***Religious Exemptions: Application of Employment Division v. Smith to COVID-19 Vaccination Mandates***

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# INTRODUCTION

Among the many unclear issues as interpretations of *Employment Division v. Smith* arise in the context of vaccination mandates is a simple question: Does any exception to a law at all (whether for a group or an individual) render a law not "generally applicable and religion-neutral" in the eyes of the current Supreme Court?

## I. Background

Prior to *Employment Division v. Smith*,[1] *Sherbert v. Verner*[2] set forth the free exercise test which called for strict scrutiny requiring a compelling state interest and the use of the least restrictive means to achieve the state interest when a law poses a substantial burden to the exercise of religion. *Sherbert* had a broad holding that prior to *Smith* applied to laws whether neutral on their face or not, and whether the asserted discrimination was intentional or not. One issue with *Sherbert* was that judges were not especially adept at judging the sincerity of beliefs and the importance of religious rituals to individuals, making it difficult to determine whether a law imposed a "substantial burden" on the practice of a religion.

*Employment Division v. Smith* holds that laws that are generally applicable and religion-neutral need not be justified by a compelling government interest even if they do have the effect of (unintentionally) burdening a religious practice.[3] *Smith*, decided in 1990, altered and narrowed judicial discretion in evaluating neutral laws that may impede the free exercise of religion. Justice Scalia aligned free exercise with other First Amendment rights.[4] He also alleviated the need for judges to determine the burden on and the sincerity of religious beliefs in instances of neutral laws. "Smith therefore diminished judicial power to grant religious citizens exemptions from their civic obligations..."[5] Yet a carveout was maintained for laws that have a "mechanism for individualized discretion"; strict scrutiny still applies to those.

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*Lukumi*[6] (1993) reaffirmed yet distinguished *Smith*. In *Lukumi*, the law in question was adopted to ensure that a religious group would be rendered unable to sacrifice animals. The law had numerous exemptions (clearly people may kill animals for many non-essential reasons like hunting and fishing for sport, etc.) and the lawmakers seemed to have the intent of interfering with animal sacrifice. It was not considered generally applicable on various grounds and the *Lukumi* Court states, "As we noted in Smith, in circumstances in which individualized exemptions from a general requirement are available, the government "may not refuse to extend that system to cases of 'religious hardship' without compelling reason." Ibid., quoting *Bowen v. Roy*, 476 U. S., at 708 (opinion of Burger, C. J.)."[7] In *Lukumi*, arguably there were so many exceptions, the rule was clearly targeting religious sacrifices. The Court applied strict scrutiny and the law was deemed unconstitutional.

## II. The Current Supreme Court and Laws Outside of *Smith*

The current and recent cases indicate that some justices on the Supreme Court assert that the caselaw supports religious exemptions to a broad array of laws. Two arguments support this result: either a limited interpretation of "generally applicable and neutral" or a slightly different tactic which argues that any laws with individual exceptions call for strict scrutiny. (One argument is that those which allow exceptions are not generally applicable and neutral, and thus fall outside of Smith and they require strict scrutiny;[8] the other is that a law can be generally applicable and neutral, but if it has a system for exceptions, then it is subject to strict scrutiny.[9])

In *John Does 1-3 v. Mills*, the Supreme Court denied an injunction on October 29, 2021. The case concerns Maine's vaccine mandate and will be heard on the merits. Gorsuch dissented from the denial of injunctive relief. He applied *Smith*, *Lukumi*, and *Fulton v. Philadelphia*[10] saying that because there is a medical exemption, the law is not "generally applicable"[11] and strict scrutiny will apply. Thomas and Alito joined Gorsuch. The Gorsuch dissent also implies that the Maine medical exemption may be somewhat bogus saying Maine finds the "mere *trepidation* over vaccination as sufficient" if it is expressed in medical rather than religious terms.[12]

Justice Barrett, joined by Kavanaugh, concurred in the denial of the injunction, but clarified that her reasoning was a wish to avoid giving a "merits preview" by enjoining the law, based on the applicants' likelihood of success, noting the case is "the first to address the questions presented."[13]

## III. Do Medical Exemptions Negate the Possibility of a Neutral and Generally Applicable Law? Are they a *de facto* "mechanism for individual exemption"?

To me, it seems that under the current law, a medical exemption could make the absence of a religious exemption more problematic. The big issue now is whether Barrett and Kavanaugh and any (even all) other justices are likely to find the medical exemption is a "mechanism for individual exemptions" or whether it otherwise more simply makes a law not neutral or generally applicable.

In previous recent COVID-19 cases, the argument of emergency authority was prominent. Caselaw regarding emergency use of governmental powers trumped some constitutional arguments and led to disparate COVID-19 caselaw.[14] For example, some courts applied *Jacobson v. Massachusetts*,[15] giving deference to public health authorities while others applied strict scrutiny.[16] At the Supreme Court level,

Justices Sotomayor, Kagan, and Breyer have been more willing to analyze COVID-19 regulations according to emergency powers.[17]

a. In Favor of the Gorsuch Reasoning

The Gorsuch dissent will require the state to offer proof of some rationale for why a medical exemption would be more acceptable, less dangerous, etc. than a religious one. Because there is a medical exemption, the causal nexus between the state's goals and the restrictions will matter.

For example, in *Fraternal Order of Police v. Newark*, a requirement that police be clean shaven was invalidated because there was a medical exception.[18] The problem with the rule was that the government interest in uniformity was not violated any more or less whether the person was noncompliant due to medical as opposed to religious reasons. Gorsuch correctly applied similar reasoning arguing that those not in compliance with the Maine vaccine mandate due to religious exemptions posed no more danger than those noncompliant due to medical conditions.[19] An opposing side might argue that by the numbers, and without a need for a doctor's signature, more people would apply for and receive religious exemptions, thus harming the ability to reach herd immunity more, or posing more risk of community spread.

b. But, on the other hand

There are many laws with medical exemptions. It would not seem right that they be subject to strict scrutiny for failing to offer religious outs as well. For example, places without motorized vehicles could allow motorized wheelchairs. Indeed, the ADA may even call for special treatment in many circumstances where religious special treatment would not be granted. Disability law often requires variances, changing zoning to allow ramps, or other accommodations.[20] It does not appear that every disability accommodation equates to a need to allow a corresponding religious accommodation, nor that strict scrutiny would apply. Zoning cases are common where churches seek exceptions from historical landmark regulations and the results of those cases vary.[21] Yet vaccination is much more personal and the cases may be distinguished.

One of the biggest vulnerabilities of the *Smith* ruling is that arguably all laws have an individualized enforcement aspect. While it may not be an official exemption or a "mechanism for individual exemption", individuals have the ability to use courts to challenge laws, there are laws that rely on wishy washy terms, like "good cause", and there are groups whose failure to comply with laws may be traditionally ignored. In each of those scenarios, those seeking religious exemptions may have a stronger case, and eventually may chip away at *Smith*.

c. Would a Different Built-In Exemption Preclude Application of *Smith*?

Application of *Smith* may depend on whether the exemption is discretionary or built in. For example, if an exemption said anyone may apply for an exemption with good cause, religious ones should be fairly and equally considered. If an exemption reads anyone with an autoimmune disease is exempt, the class of people exempt would be delineated (unlike the Maine language) rather than discretionary as with the open-ended medical exemption language of the Maine statute. In the case of a class-like exemption, the

argument that the law is neutral and generally applicable would be stronger. *Smith* was not really meant to declare that laws with any categories would be vulnerable to free exercise challenges. Similarly, objective criteria in providing exemptions differs. When criteria for exemptions are made clear, the religious argument could be weaker. However, the Gorsuch argument that in the end the religious objector poses no more danger to others than the medical (or other maybe conscientious, financial, or physical) objector may be the winning argument.

## IV. Side Note: Another Consideration for Neutral Laws

In *Roman Catholic Diocese of New York*, Justice Kavanaugh created a peer group limitation in applying *Smith*. Kavanaugh found that a law that limited gatherings at religious services was not neutral. The law had various categories of entity.[22] An interesting twist is that other entities similar to churches in objective concrete ways (like theaters) were closed altogether, so arguably religion was favored over those, but disfavored compared to essential businesses (like food stores). The orange and red zones in the challenged Cuomo Executive Order did have specific rules for places of worship. Gorsuch referred to *Lukumi* in his concurrence and went directly to strict scrutiny without sincerely entertaining the concept that the Executive Order was a neutral and generally applicable law. That is in keeping with his dissent in *Does 1-3 v. Mills*. Yet, it remains possible to argue that laws with objective, defined categories may still be neutral and generally applicable.

## V. Time to Abandon *Jacobson* at this Juncture of COVID-19

*Jacobson* applies in public health emergencies and, while in recent Supreme Court cases, many justices rightly pointed to the emergency as a reason to compromise important rights, the emergency aspect of the pandemic is waning. In many areas, the positive rate is quite low, businesses are returning to normal, and the vaccination rate is high. As such, the abandonment of strict scrutiny in favor of *Jacobson's* emergency deference to public health entities, something Gorsuch failed to entertain in *South Bay Pentecostal Church v. Newsom*[23] anyway, is arguably no longer warranted. Deference to the state and to experts must be limited to emergencies. Justices Kagan, Breyer, and Sotomayor who rightly cautioned against "armchair epidemiology"[24] during the height of the COVID-19 pandemic might return to stricter stances on protecting rights as the emergency dies down or becomes localized, and as increasing methods and treatments arise, like the COVID-19 pill by Merck. The calculus of whether we need strict COVID-19 regulations is dynamic. This is not a static emergency with powers to be left in place unconditionally.

## CONCLUSION

The argument that vaccination is a civic and moral obligation that people should engage in regardless of religious beliefs is stronger in an emergency. Whether deemed to include a "mechanism for individual exemptions" or just declared not neutral or generally applicable, laws offering any exceptions are more vulnerable to free exercise claims. Under the current Supreme Court composition, anticipating that laws may face strict scrutiny is wise—*Smith* is unlikely to shield seemingly neutral laws in the face of free exercise cases. That is not necessarily a bad outcome in a country that purports to allow religious freedom and can do so safely. Strict scrutiny is merely a protection that would ensure the public that

laws are meaningful, achieve compelling purposes, and do so without unnecessarily impeding fundamental rights. Yet one bad outcome of a rule that says if there are medical exemptions so must there be religious ones is that lawmakers will write laws that are more absolute, rigid, and unyielding to legitimate claims.

[1] 494 U.S. 872 (1990). https://supreme.justia.com/cases/federal/us/494/872/#tab-opinion-1958253
[2] 374 U.S. 398 (1963). https://supreme.justia.com/cases/federal/us/374/398/#tab-opinion-1944463
[3] Smith, at 879 (religion does not excuse people from compliance with neutral laws.)
[4] Kaplan, Carol M., "The Devil is in the Details: Neutral, Generally Applicable Laws and Exemptions from Smith," New York University Law Review, October 2000. https://www.nyulawreview.org/wp-content/uploads/2018/08/NYULawReview-75-4-Kaplan.pdf
[5] Kaplan, at 1053.
[6] Lukumi Babalu Aye, Inc. v. City of Hialeah 508 U.S. 520 (1993). https://supreme.justia.com/cases/federal/us/508/520/#tab-opinion-1959281
[7] Lukumi, at 537.
[8] Keeler v. Mayor of Cumberland. 940 F. Supp. 879 (D. Md. 1996) https://law.justia.com/cases/federal/district-courts/FSupp/951/83/1381605/; Kaplan, at 1066.
[9] Kaplan, at 1062, citing Swanson v. Guthrie Indep. Sch. Dist., 135 F. Supp. 694 (10th Cir 1998).
[10] Fulton v. Philadelphia, 593 U.S. __ (2021)
[11] Does 1-3 v. Mills, 595 U.S. ____(2021). Gorsuch, dissent, p. 2. https://www.supremecourt.gov/opinions/21pdf/21a90_6j37.pdf
[12] Does 1-3 v. Mills, Gorsuch dissent, p. 3.
[13] Does 1-3 v. Mills, Barret, concurring. https://www.supremecourt.gov/opinions/21pdf/21a90_6j37.pdf
[14] Zimmerman, A. "Weeding Out Disingenuous Emergency Orders: A Consistent Ethical Justification to Determine Whether to Apply Jacobson V. Massachusetts' Deferential Approach or the Tiered Scrutiny That Would Apply Absent an Emergency". 2021. *Voices in Bioethics*, vol. 7, May 2021, doi:10.7916/vib.v7i.8037.
[15] 197 US 11 (1905).
[16] Zimmerman, A. 2021. doi:10.7916/vib.v7i.8037.
[17] South Bay Pentecostal Church v. Newsom (2021), Kagan, dissenting, joined by Breyer and Sotomayor (Justices are "not scientists".)
[18] Kaplan, at 1079, citing Fraternal Order of Police v. City of Newark, 170 F. 3d 359 (3d Cir. 1999).
[19] Does 1-3 v. Mills, Gorsuch dissent, p. 4.
[20] https://www.ada.gov/comprob.htm
[21] Keeler v. Mayor of Cumberland (provisions deemed individualized exemptions so religious deserve strict scrutiny and consideration); Rector of St. Bartholomew's Church v. City of New York (2d Cir. 1990)(discretion does not negate Smith if it is not discriminatory so religious does not get strict scrutiny); see Kaplan at 1066.
[22] Cuomo executive order established zones. https://esd.ny.gov/cluster-action-initiative-faq
[23] 592 US __ (2021). https://www.supremecourt.gov/opinions/20pdf/20a136_bq7c.pdf
[24] South Bay Pentecostal Church v. Newsom (2021) (dissent).