Some say court’s emphasis on religious liberty meant to clear up confusion

WASHINGTON (CNS) — In the Supreme Court’s 2021-2022 term, which concluded June 30, it issued four opinions on religious liberty cases, siding with religion each time.

Two of the cases involved prayer and all of them looked at the exclusion of religion.

The cases involved chaplains praying with death-row prisoners during executions; a Christian flag flying at Boston’s City Hall; Maine tuition funds going to schools that teach religion; and a public school football coach praying on the field after a game.

The swath of religious rights decisions does not mean the majority is pro-religion but instead that they are intent on clarifying past opinions that some have found confusing, court watchers said.

“The court is engaged in a long cleanup enterprise of decades of religious liberty law that went far astray,” Mark Rienzi, president of Becket, a religious liberty law firm, and law professor at The Catholic University of America’s Columbus School of Law, told reporters June 28.

“I think they really are committed to pluralism and to respecting people’s ability to live out a different life and not always go where the majority wants them to go,” he said by phone. He also said it was unfortunate that the country’s mood now is “intolerant of differences.”

Rienzi wondered if these type of cases would continue to wind their way to the nation’s high court, saying some might now

think: “Maybe I should stop picking those fights because it’s pretty clear that the court actually believes in the First Amendment.”

Richard Garnett, Notre Dame professor of law and director of the Notre Dame Program on Church, State and Society, similarly agreed that the court this term, and in previous terms, has been involved in “doctrinal cleanup.”

In an email to Catholic News Service, Garnett said the criticisms “that these decisions represent an attack on church-state separation or Christian nationalism are entirely false.”

Instead, he said the big “takeaways” from this term include what separation of church doesn’t mean.

For example, it doesn’t “preclude cooperation, and so it is fine for governments to assist parents in selecting private and religious schools for their children” as the court ruled in Carson v. Makin, a 6-3 decision June 21 where the court sided with two Christian families who challenged a Maine tuition assistance program that excluded private religious schools.

Here, the justices overturned a lower court ruling that had rejected the families’ claims of religious discrimination in violation of the Constitution, including the First Amendment protection of the free exercise of religion.

Maine’s program provides public funds for tuition at private high schools in rural areas of the state and had required eligible schools to be nonsectarian.

Garnett also said separation of church and state “does not justify censorship, as we saw in Shurtleff and Kennedy,” referring to the court’s decisions in the Boston flag case and the praying football coach.

In its May 2 decision in Shurtleff v. Boston, the court ruled 9-0 that Boston violated the free speech rights of a Christian group by not allowing its flag with a cross image to flay in a program that allowed numerous private groups to display flags at Boston's City Hall.

The decision overturned a lower court ruling in favor of Boston.

In its June 27 decision in Kennedy v. Bremerton School District, the court ruled 6-3 in favor of Joseph Kennedy, a former assistant football coach at a public school in Bremerton, Washington.

The court's majority rejected the school district's view that prayers in a school setting, even on the football field, could be seen as coercive or as a governmental endorsement of a particular religion. The decision overturned a lower court's ruling that sided with the school district.

Garnett, who submitted amicus briefs in all of the religious liberty cases this term, said the court's opinions in these cases show that "government fears about possible perceptions of endorsement do not justify discrimination against religious expression in the public square" and that the free exercise clause of the Constitution "means that governments may not single out religious exercise for disfavorable treatment."

He also noted that in the Kennedy case, "we finally got confirmation from the justices that the notoriously unpredictable and subjective 'endorsement test' is no longer the law," referring to the Lemon test, a three-pronged system to evaluate if a law or governmental activity violates the establishment clause of the First Amendment, from its 1971 Lemon v. Kurtzman decision.

Becket's brief had asked the court to strike the Lemon test and said the court did just that by confirming "Lemon has long been dead and that the establishment clause is understood

through America's history and tradition of religious pluralism."

Kelly Shackelford, president, CEO, and chief counsel for First Liberty Institute, a nonprofit religious liberty law firm, said the justices, in Kennedy, announced for the first time that the "so-called 'Lemon test' is no longer good law."

In a June 29 Newsweek column, he said this test had "the practical effect of turning public schools into religion-free zones" noting that it caused many school administrators to "mistakenly believe they had a 'duty to ferret out and suppress religious observances,' often leading them to infringe upon the private religious rights of teachers and students."

"Now, the Supreme Court has clarified that, far from being required, this sort of censorship actually amounts to unconstitutional anti-religious discrimination," he wrote.

Shackleford added that in his "33 years of advocating for religious liberty, I have never seen a year like this at the U.S. Supreme Court."

In the discussion of religious liberty cases this term, Ramirez v. Collier, the case of a Texas prisoner who wanted his pastor to pray aloud over him and place his hands on him in the execution chamber, is sometimes overlooked.

The court's 8-1 decision issued March 24 overturned a lower court's ruling against John Henry Ramirez, the prisoner who appealed the Texas officials' rejection of his request for pastoral touch and prayer while he died of lethal injection.

Rienzi noted that prisoners still have religious liberty and are entitled to be treated with dignity and noted that Justice Elena Kagan emphasized the court "should respect the requests of this prisoner."

The court ultimately ruled that it was a burden to the prisoner’s religion not to allow this form of prayer.

This case had advocates that are not always on the same side such as Becket and the American Civil Liberties Union.

Several spiritual advisers from different faith traditions joined an amicus brief in the Ramirez case filed by the ACLU that cited two women religious and a priest, along with a Muslim, Buddhist and Unitarian Universalist.

Prior to the arguments, John Meiser, supervising attorney of Notre Dame Law School’s Religious Liberty Clinic, said the Texas policy for spiritual advisers in the execution chamber currently allows “a bare minimum of religious exercise” and he wondered why there was “such reluctance to accommodate these simple requests” since the state has “consistently claimed to be a champion of religious liberty.”

As he saw it: The fight for religious liberty in Texas “must include the voices of all members of its community,” a view which turned out to be a deciding factor in the other religious rights cases the court faced this term.