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Religion: City Ordinance Requiring Written Parental Consent Before Specific Type of Male Circumcision Cannot Survive Strict Scrutiny Analysis

Central Rabbinical Congress of the United States & Canada v. New York City Department of Health & Mental Hygiene, No. 13-107-cv (2d Cir. Aug. 15, 2014).

The Second Circuit has struck down a New York City Health Code provision which required written parental consent for a circumcision practice involving direct oral suction of the wound, finding that the rule was aimed specifically at an orthodox Jewish sect and was under-inclusive.

Jewish law requires male infants be circumcised on the eighth day after birth. For millennia this practice in orthodox Jewish sects has involved "metzitzah b'peh" or "MBP," which is the direct oral suction of the circumcision wound by a mohel – a rabbi specially trained to perform the ritual safely.
The New York City Department of Health & Mental Hygiene ("the Department") has been concerned about the health risks posed by this practice in New York – specifically the spread of the herpes simplex virus ("HSV"). In 2005 the City embarked on an educational campaign concerning the practice, but, believing this was only a qualified success, it enacted § 181.21 of the Health Code which prohibits anyone from performing the practice without first obtaining signed consent from the infant's parents.

The consent form includes a city-mandated narrative describing the procedure as involving major risks for the infant: "I understand that direct oral suction will be performed on my child and that the New York City Department of Health and Mental Hygiene (NYCDHMH) advises parents that direct oral suction should not be performed because it exposes an infant to the risk of transmission of herpes simplex virus infection, which may result in brain damage or death."

Three organizations supporting the ritual and three mohel that perform it filed suit, challenging the regulation as a violation of their Free Exercise rights. The District Court held the law was a neutral law of general applicability, and as such, was subject only to rational basis review. It passed such a test. The plaintiffs appealed.

HELD: The Second Circuit reversed the District Court, holding the regulation was neither neutral nor generally applicable, leaving it subject to strict scrutiny.

DISCUSSION: The court began by evaluating whether the regulation at issue was neutral, pointing out that it was specifically targeted at one religious practice. It noted the Department instituted an educational campaign aimed at this religious minority and, determining it was not successful, graduated to direct regulation of only a minority of orthodox Jewish sects. Put succinctly, the regulation singled out a religious practice, engaged in by a select few orthodox Jewish sects, performed during a religious ceremony, and regulated only it. The court deemed the law not neutral.

The court also addressed the issue of general applicability, though with the regulation having already failed the neutrality test, it was not necessary to the holding. General applicability makes it impermissible for government to selectively impose burdens only on religious conduct, despite the fact that other conduct implicates the same governmental concerns. In other words, the law cannot be substantially under-inclusive. The court found that on the record before it, the law could not be categorized as generally applicable, given that the regulation burdened only religious conduct that might be accountable for just 10% of the total neonatal HSV cases in New York City while leaving the causes of 90% of neonatal HSV cases unaffected by any regulation. The court thus vacated the District Court's order denying the plaintiff's motion for a preliminary injunction and remanded the case, directing the lower court to apply strict scrutiny and determine whether the plaintiffs showed a likelihood of success on the merits.

http://www.ca2.uscourts.gov/decisions/isysquery/df19c36c-2d6b-40af-8c94-6283a86b3bd2/1/doc/13-107_opn.pdf#xml=http://www.ca2.uscourts.gov/decisions/isysquery/df19c36c-2d6b-40af-8c94-6283a86b3bd2/1/hilite/ (last accessed August 28, 2014).