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North East Journal of Legal Studies

Volume 39 *Fall 2019*

Article 1

Fall 2019

Religious Liberty in a Diverse Society

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RELIGIOUS LIBERTY IN A DIVERSE SOCIETY

by

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I. INTRODUCTION

Every first-year law student learns that when the government infringes on a fundamental right, the law or government action in question is subject to strict scrutiny; the government must show that is has a *compelling* purpose to override a fundamental constitutional right. The Free Exercise Clause of the U.S. Constitution states that no person can be compelled to do something contrary to his or her religious beliefs. However, in its 1990 ruling in *Oregon v. Smith*[1] the U.S. Supreme Court stripped religious liberty of the protections afforded other fundamental rights. This article will examine how federal and state governments have reacted to this decision, and the unanticipated difficulties that have resulted.

II. OREGON v. SMITH

Employees Smith and Black were fired by a private drug rehabilitation clinic because they ingested peyote, a

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hallucinogenic drug, as part of their religious ceremonies.[2] They were members of the Native American Church, at which sacramental peyote use was well documented. Their applications for unemployment compensation were denied by the State of Oregon due to a state law that disqualified employees from receiving unemployment benefits if discharged for work-related "misconduct". At the time, intentional possession of peyote was a crime under Oregon law, with no affirmative defense for religious use.[3] Holding that the denial of unemployment compensation violated the respondents' First Amendment free exercise rights, the State Court of Appeals reversed the decision, and the State Supreme Court affirmed. However, the U.S. Supreme Court vacated the judgment and remanded the case for a determination as to whether sacramental peyote use was prohibited by Oregon's controlled substance law. This law makes it a felony to knowingly or intentionally possess the drug.[4] Pending that determination, the U.S. Supreme Court refused to decide whether such use was protected by the Constitution. On remand, the Oregon Supreme Court held that sacramental peyote use violated, and was not excepted from, the state law prohibition. However, the Court further concluded that the prohibition was not valid under the Free Exercise Clause. The state unemployment division appealed to the U.S. Supreme Court, again arguing that the denial of Smith's and Black's unemployment benefits was proper because possession of peyote was a crime.[5]

In a surprising departure from precedent, the U.S. Supreme Court held that Oregon's prohibition of sacramental peyote was valid under the Free Exercise Clause, and therefore the state could deny unemployment benefits to persons discharged for such use.[6] The majority stated that "any otherwise valid law" defeats a claim to religious liberty. It further stated that the First Amendment does not entitle a religious objector to an exemption “from obedience to a general law,” otherwise

"every citizen (would) become a law unto himself."[7] Of particular importance was the fact that the Oregon law was not specifically directed at the Native Americans' religious practice; thus, it was deemed constitutional when applied to all citizens.

In concurring and dissenting opinions, three Supreme Court justices vehemently disagreed with the majority's position in *Smith.* They argued that, consistent with the Court's precedents and its treatment of other fundamental rights, religious freedom could not be abridged unless the government had a *compelling* reason to do so, such as forbidding human sacrifice or requiring medical care for gravely ill children.[8]

As a result of the majority opinion in *Smith,* free exercise of religion is the only fundamental right that is not protected by the "compelling interest" test, requiring strict scrutiny by the Court. If the government no longer must have a compelling interest, minority religions would have to make exceptions to their beliefs and practices to comply with specified laws. The government no longer had to make exceptions to its laws or rules to obey the Constitution's guarantee of religious freedom. To restore the "compelling interest" test, in 1993 Congress passed the Religious Freedom Restoration Act (RFRA),[9] stating that a religiously neutral law can burden a religion to the same extent as a law that intended to inhibit religious practices.

III. RELIGIOUS FREEDOM RESTORATION ACT

The Religious Freedom Restoration Act (RFRA) was introduced by Congressman Chuck Schumer on March 11, 1993. A companion bill was introduced in the Senate by Ted Kennedy that same day. A unanimous U.S. House and a nearly unanimous U.S. Senate passed the bill, and President Clinton signed RFRA into law on November 16,

1993.[10] RFRA prohibits the "Government [from] substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability" unless the Government "demonstrates that application of the burden to the person: (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."[11] A government interest is compelling when it is more than routine and does more than simply improve government efficiency. RFRA covers "any exercise of religion, whether or not compelled by, or central to, a system of religious belief."[12]

RFRA clearly applies "to all Federal law, and the implementation of that law, whether statutory or otherwise", including any Federal statutory law adopted after RFRA's date of signing "unless such law explicitly excludes such application."[13] Originally, Congress intended that RFRA apply to actions by state and local governments. However in 1997, in *City of Boerne v. Flores,*[14] the Supreme Court struck down RFRA with respect to states and other local municipalities within them, stating that Congress had exceeded its power as provided in the Fourteenth Amendment. This resulted in many states passing their own versions of the Religious Freedom Restoration Act. These Acts apply to laws passed and actions taken by individual state and local governments.

IV. STATES AND RELIGIOUS LIBERTY

To what extent do various states protect their citizens' religious freedoms when a state or local law attempts to violate religious liberty? Currently thirty-one (31) states have protections for their citizens, which can be classified into two categories:

1. Twenty-one (21) states have passed RFRA-like statutes; and

2. Ten (10) states[15] have RFRA-like provisions that were provided by state Court decisions rather than by legislation.

The following twenty-one (21) states have passed RFRA-like statutes: Alabama,[16] Arizona,[17] Arkansas,[18] Connecticut,[19] Florida,[20] Idaho,[21] Illinois,[22] Indiana,[23] Kansas,[24] Kentucky,[25] Louisiana,[26] Mississippi,[27] Missouri,[28] New Mexico,[29] Oklahoma,[30] Pennsylvania,[31] Rhode Island,[32] South Carolina,[33] Tennessee,[34] Texas,[35] and Virginia.[36] Two states, Connecticut and Rhode Island, passed their acts prior to the 1997 *Boerne* decision. The remaining nineteen (19) states passed RFRA-like statutes as a direct response to *Boerne.*

State RFRA laws require the "Sherbert Test," which was set forth by *Sherbert v. Verner*,[37] and *Wisconsin v. Yoder*,[38] mandating that strict scrutiny be used when determining whether the Free Exercise Clause has been violated. However, state RFRAs contain unique provisions beyond this basic principle. For example, five states[39] do not require the burden or restriction on religion to be "substantial." While the Supreme Court has not distinguished between "substantial burden" and "burden" in the context of state RFRAs, some decisions have attempted to distinguish the terms. Some states define "burden" or "substantial burden" within their statutes, and these definitions vary. Burdens must be greater than "trivial" or "de minimis infractions" in Arizona and Idaho. They are defined as actions that would "inhibit or curtail religious practice" in Oklahoma, Tennessee and Virginia. In contrast, Kansas, Kentucky, Louisiana and Pennsylvania list examples of specific burdens in their RFRAs.[40]

Arkansas, Indiana and Texas provide that their states' RFRA can be invoked even when the government is not involved in the lawsuit. Under the Arkansas law, religious rights can be invoked to obtain an injunction or damages against an individual who insists that a person complies with a state regulation that violates that person's religious beliefs. Indiana's law similarly allows religious rights to be invoked as a claim or a defense in a private civil lawsuit. Texas allows its law to be used only as a defense "without regard to whether the proceeding is brought in the name of the state or another person."[41] In the remaining eighteen (18) states with RFRA-like statutes, the lawsuit must be invoked against the government, presumably in response to the laws that restrict a person's religious practices.

Congress' passage of RFRA in 1993 was meant to restore the "compelling interest" test, requiring strict scrutiny by the Court, whenever an individual's religious liberty was being infringed. However, some states have passed laws that specifically allow discrimination on the basis of sexual orientation. Indiana allows business owners who object to same-sex couples on religious grounds to opt out of providing them services. A Mississippi law protects people who refuse to serve others on the basis of a religious objection to same-sex marriage, transgender people, or extramarital sex from government punishment. South Dakota has a law that allows taxpayer-funded adoption agencies to deny services under circumstances that conflict with their religious beliefs.[42] It is ironic that a statute originally conceived of as protecting religious diversity has become a symbol of intolerance.

While protecting an individual's religious liberty should be seen as a good and noble mission, much controversy has surrounded RFRA laws in recent years. One reason is the Supreme Court's interpretation of the federal RFRA in the

Hobby Lobby case.[43] A second development was the legalization of same-sex marriage in the United States, and the subsequent concern that the public accommodation laws would not protect same-sex couples from the discrimination that some state RFRA laws allow.

V. BURWELL v. HOBBY LOBBY

Hobby Lobby Stores, Inc. is an arts and crafts company founded and owned by the Green family, who are Evangelical Christians. It provided health insurance for its approximately 21,000 employees until 2012, when it dropped its coverage. Hobby Lobby did not wish to provide coverage for certain types of FDA-approved contraceptives for its female employees which they considered abortion.[44] Under the Patient Protection and Affordable Care Act (ACA), employment-based group health care plans must provide certain types of preventative care, which included the aforementioned FDA-approved contraceptive methods. While there are exemptions available for religious employers and non-profit religious institutions, there were no exemptions available for for-profit institutions such as Hobby Lobby Stores, Inc.[45]

In September 2012, the Greens, as representatives of Hobby Lobby Stores, Inc., sued the Department of Health and Human Services, and challenged the contraception requirement. As plaintiffs they argued that the requirement that the employment-based group health care plan cover contraception violated the Free Exercise Clause of the First Amendment and the federal RFRA. The plaintiffs sought a preliminary injunction to prevent the enforcement of tax penalties, which the district court denied and a two-judge panel of the U.S. Court of Appeals for the Tenth Circuit affirmed. The Supreme Court also denied relief, and the plaintiffs filed for an en banc hearing of the Court

of Appeals. This hearing resulted in a reversal, and it was held that corporations were "persons" for the purposes of RFRA and therefore had protected rights under the Free Exercise Clause of the First Amendment. The Department of Health and Human Services appealed to the U.S. Supreme Court.[46]

In June 2014 the U.S. Supreme Court held that Congress intended for RFRA to be read as applying to closely held corporations, since they are composed of individuals who use them to achieve desired ends. Because the contraception requirement forces religious corporations to fund what they consider abortion, which goes against their stated religious principles, or face significant fines, it creates a substantial burden. The ruling was reached on statutory grounds, citing RFRA, because the mandate was not the "least restrictive" method of implementing the government's interest. In fact, a less restrictive method already existed in the form of the Department of Health and Human Services' exemption for non-profit religious organizations, which they treated as "persons" within the meaning of RFRA. The Court held that this exemption can and should be applied to for-profit closely held corporations such as Hobby Lobby.[47]

The ruling did not address Hobby Lobby's claims under the Free Exercise Clause of the First Amendment, but solely by applying RFRA. "Congress, in enacting RFRA, took the position that 'the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests' ... The wisdom of Congress's judgment on this matter is not our concern. Our responsibility is to enforce RFRA as written, and under the standard that RFRA prescribes, the Department of Health and Human Services contraceptive mandate is unlawful.[48]

It is interesting to note that three states had already specifically defined "person" in their state RFRAs to include corporations. Two states, Indiana and South Carolina, define a person as, among other things, a corporation, and Kansas defines a person as "any legal person or entity" under Kansas or federal law.[49] So why is *Hobby Lobby* considered a landmark case? It was the first time that the Supreme Court made it clear that for-profit, closely held corporations can assert religious rights. Are these businesses now exempt from the anti-discrimination provisions of the public accommodation law?

VI. PUBLIC ACCOMMODATION LAW

Under federal law, public accommodations may not discriminate. A place of public accommodation is defined as: "any place of business engaged in any sales to the general public and any place that offers services, facilities, privileges, or advantages to the general public or that receives financial support through solicitation of the general public or through governmental subsidy of any kind."[50] Private clubs and religious organizations are specifically exempted from this definition. Therefore, for-profit public accommodations, regardless of the nature of the goods and services provided, may not discriminate on the basis of any classification prohibited by federal or state law.

Now that for-profit, closely held corporations can assert religious rights, may they claim that the public accommodation law substantially burdens their exercise of religion by requiring them to act in contravention of their religious beliefs? For example, conservative Christians and others argue that they have a sincere religious belief that marriage must be only between one man and one woman. Facilitating or assisting individuals to enter other kinds of marital relationships requires them to act

against their religious beliefs. It seems to follow that only if the state can show it has a compelling interest in requiring these businesses to take part, they will be excused from participating in the marriage festivities of same-sex couples. To remedy this, nineteen (19) states have public accommodations laws that explicitly protect against discrimination on the basis of sexual orientation.[51] Is this necessary? Long ago the public accommodations section of the Civil Rights Act of 1964 established the principle that those who open their doors for business must serve all who enter. Is the Supreme Court's decision in *Masterpiece Cakeshop, LTD v. Colorado Civil Rights Commission* consistent with this principle?[52]

The baker in *Masterpiece Cakeshop* refused to create a custom cake for a same-sex couple's wedding celebration on religious grounds. It was the baker's sincerely held religious belief that marriage should be only between one man and one woman.[53] At the time same-sex marriage was illegal in Colorado. The couple filed a grievance with the Colorado Civil Rights Commission, and the state determined that the baker violated Colorado state law, which provides:

> It is a discriminatory practice and unlawful for a person, directly or indirectly, to refuse, withhold from, or deny to an individual or a group, because of .....sexual orientation..... the full and equal enjoyment of the goods, services, facilities, privileges, advantages or accommodations of a place of public accomodation.[54]

The U.S. Supreme Court reversed the state's decision on the basis of religious freedom, even though the baker asserted that both his freedom of speech and freedom of religion had been violated. The key factor leading to the reversal was the Court's

determination that Colorado's Civil Rights Commission did not give neutral and respectful consideration to the baker's claims. The Commission's treatment of the case had some elements of clear and impermissible hostility toward the sincere religious beliefs that motivated the baker's objection.[55]

The Commission disparaged the baker's religious faith by describing it as despicable and characterizing it as insubstantial and even insincere. The government, consistent with the Constitution's guarantee of free exercise of religion, cannot impose regulations that are hostile to the religious beliefs of citizens and cannot act in a manner that passes judgment upon the legitimacy of religious beliefs and practices. Because the Commission treated the baker's beliefs with contempt, it failed to conduct a fair hearing, and for that reason the Court sided with the baker.[56] The Court made it clear that while religious objections to same-sex marriage are protected, it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law.[57] The outcome would have been different if the baker had initially received a fair hearing.

VII. CONCLUSION

Our nation was founded on the principle of religious freedom. Our laws protect people from governmental intrusion in the practice of their faith, as long as that practice does not run afoul of a compelling governmental interest. It has long been the task of the Supreme Court to balance the competing rights of individuals, and this task has become exceedingly difficult in our diverse society. Individuals have the right to live their lives free from discrimination, especially when entering a place of

business engaged in sales to the general public. It seems clear that businesses cannot discriminate against individuals because of their sexual orientation; a bakery cannot refuse to sell baked goods to gay customers. However, must a baker who disapproves of same-sex marriages on religious grounds provide a wedding cake to celebrate a same-sex marriage? If the couple can easily purchase a cake elsewhere, is it necessary to force compliance? In the face of repeated lawsuits and personal attacks, religious conservatives have been asking, "Where are my rights?" A reasonable accommodation should be made for religious objectors when the accommodation is workable, and the underlying governmental purpose is still achieved.

But beware: Not every religious practice or belief can be, or need be accommodated. When the law in question serves an overriding societal purpose, it is not readily susceptible to reasonable accommodations; any accommodation for religion would be unreasonable. Therefore, it can be argued that allowing religious objectors to discriminate on the basis of sexual orientation is an unreasonable accommodation because these laws are essential to societal health, safety and welfare.

ENDNOTES

[1] *Oregon v. Smith,* 494 U.S. 872 (1990).
[2] *Id* at 872.
[3] *Id.*
[4] *Id.*
[5] *Id.*

[6] *Id.* at 876-890.
[7] *Id.* at 879-880.
[8] *Id.* at 892-922.
[9] 42 U.S.C. § 2000bb - 42 U.S.C. § 2000bb-4 .
[10] www.justice.gov/jmd/religious-freedom-restorstion-act-1993-pl-103-141#bills. Three senators voted against passage.
[11] *Id.* at §§2000bb–1(a), (b).
[12] *Id.* at §2000cc–5(7)(A).
[13] *Id.* at § 2000bb–3.
[14] *City of Boerne v. Flores,* 521 U.S. 507 (1997).
[15] Alaska, Hawaii, Ohio, Maine, Massachusetts, Michigan, Minnesota, Montana, Washington, and Wisconsin. Griffin, Jonathan, *"Religious Freedom Restoration Acts,"* National Conference of State Legislatures, Vol. 23, No. 17 (May 2015).
[16] Ala. Const. Art. I, §3.01.
[17] Ariz. Rev. Stat. §41-1493.01.
[18] 2015 SB 975
[19] Conn. Gen. Stat. §52-571b.
[20] Fla. Stat. §761.01, *et seq.*
[21] Idaho Code §73-402.
[22] Ill. Rev. Stat. Ch. 775, §35/1, *et seq.*
[23] 2015 SB 101*;* 2015 SB 50
[24] Kan. Stat. §60-5301, *et seq.*
[25] Ky. Rev. Stat. §446.350.
[26] La. Rev. Stat. §13:5231, *et seq.*
[27] Miss. Code §11-61-1.
[28] Mo. Rev. Stat. §1.302.
[29] N.M. Stat. §28-22-1, *et seq.*
[30] Okla. Stat. tit. 51, §251, *et seq.*
[31] Pa. Stat. tit. 71, §2403.
[32] R.I. Gen. Laws §42-80.1-1, *et seq.*
[33] S.C. Code §1-32-10, *et seq.*
[34] Tenn. Code §4-1-407.
[35] Tex. Civ. Prac. & Remedies Code §110.001, *et seq.*

[36] Va. Code §57-2.02.
[37] *Sherbert v. Verner,* 374 U.S. 398 (1963).
[38] *Wisconsin v. Yoder,* 406 U.S. 205 (1972).
[39] Alabama, Connecticut, Missouri, New Mexico and Rhode Island. Griffin, Jonathan, *"Religious Freedom Restoration Acts*," National Conference of State Legislatures, Vol. 23, No. 17 (May 2015).
[40] Griffin, Jonathan, *"Religious Freedom Restoration Acts*," National Conference of State Legislatures, Vol. 23, No. 17 (May 2015).
[41] *Id.*
[42] *Id.*
[43] *Burwell v. Hobby Lobby,* 573 U.S. ____ (2014).
[44] *Id.*
[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] *Id.*
[49] Griffin, Jonathan, *"Religious Freedom Restoration Acts*," National Conference of State Legislatures, Vol. 23, No. 17 (May 2015).
[50] www.definitions.uslegal.com
[51] www.ncls.org. California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington State, as well as the District of Columbia.
[52] *Masterpiece Cakeshop, LTD v. Colorado Civil Rights Commission,* 584 U.S. ____ (2018).
[53] *Id.*
[54] Colo. Rev. Stat. §24-34-601(2)(a) (2017).
[55] *Masterpiece Cakeshop, LTD v. Colorado Civil Rights Commission,* 584 U.S. ____ (2018).
[56] *Id.*
[57] *Id.*