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RELIGION IN THE COURTROOM

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A person arrives in court wearing headgear that violates a judge's stated dress policy. The person indicates that the headgear is an important representation of his religious beliefs.

A party, witness, or juror is directed to be in court for proceedings to be conducted on Yom Kippur. The person is Jewish and asks to be excused from appearing on that day.

A potential juror tells the court that her religion holds the belief that one should not pass judgment on the acts of others and on that basis asks to be excused from jury duty.

Not one of the above incidents is hypothetical. Each has recently taken place in a North Carolina courtroom. This bulletin discusses the law applicable to these and similar conflicts, which pit an individual's desire to exercise his or her personal religious beliefs against the state's need to establish governmental rules and norms that have the effect of prohibiting such practices and forcing the individual to choose between obtaining a governmental benefit or exercising one's religious beliefs. The discussion begins with a brief review of the legal principles governing these issues. For reference purposes, case citations are not listed in the text but are compiled in a list of cited cases and other relevant cases according to subject area and are presented at the end of the bulletin. The discussion concludes with an analytical framework for use in confronting these issues.

Legal Background—Free Exercise of Religion and the Religious Freedom Restoration Act (RFRA)

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. This familiar language from the First Amendment to the United States Constitution, and the extension of its operative principles to the states through the application of the Due Process Clause of the Fourteenth Amendment, constitute one of the core civil liberties of the American system of government. In a society as dynamic and diverse as the United States, the freedom to exercise one's religion is an ongoing concern. Not surprisingly, therefore, interpreting the meaning of the Free Exercise Clause has occupied the courts of this country since the founding of the republic. During the past decade in particular, the standards by which courts have determined whether or not its provisions have been violated have undergone considerable change.

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Pre-1990 Law

The leading case in this area prior to 1990 was *Sherbert v. Verner* (1963). Sherbert, a member of the Seventh-Day Adventist church, was fired from her job because she refused to work on Saturday, in accordance with her religious beliefs. She sought unemployment benefits and was denied, although at that time the state of South Carolina provided protection for those who chose not to work on Sunday for religious reasons. The United States Supreme Court held that the state had violated Sherbert's right to the free exercise of religion by conditioning her eligibility for benefits on actions that conflicted with her religious beliefs. It articulated two different tests. First, if the purpose or object of an action is to regulate a religious belief, it is invalid unless it can be justified by a compelling state interest and is narrowly tailored to advance that governmental interest. [See also *Church of Lukumi Babalu Aye v. Hialeah* (1993), in which a statute prohibiting animal sacrifice that apparently was aimed at this particular church was invalidated.] The compelling state interest standard is difficult for governments to meet, but it is the law and has been met in some cases. See, for example, *State v. Massey* (1949), in which the North Carolina Supreme Court upheld state laws prohibiting snake handling, ruling that the compelling state interest test had been met.

The second test articulated in *Sherbert* is more relevant to the judicial context. It applied the same compelling interest standard of review to governmental actions of general applicability (i.e., not aimed at religious practices and applicable to other nonreligious practices) that substantially burdened religious activity motivated by sincere religious beliefs. It was this test that the state failed to meet in *Sherbert*.

Oregon v. Smith

The rule established in *Sherbert* was revisited in 1990 in *Oregon v. Smith*, also an unemployment compensation case. It involved two members of the Native American Church who had been discharged from their jobs in a drug rehabilitation center after they had tested positive for peyote, a controlled substance that serves a sacramental function in their church. Smith, one of the two discharged employees, applied for unemployment benefits and was denied on the basis that his use of a controlled substance constituted "misconduct." Smith claimed a First Amendment right to consume peyote based on its sacramental use in his church. Declining to apply the test articulated in *Sherbert*, which it distinguished as a case dealing with the applicability of individualized exemptions to the rules governing the distribution of unemployment benefits, the Supreme Court treated *Smith* as a case involving a general prohibition, and it articulated a different standard to control the review of such cases: The First Amendment is not offended if prohibiting or burdening the exercise of religion is not the object of the regulation but is an incidental effect of a generally applicable and otherwise valid government policy or practice. The state is not required to show that it has a compelling interest in the regulation, but presumably it must show that the action taken is rationally related to a valid governmental interest, which is required to support any governmental action.

RFRA

In response to *Smith*, Congress in 1993 passed the Religious Freedom Restoration Act (RFRA), 42 U.S.C. §§ 2000bb to 2000bb-4 (1994). As enacted, the law prohibited a government (including state and local governments) from substantially burdening a person's exercise of religion, even if the burden resulted from a rule of general applicability, unless the government could demonstrate that the burden furthered a compelling governmental interest and was the least restrictive means of doing so. In essence, the act applied the compelling interest standard enunciated in *Sherbert* to all actions of government that act as burdens on the free exercise of religion.

The RFRA had an immediate impact, including a significant increase in litigation by a wide variety of litigants. Some of the most prominent and widely reported examples included prisoners alleging that prison policies made them unable to practice their religion and churches suing over land-use restrictions. In addition, courts were required to accommodate religious practices in new and different circumstances.

Boerne v. Flores

After a church in Boerne, Texas, was denied the necessary permits to proceed with a planned expansion because it was inconsistent with the city's historic district ordinance, the church sued under the RFRA. In the resulting suit, the city alleged that the RFRA was unconstitutional, and the Supreme Court agreed, invalidating the act as an attempt by Congress to reverse an earlier decision of the Court. It was not, as supporters in Congress and the Justice Department had suggested, a remedial measure taken by Congress to assist in the enforcement of the Fourteenth

Amendment. In the wake of *Boerne*, the RFRA is no longer enforceable against state or local governmental action.

What has been the effect of the invalidation of the RFRA? Because the basis of the *Boerne* decision is that Congress cannot impose its construction of the meaning of the religious freedom's clauses on the activities of state and local government, cases that preceded the enactment of the RFRA provide the best indication of the limits of a citizen's right to the free exercise of religion. For the kinds of activities with which the courts are confronted, *Smith* remains the leading case, but because the Court distinguished *Smith* from *Sherbert* rather than overruling it, the two rulings remain in tension.

This tension is caused by the potential application of two different tests in cases dealing with essentially the same action: a request by a citizen to be exempted from a government rule that interferes with religious practice. If a court finds the rule in question to be a neutral, generally applicable law and follows *Smith*, the test that is applied is relatively easy for the government to meet, regardless of the degree of burden imposed on the religious activity. However, if a court finds that the case involves a situation in which "the state has in place a system of individual exemptions," the state may not "refuse to extend that system to cases of 'religious hardship' without compelling reason" (*Smith*, 494 U.S. 872, 884). That standard, enunciated in *Sherbert*, is fairly difficult for the state to meet. One may plausibly argue for either test, depending on how the issue is framed, and indeed, in its opinions the Court continues to debate the relationship between the two tests.

Although the majority opinion in *Smith* does not specify the extent to which *Sherbert* retains vitality, it seems probable that the current majority on the Court will construe *Sherbert* narrowly, perhaps limiting it to the issue of determining unemployment benefits. If the Court extends *Sherbert* to other contexts, it is likely that unless the exemption procedure is formalized and entails substantial procedural provisions to ensure that facts are fully developed, the Court's focus will be on whether the policy or rule at issue is generally applicable and neutral.

The only major free exercise case since *Smith* is *Church of Lukumi Babalu Aye v. Hialeah* (1993). As previously noted, the statute in that case was found not to be neutral or generally applicable but rather aimed at the plaintiff church's religious practice of animal sacrifice. In that context, even under *Smith*, the compelling interest standard applies.

Legal Background—Establishment of Religion

The other religion clause in the First Amendment prohibits Congress, and now by extension via the Fourteenth Amendment the states, from taking actions respecting an establishment of religion. The traditional test used to determine whether a governmental action has violated the Establishment Clause was established most recently in *Lemon v. Kurtzman* (1961), a case dealing with aid to parochial educational programs and students. The *Lemon* test has three prongs: Does the action serve a secular purpose? Is its primary effect one that neither advances nor inhibits religion? Does it avoid an excessive entanglement by the state in the religious activity? A negative answer to any of those questions means that the challenged action constitutes an Establishment Clause violation as determined by *Lemon*.

In the 1960s major issues arising under the Establishment Clause included aid to religious education and prayer in schools, and *Lemon* was applied to those cases. The issue of prayer in court was addressed in the 1991 case *North Carolina Civil Liberties Union Legal Foundation v. Constangy*, in which the Fourth Circuit Court of Appeals ruled that a North Carolina judge's practice of opening state trial court sessions with a prayer could not pass the *Lemon* test and therefore violated the Establishment Clause.

In recent years, however, other issues, such as the display of religious symbols by governments, have received more of the Supreme Court's attention. These more recent cases have not always used the three-pronged test delineated in *Lemon*. In *Capitol Square Review and Advisory Board v. Pinette* (1995), which dealt with the display of a cross on the statehouse grounds in Columbus, Ohio, the Court focused on the particular question of whether the action taken had the effect of "endorsing" religion. Justice Antonin Scalia, writing for the Court, indicated that the *Lemon* test is applicable in cases in which the issue is whether the action taken by the government endorses religion or is alleged to discriminate in favor of private religious expression or activity.

In another variation on the *Lemon* test, if it is shown that the action taken has the effect of endorsing a particular religion or sect, that action is invalidated under the Establishment Clause, unless the state has a compelling interest in its action and has chosen the least restrictive means of achieving it. [*See* Larson v. Valente (1982) *and* Heritage Village Church and Missionary Fellowship, Inc. v. State (1980)].

Legal Background: What Is Religion?

A threshold question in any assertion of the right to freely exercise one's religion is whether the conduct or belief to be asserted is *religious*, as that term is defined under the cases interpreting the First Amendment. If the practice results from a choice that is merely personal or philosophical, no free exercise issue is raised. The same is true if the religious assertion is in fact a pretext to avoid an unwanted consequence of a government action. [*See* United States v. Kuch (1968)]. The determination that an action is religious has not been easy for courts to make in cases involving religious organizations or beliefs that do not fit within the traditional understanding of religion and/or religious communities. Some guiding principles have been articulated, however.

A commonly cited test of *religion* is found in *Malnak v. Yogi* (1979). This test cites three characteristics of a religion, whether the set of practices focuses on a Supreme Being or whether the belief system inhabits a place parallel to that occupied by an orthodox belief in God. These three characteristics, described as follows, are not determinative of the issue, but courts have found them useful in making this determination: (a) the belief system addresses fundamental and ultimate issues on human existence; (b) it is comprehensive in its approach; and (c) it recognizes established, external signs, such as formal services, ceremonial functions, the existence of clergy, observation of holidays, an organizational structure and similar manifestations associated with traditional religions. The Fourth Circuit applied these tests in *Dettmer v. Landon* (1986) in holding that Wicca, a form of witchcraft, was a religion such that its adherents were accorded free exercise rights in the Virginia prison system. Its doctrines addressed fundamental issues, its coverage of human existence was comprehensive, and it had recognized ceremonies.

While this analysis can be useful, the United States Supreme Court has offered a word of caution to those government officials responsible for determining if a religion is entitled to First Amendment coverage. In *Thomas v. Review Board* (1981), the Court noted that "The determination of what is a 'religious' belief or practice is more often than not a difficult and delicate task. . . . However, the resolution of that question is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent or comprehensive to others in order to merit First Amendment protection" (450 U.S. 707, 714). In *Frazee v. Illinois Department of Employment Security* (1989), for example, the Court rejected the notion that one must belong to a religious organization in order to claim protection under the First Amendment.

Application of Legal Principles to Court Proceedings

Dress Codes

The dress code mentioned in the first of the three courtroom incidents described at the beginning of this bulletin applies to all who come before that particular court. It was not adopted as a pretext to prohibit religious headgear and does not have the effect of regulating only religious headgear. It also applies to baseball caps and other headgear worn to assert one's identity or opinions. The issues that arise as a result of the dress code are as follows:

- Is the person entitled under the Free Exercise Clause to be exempted from the policy?
- If not, may the person be exempted without violating the Establishment Clause by granting religious-based exemptions but not secular-based exemptions?
- Finally, if an exemption can be extended to a religious-based request, may it be extended to some but not all such requests?

The threshold question in determining which test is applicable in pursuing answers to these questions is whether the policy is neutral and generally applicable. The first issue to consider is whether the religious belief or action is the object of the regulation. In this case the answer is no; the dress code is intended to promote a respectful environment in the courtroom, not regulate religious conduct. The second issue to consider is whether the action is based on a generally applicable and otherwise valid governmental policy. In this particular case it is, as the preservation of decorum in the courtroom would constitute such a policy. If no exemptions to the policy are granted, then *Smith* clearly applies and the free exercise claim is rejected.

If exemptions are allowed, however, an additional question arises as to whether the exemption process permits "individual" exceptions that trigger *Sherbert*'s compelling interest test. In the context of a clothing policy, it seems unlikely that the *Sherbert* test would be applied because the policy itself does not involve formal procedures or fact-finding. But even if it did, the state's interest in maintaining decorum might well be found to be compelling if the potential disruption would be substantial. Thus it is unlikely that a visitor in court would be exempted from a general dress code

on the basis of a free exercise right because the denial of an exemption in such a case would be an "incidental effect" of the application of a general policy. The dress code may force a religious person to choose between participating in a court proceeding or complying with his or her religion, but however difficult the choice, it does not violate the person's constitutional right to the free exercise of religion.

The second issue raises a different set of concerns. If certain exemptions to the dress code are granted for religious reasons, the policy itself might constitute a violation of the other prong of the First Amendment as an act respecting the establishment of religion. As previously noted, Establishment Clause cases are fact-specific, and often very slight factual variations produce different results. Yet recent cases suggest that certain factors in particular are important in providing guidance. Two such factors are relevant to the courtroom: Does the state action to accommodate an expression of religion have the effect of "endorsing" a particular religious belief? Does the action force the religious belief on others? If it does not, the Establishment Clause probably has not been violated. This is likely to be the case if a judge allows a person's dress or headgear to impart a bona fide religious expression in a neutral manner that does not imply a public endorsement, preference, or disapproval of a particular religion.

Such a result finds support from the majority opinion in *Smith*. In affirming Oregon's decision to punish the use of peyote even in a religious context, Justice Scalia noted that several states had chosen to exempt such peyote use from their criminal laws and gave no indication that such an exemption was improper. The Court suggested that the political process was the proper forum for determining whether or not such exemptions are appropriate, not constitutional litigation. Scalia reaffirmed that view in his concurring opinion in *Boerne*. The Court has not elaborated further on that discussion. In particular, it has not indicated whether the authority to accommodate religious exemptions should be limited to certain government officials, such as legislators, or whether is may be exercised more broadly by administrators or judges acting in their respective spheres. But clearly there is a recognition that exemptions are appropriate in some circumstances.

The third issue raised by such a dress code is whether certain sects or religions may be preferred in the granting of exemptions. The case law suggests that any governmental action that prefers one religious group over others, or to the exclusion of others, receives a very high degree of scrutiny and absent a very compelling state interest in the granting of the limited exemption, will violate the Establishment Clause. [*See* Larson v. Valente *and* Heritage Village Church and Missionary Fellowship, Inc. v. State.]

Such a compelling interest might be present if wearing the clothing or headgear at issue would, in context, disrupt court proceedings or provide an unfair advantage to the party. If it would, then the state's interest in conducting fair and efficient court proceedings must be weighed against the individual's interests and might well be considered compelling enough to justify a decision to allow an exemption to some religious groups and not to others. For example, in *LaRocca v. Gold* (1981), the Second Circuit ruled that it was appropriate to prohibit an attorney who also was a priest from wearing clerical garb while appearing as a trial attorney. The court distinguished this case from one involving witnesses and parties, as in those instances the negative or positive effects of a particular kind of clothing can be dealt with in jury selection or instructions. Conversely, given the continuing and constant presence of the attorney at trial, the court held that the danger of prejudice was too great to allow the clerical attire. Although *LaRocca* is considered to be a free exercise case, the analysis also seems appropriate if an establishment issue is raised by the exclusion of one form of religious attire but not others.

One final note on this issue: it may be prudent to consider adopting a policy on courtroom dress and headgear. While there are pros and cons to such a policy, having one in place before an incident arises may assist in the determination of whether the policy is neutral to religion and generally applicable. If the policy is applied to both religious and nonreligious clothing and headgear, the determination of whether the practice is aimed at religious expression will be easier to make.

Religious Holidays

The state of North Carolina's "policy" on requiring court appearances on religious holidays is stated in *In re Williams* (1967), in which the state supreme court declared that compelling witnesses, attorneys, and parties to appear on certain religious holidays promotes "the effective operation of its courts." (That policy was further enumerated in *Williams*, as the court determined that the state interest was compelling enough to force a minister to testify about communications that he claimed were protected by his right to keep religious communications confidential). In applying this generally applicable policy, judges have wide discretion in determining

when attorneys, parties, and witnesses are required to appear. Such discretion is necessary to allow for continuances and delays and to avoid scheduling problems caused by situations that have nothing to do with religion—vacations, insufficient time to prepare cases where clients have not provided adequate assistance to attorneys, personal problems, and so on. Religious conflicts simply represent another category, albeit one that could raise constitutional issues in its application.

As noted earlier, the question formulated under *Smith* is whether a policy is of general applicability and neutral with respect to religion. Absent some unusual circumstances, continuance policies, rules of procedure, local rules, and the like are likely to be found to be neutral and of general applicability. Thus the answer to the question of whether a judge must grant a religiously based request for a schedule alteration is almost certainly no, unless the policy on which it is based is aimed at religious expression. Even in the unlikely event that the decision about whether to grant an exemption is governed by *Sherbert* instead of *Smith*, it is important to note that the North Carolina Supreme Court has found that requiring a witness to appear is a compelling state interest sufficient to overcome someone's objection to testifying on the basis of religious practice.

The question of whether a judge has the authority to grant such a request, however, involves an entirely different analysis of the facts. Major Christian holidays (Good Friday, Easter, and Christmas Day) are either designated as official holidays or occur on Sunday, which is almost never a day on which court proceedings take place. Many cases have accepted the principle that Christmas Day and Sundays are to be treated as special days, apart from their significance to Christians. For example, Sunday Blue laws, which in earlier generations commonly required many businesses to close on Sunday, were validated by the United States Supreme Court in *McGowan v. Maryland* (1961) primarily on the basis of their secular benefits to society. It is also the policy of the state to observe Good Friday as a legal holiday [*see* Chapters 103-4 and 53-77.2A of the North Carolina General Statutes (hereinafter G.S.)] and to declare it to be a holiday for state employees and for the court system. That practice has been challenged in at least four other states, and those rulings are split on whether the practice constitutes an establishment of religion. [*See* Granzeier v. Middleton (1997); Cammack v. Waihee (1988); Metzl v. Leininger (1995); Koenick v. Felton (1997), *and* Freedom from Religion Foundation v. Litscher (1996).] Significantly, rulings in states where the practice has been upheld focus on the holiday's secular benefits to society (a spring holiday, etc.) and minimize the religious significance of the day. Thus in North Carolina, the custom of not scheduling official court proceedings on days that are religiously significant to Christians is a part of the official state policy, yet in several states that also follow the practice, it has been defended in terms of its purported secular benefits.

Those in the religious minority are not afforded such treatment, and it is not uncommon for Americans whose religious beliefs are not in the majority to assert that Christianity is granted special preferences in terms of scheduling policies and practices of the government. Few would dispute that claim, yet the more difficult issue is whether the public observance of Christian holidays entitles the adherents of other religions a comparable right to observe the holy days of their religions. To date no cases have focused specifically on that issue, but the emphasis placed on the secular purposes of the Christian holidays challenged in the above-cited cases suggests that such a right does not exist, since the governmental decision not to operate on Christian holy days is based on the secular benefit to society as a whole and not on the free exercise rights of Christians. In contrast, a decision to allow individuals of minority religions to be excused from appearing in court in order to observe holy days would be an action based clearly on their interest in exercising their religion.

To return to the earlier question, if there is no such right under the Free Exercise Clause, may a judge nonetheless excuse that person in order to allow him or her to observe a nonpublic religious holiday without violating the Establishment Clause? The analysis of the dress code issue would suggest that exemptions may be allowed on the basis of religion so long as some religious groups are not singled out for preferential or negative treatment.

Even if a court is amenable to trying to resolve bona fide religious conflicts, it may nevertheless take into account related factors that bear on the court's ability to get its work done. Factors that are likely to be relevant in making such determinations include the notice given to the court of the possible conflict and the extent to which the need for the excused absence from court can be accommodated without disrupting court proceedings. See *In re Steven Jackson* (1985) for a case in which an attorney who failed to appear in court in order to observe a religious holiday was validly held in contempt for not providing adequate notice to the court of the conflict.

Jury Duty

The last of the three courtroom situations described at the beginning of this bulletin dealt with jury service. The analysis in this situation is similar to that used in evaluating the dress code issue. Jury service, however, is regulated by state statutes that also must be followed unless invalidated by federal laws to the contrary.

For a North Carolina court faced with a citizen's request to be excused from jury duty because of a religious conflict, the analysis under *Smith* might be as follows: The government policy of universal jury service is not a practice aimed at or motivated by a desire to regulate religion in general or this particular religion. Nor is the policy's impact on religious expression anything other than an incidental effect of an otherwise valid, generally applicable governmental policy as stated by G.S. 9-6: "The General Assembly hereby declares the public policy of this state to be that jury service is the solemn obligation of all qualified citizens." Thus blanket exemptions are a violation of state law, and since nothing in federal constitutional law compels a different result, G.S. 9-6 mandates that all citizens are subject to jury duty.

This policy thus applies to anyone whose personal beliefs conflict with jury service, regardless of whether the belief is religious or secular. If someone's beliefs compel that person to take positions that are inconsistent with a juror's duty to be fair and impartial, the judge has a basis on which to find the potential juror ineligible for service. If an individual decision is based on a person's fitness to serve and not on the source of the particular beliefs that he or she might hold, the action is consistent with state law and with *Smith*.

G.S. 9-6(a) provides another wrinkle, however. It also establishes a state policy on the issue of exemptions: "excuses from the discharge of this responsibility should be granted only for reasons of compelling personal hardship or because requiring service would be contrary to the public welfare, health or safety." The statute also includes provisions directing the chief district judge to establish procedures to consider applications for excuses by those summoned and mandating that persons unqualified under G.S. 9-3 (nonresidents, persons not able to hear or understand English, persons *non compos mentis*, etc.) be excused. Some discretion is contemplated both in the language mandating a procedure to consider such individual applications and in the policy statement itself.

Is this the kind of individual exemption procedure that triggers the *Sherbert* compelling interest test to justify denying a religious-based exemption from jury service? There is little in either *Sherbert* or *Smith* to provide guidance, other than the presumption that *Sherbert*, while not overruled, likely will be construed narrowly if the issue is litigated. If, however, the compelling interest test applies, the leading case considering whether a state has a compelling interest in having a juror serve despite religious conflicts [*In re* Jenisen (1963)] was decided in the juror's favor. That case was subsequently discussed in a manner that did not suggest disapproval by the North Carolina Supreme Court in *In re Williams*. Although that case does not specifically address the issue, it would be consistent with *Williams* to consider as one factor in determining personal hardship a bona fide conflict presented between one's religion and the duty to serve as a juror. Such a consideration would not result in a blanket exemption but would take the person's individual interest into account as well as the interest of the state in having jurors who will apply the law fairly and conscientiously.

Conclusion

The difficulty in interpreting the two religious freedom clauses in the First Amendment and the tension between the two keep this a fluid area of litigation and a difficult realm in which to provide precise, predictive answers to how litigation will proceed. Nevertheless the following analytical framework may prove useful to those who confront these issues.

- Is the practice in question based on a sincerely held reliance on "religion"? If not, the religion clauses are not applicable. If so, the analysis must continue.
- Is the rule or practice that conflicts with religious exercise aimed at religious exercise? If so, the rule or practice must be justified by a compelling state interest and must use the least restrictive means to accomplish this interest ("compelling interest test").
- If the answer to the second question above is no, is the rule or practice neutral with respect to religion and generally applicable? If not, the compelling interest test applies. If so, the rule or practice needs only to have a rational connection to a valid state policy to be justified under the Free Exercise Clause.
- For a rule or practice that is neutral and generally applicable, is there a systematic procedure in place for determining individualized

exemptions to it? If so, the compelling interest test may apply to cases of religious hardship that arise. (Absent a change in the direction of the Supreme Court on this issue, instances in which the Court will find the compelling interest test to be applicable in such a situation are likely to be infrequent.)

The above analysis deals with challenges made by those seeking to engage in religious activity. Governmental action may also offend those who want to be free from official actions that express religious beliefs or have that perceived effect, and those persons may complain that such actions constitute an "establishment" of religion. While such a challenge is less likely to occur in situations where the facts are comparable to those discussed herein, court actions are sometimes challenged on this basis, and it is certainly advisable to consider the Establishment Clause when making decisions in this area. If they occur, such challenges will be decided based on some or all of the following tests:

- Does the action taken prefer one religion over others or exclude one religion? If so, it may constitute an establishment of religion and so must be justified by a compelling state interest.
- Does the action have the effect of "endorsing religion"? If so it must be justified by a compelling state interest.
- Does the action serve no secular purpose, or excessively entangle the state in religious activity, or advance or inhibit religion? If the answer to any of these questions is yes, the action constitutes an establishment of religion unless justified by a compelling state interest.

As this analytical framework suggests, there are several points at which a regulation or practice can run afoul of the religion clauses. Nonethless the following statements seem to be supported by the case law at this point:

- It is probably not required that exemptions from general rules adopted to run the courts be granted to those seeking to engage in religious activities.
- It is probable that a court may nonetheless neutrally grant such exemptions without violating the Establishment Clause.
- There is great danger in not extending the benefits of religious exemptions to all religions.
- The impact on court operations of granting a particular exemption may be considered in deciding whether to grant the exemption.

The struggle to provide the freedom to be religious and at the same time to be free from religion is a hallmark of the American experiment in popular government. In a nation with as diverse a religious community as the United States, perfect balance will never be fully achieved. It is likely to be a continuing work in progress, as the courts try to be sensitive to the rights of everyone affected by the shifting balance.

Cases Cited in Text and Other Relevant Cases

Free Exercise Clause

Note: Cases cited below that were decided before *Oregon v. Smith* are relevant to the analysis, but in some cases the applicable standard of review has shifted.

- Cantwell v. Connecticut, 310 U.S. 296 (1940) (Fourteenth Amendment makes religion clauses of First Amendment applicable to states)
- Oregon v. Smith, 494 U.S. 872 (1990) (neutral, generally applicable laws do not violate Free Exercise Clause, even if religious exercise is burdened by such laws)
- Sherbert v. Verner, 374 U.S. 398 (1963) (compelling interest, balancing test required when neutral law impacts religious activity; limited by *Smith* to cases of individualized exemptions)
- Church of Lukumi Babalu Aye v. Hialeah, 508 U.S. 520 (1993) (local ordinance aimed at regulating animal sacrifice as religious practice must be justified by compelling state interest, which was not present in this case)
- *In re* Williams, 269 N.C. 68, 152 S.E.2d 317 (1967) (need for witness to testify is compelling interest sufficient to override free exercise claim by minister)
- State v. Massey 229 N.C. 734, 51 S.E.2d 179 (1949), *appeal dismissed sub nom*., Bunn v. North Carolina, 336 U.S. 942 (1949) (local ordinance prohibiting snake handling, even for religious purposes, serves compelling state interest and is constitutional)
- Bob Jones University v. United States, 461 U.S. 574 (1983) (compelling interest in enforcing government policy prohibiting race discrimination laws overrides university's exercise of its religious beliefs, which had effect of discriminating based on race; charitable tax exemption withdrawn)

- United States v. Lee, 455 U.S. 252 (1982) (compelling interest in tax enforcement overrides interest of some taxpayers to not contribute to some causes that conflict with their religious beliefs)

Religious Freedom Restoration Act (RFRA)

- City of Boerne v. Flores, 117 S. Ct. 2157, 138 L. Ed. 2d 624 (1997) (RFRA unconstitutional attempt by Congress to expand meaning of Fourteenth Amendment)

Establishment Clause

- McGowan v. Maryland, 366 U.S. 420 (1961) (Sunday closing laws not Establishment Clause violation; laws have secular purpose)
- Lemon v. Kurtzman, 403 U.S. 602 (1961) (established traditional three-pronged test to determine if Establishment Clause violated)
- Capitol Square Review and Advisory Board v. Pinette, 515 U.S. 753, 132 L. Ed. 2d 650 (1995) (allowing cross to be displayed by KKK on Ohio capitol square; used "endorsement" test to determine if Establishment Clause implicated)
- Heritage Village Church and Missionary Fellowship, Inc. v. State, 299 N.C. 399, 263 S.E.2d 726 (1980) (charitable solicitation ordinance that grants exemptions to some religions—those that raise funds mostly from members—but not to others violates state equivalent of Establishment Clause by preferring some religious organizations over others)
- Larson v. Valente, 456 U.S. 228 (1982) (charitable solicitation ordinance that grants exemptions to some religions—those that raise funds mostly from members—but not to others violates Establishment Clause by preferring some religious organizations over others)

Courtroom Prayer

- North Carolina Civil Liberties Union Legal Foundation v. Constangy, 947 F.2d 1145 (4th Cir. 1991) (judge's practice of beginning session of court with prayer violated Establishment Clause)

Religious Holidays

- Granzeier v. Middleton, 955 F. Supp. 741 (E.D. Ky. 1997) (practice of closing court on Good Friday upheld, but notice of holiday that contained religious symbols constituted establishment of religion)
- Cammack v. Waihee, 932 F.2d 765 (9th Cir. 1988) (state policy of observing Good Friday as holiday found not to violate Establishment Clause, based primarily on secular purpose of holiday)
- Metzl v. Leininger, 57 F.3d 618 (7th Cir. 1995) (in the absence of evidence of any independent secular purpose, state policy of closing schools on Good Friday found to have religious purpose; invalidated under Establishment Clause)
- Freedom from Religion Foundation v. Litscher, 920 F. Supp. 969 (W.D. Wis. 1996) (state policy declaring Good Friday as state and school holiday invalidated under Establishment Clause; religious purpose of holiday undisputed)
- Koenick v. Felton, 973 F. Supp. 80 (D. Md. 1997) (state statute establishing Good Friday as school holiday not violation of Establishment Clause; does not violate *Lemon* test because the holiday does have a secular purpose and does not coerce persons into religious activity, endorse a religion, or constitute lack of neutrality toward religion)

Religious Clothing

- LaRocca v. Gold, 662 F.2d 144 (2d Cir. 1981) (attorney/priest prohibited from wearing clerical garb while appearing as attorney)
- Goldman v. Weinberger, 475 U.S. 503 (1986) (military rule prohibiting nonuniform headgear prevented officer from wearing yarmulke inside in nondisruptive context)
- *Other cases dealing with dress codes*. *In re* Palmer, 386 A.2d 1112 (R.I. 1978); Close-it Enterprises v. Weinberger, 64 A.D.2d 686 (N.Y. App. Div. 1978); McMillian v. Maryland, 265 A.2d 453 (Md. 1970); State *ex rel*. Burrell-El v. Judges, 752 S.W.2d 895 (E.D. Mo. 1988); New York v. Drucker, 418 N.Y.S.2d 744 (Crim. Ct. 1979); Tennessee v. Hodges, 695 S.W.2d 171 (Tenn. 1985)

Religious Exemptions Not to Appear in Court

- West Virginia v. Everly, 146 S.E.2d 705 (W. Va. 1966) (contempt finding for Jehovah's Witness who refused to serve on grand jury because of religious conflict invalidated because no indication that exemption would threaten the state's ability to obtain adequate grand jurors to preserve efficient court operations)
- *In re* Jenisen, 125 N.W.2d 588 (Minn. 1963) (declaring religious exemption from jury duty to be policy of state unless number of exemptions threatened state's ability to obtain adequate number of jurors)
- *In re* Steven Jackson, 770 F.2d 1550 (11th Cir. 1985) (attorney held in contempt for not attending trial on Passover; ruling based on attorney's failure to provide adequate notice to court of conflict)
- *Other cases dealing with excused appearances*. Dobkin v. District of Columbia, 194 A.2d 657 (D.C. 1963); Eastern Maine Medical Center v. Maine Health Care Finance Commission, 632 A.2d 749 (Me. 1993); New York v. Gilliam, 215 A.D.2d 401 (N.Y. App. Div. 1995); New York v. Williams, 197 A.D.2d 401 (N.Y. App. Div. 1993)

Defining Religion

- United States v. Kuch, 288 F. Supp. 439 (D.D.C. 1968) ("those who seek the constitutional protections for their participation in an establishment of religion and freedom to practice its beliefs must not be permitted the social freedoms this sanctuary may provide merely by adopting religious nomenclature and cynically using it as a shield to protect them when participating in antisocial conduct that otherwise stands condemned")
- United States v. Seeger, 380 U.S. 163 (1965) (articulates "parallel belief" standard to define religion in those situations in which belief in Supreme Being is not professed; conscientious objection case)
- Malnak v. Yogi, 592 F.2d 197 (3d Cir. 1979) (articulates three-pronged test to assist in determining if parallel belief is religion)
- Dettmer v. Landon, 799 F.2d 929 (4th Cir. 1986) (finds Wicca to be a religion for which free exercise rights must be honored)
- *Other cases dealing with definition of religion*. Thomas v. Review Board, 450 U.S. 707 (1981); Frazee v. Illinois Department of Employment Security, 489 U.S. 829 (1989)

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