THIRTY-SEVENTH ANNUAL WILLIAM E. MCGEE
NATIONAL CIVIL RIGHTS MOOT COURT COMPETITION

CONFIDENTIAL BENCH OUTLINE and SUGGESTED QUESTIONS

***Kendra Frocker*,**

Appellant

v.

***State of McGee*,**

Appellee.

On Appeal to the Court of Appeal for the State of McGee

CONFIDENTIAL: These materials are intended to assist your preparation to serve as a volunteer for the McGee Moot Court. Do not share its contents with participants or coaches of the McGee Moot Court Competition.

REMINDER: Evaluate student competitors only on the quality and organization of their arguments and advocacy. Do not judge the merits of the case.

APPRECIATION: The problem for the 2022 McGee Moot Court was prepared by **Adam Lozeau**. The committee thanks Mr. Lozeau for his work. This outline was prepared by the competition committee, with assistance from **Professors Marie Failinger** and **Mike Steenson**.

Introduction

Students will take on the role of counsel in the appeal of *Frocker v. State of McGee*, a criminal appeal of the misdemeanor conviction of Kendra Frocker for violating McGee's unlawful-camping statute.

Relevant Statute

McGee Statutes Section 609.480 defines the misdemeanor crime of unlawful camping. The statute provides:

> Prohibited Camping.
> (a) In this section:
> (1) "Camp" means to reside temporarily in a place, with shelter.
> (2) "Shelter" includes a tent, tarpaulin, lean-to, sleeping bag, bedroll, or any form of semipermanent or permanent shelter which is designed to protect a person from weather conditions that threaten personal health and safety. Clothing is not "shelter" within the meaning of this statute.
>
> (b) A person is guilty of the misdemeanor offense of prohibited camping if the person intentionally or knowingly camps in a public place without the express consent of an officer or agency who has the legal duty or authority to manage the public place.
>
> (c) The actor's intent to camp in a public place or knowledge that the actor is doing so may be established through evidence of activities indicative of such knowledge or intent, including but not limited to:
> (1) cooking;
> (2) building a fire;
> (3) storing personal belongings;
> (4) erecting a structure for shelter; and
> (5) sleeping.
>
> (d) Violation of this section is a misdemeanor punishable by up to 90 days in jail and/or a fine of up to $500.

Factual Background[1]

On the evening of March 9, 2021, police entered a city park in McGee City to investigate a reported drug sale. Police found no evidence of the drug sale, but happened upon Kendra Frocker, who was sleeping on the ground beneath a foil blanket. The place Ms. Frocker was

[1] Facts are drawn from the Order Denying Frocker's Motion to Dismiss. The case was decided on stipulated facts; students are limited to considering and arguing the facts included in the "Findings of Fact" section of the order denying Frocker's motion to dismiss.

sleeping was covered by a small plastic dropcloth that Frocker had affixed by zipties to some nearby bush branches and the back of a park bench. A few feet from where Frocker slept, there was a small handcart containing her personal belongings, which was also covered by a small plastic dropcloth.

Police told Frocker that she could not camp in the park, and Frocker replied that she was homeless and had nowhere else to sleep. She told police that she sought shelter at one of McGee's facilities -- Open Doors shelter -- but it had already reached capacity. She also told police that but did not seek shelter at the Disciple Homes facility because she was uncomfortable with what she felt was a required participation in a religious prayer as a condition of staying at the shelter. Police told her that she could not lawfully camp in the park and that they would not allow her to stay there.

Police explained that they would not typically arrest a person discovered unlawfully camping, but that they arrested Frocker that night because they were concerned about her welfare given the low temperatures and predicted sleet. Frocker was booked into the jail at 11:15 p.m. She was cited and released from jail at 7:00 a.m. the next morning.

Procedural History

Before trial, Frocker moved to dismiss the charge, arguing that the Eighth and First Amendments of the United States Constitution prohibited enforcement of the statute against her on the night in question because no shelter was practically available to her that night.

The district court denied the motion to dismiss. Ms. Frocker and the State of McGee agreed to a stipulated-facts court trial, based on the facts the court had previously found in its motion to dismiss. The court reasoned that the Eighth Amendment would prohibit enforcement of the statute where a homeless individual had no alternative shelter, but found that because Frocker had shelter available, enforcement of the statute did not violate the Eighth Amendment. The Court rejected Ms. Frocker's First Amendment argument: reasoning that the public-camping law was a generally applicable criminal law and Frocker's religious beliefs did not excuse her from compliance.

Frocker was sentenced to one day in jail with credit for one day of time served, along with a statutory-minimum $50 fine. The court also placed Frocker on probation for a period of six months, with an additional 14 days of jail time stayed, subject to conditions of probation.

Standard of Review

Ms. Frocker challenges the constitutionality of an ordinance following conviction after a court trial on stipulated facts. There are no factual disputes, and review of these legal questions is *de novo*. Students are directed to focus their briefing and argument on the substantive issues, and while students should be able to recite the standard of review, we do not anticipate significant discussion around the standard of review.

Substantive Issues on Appeal

The issues on appeal are as follows:

1. **The Eighth Amendment Claim:** Assuming no other shelter was available to Frocker, does the Eighth Amendment's prohibition on Cruel and Unusual Punishments prevent the state from enforcing the unlawful-camping statute against her?
2. **The First Amendment Claim:** Would criminal conviction and punishment in this case violate the First Amendment, given the explicitly Christian characteristics of the only available shelter and the rules Frocker would have been required to follow to stay there?

Each team must address both the Eighth Amendment issue and the First Amendment issue. Competition rules do not dictate how teams divide the issues. Briefing and argument must be limited to the above-described issues, and the students are directed not to address issues outside the identified constitutional questions.

This proceeding takes place in the Court of Appeals for the State of McGee. Therefore, while decisions of the United States Supreme Court are binding precedent, decisions of federal courts and of other state courts are not binding, though they may be persuasive.

The Eighth Amendment Claim

> Assuming no other shelter was available to Frocker, does the Eighth Amendment's prohibition on Cruel and Unusual Punishments prevent the state from enforcing the unlawful-camping statute against her?

The Eighth Amendment provides that "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. Amend. VIII. At issue in this year's problem is the Cruel and Unusual Punishments Clause, which "'circumscribes the criminal process in three ways.' First, it limits the type of punishment the government may impose; second, it proscribes punishment 'grossly disproportionate' to the severity of the crime; and third, it places substantive limits on what the government may criminalize." *Martin v. City of Boise*, 920 F.3d 584, 615 (9th Cir. 2019) (quoting *Ingraham v. Wright*, 430 U.S. 651, 667(1977)).

The third limitation—substantive limits on what the government may criminalize—is not particularly well developed in Supreme Court case law. In 1962, the Supreme Court decided in *Robinson v. California* that a statute making it a crime to be addicted to narcotics was cruel and unusual punishment in violation of the Eighth Amendment's Cruel and Unusual Punishments Clause.

Relevant Case Law: Eighth Amendment Claim

Robinson v. California, 370 U.S. 660 (1962). *Robinson* is the leading case articulating the substantive limits on what the government may criminalize. The Court in *Robinson* invalidated a California statute that "ma[de] the 'status' of narcotic addiction a criminal offense." 370 U.S. at 666. "The California law at issue in *Robinson* was 'not one which punishe[d] a person for the use of narcotics, for their purchase, sale or possession, or for antisocial or disorderly behavior resulting from their administration'; it punished addiction itself." *Martin v. City of Boise* (quoting *Robinson*, 370 U.S. at 666.) The criminal statute at issue in *Robinson* violated the Eighth Amendment because a "law which made a criminal offense of ... a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment." 370 U.S. at 666–67.

Subsequent courts and commentators have observed that the Court in *Robinson* did not articulate the principles that undergird its holding.

Powell v. Texas, 392 U.S. 514 (1968). Only a few years after *Robinson*, the Court addressed Leroy Powell's challenge to a Texas statute that criminalized "get[ting] drunk or be[ing] found in a state of intoxication in any public place." 392 U.S. at 517 (Marshall, J., plurality opinion). The trial court found that Mr. Powell suffered from the disease of chronic alcoholism, which led Mr. Powell to appear drunk in public involuntarily. Citing *Robinson*, Mr. Powell argued that the Eighth Amendment prohibited punishing an ill person for conduct over which that person has no control. Since the trial court found Mr. Powell had no control over his alcoholism and no control over his subsequent appearance in public in an intoxicated state, Powell argued his conviction violated the Eighth Amendment.

Justice Marshall, writing for a plurality of the Court, distinguished the Texas statute from the California law deemed unconstitutional in in *Robinson* because the Texas statute made criminal not the **status** of being an alcoholic but instead criminalized **conduct** — appearing in public while intoxicated. Mr. Powell "was convicted, not for being a chronic alcoholic, but for being in public while drunk on a particular occasion. The State of Texas thus has not sought to punish a mere status, as California did in *Robinson*; nor has it attempted to regulate appellant's behavior in the privacy of his own home." 392 U.S. at 532 (Marshall, J., plurality opinion).

Mr. Powell's conviction was affirmed in a fractured 4-1-4 decision. The Justices joining Justice Marshall's plurality opinion (C.J. Warren; J. Black, and J. Harlan) interpreted *Robinson* to prohibit only the criminalization of pure status and not to limit the criminalization of conduct. 392 U.S. at 533 (Marshall, J., plurality opinion). Justice Black joined in the plurality opinion and added a concurrence joined by Justice Harlan which emphasized the soundness of the Court's distinction in *Robinson* between pure status crimes (which are suspect) and crimes involving conduct (which are not).

The four dissenting justices (Fortas, Brennan, Douglas, and Stewart) read *Robinson* to stand for the proposition that "[c]riminal penalties may not be inflicted on a person for being in a condition he is powerless to change." *Id.* at 567 (Fortas, J., dissenting). The dissenting justices focused on the involuntary nature of Mr. Powell's public intoxication and reasoned that the Eighth Amendment, as interpreted in *Robinson*, protects against the criminalization of being in a condition one is powerless to avoid. Since Powell was powerless to avoid his public intoxication (according to the trial court's findings) his conviction should have been reversed. *Id*. at 569-70.

Justice White concurred in the result, but some of his reasoning aligned with that of the dissent. "If it cannot be a crime to have an irresistible compulsion to use narcotics," White wrote, "I do not see how it can constitutionally be a crime to yield to such a compulsion." 392 U.S. at 548 (White, J. concurring in the result) (internal citation omitted).

Justice White nonetheless concurred in the result because he found the record deficient to establish that Mr. Powell was compelled to frequent public places when intoxicated. White reasoned,

> "I cannot say that the chronic alcoholic who proves his disease and a compulsion to drink is shielded from conviction when he has knowingly failed to take feasible precautions against committing a criminal act, here the act of going to or remaining in a public place. On such facts the alcoholic is like a person with smallpox, who could be convicted for being on the street but not for being ill, or, like the epileptic, who would be punished for driving a car but not for his disease.

Id. at 550 (White, J. concurring in the result). Justice White did not discount the possibility that, with different facts, Texas's law would be unconstitutional,

> "For some of these [homeless] alcoholics … a showing could be made that resisting drunkenness is impossible and that avoiding public places when intoxicated is also impossible. As applied to them this statute is in effect a law which bans a single act for which they may not be convicted under the Eighth Amendment—the act of getting drunk… It is also possible that the chronic alcoholic who begins drinking in private at some point becomes so drunk that he loses the power to control his movements and for that reason appears in public. The Eighth Amendment might also forbid conviction in such circumstances, but only on a record satisfactorily showing that it was not feasible for him to have made arrangements to prevent his being in public when drunk and that his extreme drunkenness sufficiently deprived him of his faculties on the occasion in issue.

Id. at 551-52 (White, J. concurring in the result).

Martin v. City of Boise: This year's McGee problem is inspired by the Ninth Circuit case, *Martin v. City of Boise*, 902 F.3d 1031 (9th Cir. 2018), *opinion amended and superseded on denial of reh'g*, 920 F.3d 584 (9th Cir. 2019).

In *Martin*, a divided Ninth Circuit panel held that the Eighth Amendment prohibits the imposition of criminal penalties for sitting, sleeping, or lying outside on public property on homeless individuals who could not obtain shelter. (Note that standing and the *Heck* doctrine[2] were hurdles for the *Martin* plaintiffs, who brought their lawsuits as federal civil rights claims under § 1983. The competition problem is written as a direct appeal of a criminal conviction, and thus it avoids those threshold issues.) The panel in *Martin* noted its agreement with the reasoning and central holding of *Jones v. City of Los Angeles*, 444 F.3d 1118, 1138 (9th Cir. 2006), *vacated*, 505 F.3d 1006 (9th Cir. 2007); *Jones* was not binding because it had been vacated after the parties entered a settlement. Because the *Martin* Court relied heavily on *Jones*, that case is described in more detail. The *Martin* court did not address the First Amendment Argument Ms. Frocker raises.

Jones v. City of Los Angeles, 444 F.3d 1118, 1138 (9th Cir. 2006), *vacated*, 505 F.3d 1006 (9th Cir. 2007). *Jones* was a § 1983 claim brought by individual plaintiffs who were experiencing homelessness and who had been arrested in Los Angeles's Skid Row district. The plaintiffs challenged LA's Municipal Code that provided "No person shall sit, lie or sleep in or upon any street, sidewalk or other public way." The statute provided exceptions for "attending or viewing" parades and an exception for individuals "sitting upon benches . . . provided for such purposes" by the City. In *Jones*, the court held that the "Eighth Amendment right to be free from cruel and unusual punishment prohibits enforcement of that law as applied to homeless individuals involuntarily sitting, lying, or sleeping on the street due to the unavailability of shelter in Los Angeles." 444 F.3d at 1120.

At the time of the Jones litigation, LA's Skid Row had the highest concentration of homeless individuals living in the United States and the 9,000 – 10,000 available beds fell short of providing shelter to the 11,000 – 12,000 individuals who were concentrated in Skid Row and experiencing homelessness. In the city as a whole, individuals experiencing homelessness exceeded the number of available beds by almost 50,000.

The *Jones* court interpreted *Robinson* and *Powell* as "instructing that the involuntariness of the act or condition the City criminalizes is the critical factor delineating a constitutionally cognizable **status**, and incidental conduct which is integral to and an unavoidable result of that status, from **acts or conditions** that can be criminalized consistent with the Eighth Amendment." 444 F.3d at 1132 (emphasis added).

[2] The Supreme Court held in *Heck v. Humphrey*, that "to recover damages for allegedly unconstitutional conviction or imprisonment, or for actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such a determination, or called into question by a federal court's issuance of a writ of habeas corpus." 512 U.S. 477, 486-87 (1994).

Ultimately, the *Jones* court emphasized the limited nature of its holding:

> Our holding is a limited one. We do not hold that the Eighth Amendment includes a *mens rea* requirement, or that it prevents the state from criminalizing conduct that is not an unavoidable consequence of being homeless, such as panhandling …We are not confronted here with … a statute that criminalized public drunkenness or camping…or sitting, lying, or sleeping only at certain times or in certain places within the city. And we are not called upon to decide the constitutionality of punishment when there are beds available for the homeless in shelters…. We hold only that … the Eighth Amendment prohibits the City from punishing involuntary sitting, lying, or sleeping on public sidewalks that is an unavoidable consequence of being human and homeless without shelter in the City of Los Angeles.

Id. at 1137 (internal citations omitted).

Pottinger v. City of Miami, 810 F. Supp. 1551 (S.D. Fla. 1992). Similar to *Jones*, this case was settled after protracted litigation. The synopsis provides "Class action was brought under § 1983 against city on behalf of homeless persons living in city, alleging violations of constitutional rights in connection with arrests and seizures of property. The District Court, Atkins, Senior District Judge, held that: (1) city's practice of arresting homeless persons for performing such activities as sleeping, standing, and congregating in public places violated Eighth Amendment and right to travel; (2) ordinances under which homeless persons were arrested were unconstitutionally overbroad; (3) homeless persons' privacy rights were not violated; and (4) seizures of homeless persons' personal belongings violated Fourth Amendment."

Suggested Questions: Eighth Amendment Claim

- What, if anything, distinguishes this case from *Martin v. City of Boise* or *Jones v. City of Los Angeles*? If we find the reasoning from *Martin* and *Jones* persuasive, does that control the outcome here?
- Is homelessness a ***status*** protectable under the Eighth Amendment? Or is it merely a ***condition*** and if a condition, is that constitutionally cognizable?
- Why should the line be drawn at public sleeping ordinances, such as McGee's camping statute which includes "sleeping" as evidence of intent to violate the statute? Both sleeping and eating are human necessities. If criminalization of sleeping on the streets violates the Eighth Amendment when there is no alternative shelter, wouldn't criminalization of panhandling face the same charge when there is no alternative source of money to purchase food?
    - [Alternatively: What is the limiting principal of the *Jones v. Los Angeles* and *Martin v. City of Boise* interpretation of *Robinson* and *Powell*?]
- Can we separate the conduct from the status in this case? After all, humans are biologically compelled to rest and must do so by either sitting, lying, or sleeping.

- What legal standard, if any, could provide a sound principle for determining when the Eighth Amendment's prohibition on criminalizing a **status** extends to criminalizing an **act**?
- Given the fractured nature of *Powell v. Texas*, what is its precedential value?
- Has the Supreme Court or any circuit court of appeals other than the Ninth Circuit ever held that conduct derivative of a status may not be criminalized?
- Has the Supreme Court or any other circuit court of appeals held that status plus a condition which exists on account of discretionary action by someone else is the kind of "involuntary" condition that cannot be criminalized?

The First Amendment Claim

> Would criminal conviction and punishment in this case violate the First Amendment, given the explicitly Christian characteristics of the only available shelter and the rules Frocker would have been required to follow to stay there?

Ms. Frocker is not an adherent of the Christian religion. She argues that argues that enforcing the public-camping law would constitute impermissible government endorsement of religion in violation of the Religion Clause of the First Amendment. The First Amendment limits the actions of the federal government as well as the states (through the Fourteenth Amendment).

First Amendment Claim as a Violation of the Establishment Clause

Some competitors might frame Ms. Frocker's First Amendment argument under the Establishment Clause. In relevant part, the First Amendment provides that "Congress shall make no law respecting an establishment of religion . ..." U.S. Const. Amend. I.

Ms. Frocker would argue the Establishment Clause is violated because:

> (1) the only available shelter was an overtly Christian environment and
> (2) she would be forced to receive a religious tract and stand silently during a prayer in order to stay at that shelter.

Competitors representing Ms. Frocker will likely analogize to cases in which the Supreme Court has held that prayer in schools violates the Establishment Clause. Competitors representing the government likely will counter that the school prayer cases are specific to schools and not appropriately extended to Ms. Frocker's situation. Competitors representing the government may also question whether the state action requirement is met. Ms. Frocker likely will argue that state action is met by the coercive choice facing Ms. Frocker: participate in a prayer or go to jail.

Relevant Case Law: Establishment Clause

Lee v. Weisman, 505 U.S. 577 (1992). A middle school student sought to enjoin the principal of her public school from inviting a clergy member to provide an invocation and benediction at the 8th grade promotion ceremony (similar to a graduation). The district court denied the injunction, and the child attended the ceremony. The controversy remained, however, as the child enrolled in a high school with the same practice. Justice Kennedy, writing for the court explained that "[t]he sole question presented is whether a religious exercise may be conducted at a graduation ceremony in circumstances where, as we have found, young graduates who object are induced to conform. No holding by this Court suggests that a school can persuade or compel a student to participate in a religious exercise. That is being done here, and it is forbidden by the Establishment Clause of the First Amendment." *Id.* at 599.

The Court acknowledged similarities to ***Marsh v. Chambers***, 463 U.S. 783 (1983), in which the Court held that prayer during opening session of state legislature did not violate the Establishment Clause, but reasoned that the holding in *Marsh* was inapposite:

> The atmosphere at the opening of a session of a state legislature where adults are free to enter and leave with little comment and for any number of reasons cannot compare with the constraining potential of the one school event most important for the student to attend. The influence and force of a formal exercise in a school graduation are far greater than the prayer exercise we condoned in *Marsh*.

Weisman, 505 U.S. at 597. *See also* ***Town of Greece, N.Y. v. Galloway***, 572 U.S. 565 (holding that prayer opening town board meetings did not have to be nonsectarian; town did not violate First Amendment by opening town board meetings with prayer that comported with tradition of the United States; and prayer at opening of town board meetings did not compel its citizens to engage in a religious observance in violation of the Establishment Clause).

Lower courts have seized on the *Weisman* Court's emphasis on the special case of schoolchildren to limit the reach of the case. *E.g., Tanford v. Brand*, 104 F.3d 982 (7th Cir. 1997) (holding Establishment Clause did not forbid a nondenominational invocation and benediction during graduation ceremony at public university; noting "special concerns underlying [*Weisman*]"; "mature stadium attendees … were voluntarily present and free to ignore the cleric's remarks.")

Justice Blackmun's concurrence traced the history of the Court's Establishment Clause cases and concluded that "[a]lthough our precedents make clear that proof of government coercion is not necessary to prove an Establishment Clause violation, it is sufficient. Government pressure to participate in a religious activity is an obvious indication that the government is endorsing or promoting religion." 505 U.S. at 604 (Blackmun, J. concurring). Although highly critical of the majority, Justice Scalia's dissent similarly noted that coercion means government action "*by force of law and threat of penalty*." 505 U.S. at 641 (Scalia, J., dissenting).

Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000). In *Santa Fe Independent School District v. Doe*, the Court reiterated the reasoning in *Lee v. Weisman* when it held in relevant part that student-led, student-initiated invocations prior to football games did not amount to private speech and that the policy of permitting such invocations was impermissibly coercive.

The school district of Sante Fe adopted a policy[3] authorizing two student elections, the first election was to determine whether "invocations" should be delivered at football games, and the second to select the spokesperson to deliver them. The policy permitted only nonsectarian, nonproselytizing prayer.

The school district attempted to distinguish *Lee v. Weisman* by characterizing the students' messages as private student speech, not public speech. Justice Stephens, writing for the Court rejected the distinction. "The delivery of such a message—over the school's public address system, by a speaker representing the student body, under the supervision of school faculty, and pursuant to a school policy that explicitly and implicitly encourages public prayer—is not properly characterized as 'private' speech." *Id.* at 310.

W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943). In this historic case, the Court invalidated a compulsory flag salute in public school. The Court reflected, "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us. … We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power, and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control." *Id.* at 642.

First Amendment Claim as a Violation of the Free Exercise Clause

Competitors representing the government will likely argue that the anti-camping statute is a neutrally applicable law that does not impermissibly burden Ms. Frocker's First Amendment rights. They will likely rely on the watershed case of *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990).

Competitors representing Ms. Frocker might emphasize that the Free Exercise Clause protects her right to practice her religion—or to practice no religion—free from government interference, so long as the practice does not run afoul of a "public morals" or a "compelling" governmental interest. The state's action of either requiring Ms. Frocker to go to jail or to pray impedes her right to practice no religion.

[3] During the litigation, the school district modified the policy, and the District Court entered an order further modifying the policy to permit only nonsectarian, nonproselytizing prayer. The revised policy is described here and is what the court addressed.

Some students might frame Ms. Frocker's argument as an unconstitutional conditions one. In essence, the government has offered her two untenable choices: Go to Disciple Homes or go to jail. This nuanced argument finds support in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017), described below. Frocker's argument may be that she is being coerced to effectively forego the exercise of her religious belief which, even if unspecified, conflicts with the beliefs of Disciple Homes, or that even absent her religious beliefs, she is being coerced to hew to those beliefs.

Relevant Case Law: Free Exercise Clause

Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990). Two employees who worked as private drug rehabilitation counselors were fired from their jobs for ingesting peyote as part of a sacrament of the Native American Church. Oregon's Employment Division denied the terminated employees' request for benefits because the employees had violated a state criminal statute. Employee Smith then brought suit against the Employment Division and won in the lower courts. The Supreme Court reversed the decision, holding that Smith's and Black's free exercise rights were not violated.

This decision marked a turning point as the Court stepped away from the compelling interest test it had established under *Sherbert v. Verner*, 374 U.S. 398 (1963). *Smith's* holding can be summarized that "in most cases a neutral law of general applicability would override a free exercise claim, thereby narrowing the range of circumstances in which a burden on the free exercise of religion would be submitted to strict constitutional scrutiny, and correspondingly expanding the range of permissible government interference in religious practices." Fern L. Kletter, Annotation, *Free Exercise of the First Amendment – U.S. Supreme Court,* 37 A.L.R. Fed. 3d. § 12 (2018). Although not without controversy,[4] the "Supreme Court continues to cite to *Smith* when discussing otherwise valid regulations of general application that incidentally burden religious conduct." *Id.*

Shortly after the *Smith* decision, Congress responded by passing The Religious Freedom Restoration Act, which was intended to provide greater protection for religious exercise. A later Supreme Court decision held that RFRA is not applicable to the states. *See City of Boerne v. Flores*, 521 U.S. 507 (1977). Although many states have enacted their own version of RFRA, the State of McGee has not.

Trinity Lutheran Church of Columbia, Inc. v. Comer**,** 137 S. Ct. 2012 (2017): In *Trinity Lutheran*, the Missouri Department of Natural Resources excluded religiously affiliated applicants from participation in a grant process for the purchase of rubber playground surfaces. Trinity Lutheran

[4] *See*, *e.g.*, *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1883 (2021) (Alito, J. concurring) (characterizing *Smith's* holding as "severe" and "is ripe for reexamination"; noting application of the test can have "startling consequences").

challenged its exclusion. The Court held that under the circumstances the church was faced with the unconstitutional choice of being a church or receiving the government benefit. *Id.* at 2021-22. The Court also noted that the Free Exercise Clause protects against indirect as well as direct coercion of religious beliefs. *Id.* at 2022. Writing for the majority, Chief Justice Roberts explained,

> [T]he ... policy puts Trinity Lutheran to a choice: It may participate in an otherwise available benefit program or remain a religious institution. Of course, Trinity Lutheran is free to continue operating as a church .... But that freedom comes at the cost of automatic and absolute exclusion from the benefits of a public program for which the Center is otherwise fully qualified. And when the State conditions a benefit in this way ... the State has punished the free exercise of religion: "To condition the availability of benefits ... upon [a recipient's] willingness to ... surrender[ ] his religiously impelled [status] effectively penalizes the free exercise of his constitutional liberties."

Id. at 2021-22 (quoting *McDaniel v. Paty*, 435 U.S. 618, 626 (1978)).

Suggested Questions: First Amendment Claim

- Regardless of whether Ms. Frocker's challenge rests of the Establishment Clause or the Free Exercise Clause, there must be state action. What's the state action here?
- Justice Kennedy's opinion in *Lee v. Weisman* emphasized the "heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools." Those concerns aren't present here, where we are dealing with adults. Why shouldn't *Lee v. Weisman* be limited to school settings?
    - What is the difference between a school setting and the opening of a legislature? Where does an opening invocation in a homeless shelter fall?
- Ms. Frocker was not made to pray, or to participate in the prayer other than by standing. Is that really enough to constitute a violation of Ms. Frocker's First Amendment rights?
    - What if Ms. Frocker were permitted to leave the room during the prayer?
    - What if the pastor led the prayer, but individuals were not required to stand? Or to accept the tract? Would that be impermissible?
    - If she didn't want to stay at Disciple, why couldn't she make sure to show up at Open Doors earlier to ensure a spot there?
- Question for the government: Is *Town of Greece* really on point here? Isn't this more than the transitory sort of coercion noted by the Court in *Town of Greece?*
- Is this properly seen as a Free Exercise challenge or an Establishment Clause challenge?
- Do you agree that if we hold Frocker's First Amendment rights were violated, her Eighth Amendment rights were necessarily violated (because she had no place to stay)?

- The lower court held that this law was a neutral law of general applicability. There is certainly no mention of religion anywhere in the statute. So why isn't this just an incidental burden on Frocker's free exercise?

Further reading

For an essay discussing, among other topics, the history and limits of constitutional litigation approaches to protecting the rights of homeless individuals—including a discussion *Martin v. City of Boise* and *Jones v. Los Angeles*, *see* Ben A. McJunkin, *Homelessness, Indignity, and the Promise of Mandatory Citations for Urban Camping*, 52 ARIZ. ST. L.J. 955, 958 (2020).

For a broad discussion of poverty and homelessness, including analysis of *Martin v. City of Boise, see* Sara K. Rankin, *Punishing Homelessness*, 22 NEW CRIM. L. REV. 99 (2019).

For a discussion of various critiques of the Ninth Circuit's reading of *Powell*, see *Criminal Law-Eighth Amendment Prohibition on Cruel and Unusual Punishment-Department of Justice Submits Statement of Interest Arguing That City Ordinances Prohibiting Camping and Sleeping Outdoors Violate the Eighth Amendment*, 129 HARV. L. REV. 1476, 1480–81 (2016).

For a contemporary analysis of *Powell*, including a discussion of the various opinions, see Kent Greenawalt, *"Uncontrollable" Actions and the Eighth Amendment: Implications of Powell v. Texas,* 69 COLUM. L. REV. 927, 931 (1969).

For a contemporary account of *Robinson*, see Note, *The Cruel and Unusual Punishment Clause and the Substantive Criminal Law*, 79 HARV. L. REV. 635, 655 (1966).

For an accessible discussion of *Employment Division v. Smith*, see the entry on the case in THE FIRST AMENDMENT ENCYCLOPEDIA, available through the Free Speech Center at Middle Tennessee State University, available at www.mtsu.edu/first-amendment/article/364/employment-division-department-of-human-resources-of-oregon-v-smith.