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*The Law of Church and State: Opinions of Judge Samuel
Alito*

Angie A. Welborn, American Law Division

December 12, 2005

Abstract. Judge Samuel Alito, who has been nominated by President Bush to take retiring Justice Sandra Day O'Connor's seat as associate justice of the U.S. Supreme Court, has been a judge on the U.S. Court of Appeals for the Third Circuit since 1990. This report provides an overview of opinions addressing issues related to the law of church and state written by Judge Alito while serving on the Third Circuit and Supreme Court precedent relevant to those cases. Other opinions, which Judge Alito joined but did not write, are also briefly discussed.

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The Law of Church and State: Opinions of Judge Samuel Alito

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The Law of Church and State: Opinions of Judge Samuel Alito

Summary

Judge Samuel Alito, who has been nominated by President Bush to take retiring Justice Sandra Day O'Connor's seat as associate justice of the U.S. Supreme Court, has been a judge on the U.S. Court of Appeals for the Third Circuit since 1990. This report provides an overview of opinions addressing issues related to the law of church and state written by Judge Alito while serving on the Third Circuit and Supreme Court precedent relevant to those cases. Other opinions, which Judge Alito joined but did not write, are also briefly discussed. This report will not be updated.

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The Law of Church and State: Opinions of Judge Samuel Alito

Establishment Clause Cases

The Establishment Clause¹ cases before the Third Circuit for which Judge Alito wrote opinions primarily address two areas: the public display of religious symbols and religious expression in public schools. In addressing each of these areas, Judge Alito appears to have consistently applied Supreme Court precedent.

Public Display of Religious Symbols

The Supreme Court addressed the issue of public holiday displays in two separate cases in the 1980's. In *Lynch v. Donnelly*, the Court, applying the *Lemon* test,² held that a city's holiday display did not violate the Establishment Clause.³ The display in question, located in a park owned by a nonprofit organization in the heart of the shopping district, was erected by the city and included a Santa Claus house, reindeer pulling Santa's sleigh, candy-striped poles, a Christmas tree, carolers, cutout figures representing such characters as a clown, an elephant, and a teddy bear, hundreds of colored lights, a large banner that read "SEASONS GREETINGS," and a creche, or nativity, scene.⁴ The Court concluded that the city had not impermissibly advanced religion by erecting the display, and including the creche had not created excessive entanglement between religion and government.⁵ In a later case, *County of Allegheny v. American Civil Liberties Union*, the Court did strike down the display of a creche in a city and county owned building finding because it was located in a prominent position on the "Grand Staircase" of the building and was not included in a larger display a reasonable observer would likely infer that it

¹ The First Amendment to the United States Constitution reads as follows: Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; of abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances. U.S. Const. Amd. 1. The first clause is often referred to as the Establishment Clause and has been interpreted by the Supreme Court to generally prohibit "what may be deemed governmental promotion of religious doctrine." United States Constitution Annotated, [http://www.crs.gov/products/conan/Amendment01/topic_1_2.html].

² See *Lemon v. Kurtzman*, 403 U.S. 672 (1971). *Lemon* set forth a tripartite test for evaluating the constitutionality of government action under the establishment clause, requiring that government action serve a secular purpose, not have a primary effect of advancing religion, and not precipitate excessive government entanglement with religion.

³ 465 U.S. 668 (1984).

⁴ 465 U.S. at 671.

⁵ *Id.* at 685.

expressed views endorsed by the city and county governments.⁶ The Court did, however, uphold the display of a menorah and a Christmas tree with a sign “saluting liberty” outside the building, noting that these display items had secular as well as religious significance, and could not therefore be construed as endorsing either religion.⁷

In 1999, Judge Alito writing for the Third Circuit, held that a Jersey City holiday display was “indistinguishable in any constitutionally significant respect from the displays upheld by the Supreme Court in [*Lynch* and *Allegheny*].”⁸ Judge Alito noted that the Jersey City display resembled the display upheld in *Lynch* in several “important respects,” among them the inclusion of religious and secular symbols and secular signs or banners.⁹ The only notable difference in the two displays was that the display upheld in *Lynch* was on private property while the Jersey City display was on public land. Judge Alito found that the Supreme Court did not “attribute constitutional significance” to the fact that the display in *Lynch* was on private property, therefore the fact that the Jersey City display was on public land “does not in itself provide a valid basis for holding the display to be unconstitutional.”¹⁰

A similar case before the court two years later was vacated and remanded after Judge Alito, writing for the court, found that the plaintiffs lacked standing to challenge the display.¹¹ The opinion did not address the merits of the case.

Religious Expression in Public Schools

With respect to religious expression in public schools, the Supreme Court has addressed a number of specific scenarios without addressing the issue in broader terms, consistently stating that these types of cases are very fact specific. Judge Alito’s written opinion in this area concerned the distribution of materials from a religious-based organization by the school along with materials from nonreligious organizations. The Supreme Court has not addressed this issue specifically, but has held that students have a legal right to meet together in school facilities for religious purposes on the same basis as they may meet together for other noncurricular purposes,¹² and that outside religious groups cannot be discriminated against in the after-school use of school facilities where

⁶ 429 U.S. 573, 599 (1989).

⁷ 429 U.S. at 616.

⁸ *American Civil Liberties Union of New Jersey v. Schundler*, 168 F.3d 92 (3rd Cir. 1999).

⁹ *American Civil Liberties Union of Jersey v. Schundler*, 168 F.3d 92, 104 (3rd Cir. 1999).

¹⁰ *Id.* at 104, 107. Justice O’Connor did cite the location of one display invalidated in the *Allegheny* case as being of some significance, but distinguished that display, located inside the courthouse on the grand staircase, from the constitutionally valid display outside the courthouse on the basis of the content of the display, rather than the location. *See also Van Orden v. Perry*, 125 S. Ct. 2854 (2005); *McCreary County v. ACLU of Kentucky*, 125 S. Ct. 2722 (2005).

¹¹ *American Civil Liberties Union of New Jersey v. Township of Wall*, 246 F.3d 258 (3rd Cir. 2001).

¹² *See Widmar v. Vincent*, 454 U.S. 263 (1981); *Board of Education of Westside Community Schools v. Mergens*, 496 U.S. 226 (1990).

the school allows such facilities be used by outside groups.¹³ In *Rosenberger v. Rector and Visitors of the University of Virginia*, the Court addressed another issue regarding student religious speech, namely, the constitutionality of excluding a student religious publication from a college program subsidizing the printing costs of all other student publications. The Court held that the exclusion of the student religious publication from the subsidy program amounted to viewpoint discrimination in violation of the free speech clause of the First Amendment.¹⁴ The Court also found that including the religious publication would not violate the Establishment Clause.¹⁵

In 2004, Judge Alito, writing for the Third Circuit, issued an opinion rejecting a school district's argument that it prohibited a religious-based organization from distributing written materials at the school due to concerns about violating the Establishment Clause.¹⁶ Judge Alito rejected the school district's contention that the materials being distributed would be considered school or government speech, noting that the Supreme Court in *Rosenberger* held that "when a school or other government body facilitates the expression of 'a diversity of views from private speakers,' the resulting expression is private."¹⁷ Judge Alito noted that while the Supreme Court "has not settled the question whether a concern about a possible Establishment Clause violation can justify viewpoint discrimination," the Court has "rejected the position that the Establishment Clause even justifies, much less requires, a refusal to extend free speech rights to religious speakers who participate in broad-reaching government programs neutral in design."¹⁸

Judge Alito also applied Supreme Court precedent regarding the endorsement test, favored by Justice O'Connor; the *Lemon* test, used in a number of Establishment Clause cases; and the "coercion" test, favored in cases involving prayer in public schools.¹⁹ Under all of these tests, Judge Alito determined that allowing the organization's flyers to be distributed by the school would not violate the Establishment Clause.

¹³ See *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993).

¹⁴ 515 U.S. 819 (1995).

¹⁵ 515 U.S. at 834.

¹⁶ *Child Evangelism Fellowship of New Jersey, Inc. v. Stafford Township School District*, 386 F.3d 514 (3rd Cir. 2004).

¹⁷ 386 F.3d at 524, citing *Rosenberger*, 515 U.S. 819, 834 (1995).

¹⁸ *Id.* at 530, citing *Rosenberger* at 839.

¹⁹ 386 F.3d at 530 - 535.

Free Exercise Clause Cases

The Free Exercise Clause²⁰ cases for which Judge Alito wrote opinions generally address religious exemptions to generally applicable laws when other exemptions are provided. As with the Establishment Clause cases, Judge Alito appears to consistently apply Supreme Court precedent in this area.

In *Employment Division v. Smith*,²¹ the Supreme Court held that the Free Exercise Clause was not violated when a state denied unemployment benefits to a person who, for religious reasons, violated a state ban on use of the drug peyote.²² The Court held that the Clause was not violated when the burden placed on a religious practice was not the government's objective, but an "incidental effect" of a "neutral and generally applicable" law.²³ The Court stated that "the mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities."²⁴ Thus, the Court concluded, such general laws will not be subject to strict scrutiny under the Free Exercise Clause.²⁵ However, in so doing, the Court did not overrule prior precedent regarding the applicability of a strict scrutiny analysis in other types of case.²⁶ After *Smith*, there are three types of cases where the Court still requires a compelling interest: government actions that intentionally discriminate against religion, denials of unemployment compensation to persons who lost their job due to conflict between their faith and requirements of their job, and in hybrid cases where a free exercise claim is joined with another constitutional claim.²⁷ The Court expanded on this application of pre-*Smith* precedent in *Church of Lukumi Babalu Aye v. City of Hialeah*, where it invalidated a city ordinance that specifically targeted certain

²⁰ See *supra* n. 1. The second clause of the First Amendment to the United States Constitution is often referred to as the Free Exercise Clause and has been interpreted by the Supreme Court to "secure religious liberty in the individual by prohibiting any invasions there by civil authority" by prohibiting the "misuse of secular governmental programs "to impede the observance of one or all religions or . . . to discriminate invidiously between religions . . . even though the burden may be characterized as being only indirect." United States Constitution Annotated, [http://www.crs.gov/products/conan/Amendment01/topic_2.html].

²¹ 494 U.S. 872 (1990).

²² 494 U.S. at 890.

²³ *Id.* at 878.

²⁴ *Id.*, quoting *Minersville Sch. Dist. Bd. of Educ. v. Gobitis*, 310 U.S. 586, 594-95 (1940).

²⁵ See 494 U.S. at 882. Under a strict scrutiny analysis the reviewing court generally requires that the government show that it has a compelling interest in prohibiting a certain activity or imposing restrictions on a particular activity and the method chosen to prohibit or restrict the activity is the least restrictive means to further the articulated interest. See United States Constitution Annotated, [http://www.crs.gov/products/conan/Amendment01/topic_3_5_7.html].

²⁶ 494 U.S. at 881-884.

²⁷ *Id.*

religious practices by a Santeria church.²⁸ In this case, the Court reiterated that a compelling interest is required where laws fail to satisfy the *Smith* requirements of neutrality and general applicability.²⁹

In 1999, the Third Circuit considered a case regarding the constitutionality of a Newark Police Department policy prohibiting the wearing of beards by police officers absent a medical condition that makes shaving painful.³⁰ Judge Alito, writing for the court, found that the policy violated the Free Exercise Clause of the First Amendment because while the Department made exemptions for medical reasons, it did not provide justification for refusing to provide exemptions for religious reasons.³¹ In his opinion, Judge Alito discussed the Supreme Court's decisions in *Smith* and *Lukumi* and determined that the Department's refusal to make religious exemptions should be reviewed under strict scrutiny.³² Judge Alito cited a passage from *Lukumi* where the Court stated that "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."³³ The Department argued that it had to allow medical exemptions under the Americans With Disabilities Act, but contended that religious exemptions were not required by law. Judge Alito rejected this position, noting that Title VII³⁴ imposed on employers a duty to accommodate religious practices, and found that the Department failed to offer "any interest in defense of its policy that is able to withstand any form of heightened scrutiny."³⁵

In 2004, Judge Alito wrote another opinion regarding religious exemptions from generally applicable laws. In *Blackhawk v. Commonwealth of Pennsylvania*, Judge Alito agreed with a lower federal court in finding that Blackhawk's free exercise rights were violated when the Commonwealth of Pennsylvania refused to exempt religiously motivated activities from the permit fee required by law to keep wildlife in captivity.³⁶ Judge Alito determined that since the Commonwealth provided exemptions for certain

²⁸ 508 U.S. 520 (1993).

²⁹ 508 U.S. at 531-532.

³⁰ *Fraternal Order of Police v. City of Newark*, 170 F.3d 359 (3rd Cir. 1999).

³¹ 170 F.3d at 360.

³² *Id.* at 364.

³³ *Id.*, citing *Lukumi*, 508 U.S. at 537-38.

³⁴ Title VII of the Civil Rights Act of 1964, provides that it shall be an unlawful employment practice for an employer--

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin. 42 U.S.C. 2000e-2.

³⁵ *Id.* at 366.

³⁶ 381 F.3d 202 (3rd Cir. 2004).

nonreligious activities, its refusal to provide an exemption for religious activities involving wild animals would be subject to a strict scrutiny analysis. The Commonwealth offered as justification an interest in reducing the number of wild animals held in captivity arguing that keeping such animals captive is “inconsistent with state wildlife policy unless doing so provides a ‘tangible benefit’ for the state’s wild animals.”³⁷ The court rejected this justification finding that the Commonwealth had failed to define what constituted a tangible benefit, and thus determined that the Commonwealth failed to provide a sufficiently compelling justification for its refusal.³⁸ Judge Alito, writing for the court, determined that even if the Commonwealth’s asserted interests were compelling, the fee scheme was not narrowly tailored to further those interests since the policy in place does not “categorically disfavor the keeping of wild animals in captivity.”³⁹

Opinions Joined by Judge Alito

The Third Circuit considered several other cases regarding the religion clauses of the First Amendment while Judge Alito was on the bench. These cases are briefly summarized below. Judge Alito joined the majority’s opinion unless otherwise noted. None of the opinions discussed below was written by Judge Alito and for that reason may not accurately reflect his analysis of the issue before the court.

Rights of Institutionalized Persons

In *Dehart v. Horn*, the Third Circuit reversed the district court’s granting of summary judgment for the Pennsylvania State Correctional Institute in a case involving an inmate’s claim that his free exercise rights had been violated by the Institute’s failure to provide him with a vegetarian diet.⁴⁰ In so doing, the Third Circuit used the Supreme Court’s “Turner analysis” to determine that the plaintiff could have a cognizable constitutional claim and remanded the case for further proceedings.⁴¹

The Third Circuit again reversed the district court’s grant of summary judgment in a case regarding the burden of proof an inmate must overcome when alleging that prison officials have retaliated against him for exercising his constitutional rights. In *Rauser v. Horn*, the court determined that a “reasonable jury could determine that Rauser’s protected conduct was a motivating factor in the Department of Correction’s decision to

³⁷ 381 F.3d at 210.

³⁸ *Id.*

³⁹ 381 F.3d at 210, 214.

⁴⁰ 227 F.3d 47 (3rd Cir. 2000).

⁴¹ *Id.* at 51 - 60. In *Turner v. Safley*, the Supreme Court articulated the standard for reviewing a prison regulation challenged on constitutional grounds and requires the reviewing court to balance the inmate’s constitutional claims with the administrative and security concerns of the prison. *See* 482 U.S. 78 (1987).

transfer him, cut his wages and deny him parole,” and remanded the case for further proceedings.⁴²

The district court’s grant of summary judgment was upheld in a subsequent case addressing prison restrictions on the wearing of certain religious apparel. In *Ash-Bey v. Fauntleroy*, the Third Circuit, in a *per curiam*, opinion held that the prison’s restrictions were “reasonably related to legitimate penological interests” and did not impose a “substantial burden” on religious exercise.”⁴³

In *Nelson v. Horn*, the Third Circuit, in a *per curiam* opinion, vacated the district court’s dismissal of an inmate’s retaliation and free exercise claims.⁴⁴ The court found that Nelson should be allowed to go forward with his claims, which were based on the parole board’s requirement that he participate in a religious-based drug treatment program and subsequent denial of his parole when he refused to participate in such a program.

Religious Expression in Public Schools

In a case involving the Equal Access Act,⁴⁵ the Third Circuit found that the defendant board of education violated the act by refusing to certify the plaintiff’s bible club as a student organization and accord it equal treatment with other student groups.⁴⁶ The court found that East Brunswick failed to close its limited open forum, which it had created by allowing noncurriculum related student groups to meet on school premises. Since the school created such a forum, it could not discriminate against clubs based on the religious content of the speech at their meetings and was, therefore, required to recognize the plaintiff’s bible club and accord it equal treatment.⁴⁷

In *American Civil Liberties Union of New Jersey v. Black Horse Pike Regional Board of Education*, the Third Circuit invalidated a policy adopted by the Board that allowed a vote of the senior class to determine if prayer will be included in high school graduation ceremonies as violative of the Establishment Clause of the First Amendment.⁴⁸ Judge Alito joined the dissent authored by Judge Mansmann which argued that the

⁴² 241 F.3d 330, 334 (3rd Cir. 2001).

⁴³ 27 Fed. Appx. 135 (3rd Cir. 2002).

⁴⁴ 138 Fed. Appx. 411 (3rd Cir. 2005).

⁴⁵ 20 U.S.C. 4071 - 4074. Under the Equal Access Act, if a public secondary school receives federal financial assistance and has a "limited open forum," it may not discriminate against or deny equal access to student groups based on the religious or other content-based nature of the speech at their proposed meetings. A public secondary school has a “limited open forum” whenever such school grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time.

⁴⁶ *Pope v. East Brunswick Board of Education*, 12 F.3d 1244 (3rd Cir. 1993).

⁴⁷ 12 F.3d at 1251 - 1253.

⁴⁸ 84 F.3d 1471 (3rd Cir. 1996). In 2000, the Supreme Court invalidated a similar policy that applied to prayer at football games. *See Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000).

Establishment Clause claims should have been examined in conjunction with the Free Exercise Clause.⁴⁹ Judge Mansmann’s dissent argued that the graduates’ free exercise and free speech rights should be balanced against any “compelling state interest which might otherwise justify impinging these guarantees.”⁵⁰ Based upon this argument, Mansmann found that the “free exercise and free expression rights of the graduating class . . . must prevail.”⁵¹

Free Exercise Cases

In *Abundant Life Ministries v. Borough of Mahaffey*, the Third Circuit reversed the district court’s grant of summary judgment in favor of the Borough on the plaintiffs free exercise claims.⁵² The plaintiff argued that the Borough violated its free exercise rights by intentionally impeding access to its tent revival meetings. The court determined that the district court improperly granted summary judgment in favor of the defendants by focusing on the wrong issue, specifically the court did not consider whether there was sufficient evidence to create a material issue of fact regarding whether the defendants intentionally impeded the plaintiff’s religious activity.⁵³

In an employment discrimination case, the Third Circuit upheld the decision of the district court regarding whether a state hospital had reasonably accommodated the religious beliefs and practices of a staff nurse.⁵⁴ The nurse refused to participate in any procedure which she perceived to directly or indirectly end the life of a fetus and was terminated after refusing to participate in two such procedures. The court found that the hospital had attempted to accommodate the nurse’s religious beliefs and that her refusal to cooperate in the hospital’s attempt was unjustified.⁵⁵ The court also rejected the nurse’s free exercise and viewpoint discrimination claims.⁵⁶

⁴⁹ 84 F.3d at 1489.

⁵⁰ *Id.*

⁵¹ *Id.* at 1497.

⁵² 35 F.3d 846 (3rd Cir. 1994).

⁵³ 35 F.3d at 850.

⁵⁴ *Shelton v. University of Medicine & Dentistry of New Jersey*, 223 F.3d 220 (3rd Cir. 2000).

⁵⁵ 223 F.3d at 228.

⁵⁶ *Id.* at 229.