

5-1-2016

Religious Arbitration Agreements in Contracts of Adhesion

Jeff Dasteel

Follow this and additional works at: <http://elibrary.law.psu.edu/arbitrationlawreview>



Part of the [Dispute Resolution and Arbitration Commons](#)

Recommended Citation

Jeff Dasteel, *Religious Arbitration Agreements in Contracts of Adhesion*, 8 *Y.B. Arb. & Mediation* 45 (2016).

This Professional Submission is brought to you for free and open access by Penn State Law eLibrary. It has been accepted for inclusion in Arbitration Law Review by an authorized editor of Penn State Law eLibrary. For more information, please contact ram6023@psu.edu.

RELIGIOUS ARBITRATION AGREEMENTS IN CONTRACTS OF ADHESION

By
Jeff Dasteel*

I. INTRODUCTION

Suppose you are making a purchase over the Internet. As a part of the purchase process, you click on a tab that confirms your agreement to the seller's non-negotiable terms and conditions. The terms can be viewed and printed out by clicking on yet another tab.¹ Had you clicked on the terms and conditions tab (most of us do not), you would have found out that by agreeing to the terms and conditions imposed by the seller, you agreed to resolve any disputes between you and the seller in religious arbitration presided over by an arbitrator who must be a respected member of a particular religious community. Should you be required to resolve your dispute in religious arbitration even if you hold sincere religious objections to the procedure?

In a recent series of articles critical of private arbitration, the *New York Times* reported on situations where individuals against their will were required by courts to engage in religious arbitration to resolve secular disputes.² In one case, a court required two former Scientologists to resolve their claims of fraud against the Church of Scientology using a current Scientologist as arbitrator even though current church members are required to consider former church members to be "suppressive persons."³ In another case, a court required a mother suing a faith-based drug rehabilitation organization for the wrongful death of her son to bring her claim in Christian Conciliation before a Christian arbitrator where the governing law would be the Bible and not secular wrongful death law.⁴

A key feature of private arbitration is the ability of parties to design their own procedures to resolve their disputes.⁵ This includes religious arbitration where the parties

* Jeff Dasteel is a lecturer of law at UCLA Law School where he teaches international commercial arbitration and international commercial arbitration advocacy. Jeff Dasteel is a mediator and arbitrator for domestic and international arbitrations and the author of *INTERNATIONAL COMMERCIAL ARBITRATION FOR LAW STUDENTS*, (2d ed. 2014).

¹ See, e.g., *Fagerstrom v. Amazon.com, Inc.*, No. 15-cv-96-BAS-DHB, 2015 U.S. Dist. LEXIS 143295, at *4 (S.D. Cal. Oct. 21, 2015) (explaining that "by placing your order, you agree to Amazon.com's privacy notice and conditions of use" was sufficient notice to bind purchaser to adhesive arbitration agreement).

² Michael Corkery & Jessice Silver-Greenberg, *In Religious Arbitration, Scripture Is The Rule of Law*, N.Y. TIMES (Nov. 2, 2015), http://www.nytimes.com/2015/11/03/business/dealbook/in-religious-arbitration-scripture-is-the-rule-of-law.html?_r=0.

³ Corkery & Silver-Greenberg, *supra* note 2.

⁴ *Id.*

⁵ See *Volt Info Scis. v. Board of Trs.*, 489 U.S. 468, 472 (1989); see also *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003); *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002); *First Options of Chicago, Inc. v. Kaplan*, U.S. 938 (1995); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995).

have agreed to have their disputes resolved based on religious principles before a religious tribunal comprised of arbitrators who are members of the designated religion and who meet specified religious qualifications and standards. Courts in the United States enforce these religious arbitration agreements and the resulting arbitral awards under the Federal Arbitration Act.⁶

Religious arbitration agreements add a sectarian gloss to private arbitration that makes arbitral decisions, which already are subject to very narrow grounds of court review, virtually unreviewable. This is so because courts in the United States defer to religious adjudicatory institutions on ecclesiastical issues so as not to become entangled in religion.⁷ For parties who knowingly and voluntarily enter into religious arbitration agreements, the adjudication of both religious and secular disputes using religious principles and sectarian arbitrators is entirely consistent with the free exercise of religion, and the courts should continue to enforce the resulting religious arbitration awards under the Federal Arbitration Act and analogue state arbitration acts.⁸ Indeed, failure to honor the parties' voluntary agreement to engage in religious arbitration may violate the parties' free exercise of religion.⁹

But what if religious arbitration regarding a secular matter is imposed on one of the parties in a procedurally unconscionable arbitration agreement in opposition to that party's sincerely held religious beliefs? For example, what if a widely used software license in a contract of adhesion imposes religious arbitration on licensees of all faiths and religious beliefs as a condition of use? Or, as hypothesized in the example above, what if a seller of a product imposes religious arbitration on consumers in a contract of adhesion, regardless of the religious beliefs of the customers? This article argues that under the Religious Freedom Restoration Act or the doctrine of abstention parties should not be permitted to use the power of the courts to enforce religious arbitration agreements included in contracts of adhesion when there is a disparity in bargaining power and the weaker party holds a sincere religious belief opposing religious arbitration.¹⁰

II. THE CHARACTERISTICS OF RELIGIOUS ARBITRATION AGREEMENTS

Religious arbitration agreements commonly are entered into between or among members of a particular religion to resolve ecclesiastical or secular disputes before religious arbitral tribunals under religious principles rather than in secular courts or

⁶ See *infra* Section III.B.

⁷ See *infra* Section III.A.

⁸ See *infra* Section III.B.

⁹ See *infra* Section III.B.

¹⁰ Despite the somewhat alarmist tone of the *New York Times* article on religious arbitration, currently there is little evidence of widespread use of religious arbitration in contracts of adhesion. Nonetheless, given the increasing use of religious arbitration and the anecdotal appearance of religious arbitration in contracts of adhesion, there is the need to determine when such arbitration agreements are enforceable.

secular arbitration.¹¹ Religious arbitration agreements are distinctive from secular arbitration in two fundamental respects. First, these agreements typically designate religious texts as the choice of substantive and procedural law, rather than secular procedures and laws. For example, the most popular Christian arbitration rule set in the United States provides that “Conciliators [arbitrators] shall take into consideration any state, federal, or local laws that the parties bring to their attention, but the Holy Scriptures (the Bible) shall be the supreme authority governing every aspect of the conciliation process.”¹² Similarly, Jewish arbitrations held under at least one version of Beth Din rules of religious arbitration provide that “[t]he Beth Din will strive to encourage the parties to resolve disputes according to the compromise or settlement related to Jewish law principles (*p’shara krova l’din*).”¹³ Although not yet well developed in the United States, Islamic arbitration resolves disputes based on fiqh (Islamic jurisprudence).¹⁴

In addition, religious arbitration agreements also typically require the arbitrators to qualify under some form of religious test. For Christian arbitration following the Rules of the Institute for Christian Conciliation, “[a]ll conciliators shall affirm the Statement of Faith contained in the Institute for Christian Conciliation’s Standard of Conduct for Christian Conciliators.”¹⁵ Under one version of the Beth Din Rules of Arbitration, all the arbitrators must be either rabbis or “religiously observant individuals involved in the various professions.”¹⁶ The arbitration procedures also may reflect religious doctrine,¹⁷ church involvement in secular disputes involving members of the

¹¹ See e.g., CTR. FOR CONFLICT RESOLUTION, GUIDELINES FOR CHRISTIAN CONCILIATION 11 (explaining that “generally, Christians are not free to sue other Christians, at least not until they have exhausted the process that Jesus sets forth in Matthew 18:15-20 and 1 Corinthians 6:1-8. God instructs Christians to resolve their disputes within the church itself, with the assistance of other Christians if necessary.”); BETH DIN OF AMERICA, RULES AND PROCEDURES, <http://bethdin.org/wp-content/uploads/2015/07/Rules.pdf> (last visited Dec. 8, 2015) (stating that “the Beth Din of America provides a forum where adherents of Jewish law can seek to have their disputes resolved in a manner consistent with the rules of Jewish law (*halacha*) and with the recognition that many individuals conduct commercial transactions in accordance with the commercial standards of the secular society.”).

¹² *Rules of Procedure*, INST. FOR CHRISTIAN CONCILIATION, r. 4, <http://peacemaker.net/rules-of-procedure/> (last visited Dec. 15, 2015).

¹³ BETH DIN OF AMERICA, *supra* note 11, at 4.

¹⁴ See M. ALI SADIQI, ISLAMIC DISPUTE RESOLUTION IN THE SHADE OF THE AMERICAN COURT HOUSE (Oct. 2010), https://www.academia.edu/11813987/Islamic_Arbitration_in_the_Shade_of_the_American_Court_House; see also *Our Constitution*, ISLAMIC TRIBUNAL, <http://www.islamictribunal.org/our-constitution/> (last visited Dec. 9, 2015) (requiring that “the IT shall apply the principles of KITAB, SUNNAH and Islamic jurisprudence (FIQH) to solve the problems without adherence to any spastic school of thought (MADHAB)”).

¹⁵ *Rules of Procedure*, *supra* note 12, r. 10.

¹⁶ BETH DIN OF AMERICA, *supra* note 11, at 1.

¹⁷ *Rules of Procedure*, *supra* note 12, r. 13 (explaining that “during arbitration, attorneys may represent and speak for their clients” but “will be expected to respect the conciliatory nature of the process and avoid unnecessary advocacy”); BETH DIN OF AMERICA, *supra* note 11, at 5 (stating that “the Beth Din of America

church,¹⁸ or special rules of evidence or procedures that reflect religious doctrine on, e.g., the gender of witnesses or evidentiary standards.¹⁹

Religious arbitration may involve ecclesiastical disputes, secular disputes, or a combination of both. The distinction between an ecclesiastical dispute and a secular dispute is important because, as a matter of First Amendment law, courts will not become involved in ecclesiastical disputes.²⁰ As discussed below, the distinction between ecclesiastical and secular disputes is blurred when the parties elect to resolve secular disputes before a religious tribunal under religious principles.

III. THE INTERSECTION OF RELIGIOUS FREEDOM AND SECULAR ENFORCEMENT OF RELIGIOUS ARBITRATION AGREEMENTS

Resolution of a secular dispute may take place in the civil courts, private secular arbitration or, potentially, religious arbitration. When a secular matter is resolved in religious arbitration, there may be ecclesiastical issues surrounding the means and manner of adjudication. This section discusses the interaction between civil courts and religious arbitration of ecclesiastical and secular matters.

A. The Doctrine of Non-interference in Ecclesiastical Matters

The First Amendment to the Constitution provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”²¹ This has been interpreted to mean that the courts of the United States will not interfere in ecclesiastical disputes.²² Instead, courts will enforce the decisions of the highest church

accepts that Jewish law as understood by the Beth Din will provide the rules of decision and rules of procedure that govern the functioning of the Beth Din or any of its panels.”).

¹⁸ For example, the Institute for Christian Conciliation’s procedures provide:

[T]he conciliators may discuss a case with the church leaders of parties who profess to be Christians. If a party who professes to be a Christian is unwilling to cooperate with the conciliation process or refuses to abide by an agreement reached during mediation, an advisory opinion, or an arbitration decision, the Administrator or the other parties may report the matter to the leaders of that person’s church and request that they actively participate in resolving the dispute

Rules of Procedure, *supra* note 12, r. 17.

¹⁹ See Michael A. Helfand, *Between Law and Religion: Procedural Challenges to Religious Arbitration Awards*, 90 CHI.-KENT L. REV. 141, 145 n.26 (2015) (setting forth that “the focus in this article will be on instances where a rabbinical court applies Jewish law’s rule prohibiting female testimony”).

²⁰ See *infra* Section III.A.

²¹ U.S. CONST. amend. I.

²² *Serbian Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976).

tribunal for religious matters, unless the tribunal's decision violates an important public policy or was obtained through fraud or collusion engaged in for a secular purpose.²³

In *Serbian Orthodox Diocese v. Milivojevich*,²⁴ an Illinois state court invalidated the church's decision to defrock a bishop because "the proceedings of the Mother Church respecting [the bishop] were procedurally and substantively defective under the internal regulations of the Mother Church and were therefore arbitrary and invalid."²⁵ The Supreme Court reversed, holding that "where resolution of the disputes cannot be made without extensive inquiry by civil courts into religious law and polity, the First and Fourteenth Amendments mandate that civil courts shall not disturb the decisions of the highest ecclesiastical tribunal within a church of hierarchical polity, but must accept such decisions as binding on them, in their application to the religious issues of doctrine or polity before them."²⁶

The Supreme Court made clear that courts must accept the decisions of religious tribunals even if they are arbitrary:

We have concluded that, whether or not there is room for "marginal civil court review" under the narrow rubrics of "fraud" or "collusion" when church tribunals act in bad faith for secular purposes, no "arbitrariness" exception -- in the sense of an inquiry whether the decisions of the highest ecclesiastical tribunal of a hierarchical church complied with church laws and regulations -- is consistent with the constitutional mandate that civil courts are bound to accept the decisions of the highest judicatories of a religious organization of hierarchical polity on matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law.²⁷

The Supreme Court reasoned "it is the essence of religious faith that ecclesiastical decisions are reached and are to be accepted as matters of faith, whether or not rational or measurable by objective criteria. Constitutional concepts of due process, involving secular notions of 'fundamental fairness' or impermissible objectives, are therefore hardly relevant to such matters of ecclesiastical cognizance."²⁸

To prevent entanglement between the civil courts and religious adjudicatory processes, the courts therefore are commanded to keep their hands off religious tribunals' decision-making process. Instead, the courts are required to accept whatever decision is achieved by the religious organizations' highest adjudicative body on questions of

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 697.

²⁶ *Id.* at 709.

²⁷ *Milivojevich*, 426 U.S. at 713.

²⁸ *Milivojevich*, 426 U.S. at 713.

“discipline, faith, internal organization, or ecclesiastical rule, custom, or law,” except possibly in cases of fraud or collusion engaged in for a secular purpose. This doctrine of non-interference is mandated by the First and Fourteenth Amendments to preserve freedom of religion and the separation of church and state.

B. Secular Enforcement of Religious Arbitration Agreements Under the Federal Arbitration Act and State Arbitration Laws

The non-interference doctrine has an effect on secular enforcement of religious arbitration agreements. As has been said frequently, the Federal Arbitration Act was enacted to overcome judicial hostility to private arbitration.²⁹ Section 2 of the Federal Arbitration Act declares arbitration agreements “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract” under state law.³⁰ The United States Supreme Court has held that the Federal Arbitration Act preempts state laws that interfere with this mandate.³¹

An important aspect of private arbitration agreements is party autonomy to devise rules of arbitration that may be different from litigation procedures available in the courts. The Supreme Court has repeatedly held that “courts must ‘rigorously enforce’ arbitration agreements according to their terms . . . including terms that ‘specify with whom [the parties] choose to arbitrate their disputes,’ . . . and ‘the rules under which that arbitration will be conducted’”³²

It is in this context that courts have upheld the right of parties to engage in religious arbitration if they so choose.³³ Applying the Federal Arbitration Act, courts have compelled parties to participate in religious arbitration even if the parties’ selected rules of arbitration require prayer as a part of the proceedings in the face of objections from one of the parties,³⁴ require resolution of the dispute under religious, rather than secular principles,³⁵ or require the arbitrators to meet a religious test.³⁶ Indeed, at least

²⁹ *AT&T Mobility, LLC v. Concepcion*, 563 U.S. 333, 339 (2011); *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304, 2308-09 (2013).

³⁰ 9 U.S.C. § 2 (2016).

³¹ *Concepcion*, 563 U.S. at 352.

³² *Italian Colors*, 133 S. Ct. at 2309 (internal citations omitted); *see also* *DIRECTV v. Imburgia*, 136 S. Ct. 463, 468 (2015) (noting freedom of parties to select choice of law in arbitration agreements, the Court stated “[i]n principle, they might choose to have portions of their contract governed by the law of Tibet, the law of pre-revolutionary Russia, or (as is relevant here) the law of California”).

³³ *Matter of Goldman (Pinkesz)*, 977 N.Y.S.2d 667, 667 (N.Y. App. Div. 2013) (“It is well established that New York courts can enforce an agreement to refer a controversy to a Beth Din, a Jewish rabbinical forum, to proceed with religious arbitration[.]”); *Spivey v. Teen Challenge of Florida, Inc.*, 122 So.3d 986, 992 (Fla. Dist. Ct. App. 2013) (noting that presumption in favor of arbitration “extends to private religious arbitration, which is exceedingly common in our pluralistic religious society”).

³⁴ *See Spivey*, 122 So.3d at 995.

³⁵ *Id.*

one court has held that a party's representative can be compelled to participate in such proceedings even if required to engage in religious conduct.³⁷

The principles governing religious arbitration make it distinctive from court proceedings and secular arbitration. These same principles mean that religious arbitrations are all but unreviewable under the Federal Arbitration Act because courts will not review ecclesiastic rules or procedures for fairness.³⁸ For example, suppose one party challenges whether the selected arbitrator met the qualifications required in the parties' arbitration agreement. Under the Federal Arbitration Act, a challenge to the qualifications of an arbitrator can be heard at the time of an application to set aside or confirm an arbitral award.³⁹ However, a court is incompetent in the case of a religious arbitration to determine whether a particular arbitrator met the religious qualifications in the arbitration agreement because such an analysis by the court would be an impermissible entanglement in ecclesiastical matters.⁴⁰ Instead, the decision on whether a particular arbitrator meets the religious qualifications set forth in the religious arbitration agreement is left to the proper appointing authority.⁴¹ As a consequence, a challenge to whether a selected arbitrator met designated requirements is reviewable in the context of secular arbitration, but unreviewable in the context of religious arbitration.⁴²

Similarly, a court has no authority to tell a religious arbitration tribunal that it is or is not conducting itself properly under a religious rule set.⁴³ To do so would require interpretation of the religious rule set and, therefore, entangle the court in ecclesiastical

³⁶ One court enforced an arbitration agreement where:

The Arbitrator must be a Saudi national or a Moslem foreigner chosen amongst the members of the liberal professions or other persons. He may also be chosen amongst state officials after agreement of the authority on which he depends. Should there be several arbitrators, the Chairman must know the Shari'a, commercial laws and the customs in force in the Kingdom.

In re Aramco Servs. Co., No. 01-09-00624-CV, 2010 WL 1241525, at *2 (Tex. App. Mar. 19, 2010).

³⁷ *Spivey*, 122 So.3d 986.

³⁸ *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976).

³⁹ *Aviall, Inc. v. Ryder Sys., Inc.*, 110 F.3d 892, 895 (2d Cir. 1997); *Gulf Guar. Life Ins. Co. v. Connecticut Gen. Life Ins. Co.*, 304 F.3d 476 (5th Cir. 2002); *Michaels v. Mariforum Shipping, S.A.*, 624 F.2d 411, 414 n.4 (2d Cir. 1980); *Old Republic Ins. Co. v. Meadows Indem. Co.*, 870 F. Supp. 210 (N.D. Ill. 1994).

⁴⁰ *Milivojevich*, 426 U.S. 696.

⁴¹ *See In re Aramco Servs. Co.*, 2010 WL 1241525 (court was not proper authority to select arbitrators where parties' agreement required three Muslim arbitrators to be selected under Saudi arbitration rules and Saudi institution was the proper selecting authority).

⁴² Under Section 5 of the Federal Arbitration Act, a court generally has the power to select arbitrators, if need be, when the parties' arbitrator selection mechanism fails. *See, e.g., Pac. Reinsurance Mgmt. Corp. v. Ohio Reinsurance Corp.*, 814 F.2d 1324 (9th Cir. 1987). However, in Religious arbitration, a court would be incompetent to determine whether potential arbitrators met specific religious requirements as provided for in the arbitration agreement.

⁴³ *Milivojevich*, 426 U.S. 696.

issues.⁴⁴ A courts' refusal to become involved in the procedures and decision-making of religious arbitration tribunals and administrative bodies furthers the goal of religious freedom for those who voluntarily enter into religious arbitration agreements and want their secular disputes resolved based on religious principles by arbitrators who themselves share the religious beliefs of the litigants and who agree to adhere to designated religious principles and procedures to resolve the disputes.⁴⁵

Notwithstanding the First Amendment's prohibition against entanglement in religious belief, some courts have contended that religious arbitration awards are reviewable in the same manner as secular arbitration awards under neutral principles of law.⁴⁶ In *Easterly v. Heritage Christian Schools, Inc.*, the court granted an application to compel religious arbitration over the objection of one of the parties.⁴⁷ The court opined:

An arbitrator's decision [in religious arbitration] is subject to being overturned by a reviewing court for 'manifest disregard' of the law, and 'where a governing legal principle is well defined, explicit, and clearly applicable to the case, and where the arbitrator ignored it after it was brought to the arbitrator's attention in a way that assures that the arbitrator knew its controlling nature, his disregard of it is 'manifest.'⁴⁸

The *Easterly* court went on to contend:

The arbitrator's decision will not be the decision of a 'religious tribunal' regarding a religious matter; instead, it will be the resolution of a legal claim that will be subject to judicial review the same as if it had been conducted pursuant to the American Arbitration Association's procedural rules or any other set of secular procedures.⁴⁹

The *Easterly* court's underlying premise that religious arbitration of a secular matter is not the decision of a religious tribunal is incorrect. Religious arbitration is, by definition and intent, a religious tribunal, regardless of whether it adjudicates an ecclesiastical or secular matter. The whole point of religious arbitration is to have a

⁴⁴ *Id.*

⁴⁵ *But see* Helfand, *supra* note 19 (arguing that treating designation of religious law more like any other choice of law would permit a reasonable review of religious arbitration awards).

⁴⁶ *See* Emily A. Belfer, *Judicial Review Of Religious Arbitration--Is There Too Much Or Not Enough?* L. STUDENT CONNECTION (May 10, 2013, 6:53 PM), http://nysbar.com/blogs/lawstudentconnection/2013/05/judicial_review_of_religious_a.html.

⁴⁷ *Easterly v. Heritage Christian Schools, Inc.*, No. 1:08-cv-1714-WTL-TAB, 2009 WL 2750099 (S.D. Ind. Aug. 26, 2009).

⁴⁸ *Easterly*, 2009 WL 2750099 at *3 n.3.

⁴⁹ *Id.*

dispute determined using religious principles and rules by a religious tribunal. Delving into a Christian arbitrator's interpretation of governing Biblical law and whether the Christian arbitrator manifestly disregarded Biblical principles, even in the context of a secular dispute, would require the court to impermissibly entangle itself in religious doctrine. Where a religious arbitration tribunal's decision turns on the application of religious doctrine, the court would have to make a determination of what the religious doctrine is and whether the religious tribunal has properly adhered to the doctrine. This is something the Supreme Court refused to do in *Serbian Orthodox Diocese v. Milivojevich*. Thus, contrary to the *Easterly* court's contention, a court would not be permitted to apply the same kind of review to a religious arbitration award that would be permitted for secular arbitrations.⁵⁰

In *Encore Productions, Inc. v. Promise Keepers*, one party objected to religious arbitration on the basis that the court "should not enforce Christian Conciliation because theological conclusions made in the Conciliation may not be reviewed by the courts."⁵¹ The court rejected this objection as premature, holding that:

A court can, and should, apply neutral principles of law to determine disputed questions that do not implicate religious doctrine. "Neutral principles" are secular legal rules whose application to religious parties or disputes do not entail theological or religious evaluations. I recognize that I must diligently avoid impermissible First Amendment entanglement. However, by employing neutral principles, courts can review decisions of religious bodies within permissible constitutional boundaries. Thus, if cause is later shown to review the Christian Conciliation's arbitration results, a court can do so within the limitations governing review of any arbitration award. This is especially true in this case where the claims do not involve religious determinations or doctrines.⁵²

The *Encore Productions* court noted that "refusal to enforce the parties' arbitration agreement could itself arguably constitute an impermissible entanglement. PK [Promise Keepers] could claim impedance of the practice of religion or creation of an unjust bias against religion, thereby depriving PK of its free exercise rights."⁵³

Although the court's premise that it may apply neutral principles of law to determine disputed questions so long as they do not implicate religious doctrine is true,⁵⁴

⁵⁰ See *Lang v. Levi*, 16 A.3d 980, 989 (Md. Ct. Spec. App. 2011) (Noting that "[t]he addition of the religious context further narrows the [already narrow vacatur] standard to make our intervention nearly impossible.").

⁵¹ *Encore Prods., Inc. v. Promise Keepers*, 53 F. Supp. 2d 1101, 1111 (D. Colo. 1999).

⁵² *Encore Prods.*, 53 F. Supp. 2d at 1112 (citation omitted).

⁵³ *Id.* at 1113.

⁵⁴ See, e.g., *Beth Jacob Teachers Seminary Inc. v. Beis Chinuch Le'Bunos-Bas Melech*, No. 12218/08, 2009 WL 782549, at *3 (N.Y. Sup. Ct. Mar. 24, 2009) (Beth Din arbitration award vacated where "Beth Din's

the court's implication that the scope of such review is the same for review of any arbitration award is plainly untrue. As shown above, a court could not pass on whether an arbitrator met specified religious qualifications, though it would be required to conduct such a review for a secular arbitration. A court could not pass on whether the arbitrators in carrying out their duties manifestly disregarded some tenet of religious law, though it may be required to conduct such a review for a secular arbitration. Finally, a court could not pass on whether principles and procedures of religious adjudication are one-sided or "fair" to the participants, though it may be required to conduct such a review for secular arbitration. In the end, the grounds for review of a religious arbitration award necessarily are narrower than for a secular arbitration award. Indeed, the "hands off" approach to religious arbitration awards is precisely what parties to religious arbitration agreements presumably desire.

IV. ENFORCEMENT OF RELIGIOUS ARBITRATION AGREEMENTS IN CONTRACTS OF ADHESION IN CONTRAVENTION OF THE WEAKER PARTY'S SINCERE RELIGIOUS BELIEFS

A contract of adhesion is a "standardized contract, drafted by the party of superior bargaining strength, that relegates to the subscribing party only the opportunity to adhere to the contract or reject it."⁵⁵ The weaker party has the choice to accept all the terms of the contract or none of them. For an employment situation, the prospective employee may be most concerned about salary and the nature of the employment, but nonetheless must accept all terms that go along with it. For example, an employer may impose a standardized, non-negotiable arbitration agreement on its employees as a condition of employment. Similarly, a consumer may be interested in the character and price of a product. But, a seller may impose a non-negotiable arbitration agreement on the consumer as a condition of purchase. Software licensors may require consumer licensees to agree to arbitration agreements on a take-it-or-leave-it basis as a condition of use by clicking on an "acceptance" button.

Whether or not the party with weaker bargaining power actually reads the entire adhesive agreement, the non-negotiable dispute resolution clauses are ancillary to the subject matter of the transaction and, therefore, even if accepted, do not necessarily represent a truly voluntary agreement to their provisions. That is why both federal and state laws permit challenges to adhesive arbitration agreements when they are procedurally and substantively unconscionable. This section of the article considers enforcement of religious arbitration agreements in contracts of adhesion against the weaker party's religious beliefs.

clerk, who was present during the entire arbitration hearing, was married to an employee of Beth Jacob in conjunction with the fact that the clerk informed the Beth Din of the results of a private telephone conversation he had with his wife during the hearing with respect to one of the issues in dispute which resolved this issue in Beth Jacob's favor creates more than the requisite inference of partiality and bias.").

⁵⁵ Ting v. AT&T, 319 F.3d 1126, 1148 (9th Cir.2003) (citations omitted).

A. Enforcement of Religious Arbitration Agreements in Contracts of Adhesion

It is one thing for a court to enforce voluntary agreements to enter into religious arbitration regarding secular disputes between parties of approximately equal bargaining power. Enforcement of such agreements comports with the Congressional policy favoring agreements to arbitrate and the religious freedom of the litigants to determine the manner in which they arbitrate. It is quite another thing for courts to impose religious arbitration regarding secular disputes on a party to a contract of adhesion whose objection to religious arbitration is based on sincerely held religious belief. In such cases, the question is whether the unwilling party's religious rights trump the facially neutral federal and state laws that otherwise would require arbitration of the dispute.

As discussed above, the Federal Arbitration Act, a facially religion-neutral law, implements a pro-arbitration policy requiring courts to give effect to valid agreements to engage in private arbitration "save upon such grounds as exist at law or in equity for the revocation of any contract."⁵⁶ Relying on this pro-arbitration policy, courts enforce arbitration agreements even when they are included in contracts of adhesion⁵⁷ unless the party objecting to arbitration establishes that the arbitration agreement is both procedurally and substantively unconscionable.⁵⁸

Arbitration agreements imposed on a take-it-or-leave-it basis in a contract of adhesion between parties of unequal bargaining power are considered either to be procedurally unconscionable or to have elements supporting a finding of procedural unconscionability.⁵⁹ Procedural unconscionability reflects the fact that the weaker party's agreement, though not necessarily coerced, lacks the hallmarks of voluntariness. However, procedural unconscionability alone is insufficient to avoid enforcement of an arbitration agreement. Only if the objecting party also establishes substantive unconscionability will the court refuse to enforce the arbitration agreement when it is included in a contract of adhesion.⁶⁰ Generally, substantive unconscionability can be

⁵⁶ 9 U.S.C. § 2 (2016); see *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 68 (2010).

⁵⁷ *E.g.*, *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 346-47 (2011) (upholding arbitration agreement in contract of adhesion and noting "the times in which consumer contracts were anything other than adhesive are long past"); *Rent-A-Center*, 561 U.S. at 63 (upholding adhesive arbitration agreement in employment contract); *Fagerstrom v. Amazon.com, Inc.*, No. 15-cv-96-BAS-DHB, 2015 WL 6393948 at *2 (S.D. Cal. Oct. 21, 2015) ("By placing your order, you agree to Amazon.com's privacy notice and conditions of use" was sufficient notice to bind purchaser to adhesive arbitration agreement).

⁵⁸ *Loewen v. Lyft, Inc.*, No. 15-cv-01159-EDL, 2015 WL 5440729 at *7-9 (N.D. Cal. Sept. 15, 2015) (finding that although arbitration agreement was somewhat procedurally unconscionable because it was included in a contract of adhesion, it was not substantively unconscionable and, therefore, was enforceable).

⁵⁹ See *Pokorny v. Quixtar, Inc.*, 601 F.3d 987, 996 (9th Cir. 2010); *Aral v. EarthLink, Inc.*, 36 Cal. Rptr. 3d 229 (Cal. Ct. App. 2005) (clickwrap agreement presented on a take-it-or-leave-it basis procedurally unconscionable); *Merkin v. Vonage Am. Inc.*, 2014 WL 457942, at *17 (C.D. Cal. Feb. 3, 2014) ("Such 'take-it-or-leave-it' contracts of adhesion are frequently found to be oppressive under California law.").

⁶⁰ See *supra* text accompanying note 59; *Ashbey v. Archstone Property Management, Inc.*, 612 F. App'x 430, 432 (9th Cir. 2015) (arbitration agreement in employment contract upheld without regard to whether it was procedurally unconscionable because employee failed to establish that arbitration agreement was

shown by whether the terms of the arbitration agreement are one-sided and unfair to the weaker party.

It is here that the Federal Arbitration Act's facially neutral law regarding enforcement of arbitration agreements breaks down when applied to religious arbitration agreements because parties opposing religious arbitration on religious grounds are severely handicapped when attempting to prove that a particular set of religious arbitration rules or procedures is substantively unconscionable. For example, in *Garcia v. Church of Scientology Flag Service Organization, Inc.*,⁶¹ the Garcias, former members of the Church of Scientology, filed an action in federal court alleging the Church of Scientology fraudulently induced them to make certain donations and other payments. The Church of Scientology filed an application to compel arbitration based on an arbitration agreement included in member services contracts that the Garcias entered into when they were committed Scientologists. It was undisputed that the arbitration agreements were contracts of adhesion. If the Garcias wished to participate in Church of Scientology services, they were required to sign the religious arbitration agreements on a take-it-or-leave-it basis.

The court determined that under neutral provisions of applicable Florida contract law, the arbitration agreement could be voided only if it were determined to be both procedurally and substantively unconscionable. The court rejected the Garcias' argument that merely because the agreement was the result of a contract of adhesion it was procedurally unconscionable. The court ruled that under Florida law even though the agreement was a contract of adhesion, it was not procedurally unconscionable because there was no surprise (the Garcias were well aware of the terms of the contract) and the arbitration agreement generally informed the Garcias of the arbitration agreement's scope and procedures.⁶² Although this conclusion may be correct under Florida state law, as shown above, commonly the fact that an arbitration agreement is the product of adhesion at least makes it somewhat procedurally unconscionable.

Having found no procedural unconscionability, the court need not have addressed substantive unconscionability. Nonetheless, the court did so. The court determined that the arbitration agreement was not substantively unconscionable. It was undisputed that pursuant to the terms of the religious arbitration agreement all arbitrators must be Scientologists in good standing.⁶³ The Garcias complained that under Scientology doctrine, Scientologists in good standing must dissociate themselves from former Scientologists, such as the Garcias, because they are labeled "suppressive

substantively unconscionable); *Fagerstrom*, 2015 WL 6393948 at *49 (enforcing agreement to arbitrate in consumer contract of adhesion where assent is determined by clicking on online tab); *CarMax Auto Superstores California LLC v. Hernandez*, 94 F. Supp. 3d 1078, 1127 (C.D. Cal. 2015) (arbitration agreement imposed on employee as contract of adhesion was procedurally unconscionable, but was enforced because it was not substantively unconscionable).

⁶¹ *Garcia v. Church of Scientology Flag Serv. Org., Inc.*, No. 8:12-cv-220-T-27TBM, 2015 WL 10844160 (M.D. Fla. Mar. 13, 2015).

⁶² *Garcia*, 2015 WL 10844160.

⁶³ *Id.* at *5-10.

persons.”⁶⁴ Therefore, the Garcias complained, they could not possibly get a fair and neutral arbitrator. The court rejected this ground on the basis that the First Amendment prohibited the court from examining church doctrine to determine whether a fair hearing could be had before a panel of Scientologists:

As compelling as Plaintiffs’ argument might otherwise be, the First Amendment prohibits consideration of this contention, since it necessarily would require an analysis and interpretation of Scientology doctrine. That would constitute a prohibited intrusion into religious doctrine, discipline, faith, and ecclesiastical rule, custom, or law by the court. Indeed, Plaintiffs earlier acknowledged that “[t]he hostility of any Scientologists on [the arbitration panel] is . . . church doctrine.” Accordingly, the court has no jurisdiction to consider this argument.⁶⁵

Because the burden of proof was on the Garcias to establish substantive unconscionability and they could not do so without entangling the court in church doctrine, the religious arbitration agreement was determined not be substantively unconscionable. Having determined that the arbitration agreement was neither procedurally nor substantively unconscionable, the court compelled religious arbitration of all disputes between the Garcias and the Church of Scientology.

The *Garcia* case purports to rely on neutral principles of state contract law to determine procedural and substantive unconscionability. It does not in fact do so. Because the court could not (and should not) become entangled in the religious doctrines, rules and procedures of the Church of Scientology, the court could make no ruling on whether the Church of Scientology’s procedures are substantively unconscionable. In this case, the court was barred from finding that a Church of Scientology procedural requirement for all arbitrators to be members of the Church in good standing was procedurally unconscionable when engaged in arbitration with a former member of the Church because such a finding would require examination of Church doctrine, rules and procedures.

Even if an arbitrator who is a member of the Church of Scientology in good standing is required by church doctrine to have an adjudicatory bias against former church members, there is nothing a court could do about it when the facially neutral Federal Arbitration Act encounters religious doctrine. Indeed, even after arbitration, a litigant would have considerable difficulty challenging an award based on bias because any such finding would require the court to investigate the Church of Scientology’s doctrine concerning adjudication of claims with “suppressives.” Therefore, even if the court had found the *Garcia* arbitration agreement to be procedurally unconscionable under Florida law, the court nonetheless would have enforced the religious arbitration agreement because the Garcias were disabled from proving substantive unconscionability.

⁶⁴ *Id.* at *11.

⁶⁵ *Id.* (citations omitted).

Had the Church of Scientology been a secular organization unable to claim the protections of the First Amendment, there is little doubt but that the arbitrator selection clause in the Garcia's arbitration agreement would have been seen as problematic. For example, in *Zaborowski v. MNH Government Services, Inc.*,⁶⁶ an arbitration agreement in a contract of adhesion called for one party to select the arbitrators. The court found the agreement to be substantively unconscionable even though the arbitrators were required to be licensed to practice law and neutral. The court found that granting "one party near-unfettered discretion to select its three preferred arbitrators is 'unjustifiably one-sided'."⁶⁷ In *Garcia*, the Church of Scientology could mandate that the arbitrator be a member of its organization and, thus, bound by that organization's ecclesiastical rules. That kind of power over selection is one-sided in the secular context, but unreviewable in the context of religious arbitration.

Moreover, as has been made clear in secular arbitration, a party is not required to provide the very difficult proof of actual arbitrator bias, only the appearance of bias.⁶⁸ Here, unless the Scientologist-arbitrator makes some demonstrated outward display of bias, the Garcias probably could not show actual bias. For the same reasons the trial court refused on non-interference grounds to consider the "suppressive" doctrine at the front end of the arbitration, it must also refuse to consider that doctrine at the back end of the arbitration. If this had been a secular arbitration where the arbitrator was required to be a member of a secular organization and the rules of that organization required the arbitrator to consider one of the parties to be "suppressive," the court would have little trouble in at least considering substantive unconscionability. However, in the context of religious arbitration, it cannot do so on the grounds of non-interference with religion.

In *Spivey v. Teen Challenge of Florida, Inc.*,⁶⁹ another Florida court compelled religious arbitration where the arbitration agreement was included in a contract of adhesion. In *Spivey*, a nineteen-year-old man signed an agreement to enter a yearlong faith-based substance abuse program. As part of that program, the young man was required to sign a non-negotiable arbitration agreement calling for arbitration of all disputes under Christian Conciliation. His time in the program was unsuccessful, and he was released from the program within a few months. Following his release, the young man died of a drug overdose. The young man's mother brought an action in state court for wrongful death against Teen Challenge on behalf of the young man's estate. In opposition to Teen Challenge's application to compel arbitration, the young man's mother argued that her religious rights are violated if she is required to participate in religious arbitration because "the Rules of Procedure for Christian Conciliation are imbued with religious themes and require religious practices" and the "arbitration process

⁶⁶ *Zabrowski v. MNH Gov't Servs.*, 601 F. App'x 461, 463 (9th Cir. 2014), *cert. granted* (case settled before oral argument).

⁶⁷ *Id.* at 463.

⁶⁸ *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 149 (1968) ("arbitrators [must] disclose to the parties any dealings that might create an impression of possible bias.").

⁶⁹ *Spivey v. Teen Challenge of Florida, Inc.*, 122 So.3d 986, 988 (Fla. Dist. Ct. App. 2013).

. . . invokes religious principles and (at least facially) involves religious acts such as prayer.”⁷⁰

The court rejected these challenges on the basis that the young man had voluntarily agreed to resolve all future disputes through religious arbitration and that Ms. Spivey, as his representative, was bound by her deceased son’s agreement to engage in religious arbitration.⁷¹ The court then noted that courts frequently uphold religious arbitration agreements and that many of the rules of Christian Conciliation are no different from their secular counterparts.⁷² Accordingly, Florida’s First District Court of Appeal confirmed the trial court’s order compelling arbitration:

We find nothing in Florida or federal law suggesting that the trial court's decision to require arbitration of the wrongful death claim under the Teen Challenge mediation/arbitration agreement and its Rules was other than wholly proper. Indeed, had the trial court determined that the arbitration agreement was unenforceable due to its religious nature, its action “could itself arguably constitute an impermissible entanglement” under religion clause jurisprudence.⁷³

The court thus determined that because the plaintiff’s nineteen year old son had agreed to religious arbitration as a condition to entering into the Teen Challenge program, the plaintiff, as her son’s representative in a wrongful death action, was bound to religious arbitration regardless of her personal religious beliefs and regardless of the fact that the arbitration agreement had been included in a contract of adhesion.⁷⁴

What these cases have in common is that the application of neutral principles of law does not work to protect the religious freedom of the litigants in contracts of adhesion. As noted above, even if the *Garcia* court had found the arbitration agreement to be procedurally unconscionable, it still would have been required under neutral principles of law to compel the Garcias to engage in religious arbitration because the Garcias were disabled from proving substantive unconscionability.⁷⁵ In *Spivey v. Teen Challenge*, the court disregarded the religious rights of the decedent’s representative and enforced a pre-dispute contract of adhesion to engage in religious arbitration. As discussed below, these outcomes, though in compliance with neutral principles of law, run roughshod over the objecting parties’ freedom of religion.

⁷⁰ *Id.* at 992.

⁷¹ *Id.* at 993.

⁷² *Id.*

⁷³ *Spivey*, 122 So.3d at 995.

⁷⁴ See also *Easterly v. Heritage Christian Schs., Inc.*, No. 1:08-cv-1714-WTL-TAB, 2009 WL 2750099, at *10 (S.D. Ind. Aug. 26, 2009) (rejecting argument that “[t]he agreement to biblically-based arbitration in Ms. Easterly’s teaching contract cannot be enforced because the processes are structurally biased and procedurally inadequate.”).

⁷⁵ See, e.g., *CarMax Auto Superstores Cal. LLC v. Hernandez*, 94 F. Supp. 3d 1078 (C.D. Cal. 2015) (arbitration agreement imposed on employee as contract of adhesion was procedurally unconscionable, but was enforced because it was not substantively unconscionable).

B. Possible Solutions to the Problem off Religious Arbitration in Contracts of Adhesion.

This article suggests two possible solutions to protect the religious freedom of parties opposing religious arbitration in contracts of adhesion. First, there is an argument that a court could apply the Religious Freedom Restoration Act (RFRA) to establish a defense to an application to compel arbitration. Because there is some doubt as to whether an order compelling arbitration meets the state action requirement of the RFRA, a second argument is that where there is a sincere religious objection to religious arbitration in a contract of adhesion and the court is prevented from ruling on that objection due to the non-interference doctrine, the court should abstain from ruling on the application to compel arbitration.

1. Using the RFRA to Consider Whether a Party Has a Sincere Religious Objection to Religious Arbitration

According to the Supreme Court, “Congress enacted RFRA in 1993 in order to provide very broad protection for religious liberty.”⁷⁶ The Supreme Court noted further that the “Congress went far beyond what this Court has held is constitutionally required.”⁷⁷ The Religious Freedom Restoration Act itself declares that it was enacted because “laws ‘neutral’ toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise.”⁷⁸ Consequently, the Supreme Court has held that the RFRA “prohibits the Federal Government from taking any action that substantially burdens the exercise of religion unless that action constitutes the least restrictive means of serving a compelling government interest.”⁷⁹

The RFRA provides that “Government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.”⁸⁰ The Supreme Court has interpreted this to mean that “[i]f the Government substantially burdens a person’s exercise of religion, under the Act that person is entitled to an exemption from the rule unless the Government ‘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.’”⁸¹

The first question is whether by compelling arbitration a court is engaged in government action that substantially burdens an individual’s religious freedom when the federal or state court requires that individual to resolve secular disputes in a religious,

⁷⁶ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2760 (2014).

⁷⁷ *Id.* at 2767.

⁷⁸ 42 U.S.C. § 2000bb(a)(2) (2016).

⁷⁹ *Hobby Lobby*, 134 S. Ct. at 2759.

⁸⁰ 42 U.S.C. § 2000bb-1(a).

⁸¹ *Hobby Lobby*, 134 S. Ct. at 2761.

rather than a secular forum. This question requires a determination of whether arbitration, as a creature of private contract, becomes state action when enforced under the FAA or other state acts. Due to the private nature of arbitration, the court's enforcement is not obviously state action, though some legal scholars make good arguments in support of the state action designation.⁸²

In *Lee v. Weisman*, the Supreme Court held that prayer in public schools violates the Establishment clause because “[i]t is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which ‘establishes a [state] religion or religious faith, or tends to do so.’”⁸³ As discussed above, the key features of religious arbitration include participation in the exercise of religious doctrine and procedures. When a court orders a party to engage in religious arbitration, the court is requiring the party to participate in religion or its exercise, thereby substantially burdening that person's free exercise of religion.⁸⁴ Absent consent of the parties, there can be little doubt that a court could not order objecting parties to engage in religious arbitration.⁸⁵ When a court orders parties to engage in religious arbitration, that order should be considered “state action” sufficient to satisfy the state action requirements of the RFRA or merely enforcement of private rights. The remainder of this section assumes that a court would determine that the state action requirement is satisfied under these circumstances.

Application of the RFRA to religious arbitration requires the presence of a facially neutral law that burdens religion. The Federal Arbitration Act is a facially neutral law that enforces agreements to arbitrate disputes. Section 2 of the Federal Arbitration Act declares arbitration agreements “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract” under state law.⁸⁶ As shown above, this facially neutral law is applied to enforce religious arbitration agreements on the presumption that the parties to religious arbitration have given their consent to such procedures. As a safeguard to Section 2's power to compel arbitration, parties can avoid arbitration if they can show that the arbitration agreement is void under state law grounds. In that regard, as discussed above, a court will not enforce

⁸² See Michael A. Helfand, *Arbitration's Counter-Narrative: The Religious Arbitration Paradigm*, 124 YALE L. J. 2994, 3037 n.184 (2015) (surveying scholarship contending that “arbitration ought to be considered state action because of the degree of the government's support of and entanglement with commercial arbitration”).

⁸³ *Lee v. Weisman*, 505 U.S. 577, 587 (1992) (citation omitted); see also *Hazle v. Crofot*, 727 F.3d 983, 986 (9th Cir. 2013) (it is “‘uncommonly well-settled case law’ . . . that the First Amendment is violated when the state coerces an individual to attend a religion-based drug or alcohol treatment program” as a condition of parole) (citing *Inouye v. Kemna*, 504 F.3d 705, 712, 716 (9th Cir. 2007)).

⁸⁴ *Lee*, 505 U.S. at 587.

⁸⁵ *Encore Productions, Inc. v. Promise Keepers*, 53 F. Supp. 2d 1101, 1112-13 (D. Colo. 1999) (reasoning that “[a]lthough it may not be proper for a district court to refer civil issues to a religious tribunal in the first instance,” plaintiff's free exercise challenge was precluded because plaintiff had agreed to religious arbitration).

⁸⁶ 9 U.S.C. § 2 (2016).

an arbitration agreement if a party can show that it is both procedurally and substantively unconscionable. However, this exception to FAA Section 2 does not apply to religious arbitration agreements where a party bases its substantive unconscionability objection on the religiosity of the rules and procedures included in the arbitration agreement.

The unconscionability defense under Section 2 of the FAA does not work for religious objections to religious arbitration agreements because the non-interference doctrine largely disables the objecting party from showing substantive unconscionability to religious arbitration. Thus, even where the indicia of consent are weak, under existing case law courts nonetheless have forced parties to engage in religious arbitration. In contrast, under an adhesive secular arbitration agreement, a party would be permitted, for example, to establish that the arbitrator qualifications or rules set forth in the arbitration agreement make the agreement substantively unconscionable because they are one-sided.⁸⁷ However, as seen in the *Garcia* case, a party is not entitled to the same opportunity under religious arbitration even where there the arbitrator qualifications on their face raise a serious issue of substantive unconscionability. Thus, not only is the facially neutral Federal Arbitration Act burdensome to the free exercise of religion, because of the non-interference doctrine, it actually has the effect of only burdening the free exercise of religion.

To remedy this burden on freedom of religion, the RFRA provides an additional defense to Section 2 of the Federal Arbitration Act where this facially neutral law requires religious arbitration in contracts of adhesion or otherwise procedurally unconscionable circumstances against the religious beliefs of the weaker party. This defense is available under the RFRA unless it can be shown that the government has a compelling interest to require a party to engage in religious arbitration.

In *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*,⁸⁸ the Supreme Court ruled that the “RFRA requires the Government 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.”⁸⁹ In *Gonzales*, members of a religion sought a preliminary injunction against enforcement of the Controlled Substances Act with regard to certain plants with hallucinogenic qualities that were banned under the Act. The members of the religion used the plants to make sacramental tea. The Court acknowledged that the government had an interest in banning the plant due to its harmful effects, but declared that “[u]nder the more focused inquiry required by RFRA and the compelling interest test, the Government’s mere invocation of the general characteristics of Schedule I substances, as set forth in the Controlled Substances Act, cannot carry the day.”⁹⁰ The Court went on to note that the Controlled Substances Act allowed for exceptions,

⁸⁷ See, e.g., *Net Global Marketing, Inc. v. Dialtone, Inc.*, 217 F. App’x 598 (9th Cir. 2007) (one-sided arbitration agreement is substantively unconscionable).

⁸⁸ *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006).

⁸⁹ *Id.* at 430-31.

⁹⁰ *Id.* at 432.

including exceptions for religious use.⁹¹ Accordingly, the Court upheld the right under the RFRA to a preliminary injunction barring application of the Controlled Substances Act to the members of this religion.⁹²

There can be no compelling interest to enforce Section 2 of the Federal Arbitration Act to require parties with a sincere religious objection to engage in religious arbitration when religious arbitration is imposed on them in a contract of adhesion. Parties to an adhesive religious arbitration agreement cannot fully take advantage of Section 2's neutral state law exception to enforcement because they are disabled under the non-interference doctrine from proving substantive unconscionability of religious rules and procedures even when, as was the case in *Garcia v. Scientology*, the arbitrator qualifications mandated by the Scientology arbitration system threatened to treat former members, such as the Garcias, differentially from members of the Church. The Garcias were not permitted to provide evidence of substantive unconscionability because it is impermissible for a court to inquire into the religious qualifications of arbitrators in religious arbitration, the religious procedures they may use, or the religious principles on which they are bound to make a decision. Had the arbitration agreement not invoked religious principles and procedures, the Garcias would have been able to take full advantage of the state law exception to Section 2. If Scientology were a secular organization and not a religion, the Garcias would have been permitted to challenge as substantively unconscionable the requirement that the arbitrator be a member of that organization where current members were required by the organization to treat former members differentially.

The state law contract exception to Section 2 of the Federal Arbitration Act is designed to safeguard against one's loss of the right to litigate disputes in secular courts where the arbitration agreement waiving such rights lacks procedural fairness and includes substantively unconscionable provisions. The government can have no compelling interest to eliminate that safeguard to Section 2 solely with respect to parties who object to the religious provisions in religious arbitration agreements that have been imposed on them by a party with superior bargaining power and have the hallmarks of procedural unconscionability.

Without a compelling government interest in imposing religious arbitration on an objecting party, there is no need to determine if compelling religious arbitration is the least restrictive alternative as otherwise would be required under the RFRA, whatever that might be. Accordingly, under the plain language of the RFRA, "[a] person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government."⁹³

Finally, "[t]o qualify for RFRA's protection, an asserted belief must be 'sincere.'⁹⁴ Thus, a "pretextual assertion of a religious belief in order to obtain an

⁹¹ *Id.*

⁹² *Id.* at 437.

⁹³ 42 U.S.C. § 2000bb-1(c) (2016).

⁹⁴ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2774 n.28 (2014).

exemption for financial reasons would fail.”⁹⁵ Whether a party holds a sincere religious objection is a matter for the courts to decide. The *Hobby Lobby* court cited with approval *United States v. Quaintance*, in which the defendants sought to avoid criminal prosecution for possession and sale of marijuana under the RFRA based on their adherence to the principles of the “Church of Cognizance, which teaches that marijuana is a deity and sacrament.”⁹⁶ The Court of Appeals in *Quaintance* rejected the defendants’ appeal of their conviction and found that the defendants could not rely on the RFRA because their objection to the criminal statute was not based on a sincere religious belief:

After taking extensive evidence, the district court denied the motion to dismiss. It held, as a matter of law, that the Quaintances’ professed beliefs are not religious but secular. In addition and in any event, the district court found, as a matter of fact, that the Quaintances don’t sincerely hold the religious beliefs they claim to hold, but instead seek to use the cover of religion to pursue secular drug trafficking activities.⁹⁷

The *Quaintance* court assessed the religiosity of the defendants’ asserted religious belief system using a five-factor test:

ultimate ideas, metaphysical beliefs, moral or ethical system, comprehensiveness of beliefs, and accoutrements of religion. The last factor includes ten subfactors: founder, teacher, or prophet; important writings; gathering places; keepers of knowledge; ceremonies and rituals; structure or organization; holidays; diet or fasting; appearance and clothing; and propagation.⁹⁸

Thus, a court can assess whether a party asserts the RFRA as a defense to compelling religious arbitration based on that party’s sincere religious beliefs as a matter of factual inquiry, something courts are able to do and have done with some frequency in the past.⁹⁹

Had the RFRA been interposed as a defense, the outcomes of cases with facts similar to *Spivey v. Teen Challenge* and *Garcia v. Scientology* might have come out differently, depending on the applicable state law of procedural unconscionability. In *Garcia v. Scientology*, where the plaintiff could not establish substantive unconscionability due to the non-interference doctrine, there is a clear burdening of the Garcias’ religious rights by requiring them to engage in religious arbitration under a religious regime they rejected. Assuming the Garcias could establish their sincere

⁹⁵ *Id.*

⁹⁶ *See id.*; *cf.*, e.g., *United States v. Quaintance*, 608 F.3d 717, 718–19 (10th Cir. 2010).

⁹⁷ *Quaintance*, 608 F.3d at 718.

⁹⁸ *Id.* at 719 (citation omitted).

⁹⁹ Ben Adams & Cynthia Barmore, *Questioning Sincerity: The Role Of the Courts After Hobby Lobby*, 67 STAN. L. REV. ONLINE 59 (2014).

religious objection to religious arbitration under Scientology's rules (for which their abandonment of the Scientology church appears to be good evidence), the government has no compelling reason to burden the Garcias' religious beliefs by requiring them to engage in religious arbitration in a contract of adhesion, especially in states that declare contracts of adhesion to be procedurally unconscionable and oppressive on their face.¹⁰⁰

In *Spivey v. Teen Challenge*, where the court ruled that the objecting plaintiff's representative must stand in the shoes of the decedent and, therefore, was bound by the religious arbitration agreement that had been included in a contract of adhesion, there was a burdening of the representative's religious rights both as an individual and as the authorized representative of the deceased. Standing in the shoes of the decedent, the representative must have the right to raise all defenses available to the deceased, including the RFRA. If the decedent's representative's objection to religious arbitration was based on sincere religious beliefs attributable to the deceased (a question of fact subject to proof), the government lacks a compelling interest to ignore those beliefs and enforce a pre-dispute religious arbitration agreement in a contract of adhesion.

2. *Abstention*

Due to the state action requirement, it is uncertain whether a court properly could apply the RFRA to applications to compel arbitration under the FAA or analogue state laws. If a party resisting religious arbitration on the basis of religious grounds cannot use the RFRA, then courts should refuse to compel arbitration where resolution of a religious question is required to determine the outcome.

Under the abstention doctrine, courts decline to take action when presented with a religious question.¹⁰¹ Here, if a court is prohibited from considering state law grounds to refuse enforcement of an arbitration agreement because to do so would require the court to make a religious question determination, the court should refuse to make any determination at all on that ground. If a party to a contract of adhesion contends that the arbitration agreement is unconscionable on religious grounds, the court cannot make a ruling on unconscionability. Thus, in *Garcia*, if the determination of whether to grant Scientology's application to compel arbitration turned on whether the religious arbitration agreement was substantively unconscionability, and that determination required determination of an ecclesiastical issue, then the court should refrain from both making the determination of substantive unconscionability and abstain from deciding the motion to compel arbitration.

Refusing to make any decision on an application to compel arbitration under these circumstances is different from using the abstention doctrine to uphold the ecclesiastical decisions of religious tribunals. Here, religious tribunals are not making decisions. Instead, it is the court that is making a decision to grant or deny an application to compel

¹⁰⁰ The Garcias entered into the adhesive arbitration agreement when they were committed Scientologists. However, the RFRA does not on its face require consideration of whether government action would have burdened religion at some time in the past. It appears to inquire only whether government action (here, compelling arbitration) would burden the exercise of religion now.

¹⁰¹ See *supra* Section III.A.

arbitration. To make its decision it must consider both procedural and substantive unconscionability. If the court is prevented from making a decision on substantive unconscionability because of the non-interference doctrine, it cannot make a decision on the state law defense under Section 2 of the Federal Arbitration Act. Rather than decide that the court doctrine of non-interference means the party opposing arbitration has failed to meet its burden of proof, the court should decide that the abstention doctrine means the court cannot rule one way or the other on the application to compel arbitration when the objection is based on a good faith religious objection.

As discussed above, the court is in a position to determine as a matter of fact whether the religious objection is made as a matter of good faith belief or as a matter of expediency. If the religious objection is made as a matter of good faith belief, then the court should not use its power to force an unwilling person to engage in religious arbitration when there are indicia that the original agreement was not truly voluntary. Thus, when procedural unconscionability is established for a contract of adhesion and the court ordinarily must then make a determination of substantive unconscionability, the court should decline to do so when a religious question is presented and simply abstain from ruling on the application to compel arbitration. This result maintains the separation of church and state and maintains the doctrine of non-entanglement in religious questions.

VI. THE CONSEQUENCES OF SINCERE RELIGIOUS OBJECTIONS TO ENFORCEMENT OF RELIGIOUS ARBITRATION AGREEMENTS

Application of the RFRA to religious arbitration agreements under the FAA does not eliminate religious arbitration. The effects of the RFRA on the FAA only apply to the arbitration of secular disputes because ecclesiastical disputes already are protected under the First and Fourteenth Amendments' non-interference doctrine. Under that doctrine, the parties cannot object to determinations of ecclesiastical matters made by appropriate religious institutions. As noted above, courts will not become entangled in ecclesiastical disputes and will enforce whatever outcome is reached by the highest ecclesiastical authority.

Application of the RFRA to religious arbitration agreements under the FAA also does not affect the right of parties to voluntarily submit their disputes to religious arbitration. Voluntary religious arbitration agreements should be enforced under Section 2 of the FAA even though the grounds to review any arbitral award may be narrower than for secular arbitration agreements. This is so because the parties' agreement lacks procedural unconscionability. Indeed, as noted above, at least two courts opined that failure to enforce the parties' voluntary agreement to resolve disputes in religious arbitration burdens their free exercise of religion.

The RFRA does not apply to religious arbitration agreements where a party's objection is not based on sincere religious belief. This can come about in two ways. First, the objection to arbitration may have nothing to do with the religiosity of the arbitration proceedings. In that event, the objecting party has full access to the state law defense to Section 2 of the Federal Arbitration Act. For example, in *Graves v. George*

*Fox University*¹⁰² the plaintiff brought an action in federal court based on his termination from employment as an admissions counselor at George Fox University. The University moved to compel arbitration based on a Christian Conciliation arbitration clause in an employee handbook. The plaintiff objected to arbitration on the basis that the arbitration agreement was procedurally and substantively unconscionable. The claim of procedural unconscionability was based on the fact that the agreement was part of a contract of adhesion and “hidden” in an employee handbook. The claim of substantive unconscionability was based on what were asserted to be one-sided provisions in the arbitration agreement. The plaintiff did not raise religious objections to the religious arbitration agreement.¹⁰³ The court rejected the claims of unconscionability and ordered religious arbitration.¹⁰⁴

Second, the objecting party may be unable to establish that its religious objections are sincere. The party’s objection to religious arbitration may be a pretextual attempt to find a more favorable forum. Because sincerity of religious belief is required to apply the RFRA, the RFRA defense would not be available under that circumstance.

The RFRA should apply to prevent court enforcement of religious arbitration agreements regarding secular disputes where the objecting party’s ability to make a state law objection to Section 2 enforcement is burdened by the doctrine of non-interference. If a secular employer in a contract of adhesion requires a Jewish employee to agree to Christian religious arbitration as a condition of employment, it would be a violation of the Jewish employee’s religious freedom under the RFRA for a court to compel that employee to engage in Christian arbitration over his or her sincere religious objection.¹⁰⁵

In addition, as hypothesized at the beginning of this article, if a company in a consumer contract of adhesion required its Christian customers to engage in Islamic arbitration, it would be a violation of the Christian customers’ religious freedom under the RFRA for a court to require the Christian customer to settle disputes with the company in Islamic arbitration over the Christian customer’s sincere religious objection.¹⁰⁶

¹⁰² *Graves v. George Fox University*, No. CV06-395-S-EJL, 2007 WL 2363372 (D. Idaho Aug. 16, 2007).

¹⁰³ Employees subjected to religious arbitration in a contract of adhesion may have a defense under Title VII of the Civil Rights Act of 1964, which, according to the Equal Employment Opportunity Commission, prohibits covered employers from imposing religious programs on employees as a condition of employment. See *Questions and Answers: Religious Discrimination in the Workplace*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N (Jan. 31, 2011), http://www.eeoc.gov/policy/docs/qanda_religion.html (last visited Jan. 3, 2016). However, Title VII, by its terms, does not apply “to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.” 42 U.S.C. § 2000(e)(1) (2016).

¹⁰⁴ *Graves*, 2007 WL 2363372.

¹⁰⁵ As noted above, such an arbitration agreement also likely violates Title VII barring discrimination in conditions of employment based on religion. See *supra* note 103.

¹⁰⁶ It is, however, possible to waive this objection by waiting until after arbitration is held to raise the objection. Cf. *Lieberman v. Lieberman*, 566 N.Y.S.2d 490 (N.Y. Sup. Ct. 1991) (confirming award rendered through religious arbitration despite objecting party’s allegation that arbitration agreement was coerced where objection was not raised until after conclusion of the arbitration proceedings.)

VII. CONCLUSION

The Federal Arbitration Act requires courts to compel parties to arbitrate disputes that are subject to a valid arbitration agreement. However, under the non-interference doctrine, when determining validity of the arbitration agreements, the First and Fourteenth Amendments prevent parties to religious arbitration agreements from establishing grounds to revoke the agreements or from objecting to the fairness of the religious rules and procedures used in religious arbitration even though these same grounds would be available to challenge the fairness of rules and procedures for secular arbitration agreements. The Religious Freedom Restoration Act cures this defect so that, absent waiver, a court cannot compel a party to engage in religious arbitration of secular disputes in procedurally unconscionable contracts of adhesion against the weaker party's sincerely held religious beliefs.