MEMORANDUM 2023-40

Equal Rights Amendment: Discussion of Issues

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

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

The Commission commenced work on this topic in 2022, considering a proposed approach for the study.[4] The proposed approach has two stages: first, the Commission will examine the possibility of codifying a provision in state law to achieve the effect of the Equal Rights Amendment ("ERA") (such a provision is referred to hereafter as a "sex equality provision"); and second, the Commission would use the sex equality provision to evaluate existing California law, to identify and remedy defects (i.e., provisions that have discriminatory language or disparate impacts).[5]

This memorandum furthers the Commission's work on the first phase of the study. First, this memorandum provides updates on recent U.S. Supreme Court decisions and the status of two pending California constitutional amendments. Then, this memorandum provides additional information about U.S. Supreme Court case law involving religious beliefs in

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

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

2 2022 Cal. Stat. res. ch. 150.

3 *Id*.

4 Memorandum 2022-51; see also Minutes (Nov. 2022), pp. 3-4.

5 See Memorandum 2022-51, p. 2.

response to questions raised at the Commission's May meeting.[6] This memorandum also describes possible approaches for addressing constitutional doctrines in the Commission's work to codify a sex equality provision.

Unless otherwise indicated, all references to "the Court" in this memorandum refer to the U.S. Supreme Court.

EFFECT OF THE EQUAL RIGHTS AMENDMENT

The ERA provides that "[e]quality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex."[7]

In order to codify a sex equality provision to achieve the effect of this language, the Commission has previously considered the scope of the ERA's sex equality guarantee.[8]

UPDATE REGARDING RECENT SUPREME COURT DECISIONS

Towards the end of the U.S Supreme Court's 2022-23 term, the Court issued a few decisions that relate to either sex equality generally, specific statutory or constitutional provisions discussed in prior memoranda in this study, or both of these topics. This section of the memorandum provides a brief description those decisions.

Application of Anti-Discrimination Law — *303 Creative v. Elenis*

Memorandum 2023-26 discussed the compelled speech doctrine and noted that there was a pending case involving this doctrine before the Court, *303 Creative v. Elenis*.[9] That case has since been decided and the outcome is summarized below.

303 Creative v. Elenis involves a conflict at the intersection of antidiscrimination law and constitutional free speech protections. In *303 Creative*, the Court considered whether a website designer had a constitutional free speech right to offer a service (wedding website design) in a manner that would violate the state's antidiscrimination laws.[10] The website designer's claim was that requiring her to provide wedding website design services to same-sex couples would compel her to speak in a manner that she found objectionable due

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6 See Memorandum 2023-26.

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

8 Memoranda 2023-10, 2023-17.

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

9 Memorandum 2023-26, pp. 31-32.

10 (2023) 143 S.Ct. 2298.

to her religious beliefs.[11] Relying on earlier case law related to freedom of expression and compelled speech,[12] the Court, in a 6-3 decision, concluded that the state could not require the designer to comply with the state's anti-discrimination law due to the expressive nature of the wedding website design service that the designer sought to provide.[13] The Court's decision effectively permits the web designer to refuse to provide wedding website design service to same-sex couples and to publish a statement to that effect.[14]

Describing the impact of this decision, Elena Redfield, the Federal Policy Director at the Williams Institute at UCLA School of Law said:

> The Supreme Court's decision today firmly establishes an exemption to anti-discrimination laws…. If a service is "expressive" — which the court finds a wedding website to be — a business may now deny that service in some circumstances, even if it harms LGBT people or other protected groups.[15]

Under the decision, the scope of what sorts of commercially-provided services and products would be deemed custom and expressive (and thus, potentially protected speech) is far from clear,[16] nor is it clear when a seller can conclude that the product or service would convey a message that the seller finds objectionable. Thus, as a practical matter, the decision offers little guidance as to the circumstances under which someone could refuse to comply with a generally-applicable antidiscrimination law.

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[11] 143 S.Ct. at 2308 ("Specifically, she worries that, if she enters the wedding website business, the State will force her to convey messages inconsistent with her belief that marriage should be reserved to unions between one man and one woman. … But, she asserts, the First Amendment's Free Speech Clause protects her from being compelled to speak what she does not believe.").

[12] 143 S.Ct. at 2311. The cases include: Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston, Inc. (1995) 515 U.S. 557 and Boy Scouts of America v. Dale (2000) 530 U.S. 640. See also discussion of *Hurley* and *Dale* in Memorandum 2023-26, pp. 28-29, 35-38.

[13] See 143 S.Ct. at 2315, 2321-22.

[14] See 143 S.Ct. at 2309 n. 1, 2321-22.

[15] UCLA School of Law Williams Institute, Press Release: US Supreme Court rules website designer can refuse services to same-sex couples (June 30, 2023), https://williamsinstitute.law.ucla.edu/press/303-creative-press-release/.

[16] 143 S.Ct. at 2319 ("Doubtless, determining what qualifies as expressive activity protected by the First Amendment can sometimes raise difficult questions.").

This uncertainty is heightened by the Court's characterization of the weightiness of the designer's speech interest, drawing parallels between the wedding website design service at issue in the case and the "world's great works of literature and art." 143 S.Ct. at 2316. The Court suggests a contrary rule would allow "the government [to] compel anyone who speaks for pay on a given topic to accept all commissions on that same topic — no matter the message — if the topic somehow implicates a customer's statutorily protected trait." *Id.* at 2313.

Further, as the dissenting opinion describes, the Court's decision reflects a profound shift. "Today, the Court, for the first time in its history, grants a business open to the public a constitutional right to refuse to serve members of a protected class." 143 S.Ct. at 2322 (Sotomayor, J., dissenting). "According to Smith, the Free Speech Clause of the First Amendment entitles her company to refuse to sell any 'websites for same-sex weddings,' even though the company plans to offer wedding websites to the general public. In other words, the company claims a categorical exemption from a public accommodations law simply because the company sells expressive services." *Id*. at 2334 (citations omitted). And, the dissent points out that the Court allows Ms. Smith to completely deny her wedding web design service to same-sex couples, absent any consideration of what "message" will be included on the website. *Id.* at 2333-34.

That said, several commentators discussing this decision highlight the specific factual circumstances underlying the Court's decision and emphasize that the decision's legal effect is narrow.[17] The decision is premised on a poorly-described hypothetical wedding website design service, albeit a "customized" and "expressive" one, that the designer professes to want to offer.[18] According to the stipulated facts, the designer seeks to provide wedding website design to couples, where the resulting website promotes *the designer's own* view of marriage.[19] Extending this out to other types of website design services, it is unclear, for instance, whether a web designer could refuse to design business websites for women-owned businesses (because the designer believes that women should not work outside the home) or congregation websites for non-Christian houses of worship (because the designer does not believe in those faiths).

Overall, the scope of the rule set out in this case seems unclear and likely to cause confusion in the coming years.

Religious Accommodation in Employment — *Groff v. DeJoy*

Memorandum 2023-26 discussed religious accommodations and included a specific discussion related to religious accommodations for employees.[20]

In *Groff v. DeJoy*, the Court also considered the scope of an employer's obligation to provide a religious accommodation for an employee. Federal law requires an employer to provide an accommodation where that accommodation would not pose an undue

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[17] See, e.g., S. Burga, *The Implications of Supreme Court's 303 Creative Decision Are Already Being Felt*, Time (July 16, 2023), https://time.com/6295024/303-creative-supreme-court-future-implications/ ("Legal experts like Rutgers law professor Katie Eyer says that the case was 'decided on relatively narrow grounds'…."); K. Sosin, *The 19th Explains: The Supreme Court's Decision in the LGBTQ+* 303 Creative *Case*, The 19th (Jun. 30, 2023), https://19thnews.org/2023/06/303-creative-elenis-supreme-court-decision-lgbtq-rights/ (*quoting* Jenny Pizer, chief legal officer at Lambda Legal, "The litigant aiming to blow a big hole in civil rights law has prevailed, and she's prevailed with a very narrow win…..").

[18] See 143 S.Ct. at 2309.

[19] 143 S.Ct. at 2309. (One of the stipulated facts indicates that the wedding websites Ms. Smith seeks to provide "will … 'express Ms. Smith's and 303 Creative's message celebrating and promoting' her view of marriage.").

It is not clear, for instance, whether the designer would refuse to design a website for an opposite-sex couple who does not want the site to describe marriage, per the designer's view, as "a union between one man and one woman." 143 S.Ct. at 2309. Ms. Smith may be content to simply ensure that the website includes a cross and mentions the couple's love for Jesus, as in the protoype website see offered in the case. See the prototype website reproduced in the dissenting opinion in 303 Creative v. Elenis (10th Cir. 2021) 6 F.4th 1160, 1198 (Tymkovich, C. J., dissenting).

See also generally, e.g., H. Keren, *Opinion: The Supreme Court Fooled Us in 303 Creative — Just Look at the Facts*, The Hill (Jul. 31, 2023), https://thehill.com/opinion/judiciary/4125970-the-supreme-court-fooled-us-in-303-creative-just-look-at-the-facts/ (identifying "one of the major flaws of the majority's reasoning: A duty to sell 'expressive' products to everyone does not necessarily create compelled speech.").

[20] Memorandum 2023-26, pp. 24-25; see also *id.* at 13-15.

hardship.[21] Prior to *Groff*, lower courts relied on language from a 1977 case[22] and interpreted undue hardship to mean cost or effort that is "more than … *de minimus*." In *Groff*, the Court, in a unanimous opinion, rejected the more than *de minimus* standard, stating that this test "does not suffice to establish 'undue hardship' under Title VII [of the federal Civil Rights Act]." The Court went on to conclude that an employer must "show that the burden of granting an accommodation would result in substantial increased costs in relation to the conduct of its particular business."[23]

In *Groff*, the employee, an Evangelical Christian, sought Sundays off for worship and rest.[24] Due to Groff's refusal to work Sundays, his coworkers and supervisor had to cover the Sunday shifts that Groff would otherwise have worked.[25] While the burden on his coworkers is not discussed in detail, the opinion indicates (in a footnote) that his coworkers "complained about the consequences of Groff's absence" and at least one employee filed a grievance (claiming that the redistribution of shifts conflicted with contractual rights set forth in the memorandum of understanding between the Postal Service and the relevant union).[26] The Court indicated that:

> Faced with an accommodation request like Groff's, it would not be enough for an employer to conclude that forcing other employees to work overtime would constitute an undue hardship. Consideration of other options, such as voluntary shift swapping, would also be necessary.[27]

While this decision arises in a very different context (and does not directly implicate the protected class of another employee), Memorandum 2023-26[28] discussed religious accommodation cases involving employees whose religious conduct was directed at other employees. The opinion's suggestion that "voluntary" measures undertaken by other employees should be considered as religious accommodation options raises broader questions about what sorts of "voluntary" measures could be sought (and which other employees are required to accept those measures). For instance, if there was a male employee who requested a religious accommodation to be reassigned to a male supervisor (who volunteers to supervise the employee), could the employer decline to reassign that

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21 See 42 U.S.C. § 2000e(j).

22 *Trans World Airlines v. Hardison* (1977) 432 U.S. 63.

23 *Groff v. DeJoy* (2023) 600 U.S. __, 143 S.Ct. 2279, 2295.

24 143 S.Ct. at 2286.

25 143 S.Ct. at 2286-87.

26 See 143 S.Ct. at 2286, n. 1.

27 143 S.Ct. at 2297. The Court also noted that, due to the application of the incorrect more than de minimus standard, the lower court may have dismissed "a number of possible accommodations, including those involving the cost of incentive pay, or the administrative costs of coordination with other nearby stations with a broader set of employees." *Id*.

28 Memorandum 2023-26, pp. 24-25.

employee?

Federal Anti-Discrimination Law and Equal Protection Clause[29] — *Students for Fair Admissions v. Harvard*[30]

Memorandum 2023-10 discussed the Equal Protection Clause of the U.S. Constitution and the strict scrutiny test (requiring a "compelling government interest" and "narrow tailoring" to achieve that interest) used to assess whether racial classifications are consistent with the Equal Protection Clause's guarantee.[31]

In *Students for Fair Admissions v. Harvard*, the Court considered whether admissions programs at Harvard and the University of North Carolina violated federal civil rights law by taking into account the race of applicants.[32] Based on prior case law, the Court conducted this inquiry by assessing whether these programs were consistent with the U.S. Constitution's Equal Protection Clause.[33]

This brief summary focuses only on the majority opinion in the case.[34]

The Court discussed earlier case law involving admissions programs.[35] Those decisions concluded that student body diversity is a compelling interest, while also suggesting that race-conscious admissions programs would not be necessary to achieve student body diversity in 25 years (in the 2003 decision in *Grutter v. Bollinger*).[36] After that, the majority opinion notes that 20 years have passed (with "no end in sight")[37] and points to the absence of quantifiable metrics to assess whether diversity helps to further other educational goals

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[29] See Students for Fair Admissions v. President and Fellows of Harvard College (2023) 143 S.Ct. 2141, 2156, n. 2 ("Title VI provides that '[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.' 42 U.S.C. § 2000d. 'We have explained that discrimination that violates the Equal Protection Clause of the Fourteenth Amendment committed by an institution that accepts federal funds also constitutes a violation of Title VI.' *Gratz v. Bollinger*, 539 U.S. 244, 276, n. 23, 123 S.Ct. 2411, 156 L.Ed.2d 257 (2003). Although Justice Gorsuch questions that proposition, no party asks us to reconsider it. We accordingly evaluate Harvard's admissions program under the standards of the Equal Protection Clause itself.").

[30] The decision addresses two cases brought by Students for Fair Admissions against Harvard College and University of North Carolina. See Students for Fair Admissions v. President and Fellows of Harvard College (2023) 143 S.Ct. 2141, 2154.

[31] Memorandum 2023-17, pp. 3-10.

[32] 143 S.Ct. 2141.

[33] 143 S.Ct. at 2162; see also Memorandum 23-17, p. 5.

[34] See https://www.supremecourt.gov/opinions/22pdf/20-1199_hgdj.pdf. The majority opinion was authored by Justice Roberts; Justices Thomas, Gorsuch, and Kavanaugh wrote concurring opinions; and Justices Sotomayor and Jackson wrote dissents. *Id.* at p. 8. Justice Jackson participated in the University of North Carolina case, but took no part in the the consideration or decision of the Harvard case. See *id.*

[35] 143 S.Ct. at 2163-66.

[36] See 143 S.Ct. at 2163-66 (discussing *Regents of the University of California v. Bakke* (1978) 438 U.S. 265 and *Grutter v. Bollinger* (2003) 539 U.S. 306).

[37] 143 S.Ct. at 2166.

(rather than accepting diversity as an important interest itself).[38]

Further, the majority opinion found that the admission systems at issue "fail to comply with the twin commands of the Equal Protection Clause that race may never be used as a 'negative' and that it may not operate as a stereotype."[39] Considering whether race is used as a negative in these admissions programs, the majority opinion characterizes admissions as zero-sum. Then, the decision suggests that, because the demographics of the admitted classes would "meaningfully change if race-based admissions were abandoned," members of racial groups that would be admitted in higher numbers absent the policies are necessarily negatively impacted by those policies.[40] And, with regard to stereotypes, the decision suggests that race-conscious admissions are premised on "'offensive and demeaning assumption that [students] of a particular race, because of their race, think alike' — at the very least alike in the sense of being different from nonminority students."[41] The Court's suggestion that valuing racial diversity necessarily implies that all members of a race "think alike" is somewhat perplexing. While individual experiences and perceptions will differ, that does not seem to be at odds with the idea that race is a component of an individual's experience and that the educational experience of all can be enriched by including a diversity of perspectives and experiences.

The majority opinion endeavors to draw parallels between the decision in these cases and the Court's decision in *Brown v. Board of Education* (striking down the "separate, but equal" doctrine that had allowed segregation in public education).[42] In doing so, "the Supreme Court ignores the tremendous difference between using race to harm minorities as [opposed to] using race to remedy past discrimination and enhance diversity."[43]

The Columbia Law School's Center for Gender & Sexuality Law summarizes the outcome in this case and how it evinces the Court's understanding of equality (before going

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[38] See 143 S.Ct. at 2166-68. Specifically, regarding the schools' goals regarding representation of minority groups, the decision notes that "[t]o accomplish both of those goals, in turn, the universities measure the racial composition of their classes using the following categories: (1) Asian; (2) Native Hawaiian or Pacific Islander; (3) Hispanic; (4) White; (5) African-American; and (6) Native American. It is far from evident, though, how assigning students to these racial categories and making admissions decisions based on them furthers the educational benefits that the universities claim to pursue." *Id.* at 2167 (citation omitted). The Court then goes on to suggest that these racial categories are either too broad, not sufficiently well defined, or otherwise inadequate to achieve diversity. See *id.* at 2167-68.

[39] 143 S.Ct. at 2168.

[40] 143 S.Ct. at 2169.

[41] 143 S.Ct. at 2170 (citation omitted).

[42] 143 S.Ct. at 2175.

[43] Transcript of Berkeley Talks Episode #174: Legal Scholars Unpack Supreme Court Ruling on Affirmative Action (July 10, 2023), https://news.berkeley.edu/2023/07/10/berkeley-talks-transcript-affirmative-action/ (quoted language is from Dean Erwin Chemerinsky's remarks).

on to describe how the ERA could change the approach to constitutional equality[44]):

> The approach embraced by the majority is typically described as "formal equality" and the dissenters' approach as "substantive equality." The former focuses on inputs relating to individuals (such as an applicant's race) and the latter is concerned with structures of inequality (for example, in what ways have race-based policies in primary and secondary education denied equal access to educational systems to students on the basis of their race.)
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> This recent case solidifies a decades-long trend of the Supreme Court interpreting the Equal Protection Clause as a measure that most often protects the rights of men and white people, preserving a structurally unequal status quo in the U.S. As Jamelle Bouie wrote [on July 7, 2023,] in the New York Times, "a color-blind Constitution could do as much or more to preserve a hierarchical and unequal society as laws designed for that purpose."[45]

Free Speech and Criminal Stalking — *Counterman v. Colorado*

In *Counterman v. Colorado*, the Court considered the stalking conviction of Billy Counterman, who sent hundreds of unsolicited and unwelcome messages to a local (female) musician.[46] The dispute related to whether Counterman's statements were "true threats" (and therefore not protected by the First Amendment). The Court found that, to show the statements were true threats, it was not sufficient to demonstrate that Counterman's messages were objectively threatening to a reasonable person, but instead the state had to show that Counterman himself "consciously disregarded a substantial risk

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[44] See What the Supreme Court's Ruling on Affirmative Action in *Students for Fair Admissions v. Harvard* Means for Sex-Based Equality and the Equal Rights Amendment, https://gender-sexuality.law.columbia.edu/content/what-supreme-courts-ruling-affirmative-action-students-fair-admissions-v-harvard-means-sex.

> [T]he ERA could be understood as the launch of a "Third Founding," or a "constitutional moment" that signals a *new* approach to constitutional equality and citizenship—not only sex-based equality, but equality more generally. The ERA should be understood to update and enhance our constitutional conception of equality beyond the 19th century version we now have. A freestanding, new source of equality rights—one with no necessary relationship to the 14th Amendment's Equal Protection Clause—could provide more substantive equality protections beyond the meager protections found in the 14th Amendment.

Id.

[45] *Id.*

[46] (2023) 143 S.Ct. 2106. The decision described the different contents of the messages:

> Some of his messages were utterly prosaic ("Good morning sweetheart"; "I am going to the store would you like anything?")—except that they were coming from a total stranger. Others suggested that Counterman might be surveilling C. W. He asked "[w]as that you in the white Jeep?"; referenced "[a] fine display with your partner"; and noted "a couple [of] physical sightings." And most critically, a number expressed anger at C. W. and envisaged harm befalling her: "Fuck off permanently." "Staying in cyber life is going to kill you." "You're not being good for human relations. Die."

Id. at 2112 (citations omitted).

that his communications would be viewed as threatening violence."[47]

Given that the Commission has not previously considered the legal doctrines at issue, this memorandum does not present the legal details of the case. Instead, the discussion below offers some brief observations of commentators related to this case and issues of sex equality.

One concern raised about this decision is that its view of speech does not address the competing speech interests that exist in this situation:

> [T]he "freedom of speech" protected by the *Counterman* majority and valorized by civil libertarian organizations is the freedom to engage in objectively terrifying conduct that leads victims to withdraw from their professions, censor their communications, and restrict their movements. Given that the majority of stalkers are male and the majority of stalking victims are female, the thrust of the opinion can be put more bluntly: The First Amendment does not protect "speech," but *men's* speech at the expense of *women's* speech; men's delusions at the expense of women's lives.[48]

In addition, commentators raised concerns about the Court's dismissive views (expressed during the oral arguments) about the effect of being targeted in a barrage of hostile and disturbing online messages:

> There was some disappointing questioning and commentary that made light of the sorts of threats Counterman made to C.W. and a minimization of stalking victimization, especially that carried out via technology and through threats. Joking and laughing about there being an oversensitivity to receiving threats and that our typical everyday familial interactions involve the sort of threats involved in stalking. We would expect that today, in the highest court in the land, there would be a greater understanding and respect for the realities of stalking and gender-based violence.[49]

Overall, the Court's decision mostly focuses on the possibility of chilling aggressive speech,[50] while the views expressed at oral arguments downplay the harms experienced by those who are targeted by threatening speech.

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[47] 143 S.Ct. at 2112.

[48] M.A. Franks, *The Supreme Court Just Legalized Stalking*, Slate (July 6, 2023), https://slate.com/news-and-politics/2023/07/supreme-court-legalized-stalking-counterman-colorado.html; see also Memorandum 2023-26, p. 25, n. 107.

[49] M. Onello, *When Is a Threat a Threat?: A Forthcoming SCOTUS Ruling Could Have a Sweeping Impact on Gender-Based Violence*, Ms. Magazine (Apr. 28, 2023), https://msmagazine.com/2023/04/28/supreme-court-counterman-v-colorado-first-amendment-online-harassment-stalking-women/ (*quoting* Jennifer Becker, Legal Director at Legal Momentum).

[50] 143 S.Ct. at 2116 ("This Court again must consider the prospect of chilling non-threatening expression, given the ordinary citizen's predictable tendency to steer 'wide[ ] of the unlawful zone.' The speaker's fear of mistaking whether a statement is a threat; his fear of the legal system getting that judgment wrong; his fear, in any event, of incurring legal costs — all those may lead him to swallow words that are in fact not true threats." (citation omitted)).

STATUS OF STATE CONSTITUTIONAL AMENDMENTS

In Memorandum 2023-17, the staff noted provisions of the California Constitution related to sex. The Legislature is proposing changes to some of those provisions.

Assembly Constitutional Amendment 5 (Low) proposes to repeal the constitutional provision limiting marriage to unions between one man and one woman and replacing that provision with the following:

> SEC. 7.5. (a) The right to marry is a fundamental right.
> (b) This section is in furtherance of both of the following:
> (1) The inalienable rights to enjoy life and liberty and to pursue and obtain safety, happiness, and privacy guaranteed by Section 1.
> (2) The rights to due process and equal protection guaranteed by Section 7.

That proposal was chaptered and will go before the voters next year.[51]

Assembly Constitutional Amendment 7 (Jackson) would amend the language of Section 31 of Article I of the California Constitution. Currently, Section 31(a) provides that "[t]he State shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." That section would be amended to provide that "subject to approval by the Governor pursuant to specified procedures, the state may use state moneys to fund research-based, or research-informed, and culturally specific programs in any industry if those programs are established or otherwise implemented by the state for purposes of increasing the life expectancy of, improving educational outcomes for, or lifting out of poverty specific groups based on race, color, ethnicity, national origin, or marginalized genders, sexes, or sexual orientations."[52] This measure is currently in the Assembly Appropriations Committee.

COURT DOCTRINE REGARDING RELIGIOUSLY MOTIVATED CONDUCT

At the May meeting, the Commission considered Memorandum 2023-26, which included a discussion of constitutional provisions related to religion, the Establishment Clause and the Free Exercise Clause.[53] In discussing the Free Exercise Clause, the

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[51] See 2023 Cal. Stat. res. ch. 125; https://www.sos.ca.gov/elections/ballot-measures/qualified-ballot-measures (ACA 5 listed as a ballot measure for election on March 5, 2024).

[52] Legislative Counsel's Digest for ACA 7 (as amended June 14, 2023).

[53] Memorandum 2023-26, pp. 3-25; see also U.S. Const. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."); https://constitution.congress.gov/browse/essay/amdt14-S1-4-3/ALDE_00013746/ (noting the religious provisions have been applied to the states under Section 1 of the Fourteenth Amendment).

memorandum focused primarily on the case law involving conduct motivated by religious beliefs.[54] The memorandum discussed Supreme Court doctrine setting out the test used to assess whether a law or policy ran afoul of the constitutional free exercise protection.

That memorandum did not address an initial question, which was raised at the meeting, of whether and how courts assess the religious belief underlying the constitutional claim. At the meeting, the staff, with the caveat that the staff had not researched this question specifically, offered general observations that courts did not typically scrutinize religious beliefs and that the religious beliefs could be personal (i.e., the beliefs did not need to be grounded in teachings or doctrine of an organized religion).

The following discussion provides further detail on U.S. Supreme Court case law addressing this issue. The cases cited below do not necessarily involve constitutional free exercise claims, but all address the broader issue of the courts' role in assessing religious-based claims.

Court Scrutiny of Religious Beliefs, Generally

In general, the U.S. Supreme Court decisions on free exercise claims suggest that courts have limited authority to scrutinize religious beliefs underlying conduct for which constitutional protection is sought.

In describing the potential challenges that courts might face in trying to assess the "legitimacy" of religious beliefs generally, one legal commentator stated:

> Problems involved in determining religious legitimacy are compounded when it is remembered that the question involves not only the recognition of a "religious" group, but also the recognition of particular beliefs of individuals within that group. The inherently subjective nature of religion has led American courts to refuse to examine the existence, legitimacy, or sincerity of declared religious belief. Famously, the United States Supreme Court pronounced in *United States v. Ballard* that "[m]en may believe what they cannot prove…. Religious expressions which are as real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken of mortals does not mean that they can be made suspect before the law."[55]

Given those difficulties, in some instances, courts (and litigants) simply assume the validity of the religion and the sincerity of the belief and resolve the case based on those

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[54] See discussion of "Freedom to Act" in Memorandum 2023-26, pp. 8-18; see also *id.* at 7 (noting two aspects of religious free exercise, freedom to believe and freedom to act).

[55] L.S. Underkuffler, *Religious Exceptionalism and Human Rights*, Cornell L. Faculty Publications 1673 (2014) (footnotes omitted), *available at* https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=2745&context=facpub.

assumptions.[56]

More concretely, the Court's views on scrutiny of a litigant's religious claims are illustrated in a 1981 opinion. The case involved the denial of unemployment benefits to Eddie Thomas, a Jehovah's Witness who quit work due to religious objections to producing war materials.[57] Thomas alleged that the denial of unemployment benefits was a free exercise violation. The state Supreme Court had previously concluded that Thomas's belief was a "personal philosophical choice rather than a religious choice, [and therefore did] not rise to the level of a first amendment claim."[58] In its opinion, the U.S. Supreme Court identified problems with the state court's analysis and conclusion. The opinion also provided general guidance (highlighted in italics below) about the role of courts in assessing religious beliefs:

> In reaching its conclusion, the Indiana court seems to have placed considerable reliance on the facts that Thomas was "struggling" with his beliefs and that he was not able to "articulate" his belief precisely. It noted, for example, that Thomas admitted before the referee that he would not object to
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> > "working for United States Steel or Inland Steel … produc[ing] the raw product necessary for the production of any kind of tank … [because I] would not be a direct party to whoever they shipped it to [and] would not be … chargeable in … conscience…."
>
> The court found this position inconsistent with Thomas' stated opposition to participation in the production of armaments. But Thomas' statements reveal no more than that he found work in the roll foundry sufficiently insulated from producing weapons of war. We see, therefore, that Thomas drew a line, and it is not for us to say that the line he drew was an unreasonable one. *Courts should not undertake to dissect religious beliefs because the believer admits that he is "struggling" with his position or because his beliefs are not articulated with the clarity and precision that a more sophisticated person might employ.*
>
> The Indiana court also appears to have given significant weight to the fact that another Jehovah's Witness had no scruples about working on tank turrets; for that other Witness, at least, such work was "scripturally" acceptable. *Intrafaith differences of that kind are not uncommon among followers of a particular creed, and the judicial process is singularly ill equipped to resolve such differences in relation to the Religion Clauses. One can, of course, imagine an asserted claim so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection*

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[56] See *id.* at 5-6 (noting two Supreme Court cases along these lines, *Pleasant Grove City, Utah v. Summum* and *Cutter v. Wilkinson*).

[57] Thomas v. Rev. Bd. Of Ind. Emp. Sec. Div. (1981) 450 U.S. 707.

Originally, Thomas' work "was to fabricate sheet steel for a variety of industrial uses." *Id.* at 710. After the roll foundry where he worked closed, he was transferred to a "department that fabricated turrets for military tanks." *Id.* On his first day, he found that all remaining departments were working on war equipment, requested a layoff (since no transfer would resolve his concerns), and, after the layoff was denied, quit. *Id.*

[58] 450 U.S. at 713 (quoting the Indiana Supreme Court decision in the case).

> *under the Free Exercise Clause; but that is not the case here, and the guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect. Particularly in this sensitive area, it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation.*[59]

What Constitutes a Religious Belief?

The Court has recognized that a belief entitled to protection under the Free Exercise Clause must be religious (and cannot be purely secular).[60] However, the distinction between a religious and purely secular belief is far from clear.[61]

Earlier Court case law took a somewhat expansive view of what religion includes, but those cases still suggested that beliefs of a certain character would not be deemed religious (e.g., in one case, the Court, consistent with language of the conscientious objector statute, distinguishes religious beliefs from "essentially political, sociological, or philosophical views,"[62] while suggesting that the statute would cover a sincere, meaningful belief that "occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God"[63]). In a series of opinions from the 1960s, the Court recognized that religious protections could extend beyond theistic belief systems (i.e., those that involve a belief in the existence of a god or gods).[64]

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[59] 450 U.S. at 715-16 (emphasis added and citations omitted).

[60] See Frazee v. Ill. Dept. of Emp. Sec. (1989) 489 U.S. 829. 833 ("There is no doubt that '[o]nly beliefs rooted in religion are protected by the Free Exercise Clause.' Purely secular views do not suffice. Nor do we underestimate the difficulty of distinguishing between religious and secular convictions and in determining whether a professed belief is sincerely held." (citations omitted)).

[61] See generally, e.g., M. Strasser, *Free Exercise and the Definition of Religion: Confusion in the Federal Courts*, 53 Houston L. Rev. 909, 910 (2016) ("The U.S. Supreme Court has repeatedly stated that the Free Exercise Clause only protects religious practices, but has sent mixed messages about what constitutes religion for free exercise purposes. Rather than explain how the differentiation between religion and nonreligion should be made, the Court has instead only offered hints about what does not qualify as religious." (citations omitted)); J.P Kuhn, Note, *The Religious Difference: Equal Protection and the Accommodation of (Non)-Religion*, 94 Wash. Univ. L. Rev. 191, 191 (2016) ("The First Amendment provides for specific rules that apply to 'religion' without defining the term. This definition seems essential; the prohibition on establishment and the guarantee of free exercise apply by the law's terms to *religion*, and not to anything that is *not religion*. Although [quoted passage from *Africa v. Pennsylvania* (3d. Cir. 1981) 662 F.2d 1025, 1034] seems to easily explain the distinction as one between mere 'strongly held ideologies' on the one hand and 'religion' on the other, it is not clear that such a distinction is actually possible." (footnotes omitted)); D.L. Beschle, *Does a Broad Free Exercise Right Require a Narrow Definition of "Religion"?*, 39 Hastings Const. L. Q. 357, 367 (2012) ("In any Establishment Clause or Free Exercise Clause case, a court must determine whether the activity in question is, in fact, religious. Often the religious nature of the activity will be obvious, and no discussion of the issue will be necessary. But sometimes that will not be the case. Is yoga a religious activity that should not be taught in public schools? Are individual beliefs, apart from any organized community, religious? The scope of individual rights or government authority will frequently turn on the definition of 'religion.'" (footnotes omitted)).

[62] United States v. Seeger (1965) 380 U.S. 163, 165. Relevant language is quoted in full in *infra* note 64.

[63] 380 U.S. at 166. Relevant language is quoted in full in *infra* note 64.

[64] See Torcaso v. Watkins (1961) 367 U.S. 488, 495 (opinion contrasts "religions based on a belief in the

In a 1972 case, the Court, considering constitutional claims of Amish individuals opposed to their state's mandatory schooling law, reaffirmed the idea that certain beliefs would be sufficiently non-religious such that those beliefs could not give rise to a cognizable free exercise claim under the U.S. Constitution.[65] The Court described a situation where the claim might be considered secular (and therefore not entitled to protection):

> Although a determination of what is a 'religious' belief or practice entitled to constitutional protection may present a most delicate question, the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests. Thus, if the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself at Walden Pond, their claims would not rest on a religious basis. Thoreau's choice was philosophical and personal rather than religious, and such belief does not rise to the demands of the Religion Clauses.[66]

This passage indicates that the Court views Thoreau's beliefs as "philosophical" and the Amish as "religious," but provides little insight into how to distinguish between philosophical and religious beliefs more broadly.[67]

Personal Nature of Religious Beliefs

Even within a particular organized religion or broader faith family, religious beliefs

existence of God" and "religions founded on different beliefs"); *id.* at n. 11 ("Among religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others" (citations omitted)); United States v. Seeger (1965) 380 U.S. 163, 165-66 (interpreting a conscientious objector statute, Court recognized "Congress, in using the expression 'Supreme Being' rather than the designation 'God,' was merely clarifying the meaning of religious training and belief so as to embrace all religions and to exclude essentially political, sociological, or philosophical views. We believe that under this construction, the test of belief 'in a relation to a Supreme Being' is whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption. Where such beliefs have parallel positions in the lives of their respective holders we cannot say that one is 'in a relation to a Supreme Being' and the other is not."); United States v. Welsh (1970) 398 U.S. 333, 343 (even where the conscientious objector explicitly denies that the basis for the objection is religious, the Court found that objector still qualified for the exemption on the basis of his beliefs and the fact that they were held "with the strength of more traditional religious convictions"); see also *id.* at 356 (Harlan, J. concurring in result) (Justice Harlan, who was in the majority in *Seeger*, raised concerns about the "distinction between theistic and nontheistic religions" in the conscientious objector statute and stating his view that the distinction is not compatible with the U.S. Constitution).

65 Wisconsin v. Yoder (1972) 406 U.S. 205.

66 406 U.S. at 215-16 (footnote omitted).

67 Further, some scholarship raises questions about the Court's characterization of Thoreau's views as non-religious. See, e.g., M. Movsesian, *The New Thoreaus*, 54 Loy. U. Chi. L.J. 539, 540-41 (2023), *available at* https://loyola-chicago-law-journal.scholasticahq.com/article/81994-the-new-thoreaus (quoting a biography of Thoreau that describes him as "profoundly religious" and noting Christianity, Hinduism, and Zoroastrianism as sources from which Thoreau's beliefs were drawn).

(and what acts those beliefs require or prohibit) can vary dramatically. In the 1980s, the Court considered religious claims that involve individual views about the religious obligations at issue.

In the case of Eddie Thomas, described previously, the Court discussed intrafaith differences between Jehovah's Witnesses as to whether a certain type of work was "'scripturally' acceptable."[68] In that case, the Court noted that these type of differences within a faith "are not uncommon" and that courts are "singularly ill equipped to resolve such differences."[69] And, in assessing Thomas's claim, the Court focused on Thomas's individual beliefs about whether the work was permitted by his religion.[70]

In a 1989 unemployment benefits case, the Court considered the case of William Frazee, a Christian, who refused to work on Sundays.[71] Frazee's unemployment benefits claim was originally denied because the refusal to work was not based on tenets or dogma of a particular church, sect, or religion.[72] The Court stated that:

> Undoubtedly, membership in an organized religious denomination, especially one with a specific tenet forbidding members to work on Sunday, would simplify the problem of identifying sincerely held religious beliefs, but we reject the notion that to claim the protection of the Free Exercise Clause, one must be responding to the commands of a particular religious organization. Here, Frazee's refusal was based on a sincerely held religious belief. Under our cases, he was entitled to invoke First Amendment protection.[73]

It is unclear how broadly this protection of individual belief might extend. The cases discussed above involve individuals who have some affiliation with an organized religious faith or broader family of faiths.[74]

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[68] Thomas v. Rev. Bd. of Ind. Emp. Sec. Div. (1981) 450 U.S. 707, 715.

[69] *Id.*

[70] *Id.* at 716 ("The narrow function of a reviewing court in this context is to determine whether there was an appropriate finding that petitioner terminated his work because of an honest conviction that such work was forbidden by his religion.").

[71] Frazee v. Ill. Dept. of Emp. Sec. (1989) 489 U.S. 829.

[72] See 489 U.S. at 830 ("The Board of Review stated: 'When a refusal of work is based on religious convictions, the refusal must be based upon some tenets or dogma accepted by the individual of some church, sect, or denomination, and such a refusal based solely on an individual's personal belief is personal and noncompelling and does not render the work unsuitable.'" (citation omitted)), 831 ("To the Illinois court, Frazee's position that he was "a Christian" and as such felt it wrong to work on Sunday was not enough. For a Free Exercise Clause claim to succeed, said the Illinois Appellate Court, 'the injunction against Sunday labor must be found in a tenet or dogma of an established religious sect. [Frazee] does not profess to be a member of any such sect.'" (citation omitted)).

[73] 489 U.S. at 834 (footnote omitted).

[74] In one article, the author suggests that, if such an affiliation were lacking, the Court might not be as inclined to extend protections to individual beliefs. See generally M. Movsesian, *supra* note 67.

Religious Belief Must Be Sincerely Held

In its decisions, the Supreme Court has indicated "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."[75] Along those lines, in a 1944 case, the Court discussed the limits of inquiry into religious beliefs that:

> …might seem incredible, if not preposterous, to most people. But if those doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect. When the triers of fact undertake that task, they enter a forbidden domain.[76]

While courts cannot inquire into the reasonableness of the belief, courts do have some authority to assess the claimant's honesty and good faith in the offered belief (i.e., whether the belief is sincerely held).[77]

Assessing Sincerity

As a general matter, assessing the sincerity of someone's claimed religious beliefs is a challenging and uncomfortable endeavor. As indicated in the quoted language above, the belief may be "incredible," "preposterous," and it need not be true. Where the belief at issue is objectively unreasonable, it may be difficult to fairly evaluate whether the person claiming that belief sincerely believes it.[78]

Presumably, where there is clear evidence that the belief offered is a mere pretext or patently inconsistent with the claimant's behavior, a court would have little trouble in concluding that the belief is not sincerely held (and, such a case seems unlikely to reach the Supreme Court).

In cases before the Supreme Court, the question of sincerity is generally not disputed.[79]

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[75] Fulton v. City of Philadelphia (2021) 141 S.Ct. 1868, 1876 (*quoting* Thomas v. Rev. Bd. of Ind. Emp. Sec. Div. (1981) 450 U.S. 707, 714).

[76] U.S. v. Ballard (1944) 322 U.S. 78, 87.

[77] See Frazee v. Ill. Dept. of Emp. Sec. (1989) 489 U.S. 829, 833 ("Nor do we underestimate the difficulty of distinguishing between religious and secular convictions and in determining whether a professed belief is sincerely held. States are clearly entitled to assure themselves that there is an ample predicate for invoking the Free Exercise Clause.").

[78] See A. Mohammadi, Note, *Sincerity, Religious Questions, and the Accommodation Claims of Muslim Prisoners*, 129 Yale L. J. 1836, 1855-57 (2020); see also *id*. at 1855 (discussing Justice Jackson's dissenting opinion in *United States v. Ballard* and noting that "Justice Jackson identified as nearly impossible a juror's ability to separate the question of accuracy from the question of sincerity").

[79] The staff noted several Supreme Court opinions, including ones cited in this memorandum, expressly note that sincerity is not at issue before the Court. See, e.g., *Frazee*, 489 U.S. at 833 ("The courts below did not question [Frazee's] sincerity, and the State concedes it."); Wisconsin v. Yoder (1972) 406 U.S. 205, 209 ("The State stipulated that respondents' religious beliefs were sincere."); Burwell v. Hobby Lobby (2014) 573 U.S. 682, 717 ("The companies in the cases before us are closely held corporations, each owned and controlled by members of a single

And the Supreme Court seems reluctant to address the question of sincerity even when presented with opportunities.[80] Therefore, the Supreme Court case law provides little guidance as to how a sincerity inquiry might be conducted and what the limits of such an inquiry might be.

Looking beyond Supreme Court case law, the staff notes that there are other sources of law that may provide general guidance on what sorts of factors may be considered when the sincerity of a religious belief is analyzed. For instance, the Equal Employment Opportunity Commission provides guidance to employers assessing an employee's request for a religious accommodation (pursuant to Title VII of the federal Civil Rights Act of 1964).[81] In that situation, the employer may scrutinize the sincerity of the employee's

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family, and no one has disputed the sincerity of their religious beliefs."); see also *supra* note 56.

But see *infra* note 80.

[80] See Ramirez v. Collier (2022) 142 S.Ct. 1264, 1297-98 (Thomas, J., dissenting) (Justice Thomas questioning the sincerity of Ramirez, a death row inmate seeking a religious accommodation under the Religious Land Use and Institutionalized Persons Act, due to Ramirez's evolving litigation position and disputing the majority's treatment of the belief's consistency with traditional practices as demonstrating Ramirez's sincerity); N.S. Chapman, *Adjudicating Religious Sincerity*, 92 Wash. L. Rev. 1185, 1190 (2017) (quoting from oral argument and opinions in *Burwell v. Hobby Lobby*: "Justice Kagan suggested that it would be unconstitutional to 'test the sincerity of religion.' Perhaps channeling the prevailing scholarly view, Justice Sotomayor called it 'the most dangerous piece' of a religious accommodation analysis. And Justice Ginsburg's dissenting opinion, joined by three other justices, asserted that 'a court must accept as true' a plaintiff's 'factual allegations that a plaintiff's beliefs are sincere and of a religious nature.'" (citations omitted)).

[81] See generally, e.g., https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination (particularly Sections A-2 "Sincerely Held" and A-3 "Employer Inquiries into Religious Nature or Sincerity of Belief). That site indicates:

> The individual's sincerity in espousing a religious observance or practice is "largely a matter of individual credibility." Moreover, "a sincere religious believer doesn't forfeit his religious rights merely because he is not scrupulous in his observance," although "[e]vidence tending to show that an employee acted in a manner inconsistent with his professed religious belief is, of course, relevant to the factfinder's evaluation of sincerity." Factors that – either alone or in combination – might undermine an employee's credibility include: whether the employee has behaved in a manner markedly inconsistent with the professed belief; whether the accommodation sought is a particularly desirable benefit that is likely to be sought for secular reasons; whether the timing of the request renders it suspect (e.g., it follows an earlier request by the employee for the same benefit for secular reasons); and whether the employer otherwise has reason to believe the accommodation is not sought for religious reasons.
>
> However, none of these factors is dispositive. For example, although prior inconsistent conduct is relevant to the question of sincerity, an individual's beliefs – or degree of adherence – may change over time, and therefore an employee's newly adopted or inconsistently observed religious practice may nevertheless be sincerely held. Similarly, an individual's belief may be to adhere to a religious custom only at certain times, even though others may always adhere, or, fearful of discrimination, he or she may have forgone his or her sincerely held religious practice during the application process and not revealed it to the employer until after he or she was hired or later in employment. An employer also should not assume that an employee is insincere simply because some of his or her practices deviate from the commonly followed tenets of his or her religion, or because the employee adheres to some common practices but not others. As noted, courts have held that "Title VII protects more than … practices specifically mandated by an employee's religion."

(Footnotes omitted).

In recent years, these questions got renewed attention as employees sought religious exemptions from

belief. However, the guidance notes also notes that "the sincerity of an employee's stated religious belief is usually not in dispute and is 'generally presumed or easily established.'"[82]

ADDRESSING CONSTITUTIONAL PROVISIONS POTENTIALLY RELEVANT TO SEX EQUALITY IN THIS WORK

Broadly, this study and issues of sex equality relate to a number of different constitutional provisions. Recent memoranda have highlighted some of the relevant constitutional doctrines that have either been used to advance or restrict sex equality under the law. And, this memorandum summarizes recent Supreme Court decisions involving some of those doctrines.

While the doctrines provide important context for understanding the legal landscape, this area feels particularly unsettled. The Supreme Court has dramatically altered certain constitutional doctrines in recent years. And, with the ERA itself as a constitutional provision whose contours have not been explored, this study involves a myriad of challenging questions on how to reconcile different (and potentially competing) constitutional issues.

Here, the staff is seeking direction from the Commission on how, if at all, to address the different constitutional doctrines in its work.

Summary of Constitutional Provisions Presented Previously

In this and prior memoranda, the staff has discussed constitutional doctrines that relate to sex equality. Memorandum 2023-17 focuses primarily on the equal protection jurisprudence under the federal and state constitutions.[83] That memorandum also briefly notes several federal and state constitutional provisions related to sex equality (including federal protections for privacy and liberty, state protections for privacy and reproductive freedom).[84] Memorandum 2023-26 discusses constitutional doctrines that may be in conflict with efforts to achieve sex equality.

Overall, the exact contours of the constitutional doctrines, particularly as they relate to

employer's COVID-19 vaccine mandates. See generally, e.g., L. Wamsley, Nat'l Pub. Radio, *Judging 'Sincerely Held' Religious Belief is Tricky for Employers Mandating Vaccines*, updated Oct. 4, 2021, *available at* https://www.npr.org/2021/10/04/1042577608/religious-exemptions-against-the-covid-19-vaccine-are-complicated-to-get.

82 https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination (footnote omitted).

83 Memorandum 2023-17, pp. 6-13.

84 *Id.* at 13-19.

sex equality, are difficult to describe precisely and may still be evolving.[85] Moreover, the ERA, as a new constitutional provision, has not yet been interpreted by the courts, so how it will change the overall constitutional landscape is uncertain.

Approaches for Addressing Constitutional Doctrines

The Commission should consider how the first phase of its work (i.e., the codification of a sex equality principle) should account for the different constitutional provisions discussed previously. Below the staff presents different conceptual approaches for how the Commission could address the constitutional provisions in its work. The approaches are ordered roughly from most to least accommodating of potential constitutional limitations.

The staff is seeking direction from the Commission on whether to address constitutional provisions and, if so, which approach (or approaches) that the Commission would like the staff to explore in more detail going forward. In addition, the staff is seeking guidance on where in the Commission's materials (i.e., the narrative report, Commission Comment, or the statutory language itself) the Commission would like to address these constitutional doctrines.[86]

In some instances, the discussion below includes sample language to provide a concrete example of the approach. Such examples are offered simply for illustrative purposes and do not reflect a proposal for how to implement the approach.

Approach 1 — Expressly Limit the Application of the Sex Equality Principle

The Commission could craft a sex equality principle that codifies express constitutional limitations on its application. To be effective, these limitations would need to be incorporated into the statutory language itself. And, this approach could be implemented using different levels of detail to describe the limitations. Two different options are discussed below.

For this approach, one option would be to codify the substance of the constitutional tests derived from the case law. The staff strongly recommends against this option. From a practical perspective, this option would be very difficult to implement and the resulting statute would require updating as the doctrine evolves. Constitutional doctrines are complex, making it challenging to condense them into clear, useful statutory rules. Given

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[85] See *id.* at 17-18 (noting that a majority of the Supreme Court Justices have expressed some dissatisfaction with the current test for assessing whether a generally applicable law runs afoul of the Free Exercise Clause); 32-36 (discussing cases involving expressive association); see also discussion of "Application of Anti-Discrimination Law – *303 Creative v. Elenis*" *supra*.

[86] See generally *2020-2021 Annual Report*, 47 Cal. L. Revision Comm'n Reports 221, 239-43 (2020) (discussing the use of Commission materials, including Comments and the Commission report, to determine legislative intent).

that, it is likely that the scope of the rule would either be more restrictive than the constitutional doctrine requires or would appear to permit things that the constitutional doctrine prohibits. Beyond that initial drafting challenge, as future cases refine and change the doctrine, the rule would become stale and require updating (which would again pose drafting challenges).

Another less detailed option to implement this approach would be to simply name the relevant constitutional provisions (e.g., "This provision shall not apply to the extent that it is inconsistent with rights protected by the First Amendment of the U.S. Constitution…"). This option largely avoids the drafting difficulty noted above. However, this option provides minimal guidance for those using the law, as it effectively just states the general rule of constitutional supremacy. For this reason, the staff would not recommend this approach.

Approach 2 — Silence With Respect to Constitutional Provisions

The Commission could decide to simply remain silent with respect to constitutional provisions that could be in conflict with its proposal.

In general, statutory laws do not include express language addressing potentially relevant constitutional provisions.[87] Silence with respect to such provisions would typically be the staff's default drafting approach for statutory provisions. That said, this study presents weighty policy concerns, which may warrant a different drafting approach.

Even if the Commission decides to remain silent with respect to constitutional provisions in the statutory language, the Commission could still consider discussing constitutional issues in its Comments or the narrative part of its recommendation.

Approach 3 — Acknowledge Potential Constitutional Limitations

Under this approach, the Commission could include discussion of potential constitutional limitations in its materials.

For this approach, the Commission could simply identify and describe the constitutional doctrines in its narrative report.

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[87] But see, e.g., Health & Safety Code § 17980.7(c)(14) ("This section [related to violations and enforcement of building standards] shall not be construed to deprive an owner of a substandard building of all procedural due process rights guaranteed by the California Constitution and the United States Constitution, including, but not limited to, receipt of notice of the violation claimed and an adequate and reasonable period of time to comply with any orders which are issued by the enforcement agency or the court."); Pen. Code § 745(e)(4) ("The remedies available under this section [related to prohibiting conviction or sentencing based on race, ethnicity, or national origin] do not foreclose any other remedies available under the United States Constitution, the California Constitution, or any other law."); Pub. Res. Code § 29714 ("This section [related to taking or damage of private property for public use] is not intended to increase or decrease the rights of any owner of property under the California Constitution or the United States Constitution.").

Going a step further, the Commission could identify the constitutional doctrines and express an intent that the sex equality provision apply to the maximal extent consistent with constitutional limitations.

An earlier Commission study provides an example of this approach. In the Commission's work on nonprobate transfers to former spouses, the Commission crafted a rule (subject to specified exceptions) that dissolution of marriage would revoke a nonprobate transfer to a former spouse.[88] In that work, the Commission recognized that a federal statute, the federal Employee Retirement Income Security Act of 1974 ("ERISA"), could preempt the application of the Commission's proposed rule in some cases. Although this issue was not addressed in the proposed statutory language (and the Commission recognized potential risk in doing so),[89] the Commission decided to acknowledge ERISA in its narrative report and in a Commission Comment.[90] In the report, the Commission recommended that "the proposed law apply to the broadest extent consistent with federal law."[91]

In this study, the Commission could take a similar approach, expressing an intent for maximal application of the sex equality principle.

Approach 4 — Identify Affirmative Constitutional Support for Broad Application of the Sex Equality Provision

The Commission could also consider including language about the state's interest in broad application of the sex equality principle. This language could also cite constitutional protections that could support and further sex equality (e.g., equal protection, liberty, and privacy). While this type of language would not typically be included in Commission Comments, such language could be drafted as proposed statutory language (likely as findings and declarations[92]) or could be included in the Commission's narrative report.

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88 *Effect of Dissolution of Marriage on Nonprobate Transfers*, 28 Cal. L. Revision Comm'n Reports 599 (1998).

89 See *id.* at 610 ("[T]he proposed law does not exempt [ERISA-regulated] benefits from its scope of application. To do so would codify the present extent of federal preemption, precluding broader application of the proposed law if the scope of preemption is later reduced by Congress or construed more narrowly by the courts." (footnote omitted)).

90 *Id.* at 609-10, 615 (Comment to proposed Probate Code Section 5600).

91 *Id.* at 609. The Commission also recognized that an existing severability clause in the Probate Code would preserve the application of the proposed law where it was not preempted. *Id.* at 610, n. 25.

92 See generally, e.g., Fam. Code § 20000 (identifying compelling state interests relating to child and spousal support and resolution of custody and visitation disputes); Gov't Code § 7461(c) (identifying the purpose of the law on governmental access to financial records as "balanc[ing] a citizen's right of privacy with the governmental interest in obtaining information for specific purposes and by specified procedures"); Health and Safety Code § 123462 (describing the public policy of California and identifying protected fundamental rights of individuals related to reproductive privacy and decisionmaking); Pen. Code § 30505 (discussing legislative intent with respect to assault weapons and, in subdivision (b), the need for regulation to address the "unacceptable risk to the death and serious

The proposed constitutional language contained in ACA 5, presented previously in this memorandum, provides an example of this approach. That amendment would designate the right to marry as a fundamental right. Subdivision (b) would provide:

> (b) This section is in furtherance of both of the following:
> (1) The inalienable rights to enjoy life and liberty and to pursue and obtain safety, happiness, and privacy guaranteed by Section 1.
> (2) The rights to due process and equal protection guaranteed by Section 7.

Similar language could be crafted to identify the constitutional provisions that would be furthered by the Commission's sex equality principle.

Extending this approach even further, the Commission could draft language, drawn, in part, from the constitutional case law, that describes the state's strong interest in favor of sex equality (e.g., the sex equality provision could cite the state's "compelling"[93] interest in ensuring that all citizens, regardless of sex, are accorded "full citizenship stature — equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities"[94] and note that "ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests"[95]). Not only might such intent language be useful in the event of a potential constitutional challenge, such language would also serve as an important symbolic statement in favor of equality.

Commission Decision

Which of the approaches, described briefly above, would the Commission like to explore in this study?

Respectfully submitted,

Kristin Burford
Chief Deputy Director

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injury of human beings, destruction or serious damage of vital public and private buildings, civilian, police and military vehicles, power generation and transmission facilities, petrochemical production and storage facilities, and transportation infrastructure" that such weapons pose).

93 See, e.g., Bob Jones Univ. v. United States (1983) 461 U.S. 574, 603-04.

94 United States v. Virginia (1996) 518 U.S. 515, 532.

95 Wisconsin v. Yoder (1972) 406 U.S. 205, 215-16.