Syllabus

19-10

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Court for the convenience of the reader.

Argued August 26th, 2019-August 29th, 2019. Decided August 30th, 2019.

Held:

1. An executive order attempting to construct a house of worship such as a mosque, church, temple, or synagogue using government funds is a violation of the Establishment Clause of the United States Constitution.

SUPREME COURT OF SIERRA

No. 19-10

IN RE: EXECUTIVE ORDER 26: Who is America

[August 30, 2019]

SHOCKULAR, J.,. delivered the opinion for a unanimous Court. CHEATEM, C.J. filed a concurring opinion.

On August 26th, Governor ZeroOverZero issued Executive Order 26: Who is America (hereafter EO26). The Executive order directed persons unknown to build a mosque in Kingsman, Arizona "as quickly as possible" and that "no expense shall be spared" in its construction.

Suit was brought immediately, claiming that the executive order in question violates the First Amendment of the United States Constitution. We hold that it does, and strike down EO26.

The First Amendment reads, in relevant part, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. Amendment 1. The second portion, the "free exercise clause," does not apply to this case. The "establishment clause" was incorporated to the states through the due process clause of the Fourteenth Amendment for the first time in *Everson v. Board of Education*, 330 US 1 (1947).

We must first determine if the Executive Order discriminates among religious groups. "When it is claimed that a denominational preference exists, the initial inquiry is whether the law facially differentiates among religions." *Hernandez v. Commissioner,* 490 U.S. 680, 695 (1989).

In this case, the Governor seeks to build a mosque. It is difficult to imagine a situation in which the differentiation among religions is more clear than the government attempting to build a mosque, a synagogue, or a church for a specific denomination of Christianity. The "history and logic of the Establishment Clause [mean] that no State can 'pass laws which aid one religion' or that 'prefer one religion over another.'" *Larson v. Valente*,456 U.S. 228, 246 (1982). EO26 does both, aiding and granting preferential treatment to Islam. "The government must be neutral when it comes to competition between sects." *Zorach v. Clauson,* 343 U.S. 306, 314 (1952).

When a statute or executive action discriminates among religions, it is subject to strict scrutiny. Id. The so called *Lemon* test, articulated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), is applied only if a law or executive action clears that initial inquiry, and thus we do not examine this case in a *Lemon* framework. The "fullest realization of true religious liberty requires that government...effect no favoritism among sects…" *Abington School District v.*

Schempp, 374 U.S. 203, 305 (1963). (Goldberg, J., concurring.)

In order to pass strict scrutiny, a law or government action must serve a compelling governmental interest and must have narrowly tailored the law or action to achieve that interest. The burden of proof is generally on the government in strict scrutiny cases.[1] Erwin Chemerinsky, Constitutional Law Principles and Policies, § 6.5, note 10, at 554.

Here, the government has declined to defend the law at all. As the Governor has not identified *any* government interest, much less a compelling one,[2] there is little to analyze, and the state has not met the high burden required by strict scrutiny.

Accordingly, EO26 is struck down in full.

It is so ordered.

[1] There are some exceptions to this general rule, as when deference is owed to the government due to the "weighty interests of national security and foreign affairs." *Holder v. Humanitarian Law Project,* 561 U.S. 1, 33-34 (2010.) None of those exceptions apply to the instant case.

[2] The sole explanations, if they can be called that, are in the whereas clauses of EO26, which simply read "Allah" and link to a Youtube video that does not explain a thing.

CHEATEM, C.J., concurring

While I agree with my brother justice that the construction of a place of worship by the state is a flagrant violation of the First Amendment, I write separately because the Court's decision is very boring.