SUBSTANTIAL CONFUSION ABOUT "SUBSTANTIAL BURDENS"†

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As the Supreme Court revisits the clash between religious belief and the Affordable Care Act (ACA) in the *Zubik*[1] case, it is worth mulling over a key phrase in the law that governs that clash: "substantial burden." According to the Religious Freedom Restoration Act (RFRA), the government must—provided it does not meet certain other conditions, such as showing a compelling interest—make an accommodation if it places a "substantial burden" on a person's religious exercise.[2] If the question in the *Hobby Lobby* case was whether a for-profit corporation could be a "person" that "exercised religion,"[3] the question the Court now faces is whether the government has in fact "substantially burdened" some religious non-profits in trying to accommodate their objection to the contraceptive mandate.[4]

But what is a "substantial burden"? Or to put it another way, what makes a burden substantial? What follows is my best effort to provide clarity—in the form of a primer—as to the meaning of "substantial burden" under RFRA.

I. WHAT IS A "BURDEN" ON RELIGIOUS BELIEF?

The answer to this question seems to be fairly straightforward, given the Supreme Court's case law: a religious belief or believer is "burdened" when the government *puts some kind of pressure on* someone to act con-

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1. Zubik v. Burwell, 578 U. S. ____ (2016).
2. 42 U.S.C.A. § 2000bb-1 (West 2015).
3. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014); *see generally* THE RISE OF CORPORATE RELIGIOUS LIBERTY (Chad Flanders, Zoe Robinson, & Micah Schwartzman, eds., 2016).
4. Zubik v. Burwell, 136 S. Ct. 444 (2015) (granting certiorari on the question of the government's accommodation, appealing from Geneva Coll. v. Sec'y U.S. Dept. of Health & Human Services, 778 F.3d 422 (3rd Cir. 2015)).

trary to his religious beliefs.[5] This idea of "putting pressure on" is important because it distinguishes RFRA's sense of burden from what we might otherwise think is a burden. Many things can burden your exercise of religion because they make it harder for you to practice your belief, yet they would not count as being "burdens" (let alone "substantial" ones) under RFRA.

Suppose the government shuts down the road you usually take to get to church. Or suppose it rains that day and the traffic is very bad. Both of these "burden" your religious belief because it will take more than the usual effort for you to exercise your religion: they are burdens because they make things harder for you. But neither of these things would count as a burden under RFRA—certainly not the latter, because it does not involve government action, but not even the former.[6] A substantial burden is not just *any* "inconvenience on religious exercise;" it must involve some sort of direct or indirect *coercion* by the state.[7] Not all bad things happening to you involve being coerced in some way.

This understanding of burden is a major lesson of *Lyng v. Northwest Indian Cemetery Protective Association*.[8] In *Lyng*, the government planned on putting a road through a forest that was sacred to a Native American tribe. The tribe sued but lost because, while destroying the forest was certainly a bad thing for the tribe and a hindrance to them being able practice their religion, it did not put pressure on them to violate their beliefs or change their religion. The action of the government was not of the form, "do this, or else pay a price."[9] It is this element of coercion or pressure, essentially a threat by the government against you to make you act against your beliefs, which defines something as being a "burden" under RFRA.[10]

II. WHAT DOES THE ADJECTIVE "SUBSTANTIAL" MODIFY?

If "burden" means putting some pressure on a plaintiff, we have to consider what "substantial" brings to the mix. I prefer framing the question as: what does "substantial" modify? Here we should be careful. There are at least two things that "substantial" could modify. First, it

5. *See, e.g.*, Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136, 141 (1987) (noting that a substantial burden is found when there is "substantial pressure on an adherent to modify his behavior and to violate his beliefs") (internal citation omitted).

6. Things might be different if the government had *purposely* destroyed the road, just to get at your religion. But I think this would still be the basis of something other than a RFRA claim (perhaps a claim under the free exercise clause).

7. Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1227 (11th Cir. 2004).

8. 485 U.S. 439 (1988); *see also* Bowen v. Roy, 476 U.S. 693 (1986).

9. Sherbert v. Verner, 374 U.S. 398, 404 (1963) (stating that a substantial burden is when an individual is made to "choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion . . . on the other").

10. *Lyng*, 485 U.S. at 450 (noting that a substantial burden exists when the government action has "[a] tendency to coerce individuals into acting contrary to their religious beliefs"). It follows, too, that merely being offended by something the government does is not enough to count as a burden. While "being offended" may make it harder for you to practice your religion, if the government is not *putting you to a choice*, then there is no "burden."

could be that the government has to put *substantial* or *heavy* pressure on you to violate your religious beliefs. But it could also be that the government has to pressure you to violate your religious beliefs in some *substantial* or *serious* way. For example, maybe the government is asking you to violate a particularly important tenet of your religion, not just some discretionary one.

In other words, "substantial" could either refer to the quantum of pressure you are facing to violate your beliefs—is it a lot or a little? Or it could refer to how serious an imposition on your religion the government action has to be—is it a big intrusion or little one? The statute taken as a whole, I admit, could be interpreted as applying "substantial" to modify *both* pressure and religious belief. That is, "substantial burden" under RFRA might mean you face *substantial* pressure to *substantially* violate your religion—that the pressure is strong and affects a really important or vital part of your beliefs.[11]

Some courts have insisted that substantial refers to the degree or scope of the supposed religious violation, viz., that the push for you to give up or change your religious beliefs should not just be something that affects a minor or optional part of your belief system, but should really cut into the core of your religious practice. As a result, these courts have held that slight infringements—an observant prisoner misses a couple of religious meals, for instance—do not count because they are "de minimis."[12] It may be a burden, but it is not a "substantial one" if it only requires a *slight* deviation from or a *slight* violation of your religious practice; even if there is a lot of pressure on you to make that deviation or commit that violation.

The better view is that "substantial" applies *only* to the quantum of pressure that is put on a person to violate his religious beliefs—that means any part of his religious beliefs, and for any amount of time. This is true for both a statutory reason and a philosophical one. The statutory reason is that the Religious Land Use and Institutionalized Persons Act (RLUIPA)—which retroactively applies to RFRA's definition of religion—explained that an exercise of religion should mean "any exercise of religion, whether or not compelled by, or central to, a system of religious belief."[13] If "substantial burden" means something like "burdening

11. In other words, there could be LARGE pressure to make you violate your beliefs in a SMALL way (I threaten to kill you if you do not do some minor and optional act of religious devotion); there could be SMALL pressure to make you violate your beliefs in a LARGE way (I will fine you a penny unless you desecrate your house of worship); and there could be LARGE pressures for LARGE violations. Are *all* of these "substantial burdens" or just some of them?

12. *See, e.g.*, Norwood v. Strada, 249 F. App'x 269, 272 (3rd Cir. 2007) ("The issue here, however, is much more circumscribed; it is whether a short denial of such a [religious] diet during an emergency lockdown was a 'substantial burden,' or a mere de minimis intrusion."); *see also id.* (collecting cases).

13. 42 U.S.C. § 2000cc (2000); *see also* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2761–62 (2014) (discussing the enactment of RLUIPA).

a central part of the person's religious belief system," then this is plainly ruled out by the statute.[14]

On a more theoretical level, courts have traditionally been, and should now be, reluctant to determine whether or not a violation of this or that part of someone's religion is "substantial" or "insubstantial." Can a court really say that missing one or two religious meals is "de minimis" and therefore not a big deal (or an "insubstantial burden")? But this second-guessing is exactly what the courts would have to do if we interpreted "substantially burden" to mean "cause someone to violate an important or major part of his belief system." How are courts supposed to know whether or not the law is pressuring a person to violate an *important or unimportant part* of her belief system, or compromising her belief *massively* or only *slightly*, without undertaking a searching and (for that reason) problematic theological inquiry? What to one person might be a slight or "attenuated" imposition on her religious practice may be to another a very serious cost.

Courts cannot and should not have to adjudicate this point. They should instead assess whether there is a large amount of pressure ("substantial" pressure) being put on the person to violate her beliefs. The plaintiff still must show that the government is pressuring her to violate *some part* of her religion,[15] but she should not have the burden of showing that what the government is pressuring her to do makes up an *important*, *central,* or *substantial* part of her religious exercise. Absent a finding that the plaintiff is being insincere, the issue of whether the law is affecting a really important part of his or her religion should largely go unchallenged. After all, if it was not important, why sue in the first place?

III. WHAT MAKES THE PRESSURE ON BELIEF "SUBSTANTIAL"?

The main use of the word "substantial" in the *Hobby Lobby* opinion itself refers correctly to the quantum of pressure the person faces to violate some part of her religious belief system. The burden on Hobby Lobby to violate its religious beliefs is "substantial," the Court ruled, in part because if Hobby Lobby did not cover contraceptives it would have to pay a hefty tax bill—upwards of $15 million dollars a year.[16] Or, if Hobby Lobby instead dropped insurance coverage and its employees qualified for subsidies on the state exchanges, they might have to pay $26

14. For a good statement of this point, see E. Texas Baptist Univ. v. Sebelius, 988 F. Supp. 2d 743, 764 (S.D. Tex. 2013) *rev'd sub nom.* E. Texas Baptist Univ. v. Burwell, 793 F.3d 449 (5th Cir. 2015).

15. *See* Hernandez v. Comm'r, 490 U.S. 680, 699 (1989) ("We do, however, have doubts whether the alleged burden imposed by the deduction disallowance on the Scientologists' practices is a substantial one. Neither the payment nor the receipt of taxes is forbidden by the Scientology faith generally, and Scientology does not proscribe the payment of taxes in connection with auditing or training sessions specifically.").

16. *See Hobby Lobby,* 134 S. Ct. at 2757.

million in penalties.[17] Thus, it appears that a large fine counts as a substantial pressure under RFRA, and that seems right.

This leaves open many questions. For example, is there some point at which a fine would not be enough to count as "substantial"? If the fine were just $50 dollars, would this be insufficient pressure on a relatively well-off for-profit company? The logic of Justice Alito's opinion points in this direction, but other considerations may lead us to say that *any* fine could be "substantial." We did not know the amount of the welfare benefits Mrs. Sherbert risked giving up in *Sherbert v. Verner*,[18] but it certainly was not in the millions. Additionally, in *Wisconsin v. Yoder*, it seems that the Amish might have only been assessed a $50 fine if they failed to send their kids to public school; were these burdens therefore "insubstantial"?[19]

It would be great if we could get more clarity here. Unfortunately, for reasons I spell out in the next section, it does not look like this will be much of an issue in the *Zubik* litigation,[20] so clarification likely will not be forthcoming.

IV. HOW DOES THIS APPLY TO THE *ZUBIK* CASE?

I will be rather brief and perfunctory in how I see the above primer as helping to illuminate the latest case.

1. Many appellate courts have seen this as a "no burden" case along the lines of *Lyng*. This is incorrect. The government may no longer be requiring the plaintiffs to *pay* for contraception, but they are requiring them to *indicate* that they want an accommodation. This puts them to a choice: the plaintiffs either have to affirmatively notify the government that they want an accommodation or not cover contraception and pay the fines. There is a burden here, because the government is pressuring them to do something—"do this, or else pay a price." It is not just a case of plaintiffs objecting to something they do not like that the government is doing by itself to someone else, and which makes it harder for them to practice their religion. They are objecting to something in particular (for example, having to sign a form) that they are being forced to do and do not want to do.[21]
2. The plaintiffs, nonetheless, have to show that notifying the government that they want an accommodation is a violation of their sincerely held religious beliefs—not a violation of an important or

17. *See id.*
18. 374 U.S. 398 (1963).
19. "'Whoever violates this section . . . may be fined not less than $5 nor more than $50 or imprisoned not more than 3 months or both.'" 406 U.S. 205, 207 (1972) (quoting WIS. STAT. § 118.15 (1969)).
20. Zubik v. Burwell, 578 U. S. ____ (2016).
21. "So when Wheaton College tells us that it is being 'forced' to allow 'use' of its health plans to cover emergency contraceptives, it is wrong. *It's being 'forced' only to notify its insurers* . . . . " Wheaton Coll. v. Burwell, 791 F.3d 792, 795 (7th Cir. 2015) (emphasis added).

central belief, but *a* religious belief they hold. I assume they will be able to do this under some theory of complicity; and the courts should defer to the plaintiffs' assessment of their beliefs, if they are sincere. I gather that the complicity theory goes something like this, "we do not want to have any part in how this contraceptive system is being run, even if we are not in any way financially liable. We are tainted by our participation—which may seem small to you, but is a big deal to us."

3. If the fine they have to pay is roughly the same as the Hobby Lobby fine, or even less, then there is not only a burden on the plaintiffs, but a "substantial" one. This, incidentally, is why the Court will not have to confront the question of how big a fine there has to be for the pressure to be "substantial"—the fine here is plenty big.

4. Of course, this does not mean the plaintiffs will win, only that they have not lost at the first stage, viz., the stage at which they have to show their religious belief has been substantially burdened. It has.

V. SOME CONCLUDING THOUGHTS ON THE ORAL ARGUMENT AND DECISION IN *ZUBIK*

In the *Zubik* oral argument, the Solicitor General strained to avoid any questions about substantial burden—leading Justice Kennedy at one point to ask if he was in fact *conceding* that there was a substantial burden.[22] General Verrilli insisted he was not, but one could see why he was trying so hard to skirt the issue. Talking about how a religious believer's beliefs are not being *seriously* affected when the believer says they are is hard, especially when you admit up front that you are not questioning the believer's sincerity. You need to figure out a rule that says when a belief is important and affected enough that the believer's ability to practice his belief is "substantially" compromised—and you have to say that you can tell, better than the believer can, when this is the case.

My analysis counsels that courts *should* avoid taking the bait; instead they should move on to the analysis of whether there is a compelling governmental interest and a least restrictive means. Do not get me wrong, this kind of analysis is *hard*. But it is, if there is such a thing, a good kind of hard.[23] It is the kind of hard that courts are good, or good

22. Transcript of Oral Argument at 45, Zubik v. Burwell, 578 U.S. ____ (2016) (No. 14-1418) ("JUSTICE KENNEDY: And is it fair for me to infer from the way you open your remarks that you concede that there is a substantial burden here? And the question then is what is a permissible accommodation? What's the least restrictive alternative? Do you concede that there's a substantial burden?").

23. The somewhat surprising order in the case does not change my understanding of how the case should be decided. *See* Order, Zubik v. Burwell, 578 U. S. ____ (2016) (No. 14-1418) (filed Mar. 29, 2016). What the order asks, in short, is whether there is some other least restrictive means that does not burden the plaintiffs *at all*. This is precisely the threshold question of whether there is a burden on the plaintiffs (of the sort that pressures them to *do* something "or else"), or just something happening that the plaintiffs do not like or find offensive. If the Court finds that there is an alternative

enough, at handling. They are hard questions of secular governmental policies and ends, and whether and how the government can achieve them. Courts should avoid questions that involve questions that are the bad kind of hard—the hard that involves trying to figure out what someone else's religion means, and telling them when they are or are not suffering a "substantial burden." And nothing in the Court's evasive decision in *Zubik*[24] changes this fact: they have only put off the decision for a further day. The hard questions they have yet to tackle still remain; and the hard questions courts should never tackle are rightly put off, and should be put off indefinitely.[25]

means for the government to achieve its compelling interest, which involves no burden on the plaintiffs, then the plaintiffs should win and the government should adopt that alternative means. If there is a burden, however, then the Court should go on to decide whether the compelling interest in this case is compelling enough. Again, neither path requires the Court to explore whether the burden is "substantial" or not. They only need to consider whether there is a burden in the first place.

24. Zubik v. Burwell, 578 U. S. ____ (2016).

25. I have analyzed the *Zubik* opinion in more detail in a post on SCOTUSblog. *See* Chad Flanders, *Symposium: Into the Weeds*, SCOTUSBLOG (May. 16, 2016, 3:04 PM), http://www.scotusblog.com/2016/05/symposium-into-the-weeds/.