Introduction

In the field of religion and law, one of the most hotly debated laws is the Religious Freedom Restoration Act. This law, which generates significant litigation is the product of a long back and forth between Congress and the Supreme Court regarding the proper balance between free exercise rights and the obligation to follow generally applicable laws. It has also led to many subsequent including the federal Religious Land Use and Institutionalized Persons Act and the numerous state copycat RFRAs. The law has come heavily into focus due to recent high profile litigation involving the Affordable Care Act and the issues related to Gay Rights.

In this class, we will focus on the history of this law as well as several recent prominent cases. We will also look at emerging potential issues that are likely to arise in the near future.

PART I: PRE-SMITH STANDARD

Prior to the U.S. Supreme Court's 1990 decision in *Employment Division v. Smith*, the court applied a more robust vision of the free exercise clause. For example, in *Yoder v. Wisconsin*, the Supreme Court addressed the issue of Amish students whose religious beliefs clashed with Wisconsin's compulsory education law. The court held that even though education is the apex of an individual state's powers, only a strong interest which cannot otherwise be served can be the basis for overcoming a sincere religious belief. Therefore, it held that the Amish students were constitutionally entitled to an exemption from that law.

Other cases similarly held that for the government to be able to impose a substantial burden on a person's religious exercise, the government must show that it has a substantial interest in the matter and that the regulation is narrowly tailored to address the government's concerns. Prior to *Smith* this rule applied even in cases of a generally applicable law. One example of this was *Sherbert v. Verner*, which involved a law in which the plaintiff's eligibility

for government assistance was conditioned on her ability to work on Saturday. Plaintiff was unable to work on Saturday due to it being the sabbath for her religion and was therefore denied government assistance. The Court held that it was unconstitutional for the state to impose a burden on her religious practice in such a fashion. In doing so, the court noted that the cases where the court has allowed a law to stand that imposes on religious freedom, they "have invariably posed some substantial threat to public safety, peace or order" and can only be justified by a compelling state interest.

PART II: EMPLOYMENT DIVISION v. SMITH

The Supreme Court's religious exercise protections changed dramatically in *Employment Division v. Smith*. In *Smith*, the court addressed a case that was very similar to *Sherbert v. Verner*. *Smith* was denied unemployment compensation because he consumed peyote, an illegal drug, as part of his religious practice. *Smith* announced a new rule that held that no free exercise violation exists when a law is neutrally applicable and only incidentally burdens religious practice.

The Supreme Court distinguished *Sherbert* by claiming that *Sherbert* had previous been narrowly cabined and that cases of denial of unemployment for failure to work on the Sabbath were different because they occurred in a context that invited individualized consideration of each applicant's circumstances. The law *Smith* violated, prohibiting peyote consumption, was generally applicable and did not invite any individualized consideration.

The court explained the new rule as follows:

> the "exercise of religion" often involves not only belief and profession but the performance of (or abstention from) physical acts: assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, abstaining from certain foods or certain modes of transportation. It would be true, we think (though no case of ours has

involved the point), that a state would be "prohibiting the free exercise [of religion]" if it sought to ban such acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display. It would doubtless be unconstitutional, for example, to ban the casting of "statues that are to be used for worship purposes," or to prohibit bowing down before a golden calf.

Respondents in the present case, however, seek to carry the meaning of "prohibiting the free exercise [of religion]" one large step further. They contend that their religious motivation for using peyote places them beyond the reach of a criminal law that is not specifically directed at their religious practice, and that is concededly constitutional as applied to those who use the drug for other reasons. They assert, in other words, that "prohibiting the free exercise [of religion]" includes requiring any individual to observe a generally applicable law that requires (or forbids) the performance of an act that his religious belief forbids (or requires). As a textual matter, we do not think the words must be given that meaning. It is no more necessary to regard the collection of a general tax, for example, as "prohibiting the free exercise [of religion]" by those citizens who believe support of organized government to be sinful than it is to regard the same tax as "abridging the freedom . . . of the press" of those publishing companies that must pay the tax as a condition of staying in business. It is a permissible reading of the text, in the one case as in the other, to say that, if prohibiting the exercise of religion (or burdening the activity of printing) is not the object of the tax, but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended…

Our decisions reveal that the latter reading is the correct one. We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. On the contrary, the record of more than a century of our free exercise jurisprudence contradicts that proposition. As described succinctly by Justice Frankfurter in *Minersville School Dist. Bd. of Educ. v. Gobitis,* 310 U.S. 586, 594-595 (1940):

> Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs. The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities.

PART III: THE POST SMITH FIGHT BETWEEN CONGRESS AND THE SUPREME COURT

A. The Religious Freedom Restoration Act

The Supreme Court decision in *Smith* caused an uproar, not just in the legal world but in the political world as well. Religious groups were worried that the new rule would allow the government free reign to discriminate against religious activity using the excuse that they were just enforcing generally applicable laws.

Congress responded to *Smith* by passing the Religious Freedom Restoration Act. RFRA explicitly restored the old *Sherbert/Yoder* test for free exercise, in effect overruling the Supreme Court's decision. The *Smith* ruling was so unpopular that RFRA passed in the senate by a 97-3 margin.

RFRA provided:

> **(a) In general**
>
> 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.
> **(b) Exception**
> Government may substantially burden a person's exercise of religion only if it 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.

B. City of Boerne v. Flores

In *City of Boerne v. Flores*, the Catholic Archbishop of San Antonio applied for a building permit to enlarge a church in Boerne, Texas. When local zoning authorities denied the permit, relying on an ordinance governing historic preservation in a district which, they argued, included the church, the Archbishop brought this suit challenging the permit denial under RFRA.

The Supreme Court responded to Congress's action by declaring RFRA invalid as to state actions because it exceeded congress's power under Section 5 of the 14th Amendment.

The Court acknowledged that the reason behind RFRA was Congress's belief that the Court's new religious freedom standards had eroded the correct interpretation of religious free exercise rights. It responded by emphasizing that the power to determine the constitution and Congress's powers ultimately lay with the Court, not with Congress. The Court acknowledged that Congress has the right, pursuant to article V of the Fourteenth Amendment, to pass legislation enforcing the free exercise clause of the First Amendment. However, the Court held that Congress was not enforcing the Free Exercise clause but changing it. Therefore, it only could be upheld if it was deemed to be an appropriate remedial power based on current injustices. If found insufficient evidence of such problems to justify the remedy posed by RFRA.

After finishing its analysis made it clear that it viewed RFRA as an assault on its jurisprudence.

> Our national experience teaches that the Constitution is preserved best when each part of the government respects both the Constitution and the proper actions and determinations of the other branches. When the Court has interpreted the Constitution, it has acted within the province of the Judicial Branch, which embraces the duty to say what the law is. *Marbury v. Madison* , 1 Cranch, at 177. When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including stare decisis , and contrary expectations must be disappointed. RFRA was designed to control cases and controversies, such as the one before us; but as the provisions of the federal statute here invoked are beyond congressional authority, it is this Court's precedent, not RFRA, which must control.

C. RLUIPA

Congress responded to the Supreme Court's rebuke in *City of Boerne v. Flores* by passing the Religious Land Use and Institutionalized Persons Act. Although Congress gave up

on the idea of completely returning the old Sherbert/Yoder standard, RLUIPA attempted to protect religious exercise in two areas which were rife with religious discrimination, land use regulations (the subject of *Boerne*) and prison litigation. In order to defeat the issues the court cited in the *Boerne*, Congress held hearings and built a record of discrimination in these areas. Once again Congress overwhelmingly voted in favor of the measure, passing both houses based on unanimous consent.

In order to avoid the issues which sunk RFRA, RLUIPA not only narrowed the scope of the regulations and built a set of findings it also eliminated the language challenging the Courts authority that had enraged the court in RFRA.

D. Cutter v. Wilkinson

When RLUIPA was first passed many cities argued that it too, like RFRA should be found to be unconstitutional as exceeding Congress's powers under section 5 of the 14th Amendment. The vast majority of Courts upheld RLUIPA as a valid exercise of Congress's power using either the section 5 power or the commerce clause. Two courts, however, found RLUIPA to be unconstitutional. In a prison context, the Sixth Circuit Court of Appeals found that RLUIPA was unconstitutional because it impermissibly involved the government in religion. In *Elsinore Christian Center v. City of Lake Elsinore*, 291 F. Supp. 2d 1083 (C.D.Ca. 2003), a district court held RLUIPA to be unconstitutional because it held that neither section 5 of the 14th Amendment nor the commerce clause were sufficient to give Congress the power to enact RLUIPA. *Elsinore* did not reach the issue of whether RLUIPA was prohibited by the establishment clause because it was unnecessary in light of the court's finding that Congress did not have the power to pass the law in the first place.

Subsequent to *Elsinore*, the United States Supreme Court granted certiorari in *Cutter* v. *Wilkinson* and reversed the Sixth Circuit's decision. The Supreme Court held that RLUIPA's prison clauses were constitutional and did not violate the establishment clause. In so holding, the Court noted that RLUIPA had a much narrower range than RFRA, was based on extensive hearings that established significant free exercise problems in prisons. The court found that the law fell into the area in which the free exercise clause did not command but the establishment clause did not forbid. The Court expressly declined to reach the issue of whether the land use provisions of RLUIPA are unconstitutional.

Elsinore was reversed on appeal by the Ninth Circuit Court of Appeals in light of the Ninth Circuit's then recent decision in *Guru Nanak Sikh Society of Yuba City v. County of Sutter*, 456 F.3d 978 (9th Cir. 2006). In *Guru Nanak*, the Court referenced the recent Supreme Court decision, focused primarily on the scope of the law and upheld RLUIPA based on section 5 of the 14th Amendment. All other courts considering the constitutionality of RLUIPA subsequent to Cutter held that it is constitutional.

E. State RFRA Laws. Many states have created their own RFRA laws after the Supreme Court's decision in Boerne v. Flores. Recently, in the wake of the Supreme Court's rulings regarding Gay Marriage and related issues there has been a new push in states that had not yet enacted RFRA laws. This new push has been very controversial as opponents have claimed these laws are being passed primarily for the purpose of rolling back anti-discrimination laws pertaining to LGBT issues.

PART V: WHAT QUALIFIES AS A SUBSTANTIAL BURDEN TO A RELIGIOUS PRACTICE

All of the Federal RFRA, RLUIPA and the State RFRA acts start with an analysis of whether something qualifies as a substantial burden on religious practice. Therefore, it is important to review how that term has been understood to know if a RFRA claim can get off the ground.

A. Sacramental Narcotics.

This issue has arisen both in the U.S. Supreme Court Case of Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal 546 U.S. 418 (2006) and in an 1994 amendment to RFRA. The 1994 amendment clarified that Peyote, the substance at issue in Employment Division v. Smith was protected as a religious practice by RFRA and other laws protecting Native American Religious practice. In O Centro Espirita, the Supreme Court confirmed that for similar reason the use of a sacramental tea was protected by RFRA.

B. Education.

One area in which courts have sometimes found a burden on religious practice is education. In determining whether such a use is a substantial burden on religious practice, the first question is whether education is a religious practice, a cultural practice or has a different reason. Even within religious schools, the question is whether just the religious part of the studies is a religious duty or are all the parts of the school.

The most prominent case addressing this issue is *Westchester Day School v. City of Mamaronek*. *Westchester Day School* wished to expand and improve its facilities in a way that would allow the school to reverse their stagnation and grow. Early on in this long and tangled litigation, the Second Circuit Court of Appeals raised the question of whether improved recreational facilities and classrooms that would be used for secular purposes could truly be considered a religious exercise. *Westchester Day Sch. v. Village of Mamaroneck*, 386 F.3d 183 (2nd Cir. 2004). In fact,

> "Defendants' primary argument that no RLUIPA violation exists is predicated upon their reading the Second Circuit Opinion to hold that "activities and instruction in classrooms in religious schools such as WDS are not per se religious exercise under RLUIPA." (Defs. Post-Trial Br. at 50 n.8.) Defendants argue, therefore, that plaintiff's so-called "religious mission" argument (i.e., that plaintiff's entire facilities are in furtherance of their religious mission and therefore protected by RLUIPA) must fail. (Id. at 50-51.)"

Westchester Day Sch. v. Mamaroneck, 417 F. Supp. 2d 477 () However, at trial, this issue was countered by testimony, accepted by the court that religion permeated the entire curriculum of the school and was incorporated into every phase. Left undetermined was what court would have ruled if it was just addressing whether a religious mission was sufficient to have a setback be considered a substantial burden to religious practice.

The Court found that Education is in fact a central part of Judaism:

> "Here, the evidence shows that a significant portion of the proposed construction will be devoted to religious exercise. Although. a particular religious practice need not be central to one's faith to be protected under RLUIPA, this Court already has found that the religious education of children is in fact central to modern Orthodox Judaism: the religious education of children is a key religious obligation mandated by the Torah, and for most modern Orthodox Jews, the enrollment of their children in a dual curriculum Jewish school, such as WDS, is virtually mandatory.

In regards to other religions, the record is mixed. *Westchester Day School* cited a number of Christian schools in which courts found that a Christian school was in fact a religious exercise. Other case have found some Christian schools to not be a religious exercise.

C. Prayer and Synogogue

Prayer and cases involving synagogues, churches and other houses of prayer are the most common type of RLUIPA case. One common scenario such cases arise in is when a synagogue or church wishes to buy or build a property in or near a residential area not zoned for churches. Another common case is where a synagogue or church needs to make changes or expand its current facilities and needs the approval of a zoning board or an exception from a historical

preservation regime. Disputes in this area do not challenge prayer as a religious observance, but generally attacked the burden placed by the reservations at present.

Several of the earliest RLUIPA cases dealt with such scenarios. In *Temple B'nai Shalom v. City of Huntsville*, a case that was ultimately settled, a synagogue that was located in a historic preservation area sought an exception from that regime to make renovations to its facility that were required by another government agency for health and safety reasons. The city refused the request and the synagogue sued. The city tried to defend on the grounds that RLUIPA was unconstitutional, recognizing that the conflicting city orders to fix and to not fix the building was clearly a burden on the synagogue. After intervention from the Becket Fund, the case settled.

In *Congregation Kol Ami v. Abington Township*, a synagogue sought to buy a nunnery located in an area that was not zoned for houses of worship. The city refused to grant a certificate approving a continuation of a prior nonconforming use claiming that the nunnery was being used as a residence for nuns, not a church and was not a prior nonconforming use. The court rejected the argument that not allowing a synagogue within residential area was not a substantial burden and ruled in favor of the synagogue. *Congregation Kol Ami v. Abington Twp.*, 2004 U.S. Dist. LEXIS 16397 (E.D.Pa. 2004)

However, in many other cases courts have held to the contrary and found that inability to locate to a specific district convenient to the residences of the inhabitants was not a substantial burden. A typical case involving specifically Jewish facts was *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214 (11th Cir. 2004), the court acknowledged "Orthodox Judaism forbids adherents to use cars or other means of transportation during the weekly Sabbath and religious holidays; thus, adherents prefer to gather for worship and religious study in synagogues close

enough to their homes to allow them to walk to services." However it said that generally people can move near a synagogue if it's too far to walk and therefore it was not a substantial burden.

In addition to the usual cases, several unusual synagogue cases have arisen such as a request to be able to modify a synagogue to make facing east easier, which was found to not be a substantial burden on religious exercise and a request to build an eruv, which was rejected on other technical grounds.

D. Wedding Halls

Other cases have come up addressing RLUIPA in unique circumstances. In at least three cases, RLUIPA has been used to seek rights for wedding halls or outdoor wedding hosting places as a religious use. It has also arisen in a number of cases where a house of worship sought permission to hold small weddings as an accessory use to their normal religious practices. See e.g. *Third Church of Christ, Scientist v. City of New York*, 626 F.3d 667 (2nd Cir. 2010) (suing on RLUIPA discrimination grounds) Such cases raise questions of whether the use is religious or secular and whether there is a need for use of a specific property as well as other common questions mentioned above.

One court in passing has indicated that holding a wedding would normally be considered an accessory use of a synagogue but not of a religious school. See *Concerned Residents of Hancock Park v. City of L.A.*, , 2010 Cal. App. Unpub. LEXIS 7542, September 22, 2010