

Michigan Law

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The Honorable Eric H. Holder, Jr.
Attorney General of the United States
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Dear Mr. Attorney General,

I write in response to a public letter sent to you on September 17, 2009, which requested review and withdrawal of the Office of Legal Counsel's Memorandum on the Religious Freedom Restoration Act, dated June 29, 2007. I believe that the OLC Memorandum is sound and that it should not be withdrawn.

The issue is whether religious organizations that provide social services eligible for government funding, but who provide those services with a workforce committed to the organization's religious teachings and mission, may be excluded from government funding on the ground of their employment practices. Under the Religious Freedom Restoration Act, 42 U.S.C. §2000bb *et seq.* (2006), that issue turns principally on whether such a condition would impose a burden on the free exercise of religion. Does government substantially burden the exercise of religion, within the meaning of RFRA, when it offers monetary grants on condition that a religious organization abandon one of its religious practices?

Yes, it does. Such a conditional offer of funding forces the religious organization either to abandon its religious exercise in order to fund its program, or to forfeit potential funding in order to maintain its religious exercise. As the Supreme Court has long recognized, this amounts to a financial penalty on the exercise of religion. In the first modern case under the Religion Clauses, a case much cited by strict separationists, the Court said that a state may not exclude any persons, "because of their faith or lack of it, from receiving the benefits of public welfare legislation." *Everson v. Board of Education*, 330 U.S. 1, 16 (1947). In *Sherbert v. Verner*, the Court said that loss of financial benefits on account of Sabbath observance "puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship." 374 U.S. 398, 404 (1963). In *Thomas v. Review Board*, 450 U.S. 707, 718 (1981), the Court said that conditioning benefits on abandonment of religious practice puts "substantial pressure on an adherent to modify his behavior and violate his beliefs," and that

when this happens, “a burden upon religion exists.” “While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.” The Court repeated each of these statements in *Hobbie v. Unemployment Appeals Commission*, 480 U.S. 136, 140–41 (1987), and it reaffirmed them again in *Frazee v. Illinois*, 489 U.S. 829, 832 (1989). These cases are the law of RFRA, which was enacted specifically “to restore the compelling interest test as set forth in *Sherbert v. Verner*.” 42 U.S.C. §2000bb(b)(1) (2006).¹

It is sometimes suggested that RFRA is simply inapplicable to federal grant programs. That is inconsistent with the statutory text, which says that RFRA “applies to *all* federal law, and to the implementation of that law.” 42 U.S.C. §2000bb-3(a) (2006) (emphasis added). It is also inconsistent with the expressly stated intent to codify *Sherbert v. Verner*, which was a case in which government withheld a grant of funds.

Even more specifically, it is inconsistent with the express indication that Congress thought about grant programs and expressly declined to exclude them from the Act. This last point is textually complex, depending on a double negative that is spread over two sentences, but it is important to parse it through. Section 2000bb-4 first says that RFRA does not affect the Establishment Clause. Then it says that “[g]ranteeing government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall *not* constitute a violation of this chapter.” “This chapter” is all of RFRA. So RFRA does not prohibit grants.

And then it says: “As used in this section, the term ‘granteeing’, used with respect to government funding, benefits, or exemptions, does *not* include the denial of government funding, benefits, or exemptions.” The only place where the term “granteeing” is used in that section is in the preceding sentence, to say that granteeing funds is *not* a RFRA violation. So when Congress goes out of its way to state what should have been obvious—that granteeing does not include denial—it is taking denials of funding *out* of the sentence that says that granteeing is *not* a RFRA violation. Denials are not in that sentence; denials are *not not* a RFRA violation. That is, denials of funding *may be* a RFRA violation. Section 2000bb-4 does not of itself say that withholding funds *is* a RFRA violation; that depends on the analysis of substantial burden and compelling interest under §2000bb-1. But §2000bb-4 says that denials of funding are not excluded from the

¹ It is not necessary to the interpretation of RFRA, but probably these cases are also still the law of the Constitution on the burden issue as well. Nothing in *Employment Division v. Smith*, 494 U.S. 872 (1990), casts any doubt on their holdings with respect to burden; the Court assumed throughout that plaintiffs’ religious exercise had been burdened by the state’s withholding of benefits. *Locke v. Davey*, 540 U.S. 712 (2004), emphasized that the case was about funding the training of clergy; at one point the Court said that “the *only* interest at issue here is the State’s interest in not funding the religious training of clergy.” *Id.* at 722 n.5 (emphasis added). The debates on disestablishment in the founding era were precisely about how to fund the clergy; the whole theory of charitable choice is that social services are different from the core religious functions of the church.

Subsequent to *Davey*, and subsequent to the OLC opinion, the Tenth Circuit held that the Free Exercise Clause precludes a state from excluding “pervasively sectarian” colleges from a scholarship program. *Colorado Christian University v. Weaver*, 534 F.3d 1245 (10th Cir. 2008). The court noted that this exclusion imposed “a far greater burden on affected students” than the narrow exclusion in *Davey*, 534 F.3d at 1256, and that the state discriminated among religions by discriminating between sectarian and pervasively sectarian colleges. Similarly here, the government would discriminate among religions if it funded the charitable works of religions who hire without regard to faith but not of those who believe that the workforce entrusted to carry out their mission should believe in their mission. Conditioning funding on forfeiture of the right to hire believers may well violate the Free Exercise Clause as well as RFRA.

statute. Denials of funding are subject to the same RFRA analysis as any other government decision challenged as a burden on religious exercise.

One traditional reason for opposing the grant of government funds to religious organizations has been that government money would corrupt religious organizations, because the money would inevitably come with conditions that would force religious organizations to distort their mission or abandon tenets of their faith. This is a genuine risk, and charitable choice programs should be designed to minimize the danger. It is counterproductive at the level of first principle to claim that such corrupting conditions are actually *required*—that government cannot grant funds to religious charities unless it requires some of them to abandon tenets of their faith. If there are going to be grants to religious organizations—and an absolute rule against such grants has never been the law and is clearly not the law today—these grants should be structured in a way that protects religious liberty, not in a way that burdens it. Congress spoke to that issue in RFRA, requiring justification for *all* federal laws that burden the free exercise of religion.

Funding without conditions protects the religious liberty of the groups that are funded. The way to protect the religious liberty of those who would work for such charities is to fund a diverse array of charities without discrimination. We cannot protect people who want to work for religious organizations by destroying the separate religious identities of those organizations.

The right of religious organizations to hire members of their own faith has long been codified in the Civil Rights Act of 1964. 42 U.S.C. §§ 2000e-1(a) and 2000e-2(e)(2) (2006). That right is not forfeited as soon as a religious organization accepts a government grant or contract. No one seriously believes that the major Jewish charities will hire a Christian or Muslim Executive Director, or that Catholic Charities will put Jews and Protestants in its top positions. For some charities, the requirement of a statement of faith applies to rank-and-file employees as well. The OLC Memorandum recognizes that such charities get an opportunity to prove that their requirement of believing employees is a sincere exercise of religion for them, and thus to put the government to its proof on compelling interest.

Disqualifying all religious charities that hire members of their own faith even for executive positions would disqualify all religious charities. Disqualifying only those charities that hire members of their own faith for “too many” positions would not only burden their exercise of religion as described above; it would require intrusive government inquiries into many jobs at each organization, and it would require difficult line drawing to distinguish positions in which religious hiring is permitted from other positions in which it is not. Such intrusive government inquiries into religious organizations are a Religion Clause problem in themselves. It was to avoid the burden of such inquiries, and to avoid the burden of negative answers, that Congress amended Title VII to allow religious organizations to prefer believers for work in *all* their activities, not merely their “religious” activities. *Compare* Civil Rights Act of 1964, §702, 78 Stat. 253, 255; *with* Equal Employment Opportunity Act of 1972, §3, 86 Stat. 103, 103–04.

The OLC Memorandum reviews the law of burdens on religious exercise, and every other element of a RFRA claim and of potential RFRA defenses, in great detail, with the care associated with OLC Memoranda. The letter urging you to withdraw the Memorandum makes no argument at all. The letter simply asserts, repeatedly but without explanation, that the OLC

Memorandum is erroneous, unreasonable, and far-fetched. The closest the letter comes to an argument is to repeatedly note that the Memorandum was issued during the Bush Administration. I am certainly no defender of the Bush Administration and its legal interpretations, but not everything they did is wrong just because they did it. In this case, the OLC's analysis is perfectly sound.

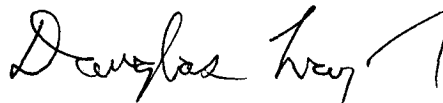
The letter also states prominently that "some" of its signers were leaders in the Coalition for the Free Exercise of Religion. This is true; I have worked with some of the signing organizations for years and regret the need to disagree with them. But the "some" is carefully chosen; many of the signers have no history of support for religious liberty, and many were active in the defeat of the proposed Religious Liberty Protection Act in the later years of the Clinton Administration. That history does not necessarily mean that they are wrong, but they cannot avoid making an argument by simply (and for some of them, falsely) claiming the mantle of religious liberty and denouncing the Bush Administration.

My argument must also stand on its own merits. But by way of introduction I should say that I have worked on religious liberty issues for more than thirty years, publishing one book and scores of articles, with more books forthcoming. I have represented individuals and organizations of many faiths and of none—religious and secular, left and right. I worked with the Coalition for the Free Exercise of Religion to pass RFRA, in minor ways at the beginning of Congress's deliberations and in more substantial ways by the time of passage. I worked on the Religious Liberty and Charitable Donations Protection Act. I worked intensively with the Congressional committees, the Justice Department, and the White House Counsel's Office during the Clinton Administration to draft and then pass the Religious Land Use and Institutionalized Persons Act. It is that Act that amended RFRA's definition of free exercise and provided the statutory text relied on in the OLC Memorandum. I am a long-time defender of religious liberty for all, with substantial expertise in the field.

Religious liberty is best protected in a regime in which core religious functions are not funded by the government, and in which both religious and secular providers of social services are funded without discrimination and without conditions that require the religious providers to compromise their exercise of religion. The OLC Memorandum is consistent with those principles, and it should not be withdrawn.

I write in my individual capacity as a scholar; of course the University of Michigan takes no position on these issues. If I can be of further assistance, please feel free to contact me.

Very truly yours,

A handwritten signature in black ink that reads "Douglas Laycock". The signature is written in a cursive, flowing style with a long, sweeping tail on the final letter.

Douglas Laycock

cc: The Honorable Gregory B. Craig
The Honorable Joshua P. Dubois