2013

Unequal Treatment of Religious Exercises Under RFRA: Explaining the Outliers in the HHS Mandate Cases

Mark L. Rienzi
The Catholic University of America, Columbus School of Law

VIRGINIA LAW REVIEW ONLINE

VOLUME 99 APRIL 2013 NUMBER 1

ESSAY

UNEQUAL TREATMENT OF RELIGIOUS EXERCISES UNDER RFRA: EXPLAINING THE OUTLIERS IN THE HHS MANDATE CASES

*Mark L. Rienzi**

ONGOING conflict over the contraceptive mandate promulgated by the Department of Health and Human Services ("HHS") has resulted in more than two dozen lawsuits by profit-making businesses and their owners seeking protection under the Religious Freedom Restoration Act ("RFRA"). To date, the businesses and their owners are winning handily, having obtained preliminary relief in seventeen of the cases, and being denied relief in only six.[1] Last month, in fact, a panel of the D.C. Circuit Court of Appeals took the extraordinary step of reconsidering and reversing its own prior ruling and granting a preliminary injunction to a business seeking RFRA's protection.[2]

The analysis in these cases is turning largely on whether courts find that the HHS mandate imposes a "substantial burden" under RFRA. RFRA prohibits the government from imposing a "substantial burden" on a person's religious exercise unless the government

*Associate Professor of Law, The Catholic University of America, Columbus School of Law; Senior Counsel, the Becket Fund for Religious Liberty. Through his work at the Becket Fund, Professor Rienzi represents several parties challenging the HHS mandate, including Hobby Lobby Stores, Inc.

[1] An updated tally of the for-profit cases is maintained here: HHS Mandate Information Central, The Becket Fund, http://www.becketfund.org/hhsinformationcentral/ (last visited Mar. 10, 2013).

[2] See Gilardi v. HHS, No. 13-5069 (D.C. Cir. Mar. 29, 2013) (order granting preliminary injunction), available at http://c0391070.cdn2.cloudfiles.rackspacecloud.com/pdf/order-granting-injunction-pending-appeal.pdf.

proves that imposing the burden is the least restrictive means of advancing a compelling government interest.[3] To date, every court to find a substantial burden has entered a preliminary injunction. Thus, determining whether or not the mandate imposes a "substantial burden" is crucial to the outcome of these cases.

Why have six courts denied relief while most other judges have granted it? One part of the answer is that these courts have wrongly concluded that religious liberty rights disappear when an organization earns profits—an error I have discussed at length elsewhere.[4]

This essay will explore a second error made by these outlier courts in applying RFRA's "substantial burden" test. Properly understood, RFRA's "substantial burden" analysis examines whether the government is coercing a believer to abandon a religious exercise (i.e., religiously-motivated conduct or abstention from conduct). Once sincerity of the religious motivation is established—an issue the government has not been contesting in the mandate cases—the underlying religious reasons for the religious exercise should be entirely irrelevant.

The few courts denying relief in the HHS mandate context, however, have failed to treat the government coercion as the focus of their substantial burden analysis. Instead, they have viewed the substantial burden analysis as an occasion for examining the *religious* reasons supporting the religious exercise. In so doing, these courts have denied relief based on their conclusion that a religious exercise supported by a particular kind of religious belief—namely a religious requirement to avoid facilitating someone else's wrongful action—is ineligible for RFRA's protection.

This type of analysis is wrong. Once a sincere religious exercise is established, the only appropriate question for the substantial burden inquiry is whether the government is coercing the believer to give up that exercise. RFRA leaves no room for judicially-created exceptions whereby courts grant or withhold the law's protections based on their own appraisal of the particular type of religious belief prompting a religious exercise.

---

[3] See 42 U.S.C. § 2000bb (2006).

[4] See Mark L. Rienzi, God and the Profits: Is There Religious Liberty for Money-Makers?, 21 Geo. Mason L. Rev. (forthcoming fall 2013), available at SSRN: http://ssrn.com/abstract=2229632.

I. RFRA'S NONDISCRIMINATORY TREATMENT OF RELIGIOUS EXERCISES

Imagine two religious believers who are denied unemployment benefits because they refuse to work at a syringe-making factory. One religious believer refuses the job because her faith teaches that all modern medicine is evil and that she cannot be involved in making syringes. A second religious believer of a different faith refuses the job because she is religiously opposed to capital punishment. This second believer's faith teaches that she cannot be involved in making syringes because some number of the syringes may eventually be used, after later and independent choices by other people, in lethal injections.

As a normative matter, religious freedom law *should* treat both religious objectors in the same way. Both are engaged in the exact same religious exercise—refusing to work in the syringe factory. And both face the exact same government pressure to forego that exercise—denial of unemployment benefits. Whether the denial of unemployment benefits constitutes a "substantial burden" on the religious exercise of refusing the job should be analyzed the same way for both believers.

To be sure, there are religious differences about the believers' religious reasons for turning down the job. The first believer's religion teaches that working in a syringe factory is intrinsically wrong, while the second believer's religion teaches that such work is wrong for a more indirect reason, namely because it may facilitate another person's later wrongful act (an execution). But these differences concern questions of underlying religious and theological motivations—topics that are beyond the competence of civil courts. Particularly in our religiously diverse society, it is no business of the government's to discriminate among believers engaged in the same religious exercise and to judge some religious reasons good enough for protection and others not. Rather, religious freedom law should simply look to see if the behavior at issue is a sincere religious exercise, and ask whether the government has coerced the believer to give up that exercise.

As a matter of positive law, this nondiscriminatory treatment of different religious beliefs is exactly what RFRA's substantial burden inquiry requires. After the Supreme Court's decision in *Employment*

Division v. Smith,[5] RFRA was enacted by Congress with the express goal of "restor[ing] the compelling interest test as set forth in *Sherbert v. Verner* . . . and *Wisconsin v. Yoder*."[6] Congress sought to "guarantee" application of that test "in all cases" where religious exercise is substantially burdened.[7] The statutory text does not discriminate based on the underlying theological reasons for a religious exercise at all. Rather, it applies the same standards "in all cases" and to "any exercise of religion" regardless of whether that exercise "is compelled by, or central to, a system of religious belief."[8] The proper question for the courts is not *why* the believer engages in a particular religious exercise, but *whether* the government is coercing the believer to cease that exercise.

The *Sherbert* line of cases adopted by RFRA confirms this reading. *Sherbert* concerned a Seventh Day Adventist, Adell Sherbert, whose religious exercise consisted of abstaining from work on Saturdays, resulting in a denial of unemployment benefits.[9] The government argued that it had not imposed a "substantial burden" on her religious exercise because it had not criminalized "the holding of any religious belief or opinion" or "force[d] or coerce[d] any person to embrace a particular religious belief."[10] In other words, the government focused its argument on the underlying religious *beliefs* that motivated Ms. Sherbert's religious exercise, and argued there was no burden because it left those beliefs untouched.

The Court rejected this approach, focusing instead on the religious conduct itself (abstaining from Saturday work) and on the presence or absence of government coercion to give up that exercise. The Court noted that the government's denial of unemployment benefits created a "pressure upon her to forego" her religious exercise that was "unmistakable."[11] Whether a substantial burden on religious exercise existed was determined not by focusing on the

---

[5] 494 U.S. 872 (1990).

[6] 42 U.S.C. § 2000bb(b)(1) (citing 374 U.S. 398 (1963); 406 U.S. 205 (1972)).

[7] Id.

[8] 42 U.S.C. § 2000cc-5(7)(A).

[9] 374 U.S. 398, 399–401 (1963).

[10] Brief for the Respondents at 12, *Sherbert*, 374 U.S. 398 (No. 526).

[11] *Sherbert*, 374 U.S. at 404 ("The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.").

believer's underlying religious beliefs (which were left intact by the law), but by asking, simply, whether the government had pressured her to give up her religiously-motivated conduct.

The Court conducted a similar analysis when it applied *Sherbert* in *Thomas v. Review Board*.[12] *Thomas* concerned a Jehovah's Witness who resigned his job in a steel foundry when the only available work involved producing tank turrets.[13] Thomas's religious beliefs prohibited him not only from personally fighting in a war, but also from facilitating someone else fighting by making the tanks that might later be used in war.[14] The Court again rejected a belief-focused approach to the burden inquiry, and instead focused on the presence or absence of government coercion to give up the conduct in question. The Court admonished that courts "should *not* undertake to dissect religious beliefs"[15] and that whether a religious exercise is protected "is *not* to turn upon a judicial perception of the particular belief or practice in question."[16] Instead, the reviewing court's "narrow function" is to look for government coercion that "put[s] substantial pressure on an adherent to modify" a sincere religious exercise, regardless of the precise religious lines drawn by the believer.[17] Again, the Court's analysis shows that the burden inquiry focuses on government coercion to give up a sincere religious exercise, and does not countenance an inquiry into the believer's theological reasons for his conduct.

Given Congress's express adoption of the *Sherbert* line of cases in RFRA, it is perhaps not surprising that the courts of appeal have interpreted the "substantial burden" inquiry like the Court applied it in *Sherbert* and *Thomas*: with the focus of the inquiry squarely on the presence or absence of government coercion. Thus the courts of appeal generally find a substantial burden whenever the government "places substantial pressure on an adherent" to give up a religious exercise.[18] Other than requiring that the exercise be motivated

---

[12] 450 U.S. 707 (1981).

[13] Id. at 709.

[14] Id.

[15] Id. at 715 (emphasis added).

[16] Id. at 714 (emphasis added).

[17] Id. at 716–18; see also id. at 715 ("Thomas drew a line, and it is not for us to say that the line he drew was an unreasonable one.").

[18] See, e.g., Abdulhaseeb v. Calbone, 600 F.3d 1301, 1315 (10th Cir. 2010); Washington v. Klem, 497 F.3d 272, 280 (3d Cir. 2007) (noting a substantial burden exists, among other situations, where "the government puts substantial pressure on an adher-

by a sincere religious belief, the substantial burden analysis is exclusively about government coercion, and does not vary based on the particular theological reasons for the believer's religious exercise.

II. UNEQUAL TREATMENT OF RELIGIOUS EXERCISES IN OUTLIER HHS MANDATE CASES

The handful of courts to deny protection in the HHS mandate context erred in part because they failed to apply these core principles. In the mandate context, a proper substantial burden inquiry should be quite easy. The religious exercise in question is the plaintiffs' religiously-motivated practice of excluding certain drugs and devices from their insurance policies. The mandate threatens very large fines—thousands or even millions of dollars *per day*—if the plaintiffs continue to engage in that exercise. By any light, such direct fines for engaging in a religious exercise are a substantial burden on that exercise, and trigger RFRA's strict scrutiny.

The outlier courts, however, found that there was no substantial burden in part because they viewed religious exercises prompted by a particular type of religious belief—a religious requirement to avoid facilitating someone else's wrongful conduct—to be ineligible for RFRA's protection. For example, one court denying relief determined that the "core" theological reason behind the plaintiffs' religious exercise of excluding certain drugs and devices from its health plan was "the effect of particular contraceptives on a fertilized egg."[19] Having discerned this "core," the court then focused not on whether the government was pressuring the plaintiffs to give up the religious exercise, but on the fact that employees would make a later choice to take, or not take, the drugs in question.[20] The court found that forcing the plaintiffs to violate their religion and provide the insurance to pay for these drugs did not burden plaintiffs' religious exercise because they themselves "remain free to make their own

---

ent to substantially modify his behavior and to violate his beliefs."); Lovelace v. Lee, 472 F.3d 174, 187 (4th Cir. 2006) ("[A] substantial burden [is one that] 'put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs . . . .'" (citing *Thomas*, 450 U.S. at 718)); Adkins v. Kaspar, 393 F.3d 559, 570 (5th Cir. 2004) ("[A] government action or regulation creates a 'substantial burden' on a religious exercise if it truly pressures the adherent to significantly modify his religious behavior and significantly violate his religious beliefs.").

[19] Conestoga Wood Specialties Corp. v. Sebelius, No. 12-6744, 2013 U.S. Dist. LEXIS 4449, at *44–45 (E.D.Pa. Jan. 11, 2013).

[20] Id. at *45.

independent decisions about their use or non-use of different forms of contraception."[21] Other courts similarly found that a religious exercise motivated by a religious obligation to separate oneself from "a series of independent decisions by health care providers and patients" was "indirect and attenuated" and therefore "unlikely to establish" a substantial burden.[22]

These courts were correct about the plaintiffs' underlying religious reason for the religious exercise of excluding certain drugs from their insurance policies: these plaintiffs stated a religious obligation not to facilitate someone's decision to kill a newly-formed human life. But the courts were wrong to believe that RFRA protection is unavailable for exercises based on religious obligations to avoid facilitating someone else's actions. For the reasons set forth above, RFRA's protection turns not on a judicial assessment of the particular theological reasoning behind a believer's religious exercise, but on whether the government is coercing the believer to stop.

The proper RFRA analysis—and indeed the type of analysis required by governing caselaw in the relevant circuits—simply required the courts to ask whether the government was forcing the plaintiffs to give up a religious exercise. Whether the believers engaged in that exercise because their religion deems all insurance sinful—a belief the Affordable Care Act actually protects elsewhere[23]—or because their religion requires them to avoid even less direct involvements with what the religion regards as wrongful conduct of others, the analysis should have been exactly the same.

In sum, RFRA requires the same standard to be applied "in all cases" and to "any religious exercise." Judicial discrimination between and among different religious reasons for a religious exercise is both unsupported by the law and unsuited to our religiously diverse society, where people of many different faiths engage in religious exercises for many different reasons. Had the outlier courts adhered to these basic principles, they would have correctly found

---

[21] Id. at *28.

[22] Hobby Lobby v. Sebelius, 870 F.Supp. 2d 1278, 1294 (W.D. Okla. 2012); see also Autocam Corp. v. Sebelius, No. 1:12–CV–1096, 2012 WL 6845677, at *7 (W.D. Mich., Dec. 24, 2012) (noting that "independent decisions of the employee and the employee's healthcare provider" are "standing between" the religious objector and contraceptive use).

[23] See 26 U.S.C.A § 5000A(d)(2)(A)(i) (West 2011); 26 U.S.C. § 1402(g)(1) (2006) (noting an exemption for those "conscientiously opposed to acceptance of the benefits of any private or public insurance").

that the mandate imposes a substantial burden on religious objectors, and would then have analyzed whether the government can demonstrate a compelling interest and narrow tailoring in imposing that burden.