Regulating Noah's Ark—Religious Freedom and Animal Control Issues

— by Bradford E. Bullock —

If a municipality allows the keeping and killing of some animals within its territorial limits (for example, it operates an animal shelter where animals are euthanized, or it permits veterinarians to practice in an appropriately zoned district), must it allow the keeping and killing of all animals that a religious adherent claims are necessary for the practice of his religion? More to the point, must the municipality allow the keeping and killing of those animals to occur in a single-family home located in a residentially-zoned district? That is the question the U.S. Court of Appeals for the Fifth Circuit now faces in *Merced v. City of Euless*.[1]

Background

In 1974, the City of Euless, Texas passed a comprehensive ordinance regulating the use, type, location, maintenance, registration, confinement, destruction, and harboring of certain animals.[2] As do most animal control ordinances, this established an animal control department, prohibited certain animals from being kept within city limits, and limited the number of animals an individual could keep on his or her property. The ordinance prohibited the killing of animals within the city, except killing, by residents, for the purposes of pest control, and euthanasia performed by animal control officers.[3] It also allowed residents to keep up to four birds considered as "tablefare" (e.g., turkeys or chickens), and permitted residents to kill such poultry on their property.[4]

In 1990, Jose Merced, a Santeria adherent, moved to Euless and took up residence in a single-family detached home in an R-1-zoned district. He viewed blood sacrifice as an essential part of the Santeria religion.[5] Accordingly, while practicing his religion, he began violating various provisions of the ordinance, unbeknownst to Euless officials.[6] However, after an anonymous tip alerted the City to his activities, officials informed Merced that he was in violation of the ordinance and ordered him to stop. When Merced sought a permit to keep and kill prohibited numbers and kinds of animals in order to continue practicing his religion, Euless officials advised him that no such permit was available. Merced responded by suing the City, raising claims under the Texas Religious Freedom Act,[7] the Free Exercise Clause of the First Amendment,[8] and the Equal Protection Clause of the Fourteenth Amendment.[9]

Euless contended that its ordinance was generally applicable and neutral – that is, Merced was permitted to have up to four tablefare birds without regard to his purpose, but he could not keep more than four birds, or any livestock, regardless of his purpose. Because its regulations did not inquire into Merced's purpose for keeping and killing the animals, the City argued that he was affected in exactly the same manner as a person who sought to keep excess or prohibited animals for a secular purpose, and would be treated the same way – his request would be denied.

The evidence at trial supported the City's professed approach, indicating that, between 2002 and 2007, Euless had issued numerous citations for a variety of violations of the ordinance (although Merced himself had only received a warning). In fact, there was no evidence that Merced or any other Santeria adherent was ever cited by Euless; likewise, there was no evidence that Euless had granted an exemption for a secular animal slaughter while prohibiting what would amount to an identical slaughter for religious purposes. However, Merced countered that, because the City permitted animal



Bradford E. Bullock is a shareholder with McKamie Law, P.C., where he practices trial and appellate law. He represents various local governments in a variety of matters, with an emphasis on First Amendment and land-use regulatory matters. He is a former Assistant City Attorney for the City of San Antonio, and a Legislative Attorney for the Texas House of Representatives. In addition to litigating cases, he has drafted sign ordinances, zoning and subdivision ordinances, and "dark sky" ordinances for clients, and regularly advises them on a variety of other public law issues.

control officers to euthanize rabid dogs; residents to kill vermin and rodents for pest control; and veterinarians to presumably euthanize pets within city limits (although not in residentially zoned neighborhoods), these secular exceptions meant that the City was treating him differently on account of his religion.

Merced relied heavily on the case of *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah* as the rubric for his claim against Euless.[10] Unlike the ordinances at issue in *Lukumi Babalu Aye*, however, the City here argued that it did not have, nor did it enforce, a ban on the "sacrifice" of animals.[11] Rather, its ordinance *permitted* a certain narrow category of killing (as sacrifices or otherwise) of certain animals under certain generally applicable and neutral circumstances – for example, birds considered to be tablefare. Unlike Hialeah, what Euless did not do was inquire into the *motivation* for animal killings and then categorize them as permissible or impermissible. For enforcement purposes, the individual's motivation was irrelevant – the only thing that Euless regulated was the *kind and number* of animals killed. To the extent that Euless regulated the method of a kill, it did so only in the context of prohibiting cruel or abusive practices (cockfighting, for example).[12] The ordinance was totally silent on the method of killing used by Merced in his rituals (slitting the carotid artery of the animal and allowing it to bleed out).

At the district court trial, as an initial matter, the City argued that Merced had failed to discharge his burden of showing that Euless' ordinance was not neutral and generally applicable. Euless further argued that it had presented undisputed evidence of its compelling governmental interest in regulating the number and kinds of animals that could be kept in a residential district (being concerns over sanitation, disease transmission, stench, filth, and noise). Merced, on the other hand, argued that, if an ordinance allowed *any* killing, then it also had to allow killing he claimed was related to a religious purpose; moreover, he claimed that the City's evidence was insufficient to justify the burden the ordinance allegedly placed on the free exercise of his religion. Because Euless did not present evidence that anyone had actually gotten sick at one of his ceremonies, the City failed to demonstrate actual harm.

For its part, the City claimed that its ordinance had only the incidental effect of burdening a particular religious practice – the priest initiation ceremony, based on the kind and number of animals that were involved – because it was enforcing a neutral law that did not target Santeria or its practitioners. In this respect, Merced admitted, at trial, that he continued to conduct certain animal sacrifices in his home during the pendency of the lawsuit, had conducted other ceremonies and rituals central to the Santeria religion that did not involve killing, and attended other Santeria ceremonies in Euless. As a result, the City asserted that its ordinance did not act as the "flat prohibition of all Santeria sacrificial practice" found in *Lukumi Babalu Aye*.[13]

The district court rejected Merced's Free Exercise, Texas Religious Freedom Act, and Equal Protection claims, and Merced appealed.[14] A decision by the Fifth Circuit is still pending.

Free Exercise Claims

"[A] law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening *a particular religious practice*."[15] Free Exercise protections apply, however, if "the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct *because it is undertaken for religious reasons*."[16] The first step is determining whether a law is facially neutral, although facial neutrality is only the beginning of the neutrality inquiry.[17] If the law is facially neutral, the analysis shifts to the more subtle consideration of whether, in application, it nonetheless operates to bear more heavily on one protected group than another. In this, the U.S. Supreme Court looked to equal protection analysis for guidance.[18] In determining whether a protected group or classification bears the brunt of a discriminatory animus in the passage or application of a facially neutral law, the court must conduct "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available."[19] Relevant evidence can include the law's "legislative or administrative history, including contemporaneous statements made by members of the decision-making body."[20]

In the case at hand, Merced contended that Euless' ordinance was identical in application to those in *Lukumi Babalu Aye* and that *Lukumi Babalu Aye* was the controlling precedent – that Euless' ordinance was a "religious gerrymander"[21] because, in practice, it "targeted" Santeria while leaving similar practices untouched. However, there were some significant differences. The Supreme Court found that the City of Hialeah had passed ordinances directed at suppressing Santeria generally, and its practice of sacrifice specifically,[22] and that Hialeah had singled out the "sacrifice" of animals, defined as the *unnecessary* killing of an animal not primarily for food consumption.[23] The ordinance also prohibited killing an animal in "any type of ritual;"[24] further, if the killing was unaccompanied by the *intent* to use the animal for food, it was prohibited.[25] Not only did the use of terms like "sacrifice" and "ritual" lead the Court to conclude that their use was consistent with facial discrimination, the effect of the ordinances was strong evidence of their object.[26] Merced adduced no such evidence against Euless.

Further, the Supreme Court found that the fatal discriminatory flaw in Hialeah's ordinances was that, in determining whether a violation occurred, "an evaluation of the particular justification for the killing" was required.[27] This motivation-specific evaluation represented an "'individualized governmental assessment of the reasons for the relevant conduct.'"[28] Because the ordinances allowed Hialeah to evaluate factually equivalent religious and secular killings, deeming the former "unnecessary" while assigning greater value to the latter, it meant the religious practice was singled out for discriminatory treatment.[29]

In support of his argument that Euless' exemptions should be viewed as exceptions that opened the door to his religious practices, Merced relied on cases where appellate courts found that the governing body granted

continued from page 25

secular exceptions, but failed to grant religious exceptions.[30] In *Blackhawk v. Pennsylvania*, for example, a state law required that a person wanting to keep exotic wildlife had to pay a fee. The law contained a waiver provision for zoos and circuses, plus a financial hardship waiver.[31] The plaintiff Blackhawk, a Native American, kept black bears, used for Native American religious ceremonies, and requested a waiver, which the state denied.[32] The Third Circuit held that the state violated Blackhawk's Free Exercise rights because its waiver provision created a scheme of individualized, discretionary exemptions.[33] Of particular importance was the fact that Blackhawk had requested a waiver because of his Native American beliefs *and* because paying the fee would cause him hardship.[34] In responding to Blackhawk's request, the state found that he would not be entitled to an exemption *regardless of his financial circumstances*.[35] This distinction amounted to the categorical favoring of secular conduct over religious conduct, and violated the Free Exercise Clause.[36]

In addressing this issue, Euless presented evidence at trial of numerous animal control citations – including one for illegal slaughter – issued to residents who were not Santeria adherents. Euless also pointed out that the ordinance contained no exemption on its face, and no evidence was adduced from which the trial court could have concluded that the provisions were discriminatorily applied.[37]

Whether or not a law is discriminatory in practice depends largely on whether its object is to infringe upon, or restrict, a religious practice.[38] In *Grace United Methodist Church v. City of Cheyenne*, for example, a church objected to a zoning ordinance, neutral on its face, because it permitted various exceptions on a case-by-case basis.[39] The church wanted to operate a daycare in a zone where daycares were prohibited, regardless of whether the operator was a religious entity or a secular one.[40] Because the City had a discretionary permitting process that allowed daycares in other zoning districts, the church argued that this amounted to a system of individualized exceptions, and the City's refusal to allow the church to operate a daycare in a prohibited zone violated the Free Exercise Clause.[41] The court declined to adopt the church's rationale and found the zoning law to be neutral, generally applicable, and not subject to strict scrutiny.[42] In contrast to the facts presented in *Lukumi Babalu Aye*, the court in *Grace United* found the lack of evidence that the ordinance was passed for a religious animus to be of particular importance. In denying the church's request for a variance for the daycare, the City's board of adjustment stated that it did not have the authority or discretion to grant a variance for *anyone* in that particular zone,[43] and the church presented no evidence that a secular daycare center had been permitted to operate in the same zoning category.[44] Thus, the mandatory denial of the daycare was very different from the discretionary denials in other cases.[45] The fact that the City allowed other daycares to operate within a specified set of zoning categories in the city did not mean the church could operate its daycare "exactly where it please[d]."[46]

The Strict Scrutiny Test

If strict scrutiny applies to assess the validity of a law, the burden lies on the government to satisfy this test.[47] Any evidence adduced must be genuine and not a sham.[48] Euless argued that it satisfied its burden by showing that its ordinance was narrowly tailored and furthered a compelling governmental interest in protecting the public health and welfare.[49] It adduced evidence that keeping livestock in enclosed pens inside homes could lead to the transmission of disease; that large numbers of animals create excess stench, filth and noise, inappropriate for residential areas; and adduced evidence of inter-species conflict.

Although compelling interests are interests of the highest order, and laws burdening religion must be narrowly tailored to advance those interests, "context matters in applying the compelling interest test … strict scrutiny does take 'relevant differences' into account – indeed, that is its fundamental purpose."[50] Thus, when the Supreme Court stated that it must "look[] beyond broadly formulated interests justifying the general applicability of government mandates and scrutinize[] the asserted harm of granting specific exemptions to particular religious claimants," it must do so in the context of the exemption sought.[51]

A narrowly tailored law is one that prohibits no more conduct than is necessary to achieve the law's stated goal.[52] Government action must have a secular purpose, and although a legislature's stated reasons generally get deference, the secular purpose "has to be genuine ... and not merely secondary to a religious objective."[53] And the fact that strict scrutiny applies "says nothing about the ultimate validity of any particular law; that determination is the job of the court applying strict scrutiny."[54] If a law is not narrowly tailored, it will not survive strict scrutiny. Merced argued that the City's ordinance was not narrowly tailored because it prohibited more religious conduct than was necessary (e.g., killing the requisite number of animals for a priest initiation ceremony in his home). The City, on the other hand, argued that its ordinance *was* narrowly tailored as it only prohibited the keeping and killing of large numbers of animals, and did not deprive Merced of a benefit generally available to the secular public.

Conclusion

In essence, Euless argued that the fundamental difference between its ordinance and those in *Lukumi Babalu Aye* was that its ordinance did not target, on its face or in practice, Santeria specifically or *any* religious practice in general. The fact that the City's ordinance was not passed in response to Merced's arrival in town further separated it from the ordinances in *Lukumi Babalu Aye*. Moreover, the Euless ordinance did permit certain animal killings within city limits and did not inquire into or distinguish between the purpose for those killings, or permit only those with a secular motivation (e.g., keeping and killing goats for a barbecue, but not for a religious sacrifice).

In the end, the Fifth Circuit's decision will provide much guidance to municipalities on whether, and how, they can enforce any animal control ordinances against religious adherents.

Notes

1. Merced v. City of Euless, No. 4:06-CV-891-A, 2008 WL 182220 (N.D. Tex. Jan. 17, 2008); on appeal as Merced v. City of Euless, Case No. 08-10358, U.S. Court of Appeals for the Fifth Circuit.
2. Euless, Tex., Code, ch. 3 (1974).
3. Euless, Tex., Code, §§ 3-10, 3-19 (1974).
4. Euless, Tex., Code, § 3-9 (1974).
5. *Merced*, 2008 WL 182220 at *1.
6. Specifically, Merced admitted to routinely violating the "no livestock" provision, the "no kill" provision, and the "maximum number of animals" provision, among others. For example, Merced testified at trial that a priest initiation that took place in his home in May 2005 required the keeping and killing of six goats or sheep, ten chickens, twelve pigeons, seven guinea hens, a turtle, two quail and a duck – a total of 39 animals.
7. Tex. Civ. Prac. & Rem. Code Ann., Ch. 110 (Vernon 2009).
8. U.S. Const. amend. I.
9. U.S. Const. amend. XIV, § 1.
10. Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993).
11. The record in *Lukumi Babalu Aye* was replete with evidence that the ordinances challenged were crafted to specifically target the Santeria religion, while making exceptions for other forms of religious slaughter – for example, Kosher slaughter. *Id.* at 540-41. Euless argued that no such evidence was adduced against it.
12. Euless, Tex., Code, § 10-65(2) (1974).
13. *Lukumi Babalu Aye*, 508 U.S. at 527-28.
14. Merced v. City of Euless, No. 4:06-CV-891-A, 2008 WL 182220 (N.D. Tex. Jan. 17, 2008).
15. *Lukumi Babalu Aye*, 508 U.S. at 531 (citing *Employment Div., Dept. of Human Res. of Oregon v. Smith*, 494 U.S. 872, 878 (1990) (emphasis added)).
16. *Id.* at 532 (emphasis added).
17. *Id.* at 534.
18. *Id.* at 540 (citing *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 694 (1970)).
19. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977).
20. *Lukumi Babalu Aye*, 508 U.S. at 540 (citing *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267-68 (1977)).
21. *Id.* at 535.
22. *Id.* at 527-28 ("The record in this case compels the conclusion that suppression of the central element of the Santeria worship service [sacrifice] was the object of the ordinances").
23. *Id.* (emphasis added).
24. *Id.* at 536.
25. *Id.* (emphasis added).
26. *Id.* at 533, 535 ("It is a necessary conclusion that almost the only conduct subject to Ordinances 87-40, 87-52, and 87-71 is the religious exercise of Santeria church members. The texts show that they were drafted in tandem to achieve this result").
27. *Id.* at 537.
28. *Id.* (citing *Employment Div., Dept. of Human Res. of Oregon v. Smith*, 494 U.S. 872, 884 (1990)).
29. *Id.* at 538.
30. *See, e.g.*, Blackhawk v. Pennsylvania, 381 F.3d 202 (3d Cir. 2004); Fraternal Order of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359 (3d Cir. 1999).
31. *Blackhawk*, 381 F.3d at 205.
32. *Id.* at 206. In Euless, bears are also defined as "prohibited animals" and are not allowed in the city. Euless, Tex., Code, §10-7 (1974).
33. *Blackhawk*, 381 F.3d at 209.
34. *Id.* at 212 (emphasis in original).
35. *Id.* (emphasis in original).
36. *Id.* at 211.
37. *See* St. John's United Church of Christ v. City of Chicago, 502 F.3d 616, 633 (7th Cir. 2007) (proposed expansion of O'Hare Airport encompassed a cemetery – as the expansion plan would apply equally to all similarly-situated cemeteries in the area, the court found no adverse impact).
38. Grace United Methodist Church v. City of Cheyenne, 451 F.3d 643, 649-50 (10th Cir. 2006) ("A law is neutral so long as its object is something other than the infringement or restriction of religious practices").
39. *Id.* at 650.
40. *Id.*
41. *Id.*
42. *Id.* at 653.
43. *Id.* (emphasis in original).
44. *Id.* at 655.
45. *See* Sherbert v. Verner, 374 U.S. 398, 401 (1963); Axson-Flynn v. Johnson, 356 F.3d 1277, 1299 (10th Cir. 2004).
46. Grace United Methodist Church v. City of Cheyenne, 451 F.3d 643, 655 (10th Cir. 2006); *see also* Swanson By & Through Swanson v. Guthrie Indep. Sch. Dist. No. I-L, 135 F.3d 694, 698 (10th Cir. 1998) (court should determine whether alleged exceptions are so pervasive that, in actuality, they only apply to religious adherents).
47. *See* Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 429-30 (2006).
48. *Cf.* Skoros v. City of New York, 437 F.3d 1, 19 (2d Cir. 2006) (deference accorded to stated secular purpose if it was genuine, not a sham, and not merely secondary to a religious objective).
49. *See* Johnson v. California, 543 U.S. 499, 505 (2005) (defining the strict scrutiny analysis in the racial classification context).
50. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. at 431-32 (internal citations omitted).
51. *Id.* at 431.
52. *See* Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 538 (1993) (overinclusiveness prohibits more religious conduct than is necessary to achieve the stated goal).
53. McCreary County, Ky. v. ACLU of Ky., 545 U.S. 844, 864 (2005).
54. *Johnson*, 543 U.S. at 515.

