



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

March 5, 2021

The Honorable James White
Chair, House Committee on Homeland
Security & Public Safety
Texas House of Representatives
Post Office Box 2910
Austin, Texas 78768-2910

Opinion No. KP-0362

Re: Government restrictions on an individual's right of access to clergy due to the COVID-19 pandemic (RQ-0383-KP)

Dear Representative White:

You ask whether a government agency or official may restrict a citizen's free exercise of religion by requiring that the citizen must face imminent death in order to see a member of the clergy of his or her choice and not otherwise allow such visitation.¹ We understand your question as seeking general guidance about governmental limitations placed on visitation by clergy in settings such as hospitals and other medical facilities during the COVID-19 pandemic.²

Both state and federal law provide broad constitutional protections for religious freedom. The First Amendment of the U.S. Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." U.S. CONST. amend. I. The Free Exercise Clause has been applied to the States through the Fourteenth Amendment. *See Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). In addition, the Texas Constitution provides: "No human authority ought, in any case whatever, to control or interfere with the rights of conscience in matters of religion . . ." TEX. CONST. art. I, § 6. Courts have opined that article I, section 6 of the Texas Constitution "provides greater protections for the free

¹See Letter from Honorable James White, Chair, House Comm. on Corr., to Honorable Ken Paxton, Tex. Att'y Gen. at 1–2 (Oct. 15, 2020), <https://www2.texasattorneygeneral.gov/opinions/opinions/51paxton/rq/2020/pdf/RQ0383KP.pdf> ("Request Letter").

²In response to COVID-19, various agencies adopted emergency rules regarding visitation to specific types of facilities, including hospitals, assisted living facilities, and intermediate care facilities for individuals with an intellectual disability. *See, e.g.*, 25 TEX. ADMIN. CODE § 133.51 (Tex. Dept. of State Health Servs.) ("Visitor Screening and Access During the COVID-19 Pandemic") (expires Mar. 23, 2021); 26 TEX. ADMIN. CODE § 551.47 (Tex. Dep't of State Health Servs.) ("Intermediate care facility COVID-19 response—Expansion of Reopening Visitation") (expires Apr. 13, 2021). By statute, emergency rules are "effective for not longer than 120 days and may be renewed once for not longer than 60 days." TEX. GOV'T CODE § 2001.034(c).

exercise of one’s religion than does the federal constitution.” *Ex parte Herrera*, No. 05-14-00598-CR, 2014 WL 4207153, at *4 (Tex. App.—Dallas Aug. 26, 2014, no pet.) (mem. op.) (citing *Howell v. State*, 723 S.W.2d 755, 758 (Tex. App.—Texarkana 1986, no writ)).

In addition, the Texas Legislature enacted the Texas Religious Freedom Restoration Act (“TRFRA”) to prohibit government agencies from placing a substantial burden on a person’s free exercise of religion unless that agency shows that the application of this burden is “the least restrictive means of furthering” a “compelling governmental interest.” TEX. CIV. PRAC. & REM. CODE § 110.003(a), (b).³ In analyzing whether a statute or regulation violates TRFRA, a court must address four questions: (1) whether the government’s action burdens the person’s free exercise of religion; (2) whether the burden is substantial; (3) whether the regulation furthers a compelling governmental interest; and (4) whether the regulation is the least restrictive means of furthering that interest. *Id.*; *Barr v. City of Sinton*, 295 S.W.3d 287, 299 (Tex. 2009).

Under the novel circumstances surrounding COVID-19, we find no direct court authority analyzing governmental limitations on clergy visitation during the epidemic. While each of these questions must be considered on a case-by-case basis with respect to the facts of a particular plaintiff, we can provide guidance on the factors a court would consider in addressing whether a government official or agency may restrict an individual’s right to access clergy of the individual’s choosing during the COVID-19 pandemic, in particular whether individuals must face imminent death in order to have clergy visit them.⁴

We first address whether a government’s restriction on an individual’s right to access a member of the clergy could burden the person’s free exercise of religion. TRFRA defines “free exercise of religion” as “an act or refusal to act that is substantially motivated by sincere religious belief.” TEX. CIV. PRAC. & REM. CODE § 110.001(a)(1). In determining whether an action is substantially motivated by sincere religious belief, “it is not necessary to determine that the act or refusal to act is motivated by a central part or central requirement of the person’s sincere religious belief.” *Id.* Visiting with a religious leader may serve as a method to practice religion and express one’s religious beliefs even if it is not a central requirement of a person’s religion, and it therefore constitutes religious exercise. *See Kikumura v. Hurley*, 242 F.3d 950, 961 (10th Cir. 2001) (explaining that pastoral visits are protected activity under the federal RFRA); *Rowe v. Davis*, 373 F. Supp. 2d 822, 826–27 (N.D. Ind. 2005). Thus, preventing an individual from accessing a religious leader of his or her choosing, except when such individual is facing death, may burden religious exercise.

³The Texas Legislature enacted the TRFRA in response to U.S. Supreme Court decisions limiting the review of neutral, generally applicable laws applied to religious practices. *See* Act of May 30, 1999, 76th Leg., R.S., ch. 399, § 1, 1999 Tex. Gen. Laws 2511 (codified at Texas Civil Practice and Remedies Code chapter 110); *see also Barr v. City of Sinton*, 295 S.W.3d 287, 294–96 (Tex. 2009). In doing so, the Legislature ensured that actions by a government that substantially burden religion will be subject to strict scrutiny and upheld only if they are the least restrictive means of furthering a compelling governmental interest. *See Barr*, 295 S.W.3d at 296.

⁴As a rule, courts decide constitutional questions only when the issue at hand cannot be resolved on non-constitutional grounds. *In re B.L.D.*, 113 S.W.3d 340, 349 (Tex. 2003). Because your questions can be addressed through application of the TRFRA, we do not separately analyze the issue under the constitutional provisions noted above.

We next address whether a government's restriction on an individual's right to access a member of the clergy is a substantial burden on the person's free exercise of religion. *See* TEX. CIV. PRAC. & REM. CODE § 110.003(a). Whether a government's action places a substantial burden on an individual's free exercise must be considered on a case-by-case basis, taking into account the individual circumstances and the degree to which the individual's religious conduct is curtailed. *A.A. ex rel. Betenbaugh v. Needville Indep. Sch. Dist.*, 611 F.3d 248, 264 (5th Cir. 2010).

To say that a person's right to free exercise has been burdened, of course, does not mean that the person has an "absolute right to engage in the conduct." *Barr*, 295 S.W.3d at 305. We must also consider whether the regulation at issue furthers a compelling state interest. *See* TEX. CIV. PRAC. & REM. CODE § 110.003(b)(1). The U.S. Supreme Court has concluded that "[s]temming the spread of COVID-19 is unquestionably a compelling interest," but it recognizes that any regulations that limit religious freedom must be narrowly tailored. *Roman Catholic Diocese v. Cuomo*, 141 S. Ct. 63, 67 (2020) (per curiam). Thus, the question becomes whether prohibiting visitation by a member of the clergy except in end-of-life circumstances is the least restrictive means for the government to limit the spread of COVID-19. *See* TEX. CIV. PRAC. & REM. CODE § 110.003(b)(2).

In considering whether an action is the least restrictive means available, courts will consider alternative means available for achieving the same government interest. *See Merced v. Kasson*, 577 F.3d 578, 594–95 (5th Cir. 2009) (addressing claimant's proposals for less restrictive alternatives to an outright ban on certain behavior). As hospitals and other medical facilities gain knowledge and experience in addressing COVID-19, many have adapted their visitation procedures to ensure patients have access to clergy in safe ways that protect against the spread of COVID-19. The federal Office of Civil Rights within the U.S. Department of Health and Human Services has resolved multiple religious discrimination complaints by facilitating modifications to hospital visitation policies.⁵ Those modifications allow visitation by religious leaders of a patient's choice at any reasonable time alongside implementing additional safety protocols, including requiring clergy to first receive training in infection control, use fit-tested personal protection equipment, and physically distance from the patient. These and other protocols are likely less restrictive than an outright prohibition on a patient's access to clergy. An outright "ban of conduct sincerely motivated by religious belief substantially burdens an adherent's free exercise of that religion." *A.A. ex rel. Betenbaugh*, 611 F.3d at 264. Thus, to the extent that other safety protocols further the government's interest in stemming the spread of COVID-19 in a manner analogous to a ban on visitation by clergy, a court would likely conclude that prohibiting an individual's access to clergy during the COVID-19 pandemic violates the TRFRA because it is not the least restrictive means of achieving the compelling interest.

⁵U.S. DEP'T OF HEALTH AND HUMAN SERVS., *OCR Resolves Religious Discrimination Complaints after Maryland and Virginia Hospitals Ensure Patients Can Receive Safe Religious Visitations During COVID-19* (Oct. 20, 2020), <https://www.hhs.gov/about/news/2020/10/20/ocr-resolves-religious-discrimination-complaints-after-maryland-and-virginia-hospitals-ensure.html>.

S U M M A R Y

Both state and federal law provide broad constitutional protections for religious freedom. The First Amendment of the U.S. Constitution provides: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof” Article I, section 6 of the Texas Constitution provides: “No human authority ought, in any case whatever, to control or interfere with the rights of conscience in matters of religion” Furthermore, under the Texas Religious Freedom Restoration Act, a government agency is prohibited from placing a substantial burden on a person’s free exercise of religion unless the agency shows that the application of the burden is the least restrictive means of furthering a compelling governmental interest.

If an individual desires to see a member of the clergy as part of his or her religious exercise, prohibiting access to that member except when death is imminent places a substantial burden on the individual’s religious exercise.

Stemming the spread of COVID-19 is unquestionably a compelling government interest. However, to the extent that other less restrictive safety protocols further the government’s interest in stemming the spread of COVID-19, a court would likely conclude that prohibiting an individual’s access to clergy only when facing death violates the state and federal constitutions and the Texas Religious Freedom Restoration Act because it is not the least restrictive means of achieving such compelling interest.

Very truly yours,

A handwritten signature in black ink that reads "Ken Paxton". The signature is written in a cursive, flowing style.

KEN PAXTON
Attorney General of Texas

BRENT E. WEBSTER
First Assistant Attorney General

LESLEY FRENCH
Chief of Staff

MURTAZA F. SUTARWALLA
Deputy Attorney General for Legal Counsel

VIRGINIA K. HOELSCHER
Chair, Opinion Committee