Supreme Court Roundup and Closing Remarks

16 June 2021

00:17
My name is Gary Doxey. I'm an Associate Director of the International Center for Law and Religion Studies at BYU Law School. It's my pleasure and pleasure to introduce our panelists, Professor David Moore and Professor Stephanie Barclay. David Moore is the Wayne and Connie Hancock professor of law at BYU Law School. Since 2019, he has also been Associate Director of the International Center for Law and Religion Studies. Professor Moore is a scholar of international law development, human rights, and US foreign relations. During the past few years, Professor Moore took a leave of absence from BYU Law and worked in multiple roles at the US Agency for International Development in Washington DC or USAID. At that agency, he served as general counsel and later as Acting Deputy Administrator, where he assisted USAID in overseeing many, many employees, numerous projects, and a very large budget. Upon his return to BYU Law School, he served in 2020 as a member of the UN Human Rights Committee, the body that oversees the enforcement and interpretation of the International Covenant on Civil and Political Rights. Professor Moore previously taught at the University of Kentucky College of Law, as a visiting professor at George Washington University Law School, and as an Olin fellow at the University of Chicago Law School. He clerked at the US Supreme Court for Justice Samuel Alito, he graduated Summa Cum Laude from BYU Law School where he was the editor-in-chief of the Law Review and graduated first in his class. Welcome to Professor Moore.

Professor Stephanie Barkley is an Associate Professor of Law and the director of the Religious Liberty Initiative at the University of Notre Dame Law School. Professor Barclay's research focuses on the role of our different democratic institutions and the role that those institutions play in protecting minority rights, particularly at the intersection of free speech and religious exercise. Prior to joining the Notre Dame faculty, Professor Barclay was an associate professor of law at BYU Law School where she was twice voted Professor of the Year. Prior to becoming a professor, Stephanie litigated first amendment cases full-time at the Becket Fund for Religious Liberty. She has a long experience for her young years as a litigator, as an advocate in the area of religious freedom, and in other areas. She graduated Summa Cum Laude from BYU Law School as well, and we're proud to claim her as one of our graduates. Welcome to Professor Barkley.

03:31
Thank you for that introduction, Professor Doxey, and thank you all for joining us to discuss recent Supreme Court cases addressing religious freedom. Over the past year, there have been a number of cases that have come to the Court that involve restrictions on religious exercise related to COVID. Not all the COVID-related cases that have come to the Court have been religious freedom cases. There have been cases on prison conditions and voting rules. But the Court has heard a significant series of cases on restrictions on worship as a result of the COVID-19 pandemic, and I want to discuss those with you today. There have been at least ten of these cases that have come to the Court, one of them

has come up to the Court twice. Most of the cases have come from California, but there have been cases from New York, New Jersey, Nevada, Colorado; and there's been a Kentucky case involving school closure orders that affected a private religious school. We won't look at that case, as our focus is going to be on restrictions on religious worship. But these roughly ten cases have come up presenting that question to the Court and have generated a fair number of pages of opinion on these questions. This litigation is likely to slow down as the pandemic begins to lift, but it is not stopped yet. There's at least one case in the pipeline for the Court to decide involving religious worship. That case and any future cases are likely to be decided by reference to two of the cases in this list, the two italicized cases, Tandon v. Newsom and Roman Catholic Diocese of Brooklyn v. Cuomo, a case that was decided in conjunction with another case, Agudath Israel of America v. Cuomo. These are the two cases in which we've received the most guidance from a majority of the Court on these questions. The Court has granted injunctive relief in most of these cases or remanded in light of cases that have granted injunctive relief. But that is a change from the initial decisions the Court heard early on in the pandemic, in the first two cases the Court heard, here bolded on the slide, the Court denied injunctive relief. And one of the questions that we'll discuss briefly is why that might be why the change after these first two cases as compared to the more recent cases,

06:11

because these cases, these cases actually all seek injunctive relief from the Supreme Court. So these are cases that have been decided on what's referred to as the Court shadow docket. These are not cases where a cert petition was granted for oral argument and full briefing. These decisions have come quite quickly as a result of emergency petitions to the Supreme Court for injunctive relief. And because the petitions seek injunctive relief or a preliminary injunction, the Court is not being asked to decide whether there has been a violation of the free exercise Clause as a result of the COVID-19 restrictions on religious worship, but whether an injunction ought to be issued against imposition or enforcement of the restriction while the litigation is proceeding and the courts are deciding whether a free exercise violation has occurred. And so the courts in hearing these cases have applied the standards for preliminary injunctions. Preliminary injunctions are extraordinary, is an extraordinary remedy a preliminary injunction, and should be granted if there is a likelihood that the petitioner will succeed on the merits of the claim. If, in the absence of a preliminary injunction, the petitioner will suffer irreparable harm and the Court will also consider prudential considerations, the equities involved in these cases, perhaps the risk to the public health of the broader public if an injunction is or is not granted. In these cases, irreparable harm really hasn't been much of an issue. The Court has held that even slight violations of the right to free exercise or violations that only occur for a limited time period cause irreparable harm. Similarly, the Prudential considerations have not been significant. These cases have really turned on the likelihood of success on the merits. And so although the Court is deciding whether to grant a preliminary injunction and in

08:35

applying the preliminary injunction standards, these cases do give us a glimpse into how the Court might resolve these cases on the merits. And there's been significant disagreement among the justices in deciding these cases on this merits question and whether there is a likelihood of success on the merits. When the Court is assessing the likelihood of success it asks the threshold question of whether the restriction at issue is neutral and generally applicable. If so, the Court held an Employment Division

v. Smith, that those laws are constitutional, generally constitutional, even if they burden religious freedom. If instead the law is not neutral, or generally applicable, then the Court must apply strict scrutiny and that requires the state to prove and the Court to find that the state has a compelling interest in imposing the restriction and that the means chosen by the state to achieve that compelling interest are narrowly tailored. Now, certainly, the states have a compelling interest in responding to the pandemic, but the courts enter inquiry with regard to whether there's a compelling interest has been more searching. So for example, if the state allows a risky behavior, risky in the sense that it might lead to the transmission of COVID, but prohibits a comparably risky behavior, then it's hard for the state to argue that it has a compelling interest in restricting that risky behavior and so the state may fail the compelling interest part of the test even though, again, there's a general interest in responding to COVID. Even if there is a compelling interest, the means must be narrowly tailored. So for example, if a state imposes a 10-person limit on worship, but the house of worship holds 1000, the Court may conclude that limit is not narrowly tailored, the state could address its compelling interest in preventing the spread of COVID by imposing a capacity limitation, a percentage of the capacity of the house of worship. So the state needs to satisfy both those standards. And as I mentioned, the justices have disagreed significantly in applying that likelihood of success test and determining whether it's likely on the merits that there would be a free exercise violation. There have also been some procedural disagreements in the Court. I'll just note those briefly, they're not the focus of what we're looking at, but in a number of these cases, the restrictions may change while the litigation is going on. And some of the justices have relied on that to say preliminary injunctive relief is not appropriate where the petitioner is no longer subject to the restriction that they're challenging. The Court as a whole has, in the more recent cases, has been willing to go ahead and grant injunctive relief, particularly in situations where the regime, the state's regime, is still in place and while a particular designation that leads to particular restrictions is not in place at the moment, it could be applied again under the fast-changing conditions of the pandemic. So there have been some procedural disagreements. Again, the more interesting, more substantive, disagreements have been on this question, the threshold question, of whether the restriction is neutral and generally applicable and there the key difference seems to be the question of, what is the appropriate comparator? How do you determine whether the restriction is neutral and generally applicable? What are the comparators? So let me give one example here in Tandon v. Newsom. The Court in that case found that a New York prohibition on at-home gatherings that involved more than three households was not neutral because the state regime allowed secular gatherings to bring together people from more than three households. So in retail stores, hair salons, movie theaters, indoor restaurants, etc. More than three households might gather, whereas in the at-home context, only three households were allowed together.

13:30

The dissenters, by contrast, believed that the relevant comparator was simply at-home gatherings and the state restricted all at-home gatherings, whether religious or secular, to three households and so the dissenters believed that the law was neutral and generally applicable. But the case illustrates this important question of what's the comparator that should be used to determine whether a law is being neutrally and generally applied. In addition to the question of what comparator ought to be used in determining whether the law is neutral and generally applicable, this series of cases has presented other issues. The first we mentioned previously, why the change? Why a denial of injunctive relief in those first cases and now grant of relief or remand in light of opinions that have granted relief in these

later cases? There are at least three possible explanations. One, Justice Barrett joined the Court in October, after those initial decisions, and before the more recent ones. Another explanation may be that we're further along in the pandemic and have a greater understanding. Perhaps the Court was willing to defer to state authorities more at the beginning of this emergency situation where we knew less about the transmission of the virus and where states had a minimal amount of time to craft their restrictions. So that as the emergency has progressed, states have had more time, we understand better, or the Court has given less deference. And a third explanation may simply be factual differences and the Court's opinions certainly draw on this to point out that some of the restrictions in those, in the latter cases, were far more intrusive than the early ones. So it may be as a simple matter of the latter cases are factually distinguishable from those early ones. Another issue these cases presented is whether the Court has adopted a most favored nation approach to free exercise. In the trade context, if the United States enters a treaty with a trade agreement with France, for example, includes a most favored nation clause, and then the United States grants trade preferences to Germany that are better than the ones France has. France automatically qualifies for those preferences pursuant to this most favored nation clause. The suggestion is that the same applies to free exercise. That if there is any secular activity that receives more favorable treatment, then free exercise, that the law is not generally applicable and neutral and strict scrutiny applies. This analogy seems to only go so far, however, because if there is a secular activity that's treated more favorably than religious exercise and that secular activity is comparable to the exercise of free exercise at issue, the state may still prevail. And that difference may be constitutional, provided the state can prove a compelling interest and narrowly tailored means. So there may be a presumption toward the most favored nation status, but there's no guarantee that religious exercise will receive that same treatment, because the state may be able to

17:03

prove a compelling interest and narrowly tailored means. The final issue these cases have raised is whether the Court has implicitly overruled Employment Division v. Smith, in that threshold determination of whether the law is neutral and generally applicable. If the Court is applying such a demanding standard, it could be in effect, concluding that if there is a burden on free exercise, then the law is not neutral and not generally applicable, such as this strict scrutiny would apply. It's interesting to read the tea leaves of Supreme Court cases, and we may be able to draw support for that theory from these cases. But there is a case, Fulton v. City of Philadelphia, which directly presents that question of whether the Court ought to overrule Employment Division v. Smith and so we can look to that case, rather than read the tea leaves here. And fortunately, for us today, we have Professor Stephanie Barclay, a real expert in the religion clauses who will discuss Fulton v. City of Philadelphia. So I'll turn the time over to her, thanking you for your participation and interest in this series of cases, addressing COVID-19, which has affected us all, and in which the course has given us a glimpse into how it perceives restrictions on religious worship, even in emergency conditions. Thank you.

18:45

My name is Professor Stephanie Barclay and I'm an Associate Professor of Law at Notre Dame Law School. Thanks for having me at BYU’s Supreme Court Roundup. It's great to be back with the BYU community, even if just virtually. I've been asked to speak today about the case pending before the Supreme Court right now: Fulton v. City of Philadelphia. This is a case that might be one of the most consequential cases of the term when it comes to questions of how the Court is going to offer

protections for a pluralistic society where people have deep disagreements about important issues including religious beliefs that have to do with things like marriage, and issues relating to adoption, and faith-based agencies in the foster care context. This case is presenting though issues of consequence, not just for religious foster care and adoption providers, but for the meaning of the free exercise clause in general. So this case involves Catholic Social Services of Philadelphia, which pioneered care for orphans and foster care in the city. It's been doing that work for more than a century. In fact, in many ways, Catholic social services is the group that started foster care in Philadelphia. This agency partners with parents like Sharon L. Fulton and Tony Sins Bush to care for children. But in 2018, city officials began using their monopoly power over foster care to exclude CSS and foster parents like Fulton from taking in more foster children. In other words, the city has control over foster care, and only those groups that contract with the city are able to perform foster care. And the city in 2018, told this Catholic social service agency that if they were unwilling to promise that if a same-sex couple ever came to them, they'd be willing to certify such a couple. They were unwilling to make that promise and they would not qualify for the normal contract with the city anymore to provide foster care for them, for the children, some of the most vulnerable children in the city who need more homes. The city officials took this step because, what they found out through news reports is that Catholic social services religious beliefs are that they can't provide a written home study endorsing a same-sex couple, a document that really evaluates relationships, adult relationships is what the home study is. Ethics social services said instead, what they would do, is things that other agencies do for lots of secular reasons. Catholic social services would provide a referral to help that family find an agency that's right for them. No same-sex couple has ever requested this sort of home study from Catholic social services and, nevertheless, the city stopped placing any children with Catholic social services. That same month, the city acknowledged that it had a shortage of over 300 beds for children who were in group homes who desperately needed to be in a safe foster family. Catholic social services at the time when that shut-down happened let the city know they had over 30 beds waiting, some with award-winning foster parents, and the city would not continue to place children with those families. So the Supreme Court granted certiorari to consider not only whether Philadelphia's actions violate the First Amendment, but also whether to revisit its 1990 decision in Employment Division v. Smith. That decision, which promised a more administrable standard for free exercise claims, has splintered in the lower courts over its interpretation. Just a couple of years ago, in a statement respecting a certain denial in Kennedy v. Bremerton, four justices on the Supreme Court openly criticized Smith, as a decision that drastically cut back on Free Exercise protections. In Fulton, this is a question that the Court might consider overruling Smith, or it could find another way to clarify what Smith means. One interesting thing to keep an eye on is that between that

23:07

opinion, respecting a certain Island, Kennedy versus Bremerton, and now there has been a number of other decisions that have come out from the Supreme Court in the COVID context, which other speakers might be speaking about, that has clarified and what it means under Employment Division v. Smith for a law to not be neutral or generally applicable and have verified that it's a pretty rigorous standard and that lots of laws will be subject to strict scrutiny if they don't treat religious groups and religious beliefs in an even-handed way that they do with other sorts of secular beliefs. And the way we judge that even-handedness is we look at the interest that the government has identified that it is trying to advance, and then we look at how much secular exemptions the government allows, undercut that

sort of interest compared to the same sort of religious exemption that religious groups are asking for. A lot of the briefing in this case, in the Fulton case, talk about how, you know, Obergefell v. Hodges, the famous Supreme Court case that was deciding the right for same-sex marriage in this country, that case also called decent and honorable religious beliefs about sex and marriage that were traditional beliefs. And so the briefing on the part of the city pointed out, or excuse me, part of the Catholic social services and the family pointed out that this is a country where we should be able to have people who have different beliefs about important issues like marriage, but who can still live and let live and be part of our pluralistic society. The government, on the other hand, made arguments about the fact that this is a government contract and so, government contract, government money, government rules, and government should be able to require whatever it wants to contractors in ways that don't trigger strict scrutiny. In oral argument, some of the justices seemed pretty skeptical of that argument, in part because this contract doesn't just operate as a contract providing money, but it essentially operates as a license whereby entities cannot perform these services, foster care, without that contract. So it authorizes them to do so. There was also a lot of discussion during oral argument, including from Justices Breyer and Kagan about wasn't there a better way or some other way that the city could have resolved this issue that we could have all gotten along without kicking Catholic Social Services out of this arena, and Justice Alito suggested that the city had essentially manufactured an unnecessary fight. It will be something to keep an eye on in terms of the Court's ruling. Trying to think about, are there ways in a diverse religious pluralistic society that we can try and avoid unnecessary conflicts and protect religious beliefs when it's not actually doing things that conflict with the ability of other citizens to access goods and services and participation in society that is important to them as well. So by this, by the time this case is decided, maybe sometime this summer, we may be looking back in appreciation on a term where the Court is making clear that despite a lot of raging partisan disputes across the landscape that we've seen in the last year or so, at least in the context of religious liberty, this is one arena where a robust understanding of religious liberty can be a peacemaking mechanism, one that offers the prospect of de-escalating culture wars, and preserving as the Supreme Court has said elsewhere, a society in which people of all beliefs can live together harmoniously. Thanks so much.

26:58

Thank you, Dave and Stephanie, for sharing your insight on current Supreme Court jurisprudence. On behalf of the organizers, I want to give a special thanks to our speakers, the Spanish interpreters, and the media, communications, and administrative teams that made this conference possible. A project of this scope requires the combined talent and hard work of so many people. I'm grateful for the wonderful people behind the scenes that you haven't met. This conference has given us a wonderful chance to reflect on the challenges and opportunities for faith traditions and believers to engage with the public life of our nation. Commentator David French recently noted that, “as Christians,” and I would add, this is true believers and nonbelievers of all stripes, “We don't discuss enough how to live in the public square. We discuss what we believe, but not how to live it. So how do we live in the public square? How do we live together at all? How can we come together as a country, despite the deep partisan and personal divides that we've been hearing about and seeing?” When I told one experienced Politico the title for this conference, Religion’s Role in Overcoming Divides and Strengthening American Democracy, he laughed. And it's true. Religion has deepened divides and contributed to partisan differences. It can fuel our political engagement, but too often does so in ugly and harsh ways. How can we assert that religion can unify us and promote democracy? One thing that's come out of the

conference is that we can re-ground our religious beliefs in religion. Shadi Hamid of the Brookings Institution, himself a Muslim, recently wrote, “As Christianity's hold in particular has weakened, ideological intensity and fragmentation have arisen. American faith, it turns out,” he says, “is as fervent as ever. It's just that what was once a religious belief has now been channeled into political belief. Political debates,” he says, “over what America is supposed to mean, has taken on the character of theological disputations. This is what religion without religion looks like.” We heard from Andrew Whitehead whose research echoes this, suggesting that the idea of Christian nationalism is actually more of a cultural category, associated with exclusive claims to a racialized Christian national identity, rather than a set of religious beliefs. In fact, as he mentioned, the hostility to a pluralist democracy and religious freedom for all that are associated with this group actually declines when individuals engage in regular forms of individual worship and religious practice. Religion makes a difference. But being not of the world doesn't entirely solve the problem about how to be religious in the world. I'm grateful for our speakers who suggested some thoughtful and productive ways for believers to engage with the democratic process. Pete Werner talked about the need, “to articulate and show we take seriously Christian anthropology,” that is recognizing that we and “others, including those with whom we disagree, are also made in the image of God.” The power of this deep commitment to human dignity stemming from religious belief in the brotherhood and sisterhood of all humans was also powerfully invoked by Elder Whitney Clayton and Brett Scharffs. Peter Werner also drew on other religious virtues such as humility, epistemic modesty, and grace. Elder and Sister Renlund gave us a concrete model of a principle and faithful way to engage with politics, and Joseph Smith's candidacy for President in the United States. They illustrated how he drew on his commitment to constitutional principles while recognizing continuing problems like slavery that still needed action. The Renlunds also illustrated how Joseph Smith's political stands were grounded in his faith and personal experience and led him to fight for the rights of others, especially with regards to religious freedom. As Modine highlights, how in our day, the compelling need to defend the religious freedom of others continues. She suggested that we can step away from the “ferocious politicization of everything” by engaging in the principal defense of the religious freedom of all, a theme echoed by the panelists discussing civil religion, nationalism, and patriotism. So where does that leave us? What can we do as individuals? How can religion and believers help overcome divides and strengthen democracy?

32:00

The Renlunds suggest that as Joseph Smith said, “did what we are encouraged to do today; to protect your democratic rights, participate, right to elected leaders, run for office, speak up.” Our nation has a history, they say, demonstrating that unless citizens demand that the government protect democratic freedoms, these rights can be ignored or unequally applied, especially for minorities. President Oaks said, “We must exercise our influence civilly and peacefully within the framework of our constitutions and applicable laws.” On contested issues, he said, and the panel has spent time discussing this, “We should seek to moderate and unify.”

Now, as individuals, we can't do everything, and thankfully don't need to do everything. As President Oaks taught, we should, “Seek inspiration on how to exercise our influence, according to our individual priorities.” He reminded us that, “We should trust in the Lord and be positive about this nation's future.” Religion has been and can continue to be, a healing and inspiring influence in America. From John Winthrop sitting on a hill, to the 1000 Points of Light Brett mentioned, to Amanda Gorman's inaugural poem, we’re reminded in her words, “There is always light, if we're brave enough to see it. If only we're

brave enough to be it." As we prayerfully and carefully engage in the public square, with humility, grace, and faith, we can be a blessing to those around us, and help to heal the rifts in our communities. I know that as a follower of Christ, I can do a better job of holding up His light to the world by being a witness of him in my actions, including those in the political square. As He taught in the Book of Mormon, "Therefore hold up your light, that it may shine unto the world. Behold, I am the light which ye shall hold up that which ye have seen me do." May we all hold up our lights, see the divine light in others and be a light and a beacon to others in our country and in our world. Thank you.