Senate Commerce Committee Nominee Questionnaire, 118th Congress
Instructions for the nominees: The Senate Committee on Commerce, Science, and Transportation (the "Committee") asks you to provide typed answers to each of the following questions. It is requested that the nominee type the question in full before each response. Do not leave any questions blank. Type "None" or "Not Applicable" if a question does not apply to the nominee. Begin each section (i.e., "A", "B", etc.) on a new sheet of paper. Electronically submit your completed questionnaire to the Committee in PDF format and ensure that sections A through E of the completed questionnaire are in a text searchable and that any hyperlinks can be clicked. Section F may be scanned for electronic submission and need not be searchable.

A. BIOGRAPHICAL INFORMATION AND QUALIFICATIONS

1. Name (Include any former names or nicknames used):

   Andrew N. Ferguson

2. Position to which nominated:

   Commissioner, Federal Trade Commission

3. Date of Nomination:

   July 11, 2023

4. Address (List current place of residence and office addresses):

   [redacted]

   Office: 202 North Ninth Street, Richmond, Virginia 23220

5. Date and Place of Birth:

   June 17, 1986, Harrisonburg, Virginia

6. Provide the name, position, and place of employment for your spouse (if married) and the names and ages of your children (including stepchildren and children by a previous marriage).

None.

7. List all college and graduate schools attended, whether or not you were granted a degree by the institution. Provide the name of the institution, the dates attended, the degree received, and the date of the degree.

   University of Virginia, 2005–2009, B.A. awarded May 2009
   William & Mary School of Law, 2009–2010 (transferred)
   University of Virginia School of Law, 2010–2012, J.D. awarded May 2012

8. List all post-undergraduate employment, including the job title, name of employer, and inclusive dates of employment, and highlight all management-level jobs held and any non-managerial jobs that relate to the position for which you are nominated.

   Solicitor General of the Commonwealth of Virginia, 2022–Present*

   Transition Counsel, Miyares for Virginia, 2021–2022

   Chief Counsel to the Senate Republican Leader Mitch McConnell, 2019–2021*

   Adjunct Professor, George Mason University Antonin Scalia School of Law, 2019, 2021

   Chief Counsel for Nominations and the Constitution to the Chairman of the Senate Judiciary Committee Lindsey Graham, 2018–2019*

   Senior Special Counsel to the Chairman of the Senate Judiciary Committee Chuck Grassley, 2018*

   Associate, Sidley Austin LLP, 2018*

   Law clerk to Justice Clarence Thomas, Supreme Court of the United States, 2016–2017*

   Associate, Bancroft PLLC, 2015–2016*

   Associate, Covington & Burling, 2014–2015*

Law clerk to Circuit Judge Karen L. Henderson, U.S. Court of Appeals for the D.C. Circuit, 2012–2014*

Summer Associate, Gibson, Dunn & Crutcher, 2011

Summer Associate, Williams Mullen, 2010

Intern to Senior District Judge Norman K. Moon, U.S. District Court for the Western District of Virginia, 2010

*Denotes management-level jobs and non-managerial jobs that relate to the position for which I am nominated.

9. Attach a copy of your resume.

   See Attachment A.

10. List any advisory, consultative, honorary, or other part-time service or positions with Federal, State, or local governments, other than those listed above after 18 years of age.

    None.

11. List all positions held as an officer, director, trustee, partner, proprietor, agent, representative, or consultant of any corporation, company, firm, partnership, or other business, enterprise, educational, or other institution.

    Consultant, A Safer Virginia PAC, 2021–2022

12. Please list each membership you have had after 18 years of age or currently hold with any civic, social, charitable, educational, political, professional, fraternal, benevolent or religiously affiliated organization, private club, or other membership organization. (For this question, you do not have to list your religious affiliation or membership in a religious house of worship or institution.). Include dates of membership and any positions you have held with any organization. Please note whether any such club or organization restricts membership on the basis of sex, race, color, religion, national origin, age, or disability.

    Virginia State Bar, Member, 2013–Present

District of Columbia Bar, Member, 2015–Present

Supreme Court of the United States, Bar Member, 2021–Present

U.S. Court of Appeals for the Second Circuit, Bar Member, 2015–Present (inactive)

U.S. Court of Appeals for the Third Circuit, Bar Member, 2015–Present

U.S. Court of Appeals for the Fourth Circuit, Bar Member, 2021–Present

U.S. Court of Appeals for the Sixth Circuit, Bar Member, 2015–Present

U.S. Court of Appeals for the Ninth Circuit, Bar Member, 2015–Present

U.S. Court of Appeals for the D.C. Circuit, Bar Member, 2014–Present

U.S. District Court for the Western District of Virginia, Bar Member, 2022–Present

U.S. District Court for the Eastern District of Virginia, Bar Member, 2022–Present

U.S. District Court for the District of North Dakota, Bar Member, 2023–Present

Federalist Society, Member, 2010–Present

Teneo Network, Member, 2022–Present

Virginia Bar Association, Member, 2022–Present

Committee on Special Issues of National and State Importance, Member, 2022–Present

National Rifle Association, Member, 2017–2020

None of these groups restricts membership on the basis of race, sex, color, religion, national origin, age, or disability.

13. Have you ever been a candidate for and/or held a public office (elected, non-elected, or appointed)? If so, indicate whether any campaign has any outstanding debt, the amount, and whether you are personally liable for that debt.

    I have not been a candidate for elected office. Since January 2022, I have served as the appointed Solicitor General of the Commonwealth of Virginia. There was no campaign associated with that appointment. That position is the only public office I have held.

14. List all memberships and offices held with and services rendered to, whether compensated or not, any political party or election committee within the past ten years. If you have held a paid position or served in a formal or official advisory position (whether compensated or not) in a political campaign within the past ten years, identify the particulars of the campaign, including the candidate, year of the campaign, and your title and responsibilities.

    I served as a transition counsel for Attorney General Jason Miyares's 2021 campaign for Attorney General of Virginia from December 2021 until January 2022. I advised the campaign on hiring and policy issues. This was a compensated position.

    I was a volunteer lawyer on Governor Glenn Youngkin's 2021 campaign for Governor of Virginia in November 2021.

    I was a campaign volunteer on Matthew Lohr's 2005 campaign to be a member of the Virginia House of Delegates for the 26th District.

15. Itemize all political contributions to any individual, campaign organization, political party, political action committee, or similar entity of $200 or more for the past ten years.

    Grassley Committee, Inc. - $250 (March 14, 2022)
    Youngkin for Governor - $500 (October 29, 2021)
    Tom Cotton for Senate - $250 (November 2, 2020)
    McConnell Senate Committee - $500 (July 10, 2019)
    John Adams for Virginia - $500 (September 30, 2017)
    John Adams for Virginia - $250 (June 8, 2016)

16. List all scholarships, fellowships, honorary degrees, honorary society memberships, military medals, and any other special recognition for outstanding service or achievements.

    Richard Heath Dabney Prize for Outstanding Thesis in United States History, University of Virginia (2009)

    Virginia Lawyers Weekly "Up & Coming Lawyers" (2022)

17. List each book, article, column, letter to the editor, Internet blog posting, or other publication you have authored, individually or with others. Include a link to each publication when possible. If a link is not available, provide a digital copy of the publication when available.

    None.

18. List all speeches, panel discussions, and presentations (e.g., PowerPoint) that you have given on topics relevant to the position for which you have been nominated. Include a link to each publication when possible. If a link is not available, provide a digital copy of the speech or presentation when available.

    *I have given several speeches, panel presentations, and other public remarks in connection with my work as a Senate staffer and as Solicitor General of Virginia. Very few of my public remarks are relevant to the position to which I have been nominated. The following is the most complete list I have been able to compile of my speeches and public remarks.

    Panelist, "Developments in Religious Liberty," Office of the Attorney General CLE Series (July 27, 2023), no public recording available. I have included the outline distributed to attendees as Attachment B to this questionnaire.

    Speaker, "Summer Rooftop Reception," Columbia Law School and University of Pennsylvania Law School Alumni Chapters (July 26, 2023), no recording available.

    Panelist, "Academic Freedom in Higher Education: The Role of States Defending Freedom of Thought," Panel at the 2023 Federalist Society Freedom of Thought Conference (June 28, 2023), recording at: https://fedsoc.org/conferences/2023-freedom-of-thought-conference?#agenda-

item-panel-4-academic-freedom-in-higher-education-the-role-of-states-defending-freedom-of-thought.

Panelist, "Appellate Brief-Writing 101," Office of the Attorney General CLE Series (June 27, 2023), no public recording available. I have included the outline distributed to attendees as Attachment C to this questionnaire.

Speaker, "The Role of a State Solicitor General," University of Virginia School of Law Federalist Society Event (February 2, 2023), no recording available.

Panelist, "How Big is too Big? Competition in the Tech Sector," Knight Foundation INFORMED event (November 29, 2022), recording at: https://knightfoundation.org/events/knight-media-forum/informed-conversations-on-democracy-in-the-digital-age/.

Speaker, "Small Group Dinner with Andrew Ferguson and Will Levi," DC Federalist Society Young Lawyers Chapter Event (October 12, 2022), no recording available.

Panelist, "SCOTUS Review and Preview," Eighth Annual Federalist Society Texas Chapters Conference (September 23, 2022), no recording available.

Panelist, "The Roberts Court at Age 16," Virginia Bar Association Summer Meeting (July 22, 2022), https://vba.inreachce.com/Details/Information/c7294956-4dbb-41f6-9857-36d2af181dd6.

Panelist, "A Conversation with Two Solicitors General," Federalist Society Puerto Rico Lawyers Chapter Event (May 26, 2022), no recording available.

Panelist, "A Conversation with Three Solicitors General," Federalist Society Richmond Lawyers Chapter (March 21, 2022), no recording available.

Speaker, "Protecting the Family through the Rule of Law," Family Foundation of Virginia Meeting (March 19, 2022), no recording available.

Panelist, "The Role of Federalism and the Separation of Powers in Challenging Government Overreach," Federalist Society Florida Chapters Conference, (February 5, 2022), no recording available.

Speaker, "Advice and Consent: Top Senate Staffers' Perspectives on the Barrett Confirmation," Federalist Society DC Young Lawyers Chapter Event (December 2, 2020), no recording available.

Panelist, "Federal Opportunities: Promoting Freedom and the Rule of Law," Alliance Defending Freedom Blackstone Legal Fellowship Conference (August 31, 2020), no recording available.

Panelist, "Lawyering on the Hill," Federalist Society Capitol Hill Chapter Event (August 1, 2019), no recording available.

Panelist, "Federal Efforts to Safeguard Religious Liberty," Alliance Defending Freedom Summit on Religious Liberty (July 9, 2019), no recording available.

19. List all public statements you have made during the past ten years, including statements in news articles and radio and television appearances, which are on topics relevant to the position for which you have been nominated, including dates. Include a link to each statement when possible. If a link is not available, provide a digital copy of the statement when available.

*I have done my best to identify all public statements I have made over the past ten years, including statements in news articles and radio and television appearances, including through a thorough review of personal files and searches of publicly available electronic databases. Despite my searches, there may be other materials I have been unable to identify, find, or remember. I have located the statements listed below. This list does not include instances where news articles have quoted from written submissions I have filed with courts in my capacity as Solicitor General of the Commonwealth of Virginia.

Testimony before the Virginia House of Delegates Committee on the Courts of Justice, Civil Subcommittee, regarding several bills (February 13, 2023), recording available at: https://virginiageneralassembly.gov/house/chamber/chamberstream.php.

Testimony before the Virginia Senate Committee on the Judiciary regarding SB 1224 (February 1, 2023), recording available at: https://virginia-senate.granicus.com/MediaPlayer.php?view_id=3&clip_id=5668.

Testimony before the Virginia House of Delegates Committee on the Courts of Justice, Criminal Subcommittee, regarding HB 2015 (January 16, 2023),

recording available at:
https://virginiageneralassembly.gov/house/chamber/chamberstream.php.

Denise Lavoie, *Loudoun County NAACP Asks to Join Virginia redistricting lawsuit*, ABC7 News (March 22, 2022), https://wjla.com/news/local/loudoun-county-naacp-asks-to-join-virginia-redistricting-lawsuit-paul-goldman-mark-herring.

Cher Muzyk, *Can Va. Public Schools Ask Some Students to Wear Masks to Protect Their High Risk Classmates? A Federal Judge Says He'll Decide "Quickly,"* Prince William Times (March 8, 2022), https://www.princewilliamtimes.com/news/can-va-public-schools-ask-some-students-to-wear-masks-to-protect-their-high-risk/article_13245d64-9ee8-11ec-b6bc-4f62271f6a37.html.

Hannah Natanson & Justin Jouvenal, *Judge Halts Loudoun's School Mask Mandate as State Mask-Optional Law Takes Effect*, Washington Post (February 16, 2022), https://www.washingtonpost.com/education/2022/02/16/judge-halts-loudouns-school-mask-mandate-halted-state-mask-optional-law-takes-effect/.

Anya Sczerzenie, *Loudoun Makes Masks Optional Immediately After Judge Grants Injunction*, Inside NoVa (February 16, 2022), https://www.insidenova.com/news/education/loudoun-makes-masks-optional-immediately-after-judge-grants-injunction/article_1ac65cda-8fa6-11ec-ba6c-23c1c921ce0f.html.

Miyares Picks ex-McConnell Counsel as Solicitor General, Associated Press (December 8, 2021), https://apnews.com/article/us-supreme-court-virginia-mitch-mcconnell-congress-supreme-court-of-virginia-1bf4927157410fb987f6395dffcd2797.

Erin Flynn, *Climbing His Way to The Top*, Daily-News Record (April 6, 2016), https://www.dnronline.com/news/climbing-his-way-to-the-top/article_d6729c5b-fa58-522b-a43d-9d9f720af014.html.

Eric Williamson, *Andrew Ferguson '12 to Clerk for Supreme Court Justice Clarence Thomas*, University of Virginia School of Law (March 3, 2016), https://www.law.virginia.edu/news/201603/andrew-ferguson-12-clerk-supreme-court-justice-clarence-thomas.

20. List all digital platforms (including social media and other digital content sites) on which you currently or have formerly operated an account, regardless of whether or not the account was held in your name or an alias. Include the full name of an "alias" or "handle", including the complete URL and username with hyperlinks, you have used on each of the named platforms. Indicate whether the account is active, deleted, or dormant. Include a link to each account if possible.

    Twitter: @nocleverideas (https://twitter.com/nocleverideas) (active)
    Facebook: Andrew Ferguson (https://www.facebook.com/profile.php?id=1520985) (active)
    Instagram: @andytheferg (dormant)
    LinkedIn: https://www.linkedin.com/in/andrew-ferguson-472168203 (dormant)

21. Please identify each instance in which you have testified orally or in writing before Congress in a governmental or non-governmental capacity and specify the date and subject matter of each testimony.

    None.

22. Given the current mission, major programs, and major operational objectives of the department/agency to which you have been nominated, what in your background or employment experience do you believe affirmatively qualifies you for appointment to the position for which you have been nominated, and why do you wish to serve in that position?

    I am an experienced litigator and policy advisor who has worked on antitrust and consumer-protection issues over the course of my eleven years as a lawyer. I have been Solicitor General of the Commonwealth of Virginia since January 2022. In that role, I manage the Commonwealth's appellate litigation, constitutional defense, multi-state amicus practice, and special litigation. I have represented parties in dozens of cases in the Supreme Courts of the United States and Virginia, the intermediate federal and state appellate courts, and state and federal trial courts. I am also lead counsel for Virginia and sixteen other States in *United States v. Google*, a major Sherman Act Section 2 case in the United States District Court for the Eastern District of Virginia alleging that Google has monopolized the ad-tech market.

Before serving as Solicitor General of Virginia, I was an advisor to the Senate Republican Leader and two Chairmen of the Senate Judiciary Committee, which has jurisdiction over antitrust issues. As the chief legal advisor to the Republican Leader, I advised him on judicial nominations, appointments to federal agencies including the FTC, and on antitrust and consumer-protection policy issues.

I also handled complex commercial litigation in the private sector, focusing on antitrust and consumer-protection law. As a lawyer in private practice, I litigated private class-action claims under Section 1 of the Sherman Act and a major government-enforcement action in a merger case under Section 7 of the Clayton Act. I also represented firms before the Department of Justice and the FTC in pre-merger and consumer-protection investigations.

I am also fortunate to have insight into how courts consider antitrust and consumer protection lawsuits, as well as challenges to agency actions, from my time serving as a law clerk on the D.C. Circuit and the U.S. Supreme Court.

I would be honored to serve as a Commissioner on the FTC. I have spent the vast majority of my career in public service and have demonstrated a commitment to protecting the public interest. I have experience in both the public and private sector working on antitrust and consumer-protection issues both as a litigator and policy advisor. If confirmed, I would do my level best to carry out Congress's mandate to promote and protect the value of competition in our dynamic economy, and to protect consumers from deceptive and unfair business practices.

23. What do you believe are your responsibilities, if confirmed, to ensure that the department/agency has proper management and accounting controls, and what experience do you have in managing a large organization?

The Commission should deploy the taxpayers' resources efficiently and effectively. If confirmed, my responsibility would be to work with the Chair, the Commissioners, and the staff to steward those resources by pursuing enforcement actions consistent with the law and sound policy.

As Solicitor General of Virginia, I manage a staff of eight lawyers and paralegals that oversee the Commonwealth's appellate litigation and provide advice on constitutional questions to a wide range of state agencies. As a Senate staffer on the Judiciary Committee, I managed teams of lawyers and

law clerks that advised Senators on judicial nominations and constitutional questions.

24. What do you believe to be the top three challenges facing the department/agency, and why?

    I believe the Commission's top three challenges include (1) applying the FTC's antitrust and consumer-protection enforcement tools to address emerging technology and the novel business practices and markets; (2) protecting the privacy and security of increasing volumes of consumer data; and (3) protecting consumers from unfair methods of competition to ensure competitive U.S. markets and the fostering of innovation.

B. POTENTIAL CONFLICTS OF INTEREST

1. Describe all financial arrangements, deferred compensation agreements, and other continuing dealings with business associates, clients, or customers. Please include information related to retirement accounts, such as a 401(k) or pension plan.

    a. Sidley Austin 401(k): I will continue to participate in this defined contribution plan, but the plan sponsor and I no longer make any contributions.

    b. Commonwealth of Virginia ORPPA Plan: I will continue to participate in this defined contribution plan. The plan sponsor will not make further contributions after my separation.

    c. Commonwealth of Virginia 457 Plan: I will continue to participate in this defined contribution plan. The plan sponsor will not make further contributions after my separation.

    d. Commonwealth of Virginia Cash Match Plan: I will continue to participate in this defined contribution plan. The plan sponsor will not make further contributions after my separation.

2. Do you have any commitments or agreements, formal or informal, to maintain employment, affiliation, or practice with any business, association, or other organization during your appointment? If so, please explain.

No.

3. Indicate any investments, obligations, liabilities, or other relationships which could involve potential conflicts of interest in the position to which you have been nominated. Explain how you will resolve each potential conflict of interest.

   In connection with the nomination process, I have consulted with the U.S. Office of Government Ethics and the Federal Trade Commission's Designated Agency Ethics Official to identify potential conflicts of interest. If confirmed, any potential conflicts of interest will be resolved in accordance with the terms of the ethics agreement that I have entered into with the Commission's Designated Agency Ethics Official.

4. Describe any business relationship, dealing, or financial transaction which you have had during the last ten years, whether for yourself, on behalf of a client, or acting as an agent, that could in any way constitute or result in a possible conflict of interest in the position to which you have been nominated. Explain how you will resolve each potential conflict of interest.

   In connection with the nomination process, I have consulted with the U.S. Office of Government Ethics and the Federal Trade Commission's Designated Agency Ethics Official to identify potential conflicts of interest. If confirmed, any potential conflicts of interest will be resolved in accordance with the terms of the ethics agreement that I have entered into with the Commission's Designated Agency Ethics Official.

5. Identify any other potential conflicts of interest, and explain how you will resolve each potential conflict of interest.

   I am not aware of any other potential conflicts of interest.

6. Describe any activity during the past ten years, including the names of clients represented, in which you have been engaged for the purpose of directly or indirectly influencing the passage, defeat, or modification of any legislation or affecting the administration and execution of law or public policy.

   None, except in my role as a Senate staffer and as Solicitor General of Virginia.

C. LEGAL MATTERS

1. Have you ever been disciplined or cited for a breach of ethics, professional misconduct, or retaliation by, or been the subject of a complaint to, any court, administrative agency, the Office of Special Counsel, an Inspector General, professional association, disciplinary committee, or other professional group?

   If yes:

   a. Provide the name of court, agency, association, committee, or group;
   b. Provide the date the citation, disciplinary action, complaint, or personnel action was issued or initiated;
   c. Describe the citation, disciplinary action, complaint, or personnel action;
   d. Provide the results of the citation, disciplinary action, complaint, or personnel action.

   No.

2. Have you ever been investigated, arrested, charged, or held by any Federal, State, or other law enforcement authority of any Federal, State, county, or municipal entity, other than for a minor traffic offense? If so, please explain.

   No.

3. Have you or any business or nonprofit of which you are or were an officer ever been involved as a party in an administrative agency proceeding, criminal proceeding, or civil litigation? If so, please explain.

   No.

4. Have you ever been convicted (including pleas of guilty or *nolo contendere*) of any criminal violation other than a minor traffic offense? If so, please explain.

   No.

5. Have you ever been accused, formally or informally, of sexual harassment or discrimination on the basis of sex, race, religion, or any other basis? If so, please explain.

No.

6. Please advise the Committee of any additional information, favorable or unfavorable, which you feel should be disclosed in connection with your nomination.

   I have no additional information to disclose.

D. RELATIONSHIP WITH COMMITTEE

1. Will you ensure that your department/agency complies with deadlines for information set by congressional committees, and that your department/agency endeavors to timely comply with requests for information from individual Members of Congress, including requests from members in the minority?

   If confirmed, I would work diligently with my fellow commissioners to ensure compliance with deadlines and requests for information.

2. Will you ensure that your department/agency does whatever it can to protect congressional witnesses and whistleblowers from reprisal for their testimony and disclosures?

   Yes.

3. Will you cooperate in providing the Committee with requested witnesses, including technical experts and career employees, with firsthand knowledge of matters of interest to the Committee?

   Yes.

4. Are you willing to appear and testify before any duly constituted committee of the Congress on such occasions as you may be reasonably requested to do so?

   Yes.

(Nominee is to include this signed affidavit along with answers to the above questions.)

F. AFFIDAVIT

Andrew N. Ferguson being duly sworn, hereby states that he/she has read and signed the foregoing Statement on Biographical and Financial Information and that the information provided therein is, to the best of his/her knowledge, current, accurate, and complete.

Signature of Nominee

Subscribed and sworn before me this 8 day of 8, 2023.

Notary Public

RAYMOND M. CORRIEA
NOTARY PUBLIC
REGISTRATION # 8015152
COMMONWEALTH OF VIRGINIA
MY COMMISSION EXPIRES
JUNE 30, 2026

ATTACHMENT A

Andrew N. Ferguson

[redacted]

EMPLOYMENT

Office of the Attorney General of Virginia, Richmond, VA
Solicitor General of Virginia, January 2022–present

- Chief appellate litigator for the Commonwealth of Virginia
- Manage an office of eight lawyers responsible for briefing and arguing Virginia's appellate litigation in state and federal courts, as well as overseeing Virginia's multi-state amicus and litigation practice

Antonin Scalia Law School, Arlington, VA
Adjunct Professor, Spring 2019, Spring 2021

- Courses taught: Conflict of Laws and Federal Courts

U.S. Senate Republican Leader Mitch McConnell, Washington, DC
Chief Counsel, July 2019–September 2021

- Chief legal advisor to the Majority Leader, providing counsel on constitutional, national-security, immigration, intellectual-property, election, antitrust, and criminal-justice issues
- Principal advisor to the Majority Leader on judicial nominations and confirmation strategy, including the development and execution of the Majority Leader's strategy for the confirmation of Justice Amy Coney Barrett
- Advised the Majority Leader on the development and drafting of major tort-reform legislation to address the economic effects of the COVID-19 pandemic (the SAFE TO WORK Act)

U.S. Senate Committee on the Judiciary, Washington, DC
Chief Counsel for Nominations and the Constitution to Chairman Lindsey Graham, December 2018–July 2019

- Principal advisor to then-Chairman Graham on nominations, including the confirmation of Attorney General William P. Barr, twelve circuit judges, and dozens of district judges
- Led a team of lawyers, law clerks, and other professional staff who vetted judicial and executive-branch nominees, directed confirmation hearings for those nominees, organized their Committee votes, and assisted the Majority Leader's staff in preparing for confirmation votes on the Senate floor
- Principal advisor to then-Chairman Graham on constitutional issues within the Committee's legislative and oversight jurisdiction

U.S. Senate Committee on the Judiciary, Washington, DC
Senior Special Counsel to Chairman Chuck Grassley, July 2018–October 2018

- Led a team of more than a dozen lawyers and law clerks who assisted then-Chairman Grassley on the confirmation of Justice Brett Kavanaugh by reviewing documents from Justice Kavanaugh's White House service, reviewed and analyzed Justice Kavanaugh's judicial record, planned and executed the confirmation hearings, and prepared rapid-response materials throughout the confirmation process
- Developed the Committee's strategy for obtaining and reviewing hundreds of thousands of White House documents, and oversaw the acquisition and review of those documents

Sidley Austin LLP, Washington, DC
Associate, January 2018–July 2018

- Represented clients in business litigation matters in state and federal trial and appellate courts
- Represented clients in antitrust and consumer-protection investigations conducted by the Federal Trade Commission and the Department of Justice

Bancroft PLLC, Washington, DC
Associate, April 2015–June 2016

- Drafted more than a dozen petitions for certiorari, merits briefs, and amicus briefs in cases before the Supreme Court, and helped prepare experienced advocates for oral arguments before the Supreme Court
- Represented clients in major appellate litigation in U.S. courts of appeals throughout the country

Covington & Burling LLP, Washington, DC
Associate, February 2014–March 2015

- Represented commercial clients in complex antitrust litigation and provided antitrust counseling and advice regarding transactions and government investigations
- Successfully defended major trade organization from tort suits filed in more than a dozen state and federal courts
- Provided *pro bono* employment law counseling to non-profit organizations

CLERKSHIPS

Hon. Clarence Thomas, Supreme Court of the United States, Washington, DC
Law Clerk, July 2016–July 2017

Hon. Karen LeCraft Henderson, U.S. Court of Appeals for the D.C. Circuit, Washington, DC
Law Clerk, August 2012–January 2014

EDUCATION

University of Virginia School of Law, Charlottesville, VA
J.D., 2012

- *Virginia Law Review*, Articles Editor
- Supreme Court Litigation Clinic
- Research assistant to Professors Sai Prakash and John Harrison
- Federalist Society

William & Mary School of Law, Williamsburg, VA
Completed First Year, 2009–2010

- Selected for *William & Mary Law Review*
- Bushrod T. Washington Moot Court Competition, Champion

University of Virginia, Charlottesville, VA
B.A. in History, with Highest Distinction, 2009

- Richard Heath Dabney Prize for Outstanding Thesis in U.S. History
- Miller Center GAGE and Presidential Recordings Program, Research Assistant

OTHER

- Admitted to the bars of Virginia and the District of Columbia
- TS/SCI security clearance (deactivated)

ATTACHMENT B

Developments in Religious Liberty

Office of the Attorney General

July 27, 2023

Presenters:

Andrew Ferguson, Solicitor General of Virginia

Kevin Gallagher, Deputy Solicitor General and Director of Tenth Amendment Litigation

Rick Eberstadt, Assistant Solicitor General

- **Introduction**
  - Over the last few years, the U.S. Supreme Court and Supreme Court of Virginia have issued momentous decisions about religious protections.
  - We will walk through six categories of religious liberty protections that government lawyers need to know.
- **Federal and constitutional protections applicable to all government policies**
  - The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."
    - The two parts of this provision are known as the Establishment Clause and the Free Exercise Clause.
    - Although the First Amendment applies only to federal action by its terms, the U.S. Supreme Court has applied the First Amendment to the States through the Due Process Clause of the Fourteenth Amendment. See *Everson v. Board of Education of the Township of Ewing*, 330 U.S. 1 (1947) (incorporating Establishment Clause); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (incorporating the Free Exercise Clause).
  - Federal Establishment Clause
    - For decades, the U.S. Supreme Court applied the test announced in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), to determine whether government action violated the Establishment Clause.
      - The *Lemon* test, however, proved difficult to apply, and the Court began to move away from *Lemon* towards a historically informed approach in *Town of Greece v. Galloway*, 572 U.S. 565 (2014), and *The American Legion v. American Humanist Association*, 588 U.S. ___, 139 S. Ct. 2067 (2019).

- In *Kennedy v. Bremerton School District*, 597 U.S. ___, 142 S. Ct. 2407 (2022), the Supreme Court overruled *Lemon*'s "ambitious, abstract, and ahistorical" approach to the Establishment Clause.
- Instead, the Court instructed that the Establishment Clause must be interpreted by reference to historical practices and understandings.

▪ After *Bremerton*, government action is not a violation of the Establishment Clause if the action is consistent with historical tradition.

▪ What is unclear, however, is how the Establishment Clause applies to government action that is not consistent with historical tradition.

o Federal Free Exercise Clause

▪ For decades, the U.S. Supreme Court enforced a rigorous understanding of the Free Exercise Clause under which government intrusion on the exercise of one's religion had to survive strict scrutiny. See *Sherbert v. Verner*, 374 U.S. 398 (1963); *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

- To satisfy strict scrutiny, the government must show that the burden on religion advances a governmental interest of the utmost importance (compelling-interest prong), and that the burden is the least restrictive means available to advance that interest (narrow-tailoring prong).

▪ In *Employment Division v. Smith*, 494 U.S. 872 (1990), however, the Supreme Court abandoned this framework and held that a government policy does not violate the Free Exercise Clause even if it substantially burdens the exercise of religion, so long as (1) the policy is neutral with regard to religion and (2) the policy is generally applicable. Such policies are subject only to rational-basis review.

▪ The rule of *Smith*, however, is cabined by two important qualifications

- First, government action, even if facially neutral with regard to religion, is not "neutral" for *Smith* purposes if it is based on religious animus, that is, if it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature. *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993).
- Second, government action is not generally applicable if it invites the government to consider the particular reasons for a person's conduct by providing a mechanism for individualized exemptions. *Fulton v. City of Philadelphia*, 593 U.S. ___, 141 S. Ct. 1868 (2021).

- *Lukumi* animus is relatively difficult to prove. But because may statutes and regulations include exceptions or confer discretionary authority to grant exceptions, much "neutral" government action will be subject to strict scrutiny under *Fulton*.

- State establishment and free-exercise provisions
  - Article I, § 16 of the Virginia Constitution contains establishment and free-exercise protections.[1]
  - The Virginia Supreme Court has held that Article I, § 16 is "a 'parallel provision' to the Establishment Clause" of the federal Constitution. *Virginia College Building Authority v. Lynn*, 260 Va. 608, 626 (2000).
  - The meaning of Virginia's free-exercise protection is unclear.
    - The Virginia Supreme Court recently heard argument in *Vlaming v. West Point School Board*, No.211061, where one of the questions presented is whether Article I, § 16 should be interpreted consistently with the U.S. Supreme Court's interpretation of the First Amendment in *Smith*, or whether some other standard should apply.
    - The Commonwealth has argued in *Vlaming* that the Court should apply strict scrutiny to every government policy that burdens an individual's religious exercise because when Virginia ratified the current free-exercise provision in 1971, the ratifying public generally understood that it was adopting then then-prevailing First Amendment strict-scrutiny test.
    - Strict scrutiny is also consistent with the original public meaning of Virginia's free-exercise provision when that provision was first ratified in 1776.

[1] Article I, § 16 provides: "That religion or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and, therefore, all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practice Christian forbearance, love, and charity towards each other. No man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief; but all men shall be free to profess and by argument to maintain their opinions in matters of religion, and the same shall in nowise diminish, enlarge, or affect their civil capacities. And the General Assembly shall not prescribe any religious test whatever, or confer any peculiar privileges or advantages on any sect or denomination, or pass any law requiring or authorizing any religious society, or the people of any district within this Commonwealth, to levy on themselves or others, any tax for the erection or repair of any house of public worship, or for the support of any church or ministry; but it shall be left free to every person to select his religious instructor, and to make for his support such private contract as he shall please."

- **First Amendment protections of access to generally available public benefits programs**
    - Excluding religious individuals or institutions from otherwise generally available public-benefits programs because of their religious status or conduct violates the Free Exercise Clause.
        - The Free Exercise Clause protects against indirect coercion or penalties on the free exercise of religion, not just outright prohibitions.
        - The U.S. Supreme Court recently applied this principle in the context of three state laws that excluded religious organizations from participating in otherwise generally available public-benefit programs. See *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. ___, 137 S. Ct. 2012 (2017); *Espinoza v. Montana Dep't of Revenue*, 591 U.S. ___, 140 S. Ct. 2246 (2020); *Carson v. Makin*, 596 U.S. ___, 142 S. Ct. 1987 (2022).
        - There remains one lone outlier in the public-benefits-program jurisprudence—*Locke v. Davey*, 540 U.S. 712 (2004).
    - Article VIII, § 10 of the Virginia Constitution—a form of Blaine Amendment—generally forbids the Commonwealth and its municipal subdivisions from expending public funds on any private education institution that is not "nonsectarian."
        - The restriction is not limited merely to direct appropriations; it bars the use of public funds to support religious institutions more generally.
        - When this provision was ratified in 1971, the U.S. Supreme Court had recognized "room for play in the joints" between the Establishment Clause and Free Exercise Clauses. In other words, the Court had understood that there is some conduct which a State may prohibit without violating the Free Exercise Clause on the basis of generalized anti-establishment concerns, even if the prohibited conduct would not in fact violate the Establishment Clause. *Walz v. Tax Commission of the City of New York*, 397 U.S. 664, 669 (1970).
        - *Carson*, however, rejected the proposition that States may use generalized anti-establishment concerns to justify burdening the exercise of religion. The lawfulness of Article VIII, § 10's prohibition on the expenditure of public funds on "sectarian" private schools is therefore sorely doubtful after *Carson*.
- **Employment-specific statutory protections**
    - Title VII of the Civil Rights Act of 1964 prohibits an employer from "fail[ing] or refus[ing] to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of

employment, because of such individual's … religion." 42 U.S.C. § 2000e-2(a)(1). "The term 'religion' includes all aspects of religious observance and practice, as well as belief …." *Id.* § 2000e(j).

- Title VII's prohibition on religious discrimination requires an employer "to reasonably accommodate to an employee's or prospective employee's religious observance or practice," unless doing so would impose an "*undue hardship* on the conduct of the employer's business." *Id.* § 2000e(j) (emphasis added).
  - For decades, lower courts applied language from the U.S. Supreme Court's decision in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977), to hold that an employer suffers an "undue hardship" in accommodating an employee's religious exercise whenever doing so would require the employer to "bear more than a de minimis cost."
  - In *Groff v. DeJoy*, 600 U.S. ___, 143 S. Ct. 2279 (2023), however, the Supreme Court narrowed the scope of the "undue hardship" exception to cover only those situations where an accommodation would substantially increase costs in relation to the conduct of the employer's business.
- The relationship between Title VII and the First Amendment poses unique challenges for government employers: Title VII requires government employers to grant religious exemptions to its employment policies absent substantial burdens on the employer, but granting exemptions likely subjects those same employment policies to strict scrutiny under the First Amendment.

- **Federal and State Religious Freedom Restoration Acts (RFRAs)**
  - Federal RFRA
    - RFRA was a reaction to *Smith*
      - The Supreme Court's decision in *Smith* jettisoning strict scrutiny for most free exercise claims was deeply unpopular.
      - Congress responded by passing RFRA almost unanimously in 1993.
      - Under RFRA, government action that "substantially burden[ed] a person's exercise of religion" was lawful only if the government could "demonstrate[ ] that the application of the burden" was "in furtherance of a compelling government interest" and was "the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(a), (b)(1), (2)

- The unambiguous purpose of RFRA purported to restore the *Sherbert*/*Yoder* strict scrutiny test for all free-exercise claims against any government—federal, state, or local. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430–31 (2006)

▪ Shortly after RFRA's enactment, however, the Supreme Court substantially narrowed its scope only to *federal* governmental action.

- In *City of Boerne v. Flores*, 521 U.S. 507 (1997), the U.S. Supreme Court held that RFRA's application to States and local governments was beyond Congress's power under Section 5 of the Fourteenth Amendment.
- As a result, RFRA no longer applies to States or local governments but continues to constrain federal government action—particularly federal regulations. See, *e.g.*, *Burwell v. Hobby Lobby, Inc.*, 573 U.S. 682 (2014).

o Virginia, like many other States, passed its own state RFRA—sometimes referred to as "Baby RFRAs"—in the aftermath of *City of Boerne*.

▪ Nearly half the States adopted Baby RFRAs on wide, bipartisan bases in response to *Smith* and *City of Boerne*.

▪ Virginia's RFRA, adopted in 2007, tracks the federal RFRA in prohibiting the state and local governments from "substantially burden[ing] a person's free exercise of religion … unless [the government] demonstrate that application of the burden to the person is (i) essential to further a compelling governmental interest and (ii) the least restrictive means of furthering that compelling governmental interest." Va. Code § 57.2-02(B).

▪ The Virginia Supreme Court has not interpreted the Virginia RFRA, but it recently heard arguments in *Vlaming v. West Point School Board*, No.211061, where one of the questions presented is how the Virginia RFRA ought to be interpreted.

▪ One of the most important questions for Virginia's RFRA is the scope of Subsection E.

- Va. Code § 52.02(E) provides that "nothing in [the Virginia RFRA] shall prevent any governmental institution or facility from maintaining health, safety, security or discipline."
- The only judicial interpretation of Subsection E read it to permit the government to burden the exercise of religion in dire emergencies. See

Lighthouse Fellowship Church v. Northam, 458 F. Supp. 3d 418 (E.D. Va. 2020).

- The Commonwealth in *Vlaming* argued that the exception enumerates the sorts of interest that qualify as "compelling governmental interests" for strict scrutiny, but that the government must still satisfy the narrow-tailoring requirement when asserting those interests as grounds for burdening an individual's free exercise.

- **Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA)**
  - RLUIPA is another important post-*Smith* federal religious liberty provision that, unlike the federal RFRA, applies to state and local government action.
  - In 2000, Congress once against unanimously adopted legislation intended to protect religious liberty from government intrusion.
  - Responding to *City of Boerne*, Congress relied on its power under the Commerce Clause and Spending Clause of Article I, § 8 rather than its enforcement power under § 5 of the Fourteenth Amendment (as it had for RFRA).
  - Like RFRA, RLUIPA re-imposes the *Sherbert*/*Yoder* strict-scrutiny test, but does so for only two situations: prisons and land-use/zoning decisions
    - For prisoners, RLUIPA forbids the government from "impos[ing] a substantial burden on the exercise of a" prisoner or other institutionalized person "unless the government demonstrates that imposition of the burden on that person … is in furtherance of a compelling governmental interest … and is the least restrictive means of further that compelling governmental interest." 42 U.S.C. § 2000cc-1(a).
      - The Court has interpreted RLUIPA to forbid States from requiring Muslim prisoners to shorten their beards, *Holt v. Hobbs*, 574 U.S. 352 (2015), and to forbid States from imposing a categorical ban on physical touch by a minister during the execution of a capital sentence, see *Ramirez v. Collier*, 595 U.S. ___, 142 S. Ct. 1264 (2022).
    - For land-use decisions, the government may not "impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person … unless the government demonstrates that the imposition of that burden … is in furtherance of a compelling governmental interest … and is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000cc(a)(1). The prohibition applies for any program that

receives federal financial assistance; that affects interstate, foreign, or Indian commerce; or that permits the government to make individualized assessment about how land will be used. *Id.* § 2000cc(a)(2).

- The Supreme Court has never addressed the land-use provision of RLUIPA, and it has been subject to widely varying interpretations as to what qualifies as a "land use regulation" and whether RLUIPA applies to eminent domain.

- **Virginia Human Rights Act**
  - The Virginia Human Rights Act prohibits discrimination in public accommodations and discrimination by employers on the basis of, among other things, religion. See Va. Code §§ 2.2-3904, 2.2-3905.
  - A federal court recently held that the VHRA does not contain an explicit waiver of sovereign immunity for Commonwealth agencies. *Mais v. Albemarle Cnty. Sch. Bd.*, ___ F. Supp. 3d___, No. 3:22-cv-51, 2023 WL 2143471 (Feb. 21, 2023).

Cases are described in further detail below.

Town of Greece v. Galloway

572 U.S. 565 (2014)

Issue

Does a town violate the Establishment Clause when it opens its Board meetings with a clergy-delivered prayer, if the Board has a nondiscrimination policy of clergy selection and does not regulate the content of the prayers?

Holding

The town's legislative prayer practice is constitutional. The Establishment Clause is not violated by longstanding traditional practices whose existence and longevity demonstrate their compatibility with the First Amendment. Here, nondiscriminatory legislative prayer qualifies as such a practice, and Greece allowed members of any religion to become the chaplain and offer legislative prayer. Greece need not require that the prayers be non-sectarian; indeed, that requirement would only create rather than solve Establishment Clause concerns.

Facts

Greece is a mid-sized city in upstate New York. Monthly town board meetings in Greece, New York, had long opened with a moment of silence. Beginning in 1999, the meetings opened with a roll call, the Pledge of Allegiance, and then a prayer given by a local clergy member. The clergy member—who was an unpaid volunteer—would change each month, and was chosen from congregations listed in a local directory. The Board allowed the clergy member to pray however he or she saw fit. The prayer program was open to all creeds, though in practice nearly all of the local congregations were Christian, and thus nearly all of the participating prayer givers had been Christian as well.

Procedural History

Two participants at the town board meetings brought suit in federal district court, alleging that the prayer program violated the First Amendment's Establishment Clause. They did not seek to end the prayer, but rather to limit the prayers to only "inclusive and ecumenical" prayers that referenced only a "generic God" and would not risk associating the local government with any one faith. The district court upheld the prayer practice on summary judgment. The Second Circuit reversed, holding that a reasonably observer would believe that Greece was endorsing Christianity.

Analysis

The Supreme Court had previously held, in *Marsh v. Chambers*, 463 U.S. 783 (1983), that a state legislature may open its session with a prayer delivered by a chaplain because the practice had long been understood as compatible with the First Amendment. Here, the Court clarified that *Marsh* did not merely permit a practice that would have been a constitutional violation if not for its historical practice. Rather, the First Amendment must be interpreted in reference to historical practices and understandings. Thus the long history of legislative prayer—dating back even to the First Congress—demonstrates that the practice was never understood by the ratifiers to be incompatible with the First Amendment. In Establishment Clause cases involving legislative prayer, or other practices with a long post-ratification history, "it is not necessary to define the precise boundary of the Establishment Clause where history shows that the specific practice is permitted."

The question here was whether Greece's prayer practice fits this long tradition of legislative prayer. Respondents had two arguments on this front: first, that legislative prayer does not approve of prayer containing sectarian language or themes, and second, that the setting of the Greece meetings creates social pressures that effectively require those present to remain or feign participation. Both of these arguments failed. Legislative prayer is not only constitutional when it is generic, and the tradition of legislative prayer has not included this requirement; instead, the history and tradition of legislative prayer has often allowed non-generic prayer. And to require prayers to be generic would require the government to regulate the conduct of the prayer, creating the very Establishment Clause questions that the court is trying to solve. Absent a pattern of prayer that over time denigrates, proselytizes, or betrays a government purpose, a challenge to the content of the prayer is unlikely to establish a constitutional violation. Nor did the town need to search beyond its borders for non-Christian clergy, as long as it maintained its non-discrimination policy for clergy selection.

As to the question of coercion, prayers would violate the First Amendment if they were coercive. But these were not. The tradition of legislative prayer allows those present to know that they are not compelled to join. And the primary audience for the prayers was not the public but rather the lawmakers. Where the prayer is delivered during the ceremonial portion of the meeting, the prayer acknowledges the role of religion in the lives of many present, and does not require others to participate.

Concurrences

Justice Alito, joined by Justice Scalia, concurred, arguing that the dissent was mistaken on two points. First, the dissent mistook the facts of the history of prayer in Greece. Second, the specific facts underlying the long tradition of legislative prayer undercut the dissent's objections.

Justice Thomas, joined by Justice Scalia, concurred in part and concurred in the judgment. He argued that the Establishment Clause should be read as a provision of federalism, and that under an original understanding of its meaning, legislative prayer does not implicate the Clause.

Dissents

Justice Breyer dissented, arguing that the majority opinion had not given enough weight to the relevant underlying facts in Greece's prayer program. For example, Greece was not an exclusively Christian town, so the miniscule number of prayers given by non-Christians was indicative of an Establishment Clause violation, and Greece did not affirmatively inform the non-Christian houses of worship about the ability to offer prayers.

Justice Kagan also dissented, with whom Justices Ginsburg, Breyer, and Sotomayor joined. She argued that the prayers given here were primarily sectarian in nature, and that Greece's failure to recognize religious diversity meant that the town was allowing public sectarian prayers in a particular religious direction, and this would violate the Establishment Clause.

Kennedy v. Bremerton School District

142 S. Ct. 2407 (2022)

Issues

Do the Free Exercise and Free Speech Clauses of the First Amendment protect a public employee's religious speech that does not arise from the scope of their employment?

Is the Establishment Clause of the First Amendment violated when a "reasonable observer" could interpret a public employee's religious speech as state endorsement of religion?

Holding

A government employee's brief, quiet, and personal prayers are doubly protected by the Free Exercise and Free Speech Clauses of the First Amendment. When regulating a sincere religious practice, a government policy presumptively violates the Free Exercise Clause if it is not neutral and generally applicable. Furthermore, if religious speech arises outside the scope of the individual's employment, it is protected by the Free Speech Clause.

To defend a policy that otherwise violates the Free Exercise and Free Speech clauses, the government entity must have a compelling state interest that justifies the policy. While avoiding a violation of the First Amendment's Establishment Clause could be a compelling interest, that standard is not met in this case. *Lemon v. Kurtzman*, 403 U.S. 602, and its progeny, which were "long ago abandoned" by the Court, suggested that the Establishment Clause is violated when a "reasonable observer" could think that the state endorsed religion. *Kennedy*, slip op. at 22. It does not include a heckler's veto that compels the government to purge religion from public life. Barring an effort to coerce religious practice, then, a government employee's personal prayer does not run afoul of the Establishment Clause.

Facts

As a person with sincere religious beliefs, high school football coach Joseph Kennedy knelt on the school's field, bowed his head, and silently prayed after games. Fearing that it would be sued for a violation of the First Amendment's Establishment Clause, the Bremerton School District told Kennedy to stop this religious practice. In compliance, Coach Kennedy only prayed during a brief time after the game where coaches were permitted to attend to private affairs. However, the District placed Kennedy on leave and prohibited him from engaging with the football program because he did not stop praying.

Procedural History

Kennedy sued the Bremerton School District, alleging that they violated the Free Speech and Free Exercise Clauses of the First Amendment. However, the Ninth Circuit held that the District's regulations did not violate the First Amendment: Kennedy's prayers were not private speech, and their policy was justified because the District had a compelling state interest to avoid violating the Establishment Clause.

Analysis

The Free Speech and Free Exercise Clauses of the First Amendment work together when religious speech is at issue. Once a plaintiff demonstrates an infringement of these rights, the defendant must show that a compelling state interest justifies the regulation and that it is narrowly tailored to achieve that goal.

Free Exercise Claim

To prove a Free Exercise violation, the plaintiff must show that "a government entity has burdened his sincere religious practice pursuant to a policy that is not 'neutral' or 'generally applicable.'" *Id.* at 12. The Court found that Kennedy discharged this burden. His prayers constituted a "sincerely motivated religious exercise," and the District's policy was not "neutral" or "generally applicable" because it was "specifically directed" at Kennedy's religious conduct. *Id.* at 13.

Free Speech Claim

To determine the validity of a public employee's Free Speech claim, the Court must pursue a two-step inquiry. First, it must determine whether the restricted speech is public or private. A public employee speaking pursuant to his official duties is not shielded from an employer's control by the First Amendment. However, he is protected when speaking "as a citizen addressing a matter of public concern." *Id.* at 15. If the employee's speech is private, the Court must then employ a "delicate balancing of the competing interests surrounding the speech and its consequences." *Id.*

The Court held that Kennedy's prayers were private speech. The prayers were not "ordinarily within the scope of his duties as a coach," and he did them at a time when coaches were free to engage in private speech. *Id.* at 17. Though the Court acknowledges the authority of coaches over students, it rejects an "excessively broad job description" for teachers and coaches that converts all their speech into "government speech subject to government control." *Id.* at 18.

Scrutiny Analysis

Notwithstanding these burdens, the District argued that its policy satisfied strict scrutiny, claiming that the policy served a compelling state interest by avoiding an Establishment Clause violation. The Court rejected this argument. The District's argument is based on the "long ago abandoned *Lemon*" test, which claims that the Establishment Clause "is offended whenever 'a reasonable observer' could conclude that the government has 'endorse[d]' religion." *Id.* at 22. In reality, the Establishment Clause "must be interpreted by reference to historical practices and understandings." *Id.* at 23. Historically, the Establishment Clause was not intended to purge religion from the public sphere. It contains "nothing like a 'modified heckler's veto, in which . . . religious activity can be proscribed based on 'perceptions' or 'discomfort.'" *Id.* at 22. If Coach Kennedy coerced students to pray, it would likely run afoul of the Establishment Clause. However, there was no evidence that he pressured students to pray.

Concurrences

Justice Thomas emphasized that the Court did not resolve two issues: first, it did not consider whether public employees have different Free Exercise rights than the general public; and second, it did not decide what standard of scrutiny applies for evaluating Free Exercise claims for religious speech.

Justice Alito noted that the opinion does not decide what standard applies to private speech under the Free Speech Clause. Instead, it only limits retaliation against Kennedy's private expression.

Dissent

Justice Sotomayor argued that the Court's opinion requires public schools to permit employees to "incorporate a public, communicative display of the employee's personal religious beliefs into a school event." *Id.* at 13 (Sotomayor, J., dissenting). In her view, this requires schools to violate the Establishment Clause, as these activities are likely to coerce students, who are "uniquely susceptible to 'subtle coercive pressure,'" into religious exercise. *Id.* at 15 (Sotomayor, J., dissenting).

Sherbert v. Verner

374 U.S. 398 (1963)

Issue

Whether provisions of a South Carolina statute that disqualified a Seventh Day Adventist from unemployment benefits abridged her right to the free exercise of religion under the Free Exercise Clause?

Holding

South Carolina could not constitutionally apply the eligibility provisions of the unemployment compensation statute so as to deny benefits to claimant who had refused employment, because of her religious beliefs, which would require her to work on Saturday.

Facts

Sherbert was a member of the Seventh-Day Adventist Church who was discharged by her South Carolina employer because she would not work on Saturday, the Sabbath Day of her faith. When she was unable to obtain other employment because she would not take Saturday work due to her religious beliefs, she filed a claim for unemployment compensation benefits under the South Carolina Unemployment Compensation Act. The Employment Security Commission found that her restriction upon her availability for Saturday work brought her within the provision disqualifying for benefits insured workers who fail, without good cause, to accept "suitable work when offered by the employment office or the employer."

Procedural History

The Commission's finding was sustained by the Court of Common Pleas for Spartanburg County. That court's judgment was in turn affirmed by the South Carolina Supreme Court, which rejected Sherbert's contention that, as applied to her, the disqualifying provisions of the South Carolina statute abridged her right to the free exercise of religion secured under the Free Exercise Clause of the First Amendment through the Fourteenth Amendment.

Analysis

The Court laid out a test for analyzing Sherbert's Free Exercise claim: for the government to succeed against Sherbert's constitutional challenge, either "her disqualification as a beneficiary represents no infringement by the State of her constitutional rights of free exercise" or "any incidental burden on the free exercise of [her] religion may be justified by a compelling state interest in the regulation of a subject within the State's constitutional power to regulate." *Id.* at 403 (cleaned up).

The Court first dealt with the question of whether the disqualification for benefits imposed a burden on Sherbert's free exercise of religion, holding that it clearly did. *Ibid.* Sherbert's ineligibility for benefits "derive[d] solely from the practice of her religion" and there was an "unmistakable" pressure upon her to "forego that practice." *Id.* at 404. The government was forcing her "to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand." *Ibid.*

The Court next turned to whether some compelling state interest would justify the substantial infringement of Sherbert's First Amendment right. "[N]o showing merely of a rational relationship to some colorable state interest would suffice," the Court held: "in this highly sensitive constitutional area, only the gravest abuses, endangering paramount interest, give occasion for permissible limitation." *Id.* at

406 (cleaned up). And, even if a compelling interest could be proffered, "it would plainly be incumbent upon the [government] to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights." *Id.* at 407. Here, the government's proffered interest—the possibility of spurious claims diluting the unemployment benefit fund and disrupting the scheduling of work—was not compelling, nor had the government shown its actions to be narrowly tailored to such interest.

Concurrences

Justice Douglas concurred to note the "profound[] important[ce]" of this case. *Id.* at 410. Specifically, because "many people hold beliefs alien to the majority of or society," the First Amendment protects their free exercise of religion from being "trod upon under the guise of 'police' or 'health' regulations reflecting the majority's views." *Id.* at 411.

Justice Stewart concurred in the result, believing the Court to have not succeeded in "papering over" a "double-barreled dilemma." *Id.* at 413. Specifically, because of the Court's case law on the Free Exercise Clause and the Establishment Clause, "there are many situations where legitimate claims under the Free Exercise Clause will run into head-on collision with the Court's insensitive and sterile construction of the Establishment Clause." *Id.* at 414.

Dissent

Justice Harlan, joined by Justice White, dissented, believing the majority's decision to be "disturbing both in its rejection of existing precedent and in its implications for the future." *Id.* at 418. The Court's holding "necessarily overrule[d]" prior precedent and would mean that the State is "constitutionally compelled to carve out an exception to its general rule of eligibility," which would create Establishment Clause problems. *Id.* at 421-23.

Wisconsin v. Yoder

406 U.S. 205 (1972)

Issue

Does the Free Exercise Clause protect members of the Amish community against the requirement to send their children to high school, if doing so would violate their genuinely-held religious belief?

Holding

The Free Exercise Clause protects the Amish community's right to remove their children from school after eighth grade and educate them instead in the Amish religion and way of life.

Facts

Wisconsin required compulsory school attendance by law until the age of 16. Members of the Amish religion refused to send their children to public or private school after eighth grade, deciding instead to provide them with informal vocational education designed to prepare them for life in the Amish community, based on their sincere belief that high school attendance was contrary to the Amish religion and way of life. Several members of the Amish religion were convicted of violating Wisconsin's compulsory school attendance law. The respondents argued that the First and Fourteenth Amendments protected them against the convictions.

Procedural History

The state trial court convicted the respondents of violating the compulsory school attendance law, over respondents' First Amendment and Fourteenth Amendment defenses. The Wisconsin Circuit Court affirmed the convictions. But the Wisconsin Supreme Court reversed the convictions, sustaining respondents' Free Exercise Clause claim.

Analysis

The question was whether the respondents' rights under the Free Exercise Clause outweigh the state's interest in compelling school attendance beyond eighth grade. Here, the Amish refusal to attend high school was based on a sincere religious belief, and their religion taught that entanglement and participation in secular life at that point (in contrast to learning and living the Amish way of life) risked endangering their souls. Thus the Wisconsin law affirmatively compelled them to perform acts at odds with the fundamental tenets of their religious beliefs.

The state's argument—that the First Amendment protects only religious beliefs and not religious actions—was mistaken. And the fact that this law applied to everyone similarly does not save the state's case, because a neutral regulation may, in application, unduly burden the free exercise of a particular religion. So the primary question remained whether the stat's interest in education is so compelling that the Amish religious practices must give way.

Here, the state had an interest in education. But the Amish did not oppose the idea of educating their children; instead, they educated them in a religious manner rather than a secular one. The state's interest in educating Amish children in the particular way that the state wanted, rather than in the way that the Amish wanted, was considerably weaker than its interest in ensuring that they were educated generally. The genuinely-held Amish beliefs outweighed the state's interest.

Concurrences

Justice Steward, joined by Justice Brennan, concurred, noting that Amish children were still legally allowed to attend high school if they so chose.

Justice White, joined by Justices Brennan and Steward, concurred, arguing that the case would be different if the religion prevented children from attending any school at any time and prohibited compliance with the educational standards set by the state.

Dissent

Justice Douglas dissented in part, arguing that the interests at play here were not only those of the parents and of the state, but also of the children, and that the child's own religious beliefs should control the outcome.

Employment Division v. Smith

494 U.S. 872 (1990)

Issue

Whether the Free Exercise Clause of the First Amendment permits the State of Oregon to include religiously inspired peyote use within the reach of its criminal prohibition on use of that drug, and thus permits the State to deny unemployment benefits to persons dismissed form their jobs because of religiously inspired use.

Holding

The Free Exercise Clause did not prohibit application of Oregon's drug laws to ceremonial ingestion of peyote and, thus, the State could deny claimants unemployment compensation for work-related misconduct based on the use of the drug, consistent with the Free Exercise Clause.

Facts

Two individuals were fired by a private drug rehabilitation organization because they ingested peyote, a hallucinogenic drug, for sacramental purposes at a ceremony of their Native American Church. Their applications for unemployment compensation were denied by the State of Oregon under a state law disqualifying employees discharged for work-related "misconduct."

Procedural History

The Oregon State Court of Appeals reversed the denial of unemployment compensation, holding that the denials violated the individuals' First Amendment Free Exercise rights. The Oregon Supreme Court affirmed. The United States Supreme Court vacated the judgment and remanded for a determination of whether sacramental peyote use is proscribed by Oregon's controlled substance law, otherwise refusing to decide whether such use is protected by the Constitution. On remand, the Oregon Supreme Court held that sacramental peyote use violated, and was not excepted from, the state drug laws, but concluded that the prohibition was invalid under the Free Exercise Clause.

Analysis

The Court held that, although a State would be prohibiting the free exercise of religion if it sought to ban the performance of (or abstention from) physical acts solely because of their religious motivation, the Free Exercise Clause does not relieve an individual of the obligation to comply with a law that incidentally forbids (or requires) the performance of an act that his religious belief requires (or forbids) if the law is not specifically directed to religious practice and is otherwise constitutional as applied to those who engage in the specified act for nonreligious reasons. The Court explained that it had only held the First Amendment to bar application of a neutral, generally applicable law to religiously motivated action when the cases involved not just the Free Exercise Clause alone, but that Clause in conjunction with other constitutional protections.

The Court further held that the individuals' claim for a religious exemption from the Oregon law could not be evaluated under the balancing test set forth in *Sherbert* and its progeny, whereby governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest. The Court held that that test was developed in a context—unemployment compensation eligibility rules—that lent itself to individualized governmental assessment of the reasons for the relevant conduct and was inapplicable to an across-the-board criminal prohibition on a particular form of conduct.

A contrary holding would create an extraordinary right to ignore generally applicable laws that are not supported by a compelling government interest on the basis of religious belief. Thus, the Court held, although it is constitutionally *permissible* to exempt sacramental peyote use from the operation of drug laws, it is not constitutionally *required*.

Concurrence

Justice O'Connor (with whom Justices Brennan, Marshall, and Blackmun joined as to part of the opinion) concurred in the judgment. She believed that, although the result was correct, the Court's holding "dramatically departs from well-settled First Amendment jurisprudence, appears unnecessary to resolve the question presented, and is incompatible with our Nation's fundamental commitment to individual religious liberty." *Id.* at 891.

Dissent

Justice Blackmun, joined by Justices Brennan and Marshall, dissented. He believed the majority opinion "effectuate[d] a wholesale overturning of settled law concerning the Religion Clauses of our Constitution," most notably the precedents establishing that a state statute that burdens the free exercise of religion "may stand only if the law in general, and the State's refusal to allow a religious exemption in particular, are justified by a compelling interest that cannot be served by less restrictive means." *Id.* at 907-08. The dissent largely agreed with Justice O'Connor's concurrence, except that it would have held the Free Exercise Clause *was* violated here.

Church of the Lukumi Babalu Aye, Inc. v. Hialeah

508 U.S. 520 (1993)

Issue

Whether city ordinances dealing with the ritual slaughter of animals violated the Free Exercise Clause?

Holding

The ordinances were not neutral or generally applicable, and the governmental interest assertedly advanced by the ordinances did not justify the targeting of religious activity.

Facts

A church and its congregants practiced Santeria, which employs animal sacrifice as one of its principal forms of devotion. After the church leased land in the City of Hialeah and announced plans to establish a house of worship there, the city council held an emergency public session and passed several city ordinances: (1) a resolution noting city residents' concern over religious practices inconsistent with public morals, peace, or safety, and declaring the city's commitment to prohibiting such practices; (2) an ordinance which incorporated Florida animal cruelty laws that had been interpreted to reach killings for religious reasons; (3) an ordinance which prohibited the possession, slaughter, or sacrifice of an animal if it was killed in "any type of ritual," but exempting licensed food establishments; (4) an ordinance prohibiting the sacrifice of animals; and (5) an ordinance defining "slaughter" as the killing of animals for food and prohibiting slaughter outside of areas zoned for slaughterhouses, with a few minor exemptions.

Procedural History

The Church filed a suit under 42 U.S.C. § 1983, alleging violations of their rights under, *inter alia*, the Free Exercise Clause. Although acknowledging that the ordinances were not religiously neutral, the district court ruled for the City, concluding, among other things, that compelling governmental interests in preventing public health risks and cruelty to animals fully justified the absolute prohibition on ritual sacrifice accomplished by the ordinances, and that an exception to that prohibition for religious conduct would unduly interfere with fulfillment of the governmental interest because any more narrow restrictions would be unenforceable as a result of the Santeria religion's secret nature. The court of appeals affirmed.

Analysis

The Court explained that *Smith* had held that a law that burdens religious practice need not be justified by a compelling governmental interest if it is neutral and of general applicability. Where such a law is not neutral or not of general applicability, however, it must undergo strict scrutiny: it must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest. Neutrality and general applicability are interrelated, and failure to satisfy one requirement is a likely indication that the other has not been satisfied.

The Court held that the ordinances' texts and operation demonstrate that they were not neutral, but had as their objection the suppression of Santeria's central element: animal sacrifice. That religious exercise was targeted was evidenced by the statements of concern and commitment in the resolution, and by the use of the words "sacrifice" and "ritual" in the ordinances. Moreover, the ordinances were gerrymandered to proscribe religious killings of animals by Santeria church members but to exclude almost all other animal killings. They also suppressed much more religious conduct than is necessary to achieve their stated ends: the legitimate governmental interests in protecting the public health and preventing cruelty to animals

could be addressed by restrictions stopping far short of a flat prohibition of all Santeria sacrificial practice.

Further, each of the ordinances pursued the City's governmental interests only against conduct motivated by religious belief and thereby violated the requirement that laws burdening religious practice must be of general applicability. The ordinances were substantially underinclusive with regard to the City's interest in preventing cruelty to animals, since they were drafted to forbid few animal killings but those occasioned by religious sacrifice.

Finally, the ordinances could not withstand strict scrutiny because they were overbroad and underinclusive in substantial respects, since the proffered objectives were not pursued with respect to analogous nonreligious conduct and the interests could be achieved by narrower ordinances that burdened religion to a far lesser degree. Where, as here, the government restricts only conduct protected by the First Amendment and fails to enact feasible measure to restrict other conduct producing substantial harm or alleged harm of the same sort, the governmental interests given in justification of the restriction cannot be regarded as compelling.

Concurrences

Justice Scalia (joined by Chief Justice Rehnquist) concurred in part and concurred in the judgment. He did not join one section of the opinion because "it departs from the opinion's general focus on the object of the *laws* at issue to consider the subjective motivation of the *lawmakers*, *i.e.*, whether the Hialeah City Council actually *intended* to disfavor the religion of Santeria." *Id.* at 558.

Justice Souter concurred in part and concurred in the judgment, writing that the case "turns on a principle about which there is no disagreement, that the Free Exercise Clause bars government action aimed at suppressing religious belief or practice." *Id.* at 559. He wrote separately, given the Court's reference to *Smith* in dicta, to "explain why the *Smith* rule is not germane to this case and to express [his] view that, in a case presenting the issue, the Court should re-examine the rule *Smith* declared." *Ibid.*

Justice Blackmun (joined by Justice O'Connor) concurred in the judgment. He disagreed with the *Smith*-based framework used by the Court: "I continue to believe that *Smith* was wrongly decided, because it ignored the value of religious freedom as an affirmative individual liberty and treated the Free Exercise Clause as no more than an antidiscrimination principle." *Id.* at 578. He would have achieved the same result by using the *Sherbert* balancing test.

Fulton v. City of Philadelphia

141 S. Ct. 1868 (2021)

Issue

Did the City of Philadelphia's refusal to contract with a religious foster care agency unless it agreed to certify same-sex couples as foster parents violate the Free Exercise Clause of the First Amendment?

Holding

The refusal of the City of Philadelphia to contract with the foster care agency for the provision of foster care services unless the agency agreed to certify same-sex couples as foster parents violated the Free Exercise Clause of the First Amendment.

Facts

The City of Philadelphia enters standard annual contracts with private foster care agencies to place children with foster families. One of the responsibilities of the agencies is certifying prospective foster families under state statutory criteria. Catholic Social Services (CSS) contracted with the City to provide foster care services for over 50 years. Because CSS believes that certification of prospective foster families is an endorsement of their relationship, it would not certify same-sex couples, given its religious belief that marriage is a sacred bond between a man and a woman. Following press coverage on the issue, the City informed CSS that unless it agreed to certify same-sex couples, the City would no longer refer children to the agency or enter a full foster care contract with it in the future. The City explained that CSS's refusal to certify same-sex couples violated both a non-discrimination provision in the agency's contract with the City as well as the non-discrimination requirements of a citywide Fair Practices Ordinance.

Procedural History

CSS and three affiliated foster parents filed suit seeking to enjoin the City's referral freeze on the grounds that the City's actions violated the Free Exercise and Free Speech Clauses of the First Amendment. The district court denied preliminary relief, reasoning that the contractual non-discrimination requirement and the Fair Practices Ordinance were both neutral and generally applicable under *Smith* and that CSS's Free Exercise claim was therefore unlikely to succeed. The court of appeals affirmed.

Analysis

The Court held that the City's actions burdened CSS's religious exercise by forcing it to either curtail its mission or to certify same-sex couples as foster parents in violation of its religious beliefs. The Court further held that this case fell outside of *Smith* because the City had burdened CSS's religious exercise through policies that do not satisfy the threshold requirement of being neutral and generally applicable.

The Court held that a law is not generally applicable if it invites the government to consider the particular reasons for a person's conduct by creating a mechanism for individualized exemptions. Where such a system of individual exemptions exists, the government may not refuse to extend that system to cases of religious hardship without a compelling reason. Here, the non-discrimination requirement of the City's standard foster care contract was not generally applicable because the contract permitted exceptions to the requirement at the sole discretion of the Commissioner. Further, the Fair Practices Ordinance did not apply to CSS's actions because foster care certification is not "made available to the public."

Because the contractual non-discrimination requirement burdened CSS's religious exercise and was not generally applicable, it was subject to strict scrutiny. The question, the Court held, is not whether the City has a compelling interest in enforcing its non-discrimination policies generally, but whether it has such an interest in denying an exception to CSS. Under the circumstances here, the City did not have a compelling interest in refusing to contract with CSS: CSS sought only an accommodation that would allow it to continue serving the children of Philadelphia in a manner consistent with its religious beliefs, rather than seeking to impose its beliefs on anyone else.

Concurrences

Justice Barrett (joined by Justice Kavanaugh and, largely, Justice Breyer) concurred. She noted that "Petitioners, their *amici*, scholars and Justices of this Court have made serious arguments that *Smith* ought to be overruled." *Id.* at 1882. She saw "no reason to decide in this case whether *Smith* should be overruled, much less what should replace it." *Id.* at 1883.

Justice Alito (joined by Justice Thomas and Justice Gorsuch) concurred in the judgment. He would have reached the question of whether *Smith* should be overruled, holding instead that *Smith* was "fundamentally wrong and should be corrected." *Ibid.*

Justice Gorsuch (joined by Justice Thomas and Justice Alito) also concurred in the judgment. He criticized the majority and Justice Barrett's concurrence for believing there was "no 'need' or 'reason' to address the error of *Smith* today." *Id.* at 1926.

Trans World Airlines, Inc. v. Hardison

432 U.S. 63 (1977)

Issue

What is the scope of the "reasonable accommodations" that employers must provide for religious employees under Title VII of the Civil Rights Act?

Holding

An employer must make "reasonable efforts to accommodate" a religious employee, but it does not need to bear any "undue hardship" to do so. The employer does not need to succeed in securing the accommodation: they must simply make a clear effort to find a compromise. In this case, the bona fide seniority system negotiated by the union impeded the employer's ability to accommodate the religious employee. This failure to accommodate, however, did not violate Title VII because it would require the employer to bear an "undue hardship," defined as anything "more than a *de minimis* cost."

Facts

While working for Trans World Airlines (TWA), Hardison joined the Worldwide Church of God, which required him to observe the Sabbath on Saturdays. To avoid conflicts with his demanding work schedule, Hardison transferred to a job that could accommodate his Sabbath. Later, he transferred into another job that could not accommodate him because he did not have sufficient seniority under the collective bargaining agreement to modify his schedule. After considering several accommodation options, Hardison and his supervisors could not find any satisfactory solution, so he was discharged for insubordination after refusing to report for work on Saturdays.

Procedural History

Hardison sued, arguing that TWA engaged in religious discrimination when they fired him, violating Title VII of the Civil Rights Act, and that his union failed to adequately represent him in the dispute. Hardison lost in the district court but won in the Eighth Circuit. Both courts agreed that Title VII's accommodation requirements were not an unconstitutional establishment of religion. However, the Eighth Circuit held that TWA did make reasonable efforts to accommodate Hardison because it rejected several reasonable alternatives—"any one of which would have satisfied its obligation without undue hardship." *Id.* at 76.

Analysis

The purpose of enacting Title VII was to "eliminate discrimination in employment; similarly situated employees are not to be treated differently solely because they differ with respect to race, color, religion, sex, or national origin." *Id.* at 71. Interpreting this provision, the EEOC issued a guideline stating that an employer was obligated "to make reasonable accommodations to the religious needs of employees . . . where such accommodations can be made without undue hardship on the conduct of the employer's business." *Id.* at 72. A similar definition was incorporated into the Civil Rights Act by Congressional Amendment in 1972. None of these provisions defined the extent of the accommodations that employers must provide, nor did they clarify what was meant by "undue hardship."

The Court held that TWA made "reasonable efforts to accommodate," and that the Eighth Circuit undersold its attempts to accomplish this goal. *Id.* at 77. TWA met with the plaintiff, approved accommodations for his observance of religious holidays, and authorized the union steward to search for

voluntary shift swaps. Even though they were unsuccessful in finding swaps, TWA "cannot be faulted for having failed to work out a shift or job swap for Hardison." *Id.* at 79-80.

Though a collective bargaining agreement or a seniority system cannot be used to intentionally discriminate against people, seniority systems generally do not violate Title VII when they cause conflict with religious observances. Seniority systems are meant to navigate tensions between employees in advance, so allowing a religious person to circumvent the seniority system would be unfair to more senior employees. Because there was no evidence of discriminatory intention in this case, the unequal treatment caused by the seniority system was acceptable. For "Hardison and others like him [to get] the days off necessary for strict observance of their religion," TWA would have to do so "only at the expense of others who had strong, but perhaps nonreligious, reasons for not working on weekends." *Id.* at 81. Because Hardison could not find someone to willingly swap shifts, "TWA would have had to deprive another employee of his shift preference at least in part because he did not adhere to a religion that observed the Saturday Sabbath. Title VII does not contemplate such unequal treatment." *Id.*

The Court noted that asking TWA to allow Hardison to work a four-day week would have constituted an "undue hardship." Because it would have to replace Hardison with other employees at a premium rate, the Court found that this requirement would "involve unequal treatment of employees on the basis of their religion." *Id.* at 84. "To require TWA to bear more than a *de minimis* cost in order to give Hardison Saturdays off is an undue hardship." *Id.*

Dissent

Justice Marshall argued that this decision "deals a fatal blow to all efforts under Title VII to accommodate work requirements to religious practices." *Id.* at 86. According to the majority, any accommodation for religious observers is invalid because it requires some "unequal treatment" of the religious person. But this is the point of the statute. "The accommodation issue by definition arises only when a neutral rule of general applicability conflicts with the religious practices of a particular employee." "To [grant an exemption from the neutral rule] will always result in a privilege being 'allocated according to religious beliefs,' unless the employer gratuitously decides to repeal the rule *in toto*." *Id.* at 88.

The TWA did not face undue hardship, as their efforts to seek an accommodation were insufficient. Furthermore, it is not reasonable to say that "one of the largest air carriers in the Nation" would have faced undue hardship by shuffling one person into this timeslot. *Id.* at 91. The "singular advantage" of the Court's opinion is to avoid a constitutional challenge by not asking if requiring employers to incur substantial costs to aid religious employees constitutes an Establishment Clause violation. *Id.* at 89. Even though the accommodations at issue in this case are relatively costless, the Court still considers these to be too costly of a burden.

Groff v. DeJoy

600 U.S. ___, 2023 WL 4239256 (2023)

Issue

At what point does an employee's need for religious accommodations impose an "undue hardship on the conduct of [an] employer's business," under Title VII of the Civil Rights Act of 1964?

Holding

An "undue hardship" under Title VII is shown when the need for religious accommodations is "substantial in the overall context of the employer's business." Slip op. at 16-17. The Supreme Court's decision in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977), provided contradictory definitions of the phrase "undue hardship," and many lower courts adopted a test defining an "undue hardship" as merely "more than a *de minimis* cost." *Groff*, slip op. at 3. The Court rejected this "*de minimis* cost" language. Instead, it requires employers to show that required accommodations would incur "substantial additional costs," contextually determined based on the business's specific nature, size, and cost structure. This means that an accommodation inciting hostility from coworkers or requiring minimal organizational costs is not enough to constitute "undue hardship"—it must impact the business more substantially.

Facts

Gerald Groff, an Evangelical Christian, believes that he should not work on Sundays for religious reasons. While working for the United States Postal Service, he refused to deliver mail on Sundays. Despite attempts at accommodations, USPS's memorandum governing Sunday deliveries led to Groff being repeatedly disciplined for failing to work on his Sabbath day.

Procedural History

Groff sued the Postmaster General under Title VII, alleging that USPS could have accommodated his Sabbath practice "without undue hardship on the conduct of [USPS's] business." However, the Third Circuit ruled against Groff, finding that the Supreme Court's decision in *Hardison* controlled. Following *Hardison*, the court held that an "undue hardship" occurs when an employer must "bear more than a de minimis cost" to accommodate an individual's religion. *Id.* at 174, n. 18. Because exempting Groff from work on his Sabbath created impositions on his coworkers and workplace, the Third Circuit found that the accommodations created an "undue hardship."

Analysis

The Court found that *Hardison* created confusion about what constitutes an "undue hardship." In *Hardison*, the Court focused most of the opinion on the question of the seniority rights negotiated in a collective bargaining agreement—not the definition of "undue hardship." The language defining this phrase as "more than a *de minimis* cost" conflicted with other parts of the opinion that "an accommodation is not required when it entails substantial costs or expenditures." *Hardison*, slip op. at 12 (internal quotation marks omitted). Though some lower courts recognized the "substantial costs" definition of "undue hardship," many others accepted the "*de minimis cost*" definition.

To clarify the law, the Court held that proving an "undue hardship" is more demanding than merely showing that a business incurred "more than *de minimis cost*." The "common parlance" meaning of the phrase "undue hardship" suggests something "more severe than a mere burden." *Id.* at 16. A "hardship" is "at a minimum, something hard to bear," and "the modifier 'undue' means that the requisite burden,

privation, or adversity must rise to an 'excessive' or 'unjustifiable' level." *Id.* Employers, then, may be required to bear "substantial additional costs" to accommodate their religious employees. *Id.* at 17.

Though the parties disputed the best way to phrase the new test, the Court emphasized that determining an "undue hardship" requires the court to consider all relevant factors to the employer's operations—including the details of requested accommodations, the size of the employer's business, and the magnitude of the costs. The Court leaves much of the EEOC's guidance on accommodations unaffected, but it declines to ratify them wholesale. The guidelines are only useful insofar as they help courts "resolve whether a hardship would be substantial in the context of an employer's business in the commonsense manner that it would use in applying any such test." *Id.* at 19.

To prove an "undue hardship," the employer must show more than mere "coworker impacts." If a religious person's accommodations affect their coworkers, the only issues that are cognizable for "undue hardship" analysis are those that impact the "conduct of the business." *Id.* at 19. Certain coworker conflicts, especially those stemming from a coworker's animosity towards religion or religious people, are off the table as evidence of undue hardship. As the Court states, "If bias or hostility to a religious practice or a religious accommodation provided a defense to a reasonable accommodation claim, Title VII would be at war with itself." *Id*. at 20.

Finally, an employer faced with a request must consider all potential reasonable accommodations. It is not enough for an employer to decide that they cannot force other employees to work overtime to cover a religious Sabbath request. "Faced with an accommodation request like Groff's, . . . [c]onsideration of other options, such as voluntary shift swapping, would also be necessary." *Id.* at 20.

Concurrence

Justice Sotomayor emphasizes that the core holding of *Hardison* still stands, in part on grounds of *stare decisis*: an accommodation that would "deprive other employees of their seniority rights under a collective-bargaining agreement" or incur other substantial costs is an "undue hardship." *Id.* at 1 (Sotomayor, J., concurring).

Trinity Lutheran Church of Columbia, Inc. v. Comer

137 S. Ct. 2012 (2017)

Issue

Does the Free Exercise Clause of the First Amendment prevent a government entity from denying a religious entity an otherwise-available public benefit on account of its religious status?

Holding

The Free Exercise Clause requires that courts subject to strict scrutiny a government action that denies publicly-available benefits to an entity solely because of the entity religious character.

Facts

Missouri's Department of Natural Resources offered reimbursement grants to nonprofits that installed playground surfaces made from recycled tires (the "Scrap Tire Program"). The Missouri Constitution required that "no money shall ever be taken from the public treasury . . . in aid of any church, section or denomination of religion." The Director of the Department of Natural Resources interpreted this to mean that religious institutions were ineligible for participation in the Scrap Tire Program. Trinity Lutheran Church Child Learning Center was a Missouri preschool and daycare center that had merged with a church and operated on church property. When Trinity Lutheran applied to participate in the Scrap Tire Program to replace a gravel playground with a rubber surface, Missouri denied the application on the grounds that it denied all such applications from religious entities. Trinity Lutheran would have received the benefit of the program but for the fact that it was owned or controlled by a church.

Procedural History

Trinity Lutheran sued the Director of Missouri's Department of Natural Resources, asserting free exercise claims and seeking declaratory and injunctive relief. The district court dismissed Trinity Lutheran's case and the Ninth Circuit affirmed.

Analysis

The Free Exercise Clause requires courts to use a strict scrutiny analysis for any government action that discriminates based on religious status. When a government denies publicly-available benefits to an organization based on the organization's religious status, the government thereby discriminates based on religious status; in other words, the government discriminates on this basis and subjects itself to strict scrutiny if it would give an entity a public benefit but for its religious character. Trinity Lutheran and other religious organizations have a right to participate in a government benefit program "without having to disavow its religious character." A prior case (*Locke v. Davey*, 540 U.S. 712 (2004)) had allowed the government to deny benefits based on what the recipient planned to *do* with those benefits, including to use them for religious purposes; but here, the government denied benefits based on what the recipient *was*—a religious organization. A state subjects itself to strict scrutiny when it effectively asks an organization to renounce its religious character in order to be eligible for a public benefit.

Nor did the policy here withstand a strict scrutiny analysis. Here, the state would need to show an interest "of the highest order." But the state's stated interest of avoiding Establishment Clause concerns is insufficient and does not qualify as compelling. A state's interest in avoiding Establishment Clause entanglements more thoroughly than the Constitution requires is not an interest "of the highest order" that would justify discriminating against religious entities. The policy is unconstitutional.

Concurrences

Justice Thomas, joined by Justice Gorsuch, concurred and also would overturn *Locke* to the extent that it had allowed "even a mild kind" of religious discrimination.

Justice Gorsuch, joined by Justice Thomas, concurred and offered two qualifications. First, he doubted that the majority's distinction between religious status and religious action would be workable in practice, and also doubted whether the First Amendment allows this distinction. Second, he wanted to clarify that the majority's holding applied more broadly than merely to cases involving playground or other child-related cases.

Justice Breyer concurred in the judgment, but emphasized that the particular public benefit here would secure and improve the health and safety of children, and thus was the type of government-provided benefit to which religious entities should have access.

Dissent

Justice Sotomayor, joined by Justice Ginsburg, dissented and emphasized that the majority's opinion "profoundly changes that relationship [between church and state]" by holding that the Constitution requires the government directly to fund a church. The dissent argued that the majority's opinion weakened the country's commitment to the separation of church and state. The dissent would have held that the direct funding of a religious entity raised separate Establishment Clause concerns, and thus state "prophylactic rule[s]" against the use of public funds for houses of worship were permissible rather than unconstitutionally discriminatory.

Espinoza v. Montana Dep't of Revenue

140 S. Ct. 2246 (2020)

Issue

Does the Free Exercise Clause prohibit a state from applying a no-aid provision that prevents religious schools from receiving funds from a state-funded scholarship program?

Holding

The Free Exercise Clause does not allow a state to apply a no-aid provision to schools such that religious schools would be prohibited from receiving scholarship funds for which they would be eligible if they had instead been secular schools.

Facts

The Montana Legislature created a program to grant tax credits for donations to organizations that gave scholarships for private school tuition. But the Department of Revenue also created "Rule 1," which prevented families from using the scholarships at religious schools, to comply with the Montana Constitution's prohibition on government aid to sectarian schools (the "no-aid provision"). Rule 1 blocked three mothers from using the scholarship funds for tuition at their children's private Christian school.

Procedural History

The three mothers sued the Montana Department of Revenue in state court, claiming that Rule 1 was based on a mistake of law, and also that it discriminated against them based on their religious beliefs and the religious views of their school. The district court enjoined Rule 1 and held that the rule had been based on a mistake of law (specifically, that the Department had mistaken tax credits to apply to the Montana Constitution's prohibition on funding for sectarian schools). The Montana Supreme Court reversed, and held that the department had exceeded its authority in promulgating Rule 1, that the no-aid provision applied broadly in the absence of Rule 1, and that therefore the no-aid provision prohibited the scholarship program from existing at all—either to religious or nonreligious schools.

Analysis

The Free Exercise Clause requires courts to apply strict scrutiny whenever a government prohibits otherwise-eligible recipients from receiving a public benefit solely because of their religious status. Here, the no-aid provision prevented religious schools from receiving an otherwise-available public benefit (scholarship funds) solely because of the religious character of the schools. The provision also prevented parents from using the funds to send their children to certain schools rather than others based entirely on the religious status of the school in question. This case is about religious status rather than religious action because the Montana Supreme Court had applied the no-aid provision solely by reference to the school's religious status; the case is unlike *Locke v. Davey*, 540 U.S. 712 (2004), because that case involved prohibition of funds for what was the "essentially religious endeavor" of training a minister, whereas this case involves a prohibition generally on funds going to schools that happen to be religious.

Applying strict scrutiny, the majority held that the state's interest in separating church and state "more fiercely" than the U.S. Constitution requires "cannot qualify as compelling in the face of the infringement of free exercise here." (cleaned up). And the Department's argument that the no-aid provision promoted religion failed, because a religious infringement cannot be justified by the state's view that the

infringement instead advanced religious interests. Moreover, the state's interest in public education was underinclusive because that objective was only being pursued here as to secular, rather than sectarian, institutions.

Finally, the state's argument that there was no violation here because the state eliminated the scholarship program altogether also failed. The legislature created the program and never ended it; rather, a court eliminated the program pursuant to an unconstitutional provision of law. The Montana Supreme Court's decision thus did not rest on adequate and independent state law grounds, and required reversal.

Concurrences

Justice Thomas, joined by Justice Gorsuch, concurred to argue that the Court's interpretation of the Establishment Clause hampered free exercise rights. The concurrence stated that overly-broad Establishment Clause jurisprudence (including *Locke*) caused cases like this one to arise, and thus thwarted rather than promoted equal treatment of religion.

Justice Alito also concurred, writing separately to argue that a law's original motivation should have no bearing on the present constitutionality of that law.

Justice Gorsuch also concurred, writing separately to argue that the majority's continued reliance on the distinction between religious status and religious activity was not a tenable distinction.

Dissents

Justice Ginsburg, joined by Justice Kagan, dissented, arguing that the Montana Supreme Court's elimination of the program in its entirety results in equal treatment between religious and nonreligious schools, thereby foreclosing a free exercise challenge.

Justice Breyer also dissented, joined in part by Justice Kagan, and argued that the majority's view risked entangling states in Establishment Clause conflicts, and that *Locke* controlled this case to the opposite conclusion.

Justice Sotomayor also dissented, arguing that the majority had decided a question not presented, and that its reasoning was wrong for the same reason as its decision in *Trinity Lutheran* had been wrong.

Carson v. Makin

142 S. Ct. 1987 (2022)

Issue

Does state law violate the Free Exercise Clause when the state provides a tuition-assistance program, but requires parents to use the funds only on "nonsectarian" schools?

Holding

The Free Exercise Clause prohibits a state from operating a tuition-assistance program that provides tuition assistance only to nonsectarian schools. The principles of *Trinity Lutheran* and *Espinoza* require this result; when a state provides a public benefit, such as tuition assistance, it cannot limit this benefit based on the religious nature of the entity that would receive the benefit. And a state cannot avoid this conclusion simply by casting status-based discrimination as activity-based discrimination.

Facts

Maine enacted a tuition-assistance program for parents who live in a school district that lacks a secondary school, under which parents designated their child's secondary school of choice and the school district transmitted payments to that school to alleviate tuition costs. But Maine limited these tuition assistance payments to "nonsectarian" schools. Several parents who lived in districts that lacked a secondary school sought tuition assistance from the program to send their children to private religious schools. But the Maine Department of Education denied them tuition assistance because the schools were sectarian.

Procedural History

The parents filed a § 1983 action against Maine's Commissioner of the Department of Education, alleging that the requirement violated the U.S. Constitution's Free Exercise Clause, Establishment Clause, and Equal Protection Clause of the Fourteenth Amendment. The district court granted the Commissioner's motion for summary judgment. The First Circuit affirmed, distinguishing the case from *Espinoza* on the grounds that first, Maine barred the tuition based on the religious use of the funds rather than on schools' religious status, and second, that Maine had tried to provide a rough equivalent of the public-school education that Maine is constitutionally permitted to keep secular.

Analysis

The Free Exercise Clause requires that courts impose strict scrutiny on governmental decisions to exclude religious entities from eligibility for otherwise-available public benefits. The Court stated that, for the same reasons that the Court explained in *Trinity Lutheran* and *Espinoza*, that principle applies to this case as well. Maine had offered its citizens a public benefit in the form of tuition assistance, under which religious schools were ineligible "solely because of their religious character." Thus the Court applied strict scrutiny to the program.

Appling this strict scrutiny analysis, Maine needed to present "interests of the highest order" and actions that were "narrowly tailored" in pursuit of those interests. Here, Maine's interest in promoting stricter separation of church and state than the U.S. Constitution requires is not a sufficient interest because a state's "antiestablishment interest does not justify enactments that exclude some members of the community from an otherwise generally available public benefit because of their religious exercise."

The majority disagreed with the First Circuit's attempts to distinguish this case from *Espinoza*. First, the First Circuit's holding that the private tuition funds were essentially public-education equivalency was mistaken, both because the statute expressed no such thing, and also because the private schools receiving tuition assistance were substantially different (including different curricula and teacher certifications) that were completely different from those in public schools. The only substantial similarity was that they must both be secular. And second, the First Circuit's holding that the program involved "religious action" rather than "religious status" was mistaken, because neither *Espinoza* nor *Trinity Lutheran* held that discrimination against "religious action" violated the Free Exercise any less than those based on "religious status." *Locke v. Davey* turned on the fact that the recipient tried to use state funds for training to join the clergy, which was effectively religious training; no such facts applied here.

Dissents

Justice Breyer, joined by Justice Kagan and in part by Justice Sotomayor, argued in dissent that the majority's focus on the Free Exercise Clause effectively ignored the Establishment Clause and the interplay between the two. As a result, the majority unreasonably ignores a state's legitimate interest in avoiding entanglements with the Establishment Clause. Moreover, neither *Espinoza* nor *Trinity Lutheran* require this result.

Justice Sotomayor also dissented, arguing *Trinity Lutheran* and its progeny have been wrongly decided, that the consequences of this line of cases are substantial, and that the benefit at issue here is public education which the Establishment Clause requires to be secular.

Locke v. Davey

540 U.S. 712 (2004)

Issue

When a State offers a scholarship for higher education, does the Free Exercise Clause permit the State to exclude the scholarship funds from being used to pursue a devotional theology degree?

Holding

The Free Exercise Clause permits a State to exclude scholarship funds from being used to pursue a devotional theology degree, even if the scholarship can be used to study any other topic.

Facts

Washington State established the Promise Scholarship Program to help gifted students pay for postsecondary education expenses. But in accordance with the Washington Constitution, students could not use this state-funded scholarship to pursue a devotional theology degree. Joshua Davey received the scholarship and chose to attend Northwest College, a private Christian college, and decided to double major in pastoral ministries and business administration. Pastoral ministries was a devotional theological degree that was excluded under the Promise Scholarship Program. Washington stopped sending Davey the scholarship funds as a result.

Procedural History

Davey brought action in federal district court to enjoin Washington from refusing to award the scholarship funds, arguing that the denial here violated the Free Exercise, Establishment, and Free Speech Clauses of the First Amendment, as well as the Equal Protection Clause of the Fourteenth Amendment. The district court denied Davey's request for a preliminary injunction, and ruled against him on summary judgment. The Ninth Circuit reversed, holding that Washington had singled out religion for unfavorable treatment, and that under *Lukumi* the state's antiestablishment concerns were not sufficiently compelling to support the denial.

Analysis

This funding scheme comported with the First Amendment, because although the State could permit the scholars to pursue a degree in devotional theology, it was not required to permit recipients to pursue such a degree. The court distinguished *Lukumi* because there, the state's law sought to suppress particular practices in a specific religion, whereas here, it created no sanctions for religions practice and did not deny ministers the right to participate in the community. Instead, the State had "merely chosen not to fund a distinct category of instruction."

The Court held that training somebody to lead a congregation was essentially a religious endeavor, and was as akin to a religious calling as it was to an academic pursuit. The Washington Constitution drew a more stringent line than that in the U.S. Constitution, but here, the State had a strong antiestablishment interest, because the State would be directly funding a religious vocation. And rather than show hostility to religion, the program here permitted students to attend religious schools. Davey's claims thus lacked the presumption of unconstitutionality and therefore failed.

Dissents

Justice Scalia, joined by Justice Thomas, dissented, arguing that *Lukumi* was irreconcilable with the result in this case. He argued that when a State makes a public benefit generally available, the First Amendment requires that this benefit is the baseline against which burdens on religion are measured, so the State violates the law when it denies the benefit based on religion. Here, by singling out religion as the disfavored study, Washington effectively treated religious study to a tax, and thereby violated the First Amendment.

Justice Thomas also dissenting, arguing that the study of theology did not necessarily implicate religious devotion here; the definition in the law also would deny the study of theology from the secular perspective, but the litigants and the Court had interpreted it only to deny the study from the religious perspective, and he dissented to that extent.

City of Boerne v. Flores

521 U.S. 507 (1997)

Issue

Did Congress exceed the scope of its enforcement power under the Fourteenth Amendment by passing the Religious Freedom Restoration Act (RFRA)?

Holding

Under the enforcement authority conferred in §5 of the Fourteenth Amendment, Congress can pass legislation to enforce constitutional rights against the states. This broad enforcement power, though, is limited to remedial legislation. By explicitly rejecting the Supreme Court's holding in *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), RFRA represented a Congressional effort to change the meaning of the Free Exercise Clause. Accordingly, RFRA was not remedial. Congress exceeded the scope of its enforcement power, rendering RFRA unconstitutional as applied to the states.

Facts

On behalf of a rapidly growing Catholic church in Boerne, Texas, the Archbishop of San Antonio applied for a building permit to expand the church's building. However, the Boerne City Council had designated the area around the church as a historic district, preventing the Archdiocese from modifying the building.

Procedural History

The Archbishop sued on several grounds, including the argument that the historic district designation violated RFRA. The Western District of Texas found that Congress had exceeded the scope of its enforcement authority under §5 of the Fourteenth Amendment when it passed RFRA. The Fifth Circuit reversed, holding that RFRA was constitutional.

Analysis

In *Sherbert v. Verner*, 374 U.S. 398 (1963), the Supreme Court held that a generally applicable law that "substantially burden[s] a religious practice" violates the Free Exercise Clause of the First Amendment, so long as the burden is not "justified by a compelling state interest." *Flores*, 521 U.S. at 513. However, the Court changed course in *Employment Div. v. Smith*. Because the *Sherbert* test creates "a constitutional right to ignore neutral laws of general applicability" on the basis of religion, the Court advanced a bright line rule: only laws that facially target religious practices violate the Free Exercise Clause.

Congress passed RFRA to reinstate the *Verner* test, in opposition to the *Smith* decision. RFRA prohibits both the federal government and the states from "substantially burdening a person's exercise of religion even if the burden results from a rule of general applicability." *Id.* at 515. If a neutral law burdened religion, government would have to demonstrate that the rule "is in furtherance of a compelling governmental interest" and that it "is the least restrictive means" of advancing that interest. *Id.* at 515-16.

When passing RFRA, Congress relied upon §5 of the Fourteenth Amendment, which enumerates the power to enforce the amendment "by appropriate legislation." *Id.* at 517. Though this enforcement power is broad, it is not unlimited: it only extends to provisions that enforce provisions of the Fourteenth Amendment. Put differently, it is a "remedial," not substantive, power. *Id.* at 519. The Court acknowledges that "the line between measures that remedy . . . unconstitutional actions and measures that

make a substantive change in the governing law is not easy to discern." *Id.* at 519. Nonetheless, "the distinction exists and must be observed." *Id.* at 520.

Because RFRA "alters the meaning of the Free Exercise Clause," it "cannot be said to be enforcing [it]." *Id.* at 519. The Court embraces *Employment Div. v. Smith* as the controlling interpretation of the First Amendment, so restoring the *Sherbert* test would contravene the meaning of the First Amendment. "Congress does not enforce a constitutional right by changing what the right is." *Id.* at 519.

Furthermore, RFRA is not an exercise of remedial power because of the incongruity between its means and ends. RFRA is "so out of proportion to a supposed remedial object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." *Id.* at 532. Because RFRA affirms exemptions against neutral and generally applicable laws, "[s]weeping coverage ensures its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter." *Id.* Unlike the Voting Rights Act, which was specifically targeted towards regions that had historically discriminated against racial minorities, RFRA applies at all levels of the government—"a considerable congressional intrusion into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens." *Id.* at 534. As it will be "difficult to contest" claims that religious exercise is burdened, *Sherbert*'s compelling interest test ("the most demanding test known to constitutional law") will make it so that "many laws will not meet the test." *Id.*

Ultimately, RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance." *Id.* at 536. It does not even provide "a discriminatory effects or disparate-impacts test," because it would challenge "numerous state laws, such as the zoning regulations at issue here." *Id.* If Congress could pass RFRA, "no longer would the Constitution be 'superior paramount law, unchangeable by ordinary means.' It would be . . . alterable when the legislature shall please to alter it.'" *Id.* at 529.

Concurrences

Justice Stevens argued that RFRA violates the Establishment Clause by privileging religious entities over nonreligious entities in the face of neutral, generally applicable laws.

Justice Scalia argued that the historical record supported the Court's *Smith* decision, permitting this case to proceed under the assumption that *Smith* provides the correct view of the First Amendment.

Dissents

Justice O'Connor agreed that the appropriate question is whether RFRA is an appropriate use of Congress's §5 enforcement power under the Fourteenth Amendment. However, she argued that *Smith* misinterprets the Free Exercise Clause. As such, it cannot be used as a yardstick to evaluate the constitutionality of RFRA. "The Free Exercise Clause is not simply an antidiscrimination principle that protects only against those that laws that single out religious practice for unfavorable treatment." *Id.* at 46 (O'Connor, J., concurring). The historical record of the American founding supports the view that the Clause guarantees "the right to participate in religious practices and conduct without impermissible governmental interference, even when such conduct conflicts with a neutral, generally applicable law." *Id.* Accordingly, the Court should direct the parties to brief this issue and reargue the case.

Justice Souter wanted to dismiss the writ of certiorari for this case, as reconsideration of the *Smith* decision would be required before reaching the enforcement power question.

Justice Breyer found the *Smith* question to be essential. Therefore, reaching the question about Section Five of the Fourteenth Amendment was unnecessary.

Burwell v. Hobby Lobby Stores, Inc.

573 U.S. 682 (2014)

Issues

Does a mandate requiring employers to provide contraceptive services to its employees, in violation of the business owners' sincerely held religious beliefs, run afoul of the Religious Freedom Restoration Act of 1993 (RFRA)?

Holding

RFRA bars this mandate. Owners of for-profit companies do not forfeit protections of their religious beliefs when they decide to organize their business as a corporation. Under RFRA, the contraceptive mandate outlined by the Department of Health and Human Services (HHS) substantially burdened the exercise of religion by forcing business owners to choose between millions of dollars in fines or violating their religious beliefs. Though the HHS regulation likely serves the compelling government interest of providing women with healthcare, it is not the least restrictive means of serving that interest.

Facts

Under the Affordable Care Act of 2010 (ACA), employers with 50 or more full-time employees were required to offer a group health insurance plan that provides "minimum essential coverage." *Id.* at 696. If they do not, they risked incurring heavy fines. As part of this essential coverage, employers had to provide women with "preventive care and screenings" without "any cost sharing requirements," defined to include contraception. *Id.* at 697. Religious employers were explicitly exempted from the contraception requirements, and certain religious nonprofits are also implicitly exempted. *Id.* at 698.

The burdened businesses in this consolidated case were for-profit corporations helmed by people whose religious beliefs dictate that life begins at conception. The contraception mandate required them to violate those beliefs by following the law, or incur fines in the millions of dollars.

Procedural History

The businesses separately sued HHS under RFRA and the Free Exercise Clause. Against Conestoga Wood Specialties, the Third Circuit denied a motion for preliminary injunction, holding in a contested opinion that "for-profit, secular corporations cannot engage in religious exercise" under RFRA or the First Amendment. *Id.* at 702. Against Hobby Lobby, the Tenth Circuit granted a preliminary injunction, holding that Hobby Lobby is a person under RFRA. Hobby Lobby had established a likelihood of success on their RFRA claim because the mandate substantially burdened their exercise of religion. Furthermore, HHS had not demonstrated a compelling interest in enforcing the mandate against Hobby Lobby.

Analysis

RFRA applies to "a person's exercise of religion." *Id.* at 707 (internal quotation marks omitted). Here, the Court held that the definition of a "person" includes corporations. Using a "familiar legal fiction," the Court argues that recognizing the protection of the religious exercise of corporations ultimately "provide[s] protection for human beings." *Id.* at 706. Corporations cannot be separated from the people who own, run, and work for them. Furthermore, the Dictionary Act defines person expansively to include corporations, and all parties conceded that a nonprofit corporation could be a "person" under the act. *Id.* at 708. Therefore, it logically follows that a for-profit corporation should not be excluded.

Though HHS argued that corporations cannot exercise religion, the Court found that they can. The fact that these businesses are for-profit enterprises does not diminish religious liberty interests implicated in the marketplace. For profit corporations engage in activities beyond making money, and "modern corporate law does not require for-profit considerations to pursue profit at the expense of everything else." *Id.* at 711-12. Furthermore, the line between nonprofit and for-profit corporations is blurry, so the Court refuses to interpret RFRA as requiring a distinction between the two.

RFRA does not precisely reconstruct the pre-*Employment Division v. Smith*, 494 U.S. 872 (1990), legal landscape. Prior to Smith, no case had explicitly held that a for-profit corporation has free exercise rights. However, the text of the original RFRA and its amendment through the Religious Land Use and Institutionalized Persons Act (RLUIPA) are geared towards broadly protecting religious exercise, so it does not follow that a for-profit corporation should necessarily be excluded.

HHS argued that ascertaining the sincerity of a corporation's religious belief would be difficult, but the Court disagreed. RLUIPA demonstrates that Congress was "confident in the ability of federal courts to weed out insincere claims." *Id.* at 718.

Given that RFRA applies, the Court then found that the HHS contraceptive mandate "substantially burden[s]" the exercise of religion. If business do not comply with the mandate, they will be subjected to millions of dollars in fines. That burden cannot be mitigated by any alternative cost structures or institutional practices, as defying the mandate would force businesses to incur either fines or excessive additional costs to provide healthcare for their employees in accordance with the ACA.

HHS argued that the connection between providing health insurance and destroying embryos is too attenuated to sustain a claim. However, the Court held that making this inquiry would require courts to impermissibly adjudicate religious and moral questions, which they do not have the authority to do.

Finally, the Court held that the law is not the least restrictive means by which to achieve the end of promoting public health. Because the "least-restrictive means standard is exceptionally demanding," the Court finds that it is not satisfied here. *Id.* at 728. The federal government could bear the costs of this policy more easily than businesses. Alternatively, HHS could simply adopt its accommodation for nonprofit organizations with religious objectives when considering for-profit entities. The dissent argued that this would lead to businesses falsely claiming substantial religious objections on many healthcare requirements and employment practices. Nonetheless, the Court noted that its holding is narrowed by its deference to compelling state interests that limit burdens on religion as much as possible.

Concurrence

Justice Kennedy emphasized that for this case specifically, the government's burden of accommodating religious liberty is not high enough to justify placing such a substantial burden onto the employers.

Dissents

Justice Ginsburg argued that *Smith* should preclude the majority's position. The Court is making RFRA far broader than it was otherwise intended to be, striking down a broad range of otherwise valid statutes with incidental costs for religious people.

Justices Breyer and Kagan separately dissented to note that the Court did not need to decide the issue of whether for profit corporations or their owners can bring claims under RFRA.

Holt v. Hobbs

574 U.S. 352 (2015)

Issues

Does the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) prohibit a Muslim inmate from growing a beard in accordance with his religious beliefs?

Holding

RLUIPA prohibits a state or local government from actions that "substantially burden the religious exercise of an institutionalized person unless the government demonstrates that the action constitutes the least restrictive means of furthering a compelling governmental interest." *Id.* at 356. The Arkansas Department of Corrections' grooming policy substantially burdened the inmate's free exercise. Furthermore, the grooming policy does not seem to be the least restrictive means of furthering its governmental interest in identifying prisoners and preventing the smuggling of contraband.

Facts

Gregory Holt (petitioner), also known as Abdul Maalik Muhammad, wanted to grow a beard in keeping with his Muslim religious beliefs. However, the Arkansas Department of Corrections had a grooming policy that prohibits him, an inmate, from growing out his beard. Though his beliefs required him not to trim the beard at all, he compromised by offering to only grow a 1/2-inch beard. Nonetheless, his request was denied, and he was threatened with punishment from the prison system.

Procedural History

The District Court and the Eighth Circuit dismissed the petitioner's *pro se* complaint. Though the District Court granted a preliminary injunction, a Magistrate Judge recommended that the preliminary injunction be vacated and that the claim be dismissed for failure to state a claim. The Eighth Circuit briefly noted that the grooming policy was the least restrictive means of furthering the prison's compelling security interests, and that courts should generally be deferential to the expertise of prison authorities.

Analysis

In contrast to the District Court, the Supreme Court held that the policy burdened petitioner's sincere religious beliefs. No one disputes that the petitioner's religious belief that his faith requires him to grow a beard was sincere. Because the Department's policy requires him to shave his beard, therefore, the policy "puts petitioner to this choice: between his religious beliefs and disciplinary action." *Id.* at 361.

The District Court committed three errors when finding that the petitioner's free exercise was not burdened. First, it suggested that the availability of other religious accommodations, like a prayer rug and dietary accommodations, justified burdening this particular religious exercise. Second, it said that the burden was only slight because "his religion would 'credit' him for attempting to follow his religious beliefs, even if that attempt proved to be unsuccessful." Finally, the District Court found that not all Muslim men believe that they must grow beards. However, "RLUIPA provides greater protection" than even other lines of First Amendment cases, which consider "alternative means of practicing religion" as justifications for burdening a religious exercise. *Id.* at 361-62. It covers beliefs that are not shared by all members of a particular sect, and it applies to exercises of religion that are important, even if not "compelled" by a person's tradition.

Once the petitioner established that his religious exercise was substantially burdened, the burden shifted to the Department of Corrections to show 1) that its policy furthered a compelling government interest, and 2) that it was the least restrictive means of doing so.

The Department alleged two compelling interests that the grooming policy protected, but the Court found neither of them to overcome RLUIPA's demands. The compelling interest to prevent the smuggling ofcontraband into the prison is important, but it "is hard to take seriously" the idea that "this interest would be seriously compromised by allowing an inmate to grow a ½-inch beard." *Id.* at 363. Even if petitioner could somehow hide contraband in such a short beard, the prison guards could search that beard just like they search other inmates' hair and clothing. Thus, the grooming requirement is not the least restrictive means of achieving security goals. Furthermore, the Department has a compelling interest in preventing prisoners from disguising their identities through shaving. However, the Court noted that the prison can take photos of the petitioner with and without the beard, in order to easily identify him in the even that he shaved to escape detection. The fact that the prison allows some prisoners to grow short beards for medical reasons further demonstrates that facial hair does not raise a serious security concern.

Beyond this core analysis, the Court notes that "the proffered objective" of limiting contraband and facilitating prisoner identification are not equally pursued for "analogous nonreligious conduct." The grooming policy is underinclusive because it permits ¼-inch beards for some prisoners with medical needs. Additionally, it differs from the "vast majority of States and the Federal Government," which permit growing facial hair for any reason. *Id.* at 368. To the Court, this line of argument suggests that the prison is making the "classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make one for everybody, so no exceptions." *Id.* "[W]hen so many prisons offer an accommodation, a prison must, at a minimum, offer persuasive reasons why it believes that it must take a different course." *Id.* at 369. The Department fails to do so here.

Concurrences

Justice Ginsburg notes that accommodating these religious beliefs would not harm those who do not share the prisoner's beliefs, which distinguishes this case from *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

Justice Sotomayor emphasizes that the majority opinion does not preclude deference to prison officials' policies, which would otherwise restrict religious liberty, when they articulate better reasons for doing so.

Mais v. Albemarle Cnty. Sch. Bd.

-- F. Supp. 3d --, 2023 WL 2143471 (Feb. 21, 2023)

Issues

Does the Virginia Constitution's Free Speech Clause create a sovereign-immunity waiver that opens the Commonwealth and its entities to lawsuits?

Does the Virginia Human Rights Act create a sovereign-immunity waiver that opens the Commonwealth and its entities to lawsuits?

Does the Virginia Constitution's Free Speech Clause support a cause of action for wrongful discharge in violation of public policy?

Do allegations of a hostile anti-racism training program, in which the plaintiff alleges that she was discriminated against for her race and later precede her resignation, give rise to several Title VII claims?

Holding

The Virginia Constitution's Free Speech Clause is not self-executing for the purposes of this suit, nor did the legislature pass accompanying legislation waiving sovereign immunity, so the clause does not allow suit against the Commonwealth or its entities. Similarly, the Virginia Human Rights Act lacks any sort of explicit sovereign immunity waiver, and definitions provided in separate generally-applicable legislation do not provide such a waiver. And the Virginia Constitution does not serve as a basis for a wrongful discharge claim. But, the plaintiff has alleged sufficient facts to allow her Title VII claims to proceed.

Facts

Emily Mais worked as an assistant principal at a public elementary school in Albemarle County, Virginia. In 2019 the School Board adopted an anti-racism policy that required faculty to attend training that defined "racism" and "anti-racism," during which Mais relayed the concerns of other teachers about the content of the training, and complained that the training vilified white people. She also alleges that she accidentally used the word "colored" instead of "people of color" and was publicly chastised by the trainer. Mais alleges that she continued to complain about ongoing content in the trainings, and that the School Board ignored her complaints that the training was undermining staff morale and causing racial tension to emerge. She ultimately resigned in 2021, stating that her resignation was based on her deteriorating physical and mental health as a result of the ongoing strife in the anti-racism trainings.

Procedural History

Mais filed a Charge of Discrimination with the Virginia Attorney General's Office of Civil Rights. The Office forwarded the charge to the U.S. Equal Employment Opportunity Commission, which told her that it would not process the Charge or proceed further with the investigation. Mais filed in federal district court, alleging ten claims against the School Board, including violation of her free speech rights under Article I, § 12 of the Virginia Constitution (Count 1), wrongful discharge in violation of public policy (Count 2), and several violations under the Virginia Human Rights Act ("VHRA") (Counts 3–6) and Title VII (Counts 7–10). The School Board moved to dismiss these claims.

Analysis

Several claims turned on sovereign immunity. The court observed that pursuant to sovereign immunity, the Commonwealth is immune from suit against its own consent. Typically, legislation must explicitly

waive sovereign immunity in order to allow suit against the Commonwealth and its agencies. In addition, a constitutional provision must either be self-executing or accompanied by associated legislation that allowed a cause of action against the Commonwealth to allow suit against the same.

Free Speech Claim under the Virginia Constitution

Mais argued that the School Board violated her free speech rights under the Virginia Constitution, but the School Board responded that the Commonwealth was immune from suit based on sovereign immunity. The court held that, here, the provision is not self-executing (except to challenge laws and ordinances), and lacks accompanying legislation that would allow the suit. Thus, the School Board was immune from the free speech claim

VHRA Claims

Mais brought several claims under the VHRA, which prohibits an employer from discriminating against an employee based on the employee's race, and which allows lawsuits against people who perpetuate that discrimination. The School Board argued that these claims also were barred by sovereign immunity because the VHRA lacked an explicit waiver of sovereign immunity.

The court agreed that the VHRA did not contain an express waiver of sovereign immunity, and held that this fact meant the Commonwealth had not waived sovereign immunity. Plaintiff's argument that the VHRA should be read in conjunction with the definitions found in Virginia Code § 1-230 (which includes Commonwealth agencies in the definition of "person") failed, because that statute is a statute of general application that failed to provide a specific waiver of sovereign immunity in the unrelated VHRA. Moreover, the court held that general principles of statutory construction supported this outcome, because the VHRA specifically defined "employer" (without including Commonwealth agencies), so that definition prevails over the generalized and separate definition in Code § 1-230. Thus, the VHRA did not contain a waiver of sovereign immunity, and Mais's VHRA claims failed.

Wrongful Discharge in Violation of Public Policy

Mais alleged that the School Board had effectively discharged her in violation of public policy. The court observed that several courts had found that the Virginia Constitution could not serve as a basis for a wrongful discharge claim. The court thus held that this claim failed for the same reason.

Title VII Claims

Mais also alleged several violations of Title VII, which prohibits employment discrimination based on "race, color, religion, sex, or national origin." The court held that Mais had alleged sufficiently "severe or pervasive" harassment to allow the racial hostile work environment claim to proceed. The court also held that Mais's allegations of race-based comments that caused her distress supported her constructive discharge claim, and allowed it to proceed. Finally, the court held that Mais had alleged protected activity—complaining that the anti-racist training had created a hostile work environment and that the School Board had discriminated against her—that could plausibly have been the but-for cause of the hostile conduct and her constructive discharge; thus her retaliatory hostile work environment and retaliatory constructive discharge claims could proceed.

ATTACHMENT C

Appellate Brief-Writing 101: Effective Appellate Briefing for OAG Attorneys

June 27, 2023 | 10:00 a.m.

- **Writing an Appellee Brief**
  - OAG appellate writing is primarily as appellee
  - Good appellate brief-writing is good writing: clear, concise, and well-organized
  - Appellee briefs should not primarily be responses to the appellant brief: develop your own themes and arguments
- **Introductions**
  - Include an introduction!
  - Introductions are important to orient the judge to the key issues in the case
  - Introductions should set forth your key themes in a clear and compelling way
    - How to identify key themes
    - Introductions are not summaries of argument
    - The key themes should drive your drafting decisions for all parts of the brief
- **Statements of Facts**
  - The goal is to emphasize your theme and tell a self-contained story by the end of which the reader is on your side.
    - The reader should know everything that matters on appeal from reading your facts alone without ever picking up another brief
  - Do not write a dry, neutral recitation
    - The facts are not part of a neutral bench memo, nor are you creating a record digest for the court
    - Although the fact section must be accurate, cited to the record/appendix, and fulfil your duty of candor, it is just as much a persuasive part of the brief as your argument section
  - Structure it in a logical fashion consistent with the narrative and argument you are creating. Emphasize favorable details while minimizing the role of unfavorable facts without infringing your duty of candor
  - Avoid focusing on factual disagreements with the other side

- Avoid block quotes, especially lengthy exchanges with witnesses. Quote only the most important language. Only the rare case that turns around an exchange in a transcript will merit extensive quoting from the transcript.

- **Assignments of Error/Framing the Issues**
  - Because OAG typically represents the appellee, you usually will not be drafting assignments of error but rather responding to assignments presented by the appellant
  - You are not bound by how the appellant frames the issues. Instead, frame your brief in the structure most favorable for your position
    - Often appellants will present many assignments of error, but the case is only about, say, two main issues. Frame your brief around those two issues. Do not let the other side's assignments of error dictate your structure.
    - In general, less is more—fewer issues make for a more accessible brief.
  - In general, lead with your most favorable issue. The topic the appellant addresses third may be the one you should address first.
  - Because Virginia has relatively draconian waiver rules, analyze the appellant's assignments of error for potential waivers or defaults:
    - Is the assignment of error too vague to provide adequate notice of the issue?
    - Do the arguments on brief fall within the assignments of error?
    - Is any assignment of error inadequately briefed?
    - Do the assignments of error include adequate citation to preservation in the record?
    - Does the assignment of error correctly identify the lower court's alleged error? (I.e., on appeal to the SCV from a CAV affirmance, did the CAV actually find that the evidence at issue was hearsay, or did it find that issue not preserved?)
    - Did the appellant change the wording/nature of the assignments of error between designating them/the SCV granting them and the merits briefing?

- **Arguments**
    - Everything you say must be supported by the record and case law
        - Your credibility is your most important asset—especially as a government attorney
        - Cites are a critical part of a brief
    - Draft your argument section to advance your key themes
        - Your key arguments should be the most prominent, both in placement and in how thoroughly you develop them
        - Accentuate the positive
        - Always keep your audience in mind
            - Appellate judges are generalists, and typically will not have prior experience with your case
            - Explain your key points
            - Keep it simple: judge and clerks will have limited time and attention for your case
    - Structure pointers
        - Generally, your strongest arguments should be first
            - Exceptions: jurisdictional arguments and arguments that are logically antecedent
        - Affirmative arguments should come before counter-arguments
        - Aim for simplicity in structuring the argument section
            - As a rule of thumb, you should generally have between 2 and 4 main (roman numeral) argument sub-sections
    - Style pointers: keep your drafting as clear as possible
        - Break long units into subunits: shorter sentences, paragraphs, and sections are easier for the reader to follow
        - Refer to parties by name or trial-court designation, not as "appellant" and "appellee"
        - Minimize the use of acronyms
        - Minimize the use of footnotes
        - Minimize the use of block quotations
            - Block quotations should be used (very sparingly) only to set forth key statutory language, contractual text, etc.

        - There is never a good reason to block quote case law
- Show, don't tell
    - Avoid use of heated rhetoric, overly pejorative or emotional language
    - Instead, explain why your position is correct and the appellant's position is not