New Federal Initiatives Project

Will the Obama Administration Reinterpret Federal Law Re: Religious Discrimination When Awarding Federal Grants?

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INTRODUCTION

Many religious organizations, as a sincere exercise of their religious faith, engage in religious preferences when hiring those who serve in their organizations. Such religious preferences are designed to ensure that a religious organization has in place personnel who affirm and practice the religious beliefs of that organization. Such religious preferences also maintain the religious autonomy of that organization by preventing situations in which that organization is compelled to hire those who do not share the core beliefs of that organization (e.g., a Jewish charity doesn't have to hire Christians or Muslims).

The Obama Department of Justice (DOJ) is currently debating whether to re-interpret federal law so as to allow discrimination, when awarding federal grants, against faith-based organizations who engage in such religious hiring preferences. The outcome of this debate will affect the ability of faith-based providers who engage in religious hiring preferences to compete with secular and other faith-based organizations for federal social service grants.

BACKGROUND

The background to this debate arises out of two competing values in federal law.

On the one hand, there is the principle of non-discrimination. Embedded in the authorizing legislation and/or regulations for numerous federal grant programs (e.g., disaster response, poverty relief, education, rehabilitation, etc.) are generally applicable rules prohibiting organizations that receive federal grants from discriminating in its hiring practices, including religious discrimination. This generally applicable rule against religious discrimination poses little trouble for secular social service providers. However, it does pose a significant issue for many religious organizations that, as an exercise of their faith, engage in religious hiring preferences. The generally applicable ban on religious discrimination in hiring would disqualify such religious organizations from receiving any federal grants.

On the other hand, there is the desire to protect religious exercise against government imposed burdens on religious exercise. This protection of religious exercise, at least with regard to the action of the federal government, is most expansively set forth in the Religious Freedom Restoration Act of 1993 (RFRA). RFRA prohibits the federal government from imposing a "substantial burden" on the religious exercise of any individual or entity unless the government can prove that imposition of that substantial burden passes the strict scrutiny test, i.e., that it is the least restrictive means of achieving a compelling government interest.

In June 2007, the Department of Justice's Office of Legal Counsel (OLC) issued an opinion to provide guidance to all federal agencies on how to resolve these two competing values in federal law. At issue was the eligibility of World Vision, an explicitly Christian aid organization that employs religious preferences in hiring its personnel, to receive a grant pursuant to the Juvenile Justice and Delinquency Prevention Act. That act prohibited grant recipients from engaging in

religious discrimination in their employment practices. In a 25 page opinion, the OLC concluded that the protections of religious exercise set forth in RFRA are reasonably construed to apply to religious organizations that seek federal grants. The opinion concludes that because requiring a religious organization to abandon its religious practices in order to receive a grant is a substantial burden on religious exercise, the government may not force a religious organization to abide by the non-discrimination rules as a condition of receiving a grant.

In light of the OLC opinion and RFRA's commands, DOJ's Office of Justice Programs then issued guidance stating that a faith-based organization (FBO) may receive federal funds and be exempt on a case-by-case basis under RFRA from the non-discrimination rules.[1] To be exempt, an FBO must certify to the following, and there must be no reason to question its truthfulness:

1. The FBO will offer all federally-funded services to all qualified beneficiaries without regard for the religious or non-religious beliefs of those individuals; and

2. Any activities of the FBO that contain inherently religious content will be kept separate in time or location from any services supported by direct federal funding, and if provided under such conditions, will be offered only on a voluntary basis; and

3. The FBO is a religious organization that sincerely believes that providing the services in question is an expression of its religious beliefs; that employing individuals of particular religious belief is important to its religious exercise; and that having to abandon its religious hiring practice to receive federal funding would substantially burden its religious exercise.

THE PRESENT CONTROVERSY

While RFRA was passed in 1993 with the support of an extraordinarily unified coalition of religious groups of all denominations and civil rights groups from across the political spectrum, the OLC's interpretation of RFRA has fractured this coalition. In September 2009, a subset of the coalition that had supported RFRA (joined by some gay rights advocacy groups) sent a letter to Attorney General Eric Holder asking him to "review and withdraw" the June 2007 OLC opinion. In response, University of Michigan Law School Professor Douglas Laycock — a legal scholar, now at the University of Virginia School of Law, who worked on the original drafting of RFRA and its subsequent amendment in 2000 and who has represented individuals and organizations of many faiths and none — sent the Attorney General a November 2009 letter arguing that the OLC opinion "is sound and … should not be withdrawn."

To date, the OLC opinion has not been withdrawn, but the Obama Administration has not yet stated publicly whether it will narrow the scope of RFRA's protections and withdraw the opinion.

ANALYSIS OF THE ARGUMENTS

The letter urging that the Obama Administration narrow RFRA's protections asserts that the OLC opinion adopts an "erroneous" interpretation of RFRA, and "threatens core civil rights and religious freedom protections." The letter argues that the OLC memo is incorrect when it

concluded that RFRA is "reasonably construed" to require that a federal agency categorically exempt a religious organization from an explicit federal non-discrimination provision tied to a grant program. The letter also asserts that the OLC opinion was a political decision of the Bush administration to override federal laws barring religious discrimination after it failed in its attempt to get Congress to repeal such laws. Finally, the letter asserts that the OLC memorandum is focused on one DOJ program, and is wrongly being cited by other agencies in favor of other programs.

In response, Professor Laycock asserts that the letter calling for the opinion's withdrawal does not actually provide any legal analysis of RFRA to rebut the legal analysis in the OLC opinion. The legal argument, as set forth in both the OLC opinion and Laycock letter, that RFRA is reasonably construed to allow religious organizations receiving grants to continue to be able engage in hiring practices in favor of their co-religionists, is as follows. First, RFRA's definition of protected "religious exercise" — i.e., "any exercise of religion, whether or not compelled by, or central to, a system of religious belief" — is broad enough to cover the charitable works being undertaken by religious organizations seeking government grants.[2]

Second, the government does "substantially burden" such religious exercise when it offers monetary grants on condition that a religious organization compromise its religious identity by abandoning its religious practice of hiring only those who share the organization's religious convictions. RFRA's definition of "substantial burden" was intended to track the Supreme Court's definition of "substantial burden" under the First Amendment. Prof. Laycock asserts that a string of Supreme Court cases has established that conditioning benefits on abandonment of religious practices is a substantial burden because, even though the compulsion is "indirect," it puts "substantial pressure on an adherent to modify his behavior to violate his beliefs."[3]

Third, by its own terms, RFRA "applies to all federal law and to the implementation of that law," and nothing in its text excludes grant making programs.[4]

Fourth, there is no compelling government interest in requiring a religious organization to hire those who do not share that religious organization's beliefs.

Finally, Laycock suggests that if RFRA does not apply here, the government would be engaging in religious discrimination of its own that may violate the First Amendment's protection of religious liberty if it were to only award grants to religious groups that hire without regard to faith and to discriminate against religious groups that, in order to preserve their religious identity, hire only co-religionists.

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[1] *See* http://www.justice.gov/archive/fbci/effect-rfra.pdf
[2] 42 U.S.C. § 2000cc-5(7)(A) (2000)
[3] *Thomas* v. *Review Board*, 450 U.S. 707, 718 (1981)

[4] 42 U.S.C. § 2000bb-3(a) (2006)

Related Links:

"Application of the Religious Freedom Restoration Act to the Award of a Grant Pursuant to the Juvenile Justice and Delinquency Prevention Act," Memorandum Opinion for the General Counsel of the Office of Justice Programs from the U.S. Department of Justice Office of Legal Counsel (June 29, 2007)

http://www.justice.gov/olc/2007/worldvision.pdf

"Effects of the Religious Freedom Restoration Act on Faith-Based Applications for Grants," Office of Justice Programs, United States Department of Justice (October 2007)

http://www.justice.gov/archive/fbci/effect-rfra.pdf

"Request for Review and Withdrawal of June 29, 2007 Office of Legal Counsel Memorandum Re: RFRA," many signatories (September 17, 2009)

http://www.au.org/media/press-releases/archives/2009/09/card-letter-to-atty-gen.pdf

Letter to U.S. Attorney General Eric H. Holder, Jr. from Prof. Douglas Laycock, The University of Michigan Law School (November 13, 2009)

http://www.ecfa.org/Files/LaycockHolderReRFRA.pdf