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Expert Analysis

Religious Community Eagerly Awaits U.S. Supreme Court's New Term

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Religious institutions, clergy, members of religious congregations, and the religious community as a whole generally were quite pleased with the U.S. Supreme Court's religion law decisions from its 2019-2020 term. See Barry Black and Jonathan Robert Nelson, "U.S. Supreme Court Expands Religious Freedom in Key Rulings," NYLJ (Aug. 31, 2020).

The Supreme Court's opinions in favor of religious liberty continued into its most recent term. Indeed, religious institutions and individuals typically should have been gratified with the court's recent religion rulings (despite disappointment with the court's denying certiorari in *Arlene's Flowers v. Washington*). Moreover, they should be eagerly anticipating the upcoming term's religion law cases from a court that has made it clear that it respects the First Amendment and the right of all Americans to freely exercise their religion.

Key Rulings

One of the Supreme Court's more significant religion law decisions from this past term was *Fulton v. City of Philadelphia*, No. 19-123, 593 U.S. __ (2021). The case arose when Philadelphia stopped referring children to Catholic Social Services (CSS), a foster care agency, after it learned that the agency would not certify same-sex couples to be foster parents due to its religious beliefs about marriage. The city indicated that, in accordance with its nondiscrimination policy, it would renew its foster care contract with CSS only if the agency agreed to certify same-sex couples.

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The court, on narrow grounds, ruled unanimously that Philadelphia had violated CSS's free exercise rights by refusing to contract with CSS. Chief Justice Roberts wrote the opinion for the court, in which Justices Breyer, Sotomayor, Kagan, Kavanaugh and Barrett joined.

In separate opinions concurring in the judgment, Justices Alito, Thomas and Gorsuch argued that the court should have used *Fulton* to reject the holding in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U. S. 872 (1990). In *Smith*, in an opinion by Justice Scalia, the court ruled that a neutral and generally applicable law typically does not violate the Free Exercise Clause, no matter how severely that law burdens

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religious exercise. Justices Alito, Thomas and Gorsuch wrote that they would reject the *Smith* test and examine neutral and generally applicable laws under a "strict scrutiny" standard.

Whether *Smith* should be overruled also was discussed in the concurring opinion filed by Justice Barrett, in which Justice Kavanaugh joined and in which Justice Breyer joined as to all but the first paragraph, in which Justice Barrett made her discomfort with *Smith* clear. Justice Barrett suggested, however, that it was inopportune to overrule *Smith* without having a clear indication of what would take its place.

During the past term, the court also issued a number of decisions in cases involving COVID-19 limitations on houses of worship and the ability of people of faith to gather and practice their religion. Since Justice Barrett joined the court and heard her first oral argument in November 2020, the court has been much more willing to strike down those restrictions than it was before Justice Barrett took her seat.

The court's per curiam ruling in *Tandon v. Newsom*, No. 20A151, 593 U.S. ____ (2021), may be the most significant of these COVID-19-related cases. Here, the court ruled that the U.S. Court of Appeals for the Ninth Circuit had erred when it failed to enjoin California's COVID-19 restrictions limiting religious gatherings in homes to three households. (Chief Justice Roberts would have denied the application; Justice Kagan dissented in an opinion in which Justices Breyer and Sotomayor joined.)

As important as the court's conclusion was for those involved in the case, the per curiam decision itself may have more long-term and practical implications. That is because the court said, among other things, that "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"—showing the court's growing and expanding intolerance for government selectivity in favoring secular activity over religious exercise in any manner or to any extent.

Notably, during this past term, the court ruled in favor of religious exercise and against COVID-19 restrictions in other instances, too. See, e.g., *Gateway City Church v. Newsom*, No. 20A138, 592 U.S. ____ (2021); *Harvest Rock Church v. Newsom*, No. 20A137, 592 U.S. ____ (2021). Other cases from the court's most recent term involving religion-related issues included *Uzuegbunam v. Preczewski*, No. 19-968, 592 U.S. ____ (2021) (finding that a nominal damages request of an evangelical Christian who handed out religious literature to students at a public college was a sufficient basis for the court to redress his alleged constitutional violation and establish Article III standing); *Tanzin v. Tanvir*, No. 19-71, 592 U.S. ____ (2020) (relief under Religious Freedom Restoration Act of 1993 includes money damages against government officials in their individual capacities).

On the Docket

The court, which soon will open its new term, already has an important religious liberty case on its docket: *Carson v. Makin*, No. 20-1088.

More than half of Maine's 260 school administrative units (SAUs) do not operate a public secondary school of their own. Under Maine law, those SAUs either (1) may contract with a secondary school—whether a public school in a nearby SAU or an "approved" private school—for school privileges, or (2) may "pay the tuition … at the public school or the approved private school of the parent's choice at which the student [from their SAU] is accepted." Under Maine law, however, a private school must be "a nonsectarian school in accordance with the First Amendment of the United States Constitution" to qualify as "approved" to receive tuition assistance payments.

Several families brought suit, claiming that this "nonsectarian" requirement infringed several of their federal constitutional rights, including their rights under the Free Exercise Clause, by barring them from using their SAUs' tuition assistance to send their children to religious schools.

The plaintiffs relied extensively on two recent Supreme Court decisions. The first was *Trinity Lutheran Church of Columbia v. Comer*, 582 U.S. ____ (2017), involving a federal constitutional challenge to a Missouri restriction on a state-provided subsidy for resurfacing playgrounds at preschool and daycare facilities.

In *Trinity Lutheran*, the court determined that, under the Free Exercise Clause, the application of Missouri's restriction to deny the subsidy to a church-owned preschool was subject to the strictest scrutiny, because it was based "solely" on the putative recipient's religious "character." The court then concluded that the application of the restriction in that manner could not survive such exacting review.

The second case, *Espinoza v. Montana Department of Revenue*, No. 18-1195, 591 U.S. ____ (2020), involved a free exercise challenge to a Montana Supreme Court decision that struck down a state program giving tax credits to those who donated to organizations providing scholarships to private schools. The Montana Supreme Court explained that it was invalidating the program because it conflicted with a provision of that state's constitution that, among other things, prohibited state aid to private schools controlled by a "church, sect, or denomination."

The Supreme Court ruled that, under the Free Exercise Clause, the Montana Supreme Court's decision applying the state constitution's no-aid provision based on a school's religious identity was subject to strict scrutiny and could not survive such a review.

The First Circuit in *Carson v. Makin* was not persuaded by the plaintiffs' arguments regarding *Trinity* and *Espinoza*. Instead, it focused on the schools' curriculum rather than their status and rejected the plaintiffs' contention that the "nonsectarian" requirement discriminated against them based on their religion and thereby violated the Free Exercise Clause. The First Circuit ruled that the "nonsectarian" requirement did not discriminate based solely on religious status and that it did not punish the plaintiffs' religious exercise.

The issue that the court has agreed to hear in 'Carson' is whether Maine violated the First Amendment by prohibiting students participating in an otherwise generally available student-aid program from choosing to use their aid to attend schools that provide religious, or "sectarian," instruction.

The Supreme Court granted certiorari on July 2. The issue that the court has agreed to hear in *Carson* is whether Maine violated the First Amendment by prohibiting students participating in an otherwise generally available student-aid program from choosing to use their aid to attend schools that provide religious, or "sectarian," instruction.

Pending Petitions

The court may decide to hear additional religion cases this term. For example, a petition for certiorari has been filed in *Roman Catholic Diocese of Albany v. Lacewell*, No. 20-1501, challenging a New York requirement mandating that employer health insurance plans cover abortions.

Another case that may reach the court is *Arlene's Flowers v. Washington*, No. 19-333. As noted above, the court denied the petition for certiorari in this case, which involved whether the state of Washington violated a floral designer's First Amendment rights to free exercise and free speech by forcing her to take part in and create custom floral art celebrating same-sex weddings; Justices Thomas, Alito and Gorsuch would have granted the petition. Now, the petitioners have filed a petition for rehearing.

The upcoming Supreme Court term promises further Free Exercise and First Amendment developments. Stay tuned!