No. _____

In The

Supreme Court of the United States

RIVES GROGAN,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the District of Columbia Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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June 14, 2022

QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals erred, contravening Supreme Court precedent set forth in *Burwell v. Hobby Lobby Stores, Inc.*, by weighing Mr. Grogan's alternative forms of religious exercise rather than considering the magnitude of his punishment when answering the threshold question of whether Mr. Grogan's exercise of religion was "substantially burden[ed]" under the Religious Freedom Restoration Act.

PARTIES TO THE PROCEEDING

The parties to the proceedings are Pastor Rives Grogan, the Defendant in the Superior Court of the District of Columbia and the Appellant in the District of Columbia Court of Appeals. The Respondent is the United States.

STATEMENT OF RELATED PROCEEDINGS

Grogan v. United States, 271 A.3d 196 (D.C. 2022).

United States v. Grogan, No. 2018-CMD-018979 (D.D.C. 2019).

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PETITION FOR WRIT OF CERTIORARI

Petitioner Rives Grogan respectfully petitions for a writ of certiorari to review the judgment of the District of Columbia Court of Appeals.

OPINIONS BELOW

The opinion of the District of Columbia Court of Appeals is reprinted in the Appendix to the Petition ("Pet. App.") at App. 1.

JURISDICTION

The Court of Appeals entered its judgment on March 17, 2022. This Court has jurisdiction to review the decision of the Court of Appeals under 28 U.S.C. § 1257(a) and 28 U.S.C. § 1257(b).

CONSTITUTIONAL PROVISION AND STATUTORY PROVISIONS INVOLVED

Following are the Constitutional provisions and statutes involved in the case:

The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech… or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

The Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1 provides in pertinent part:

Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability…

Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—
(1) is in furtherance of a compelling governmental interest; and
(2) is the least restrictive means of furthering that compelling governmental interest.

D.C. Code § 10-503.16(b)(7) states:

It shall be unlawful for any person or group of persons willfully and knowingly...to parade, demonstrate, or picket within any of the Capitol Buildings.

INTRODUCTION

This case turns on whether an individual's religious conviction that he was called to the Senate public gallery "to proclaim everywhere the kingdom of God" *see* Transcript of Record on October 3, 2019 at 24, *United States v. Grogan*, No. 2018-CMD-018979 (D.D.C. 2019) (quoting *Luke* 9:60), and his exercise thereof after the Senate had adjourned for the evening, can be limited through removal, arrest, conviction, and a sentence of seven days in prison under D.C. Code § 10-503.16(b)(7).

The free exercise of religion is guaranteed in the First Amendment, and the Religious Freedom Restoration Act ("RFRA"), further provides a "defense to persons whose religious exercise is substantially burdened by the government." 42 U.S.C. § 2000bb(b)(2).

Both the D.C. Court of Appeals and the trial court incorrectly applied RFRA's threshold inquiry of "substantial burden," failing to recognize that Mr. Grogan was physically removed from the Senate gallery, arrested, and convicted — he spent an entire week in jail, and was at risk of a fine of up to $500 and spending six months incarcerated. D.C. Code § 10-503.18 (stating the punishment of offenses, including for violations of D.C. Code § 10-503.16(b)(7)). This does not include the other charge against Mr. Grogan under D.C. Code § 22-1307(b), which the Court of Appeals vacated but would have resulted in punishment of up to 90 days in jail and an additional $500. D.C. Code § 22-3571.01(b)(3). In total, Mr. Grogan faced a

punishment of nine months in jail and a fine of $1,000, which is a considerable penalty.

This Court's ruling in *Hobby Lobby* dictated that "substantial" refers to the magnitude of the penalty the Government imposes on an individual. 573 U.S. at 726 (finding a mandate that forced plaintiffs to pay "an enormous sum of money" … "clearly imposes a substantial burden on those beliefs").

Instead of following the substantial burden analysis framework in *Hobby Lobby*, the Court of Appeals conducted an inquiry into the reasonableness of Mr. Grogan's actions, suggesting alternative venues and methods of contacting Congress and failing to recognize that a tenet of Mr. Grogan's faith and religion is specifically to proclaim "everywhere" the kingdom of God.

A court cannot engage in a reasonableness inquiry. "RFRA's question is whether the mandate imposes a substantial burden on the objecting parties' ability to conduct business in accordance with *their religious beliefs*… It is not for the Court to say that the religious beliefs of the plaintiffs are mistaken or unreasonable." 573 U.S. at 682.

Mr. Grogan believed he was called, by a tenet of his faith, to the Senate gallery to preach. Though he is free to "write letters" or "make speeches," as the Court of Appeals found, his ability to exercise his religious beliefs through direct demonstration to the Senate gallery were severely burdened by his removal, arrest, prosecution, and jail sentence.

STATEMENT OF THE CASE

On November 27, 2018, Mr. Rives Miller Grogan, known to his congregation as "Pastor Rick," attended a public hearing in the Senate public Gallery. For over three hours, he sat quietly, watching the Senate proceedings. At approximately 6:50 PM, the Senate gaveled to a close, signaling adjournment until the following day. No speeches, votes, or debates were occurring at that time, although there were a few staffers left in the Gallery at that moment.

When the gavel sounded, Mr. Grogan stood and began preaching about abortion. At trial, he testified that his faith requires him "to go and proclaim everywhere the kingdom of God." He specifically went to the Senate because, as he testified, Congress is where laws are made and those laws could be changed to outlaw abortion.

Immediately upon beginning to speak, Mr. Grogan was arrested—he was placed in an L-formation and taken out of the Senate Gallery. He was told to stop speaking only after he had been grabbed by law enforcement. No warning to cease was given to Mr. Grogan before he was placed under arrest.

At trial, Mr. Grogan employed a defense under the Religious Freedom Restoration Act ("RFRA"), which requires first whether a governmental action imposes a substantial burden on religious exercise, and then looks to whether it (1) serves a compelling government interest and (2) is the least restrictive means of serving that interest. 573 U.S. at 691-92.

The trial court rejected this defense, and instead questioned whether Mr. Grogan's actions were sincere religious exercise. When Mr. Grogan attempted to testify about the sincerity of his beliefs, the prosecution objected, which was sustained.

Mr. Grogan was then convicted on two counts: Illegal Demonstration on United States Capitol Grounds under D.C. Code § 10-503.16(b)(7), and Illegal Demonstration inside a Building under D.C. Code § 22-1307(b). He was sentenced to seven days in prison and was ordered to pay $100 to the Victims of Crime Compensation Fund.

On appeal, Mr. Grogan again raised a defense under RFRA, asserting that the trial court erred in questioning his sincerity, as "[i]t is not for the Court to say that the religious beliefs of the plaintiffs are mistaken or unreasonable." 573 U.S. at 686.

Despite conducting a *de novo* review, the Court of Appeals also did not correctly analyze RFRA's threshold question — whether Mr. Grogan's removal, arrest, conviction, and sentence "substantially burden[ed] the sincere exercise of his religion." *Nesbeth v. United States*, 870 A.2d 1193, 1196 (D.C. 2005). Rather, the court identified possible alternatives in venue for Mr. Grogan's demonstration, engaging in an analysis of Mr. Grogan's reasonableness in his exercise of his religious beliefs; this analysis is a clear contravention of Supreme Court precedent set in *Hobby Lobby*.

The Court of Appeals affirmed Mr. Grogan's conviction, holding that his RFRA defense "failed to show by a preponderance of the evidence that the government

substantially burdened the exercise of his religion." *Grogan v. United States*, 271 A.3d 196, 209 (D.C. 2022).

REASONS FOR GRANTING THE PETITION

The Court of Appeals failed to correctly apply the RFRA threshold "substantial burden" inquiry, contravening Supreme Court precedent set by *Hobby Lobby*. The Court of Appeals found no substantial burden on Mr. Grogan's freedom to exercise religion, arguing that his removal from the Senate gallery (1) was "at most a restriction on one of a multitude of means" and that (2) Mr. Grogan had alternative locales to demonstrate and he had alternative means to contact Congress. *Grogan v. United States*, 271 A.3d 196, 210 (D.C. 2022).

Summary reversal would allow the Court to reiterate its holding in *Hobby Lobby* and correct the D.C. Court of Appeals' flagrant disregard of that precedent. Lower courts frequently address RFRA defenses against convictions for demonstrating in public spaces—clarification and guidance from the Court is necessary to ensure proper application of RFRA analysis in the future.

I. THE COURT OF APPEALS INCORRECTLY APPLIED THE SUBSTANTIAL BURDEN ANALYSIS BY FAILING TO RECOGNIZE THE SEVERITY OF MR. GROGAN'S PENALTY AND INSTEAD WEIGHING OTHER TYPES OF UNRESTRICTED RELIGIOUS EXERCISE IN AN ANALYSIS OF REASONABLENESS

The Court of Appeals found no substantial burden on Mr. Grogan's exercise of his religious beliefs on the grounds that "[t]he government does not substantially burden the exercise of religion when it restricts only 'one of a multitude of means' to accomplish a religious end." *Grogan v. United States*, 271 A.3d 196, 209 (D.C. 2022).

However, the Court failed to consider the specificity of the religious end Mr. Grogan was trying to accomplish, and in proposing alternatives, instead conducted an analysis of reasonableness.

The Court of Appeals should have considered the penalties Mr. Grogan faced when conducting their substantial burden analysis. This Court, in *Hobby Lobby*, looked to the annual $475 million price to the plaintiffs that compliance with the mandate at issue would cost, the alternative being a violation of their religious beliefs. 573 U.S. at 720. It found "these sums are surely substantial." *Id.*

Mr. Grogan's penalty was his liberty for a week and the possibility of a $1,000 fine and up to nine months in jail. Though the Court of Appeals vacated Mr. Grogan's charge under D.C. Code § 22-1307(b), the possible punishment he faced at the time of his arrest and conviction was nine months of imprisonment — a clear deprivation of his liberty, and one that could be seen as even more substantial than the purely economic costs the Court found to be substantial in *Hobby Lobby*. 573 U.S. at 685.

The Court of Appeals did not even mention Mr. Grogan's punishment and its magnitude in comparison to his actions. Instead, the court conducted an inquiry into alternative venues.

The Court of Appeals compared the restriction of one venue, the Senate chambers, to the restriction of venue in *Henderson v. Kennedy*, in which the D.C. Court of Appeals affirmed the district court's finding that restricting sales of t-shirts at the National Mall did not create a substantial burden on plaintiffs' vocation to

spread the gospel by "all available means." 253 F.3d 12, 17 (D.C. 2001). The *Henderson* Court went on to say that "[Plaintiffs'] declarations do not suggest that their religious beliefs demand that they sell t-shirts in every place human beings occupy or congregate. There is no indication that they have followed—or attempted to follow—any such practice" *Id.* at 16. However, *Henderson* predates *Hobby Lobby*, which rejected an analysis of reasonableness of a sincerely held religious belief. 573 U.S. at 724.

The Court of Appeals further erred in stating there are alternative methods of contacting Congress, suggesting Mr. Grogan's exercise of his religious belief that he must speak in the gallery directly to Senators was unreasonable, *Grogan v. United States*, 271 A.3d 196, 210 (D.C. 2022), by using a test of whether the restriction restricts "one of a multitude of means." *See Henderson v. Kennedy*, 253 F.3d 12, 17 (D.C. 2001). Mr. Grogan's declarations clearly demanded that he speak in all public fora possible, particularly in the Senate chambers, to convey his beliefs to those who represent them in government. During the jury trial, Mr. Grogan testified that "Jesus Christ commands [him] to proclaim everywhere the kingdom of God, that includes the Senate galleries, that includes the rotunda…. That is a very tenet of my faith." *See* Transcript of Record on October 8, 2019 at 16, *United States v. Grogan*, No. 2018-CMD-018979 (D.D.C. 2019). The case at hand is incomparable to *Henderson* because of the specificity and narrowness of Mr. Grogan's religious beliefs. In contrast to the plaintiffs in *Henderson*, Mr. Grogan does not have a "multitude of means" by which

he can preach to the Senate—he either can or cannot, and the government prevents him from doing so in a public space after the official business had been concluded and the Senate was adjourned for the night through the application of this statute.

It is not the Court's role to determine the reasonableness of a religious conviction. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 725 (2014). And Mr. Grogan's religious conviction was God called him to speak in the Senate gallery. The Court of Appeals impermissibly contravened this Court's precedent when it began to embark on a reasonableness inquiry, rather than properly analyzing for substantial burden.

II. THE COURT OF APPEALS FAILED TO ACKNOWLEDGE THE LOWER COURT'S CLEAR ERROR IN SUBSTANTIAL BURDEN ANALYSIS.

The trial court flagrantly erred in its application of RFRA by confusing the question of whether Mr. Grogan's sincere exercise of his religion was *substantially burdened* by his arrest and conviction under D.C. Code § 10-503.16(b)(7). Rather than addressing this error, the Court of Appeals moved ahead with its own incorrect analysis.

"An individual asserting a … defense under RFRA must show by a preponderance of the evidence that the government in question would substantially burden the sincere exercise of his religion, whereupon the burden of proof shifts to the government…" *Nesbeth v. United States*, 870 A.2d 1193, 1196 (D.C. 2005). Whether a government action substantially burdens a plaintiff's religious exercise is a question of law for a court to decide. *Singh v. McHugh*, 185 F. Supp 3d 201, 210

(D.C. 2016) (citing *Priests for Life v. U.S. Dep't of Health & Human Servs.*, 772 F.3d 229, 247 (D.C. 2014)).

The trial court impermissibly erred by (1) questioning whether Mr. Grogan's actions were a sincere religious exercise and (2) confused the substantial burden inquiry. Brief for Petitioner at 29, *Grogan v. United States*, 271 A.3d 196 (D.C. 2022) (No. 19-CM-1030), 2020 WL 10897989 at *29.

The trial court, much as the Court of Appeals later did, found that Mr. Grogan's actions were not specifically a tenet of his religion. *See* Transcript of Record on October 3, 2019 at 24, *United States v. Grogan*, No. 2018-CMD-018979 (D.D.C. 2019). The government further said that it was "unaware of any fundamental tenant (sic) of any religion that would require an expression of that religion to go into a Senate Chamber and start yelling." *Id.*

This Court has warned that an exercise need not be shared by other members of a religion for it to be sincerely held. *Holt v. Hobbs*, 574 U.S. 352, 362 (2015). Inquiry into whether Mr. Grogan's actions are an exercise of a central tenant of his religion crosses the line into sincerity inquiry, precisely what this Court cautioned against in *Holt*.

The trial court also failed to consider the actual burdens placed on Mr. Grogan — it overlooked the burden of removal, arrest, conviction, and his sentence. By preventing Mr. Grogan's ability to non-violently preach in public areas after adjournment, when the legislative day is completed, an action *required* by his

religion, the government has substantially burdened that exercise. It has further burdened Mr. Grogan's ability to non-violently preach by sentencing him to seven days in prison.

It was imperative that the Court of Appeals correct and nullify an incorrect application of "substantial burden" analysis. However, the Court of Appeals failed to do so. By summary reversal, this Court may correct the lower courts' failings.

III. THE COURT OF APPEALS' SUBSTANTIAL BURDEN TEST DEVIATES FROM OTHER CIRCUITS, FURTHER OBFUSCATING PROPER RFRA APPLICATION.

The D.C. Court of Appeals has further muddied the waters for how courts should define substantial burden, using a test of whether the restriction restricts "one of a multitude of means," *see Henderson v. Kennedy*, 253 F.3d 12, 17 (D.C. 2001) (holding that because the ban in question is "at most a restriction on one of a multitude of means, it is not a substantial burden on [plaintiffs'] vocation"), which is much narrower than the broad protections that RFRA set out to provide, and edges into an inquiry of reasonable alternatives. It has also deviated from its own precedent — in *Kaemmerling v. Lappin*, the D.C. Court of Appeals found substantial burden exists when government action puts "substantial pressure on an adherent to modify his behavior and to violate his beliefs." 553 F.3d 669, 678 (D.C. Cir. 2008) (quoting *Thomas v. Review Bd.*, 450 U.S. 707, 718 (1981)).

Across the circuits there are a variety of other approaches, but the D.C. Circuit is an outlier in this case by relying on *Henderson*'s "multitude of means" test — the Fourth, Ninth, and Eleventh Circuits have defined "substantial burden as "one that

either compels the religious adherent to engage in conduct that his religion forbids … or forbids him to engaged in conduct that his religion requires." *see Mack v. O'Leary*, 80 F.3d 1175, 1178 (7th Cir. 1996). The Eighth and Tenth Circuits define a substantial burden as "action that forces religious adherents to 'refrain from religiously motivated conduct' or that 'significantly inhibit[s] or constrain[s]s conduct or expression that manifests some central tenet of a [person's] individual beliefs.'" *Id*. The Sixth Circuit asks whether the burdened practice is "essential" or fundamental." *see Abdur-Rahman v. Mich. Dept. of Corrections*, 65 F.3d 489, 491-92 (6th Cir. 1995).

This case is an opportunity for this Court to clarify how substantial burden analysis should be conducted, and return to the precedent set by *Hobby Lobby*, in which the Court rejected inquiry into reasonableness of conduct and instead look beyond broadly formulated interests — which in this case, is the purpose of D.C. Code § 10-503.16(b)(7) —to scrutinize the asserted harm of granting specific exemptions. 573 U.S. at 726-27. Accordingly, the Court of Appeals should have conducted balancing of Mr. Grogan's *actual* interference and disruption of Senate activities against the burden placed upon him by his removal, arrest, conviction, and sentence.

Because of this failure to adequately analyze the threshold inquiry of "substantial burden" on Mr. Grogan's religious exercise, the Court of Appeals did not reach RFRA's balancing test, which places the burden on the government to make a showing that Mr. Grogan's removal, arrest, and conviction would "(1) further a compelling governmental interest (2) that cannot be effectuated by less restrictive

means." Mr. Grogan has a compelling case on both factors, but because of the failure of the Court of Appeals to properly inquire as to the RFRA threshold question, his religious freedom is preemptively restricted.

CONCLUSION

For the foregoing reasons and any other that may appear to this Court, Petitioner respectfully requests that this petition for a writ of certiorari and a motion for summary reversal be granted.

Respectfully submitted,

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