

**[J-91-2025] [MO: McCaffery, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT**

MOHAMAD ALSYRAWAN,	: No. 87 MAP 2024
	: :
Appellant	: Appeal from the Order of the
	: Commonwealth Court at No. 111
	: CD 2023 dated May 20, 2024
v.	: Affirming the Order of the
	: Department of Human Services,
	: Bureau of Hearings and Appeals
DEPARTMENT OF HUMAN SERVICES,	: at No. 514410449-002 dated
	: January 9, 2023
Appellee	: :
	: ARGUED: November 19, 2025

CONCURRING AND DISSENTING OPINION

JUSTICE MUNDY

DECIDED: October 5, 2026

I agree with some of the majority’s core points of law, but I respectfully am unable to join its mandate, as I would evaluate the merits of Appellant’s First Amendment claim rather than remand for a ruling on whether he alleged a cognizable burden under that provision, which he clearly did. I also believe his claim under Pennsylvania’s Religious Freedom Protection Act (RFPA),¹ is not meritorious, for the reasons explained below.

Initially, I agree with the majority that in the public benefits arena, a religious adherent suffers a cognizable burden on his religious exercise when put to the choice of receiving benefits or complying with his religious beliefs. See Majority Op. at 32-33. I also agree to the extent the majority expresses that, generally speaking, courts are not required under the First Amendment to analyze whether a particular burden is substantial or slight. See *id.* at 22-31. This is because even a substantial burden is not grounds for

¹ Act of Dec. 9, 2002, P.L. 1701, No. 214 (reposited at 71 P.S. §§ 2401-2408).

judicial relief from neutral, generally-applicable state laws and regulations. See *Employment Div. v. Smith*, 494 U.S. 872 (1990).² Conversely, any incidental burden will generally establish a claim in relation to a regulation that is not religiously neutral and generally applicable. See *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 546 (1993).³ In that event, *Smith* does not apply, and a plaintiff may establish a free exercise violation by showing the government “has burdened his sincere religious practice[.]” *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 525 (2022); see also *id.* at 526 (finding a school district policy, which prohibited a coach from saying a brief, silent prayer on the football field after each game, was not neutral and generally applicable, as it was specifically directed at a religious practice).⁴

² I am speaking of *Smith* as applied to the states. The Religious Freedom Restoration Act of 1993, passed by Congress in reaction to *Smith*, was held inoperative vis-à-vis state agencies, see *City of Boerne v. Flores*, 521 U.S. 507 (1997), and the follow-up Religious Land Use and Institutionalized Persons Act of 2000 does not apply to this case. Although *Smith* has been heavily criticized since it was decided in 1990, it is still binding First Amendment law. See generally *Fulton v. City of Phila.*, 593 U.S. 522, 533 (2021); *Burwell v. Hobby Lobby Stores*, 573 U.S. 682, 694 (2014); *Christian Legal Soc’y Chapter of Univ. of Calif. v. Martinez*, 561 U.S. 661, 697 n.27 (2010).

Unlike *Smith*, I would not deem *Mahmoud v. Taylor*, 606 U.S. 522 (2025), to be directly relevant to this case. In *Mahmoud*, the Court found strict scrutiny applicable even absent an inquiry into neutrality and general applicability, because it concluded the burden was of the “same character” as that involved in *Wisconsin v. Yoder*, 406 U.S. 205 (1972); see *Mahmoud*, 606 U.S. at 565. Importantly, *Yoder* was a case *Smith* expressly carved out from its holding, reasoning the burden in *Yoder* did not involve free exercise alone, but the Free Exercise Clause combined with another constitutional protection, namely, the right of parents to direct the education of their children. See *Smith*, 494 U.S. at 881. *Smith* described such overlap of constitutional rights as a “hybrid situation” that implicates strict scrutiny even if the religious claim standing alone would not. *Id.* at 882.

³ The use of “incidental” in this context is not a measure of the burden’s weight. It means the law is not intended to prohibit a religious practice, but does so as an “incidental effect” of its operation. *Smith*, 494 U.S. at 872. That was true of the law in *Smith*, which prohibited the use of peyote, a religious practice of the Native American Church.

⁴ Cf. *Masterpiece Cakeshop v. Colo. Civil Rights Comm’n*, 584 U.S. 617 (2018) (holding a state civil rights commission did not comply with Free Exercise Clause’s requirement of (continued...))

In light of the above, I would find that the choice of rational basis review or strict scrutiny is determined by whether the 40/60 Rule is both neutral and generally applicable. And this gives rise to my main disagreement with the majority's approach to this dispute. There is little reason to doubt Appellant's religious exercise was burdened, as his claim rests on exactly what the majority defines as a burden in this context, namely, that his obedience to his religion will cause him to lose benefits. It thus seems judicially wasteful to send the matter back to the Commonwealth Court for a ruling on whether DHS's policy requires him to make a "forced choice," Majority Op. at 34, as it clearly does. Hence, a central question presently before this Court is whether the 40/60 Rule is neutral and generally applicable, in which case it must only withstand rational basis review. Otherwise, it must survive strict scrutiny.⁵ I would answer that question and then apply the appropriate level of scrutiny.

In analyzing that issue, I note, first, a plaintiff bears the burden to demonstrate an infringement of his Free Exercise rights. See *Kennedy*, 597 U.S. at 524. This means if Appellant wishes to have the 40/60 Rule evaluated under strict scrutiny, he must make a showing sufficient to invoke that level of scrutiny – in other words, he bears the burden to establish, in the first instance, that the Rule is not neutral or not generally applicable. As it is undisputed the Rule is religiously neutral, the crucial question is whether it is also

neutrality, where it issued a cease-and-desist order requiring cakeshop owner to bake a custom-made cake with a message his religion prohibited, and expressed hostility toward religion in comments at public hearings); *Tandon v. Newsom*, 593 U.S. 61, 62 (2021) (*per curiam*) ("[G]overnment regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise."); *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 18 (2020) (restrictions that are not neutral and of general applicability must satisfy strict scrutiny); *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 546 (1993) (same).

⁵ The only other path to strict scrutiny is by demonstrating a *Yoder*-style hybrid situation, see *supra* note 2, but neither party suggests that type of circumstance has arisen here.

generally applicable. A law is not generally applicable “if it invites the government to consider the particular reasons for a person’s conduct by providing a mechanism for individualized exemptions,” or if it “prohibits religious conduct while permitting secular conduct that undermines the government’s asserted interests in a similar way.” *Fulton v. City of Phila.*, 593 U.S. 522, 533-34 (2021) (cleaned up).

The only ground on which Appellant claims the 40/60 Rule is not generally applicable is that on one previous occasion an exception was made. I do not find that to be enough. That situation was briefly mentioned in *Jalil v. DHS*, 250 A.3d 550 (Pa. Cmwlth. 2021), but we have no information about it, what prompted it, or even whether it was a permanent exception or a temporary one. As the majority points out, moreover, the DHS bulletin “did not indicate there were any *permanent exceptions* to the 40/60 Rule.” Majority Op. at 6 (emphasis in original).⁶

The present situation is starkly different from that which occurred in *Fulton*, where the Supreme Court determined the city’s non-discrimination requirement was not generally applicable because it allowed for a system of discretionary exemptions. See *id.* at 535. As noted, there is no information in the record before us suggesting the 40/60 Rule includes, or is otherwise subject to, a system for discretionary *permanent*

⁶ The majority does not address the meaning of the single exception mentioned in *Jalil*. The parties’ stipulation refers to it as having been granted “based on individualized circumstances and not based on an emergency or unplanned departure of a regularly scheduled worker.” Stipulation at 1. This suggests the rationale for the exemption fell outside the official reasons listed in the Rule for exceptions up to 90 days when there is an emergency or an unplanned departure of a regularly scheduled worker, and it also suggests the exemption *might* have been a permanent one. But it is not conclusive on this point, notwithstanding that Appellant’s briefing assumes the exemption was permanent. See, e.g., Brief for Appellant at 50; Reply Brief for Appellant at 17-18. Notably, Appellant bears the burden to demonstrate a basis for relief, including that the rule in question fails the neutrality/general-applicability test. It was thus his obligation to ensure the record contained sufficient information for a reviewing court to conclude the exemption in question was a permanent one granted on a discretionary basis.

exemptions, and it is not even clear whether the one prior exemption referenced in *Jalil* was a permanent one. I thus conclude DHS's enforcement of the Rule vis-à-vis Appellant only works a free exercise violation if it fails rational basis review.

Under the deferential rational basis standard, a regulation will be deemed valid if it is rationally related to a legitimate governmental interest. See *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 339 (1987). On this topic, DHS argues the denial of permanent exemptions is rationally related to the agency's legitimate objective of ensuring the quality of care and promoting community participation and engagement by service recipients. See Brief for Appellee at 31-32. Moreover, the Commonwealth Court observed that, although DHS's motive for implementing the 40/60 Rule was not entirely clear, DHS did offer what could be considered a compelling (and thus rational) interest for denying an exemption here: Mother and Sister's quality of care would suffer due to their own exhaustion if they had to care for Appellant 24/7. The Rule encourages families to allow others to provide breaks for them, thus enhancing service quality. This is true regardless of whether they ultimately comply with such encouragement. See *Alsyrawan*, 316 A.3d at 1091 n.25.

For purposes of the Free Exercise Clause, I agree with this analysis to the extent it establishes that the Rule at least satisfies rational basis review. Hence, I would find Appellant has not established a Free Exercise violation, and, as such, that he can only prevail if his RFPA claim is meritorious.

Turning now to that claim, the Commonwealth Court first recited that the statute provides as follows:

(a) General rule.--Except as provided in subsection (b), an agency shall not substantially burden a person's free exercise of religion, including any burden which results from a rule of general applicability.

(b) Exceptions.--An agency may substantially burden a person's free exercise of religion if the agency proves, by a preponderance of the evidence, that the burden is all of the following: (1) In furtherance of a compelling interest of the agency. (2) The least restrictive means of furthering the compelling interest.

71 P.S. § 2404, *quoted in Alsyrwan*, 316 A.3d at 1090. As reflected in subsection (a) above, the court explained that Appellee would have to demonstrate a "substantial burden" on his religious exercise, which is defined by RFPA as an agency action that does any of the following:

(1) Significantly constrains or inhibits conduct or expression mandated by a person's sincerely held religious beliefs. (2) Significantly curtails a person's ability to express adherence to the person's religious faith. (3) Denies a person a reasonable opportunity to engage in activities which are fundamental to the person's religion. (4) Compels conduct or expression which violates a specific tenet of a person's religious faith.

Id. § 2403, *quoted in Alsyrwan*, 316 A.3d at 1092-93. The court cautioned, however, that

there is no substantial burden if the governmental action does not coerce the individuals to violate their religious beliefs or deny them the rights, benefits, and privileges enjoyed by other citizens – even if the challenged government action would interfere significantly with private persons' ability to pursue spiritual fulfillment according to their own religious beliefs. Nor can a party use RFPA to require the government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens.

Alsyrwan, 316 A.3d at 1092-93 (cleaned up) (quoting *Real Alternatives, Inc. v. DHS*, 867 F.3d 338, 357 (3d Cir. 2017)).

Applying these precepts, the court determined DHS's implementation of the 40/60 Rule would not exclude him from receiving benefits, it would only exclude his relatives from receiving payment for any hours they care for him above and beyond the 40 or 60 permitted under the policy. In the court's view, then, Appellant failed to meet his initial requirement to demonstrate a substantial burden. *See id.* at 1095.

I agree with this assessment. Initially, and consistent with the above-quoted passage from the intermediate court, the concept of a substantial burden for constitutional purposes is not unbounded. A substantial burden generally does not arise where a law or administrative policy is not imperative, that is, where it does not command or prohibit individual conduct, or require people to affirm certain beliefs or refrain from doing so.⁷ No such commands or prohibitions are at issue in the present dispute, nor has DHS denied services. Instead, Appellant seeks to obtain, based on his religion, a benefit *to which nobody else is entitled*. He is challenging the state's refusal to pay his family members for more hours than any other family receives so that he may comply with his religion. In this regard, our intermediate court has appropriately articulated that, "although religious freedom has an important place in our scheme of ordered liberty, it also steadfastly maintains that claims of religious convictions do not automatically entitle a person to fix unilaterally the conditions and terms of dealings with the government." *Kocher v. Bickley*, 722 A.2d 756, 759 (Pa. Cmwlth. 1999) (footnote omitted).⁸

⁷ See, e.g., *Bowen v. Roy*, 476 U.S. 693, 700 (1986) ("The Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can extract from the government." (quoting *Sherbert v. Verner*, 374 U.S. 398, 412 (1963))); *Braunfeld v. Brown*, 366 U.S. 599, 606 (1961) (rejecting a challenge by Orthodox Jews to Pennsylvania's Sunday closure laws, indicating that "some financial sacrifice or inconvenience does not necessarily burden religious exercise"); *Anspach ex rel. Anspach v. City of Phila.*, 503 F.3d 256, 272 (3d Cir. 2007) (to establish a substantial burden, a claimant must allege state action that is "compulsory or coercive in nature").

⁸ See *Rector Church Wardens v. City of Phila. Historical Comm'n*, 215 A.3d 1038, 1045 (Pa. Cmwlth. 2019) (finding no substantial burden where a land use regulation limited a church's ability to sell or modify a property used as a funding source rather than for religious services); cf. *Real Alternatives, Inc. v. Dep't of Health & Hum. Servs.*, 867 F.3d 338, 357 (3d Cir. 2017) ("There is no substantial burden if the governmental action does not coerce the individuals to violate their religious beliefs or deny them the rights, benefits, and privileges enjoyed by other citizens – even if the challenged Government action would interfere significantly with private persons' ability to pursue spiritual fulfillment according to their own religious beliefs.") (internal quotation marks and citations omitted).

As for RFPA, that enactment includes a statutory definition of “substantial burden” that is aligned with these conceptual limitations, as the General Assembly has elected to define the concept in terms suggesting active interference: *constrain, inhibit, curtail, deny, and compel*. See 71 P.S. § 2403. The 40/60 Rule does none of these things. As explained, it limits the number of hours per week DHS is authorized to pay family members based on health and safety concerns unrelated to religion, but it does not compel family members to turn Appellant over to the care of others in violation of his religious beliefs, nor does it prevent him otherwise from adhering to his faith. I would thus conclude as a matter of law that the Rule does not impose a substantial burden as that term is statutorily defined.⁹ That being the case, I would find Appellant has not forwarded a meritorious claim under RFPA.

Finally, the majority suggests my analysis of Appellant’s RFPA claim is beyond the scope of the question on which we allowed appeal. See Majority Op. at 22 n.25. To explain why I disagree, it is helpful to review how that question came about. Appellant raised two issues in his petition for allowance of appeal, as follows:

1. Did the Commonwealth Court err in finding no First Amendment violation where the Department stipulated that it had made both individual and broad exemptions to the 40/60 rule, but refused a religious exemption for Petitioner?
2. Did the Commonwealth Court err in holding that the fact that Petitioner cannot access Medicaid-funded services prescribed by his Individual Support Plan without violating his religious beliefs fails to show a “substantial burden” under the Pennsylvania Religious Freedom Protection Act?

⁹ None of this is to say DHS would not be permitted to accommodate Appellant’s religious beliefs through a system that allows for permanent exceptions. My only point is that RFPA does not require DHS to do so under the current version of the 40/60 Rule.

Alsyrawan v. DHS, 289 MAL 2024, Petition for Allowance of Appeal, at 6 (filed June 19, 2024). In the first issue, Appellant asked whether the Commonwealth Court erred in denying his First Amendment claim. In the second issue, he asked whether the lower court erred in denying his RFPA claim. We consolidated these issues into a single question for review, as follows:

Did the Commonwealth Court improperly conflate its First Amendment Free Exercise analysis with its disposition of Appellant’s Pennsylvania Religious Freedom Protection Act (RFPA) claim?

Alsyrawan v. DHS, 329 A.3d 448, 449 (Pa. 2024) (*per curiam*).

Initially, I believe this reframing was improvident as it omits how any such conflating might have led the lower court to fail to recognize a valid claim, and if so, under which provision – the First Amendment, or RFPA. And it clouds the relatively straightforward RFPA issue Appellant did articulate. The majority now interprets our own reframing as including the Free Exercise claim while excluding the RFPA claim. It is not clear to me why that should be so. Nor am I certain that was our intent.

For its part, the majority need not speak to whether Appellant’s RFPA claim is meritorious in any event, as it clarifies that the concept of a “substantial burden” has largely disappeared from Free Exercise Clause jurisprudence and then remands for further proceedings. See Majority Op. at 34. By referencing the definition of a burden as involving a “forced choice,” see *id.*, the mandate appears to instruct the Commonwealth Court to rule on whether Appellant has alleged a cognizable burden, which, as explained, seems unnecessary insofar as it is evident that he has indeed alleged such a burden.

Regardless, I am in a different position. Because I would find relief unavailable under the First Amendment, I would not be able to articulate how I think this appeal should be resolved without either construing our reworded issue as entirely excluding the RFPA question Appellant raised in his petition for allowance of appeal, or specifying why

Appellant is not entitled to relief under RFPA. I have chosen to do the latter because, as noted, I do not see how our reframed issue clearly excludes any claim under RFPA. Again, it just asks whether the Commonwealth Court conflated two things without clearly saying that one thing is “in” and the other thing is “out.”

In sum, then, I would hold that because the 40/60 Rule is neutral and generally applicable, and survives rational basis scrutiny, Appellant lacks a valid First Amendment claim. I would also conclude the 40/60 Rule does not impose a substantial burden on Appellant’s religious exercise, meaning he also lacks a valid RFPA Claim. Therefore, I would affirm the order of the Commonwealth Court.

Accordingly, I respectfully dissent from the majority’s decision to reverse that order and remand for further proceedings.¹⁰

¹⁰ The majority’s mandate is phrased in terms of reversing the Commonwealth Court’s order. It seems to me this would be more appropriately cast as vacating that order given the majority does not reach a determination on whether Appellant’s asserted avenues for relief are meritorious.