RFRA: Catholic Healthcare Loses an Arrow from Its Quiver

BY PETER LEIBOLD, JD, & CHARLES S. GILHAM, JD, LLM

Last spring the U.S. Supreme Court restricted religious freedom by striking down as unconstitutional the Religious Freedom Restoration Act (RFRA). The RFRA was a federal statute that provided significant protection for individuals practicing their religion. This article will briefly look back at the RFRA's genesis, examine the court's decision, and try to predict the decision's repercussions for Catholic healthcare.

Mr. Leibold is general counsel and Mr. Gilham is associate general counsel, Catholic Health Association, St. Louis.

Smith Decision: "Rational Basis"

In 1993, the U.S. Congress passed the RFRA in response to a 1990 U.S. Supreme Court decision called *Employment Division, Department of Human Resources of Oregon v. Smith.* In *Smith*, two members of the Native American Church were fired as drug counselors because they ingested peyote for sacramental purposes at a church ceremony. The state denied them unemployment compensation because their dismissals had been for work-related misconduct, namely, violating Oregon's controlled substances law. The Oregon Supreme Court ruled that unemployment benefits should not have been denied because applying the controlled substances law to the religious use of peyote violated the Free Exercise Clause of the U.S. Constitution.

The U.S. Supreme Court reversed that decision, stating that religious exemptions from neutral laws of general applicability (e.g., Oregon's controlled substances law) are not constitutionally mandated if the state has a rational basis for enacting the neutral law. In using the "rational basis" test in *Smith*, the Court abandoned the "compelling interest" test employed in two of its previous cases *(Sherbert v. Verner* and *Wisconsin v. Yoder).* Under the compelling interest test, the state cannot impose substantial burdens on an individual's religious practice without a compelling reason. In *Smith*, the majority found that the First Amendment does not require such exacting scrutiny of statutes that have an *indirect* negative impact on religion. The Court reasoned that most Free Exercise cases applied a more permissive standard than *Sherbert* and *Yoder* in determining the constitutionality of neutral laws of general applicability.

In *Smith*, the Supreme Court distinguished between laws specifically intended to burden religious practice and general laws unintentionally impeding religious conduct. The Court endorsed the compelling interest analysis for the former laws and the rational basis test for the latter.

The *Smith* decision was widely criticized by religious and civil liberties groups, which claimed that small, unpopular religions would be adversely affected. The legislating majority could impede minority religious activities without penalty—which, in the Court's opinion, was "an unavoidable consequence of democratic government."

Sherbert and *Yoder*: "Compelling Interest"

In passing the RFRA, Congress found that "laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise" and that, in *Smith*, the Supreme Court virtually eliminated the requirement that the government justify such burdens. Congress specifically stated that its purpose in passing the RFRA was "to restore the compelling interest test as set forth in [*Sherbert* and *Yoder*] and to guarantee its application in all cases where free exercise of religion is substantially burdened."

In *Sherbert*, a woman was fired after refusing to work on Saturdays when the work week increased to six days. Sherbert, a member of the Seventh-Day Adventist Church, observed the Sabbath on Saturdays. Since she could not accept other employment if Saturday work was required, her religious observance made her ineligible for unemployment compensation under South Carolina law.

In upholding Sherbert's claim that being denied unemployment compensation violated her free exercise of religion, the Supreme Court found that the state had no compelling interest in

enforcing its eligibility requirement. Under the *Sherbert* rationale, freedom of religion supersedes laws of general applicability unless it poses "some substantial threat to public safety, peace or order."

In *Yoder*, an Amish citizen challenged a Wisconsin statute requiring compulsory formal education for children through age 16. Since the Amish faith forbids children to attend school beyond the eighth grade, Wisconsin fined Yoder for noncompliance with the statute. Using the compelling interest test of *Sherbert*, the Supreme Court ruled that the generally applicable compulsory education statute violated Yoder's right to free exercise of religion. The state could not satisfy the compelling interest test because not requiring Amish children to attend school beyond the eighth grade would have no adverse effect on the community.

Congress used the compelling interest test applied in *Sherbert* and *Yoder* as the substantive standard in the RFRA. Section 3 of the RFRA states:

> (a) **In general.** Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).
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> (b) **Exception.** Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—
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> > (1) is in furtherance of a compelling governmental interest; and
> > (2) is the least restrictive means of furthering that compelling government interest.

The *Boerne* Decision: RFRA Unconstitutional

In *City of Boerne v. Flores*, Abp. Patrick Flores challenged a local zoning ordinance that prevented a Catholic church from expanding to serve its parishioners' needs. The archbishop argued that the city of Boerne, TX, had no compelling reason to deny the church an exemption from the ordinance, and that because the city's actions were burdening the parish's religious activity, the church should receive protection under the RFRA. In response, the city argued that the RFRA was unconstitutional, and the district court found for the city. The court of appeals reversed, but the Supreme Court reinstated the district court's holding and held the RFRA unconstitutional.

In its Boerne decision, the Supreme Court found the Religious Freedom Restoration Act (RFRA) to be unconstitutional.

In defending the RFRA's constitutionality, Abp. Flores and the United States argued that even though the Constitution (as interpreted in *Smith*) does not require government to justify neutral burdens on religion with a "compelling interest," Congress had the authority under section 5 of the Fourteenth Amendment to require this justification as a matter of statute.

Majority Opinion Section 5 of the Fourteenth Amendment allows Congress to *enforce* the individual rights protected by the Constitution's first 10 amendments from interference by states and localities. In *Boerne*, the Supreme Court said that "[a]lthough Congress certainly can enact legislation enforcing the constitutional right to the free exercise of religion, its section 5 power 'to enforce' is only preventive or remedial."

Justice Anthony M. Kennedy, writing for the majority, stated that Congress may not pass legislation "enforcing" the right to free exercise of religion by essentially changing the meaning of the right. The *Smith* decision held that laws of general applicability would be subject to the rational basis test. Kennedy said the RFRA was an attempt to change this level of constitutional protection through statute in a manner inconsistent with the Court's decision in *Smith*. Consequently, the Supreme Court ruled that the RFRA exceeded Congress's authority under section 5 of the Fourteenth Amendment.

Minority Dissent Justice Sandra Day O'Connor dissented, along with Justice Stephen Breyer, in *Boerne*. Although O'Connor did not disagree with the majority's analysis, she argued that the rational basis test used in *Smith* and approved by the majority in *Boerne* is an improper standard for deciding Free Exercise claims.

O'Connor concluded that the historical evidence

"casts doubt on the Court's current interpretation of the Free Exercise Clause [and] reveals that its drafters and ratifiers more likely viewed the [clause] as a guarantee that government may not unnecessarily hinder believers from freely practicing their religion, a position consistent with our pre-*Smith* jurisprudence." Based on this evidence and other cases, O'Connor declared that *Smith* was wrongly decided and should have been reexamined by the Court in *Boerne*. In her view, the Court could have put Free Exercise jurisprudence back on course by returning to the pre-*Smith* standard of requiring government to justify *any* substantial burden on religion by a compelling interest.

Unlike the majority, which seems to believe that the Free Exercise Clause merely protects religion from *discrimination*, O'Connor believes it is "an affirmative guarantee of the right to participate in religious practices and conduct without impermissible government interference, even when such conduct conflicts with a neutral, generally applicable law."

Effect on Catholic Healthcare

In eliminating the RFRA and effectively reinstating the rational basis analysis of *Smith*, the *Boerne* decision will make it more difficult for Catholic healthcare providers to challenge generally applicable ("neutral") laws that burden religious conduct. For example, numerous states and the federal government require managed care contractors to deliver *all* medically necessary covered services to enrollees in state and federal programs, even though Catholic providers object to the provision of services that violate Catholic beliefs.

Prior to the *Boerne* decision, Catholic providers could have relied on the RFRA to support their refusal to violate their religious beliefs in compliance with a neutral state or local law. In the absence of the RFRA, Catholic providers will have to obtain legislative exemptions, or "conscience clauses," in generally applicable laws that burden Catholic belief and practice. These types of legislative battles are hard fought, often producing "compromises" that may not be acceptable to the parties involved.

It is often difficult to foresee the negative impact of neutral laws on religious conduct. In *Boerne*, the church could not have known that the city's designation of a historic preservation area might impede the church's need for expansion years later. Religious providers also have difficulty predicting if a neutral healthcare policy will have a disparate impact on them.

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Similarly, healthcare-related legislation could negatively affect Catholic healthcare. If other states pass physician-assisted suicide laws (e.g., the Death with Dignity Act in Oregon), Catholic providers must ensure protections within these laws that respect their religiously motivated rejection of these procedures. Language to protect the religious freedom of Catholic providers is an essential component of these laws.

With the RFRA, Catholic facilities did not need to anticipate such dilemmas before legislation was passed. The RFRA permitted them to litigate an issue in an environment that protected religious liberty. Without the RFRA, facilities have little recourse if an unforeseen dilemma arises after a statute is drafted. Amending a statute to include conscience protection is much more difficult than seeking recourse in a court under the RFRA.

In adopting the pre-*Smith* free exercise clause jurisprudence, the RFRA could provide broad protection to religious adherents. Laws did not require constant amendment to provide protection from unforeseen circumstances. Without this protection, Catholic healthcare providers should pursue a three-part strategy:

- Examine ways to pass constitutional federal or state statutes protecting religiously based conduct.
- Be vigilant in attaching conscience clauses to legislation (where appropriate) in state capitals and in Washington, DC.
- Explore the political and practical possibility of enacting a comprehensive healthcare "conscience clause" in Congress. □

CHA stands ready to assist members with any of these strategies to ensure the protection and continued vitality of Catholic healthcare. For more information, contact Peter Leibold at 202-296-3993 (pleibol@chausa.org) or Charles Gilham at 314-253-3412 (cgilham@chausa.org).