement does not address any dispute about the participation of openly gay, lesbian, or bisexual individuals in various units admitted to the parade. Petitioners disclaim any intent to exclude homosexuals as such, and no individual member of GLIB claims to have been excluded from parading as a member of any group that the Council has approved to march. Instead, the disagreement goes to the admission of GLIB as its own parade unit carrying its own banner. Since every participating unit affects the message conveyed by the private organizers, the state courts' application of the statute produced an order essentially requiring petitioners to alter the expressive content of their parade. Although the state courts spoke of the parade as a

145. *Id.* at 776.
146. *Id.*
147. Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston, Inc. (1995) 515 U.S. 557; see discussion of "Compelled Speech Related to Parade Participation" *supra*.
148. *Hurley*, 515 U.S. at 561.
149. See *id.* at 564 (noting the right to expressive association was raised in the trial court).
150. *Id.* at 568-71, 581.

> place of public accommodation, once the expressive character of both the parade and the marching GLIB contingent is understood, it becomes apparent that the state courts' application of the statute had the effect of declaring the sponsors' speech itself to be the public accommodation.[151]

More recently, in 2000, the Court considered *Boy Scouts of America v. Dale*, involving an assistant scoutmaster whose position was revoked when the scouting organization learned that he was homosexual.[152] When the former assistant scoutmaster filed a claim against the Boy Scouts under the state's antidiscrimination law, the Boy Scouts claimed that application of the state law would violate their First Amendment free association rights.[153] In particular, the Boy Scouts asserted that "homosexual conduct is inconsistent with the values it seeks to instill."[154] In its opinion, the Court concluded that the Boy Scouts engage in expressive activity,[155] the inclusion of Dale would significantly burden the Boy Scouts' desire to not 'promote homosexual conduct as a legitimate form of behavior[,]'"[156] and the application of the antidiscrimination law would run afoul of the Boy Scouts freedom of expression.[157]

Other Constitutional and Federal Statutory Provisions that Could be in Tension with California's Efforts to Legislate on Sex Equality

In addition to the constitutional doctrines discussed above, there are other matters that may affect the scope of California's authority to legislate on the topic of sex equality. A few examples of situations in which California's authority may be limited (either legally or practically) are noted below.

- Areas where the U.S. Constitution grants powers exclusively to Congress.[158]
- Federal statutes that preempt state law, either expressly or impliedly.[159]

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151. *Id.* at 572-73 (citations omitted).
152. 530 U.S. 640.
153. *Id.* at 643-44.
154. *Id.* at 644.
155. *Id.* at 650.
156. *Id.* at 653, 656.
157. *Id.* at 656.
158. See generally https://constitution.congress.gov/browse/article-1/section-8/.
None of Congress' enumerated powers directly implicate sex equality. In the staff's view, Congress' power to regulate commerce is the enumerated power that is most likely to be relevant to issues of sex equality.
159. See generally, e.g., J.B Sykes & N. Vanatko, Congressional Research Service, Federal Preemption: A Legal Primer, R45825 (Jul. 23, 2019), *available at* https://crsreports.congress.gov/product/pdf/R/R45825.

- Full Faith and Credit clause.[160]
- Federal laws whose application is conditioned on the receipt of federal funds (one example is discussed below).

Federal Law Applicable Due to Federal Funding: Federal Equal Access Act

In 1984, the federal government enacted the Equal Access Act, involving the access of student groups to school facilities. That law provides in part:

> It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.[161]

This law specifically applies to public secondary schools that receive federal financial assistance. With regard to the amount of federal funding received by California public schools, a recent factsheet of the Public Policy Institute of California indicates "[f]ederal funds accounted for 23% of K–12 funding in 2020–21 and 12% in 2021–22. In most non-recession years, the federal share is only 6% to 9%."[162]

NEXT STEPS

As this memorandum describes, in some instances, First Amendment constitutional protections may be in tension with protections for sex equality. The memorandum summarizes how the Court has evaluated and decided some of those claims. In the staff's view, some key takeaways from this analysis include:

- For the Free Exercise clause, the *Smith* case indicates that a generally-applicable law does not run afoul of the Free Exercise clause unless it represents "an attempt to regulate religious beliefs, the communication of religious beliefs, or the raising of one's children in those beliefs[.]"[163] In a more recent case, the Court indicated that a law would not be deemed generally applicable if it either: (1) "'invite[s]' the government to consider the particular

160. U.S. Const. art. IV, § 1.
161. 20 U.S.C. § 4071(a). The law also defines "limited open forum" as follows: "[a] public secondary school has a limited open forum whenever such school grants an offering to or *opportunity* for one or more noncurriculum related student groups *to meet on school premises during noninstructional time*." *Id*. § 4071(b) (emphasis added).
162. J. Lafortune & J. Herrera, Public Policy Inst. Of Cal., Fact Sheet - Financing California's Public Schools (Sept. 2022), *available at* https://www.ppic.org/publication/financing-californias-public-schools/.
163. Employment Div., Dep't of Human Resources of Or. v. Smith (1990), 494 U.S. 872, 882.

reasons for a person's conduct by providing '"a mechanism for individualized exemptions"'" or (2) "if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way."[164] More broadly, the Court also raised questions about whether the holding in *Smith* should be revisited.[165]

- For the Free Speech clause, the compelled speech doctrine generally protects speakers from being required to convey a message that the speaker does not agree with or objects to. The details of the doctrine are not easy to discern.[166] The Court, however, has been receptive to some compelled speech claims involving issues of sex equality and there is pending litigation involving compelled speech claims and issues of sex equality (both at the Supreme Court and in other federal and state courts).
- For the Free Association clause, the Court has concluded that antidiscrimination laws can apply to associations, but that those laws may be required to yield where their application would burden an organization's expressive conduct.

In a future memorandum, the staff will discuss how the Commission's work should account for the constitutional doctrines discussed in this memorandum.

Respectfully submitted,

Kristin Burford
Senior Staff Counsel

164. Fulton v. City of Philadelphia (2021) 141 S.Ct. 1868, 1877.
165. See *supra* notes 72 and 73.
166. See V.D. Amar & A. Brownstein, *Toward a More Explicit, Independent, Consistent and Nuanced Compelled Speech Doctrine*, 2020 U. Ill. L. Rev. 1 (2020) ("[In the compelled speech context], the early cases were (once more) grounded on judicial intuition and ad hoc analysis. But as additional cases have been decided, guidelines for adjudicating compelled speech claims have never clearly emerged. Cases are decided haphazardly and inconsistently without any attempt to formalize the analyses into rules of decision. One resulting and abiding shortcoming of the current state of affairs is that compelled speech has remained essentially an all-or-nothing domain of constitutional decision-making. Based on a somewhat inscrutable and seemingly selective consideration of various factors, compelled speech claims are either embraced and subjected to strict scrutiny review or rejected as not implicating the right not to be compelled to speak at all. No detailed identification of the circumstances that warrant more or less rigorous standards of review has been recognized." (footnotes omitted)); E. Volokh, *The Law of Compelled Speech*, 97 Tex. L. Rev. 355 (Dec. 2018).