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Substantially Burdened, Substantially in Conflict, or Substantially Unneeded? A Discussion of Abdulhaseeb v. Calbone

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Substantially Burdened, Substantially in Conflict, or Substantially Unneeded? A Discussion of *Abdulhaseeb v. Calbone*

I. INTRODUCTION

The Tenth Circuit's recent decision in *Abdulhaseeb v. Calbone*[1] highlights the difficulty and conflicting rules courts face in determining when the government has placed a substantial burden on an inmate's religious rights. In *Abdulhaseeb*, the Tenth Circuit considered the Religious Land Use and Institutionalized Persons Act[2] ("RLUIPA"), which provides, inter alia, that "[n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution."[3] Although the substantial burden requirement of RLUIPA is fundamental to the statute's application, the term is not defined within the statute, and circuit courts have differed in their interpretation of this requirement. To address this problem, the Tenth Circuit attempted to synthesize the various circuit rules by holding that a government substantially burdens an inmate's religious expression if it

> (1) requires participation in an activity prohibited by a sincerely held religious belief, or (2) prevents participation in conduct motivated by a sincerely held religious belief, or (3) places substantial pressure on an adherent either not to engage in conduct motivated by a sincerely held religious belief or to engage in conduct contrary to a sincerely held religious belief.[4]

This Note argues that the Tenth Circuit's synthesized rule is problematic for two reasons. First, by combining the two prevalent but different tests used in the different circuits into one test, the rule undermines precedent and exacerbates the friction between the various circuit rules. Second, the third part of this rule provides little

1. 600 F.3d 1301 (10th Cir. 2010).

2. Pub. L. No. 106-274, 114 Stat. 803 (2000) (codified at 42 U.S.C. §§ 2000cc-1 to -5) (2006).

3. 42 U.S.C. § 2000cc-1(a) (2006).

4. *Abdulhaseeb*, 600 F.3d at 1315.

guidance for application and opens the door for judges to base their decisions on their preferences instead of precedent.

Part II of this Note discusses the facts and history of *Abdulhaseeb*. Part III discusses the context, political situation, and background leading up to the decision in *Abdulhaseeb*. Finally, Part IV discusses the problems inherent in the third part of the test postulated by the Tenth Circuit and the resulting need to eliminate that prong.

II. FACTS AND PROCEDURAL HISTORY

From June 4, 2001, to January 27, 2005, Madyun Abdulhaseeb was incarcerated at Great Plains Correction Facility ("GPCF").[5] While a prisoner at GPCF, Abdulhaseeb requested that he be provided with a halal diet, but his requests were denied.[6] After three years of incarceration, Abdulhaseeb submitted a formal grievance charging that GPCF forced him to accept gelatin and puddings on his meal trays in violation of his beliefs.[7] Abdulhaseeb argued that, although GPCF indicated that the pudding and gelatin were halal and kosher, there was nothing on the packaging to substantiate that claim; thus, GPCF should have provided him with a satisfactory halal substitute.[8] The administrator at GPCF denied Abdulhaseeb's grievance and indicated that no one was forcing Abdulhaseeb to have gelatin or pudding on his tray.[9] The administrator also noted that there was no pork or pork byproduct in the gelatin or pudding; therefore, in his opinion, those products met Abdulhaseeb's religious standards.[10]

A month after GPCF denied his initial grievance, Abdulhaseeb filed another grievance with GPCF arguing that the prison should provide halal chickens for all the prisoners in celebration of the

5. *Id.* at 1306. Oklahoma contracts with GPCF, a private prison, to hold Oklahoma prisoners. *Id.*

6. *Id.* A halal diet, also known as a "lawful" diet, prohibits consumption of food that is deemed to be unlawful ("haram"). *Id.* at 1313. It requires one to abstain from eating "pork and its byproducts, animals improperly slaughtered or killed, alcohol and intoxicants, blood and blood byproducts, and foods contaminated with haram products." *Id.* (citing *What is Halal?*, ISLAMIC FOOD AND NUTRITION COUNCIL OF AMERICA, http://www.ifanca.org/halal/ (last visited Feb. 28, 2011)).

7. *Id.*

8. *Id.*

9. *Id.* at 1307.

10. *Id.*

Islamic feast Eid-ul-Adha.[11] Again, GPCF denied his request for accommodation.[12] The GPCF administrator stated that "DOC policy allows you [Abdulhaseeb] to purchase a Hallal meal through an approved vendor. The practice at GPCF, which includes the current year, is to provide a Hallal meal at the conclusion of Ramadan" but not for the Eid-ul-Adha feast.[13] After receiving this denial, Abdulhaseeb unsuccessfully appealed to the Oklahoma Department of Corrections ("ODOC").[14]

Three months after his second grievance, GPCF transferred Abdulhaseeb to the Oklahoma State Penitentiary ("OSP"), a prison administered by ODOC.[15] After arriving at OSP, Abdulhaseeb again requested a halal diet.[16] Specifically, he wrote a letter stating, "I am a Muslim. I request a Halal diet that is consistent with my sincerely held religious beliefs and does not substantially burden my freedom of religious expression. . . . Your non-pork common fare diet and vegetarian diet are not diets that are consistent with Islamic dietary laws."[17] Like the GPCF administrators, OSP officials denied his request and responded by indicating that they only provided two alternative diets for religious reasons: non-pork and vegetarian.[18]

After receiving this denial, Abdulhaseeb filed another grievance asking for a halal diet, but OSP again denied his request, citing the two alternative diets available to Abdulhaseeb.[19] Abdulhaseeb again unsuccessfully appealed to ODOC.[20]

Following ODOC's denial of his request, Abdulhaseeb filed seventeen claims[21] in district court alleging, inter alia, that GPCF and OSP violated his rights under RLUIPA by not providing him with a halal diet.[22] GPCF and OSP both moved for summary judgment on all seventeen counts, and the district court entered judgment in favor

11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.* at 1307–08.
21. Abdulhaseeb filed twelve claims against GPCF and five claims against OSP. *Id.* at 1308–09.
22. *Id.* at 1308.

of GPCF and OSP on eight of the claims and dismissed the remainder of the claims.[23] Abdulhaseeb then appealed to the Tenth Circuit.[24]

III. SIGNIFICANT LEGAL BACKGROUND

A. Religious Practices and Inmates

Religious practices are very prevalent among prison inmates within the United States prison system.[25] For instance, one study conducted in the South Carolina prison system found that nearly half of prison inmates attend religious services, and that those who attend do so six times a month on average.[26] This is seen as a positive trend, since the number and severity of inmate infractions decreases as inmates become more involved with religious practices.[27] In addition, courts have noted that "deny[ing] the opportunity to affirm membership in a spiritual community . . . may extinguish an inmate's last source of hope for dignity and redemption,"[28] which may decrease the likelihood of rehabilitation for an inmate. Consequently, religion is "one of the best rehabilitative influences we can have" on inmates.[29]

B. Religious Expression: A Varying Standard

The legal standard for determining an inmate's right to religious expression has varied over time. Initially, recognizing the need for a framework to protect the individual's right of religious expression, the Supreme Court held, in *Sherbert v. Verner*,[30] that the government cannot pass a law that infringes on an individual's religious liberties unless the law survives strict scrutiny; that is to say, unless the

23. *Id.* at 1309. Judgment was not entered on claims 6–9 and 14–17 because the court held that they were not ripe due to non-exhaustion of remedies. *Id.*

24. *Id.*

25. Thomas P. O'Connor & Michael Perreyclear, *Prison Religion in Action and Its Influence on Offender Rehabilitation*, in RELIGION, THE COMMUNITY, AND THE REHABILITATION OF CRIMINAL OFFENDERS 11, 12 (Thomas P. O'Connor & Nathaniel J. Pallone eds., 2002).

26. *Id.* at 21.

27. *Id.* at 11.

28. O'Lone v. Estate of Shabazz, 482 U.S. 342, 368 (1987) (Brennan, J., dissenting).

29. 139 CONG. REC. S14,367 (daily ed. Oct. 26, 1993) (statement of Sen. Orrin Hatch).

30. 374 U.S. 398 (1963).

government demonstrates that the law achieves a "compelling state interest" and utilizes the least restrictive means of achieving that interest.[31] The Court further upheld this judicial requirement in *Wisconsin v. Yoder*[32] by concluding that "only those interests of the highest order . . . can overbalance legitimate claims to the free exercise of religion."[33] Thus, if a law infringed upon religious expression, it had to be the least restrictive means of achieving a compelling interest of the highest order to pass the stringent test articulated in *Sherbert* and *Yoder*.

During the 1970s and 1980s, courts continued to apply the rationale of *Sherbert* and *Yoder* to free exercise claims by prisoners.[34] Beginning in the late 1980s, however, the Court departed from its reasoning in *Sherbert* and *Yoder* by subjecting laws that infringed upon religious expression to a standard that resembled, though was not explicitly, rational basis review.[35] This more deferential review continued until finally, in *Employment Division v. Smith*,[36] the Court explicitly rejected the "compelling governmental interest" standard of *Sherbert* altogether and replaced it with rational basis review.[37] Although this was a departure from its prior standard, the Court reasoned that generally applicable laws that incidentally burden religious expression were subject only to rational basis review—not strict scrutiny.[38]

C. Statutory Responses to Smith

In response to the Supreme Court's application of the rational basis standard to a religious freedom case, Congress passed the Religious Freedom Restoration Act[39] ("RFRA"), which effectively

31. *Id.* at 406, 407.

32. 406 U.S. 205 (1972).

33. *Id.* at 215.

34. *See, e.g.*, Kennedy v. Meachem, 540 F.2d 1057 (10th Cir. 1976); United States v. Fisher, 571 F. Supp. 1236 (S.D.N.Y. 1983); Masjid Muhammad-D.C.C. v. Keve, 479 F. Supp. 1311 (D. Del. 1979).

35. *See* O'Lone v. Estate of Shabazz, 482 U.S. 342, 350–51 (1987); Daniel J. Solove, *Faith Profaned: The Religious Freedom Restoration Act and Religion in the Prisons*, 106 YALE L.J. 459, 470 (1996) (discussing the evolution of rational basis and strict scrutiny in regards to religious expression).

36. 494 U.S. 872 (1990).

37. *Id.* at 885–89.

38. *Id.*

39. 42 U.S.C. § 2000bb (2006).

legislatively reversed *Smith* and reinstituted the strict scrutiny standards from *Sherbert* and *Yoder*.[40] The pertinent sections of RFRA prohibited the government from "substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability";[41] yet, the Act did not define "substantially burden."[42]

However, four years after Congress passed RFRA, the Supreme Court, in *City of Boerne v. Flores*, struck down the Act as applied to state and local governments.[43] The Court reasoned that because Congress has only the "power 'to enforce,' not the power to determine what constitutes a constitutional violation," Congress exceeded its powers under the Fourteenth Amendment when it passed RFRA.[44]

Congress responded to the Court's holding in *Flores* by enacting RLUIPA three years later. RLUIPA closely mirrors the provisions of RFRA, but limits its scope to land use and institutionalized persons.[45] The Act provides that

> No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution . . . unless the government demonstrates that imposition of the burden on that person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.[46]

While RLUIPA, like RFRA, failed to explicitly define "substantial burden," the legislative history indicates that it is to be interpreted in

40. *See* Eugene Gressman & Angela C. Carmella, *The RFRA Revision of the Free Exercise Clause*, 57 OHIO ST. L.J. 65, 102 (1996); Abbott Cooper, *Dam the RFRA at the Prison Gate: The Religious Freedom Restoration Act's Impact on Correctional Litigation*, 56 MONT. L. REV. 325, 325–26 (1995).

41. 42 U.S.C. § 2000bb-1.

42. 146 CONG. REC. S16,698, 16,700 (July 27, 2000) (joint statement of Sen. Orrin Hatch and Sen. Edward Kennedy).

43. *See* 521 U.S. 507, 532–36 (1997). However, the federal government still must follow RFRA. Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 424 (2006).

44. *Flores*, 521 U.S. at 519.

45. *See* 42 U.S.C. §§ 2000cc–2000cc-5; Adkins v. Kaspar, 393 F.3d 559, 567 (5th Cir. 2004).

46. 42 U.S.C. § 2000cc-1(a).

reference to RFRA and its jurisprudence.[47] As a result, circuit courts have interpreted RLUIPA according to RFRA and its jurisprudence, yet still significantly differ as to when government action substantially burdens an inmate's religious beliefs.

IV. THE COURT'S DECISION

In *Abdulhaseeb*, a three-member panel of the Tenth Circuit reversed the district court's decision to grant GPCF and OSP's motions for summary judgment.[48] Specifically, the court held that GPCF and OSP may have "substantially burdened" Abdulhaseeb's religious exercise by refusing to provide him with a halal diet or halal chickens for the Eid-ul-Adha feast.[49]

A. General Requirements of RLUIPA

In deciding whether GPCF and OSP violated RLUIPA, the court reasoned that RLUIPA required Abdulhaseeb to demonstrate that he desired to participate in "(1) a religious exercise (2) motivated by a sincerely held belief, which exercise (3) [was] subject to a substantial burden imposed by the government" to succeed in his claims.[50] The court briefly discussed the general elements of the first two requirements, but reasoned that since GPCF and OSP did not challenge the "religious nature of Abdulhaseeb's beliefs" and there was no evidence in the record that Abdulhaseeb did not sincerely hold his expressed beliefs, it did not need to rule on these issues.[51] Rather, the court held that the dispositive issue was whether

47. 146 CONG. REC. S16,698, 16,700 (July 27, 2000) (joint statement of Sen. Orrin Hatch and Sen. Edward Kennedy). *See also* Grace United Methodist Church v. City of Cheyenne, 451 F.3d 643, 661 (10th Cir. 2006) (concluding that the substantial burden standard under RFRA applied to RLUIPA).

48. Abdulhaseeb v. Calbone, 600 F.3d 1301, 1309 (10th Cir. 2010). Although Abdulhaseeb alleged seventeen different claims against OSP and GPCF, this Note is only concerned with claims five and ten, which allege that GPCF and OSP violated RLUIPA by denying Abdulhaseeb a halal diet.

49. *Id*. at 1315.

50. *Id*. at 1312–13 (citing Kikumura v. Hurley, 242 F.3d 950, 960 (10th Cir. 2001)).

51. *Id*. at 1313–15. In his concurrence, Judge Gorsuch explicitly stated that the "only question before the court is whether the government has imposed a substantial burden" since the government did not contest Abdulhaseeb's "religiosity or the sincerity of [his] beliefs." *Id*. at 1324 (Gorsuch, J., concurring).

the government "substantially burdened" Abdulhaseeb's religious exercise.[52]

B. Defining "Substantial Burden" under RLUIPA

Abdulhaseeb presented the Tenth Circuit with its first opportunity to interpret the meaning of "substantial burden" under RLUIPA.[53] The court, after reviewing other circuit decisions that clarified the term, concluded that the government substantially burdens an individual's religious exercise when it

> (1) requires participation in an activity prohibited by a sincerely held religious belief, or (2) prevents participation in conduct motivated by a sincerely held religious belief, or (3) places substantial pressure on an adherent either not to engage in conduct motivated by a sincerely held religious belief or to engage in conduct contrary to a sincerely held religious belief.[54]

The court opined that the first and second parts of the rule were self-explanatory, but believed that the third part, "substantial pressure," needed additional explanation.[55] To explain the third part of its rule, the court provided several examples.[56] First, the court concluded that a government substantially pressures an inmate if it provides him or her with a "Hobson's choice."[57] The court defined a Hobson's choice as an "illusory choice where the only realistically possible course of action trenches on an adherent's sincerely held religious belief."[58] Essentially, if the government requires an inmate to choose between eating food that the inmate considers against his religious beliefs or not eating at all, then the court would consider the choice a Hobson's choice.[59]

Second, in accordance with congressional intent,[60] the court reviewed Supreme Court decisions prior to *Smith* that defined

52. *Id.* at 1315 (majority opinion).

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* at 1315.

57. *Id.*

58. *Id.*

59. *Id.* at 1317.

60. *See* 146 CONG. REC. S16,698, 16,700 (July 27, 2000) (joint statement of Sen. Orrin Hatch and Sen. Edward Kennedy).

"substantial burden" and parenthetically reasoned that "substantial pressure on an adherent to modify . . . behavior"[61] and "indirect coercion or penalties"[62] were additional examples of substantial pressure sufficient to constitute a substantial burden. The court provided several other parenthetical observations but concluded that not "every infringement on a religious exercise will constitute a substantial burden,"[63] and that the court would need to evaluate on a case-by-case basis the level of inconvenience to an individual's religious practice in order to determine whether the burden should be considered "substantial."[64]

C. Did OSP Violate RLUIPA by Failing to Provide Abdulhaseeb with a Halal Diet?

After defining the third part of the rule, the Tenth Circuit considered whether OSP substantially burdened Abdulhaseeb's religious expression by not providing him with a halal diet. In particular, the court concluded that the government substantially pressured Abdulhaseeb because it left him with a Hobson's choice: Abdulhaseeb could either eat a diet that violated his sincerely held belief, or not eat at all.[65] The court reasoned that "it is one thing to curtail various ways of expressing belief, for which alternative ways of expressing belief may be found. It is another thing to require a believer to defile himself, according to the believer's conscience, by doing something that is completely forbidden by the believer's religion."[66] In addition, the court noted that other courts have held that failure to provide a halal diet may substantially burden the religious exercise of a Muslim.[67]

61. *Abdulhaseeb,* 600 F.3d at 1315 (quoting Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 717–18 (1981)).

62. *Id*. at 1316 (quoting Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 450 (1988)).

63. *Id*.

64. *Id*. (citing Adkins v. Kaspar, 393 F.3d 559, 570 (5th Cir. 2004)).

65. *Id*. at 1317.

66. *Id*. (quoting Beerheide v. Suthers, 286 F.3d 1179, 1192 (10th Cir. 2002)).

67. *Id*. (citing Hudson v. Dennehy, 538 F. Supp. 2d 400, 411 (D. Mass. 2008); Thompson v. Williams, No. C06-5476FDB-KLS, 2007 WL 3244666, at *19 (W.D. Wash. Oct. 31, 2007); Caruso v. Zenon, No. 95-MK-1578 (BNB), 2005 WL 5957978, at *12 (D. Colo. July 25, 2005)). Moreover, Judge Gorsuch, in his concurrence, noted that "[t]o say that access to edible food qualifies as 'an important benefit' is to put it mildly" and that the government substantially pressured Abdulhaseeb's religious expression by not providing a halal diet. *Id*. at 1325 (Gorsuch, J., concurring).

OSP argued that it did not force Abdulhaseeb into a Hobson's choice because it allowed the option of purchasing a halal diet from a possible outside vendor, but the court rejected this argument.[68] The court first noted that this is an unreasonable option for an indigent inmate, such as Abdulhaseeb, since he would still effectively be barred from obtaining the halal food as he lacked the requisite finances.[69] Moreover, the court, citing an affidavit from a chaplain at GPCF,[70] noted that there was no approved halal vendor for ODOC, and that it was ODOC's policy that all vendors be preapproved before they could deliver food.[71] Thus, although a cursory analysis seemed to indicate that Abdulhaseeb did have methods to obtain a halal diet, this nonetheless was not the case while he was incarcerated at OSP, since both OSP and GPCF had the same food policies.[72] However, although withholding a halal diet may have substantially burdened Abdulhaseeb's religious exercise, the court remanded Abdulhaseeb's claim on different grounds: that the government failed to address whether the burden resulted from a "compelling governmental interest" along with whether the government used the "least restrictive means" in accomplishing its interest.[73]

D. Was the Denial of Halal Meat for an Islamic Feast a Substantial Burden to Abdulhaseeb's Religious Exercise?

After considering whether OSP may have substantially burdened Abdulhaseeb's religious exercise, the Tenth Circuit next considered Abdulhaseeb's additional claim that GPCF's failure to provide halal meat for an Islamic feast, Eid-ul-Adha, violated RLUIPA.[74] The court began by explicitly rejecting the district court's reasoning that the "failure to celebrate the Feast itself would [not] substantially burden . . . [Abdulhaseeb's] religious exercise."[75] Specifically, the

68. *Id*. at 1317 (majority opinion).

69. *Id*. *But see id*. at 1326 (Gorsuch, J., concurring) (indicating that RLUIPA does not require "the state to provide prisoners—even indigent prisoners—with everything they need for religious purposes").

70. Although the court was evaluating the actions of OSP, the court used testimony of a GPCF chaplain since GPCF and OSP both fall under ODOC and follow ODOC policies. *Id*. at 1317–18 (majority opinion).

71. *Id*.

72. *Id*.

73. *Id*. at 1318.

74. *Id*. at 1319–20.

75. *Id*. at 1319.

court reasoned that the district court erred by not inferring from Abdulhaseeb's complaint that Abdulhaseeb wanted to "observe a halal diet for *both* feast and non-feast days, and that halal meat is important to this feast."[76] The court also decided that "if an inability to eat proper foods for a religious holiday prevents one from engaging in conduct motivated by a sincerely held religious belief or forces one to engage in conduct prohibited by a sincerely held religious belief, it may constitute a substantial burden."[77]

Additionally, the Tenth Circuit rejected the district court's reasoning that failure to provide halal meat on Eid-ul-Adha did not violate RLUIPA, since the "faith community" could purchase festive or ceremonial meals according to ODOC policy.[78] Particularly, the Tenth Circuit noted that ODOC policy requires halal meat to be purchased from an "approved vendor," but the record indicated no such vendor existed.[79] As a result, the court concluded that there may have been periods when there was no approved halal vendor for GPCF; thus, there may have been a time where Abdulhaseeb's religious exercise was substantially burdened.[80] The court held that this fact might allow a reasonable jury to find that GPCF substantially burdened Abdulhaseeb's religious exercise by prohibiting halal meat for the Eid-ul-Adha feast. Consequently, the court remanded his claim.[81]

V. ANALYSIS

This case is an example of the Tenth Circuit wanting to have its cake and eat it too: the Tenth Circuit wanted the benefits of synthesizing the rules of the other circuits into a flexible standard, yet still wanted the benefits of a rigid rule that would provide notice and guidance to the lower courts. The court tried to achieve these benefits by creating a three-part test that is a mixture of straightforward rules (parts one and two of the test) and a flexible standard (part three of the test). However, by crafting the test in this way, it failed to achieve any of the benefits. This Part first discusses the

76. *Id.* (emphasis added).
77. *Id.* at 1319–20.
78. *Id.* at 1320.
79. *Id.*
80. *Id.* at 1320.
81. *Id.*

conflict created among the circuits through the creation of the Tenth Circuit's hybrid rule and then discusses the inherent problems of the third part of the rule.

A. Substantially in Conflict

The Tenth Circuit, by combining the two prevailing tests within the circuits into one test, created a three-part test that conflicts with nearly every other circuit to some degree. As a result, the Tenth Circuit's rule contributes to inconsistent outcomes in applying RLUIPA and undermines precedent.

1. How the Tenth Circuit's rule conflicts with the other circuits

Parts one and two of the Tenth Circuit's rule mirror the rules found in the District of Columbia and Seventh Circuits, but part three of the test conflicts with the D.C. and Seventh Circuits. In particular, the first two parts of the Tenth Circuit's rule indicate that a government substantially burdens an inmate's religious expression if it "*requires*" or "*prevents*" religiously expressive conduct.[82] Similarly, the D.C. Circuit recognizes a substantial burden when the government "*forces*" or "*prevents* [an inmate] from engaging in conduct their religion requires."[83] Likewise, the Seventh Circuit indicates that the government substantially burdens a plaintiff when it "*forces*" or "*compels* conduct or expression that is contrary" to the individual's religious expression or "*inhibits* or *constrains* conduct or expression" that is central to an individual's religious belief.[84] The wording of these rules denotes a defined bright-line rule whereby a court can easily ascertain whether the government's action significantly burdens the inmate's religious expression, because the words provide a more objective inquiry into the actions of the government.[85] Although these tests require a higher showing from a

82. *Id*. at 1315 (emphasis added).

83. Henderson v. Kennedy, 253 F.3d 12, 16 (D.C. Cir. 2001) (emphasis added).

84. Mack v. O'Leary, 80 F.3d 1175, 1179 (7th Cir. 1996) (emphasis added), *rev'd on other grounds*, 522 U.S. 801 (1997). The Seventh Circuit later interpreted these phrases to mean that the force or inhibition must be substantial enough to make an inmate's religious expression "effectively impracticable." *See* Koger v. Bryan, 523 F.3d 789, 800 (7th Cir. 2008); Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752, 761 (7th Cir. 2003).

85. To illustrate, it is easier for a court and an observer to objectively determine when a rule or a regulation becomes so onerous that it effectively "*forces*" or "*compels*" an individual to obey because we all have some natural sense or experience of being forced to act.

plaintiff than the pressure standards used by other circuits, an individual's natural understanding and experience with these words helps courts uniformly apply the law.

In contrast, part three of the Tenth Circuit's rule allows mere "substantial pressure" to be sufficient for a substantial burden—a less stringent standard than parts one or two of the rule. Consequently, by allowing "substantial pressure" to be sufficient for a "substantial burden" within the Tenth Circuit, the third part of the court's rule conflicts with the rules articulated in the D.C. and Seventh Circuits, where mere "pressure" is insufficient to constitute a substantial burden.

Additionally, although part three of the Tenth Circuit's rule is ostensibly labeled a "substantial pressure" test, it is not really a substantial pressure test and thus contradicts the substantial pressure tests of the Third, Fourth, Fifth, Ninth, and Eleventh Circuits.[86] Specifically, the Tenth Circuit articulated its substantial pressure standard to mean the pressure that occurs when "the government presents the plaintiff with a Hobson's choice—an illusory choice, where the only realistic possible course of action trenches on the adherent's sincerely held religious belief."[87] Although the court initially defined the term "pressure" with different synonyms,[88] its overall rule hinges on whether the government's pressure constitutes a Hobson's choice for an inmate.

For instance, the court decided that the government substantially burdened Abdulhaseeb's religious expression because it provided him with a Hobson's choice.[89] In reaching this holding, the court determined that this occurs because a Hobson's choice requires an inmate to either violate his religious beliefs or forego "essentials," such as medical treatment,[90] eating,[91] or communicating with legal

86. *See* Washington v. Klem, 497 F.3d 272 (3d Cir. 2007); Lovelace v. Lee, 472 F.3d 174 (4th Cir. 2006); Adkins v. Kaspar, 393 F.3d 559 (5th Cir. 2004); San Jose Christian Coll. v. City of Morgan Hill, 360 F.3d 1024 (9th Cir. 2004); Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214 (11th Cir. 2004).

87. *Abdulhaseeb*, 600 F.3d at 1315. This definition of pressure is attached by a dash to the court's initial articulation of the third part of the test, seemingly indicating that a Hobson's choice is what the court meant by "substantial pressure."

88. *See supra* notes 61–64 and accompanying text.

89. *Abdulhaseeb*, 600 F.3d at 1318

90. *Id*. (quoting Beerheide v. Suthers, 286 F.3d 1179, 1189 (10th Cir. 2002)).

91. *Id*. at 1315.

representatives.[92] Additionally, the court noted that Hobson's choices are "choices between options that are mutually unacceptable" to the practice of the inmate's religious faith.

Moreover, after noting that the pressure synonyms used by other circuits were helpful in determining what constitutes substantial pressure, the court stated that "not every infringement on a religious exercise will constitute a substantial burden."[93] This statement, which immediately follows the pressure synonym discussion, bolsters the argument that the Tenth Circuit intended a higher, more stringent test for substantial pressure than its sister circuits. As a result, the Tenth Circuit's substantial pressure test is not akin to the substantial pressure tests of the other circuits, since it requires pressure analogous to "forcing" or "compelling" an inmate to act where the inmate does not really have a choice. However, the third part is still a diluted and less stringent standard than the "forcing" or "compelling" tests of the D.C. and Seventh Circuits, because the Tenth Circuit still uses the pressure synonyms to advocate a lesser standard similar to the ones used by the majority of the circuits. Thus, the third part of the court's rule conflicts to some degree with nearly every other circuit.

2. Consequences of a synthesized rule that conflicts with other circuits

Using a synthesized rule that conflicts with all the other circuits to some degree is problematic for two reasons: first, it contributes to inconsistent outcomes; and second, it dilutes precedent and enables lower courts in the Tenth Circuit to decide cases according to preference—not precedent.

a. Inconsistent outcomes. An application of the different circuits' tests to the facts of *Abdulhaseeb* highlights the problems that arise with the Tenth Circuit's synthesized rule. In particular, if Abdulhaseeb were an inmate within the Seventh or D.C. Circuits, it is unlikely that he could prove that OSP's refusal to provide him with a halal diet violated RLUIPA. Specifically, OSP's actions likely fell short of "forcing" or "compelling" him to act in a manner that was contrary to his centrally held belief, since providing a Hobson's choice to an inmate does not rise to the level of "forcing" or

92. *Id.* at 1318 (quoting *Beerheide*, 286 F.3d at 1189).

93. *Id.* at 1316.

"compelling" religious expression. This is evident from the reasoning in *Abdulhaseeb,* where the court ignored the first two parts of its new rule, which mirrored the D.C. and Seventh Circuit tests, and relied on its third prong—substantial pressure—which incorporates the Hobson's choice reasoning to conclude that OSP likely violated RLUIPA by failing to provide Abdulhaseeb with a diet.[94] Consequently, although Abdulhaseeb faced the difficult decision of choosing between eating food that was not within a halal diet and not eating everything given to him and likely going hungry, it is unlikely that this decision amounted to a substantial burden to his religious expression under the D.C. and Seventh Circuit's rules.

However, if Abdulhaseeb were an inmate within a circuit other than D.C. or the Seventh, he would likely have a stronger argument that OSP violated his rights by not providing a halal diet, since those circuits follow a substantial pressure test. Nevertheless, although Abdulhaseeb's argument would be stronger in those circuits, there is no absolute assurance Abdulhaseeb's claim would meet their substantial pressure standards, since the Tenth Circuit's reasoning regarding what constitutes substantial pressure is vague[95] and inconsistent with the substantial pressure standards of those circuits.[96] Thus, application of the different circuit tests to *Abdulhaseeb* highlights the problem of having three different standards: an inmate's religious rights, rather than being protected by RLUIPA (a national and theoretically uniformly-applied law), are determined by the physical location of the inmate's incarceration. Therefore, the court should have decided which circuits had the best argument and aligned itself with them, rather than creating a new hybrid rule that exacerbates a split and creates a greater gamble for an inmate and his or her rights under RLUIPA.

b. Decisions according to preference, not precedent. The Tenth Circuit's synthesized three-part rule is uniquely problematic because it allows lower courts to select nearly *any* "substantial burden" precedent from *any* circuit to support its preferred outcome. Specifically, lower courts can draw analogies from any other circuit, since the rule postulated by the Tenth Circuit contains at least one prong that mirrors the rules and precedent of all the other circuits.

94. *Id*. at 1317–18.

95. *See* discussion *supra* Part IV.B.

96. *See supra* notes 86–93 and accompanying text.

As a result, this ability to look to other circuits waters down the precedential value of opinions within the Tenth Circuit, as lower court judges are not necessarily bound by decisions within the Tenth Circuit and can use decisions from different circuits to support their desired result. Thus, the Tenth Circuit's synthesized three-part rule conflicts with its sister circuits and dilutes precedential value by allowing judges to decide cases according to their preferences, but not necessarily according to Tenth Circuit precedent.

B. Substantially Unneeded: The Need to Eliminate Part Three of the Tenth Circuit's Test

Abdulhaseeb was the first time the Tenth Circuit had the opportunity to evaluate the "substantial burden" requirement of RLUIPA,[97] and as a result the court had a responsibility to draft the rule in a manner that provided guidance to the lower courts. However, the Tenth Circuit did not provide the needed guidance but instead included a prong in its test that is substantially vague in its explanation of what constitutes a substantial burden. Thus, part three of the Tenth Circuit's rule should be eliminated altogether.

1. Substantially vague

The third part of the Tenth Circuit's rule states that the government substantially burdens an inmate's right to religious expression if it "places *substantial pressure* on an adherent either not to engage in conduct . . . or to engage in conduct contrary to a sincerely held religious belief."[98] Notably, the Tenth Circuit tries to define "substantial pressure" in two ways: first, it provides the Hobson's choice analogy,[99] and second, it arbitrarily cites different phrases from past Supreme Court decisions and then reasons that they all apply in determining whether a burden is considered substantial.[100] Unfortunately, this reasoning is vague and does little to define or articulate the meaning of substantial pressure.

97. *See* discussion *supra* Part IV.B.

98. *Abdulhaseeb*, 600 F.3d at 1315.

99. *See supra* notes 57–59 and accompanying text.

100. *Abdulhaseeb,* 600 F.3d at 1316. For example, the court cites six different Supreme Court cases that use different language to articulate elements to weigh in determining whether or not there is substantial pressure. *Id.* at 1315–16.

a. Hobson's choice. Although a "Hobson's choice" explanation seems to provide guidance for lower courts, a deeper look reveals that it fails in this regard. Specifically, the court merely states that a Hobson's choice is a choice that essentially "trenches" on an inmate's religious expression. No guidance is given on the amount of "trenching" that is required, or what exactly constitutes "trenching." The court tries to partially answer this question in a parenthetical, nearly two pages after stating the trenching rule, by noting that "forcing prisoners to decide between communicating with family and legal representatives, seeking medical treatment, and following religious tenets constitutes a Hobson's choice rather than a true alternative."[101] Regrettably, this parenthetical merely provides examples, without explanations, of Hobson's choices and fails to provide lower courts with a standard or rule regarding how much trenching or pressure an inmate must feel before it is deemed "substantial." Consequently, lower courts, and readers, are left to their own devices in deciding the broad implications of substantial pressure.

b. Arbitrary parenthetical phrases. In addition, the parenthetical phrases used by the Tenth Circuit to explain substantial pressure are inherently vague. In particular, the court notes that "indirect coercion,"[102] indirect "compulsion,"[103] and the level of "inconvenience"[104] are factors to be considered in determining substantial pressure. These words give little guidance to the lower courts and seem circular since they are simply synonyms of uncomfortable "pressure." Again, lower courts and readers have little guidance except perhaps the indication that they should check a thesaurus for additional unhelpful adjectives in resolving what actions constitute substantial pressure. Thus, the wording of the third part of the rule and its reasoning are vague and provide little assistance to the lower courts in determining when substantial pressure constitutes a substantial burden.

101. *Id.* at 1318 (quoting Beerheide v. Suthers, 286 F.3d 1179, 1189 (10th Cir. 2002)).

102. *See* Lying v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 450 (1998).

103. *See* Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 717 (1981).

104. *See* Smith v. Allen, 502 F.3d 1255, 1278 (11th Cir. 2007).

2. Substantially unneeded

This lack of reasoning for the Hobson's choice analogy and seemingly hodge-podge assortment of parenthetical phrases does not provide judges with clear precedent that they must adhere to and opens the door for lower courts to use their imagination to support their desired outcome.[105] In particular, a judge in a lower court could have serious personal concerns about Islamic beliefs and, under the guise of part three of the rule, discriminate against an inmate. This lower court, using facts similar to *Abdulhaseeb*, could conclude that a prison, failing to provide an inmate with a halal diet, did not violate RLUIPA by reasoning that the refusal merely "urges" or "encourages" an inmate to eat food contrary to his religious belief. Further, the hypothetical court could reason that there is no coercion or inconvenience, since an inmate can always choose not to eat the non-halal food—a choice that any person on any kind of diet is required to make daily, and not one that "trenches" on his religious expression. Thus, lower courts can rely on synonyms to dodge the current precedent given by the court and mask their personal motives in the process. Additionally, as mentioned above, part three of the rule compounds the current split in the circuits and undermines precedential value within the Tenth Circuit.[106] Consequently, the court, to avoid the potential confusion among the lower courts, should eliminate the third part of its new test.

VI. CONCLUSION

The Tenth Circuit's decision in *Abdulhaseeb v. Calbone* does little to resolve the confusion surrounding what constitutes a "substantial burden" under RLUIPA. In particular, the synthesized rule adds to the confusion and is problematic for two reasons. First, it undermines precedent and aggravates the friction between the various circuit rules by creating a hybrid rule. A split was inevitable, since one already existed between the circuits, but by combining rules the Tenth Circuit contradicts each of the other circuits' rules in some way and adds to the confusion of what constitutes a "substantial burden." Second, the Tenth Circuit should eliminate its third prong, since it provides little guidance to the lower courts and

105. *See supra* Part V.A.2.b.

106. *See supra* Part V.A.2.

has the potential of allowing judges to mask their personal feelings and discriminate against inmates. Thus, to solve these problems and provide guidance to lower courts, inmates, and prison facilities about inmate religious rights for future cases, the Tenth Circuit should eliminate the obstructive third part of its "substantial burden" rule.

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