

An hourglass-shaped graphic with a globe inside. The top bulb is dark blue, and the bottom bulb is light blue. The globe is centered in the narrow neck of the hourglass. The top bulb has a dark blue cap, and the bottom bulb has a light blue cap.

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February 2, 2009

Congressional Research Service

Report RS20638

*THE RELIGIOUS LAND USE AND
INSTITUTIONALIZED PERSONS ACT OF 2000*

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Updated October 4, 2000

Abstract. On September 22, 2000, President Clinton signed into law the "Religious Land Use and Institutionalized Persons Act (RLUIPA). This is the latest chapter in what has been a lengthy dispute over whether religious practices ought to be given special treatment by government and about Congress' constitutional authority to require state and local governments to do so. Issues raised include whether religious exercise ought to be afforded special treatment, its effect on historic preservation policies and practices, whether it unduly interferes with state and local prerogatives regarding land use, and its constitutionality. A legal challenge to the constitutionality of the measure seems likely.

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CRS Report for Congress

Received through the CRS Web

The Religious Land Use and Institutionalized Persons Act of 2000

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Summary

On September 22, 2000, President Clinton signed into law the “Religious Land Use and Institutionalized Persons Act” (RLUIPA). The measure is a truncated version of the “Religious Liberty Protection Act” (H.R. 1691), which passed the House in 1999 but lost momentum after a dispute emerged over its effect on state and local civil rights laws. RLUIPA is the latest chapter in what has been a lengthy dispute over whether religious practices ought to be given special treatment by government and about Congress’ constitutional authority to require state and local governments to do so. RLUIPA uses Congress’ interstate commerce, spending clause, and Fourteenth Amendment powers to impose a strict scrutiny test on (1) state and local zoning and landmarking actions that substantially burden a person’s or institution’s religious exercise and (2) on state and local actions that substantially burden the religious exercise of persons who are in state institutions. Issues that have been raised about the measure include whether religious exercise ought to be afforded special treatment, its effect on historic preservation policies and practices, whether it unduly interferes with state and local prerogatives regarding land use, and its constitutionality. A legal challenge to the constitutionality of the measure seems likely to be made in the not-too-distant future.

Background

On July 13, 2000, the “Religious Land Use and Institutionalized Persons Act of 2000” (RLUIPA) (H.R. 4862, S. 2869) was introduced by bipartisan cosponsors in both the House and the Senate.¹ The proposal was a narrowed version of the “Religious Liberty Protection Act” (RLPA) (H.R. 1691), which passed the House in 1999 but lost momentum as concern developed over its possible impact on state and local civil rights

¹ 146 CONG.REC. S 6687 and H 6052 (daily ed. July 13, 2000). Sponsors in the Senate were Senators Hatch, Kennedy, Hutchinson, Daschle, Bennett, Lieberman, Schumer, and Smith (of Oregon). Sponsors in the House were Representatives Canady, Nadler, and Edwards.

laws.² RLPA would have imposed a strict scrutiny test on state and local governmental policies and decisions that substantially burden religious exercise not only in the land use area but also in any state or local program receiving federal financial assistance and in any instance in which the burden on religious exercise affected interstate commerce. RLUIPA still applies broadly to state and local governmental policies and decisions concerning zoning and landmarking policies and practices that have an impact on religious exercise, but its scope otherwise has been narrowed to the religious exercise of persons institutionalized in state and local governmental facilities. Both the Senate and the House gave their approval to the bill by voice vote on July 27, 2000³; and President Clinton signed the measure into law on September 22, 2000.⁴

Background

RLUIPA is the latest chapter in a decade-long debate over whether religious exercise ought to be given special protection in law and over Congress' power to legislate that special protection. The debate centers on whether what is known as the strict scrutiny test ought to be applied to burdens on religious exercise that result from government action and has evolved as a dialogue between the Supreme Court and Congress. The following subsections explain the strict scrutiny test and detail this evolution.

Strict scrutiny. The free exercise clause of the First Amendment provides in pertinent part that “Congress shall make no law ... prohibiting the free exercise (of religion).”⁵ This clause protects religious **beliefs** absolutely from governmental interference but not religious **practices**. Over the past century the Supreme Court has used various standards of review in applying the clause to government actions that have impinged on religious **practices**. Beginning with *Sherbert v. Verner*⁶ in 1963, however, the Court seemed to settle on the strict scrutiny standard as the basic standard of judicial review. In that case the Court held that government actions alleged to interfere with a religious practice are constitutional **only** if they can be shown to serve some compelling public interest and to be no more restrictive of the religious practice than necessary. Absent such a showing, the strict scrutiny test requires the religious practice to be exempted from the governmental action that imposes the burden. Strict scrutiny, in short, is a balancing test that, on its face, gives extra weight to the religious interest.

The *Smith* decision. Notwithstanding use of the strict scrutiny test, religious claims prevailed in only a minority of the reported cases in the quarter of a century after *Sherbert*,

² For a full discussion of RLPA and its antecedents, see CRS, “The Religious Liberty Protection Act”(RL 30221).

³ See 146 CONG.REC. S 7779 and H 7192 (daily ed. July 27, 2000), respectively.

⁴ P.L. 106-274 (September 22, 2000).

⁵ By its terms the free exercise clause is applicable only to the actions of the federal government. But it has been held also to be part of the liberty protected by the due process clause of the Fourteenth Amendment from undue interference by the states. See *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

⁶ 374 U.S. 398 (1963).

as the courts seemed to apply the test with a light hand⁷; and in the 1980s the Supreme Court itself indicated a growing disenchantment with the test by using a less protective standard for free exercise claims by military personnel and prisoners.⁸ Finally, in 1990 in *Employment Division, Oregon Department of Human Resources v. Smith*⁹ the Court largely abandoned strict scrutiny as the constitutional test for free exercise cases, 5-4. It said that, except in three limited circumstances,¹⁰ strict scrutiny was no longer to be employed. As long as laws are religiously neutral and generally applicable, the Court held, they may be uniformly applied to all persons and institutions without regard to **any** burden or even prohibition placed on their exercise of religion. The free exercise clause, the Court said, **never** “relieves an individual of the obligation to comply with a `valid and neutral law of general applicability’ on the ground the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).” The Court asserted that the question of whether religious practices ought to be accommodated by government was a matter to be resolved by the political process and not the courts, although it admitted that “leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in”

Religious Freedom Restoration Act (RFRA). This abandonment of strict scrutiny and relegation of religious accommodation to the political process stimulated the rapid creation of a broad-based organization, the Coalition for the Free Exercise of Religion,¹¹ and the introduction by bipartisan sponsors in both the House and the Senate of a bill to undo *Smith*, the “Religious Freedom Restoration Act” (RFRA). After three years of consideration, Congress enacted a modified version of RFRA into law in 1993.¹²

RFRA restored strict scrutiny for free exercise cases, albeit as a statutory standard rather than a constitutional one. It provided that a statute or regulation of general applicability can lawfully burden a person’s free exercise of religion only if it can be shown

⁷ One author found that the Supreme Court rejected 13 of the 17 free exercise claims it heard during this period and that between 1980 and 1990 the U.S. courts of appeal rejected 85 of the 97 claims they heard. See Ryan, James E., “Smith and the Religious Freedom Assessment Act: An Iconoclastic Assessment,” 78 *Virginia Law Review* 1407, 1414-1417 (1992). Judge Noonan of the U.S. Court of Appeals for the 9th Circuit came up with a slightly different count. He found that from 1963 to 1988 the Supreme Court rejected 13 of 19 free exercise claims and the U.S. courts of appeal rejected 60 of 67 free exercise claims. See Appendix in *EEOC v. Townley Engineering & Mfg. Co.*, 859 F.2d 610 (9th Cir. 1988) (Noonan, J., dissenting).

⁸ See *Goldman v. Weinberger*, 475 U.S. 503 (1986) and *O’Lone v. Estate of Shabazz*, 482 U.S. 342 (1987), respectively.

⁹ 494 U.S. 872 (1990).

¹⁰ The Court retained strict scrutiny for governmental actions that **intentionally** discriminate against religion, cases involving denials of unemployment compensation to persons who are unemployed due to a conflict between their faith and the requirements of a job, and what it termed “hybrid” cases, *i.e.*, cases in which a free exercise claim is joined with another constitutional claim.

¹¹ The Coalition eventually comprised 67 religious, civil liberties, and civil rights organizations ranging across the political and religious spectrum.

¹² P.L. 103-141 (Nov. 16, 1993); 42 U.S.C.A. 2000bb *et seq.* For a fuller description of RFRA’s consideration by Congress, see CRS, *The Religious Freedom Restoration Act: Its Rise, Fall, and Current Status* (January 21, 1999) (CRS Report 97-795).

to be “essential to further a compelling governmental interest and (to be) the least restrictive means of furthering that compelling governmental interest.” RFRA made the standard applicable to governmental action at every level — federal, state, and local — and extended it to those areas, such as the military and prisons, that the Supreme Court had specifically excluded from the application of the strict scrutiny test in the 1980s. As the means of enforcement, RFRA allowed aggrieved parties to bring suit.

City of Boerne, Texas v. Flores. Arguments that RFRA violated the constitutional principles of federalism and separation of powers had been raised during its consideration by Congress and were subsequently pressed in litigation brought under the statute. In 1997 in *City of Boerne, Texas v. Flores*¹³ the Supreme Court held, 6-3, that RFRA was unconstitutional as applied to the states because it violated principles of federalism.

Boerne involved a dispute between a local Catholic church that wanted to expand its sanctuary and the city of Boerne’s designation of the original sanctuary as an historic structure under its historic preservation ordinance. Under the *Smith* test, the church had no claim for exemption from the landmarking ordinance, because the measure was a religiously neutral and generally applicable statute. Consequently, the lawsuit filed by the church invoked RFRA as the basis for its claim to an exemption from the ordinance.

In applying RFRA to the states, Congress had exercised its power under § 5 of the Fourteenth Amendment to enact “appropriate legislation” to enforce the religious liberty right embodied in the due process clause of that amendment. But in *Boerne* the Supreme Court asserted that such legislation must reflect “a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end” and held that RFRA failed to meet that test. In enacting RFRA, it said, Congress not only had failed to develop a legislative record that showed extensive denials of religious liberty but also had made RFRA so broad that it intruded “at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter.” Particularly with respect to the states, it stated, RFRA constituted “a considerable congressional intrusion into the States’ traditional prerogatives and general authority to regulate for the health and welfare of their citizens.” As a consequence, the Court concluded, RFRA “reflects a lack of proportionality or congruence between the means adopted and the legitimate end to be achieved ... and contradicts vital principles necessary to maintain separation of powers and the federal balance.” In applying RFRA to the states, it held, Congress’ exceeded its power under the Fourteenth Amendment.

Thus, after *Boerne*, state and local governments were no longer bound by RFRA. For them, the religiously neutral and generally applicable standard of *Smith* was generally the test governing policies and actions that burdened religious exercise.¹⁴

The “Religious Liberty Protection Act”. There is ongoing debate about whether judicial decisions applying RFRA differed markedly in result from those of the pre-*Smith*

¹³ 521 U.S. 407 (1997).

¹⁴ The Clinton Administration and most courts to date view RFRA as still applying to the federal government.

era as well as over whether it had a significant non-judicial effect.¹⁵ But continued concern over *Smith* and new concern over *Boerne* led bipartisan sponsors in both the House and the Senate, with the support of the Coalition for the Free Exercise of Religion, to introduce the “Religious Liberty Protection Act of 1998” (RLPA) (H.R. 4019 and S. 2148) on June 9, 1998. As with RFRA, the measure would have re-imposed a strict scrutiny standard on state and local governments, but this time primarily on the basis of Congress’ power to attach conditions to its spending programs and its power over interstate commerce. Hearings were held in both the House and the Senate, but the measure did not get beyond a subcommittee markup in the House in the 105th Congress.

In the 106th Congress a modified version of RLPA was re-introduced in the House on May 5, 1999 (H.R. 1691). After another hearing, it was reported on June 23 by the House Judiciary Committee by voice vote¹⁶; and on July 15, 1999, the full House, after some debate, adopted the reported version of RLPA without change, 306-118.¹⁷

The House-passed version of RLPA would have re-applied a strict scrutiny test to state and local government policies and actions that imposed a substantial burden on religious exercise (1) in any program or activity they operated which received federal financial assistance, and (2) in any situation in which the burden, or its removal, would have affected interstate commerce. In addition, RLPA would have imposed a strict scrutiny standard on any state or local land use regulation which imposed a substantial burden on religious exercise if the regulation allowed the government to make “individualized assessments” of the proposed uses to which a property would be put. It would also have barred such governments from discriminating against religious entities in the land use regulation process. As with RFRA, aggrieved parties could have used RLPA in lawsuits or other proceedings to obtain “appropriate relief” against state and local governments. Unlike RFRA, RLPA also authorized the federal government to bring suit to enforce compliance with the Act.

The “Religious Land Use and Institutionalized Persons Act of 2000”

During RLPA’s consideration in the House, concerns were raised, *inter alia*, that it would have the effect of overriding state and local civil rights statutes barring discrimination. Rep. Nadler (D.-N.Y.) proposed an amendment to limit this effect to small landlords, in the case of housing discrimination laws, and to small employers and religious institutions, in the case of employment discrimination statutes. His amendment

¹⁵ One author found that of the 168 cases involving RFRA decided before *Boerne*, the RFRA claim had been rejected in 143 instances and granted in only 25. See Lupu, Ira. C., “The Failure of RFRA,” 20 U. Arkansas Little Rock L. J. 575, 591 (1998) and n. 6. *But see* Berg, Thomas, “The Constitutional Future of Religious Freedom Legislation,” 20 U. Ark. Little Rock L. J. 715, 718 (1998) (“it was beginning to make a difference”).

¹⁶ H.Rept. 106-219, 106th Cong., 1st Sess. (July 1, 1999).

¹⁷ 145 CONG. REC. H 5608 (daily ed. July 15, 1999).

lost in committee and was rejected on the House floor by a vote of 190-234.¹⁸ But the Coalition for the Free Exercise of Religion fractured over the issue, and the bill stalled.¹⁹

On July 13, 2000, a truncated version of RLPA – the “Religious Land Use and Institutionalized Persons Act of 2000” (RLUIPA) – was introduced with the full support of the Coalition. On July 27, 2000, both the House and the Senate approved the measure; and President Clinton signed it into law on September 22, 2000. The measure

(1) imposes a strict scrutiny standard on state and local zoning and landmarking laws and regulations that impose a substantial burden on an individual’s or institution’s exercise of religion, if the burden (a) is imposed in a program that receives federal financial assistance, (b) affects interstate commerce, or (c) is imposed through a process which permits the government to make individualized assessments of the proposed uses for the property involved;

(2) bars state and local governments from discriminating against religious entities in zoning and landmarking processes and from excluding religious assemblies from, or unreasonably limiting them within, any jurisdiction;

(3) imposes a strict scrutiny standard of review on state and local governments for any substantial burdens they impose on the exercise of religion by persons in state or local institutions such as prisons, juvenile detention facilities, mental hospitals, and nursing homes if the burden is imposed (a) in a program that receives federal financial assistance, or (b) affects interstate commerce;

(4) allows persons and institutions to use the Act as a claim or defense against a state or local government;

(5) allows prisoners to use the Act but subject to the Prison Reform Litigation Act of 1995, which sought to prevent frivolous litigation by prisoners;

(6) allows the federal government to enforce the Act by seeking declaratory or injunctive relief against state and local governments; and

(7) defines “religious exercise” broadly to mean any exercise of religion, whether compelled by, or central to, a system of religious beliefs and to include the use, building, or conversion of real property for religious purposes.

Thus, in general terms RLUIPA can now be invoked in lawsuits and other proceedings by individuals and institutions that believe their exercise of religion has been substantially burdened by state and local government zoning and landmarking policies and decisions as well as by individuals in state and local institutions. In both situations state and local governments will have to show that the policy or practice that imposes the burden serves a compelling public interest and does so in the manner that is least restrictive of religious exercise. If that test cannot be met, the religious exercise will have to be exempted from the policy’s application. The types of religious practices for which exemption can be sought are broad and inclusive and are not limited to those that are mandated by, or central to, a system of religious beliefs. Finally, it should be noted that the federal government can bring suit against state and local governments to enforce compliance with the Act.

¹⁸ *Id.* at H 5607.

¹⁹ In the Senate H.R. 1691 was held at the desk for several months before being referred to the Judiciary Committee in November, 1999. Sen. Hatch (R.-Utah) introduced a slightly modified version (S. 2081) on February 22, 2000, which was placed directly on the Senate calendar. No further action occurred on either measure.