05-4756-ag

United States Court of Appeals

for the

Second Circuit

DANIEL TAYLOR JENKINS,

Petitioner-Appellant,

– v. –

COMMISSIONER OF INTERNAL REVENUE SERVICE,

Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES TAX COURT

REPLY BRIEF FOR PETITIONER-APPELLANT

LAW OFFICE OF FREDERICK R. DETTMER
Attorneys for Petitioner-Appellant
340 Corlies Avenue
Pelham, New York 10803
(914) 738-8782

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Petitioner-appellant Daniel Taylor Jenkins submits this reply brief to respond to the arguments of the Commissioner of Internal Revenue in the Brief for the Appellee.[1]

SUMMARY OF ARGUMENT

Daniel Jenkins's appeal raises issues under the First and Ninth Amendments to the United States Constitution and under the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb, *et seq.* ("RFRA"). The appeal also addresses the imposition by the United States Tax Court of a $5,000 penalty on unpaid taxes of $2,276 pursuant to 26 U.S.C. § 6673(a)(1).

The Commissioner's brief does not address Daniel Jenkins's constitutional arguments.[2]

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[1] References to the principal Brief for Petitioner-Appellant are to "Jenkins Br. at __"; references to the Brief for the Appellee are to "IRS Br. at __".

[2] In his principal brief, Daniel Jenkins discusses the constitutional theory he had attempted to present in the court below, but which the Tax Court refused to consider. Jenkins Br. at 12-22. At a minimum, the Ninth Amendment provides a "rule of construction," *United States v. Bifield*, 702 F.2d 342, 349 (2d Cir. 1983), for elucidating the contours of other constitutional rights, here the free exercise of religion clause of the First Amendment. His principal brief also highlights evidence that the right of conscience not to be compelled to participate in war making is grounded in a liberty explicitly recognized as an element of religious freedom at the time of the adoption of the United States Constitution and the Bill of Rights. This evidence supports the conclusion that the right of

(continued...)

Daniel Jenkins's principal brief also argues that he is entitled to an accommodation under RFRA's mandate to the courts to craft individualized exceptions to all general federal statutes in order to prevent the government from burdening a person's exercise of religion. Jenkins Br. at 22-26. The recent decision of the Supreme Court in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, __ U.S. ___, 126 S.Ct. 1211, 1220, 163 L.Ed.2d 1017 (2006), provides significant new insight into the scope of RFRA and the manner in which it is to be applied by the federal courts. As a result, earlier decisions regarding the interplay between the First Amendment's free exercise of religion clause and the tax laws, as well as prior lower-court decisions interpreting RFRA, no longer determine the outcome here. Accordingly, the Commissioner's reliance on that prior case law is not persuasive.

Finally, the imposition of a penalty was not warranted because (even if the Court affirms the decision of the court below) Daniel Jenkins's legal arguments are not frivolous. The Commissioner argues, among other things, that because Daniel

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[2](...continued)
conscience is a recognized liberty that the Government could not "deny or disparage" by virtue of the Ninth Amendment's rule of construction.

The Commissioner chooses not to address this argument at all, except for a conclusory dismissal of Daniel Jenkins's theory in defending the Tax Court's imposition of a penalty. IRS Br. at 30. Accordingly, the Court must consider the impact of the Ninth Amendment's "rule of construction" without the benefit of any analysis from the Commissioner.

Jenkins requests the same relief as did many prior claimants, including Daniel Jenkins 20 years ago, he must have known that his legal arguments are frivolous. The Commissioner confuses requests for relief with the legal nature or bases of claims. Daniel Jenkins proposes a novel legal theory under the First and Ninth Amendments and argument based on significant new interpretation of RFRA. His legal arguments are not frivolous.

ARGUMENT

I. THE TAX COURT ERRED IN FAILING TO DETERMINE WHETHER ACCOMMODATING DANIEL JENKINS WOULD BE UNDULY BURDENSOME UNDER THE RELIGIOUS FREEDOM RESTORATION ACT OF 1993

The Commissioner acknowledges that Daniel Jenkins's request for accommodation is based on a sincere religious belief and the failure to provide an accommodation substantially burdens his exercise of religion.[3] IRS Br. at 13, 15, 18. The Commissioner offers no evidence or argument that accommodating Daniel Jenkins would be unduly burdensome. Instead, the Commissioner argues only that

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[3] The Commissioner's brief inadvertently includes an outdated version of RFRA as an Addendum. In the current, amended version, among other changes, the definition of "exercise of religion", 42 U.S.C. § 2000bb-2(4), is revised to incorporate the definition of "religious exercise" in the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc-5, which reads: "The term 'religious exercise' includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief."

the Internal Revenue Service should be excused from RFRA's *mandatory* "compelling interest" analysis, and the accompanying requirement that the Commissioner submit substantial evidence to demonstrate that there are no "less restrictive means" for accomplishing that interest, on the basis of a presumption supposedly arising primarily from the Supreme Court's decision in *United States v. Lee*, 455 U.S. 252, 102 S.Ct. 1051, 71 L.Ed.2d 127 (1982), and later cases following *Lee*. IRS Br. at 13-18.

The Commissioner's reliance on *Lee* and the subsequent decisions is misplaced for at least six reasons.

First, the Commissioner's position flies in the face of the clear language of RFRA and its elucidation by the Supreme Court. Under RFRA, once the private party establishes that the application to him of a general federal statute or regulation impinges on his sincere religious exercise, the burden of proof shifts to the government to show that its refusal to provide accommodation "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b).

As the Commissioner admits that Daniel Jenkins's request flows from a sincere religious belief, the Commissioner assumes the burden "to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the

person' – the particular claimant whose sincere exercise of religion is being substantially burdened." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, __ U.S. ___, 126 S.Ct. 1211, 1220, 163 L.Ed.2d 1017 (2006). Under this "strict scrutiny" standard, the government cannot rely on "the notion that a general interest in uniformity justified a substantial burden on religious exercise. . . ." *Id.*, 123 S.Ct. at 1223. *See also City of Boerne v. Flores*, 521 U.S. 507, 534, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997)[4]; *Employment Division v. Smith*, 494 U.S. 872, 888-889, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990).[5] Here, the Commissioner has made no effort to fulfill its burdens under RFRA. Accordingly, it was not entitled to summary judgment.

Second, in *Employment Division v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108

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[4] In holding RFRA unconstitutional as applied to the states, the Court in *City of Boerne* noted that "[r]equiring a State to demonstrate a compelling interest and show that it has adopted the least restrictive means of achieving that interest is the most demanding test known to constitutional law. . . . Even assuming RFRA would be interpreted in effect to mandate some lesser test, say one equivalent to intermediate scrutiny, the statute nevertheless would require searching judicial scrutiny of state law with the attendant likelihood of invalidation." 521 U.S. at 534.

[5] In *Smith*, the Court cautioned that "if 'compelling interest' really means what it says . . . many laws will not meet the test. . . . The rule . . . would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind - ranging from compulsory military service . . . to the payment of taxes. . . ." 494 U.S. at 888-889 (citations omitted).

L.Ed.2d 876 (1990), the Supreme Court declared that its "decisions have consistently held that the [constitutional] 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 (or prescribes) conduct that his religion prescribes (or proscribes)." *Id.* at 879 (internal quotation marks omitted). *The primary example it offered of the application of this constitutional standard that does not demand accommodation of religious beliefs was United States v. Lee.* 494 U.S. at 879-880. As to the individualized scrutiny utilized in *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972), the Court explained that "[t]he only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press . . . or the right of parents . . . to direct the education of their children. . . ." 494 U.S. at 881.

In other words, to the extent that RFRA incorporates standards of individualized scrutiny from *Sherbert* and *Yoder*, those standards were *not* applied in *United States v. Lee*. Indeed, the Court in *Smith* specifically noted that determining the "compelling interest" test to be constitutionally required "would open the prospect

of constitutionally required religious exemptions from civic obligations of almost every conceivable kind - ranging from compulsory military service, see, *e.g., Gillette v. United States*, 401 U.S. 437 (1971), to the payment of taxes, see, *e.g., United States v. Lee, supra*. . . ." 494 U.S. at 888-889. *See also City of Boerne, supra*, 521 U.S. at 534 ("Laws valid under *Smith* would fall under RFRA without regard to whether they had the object of stifling or punishing free exercise."). The Commissioner can not be excused from submitting evidence to satisfy the compelling interest test on the basis of a decision, *United States v. Lee*, in which the compelling interest test was not applied.

Third, RFRA does not simply incorporate the individualized scrutiny standards of *Sherbert* and *Yoder*. Rather, "the Act imposes in every case a least restrictive means requirement - a requirement that was not used in the pre-*Smith* jurisprudence RFRA purported to codify. . . ." *City of Boerne, supra*, 521 U.S. at 535. Hence, even if *United States v. Lee* involved an application of the *Sherbert* and *Yoder* standards, it did not include consideration of whether less restrictive means exist for satisfying the Commissioner's asserted compelling interest without invading Daniel Jenkins's religious conscience.

Fourth, the most that can be said of *Lee* and the other decisions cited by the Commissioner is that accommodations of religious conscience that would affect the

tax code are not constitutionally mandated by the free exercise clause of the First Amendment (and that seems to be the thrust of the Commissioner's argument (IRS Br. at 15)). RFRA does not apply a "constitutionally necessary" standard, though, and applications of RFRA to particular statutes and persons do not raise concerns that animate constitutional jurisprudence.

As every law school student quickly learns, it is the province of the Judicial Branch to say what the Constitution means, requires and prohibits. *Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137, 177, 2 L. Ed. 60 (1803). Congress "has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation." *City of Boerne, supra*, 521 U.S. at 519.

As a result, when a Federal Court says that the constitution requires an exemption from a statute of general application, which is what was being requested in *Lee*, the legislature is powerless to modify, restrict or undo that exemption. Indeed, in *Smith*, the Supreme Court stressed that concern in holding that the free exercise clause of the First Amendment does not compel accommodations to statutes of general application. 494 U.S. at 886 ("What [the 'compelling government interest' requirement] produces in those other fields - equality of treatment [regardless of race] and an unrestricted flow of contending speech - are constitutional norms; what it would produce here - a private right to ignore generally applicable laws - is a

constitutional anomaly." (footnote omitted)); *id.* at 888-890 ("But to say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required. . . ."). And in *City of Boerne*, the Court emphasized the comparable disability the States would suffer if Congress could impose RFRA standards on them under the First and Fourteenth Amendments. 521 U.S. at 532-535.

RFRA raises none of those jurisprudential concerns (when applied to federal statutes and regulation). In general, what Congress has constitutional authority to enact, it may amend or repeal (so long as it does not transgress some other constitutional right or limitation in the process). *See Hankins v. Lyght*, 438 F.3d 163, 172-174 (2d Cir. 2006). And RFRA creates only statutory rights, not constitutional rights.

RFRA must be understood as amending *all* federal generally applicable statutes. *Hankins v. Lyght*, 438 F.3d 163, 172-174 (2d Cir. 2006) When Congress wishes to exempt tax laws from the scope of other legislation, it knows how to do so. *See, e.g., Anti-Injunction Act*, 26 U.S.C. § 7421(a) ("no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person. . . ."). Accordingly, unless and until Congress specifies otherwise, the amendment of federal statutes effected by RFRA must be understood to include the

Internal Revenue Code. Thus before it is entitled to judgment, the Commissioner must demonstrate that "it has actually considered and rejected the efficacy of less restrictive measures. . . ." *Sample v. Lappin*, 424 F.Supp.2d 187, 195 (D.D.C. 2006), *quoting Gartrell v. Ashcroft*, 191 F.Supp.2d 23, 39 (D.D.C. 2002). *See, e.g., Cutter v. Wilkinson*, 544 U.S. 709, 725, 125 S.Ct. 2113, 161 L.Ed.2d 1020 (2005) (Holding section 3 of the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc-1(a)(1)-(2), to be constitutional and remanding for development of a factual record) ("A finding that it is *factually impossible* to provide the kind of accommodations that RLUIPA will require without significantly compromising prison security or the levels of service provided to other inmates cannot be made at this juncture." (internal quotation marks omitted; emphasis in original)).

Fifth, the fact that, in the wake of *Lee*, Congress legislated an exemption for the class of taxpayers adversely affected by the decision[6] indicates that less restrictive means do exist for accomplishing any compelling interest the Commissioner may offer (and the commissioner offers none in this case). And the fact that the Internal Revenue Service has readily administered the $3 campaign finance check-off statute, 26 U.S.C. § 6096, indicates that segregating taxes for specific uses is neither unduly burdensome nor contrary to any procedural needs of our tax system. These provisions

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[6] *See Exemption Act of 1988*, 26 U.S.C. § 3127.

demonstrate that the broad public interest in maintaining a sound federal tax system may be furthered by accommodating sincere convictions of conscience and that there exist readily feasible "less restrictive means" than compulsory uniform treatment for accomplishing that public interest. *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, supra*, 126 S.Ct. at 1221-1224 ("We do not doubt that there may be instances in which a need for uniformity precludes the recognition of exceptions to generally applicable laws under RFRA. But it would have been surprising to find that this was such a case, given the longstanding exemption from the Controlled Substances Act for religious use of peyote, and the fact that the very reasons Congress enacted RFRA was to respond to a decision denying a claimed right to sacramental use of a controlled substance.").

Finally, the Commissioner contends that "taxpayer here is barking up the wrong tree in seeking judicial rather than legislative relief." IRS Br. at 35 n.4. It seeks to rely on *Lee*, *Hernandez v. Commissioner*, 490 U.S. 680 (1989), *Adams v. Commissioner of Internal Revenue*, 170 F.3d 173 (3d Cir. 1999), *cert. denied*, 528 U.S. 1117 (2000), and *Browne v. United States*, 176 F.3d 25 (2d Cir. 1999), *cert. denied*, 528 U.S. 1116 (2000), for the proposition that exceptions to the uniform application of the tax code on religious grounds must come from Congress (IRS Br. at 16-18, 21-22, 34-35), and four times notes that Daniel Jenkins supposedly

conceded in the prior proceedings that accommodating his religious conscience "would require a legislative remedy." IRS Br. at 6, 9, 22, 27.

The Commissioner's contention is a red herring. Determining the feasibility on a case-by-case basis of crafting accommodations to general federal statutes, including the Internal Revenue Code, is exactly "the task assigned by Congress to the courts under RFRA. . . ." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, supra*, 126 S.Ct. at 1225. The Supreme Court recognized that this may be a difficult and arduous responsibility, *id.,* and the Commissioner argues that the Federal Courts may avoid that responsibility by relying on decisions like *Adams* and *Browne* for the proposition that exceptions to the tax laws must come from Congress. "RFRA, however, plainly contemplates that *courts* would recognize exceptions - that is how the law works." *Gonzales*, 126 S.Ct. at 1222 (emphasis in original). (And of course, a party's supposed belief that relief may require legislation is never a substitute for the Court's province and duty to say what the law is.)

In short, *Lee* reached a constitutional conclusion that the free exercise of religion protected by the First Amendment did not compel the government to accommodate taxpayers because (1) the First Amendment did not require accommodations to federal statutes of general application, and (2) the Court believed that "[t]he tax system could not function if denominations were allowed to challenge

the tax system because tax payments were spent in a manner that violates their religious belief." *United States v. Lee, supra*, 455 U.S. at 1056. Those considerations no longer hold. RFRA does not involve constitutional analysis, and its standards for refusing to accommodate religious exercise are more demanding than those applied in *Lee* and its progeny. Congress has shown by its subsequent acts that exceptions to the uniform application of the Internal Revenue Code will not undermine the tax system. RFRA entails consideration of accommodating the religious conscience of *individuals*, not *denominations*. And the Supreme Court has made it clear that Congress's direction to the Federal Courts to adjudicate requests for accommodation on a case-by-case basis under the standards set forth in RFRA should be fully honored for *all* federal statutes. For all these reasons, decisions like *United States v. Lee, supra, Hernandez v. Commissioner*, *supra, Adams v. Commissioner of Internal Revenue*, *supra,* and *Browne v. United States*, *supra*, do not govern the outcome of Daniel Jenkins's claim.

II. THE TAX COURT SHOULD NOT HAVE ASSESSED A PENALTY BECAUSE DANIEL JENKINS'S CLAIM IS NOT FRIVOLOUS

In appellee's brief, the Commissioner chooses not to address Daniel Jenkins's constitutional arguments, yet still asserts that the imposition of a $5,000 penalty on

the escrowed $2,276 of his total tax liability of $4,118.58 is justified.

The Commissioner musters a seemingly impressive array of decisions imposing damages or penalties under 26 U.S.C. § 6673. Those decisions, however, are largely inapposite.

The Commissioner cites decisions for the proposition that a penalty is appropriate in suits brought "solely for the purpose of protesting Federal tax laws." IRS Br. at 24. Despite the Commissioner's effort to describe Daniel Jenkins as engaging in "civil disobedience" (IRS Br. at 22, 34), however, there is no evidence that he brought suit for symbolic political purposes. The Commissioner cannot simultaneously admit (as the IRS must at this stage of the proceedings) that Daniel Jenkins's request for accommodation is made in good faith and is motivated by a sincere religious conviction (IRS Br. at 13, 15, 18, 31), and ascribe ulterior political motives to his lawsuit.

The Commissioner cites numerous decisions imposing penalties on taxpayers who asserted they were exempt or should be excused from the tax laws (or from even filing tax returns), or were entitled to deductions or credits. IRS Br. at 24-25, 27-28. Daniel Jenkins claims no such exemption, but, rather, seeks to pay his taxes with an accommodation so that he may obey both the commands of the government and the commands of his faith. Indeed, he removed the subject portion of his tax liability

from his control by placing it in escrow.

The Commissioner cites decisions that upheld the imposition of a penalty "where the taxpayers asserted arguments that had been frequently and uniformly rejected." IRS Br. at 26. And the Commissioner stresses that Daniel Jenkins supposedly "was fully aware that his claims lack legal merit" on the basis of a 20-year old case in the Small Tax Case Division (A 39-41) and the supposed efforts of the settlement officer and the court below to discourage Daniel Jenkins from proceeding without having any judicial body address his legal theory. IRS Br. at 27, 29, 32. But Daniel Jenkins raises a novel argument under the First and Ninth Amendments, supported by historical data not evident in prior cases (*see* Jenkins Br. at 12-22), to which the Commissioner chooses not even to respond; and Daniel Jenkins presents a substantial, nonfrivolous argument for the application of RFRA which is supported by recent decisions of the Supreme Court and this Court. The Commissioner confuses requests for relief with the legal nature or bases of claims. There is no doubt that prior litigants asked for relief similar to the accommodation Daniel Jenkins requests here, including his 1987 proceeding in the Small Tax Case Division, but none of those earlier actions raised the constitutional, statutory and judicial interpretation arguments presented in this case. Even if this Court finds those legal theories wanting, it should reverse the imposition of a penalty.

CONCLUSION

Petitioner-appellant Daniel Taylor Jenkins respectfully submits that, for the foregoing reasons, together with those set forth in his principal brief, the rulings of the Tax Court should be reversed and petitioner's appeal should be granted.

Dated: New York, New York
August 24, 2006

Respectfully submitted,

LAW OFFICE OF FREDERICK R. DETTMER

By: 
Frederick R. Dettmer (FD-2426)
340 Corlies Avenue
Pelham, New York 10803
914-738-8782

Attorney for Petitioner-Appellant
DANIEL TAYLOR JENKINS

CERTIFICATE OF COMPLIANCE
WITH RULE 32(a)

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 3634 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

Frederick R. Dettmer

Frederick R. Dettmer

Attorney for Petitioner-Appellant
Daniel Taylor Jenkins

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On

deponent served the within: **Reply Brief for Petitioner-Appellant**

upon:

Marion E.M. Erickson
U.S. Department of Justice Tax Division
Attorneys for Respondent-Appellee
P.O. Box 502
Ben Franklin Station
Washington, D.C. 20044
(202) 514-9861
marion.e.m.erickson@usdoj.gov

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