AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 12: The Contemporary Era – Individual Rights/Religion/Free Exercise

**Legacy Church v. Kunkel, No. 20-0327 (D.NM. 2020)**

*In the spring of 2020, the novel coronavirus, later designated COVID-19, jumped from animals to humans. A global pandemic began in China and quickly swept through much of the rest of the world. COVID-19 had various unusual and significant features, including that humans had no natural immunity to it, many infectious carriers were asymptomatic, and many of those who would become symptomatic were infectious for up to two weeks before their symptoms became apparent. The virus was relatively easy to transmit and was fatal in a relatively high number of cases, particularly among the elderly. There was no immediate vaccine or effective treatment, and tests to detect the virus had to be newly developed, manufactured and distributed. Public health experts recommended that the most effective means of slowing transmission were frequent hand washing, the use of masks that covered the nose and mouth, and maintaining a physical distance of six feet or more between individuals.*

*Governors across the country declared public health emergencies and made use of preexisting statutory authority to slow the spread of infection. Because of prevalence of infectious asymptomatic carriers and limiting testing capacity, the infectious could not be easily identified and quarantined as in traditional epidemics. As a result, many governors took the unprecedented step of issuing wide-ranging “lockdown” orders that imposed generalized restrictions on ordinary life of most of the general public.*

*On March 24, 2020, New Mexico Department of Health Secretary Kathyleen Kunkel ordered all non-essential businesses to close and prohibited all “mass gatherings,” which included gatherings that brings together five or more individuals in a single room or a confined outdoor space in which individuals are within six feet of one another. The order exempted gatherings in places of worship. On April 11, Kunkel issued a revised order that eliminated the exemption for places of worship and modified the conditions under which essential businesses could operate.*

*Legacy Church is a “mega church” in New Mexico with nearly 20,000 members and regularly hosts services in three physical sites and airs its services on broadcast television and an Internet livestream. On April 11, Legacy Church filed a motion in federal district court seeking an injunction against Kunkel’s revised order. On April 12, Legacy Church livestreamed three Easter services but also allowed several dozen parishioners to attend services in person. In addition, Legacy Church’s services involved about thirty staff members. The church contended that revised order unconstitutionally interfered with religious free exercise. The trial court denied the motion to issue a temporary restraining order, concluding that state’s order likely did not violate the federal constitution.*

Judge BROWNING.

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The First Amendment’s Religion Clause states: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof[.]”From its earliest decision on the Free Exercise Clause, the Supreme Court has recognized that religious freedom does not act as an absolute shield against generally applicable laws. . . .

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*Employment Division v. Smith* (1990) shapes contemporary Free Exercise law. . . . [T]he Supreme Court held that generally applicable, neutrally applied laws that incidentally restrict religious exercise need be only rational and legitimate exercises of governmental power. . . . Accordingly, the religious adherent holds the burden to demonstrate that across-the-board, neutrally applied laws are irrational or beyond the government’s authority.

An otherwise valid law may be discriminatory when its purpose is to burden religion. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah* (1993). . . .

The Supreme Court also continues to hold -- albeit in a strengthened form -- that laws cannot impose special disability based on one’s status as religious. *Trinity Lutheran Church of Columbia, Inc. v. Comer* (2017). . . . The Supreme Court noted that it has repeatedly held that only compelling governmental interests justify withholding generally available services on the basis of religion. On a broader reading, however, *Trinity Lutheran* provides that the Free Exercise Clause now protects individuals’ and institutions’ status as religious. *Trinity Lutheran*, under this broader reading, thus erases the distinction between what a religious institution is and what a religious institution does for the governmental services’ purposes, because there was no actual conflict between Missouri’s policy and the plaintiff-church’s religious beliefs. In other words, *Trinity Lutheran* provides that the fact of having beliefs cannot be a setback where government services and benefits are concerned.

A law also may violate the Free Exercise Clause if it is not applied neutrally. *Masterpiece Cakeshop, LLC v. Colorado Civil Rights Commission* (2018). . . .

*Masterpiece Cakeshop* reflects the Supreme Court’s longstanding aversion to laws and regulations that allow officials’ subjective, case-by-case determinations. . . . Similarly, a law may not be generally applicable where it has built-in exemptions that it does not extend to accommodate religious exercise. Such instances require government to weigh religious freedom against governmental interest, a process that *Smith* expressly decries. Accordingly, where government regulates within its prerogative, it may enact general laws and apply them neutrally without inquiry into the extent to which the law incidentally burdens religious exercise. Only where the government acts with religious animus or requires case-by-case determination of the merits or sincerity of religious beliefs as a condition of governmental benefits or exemption from legal requirements will the government violate the First Amendment.

The First Amendment to the Constitution of the United States guarantees that “Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble.” . . .

Despite the importance of the right to assemble, it, like other constitutional rights, is still subject to restrictions. The Supreme Court in *Jacobson v. Massachusetts* (1905), stated that constitutional rights “may at times, under the pressure of great dangers” be restricted “as the safety of the general public may demand.” . . .

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The Court’s analysis is broadly framed by the fact that, when the state faces a major public health threat, as New Mexico now does, its Tenth Amendment police and public health powers are at a maximum. “The right to practice religion freely does not include liberty to expose the community . . . to communicable disease or the latter to ill health or death.” *Prince v. Massachusetts* (1944). . . . The April 11 Order is neutral and generally applicable, and important government interests having nothing to do with religion motivate the April 11 Order. . . .

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The April 11 Order’s timing nonetheless troubles the Court. COVID-19 has been an ongoing health emergency in New Mexico for well over a month. The Governor declared a state of emergency on March 11, 2020, the day New Mexico announced its first confirmed COVID-19 case. Secretary Kunkel announced further restrictions on mass gatherings on April 6, 2020, two days before Passover began, but permitted religious gatherings. On the evening of April 11, the night before Easter, Secretary Kunkel removed the exemption for religious services, prohibiting Easter services. The Court notes, however, that the COVID-19 situation had escalated dramatically between April 6 and 11. On April 6th, the state had 685 confirmed cases and twelve deaths. On April 11th, New Mexico had 1,174 confirmed cases, and deaths had more than doubled to twenty-six. . . . Secretary Kunkel thus contends that anti-Christian animus does not motivate the April 11 Order’s timing, but rather churches’ last-minute decisions to hold in-person services despite the escalating public health emergency. This justification is more plausible than the Governor’s desire to thwart Christianity’s most sacred holiday. As officials received word of churches’ plans to push forward, which would lead to dozens of gatherings of dozens, perhaps hundreds of people across the state, the state took action to “be crystal clear” that it viewed mass gatherings as a public health threat. These churches’ plans, in Secretary Kunkel’s view, endangered public health, not because of their religious nature, but because they involved masses of people in closed spaces and in close proximity. As Secretary Kunkel has asserted a plausible, religion-neutral justification for the April 11 Order’s timing, the Court sees no animus or overt discrimination in the April 11 Order’s timing.

That Secretary Kunkel appears to have discretion to categorize and recategorize activities as essential or nonessential gives the Court pause. . . . Secretary Kunkel notes, however, that her categorization has remained largely constant through each public health order. Similarly, it should not surprise that each public health order might grow more restrictive as time passes and the pandemic worsens. In other words, mass gatherings and activities involving close physical proximity grow more threatening as COVID-19 spreads through the community. The Supreme Court’s cases contemplate, as Free Exercise violations, individualized determinations of what religious activity is preferable or amounts to a good cause, and what religious activity falls short of meriting governmental protection. Here, religious activity’s recategorization did not result from individualized assessment as to whether certain religious activity is more important than other religious activity. Instead, that recategorization resulted from increased danger that some religious activity -- mass gatherings -- caused. This is not the kind of individualized assessment that the First Amendment prohibits. Similarly, Secretary Kunkel points out that religious activity’s relatively late recategorization stemmed not from hostility toward religion, but rather solicitousness towards religion. Secretary Kunkel sought to preserve religious organizations’ leeway to conduct services as long as possible until COVID-19 became too severe to continue affording such latitude.

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*Lukumi*’s majority opinion incorporates into its holding *Smith*’s dictum that, when the government provides exemptions for secular conduct, it must assert a compelling justification for refusing exemptions for analogous religious conduct. *Lukumi* and *Smith* require the Court, however, to compare analogous exemptions. The April 11 Order does not prohibit religious conduct only; it prohibits a host of secular activities, both commercial and recreational. Accordingly, to determine the April 11 Order’s neutrality, the Court must compare not only the April 11 Order’s essential-business exemptions against religious-activity prohibitions, but also its religious-activity prohibitions against its secular-activity prohibitions. Framed as such, the April 11 Order is neutral. The April 11 Order severely restricts myriad secular activities. By omission from its list of essential businesses, the April 11 Order restricts secular gatherings like sporting events, conferences, and conventions. For example, the April 11 Order maintains the April 6 Order’s closure of non-Indian casinos and horse racing facilities, directs all non-essential businesses to reduce their in-person staffing by 100 percent, and restricts hotels and other lodging operations to twenty-five-percent capacity. Nor does the April 11 Order reserve unbridled freedom for secular activities that it deems essential. For example, it allows essential businesses to remain open, “provided they minimize their operations and staff to the greatest extent possible.” It also restricts such businesses to twenty percent of their maximum occupancies. The April 11 Order does not impose special disability on the basis of religion. . . . The April 11 Order, accordingly, is neutral, because its “object is something other than the infringement or restriction of religious practices.” *Grace United Methodist Church v. City of Cheyenne* (10th Cir. 2006).

The April 11 Order is also generally applicable. Legacy Church contends that the April 11 Order violates the First Amendment because it is underinclusive; it exempts certain secular activities that also entail large gatherings. The April 6 Order and the April 11 Order provide a set of activities that Secretary Kunkel deems essential. Those enterprises include, among others, hospitals, farms, media services, funeral homes, automobile and bicycle mechanics, and business that generate the majority of their revenue by selling “canned food, dry goods, fresh fruits and vegetables, pet food, feed, and other animal supply stores, fresh meats, fish, and poultry, and any other household consumer products.” Legacy Church contends that the April 11 Order is not generally applicable, because it allows “big box retailers to continue to welcome patrons” while prohibiting church services.

Since its earliest decisions addressing religious freedom, the Supreme Court has recognized that, if religious conduct is defined broadly enough, and its protections afforded too much bite against government regulation, “most activities of the modern regulatory state are thrown into chaos.” . . . First Amendment caselaw thus recognizes and allows that “[a]ll laws are selective to some extent.” . . . Impermissible “inequality results when a legislature decides that the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation.”

Here, Secretary Kunkel may distinguish between certain classes of activity, grouping religious gatherings in with a host of secular conduct, to achieve what she determines is a balance between maintaining community needs and protecting public health. Secretary Kunkel does not pursue this aim “only against conduct with a religious motivation.” Although public health risks may arise in allowing say, Wal-Mart, to continue its operations, the April 11 Order does not leave such business untouched. In furtherance of its goal of minimizing social proximity, the April 11 Order directs all essential businesses to reduce occupancy, enforce social distancing, and reduce staffing. The April 11 Order reflects Secretary Kunkel’s judgment that certain activities -- namely, large gatherings -- present the greatest risk to public health. . . .

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As the Supreme Court noted in *Smith*, the First Amendment does not require the courts to invalidate legislation where courts would prefer more solicitous treatment of religious freedom. “But to say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required, and that the appropriate occasions for its creation can be discerned by the courts.” The April 11 Order, in short, does not single out religious activity or impose special disability on the basis of religious status and so does not violate Legacy Church’s Free Exercise rights.

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The right to expressive association is not an absolute right and can be infringed upon if that infringement is (i) unrelated to the suppression of expressive association; (ii) due to a compelling government interest; and (iii) narrowly tailored. *Roberts v. United States Jaycees* (1984). The Court first concludes that New Mexico’s infringement on Legacy Church’s right to expressive association is not related to the suppression of Legacy Church’s expression of its ideas. There is no doubt that the April 11 Order infringes on the right of Legacy Church to gather together to exercise their right of expressive association -- the April 11 Order, which New Mexico announced only a day “before Legacy’s most important religious holiday,” restricts the manner in which Legacy can worship. When announcing the April 11 Order, Governor Lujan Grisham noted that the April 11 Order, which includes the restriction on number of individuals at a gathering, would place a “tremendous social and spiritual burden . . . on New Mexicans.” Legacy Church’s right to assemble may not have been eviscerated, because it still can assemble virtually or in cars, but the manner in which it can assemble is restricted. . . . There is also no doubt, however, that New Mexico did not impose the April 11 Order to suppress the ideas Legacy Church wished to express during its Easter service gathering. Legacy Church does not contend that the April 11 Order’s purpose was to suppress their message. . . .

As discussed supra, a global pandemic and its local outbreak amount to a compelling state interest. Thus, the Court must determine whether the infringement is narrowly tailored. . . .

First, the proffered “less restrictive” alternative in which congregation members attend services but stay physically distant from each other does not further the compelling state interest in escalating social distancing measures to mitigate COVID-19. In its March 23, 2020 order, the State of New Mexico ordered all essential businesses exempt from the stay-at-home order to “adhere to social distancing protocol and maintain at least a six-foot social distancing from other individuals [and] avoid person-to-person contact.” Although the physical distancing likely helped mitigate the initial spread of disease, under these measures the number of deaths still doubled. If applied to houses of worship, this physical-distancing restriction, under which the death rate doubled in four days, may not advance mitigation efforts further, but instead merely sustain them. With the number of deaths in New Mexico almost doubling between the April 6 Order and the April 11 Order, it is reasonable that New Mexico and the Secretary would escalate social distancing measures. The Court concludes, therefore, that applying social distancing measures that were unable to contain the drastic increase in New Mexico COVID-19 cases is not a less restrictive alternative to the cap on gatherings, because it would sustain, rather than increase, New Mexico’s social distancing measures. *Burson v. Freeman* (1992).

The Court further concludes that Legacy Church’s argument that the restriction is underinclusive, because it does not ban mass gatherings at essential businesses, incorrectly equates its religious services, with the essential businesses that are permitted to stay open. Legacy Church specifically draws attention to the following businesses that are permitted to stay open: media outlets, Home Depot, Wal-Mart, grocery stores, automobile repair shops, and funeral homes. Each and every business mentioned by Legacy Church either sells items necessary for everyday life or to facilitate the mitigation of COVID-19. While, as Legacy Church noted, some people may take advantage of the exemption and purchase frivolous items, these are open for good New Mexico citizens to use them judiciously. . . . Secretary Kunkel has deemed these entities essential, and the Court is not in a position to second-guess expert decisions on which restrictions will be most effective at saving lives during an epidemic when those restrictions are based not on suppression of religion but suppression of a epidemic. The Court recognizes that, to many individuals, religious worship is equally essential and important to life. Importantly, however, none of the April 11 Order’s listed essential businesses can operate remotely, while religious services can be broadcast to congregation members. The broadcast, of course, may be dissatisfying for some parishioners, but they will still be able to access the services remotely, regardless of their satisfaction. The entities that Legacy Church named are not comparable to houses of worship; all of these services are necessary to everyday life and to fighting the epidemic, and none of these services can be done remotely, in contrast to religious worship, which, while important, does not facilitate survival of the public and has the ability to be conducted remotely.

Moreover, religious organizations have received preferential treatment relative to their closest comparators -- in terms of physical set-up and risk, not necessarily meaning. Movie theatres and concert halls are spaces where people gather and sit together for a period of time similar to Legacy Church’s auditorium. On March 23, New Mexico shuttered movie theatres and concert halls. Meanwhile, places of worship were kept open, perhaps because New Mexico acknowledge religious worship’s importance to many individuals. . . .

Nor is the April 11 overbroad. It allows Legacy Church and other religious organizations to broadcast services. It does not mention a ban on drive-through services. . . .

Legacy Church has not established a likely success on the merits of its First Amendment claims. It must also show that it will suffer irreparable harm without the temporary restraining order, that the balance of equities weighs in its favor, and that the restraining order is in the public interest. . . .