

Holy Ground: Religious Liberty and Religious Land Use

Introduction

Who we are, what we do, how we do it.

Religious Liberty at SCOTUS

In the past decade, the US Supreme Court has made significant adjustments to its first amendment jurisprudence, most especially in how it interprets the religion clauses.

In *American Legion v. AHA*, the Court put an end to courts allowing offended observers to invoke the Establishment Clause in order to purge the public square of religious displays. Rather, the Court held that such religious displays are consistent with our history and tradition and should be presumed constitutional.

Carson v. Makin continued the growing line of cases started with *Trinity Lutheran v. Comer* and *Espinosa v. Montana* to invalidate state action that excludes religious organizations who wish to take part in a public benefit program. In essence, the state cannot assert the establishment clause as a justification for excluding those organizations seeking to exercise their religious beliefs.

In the employment context, the Justices in *Groff v. DeJoy* overruled a case from the 1970's called *TWA v. Hardison*

which allowed employers to deny religious accommodations if doing so presented a “de minimis” burden on the employer. Instead, *Groff* stands for the principle that religious freedom ought to be enjoyed in the workplace, compelling everyone from the board room to the mail room to work together to respect and accommodate religious belief.

And, in *Kennedy v. Bremerton*, the court explicitly overruled *Lemon v. Kurtzman*. That case had long pitted the establishment clause against the free exercise clause, severely restricting religion’s entry into the public square. *American Legion* struck a blow to *Lemon*, or at least to the ghoul it had famously become, but *Kennedy* overruled it. Justice Gorsuch explains that the First Amendment “doubly protects religious speech.”

And efforts to use the Establishment clause to attack that protection under the Free Speech or Free Exercise Clauses misunderstands the freedom intended under the First Amendment. Rather than serving in competition, the Establishment Clause is meant to complement the freedom served by its companion clauses.

Also of note is *Fulton v. City of Philadelphia*. *Fulton* stands for the principle that, when a state law or city ordinance contains a “mechanism for individualized exemptions,” it removes the state action from general applicability and neutrality, undermining any asserted state interest

asserted—and that is true whether or not any of those exemptions or exceptions are granted; the mere presence of a system of exceptions is sufficient to demonstrate a lack of general applicability.

Finally, there are *Roman Catholic Diocese of Brooklyn v. Cuomo* and *Tandon v. Newsom*, which struck down regulations preventing religious land use based on the COVID-19 pandemic, clarified that laws that treat any secular comparator better are subject to strict scrutiny

How did we get RLUIPA?

So, why do I give you this brief overview about SCOTUS cases and religious liberty? Well, first off, I want you to know about these improvements to religious liberty. We have worked hard to obtain them and nothing dispirits an attorney more than to see his hard-fought wins being ignored.

Just this week, we received a request for legal help in which the inquisitor asked if a school board could still rely on *Lemon v. Kurtzman* in its policies. I looked at the policy and, sure enough, they were out of date, still relying on several cases that relied on *Lemon*.

If *Lemon's* ghoul died in *Kennedy v. Bremerton*, someone needs to tell the ACLU of WV. Just this week, they filed a lawsuit against the state alleging that a recent state grant to a religious college violated the *state's* constitution—an

effort clearly trying to resuscitate *Lemon* under a state constitution's equivalent of the Establishment Clause.

But, most importantly, I've taken you down this path to get to that last point of general applicability. Careful listeners will know where that language came from, but from those who don't, let's go back to 1993 and the State of Oregon's efforts to regulate peyote.

Oregon had rules against the use of certain hallucinogenic drugs. That ban on hallucinogenic usage included when used for religious purposes. Some Native American tribes have used peyote for a long time as part of their religious ceremonies, but Oregon's ban applied to every use, religious or otherwise. It did not specifically place a ban on the religious use of hallucinogenic drugs, it did not single out religious use with opprobrium, and nothing in the passage of the law indicated it was being done to offend religious adherents. It simply outlawed hallucinogenic drugs.

Those religious adherents aggrieved by the general, neutral law brought suit and it ended up at the U.S. Supreme Court. Justice Scalia said that the religious claimants were attempting to use their religious beliefs to place themselves "beyond the reach of criminal law," but that the law only had an incidental effect on their religious exercise.

Rather, free exercise is not an excuse from “valid and neutral laws of general applicability.” And, so, rather than require the state to pass strict scrutiny when the state burdened religious exercise with its ban on hallucinogenic drugs, the state only had to have a rational basis for its law.

Well, this kicked off quite the firestorm. Where the courts had been subjecting state action that burdened religious exercise to strict scrutiny in cases like *Wisconsin v. Yoder* (Amish and public education) and *Sherbert v. Verner* (Adventist required to work on the sabbath), now the state need only prove the absence of religious hostility or targeting to get the lowest level of review when its action burdened free exercise.

In response, Congress quickly passed the Religious Freedom Restoration Act or RFRA, just as quickly signed by President Bill Clinton. This imposed strict scrutiny upon neutral, generally applicable state action that substantially burdens the free exercise of religion of Americans.

That worked well for several years, until the Supreme Court, in *City of Boerne v. Flores*, in a very fractured opinion, cut off RFRA’s application to municipal action. Instead, RFRA would only apply at the Federal level.

This prompted Congress to act yet again, this time by passing in 2000, the Religious Land Use and Institutionalized Persons Act or “RLUIPA.”

RLUIPA extends religious liberty protections to state action that either (a) burdens religious land use or (b) impacts the religious exercise of prisoners.

Overview and Breakdown of RLUIPA

RLUIPA, which can be found at 42 USC §2000cc, *et seq*, has 4 main provisions when it comes to land use, which will be our primary focus for this talk.

First, and the subject to the most litigation, is *substantial burden*. As a general matter, RLUIPA holds:

No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution--

(A) is in furtherance of a compelling governmental interest; and

(B) is the least restrictive means of furthering that compelling governmental interest.

Thus, state action that substantially burdens religious land use is subject to strict scrutiny.

Now, we are not given a definition of substantial burden in this land use section, but neither are we given definitions for compelling governmental interest or least restrictive means. But, as we will see, the courts will supply those definitions in time.

The statute does, however, give definition to what constitutes a “land use regulation,” essentially a “zoning or landmarking law” or its application against any land or leaseholder.

Interestingly, Congress debated the inclusion of eminent domain in this definition, but ultimately left it out, which has puzzled many for years. It seems eminent domain is the ultimate “zoning” law. Perhaps some future Congresses will deem fit to include it again, but for now, court generally exclude RLUIPA’s application to eminent domain proceedings, *unless* it can be demonstrated that it is being used as an extension of its zoning efforts.

For instance, we represent a synagogue attempting to move into Atlantic Beach, New York. Soon after purchasing the property, the Village tried to seize the property through eminent domain, even though the property had sat vacant and on the market for 3 years. When we filed suit, the Village claimed that they needed the property for a lifeguard training center (3 blocks from the beach), but regardless no buildings could be used in their village for religious purposes, according to their own

ordinance. We successfully pled RLUIPA and defeated their eminent domain efforts.

We will come back to more on the substantial burden portion of RLUIPA as we go along.

The second protection extended to religious claimants under RLUIPA is *Equal Terms*. RLUIPA provides:

No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.

In other words, state action must be fair toward religious land use. If, for instance, a town permits movie theaters on the town square, it cannot exclude a church. And, if it does, RLUIPA's provision is complete. There is no analysis, strict scrutiny or otherwise. The state action is rejected as unlawful on the whole.

What constitutes equal terms is, of course, subject to much litigation. The Eleventh Circuit in *Midrash Sephardi v. Town of Surfside* applies a fairly straightforward approach for those land uses that are "similarly situated as to the regulatory purpose." So, movie theaters and country clubs are places in which large groups of people meet for a common purpose. In that sense, churches and synagogues are essentially the same thing: a place in which large groups of people meet for a common purpose.

The Sixth Circuit, and others, in *Tree of Life Christian Schools v. Upper Arlington*, require courts to take into consideration other “legitimate zoning criteria,” like revenue generation, for instance.

We think this will be subject to a lot more litigation and hope that SCOTUS will ultimately provide some clarification, but side with the Eleventh Circuit (and others) in comparing religious uses to similarly situated secular uses.

Third, RLUIPA regulates nondiscrimination. Here it says, “*No government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination.*”

Again, RLUIPA’s provision against discrimination is a complete bar. It does not subject state action to strict scrutiny. Rather, its prohibition is total.

This section is mercifully light by way of court review, though often included as part of the pleadings. For instance, we alleged in *Opulent Life Church v. Holly Springs* that the town’s attempt to exclude an African American church from the town’s historic square constituted discrimination. Ultimately, the court decided the case on other grounds, but requiring the church to walk the square and seek permission from its white

neighbors sure seemed like the right time to invoke the nondiscrimination provision of RLUIPA.

Finally, RLUIPA provides protection against exclusions and limitations. It says:

No government shall impose or implement a land use regulation that--

(A) totally excludes religious assemblies from a jurisdiction; or

(B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.

In other words, state action cannot totally zone out religious institutions from a given jurisdiction. These are increasingly rare cases, but we have seen them and they make very easy cases since, again, the prohibition is total; there is no scrutiny to be applied to the state action in question.

Is RLUIPA Constitutional?

So, that's the overview of RLUIPA, which sounds very much like RFRA which was held unconstitutional as to non-Federal state action. What has SCOTUS said about RLUIPA? Is it constitutional?

Yes, it is Constitutional. In *Cutter v. Wilkerson*, a unanimous decision by the Supreme Court in 2005, Justice Ginsburg explains that, "RLUIPA is the latest of

long-running congressional efforts to accord religious exercise heightened protection from government-imposed burdens, consistent with this Court's precedents."

I like highlighting that quote because, for one, it's not often that I can quote Justice Ginsburg with approval, but also, because it answers some objections to religious liberty protections more broadly.

Some argue that religious claimants seeking protection by the First Amendment or RFRA or RLUIPA are seeking preferential treatment, something more than their secular neighbors. Or, as Justice Scalia said, using their religious ceremonies to put themselves out of reach of criminal law.

Well, Justice Ginsburg says that RLUIPA was meant "to accord religious exercise heightened protection." So, yes, religion is given preference, in that sense, over other like activity. It is the commitment of the U.S. Constitution that religious citizens and the religious organizations they operate, be given "heightened protection" over secular activity. We need not shy away from that accusation, but should remind those who allege it against religious litigants, that their accusations are out of step with our country's state policy.

But, back to *Wilkerson*. The court held that RLUIPA is "compatible with the establishment clause because it alleviates exceptional government-created burdens on

private religious exercise.” So, we know that the law itself is constitutional, but *Wilkerson* was a prisoner case.

The Court next considered RLUIPA’s substantial burden provision in another prisoner case in *Holt v. Hobbs*. There, the State of Arkansas had a provision that allowed its prisoners to have a ¼ inch beard, but a Muslim inmate wished to obey his religious teachings by growing a ½ inch beard, but the state would not allow him to do so.

The State recognized their policy created a burden on the inmate’s religious exercise, but cited concerns of safety and security in allowing the extra quarter inch beard. They claimed that an inmate might use the extra space to stash contraband. Further, there was no lesser restrictive way to accomplish this compelling interest without banning beards longer than ¼ once.

This led to one of my favorite exchanges in Supreme Court oral argument history. Justice Alito asked the state’s advocate about this and asked whether anyone had considered running a comb through a longer beard to see if a revolver would fall out.

Importantly, Justice Alito’s unanimous opinion (with a few concurrences) connected the inquiry into what constitutes a substantial burden with the court’s opinion in *Hobby Lobby*.

So, we can take from this not only that courts should interpret the two federal laws similarly, but that if it is a “substantial burden” under RFRA for a religious organization to sign a piece of paper that says they do not wish their health insurance programs to cover abortifacients, then any state action more rigorous than signing a piece of paper should likewise constitute a substantial burden.

Beyond that, *Holt v. Hobbs* guides litigants through the strict scrutiny process, again borrowing from *Hobby Lobby* to conclude that a compelling interest requires “a ‘more focused’ inquiry and ‘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.”

The court says something similar in *Fulton v. City of Philadelphia*, disallowing the state to rest on “broadly formulated” interests. Rather, to be compelling, the interest must be specific, not general.

In other words, claims of safety and security or a broadly defined interest in controlled substances or, to use a more recent example, preventing the spread of a worldwide pandemic, are not specific enough to be compelling.

Like the court in *Hobby Lobby* said that a general interest in maintaining access to contraceptives is too broad to be compelling, so too is a general interest in *Hobbs* for safety and security. Once a claimant has articulated how state action substantially burdens the free exercise of religion, the state must articulate a compelling interest (not a general one) and demonstrate that its regulatory actions are *the* least (not a lesser) restrictive means of achieving that interest.

We think that logic extends to religious land use analysis as well, even though we derive that from RLUIPA cases focused on prisoner litigation and RFRA cases. In the only case SCOTUS has considered RLUIPA in the religious *land* use context, *Mast v. Fillmore*, Justice Gorsuch makes the connection.

Mast concerned the requirement by the State of Minnesota that disposal of gray water be by means of a modern septic system. That substantially burdened the Schwarzenrubler Amish community.

The Court GVR'd the suit without opinion, in favor of the Amish. But, Justice Gorsuch says in a lengthy concurrence that the courts below have "misapprehended RLUIPA's demands" in the application of strict scrutiny. He then expressly connects RLUIPA's substantial burden analysis for religious land use through *Fulton*'s analysis on the application of strict scrutiny. He explains it this way:

*Accordingly, the question in this case ‘is not whether the [County] has a compelling interest in enforcing its [septic system requirement] **generally**, but whether it has such an interest in denying an exception from that requirement to the Swartzentruber Amish **specifically**.*

And, on top of that, courts that ignore a series of individualized exceptions—in *Mast*, the state law exempted hunters, fishermen, and owners of rustic cabins from the gray water-septic disposal demands—the state must articulate why it must regulate religious land use more strictly than the others.

In short, in assessing a substantial burden claim under RLUIPA, when a claimant shows that its religious exercise has been burdened by state action, courts must insist that the state articulate a compelling interest and demonstrate that it has regulated in *the least* restrictive means to achieve that interest.

What are some examples in action?

Let me conclude by giving some real life examples of how this has worked in practice.

On the Big Island, we asserted RLUIPA against the county for regulating a synagogue’s use of its Rabbi’s home to host religious gathers in a more restrictive way than the county required of area businesses, like a concert venue.

In Colorado, the Town of Castle Rock tried to prevent The Rock Church from parking 2 RV's on the back of its parking lot to provide shelter for the suddenly homeless. The court issues a preliminary injunction explaining that any of the compelling interests articulate by the town—mostly that it might lead to an expansion of housing on the church's property or others in town might do the same thing to help the homeless—were either factually different from the church's use or “entirely speculative.”

In Arizona, we represent a small church on the border that has a large ministry that provides food and clothing to those in need. The church hauls donations of food and material to the church by means of an 18-wheeler. The City cited the pastor for parking the 18-wheeler on the church property to unload, despite (1) an ordinance that allows semis to make such deliveries, parking for up to 2 hours on residential streets and (2) the town completely ignoring semi-truck deliveries of food to public elementary schools down the street as part of a head start program.

The Court rejected the city's motion to dismiss, concluding that the city's actions constitute an individualized assessment, entitling it to assert RLUIPA's protections.

Finally, in California, we represented Anchor Stone Christian Church against the City of Santa Ana after the City denied the Church's request for a conditional use permit. The Court entered a preliminary injunction against

the City on both substantial burden and equal terms claims.

Conclusion

There are many other cases we could discuss, but let me conclude by trying to tie all of this together.

What I think the Court has been trying to say by linking its free exercise jurisprudence with RLUIPA, as it has in *Mast* and *Hobbs*, is that the First Amendment—and efforts by Congress in legislation—is meant to maximize freedom.

That means, yes, it affords “heightened protection” for religious exercise, as Justice Ginsburg said in *Cutter v. Wilkerson*. Or, as Justice Gorsuch said in *Kennedy*, the First Amendment “doubly protects” religious expression.

Our default as a country should be to maximize protections for religious liberty. And, when government uses what Attorney General of Ohio, Dave Yost, said recently, its “petty tools of government,” as lawyers, we ought to remind the government, as Justice Gorsuch did in *Mast*, that the state has a duty to refrain from “infringing sincerely held religious beliefs and practices except as a last resort.”