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Developments in Constitutional Law: Free Exercise of Religion

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The "free exercise" clause of the First Amendment to the U.S. Constitution limits governments' ability to restrict religious exercise, providing that "Congress shall make no law … prohibiting the free exercise [of religion]."[1] Article I, Section 18 of the Wisconsin Constitution similarly prohibits government infringement of "the right of every person to worship Almighty God according to the dictates of conscience." Since 1990, the Wisconsin Constitution has been interpreted to restrict government action in more circumstances than does the U.S. Constitution, but recent U.S. Supreme Court decisions suggest that the Court's interpretation of the free exercise clause has shifted. This issue brief summarizes recent developments in free exercise jurisprudence at the federal level.

STANDARD FOR GENERALLY APPLICABLE LAWS

For several decades beginning in the 1960s, the U.S. Supreme Court applied a "strict scrutiny" test in all free exercise cases. Strict scrutiny requires that a burden on religious exercise must be outweighed by a compelling government interest and "narrowly tailored" to accomplish the government's goal. However, in *Employment Division v. Smith*, decided in 1990, the Court held that strict scrutiny does not apply to government actions that are neutral and generally applied.[2] [494 U.S. 872 (1990).] Under *Smith*, federal courts uphold such generally applied government actions as long as they have only an "incidental" effect on religious practice.[3] For other types of government actions that burden the free exercise of religion, strict scrutiny continues to apply.

Fulton v. City of Philadelphia

In *Fulton v. City of Philadelphia*, the Court declined to overrule *Smith*'s neutrality test, as some court watchers had predicted,[4] but also did not apply it. In the case, the City of Philadelphia had declined to contract with Catholic Social Services for foster care placements, because the agency had a policy, rooted in Catholic doctrine, of not certifying same-sex couples to be foster parents. The agency brought a challenge on free exercise grounds.

In a majority opinion by Chief Justice Roberts, the Court neither overruled nor reaffirmed *Smith*. Instead, the Court found that the city's standard contract allowed a city commissioner to grant exceptions to the general nondiscrimination requirements, and thus the city's requirements lacked general application. Having concluded the city's actions fell outside of *Smith's* neutrality test, the Court applied strict scrutiny to hold that the city's contract requirement is unconstitutional. In doing so, the Court relied in part on a 1993 decision, *Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 US 520 (1993).

Justices Alito and Gorsuch, joined by Justice Thomas, each wrote separately to call for overruling *Smith*. In addition, Justice Barrett wrote a concurring opinion, joined by Justices Kavanaugh and Breyer,[5] in which she called for a "nuanced" approach to replacing *Smith*, saying "… I am skeptical about swapping Smith's categorical antidiscrimination approach for an equally categorical strict scrutiny regime."

COVID-19-Related Orders

The Court appeared to embrace such a "nuanced regime" in several emergency orders issued in challenges to COVID-19-related restrictions. Although they are emergency orders rather than full opinions issued after oral argument,[6] the orders suggest important developments in the free exercise area.

The approach is most evident in the Court's orders in *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U.S. __ (2020) and *Tandon v. Newsom*, 593 U.S. ____ (2021), two *per curium* ("of the court") emergency orders granting relief to religious groups challenging COVID-related capacity limits. *Roman Catholic Diocese* involved a challenge to an executive order by the Governor of New York that limited gatherings to only 10 or 25 people in certain "zones" with high transmission rates. Similarly, the petitioner in *Tandon* challenged capacity limits in California that had the effect of preventing in-home bible study and prayer meetings involving more than three households.

The orders adopted an approach under which "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."[7] [*Tandon*, 593 U.S. __ (emphasis in original).] Framed another way, for *Smith*'s neutrality test to apply, government must treat religious entities at least as well as the most favorably treated comparable secular entity. In the orders, the Court compared the religious gatherings at issue with certain secular activities, such as grocery shopping, that were exempted, to conclude that strict scrutiny should apply.

The Court appears likely to confirm that approach in a fully argued case, although whether it will do so in its current term is less clear. One pending free exercise case, *Ramirez v. Collier*, includes challenges on statutory grounds, and so the Court might not reach the constitutional question in that case.

Cases Related to Government Funds

In another interesting strand of free exercise jurisprudence, the Court has recently struck down state laws that prohibit the use of public funds for religious entities. Balancing the tension between the free exercise clause and the establishment clause,[8] past precedent had interpreted the First Amendment to allow, but not require, government funding to be made available to religious entities. [See *Locke v. Davey*, 540 US 712 (2004).]

In *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. __ (2017), the Court struck down a state law that excluded religious entities from a grant program for playground improvements. Chief Justice Roberts authored the majority opinion, in which the Court differentiated the case from past precedent by emphasizing that the exclusion was based on who would receive funds, rather than how the funds were used. In *Espinoza v. Montana Department of Revenue*, 591 U.S. __ (2020), the Court relied on *Trinity Lutheran* to strike down a state law that prohibited the use of scholarship funds to attend religious schools. The Court is expected to reach a similar conclusion in a pending case, *Carson v. Makin*, which involves a Maine law that excludes students who attend sectarian schools from receiving state tuition assistance.

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[1] Although the First Amendment refers to "Congress," it also applies to states and local governments, through the Fourteenth Amendment's incorporation of the First Amendment. [*Cantwell v. Conn.*, 310 U.S. 296 (1940).]

[2] In contrast, strict scrutiny continues to apply in all free exercise cases under the Wisconsin Constitution. [See *State v. Miller*, 549 N.W.2d 235 (1996).]

[3] There are also statutory restrictions on government actions affecting religious exercise. Following the *Smith* decision, Congress enacted the federal Religious Freedom Restoration Act (RFRA) to restore the strict scrutiny test in free exercise cases. However, as interpreted by the federal courts, RFRA only applies to the federal government. [*City of Boerne v. Flores*, 521 U.S. 507 (1997).] Another federal law, the Religious Land Use and Institutionalized Persons Act (RLUIPA), also establishes a strict scrutiny standard as a matter of statute. Although RLUIPA applies to state and local government actions, it applies only in the contexts of land use and incarceration.

[4] "Whether *Smith* should be revisited" was one of the questions presented in the case.

[5] Justice Breyer joined all but the first paragraph of Justice Barrett's opinion. That paragraph characterized *Smith* as requiring courts to uphold a neutral and generally applicable law "no matter how severely that law burdens religious exercise" and noted the "serious arguments that *Smith* ought to be overruled."

[6] The development of doctrinal shifts in the context of emergency orders has been characterized by some scholars and media as the court's "shadow docket." Noting an increasing trend of giving such orders precedential weight, some critics argue that major shifts in the law should be reserved for cases that are fully argued and reasoned. Others note that the court has had a longstanding practice of issuing emergency orders.

[7] That approach is sometimes referred to as the "most favored nation" standard. "Most favored nation" is a phrase borrowed from international law. In international agreements, a "most favored nation" clause requires that, if a country extends a privilege or exception to another country, it must extend that same privilege or exception to all countries that are parties to the agreement.

[8] The establishment clause prohibits government from making any law "respecting the establishment of" religion.