First Amendment Protections for Health Care Sharing Ministries:

Religious Liberty, Freedom of Speech, Freedom of Association, and Similar Rights

Alliance for Health Care Sharing Ministries
January 2023

Table of Contents

Executive Summary

The Constitution and numerous statutes protect religious organizations from unduly burdensome and intrusive regulations. That is unsurprising, in light of this nation's history with respect to fundamental freedoms such as religious liberty, freedom of speech, and freedom of association. Our nation was founded and designed by "a religious people" dedicated to "guarantee[ing] the freedom to worship as one chooses." *Zorach v. Clauson*, 343 U.S. 306, 313 (1952). It also was founded by people acutely aware that government may attempt to "suppress dissent" with restrictions on speech, *Kennedy v. Bremerton Sch. Dist*., 142 S. Ct. 2407, 2421 (2022), and that "religious bodies" long have "act[ed] as critical buffers between the individual and the power of the State," *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C*., 565 U.S. 171, 199–200 (2012). Health care sharing ministries are but one of the most recent beneficiaries of our nation's longstanding devotion to First Amendment freedoms.

Religious liberty is the foremost fundamental freedom protecting health care sharing ministries. Religious liberty encompasses both the right to free exercise of religion and the right to be free from the establishment of a state religion. Together, these rights "aim to foster a society in which people of all beliefs can live together harmoniously." *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2074 (2019).

The free exercise of religion entails both freedom of thought and deed: "the [First] Amendment embraces two concepts—freedom to believe and freedom to act." *Cantwell v. State of Connecticut*, 310 U.S. 296, 303 (1940). Laws that implicate the free exercise of religion can run afoul of the Constitution in several ways.

First, they can restrict religious exercise in a way that is not neutral or generally applicable, without serving a compelling interest by narrowly tailored means. Governments can incur liability when their actions target religious activity even in part due to its religious nature or, alternatively, create a scheme of exemptions for what otherwise would be a universal rule.

Second, governments may restrict religious exercise due to bias, prejudice, or hostility. Such hostility can be direct or implicit: if government acts in a manner that passes judgment upon religious beliefs or practices, then it acts with animus towards religious exercise.

The right to be free from the establishment of a state religion, or irreligion, is complementary to the right to the free exercise of religion. The right to be free from the establishment of religion takes as its directing principle that government should not be involved in the management of religious organizations. Religious bodies must enjoy "independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94, 116 (1952). The Establishment Clause thus forbids that government become excessively entangled with religion. Regulatory schemes that subject religious organizations to continuous monitoring of activities, budgets, relationships, and structures can run afoul of this protection.

The religious liberty rights of health care sharing ministries are reinforced by other First Amendment freedoms. The freedom of speech, for example, "provides overlapping protection

for expressive religious activities," such "[t]hat the First Amendment doubly protects religious speech." *Kennedy v. Bremerton Sch. Dist*., 142 S. Ct. 2407, 2421 (2022). Government may never prohibit nor compel speech without satisfying the strictest standards for governmental action.

Similarly, the freedom of association protects both religious organizations and their members and affiliates from the chilling effect of government regulation. The government can violate the freedom of association by compelling an organization to disclose the names of individuals or organizations who associate with the organization, including their contractual arrangements and any financial payments to or from the religious organization.

Finally, the right to due process and equal protection of the laws forbids government from selectively enforcing statutory or regulatory requirements in ways that discriminate against particular types of organizations. Government may not single out organizations for special treatment.

Health care sharing ministries also enjoy statutory protections that in many jurisdictions extend beyond constitutional protections. Numerous states have adopted religious freedom restoration acts or similar legal frameworks that provide that state regulatory activity that significantly burdens religious exercise must be the least restrictive means for furthering a compelling state interest. In these jurisdictions, the state government easily could run afoul of its own laws by overly regulating health care sharing ministries.

Courts increasingly enforce these protections against instances of government overreach into the religious affairs of individuals and against religious organizations. Government thus runs the risk of civil liability, and certainly civil litigation, to the extent it attempts to impose overly burdensome or intrusive regulatory regimes on health care sharing ministries.

Introduction

It is essential and unique to the American system of government that individuals and organizations possess certain fundamental freedoms. Those first freedoms include religious freedom, freedom of speech, freedom of association, and due process and equal protection of the laws. The Constitution protects these freedoms and in many jurisdictions statutes reinforce and expand upon those constitutional protections.

This white paper discusses the constitutional and statutory protections that shield health care sharing ministries from overly burdensome and intrusive government regulation. Many of those freedoms find their locus in the First Amendment. Consequently, this white paper begins with the First Amendment. It discusses religious liberty—both the Free Exercise and Establishment Clauses, freedom of speech, and freedom of association. It then discusses the equal protection and due process protections in the Constitution. It concludes with a discussion of statutory protections, including federal and state RFRAs.

I. First Amendment Protections

The First Amendment protects fundamental freedoms emanating from the recognition that government should not prescribe or proscribe religious exercise, the expression of valuable ideas, and the ability to join together for a common cause. The Amendment provides that:

> 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.

U.S. Const., 1st Am. Each of these protections—religious liberty (free exercise and establishment), speech, and association—provide crucial protections for health care sharing ministries.

A. Religious Liberty

Religious liberty is at the heart of the American experiment. Many people sought, and many people continue to seek, religious liberty in this land. Designed and adopted by "a religious people," our Constitution "[g]uarantee[s] the freedom to worship as one chooses." *Zorach v. Clauson*, 343 U.S. 306, 313 (1952). Indeed, that guarantee is reflected in the very first words of the First Amendment: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

The Free Exercise Clause and Establishment Clause provide crucial protections. Together, they shield health care sharing ministries from regulation that infringes upon the religious mission that health care sharing ministries embody and seek to live out in their activities.

1. Free Exercise of Religion

The First Amendment prohibits the government from "prohibiting the free exercise" of religion. This "Free Exercise Clause" arises in the context of the recognition that "[i]n the realm of religious faith, . . . sharp differences arise" that may lead to conflict among men. *Cantwell v. State of Connecticut*, 310 U.S. 296, 310 (1940). "But the people of this nation have ordained in the light of history, that . . . these [religious] liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy." *Id*.

"The [Free Exercise] Clause protects not only the right to harbor religious beliefs inwardly and secretly." *Kennedy v. Bremerton Sch. Dist*., 142 S. Ct. 2407, 2421 (2022). Rather "[i]t does perhaps its most important work by protecting the ability of those who hold religious beliefs of all kinds to live out their faiths in daily life through 'the performance of (or abstention from) physical acts.'" *Id*. (quoting *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 877 (1990)).

These protections extend to the full spectrum of the diversity of religious views. "Popular religious views are easy enough to defend" but "[i]t is in protecting unpopular religious beliefs that we prove this country's commitment to serving as a refuge for religious freedom." *Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n*, 201 L. Ed. 2d 35, 138 S. Ct. 1719, 1737 (2018) (Alito, J., and Gorsuch, J., concurring).

These protections extend to believers as long as they are sincere in their beliefs. It is anathema to the American experiment to evaluate the religious beliefs of sincere individuals. *Thomas v. Review Bd. of Indiana Employment Security Div*., 450 U.S. 707 (1981). As the Supreme Court recently put it, "we have repeatedly refused" to tell religious believers "that their beliefs are flawed." *See, e.g*., *Burwell v. Hobby Lobby Stores*, Inc., 573 U.S. 682, 724 (2014).

An individual or organization "may carry the burden of proving a free exercise violation in various ways." *Kennedy v. Bremerton Sch. Dist*., 142 S. Ct. 2407, 2422 (2022). First, he may show that a government entity has restricted his religious exercise in way that is not neutral or generally applicable. Second, he may show that a government entity has restricted his religious exercise due to bias, prejudice, or hostility. Health care sharing ministries find substantial protection both of these prongs of the Free Exercise Clause.

a. Neutrality and General Applicability

An individual or organization may prove a violation of the free exercise of religion by showing "that a government entity has burdened his sincere religious practice pursuant to a policy that is not 'neutral' or 'generally applicable.'" *Kennedy*, 142 S. Ct. at 2422. If the individual or organization makes that showing, then the government restriction violates the First Amendment unless it satisfies strict scrutiny, that is, the government restriction is justified by a compelling state interest and is narrowly tailored in pursuit of that interest. *Id.*

"A government policy will not qualify as neutral if it is 'specifically directed at . . . religious practice.'" *Kennedy*, 142 S. Ct. at 2422 (quoting *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 879–881 (1990)). "A policy can fail this test if it

"discriminate[s] on its face," or if a religious exercise is otherwise its 'object.'" *Id.* (quoting *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 546 (1993)).

The Supreme Court's recent decision in *Kennedy v. Bremerton School District* illustrates that government can easily run afoul of this test if takes the religious nature of conduct into account "at least in part" in its decisionmaking. In that case, the school district sought to restrict the prayers of a coach after football games. The Court easily concluded that "the District sought to restrict Mr. Kennedy's actions at least in part because of their religious character" because its letter to the coach referred to "prayer" and "religious conduct." *Id.* That action, the Court concluded, acknowledging the District's admission, was "not neutral" toward religion. *Id*. at 2423.

A government policy also can fail the general applicability requirement, and in at least two different ways. First, "[a] government policy will fail the general applicability requirement if it 'prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way.'" *Id*. (quoting *Fulton v. Philadelphia*, 141 S. Ct. 1868, 1876–1877, 1881 (2021)). In addition, "[a] law is not generally applicable if it 'invite[s]' the government to consider the particular reasons for a person's conduct by providing 'a mechanism for individualized exemptions.'" *Fulton*, 141 S. Ct. at 1877 (quoting *Smith*, 494 U.S. at 884); *see Kennedy*, 142 S. Ct. at 1422 (same).

The Supreme Court's recent decisions in *Kennedy* and *Fulton* illustrate that government must be scrupulously even-handed to avoid running afoul of this requirement. In *Kennedy*, the school district stated that during coach Kennedy's prayer, he "failed to supervise student-athletes after games." *Id*. But, the Court concluded, this was a "bespoke requirement specifically addressed to Mr. Kennedy's religious exercise" because the school district "permitted other members of the coaching staff to forgo supervising students briefly after the game to do things like visit with friends or take personal phone calls." *Id.* In the Court's view, "any sort of postgame supervisory requirement was not applied in an evenhanded, across-the-board way." *Id*.; *see Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021) ("government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat any comparable secular activity more favorably than religious exercise"); *Roman Catholic Diocese of Brookyn v. Cuomo*, 141 S. Ct. 63, 66 (2021) (per curiam) (striking down pandemic restriction because of "disparate treatment" of religious and non-religious buildings).

The Court's decision in *Fulton* reinforces the stringency of an "across-the-board" requirement. There, the city of Philadelphia "stopped referring children to C[atholic] S[ocial] S[ervices] upon discovering that the agency would not certify same-sex couples to be foster parents due to its religious beliefs about marriage." *Fulton*, 141 S. Ct. at 1874. The city argued that its decision was an application of a generally applicable policy that foster agencies such as Catholic Social Services must provide services regardless of sexual orientation. But, the Court, concluded, that was not a generally applicable policy because it empowered the city to grant exceptions at its "sole discretion." *Id.* As the Court put it, "[t]he creation of a formal mechanism for granting exceptions renders a policy not generally applicable, regardless whether any exceptions have been given, because it 'invite[s]' the government to decide which reasons for

not complying with the policy are worthy of solicitude." *Id.* at 1879 (quoting *Smith*, 494 U.S. at 884).

These precedents confirm that health care sharing ministries cannot be treated differently than secular organizations. For example, if the state subjects health care sharing ministries to regulatory obligations but does not regulate secular organizations that perform similar functions, such as direct primary care arrangements, consumer payment plans, or other cost-sharing, then the government is regulating based "at least in part" on the religious nature of the health care sharing ministries.

Similarly, if the state regime provides that a government official may exercise his discretion to grant any exemptions from regulatory obligations, then its regulations will not survive free exercise scrutiny. It does not matter whether the government official actually has granted any exemptions; merely the power to grant such individualized actions condemns the government regime under the Free Exercise Clause.

The same result would occur if the state takes either of these actions by way of an interpretation of the insurance code, as opposed to by way of statute or regulation. For example, if the state interprets the insurance code broadly to subject health care sharing ministries to regulation but does not apply the same broad interpretation to other organizations that pay medical bills, then its actions will not survive free exercise scrutiny. Similarly, if the state interprets the insurance code broadly to subject health care sharing ministries to regulation and creates a scheme for individualized exemptions, then its actions will not survive the Free Exercise Clause.

b. Anti-religious Animus

An individual or organization also may "prove a free exercise violation by showing that 'official expressions of hostility' to religion accompany laws or policies burdening religious exercise; in cases like that [courts] have 'set aside' such policies without further inquiry. *Id.* (quoting *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1732, (2018)).

Hostility need not be dramatic to condemn a government action. Quite the contrary: "[t]he Constitution 'commits government itself to religious tolerance, and upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures.'" *Masterpiece Cakeshop*, 138 S Ct. at 1731 (quoting *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 547 (1993)). As the Supreme Court has explained, "[t]he Free Exercise Clause bars even 'subtle departures from neutrality' on matters of religion." *Id.*

In addition, expressions of hostility, or animus, can be direct or implicit. Government "cannot impose regulations that are hostile to the religious beliefs of affected citizens and cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices." *Id.* Rather, government must "proceed in a manner neutral toward and tolerant of [a person's] religious beliefs." *Id.*

Government action can be condemned for hostility at numerous stages. "Factors relevant to the assessment of governmental neutrality include 'the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body.'" *Id.* (quoting *Lukumi*, 508 U.S. at 540).

The Court's recent decision in *Masterpiece Cakeshop* demonstrates that animus may be hiding in plain sight. There, the Colorado Civil Rights Commission pursued an enforcement action against a baker who told a same-sex couple "that he would not create a cake for their wedding because of his religious opposition to same-sex marriages." *Id*. at 1723. During that action, commissioners made comments along the lines of "[i]f a businessman wants to do business in the state and he's got an issue with the—the law's impacting his personal belief system, he needs to look at being able to compromise." *Id.* at 1729.

The Court concluded these comments were "inappropriate and dismissive comments showing lack of due consideration for [the baker's] free exercise rights." *Id.* The government, in the Court's view, "was neither tolerant nor respectful of [the baker's] religious beliefs" and "gave every appearance of adjudicating [the baker's] religious objection based on a negative normative evaluation of the particular justification for his objection and the religious grounds for it." *Id.* That constituted "official expressions of hostility to religion."

Numerous other decisions across the past thirty years reach the same result. *E.g*., *Roman Catholic Diocese of Brookyn v. Cuomo*, 141 S. Ct. 63, 66 (2021) (per curiam) (rejecting pandemic restrict because of "statements made in connection with the challenged rules [that] can be viewed as targeting the ultra-Orthodox [Jewish] community"); *Lukumi*, 508 U.S. at 540 (1993) (regulation regarding treatment of animals).

These precedents indicate that statements by government officials that target health care sharing ministries due to skepticism regarding their religious mission and character have the effect of condemning regulation of health care sharing ministries. When bias against religion motivates regulation of ministries at least in part, then the regulation cannot survive free exercise scrutiny.

2. Establishment Clause

"Throughout our Nation's history, religious bodies have been the preeminent example of private associations that have 'act[ed] as critical buffers between the individual and the power of the State.'" *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C*., 565 U.S. 171, 199–200 (2012) (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 619 (1984)).

"To safeguard this crucial autonomy," the courts have long acted to "protect a private sphere within which religious bodies are free to govern themselves in accordance with their own beliefs." *Id.* To put it another way, the Constitution guarantees religious bodies "independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94, 116 (1952).

The Establishment Clause furthers that end. Under it, government action may not "foster an excessive entanglement with religion." *Lemon v. Kurtzman*, 403 U.S. 602 (1971). It may not "closely" monitor the proportion of activities a religious organization spends on religious activity or the manner to which it puts its resources. *Aguilar v. Felton*, 473 U.S. 402 (1985). Although government may impose "narrowly drawn" requirements regarding "recordkeeping and disclosure," it may not force a religious organization to subject itself to the state as ultimate arbiter of its activities. For example, the Court has distinguished between recordkeeping requirements to enable the collection of sales taxes, *see Jimmy Swaggart Ministries v. Board of Equalization*, 493 U.S. 378 (1990), and recordkeeping that requires "close administrative contact" on an ongoing basis, *see Hernandez v. Commissioner*, 490 U.S. 680, 684–86 (1989).

This distinction is well illustrated in *Church of Scientology Flag Serv. Org., Inc. v. City of Clearwater*, 2 F.3d 1514, 1519 (11th Cir. 1993). There, the city of Clearwater, Florida, promulgated an ordinance requiring that any organization solicits funds report the name of the organization, its tax-exempt status, its purpose, the names and addresses of its officers, its other locations, any past criminal prosecutions, and, most relevant here, "[a]n estimated schedule of salaries, wages, fees, commissions, expenses and costs to be expended and paid in connection with the solicitation of funds and in connection with their disbursement, and an estimated percentage of the total projected collections which the costs of the solicitation will comprise," together with annual figures for the same. *Id.* The court concluded that this ordinance excessively entangled the government with a religious organization, because it essentially required a religious organization "to divulge its entire budget and all its operations on a continuing basis." *Id*. at 1536.

Similarly and much more recently, *in Medina v. Catholic Health Initiatives*, 877 F.3d 1213 (10th Cir. 2017), the court held that regulatory schemes that require "long-term, continuing monitoring" constitute excessive entanglement with religious organizations in violation of the Establishment Clause. There, an employee argued that a church's benefit plan should be subject to ERISA and that exempting churches from ERISA coverage constituted excessive entanglement with religion. The Tenth Circuit concluded that the employee's argument turned the Establishment Clause on its head: it "far from entangling the government in the affairs of religious institutions, the church-plan exemption avoids the entanglement that would likely occur in its absence." *Id*. at 1234.

These precedents confirm that health care sharing ministries are protected by the First Amendment's Establishment Clause from overly intrusive and burdensome regulations. For example, state regulatory regimes that require detailed accounting of expenditures, assessments of percentages of funds expended for certain purposes, or copies of contracts or other financial and economic arrangements, run the risk of excessively entangling the government with a religious organization. That risk is heightened to the extent that these requirements are imposed on an ongoing basis.

The same risk arises for states if they choose to delegate this type of intrusive and burdensome regulation to another entity, such as an accreditation body, that will perform the same type of functions. Government cannot escape its constitutional obligations by empowering a third-party to perform its tasks.

B. Freedom of Speech

The First Amendment prohibits government from "abridging the freedom of speech." The Supreme Court has "often noted the close connection between our Nation's commitment to self-government and the rights protected by the First Amendment." *Knox v. Serv. Emps. Int'l Union, Loc. 1000*, 567 U.S. 298, 308 (2012) (citing *Brown v. Hartlage*, 456 U.S. 45, 52 (1982) ("At the core of the First Amendment are certain basic conceptions about the manner in which political discussion in a representative democracy should proceed")). "The First Amendment creates 'an open marketplace' in which differing ideas about political, economic, and social issues can compete freely for public acceptance without improper government interference." *Id.* at 309.

This "basic tenet" of our government has two primary implications: "The government may not prohibit the dissemination of ideas that it disfavors, nor compel the endorsement of ideas that it approves." *Id.* Although distinct, both of these restrictions on government are rooted in the fundamental freedom that government may not declare and enforce its own orthodoxy: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

In light of the core concern of the freedom of speech, it is well recognized that the First Amendment protections for freedom of religion and freedom of speech "work in tandem." *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2421 (2022). Indeed, "the Free Speech Clause provides overlapping protection for expressive religious activities." *Id.* Anyone with a basic knowledge of American history can recognize the fact "[t]hat the First Amendment doubly protects religious speech is no accident." *Id.* Rather, "[i]t is a natural outgrowth of the framers' distrust of government attempts to regulate religion and suppress dissent." *Id.* As the Supreme Court once put it with literary flourish, "in Anglo–American history, . . . government suppression of speech has so commonly been directed precisely at religious speech that a free-speech clause without religion would be Hamlet without the prince." *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995).

1. Prohibition of Speech: Conditioning Speech on Regulation

To justify a prohibition of speech, the government must establish that its restriction of speech serves a compelling interest and is narrowly tailored to that end. *Kennedy*, 142 S. Ct. 2407 at 2421. This "strict scrutiny" is often and rightly said to be "strict in theory, fatal in fact." *See* Adam Winkler, Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts, 59 Vand. L. Rev. 793, 844 (2006) ("strict scrutiny is actually most fatal in the area of free speech, where the survival rate is 22 percent, lower than in any other right"). Few if any prohibitions on speech survive it. *See id.* (collecting cases).

Indeed, the strict scrutiny standard is so difficult for the government to survive that it courts routinely strike down the mere regulation of organizations that want to speak. For example, in *Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980), the Court struck down a municipal ordinance prohibiting the solicitation of contributions by a charitable

organization that did not use at least 75% of its receipts for "charitable purposes." The state argued that its statute helped to prevent fraud and other malfeasance. The Court concluded that the statute was unconstitutionally overbroad in violation of the First and Fourteenth Amendments because "[t]he flaw in the Village's assumption, as the Court recognized, was that there is no necessary connection between fraud and high solicitation and administrative costs." *Id.* at 961.

Similarly, in *Secretary of State of Md. v. Joseph H. Munson Co*., 467 U.S. 947 (1984), the Court went even further to protect speech than in *Schaumburg*. There, Maryland's statute attempted to avoid *Schaumburg* by providing for a waiver of the 75% rule if it would prevent the organization from raising contributions. The Court rejected that attempt, observing that the statute required the filing of contracts with professional fundraisers and thus that the "child on the protected activity is the same." *Id.* at 969.

These precedents establish that health care sharing ministries enjoy substantial protections with respect to their communications in furtherance of their religious message and activity. Government regulators may not, without significant justification and narrow tailoring, impose arbitrary financial percentages on the use of funds, *see Schaumburg*, 444 U.S. at 620, or restrict the religious content of their speech activity, *see Kennedy*, 142 S. Ct. at 2407.

2. Compelled Speech: Forced Disclosures

The standard is similar for the government to compel speech. "Laws that compel speakers to utter or distribute speech bearing a particular message are subject to the same rigorous scrutiny" as those that forbid speech. *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 642 (1994); *see Hurley v. Irish–Am. Gay, Lesbian & Bisexual Grp. of Bos*., 515 U.S. 557, 573–74, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995). That is because "[t]he right to speak and the right to refrain from speaking are complementary components of the broader concept of individual freedom of mind." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977).

The only narrow exceptions to that strict scrutiny are "purely factual and uncontroversial disclosures" that are "related to the State's interest in preventing deception of consumers" and not "unduly burdensome" and commercial speech. *See, e.g*., *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 566 (1980).

These precedents establish that health care sharing ministries enjoy substantial protections with respect to government attempts to compel certain disclosures. Government regulators may not forbid health care sharing ministries from soliciting members without state-sponsored accompanying messages (except for factual and uncontroversial disclosures). *See Turner*, 512 U.S. at 542. For example, regulators may not require ministries to state that they do not comply with the Affordable Care Act or that health insurance is better for most people than health care sharing ministries.

C. Freedom of Association

The First Amendment prohibits government from abridging the freedom of speech, the freedom to peaceably assemble, the freedom to petition the government, and related rights. Courts have "long understood as implicit in the right to engage in activities protected by the First

Amendment a corresponding right to associate with others." *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984). The protection for the freedom of association "furthers 'a wide variety of political, social, economic, educational, religious, and cultural ends,' and 'is especially important in preserving political and cultural diversity.'" *Am. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2382 (2021) (quoting *Robert*, 468 U.S. at 622). Consequently, free association "lies at the foundation of a free society." *Buckley v. Valeo*, 424 U.S. 1, 25 (1976) (per curiam).

The government may run afoul of this fundamental freedom through regulation that takes "a number of forms." *Bonta*, 141 S. Ct. at 2382. Courts have held, for example that government may not force groups to associate with others they do not want to associate with, punish individuals for their association, or deny individuals benefits based on their association. *Id.* (citing *Roberts*, 468 U.S. at 622; *Elrod v. Burns*, 427 U.S. 347, 355 (1976) (plurality opinion); *Healy v. James*, 408 U.S. 169, 181–182 (1972)).

The right to freedom of association applies in two ways of particular relevance here. First, the government can violate the freedom of association by compelling an organization to disclose the names of individuals who associate with the organization. In *Americans for Prosperity Foundation v. Bonta*, the Court held that California's requirement that nonprofit organizations disclose the identities of their donors violated the First Amendment. *Bonta*, 141 S. Ct. at 2382. There, the California Attorney General promulgated a regulation requiring nonprofit organizations to file paperwork listing their major donors in the interest of easing the investigatory burden of the government agency. The Court struck down this regulation. It held that California's generalized interest in preventing wrongdoing did not justify the significant burden, including the risk of public disclosure, of collecting this information from nonprofit organizations. *Id*.

Bonta is the latest in a long line of cases preventing the government from inquiring into the "internal structure or affairs of an association." *Roberts*, 468, U.S. at 623; *see, e.g*., *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958); *Bates v. City of Little Rock*, 361 U.S. 516, 523 (1960); *Elrod v. Burns*, 427 U.S. 347, 355 (1976) (plurality opinion); *Healy v. James*, 408 U.S. 169, 181–182 (1972).

Second, the government can violate the freedom of association by compelling an individual to disclose the names of organizations with which it associates. "[A] vital relationship [exists] between freedom to associate and privacy in one's associations." *NAACP v. Alabama*, 357 U.S. at 462. That is because compelled disclosure of individuals' associations can "subject them to threats, harassment, or reprisals from either Government officials or private parties," a risk that is increasingly true in today's digital age. *John Doe No. 1 v. Reed*, 561 U.S. 186, 203 (2010) (Alito, J., concurring).

In *Shelton v. Tucker*, for example, the Court struck down an Arkansas statute requiring teachers to list the organizations to which they belonged or contributed. 364 U.S. 479 (1960). The Court held that, although the government of course enjoys the right to investigate the fitness of those who teach in its schools, that governmental interest "cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Id.* at 488.

In either of these situations, courts subject government restrictions on the freedom of association to "exacting scrutiny." This is a high bar. Under this standard, there must be "a substantial relation" between the restriction and a "sufficiently important governmental interest." *Bonta*, 141 S. Ct. at 2383. Not any governmental interest is "sufficiently important": "administrative convenience" is not enough. *Id.*

Similarly, for a "substantial relation" to exist between the restriction and the governmental interest, that restriction must be "narrowly tailored." That is because "[b]ecause First Amendment freedoms need breathing space to survive." *NAACP v. Button*, 371 U.S. 415, 433 (1963). To be "narrowly tailored," the restriction must satisfy a "means-end fit." Required disclosure, for example, is not acceptable when enforcement mechanisms such as ex post investigation would suffice. *Bonta*, 141 S. C.t at 2386.

These precedents establish that health care sharing ministries cannot, consistent with the First Amendment, be forced to disclose those individuals or entities who associate with the ministries without significant justification. It is beyond peradventure that government could not force ministries to divulge the names of their members. There is simply no way to distinguish such restrictions from those imposed upon other nonprofit organizations throughout the nation's history. *See, e.g*., *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958).

Just as clear is the protection that ministries enjoy from unjustified compelled disclosure of those individuals and organizations who associate with the ministries to perform their associational functions, such as vendors, providers, or other nonprofit organizations, including payments and contractual arrangements. Any such ex ante disclosure requirements cannot be justified by the "administrative convenience" of the government regulator. *Bonta*, 141 S. Ct. at 2383. Nor can they survive exacting scrutiny when ex post investigative mechanisms can be used to investigate potential wrongdoing. *Id.*

In sum, the freedom of association protects health care sharing ministries' rights to organize their affairs internally and associate with their members, vendors, and other organizations without fear of government interference. This fundamental freedom counsels caution in subjecting ministries to burdensome regulation.

II. Equal Protection and Due Process Protections

The Equal Protection and Due Process Clauses provide protections that complement those of the First Amendment. Together, these clauses require that the laws be applied equally to similarly-situated organizations and that government decisionmakers be free of bias.

The Equal Protection Clause prevents governments from "deny[ing] to any person with its jurisdiction the equal protection of the laws." U.S. Const., amend XIV, § 1. This "is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). To the extent that government officials apply the laws selectively to health care sharing ministries, they may run afoul of equal protection of the laws.

The Due Process Clause, by contrast, requires government to provide "due process" before punishing an organization. "[I]t is axiomatic that "[a] fair trial in a fair tribunal is a basic

requirement of due process." *Caperton v. A.T. Massey Coal Co*., 556 U.S. 868, 886 (2009). A fair tribunal does not exist when a judge has a "financial interest in the outcome of a case" or has a "potential for bias" due to prior involvement in the substance of the matter. To the extent officials appear on a long-running mission to target health care sharing ministries, they may run afoul of basic due process protections.

III. Statutory Protections: Federal and State RFRAs

Many jurisdictions protect religious freedom by statute above and beyond constitutional protections. At the federal level, the bipartisan Religious Freedom Restoration Act (originally introduced by Congressman Chuck Schumer and Senator Ted Kennedy) institutes a rule of strict scrutiny for any federal government program that significantly burdens a person's religious exercise. Specifically, the Act prohibits the government from:

> substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability" unless the Government "demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. §§ 2000bb–1(a), (b) (emphasis added); *see also* Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. § 2000cc et seq.

This Act is enforced strictly. *See Burwell v. Hobby Lobby Stores, Inc*., 573 U.S. 682 (2014). In *Hobby Lobby*, for example, the Supreme Court observed that "Congress enacted RFRA in 1993 in order to provide very broad protection for religious liberty." *Id*. at 693. In that case, the Court invalidated regulations issued under the Affordable Care Act that required certain employers to provide health insurance for abortion-inducing drugs, certain contraceptive methods, and other medical services. In the Court's view, those regulations burdened religious exercise and yet did not further a compelling state interest by the least restrictive means possible, an "exceptionally demanding" standard. *Id.* at 728. Because the regulations violated RFRA, the Court did not address the religious believers First Amendment claims.

Although the federal RFRA applies only to federal programs, *see City of Boerne v. Flores*, 521 U.S. 507, 514 (1997) (striking down state component of RFRA), dozens of states have adopted similar protections. Many of these states have done so through legislative enactment; some have done so by court decision. *See* 1 Religious Organizations and the Law § 3:26, State standards of free exercise review under state RFRAs and state high court decisions, (2d ed. Dec. 2022) (listing twenty-three states with equivalent statutes and thirteen overlapping states with similar judicial decisions, for a total of thirty-three states).

In jurisdictions with RFRAs, any burden on the exercise of religion, including those imposed by neutral and generally applicable laws, is subject to strict scrutiny. This is a significant protection beyond that of the First Amendment. The "strict scrutiny" standards of RFRAs is "strict in theory, fatal in fact."

Conclusion

The Constitution and numerous statutes provide significant protections for religious liberty, freedom of speech, and freedom of association. Courts increasingly enforce these protections against instances of government overreach into the religious affairs of individuals and organizations.

Health care sharing ministries thus enjoy numerous constitutional and statutory protections because of their religious character and because of their expressive and association qualities. Government runs the risk of civil liability, and certainly civil litigation, to the extent it attempts to impose overly burdensome or intrusive regulatory regimes on health care sharing ministries.