THE ROBERTS COURT'S CONTINUED PROTECTION OF RELIGIOUS LIBERTY

by BLAINE H. EVANSON

For decades, the scope and interpretation of the religious clauses of the First Amendment have been some of the most hotly contested questions on the Supreme Court's docket. And the October 2021 Term was no exception.

The Roberts Court has sided with protecting private religious expression and the exercise of religion in the public square in the vast majority of the religion cases it has decided. Many have praised this as bringing coherence and clarity to an area of the law that has at times been chaotic and unpredictable. For others (including Justice Sonia Sotomayor), the Court's cases have "dismantle[d] the wall of separation between church and state that the Framers fought to build."

Whatever one's perspective, the Court's religion cases last Term were significant and consequential. The Court allowed a death row inmate's pastor to lay hands on him and pray during his execution, required Boston to display a Christian-themed flag, prohibited Maine from excluding sectarian high schools from its tuition assistance program, and required a Washington school district to allow a football coach to openly pray at the fifty-yard line after football games. And the Court has already granted certiorari on an important question related to religious liberty exemption from public accommodation laws.

In *Ramirez v. Collier*, 142 S. Ct. 1264 (2022), Texas denied a death row inmate's request that his pastor "pray over him" and "lay hands on him" during his execution. He sought a stay of execution, which the district court and Fifth Circuit denied. But the Supreme Court reversed in an 8-1 opinion by Chief Justice Roberts, holding that Mr. Ramirez was likely to prevail on his Religious Land Use and Institutionalized Persons Act (RLUIPA) claim.

Under RLUIPA, a state can substantially burden a prisoner's sincere religious belief only if the state uses the "least restrictive means of furthering [its] compelling governmental interest." 42 U.S.C. § 2000cc-1. The Supreme Court considered the fact that laying hands on and praying over an inmate during an execution are "traditional forms of religious exercise" that are "a significant part of [the] faith tradition [of] Baptists." And the Court explained that although Texas's interests in categorically banning religious touch and vocal prayer were "commendable," Texas failed to show that its bans were "the least restrictive means of furthering such interests."

Texas did "nothing to rebut . . . obvious alternatives" that were less restrictive than the total ban on touching. Texas sought deference in the manner that it carried out executions, but "[t]hat is not enough under RLUIPA" when a policy imposes a substantial burden on sincere religious exercise. And the Court emphasized that the "historic practice" of such prayer was once commonplace in Texas and remains common in other parts of the country. Justice Brett Kavanaugh noted in his concurring opinion that "[t]his case illustrates . . . the important role that history and state practice often play in the analysis."

Shurtleff v. Boston, 142 S. Ct. 1264 (2022), involved Boston's refusal to allow an organization to fly its "Christian flag" alongside the American and Massachusetts flags in front of city hall. The City of Boston had a program that allowed private groups to raise flags of their choosing, and the City had never denied an organization's request to participate in this program. But the City denied the request for a Christian flag out of worry that it would violate the Establishment Clause of the First Amendment.

The Court held, 9-0, that Boston's refusal violated the Free Speech Clause of the First Amendment. Justice Breyer's opinion explained that the flag raising was "private, not government, speech" because a "holistic inquiry" of the facts supported the conclusion that the government did not intend to speak for itself. "Because Boston's flag-raising program [did] not express government speech," the City's refusal to let petitioners "fly their flag based on [their] religious viewpoint violated the Free Speech Clause."

Both Justice Kavanaugh and Justice Gorsuch wrote concurrences highlighting the Boston commissioner's misunderstanding of the Establishment Clause. Justice Kavanaugh explained that the government does not violate the Establishment Clause "merely because it treats religious . . . speech equally with secular" speech. Rather, the "government *violates* the Constitution when . . . it *excludes* religious speech . . . because of religion." Justice Gorsuch wrote that Boston's approach in this case should be "a cautionary tale for other localities and lower courts" that discriminate against religious viewpoints for fear of violating the Establishment Clause.

In *Carson v. Makin*, the Court considered Maine's prohibition on tuition assistance being paid to sectarian high schools. *Carson v. Makin*, 596 U.S. __ (2022). Because of its predominantly rural geography, less than half of Maine's school districts operate a public high school. As a result, the State offers tuition assistance so that families without access to a public high school can attend private school.

In 1981, Maine added a "nonsectarian" requirement to its tuition assistance, which disqualified any religious school from receiv-

ing payments under the program. Maine (like Boston) did so in response to its attorney general's concern that public funding of private religious schools would violate the Establishment Clause.

In an opinion written by Chief Justice Roberts, the Court struck down Maine's "nonsectarian" requirement as unconstitutional "discrimination against religion." The Court reasoned that there was nothing neutral about Maine's program because "[t]he State pays tuition for certain students at private schools—so long as the schools are not religious." And Maine's antiestablishment interests could not justify the exclusion of "some members of the community from an otherwise generally available public benefit because of their religious exercise." The Court did not disturb its prior precedent (the 2003 case, *Locke v. Davey*) allowing the state to preclude funding for a vocational religious degree. But that precedent does not authorize states "to exclude religious persons from the enjoyment of public benefits on the basis of their anticipated religious use of the benefits."

The final religion case of the Term was *Kennedy v. Bremerton School District*, 142 S. Ct. 2407 (2022), involving a high school football coach's practice of praying at the fifty-yard line following football games. Coach Kennedy would kneel to pray for about thirty seconds at the fifty-yard line after players and coaches had shaken hands. Sometimes Coach Kennedy ended up praying alone, other times he prayed surrounded by a group of players, and other times he added a motivational speech. He explained that he never "told any student that it was important they participate in any religious activity." And he "neither request[ed], encourage[d], nor discourage[d] students from participating in" his postgame midfield prayers.

After about seven years of this practice, the school district sought to rein in Coach Kennedy's prayers and motivational speeches. The district specifically cited the Establishment Clause, and explained that the Coach's right to free exercise "must yield so far as necessary to avoid school endorsement of religious activities." After some back-and-forth with the school district, Coach Kennedy was ultimately fired for continuing his fifty-yard-line prayers. He sought an injunction requiring the school district to reinstate him, but that was denied by the district court and affirmed by the Ninth Circuit.

The Supreme Court reversed. Justice Gorsuch, writing for the majority, explained that the only justification the school district had for suppressing the coach's religious expression was its "interest in avoiding an Establishment Clause violation." But the school district erred in pursuing the "same line of thinking, insisting that the [school district's] interest . . . trump[ed]" the coach's rights to religious exercise and free speech. The Court, citing *Shurtleff*, reemphasized that "just this Term the Court unanimously rejected a city's attempt to censor religious speech based on *Lemon [v. Kurtzman]* and the endorsement test." Instead, the Establishment Clause must be interpreted by "reference to historical practices and understandings." Applying this historical perspective to Coach Kennedy and Bremerton High School, the Court concluded that the "Constitution neither mandates nor tolerates that kind of discrimination." Accordingly, the school district's discipline of Coach Kennedy for engaging in sincere religious practice was unconstitutional.

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Looking ahead to the October 2022 Term, the Court has already agreed to consider an important case concerning the balance between religious liberty and public accommodation for LGBTQ+ individuals. *303 Creative LLC v. Elenis,* 6 F.4th 1160 (10th Cir. 2021), involves a Colorado law that "restricts a public accommodation's ability to refuse to provide services based on a customer's identity." 303 Creative is a for-profit graphic and website design company that plans to get into the wedding business, but refuses (for religious reasons) to create websites for same-sex marriages. It sought a declaration that applying Colorado's public accommodation law to compel an artist to speak or stay silent violates the Free Speech Clause of the First Amendment. The Tenth Circuit rejected 303 Creative's claim, explaining that although "Free Speech and Free Exercise rights are . . . compelling," "so too is Colorado's interest in protecting its citizens from the harms of discrimination."

The Supreme Court granted certiorari on the question: "[w]hether applying a public-accommodation law to compel an artist to speak or stay silent violates the Free Speech Clause of the First Amendment." (It did *not* grant certiorari on a second question presented by the petitioner—namely, whether the Supreme Court should revisit its 1990 decision *Employment Division v. Smith.*)

The Supreme Court's recent activity in hearing religious liberty cases has resolved a number of issues that have been percolating for several years. For instance, the Court's decisions this Term in *Shurtleff, Carson*, and *Kennedy* resolve concretely that governments may not justify unequal treatment of religious exercise for fear that doing so will violate the Establishment Clause. The Court in *Kennedy* formally repudiated the *Lemon* test that was the root of much of this confusion.

But the Court has not squarely resolved the tension between religious liberty and public accommodation in LGBTQ+ rights. The scope of the ministerial exception continues to be heavily litigated in the lower courts. And there are many open questions related to the treatment of religious groups at universities. In other words, there is enough to keep the Court busy in this area for years to come.

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