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# Religious Clause Chaos

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In Fifth Edition of the ACS Supreme Court Review, Professor Alan K. Chen authored an analysis of the Court's recent free speech holdings, titled "First Amendment Adrift?"[2] A similar title would be appropriate for a review of the October 2021 Term's Religion Clause holdings, but in some ways the situation is more dire: the Court's Establishment Clause jurisprudence is not simply adrift but is rapidly sinking after being battered on the rocks by a conservative majority bent on dramatically refashioning that jurisprudence. It is no exaggeration to say, as Justice Sonia Sotomayor wrote in dissent in one of the cases, that "[t]his Court continues to dismantle the wall of separation between church and state that the Framers fought to build."[3]

In many respects, the 2021 Term was the most consequential for church-state jurisprudence since 1963, when the Court first applied strict scrutiny to free-exercise challenges (subsequently overturned in 1990)[4] and fashioned the first two prongs of its three-part analytical standard (i.e., the *Lemon* test), while striking the popular practice of prayer and Bible reading in the public schools.[5] This analysis will consider the five Court holdings that raised issues arising under the Religion Clauses,[6] though it will concentrate on the two blockbuster decisions in *Carson v. Makin*[7] and *Kennedy v. Bremerton School District*,[8] which together effectively rewrote the Court's

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[2] Alan K. Chen, *The Constitution Adrift*, 5 AM. CONST. SOC'Y SUP. CT. REV. 59 (2021), https://www.acslaw.org/wp-content/uploads/2021/10/ACS-Supreme-Court-Review-2020-2021-WEB.pdf.

[3] Carson v. Makin, 142 S. Ct. 1987, 2012 (2022) (Sotomayor, J., dissenting).

[4] Sherbert v. Verner, 374 U.S. 398, 406 (1963); Emp. Div., Dept. of Hum. Res. of Or. v. Smith, 494 U.S. 872, 883 (1990).

[5] Sch. Dist. of Abington Tp., Pa. v. Schempp, 374 U.S. 203, 223–27 (1963); Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971).

[6] FBI v. Fazaga, 142 S. Ct. 1051 (2022); Ramirez v. Collier, 142 S. Ct. 1264 (2022); Shurtleff v. Boston, 142 S. Ct. 1583 (2022).

[7] Carson v. Makin, 142 S. Ct. 1987 (2022).

[8] Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022).

religion-clause jurisprudence, and, as in *Dobbs v. Jackson Women's Health Organization*,[9] overturned its own fifty-year precedent.

## I. Background

The Supreme Court's church-state jurisprudence has been controversial since its inception (not to mention the controversies sparked by its specific holdings). Still, the principle of church-state separation was generally accepted and secure[10] until the mid-1980s when then-Justice William Rehnquist threw down the gauntlet by excoriating the Court's Establishment Clause jurisprudence and calling its reliance on a Jeffersonian-Madisonian model of church-state separation "bad history . . . [that] should be frankly and explicitly abandoned."[11] Following then-Justice Rehnquist's jeremiad, since the late-1980s Court majorities have adopted a more sympathetic view of funding mechanisms to aid religious schools and charities, of government sponsored religious displays, and of religious expression on public school campuses. With funding issues, the Court expanded the types of permissible mechanisms while placing fewer restrictions on their applications.[12] This shift in funding jurisprudence seemed to crest with the 2002 Cleveland tuition-voucher case, *Zelman v. Simmons-Harris*, where a bare majority held that states could finance religious education without violating the Establishment Clause's "no-aid" principle, provided it occurred through the magic of genuine "individual private choice."[13] The *Zelman* holding was permissive—that states were free to indirectly fund religious education if they so desired but were not required to do so. With respect to public religious displays (e.g., creches, Ten Commandment monuments, and crosses), the Court considered whether they involved private religious expression in a public forum or whether the government-controlled display communicated an overall message that was not solely religious.[14] Finally, the Court adhered to the prohibition against officially sponsored religious expression in public schools through 2000,[15] but then distinguished that from voluntary student expression and private expression merely taking place on school campuses during non-instructional times.[16] While there was a clear trend that the jurisprudence was moving into a "postseparationist period," according to Professor Chip Lupu, that development was incremental.[17]

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[9] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).
[10] *See* STEVEN K. GREEN, SEPARATING CHURCH AND STATE: A HISTORY, 165-73 (2022).
[11] Wallace v. Jaffree, 472 U.S. 38, 108 (1985) (Rehnquist, J., dissenting).
[12] *See* Witters v. Wash. Dept. Serv. for the Blind, 474 U.S. 481 (1986); Bowen v. Kendrick, 487 U.S. 589 (1988); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993); Rosenberger v. University of Va., 515 U.S. 819 (1995); Agostini v. Felton, 521 U.S. 203 (1997); Mitchell v. Helms, 530 U.S. 793 (2000).
[13] Zelman v. Simmons-Harris, 536 U.S. 639, 662–63 (2002).
[14] Lynch v. Donnelly, 465 U.S. 668, 670–671 (1984); Capitol Square Rev. v. Pinette, 515 U.S. 753, 757 (1995); Van Orden v. Perry, 545 U.S. 677, 681 (2005); Salazar v. Buono, 559 U.S. 700, 706 (2010).
[15] Lee v. Weisman, 505 U.S. 577, 599 (1992); Santa Fe Ind. Sch. Dist. v. Doe, 530 U.S. 290, 315–17 (2000).
[16] Bd. of Educ. v. Mergens, 496 U.S. 226, 235–37 (1990); Lamb's Chapel v. Ctr. Morishes Union Free Sch. Dist., 508 U.S. 384, 395–96 (1993); Good News Club v. Milford Central Sch., 533 U.S. 98, 114–20 (2001).
[17] Ira C. Lupu, *The Lingering Death of Separationism*, 62 GEO. WASH. L. REV. 230, 254–79 (1993).

On the free exercise side, a Court majority famously re-wrote its jurisprudence in the 1990 case of *Employment Division v. Smith*, shifting the standard for free exercise burdens arising under neutral regulations from strict scrutiny to rational basis.[18] The justices limited the scope of the *Smith* decision three years later in *Church of the Lukumi Babalu Aye v. Hialeah*,[19] but that clarification failed to forestall Congress from enacting the Religious Freedom Restoration Act ("RFRA") in 1993[20] and then the Religious Land Use and Institutionalized Person's Act ("RLUPIA") in 2000.[21] In 2005, a unanimous Court upheld the constitutionality of RLUPIA (and by implication, RFRA), and the following year it applied RFRA's strict scrutiny standard, indicating that the justices were not as hostile to religious-based claims as the *Smith* decision had implied.[22]

By the 2010s, however, this incremental approach appeared to be giving way. The Court then had five staunch conservatives—Chief Justice John Roberts and Justices Antonin Scalia, Anthony M. Kennedy, Clarence Thomas, and Samuel A. Alito—with Justice Kennedy having replaced the more moderate Justice Sandra Day O'Connor as the "swing" vote. In 2012, the Court signaled that it was undertaking a permissive approach to religion claims by holding that a religious organization—here, a religious school—did not need to follow the nondiscrimination requirements of federal civil rights laws (e.g., Title VII, the Americans with Disabilities Act) when engaged in employment decisions involving ministers (i.e., the "ministerial exception").[23] In essence, when it came to those who lead religious communities, those bodies did not have to answer claims that their employment actions were motivated by racial, gender, or disability discrimination rather than by religious reasons. For the government to require otherwise would "interfere[] with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs."[24] On its own, the unanimous holding in *Hosanna-Tabor* was not that remarkable, as the interest in religious autonomy could be seen as being central to the principle of free exercise of religion (as well as to church-state separation). Eight years later, however, the Court expanded on that principle by extending the ministerial exception to teachers of secular subjects in religious schools who were not designated as "ministers."[25] This time, the holding drew a dissent, accusing the majority of affording

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[18] Emp. Div., Dept. of Hum. Res. of Or. v. Smith, 494 U.S. 872, 882–90 (1990).
[19] Church of the Lukumi Babalu Aye v. Hialeah, 508 U.S. 520, 546–47 (1993).
[20] 42 U.S.C. § 2000bb (a)(5).
[21] 42 U.S.C. § 2000cc (a)(1).
[22] Cutter v. Wilkinson, 544 U.S. 709, 725 (2005); Gonzalez v. O Centro Espírita Beneficente Uniã do Vegetal, 546 U.S. 418, 436–37 (2006). In *Watchtower Bible and Tract Soc'y v. Stratton*, 536 U.S. 150, 164–69 (2002), the Court sided with the religious claimants (Jehovah's Witnesses) but relied on free expression and free assembly rationales.
[23] Hosanna-Tabor Evangelical Lutheran Church v. EEOC, 565 U.S. 171 (2012).
[24] *Id.* at 188.
[25] Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2060–61, 2063–65, 2068 (2020).

unnecessary deference to a religious entity's definition of what constitutes a "minister" and turning judicial review into "a rubber stamp."[26]

In 2014, the Court issued two decisions that indicated the slow, rightward turn in Religion Clause jurisprudence was about to accelerate. *Town of Greece v. Galloway* involved Christian prayers in a legislative assembly, an issue the justices had not considered since 1983, but this time the prayers were sectarian in nature. Rather than employing any of the analytical tests the Court had previously used, Justice Kennedy applied a "historical practices" test, writing that "the Establishment Clause must be interpreted 'by reference to historical practices and understandings[27]'" (presuming that an "unambiguous and unbroken history of more than 200 years" can be accurately divined). Justice Kennedy then resorted to a syllogism: "it is not necessary to define the precise boundary of the Establishment Clause where history shows that the specific practice is permitted. Any test the Court adopts must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change."[28]

*Burwell v. Hobby Lobby Stores Inc.*, decided the same term, represented a more radical shift in the Court's Religion Clause jurisprudence. There, the conservative majority held that a privately held, for-profit business with 500 stores and over 13,000 employees could raise a free-exercise objection to complying with the requirement under the Affordable Care Act of 2010 ("ACA") to provide certain medical contraceptives under its insurance plan. The Court held that RFRA applied not only to individuals and religious institutions but also to non-religious for-profit businesses—not something previously assumed—and that the owners' personal religious objections transferred to the incorporated business: "protecting the free-exercise rights of corporations like Hobby Lobby . . . protects the religious liberty of the humans who own and control those companies."[29] In addition to extending the idea of who or what can assert a religious burden, the majority held that a burden can arise not only from being forced to engage in an immoral act itself, but also actions that have "the effect of enabling or facilitating the commission of an immoral act by another."[30] At the same time that the majority expanded on the notion of what constitutes a burden on a claimant, it minimized the burdens now transferred to third parties who were effectively required to accommodate the claimant's burden. Together, *Town of Greece* and *Hobby Lobby* signaled that the justices were willing to reevaluate Religion Clause jurisprudence and were not afraid to institute significant changes.

This trend of expanding on notions of free-exercise burdens continued in recent Court terms. The mechanism for this expansion involved a reevaluation of what constituted a "neutral and

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[26] *Id*. at 2076 (Sotomayor, J., dissenting).
[27] Town of Greece v. Galloway, 572 US 565, 576 (2014).
[28] *Id*. at 577.
[29] Burwell v. Hobby Lobby Stores Inc., 473 U.S. 682, 707 (2014).
[30] *Id*. at 724.

generally applicable" regulation that imposed an acceptable burden on religious practice and the significance of any exemptions from the regulatory scheme. Several cases involved state regulations that imposed closures and social-gathering restrictions during the COVID-19 pandemic.[31] Commonly, both closure and gathering restrictions provided exceptions for "essential" services, e.g., medical offices and pharmacies. In many instances, churches and other houses of worship were subjected to gathering limitations comparable to similar entities—e.g., movie theatres, fraternal organizations, sporting venues—but significant variations existed depending on a regulation's coverage and definition of what was an "essential service." As churches faced gathering limitations of twenty-five percent of capacity, for example, they sued, claiming the restrictions burdened their religious practice and discriminated against them by providing exemptions for other entities.

These cases made their way to the Supreme Court through applications for injunctive relief under the Court's "shadow docket." Initially, a slim majority of the justices upheld the regulations as being neutral and generally applicable and ruled that exemptions for dissimilar entities and activities did not make the regulations non-neutral.[32] In contrast, the conservative justices argued that the number of secular entities that were treated similarly to churches did not matter; the question, they insisted, was whether *any* secular analogs to churches were exempted, with less deference being afforded as to what was deemed "essential." With the death of Justice Ruth Bader Ginsburg and her replacement with Justice Amy Coney Barrett, those outcomes changed in favor of churches. Strict scrutiny review is triggered under the Free Exercise Clause, the Court held, "whenever [government] treat[s] *any* comparable secular activity more favorably than religious exercise. It is no answer that a State treats some comparable secular businesses or other activities as poorly as or even less favorably than the religious exercise at issue."[33]

Finally, in the summer of 2021, the Court held that the city of Philadelphia could not enforce a requirement that city-funded contractors for social services—here, Catholic Social Services—serve all communities, including same-sex couples. Because the city director of social services could grant exceptions to the city's nondiscrimination requirement, the Court found that requirement was not generally applicable and discriminated against the religious agency.[34]

The trend narrowing the scope on the non-establishment principle also accelerated in more recent terms. In 2017 and 2020, the Court decided two religious funding cases, *Trinity Lutheran*

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[31] *See* S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613 (2020); Calvary Chapel v. Sisolak, 140 S. Ct. 2603 (2020).

[32] *S. Bay United Pentecostal Church*, 140 S. Ct. at 1613; *Calvary Chapel*, 140 S. Ct. at 2603 (2020).

[33] Tandon v. Newsom, 141 S. Ct. 1294, 1296 (2021); *see also* Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63 (2020).

[34] Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1881–82 (2021).

*Church of Columbia, Inc. v. Comer*[35] and *Espinoza v. Montana Dept. of Revenue*,[36] respectively. Both decisions were significant, not so much for the ultimate rulings, but for the language of the majority and concurring opinions which bristled with hostility toward the traditional "no-aid" approach to funding questions. Equally significant, both decisions cast the legal question not within the conventional context of whether the funding mechanisms were either prohibited or allowed by non-establishment principles, but whether to enforce the no-funding principle discriminated against religion.

*Trinity Lutheran* was the easier case factually because the financial aid at stake was a state grant to reimburse expenses for resurfacing a playground at a church that operated a religious school. The state of Missouri had refused to award a grant to the church based on the no-funding-of-religion provision of its state constitution and then on the more general principle of church-state separation. The state also argued that in denying the reimbursement grant it had not meaningfully burdened the church's ability to freely exercise its religion, as the church was in the same position as if the grant program did not exist. Rather than holding that a grant for this particular in-kind benefit (playground resurfacing) simply did not implicate the non-establishment principle because it did not finance religious activity, the Court held that the denial discriminated against the church based on its religious identity or status. Missouri's interest in "achieving greater separation of church and State than is already ensured under the Establishment Clause of the Federal Constitution," Chief Justice Roberts wrote, "is limited by the Free Exercise Clause."[37]

Three years later in *Espinoza v. Montana Department of Revenue* the Court extended this nondiscrimination limitation to the non-establishment principle by holding that a state could not operate a tuition tax-credit program that excluded participants from applying the credit toward tuition at religious schools. Here, the potential advancement of religious training and instruction was much greater than in *Trinity Lutheran*, but the majority applied the same discrimination-against-religion rationale. The goal of non-establishment of religion was beside the point: "Status-based discrimination remains status based even if one of its goals or effects is preventing religious organizations from putting aid to religious uses."[38] In the process, the majority—with assistance from Justice Alito's concurrence—called into question the constitutionality of express no-funding provisions that are contained in the constitutions of thirty-seven states. As in *Trinity Lutheran*, the majority and concurring opinions expressed hostility to the no-funding principle and to church-state separation generally; according to the majority opinion, "we do not see how the no-aid provision promotes religious freedom."[39]

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[35] Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012 (2017).
[36] Espinosa v. Mont. Dept. of Revenue, 140 S. Ct. 2246 (2020).
[37] *Trinity Lutheran Church*, 137 S. Ct. at 2024.
[38] *Espinoza*, 140 S. Ct. at 2256.
[39] *Id*. at 2261.

Sandwiched between the above two decisions, in 2019 the Court handed down its decision in *American Legion v. American Humanist Association*, upholding the constitutionality of a thirty-two-foot cross on a public highway. The concrete cross, erected by the American Legion in 1925 to honor fallen soldiers from World War I, was subsequently acquired and maintained by a government-planning commission. By a seven-to-two vote, the Court found that the government-owned cross did not violate the Establishment Clause, with the justices applying the "historical practices and understanding" test from *Greece v. Galloway* rather than the *Lemon* test.[40]

Thus, in the decade preceding the 2021 Term, the Court majority had taken significant steps in expanding the understandings of free exercise burdens and of discrimination against religious actors while it had retracted understandings of what conduct violated the Establishment Clause. Exemplifying that trend, the last time the Court had struck down a government action as violating the Establishment Clause had been in 2005.[41]

## II. The 2021 Term

Of the five cases of the Term that raised issues under the Religion Clauses, in two—*Federal Bureau of Investigation v. Fazaga*[42] and *Shurtleff v. City of Boston*[43]—the Court ruled without addressing those issues. *Ramirez v. Collier* directly presented a free-exercise claim, albeit arising under RLUPIA,[44] while *Carson v. Makin*[45] and *Kennedy v. Bremerton School District*[46] presented overlapping free-exercise and non-establishment claims.

### A. *FBI v. Fazaga*

In *FBI v. Fazaga*, the respondents, Muslims residing in California, sued the FBI and other government officials for illegal surveillance of them in their mosque, businesses, and homes under the Foreign Intelligence Surveillance Act ("FISA").[47] FISA provides a procedure under which a trial-level court may consider the legality of electronic surveillance conducted pursuant to FISA.[48] In particular, the respondents wanted to have the court consider whether they had been targeted by the FBI because of their religion, thus rendering the surveillance a violation of the Free Exercise Clause.[49] The government moved to dismiss the action pursuant to the "state secrets privilege" on grounds that divulging any vital information would threaten national

[40] American Legion v. American Humanist Ass'n, 139 S. Ct. 2067, 2089–90 (2019).
[41] McCreary County v. ACLU, 545 U.S. 844, 881 (2005).
[42] FBI v. Fazaga, 142 S. Ct. 1051, 1062–63 (2022).
[43] Shurtleff v. City of Boston, Mass., 142 S. Ct. 1583, 1589–93 (2022).
[44] Ramirez v. Collier, 142 S. Ct. 1264, 1275 (2022).
[45] *Carson*, 142 S. Ct. at 1995–96.
[46] Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2416 (2022).
[47] *Fazaga*, 142 S. Ct. at 1058.
[48] *Id*. at 1057.
[49] *Id*. at 1058.

security.[50] One might have thought that the respondent's targeting claim would resonate with the Court's conservative members, but a unanimous Court held that the judicial review provision of FISA did not override the state secrets privilege.[51] Even though the respondents and their amici argued that a FISA court should be able to balance the "Nation's fundamental commitment to individual religious liberty" against the government's interests in secrecy,[52] the justices sidestepped that question, simply holding that FISA did not curtail or modify the state secrets privilege, which can preclude even an *in camera*, *ex parte* review of the relevant evidence.[53]

### B. *Shurtleff v. Boston*

*Shurtleff v. Boston* involved a twelve-year practice of the city of Boston that permitted private groups to use the plaza in front of city hall for ceremonies.[54] That access included allowing groups to hoist a flag of their choosing on the third flagpole that usually flew the city's flag.[55] Over the years, the city had allowed the flying of fifty unique flags for 284 such ceremonies; it had never rejected an application until Camp Constitution, a conservative Christian group, sought to fly the so-called "Christian flag" as part of a ceremony on the plaza.[56] The city claimed that the messages communicated by the flagpole constituted "government speech," and to allow the flying of the Christian flag would result in government endorsement of religion.[57]

The Court ruled unanimously for the petitioner, with the majority opinion being as notable for what it did not say as for what it did say. Justice Stephen G. Breyer's majority opinion was relatively straightforward if not predictable. The two questions for the majority were whether the expression in dispute—flying a private flag on a city-owned flagpole under circumstances constituting an admitted public forum—was government speech (it was not), and then, acknowledging the private nature of the expression, whether the city's denial constituted viewpoint discrimination (it did).[58] "When a government does not speak for itself," Justice Breyer wrote, "it may not exclude speech based on 'religious viewpoint'; doing so constitutes impermissible viewpoint discrimination."[59] Justice Breyer's opinion abruptly ended there without addressing (or weighing) the city's possible Establishment Clause justifications for declining to fly a Christian flag outside city hall.[60] The majority's failure to address the

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[50] *Id*. at 1058–59.
[51] *Id*. at 1062–1063.
[52] Brief for Const'l Law Professors as Amicus in Support of Respondent at 5, *Fagaza*, 142 S. Ct. 1051 (No. 20-828).
[53] *Id.* at 1062.
[54] *Shurtleff*, 142 S. Ct. at 1588.
[55] *Id*.
[56] *Id*.
[57] *Id*.
[58] *Id*. at 1589, 1593.
[59] *Id*. at 1593.
[60] *Id*.

Establishment Clause claim drew concurrences signed by Justices Thomas, Alito, Neil M. Gorsuch, and Brett M. Kavanaugh. Justice Kavanaugh, who concurred in the majority opinion, commented that:

[A]s this Court has repeatedly made clear, however, a government does not violate the Establishment Clause merely because it treats religious persons, organizations, and speech equally with secular persons, organizations, and speech in public programs, benefits, facilities, and the like. On the contrary, a government *violates* the Constitution when (as here) it *excludes* religious persons, organizations, or speech because of religion from public programs, benefits, facilities, and the like.[61]

Justice Alito, joined by Justices Thomas and Gorsuch, was harsher in his commentary, declaring that "excluding religious messages from public forums that are open to other viewpoints is a 'denial of the right of free speech' indicating 'hostility to religion' that would 'undermine the very neutrality the Establishment Clause requires.'"[62] And foreshadowing his opinion in *Kennedy v. Bremerton School District*, Justice Gorsuch (joined by Justice Thomas) used his concurrence to denounce the *Lemon* test as ahistorical, unworkable, and inherently discriminatory against religious practitioners. He urged the adoption of a historical-practices-and-understanding approach for resolving Establishment Clause claims.[63]

### C. *Ramirez v. Collier*

*Ramirez v. Collier* raised a claim under the RLUPIA. There, the petitioner challenged the Texas Department of Criminal Justice's shifting policy of providing death-row inmates access to a spiritual advisor at the time of execution.[64] Three years earlier in *Murphy v. Collier*, the Court had held that Texas had discriminated on the basis of religion by permitting Christian and Muslim spiritual advisors to attend executions but not a Buddhist spiritual advisor.[65] In response, Texas amended its execution protocol to bar all chaplains from entering the execution chamber.[66] After Ramirez sued, Texas amended its policy again to permit a prisoner's spiritual advisor to be present in the execution chamber. Ramirez then requested that his minister be allowed to "lay hands" on him and pray over him while he was strapped to the execution gurney, which prison officials refused.[67]

In an 8-1 decision written by Chief Justice Roberts, the Court held that Ramirez had raised a claim under RLUPIA, that he was likely to show that his request was based on a sincerely held belief that was substantially burdened by the state, and that while the state likely had a

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[61] *Id*. at 1594 (Kavanaugh, J., concurring).
[62] *Id*. at 1602 (Alito, J., concurring).
[63] *Id*. at 1603-10 (Gorsuch, J., concurring).
[64] Ramirez v. Collier, 142 S. Ct. 1264, 1272 (2022).
[65] Murphy v. Collier, 139 S. Ct. 1475 (Mem.) (2019).
[66] *Ramirez*, 142 S. Ct. at 1273.
[67] *Id*.

compelling interest to prevent any unwarranted physical contact with a prisoner, a categorical ban on touching and audible prayers was not the least-restrictive alternative to accomplish those interests.[68] The Chief Justice noted that the federal government and several states have allowed similar access to execution chambers without experiencing any problems.[69] Only Justice Thomas dissented, insisting that Ramirez had not exhausted his administrative remedies by adding additional last-minute requests and that the Court's decision would invite abusive and frivolous litigation by prisoners seeking to delay execution.[70] The decision in *Ramirez* is consistent with the decade-long approach by a majority on the Court to generously interpret the coverage and protections of RLUPIA. It represents one of the few religion-clause-related issues for which there appears to be a broad consensus.[71]

### D. *Carson v. Makin*

*Carson v. Makin* was the latest in the recent line of state financial aid-to-religion cases and may represent the capstone in the trend that has shifted the focus from whether the Establishment Clause prohibits the government funding of religious entities and activities to whether to deny such funding discriminates against religion in violation of the Free Exercise Clause. Whether one agrees or disagrees with the outcome in *Carson* and the majority's analysis, it is no exaggeration to state that the holding in *Carson*, along with those in *Trinity Lutheran* and *Espinoza*, represent a significant repudiation of the Court's own church-state jurisprudence reaching back some seventy-five years.[72]

Maine is a very rural state, so much so that approximately fifty-percent of its school districts (school administrative units, or "SAUs") do not operate public secondary schools.[73] Rather, pursuant to state law, the SAUs may pay tuition costs for students to attend private schools and academies, the only requirements being that the schools are approved by the state department of education and are "nonsectarian."[74] (Some SAUs contract to send their students to other SAUs with public schools.) The decision as to what private school a student shall attend otherwise rests with the parents.[75] Two sets of parents who wanted their children to attend religious schools sued the state, challenging the requirement that private schools must be "nonsectarian" in order to receive the tuition payments.[76]

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[68] *Id*. at 1278–80.
[69] *Id*. at 1279.
[70] *Id*. at 1291-01 (Thomas, J., dissenting).
[71] *See* Holt v Hobbs, 574 U.S. 352, 369–70 (2015); *Murphy*, 139 S. Ct. at 1475; Gutierrez v. Sanez, 141 S. Ct. 127, 128 (2020); Dunn v. Smith, 141 S. Ct. 725 (2021).
[72] *See* Steven K. Green, *supra* note 10 at 178-90.
[73] *Carso*n, 142 S. Ct. at 1993.
[74] *Id*.
[75] *Id*. at 1994.
[76] *Id*. at 1995.

At first glance, the constitutional issue in *Carson* appeared to be similar to what was previously resolved in *Zelman*, where the Court upheld the distribution of tuition vouchers to religious schools based on the independent private choice of the parents.[77] But the state argued, and the First Circuit agreed, that this was not a true "private choice" program, because many SAUs contracted with other SAUs, and those that did not were simply seeking to fulfill their obligation to provide "a rough equivalent of a secular public school education" through the tuition payments.[78] The state and the First Circuit also distinguished the facts from *Espinoza*, insisting that the state did not bar tuition payments based on the religious "status" of any school but "based on the religious use that [the schools] would make of it in instructing children."[79] The Court, in a 6-3 decision by Chief Justice Roberts, rejected both arguments.

Several aspects about the Court's opinion are interesting and telling. First, Chief Justice Roberts could have rested the holding more squarely on *Zelman*, declaring that the issue was simply about independent private choice. Chief Justice Roberts did reaffirm the central holding of *Zelman* that "a neutral benefit program in which public funds flow to religious organizations through the independent choices of private benefit recipients does not offend the Establishment Clause."[80] But under the Cleveland Voucher Program at issue in *Zelman*, the Ohio legislature had affirmatively chosen to include religious schools as beneficiaries.[81] Here, the state had affirmatively *excluded* religious education under its tuition program. As a result, the question became whether the state, when it came to providing education, could privilege *secular* education over *religious* education. Chief Justice Roberts appeared to say that a state could, provided it never funded private schooling, but once the state chooses to subsidize any private education, it cannot deny funding of religious schooling. Quoting the holding in *Espinoza*, Chief Justice Roberts said, "[A] State need not subsidize private education. But once a State decides to do so, it cannot disqualify some private schools solely because they are religious."[82] As a result, Chief Justice Roberts wrote, Maine's refusal to pay tuition for religious schooling amounted to "discrimination against religion. A State's antiestablishment interest does not justify enactments that exclude some members of the community from an otherwise generally available public benefit because of their religious exercise."[83]

In some respects, this holding may be the logical extension of *Trinity Lutheran* and *Espinoza* when read in conjunction with *Zelman*. Chief Justice Roberts even iterated that the "'unremarkable' principles applied in *Trinity Lutheran* and *Espinoza* suffice to resolve this

[77] *Id.* at 1998.
[78] *Id*.
[79] *Id*. at 1995.
[80] *Id*. at 1997.
[81] *Simmons-Harris*, 536 U.S. at 646.
[82] *Id*. at 2000 (quoting *Espinoza*, 140 S. Ct. at 2261).
[83] *Id*. at 1998.

case."[84] But Chief Justice Roberts's rationale begs the question of why, if a school district can prefer to operate *secular* public schools, can it not prefer a *secular* curriculum for all of the students it financially supports. The Court majority insists that the only choice states have is either to fund public schools exclusively or, if not, to fund public schools and *all* private schools. It does not adequately explain why the alternative choice cannot be to fund public schools and then *secular* private schools, particularly since states can otherwise privilege secular public education. One might argue that a state is simply funding (or buying) a particular product that is consistent with its policy objectives, as the Court affirmed in *Rust v. Sullivan*.[85] Chief Justice Roberts blithely remarked that "Maine has decided *not* to operate schools of its own" but had chosen to offer tuition assistance when it could have "increase[d] the availability of transportation, provide[d] some combination of tutoring, remote learning, and partial attendance, or even operate[d] boarding schools of its own."[86] Those options are clearly not realistic in rural Maine; nor is it realistic for school districts never to rely on private entities and resources to meet the diverse needs of the students they are obligated to serve.[87] Chief Justice Roberts's analysis also raises questions about whether a Maine SAU could contract with a secular private school to educate all of its students when some parents might prefer the contract to include a nearby religious school, as well. Or, more generally, are states and school districts now barred from requiring that applicants for charter schools only offer a secular educational program? Are religious charter schools now required? Although the Chief Justice disputed Justices Breyer's and Sotomayor's assessment that the holding requires that states must now fund religious education in certain circumstances, that potential remains real.[88]

The second significant aspect to the *Carson* holding is how the majority addressed the state's and First Circuit's argument that the state was not discriminating on the basis of anyone's religious status by denying the tuition payments but was merely prohibiting how the tuition monies could be used. As noted, this was a distinction the Court made in *Trinity Lutheran* and *Espinoza*, although justices on both the right and left criticized the distinction as being facile, with Justice Gorsuch arguing in his two concurrences that discrimination against religion occurs under both status and use distinctions.[89] In his majority opinion, Chief Justice Roberts apparently now abandoned the distinction, or at least its constitutional significance: "In *Trinity*

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[84] *Id*. at 1997.
[85] Rust v. Sullivan, 500 U.S. 173 (1991).
[86] *Carson*, 142 S. Ct. at 2000.
[87] Although the Court in *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 13–14 (1993), held that a school district could constitutionally pay for services for a disabled student in a private religious school under the Individuals with Disabilities Act ("IDEA"), the Court stopped short of holding that the district must do so pursuant to the Free Exercise Clause. *See* Leiman v. Starr, 121 F. Supp. 3d 466, 478 (D. Md. 2015) (holding that a district can comply with IEDA without placing a child in a religious school).
[88] *Carson,* 142 S. Ct. at 2001–02.
[89] *Espinoza*, 140 S. Ct. at 2275-76 (Gorsuch, J., concurring); *Trinity Lutheran Church*, 137 S. Ct. at 2025-26 (Gorsuch, J., concurring).

*Lutheran* and *Espinoza*, we held that the Free Exercise Clause forbids discrimination on the basis of religious status. But those decisions never suggested that use-based discrimination is any less offensive to the Free Exercise Clause."[90] He acknowledged that a "status-use distinction [may] lack[] a meaningful application not only in theory, but in practice as well."[91] Although Chief Justice Roberts may still believe that the distinction retains some constitutional saliency, as do the three dissenters, it appears that Justice Gorsuch's position has prevailed among the other conservatives on the Court and that the status-use distinction is irrelevant going forward. That retreat may partially explain the absence of any concurring opinions from Chief Justice Roberts's right.

Justice Breyer penned the lead dissent in what was apparently his swansong on church-state controversies. Justice Breyer had long been a fence-sitter in church-state cases, joining Justice O'Connor's controlling concurrence in *Mitchell v. Helms* (upholding Title I funds for religious schools),[92] writing the controlling concurrence in *Van Orden v. Perry* (upholding a Ten Commandments monument on the Texas Capitol grounds),[93] and even concurring in *Trinity Lutheran*.[94] Still, Justice Breyer leaned separationist, though he always came across as a pragmatist rather than as an ideologue. Justice Breyer used his *Carson* dissent to offer a broad vision of church-state relations, reaffirming the values underlying church-state separation, while restating his longstanding concern about the dangers of religious divisiveness. In stark contrast to the majority opinion, he laid out the traditional legal rationales for the "no-aid" rule and the importance of maintaining a religiously neutral, secular education system.[95] The two religion clauses, he insisted, protect different but complementary values, and he chastised the majority for creating a tension between the two clauses and upsetting a constitutional balance that allows for "play in the joints."[96] "The Religion Clauses thus created a compromise in the form of religious freedom," Breyer insisted.[97] "The very point of the Establishment Clause is to prevent the government from sponsoring religious activity itself, thereby favoring one religion over another or favoring religion over nonreligion," he wrote.[98] "State funding of religious activity risks the very social conflict based upon religion that the Religion Clauses were designed to prevent."[99]

Justice Sotomayor's shorter dissent struck a darker tone. Like Justice Breyer, she criticized the majority for abandoning or at least conflating the status-use distinction. But chiefly, she charged

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[90] *Carson*, 142 S. Ct. at 2001.
[91] *Id*.
[92] Mitchell v. Helms, 120 S. Ct. 2530, 2556 (2000).
[93] Van Orden v. Perry, 125 S. Ct. 2854, 2868 (2005).
[94] *Trinity Lutheran Church*, 137 S. Ct. at 2026.
[95] *Carson*, 142 S. Ct. at 2003–04 (Breyer, J., dissenting).
[96] *Id*. at 2004.
[97] *Id*.
[98] *Id*. at 2007.
[99] *Id*.

the conservative majority with revolutionizing Religion Clause jurisprudence through its recent decisions. "[I]n just a few years, the Court has upended constitutional doctrine, shifting from a rule that permits States to decline to fund religious organizations to one that requires States in many circumstances to subsidize religious indoctrination with taxpayer dollars."[100] Agreeing with Justice Breyer that the majority had abandoned constitutional balance for ideological purity, Justice Sotomayor wrote: "The Court's increasingly expansive view of the Free Exercise Clause risks swallowing the space between the Religion Clauses that once 'permit[ted] religious exercise to exist without sponsorship and without interference.'"[101] Her opinion concluded with a remonstrance: "What a difference five years makes. In 2017, I feared that the Court was 'lead[ing] us . . . to a place where separation of church and state is a constitutional slogan, not a constitutional commitment.' Today, the Court leads us to a place where separation of church and state becomes a constitutional violation. . . . With growing concern for where this Court will lead us next, I respectfully dissent."[102]

## E. *Kennedy v. Bremerton School District*

Justice Sotomayor's foreshadowing came true less than a week later with the Court's decision in *Kennedy v. Bremerton School District*. In *Kennedy*, a football coach at a public high school sued his school district for suspending him for praying on the fifty-yard line of the school's football field immediately following games, allegedly in violation of his free-speech and free-exercise rights.[103] Although Coach Kennedy's practice shifted over time, and some facts were in dispute, student athletes from his team and members of opposing teams—as well as people from the community, including politicians—joined Kennedy on the field during his prayers.[104] District officials instructed Kennedy not to engage in the demonstrative prayers at the end of the games while he was still on duty, and offered other opportunities for him to pray in private.[105] After initially complying, Kennedy resumed his prior practice of praying on the field, and the District suspended him and ultimately terminated his employment.[106] Kennedy was unsuccessful with his claims before the trial court and the Ninth Circuit.[107] The Supreme Court denied his initial petition for certiorari in 2019, but at the time Justice Alito issued a statement, joined by Justices Thomas, Gorsuch, and Kavanaugh, expressing sympathy with Kennedy's claims, all but inviting a new certiorari petition once the facts were further developed below.[108]

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[100] *Id*. at 2013.
[101] *Id*. at 2014 (Sotomayor, J., dissenting).
[102] *Id*. at 2014–15.
[103] Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2416, 2419 (2022).
[104] *Id*. at 2416.
[105] *Id*. at 2416–17.
[106] *Id*. at 2418–19.
[107] *Id.* at 2419–21.
[108] Kennedy v. Bremerton Sch. Dist., 139 S. Ct. 634 (Mem.) (2019).

As in *Carson*, the content of the majority and dissenting opinions in *Kennedy* stand in stark contrast, both as to the relevant facts and to the constitutional issues at stake. Reading the opinions, it is as if the majority and dissent are discussing two different cases. Justice Gorsuch wrote the majority opinion for six justices, concluding that the school district had "retaliated" against Coach Kennedy for expressing his free-speech and free-exercise rights.[109] The majority agreed with Kennedy that even though he was technically "on duty" when he engaged in the prayers, they occurred at a moment following the game when other school employees engaged in private expression (though not of the same demonstrative kind).[110] Justice Gorsuch disagreed that the *Pickering-Garcetti* "government employee" speech doctrine controlled under the facts—Kennedy was clearly praying in his capacity as "a private citizen," and his expression did not "amount to government speech attributable to the District," Justice Gorsuch wrote.[111] The prayer was not "within the scope of his employment duties" and he was "not seeking to convey a government-created message."[112] All those factors can be relevant to whether the government-employee-speech doctrine applies and justifies employer limitations on employee speech, but the majority downplayed the other threshold factor of whether the expression involves a matter of "public concern," which was clearly not the case here.

Even then, this initial showing by an employee only sets up a balancing of the employee's expressive interests and the interests of the government employer, the latter to which courts had traditionally been deferential. Not so here, as the majority applied heightened scrutiny to the District's interests in avoiding the impression that it was endorsing Kennedy's religious activity or of preventing religious coercion of students. At this point, the focus of the majority opinion diverged even more starkly from that of Justice Sotomayor's dissenting opinion. Missing from the majority opinion is any considered discussion of the significant body of caselaw governing religious expression in public schools and the concerns expressed in those holdings. Rather, the majority trashed (for lack of a better word) the "Endorsement Test" as unworkable (relying chiefly on non-school case holdings)[113] and then disputed whether any of Kennedy's actions coerced unwilling student-players to participate in the prayers. Those familiar with the Court's school-prayer jurisprudence will recall, however, that in school contexts the justices had not required evidence of actual coercion of students' religion for the Establishment Clause to serve as a bar to the religious activity.[114] But fundamentally, the

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[109] *Kennedy*, 142 S. Ct. at 2415.

[110] *Id*. at 2424.

[111] *Id*. at 2424–25.

[112] *Id*.

[113] As Justice Sotomayor observed in her dissenting opinion, "No subsequent decisions in other contexts, including the cases about monuments and legislative meetings on which the Court relies, have so much as questioned the application of this core Establishment Clause concern in the context of public schools." *Id*. at 2448.

[114] McCollum v. Bd. of Educ., 333 U.S. 203, 209, n.1 (noting that "the religious education program was voluntary in name only because in fact subtle pressures were brought to bear on the students to force

District's concerns were invalid because the Court's longstanding standard, *Lemon v. Kurtzman*, was equally invalid; as Justice Gorsuch had intimated in his *Shurtleff* opinion, the three-part *Lemon* test was dead: "this Court long ago abandoned *Lemon* and its endorsement test offshoot."[115] In place of the *Lemon* and Endorsement tests, Justice Gorsuch suggested applying the "historical practices and understandings" approach to school prayer cases.[116] The "historical practices and understandings" within the school context are highly problematic, however, considering the strong Protestant character of public education throughout much of the nineteenth century.[117] Thus, as the Court had done less than a week earlier in *Dobbs*, it reversed a fifty-year precedent with the stroke of a pen.[118]

As noted, Justice Sotomayor filed a lengthy dissenting opinion, joined by Justices Breyer and Kagan. Her opinion took the opposite approach from that of Justice Gorsuch; rather than categorizing the case as involving the free speech and free exercise rights of school employees to engage in religious expression, Justice Sotomayor's discussion followed the traditional analysis represented by sixty years of Court jurisprudence.[119] As she remarked in her opening paragraph, since *Engel v. Vitale* in 1962, "this Court consistently has recognized that school officials leading prayer is constitutionally impermissible. Official-led prayer strikes at the core of our constitutional protections for the religious liberty of students and their parents, as

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them to participate in it"); Engel v. Vitale, 370 U.S. 421, 430–31 (1962) ("The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion. . . . When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain."); Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 316 (1963) (Stewart, J. dissenting) (acknowledging that "[i]t is clear that the dangers of coercion involved in the holding of religious exercises in a schoolroom differ qualitatively from those presented by the use of similar exercises or affirmations in ceremonies attended by adults."); Lee v. Weisman, 505 U.S. 577, 592 (1992) (affirming that "prayer exercises in elementary and secondary schools carry a particular risk of indirect coercion").

[115] *Kennedy*, 142 S. Ct. at 2427; *see also* Lemon v. Kurtzman, 403 U.S. 602, 612 (1971). In actuality, the majority reversed sixty-year-old precedent in that the first two prongs of *Lemon* originated in *Schempp*, and *Schempp* struck down purportedly "voluntary" teacher-led (and student-led) prayers and Bible readings. *Schempp*, 373 U.S. at 224–27.

[116] *Kennedy*, 142 S. Ct. at 2428.

[117] *See* FRANK S. RAVITCH, SCHOOL PRAYER AND DISCRIMINATION (1999); STEVEN K. GREEN, THE BIBLE, THE SCHOOL, AND THE CONSTITUTION: THE CLASH THAT SHAPED MODERN CHURCH-STATE DOCTRINE (2012).

[118] *Jackson Women's Health Org.*, 142 S. Ct. at 2284–85.

[119] Properly understood, this case is not about the limits on an individual's ability to engage in private prayer at work. This case is about whether a school district is required to allow one of its employees to incorporate a public, communicative display of the employee's personal religious beliefs into a school event, where that display is recognizable as part of a longstanding practice of the employee ministering religion to students as the public watched. A school district is not required to permit such conduct; in fact, the Establishment Clause prohibits it from doing so.
*Kennedy*, 142 S. Ct. at 2441 (Sotomayor, J., dissenting).

embodied in both the Establishment Clause and the Free Exercise Clause of the First Amendment."[120] Justice Sotomayor charged the majority with misconstruing the facts, and in a skillful rebuttal she provided a lengthy rendition of the facts (accompanied with photographs) to show how Kennedy used his position to encourage student participation in the prayers.[121] She chastised the majority for abandoning the Endorsement Test and for its post hoc assertion that the *Lemon* test was already dead.[122] She also criticized the majority's narrowing of what might constitute compulsion to participate in religious activities during school, charging that the majority had adopted "a nearly toothless version of the coercion analysis, failing to acknowledge the unique pressures faced by students when participating in school-sponsored activities."[123]

In the end, *Kennedy* serves as the bookend to *Carson* in the conservative majority's dismantling of sixty years of church-state precedent. One might argue that the *Carson* and *Kennedy* decisions are merely the latest manifestations of a trajectory the Court has been on for several decades. But even if that assessment is correct, it should not overshadow the significant about-face in church-state jurisprudence that has occurred and has now been perfected in the holdings in *Carson* and *Kennedy*.[124] The no-aid-to-religion rule announced in *Everson v. Board of Education*[125] seventy-five years ago is effectively dead; not only *may* the state permissibly fund most forms of religious activity under a program that is neutral and generally available, in many instances it now *must*. It will be up to the Court to determine when a religious applicant is the comparable equivalent to a secular recipient, but one can safely predict that the current Court majority will view that inquiry generously. The Establishment Clause, which many have argued requires treating religion distinctly in certain circumstances, has been transformed into a tool for discriminating. As for religious activities in public schools, the previous Establishment Clause bar has been significantly lowered. One would assume that a school administrator's religious expression in the middle of an official school event with a captive audience of students may still be prohibited, though even that outcome will likely turn on how the Court views the coercive nature of the particular context. But as likely, other school employees—teachers, aides, staff—will claim (like Coach Kennedy) that their faith requires them to pray at a particular time and place (e.g., a classroom during instructional time) at moments when they are not actively teaching, even though students are present.

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[120] *Id*. at 2434.

[121] *Id*.

[122] *Id*.

[123] *Id*.

[124] "The Court now charts a different path, yet again paying almost exclusive attention to the Free Exercise Clause's protection for individual religious exercise while giving short shrift to the Establishment Clause's prohibition on state establishment of religion." *Id*.

[125] Everson v. Bd. of Educ. of Ewing Twp., 67 S. Ct. 504, 505 (1947).

What *Carson* and *Kennedy* confirm is that we are witnessing the elevation of the Free Exercise Clause at the expense of the Establishment Clause. The conservative majority's "revolutionized Free Exercise doctrine," in the words of Justice Sotomayor, is effectively "swallowing the space between the Religion Clauses."[126] The values that the Establishment Clause has protected and reinforced—preventing government sponsorship of religious activity, avoiding religious dependence on government largesse, preventing the government imprimatur of religion, avoiding religious strife and dissension, guarding against government involvement with internal religious operations, and preventing government from appropriating religion for its political ends—are all apparently of secondary importance. The Court majority has essentially lost sight of the forest for the trees by emphasizing the value of individual religious liberty over the greater value of religious freedom, writ large, which the Establishment Clause ensures. This comes at the expense of any meaningful understanding of separation of church and state.

[126] *Carson*, 143 S. Ct. at 2013–14 (Sotomayor, J., dissenting).

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