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Constitutional Law - Vernon v. City of Los Angeles, et al.: Government Employer May Investigate Employee's Religious Beliefs To Determine Whether Beliefs Affect Job Performance

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CONSTITUTIONAL LAW

VERNON v. CITY OF LOS ANGELES, ET AL.: GOVERNMENT EMPLOYER MAY INVESTIGATE EMPLOYEE'S RELIGIOUS BELIEFS TO DETERMINE WHETHER BELIEFS AFFECT JOB PERFORMANCE

I. INTRODUCTION

In *Vernon v. City of Los Angeles, et al.*,[1] the Ninth Circuit held that the city of Los Angeles' investigation of its assistant police chief's religious beliefs did not violate his state or federal civil rights.[2]

II. FACTS AND PROCEDURAL HISTORY

In November of 1991, Robert L. Vernon, a thirty-eight year veteran[3] of the Los Angeles Police Department (hereinafter "LAPD"), held the position of Assistant Chief of Police.[4] Since 1984, Vernon has also served as an elder for the Grace Community Church (hereinafter "the Church"), a fundamentalist religious organization located in Sun Valley, California.[5]

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1. Vernon v. City of Los Angeles, et al., 27 F.3d 1385 (9th Cir. 1994) (per Fletcher, J., joined by Nelson, J., and Will, J., District Judge for the N.D. of Ill., sitting by designation).

2. *Id.* at 1388.

3. Appellant's Brief at 6, Vernon v. City of Los Angeles, 27 F.3d 1385 (9th Cir.) (No. 92-55473) (1994).

4. Vernon v. City of Los Angeles, 27 F.3d 1385, 1388 (9th Cir. 1994). In 1991 as Assistant Chief of Police of the LAPD, Vernon was second in command to Chief of Police, Daryl Gates, and was responsible for eighty-five percent of operations for the LAPD police force. *Id.*

5. *Id.* In 1991, the Grace Community Church had between 8,000 to 9,000

On May 5, 1991, an article in the Los Angeles Magazine criticized Vernon's involvement in the Church.[6] Quoting from audio tapes Vernon had made for the Church fifteen years earlier, the article portrayed Vernon as a man who condemned homosexuality, depicted police officers as "ministers of God," and admonished men to "recognize the concepts of disciplining followers, whether it be your son, employees or anyone under your control—your wife."[7]

After the publication of the article, Defendant Zev Yaroslavsky, a city councilman responsible for the LAPD, met with Michael Yamaki, a Los Angeles police commissioner.[8] Both men agreed to conduct an investigation to determine whether Vernon's religious beliefs had improperly affected his job performance.[9] Defendant Stanley Sheinbaum, a Los Angeles police commissioner, then publicly questioned whether Vernon still held the alleged views and whether those views were affecting his job performance.[10]

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members. John Dart, *Pastor's Blunt Words Roil Christian Waters,* L.A. TIMES, September 6, 1991, at B 1.

6. *The Dan Quayle Principle Strikes Again,* LOS ANGELES MAGAZINE, May 21, 1991, at 28. The article was one item in a one page layout entitled "Trends and Talk in Town." (One newspaper described the magazine section as a "local gossip column." Sally Ann Stewart, *L.A.'s Deputy Chief Has Troubles, Too,* U.S.A. TODAY, May 28, 1991, at 2A). The Los Angeles Magazine is a regional periodical published monthly with a circulation of approximately 173,000. BILL KATZ AND LINDA STERNBERG KATZ, *Magazines for Libraries,* 267 (R.R. Bowker, publ., 7th Ed. 1992).

7. *Vernon,* 27 F.3d at 1388. *See* Sally Ann Stewart, *supra* note 6, at 2A. The audio tapes quoted from were part of a six-part series endorsed by the Church and taught by Vernon in a religious class; the tapes were entitled "The True Masculine Role." *Vernon,* 27 F.3d at 1388.

8. *Vernon,* 27 F.3d at 1388. This meeting occurred on May 22, 1991, at a city council meeting to confirm Michael Yamaki as a police commissioner. *Id.*

9. *Id.* at 1389. Yaroslavsky had allegedly uncovered evidence suggesting that: (1) Vernon had made an unauthorized investigation of Chief of Police Daryl Gates because "God wants me to be chief;" (2) Vernon was unfair in his hiring and promoting practices, and advanced church members before others; (3) Vernon was known as a "bible thumper" and head of the LAPD "God Squad;" (4) Vernon had been influenced by his religious beliefs when dealing with issues of abortion, homosexuality and female officers within the LAPD; (5) Vernon pressured officers to attend church services; and (6) Vernon used religious symbols in official LAPD correspondence. *Id.* Vernon's lawyer denied, among other things, that Vernon said anything about God wanting him to be chief. Bill Boyarsky, *The Battle Within the LAPD,* L.A. TIMES, February 7, 1992, at B 2.

10. *Vernon,* 27 F.3d at 1389. This public questioning occurred on May 25, 1991. *Id.*

Yaroslavsky sent a letter listing his allegations to Defendant Melanie Lomax, acting President of the Board of Police Commissioners (hereinafter "the Board"), requesting an investigation.[11] Yaroslavsky then released this letter to the press.[12]

On June 4, 1991, the Board voted unanimously to request an investigation into Yaroslavsky's allegations.[13] The Board sent a memorandum to Police Chief Daryl Gates which stated in part: "[The] Board wishes only to ensure that Chief Vernon's personal beliefs have not created any adverse impact on any job-related matters and that he has not violated any Department policies or procedures."[14]

As a result of the Board's memorandum, Chief Gates began an investigation.[15] According to Gates, the investigation focused entirely on Vernon's on-duty conduct.[16] On November 26, 1991, after a five-month probe, the investigation was terminated and the Board took no further action with respect to the allegations concerning Vernon.[17]

Between May 1991 and the filing of the complaint, approximately 33 articles concerning the investigation of Vernon appeared in many prominent national newspapers and periodicals.[18] On at least one occasion, information concerning the

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11. *Id.* In the letter, Yaroslavsky wrote that Vernon was "entitled to his personal religious and political views . . . However, when one's views interfere with one's ability to perform official duties fairly . . . it is no longer a personal matter, but a matter of public policy. Allegations . . . deserve to be reviewed." *Id.*

12. *Id.* Yaroslavsky released the letter on May 3, 1991. Yamaki then released the letter to the press. Vernon responded by appearing on a local news station stating that, "[D]iscriminating against anyone because of their religious beliefs is against the law and deprives them of their civil rights." Appellant's Brief at 10, Vernon v. City of Los Angeles, 27 F.3d 1385 (9th Cir.) (No. 92-55473) (1994).

13. *Vernon,* 27 F.3d at 1389. Both Sheinbaum and Lomax made public statements. For example, Sheinbaum stated that it bothered him that "some allegations do claim [his religious belief] has impacted on his role as Assistant Police Chief." *Id.*

14. *Id.* at 1390.

15. *Id.* During the five months of investigation, the contents of the investigation were not disclosed to Vernon or to the public. *Id.*

16. *Id.* The court notes that "apparently no specific inquiry was made into Vernon's religious beliefs." *Id.*

17. *Id.* at 1390. Chief Gates formally reported to the Board that none of the allegations could be substantiated. *Id.*

18. *See, e.g.,* Henry Weinstein, *Vernon Granted Trial on Claim He Is Victim of*

investigation was televised on a nationally syndicated talk show.[19]

On November 4, 1991, Vernon filed an action in Los Angeles District Court against the City of Los Angeles, the City Council, the Board, Yaroslavsky, Sheinbaum, Brewer, and Lomax, claiming that the government's *investigation* had violated his First Amendment right to freedom of religious belief.[20] Vernon alleged that the *pre-investigation activities* and the *investigation* itself violated his federal constitutional rights under the Free Exercise and Establishment Clauses of the First Amendment,[21] the Due Process[22] and Equal Protection[23] Clauses of the Fourteenth Amendment, and Article I, Section 4 of the California Constitution.[24]

Furthermore, Vernon claimed that the actions of the de-

Religious Bias, L.A. TIMES, Feb. 25, 1992, at B3. Sally Ann Stewart, *L.A.'s Deputy Chief Has Troubles, Too,* U.S.A. TODAY, May 28, 1991, at 2A. Garry Abrams, *Don't Pack God in Your Lunch Box,* S.F. CHRON., July 30, 1991, at D3. Associated Press, *No. 2 L.A. Cop Faces Scrutiny for Preaching Views on Women, Gays Prompt Call for Probe,* S.F. CHRON., May 24, 1991, at A25. David Freed, *'Born-Again' Christians Who Also Carry a Badge, Piety in the Ranks Raises Concern in LAPD,* L.A. TIMES, July 12, 1987, at B 1.

19. Sheinbaum appeared on the nationally televised talk show "Geraldo" to discuss information regarding the investigation. Appellant's Brief at 15 n.5, Vernon v. City of Los Angeles, et al., 27 F.3d 1385 (9th Cir.) (No. 92-55473) (1994).

20. Vernon v. City of Los Angeles, 27 F.3d 1385, 1390 (9th Cir. 1994). Vernon asked for relief in the amount of ten million dollars. *See,* Bill Boyarsky, *The Battle Within the LAPD,* L.A. TIMES, Feb. 7, 1992, at B2. *See also,* Andrea Ford, *Vernon Loses Injunction Try in Flap Over Religion,* L.A. TIMES, Dec. 18, 1991, at B3. The attorney hired by Vernon, David Casterline, had successfully defended against a Wisconsin law that required members of the Amish Church to send their children to public school after the eighth grade. The case was a landmark one in the area of freedom of religion and constitutional law. Wisconsin v. Yoder, 406 U.S. 205 (1972).

21. U.S. CONST. amend. I. The Free Exercise and Establishment Clauses are found in the First Amendment to the United States Constitution which provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." *Id.*

22. U.S. CONST. amend. XIV. The Due Process Clause of the Fourteenth Amendment protects persons from unfair procedural, state actions.

23. U.S. CONST. amend. XIV. The Equal Protection Clause of the Fourteenth Amendment prohibits a state from denying to any person within its jurisdiction the equal protection of the laws. This clause requires that persons under like circumstances be given equal protection in the enjoyment of personal rights and the prevention and redress of wrongs.

24. CAL. CONST. art. 1, § 4. Article 1, section 4 of the California Constitution provides for the free exercise and enjoyment of religion.

fendants caused him extreme embarrassment, anxiety, and fear.[25] He also asserted that he had been prevented from the exercise of his religious beliefs, and alleged damage to his personal and professional reputation.[26]

The district court denied Vernon's motion for a preliminary injunction, and later granted the defendants' motion for summary judgment in its entirety.[27] The claims against Yaroslavsky were dismissed on grounds of absolute legislative immunity.[28] The court dismissed the claims against Brewer, stating that his alleged conduct did not rise to the level of a constitutional violation.[29] As to the free exercise claims against all defendants, the court found that Vernon failed to both allege or prove a constitutionally cognizable injury.[30] As to the Establishment Clause claims, the court found no triable issue of material fact, finding that the investigation passed the "*Lemon* Test."[31] Furthermore, the court found that the city's actions were justified by a compelling state interest and were narrowly tailored to serve that interest.[32] The court also dismissed the Equal Protection and Due Process Clause claims.[33]

Finally, the court dismissed the claims under Article I of

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25. *Vernon*, 27 F.3d at 1390.

26. *Id.* Vernon claimed that the investigation affected his worship, consultation with his pastor, participation in Christian fellowship, and giving public testimony to his faith without severe consequences. *Id.*

27. *Id.*

28. *Id.* Government officials performing discretionary functions generally have qualified immunity, shielding them from civil damages liability as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated. Anderson v. Creighton, 483 U.S. 635 (1987), *on remand* 724 F.Supp. 654 (1989), *aff'd* 922 F.2d 433 (1990).

29. *Vernon*, 27 F.3d at 1390.

30. *Id.*

31. *Id.* at 1391. The "*Lemon* Test" was first enunciated in Lemon v. Kurtzman, 403 U.S. 602 (1971). Generally, the test is a three-part method of determining whether the government is violating the Establishment Clause. *Id. See infra* notes 45-46 and accompanying text for a discussion of the "*Lemon* Test."

32. *Vernon*, 27 F.3d at 1391. A compelling state interest is one which the state is forced or obliged to protect. Coleman v. Coleman, 291 N.E.2d 530, 534 (Ohio 1972). Protecting against excessive state entanglement with religion has been held to be a compelling state interest. Rosenberger v. Rector and Visitors of Univ. of Virginia, 18 F.3d 269, 287 (4th Cir. 1994). A narrowly tailored action is one which is does not unduly affect interests other than the interest which the action is attempting to regulate. *Id.*

33. *Id.*

the California Constitution, stating that the analysis would not differ from that of the Free Exercise Clause and Establishment Clause claims under the Federal Constitution since in this particular instance state and federal law were coextensive.[34]

Vernon appealed on all claims.[35]

III. BACKGROUND

A. THE FIRST AMENDMENT AS THE BASIS FOR FREEDOM OF RELIGION

The basic premises of freedom of religion are found in the First Amendment of the United States Constitution. Two distinct clauses of the First Amendment protect religious freedom.[36] One is the Establishment Clause, which prohibits any law "respecting an establishment of religion."[37] The other is the Free Exercise Clause, which bans laws "prohibiting the free exercise of religion."[38]

The Establishment Clause and the Free Exercise Clause combine to protect the freedom of individuals to worship or not worship as they wish, without governmental interference that might encourage or discourage religion.[39] Both clauses are made applicable to the states by the Due Process Clause of the Fourteenth Amendment.[40]

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34. *Id.* The District Court found it unnecessary to address separately Vernon's state constitutional rights. *Id.*

35. *Id.*

36. U.S. CONST. amend. I.

37. *Id.*

38. *Id.*

39. Abington School District v. Schempp, 374 U.S. 203, 222 (1963).

40. U.S. CONST. amend. XIV. The Free Exercise Clause was first held applicable to the states in Cantwell v. Connecticut, 310 U.S. 296 (1940). The Establishment Clause was first held applicable to the states in Everson v. Board of Education, 330 U.S. 1 (1947), *rehr'g denied* 330 U.S. 855 (1947). *See*, NOWAK AND ROTUNDA, CONSTITUTIONAL LAW 1157 n.2 (4th ed. 1991).

1. *The Establishment Clause: The Wall Between Church and State*

The Establishment Clause prohibits laws "respecting an establishment of religion."[41] It is this clause which is said to create the "wall" between church and state.[42] In *Everson v. Board of Education*, the Court elaborated on what types of governmental actions would clearly violate the Establishment Clause.[43] The Court stated that government may not (1) set up an official church; (2) force or influence a person to profess a belief or disbelief in religion; (3) punish a person for entertaining or professing religious beliefs or disbeliefs; (4) prefer one religion over another; or (5) participate in the affairs of religious organizations.[44]

In *Lemon v. Kurtzman*, the Court applied a three-part test to determine whether the government was violating one of the above Establishment Clause prohibitions.[45] The governmental action must satisfy each of following conditions to be valid: (1) it must have a secular purpose; (2) its primary effect must neither advance nor inhibit religion; and (3) it must not foster excessive government entanglement.[46]

2. *The Free Exercise Clause: Freedom to Believe, Freedom to Act*

The Free Exercise Clause bars the government from mak-

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41. U.S. CONST. amend. I.

42. This "strict separation theory" attributed to Thomas Jefferson was accepted by both the majority and the dissenters in *Everson*, which upheld publicly funded transportation for parochial school pupils along with others. *See generally,* LAWRENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 1166 (Foundation Press, 2nd Ed. 1988), which further notes that "The very fact that Justices who agreed on the governing principle could divide so sharply on the result suggests that the principle evoked by the image of a wall furnishes less guidance than metaphor." *See also Everson,* 330 U.S. at 14.

43. Everson v. Board of Education, 330 U.S. 1, 15 (1947).

44. *Id.*

45. Lemon v. Kurtzman, 403 U.S 602, 612 (1971).

46. *Id. See* NOWAK, ROTUNDA, AND YOUNG, CONSTITUTIONAL LAW 851 (3d ed. 1986) in which the authors infer a fourth requirement that the governmental action must not create an excessive degree of political division along religious lines. The authors elaborate on the fourth condition by noting that it seems to be simply an aspect of the requirement of no "excessive entanglement."

ing any law "prohibiting the free exercise" of religion.[47] In practice, the Supreme Court has invalidated very few government actions on the basis of the Free Exercise Clause.[48]

The Free Exercise Clause strictly forbids the outlawing of any religious belief, but is ambiguous as to what types of conduct it may not prohibit.[49] Generally, when a government action negatively affects a particular type of conduct which has been dictated by an individual's religion, that act violates the Free Exercise Clause.[50] Furthermore, where the statute is not motivated by an intent to interfere with religiously-related conduct, but the statute nonetheless has that effect, the Court has applied a test of heightened scrutiny.[51] This means that the state, as defendant, must demonstrate first, that the regulation pursues a particularly important governmental goal, and second, that an exemption would substantially hinder the fulfillment of that goal.[52] This constitutional principle has been named the "Burdensome Effect" test.[53]

Currently, when state regulations have the unintended effect of burdening religious beliefs, the court will uphold such laws only when they are the least restrictive means of accomplishing a compelling state objective.[54] In particular, where

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47. U.S. CONST. amend. I. *See* Peyote Way Church of God, Inc. V. Smith, 742 F.2d 193, *on remand* 698 F.Supp. 1342 (5th Cir. 1984) for a detailed explication of the generalization, "freedom to believe, freedom to act."

48. ROTUNDA AND NOWAK, TREATISE ON CONSTITUTIONAL LAW 519 (2d ed. 1986).

49. *See, e.g.*, Bowen v. Roy, 476 U.S. 693, 699 (1986) (stating that the freedom of individual belief is absolute, but the freedom of individual conduct is not). *See also* Forest Hills Early Learning Center, Inc. v. Lukhard, 728 F.2d 230, 240 (4th Cir. 1984), *appeal after remand* 789 F.2d 295 (4th Cir. 1986).

50. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972) (striking down a law that negatively affected Amish home schooling by initiating compulsory high school attendance).

51. *See, e.g.*, Ogden v. U.S., 758 F.2d 1168, 1179 (7th Cir. 1985) (using the traditional standard of review utilized in First Amendment challenges in a civilian context: a state regulation of free exercise will be subjected to strict scrutiny and will be upheld only if it is narrowly drawn and justified by a compelling state interest).

52. *See* LAWRENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 1261-62 (2d ed. 1988).

53. *See, e.g.*, U.S. v. Columbus Mun. Sch. Dist., 558 F.2d 228, 231 (1977) (using the term "Burdensome Effect").

54. *See* Lyng v. Northwest Indian Cemetery Protective Assoc., 485 U.S. 439 (1986).

the state's objective could be served as well, or almost as well, by granting an exemption to those whose religious beliefs are burdened by the regulation, such an exemption must be given.[55]

The modern approach to exemptions is best seen in *Sherbert v. Verner*.[56] Sherbert, a Seventh Day Adventist, was fired for refusing to work on Saturdays, her religion's Sabbath.[57] All other available jobs required that she be willing to work on Saturdays.[58] The state refused to give her unemployment compensation benefits, stating that she had declined to accept "suitable work when offered."[59] The Supreme Court reversed and held that the state's refusal violated her right to the free exercise of her religion.[60] The Court reasoned that South Carolina's policy burdened Sherbert's free exercise of religion because it forced her to choose between receiving benefits and following her religion.[61] This choice placed "the same kind of burden upon the free exercise of religion as would a fine imposed against [her] for her Saturday worship."[62] Furthermore, the Court stated that there was a discriminatory component to the state's action, since Sunday worshippers did not have to make this choice.[63]

However, in order to win the suit, it was not enough that Sherbert prove that her free exercise rights were burdened.[64] The Court stated that Sherbert also had to prove that there was no compelling state interest that justified the government policy, and that the interest could be satisfied in a less burdensome manner.[65] In Sherbert's case, the Court found that no showing was made by the state that an exemption for Sabbat-

55. *See* Sherbert v. Verner, 374 U.S. 398, 403 (1963).
56. *Id.* at 398.
57. *Id.* at 402. Sherbert's employer operated a textile mill. *Id.* at 399.
58. *Id.* at 402.
59. *Sherbert*, 374 U.S. at 401.
60. *Id.* at 410.
61. *Id.* at 404.
62. *Sherbert*, 374 U.S. at 404.
63. *Id.*
64. *Id.* at 406.
65. *Id.*

arians would prevent the state from achieving its objective.[66]

B. RECENT DEVELOPMENTS

In recent cases, the Supreme Court has announced its willingness to reexamine its positions regarding the Establishment Clause and the Free Exercise Clause.

1. *The Establishment Clause: A Possible Movement Toward a One-Part Test*

The Supreme Court may be dissatisfied with the *Lemon* three-part test and may instead move to a single, one-part test.[67] If the Court rejects *Lemon* in the future, the Ninth Circuit's reliance on *Lemon* may be questionable.[68] In *Texas Monthly, Inc. v. Bullock*, the Supreme Court majority opinion stated that the main test was whether the law "constitutes an endorsement of one or another set of religious beliefs or of religion generally."[69]

Furthermore, in *Lee v. Weisman,* the Court was asked to abandon *Lemon*, but refused to do so.[70] The four dissenting Justices in *Lee* agreed that the three-part test should be replaced in favor of a test asking only whether government has coerced participation in, or endorsed, a sectarian observance.[71] Indeed, Justice Kennedy, author of the *Lee* majority opinion, suggested that the Court did not approve of the *Lemon* test, stating that *Lee* could be decided without reconsidering *Lem-*

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66. *Id.* at 19. The court stated, "[n]othing we say today constrains the states to adopt any particular form or scheme of unemployment compensation." *Id.*

67. Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989).

68. *Id.*

69. *Id.* at 17.

70. Lee v. Weisman, 112 S. Ct. 2649, 2655 (1992). The Court stated, "[T]hus we do not accept the invitation of petitioners and *amicus* the United States to reconsider our decision in *Lemon v. Kurtzman.*" *Id.* Justice Kennedy wrote the majority opinion. *Id.* at 2655. Justice Souter wrote an opinion concurring in both the judgment and the majority opinion that was joined by Justices Stevens and O'Connor. *Id.* at 2667. Justice Blackmun with whom Stevens and O'Connor join also filed an opinion in the case in which he noted that nothing in this decision formally altered, or was inconsistent with, the Court's Establishment Clause decisions during the previous two decades. *Id.* at 2611.

71. *See Lee,* 112 S. Ct at 2652 (Scalia, J. dissenting; with whom White, J., Thomas, J. and Rehnquist, C.J. joined).

on.[72] Justice Kennedy argued that the government conduct in *Lee*, the offering of a prayer at a public high school commencement, represented official government endorsement and coercion of religion.[73] Justice Kennedy found that such endorsement and coercion was a violation of the Establishment Clause no matter which standard was applied.[74] Therefore, if presented with a case that could not be easily decided without considering the *Lemon* test, the majority of the Court would likely abandon the test.[75]

2. *The Free Exercise Clause: An Increased Burden for Plaintiffs*

Recently, the Supreme Court has increased the plaintiff's burden in claims alleging a violation of Free Exercise rights. The Court has relaxed the standard it applies in testing government granted exemptions[76] and has given plaintiffs the added requirement of proving government coercion of religious activity.[77]

a. A Possible Departure from Strict Scrutiny in the Area of Exemptions

Employment Division v. Smith[78] suggests that the *Sherbert* rule, requiring exemptions to be given where feasible, will be dramatically cut back by the Rehnquist Court. In *Smith*, a 5-4 decision held that a generally applicable criminal law is automatically enforceable, apparently regardless of the degree of burden it causes on an individual's religious beliefs.[79] Therefore, it follows that a governmental refusal to

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72. *Id.* at 2655.
73. *Id.* at 2657.
74. *Id.*
75. *See Texas Monthly,* 489 U.S. 1; *see also Lee,* 112 S. Ct. 2649.
76. *See infra* notes 78-88 and accompanying text for further discussion.
77. *See infra* notes 89-96 and accompanying text for further discussion.
78. 494 U.S. 872 (1990).
79. *Id.* Smith was a Native American who participated in sacramental peyote use. Peyote had been determined by Oregon State to be a controlled substance. *Id.* at 874. The Supreme Court, in an opinion by Justice Scalia, held that: (1) the Free Exercise Clause did not prohibit application of Oregon drug laws to the ceremonial ingestion of peyote, and (2) thus the state could, consistent with the Free Exercise Clause, deny claimants unemployment compensation for work-related misconduct based on use of the drug. The majority wrote that "the right of free exer-

grant an exemption would no longer be held to the high standard of strict scrutiny.

Furthermore, although none of the recent cases involving the Free Exercise Clause have been explicitly overruled by the Supreme Court, it is important to note that the current Court has rejected the balancing test used in past decisions.[80] For example, in 1993, in *Church of Lukumi Babalu Aye, Inc.*,[81] the majority of the Court described the current Free Exercise Clause standard as follows:

> [A] law that is neutral and of general applicability need not be justified by a compelling government interest even if the law has the incidental effect of burdening a particular religious practice . . . A law failing to satisfy these requirements [the neutrality and general applicability requirements] must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest.[82]

The *Lukumi* Court endorsed the ruling in *Smith*, in which the Court had refused to require religiously based exemptions for a religiously neutral, generally applicable law prohibiting the use of certain drugs.[83] The *Lukumi* Court further endorsed the principle, recognized in *Smith*, that a law which is either designed to burden or suppress religious beliefs, or which prohibits an action solely because of its religious significance, violates the Free Exercise Clause.[84] A law that is not a religiously neutral law of general applicability will be subject to strict judicial scrutiny and the compelling interest test.[85]

In *Lukumi*, the unanimous Court invalidated a city ordinance that prohibited certain types of animal slaughter be-

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cise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes . . . conduct that his religion prescribes. . . ." *Id.* at 879.

80. ROTUNDA AND NOWAK, TREATISE ON CONSTITUTIONAL LAW 62 (2d ed. Supp. 1994).

81. 113 S. Ct 2217 (1993).

82. *Lukumi*, 113 S. Ct. at 2226 (1993).

83. *Smith*, 494 U.S. at 872.

84. *Id.*

85. *Id.*

cause the Court found that the ordinance was designed solely to suppress a particular religious sect.[86] The ordinance had prohibited virtually no other types of animal slaughter, except that used by the religious sect, and the city had not adopted the law until it was informed that the religious sect planned to conduct the slaughtering rituals within the city.[87] This city ordinance was invalidated by the Court because the city could not identify any compelling interest that would require banning only the type of animal slaughter used in the religion's rituals.[88]

Lukumi is significant because it illustrates the current Free Exercise Clause standard which disavows a balancing test, and because it constitutes a continuing endorsement of *Smith*.

b. A New Requirement of Coercion?

A related development concerns a possible new requirement of coercion when proving a violation of free exercise rights. It is well established that the courts will not grant an individual an absolute right to practice his or her religion free from all governmental interference.[89] On the other hand, the government may not actively "coerce" the individual to act or not act religiously.[90] Somewhere between these two extremes lies government action which does not coerce, but which nonetheless has the effect of making it much more difficult for the individual to practice his or her religion.[91]

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86. *Lukumi,* 113 S. Ct. at 2221.

87. *Id.*

88. *Id.*

89. *See* Bollenbach v. Board of Educ. of Monroe-Woodbury Cent. School Dist., 659 F.Supp at 1467 (S.D.N.Y. 1987), standing for the proposition that although there is an absolute freedom to hold religious beliefs, the freedom to act upon those beliefs is not absolute. *See also* Alabama and Coushatta Tribes of Texas v. Trustees of Big Sandy Independent School Dist., 817 F.Supp. at 1330 (E.D. Tex. 1993).

90. Bowen v. Roy, 476 U.S. at 699-700 (stating that "the Government may not insist that [people] engage in any set form of religious observance").

91. *See infra* notes 92-95 and accompanying text for further discussion on the modern resolution of these two extremes.

Until recently, the Supreme Court found that this "middle ground" government action violated the Free Exercise Clause.[92] However, in 1988, in *Lyng v. Northwest Indian Cemetery Protective Assoc.*, the Supreme Court held that the federal government could construct a road through federal land, resulting in the destruction of certain American Indians' traditional rituals, with only a slight gain to any federal interest.[93] In *Lyng,* the Supreme Court has implicitly ruled that the government may take actions which interfere with religious practice even where the governmental interest in the action is very weak, and the burden to the individual's practice of his religion is very great.[94] *Lyng* is significant in that the concept of "coercion" now appears to be central to free exercise analysis.[95] Therefore, if the individual is not being intentionally induced to do or not do something, there is no free exercise claim, and the government is not required to justify its acts.

Notably, Brennan's dissent in *Lyng* contended that where a government action posed a "substantial and realistic threat of frustrating . . . religious practices," the government should bear the burden of "com[ing] forward with a compelling state interest sufficient to justify the infringement of those practices."[96] Brennan's dissent illustrates his support for retaining the traditional interpretation of *Sherbert*, namely that the government must justify its action by showing a compelling state interest that can not be satisfied in a less burdensome manner.[97]

92. Justice Brennan wrote in his dissent in Lyng v. Northwest Indian Cemetery Protective Assoc., 485 U.S. at 465, "Since our recognition nearly half a century ago that restraints on religious conduct implicate the concerns of the Free Exercise Clause, . . . we have never suggested that the protections of the guarantee are limited to so narrow a range of governmental burdens."

93. *Id.* at 445. Justice O'Connor wrote the majority opinion, joined by Rehnquist, White, Stevens, and Scalia. Justice Brennan dissented, joined by Justices Marshall and Black. Justice Kennedy took no part in the proceedings.

94. *Id.* at 450.

95. *Id.*

96. *Id.* at 475.

97. *See supra* note 65 and accompanying text.

IV. THE COURT'S ANALYSIS

A. STANDARD OF REVIEW

The Ninth Circuit began its analysis of *Vernon* by reiterating well-established law concerning the standard of review.[98] First, the court stated that summary judgment is appropriate where no genuine issues of material fact remain and the moving party is entitled to judgment as a matter of law; the evidence must be viewed in the light most favorable to the nonmoving party.[99]

Second, as to any claims under California law, the court stated that "a federal court interpreting state law is bound by the decisions of the highest state court."[100] The court stressed that when the state court has not stated a clear rule, the federal court must determine what result the highest state court would reach based on existing state law.[101]

Therefore, the court stated that it would view the evidence in the light most favorable to Vernon when deciding (1) whether there existed any genuine issues of material fact; and (2) whether the district court properly applied the relevant substantive law.[102]

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98. *See* Vernon v. City of Los Angeles, et. al., 27 F.3d 1385, 1391 (9th Cir. 1994).

99. *Vernon,* 27 F.3d at 1391 (citing FED. R. CIV. P. 56; Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986); Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587-88 (1986); Celotex Corp. v. Catpett, 477 U.S. 317, 322 (1986)).

100. *Id.* (citing Hewitt v. Joyner, 940 F.2d 1561, 1565 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 969 (1992); In re Kirkland, 915 F.2d 1236, 1238 (9th Cir. 1990)). In California, the highest state court is the California Supreme Court.

101. *See Vernon*, 27 F.3d at 1391. *See also* Hewitt v. Joyner, 940 F.2d 1561, 1565, *cert. denied*, 112 S. Ct. 969 (1992); *Kirkland*, 915 F.2d at 1239; Molsbergen v. United States, 757 F.2d 1016, 1020 (9th Cir. 1985), *cert. denied*, 473 U.S. 934 (1985).

102. *Vernon,* 27 F.3d at 1391.

B. CLAIMS UNDER THE CALIFORNIA CONSTITUTION: FEDERAL LAW APPLIED FOR LACK OF DIRECTLY APPLICABLE CALIFORNIA CASE LAW

In determining whether the district court properly applied the relevant substantive law, the Ninth Circuit first determined whether alternative state grounds were available.[103] If alternative state grounds are available, a court will usually avoid adjudication of federal constitutional claims.[104] If, however, the federal and state constitutional provisions are coextensive, the court may decide the federal claims because that analysis would include the state claims.[105] When state constitutional provisions are more expansive in their protection, the court must address the state federal constitutional claims.[106]

In *Vernon*, the court found no federal or state cases directly applicable.[107] Therefore, the court stated that it would apply general principles common to both federal and state constitutional doctrines as they relate to the Free Exercise and Establishment Clauses.[108]

C. FREE EXERCISE CLAIMS: MERE "CHILLING OF RELIGIOUS BEHAVIOR DOES NOT CONSTITUTE SUBSTANTIAL BURDENING

In determining whether Vernon's Free Exercise claim would prevail, the Ninth Circuit asked whether Vernon's religious belief had been substantially burdened.[109] If so, the government's acts would violate the United States Constitu-

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103. *Vernon*, 27 F.3d at 1392.

104. *Id.* at 1391-92. *See also Hewitt*, 940 F.2d at 1565 (citing Siler v. Louisville & Nashville R.R. Co., 213 U.S. 175, 193 (1909)); Carreras v. City of Anaheim, 768 F.2d 1039, 1042-43 (9th Cir. 1985).

105. *Vernon*, 27 F.3d at 1392 (citing Los Angeles County Bar Ass'n v. Eu, 979 F.2d 697, 705 n.4 (9th Cir. 1992)).

106. *Vernon*, 27 F.3d at 1392 (citing Ellis v. City of La Mesa, 990 F.2d 1518, 1524 (9th Cir. 1993), *cert. denied*, 114 S.Ct. 2707 (1994); *Hewitt*, 940 F.2d at 1565).

107. *Vernon*, 27 F.3d at 1392.

108. *Id.*

109. Vernon v. City of Los Angeles, et al., 27 F.3d 1385, 1392 (9th Cir. 1994).

tion.[110] The First Amendment of the United States Constitution protects the "free exercise of religion."[111] Article I, Section 4 of the California Constitution provides for the "Free exercise and enjoyment of religion. . . . Liberty of conscience does not excuse acts that are licentious or inconsistent with the peace or safety of the State."[112] California case law suggests that an analysis of freedom of religion claims is generally similar under both federal and state law.[113] In fact, in 1963 the California Supreme Court adopted the federal test enunciated in *Sherbert v. Verner*.[114]

In *Sherbert v. Verner*, the Court used a balancing test to determine whether government actions that substantially burdened a religious practice were justified by a compelling state interest whether the government action was narrowly tailored to achieve that interest.[115] The balancing test asks whether there is a less discriminatory method of achieving the means, and whether the government actions discriminate between religions, or between religion and nonreligion.[116]

The district court denied the free exercise claims, finding that the plaintiff had not established that his right to freely exercise his religion had been substantially burdened by the government's actions.[117] The district court noted that a plaintiff cannot show substantial burden by merely alleging that government actions subjectively "chilled" his religious behav-

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110. *Vernon*, 27 F.3d at 1392.

111. *Id.* (citing U.S. CONST. amend. I). *See supra* notes 36-40 and accompanying text for a further discussion of the First Amendment's guarantee of freedom of religion.

112. *Vernon*, 27 F.3d at 1392 (citing CAL. CONST. art. I, § 4).

113. *Vernon*, 27 F.3d at 1392 (citing Molko v. Holy Spirit Ass'n, 762 P.2d 46, 56-57 (Cal. 1988), *cert denied*, 490 U.S. 1084 (1989)).

114. *Vernon*, 27 F.3d at 1392 (citing *Sherbert*, 374 U.S. 398 (1963)). *See also* People v. Woody, 394 P.2d 813, 815-16 (Cal. 1964). *See also* Walker v. Superior Court, 763 P.2d 852, 869-71 (Cal. 1988) (applying federal balancing test and compelling state interest analysis as a matter of state constitutional law), *cert. denied*, 491 U.S. 905 (1989).

115. *Vernon*, 27 F.3d at 1392 (citing *Sherbert*, 374 U.S. at 403). *See supra* notes 56-66 and accompanying text.

116. *Vernon*, 27 F.3d at 1393 (citing *Molko*, 762 P.2d at 57). Note that this is almost identical to the strict scrutiny test with the added question of whether it discriminates between two types of classifiers. *Id.*

117. *Vernon*, 27 F.3d at 1393.

ior.[118]

D. ESTABLISHMENT CLAUSE CLAIMS: GOVERNMENT MAY NOT DISAPPROVE OR APPROVE OF RELIGION

Vernon's Establishment Clause claim contended that the City's investigation violated the government's constitutionally mandated neutrality toward religion.[119] The United States Constitution prohibits any law that "establishes" a religion.[120] The California Constitution states that "the Legislature shall make no law respecting an establishment of religion."[121] The California Constitution further guarantees "free exercise and enjoyment of religion without discrimination or preference,"[122] and in this way is more expansive than the Federal Constitution."[123]

1. *The Lemon v. Kurtzman 3-Part Analysis Applied*

The Court in *Vernon* began its Establishment Clause analysis by reiterating the First Amendment ideal that forbids the government from disapproving of a particular religion or of religion in general.[124] The court noted that the government must be neutral and may not disapprove or approve of religion.[125]

In *Lemon v. Kurtzman,* the Court articulated the modern test to determine a law's constitutionality under the Establishment Clause of the First Amendment.[126] According to this test, the action must: (1) have a secular purpose; (2) have a primary effect which neither advances or inhibits religion; and

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118. *Id.* at 1394 (citing Laird v. Tatum, 408 U.S. 1, 13-14 (1972); Presbyterian Church (U.S.A.) v. United States, 870 F.2d 518, 522 (9th Cir. 1989)).

119. Vernon v. City of Los Angeles, et al., 27 F.3d 1385, 1396 (9th Cir. 1994).

120. *Vernon,* 27 F.3d at 1395 (citing U.S. CONST. amend. I).

121. *Vernon,* 27 F.3d at 1395 (citing CAL. CONST. art I, § 4).

122. CAL. CONST. art I, § 4.

123. *Vernon,* 27 F.3d at 1395. However, California's more expansive clause only applies in certain situations and doesn't apply in this particular case. *See infra* notes 143-148 and accompanying text for further elaboration on how California's "No Preference Clause" expands the Federal Constitution.

124. *Vernon,* 27 F.3d at 1396.

125. *Vernon,* 27 F.3d at 1396 (citing Epperson v. Arkansas, 393 U.S. 97, 104 (1968)). *See also* School Dist. of Abington v. Schempp, 374 U.S. 203, 215 (1963).

126. *Vernon,* 27 F.3d at 1396 (citing Lemon v. Kurtzman, 403 U.S. 602 (1971)). *See supra* notes 45-46 and accompanying text for a parallel discussion.

(3) not foster excessive state entanglement with religion.[127]

As to the first prong, the Ninth Circuit used its own case law, which states that if the action has more than one purpose, the action will pass constitutional muster if at least one of the purposes is secular, regardless of how many purposes may be non-secular.[128] In *Vernon,* the Ninth Circuit recognized that the United States Supreme Court has used a slightly more stringent approach, which requires that the primary purpose of the action be secular.[129] However, the Ninth Circuit found that no matter which approach was used, the action passed the first prong of the test.[130]

The court made this determination by looking at Yaroslavsky's letter, Lomax's memorandum, the Board meeting, and Chief Gates' declaration.[131] Each of these items had at least once mentioned that the purpose of the investigation was to determine whether the operations and policies of the LAPD were being improperly compromised by Vernon.[132] The court found that the department's fear that Vernon's religious beliefs might have affected his job was a valid secular purpose and was the primary purpose of the investigation.[133]

As to the second prong of the test, the court determined whether the investigation could be reasonably construed as sending a message either endorsing or disapproving of religion.[134] The Ninth Circuit ultimately agreed with the district court, focusing on whether the action 'primarily' disapproved of religious beliefs. After reviewing Yaroslavsky's letter and Lomax's memorandum, and the prominent disclaimers contained therein, the court found that the action did not primarily disapprove of religion.[135]

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127. *Vernon,* 27 F.3d at 1396 (citing *Lemon,* 403 U.S. at 612-13).
128. *Id.* at 1397.
129. *Id. See* Cammack v. Waihee, 932 F.2d 765, 782-83 (9th Cir. 1991), *cert denied,* 112 S. Ct. 3027 (1992).
130. *Vernon,* 27 F.3d at 1398.
131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.*
135. *Vernon,* 27 F.3d at 1399.

As to the third prong of the *Lemon* test, the court noted that administrative entanglement typically involves comprehensive, discriminating, and continuing state surveillance of religion.[136] The Lemon test gives three factors to determine this prong of the test: (1) The character and purpose of the religious institution affected; (2) the nature of the activity that the government mandates; and (3) the resulting relationship between the government and the religious institution.[137]

The court found that Vernon failed to present a clear argument as to the first factor.[138] The government's actions were not directed toward the Church itself, only toward Vernon. As to the second factor, the court concluded that the government's action was closely connected to the institution's religious charge.[139] As to the third factor, the court noted that there was no continuing or systematic investigation of religious beliefs.[140] The government's investigation of Vernon was limited in scope, had a justifiably secular purpose, and did not require the government to make religious versus secular determinations or to engage in ongoing monitoring.[141]

2. *California's No Preference Clause is Not Applicable in Vernon's Establishment Clause Analysis*

In its Establishment Clause analysis, the Ninth Circuit noted the possible application of California's "No Preference Clause."[142] California's "No Preference Clause" is the state's restatement of the United States Constitution's Establishment Clause.[143] The court in *Vernon* noted that the California "No Preference Clause" is more expansive than the federal Establishment Clause.[144] Therefore, the fact that the court applied federal law may have had an effect on the court's decision since California gives greater deference to freedom of reli-

136. *Id.* (citing *Lemon*, 403 U.S. at 619-22). Lynch v. Donnelly, 465 U.S. 668, 684 (1984). *See also Cammack*, 932 F.2d at 781.
137. *Vernon*, 27 F.3d at 1399 (citing *Lemon*, 403 U.S. at 615).
138. *Vernon*, 27 F.3d at 1399.
139. *Id.*
140. *Id.* at 1400.
141. *Id.* at 1401.
142. *Id.*
143. CAL. CONST. art. I, § 4.
144. *Vernon*, 27 F.3d at 1402.

gion.[145]

However, California's "No Preference Clause" is more expansive only insofar as it encompasses more government action which aids religion, not insofar as it hinders or stigmatizes religion; therefore, the application of either the state or federal law would be identical.[146] For example, Vernon did not contend that the state's investigation discriminated against him by *favoring* his religion. Thus, the government's actions could not have violated the No Preference Clause as it is expansively read by California.[147]

Based on the preceding analysis, the Ninth Circuit affirmed the district court's analysis that Vernon had failed to prove that the City's investigation had violated either his Free Exercise or Establishment Clause rights.[148]

V. CONCLUSION

The Ninth Circuit held that Vernon had failed to meet the threshold test of establishing that his right to freely exercise his religion had been substantially burdened.[149] The court further held that Vernon had failed to prove his claim that he could no longer worship or associate freely.[150] Therefore, the Ninth Circuit found it proper, for a city to conduct an investigation into the religious beliefs of its employee, when the city is concerned that those beliefs might affect job performance.

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145. See *supra* notes 119-123 and accompanying text.

146. *Vernon,* 27 F.3d at 1402.

147. *Id.*

148. *Id.* As to the City's claim for attorneys' fees, the Court stated that the same standard applies when analyzing requests for attorneys' fees at both the trial and appellate levels. The mere fact that a party prevails does not entitle that party to attorneys' fees unless it would be "unjust" not to award them. It would be unjust if the actions were found to be "unreasonable, frivolous, meritless, or vexatious." The court reasoned that because none of these applied, defendants' attorneys' fees were denied. *Id.*

149. Vernon v. City of Los Angeles, et al., 27 F.3d 1385, 1388 (9th Cir. 1994).

150. *Id.*

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