COURT OF APPEALS
DECISION
DATED AND FILED

April 7, 2016

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal Nos. 2015AP122-CR
2015AP123-CR

Cir. Ct. Nos. 2011CF504
2011CF505

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

NO. 2015AP122-CR

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ALINA N. CAMINITI,

DEFENDANT-APPELLANT.

NO. 2015AP123-CR

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MATTHEW B. CAMINITI,

DEFENDANT-APPELLANT.

APPEALS from judgments of the circuit court for Dane County: ELLEN K. BERZ, Judge. *Affirmed*.

Before Kloppenburg, P.J., Higginbotham, and Blanchard, JJ.

¶1 BLANCHARD, J. Alina and Matthew Caminiti, a couple with two young children, were convicted at a joint jury trial of multiple counts of intentionally causing bodily harm to their children, in violation of WIS. STAT. § 948.03(2)(b) (2013-14).[1] The evidence at trial included statements by Alina and Matthew that each had engaged in what they referred to as "rod discipline" of their children. By the Caminitis' own accounts, rod discipline involved striking the children on their bare bottoms with wooden spoons or rods, using sufficient force to cause bruising. The State does not dispute the Caminitis' contention that their practice of rod discipline was an exercise of their sincerely held religious beliefs.

¶2 Alina and Matthew argued to the circuit court that this prosecution abridges their substantive due process right to discipline their children, and their rights to the free exercise of religion under the United States Constitution and to freedom of conscience under the Wisconsin Constitution. The court rejected these arguments, and Alina and Matthew appeal their respective judgments of conviction and orders denying pretrial motions to dismiss based exclusively on these constitutional issues.[2] On appeal, the Caminitis pursue only arguments

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

[2] Alina and Matthew were charged separately, but were tried jointly and their cases have been consolidated on appeal. They filed identical pretrial motions, in response to which the circuit court issued identical pretrial rulings which the Caminitis now jointly appeal, drawing no (continued)

based on facial constitutional challenges to the set of statutes at issue. For the reasons provided below, we affirm.

BACKGROUND

¶3 The parties do not dispute the following facts.

Nature of Charged Conduct

¶4 In November 2010, Alina and Matthew's two children were just under 2-1/2 years old and 11 months old. At that time, sheriff's office investigators interviewed Alina and Matthew as part of an investigation into allegations of physical abuse of children. Alina gave statements to the investigators that included the following.

¶5 Alina used "rod discipline" on the two children, beginning in each case when the child was two to three months old, and thereafter on a routine basis. This entailed delivering "one to three spanks" using a wooden spoon or dowel—that is, a solid, cylindrical rod—to the bare bottom or upper thighs of each child, being "very careful" in doing so. "When they were younger, [Alina] would use a wooden spoon, and as they got older or meatier, she would graduate to [use of] a wooden dowel."

¶6 Regarding injuries resulting from rod discipline, Alina said that "red or light purple" bruising was "common" on the older child when she was six to

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meaningful distinctions between the conduct of one versus the other, and making no arguments on appeal that are applicable to only one of them.

twelve months old, and that "one to three spankings resulted in a bruise." If Alina "went to spank [the older child] and saw a bruise, [Alina] would spank on the other side of the buttock or on a different part of the leg." When the older child was about ten months old, the child "was having problems sitting down, and Alina believed it was from spanking." As for the younger child, Alina recalled observing bruising about five times, and separately said that this child was "probably bruised every time [the child] was spanked."

¶7 Matthew told investigators that he also used "rod discipline" on the two children, using the same methods as Alina, and did so more often than Alina did: from two times a week to "two times in a month and beyond." Matthew began by using a small, flat wooden spoon, when the children were about two months old, and then "graduated" to a wooden dowel as the children became "meatier."

¶8 As to bruising or injury, Matthew told investigators that he struck the children "hard enough to inflict pain" and to leave bruises. On one occasion, when the older child was approaching the age of two years, Matthew drew blood from the child after the tip of a wooden dowel caught her calf.

Religious Context

¶9 Matthew is an "elder" in a Christian church. Church members use corporal punishment to discipline their children in a manner that they believe is consistent with biblical injunctions that include the following: "He who spares his rod hates his son, but he who loves him disciplines him diligently." Matthew averred in an affidavit filed as part of a pretrial motion that church members interpret the word "diligently" in this biblical injunction to mean that parents are

to use rod discipline when the children are "very young." Matthew interprets the Bible to teach that, "as soon as a parent sees foolishness expressed, at whatever age, … it is not to be taken lightly."

¶10 Matthew said that the purpose of rod discipline is to inflict pain so that "the child knows [that the child has] disobeyed." "[I]t was clear with the children what they needed to do and if they disobeyed, then the spankings followed."

¶11 Matthew averred: "If Wisconsin law does not permit us to include rod spanking of our young children as part of their upbringing, then in obeying [Wisconsin criminal] law, we are disobeying Scriptures," which would mean "that we are spiritually dead ... and our children will be spiritually dead." At an evidentiary hearing, Matthew testified that failure to obey scripture "culminates in eternal loss."[3]

¶12 In a similar vein, Alina told the investigators that the purpose of rod discipline is "to inflict pain on the child," as a form of "training" and to encourage "listening." Alina would use rod discipline when the older child was "angry or not listening, [or] not being quiet," and when the younger child was "not listening." For example, Alina explained that on one occasion, after Alina handed the older

[3] On appeal, the State emphasizes statements that each of the Caminitis made at sentencing that could be interpreted to cast doubt on the sincerity of their religious beliefs regarding rod discipline, at least by the time of the sentencing hearing if not earlier. However, the State on appeal bases its primary arguments on the premise that the circuit court correctly found that the Caminitis held pertinent, sincere religious beliefs during pertinent time periods. We do not further address the topic of the sentencing hearing statements.

child to someone else in church and the child began to cry, Alina took the child to another room and spanked her.

¶13 After Alina's parents expressed concern about bruising they observed on the children, Alina wrote a letter to her parents. In the letter, Alina spoke of using rod discipline as a method to deal "quickly, consistently and in a way that will make" "any form of selfishness" by the children "not happen again." "Especially in regard to [the older child's] crying with other people, my main focus … has been to get [the child] to fear, respect and listen to me all throughout the day."

Procedural History

¶14 The amended information charged Alina with three counts of intentionally causing bodily harm to a child in violation of WIS. STAT. § 948.03(2)(b) (two counts naming the older child as victim and one naming the younger child), and Matthew with five counts of the same offense (four counts naming the older child, and one naming the younger child).

¶15 The Caminitis filed a pretrial motion for dismissal on the ground that WIS. STAT. § 948.03(2)(b) is unconstitutional because it interferes with the free exercise of their religion and is vague and overbroad. The Caminitis later filed a second motion to dismiss, contending that the prosecution impermissibly infringed on their "constitutionally protected familial relationship" with their children.

¶16 We put aside in this summary the vagueness and overbreadth issues, which the Caminitis do not pursue on appeal. As to the remaining issues, the circuit court denied the motions to dismiss. In the course of doing so, the court found that Alina and Matthew each held a sincere belief that their shared religion

obligated them to use rod discipline, but that the State's interest in protecting children from abuse outweighs the Caminitis' freedom to exercise their rights to attempt to control their children, and to follow religious teachings, through the use of rod discipline.

¶17 The jury convicted Alina on all three counts of intentionally causing bodily harm to a child in the amended information, convicted Matthew on four counts of the same offense, and acquitted Matthew on one count of the same offense (involving the older child). Alina and Matthew now appeal their convictions on two grounds: that WIS. STAT. § 948.03(2)(b) "invades their constitutionally protected relationship with their children" under the substantive due process clause, and that the statute "burdens the religious practice of the Caminitis" under both the free exercise clause of the First Amendment and the freedom of conscience clause, art. I, § 18, of the Wisconsin Constitution.

DISCUSSION

¶18 We first summarize the nature of the single offense that was charged in each of the counts of conviction and that the Caminitis challenge as unconstitutional on its face, then address the Caminitis' substantive due process argument, and finally their arguments under the federal constitutional free exercise clause and the state constitutional freedom of conscience clause.

I. OFFENSE AT ISSUE

¶19 Wisconsin criminalizes specified conduct as physical abuse of a child at the felony level. WIS. STAT. § 948.03. As pertinent here, "[w]hoever intentionally causes bodily harm to a child is guilty of a Class H felony." Section

948.03(2)(b). "'Bodily harm' means physical pain or injury, illness, or any impairment of physical condition." WIS. STAT. § 939.22(4).

¶20 However, there is a complete defense in the form of a privilege when the accused was "responsible for the child's welfare" at the time of the offense and the conduct entailed "reasonable discipline." WIS. STAT. §§ 939.45(5)(a)3.; 939.45(5)(b). The "reasonable discipline" sufficient to create this complete defense "may involve only such force as a reasonable person believes is necessary." ***Id.***

¶21 As the State correctly points out, the constitutional challenges here, properly understood, are to the above statutes as those statutes have been interpreted in such authority as ***State v. Kimberly B.***, 2005 WI App 115, ¶29, 283 Wis. 2d 731, 699 N.W.2d 641. Two aspects of the case law are significant. First, when a defendant raises the reasonable discipline privilege as an affirmative defense, the State carries the burden of proving beyond a reasonable doubt both the elements of the alleged child abuse and also that the privilege does not apply. *See* ***id.***, ¶29.

¶22 Second, regarding the nature of reasonable discipline, including the component concept of reasonable force:

> Reasonable force is that force which a reasonable person would believe is necessary. Whether a reasonable person would have believed the amount of force used was necessary and not excessive must be determined from the standpoint of the defendant at the time of the defendant's acts. The standard is what a person of ordinary intelligence and prudence would have believed in the defendant's position under the circumstances that existed at the time of the alleged offense.
>
> … There is no inflexible rule that defines what, under all circumstances, is unreasonable or excessive

> corporal punishment. Rather, the accepted degree of force must vary according to the age, sex, physical and mental condition and disposition of the child, the conduct of the child, the nature of the discipline, and all the surrounding circumstances.

Id., ¶¶32-33 (citations omitted).

¶23 These legal principles were reflected in an instruction that the jury received at trial in this case:

> Discipline of a child is an issue in this case because the defendants are the parents of both children.
>
> As to each count, the State must prove by evidence which satisfies you beyond a reasonable doubt that a specific defendant did not act reasonably in the discipline of the named child.
>
> Wisconsin recognizes the right of a parent to inflict corporal punishment to correct or discipline a child. The law allows a parent to use reasonable force to discipline his or her child. Reasonable force is that force which a reasonable person would believe is necessary and not excessive.
>
> Whether a reasonable person would have believed that the amount of force used was necessary and not excessive must be determined from the standpoint of the defendant at the time of that defendant's acts. The standard is what a person of ordinary intelligence and prudence would have believed in the defendant's position under the circumstances that existed at the time of the alleged offense.
>
> In determining whether the discipline was or was not reasonable, you should consider the age, sex, physical and mental condition and disposition of the child, the conduct of the child, the nature of the discipline, and all the surrounding circumstances.

¶24 These statutes and legal principles apply to each of the counts of conviction challenged in this appeal, which vary only as to the time period covered and the particular child allegedly abused. As shorthand, when we refer to the

simultaneous application of the above-referenced statutes and legal principles we will generally speak of "the intentional physical abuse charge," or "the statutes here."

II. THE CONSTITUTIONAL CHALLENGES

¶25 As our supreme court has explained:

> The constitutionality of a statute is a question of law which [an appellate] court approaches de novo without deference to the court[] below. There is a presumption of constitutionality for legislative enactments and every presumption favoring validity of the law must be indulged. Further, the challenger bears the burden to prove a statute unconstitutional beyond a reasonable doubt.

State v. Post, 197 Wis. 2d 279, 301, 541 N.W.2d 115 (1995) (citations omitted).

¶26 When a party challenges a law as being unconstitutional on its face, that party "must show that the law cannot be enforced 'under any circumstances,'" unlike under an as-applied challenge, which courts are to assess "by considering the facts of the particular case in front of us, 'not hypothetical facts in other situations.' Under such a challenge, the challenger must show that his or her constitutional rights were actually violated." ***League of Women Voters of Wisconsin Educ. Network, Inc. v. Walker***, 2014 WI 97, ¶13, 357 Wis. 2d 360, 851 N.W.2d 302 (quoted sources omitted).

¶27 The Caminitis in their principal brief present arguments based on facial constitutional challenges, not as-applied challenges, to the intentional

physical abuse charge.[4] Therefore, we focus on the facial challenge arguments advanced by the Caminitis.

A. Substantive Due Process: Familial Relations

¶28 The Caminitis' first constitutional argument, which we will call the "familial relations" argument, is that the intentional physical abuse charge unjustifiably interferes with the substantive due process rights of parents under the Fourteenth Amendment in two ways, which we summarize in the analysis section below.[5] The Fourteenth Amendment provides in pertinent part that no "State shall 'deprive any person of … liberty, …without due process of law.'" Substantive due process "provides heightened protection against government interference with certain fundamental rights and liberty interests." Important here, this includes the liberty interest "of parents in the care, custody, and control of their children." *See* ***Troxel v. Granville***, 530 U.S. 57, 65 (2000) (quoted sources omitted). The State here does not dispute that "control" in this context includes the right of parents to use reasonable methods in disciplining their children. *See* ***Doe v. Heck***, 327 F.3d

[4] There is a single, passing reference to "as applied" analysis in the Caminitis' principal brief, in the freedom of conscience argument. We decline to abandon our neutral role to attempt to develop an argument from this reference. *See* ***M.C.I., Inc. v. Elbin***, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988). In their reply brief, the Caminitis change course and explicitly attempt to argue using the as-applied approach. The rule is "well-established" that we generally do not consider arguments raised for the first time in a reply brief, *see* ***Bilda v. County of Milwaukee***, 2006 WI App 57, ¶20 n.7, 292 Wis. 2d 212, 713 N.W.2d 661, and we conclude that it would be inappropriate to deviate from that rule in this instance.

[5] Without citation to authority, the Caminitis briefly assert that "[t]o the extent that" their "family relationships are intruded upon" by the intentional physical abuse charge, this would violate the free exercise and freedom of conscience clauses. We do not address this undeveloped argument regarding these constitutional doctrines.

492, 522 (7th Cir. 2003), as amended on denial of reh'g (citing ***Troxel***, 530 U.S. at 78, and ***Meyer v. Nebraska***, 262 U.S. 390, 399 (1923)).

1. Standard of Judicial Review

¶29 The parties disagree about the level of review we are to apply to the intentional physical abuse charge when considering the Caminitis' familial relations argument: strict scrutiny or a balancing test.

¶30 The Caminitis argue that strict scrutiny review applies, because the statutes here burden a fundamental liberty interest. Under strict scrutiny review a challenged law may be upheld only if it is shown to be necessary to further a compelling state interest and if it addresses that interest through the least restrictive means available. *See* ***Kenosha County DHS v. Jodie W.***, 2006 WI 93, ¶¶39-41, 293 Wis. 2d 530, 716 N.W.2d 845 (applying strict scrutiny to the examination of whether circuit court's application of statute defining grounds for involuntary termination of parental rights violated parent's substantive due process rights).

¶31 The State acknowledges that the United States Supreme Court has recognized a fundamental liberty interest in familial privacy and integrity, *see* ***Troxel***, 530 U.S. at 72-73, which in some contexts would require strict scrutiny review, and that the right to discipline one's children falls within this protected liberty interest. However, the State submits that federal circuit court cases interpreting the plurality's approach in ***Troxel*** have identified a separate standard that is to be used in the specific context of a review of laws addressing child abuse based on a substantive due process challenge. *See* ***Doe***, 327 F.3d at 519-25; ***Croft v. Westmoreland Cty. Children & Youth Serv.***, 103 F.3d 1123, 1125 (3d Cir.

1997). Based on this authority, the State argues that courts are to balance "the fundamental liberty interests of the family unit with the compelling interests of the state in protecting children from abuse," using a heightened level of scrutiny, but not strict scrutiny. *See* ***Croft***, 103 F.3d at 1125.

¶32 We need not resolve this dispute. For reasons we now explain, we conclude that, assuming without deciding that the higher standard advocated by the Caminitis applies, the statutes here survive strict scrutiny review because they are necessary to further a compelling state interest and address that interest through the least restrictive means available.

2. Compelling Interest

¶33 The Caminitis concede that the State has "a compelling interest in protecting children" from certain types of harmful parental discipline. They qualify the concession, however, by arguing that this compelling interest extends only to the criminalization of discipline resulting in physical *injury*, not to discipline resulting in physical *pain* that leaves no evidence of physical injury, and that the statutory prohibition on unreasonably inflicting "physical pain" is therefore unconstitutional.[6] *See* WIS. STAT. § 939.22(4). Under the Caminitis'

[6] The Caminitis use shifting terminology for two concepts that we will refer to using only two phrases from the intentional physical abuse charge: "physical pain" and "physical injury." *See* WIS. STAT. § 939.22(4). The Caminitis speak of: "injury"; "actual injury"; "serious injury"; "actual bodily injury"; "physically harmful"; "actually harmful"; "greater than a slap"; "substantial pain"; "non-injurious spanking"; a pain that is "transitory," "minimal," "momentary," "minor," or "very minor." By using these various formulations, the Caminitis may intend to suggest arguments that we do not address in the text, but we deem any such attempted arguments to be undeveloped. Put differently, the only developed arguments that we clearly understand the Caminitis to make in this connection involve the concept, which we address in the text, of causing physical pain without causing physical injury.

view, the State lacks a compelling interest in criminalizing how parents might discipline their children using methods that produce "only" physical pain but not physical injury, based on the unstated premise that discipline producing physical pain and not injury is necessarily less harmful to children than conduct that produces physical injury.[7]

¶34 We reject this argument on two related grounds: (1) there is no basis to accept the unstated premise that the infliction of physical pain not resulting in physical injury is always less harmful than the infliction of physical injury; (2) this argument effectively ignores the complete defense represented by the reasonable discipline privilege. First, discipline that produces physical pain not resulting in physical injury could include conduct that, depending on details, could qualify as a form of torture: administering shocks by passing electric current through a child's body; hanging a child upside down by his or her feet; or confining a child in a cold or hot place, or in a small space. Any of these could be extremely painful without necessarily causing physical injury, and any could be potentially more harmful to a child than a wide range of conduct that causes physical injuries, such as a bruise or cut caused by a blow from a hand, belt, or rod.

[7] The Caminitis make this same argument in the context of the "no less restrictive alternative" prong of the analysis, arguing that the intentional physical abuse charge is overly restrictive in criminalizing discipline that causes physical pain but not physical injury. We reject this argument in both contexts for the reasons we provide in the text.

Separately, given the particular arguments made by the Caminitis and our discussion in the text, it is not necessary for us to resolve a dispute between the parties as to whether the State's theory of prosecution at trial was exclusively limited to rod discipline that produced bruising (physical injuries), as opposed to rod discipline that produced bruising in some instances but in other instances produced physical pain with no accompanying bruising.

¶35 Second, the Caminitis do not even begin to develop a persuasive argument that the State lacks a compelling interest in preventing parents from intentionally and *unreasonably* administering discipline to their children that causes physical pain but not physical injury. By definition, under the terms of the reasonable discipline privilege, the administration of discipline causing physical pain must be unreasonable in order to result in a conviction.

¶36 The Caminitis make the general statement that "not all pain is harmful." This general statement is not objectionable. However, the statutes here do not criminalize all parental discipline that results in pain. For the reasons we have already stated, the right to familial relations does not prevent the State from criminalizing unreasonable discipline that results in physical pain any more than it prevents the State from criminalizing unreasonable discipline that results in physical injury.

¶37 Without citing authority for the proposition, the Caminitis in their reply brief assert for the first time that we should ignore the affirmative defense of reasonable discipline, "because it is unquestionably a burden" for parents "to be hauled into court, [and] put to the humiliation and expense of a trial for administering a non-injurious spanking to a child." We reject this argument because it is inconsistent with the premise of arguments made in the Caminitis' principal brief that we may consider all pertinent statutes, as interpreted in ***Kimberly B.***, and because the Caminitis provide insufficient reason for us to ignore the reasonable discipline privilege on this ground.

¶38 The Caminitis refer in passing to many cases from other jurisdictions. However, as far as we can tell, and as far as the Caminitis provide explanations, each case falls into one or more of the following categories: the case

supports a proposition not contested by the State; the case supports the proposition that lawmakers in other jurisdictions may decide to provide less protection for children than does Wisconsin, a proposition that does not in itself raise a constitutional issue; or the case addresses a context that is readily distinguishable on its face (such as regulation of corporal discipline by teachers in schools) and the Caminitis fail to explain how the case might support their argument. For example, the Caminitis twice cite a 157-year-old Vermont case that does not appear to advance any contested point they make. *See, e.g.,* ***Lander v. Seaver***, 32 Vt. 114 (1859) (holding that considerable allowance should be made for a teacher who used corporal discipline on a student based on good motives and did not act in anger or with malice).

¶39 For these reasons, we reject the only developed argument that we can discern offered by the Caminitis to rebut the State's position that the intentional physical abuse charge advances a compelling state interest.

3. Less Restrictive Alternative

¶40 The State submits that there is no less restrictive alternative to the intentional physical abuse charge to address the compelling state interest in protecting children from unreasonable discipline by a parent in way that would not "lower the standard of child protection in Wisconsin to the detriment of the State's children." The following is the only argument not already addressed above that the Caminitis make in response. The statutes here criminalize the use of force when a reasonable person would consider it not reasonably "necessary" under the circumstances, but it is unconstitutional to allow a jury to decide whether a parent's reason for imposing discipline is reasonably "necessary." Under the Caminitis' view, every parent is constitutionally entitled to determine, without

government interference, when discipline is reasonably necessary. Their position is unqualified: the State "has no legitimate interest whatsoever" in allowing a jury in a criminal case to consider the reasons for a parent's use of physical force in disciplining his or her child. We are not persuaded.

¶41 We agree with the State that this amounts to a "bold and remarkable" assertion that the Caminitis fail to support as a legal argument. As purported support, they question whether jurors could fairly evaluate whether a religious belief could justify a particular type and amount of discipline as being reasonably necessary. However, as referenced in a separate section below, there is no dispute that the statutes here are facially neutral and make no distinctions based on religious belief. Moreover, the Caminitis' position directly contradicts our supreme court's explanation that "a parent's fundamental right to make decisions concerning a child's care has limitations. The state's authority is not nullified merely because a parent grounds his or her claim to control the child in religious belief." *See* ***State v. Neumann***, 2013 WI 58, ¶126, 348 Wis. 2d 455, 832 N.W.2d 560.

¶42 For these reasons, we reject all arguments made by the Caminitis to rebut the State's position that there are no less restrictive alternatives to the intentional physical abuse charge, and affirm the circuit court's decision to reject the familial relations argument.[8]

[8] In further support of their "less restrictive alternatives" argument, the Caminitis cite to cases and statutes from other jurisdictions that may allow parents to discipline their children more harshly than Wisconsin law permits. However, the Caminitis cite to no authority supporting the proposition that any federal or Wisconsin constitutional provision requires that Wisconsin (continued)

B. Free Exercise and Freedom of Conscience

¶43 The Caminitis' second constitutional argument comes in two parts, a challenge under the free exercise clause of the First Amendment and a challenge under the freedom of conscience clause, art. I, § 18, of the Wisconsin Constitution.

1. Free Exercise

¶44 The Caminitis submit that using rod discipline is central to their religious beliefs, and from this premise argue that it violates the free exercise clause of the First Amendment to prosecute them for following those beliefs. The Caminitis take the position that the protections of the free exercise clause apply if the challenged law discriminates against certain religious beliefs or prohibits conduct that is undertaken for religious reasons.

¶45 In response, the State explains that the United States Supreme Court in ***Employment Division, Department of Human Resources, Oregon v. Smith***, 494 U.S. 872, 879-80 (1990), has held that all citizens must abide by any criminal law of general applicability that does not discriminate on religious grounds, as recognized by our supreme court in ***Neumann***, 348 Wis. 2d 455, ¶125 n.76. Effectively conceding the point by failing to address this authority, and without refuting the proposition that the statutes here are neutral laws of general applicability, the Caminitis essentially assert that it always violates the free exercise clause for a jury to find child discipline to be unreasonable when the

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provide children with no greater protection from physical abuse than is provided by any other jurisdiction.

discipline is motivated by or informed by religious belief, because this would necessarily involve "viewpoint discrimination." However, the Caminitis fail to support this highly counterintuitive suggestion with authority that might distinguish ***Smith***, which is a controlling interpretation of our federal constitution by the United States Supreme Court.

2. Freedom of Conscience

¶46 The freedom of conscience clause in WIS. CONST., art. I, § 18 provides "stronger protection of religious freedom" than does the First Amendment. *See* ***State v. Miller***, 202 Wis. 2d 56, 64, 549 N.W.2d 235 (1996), *abrogated on other grounds by* ***City of Boerne v. Flores***, 521 U.S. 507 (1997), *as recognized in* ***Coulee Catholic Schools v. LIRC***, 2009 WI 88, ¶62, n.27, 320 Wis. 2d 275, 768 N.W.2d 868. Thus, unlike under the First Amendment, under the state constitution a four-part, burden-shifting test applies:

> [T]he challenger carries the burden to prove: (1) that he or she has a sincerely held religious belief, (2) that is burdened by application of the state law at issue. Upon such proof, the burden shifts to the State to prove: (3) that the law is based on a compelling state interest, (4) which cannot be served by a less restrictive alternative.

Id., 202 Wis. 2d at 66.

¶47 As noted above, the State in the main does not dispute the circuit court's finding that the practice of rod discipline here was an exercise of sincerely held religious beliefs that was burdened by the statutes. This leaves the question of whether the State has demonstrated that it has a compelling interest that cannot be served by a less restrictive alternative.

¶48 In discussion above we have addressed and resolved in favor of the State the parties' discernable arguments on these issues. We now address one argument that the Caminitis emphasize in the freedom of conscience context not already addressed above, at least not in the following terms.

¶49 The Caminitis emphasize that, because a "religion is based on faith," its requirements to adherents do "not necessarily" appear "'reasonable' or rational" to a jury. In this same vein, their principal brief contains extensive references to religious sources that they submit support the notion that rod discipline is of deepest significance to the Caminitis and fellow worshippers, regardless of contrary prevailing beliefs and attitudes in the public at large. However, we agree with the following partial response of the State:

> A less restrictive alternative that would create a different standard for religiously minded child discipliners would immunize such people from child abuse prosecutions in even the most egregious cases. *Cf.* ***Giboney v. Empire Storage & Ice Co.***, 336 U.S. 490, 495-96 (1949) ("it is difficult to perceive how … these constitutional guaranties afford [the Caminitis] a peculiar immunity from laws against [child abuse] unless … [they are] given special constitutional protection denied all other people") (***Giboney*** involved union picketing in restraint of trade).

¶50 For these reasons, we affirm the circuit court's decision to reject the free exercise and freedom of conscience arguments.

CONCLUSION

¶51 For all of these reasons, we affirm the decisions of the circuit court to deny the Caminitis' motions to dismiss based on the constitutional issues we have addressed.

By the Court.—Judgments affirmed.

Not recommended for publication in the official reports.