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# Religious Freedom in the Workplace and Beyond


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# Religious Freedom in the Workplace and Beyond

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## I. INTRODUCTION

Attorneys who advise or litigate on issues involving religious practices in the workplace quickly discover a complex matrix of constitutional principles, federal and state laws, judicial opinions, and administrative regulations and guidance that support multiple – and sometimes conflicting – public policy goals. Most people can readily accept the core principle that government should not unreasonably interfere with the religious beliefs and expressions of an individual or a group, and most will also agree that a person's religion should not be a factor in their employment absent special circumstances. But consistently throughout the history of American jurisprudence – and with increasing zeal in recent years – both lawmakers and litigants have tested the boundaries and expanded the scope of these core principles. The result today is a legal landscape that is challenging to navigate, with many important questions still not fully developed.

The relationship between religion and the civil law has been a dynamic and enduring element of American life going back to the earliest days of our nation.[3] The First Amendment to the United States Constitution contains two parameters defining the relationship between government and religion – the Free Exercise Clause and the Establishment Clause – each of which has been a source of many vigorous workplace disputes when the government acts either as an employer or the provider of public benefits or restrictions. In more recent years, Title VII of the 1964 Civil Rights Act extended the legal protection of religious beliefs and practices to the private sector workplace by prohibiting discrimination in employment based on religion, and extending that protection to include an affirmative duty on employers to accommodate employees' religious beliefs and practices. Most recently, both Congress and state legislatures have enacted laws intended to protect the free exercise of religious beliefs of both employees and employers from any government interference absent a showing that the restriction furthered a compelling governmental interest. The interplay of these multiple sources of law often makes for challenging legal analysis of issues that touch on religion in the current American workplace.

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[1] Division Chief, City of Austin Law Department. This paper also includes information and case references taken from many excellent secondary sources. Three sources of note for those wishing to read more on this topic are: Brown & Scott, *Belief v. Belief: Resolving LGBTQ Rights Conflicts in the Religious Workplace*, 56 Amer. Business Law J. 55 (Spring 2019; Nahmod, *The Establishment Clause, the Free Exercise Clause, RFRA and RLUIPA,* New Mexico State Bar Convention (August 2017); and Wolanek & Liu, *Applying Strict Scrutiny: An Empirical Analysis of Free Exercise Cases,* 78 Mont. L. Rev. 275 (2017).

[2] Employment Law Practice Group Chair, Lloyd Gosselink Rochelle & Townsend, P.C.

[3] For an excellent discussion of the role that religion has played in the founding and development of American society and culture, see Jon Meacham, *American Gospel: God, the Founding Fathers, and the Making of America* (Random House, LLC 2006).

This paper highlights the sources of law protecting or concerning religious freedom in the workplace and discusses significant judicial opinions particularly relevant to practitioners in the Fifth Circuit that have defined the scope and parameters of these laws. Specifically, Part II of this paper describes the evolution of First Amendment religious protection jurisprudence focusing on cases involving workplace issues. Part III discusses prohibited employment discrimination based on religion and the duty to reasonably accommodate an employee's religious beliefs and practices under Title VII and Texas Labor Code Chapter 21. Part IV describes the development of federal and state laws that create statutory (but not Constitutional) prohibitions on government actions that impinge on the religious beliefs and expression of employees and employers.

# II. THE UNITED STATES CONSTITUTION AND RELIGION IN THE WORKPLACE

## A. Free Exercise Clause Cases

The First Amendment guarantees, among other things, both the right of free exercise of religion (the Free Exercise Clause) and the right to be free from government establishment of religion (the Establishment Clause). Historically the Free Exercise Clause has been the primary source of Constitutional protection for individuals to practice their faith without government interference.[4] However, like all Constitutional rights, the Free Exercise Clause has always had parameters. In an early case testing whether laws criminalizing polygamy could be applied to a person whose religious beliefs compelled it, the Supreme Court held that excusing that person from compliance with laws on the basis of their religious beliefs would "make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself." *Reynolds v. United States*, 98 U.S. 145 (1878). This core principle – that all persons must comply with laws of general applicability, regardless of their personal religious beliefs – remained the governing Constitutional principle for the next 85 years.

The Free Exercise Clause has been applied in many employment-related cases. In 1963 the Supreme Court shifted the legal analysis for Free Exercise cases in *Sherbert v. Verner*, 374 U.S. 398 (1963), an unemployment compensation benefits case, from a focus on the general applicability of the law in question to a test based on the Constitutional strict scrutiny standard. In that case the Court overturned a denial of unemployment benefits to an employee who was fired when she refused to work on a Saturday, which was her Sabbath day. Although the state statute disqualifying the employee from benefits was neutral on its face and applied equally to everyone, the Court used the case to articulate a new standard for evaluating Free Exercise cases. The standard asked whether the burden imposed by the government action on the claimant's religious freedom advanced a compelling state interest in the least restrictive manner. *Id.* at 403, 406-07. While the Court did occasionally reconfirm the importance of uniform laws of general application in the years that followed, see, e.g., *United States v. Lee*, 455 U.S. 252 (1982) (rejecting claim by Amish employers that their religion forbade them from paying social security taxes), this compelling interest standard remained the test for Free Exercise cases for the next quarter century

[4] The Free Exercise Clause, which is part of the First Amendment, provides that "Congress shall make no law . . . prohibiting the free exercise [of religion]." The First Amendment is, of course, applicable to the States through the Fourteenth Amendment. See, e.g., *Cantwell v. Conn.*, 310 U.S. 296 (1940).

following *Sherbert v. Verner*. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 213-15 (1972) (elaborating on the compelling interest test in a case upholding the Free Exercise claim of Amish families to exemption from state laws requiring mandatory attendance at school for their children); *Thomas v. Review Bd. of Indiana Emp't Sec. Div.,* 450 U.S. 707 (1981) (state law disqualification for unemployment benefits of employee terminated for refusing to work on Sabbath reversed based on same balancing test used in *Sherbert*).[5]

In 1990 the Supreme Court again reset the legal standard for evaluating Free Exercise cases, returning this time to a test based on a "law of general, neutral application" standard similar to the standard used before *Sherbert v. Verner*. In *Emp't Div., Dep't of Human Res. of Oregon v. Smith*, another case involving eligibility for unemployment compensation benefits, the Court rejected the claim for state unemployment benefits of an employee who was terminated for his religious practices. 494 U.S. 872 (1990). However, unlike the earlier Free Exercise cases involving employees terminated for not working on their Sabbath, the religious practice at issue in *Smith* was the employee's use of peyote, which was a criminal offense under state law. The Court analyzed many of its post-*Sherbert* decisions and noted that almost all of the cases "have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech, and of the press. . . ." *Id.* at 881 (citing cases). The Court also found the distinction between religious practices that are lawful and unlawful under state law highly significant. In the end, the Court read its earlier holding in *Sherbert v. Verner* as limited to state law regulation of unemployment compensation issues, and held that because the employee's "ingestion of peyote was prohibited under Oregon law, and because that prohibition is constitutional, Oregon may, consistent with the Free Exercise Clause, deny [employees] unemployment compensation when their dismissal result from use of the drug." *Id.* at 890.

The Supreme Court's decision in *Smith* was highly publicized nationwide, and the outcome surprised many people. Both the popular reaction to the case, and the Court's heavy reliance in its opinion on the "political process" (i.e. the legislative process) to define lawful and unlawful conduct, were significant motivators for Congress to step in with legislative action. Thus, in 1993 Congress passed the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb through 42 U.S.C. § 2000bb-4 ("RFRA"), with broad bipartisan support. The stated Congressional purpose of RFRA was to reinstate the pre-*Smith* case law that the government could burden a person's religious freedom only to the extent that the burden served a compelling state interest and was narrowly tailored for that purpose. Indeed, the text of RFRA noted "in *Smith* the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion." See, 42 U.S.C. §2000bb(a)(4).[6] Both RFRA and analogous state legislative initiatives concerning religious freedom are discussed in more detail in Part IV.

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[5] In another significant case involving state unemployment benefits laws, the Court held that permitting an employee who is terminated for refusing to work on her Sabbath to receive state unemployment benefits would not violate the Establishment Clause of the First Amendment. *Hobbie v. Unemployment Appeals Comm. of Fla*, 480 U.S. 136 (1987). "This Court has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause." *Id.* at 144-45.

[6] For a more detailed description of the national response to *Emp't Div. v. Smith* that resulted in the passage of RFRA, *see generally* Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEX. L. REV. 209 (1994-95).

The same year as Congress enacted RFRA, the Supreme Court decided *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, Florida*, the last of the Court's seminal Establishment Clause cases. 508 U.S. 520 (1993). While *City of Hialeah* is not an employment case, it is an instructive expansion on the meaning and scope of the Court's earlier decision in *Smith*. In that case, a Florida church that practiced animal sacrifice as part of its religion sued the local government to enjoin ordinances that prohibited "animal cruelty" generally and "animal sacrifice" particularly. Ultimately, the Supreme Court found that these ordinances violated the Establishment Clause and permanently enjoined them. The Court's reasoning is instructive and states what appears to be the current jurisprudence for evaluating Establishment Clause cases. The Court referenced its 1990 decision in *Smith* and explained that upholding the Oregon law in that case was premised on its finding that the state law was of general application, and not enacted with a purpose of constraining or promoting any religion. Thus, the Court concluded, for laws that are neutral in purpose and of general application, the test in *Smith* was proper. However, the Court found that City of Hialeah ordinances were not neutral in their purpose, but instead were enacted at least in part for the purpose of suppressing the Santeria religion (the religion of the petitioner in the case). The test for "neutrality" applied by the Court in *Lukumi* was that a law lacks neutrality if its purpose, either explicitly or implicitly, "is to infringe upon or restrict practices because of their religious motivation." *Id.* at 533. For such laws the stricter "compelling interest" test from *Sherbert v. Verner* still applied. Using the test from that case, the Court found that the City of Hialeah had not demonstrated a compelling government interest based on the design and scope of the ordinances. In concluding that the ordinances were an unconstitutional violation of the Establishment Clause, the Court chided the local officials:

> "[A]ll officials must pause to remember their own high duty to the Constitution and to the rights it secures. Those in office must be resolute in resisting importunate demands and must ensure that the sole reasons for imposing the burdens of law and regulation are secular. Legislators may not devise mechanisms, overt or disguised, designed to persecute or oppress a religion or its practices." *Id.* at 547.

## B. Other Constitutional Cases

Apart from the Free Exercise Clause cases described above, there are a number of other Supreme Court and appellate court decisions that illustrate principles important to understanding the scope and limits of Constitutional protection on religious freedom in the workplace. These cases address the limited ability of the government to favor religion under the Establishment Clause, and the ability of Congress to restrict State regulations that may affect individual religious beliefs and practices.

The first case, *City of Boerne, Texas v. Flores*, addressed the scope of RFRA and the Constitutional authority of Congress to prohibit state and local government actions that might burden religion. 521 U.S. 507 (1997). The *Flores* opinion is a complicated and nuanced analysis of Constitutional principles concerning the separation of powers between the judicial and legislative branches, and between the States and the federal government. The case arose when city authorities in Boerne, Texas denied a local Catholic church a building permit to expand its facilities because the church was in a designated historical preservation district under local zoning regulations. The church argued that the local zoning regulations "substantially burdened" its

religious exercise and were thus invalid under RFRA. The Fifth Circuit agreed with the church (73 F.3d 1352 (5th Cir. 1996)), but the Supreme Court reversed that decision, holding that Congress lacks Constitutional authority to constrain state and local governments in the manner this was done in RFRA, and that such authority lies with the States as a retained power under the Constitution.

The Court premised its holding in *Flores* on the scope of Section 5 of the Fifth Amendment to the Constitution, which gives Congress the authority to "enforce [against the states], by appropriate legislation, the provisions of [the Fifth Amendment]." The opinion cites a long history of Supreme Court precedent establishing that this language gives Congress authority to pass *remedial* legislation to address state actions that might impair the Fifth Amendment protections against state action that might deprive persons of life, liberty, or property without due process of law (or deny persons equal protection of the law), but no authority to enact *substantive* legislation against the States that doesn't meet that test. The Court's analysis relied heavily upon the fact that there has not been any significant history of States creating legal or social disabilities based on the religion of their residents – as contrasted, for example, with historical laws creating such disabilities based on race and gender. In the end, the Court found that RFRA was a substantive, not remedial, law and on that basis was beyond the authority of Congress to enact as applied to the States. Thus, while RFRA was a valid restriction on federal government action, it could not be constitutionally applied to the States.

Since the *Flores* decision most of the legal development involving protection of religious beliefs has (predictably) shifted to the States, and many state legislatures have since that decision enacted various forms of "religious freedom" statutes similar to RFRA to fill the perceived gap left by that ruling. For example, in 1999 the Texas Legislature passed the Texas Religious Freedom Restoration Act ("TRFRA"), Civ. Prac. & Rem. Code Chap. 110, which prohibits the State and all political subdivisions of the State from "burden[ing] a person's free exercise of religion" unless the government's action is in furtherance of a compelling government interest and is the least restrictive means of furthering that interest. C.P.R.C. Section 110.003. Both RFRA and TRFRA are discussed in more detail in Part IV of this paper.

The other important Supreme Court opinion touching on religion in the workplace is an Establishment Clause case, *Estate of Thornton v. Caldor*. 472 U.S. 703 (1985). The Establishment Clause is that part of the First Amendment which states: "Congress shall make no law respecting an establishment of religion. . . ."[7] This prohibition against establishing a government-sanctioned religion extends to the States through the 14th Amendment. *See Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). In *Caldor*, the Supreme Court held that the Establishment Clause barred the State of Connecticut from enacting a statute that allowed its residents the right not to work on their declared Sabbath Day each week. As the Court described the law:

> "The State has thus decreed that those who observe a Sabbath any day of the week as a matter of religious conviction must be relieved of the duty to work on that day,

[7] In the original 1789 draft of the First Amendment, Congress proposed that the language should read, "Congress shall make no law establishing articles of faith, or a mode of worship, or prohibiting the free exercise of religion. . . ." Following debate, Congress settled on the final language of the Religion Clauses in the First Amendment, which reads, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . . ."

no matter what burden or inconvenience this imposes on the employer or fellow workers." *Id.* at 709.

In its analysis, the Court cited its earlier decision in *Lemon v. Kurtzman* as providing the controlling test. 403 U.S. 602 (1971). Under that test, a statute must meet two criteria to survive an Establishment Clause challenge: (1) the statute must have a secular purpose and not foster "excessive entanglement of government with religion;" and (2) the "primary effect" of the statute must not be to advance or inhibit religion. *Id*. at 619.

The Court concluded in *Caldor* that the Connecticut statute failed both parts of the *Lemon* test. Because of the categorical nature of the statute – which the Court found "imposes on employers and employees an absolute duty to conform their business practices to the religious practices of the employee by enforcing observance of the Sabbath that the employee unilaterally designates," *Id.* at 2917, and permitted no exceptions for special circumstances or reasonable accommodations, that the statute had "a primary effect that impermissibly advances a particular religious practice," and that this effect was well beyond "an incidental or remote effect of advancing religion." *Id.* at 2918. Accordingly, the Court held that the statute violated the Establishment Clause of the First Amendment.

Constitutional jurisprudence has also distinguished between religious subject matter and religious viewpoints when analyzing the extent of constitutional free speech protection specifically. One recent example is *Ne. Pennsylvania Freethought Soc'y v. County of Lackawanna Transit Sys*., 938 F.3d 424 (3d Cir. 2019). In this case, the Third Circuit held that a county transit system's policy that excluded advertisements containing religious and atheistic messages violated the First Amendment, concluding that it " . . . discriminate[d] based on viewpoint." *Id.* at 428. The Northeastern Pennsylvania Freethought Society, an association of atheists, agnostics, secularists, and skeptics, submitted an advertisement that included its name and word "atheists" for display on public buses in Lackawanna County. The county transit system rejected the proposed advertisement several times, based on its policies that precluded religious advertising. The Court found that the County's rejection of the ad constituted unconstitutional viewpoint discrimination. It distinguished prohibition of speech on subject matter, which may be constitutional, from prohibitions of speech regarding a viewpoint, which are not constitutional. The ad merely informed the public that the society existed, which secular ads are allowed to do. Since secular organizations are allowed to display ads with a similar purpose, the "ban on religious messages in practice operates not to restrict speech to certain subjects but instead to distinguish between those who seek to express secular and religious views *on the same subjects.*" *Id.* at 434.

This brief discussion of important rulings involving the Religion Clauses in the First Amendment is intended to highlight both the strength of the constitutional protection of people's right to practice their religion free of governmental constraints and entanglements, and the delicate balances that are called for when the religious beliefs and practices of different individuals come into conflict.

In addition to these federal court decisions, an employment-related case from the Texas Court of Appeals in Dallas is helpful to understand the interplay between state laws that differentiate based on religion and the Establishment Clause, the Free Exercise Clause, and the

14th Amendment Equal Protection Clause. In *Spicer v. Texas Workforce Commission*, a discharged church organist was denied unemployment compensation benefits under the Texas Unemployment Compensation Act, Tex. Labor Code Chaps. 201-215 ("TUCA") based on a provision in TUCA which states that "employment" does not include "employment in the service of a church." 430 S.W.3d 526 (Tex. App.—Dallas 2014, no pet.); Lab. Code §201.066. The employee challenged the exemption for church employment in TUCA under both the Establishment Clause and the Free Exercise Clause of the First Amendment, and the Equal Protection Clause of the 14th Amendment. The *Spicer* opinion is extensive and well-written, and includes an interesting history of TUCA and the rationale for the exemption in unemployment compensation coverage for employment at a church. In the end the Court upheld the denial of benefits to the employee and in the process made several key holdings addressing the constitutional arguments, including:

- The Court applied the 3-part test in *Lemon v. Kurtzman* for evaluating Establishment Clause claims involving facially-neutral state laws. 403 U.S. 602 (1971). Under that test, a facially neutral law (1) must have a secular legislative purpose, (2) must have a principal or primary effect that neither advances nor inhibits religion, and (3) must not foster "an excessive government entanglement with religion." *Id.* at 612–13. Applying this test, the Court found TUCA has a secular purpose under *Lemon* in excluding church employment from coverage, based in large part on its analysis of the many different types of exemptions in TUCA, as well as its review of the legislative history of TUCA, which showed that the Legislature was concerned with the practical difficulty that small and informal churches would have in tracking and reporting wages under TUCA.

- The employee also claimed that the exemption in TUCA for church employment burdened his right to play music during worship services in violation of his First Amendment Free Exercise rights. The Court rejected this argument as well, holding that the exemption "placed, at most, an inconsequential burden on [the employee's] ability to play music during church services, and does not violate [his] right to freely exercise his religion." 430 S.W. 3d at 542. The Court found nothing about the exemption actually affected the employee's ability to play music or forced him to work under conditions that violated his religious beliefs.

- Finally, the Court also rejected the employee's Equal Protection Clause claim. While conceding that practicing one's religion is a fundamental constitutional right, the Court noted that the employee's Equal Protection claim was premised on his Free Exercise claim, and under Supreme Court precedent when the underlying Free Exercise claim fails, the proper test for analyzing the Equal Protection claim is "rational basis," rather than "strict scrutiny." *Id.* at 542, citing *Locke v. Davey*, 540 U.S. 712 (2004). Applying the rational basis test, the Court found ample rational grounds for the exemption, including its observation that "exempting religious organizations from paying the excise tax served the legitimate governmental purpose of enhancing the efficient administration of the federal-state unemployment insurance programs by excluding from coverage a variety of workers whose employment patterns are irregular or whose wages are not easily accountable." *Id.* at 543.

In a recent case, the Court declined to rigidly apply the Lemon test recognizing that Lemon does not fit all cases. *Am. Legion v. Am. Humanist Assoc*., 139 S. Ct. 2067 (2019). The Court held that a large Latin cross erected in the 1920s, now on public land, did not violate the Establishment Clause. The cross was erected to serve as a memorial to soldiers who died in World War I. The Court differentiated between long-standing religiously expressive monuments, symbols, and practices from those recently adopted, noting "the passage of time gives rise to a strong presumption of constitutionality." *Id.* at 2085. The Court acknowledged that the Lemon test presents problems in certain cases "involving the use, for ceremonial, celebratory, or commemorative purposes, of words or symbols with religious associations. . . ." Id. at 2081. The Court recognized four reasons these problems may occur: 1) identifying the original purpose or purposes of monuments, symbols, or practices that were first established long ago may be especially difficult, 2) even if the monument's original purpose was infused with religion, the passage of time may obscure that sentiment and the monument may be retained for the sake of its historical significance or its place in a common cultural heritage, 3) the message of a monument, symbol, or practice may evolve and familiarity itself can become a reason for preservation, and 4) when time's passage imbues a religiously expressive monument, symbol, or practice with this kind of familiarity and historical significance, removing it may no longer appear neutral, especially to the local community. *Id.*at 2082–85.

This discussion is not intended to present an exhaustive treatment of all cases involving the Religion Clauses in the First Amendment, but rather to illustrate the key principles and historical developments of the law in this area, and to highlight the most significant Supreme Court authorities.

# III. REASONABLE ACCOMMODATION OF RELIGION UNDER EMPLOYMENT DISCRIMINATION LAWS

## A. Federal Law under Title VII

Protection for both private and public sector employees from workplace discrimination based on religion was part of the original scope of Title VII of the Civil Rights Act of 1964 (42 U.S.C.A. §§ 2000e *et seq*.). However, when the statute was first enacted it said nothing about accommodating an employee's religious beliefs and expressions or undue hardship. Rather, the statute stated only the general proscription against discrimination because of "religion" currently found in 42 U.S.C.A. §2000e-2(a). While the first implemented regulations under Title VII issued by the EEOC in 1966 did address accommodations of employees' religious practices, those initial regulations provided only that an employer had an obligation to accommodate the religious practices of its employees when doing so did not create a "serious inconvenience to the conduct of the business." *See* 31 Fed. Reg. 8370 (1966). The following year, the EEOC revised these regulations to include an affirmative duty on covered employers to make a reasonable accommodation to the religious practices of employees to the extent the employer could do so without undue hardship or inconvenience.

In a case brought under the EEOC's initial 1966 regulations, the Sixth Circuit stated that the authority of the EEOC to adopt a regulation "interfering with the internal affairs of an employer may well be doubted." *Dewey v. Reynolds Metals Co.,* 429 F.2d 324, n.1 (6th Cir. 1970). The

Sixth Circuit's decision in *Dewey* was affirmed by the Supreme Court in an evenly-divided 4-4 decision, Justice Harlan took no part in the consideration or decision of the case. *Dewey v. Reynolds Metals Co*., 402 U.S. 689 (1971).

In 1972, in response to the Supreme Court's opinion in *Dewey*, which left unresolved the authority of the EEOC to impose an affirmative obligation on employers to reasonably accommodate the religious practices of their employees, Congress amended the definition of "religion" in Title VII to include an express obligation of employers to reasonably accommodate the religious practices of their employees if they can do so without undue hardship. Thus, Title VII currently defines "religion" as:

> ". . . including all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. §2000e(j).

**Key Supreme Court Decisions.**

There have been three key Supreme Court decisions concerning issues of religious accommodation and undue hardship under Title VII.

> *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977). This case remains the Supreme Court's seminal decision addressing an employer's duty under Title VII to make a reasonable accommodation to an employee's religion. In *Hardison*, the employee's religion prohibited secular work from sundown Friday to sundown Saturday. His employer provided a seniority system under its collective bargaining agreement that allowed employees to choose their shifts under a bidding system based on departmental seniority. This flexibility initially allowed the employee to bid on a shift schedule that did not conflict with his religion. However, when the employee transferred to a new location where he had much lower departmental seniority, he was unable to bid on a shift that allowed him to have all Saturdays off work. When the employee objected to working a Saturday shift while another employee was on vacation, the employer agreed to allow his union to seek a change in his work assignments; however, the union was not willing to violate the seniority provisions of the existing labor agreement. The employer rejected the employee's request to arrange shift swaps for the employee, which would have meant involuntary assignments of other employees to cover the shifts the employee wasn't working, and also rejected the employee's proposal to work only four shifts per week because his job position was essential and he was the only available person on his shift to perform it on weekends.
>
> The Supreme Court ruled in *Hardison* that the employer had "made reasonable efforts to accommodate and that each of the [employee's] suggested alternatives would have been an undue hardship within the meaning of the statute as construed by the EEOC guidelines." *Hardison* 432 U.S. at 64. The Court's opinion established important boundaries for determining undue hardship under Title VII, including:

- The employer was not required to violate the terms of the labor agreement to accommodate the employee (*Id.* at 79).

- The employer was not required to assign other employees to involuntary shift swaps to accommodate the employee (*Id.* at 81).

- The employer was not required to reduce the employee's work schedule to 4 shifts per week (*Id.* at 84).

In its *Hardison* opinion, the Court first articulated the well-known maxim that "[t]o require [the employer] to bear more than a *de minimis* cost in order to give [the employee] Saturdays off is an undue hardship. Like abandonment of the seniority system, to require [the employer] to bear additional costs when no such costs are incurred to give other employees the days off that they want would involve unequal treatment of employees on the basis of their religion." *Id.* at 84.

The *de minimis* standard for undue hardship set by the Court in *Hardison* has endured to this day. It appears well-established at this time that an employer's Title VII duty to make a reasonable accommodation to an employee's religion based on *Hardison* is a lower standard of duty than an employer's duty to make a reasonable accommodation to an employee's disability under the Americans with Disabilities Act ("ADA"). Under Title VII, the employer's undue hardship defense to providing religious accommodation requires only a showing that the proposed accommodation poses a "more than *de minimis*" cost or burden, while an employer seeking to establish "undue hardship" as a defense to an ADA claim must establish that the accommodation would require "significant difficulty or expense." *Compare Hardison,* 432 U.S. at 84 (interpreting Title VII "undue hardship" standard) *with* 42 U.S.C.A. § 12111(10)(A) (defining ADA "undue hardship" standard).

*Arizona Bd. of Educ. v. Philbrook*, 479 U.S. 60 (1986). In this case, the employee, a high school teacher, requested six days of paid leave per year for religious observances. The employer school district's labor agreement with its teachers union provided only three days of leave per year for religious observances, and these days were not charged against a teacher's total annual leave usage. The labor agreement also provided for a substantial number of leave days for other reasons (bereavement, weddings, etc.). Based on the labor agreement, the employer denied the employee's request for extra days of religious observance leave, but agreed that the employee could take personal leave under the labor agreement (which would count against his annual allotment) to cover the extra three days.

The Court in *Philbrook* ruled that permitting the employee to use personal days as provided in the labor agreement was a reasonable accommodation, particularly in light of the *de minimis* standard established in *Hardison*. The Court established in *Philbrook* several key principles concerning reasonable accommodations and undue hardships, specifically:

- An employer does not need to accept an employee's preferred accommodation if it has offered another accommodation that is "reasonable."

- An employer that proves that it has offered a reasonable accommodation has met its burden of proof under 42 U.S.C.A. § 2000e(j).

- Once an employer establishes that it has made or offered a reasonable accommodation, there is no need to evaluate whether an employee's preferred accommodation would be an undue hardship for the employer.

*E.E.O.C. v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768 (2015) . In this case, the employer declined to hire a Muslim applicant because she wore a headscarf during her job interview, which would have conflicted with the employer's dress policy. The interesting twist in the facts that distinguishes this case from most grooming/dress policy cases under Title VII is that the employer never asked the applicant about whether she would have worn the headscarf at work if she were hired, and the applicant never asked for an accommodation to the employer's dress policy. Thus, the record before the Court did not indicate whether the applicant either wanted or needed a modification of the employer's dress policy as an accommodation for her religion.

The primary significance of the *Abercrombie & Fitch* case is its holding that a claim for failure to accommodate an employee's religion under Title VII is a disparate treatment claim. "Thus, the rule for disparate-treatment claims based on a failure to accommodate a religious practice is straightforward: An employer may not make an applicant's religious practice, confirmed or otherwise, a factor in employment decisions." *Id.*at 2033. The Court emphasized in its holding that the central issue in a failure to accommodate claim was the employer's motive – i.e. if the employer's desire to avoid accommodating the employee's religion is a motivating factor in the adverse action, then the employer violates Title VII.

Thus, the Court clarified in *Abercrombie & Fitch* that a failure to accommodate is not a separate and distinct cause of action under Title VII. Prior circuit court of appeals decisions that had considered this issue had concluded that the failure to accommodate an employee's religion was a separate type of claim under Title VII – and not strictly either a disparate treatment claim or disparate impact claim (as those claims are defined in 42 U.S.C. §2000e-2(a)). These earlier decisions had settled on a burden of proof model for litigating such cases similar to the proof model for a Title VII retaliation claim. That is, an employee first established a *prima facie* case of failure to accommodate religion by showing (1) a sincere religious belief that conflicts with an employment requirement, (2) knowledge by the employer of the conflict, and (3) a discharge or discipline for failing to comply with the requirement. After that, the burden shifted to the employer to show that it could not reasonably accommodate the employee without undue hardship. The reasonableness of an employer's attempted accommodation was to be determined on a case-by-case basis, and the burden of proof remained on the employer to prove the undue hardship defense. *See e.g., Protos v Volkswagen of America, Inc*., 797 F2d 129 (3d Cir. 1986), *cert. denied,* 479 US 972 (1986) .

In *Abercrombie & Fitch,* however, both the majority opinion and Justice Thomas' concurrence state expressly that disparate treatment and disparate impact "are the only two causes of action under Title VII." *Abercrombie & Fitch*, 575 U.S. at 2032. Thus, it appears that the proof model for Title VII failure to accommodate claims is a disparate treatment

model, which means the employee bears the ultimate burden of proving that the employer's discriminatory intent not to accommodate was a motivating factor in the adverse employment action at issue.

**Representative Fifth Circuit Decisions.**

In addition to these three Supreme Court decisions, the Fifth Circuit has issued a number of religious accommodation decisions in its Title VII jurisprudence. While none of the Fifth Circuit opinions have been ground-breaking, several of the cases are of significant interest, including the following:

*Horvath v. City of Leander*, 946 F.3d 787 (5th Cir. 2020). Horvath, a firefighter for the City of Leander requested an accommodation for his religion (Christianity) by asking the City to waive its DTAP vaccination requirements, which were safety and infection control requirements for that position. The City refused and offered other accommodations, including allowing him to wear a respirator or transfer to another position with equal pay and benefits. When Horvath refused to choose one of the City's accommodations, he was terminated. Horvath sued for religious discrimination and violation of his First Amendment rights. The Fifth Circuit affirmed a summary judgment in favor of the City. The accommodations offered by the City were reasonable as a matter of law, and the accommodation of wearing a respirator did not prevent the free exercise of his religion.

*Davis v. Ft. Bend Cty.*, 765 F.3d 480 (5th Cir. 2014) . This case includes a useful analysis of several issues in Title VII religious accommodation cases. The employee asked to have off a Sunday morning to attend a "community service event" with other church members at the request of the church's pastor. The employer declined to approve that absence, and the employee then found a co-worker who volunteered to substitute on her shift. When the employee did not appear for the assigned shift, she was terminated. She then sued alleging both failure to accommodate her request for time off and retaliation based on her religion. The Fifth Circuit reversed a summary judgment for the employer on her failure to accommodate claim, but affirmed summary judgment for the employer on her retaliation claim. Among the important points in the Court's analysis were the following:

- The Court emphasized that its inquiry into the quality and sincerity of the employee's religious belief was very limited. The court's task "is to decide whether [the individual's beliefs] are, in his own scheme of things, religious. . . . [The employee's] showing of sincerity, however, does not require proof that the July 3rd church event was in itself a true religious tenet, but only the [the employee] sincerely believed it to be religious in her own scheme of things." *Id.* at 485–86.

- While the *Hardison* decision establishes that an involuntary reassignment of another employee to cover a vacant shift is an undue hardship under Title VII, "[s]ubstituing a volunteer does not necessarily impose the same hardship on the employer, if any, as requiring an employee to substitute for another's religious observance." *Id.* at 489. Thus, the Court emphasized the "voluntary vs. forced" distinction in analyzing shift swap accommodations under Title VII.

- The Court ruled that the employee didn't establish a prima facie case of retaliation even though she was terminated for failure to appear for her assigned shift for religious reasons. The Court analyzed several other changes to the employee's work that followed the missed shift and concluded that these were not "adverse actions" sufficient to support a retaliation claim. *Id.* at 490–91.

*Eversley v. MBank Dallas*, 843 F.2d 172 (5th Cir. 1988). In this case, the employer had for many years accommodated the employee's religious-based need to be off work between sundown Friday and sundown Saturday by allowing the employee to work a special split-week schedule. When an efficiency consultant recommended that all the schedules for the employee's work group be standardized and the special schedule for the employee be stopped, the employer did so. After the employee was unsuccessful locating another position with a suitable schedule, he resigned and sued the employer alleging a failure to accommodate his religion under Title VII. The Fifth Circuit affirmed summary judgment for the employer. Among the important points in the Court's analysis were the following:

- The past practice of accommodating the employee by providing the split-week schedule did not preclude the employer from arguing that it was an undue hardship at the time it made the change. The Court accepted the consultant's assessment that the special schedule was less efficient as adequate to satisfy the *de minimis* threshold an undue hardship established in the *Hardison* case.

- The Court noted that the employer had provided accommodations it deemed reasonable to the employee. One accommodation that the Court found reasonable was allowing the employee to move to a vacant position, even though that position would have meant a 20% pay cut for the employee. The employer had also declined the employee's request to force-swap the employee with another employee working a different shift, and the Court found that such a forced swap would be an undue hardship, not required by Title VII.

*Tagore v. United States,* 735 F.3d 324 (5th Cir. 2013). A Sikh employee of the IRS requested an accommodation that would allow her to wear a kirpan (a type of ceremonial knife) into the Leland Federal Bldg. where she worked. She was denied permission to bring in the kirpan by the Federal Protection Services (FPS), a part of the U.S. Dept. of Homeland Security, which maintains security over all federal buildings, including the Leland Bldg. After several attempts at accommodation, including using a dull-edged kirpan, using a shortened kirpan, and having her kirpan encased in leucite, the employee was ultimately terminated when she declined to come into her workplace without the kirpan. She sued under both Title VII and the Religious Freedom Restoration Act (RFRA). Ultimately the 5th Circuit sustained a summary judgment in favor of the employer on the Title VII accommodation claim, but remanded the employee's RFRA claim. Among the important points in the Court's analysis are the following:

- The Court continued to apply a "light touch" analysis to the employee's claim of a sincere religious belief, and stated that the real focus in evaluating this element of the employee's claim is the sincerity of the belief, not whether the belief itself is a recognized tenet of an established religion. Here the Court referenced the employee's actual conduct (she was willing to be terminated from her job rather than not wear the kirpan), plus the independent evidence of Sikh faith practices, as sufficient to demonstrate that she had a sincere religious belief.

- The Court sustained summary judgment on the employee's Title VII claim, finding as a matter of law that her employer (the IRS) is not authorized to determine the security requirements in federal buildings, and therefore "cannot be deemed legally responsible for discriminating against [the employee] . . . . An employer need not accommodate an employee's religious practice by violating other laws." *Id.* at 329.

- The Court found that issues of material fact remained on the employee's RFRA claim. While the Court seemed convinced that "the government has a compelling interest in protecting federal buildings and the people in and around them . . ." and the "Congress's choice in defining 'dangerous weapons' that cannot be introduced into the buildings . . . must be given significant deference" (*Id.* at 330), the Court also noted that since the filing of the lawsuit the FPS had established a new policy for weapons in federal buildings that permitted exceptions to an outright ban on knives such as the employee's kirpan. The new policy even had a specific section called "Accommodations for Sikh Articles of Faith." On that basis the Court remanded the case for further consideration of whether the government could establish that the earlier weapon ban that had resulted in the employee's termination could meet the strict scrutiny test under RFRA.

**The Ministerial Exemption in Title VII.** In recognition that religion may sometime be an appropriate factor in employment decisions, Title VII exempts church organizations, church-owned or controlled schools, and other religious organizations and societies from the protections against religious discrimination in employment, including the duty to make a reasonable accommodation. Thus, where religion "is a bona fide occupational qualification reasonably necessary to the normal operation of [a] particular business or enterprise," an employer may hire and employ individuals based on their religion. 42 U.S.C. § 2000e-2(e)(l). Likewise, where schools are "owned, supported, controlled or managed, [in whole or in substantial part] by a particular religion or by a particular religious corporation, association, or society" or direct their curriculum "toward the propagation of a particular religion," such institutions may hire and employ individuals of a particular religion. *Id.* And "a religious corporation, association, educational institution, or society" may employ "individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities." *Id*.; 42 U.S.C. § 2000e-l(a); *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987) .

The exemption in 42 U.S.C. §2000e-1(a) for churches and religious organizations from religion-based discrimination claims and the duty to accommodate an employee's religion is

surprisingly broad. The statutory language is not limited to nonprofit corporations, to organizations that only conduct religious activities, or to organizations affiliated with a recognized church. At a core level, however, the exemption bars any Title VII claim involving ecclesiastical or internal governance decisions of a religious organization, such as hiring or retaining ministers or other religious employees, but not Title VII claims involving purely lay or non-religious job positions. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012); *see also Colon v. Inter-Varsity Christian Fellowship/USA*, 777 F.3d 829, 834 (6th Cir. 2015).

The scope of the ministerial exemption, however, was expanded by the Supreme Court in two cases from the Ninth Circuit involving the ministerial exemption: *Our Lady of Guadalupe School v. Morrissey-Berru*, 769 F App'x 460 (9th Cir 2019) and *St. James School v. Biel*, 911 F.3d 603 (9th Cir. 2018).

Both cases involved former Catholic elementary school teachers who sued their religious schools for discrimination, one under the Age Discrimination in Employment Act (ADEA), alleging she was demoted and her teaching contract was not renewed so the school could replace her with a younger teacher, and the other teacher suing under the Americans with Disabilities Act (ADA), alleging that she was discharged because she had requested leave of absence to obtain treatment for breast cancer. *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S.Ct. 2049, 2056–60 (2020).

On July 8, 2020, in a consolidated action, the Supreme Court held that the ministerial exception applied to the two Catholic elementary school teachers, barring their employment discrimination claims under the First Amendment's Religious Clause. *Id.* at 2059–69. The Court explained that the factors outlined in *Hosanna-Tabor* were not a rigid test. *Id.* at 2069. An employee need not have a particular religious title or formal religious education to fall under the ministerial exception. Instead, "[w]hat matters, at bottom, is what an employee does" with regard to "educating young people in their faith, inculcating its teachings, and training them to live their faith," which "are responsibilities that lie at the very core of the mission of a private religious school." *Id.* at 2063–66. The Court acknowledged that the religious institution's explanation of the role of its employees in the life of the religion was also an s important consideration. Id. at 2066–67. After observing the teachers' roles within their school and the religious institutions' belief as to the role of both employees in furthering the religious education of their students, the Court determined that the two former teachers "both performed vital religious duties" and were therefore subject to the ministerial exception. *Id.* at 2068.

Moving forward, the Court has stated that there is no rigid structure or formula for the ministerial exception. *Id.* at 2067. Instead, courts are to take all relevant circumstances into account and determine whether each particular position implicates the fundamental purpose of the exception. *Id.* As to schools specifically, "[w]hen a school with a religious mission entrusts a teacher with the responsibility of educating and forming students in the faith, judicial intervention into disputes between the school and the teacher threaten the school's independence in a way that the First Amendment does not allow." *Id.* at 2069.

**EEOC Regulations and Compliance Manual Guidance.**

The EEOC has amended its original regulations addressing religious discrimination under Title VII, titled *Guidelines on Discrimination Because of Religion,* 29 CFR Part 1605 ("Regulations"), multiple times since their original publication in 1966 to address amendments to Title VII and case law developments arising under the statute. Part 1605.2 of the EEOC Regulations addresses reasonable accommodation of religion under Title VII. See link for a copy of these regulations: https://www.govinfo.gov/content/pkg/CFR-2016-title29-vol4/xml/CFR-2016-title29-vol4-part1605.xml.

Part 1605.2 of the Regulations confirms that an employer's failure to make a reasonable accommodation of the religious practices of an employee or applicant is an unlawful employment practice under Title VII. 29 CFR Part 1605.2(b)(1). In addition, the Regulations also confirm that the accommodation duty extends to labor organizations, employment agencies, and joint labor-management apprenticeship or other training programs. 29 GRC Part 1605.2(b)(2)-(b)(3). The Regulations also comment on several of the types of religious accommodations, including work scheduling, union dues, and pre-hire selection practices that arise most frequently under Title VII. These include:

- **Voluntary Substitutes and "Swaps:"** "The Commission believes that the obligation to accommodate requires that employers and labor organizations facilitate the securing of a voluntary substitute with substantially similar qualifications." 29 CRF Part 1605.2(d)(1)(i).

- **Flexible Scheduling:** "[E]mployers and labor organizations should consider [ ] the creation of a flexible work schedule for individuals requesting [religious] accommodation." 29 CRF Part 1605.2(d)(1)(ii).

- **Lateral Transfers and Change of Job Assignments:** "When an employee cannot be accommodated either as to his or her entire job or an assignment within the job, employers and labor organizations should consider whether or not it is possible to change the job assignment or give the employee a lateral transfer." 29 CRF Part 1605.2(d)(1)(iii).

- **Union Dues Payments:** If requested, "a labor organization should accommodate the employee by not requiring the employee to join the organization and by permitting him or her to donate a sum equivalent to the dues to a charitable organization." 29 CRF Part 1605.2(d)(2). *Cf. Reed v. United Auto Workers*, 569 F.3d 576 (6th Cir. 2009) (requiring payments to charity in lieu of union dues by religious objector was a disparate treatment claim under Title VII).

- **Pre-hire Selection Processes:** "[T]he Commission has concluded that the use of pre-selection inquiries which determine an applicant's availability has an exclusionary effect on the employment opportunities of persons with certain religious practices. The use of such inquiries will, therefore, be considered to violate Title VII unless the employer can show [either no actual exclusionary effect in practice, or business necessity]." 29 CFP Part 1605.3.

The EEOC has also published a separate section in its Field Compliance Manual titled "Reasonable Accommodation" (the "Manual"), Chapter 12-IV, EEOC No. 915003, July 22, 2008, which provides instructions on how EEOC personnel are to investigate and analyze discrimination charges alleging a failure to accommodate a charging party's religious practices. See link for a copy of the Manual: https://www.eeoc.gov/policy/docs/religion.html#_Toc203359518.

The Manual is an excellent resource which includes voluminous research and case analysis on religious accommodation topics. This paper doesn't attempt to replicate that extensive analysis, but instead refers readers to the materials compiled in the Manual as a research tool. The Manual discusses many different Title VII religious accommodation issues, including the following:

- **Dress and Grooming Standards: "**While there may be circumstances in which allowing a particular exception to an employer's dress and grooming policy would pose an undue hardship, an employer's reliance on the broad rubric of "image" to deny a requested religious accommodation may in a given case be tantamount to reliance on customer religious bias (so-called "customer preference") in violation of Title VII." [Manual, page 74, citing *E.E.O.C. v. Red Robin Gourmet Burgers, Inc.*, No. C04–1291JLR, WL 2090677, (W.D. Wash. Aug. 29, 2005) ].

- **Religious Garb:** "There may be limited situations in which the need for uniformity of appearance is so important that modifying the dress code would pose an undue hardship. However, even in these situations, a case-by-case determination is advisable." [Manual, page 76-77, citing *Webb v. City of Philadelphia*, 2007 WL 1866763 (E.D. Pa. June 27, 2007).]

  "Employers should make efforts to accommodate an employee's desire to wear a yarmulke, hijab, or other religious garb. If the employer is concerned about uniform appearance in a position which involves interaction with the public, it may be appropriate to consider whether the employee's religious views would permit him to resolve the religious conflict by, for example, wearing the item of religious garb in the company uniform color(s)." [Manual, page 88]

- **Religious Expression (Permitting Prayers, Proselytizing, Displays of Icons, Etc.):** "As noted in §§ II-A-3 and III-C of [the Manual], prayer, proselytizing, and other forms of religious expression do not solely raise the issue of religious accommodation, but may also raise disparate treatment or harassment issues." [Manual, page 77]

  In evaluating a request to allow an employee to engage in religious expression, "employers should consider the potential disruption, if any, that will be posed by permitting this expression of religious belief . . . includ[ing] the effect such expression has had, or can reasonably be expected to have, if permitted to continue, on co-workers, customers, or business operations." [Manual, page 77-78, citing *Brown v. Polk Co.*, 61 F.3d 650 (8th Cir. 1995), cert. denied, 516 U.S. 1158 (1996).

  "Employers should incorporate a discussion of religious expression, and the need for all employees to be sensitive to the beliefs or non-beliefs of others, into any anti-harassment training provided to managers and employees." [Manual, page 89]

## B. State Law under Texas Labor Code Chapter 21

Chapter 21 of the Texas Labor Code is the state law counterpart to Title VII and prohibits employment discrimination based on religion in much the same manner as the federal statute. Thus, the Labor Code provides that an employer commits an unlawful employment practice if, because of an employee's religion, the employer "fails or refuses to hire an individual, discharges an individual, or discriminates in any other manner against an individual in connection with compensation, or the terms, conditions or privileges of employment." Tex. Lab. Code §21.051(1). Texas state courts have frequently stated that the Legislature intended to correlate Chapter 21 with federal law in employment discrimination cases, and thus, state courts may rely on federal decisions under Title VII to interpret and apply Labor Code Chapter 21. See, e.g., *Quantum Chem. Corp. v. Toennies***,** 47 S.W.3d 473 (Tex. 2001).

Labor Code Chapter 21 includes a specific definition of religious discrimination that is essentially the same as the federal definition in 42 U.S.C. §2000e(j), and equally broad and inclusive. Labor Code Sec. 21.108 provides:

> **§ 21.108. Discrimination Based on Religion.** "A provision in this chapter referring to discrimination because of religion or on the basis of religion applies to discrimination because of or on the basis of any aspect of religious observance, practice, or belief, unless an employer demonstrates that the employer is unable reasonably to accommodate the religious observance or practice of an employee or applicant without undue hardship to the conduct of the employer's business."

Similarly, Chapter 21 provides a complete exemption from the unlawful employment practices subchapter in Chapter 21 for the employment of a person by a religious organization "to perform work connected with the performance of religious activities by the corporation, association, or society." Tex. Labor Code §21.109.

There are relatively few reported state court decisions under Chapter 21 involving claims of religious discrimination or failure to accommodate an employee's religious practices. Below are brief summaries of key holdings from some of the most significant cases:

- *Grant v. Joe Myers Toyota, Inc*., 11 S.W.3d 419 (Tex. App.—Houston [14th Dist.] 2000, no pet.) . In this case the Court established that a failure to accommodate claim under Chapter 21 follows the same model of proof as the claim would follow under Title VII. *Id.* at 423. Thus, the plaintiff must establish: (1) that he or she has a bona fide religious belief that conflicts with an employment requirement; (2) that he or she informed the employer of this belief; and (3) that he or she suffered an adverse consequence for failure to comply with the conflicting employment requirement. *Id*. Applying this test, the Court in *Grant* reversed a no-evidence summary judgment ruling in favor of the employer.

- *Jones v. Angelo State Univ.*, 2016 WL 3228412 (Tex. App.—Austin June 10, 2016, pet. denied). In this case, the employer university did not offer a renewal teaching

contract to one of its professors who was a self-described "active evangelical Christian." The professor sued over the non-renewal and alleged both disparate treatment and failure to accommodate his religious practice of discussing his faith in class with his students and writing a Bible verse on the blackboard the last day of each class. The opinion is instructive on the type of proof needed to establish a religious discrimination claim under Chapter 21. First, the Court found that the employer's instruction to the employee to cease making religious statements in class was not "direct evidence" of religious discrimination, because the statement was directed to his practice of teaching, not his religious practice. Second, the Court held that the employee couldn't make a prima facie case of disparate treatment based on circumstantial evidence because he failed to provide evidence that he was replaced by a person who was not a member of his protected class, or that co-workers who were not a member of his protected class were treated more favorably. While the employee argued that he was different from his co-workers because he was an "evangelical Christian," the Court stated there was no support for his claim "that Christians who share his particular evangelical beliefs are considered to be a 'protected class,' separate and apart from Christians in general." *Id.* at *5. Finally, the Court remanded the employee's failure to accommodate claim because it wasn't properly raised and briefed in the lower court. It was noteworthy that the public university employer argued that it could not accommodate the employee's desire to make religious statements in his classes because permitting that conduct would "put the University at risk for a claim of violation of the Establishment Clause." *Id.* at *7. There is no reported resolution of that issue in this case.

- *Collins v. Tarrant Appraisal Dist.*, 2007 WL 1726135 (Tex. App. —Ft. Worth June 14, 2007, no pet.). In this case the employee was terminated for refusing to provide a hair sample for a "reasonable suspicion" drug test requested by her employer. She argued that cutting her hair would violate the tenets of her Pentecostal faith. The case proceeded as a disparate treatment case, and the opinion does not reference or consider a failure to accommodate claim. The issue raised in the opinion was whether the employer knew that the employee had a religious objection to cutting her hair. Citing federal precedent including *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), the Court stated that an employee claiming disparate treatment because of religion under Chapter 21 must establish a prima facie case by showing: "(1) the plaintiff has a bona fide religious belief that conflicts with an employment requirement, (2) the plaintiff informed the employer of this belief, and (3) the plaintiff suffered an adverse consequence for failure to comply with the conflicting employment requirement." *Id*. at *3. In this case the Court found that the employee had never told the employer that her refusal to provide the hair sample was because of her religion. Although the employer had knowledge that the employee was Pentecostal, and knew that she had long hair, the Court found this insufficient to establish that the employer knew the employee's refusal was based on her religion. The Court ruled "knowledge that an employee has strong religious beliefs does not place an employer on notice that she might engage in any particular religious activity." *Id*. at *4. Interestingly, the employer

testified that he would have permitted the employee to provide hair from another location on her body – i.e. an accommodation – if he had known that her objection was religious. Apparently, however, the posture of the case did not raise a claim for failure to make a reasonable accommodation.

# IV. "RELIGIOUS FREEDOM" STATUTES AND REGULATORY GUIDANCE

While the core constitutional principles described in Part II and the protections in Title VII against discrimination in the workplace outlined in Part III are longstanding and well-established parts of American jurisprudence, the use of federal and state statutory law to assert religious freedom rights touching the workplace is a more recent phenomenon. This section describes these federal and Texas state laws and highlights some of the important cases illustrating both the broad scope and the strength of these laws, as well as some of the unresolved issues they raise.

## A. Federal Law – RFRA

As briefly discussed earlier (*infra,* page 3), Congress passed the Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. §§2000bb *et seq.*, in direct response to the Supreme Court's opinion in *Employment Division v. Smith*, which held that the Free Exercise Clause was not a defense to the enforcement of neutral laws of general application. 494 U.S. 872 (1990). RFRA has two substantive parts:

- It creates federal statutory protection for the "exercise of religion" that is now even broader in scope than the constitutional protection of religion in the Establishment Clause; and

- It preempts application of any *federal* law to a person claiming the law burdens their exercise of religion unless the government "demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." *Id.* §2000bb-1 (a), (b).

The scope of RFRA is exceptionally broad. While the statute originally defined the "exercise of religion" to be coterminous with the First Amendment, Congress modified that definition in 2000 as part of the Religious Land Use and Institutionalized Persons Act ("RLIUPA"), 42 U.S.C. §§2000cc *et seq*. The amendment deleted the reference to the First Amendment and substituted very broad language, under which RFRA now applies to "any exercise of religion, whether or not compelled by, or central to, a system of religious belief," see §§2000bb-2(4), 2000cc-5(7). Indeed, RLIUPA expressly states that the term "exercise of religion" in RFRA should be "construed in favor of a broad protection of religious exercise, to the maximum extent permitted by this chapter and the Constitution." 42 U.S.C. §2000cc-3(g).

Significantly, RFRA provides a defense to enforcement of a federal law[8] even when the burden on religion arises out of a "rule of general applicability" that was created without animus or discriminatory intent. See *id*. §2000bb-l(a). Thus, the effect of RFRA was to reinstate the "strict scrutiny" standard that applied in Free Exercise cases prior to *Smith*.

One significant feature of RFRA is that it applies *only when the federal government is a party to the lawsuit* – i.e., it does not apply to purely private civil lawsuits, even if a party in the case is claiming that a federal law applicable to the case creates a substantial burden on that party's exercise of religion. *See E.E.O.C. et al. v. R.G. & G.R. Harris Funeral Homes, Inc.,* 884 F.3d 560 (6th Cir. 2018), *cert. granted in part by,* 139 S. Ct. 1599 (Apr. 22, 2019) (No. 18–107). (discussed *infra*) ; *see also General Conference of Seventh-Day Adventists v. McGill,* 617 F.3d 402 (6th Cir. 2010). However, many state religious freedom statutes, including the Texas Religious Freedom Restoration Act (Tex. Civ. Prac. & Rem. Code Chapter 110), do not contain such a limitation and are, accordingly, available for parties to assert regardless of whether the state or a political subdivision is a party to the suit.

Without question, the most significant judicial opinion addressing the scope and meaning of RFRA is *Burrell v. Hobby Lobby Stores, Inc.* – which concerns group healthcare coverage in the workplace. 573 U.S. 682 (2014). In that case, the employer, Hobby Lobby – a private, closely held corporation – asserted a defense under RFRA to enforcement of the employer healthcare mandate in the Patient Protection and Affordable Care Act of 2010 ("ACA"). Based on what all parties to the case conceded was the employer's sincerely held religious belief, the employer objected to participating in the ACA group healthcare program because regulations under that law required the employer to provide "coverage, without cost sharing" for several types of contraceptives that the employer believed were inconsistent with its religious beliefs. *Id.* at 2762. While the implementing regulations under the ACA did provide for exemptions from the contraceptive requirements for some types of religious organizations, Hobby Lobby didn't qualify as a religious organization under those regulations.

The Supreme Court held in *Hobby Lobby* that the contraceptive mandate in the ACA did substantially burden the employer's exercise of religion under RFRA, and that the government could not show that the application of that mandate to Hobby Lobby furthered a compelling government interest and was the least restrictive means of achieving that interest – i.e. the enforceability test under RFRA. Accordingly, the Court held that RFRA precluded application of the contraceptive mandate to this employer. In the course of its analysis the Court reached several significant holdings, including the following:

- The Court held that Hobby Lobby Stores, Inc. fell within the definition of a "person" who could assert a religious claim under RFRA, despite the fact that Hobby Lobby was

[8] While the text of RFRA doesn't limit its application to federal laws only, the Supreme Court ruled in *City of Boerne, Texas v. Flores*, 521 U.S. 507, (1997) that RFRA could not be constitutionally applied to the States. Thus, at present RFRA is only available to religious claimants seeking exemption from federal laws. However, in response to the *Boerne v. Flores* decision, many states (including Texas) have enacted state level religious-protection statutes providing essentially the same type of protection for religious claimants under state law as RFRA does under federal law. See, Part IV.B., *supra.*

a corporation and not an individual. This analysis included a fact-intensive discussion of the ownership of the company – who were all individual family members and held the same religious views. The Court also relied upon the 2000 amendment in RLUIPA to the RFRA's definition of "exercise of religion" that eliminated the reference in RFRA's original text to the First Amendment (which protects only individuals under established constitutional law). The Court found this amendment an expression of Congressional intent that RFRA's definition of religion was intended to protect more broadly than the First Amendment. Finally, the Court rejected the government's argument that even if RFRA did apply to corporations, it should only apply to nonprofit corporations. The Court found no support for that distinction in the RFRA statute itself or its legislative history.

- The Court reinforced in the *Hobby Lobby* opinion earlier opinions that set a very low bar for establishing that a law "substantially burdens" a person's exercise of religion. On this issue the parties all agreed that the employer had a *sincere* belief that the contraceptive mandate was inconsistent with their religious beliefs. The government argued that compliance with the contraceptive mandate was *objectively* not the equivalent of endorsing it and, therefore, not a substantial burden. The Court rejected that approach, and instead focused exclusively on the employer's *subjective* belief that their religion made it immoral for them to provide the coverage. The Court declined to examine that subjective belief, simply stating, "[I]t is not for us to say that their religious beliefs are mistaken or insubstantial." *Id*. at 2778. The opinion also references the high cost of ACA noncompliance penalties to Hobby Lobby (~$475MM/year) as further showing that compliance would be a substantial burden to it.

- The Court found it unnecessary in *Hobby Lobby* to conduct a compelling interest analysis under RFRA because it concluded that even if the government had a compelling interest in enforcing the contraceptive mandate, it was unable to show that the mandate was the least restrictive means of achieving that interest. The Court first proposed that the government itself could pay for the contraceptives as a less restrictive means of achieving the goal of the mandate. *Id.* at 2780. The Court also found that the government's existing accommodation protocol for religious organizations (for which Hobby Lobby did not qualify) would satisfy the less restrictive alternative test. Under that procedure, a self-certifying religious organization could obtain an exemption from the contraceptive mandate, and in that case the organization's insurance company would pay for the contraceptives without charging the employer for those costs.[9] The Court stated that allowing organizations such as Hobby Lobby to apply for this exemption was a less-restrictive means to satisfy the contraceptive mandate. On this

[9] Since the *Hobby Lobby* decision in 2014, over 50 companies have requested a religious exemption from the contraceptive mandate in the ACA. *See* L. Durso *et al.*, *Who Seeks Religious Accommodations to Providing Contraceptive Coverage?*, Center for American Progress (Aug. 11, 2017), found at: https://www.americanprogress.org/issues/lgbt/news/2017/08/11/437265/seeks-religious-accommodations-providing-contraceptive-coverage/.

basis the Court concluded that RFRA provided a valid defense to the employer against enforcement of the contraceptive mandate.

Although RFRA passed with broad bipartisan support, most of the workplace cases citing the statute have involved fundamentalist Christian businesses seeking exemptions from laws relating to contraceptives, access to reproductive care and health services, and providing business services to LGBTQ people. There are no reported cases at this time about how religious exemptions under RFRA might provide a means for corporations and individuals to protect the rights of LGBTQ individuals in the workplace.

*Hobby Lobby* is certainly one of the most highly visible and important Supreme Court opinions in the last decade. While its actual effect on the ACA is limited because of the narrowness of its facts, its greater significance lies in its treatment of RFRA as a defense to enforcement of federal laws in areas of social regulation (e.g., laws protecting the rights of persons in the LGBTQ community). Both the Court's reluctance to evaluate the objective reasonableness of the employer's substantial burden claim in *Hobby Lobby*, and the very high bar the case sets for the government to establish that a burden is the least restrictive means of achieving a governmental interest, portend a greater use of RFRA in the future by employers in enforcement actions by the government.

One post-*Hobby Lobby* case illustrates this tension. *Irish 4 Reproductive Health*, et al. *v. U.S. Dep't of Health & Human Servs.*, et al., No. 3:18-CV-491-PPS-JEM, 2020 WL 248009 (N.D. Ind. Jan. 16, 2020) . In *Irish*, Plaintiffs challenged HHS Rules regarding implementation of ACA regulations exempting certain religious organizations from mandates of coverage for reproductive health benefits and a Settlement Agreement with Notre Dame University System that affected Plaintiffs by denying them contraceptive coverage. There were a variety of claims in the lawsuit, including violations of the Establishment Clause. The court denied motions to dismiss by the federal entity Defendants, because Plaintiffs stated plausible claims that the Settlement Agreement between the federal government and Notre Dame University and various ACA regulations exempting Notre Dame University from the ACA contraceptive coverage mandate favors religion and thus, violates the Establishment Clause. The Court also found that RFRA claim did not authorize exemption from contraceptive coverage in the Regulations or Settlement Agreement because the 'check the box' accommodation to religious institutions did not substantially burden Notre Dame's exercise of religion.

The U.S. Supreme Court recently issued a decision reversing the Third Circuit Court of Appeals and upholding the same Health Resources and Services Administration (HRSA) Guidelines regarding implementation of ACA regulations exempting certain religious organizations from the mandate of coverages for reproductive health benefits because of religious and conscientious objections. *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 140 S.Ct. 2367, 2386 (2020). The Court held that the plain meaning of the ACA text, specifically the phrase "as provided for," granted authority to HRSA to define preventive care that applicable health plans must cover, as well as empowered the Department to identify and create exemptions from the regulatory requirement. *Id*. at 2379–80. Thus, the Court confirmed that HHS, DOL and the Treasury had the authority under the ACA to interpret and promulgate the religious and moral exemptions. In her dissent, joined by Justice Sotomayor, Justice Ginsburg

states that a blanket exemption for religious and moral objectors to contraception is inconsistent with Congress' intent in both the ACA and RFRA.

The most significant post-*Hobby Lobby* case involving RFRA and protection from employment discrimination under Title VII is *E.E.O.C. et al. v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560 (6th Cir. 2018), *cert. granted in part by,* 139 S. Ct. 1599 (Apr. 22, 2019) (No. 18–107).[10] In this watershed case the Sixth Circuit directly confronted the clash between an employee's protection from religious discrimination under Title VII and the employer's protection from substantial governmental burden on its religious beliefs under RFRA. The employee in the case worked for a family-owned funeral home business as a funeral director – a position that required substantial interactions with the employer's clients during times of significant emotional sadness for the clients. The funeral home owners were devout Christians who saw their funeral home business as a part of their personal ministry, and whose religious beliefs included an understanding that each person's gender is an immutable condition of life determined biologically at birth. The employee was a transgender woman who was "assigned male at birth" (*Id.* at 567) and worked for the employer as a male for about six years before notifying the employer that she intended to have sex reassignment surgery, and would need to present herself as a woman at the workplace for a year before the surgery as part of her gender reassignment process. Shortly after this the employee was fired.

The EEOC brought suit against the employer on behalf of the employee. In a lengthy opinion the Sixth Circuit granted summary judgment to the EEOC on liability for sex discrimination under Title VII based on the employee's termination. The Court reached several significant holdings in its opinion about both the meaning of "sex" in Title VII and the interplay between Title VII and RFRA in a workplace dispute, including the following:

- **Is Transgender Status a Protected Class under Title VII?** Before even reaching the question of whether RFRA provides a defense for the employer on the Title VII sex discrimination claim, the Court had to determine the threshold question whether the employee's transgender status was protected under Title VII. After noting that this is a different question than whether sexual orientation is protected under Title VII (*compare Hively v. Ivy Tech Community College of Indiana*, 853 F.3d 339, 345 (7th Cir. 2017)), the Court reasoned that discrimination "because of sex" under Title VII "inherently includes discrimination against employees because of a change in their sex." 884 F.3d at 575. At the end of its analysis, the Court's holding was categorical: "We also hold that discrimination on the basis of transgender and transitioning status violates Title VII." *Id*. at 574–75.[11]

- **Is RFRA Applicable in Cases with a Non-Governmental Plaintiff?** The Court in *Harris Funeral Homes* confirmed earlier Sixth Circuit holdings that "Congress

[10] The docket note for the grant of *certiorari* states that the grant is limited to the following question: "Whether Title VII prohibits discrimination against transgender people based on (1) their status as transgender or (2) sex stereotyping under *Price Waterhouse v. Hopkins*, 490 U. S. 228 (1989)."

[11] The Supreme Court granted certiorari in this case on April 22, 2019, to address this specific issue. See Note 10 and accompanying text.

intended RFRA to apply only to suits in which the government is a party." *Id.* at 584. This appears to be the correct analysis (though there is some contrary judicial authority) based on the language of the statute and its legislative history, which are discussed at length in this opinion. While the EEOC was the original plaintiff in *Harris Funeral Homes*, the wrinkle in the case was that the transgender employee intervened in the lawsuit as an additional plaintiff while it was pending in the Sixth Circuit. The Court avoided ruling on the issue of whether RFRA could apply to a Title VII lawsuit between private parties by concluding that the issue hadn't been addressed by the lower court and thus was not ripe for consideration.

- **Can Customer Bias Establish a "Substantial Burden" under RFRA?** The employer in *Harris Funeral Homes* argued that its clients would be distracted and put off by the employee's transgender status, interfering with the employer's desire to minister to these customers during their periods of mourning and thus creating a "substantial burden" on the employer's religion under RFRA. The Court rejected this argument, reasoning that a mere concern that the funeral homes' clients were actually biased against transgendered people in a way that affected the employer's business, absent any actual proof of such bias or its effects, was insufficient to be a "substantial burden" on the employer's religion. "[W]e hold as a matter of law that a religious claimant cannot rely on customers' presumed biases to establish a substantial burden under RFRA." 884 F.3d at 586.

- **Is Having an Employee Whose Appearance is At Odds with the Employer's Religious Beliefs a "Substantial Burden" under RFRA?** The Court answered this question "no," based on the record in the case. The employer had argued that just the presence of a transgender employee in its workplace would put him under "significant pressure to leave the funeral industry and end his ministry to grieving people." *Id.* at 587. The Court rejected this argument, reasoning that simply tolerating an employee's understanding of their sex and gender identity "is not tantamount to supporting it." *Id.* at 588. Even though it assumed the employer's belief that it violated God's command for him to employ a transgender person was "an honest conviction," the Court held that "permitting [the employee] to wear attire that reflects a conception of gender that is at odds with [the employer's] religious beliefs is not a substantial burden under RFRA." *Id.*

- **Is Enforcing Title VII Protections for an Individual Employee a "Compelling Government Interest" under RFRA?** Although the Court ruled that the employer had not established a "substantial burden" on his religion, the Court nonetheless analyzed whether the EEOC could establish that the burden was necessary to further a compelling government interest under RFRA in this case. The Court concluded from this analysis that protecting the employee from discrimination under Title VII was a sufficiently compelling government interest to overcome the RFRA defense, contrasting the framework of this case from the line of cases that had found religious exemptions from laws of general application justifiable. The difference, the Court

> pointed out, was that in the religious exemption cases courts determined that the *general public interest* served by a law would not be compromised by granting an exemption to a particular *individual*. Thus, the point of the exemption was to prevent harm to an individual. By contrast, in this case failing to enforce the general public interest in protecting employees from discrimination in the workplace would result in harm to the individual it was intended to protect. Thus, permitting RFRA to exempt an employer from Title VII would result in harm to a specific individual, while permitting exemptions to general laws for religious observers would not. 884 F.3d at 591–92.

The case was argued before the Supreme Court on October 8, 2019. As of the publication of this paper, the Court has not issued their opinion.

## B. State Law – TRFRA and Other Religious Exemption Laws

The Texas Legislature enacted the Texas Religious Freedom Restoration Act ("TRFRA"), Tex. Civ. Prac. & Rem Code Chap. 110, in 1999. The statute was passed in the next session of the Legislature following the Supreme Court's 1997 decision in *City of Boerne v. Flores* (discussed at page 5, *supra*), in which the Court held that the federal RFRA could not constitutionally be applied to state and local governments. Like RFRA, the TRFRA provides in part, that the state or a local government in Texas "may not substantially burden a person's free exercise of religion [unless it] demonstrates that the application of the burden to the person ... is in furtherance of a compelling governmental interest; and ... is the least restrictive means of furthering that interest." Tex. Civ. Prac. & Rem. Code §110.003(a)-(b). See link for a copy of the TRFRA statute: https://statutes.capitol.texas.gov/Docs/CP/htm/CP.110.htm.

Like RFRA, the TRFRA is also extremely broad in scope, and provides that "[t]he protection of religious freedom afforded by this chapter is in addition to the protections provided under federal law and the constitutions of this state and the United States." *Id.* §110.009(b). Indeed, TRFRA has even broader application within Texas than RFRA did prior to *City of Boerne v. Flores.* As discussed in Part IV. A, above, a person may assert a religious objection claim under RFRA only in cases in which the federal government is a party. However, TRFRA contains no such limitation, but rather provides that:

> "A person whose free exercise of religion has been substantially burdened in violation of Section 110.003 may assert that violation as a defense in a judicial or administrative proceeding *without regard to whether the proceeding is brought in the name of the state or by any other person*."
>
> Tex. Civ. Prac. & Rem. Code §110.004 (Emphasis added.)

While TRFRA has now been in place for 20 years, surprisingly there are no reported case decisions involving application of that statute to a claim under Labor Code Chapter 21 or any other

employment-related law.[12] Nonetheless, the reported cases do illustrate the powerful sweep of the statute and the difficulty of meeting the compelling interest and least restrictive means prongs of the test that are necessary to sustain the application of a challenged law against a TRFRA claim. Following are examples of cases highlighting these principles:

- *Barr v. City of Sinton,* 295 S.W. 3d 287 (Tex. 2009). This is the leading and most-cited case involving application of TRFRA. In the case the Supreme Court upheld the TRFRA claim of a pastor who operated a "halfway house ministry" out of two houses he owned against a local zoning ordinance providing that a "correctional or rehabilitation facility" could not be operated within 1000 feet of certain types of land uses. The halfway houses qualified as rehabilitation facilities under the ordinance and were within 1000 feet of the pastor's church building. The pastor sued for declaratory relief under TRFRA. The Supreme Court ruled in the case that the ordinance imposed a "substantial burden" on the pastor's religion, and rejected the City's arguments that (1) the pastor could locate the halfway houses elsewhere, and (2) the pastor didn't have to operate the halfway houses as religious operations. The case includes a lengthy discussion of the history and application of TRFRA, and confirms that because TRFRA and RFRA were both "enacted in response to *Smith* [*v. Emp't Div.*, see discussion at pages 3-4, *supra*] and were animated in their common history, language and purpose by the same spirit of protection of religious freedom, we will consider decisions applying the federal statutes germane in applying the Texas statute." *Id.* at 296. Applying the federal standards from RFRA cases, the Court also emphasized in its analysis the importance of testing the government's proffered compelling interest and least restrictive means defenses to the ordinance against "the particular claimant whose sincere exercise of religion is being substantially burdened," rather than against a generalized claim of compelling need. *Id.* at 306, citing *Gonzales v. O Centro Espirita Beneficente Unaio do Vegetal,* 546 U.S. 418 (2006).

- *Merced v. Kasson,* 577 F.3d 578 (5th Cir. 2009). In this case a priest in the Santeria religion asserted claims against the City of Euless, Texas under TRFRA and other statutes alleging that local ordinances prevented him from keeping animals at his home for slaughter and slaughtering animals, which he claimed were part of his Santeria religious practices. The lower court found that the ordinances "furthered a compelling governmental interest and were the least restrictive means of advancing them." *Id.* at 587. The Fifth Circuit reversed the lower court's ruling and enjoined the Euless ordinances under TRFRA. The Fifth Circuit took much of its analytical guidance in the case from the Texas Supreme Court's opinion in *Barr,* above, including the appropriate 4-part test for analyzing claims under TRFRA: "(1) whether the government's regulations burden the plaintiff's free exercise of religion; (2) whether the burden is substantial; (3) whether the regulations further a compelling governmental

[12] It appears likely that the plaintiff in *Spicer v. Tex. Workforce Comm'n,* 430 S.W.3d 526 (Tex. App.—Dallas 2014, no pet.), could have asserted a TRFRA claim in that case, which involved the denial of unemployment compensation benefits under Tex. Labor Code Chap. 21 to a church organist. [See discussion of this case at pages 6–7.] However, the Court's opinion indicates that no TRFRA claim was made in that case. *Id.* at 541, n.11.

interest; and (4) whether the regulations are the least restrictive means of furthering that interest." *Id.* at 589. While the plaintiff's religious practice involved ritual slaughter of as many as 40 animals,[13] the Court nonetheless found that the city could not identify a compelling governmental interest in regulating that conduct. Once again, the Court emphasized the need for the government to demonstrate under TRFRA a compelling interest in applying the challenged law to the particular individual, as opposed to "generalized statements of its interests." *Id.* at 594.

- *A.A. ex rel. Betenbaugh v. Needville Ind. Sch. Dist.*, 611 F.3d 248 (5th Cir. 2010). In the case, the parents of a 5-year old Native American boy moved to Needville and sued the school district to allow the boy to wear his hair long (two 13" braids) to kindergarten, in violation of the school district's dress policy. The primary issues in this case were the sincerity of the plaintiffs' religious belief and whether the school district's proffered accommodations to the plaintiff's requested exemption still created a "substantial burden" on the plaintiff under TRFRA. The Court expressed great reluctance to question the sincerity of the plaintiff's beliefs, despite the record which showed (1) the plaintiff's beliefs did not align with other Native American beliefs about hair length, (2) the plaintiff had given inconsistent accounts of his beliefs about hair length, and (3) the plaintiff had testified that he wore his hair long because of his ethnic origin rather than his religion. The Court also rejected that school district's offer to allow the boy to braid his hair and put the braid down the back of his shirt. Citing the *Barr* decision, the Court found that the proffered accommodation was still a substantial burden: "When a restriction is not completely prohibitive, Texas law still considers it substantial if 'alternatives for the religious exercise are severely restricted.'. . . . [T]hat means a burden imposing a less-than-complete ban is nonetheless substantial if it curtails religious conduct and impacts religious expression to a 'significant' and 'real' degree." *Id.* at 265.

Given the increasing use of RFRA as an affirmative tool to challenge facially neutral federal laws, it is likely that TRFRA will likewise become an affirmative tool used to challenge state and local laws of general application, including laws affecting the workplace.

Beyond statutes like TRFRA that provide an exemption from laws of general application based on religious beliefs without specifying the particular belief system, there have been Legislative efforts in Texas to give priority to *specific* religious beliefs. For example, H.B. 1035, attached as **APPENDIX 1** to this paper, was introduced in the 2019 Texas legislature, and would have created an exemption from any type of state or local enforcement action for a person based on the person's "sincerely held religious belief" that: "(1) marriage is or should be recognized as the union of one man and one woman; and (2) the terms 'male,' 'man,' 'female,' and 'woman'

[13] The Santeria ceremony at which a new shrine is consecrated, as described by the Court "generally involves a sacrifice of five to seven four-legged animals (lambs or goats), a turtle, a duck, ten to fourteen chickens, five to seven guinea hens, and ten to fourteen doves in addition to other elements (songs, drum music, and the offering of other objects). The animals are usually cooked and eaten after these sacrifices." *Merced*, 577 F. 3d at 582.

refer to an individual's immutable biological sex as objectively determined by anatomy and genetics at the time of birth." The exemption from state and local enforcement actions could have been claimed by any person who declines to provide marriage-related services, such as photography, poetry, wedding planning services, floral arrangements, wedding cakes, venue rentals, or to perform a marriage ceremony based on a sincerely held religious belief as defined above. The Bill did not make it out of the State Affairs committee.

Outside Texas, other state legislatures have passed a number of "religious exemption" laws. Most of the recent examples appear to be based on antipathy toward the Supreme Court's decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) , where the Supreme Court ruled that states could not deny persons of the same sex the right to marry. For example:

- Miss. Code Ann. § 11-62-5, enacted in 2016, explicitly permits discriminatory conduct against LGBTQ persons in numerous areas, including the provision of wedding services.

- Tenn. Code Ann. § 63-22-302, also enacted in 2016, permits mental health counselors to turn away clients based on their religious beliefs.

- Mich. Comp. Laws Ann. §400.5A, enacted in 2015, allows adoption and foster care agencies to refuse to place children with LGBT parents based on religious objections. [Mote:

- Other states have enacted laws similar to Tex. H.B. 1035, which prevent the government from denying licenses, funding, or contracts to service providers who discriminate based on religious beliefs.

- Michigan's House Bill 4188 and South Dakota's Senate Bill 149, for instance, prohibit the government from taking adverse action against a child placement agency because of its refusal to provide services based on religious beliefs.

## C. Regulatory Guidance

On May 4, 2017, the President issued Executive Order 13798, which recognized "the fundamental right to religious liberty as Americans' first freedom." See *Promoting Free Speech and Religious Liberty*, 82 Fed. Reg. 21675 (May 4, 2017). Among other things, E.O. 13798 directed the United States Attorney General to "issue guidance interpreting religious liberty protections in Federal law." *Id*. at §§ l, 4. In response to this direction, the Attorney General issued a formal guidance on October 6, 2018, to "All Executive Departments and Agencies" of the federal government, with the subject line: "Federal Law protections for Religious Liberty." See *Federal Law Protections for Religious Liberty, Attorney General's Memorandum*, 82 Fed. Reg. 49668-01, 2017 WL 4805663 (the "Religious Liberty Guidance"). A copy of the Religious Liberty Guidance is attached as **APPENDIX 2** to this paper.

The Religious Liberty Guidance has three parts. The first part includes 20 separate "Principles of Religious Liberty," each with a paragraph of explanation about the meaning of the statement. The Attorney General states in this part of the document that "to the greatest extent practicable and permitted by law, religious observance and practice should be reasonably accommodated in all government activity, including employment contracting, and programming." *Id.* at p. 1. The 20 Principles of Religious Liberty appear to be intended as statements of existing federal law, for example:

- "The freedom of religion extends to persons *and* organizations." [*Id*., page 2]

- "RFRA does not permit the federal government to second-guess the reasonableness of a religious belief." [*Id*., page 4]

- "RFRA applies even where a religious adherent seeks an exemption from a legal obligation requiring the adherent to confer benefits on third parties." [*Id*., page 5]

The second part of the Religious Liberty Guidance appears to be guidance to federal agencies in addressing religious beliefs and practices. It includes different sections addressed to agencies in their capacities as employers, as rule makers, in their enforcement capacities, and in their grant and contracting practices. The third part of the Religious Liberty Guidance is a lengthy appendix that includes analysis of the constitutional and statutory sources of legal rights and protections for religion. This part of the Religious Liberty Guidance is an excellent resource for further review of the historical case law development around the constitutional and statutory principles addressed in this paper.

On May 3, 2018, the President issued Executive Order 13831, establishing the White House Faith and Opportunity Initiative. See *Establishment of a White House Faith and Opportunity Initiative*, 83 Fed. Reg. 20715 (May 3, 2018). The purpose of the order was to set policy by indicating that the "executive branch wants faith-based and community organizations, to the fullest opportunity permitted by law, to compete on a level playing field for grants, contracts, programs, and other Federal funding opportunities." E.O. 13831 § 1. E.O. 13831 is attached as **Appendix 3** to this paper.