

THE APPLICATION OF RFRA TO OVERRIDE EMPLOYMENT
NON-DISCRIMINATION CLAUSES EMBEDDED IN FEDERAL SOCIAL SERVICE PROGRAMS

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The basic federal employment nondiscrimination law is Title VII of the Civil Rights Act of 1964.¹ The Act prohibits discrimination in employment on the basis of race, color, national origin, sex, or religion, and is binding when an employer has fifteen or more employees. However, section 702(a) of the act acknowledges the freedom of religious organizations to take religion into account in their employment decisions.² Moreover, the section 702(a) exemption is not forfeited when a faith-based organization accepts government grant funding,³ nor does the exemption thereby become a religious preference in violation of the Establishment Clause.⁴ There is more to federal civil rights compliance than Title VII, however, and strictly speaking the section 702(a) exemption is applicable only to claims brought under Title VII.⁵

I. PROGRAM-SPECIFIC NON-DISCRIMINATION CLAUSES IN FEDERAL LEGISLATION

Almost all federal funding awards to independent-sector organizations to provide social services take the form of a “grant” or “cooperative agreement,” rather than the form of a government “contract” for services.⁶ Some federal social service programs have embedded in their authorizing legislation a nondiscrimination clause binding on the recipients of program grants. While this is true of only a minority of all federal welfare programs, still the number of programs with embedded clauses is not insubstantial. The principal thrust of these clauses is to prohibit discrimination against the ultimate beneficiaries of the social service programs. However, a few of the embedded clauses expressly prohibit discrimination by a service provider against its employees in addition to discrimination against the ultimate beneficiaries. In still other programs the embedded clauses prohibit discrimination against the “intended beneficiaries” of the funded social services, but “intended beneficiaries” has been interpreted broadly in judicial decisions to prohibit discrimination not only against the program’s ultimate beneficiaries but also against the service provider’s employees.⁷

These embedded employment nondiscrimination clauses are presumptively binding on all recipients of federal grants awarded under the programs in question. Examples are the Workforce Investment Act of 1998,⁸ administered by the United States Department of Labor, and the first title of the Omnibus Crime Control and Safe Streets Act of 1968,⁹ administered by the United States Department of Justice. An embedded clause, if it covers employees as well as ultimate beneficiaries, typically prohibits discrimination against a grantee’s employees only while the employees are working in the government-funded program. Two programs, AmeriCorps VISTA and AmeriCorps State and National, both operated by the Corporation for National and Community Service, are unusual in this regard.

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These programs have an embedded clause restricting religious staffing, but the restriction is limited only to employees newly hired (if any) with the federal program funds in question.¹⁰

II. THE RELIGIOUS FREEDOM RESTORATION ACT OF 1993

The Religious Freedom Restoration Act of 1993 (RFRA)¹¹ gives relief to persons of faith and to faith-based organizations.¹² RFRA prohibits intentional discrimination on the basis of religion, but more importantly it also gives relief from substantial burdens on religion when the burden is the unintended impact of a generally applicable federal law.¹³ For the religious claimant there are three elements to a prima facie case under RFRA: (1) that the professed religious practice is sincere; (2) that the burden on the practice is substantial; and, (3) that the practice is an exercise of religion. The government or other RFRA defendant has the affirmative defense (and thus the burden of proof to show) that application of the law is in furtherance of a compelling governmental interest and is the least restrictive means of achieving that governmental interest.¹⁴

When the aforementioned embedded employment nondiscrimination clauses apply to faith-based social service providers that staff on a religious basis, may these providers turn to RFRA for protection? The United States Department of Justice has answered in the affirmative. In October 2007 the Office of Justice Programs [OJP], which administers the social service programs within the Department of Justice, along with the Taskforce for Faith-Based and Community Initiatives within the Office of the Deputy Attorney General, posted on the Department of Justice webpage the determination that RFRA enables religious organizations to be eligible for federal grants while continuing to employ those of like-minded faith.¹⁵ And faith-based organizations may do so “even if the statute that authorized the funding program generally forbids consideration of religion in employment decisions by grantees.”¹⁶ Successfully invoking RFRA is conditional on the sincerity of the faith-based grantee’s professed religious motive for involvement in the program, and whether requiring the grantee to choose either religious staffing or federal funding would be a substantial burden on its religion.¹⁷

The October 2007 posting by OJP came about as a result of a formal request submitted by World Vision, a Christian world relief and community development organization. In early 2005, World Vision was awarded a \$1.5 million grant by OJP to address an escalating gang presence and juvenile crime in Northern Virginia. The grant was awarded under the Juvenile Justice and Delinquency Prevention Act, which is subject to provisions of the Omnibus Crime Control and Safe Streets Act. The latter requires that grant applicants not discriminate in employment on the basis of religion when using grant monies.¹⁸ As with many faith-based organizations, World Vision does consider religion when hiring and thus sought a determination that it could safely rely on RFRA and continue its hiring

practices. After some delay, in June of 2007 the Office of Legal Counsel (OLC) at the Department of Justice provided OJP with a written legal opinion to the effect that RFRA did override conflicting federal employment nondiscrimination clauses, that World Vision was religiously motivated in its practice of staffing on a religious basis, and that World Vision would be substantially burdened if it could not continue to employ staff of like-minded faith while administering the grant. Although the OLC legal opinion provided to OJP is confidential under the attorney-client privilege, World Vision was soon advised as to the favorable conclusion. The aforementioned posting on the Department of Justice webpage in October 2007 made the ultimate determination available to other religious organizations awarded or applying for OJP grants. Because RFRA applies to social service grants issued by the Department of Justice, it necessarily follows that RFRA applies to grants awarded by other departments and agencies such as the Department of Labor and the Department of Housing and Urban Development.

RFRA protects religious practices from substantial burdens that are imposed by the federal government.¹⁹ Religious charities have a strong interest in maintaining their religious character, and that character in turn is modeled to the poor and needy through its employees. The White House Office of Faith-Based and Community Initiatives published a booklet in June 2003 acknowledging that a faith-based organization's ability to select employees that share its religious values is vital to the group's self-identity and continued ministry.²⁰ It argues that nonreligious organizations receiving federal grant monies freely hire based on their core mission, just as Planned Parenthood requires that employees be pro-choice and Sierra Club screens applicants based on their view of global warming. Religious groups likewise cannot remain true to their founding creedal purposes unless employees are aligned with the energizing core of the mission.

It is true, of course, that when the aid is direct the government-funded social services must be delivered without prayer, proselytizing, or other inherently religious activities,²¹ all as required by the separation of church and state. So congressional critics have argued that the delivery of government-funded services does not require an employee of a particular religion. The quip heard among the critics has been: "An evangelical homeless shelter doesn't need an evangelical employee if all she is doing is ladling soup in a feeding line." But the quip evidences an ignorance of religion. More to the point is Justice William Brennan's observation in his concurring opinion in *Corporation of the Presiding Bishop v. Amos*.²² Justice Brennan notes that a religious organization is "an ongoing tradition of shared beliefs, an organic entity not reducible to a mere aggregation of individuals."²³ The organization's choice of whom to hire is an important means by which the group "defines itself."²⁴ The civil courts should be solicitous of those choices because "furtherance of the autonomy of religious organizations often furthers individual religious freedom as well."²⁵ Religious charities often regard the provision of social services as a means of fulfilling religious duty and as providing a ready example of the life of faith they seek to foster. Religious organizations like World Vision will tell you that their work in reducing gang violence and juvenile delinquency is successful

among hard-to-reach adolescents because its employees credibly do what they do with the genuine care and sustained love that only their faith makes possible.

Not all employment discrimination is the same. Disapproving of a job applicant because of her race is senseless and invidious.²⁶ But one's religious beliefs speak to real and important differences about life's present purposes as well as the ultimate meaning of life, which in turn shape one's vocational objectives and job performance. While the Constitution ascribes no value to racial discrimination, a religious organization's employment discrimination on the basis of religion is often protected as a matter of free exercise. One who has never disagreed with others about religion is not thereby commendably tolerant, but is treating religious differences as trivial, as if religious beliefs do not matter. That is just a soft form of religious bigotry.

III. ADDITIONAL ARGUMENTS BY CRITICS OF THE FAITH-BASED INITIATIVE

The most common response to a request such as that of World Vision is that if a faith-based organization does not want restrictions on its hiring then they should not take the money. But there is little doubt that a religious hiring restriction puts enormous pressure on faith-based organizations to recant on a cardinal religious tenet or lose the grant and with it the opportunity to help America's poor and needy. RFRA defines "exercise of religion" broadly to include "any" exercise, whether or not the exercise is "compelled by, or central to, a system of religious belief."²⁷ Every personnel decision by a religious organization has the potential for being an exercise of religion. And in an organization highly integrated in its faith and the delivery of social services, every personnel decision has the very real potential to be an "exercise of religion" as defined in RFRA.

Opponents continue to insist, however, that a religious organization can easily avoid the religious burden by simply forgoing the competition for federal grant monies. But requiring withdrawal from involvement in modern public life is hardly equitable treatment. Just as the government cannot justify restricting a particular form of speech (e.g., passing out handbills on a public street) merely by pointing to other opportunities that a person has to express herself (e.g., writing a letter to the editor of a newspaper), so the government cannot restrict a particular exercise of religion by pointing to some other course of action where the organization's religious practices are not penalized. And in any event, the question is free of serious doubt under RFRA. RFRA states that a "denial of government funding" on account of a social service provider's religion or religious practice can trigger RFRA's protection.²⁸ This is only logical. Congress enacted RFRA to "restore" the standard of protection for religious free exercise originally reflected in *Sherbert v. Verner*,²⁹ a case about a denial of government funding.³⁰ The Supreme Court held in *Sherbert* that an individual refusing to take a job entailing work on her Sabbath could not be put to the "cruel choice" of either forfeiting her claim for unemployment benefits or violating her religious Sabbath. Likewise, a faith-based organization cannot be put to the "cruel choice" of either forfeiting its ability to compete for

valuable federal grant monies or violating its religious practice of employing those of like-minded faith.

As noted above, the term “religious exercise” is broadly defined in RFRA to include “any exercise of religion, whether or not compelled by, or central to, a system of religious belief.”³¹ Nonetheless, opponents of the faith-based initiative argue that for government to decline to facilitate the free exercise of religion is not a religious burden at all, whether substantial or de minimis. The argument will not stand close analysis. It is true, of course, that the Free Exercise Clause of the First Amendment is written in terms of what the government cannot do to a faith-based organization and not in terms of what a faith-based organization can exact from the government. But that line of argumentation does not describe what is occurring here. The government may indeed choose to deliver all social services by itself. In such circumstances, the fact that a faith-based provider cannot win a grant is not a free exercise burden because no one in the independent sector is eligible to win a grant.³² The federal government, however, has not chosen such a path. Instead, almost all government social services are delivered by the independent sector. Having chosen to deliver welfare services through providers in the independent sector, the federal government cannot then pick and choose among the available providers using eligibility criteria that have a discriminatory impact on faith-based providers. A discriminatory impact on a religious practice as a result of an otherwise neutral law is the very type of occurrence that Congress sought to halt by enacting RFRA. RFRA states that “[g]overnment shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability.”³³

Conceding, as they must, that by its terms a denial of grant funding can trigger RFRA protection, opponents of the faith-based initiative argue that RFRA cannot be invoked by a religious charity because the loss of grant monies is not a “substantial” religious burden.³⁴ This makes no sense. It is true that religious organizations making claims of increased financial burden, without more, have not been excused from compliance with general regulatory and tax legislation.³⁵ That is, it is not enough simply to show that a religiously neutral law increases a faith-based provider’s cost of operation. But such cases have no resemblance to the claim of substantial burden here. Instead, an embedded restriction on religious staffing uniquely harms a faith-based organization by preventing it from sustaining its religious character by hiring those of like-minded faith. The harm is not financial or increased operating cost; the harm is uniquely religious.³⁶ A prohibition on religious staffing cuts the very soul out of a faith-based organization’s ability to define and pursue its spiritual calling, as well as its ability to sustain its vision over generations.

RFRA itself can be overridden, of course, upon proof by the federal government of a “compelling governmental interest.”³⁷ In the recent case of *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*,³⁸ the Supreme Court held that under RFRA the government’s showing of a compelling interest is limited to the particular exercise of religion by the claimant in the case.³⁹ In *Centro Espirita*, a religious group asked for an exemption from the Controlled Substances Act so that it could import a particular narcotic used only by adults during one

of its religious ceremonies. The federal government opposed the importation request insisting that there was a “compelling governmental interest” in the uniform enforcement of the Controlled Substances Act.⁴⁰ In other words, the government claimed a compelling interest in no exceptions for anyone for any reason because to grant an exception for one would mean having to consider other requests for exemptions.⁴¹ The Court rejected that interpretation of RFRA. The Court said that the proper statutory inquiry was more focused in that “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.”⁴² Following the Court’s rationale in *Centro Espirita*, the compelling-interest inquiry in a religious staffing case is not in uniformly preventing employment discrimination on a religious basis by all religious grantees. Rather, the government has to more narrowly show that it has a compelling interest in preventing the particular practice of religious staffing by the particular religious grantee in question.

It is a near impossibility for the government to meet such a focused evidentiary burden, and it is absurd to claim that the elimination of religious staffing by a particular faith-based organization is a compelling interest. Congress sought to achieve just the opposite when it provided in section 702(a) that Title VII’s ban on religious discrimination should not apply to religious organizations. Section 702(a) is a parallel policy choice by Congress to accommodate the religious freedom of religious organizations. If anything, accommodating religious staffing expands religious freedom—and the expansion of religious freedom is a strong governmental interest, the leading example of which is the First Amendment. Lastly, it has been observed that protecting the religious character of faith-based organizations that participate in government programs expands the array of choices available to the poor and needy, some of whom desire to seek out assistance at robustly faith-centered providers.⁴³

Permitting religious charities to staff on a religious basis does not undermine compelling social norms or enduring constitutional values. Just the opposite is true. The religious staffing freedom minimizes the influence of government actions on the religious choices of both religious providers and those wanting to receive services from a faith-based provider. Finally, safeguarding a faith-based organization’s freedom of religious staffing advances the Establishment Clause value of noninterference by government in the religious affairs of religious communities.⁴⁴ Senator Sam Ervin (D-N.C.) said it more colorfully upon the revision of Title VII when he stated that the aim of the staffing freedom is to “take the political hands of Caesar off of the institutions of God, where they have no place to be.” In *Corporation of the Presiding Bishop v. Amos*, the Supreme Court put its seal of approval on that congressional judgment concerning proper church-state relations.⁴⁵

CONCLUSION

Freedom for religious staffing by faith-based grantees enhances our nation’s religious pluralism and undeniable dynamism. Authentic pluralism⁴⁶ is rightly accommodated, not diminished, when the government affirms the equal treatment

of these independent-sector providers to participate in social service programs. To do otherwise would privilege secularism, driving robust faith-based organizations underground and away from participation in modern public life. That would be more like hostility toward religion than neutrality toward religion. By the same token, the approach of government neutrality permits faith-based organizations to preserve their institutional character which is necessary to perpetuate their distinctive way of life. These are the social norms to be upheld and the enduring constitutional values to be reinforced. In the face of these realities, the opponents' bald assertions that a ban on religious staffing by federal grantees holds the moral high ground is little more than self-flattery.

Many religious organizations care deeply about retaining the ability to participate fully and equally in modern public life, while retaining their full character as religious organizations of integrity and vision. Not every religious grantee will care about the freedom to staff on a religious basis, of course, but many do.⁴⁷ And even this variance among religious groups goes to underline America's religious pluralism made possible only when America's religious freedom is extended to all. When RFRA overrides embedded employment nondiscrimination clauses, the rule of law chooses freedom over a crabbed notion of equality that acts to oppress the vital need of robust religious organizations to retain their institutional autonomy. This freedom, made possible by Congress in passing RFRA, is to be celebrated as in the best of our nation's legal traditions.

Endnotes

1 42 U.S.C. §§ 2000e to -17.

2 Section 702(a) provides, in relevant part, as follows:

This title shall not apply to... a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

42 U.S.C. § 2000e-1(a). The § 702(a) exemption is not limited to the employment of persons of the same denomination as the employer. Rather, a religious organization may seek employees that are like-minded with respect to the religious observance the employer deems relevant to the organization's religious nature whether or not the employee is a co-religionist or is a member of the same denomination. *Cf.* Killinger v. Samford University, 113 F.3d 196, 199-200 (11th Cir. 1997); Hall v. Baptist Memorial Health Care Corp., 27 F. Supp. 2d 1029, 1033, 1036-40 (W.D. Tenn. 1998), *aff'd*, 215 F.3d 618 (6th Cir. 2000).

3 Lown v. Salvation Army, Inc., 393 F. Supp. 2d 223, 246-52 (S.D.N.Y. 2005).

4 *Id.* at 249-52.

5 *See generally* CARL H. ESBECK, STANLEY W. CARLSON-THIES & RONALD J. SIDER, *THE FREEDOM OF FAITH-BASED ORGANIZATIONS TO STAFF ON A RELIGIOUS BASIS* (Ctr. for Pub. Justice 2004). This monograph may be downloaded at http://www.cpjustice.org/faith-based_initiative/equal_treatment/religious_staffing/key_resources. Portions of this extended essay are taken from the monograph.

6 The three terms are defined at 31 U.S.C. §§ 6301-08.

7 Programs such as the Community Development Block Grant Act and Head Start include civil rights language requiring that no one will be denied program benefits or be discriminated against on account of race, color, national origin, sex, or religion. Community Development Block Grant

Act, 42 U.S.C. § 5309; Head Start Act, 42 U.S.C. § 9849(a). Although this embedded language does not mention employment, a White House bulletin notes that "some older U.S. Supreme Court cases indicate that these statutes may also apply to employment decisions." White House Office of Faith-Based and Community Initiatives, *Protecting the Civil Rights and Religious Liberty of Faith-Based Organizations: Why Religious Hiring Rights Must Be Preserved* 5-6 (June 23, 2003), <http://www.whitehouse.gov/government/fbci/booklet.pdf>.

8 29 U.S.C. §§ 2801-2945. § 2938(a)(2) prohibits employment discrimination on several bases, including religion.

9 42 U.S.C. §§ 3711 to 3797ee-1. § 3789d(c)(1) prohibits employment discrimination on several bases, including religion.

10 *Id.* § 12635(c)(1)-(2).

11 42 U.S.C. §§ 2000bb to -4. RFRA was amended in September of 2001 as part of the bill that enacted the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc to -5. As amended, RFRA is no longer applicable to the operations of state or local governments, only to the operation of federal law and its implementation by federal officials. 42 U.S.C. § 2000bb-3(a). This amendment was made necessary because the Supreme Court held that RFRA's application to burdens on religion as a result of state or local law was an unconstitutional use of congressional power under section 5 of the Fourteenth Amendment. *See City of Boerne v. Flores*, 521 U.S. 507 (1997).

12 RFRA reads in terms of protecting the rights of "persons." 42 U.S.C. § 2000bb-1(a). However, in the United States Code the term "persons" includes organizations, thereby including protection for faith-based organizations. *See* 1 U.S.C. § 1.

13 42 U.S.C. § 2000bb-1(a).

14 *Id.* § 2000bb(b), 2000bb-1, 2000bb-2(3)-(4).

15 *See Effect of the Religious Freedom Restoration Act on Faith-Based Applicants for Grants*, <http://www.usdoj.gov/fbci/effect-rfra.pdf>. *See also* Answer to Question 10 of *Frequently Asked Questions*, <http://www.usdoj.gov/fbci/faq.html>.

This determination by the Department of Justice was hardly a surprise. The ruling had long been presaged within the Bush Administration. The White House Office of Faith-Based and Community Initiatives advised faith-based organizations that, notwithstanding restrictive statutory language in some federal funding programs, faith-based organizations may resort to RFRA for protection. *See* White House Office of Faith-Based and Community Initiatives, *Protecting the Civil Rights and Religious Liberty of Faith-Based Organizations: Why Religious Hiring Rights Must Be Preserved* 4 n.3, 5 n.4 (June 23, 2003), <http://www.whitehouse.gov/government/fbci/booklet.pdf>. Further, the regulations for several of the Substance Abuse and Mental Health Services Administration's (SAMHSA) drug-abuse prevention and treatment programs looked to RFRA to nullify a statutory limitation on faith-based recipients of the funding. *See* "Charitable Choice Regulations Applicable to States Receiving Substance Abuse Prevention and Treatment Block Grants, Projects for Assistance in Transition From Homelessness Formula Grants, and to Public and Private Providers Receiving Discretionary Grant Funding From SAMHSA for the Provision of Substance Abuse Services Providing for Equal Treatment of SAMHSA Program Participants," 68 Fed. Reg. 56430, 56435 (Sept. 30, 2003) (codified at 42 C.F.R. pt. 54.6). The preamble to the final rule for the Department of Justice's Equal Treatment regulations noted that RFRA applies even though it is not specifically mentioned in the regulations. *See* "Participation in Justice Department Programs by Religious Organizations; Providing for Equal Treatment of All Justice Department Program Participants," 69 Fed. Reg. 2832, 2836 (Jan. 21, 2004). The preamble to the final rule for the Department of Health and Human Services' Equal Treatment regulations included a similar comment. *See* "Participation in Department of Health and Human Services Programs by Religious Organizations; Providing for Equal Treatment of All Department of Health and Human Services Program Participants," 69 Fed. Reg. 42586, 42591 (July 16, 2004).

16 *Effect of the Religious Freedom Restoration Act on Faith-Based Applicants for Grants* (Oct. 2007), <http://www.usdoj.gov/fbci/effect-rfra.pdf>. The posting is careful to note that religious providers may never discriminate on the basis of religion with respect to the ultimate beneficiaries of the program. *Id.* And, of course, RFRA addresses religious burdens only and thus does not permit employment discrimination on the basis of race, national origin, sex, age, or disability. *Id.*

17 *Id.* In one sense RFRA is case-specific, responding to each organization's sincerely held claim of a religious burden. But for faith-based organizations that staff on a religious basis, RFRA will presumptively grant relief from generally applicable employment laws prohibiting discrimination on the basis of religion. Because RFRA will grant relief almost without fail to faith-based organizations with sincerely held religious staffing practices (see, *infra* notes 36-41, and accompanying text), it is correct to suggest that there is a presumption that RFRA relieves faith-based organizations from the religious burden imposed by these program-embedded nondiscrimination clauses. As with any presumption, the government can inquire into the bona fides of the faith-based organization's claim and rebut the operation of RFRA by evidence of insincerity.

18 42 U.S.C. §§ 3711 to 3797ee-1. Sec. 3789d(c)(1) prohibits employment discrimination on several bases, including religion.

19 *Id.* § 2000bb-1(a).

20 White House Office of Faith-Based and Community Initiatives, *Protecting the Civil Rights and Religious Liberty of Faith-Based Organizations: Why Religious Hiring Rights Must Be Preserved* 3 (June 23, 2003), <http://www.whitehouse.gov/government/fbcil/booklet.pdf>.

21 See, e.g., Charitable Choice Provisions Applicable to the Temporary Assistance for Needy Families Program, 45 C.F.R. § 260.34(c)-(d) (2007).

22 Corp. of the Presiding Bishop v. Amos, 483 U.S. 327, 340 (1987) (Brennan, J., concurring in judgment) (upholding constitutionality of the § 702(a) exemption in Title VII for religious organizations staffing on a religious basis).

23 *Id.* at 342.

24 *Id.*

25 *Id.*

26 RFRA, of course, guards only against burdens on religious exercise. It does not deal with race. Opponents of the faith-based initiative argue that using RFRA to overcome embedded program restrictions on religious staffing will excuse racial discrimination rooted in religious belief. This has not been the case, as there are no reported RFRA cases where racial discrimination is excused under the guise of religion. And in all events, the Supreme Court has already held that the denial of benefits to a religious organization in the interest of eradicating racial discrimination is a compelling governmental interest. See *Bob Jones Univ. v. United States*, 461 U.S. 574, 602-04, 604 n.29 (1983). RFRA claims are overridden, of course, by compelling governmental interests. 42 U.S.C. § 2000bb-1(b).

27 See 42 U.S.C. § 2000bb-2(4) (incorporating by reference the definition of "religious exercise" in 42 U.S.C. § 2000cc-5(7)).

28 See *id.* § 2000bb-4 ("Granting government funding... shall not constitute a violation of this chapter... [T]he term 'granting,' used with respect to government funding... does not include the denial of government funding...").

29 374 U.S. 398 (1963). See also S. REP. NO. 103-111, at 13 (1993), as reprinted at 1993 U.S.C.C.A.N. 1892 ("parties may challenge, under the Religious Freedom Restoration Act, the denial of benefits to themselves as in *Sherbert*"); *id.* at 15 ("the denial of [government] funding... may constitute a violation of the act, as was the case under the free exercise clause in *Sherbert v. Verner*").

30 RFRA states, as one of its purposes, "to restore the compelling interest test" of *Sherbert v. Verner*. 42 U.S.C. § 2000bb(b)(1). The denial of funding in *Sherbert* was slightly different from the denial of a social service grant to a faith-based organization. But RFRA was not drafted to restore the holding of a single case. *Sherbert* was illustrative of the problem, not the whole problem. The terms of RFRA read as general principles, with the object being the provision of a remedy for a variety of religious burdens—no matter how or where the burdens occur.

31 42 U.S.C. § 2000bb-2(4) (incorporating by reference the definition of "religious exercise" in 42 U.S.C. § 2000cc-5(7)).

32 In *Brusca v. Bd. of Educ.*, 405 U.S. 1050 (1972), *aff'g* 332 F. Supp. 275 (D.C. Mo. 1971), the Supreme Court affirmed that a state's provision of free public school education does not compel the state to provide an equal benefit to religious school parents. *Luetkemeyer v. Kaufmann*, 419 U.S. 888 (1974),

aff'g 364 F. Supp. 376 (D.C. Mo. 1973), likewise affirmed that a state may choose to provide free bussing to government schools without providing a like benefit to religious schools. But *Brusca* and *Luetkemeyer* are inapposite to the situation here where the government has elected to involve private charities in the delivery of social services.

33 42 U.S.C. § 2000bb-1(a).

34 As part of the *prima facie* case, RFRA requires proof of a substantial burden on a claimant's religion. 42 U.S.C. § 2000bb-1(a) and (b).

35 See, e.g., *Jimmy Swaggart Ministries v. Bd. of Equalization of Cal.*, 493 U.S. 378, 391-92 (1990) (upholding uniform state levy of sales and use taxes on sale of material, including religious material).

36 The dollar amount, large or small, of any particular available grant is relevant but not essential to meeting RFRA's "substantial burden" requirement. A promise to comply with program-embedded employment nondiscrimination provisions is an essential criterion of grant eligibility. To fail to accommodate sincerely held religious employment practices is thus a categorical bar to a faith-based organization's eligibility for any such federal grant program. That unquestionably is a substantial burden or cruel choice, and the burden is uniquely religious rather than monetary. See *Sherbert*, 374 U.S. 398, 404, 406 (1963) (holding that an individual refusing to take a job entailing work on her Sabbath could not be put to the cruel choice of either forfeiting her unemployment benefits or violating her religious Sabbath).

A prohibition on religious staffing may also lead to a lawsuit alleging employment discrimination on the basis of religion. Such a lawsuit may be brought by the government or by a private litigant, the defense of which would be a substantial burden. See *Amos*, 483 U.S. at 336 (noting burden of defending religious organization sued for employment discrimination on basis of religion). RFRA regards any such lawsuit as a burden on religion. If the lawsuit is by a private claimant, RFRA still applies. RFRA applies not only to "all federal law" but also to "the implementation of that law." 42 U.S.C. § 2000bb-3(a). Every discrimination lawsuit by a private litigant is an "implementation" of a federal embedded nondiscrimination clause.

37 42 U.S.C. § 2000bb-1(b).

38 546 U.S. 418 (2006).

39 *Id.* at 430-31.

40 *Id.* at 432.

41 *Id.* at 434-37.

42 *Id.* at 430-31. See also *id.* at 428, 432-34.

43 See John D. Ashcroft, Statement on Charitable Choice, Proceedings and Debates of the 105th Cong., 2d Sess., 144 CONG. REC. S12686, S12687 (Oct. 20, 1998) ("Demanding that religious ministries 'secularize' in order to qualify to be a government-funded provider of services hurts intended beneficiaries of social services, as it eliminates a fuller range of provider choices for the poor and needy, frustrating those beneficiaries with spiritual interests.").

44 See, e.g., *Widmar v. Vincent*, 454 U.S. 263, 269 n.6, 271 n.9, 272 n.11 (1981) (stating that the principle of no-establishment is served when government avoids entanglement in religious events, practices, and doctrine); *Walz v. Tax Comm'n*, 397 U.S. 664, 674-76 (1970) (holding that no-establishment is served when government avoids excessive entanglement in the affairs of religious organizations).

45 483 U.S. 327, 332 n.9 (1987) (quoting Senator Ervin).

46 Authentic pluralism is when religious differences are openly acknowledged to make a difference. That is, religious particularity in a civil society that lives with these differences amicably while not denying that the particulars truly matter is authentic pluralism. On the other hand, *pseudo* pluralism is when religious people are expected to hide their religious differences in the public square so as not to offend others of a different persuasion.

47 STEPHEN V. MONSMA, PUTTING FAITH IN PARTNERSHIPS: WELFARE-TO-WORK IN FOUR CITIES 62-63, 188-94 (U. of Mich. Press 2004).