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FREE EXERCISE OF RELIGION

United States Constitution Amendment I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .

New York Constitution Article I, Section 3:

The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this state to all mankind . . . .

SUPREME COURT, APPELLATE DIVISION

SECOND DEPARTMENT

Bowden v. Iona Grammar School[1]
(decided June 11, 2001)

Plaintiffs, Derrick Bowden and others, sued defendants, Iona Grammar School and John D. Dugan (collectively, "the school,") seeking a preliminary injunction to enjoin the school from refusing to allow the infant plaintiffs to attend classes because they had not received the immunizations required by New York Public Health Law § 2164.[2] It was Bowden's contention that he should be permitted to attend classes without receiving immunizations pursuant to the religious exemption of

[1] 284 A.D.2d 357, 726 N.Y.S.2d 685 (2d Dep't 2001).

[2] *Id.* at 358, 726 N.Y.S.2d at 686. N.Y. PUB HEALTH LAW § 2164 (7)(a) (McKinney 2001) states in pertinent part: "No principal, teacher, owner or person in charge of a school shall permit any child to be admitted to such school, or to attend such school . . . without . . . acceptable evidence of child's immunization . . . ."

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Public Health Law § 2164 (9),[3] and therefore the government's conduct violated the Free Exercise Clause of the Federal[4] and New York State[5] Constitutions. The Supreme Court of Westchester County granted the plaintiffs' motion for a preliminary injunction.[6] On the school's appeal, the Appellate Division, Second Department, affirmed the district court's grant of a preliminary injunction based on the fact that the plaintiffs had established a likelihood of success on the merits and the possibility of irreparable harm through the loss of First Amendment freedoms.[7] The court held that "[i]n denying the plaintiffs a religious exemption on the ground that they were not members of a recognized religious organization, the appellants disregarded the statutory requirement of genuine and sincere religious beliefs."[8]

Bowden began kindergarten at the school when classes started on September 13, 1999.[9] However, beginning September 21, 1999, the school would not allow him to continue to attend classes because he had not received the immunizations required by Public Health Law § 2164.[10] Plaintiffs claimed a religious exemption from the immunization requirements by submitting a sworn statement along with a letter from their pastor indicating they were members of the Temple of the Healing Spirit, which is

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[3] N.Y. PUB HEALTH LAW § 2164 (9) (McKinney 2001), states in pertinent part: "This section shall not apply to children whose parent, parents, or guardian hold genuine and sincere religious beliefs which are contrary to the practices herein required, ..."

[4] U.S. CONST. amend. I. The first amendment provides in pertinent part: "Congress shall make no law respecting an establishment of religion, or *prohibiting the free exercise thereof* . . . ." (emphasis added).

[5] N.Y. CONST. art. I, § 3. The New York Constitution provides in pertinent part: "The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this state to all mankind . . . ."

[6] *Bowden,* 284 A.D.2d at 358, 726 N.Y.S.2d at 686.

[7] *Id.* at 358-59, 726 N.Y.S.2d at 687.

[8] *Id.* at 359, 726 N.Y.S.2d at 687.

[9] *Id.* at 357, 726 N.Y.S.2d at 686.

[10] *Id.*

a religion opposed to immunizations.[11] The school rejected the demand for a religious exemption because the plaintiffs were not members of "a bona fide recognized religious organization."[12]

The New York Supreme Court granted the plaintiffs' motion for a preliminary injunction because the plaintiffs showed a likelihood of success on the merits and the possibility of irreparable harm.[13] The *Bowden* court found that the school had disregarded the statutory criteria and applied the former standard, which had previously been held unconstitutional, in denying the plaintiffs a religious exemption because they were not members of a religious organization.[14] The appellate division agreed with the lower court's findings, reasoning that when the proper standard was applied, the plaintiffs' opposition to immunization seemed to arise from genuinely held religious beliefs.[15] Based on this, the court held that a preliminary injunction was necessary to prevent an impairment of plaintiffs' First Amendment freedoms.

The Free Exercise Clause of the First Amendment, which provides that Congress cannot make a law that hinders the free exercise of religion, has been made applicable to the states through the Fourteenth Amendment.[16] "The free exercise of religion means . . . the right to believe and profess whatever religious doctrine one desires."[17] Thus, the First Amendment clearly excludes all regulation by government of such religious beliefs.[18] The exercise of religion often involves the performance or abstention from certain physical acts.[19] Therefore, a state would be prohibiting the free exercise of religion if it sought to

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[11] *Bowden,* 284 A.D.2d at 358, 726 N.Y.S.2d at 686.

[12] *Id.*

[13] *Id.* at 358-59, 726 N.Y.S.2d at 687.

[14] *Id.* at 359, 726 N.Y.S.2d at 687; *see* Matter of Sherr v. Northport-East Northport Union Free Sch. Dist. 672 F. Supp. 81 (1987).

[15] *Id.*

[16] Employment Div. v. Smith, 494 U.S. 872, 876-77 (1990).

[17] *Id.* at 877.

[18] *Id.* (citing Sherbert v. Verner, 374 U.S. 398, 402 (1963)).

[19] *Id.*

ban such abstentions only because they were being engaged in for religious reasons.[20]

In *Employment Division v. Smith*,[21] respondents were fired from their jobs with a private drug rehabilitation organization because they ingested, for sacramental purposes, a drug whose consumption was illegal under Oregon Law.[22] When the respondents applied for unemployment compensation, they were deemed ineligible because they had been discharged for work-related misconduct.[23] The United States Supreme Court considered whether this prohibition was permissible under the Free Exercise Clause. Respondents argued that their claim for a religious exemption must be evaluated under the *Sherbert v. Verner*[24] balancing test.[25] The Court held that this balancing test was inapplicable to free exercise challenges of criminal prohibitions.[26] The Court reasoned that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes conduct that his religion prescribes.' "[27]

In determining whether a person should be exempt from public health law statutory requirements that impact upon the Free Exercise Clause, the federal courts have applied a two-part test. First, the court must determine whether the plaintiff's purported beliefs are religious.[28] If plaintiff's beliefs are deemed

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[20] *Id.*

[21] 494 U.S. at 872.

[22] *Id.* at 874-75.

[23] *Id.*

[24] 374 U.S. at 402-03.

[25] *Smith*, 494 U.S. at 882-83. Under the *Sherbert v. Verner* balancing test, a compelling governmental interest must exist in order to justify governmental actions that substantially burdens a religious practice. *Id.*

[26] *Id.* at 885.

[27] *Id.* at 880. The Court reasoned that "to make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is 'compelling' . . . contradicts both constitutional tradition and common sense." *Id.*

[28] Berg v. Glen Cove City Sch. Dist., 853 F. Supp. 651, 655 (E.D.N.Y. 1994).

to be religious, then the court must determine whether those beliefs are genuinely and sincerely held.[29]

In *Berg v. Glen Cove City School District*,[30] the plaintiffs commenced an action against the school district alleging that the defendant violated their constitutionally protected right of freedom of religion by prohibiting the infant plaintiffs from attending school in the Glen Cove City School District, unless plaintiffs had their children immunized.[31] Plaintiffs contended that the immunizations required by § 2164 of the Public Health Law were contrary to their genuine and sincere religious beliefs and that they were entitled to the benefit of the exemption set forth in § 2164 (9).[32] The United States District Court stated that "because the statutory exception is for persons whose opposition to immunizations stems from religious beliefs, it does not extend to persons whose views are founded upon medical or purely moral considerations, scientific and secular theories, or philosophical or personal beliefs."[33] Thus, the court reasoned that it must first be determined whether the plaintiff's purported beliefs are "religious."[34] If the beliefs are considered religious, "then the court must determine whether those beliefs are genuinely and sincerely held."[35] In other words, where a state statute impacts on a plaintiff's First Amendment rights, a plaintiff must show that his opposition to the statute is based on beliefs that qualify as religious, and the plaintiff must show that he holds those beliefs both genuinely and sincerely in order to meet the burden required for an exception from compliance with the statute.[36]

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[29] *Id.*

[30] *Id.* at 651.

[31] *Id.* at 652.

[32] *Id.*

[33] *Berg*, 853 F. Supp. at 655 (citing Mason v. Gen. Brown Cent. Sch. Dist., 851 F.2d 47, 51-52 (2d Cir. 1981) which found that the beliefs of the plaintiffs were based on scientific and secular theories, not religious beliefs and therefore were not protected under the exception).

[34] *Id.* at 655.

[35] *Id.*

[36] *Id.* Plaintiffs maintained that the basis for their opposition to immunization was their own interpretation of passages from certain Hebrew

In order to determine whether a belief is religious, there must be a threshold inquiry into the religious aspect of particular beliefs and practices.[37] It is not enough for an individual to assert that a belief he holds is religious.[38] "If plaintiffs assert their claim 'because of their subjective evaluation and rejection of contemporary secular values accepted by the majority,' their claims do 'not rest on a religious basis.' "[39] In *Mason v. General Brown Central School District,*[40] the court stated, "Everyone makes basic choices about where to live, what to eat, and how to raise children. Merely because these decisions are important, and may be supported by strong conviction, does not render them religious."[41] Beliefs of this nature are more likely to be based on philosophical reasoning and are therefore not protected by the Free Exercise Clause.[42]

Once the court makes a finding that an individual's beliefs are religious, the court must determine whether those beliefs are genuinely and sincerely held.[43] The United States Court of Appeals for the Second Circuit set forth the necessary standard to prove that a religious belief is sincere in *International Society for Krishna Consciousness v. Barber.*[44] In *Krishna*, the court held that it must determine the subjective good faith of a person in performing certain rituals.[45] The purpose of this analysis was to

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scripture. "Based on plaintiffs' statement of their beliefs in the complaint, it appears that plaintiffs will likely succeed on their claim that the beliefs they hold opposing immunization qualify as 'religious.' " *Id.*

[37] *Mason*, 851 F.2d at 51.

[38] *Id.*

[39] *Id.* (citing Wisconsin v. Yoder, 406 U.S. 205, 215-16 (1972)).

[40] *Id.* at 47. "Plaintiffs believe that the human body possesses the means of healing itself without medical intervention and therefore, immunizations are unnecessary and indeed contrary to the 'genetic blueprint' intended by nature." *Id.* at 48. The court held that plaintiffs could not utilize § 2164 to claim an exemption from immunizations because "their beliefs were based on chiropractic principles and scientific beliefs as opposed to religious beliefs." *Id.*

[41] *Id.* at 52.

[42] *Id.*

[43] *Berg*, 853 F. Supp. at 655.

[44] 650 F.2d 430 (2d Cir. 1981).

[45] *Id.* at 441.

protect those beliefs that a person holds as a matter of conscience.[46] In many situations, it is difficult for the court to conclude that a particular belief can be sincerely held.[47] The *Krishna* court further reasoned that "[h]uman nature being what it is, however, it is frequently difficult to separate this inquiry from a forbidden one involving the verity of the underlying belief."[48] Therefore, in order to make this determination, the court can evaluate extrinsic evidence.[49] For example, in *Berg,* the court's examination of certain medical and dental records substantiated plaintiffs' claim.[50] The court found that the plaintiffs held their beliefs genuinely and sincerely.[51]

In dealing with state requirements that impact upon the Free Exercise Clause, the New York State courts generally adhere to a balancing test that includes a "compelling government interest" component. In *Matter of Miller*,[52] the Allegany County Sheriff denied an application for a pistol permit because petitioner did not submit a photograph.[53] Petitioner filed suit seeking an order directing the Sheriff to exempt him from the photograph requirement on the grounds that it violated his religious beliefs.[54] The Appellate Division, Fourth Department dismissed the petitioner's claim.[55] The court applied a traditional balancing test which involved a two step analysis: "(1) whether the party claiming the free exercise right has established a sincerely held religious belief that is burdened by the statutory requirement; and (2) whether the state has demonstrated that 'the requirement

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[46] *Id.*

[47] *Id.*

[48] *Id.* (citing United States v. Ballard, 222 U.S. 78, 92-95 (1944) (Jackson, J., dissenting).

[49] *Barber*, 650 F.2d at 441. For example, an adherent's belief would not be "sincere" if he acts in a manner inconsistent with that belief, or if there is evidence that the adherent materially gains by fraudulently hiding secular interests behind a veil of religious doctrine. *Id.*

[50] *Berg,* 853 F. Supp. at 655.

[51] *Id.*

[52] 252 A.D.2d 156, 684 N.Y.S.2d 368 (4th Dep't 1998).

[53] *Id.* at 157, 684 N.Y.S.2d at 369.

[54] *Id.*

[55] *Id.* at 160, 684 N.Y.S.2d at 371.

nonetheless serves a compelling governmental purpose, and that an exemption would substantially impede fulfillment of that goal.' "[56] In analyzing petitioner's claim, the court found that there were other available means for the petitioner to hunt deer, which would not require him to submit to the photograph requirement and would reduce the burden on his religious beliefs.[57] Also, the court found that the compelling governmental interest in enforcing criminal laws involving firearms justified the burden placed upon the petitioner's exercise of religious beliefs.[58]

The New York courts have taken a similar approach in handling public health law statutes that affect the Free Exercise Clause. In *Brown v. City School District of the City of Corning*,[59] the plaintiff sought to enjoin defendant from preventing Ysreen from attending classes at school.[60] Ysreen had not received the immunizations required by § 2164 of the Public Health Law.[61] However, the plaintiff claimed that the exemption contained in subdivision 9 of § 2164 exempted him from the required inoculations.[62] The court stated that a parent who comes before a New York court claiming exemption from a statute that impacts upon the Free Exercise Clause must satisfy a two-part test: "First, the court must be satisfied as to the sincerity of the religious belief; and, secondly, that there is no present circumstance which, in the opinion of the public health authorities, represents a clear and present danger of the particular communicable disease."[63] In analyzing Brown's claim, the court found that no "grave and immediate danger" was shown.[64] New York State Department of Health's Immunization Program coordinator, who was employed by the federal government, testified that he was unaware of any cases of illnesses in the

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[56] *Id.* at 159-60, 684 N.Y.S.2d at 371 (citations omitted).
[57] *Miller,* 252 A.D.2d at 160, 684 N.Y.S.2d at 371.
[58] *Id.*
[59] 104 Misc. 2d 796, 429 N.Y.S.2d 355 (1980).
[60] *Id.*
[61] *Id.*
[62] *Id.* at 797, 429 N.Y.S.2d at 355-56.
[63] *Id.* at 800, 429 N.Y.S.2d at 357.
[64] *Brown,* 104 Misc. 2d. at 799, 429 N.Y.S.2d at 357.

Corning City School District, which was the reason for wanting children who attend the schools to receive the inoculations.[65] The Superintendent of Schools testified that there were only four children within the school district who had not received immunizations, presenting no clear and present danger.[66] Therefore, in applying this balancing test, the court held that the plaintiff was entitled to the exemption provided by Public Health Law § 2164 (9).[67]

In sum, federal and New York State law are similar with respect to statutes that affect the Free Exercise Clause. In analyzing whether a statutory requirement violates an individual's constitutional right to free exercise of religion under the United States Constitution, federal courts typically apply a two-part test. First, the court must determine whether plaintiffs' purported beliefs are "religious."[68] Second, if the plaintiff's purported beliefs are religious, then the court must determine whether those beliefs are genuinely and sincerely held.[69]

New York State courts use a similar test in order to determine whether a statute violates the Free Exercise Clause. The New York courts generally adhere to a two-part test: First, the religious belief must be sincerely held.[70] If the religious beliefs are sincerely held, then the State must demonstrate that "the requirement nonetheless serves a compelling governmental purpose, and that an exemption would substantially impede fulfillment of that goal."[71] This "compelling government interest" component requires a case-by-case determination about whether such a burden on specific individuals is constitutionally significant and whether the particular interest asserted by the New York State government is compelling. It appears that the New York balancing test provides greater protection to an individual's

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[65] *Id.* at 799, 429 N.Y.S.2d at 357.
[66] *Id.*
[67] *Id.* at 800, 429 N.Y.S.2d at 357.
[68] *Berg*, 853 F. Supp. at 655.
[69] *Id.*
[70] *Brown*, 104 Misc. 2d at 800, 429 N.Y.S.2d at 357.
[71] *Miller*, 252 A.D.2d at 159-60, 684 N.Y.S.2d at 371.

free exercise of religion than the facially neutral and generally applicable standard followed by the federal courts.

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