Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA): An Overview

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Summary

The constitutional standard by which laws that burden an individual's First Amendment right to exercise his religion are measured has evolved over the last half-century through U.S. Supreme Court decisions and legislative action by Congress in response to those decisions. After decades of requiring that laws burdening the free exercise of religion be subject to heightened judicial review, the Court reinterpreted that constitutional standard in the 1990 case of *Employment Division v. Smith*, deciding that the First Amendment provided narrower protection than the Court had previously recognized. In *Smith*, the Court held that the strict scrutiny standard of review, which required a compelling governmental interest achieved by the least restrictive means, did not apply to neutral laws that applied to society generally. Under *Smith*, heightened review (sometimes referred to as strict scrutiny) applies only to cases that involve religious claims for exemption in programs that allow for individualized assessments, cases that involve deliberate governmental targeting of religion, or cases in which a Free Exercise claim is joined with another constitutional claim.

A constitutional standard is a baseline of protection, but Congress may raise that standard to provide heightened protection by statute. After *Smith* narrowed the protections provided under the Constitution, Congress sought to reinstate the heightened standard of review statutorily. Congress enacted legislation that created a statutory standard of review that would apply, first through the Religious Freedom Restoration Act of 1993 (RFRA; P.L. 103-141), which applied heightened judicial review to all federal, state, and local government actions. In the 1997 case of *City of Boerne v. Flores*, the Court struck down as unconstitutional portions of RFRA that applied to state and local government actions. Congress responded later through the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA; P.L. 106-274), which applies heightened review to state and local government actions in limited types of cases.

The heightened standard of review provided by RLUIPA applies to state and local government actions that (1) restrict religious exercise through zoning laws, or (2) restrict the religious exercise of institutionalized persons. In order to avoid federal interference with state governments, which had proved fatal to portions of RFRA, Congress further limited the application of heightened review provided by RLUIPA to certain instances within these two categories of state and local action. The heightened standard of review under RLUIPA therefore applies only in (1) instances in which Congress exercises power under the Spending Clause, Commerce Clause, or section 5 of the Fourteenth Amendment, and (2) instances in land use cases in which decisions are made based on a case-by-case assessment of particular properties.

Since its enactment in 2000, RLUIPA has been challenged several times in federal court. Most courts have upheld RLUIPA as constitutional under the Spending Clause, Commerce Clause, section 5 of the Fourteenth Amendment, and the Establishment Clause. This report provides background on RFRA and discusses the provisions of RLUIPA and its related case law.

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Background

The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[1] In some cases, the right to exercise one's religion conflicts with the government's need to enforce a uniform set of laws to ensure a civilized society. The constitutional standard by which laws that burden free exercise are measured has evolved over the last half-century through U.S. Supreme Court decisions.

In *Sherbert v. Verner*[2] and *Wisconsin v. Yoder*,[3] the Court considered laws that placed a burden on individuals' free exercise rights under a standard that is often referred to as strict scrutiny. Under strict scrutiny, government actions that burden religious exercise must (1) serve a compelling public interest and (2) use the least restrictive means possible. In *Sherbert*, the Court held that a state could not deny unemployment compensation benefits to a person who was fired because she refused to work on her Sabbath.[4] The Supreme Court held such a denial would violate the Free Exercise Clause, unless it served a compelling interest. Similarly, in *Yoder*, the Supreme Court held that compulsory school attendance for Amish students was a violation of their Free Exercise rights due to the Amish belief that attendance beyond the eighth grade would expose children to worldly influences dangerous to their salvation. The Supreme Court stated, "there are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, even under regulations of general applicability."[5]

In 1990, the Supreme Court significantly altered its interpretation of the Free Exercise clause. In *Employment Division v. Smith*,[6] the Court abandoned the requirement that laws burdening religious exercise have a compelling governmental interest with respect to neutral statutes. In *Smith*, two employees claimed their Free Exercise rights were violated when they were fired and denied unemployment compensation after ingesting peyote (a hallucinogenic substance regulated by controlled substances laws) for religious purposes. However, the Supreme Court found the controlled substances law was a general criminal provision, neither aimed at inhibiting religious beliefs nor creating an exception for religious practice. The Court held that a compelling interest analysis was an inappropriate constitutional test for neutral laws of general applicability.[7]

Congress responded to the *Smith* decision by enacting the Religious Freedom Restoration Act (RFRA; P.L. 103-141) of 1993.[8] RFRA statutorily reinstated the strict scrutiny standard in all circumstances where government actions burdened religious exercise. RFRA provided that the government could substantially burden a person's exercise of religion only if the burden (1) is in

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[1] U.S. CONST. amend I. For more information and legal analysis relating to the religion clauses, *see* CRS Report RS22833, *The Law of Church and State: General Principles and Current Interpretations*, by Cynthia Brougher.

[2] 374 U.S. 398 (1963).

[3] 406 U.S. 205 (1972).

[4] *Sherbert*, 374 U.S. at 402.

[5] *Yoder*, 406 U.S. at 220.

[6] 494 U.S. 872 (1990).

[7] There are three categories of cases in which the Court requires a compelling interest: government actions that intentionally discriminate against religion, denials of unemployment compensation to persons who lost their jobs due to conflict between their faith and requirements of their job, and in hybrid cases where a free exercise claim is joined with another constitutional claim. *See id.* at 881-884.

[8] P.L. 103-141, 107 Stat. 1488; codified at 42 U.S.C. § 2000bb *et seq*.

furtherance of a compelling governmental interest and (2) is the least restrictive means of furthering that interest.[9]

As originally enacted, RFRA applied the strict scrutiny standard for governmental action at the federal, state, and local levels. Congress justified applying strict scrutiny to the states as an exercise of power under section 5 of the Fourteenth Amendment, which grants "Congress the power to enforce, by appropriate legislation, the provisions of this article [guaranteeing individuals equal protection and due process of law]."[10] In *Ex Parte Virginia*,[11] the Supreme Court explained section 5 of the Fourteenth Amendment as follows:

> Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.[12]

The Court has described Congress's power under section 5 as a "remedial" power because it extends only to "enforc[ing]" the provisions of the Fourteenth Amendment.[13]

In *City of Boerne, Texas v. Flores*,[14] the Supreme Court held RFRA unconstitutional as it applied to states and localities because the statute exceeded Congress's remedial powers to enforce rights under the Fourteenth Amendment.[15] In *Boerne*, the Court considered whether RFRA could exempt a church from local zoning requirements in a historic district. The Supreme Court held that "by enacting RFRA, Congress had exceeded [its remedial authority under section 5] by *defining* rights instead of simply enforcing them."[16] The Court explained that Congress's powers under section 5 of the Fourteenth Amendment were limited to the extent that there must be a "congruence and proportionality" between the injury to be remedied and the law adopted to that end.[17] In order to satisfy the Court's "congruence and proportionality" test, Congress must limit the scope of the remedial measure to only those instances where the record clearly demonstrates a pervasive pattern of violations of the Fourteenth Amendment.[18] The Court was unable to find a pattern of the use of neutral laws of general applicability to disguise bigotry and animus against religion, and therefore struck down RFRA as an overbroad response to a relatively non-existent problem.

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[9] *Id.*

[10] U.S. CONST. amend. XIV §5.

[11] 100 U.S. 339 (1869).

[12] *Id.* at 345-346.

[13] *See, e.g., South Carolina v. Katzenbach*, 383 U.S. 301, 325-327 (1966) (focusing on enforcement power under the Fifteenth Amendment, but also encompassing enforcement authority under section 5 of the Fourteenth Amendment).

[14] 521 U.S. 507 (1997).

[15] The Supreme Court held RFRA unconstitutional as applied to states and localities, but upheld its application to federal actions. Thus, the strict scrutiny protections of RFRA remain in effect as applied to the federal government. *See* 42 U.S.C. § 2000bb-1.

[16] *City of Boerne*, 521 U.S. at 532 (emphasis added).

[17] *Id.* at 520 ("There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect.").

[18] *See, e.g., City of Boerne*, 521 U.S. 507; Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank, 527 U.S. 627 (1999) (invalidating Congress's attempt to abrogate state sovereign immunity in federal intellectual property law under section 5 of the Fourteenth Amendment).

In the wake of *Boerne*, Congress enacted the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA; P.L. 106-274).[19] Although similar to RFRA in its restoration of strict scrutiny analysis to free exercise cases, Congress significantly restricted RLUIPA's application in order to conform to the Court's ruling in *Boerne*. The protections of RLUIPA apply only where states or localities place a substantial burden on religious exercise as a result of a land use regulation, or on the religious exercise of institutionalized persons.[20] The language of RLUIPA broadly defines "religious exercise" as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief."[21] RLUIPA's land use provisions (section 2) are triggered only where the substantial burden is imposed in a program that receives federal funding, affects interstate commerce, or occurs as the result of a land use decision involving an individualized assessment.[22] The protections for institutionalized persons (section 3) are triggered only where the institution receives federal funding or the substantial burden affects interstate commerce.[23] Thus, to avoid the broad exercise of power invalidated by *Boerne*, Congress specifically delineated the narrow application of the RLUIPA protections in order to ground the statute in Congress's powers under the Spending Clause, the Commerce Clause, and the Fourteenth Amendment.

Although grounded under different constitutional authority than RFRA, RLUIPA provides the same two-part standard of protection. That is, government actions that impose a substantial burden on religious exercise must (1) serve a compelling government interest and (2) use the least restrictive means to achieve that interest. The party asserting the violation under RLUIPA must prove that the government has placed a substantial burden on religious exercise. The U.S. Supreme Court has interpreted a "substantial burden" as a burden that requires an individual to modify his behavior in violation of his religious beliefs in order to comply with legal requirements.[24] Once a substantial burden is proven, the government must show that the imposition of the burden furthers a compelling governmental interest and is the least restrictive means of furthering that interest.

Zoning Laws Under RLUIPA

RLUIPA specifically includes the "use, building, or conversion of real property for the purpose of religious exercise" in its definition of religious exercise.[25] In part, Congress enacted RLUIPA to address challenges to zoning ordinances based on religious exercises. Congress recognized that places of assembly are needed to facilitate religious practice, and that zoning regulations may be used to prevent religious groups from using land for such purposes.[26] RLUIPA's legislative

[19] P.L. 106-274, 114 Stat. 803; codified at 42 U.S.C. § 2000cc *et seq*.

[20] 42 U.S.C. §§ 2000cc-2000cc-1.

[21] 42 U.S.C. § 2000cc-5.

[22] 42 U.S.C. § 2000cc. Congress included the individualized assessments application of RLUIPA based on a significant amount of evidence demonstrating a pattern of discrimination against religious groups in municipal zoning decisions involving individualized assessments.

[23] 42 U.S.C. § 2000cc-1.

[24] *See Sherbert*, 374 U.S. at 404 (substantial burden on religious exercise exists when an individual must "choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion ... on the other hand"); Thomas v. Review Bd. Of the Ind. Employment Sec. Div., 450 U.S. 707, 717-18 (1981) (citing "substantial pressure on an adherent to modify his behavior and to violate his beliefs").

[25] 42 U.S.C. § 2000cc-5(7)(B).

[26] *See* Midrash Shephardi, Inc. v. Town of Surfside, 366 F.3d 1215, 1226 (11th Cir. 2004).

history shows that Congress had amassed a record containing numerous instances of targeted discrimination against religious groups evidenced by denial of conditional building permits through discretionary individual assessments and land use regulations.[27] Unlike the institutionalized persons portion of RLUIPA, which only applies when the institution receives federal funding or where the burden affects interstate commerce, the land use portion of RLUIPA also applies wherever the substantial burden is imposed as a result of a land use regulation involving individualized assessments.[28]

Examples of Statutory Application

The repeated denial of a religious group's application for a conditional use permit may violate RLUIPA where the group agrees to, and cooperates with, the zoning boards proposed conditions. In *Guru Nanank Sikh Society v. County of Sutter*,[29] a Sikh group challenged the Sutter County Planning Commission's decision to deny the group a conditional use permit to build a religious temple. Guru Nanak initially applied for a permit to build the temple on a parcel of land adjacent to a residential area. The county denied this permit citing traffic and noise concerns. Guru Nanak then applied for a permit to build its temple on a much larger, rural parcel of land, consistent with certain conditions laid out by the county. The county again denied the application citing a concern over "leapfrog" development. The U.S. Court of Appeals for the Ninth Circuit found that the county's inconsistent treatment of the group's application—first denying the group's application for its proximity to a residential neighborhood, then denying the group's second application for being too far from the city center—had significantly "lessened the prospect of Guru Nanak being able to construct a temple in the future," and therefore imposed a substantial burden on the group's religious exercise.[30] The county presented no argument that it had a compelling interest in denying the building permit and imposing the substantial burden, nor that the restriction was narrowly tailored.

RLUIPA also may be violated where the stated reasons for the denial of a religious group's conditional use construction permit are arbitrary and capricious. In *Westchester Day School v. Village of Mamaroneck*, the U.S. Court of Appeals for the Second Circuit ordered a town to grant a Jewish private school's application for a conditional use permit to expand its facilities.[31] The court held that the zoning board's consideration of the school's application was characterized by a "blindness to the facts" and was arbitrary and capricious under New York law because the denial bore no relation to public health, safety, or welfare.[32] The court also engaged in a detailed analysis of what constitutes a "substantial burden." The court applied three factors in considering whether a burden was "substantial": (1) whether the denial was arbitrary and unlawful; (2) whether "quick, reliable, and financially feasible alternatives" exist to meet the groups religious needs; and (3) whether the denial was conditional or absolute.[33] Because the expansion was necessary to

[27] 146 Cong. Rec. 16,698 (2000).

[28] An individualized assessment exists "when the government [takes] into account the particular details of an applicant's proposed use of land when deciding to permit or deny that use." Guru Nanak Sikh Society v. County of Sutter, 456 F.3d 978, 986 (9th Cir. 2006).

[29] 456 F.3d 978 (9th Cir. 2006).

[30] *Id.* at 992.

[31] 504 F.3d 338 (2nd Cir. 2007).

[32] *Id.* at 352.

[33] *Id.*

fulfill the educational and religious needs of the school and because the zoning board's decision was final, the court held that the denial of the school's conditional use permit constituted a substantial burden.[34] The school having demonstrated the existence of a substantial burden on religious exercise, the court next turned to whether the village could show a compelling interest. The court rejected the village's argument that it had a compelling interest in enforcing zoning and traffic regulations, holding that the village "must show a compelling interest in imposing the burden on religious exercise in the particular case at hand, not a compelling interest in general."[35]

Constitutional Challenges

Government entities have repeatedly responded to suits brought pursuant to section 2 of RLUIPA by challenging the constitutionality of RLUIPA. Several appellate courts, however, have upheld the land use provisions of RLUIPA in the face of these challenges, holding that the statute is a legitimate use of power under the Commerce Clause or section 5 of the Fourteenth Amendment, and does not violate either the Establishment Clause or the Tenth Amendment.

The Second Circuit has upheld the land use provisions of RLUIPA as a legitimate use of Congress's power under the Commerce Clause.[36] Under RLUIPA, heightened scrutiny protections apply where the specific burden placed on religious exercise affects interstate commerce. This jurisdictional element "must be demonstrated in each case" in order to trigger heightened scrutiny.[37] The Second Circuit noted that the Supreme Court has upheld the inclusion of this type of "jurisdictional element" as a valid use of the Commerce Clause, which only requires the effect on commerce to be minimal.[38] Claims brought under the land use section of RLUIPA involving the denial of a proposed construction or expansion project will likely satisfy this "minimal effect" requirement as "commercial building construction is activity affecting interstate commerce."[39]

The Ninth and Eleventh Circuits have upheld the application of RLUIPA's land use provisions to individualized assessments of a proposed property use as a legitimate use of Congress's section 5 enforcement power under the Fourteenth Amendment.[40] Congress was able to provide ample evidence to demonstrate a history and pattern of unconstitutional intrusion on religious exercise through the denial of conditional use permits sufficient to satisfy the "congruence and proportionality" test used by the Supreme Court in *Boerne*. Where Congress had failed to present a record of demonstrated abuses sufficient to justify the broadly applied RFRA, the narrowly tailored RLUIPA "targets only regulations that are susceptible, and have been shown, to violate individuals' religious exercise."[41] Thus, the narrow prohibitions under the land use section of

[34] Although building or converting real property for religious exercise purposes constitutes religious exercise under the RLUIPA, in dicta the court concluded that the specific facility must be proposed for a religious purpose in order to implicate RLUIPA. A denial of a permit to build a gymnasium purely for sporting activities, or an addition built exclusively to house office space, for example, would not implicate RLUIPA. *Id.* at 347-48.

[35] *Id.* at 353.

[36] *Id.* at 354.

[37] *Id.*

[38] *Id.* ("As we have recognized, the evidence need only demonstrate a minimal effect on commerce ...").

[39] *Id.*

[40] *Guru Nanak Sikh Society*, 456 F.3d 978. *See also* Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214 (11th Cir. 2004) (upholding RLUIPA as a valid exercise of section 5 of the Fourteenth Amendment).

[41] *Guru Nanak Sikh Society*, 456 F.3d at 994.

RLUIPA are a "congruent and proportional" remedy to the documented pattern of the purposeful exclusion of unwanted religious groups through the denial of conditional use permits.

The Second and Eleventh Circuits have also held that the land use provisions of RLUIPA do not violate either the Establishment Clause or the Tenth Amendment.[42] The court applied the Supreme Court's Establishment Clause test from *Lemon v. Kurtzman* in holding that the land use provisions of RLUIPA have a secular purpose with a principal effect that neither advances nor inhibits religion and do not foster an excessive entanglement between government and religion. According to the Second Circuit, RLUIPA does not advance religion simply by removing barriers to an individual's constitutionally protected right to freely exercise his religious beliefs. The court cited the Supreme Court's decision in *Cutter v. Wilkinson*[43] in characterizing the desire to "lift government-created burdens on private religious exercise" as a secular purpose.[44]

The Second Circuit has also rejected the contention that RLUIPA violates the Tenth Amendment. The Court noted that nothing in RLUIPA compels the states to prohibit or require particular acts.[45] The statute simply "leaves it to each state to enact and enforce land use regulations as it deems appropriate so long as the state does not substantially burden religious exercise in the absence of a compelling interest achieved by the least restrictive means."[46]

Institutionalized Persons Under RLUIPA

Though the proponents of RLUIPA recognized the possibility of frivolous lawsuits, they nevertheless believed it was necessary to give heightened protection to religious practice by institutionalized persons:

> Far more than any other Americans, persons residing in institutions are subject to the authority of one or more local officials. Institutional residents' right to practice their faith is at the mercy of those running the institution and their experience is very mixed. It is well known that prisoners often file frivolous claims; it is less well known that prison officials sometimes impose frivolous or arbitrary rules. Whether from indifference, ignorance, bigotry, or lack of resources, some institutions restrict religious liberty in egregious and unnecessary ways.[47]

The institutionalized persons provisions of RLUIPA apply to any facility that accepts federal funding. As of 2005, every state accepted federal funding for its prison system.[48] Although most challenges under these provisions arise from incarcerated individuals, the statute also covers any

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[42] *Westchester Day School*, 504 F.3d 338. *See also*, *Midrash Sephardi*, 366 F.3d 1214 (11th Cir. 2004) (rejecting Tenth Amendment and Establishment Clause challenge to RLUIPA).

[43] Although the Second Circuit cited the Supreme Court's decision in *Cutter* in its defense of section 2 of RLUIPA, the Supreme Court specifically stated that "Section 2 of RLUIPA is not at issue here. We therefore express no view on the validity of that part of the Act." Cutter v. Wilkinson, 544 U.S. 709, 717 n.3 (2005).

[44] *Westchester Day School*, 504 F.3d at 355.

[45] *Id.* at 354-55.

[46] *Id.*

[47] Joint Statement of Senator Hatch and Senator Kennedy, 146 Cong. Rec. 16,698, 16,699 (July 27, 2000) (inserted in general debate as Exhibit 1).

[48] *Cutter*, 544 U.S. at 716.

federally funded pre-trial detention facility, juvenile detention center, long term care center, or institution for the mentally ill, disabled, retarded, chronically ill, or handicapped.[49]

Example of Statutory Application

U.S. appellate courts have followed a distinctly different interpretation of RLUIPA's compelling interest test where an inmate claims a prison has placed a substantial burden on his religious exercise. The legislative history behind the institutionalized persons segment of RLUIPA states that courts should consider the compelling interest test with "due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security and discipline, consistent with consideration of costs and limited resources."[50] This history interjects aspects of safety, security, discipline, and economic feasability into the consideration of the existence of a compelling interest. No such formula exists in RLUIPA's land use section.

A prison's failure to provide an inmate with a kosher diet does not violate RLUIPA where the prison's budget is inadequate to provide alternative menus. In *Baranowski v. Hart*, the U.S. Court of Appeals for the Fifth Circuit held that although the lack of a kosher diet places a substantial burden on the religious exercise of a Jewish inmate, the prison policy was narrowly tailored to a compelling interest.[51] In giving deference to the prison administrators, the court held that if the prison were made to undertake the expense of an alternative kosher menu, the prison's "ability to provide a nutritionally appropriate meal to other offenders would be jeopardized."[52] Because the decision not to provide a kosher diet is related to the compelling interest of controlling costs, and because the "budgetary interests at stake cannot be achieved by any different or lesser means," the prison was not in violation of RLUIPA.[53]

Constitutional Challenges

The institutionalized persons provisions of RLUIPA are most often justified as a legitimate use of Congress's power under the Spending Clause. In *Madison v. Virginia*, the U.S. Court of Appeals for the Fourth Circuit specifically upheld RLUIPA as a valid use of Congress's power to set conditions on the receipt of federal funds.[54] In reaching that decision, the court applied the Supreme Court's Spending Clause test set forth in *South Dakota v. Dole*.[55] The *Dole* Court laid out five requirements for the valid use of conditional funding: (1) the condition itself must advance the general welfare; (2) Congress must clearly define the condition, allowing states to make an informed decision about whether to accept funding; (3) the condition must be related to the same federal interest advanced by the funding; (4) the conditioned funds may not be used to

[49] 42 U.S.C. § 2000cc-1; *see also* 42 U.S.C. § 1997.

[50] S.Rept. 103-111 at 10 (1993).

[51] 486 F.3d 112 (5th Cir. 2007).

[52] *Id.* at 125.

[53] *Id.* at 126. The Circuit Court also held that an inmate's religious exercise was not substantially burdened where the prison did not provide religious services on certain Sabbath or other holy days because no approved religious volunteer was available to lead the requested service. *Id.* at 124-25.

[54] 474 F.3d 118 (4th Cir. 2006). *See also* Benning v. Georgia, 391 F.3d 1299 (11th Cir. 2004); Charles v. Verhagen, 348 F.3d 601 (7th Cir. 2003) (upholding RLUIPA as a valid use of Congress's spending power).

[55] 483 U.S. 203 (1987).

induce states to participate in an unconstitutional activity; and (5) the financial inducement offered by Congress cannot be so large as to be coercive.[56] The Fourth Circuit had "no trouble concluding" that Congress's intent to protect the religious exercise of institutionalized persons was in furtherance of the general welfare and that the conditions for receipt of federal funding were clear and unambiguous.[57] The court also found that the protection of prisoners' religious liberties was sufficiently related to the receipt of federal prison funding.

The Fourth Circuit rejected Virginia's argument that *Dole's* "unconstitutional condition" requirement barred Congress from setting conditions on the states that it did not otherwise have the authority to impose. Instead, the court held that the Spending Clause grants Congress the power to achieve goals not otherwise enumerated within its Article I powers as long as Congress does not induce the states to "engage in activities that would themselves be unconstitutional."[58] According to the court, RLUIPA had not induced the states to engage in any unconstitutional activities. Finally, the court determined that the conditional funding of RLUIPA did not constitute a coercive financial inducement. The record showed that the Virginia Department of Corrections received only 1.3% of its total prison funding from the federal government.[59] Although Virginia argued that the condition was coercive because Congress was threatening to withdraw the entirety of the state's federal prison funding, the court was unpersuaded that Virginia's "capacity for free choice" could be overcome by such a limited financial loss.[60]

Although RLUIPA's constitutionality has been frequently litigated since its inception in 2000, the Supreme Court has granted certiorari only on the narrow issue of whether the institutionalized persons section of the statute violates the Establishment Clause. In *Cutter v. Wilkinson*, the Court held that section 3 of RLUIPA was a "permissible government accommodation of religious practices" that did not violate the Establishment Clause.[61] The Court did not opine on the constitutionality of section 2's land use provisions,[62] nor did it consider the validity of the institutionalized persons provisions under the Commerce Clause or Spending Clause. The Court held that section 3 of RLUIPA was compatible with the Establishment Clause because it alleviated "exceptional government-created burdens on private religious exercise."[63] The Court explained that RLUIPA "confers no privileged status on any particular religious sect, and singles out no bona fide faith for disadvantageous treatment."[64] The Court noted that RLUIPA did not "elevate accommodation of religious observances over an institution's need to maintain order and safety" and stated that RLUIPA could be "applied in an appropriately balanced way, with particular sensitivity to security concerns."[65] The Court also rejected the lower court's determination that RLUIPA violated the Establishment Clause because it "'impermissibly

[56] *Id.* at 207-212.

[57] *Madison*, 474 F.3d at 125.

[58] *Id.* at 127.

[59] *Id.* at 128.

[60] *Id.*

[61] 544 U.S. 709 (2005).

[62] *Id.* at 717 n.3 ("Section 2 of RLUIPA is not at issue here. We therefore express no view on the validity of that part of the Act.").

[63] *Id.* at 720. Section 3 of RLUIPA provides, "No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution," unless the burden furthers "a compelling governmental interest," and does so by "the least restrictive means." 42 U.S.C. 2000cc-1(a)(1)-(2).

[64] *Id.* at 724.

[65] *Id.* at 722.

advance[d] religion by giving greater protection to religious rights than to other constitutionally protected rights,'" citing precedent where the Court held that religious accommodations need not "'come packaged with benefits to secular entities.'"[66] The Court, recognizing the "room for play in the joints"[67] between providing for free exercise and establishing a religion, placed RLUIPA in the legitimately available "space for legislative action neither compelled by the Free Exercise Clause nor prohibited by the Establishment Clause."[68]

Conclusion

Courts generally have upheld RLUIPA as a valid use of Congress's power under the Commerce Clause, Spending Clause, or section 5 of the Fourteenth Amendment, and have rejected challenges to the law under the Tenth Amendment and the Establishment Clause.[69] The Supreme Court has played a limited role in RLUIPA litigation—holding only that the institutionalized persons provisions of the statute do not violate the Establishment Clause. As of the date of this writing, no appellate court has struck down the provisions of RLUIPA on constitutional grounds,[70] and with the absence of a circuit split on the topic at this time, it appears unlikely that the Supreme Court will consider RLUIPA in the near future.

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This report was originally prepared by Angie Welborn, formerly a Legislative Attorney, American Law Division.

[66] *Id.* at 724.

[67] *Id.* at 719.

[68] *Id.*

[69] *See, e.g.*, *Westchester Day School*, 504 F.3d 338 (2nd Cir. 2007); *Baranowski*, 486 F.3d 112 (5th Cir. 2007); *Madison*, 474 F.3d 118 (4th Cir. 2006); *Guru Nanak Sikh Society*, 456 F.3d 978 (9th Cir. 2006); *Midrash Sephardi Inc.*, 366 F.3d 1214 (11th Cir. 2004); *Charles*, 348 F.3d 601 (7th Cir. 2003).

[70] Although the Sixth Circuit held that section 3 of RLUIPA violated the Establishment Clause, the holding was subsequently reversed by the Supreme Court. Cutter v. Wilkinson, 349 F.3d 257 (6th Cir. 2003), *rev'd* 544 U.S. 709 (2005).