
YALE LAW & POLICY REVIEW

Hankins v. Lyght: The RFRA Defense to Federal Discrimination Claims

Steven M. Shepard*

INTRODUCTION

Does the Religious Freedom Restoration Act (“RFRA”) bar employment discrimination lawsuits against churches?¹ Last year a divided panel of the Second Circuit answered “yes” to that question in *Hankins v. Lyght*,² but the Seventh Circuit disagreed; its opinion in *Tomic v. Catholic Diocese of Peoria* called *Hankins* “unsound.”³

This Comment defends *Hankins*. Part I explains how the RFRA defense applies to private plaintiffs. Part II builds on the work of Professor Douglas Laycock to argue that employment decisions are an exercise of religion. Part III rebuts *Tomic*’s attack on *Hankins* by showing that the RFRA defense is broader than the constitutionally based “ministerial exception” to anti-discrimination laws.

Congress passed the RFRA to undo the Supreme Court’s work in *Employment Division v. Smith*.⁴ In *Smith*, the Court held that states may apply neutral, generally applicable laws to the faithful without accommodating their religious needs. In passing the RFRA, Congress found that *Smith* did not do enough to protect religion because “laws ‘neutral’ toward religion

* J.D., Yale Law School, 2007. My thanks to Julianna Bentes for her helpful edits.

1. The RFRA is codified at 42 U.S.C. §§ 2000bb to 2000bb-4 (2000). By “employment discrimination lawsuits,” I mean suits brought under Title VII of the Civil Rights Act of 1964, codified at 42 U.S.C. §§ 2000e to 2000e-16c (2000), and the Age Discrimination in Employment Act of 1967, codified at 29 U.S.C. §§ 621-634 (2000).
2. 441 F.3d 96, 106 (2d Cir. 2006).
3. 442 F.3d 1036, 1042 (7th Cir. 2006).
4. 494 U.S. 872, 881 (1990). For an account of the RFRA’s legislative history, see Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEX. L. REV. 209 (1994).

may burden religious exercise as surely as laws intended to interfere with religious exercise.”⁵ Though the federal anti-discrimination laws are facially neutral, they nonetheless burden religious exercise by impairing churches’ ability to shape their characters and beliefs.

I. HOW DOES THE RFRA DEFENSE APPLY TO PRIVATE PLAINTIFFS?

Congress intended the RFRA to “provide a . . . defense” to “persons,”⁶ including churches,⁷ whose “religious exercise is substantially burdened by government.”⁸ Once a church shows that the government has substantially burdened its religious exercise, then the government’s action may only be upheld if the government’s interest is compelling and the means chosen to achieve that interest are the least restrictive available.⁹

The *Hankins* majority held that the RFRA’s text indicates that Congress intended the defense to apply to lawsuits brought by private plaintiffs.¹⁰ That textual argument is convincing—indeed, there are other textual clues, besides those mentioned by the majority, that support this reading.¹¹

But the majority’s textual analysis does not address the dissent’s practical objection: How can a private plaintiff produce evidence of the *government’s* interest in preventing discrimination?¹² We expect plaintiffs to prove their employers’ discriminatory intent, but we don’t expect them to show that the anti-discrimination laws are narrowly tailored to achieve a compel-

5. 42 U.S.C. § 2000bb(a)(2).

6. *Id.* § 2000bb(b)(2).

7. *See* 1 U.S.C. § 1 (2000) (defining “person” to include “associations” and “societies”); *see also* Douglas Laycock, *RFRA, Congress, and the Ratchet*, 56 MONT. L. REV. 145, 151-52 (1995) (gathering evidence from the congressional debates over the RFRA to conclude that the Act protects “institutional free exercise”).

8. 42 U.S.C. § 2000bb(b)(2).

9. *Id.* § 2000bb-1(a)-(b).

10. *Hankins v. Lyght*, 441 F.3d 96, 103 (2d Cir. 2006).

11. The *Hankins* majority might also have pointed out that Congress intended the RFRA to apply not only to “all federal law” but also to “the *implementation* of that law.” 42 U.S.C. § 2000bb-3(a) (emphasis added). Every discrimination lawsuit is an “implementation” of the federal anti-discrimination laws. The majority also might have noted that the RFRA implicitly includes the federal courts in its definition of “government”: “a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States.” *Id.* § 2000bb-2(1). Thus, when a court grants a private litigant relief under the anti-discrimination laws, that grant is an act of “government” and covered by the RFRA.

12. *Hankins*, 441 F.3d at 114-15 (Sotomayor, J., dissenting).

ling governmental interest. Only the government has the authority and the resources to argue these points.

The dissent's objection is misplaced because the government has no compelling interest in a private employment dispute. Therefore, even if private plaintiffs did have the government's authority and resources, those advantages wouldn't make any difference—plaintiffs can't win this argument.

The government's interest is limited to the particular exercise of religion at issue, as the Court made clear in *Gonzales v. O Centro Espírita Beneficente União do Vegetal*.¹³ There, a church asked for an exemption from the Controlled Substances Act so that its members could import *huasca*, a narcotic used in its ceremonies. Opposing that request, the Attorney General stressed the government's interest in the "uniform application" of the drug laws—that is, its interest in keeping all narcotics away from all citizens.¹⁴ A unanimous Court rejected that interpretation in favor of a "more focused" inquiry: "RFRA requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened."¹⁵ *Centro Espírita* shows that the government's interest in an employment discrimination lawsuit is *not* its interest in eliminating discrimination from all workplaces, but instead its interest in "the particular claimant"—that is, its interest in preventing the particular religious employer from making a particular kind of employment decision.

However compelling the government's global interest in banning discrimination from all workplaces, its specific interest in how one particular church fills a vacancy is not compelling. Ugly and hurtful though discrimination is, the government's interest in preventing one instance of it is less than Wisconsin's interest in seeing to it that its Amish teens receive an education—an interest found not to be compelling in *Wisconsin v. Yoder*.¹⁶ Nor is the government's interest in a single employer more compelling than Indiana's interest in preventing fraud in unemployment claims—an interest found not to be compelling in *Thomas v. Review Board of Indiana Employment Security Division*.¹⁷ Nor is the government's interest in preventing a church from discriminating greater than its interest in preventing that church's members from overdosing—an interest found not to be compelling in *Centro Espírita*. If none of those interests are compelling, then the

13. 546 U.S. 418, 429 (2006).

14. *Id.* at 423.

15. *Id.* at 430-31.

16. 406 U.S. 205, 223-27 (1972).

17. 450 U.S. 707, 718-19 (1981).

government's interest in the outcome of one church's hiring process isn't compelling, either.

The Court once described "the State's . . . interest in eliminating discrimination against women" as "compelling."¹⁸ But the interest at stake in that case was California's global interest in preventing discrimination in all its workplaces, and therefore isn't relevant to the RFRA defense. If the RFRA required courts to consider the global interests served by the anti-discrimination laws, then *Centro Espírita* would have considered the government's interest in preventing drug abuse by every citizen. The Court didn't do that; instead, it considered only the interest in preventing church members from worshipping with *huasca*.

The RFRA defense to an employment discrimination lawsuit collapses into one question: Do the discrimination laws substantially burden the defendant's exercise of religion? The answer to that question is well within private plaintiffs' power of proof. It therefore is not unfair for a church to raise the RFRA defense to an employee's discrimination lawsuit, and the *Hankins* dissent's objections are misplaced.

II. HOW DO THE ANTI-DISCRIMINATION LAWS "BURDEN" THE "EXERCISE OF RELIGION"?

The RFRA defines "exercise of religion" broadly, to include "any" exercise, whether or not the exercise is "central" to a system of religious belief.¹⁹ Every personnel decision by a religious institution is an exercise of religion, and a lawsuit challenging such a decision substantially burdens the institution's religious exercise.

A church is more than a troupe that performs sacred rites. The secretary who answers the rabbi's phones and the custodian who locks up at night are as much a part of the synagogue as the rabbi. The people whom a church hires determine the church's present character and shape its future development. This is the lesson Professor Douglas Laycock draws from the Supreme Court's decisions on church labor disputes: "When the state interferes with the allocation of influence and authority within a church, it interferes with the very process of forming the religion as it will exist in the future."²⁰

18. *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987).

19. 42 U.S.C. § 2000bb-2(4) (2000).

20. Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1391 (1981) (noting that the Supreme Court has been willing to extend the "right of church autonomy as far as necessary to include the cases before it").

Justice Brennan adopted Laycock's reasoning in his concurring opinion in *Corporation of Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*.²¹ That decision upheld as constitutional section 702 of Title VII, a provision that permits church employers to discriminate against other faiths.²² Citing Laycock, Justice Brennan noted that a religious community is "an organic entity" that is "not reducible to a mere aggregation of individuals."²³ The community's choice of whom to hire is an important means by which the community "defines itself."²⁴ The courts should be "solicit[ous]" of those choices because "furtherance of the autonomy of religious organizations often furthers individual religious freedom as well."²⁵

Every discrimination lawsuit—whatever the type of discrimination alleged—interferes with the allocation of influence and authority within the "organic entity" of the church and thereby substantially burdens religious exercise. Such regulation affects the character of the church today and thus the content of its members' beliefs tomorrow.

Yet the RFRA defense is not available to every employer affiliated with religion; it is available only to an institution with religion at its very core. If, for instance, a church owns a bank, that bank's employment decisions should be regulated just like those of every other bank. A bank isn't a religious institution, and having a church as a majority shareholder doesn't make it one. By regulating a bank's personnel decisions, the government doesn't impinge on the autonomy of an institution that articulates religious beliefs.

Federal courts have experience distinguishing truly religious institutions from church-owned businesses. Section 702 of Title VII allows a religious institution to discriminate against other faiths; to qualify for the exemption, an organization must prove that it is, in fact, religious—that it is more similar to a church than to a church-owned bank. The courts apply section 702 carefully. Before giving an employer the benefit of the section 702 exemption, a court will "weigh[]" "all significant religious and secular characteristics . . . to determine whether the corporation's purpose and character are primarily religious."²⁶ If the "purpose" of the organization is "essentially secular, or neutral as far as religion is concerned," the court will not grant

21. 483 U.S. 327, 340-46 (1987) (Brennan, J., concurring).

22. 42 U.S.C. § 2000e-1.

23. 483 U.S. at 342.

24. *Id.*

25. *Id.*

26. *Equal Employment Opportunity Comm'n v. Townley Eng'g*, 859 F.2d 610, 618 (9th Cir. 1988).

the Section 702 exemption.²⁷ The caselaw developed under Section 702 should apply to the RFRA defense as well: Only those employers considered “religious” for purposes of Section 702 should be allowed to raise the RFRA defense. Once raised, however, that defense should bar every discrimination lawsuit.

III. HOW DOES THE RFRA DEFENSE DIFFER FROM THE “MINISTERIAL EXCEPTION”?

In *Tomic*,²⁸ the Seventh Circuit belittled the RFRA defense as unnecessary because courts already grant religious institutions a “ministerial exception” to anti-discrimination laws.²⁹ According to *Tomic*, the RFRA defense requires more of a church than does the ministerial exception: The RFRA requires the church to show that the lawsuit imposes a substantial burden on its exercise of religion. Because the RFRA defense is more limited than the ministerial exception, *Tomic* dismissed the defense as superfluous.

Tomic is mistaken. The RFRA defense is more than the ministerial exception’s shadow. As shown above, the RFRA defense applies to all employees of religious institutions; the ministerial exception applies only to employees with religious duties.³⁰ Employees with few religious duties don’t qualify.³¹

Moreover, the ministerial exception is limited to lawsuits involving disputes over religious meaning. At least three circuits have explained the exception as a prohibition on courts becoming “entangled” in religious dis-

27. *Equal Employment Opportunity Comm’n v. Kamehameha Schs.*, 990 F.2d 458, 460 (9th Cir. 1993).

28. *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1042 (7th Cir. 2006).

29. *See Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223, 227 (6th Cir. 2007); *Petruska v. Gannon Univ.*, 462 F.3d 294, 304-05 (3d Cir. 2006) (collecting cases from eight circuits and joining them).

30. The courts have been fairly generous in their understanding of what positions involve religious duties. *See, e.g., Tomic*, 442 F.3d 1036 (a music director and organist); *Shaliehsabou v. Hebrew Home of Greater Washington, Inc.*, 363 F.3d 299 (4th Cir. 2004) (supervisor of kosher foods); *Alicea-Hernandez v. Catholic Bishop of Chi.*, 320 F.3d 698 (7th Cir. 2003) (“Hispanic Communications Manager”); *Equal Employment Opportunity Comm’n v. Roman Catholic Diocese of Raleigh*, 213 F.3d 795 (4th Cir. 2000) (director of “music ministry” and part-time teacher); *Starkman v. Evans*, 198 F.3d 173 (5th Cir. 1999) (choir director).

31. *E.g., Demarco v. Holy Cross High Sch.*, 4 F.3d 166, 172 (2d Cir. 1993) (stressing that the plaintiff, a lay teacher, had few religious duties that were “easily isolated and defined”); *Geary v. Visitation of the Blessed Virgin Mary Parish Sch.*, 7 F.3d 324, 331 (3d Cir. 1993) (same).

putes.³² That entanglement would violate the Establishment Clause because by deciding the case the court would lend its authority to one side of a religious debate.³³ Because the RFRA defense is based on free exercise rather than establishment concerns, it is not so limited. The RFRA defense bars even those employment discrimination suits that don't threaten to entangle a court in a dispute over religious meaning.

It makes sense to interpret the RFRA to give churches more protection than the constitutionally based ministerial exception offers—indeed, that's the only interpretation of the RFRA that makes sense of *City of Boerne v. Flores*.³⁴ Prior to *City of Boerne*, the Supreme Court had limited churches' free exercise rights in *Employment Division v. Smith*,³⁵ which held that the First Amendment does not relieve churches of the burden of obeying neutral, generally applicable laws.³⁶ Congress meant to overturn *Smith* by passing the RFRA, which does exempt churches from such laws. Precisely because the RFRA grants more protection than the First Amendment, the Court in *City of Boerne* held that § 5 of the Fourteenth Amendment does not authorize Congress to apply the RFRA to state laws.³⁷ Section 5, the Court explained, only grants Congress the power to prevent states from violating the Constitution, and *Smith* held that states don't violate the First Amendment when they force churches to follow neutral laws.

The implication is clear: The RFRA defense must offer churches more protection from the federal anti-discrimination laws than the First Amend-

32. Equal Employment Opportunity Comm'n v. Catholic Univ. of Am., 83 F.3d 455, 466 (D.C. Cir. 1996); Young v. N. Ill. Conference of the United Methodist Church, 21 F.3d 184, 185 (7th Cir. 1994); Rayburn v. Gen. Conference of Seventh-Day Adventists, 772 F.2d 1164, 1171 (4th Cir. 1985).

33. See, e.g., *Catholic University*, 83 F.3d at 465-66. The word "entanglement" comes from the third prong of the *Lemon v. Kurtzman* test, which determines whether government action violates the Establishment Clause. 403 U.S. 602, 612-13 (1971). But the Supreme Court's refusal to allow the nation's courts to adjudicate religious disputes has much deeper roots. See *Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 449 (1969) ("[T]he First Amendment severely circumscribes the role that civil courts may play in resolving church property disputes."); *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 729 (1871) (holding that secular courts may not review the religious reasoning of church courts).

34. 521 U.S. 507 (1997).

35. 494 U.S. 872 (1990).

36. See *City of Boerne*, 521 U.S. at 514 ("*Smith* held that neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling government interest.>").

37. *Id.* at 519-20.

ment does. *Tomic's* contrary assertion can't be squared with *City of Boerne*. If *Tomic* were right that the RFRA offers churches less protection than the First Amendment, then Congress would have authority to apply the RFRA to state laws, and *City of Boerne* would have come out the other way.

CONCLUSION

Hankins may be the first of many cases to consider how the RFRA defense applies to discrimination lawsuits against church employers. Other circuits should follow *Hankins* not only because of the majority's persuasive textual analysis, but also because the *Hankins* result is a fair way to ensure churches the autonomy over personnel decisions that is vital to their exercise of religion.