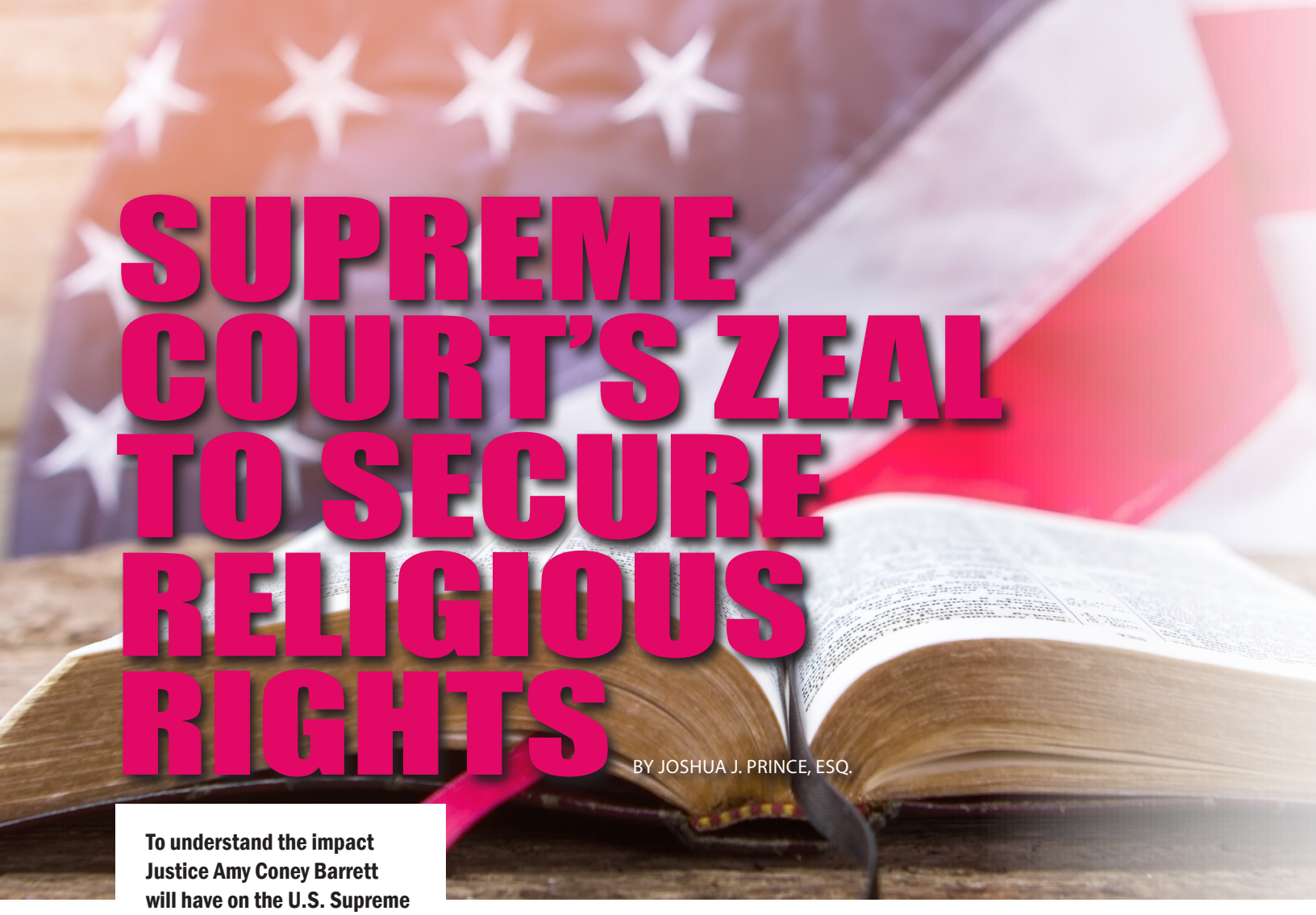

SUPREME COURT'S ZEAL TO SECURE RELIGIOUS RIGHTS

BY JOSHUA J. PRINCE, ESQ.

To understand the impact Justice Amy Coney Barrett will have on the U.S. Supreme Court's religious-liberty jurisprudence—and especially the pending case of *Fulton v. City of Philadelphia*—it is first necessary to understand where the court is now, and how it got there. For at least the last decade, cases addressing the Religion Clauses' proper scope have largely been decided the same way—in favor of the party asserting its religious rights. Many such cases, moreover, have been decided by supermajority, with Justices Stephen Breyer and Elena Kagan voting with the five more conservative justices over the dissents of the late Justice Ruth Bader Ginsburg and Justice Sonia Sotomayor.

These religious-liberty cases have often involved weighing other rights—such as the right to contraception[1] or the right to be free from sexual-orientation or gender-identity discrimination[2]—against the Free Exercise rights protected by the First Amendment or the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb *et seq.* The court has upheld religious rights so consistently in recent years that in her last opinion, Ginsburg accused the court of casting "totally aside countervailing rights and interests in its zeal to secure religious rights to the *n*th degree."[3] Now that Barrett has replaced her on the court, this trend will likely accelerate.

For much of the last decade, four justices—Chief Justice John Roberts and Justices Breyer, Kagan and Anthony Kennedy—have controlled how far the court will go in religion cases. Roberts, previously considered the "swing" vote, strives to obtain consensus in his opinions. To Roberts, a majority opinion joined by more than a bare majority of the court fosters public acceptance better than an opinion where the court is sharply divided. To achieve this end, Roberts regularly crafts his opinions—including his opinions in religious-freedom cases—narrowly.

Consider his opinion in *Trinity Lutheran v. Comer*, 137 S. Ct. 2012 (2017), one of the first cases decided after Justice Neil Gorsuch joined the court. That case involved a small religious preschool, Trinity Lutheran, and a competitive government-grant program in Missouri. The program provided rubber made from recycled tires to applicants to allow them to replace playground surfaces. The school would have received the rubber it sought but for one wrinkle—it was owned and controlled by a church, and Missouri law forbade contributing government resources to religious institutions for any purpose. A six-member majority[4] found that this violated the Free Exercise Clause because the "exclusion of [a religious school] from a public benefit for which it is otherwise qualified, solely because it is a church, is odious to our Constitution … and cannot stand." *Id.* at 2025.

That general principle is difficult to constrain, and, by its terms, could apply to a host of other circumstances. Recognizing this, Roberts attempted to

limit the court's holding to "discrimination based on religious identity with respect to playground resurfacing"—in a footnote. *Id.* at 2024 n.3.[5]

Why did Roberts include this footnote? It was likely necessary to foster some consensus, and its inclusion led Kagan to join the majority opinion and Breyer to concur in its judgment. A case decided last term, *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246 (2020), suggests that the footnote may have also kept Kennedy on board.

In many ways, *Espinoza* serves as a logical extension of *Trinity Lutheran*. It involved a Montana program that gave "scholarships to children for tuition at a private school." *Id.* at 2251. As with Trinity Lutheran's tire-rubber program, Espinoza's scholarship program was available to all private schools meeting certain criteria—unless they had religious ties. *Id.* at 2252. Finding that the provision "plainly excludes schools from government aid solely because of religious status," a bare majority of the court applied *Trinity Lutheran* and held that the scholarship program violated the Free Exercise Clause. *Id*. at 2255.

But in *Espinoza,* Roberts did not try to limit the holding to the facts like he had in *Trinity Lutheran*. *Espinoza* reiterates the principle that the Free Exercise Clause forbids the government from making status-based distinctions between secular and religious institutions, full stop. The only change to the court between *Trinity Lutheran* and *Espinoza* was Justice Brett Kavanaugh's replacement of Kennedy. Whereas *Trinity Lutheran* was decided by supermajority, however, *Espinoza* was decided by a bare majority; both Breyer and Kagan dissented. Kavanaugh's presence seemingly emboldened Roberts to carry the principle he established in *Trinity Lutheran* to its logical conclusion.

What does this mean for future religion cases? We know that Kennedy, like Roberts, was prone to draft his religious-liberty opinions narrowly to encourage his more liberal colleagues to join him. His majority opinion in *Masterpiece Cakeshop v. Colorado Civil Rights Commission* is a prime example. There, Jack Phillips, a Colorado baker with deeply held religious beliefs, declined to create a custom wedding cake for a same-sex wedding. He believed that creating the cake for such a wedding would be "equivalent to participating in a celebration that is contrary to his own most deeply held beliefs." 138 S. Ct. 1719, 1724 (2018). The Colorado Anti-Discrimination Act forbade discrimination because of a person's sexual orientation, and the couple sued Phillips. The case thus presented the court the chance to weigh two competing rights, the statutory right to be free from discrimination because of one's sexual orientation, against the right to decline services if providing them would be contrary to one's religious beliefs. But the court never did weigh those competing rights. Instead, it used statements from the Colorado Civil Rights Commission that disparaged Phillips' beliefs and held that those statements showed that Phillips had been denied the "neutral and respectful consideration" that the Free Exercise Clause required. *Id.* at 1729. As in *Trinity Lutheran,* Breyer and Kagan were part of the seven-justice[6] majority that decided this case. Perhaps the cost of having Breyer and Kagan join was the court punting on the Free Exercise question.

Kennedy retired only a few weeks after announcing his opinion in *Masterpiece Cakeshop*. As the court left the underlying question there unanswered, commentators quickly began speculating about how a future court would answer the question.[7] We still don't fully know how Kavanaugh would answer it, but *Espinoza* gave some indication that Kavanaugh, unlike Kennedy, is less of a "flight risk" in religious-liberty cases. As a result, Kavanaugh's membership on the court seems to have limited Roberts's propensity to draft narrow opinions—at least in 5-4 cases involving religion. And following Barrett's confirmation, Roberts may perceive even less reason to answer such questions narrowly—although he will still likely strive to get as much consensus as he can.

We will quickly see how Barrett approaches religion cases. Only a few days after her confirmation, the Supreme Court will hear oral argument in *Fulton v. City of Philadelphia*, No. 19-123, a case that asks anew the question first presented in *Masterpiece Cakeshop*. *Fulton* involves a religious foster agency with a religious belief that would prevent it from assisting same-sex couples in the foster process. It asks whether the government can condition the agency's participation in the foster process on its abandoning that belief. It will also present Barrett, just hours into her tenure, with the possibility of overruling *Employment Division v. Smith* 494 U.S. 872 (1990), a case that her former boss the late Justice Antonin Scalia considered his Free Exercise "manifesto."[8] *Smith* famously held that neutral laws of general applicability do not violate the Free Exercise clause even if they substantially burden an individual's religious beliefs. *Smith* 494 U.S. at 878–79.

Whether the court overturns *Smith* or not, the changes to the court since *Masterpiece Cakeshop* make significant changes to an already religion-friendly court more likely. If the trends continue, then the court will hold that the First Amendment forbids the government from conditioning participation in government programs on the abandonment of religious beliefs. To borrow once more from Ginsburg, it is impossible to say where the court's "zeal to secure religious rights to the *n*th degree" will take it. But Barrett's confirmation makes one thing nearly certain: The court has not reached its destination yet.

ENDNOTES:

1. See *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367 (2020).
2. See *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018).
3. *Little Sisters*, 140 S. Ct. at 2400 (2020) (Ginsburg, J., dissenting).
4. Justice Breyer, a seventh justice, concurred in the judgment.
5. Because of Justice Clarence Thomas and Justice Gorsuch, this footnote failed to command a majority of the court.
6. Justice Thomas concurred in part and in the judgment.
7. See Erwin Chemerinsky, Not a Masterpiece: The Supreme Court's Decision in Masterpiece Cakeshop v. Colorado Civil Rights Commission, ABA, https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/the-ongoing-challenge-to-define-free-speech/not-a-masterpiece/.
8. Amy Coney Barrett et. al., Scalia Forum 2019: Panel Discussion, 26 Geo. Mason L. Rev. 19, 20 (2019).

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