

NEW YORK LAW JOURNAL

Religious Land Use

Courts Uphold Statute, But Key Issues Remain

By John M. Armentano

More than a decade ago, the U.S. Supreme Court, in *Employment Div., Dep't of Human Res. of Oregon v. Smith*,¹ eliminated the "strict scrutiny" standard that it had applied for some years in free exercise of religion cases.²

Instead, the Court held in *Smith* that generally applicable, religion-neutral laws did not have to be justified by a compelling governmental interest, even if they burdened religious practices.

The *Smith* decision set off significant controversy. In response, Congress passed and President Clinton signed the Religious Freedom and Restoration Act of 1993 (RFRA).³ Acting pursuant to the Enforcement Clause of the Fourteenth Amendment to the U.S. Constitution, Congress designed RFRA to have claims under the Free Exercise clause determined under the prior strict scrutiny test, which places a heavier burden on governments than the *Smith* test.

The Supreme Court, however, had other ideas, and in *City of Boerne v. Flores*⁴ the Court held that RFRA was unconstitutional, determining it exceeded Congress's enforcement author-

ity and was instead an attempt to expand the Constitution's substantive rights legislatively.

Congress responded. In July 2000, Senators Orrin Hatch (R - Utah) and Edward Kennedy (D - Mass.) introduced the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) in the Senate. Gaining bipartisan support, RLUIPA unanimously passed both houses of Congress and was signed by President Clinton on Sept. 22, 2000.

RLUIPA again resurrects the strict scrutiny standard of review for land use cases involving the free exercise of religion. Specifically, it prohibits any government agency from imposing or implementing 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 is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest.⁵

The underpinning for RLUIPA was different from the basis for RFRA. RLUIPA covers state action aimed at land use decisions and the application of RLUIPA is limited to cases that affect federally financed programs or interstate and foreign commerce or cases where the land use decisions are part of a system of "individualized assessments." By limiting RLUIPA in this way, Congress hoped to achieve constitutionality by invoking its powers under the Spending and Commerce Clauses⁶ and not the Fourteenth Amendment. The ultimate effect of RLUIPA is identical to that of RFRA.

Recently, two federal district courts — one in Pennsylvania, in *Freedom Baptist Church of Delaware County v. Township of Middletown*,⁷ and one in California, in *Cottonwood Christian Center v. Cypress Redevelopment Agency*⁸ — issued decisions under RLUIPA. The Pennsylvania court considered the constitutionality of RLUIPA — apparently the first court to do so in a reported decision — and upheld it.

John M. Armentano, a partner with the Long Island law firm of Farrell Fritz, P.C., represents local governments and developers in zoning, land use, and environmental matters, including litigation. He may be reached at jarmentano@farrellfritz.com.

The constitutionality of the statute was not directly attacked in the California case, and the court applied the statute as written to preliminarily enjoin the government's actions that were challenged there.

These two decisions certainly do not close the book on the validity of RLUIPA. Rather, it is likely that other courts — undoubtedly including the U.S. Supreme Court — will have to decide the constitutionality of the statute. Indeed, given the Supreme Court's recent Tenth Amendment decisions, it would not be surprising if this statute were to suffer the same fate as RFRA.

Cottonwood

The California court's decision in *Cottonwood* illustrates the practical importance of a court applying the RLUIPA standard rather than the *Smith* rule.

Cottonwood involved a dispute between the City of Cypress and the Cottonwood Christian Center over property owned by Cottonwood on which it wanted to build a church facility that would include a 4,700 seat auditorium and surrounding buildings for use in its ministries. Cypress wanted the property as commercial retail space and began eminent domain proceedings. Cottonwood filed suit, seeking to preliminarily enjoin those proceedings.

Cottonwood asserted that the various zoning decisions and efforts to condemn Cottonwood's property were subject to strict scrutiny and that the city's actions only could be upheld if they were the least restrictive means taken to advance a compelling government interest. Cypress, however, relying on *Smith*, argued that review of government actions under the Free Exercise Clause was governed by a rational basis standard.

The court disagreed and found that a strict scrutiny analysis applied under RLUIPA because the city's refusal to approve Cottonwood's application involved a "land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments," as provided in the law.

Moreover, the court ruled, Cottonwood demonstrated that Cypress's zoning and eminent domain actions substantially burdened its exercise of religion, observing that Cottonwood was "unable to practice its religious beliefs in its current location."

The court also stated that neither of the interests advanced by the city for refusing to grant Cottonwood's application and for condemning the Cottonwood property — blight and generating revenue for the city — were sufficiently compelling to justify burdening Cottonwood's religious exercise.

In the court's view, although aesthetic concerns are substantial governmental interests⁹ they are not compelling interests that could justify burdening Cottonwood's religious exercise rights under RLUIPA.

The court also found that revenue generation was not a compelling state interest, adding that there was no evidence that the construction and operation of the Cottonwood church would place a significant burden on city resources or require expansion of roads maintained by the city.

The legal standard relied on by the court led it to issue the preliminary relief requested by Cottonwood. It seems rather clear, however, that such relief would not have been granted under the *Smith* test.

Interestingly, the *Cottonwood* court observed that Cypress had not attacked the constitutionality of RLUIPA, at least at the preliminary injunction stage of the proceedings.

The court nevertheless cursorily stated in dicta and without significant analysis that because RLUIPA was based on the Spending and Commerce Clauses, it "would appear to have avoided the flaws of its predecessor RFRA, and be within Congress's constitutional authority."

RLUIPA's constitutionality was the focus of the Pennsylvania court's decision in the *Freedom Baptist* case.

Freedom Baptist

In a case in which the Freedom Baptist Church of Delaware County and its pastor asserted that land use restrictions enacted by the Township of Middletown, violated RLUIPA, the Pennsylvania court analyzed the constitutionality of the statute and found it constitutional.

In particular, the court examined whether Congress had exceeded its authority under the Commerce Clause when it adopted RLUIPA.

The defendants in this case had stressed that religious institutions had virtually no effect on interstate commerce and that Congress therefore could not seriously have invoked Commerce Clause authority to regulate something that they regarded as the antithesis of commerce.

By contrast, the church countered that the zoning condition on their property, and associated parking requirements, constituted a substantial burden on them, and therefore the commerce aspect of RLUIPA was triggered.

The court stated that, at least in its Commerce Clause dimension, it would seem that Congress's power over economic activity remains extraordinarily broad. The court seemed to take at face value Congressional findings as to the interstate commerce jurisdictional element underpinning RLUIPA, and then declared that insofar

as state or local authorities "substantially burden" the economic activity of religious organizations, Congress had ample authority to act under the Commerce Clause. The court therefore held the statute a "permissible exercise of that broad power."

The court also found that RLUIPA critically differed from RFRA in that RFRA had a "sweeping coverage" that ensured that statute's "intrusion at every level of government, displacing laws and prohibiting official actions of almost every description regardless of subject matter, while RLUIPA was targeted "solely to low visibility decisions." Based on this analysis, the court upheld RLUIPA's constitutionality.

These two cases demonstrate that Congress through RLUIPA reaches down to what traditionally has been a matter of almost exclusively local concern: the enforcement of zoning codes. Yet, not only was the Commerce Clause analysis not in depth, neither of these two decisions analyzed the statute in any detail in the context of the Tenth Amendment, which imposes significant limitations on legislation enacted under the Commerce Clause to maintain the division of power between states and the federal government.

It is significant to note that RLUIPA does not involve the First Amendment. Rather, Congress, through RLUIPA, is legislatively restricting local government in its land use powers.

Court Decisions

In this context, consider the decision of the U.S. Supreme Court in *United States v. Lopez*,¹⁰ finding that the Gun-Free School Zones Act was unconstitutional. The case arose when a high school student in Texas was arrested after he was found carrying a gun and charged with violating the statute.

The Supreme Court, invoking bedrock notions of federalism, observed that the Constitution creates a federal government of enumerated powers — and that even Congress' power under the Commerce Clause was subject to limits. The Court pointed out that Congress may regulate the use of the channels of interstate commerce, the instrumentalities of interstate commerce, and those activities having a substantial relation to interstate commerce. The Court held that the Gun-Free School Zones law fell within the third category as a regulation of an activity that substantially affects interstate commerce.

The Court found, though, that the law was a criminal statute which "by its terms" had nothing to do with "commerce" or any sort of economic enterprise, however broadly one might define those terms.

Moreover, the Court continued, the law had no express jurisdictional element that might limit its reach to a discrete set of firearm possessions that additionally had an explicit connection with or effect on interstate commerce.

The Court then turned to the government's essential contention: that the law was valid because possession of a firearm in a local school zone did indeed substantially affect interstate commerce. The government argued, for example, that the presence of guns in schools posed a substantial threat to the educational process by threatening the learning environment, which, in turn, would result in a less productive citizenry, having an adverse effect on the nation's economic well-being.

The Court rejected this position, stating that under the government's "national productivity" reasoning, Congress could regulate any activity that it found was related to the economic productivity of individual citizens.

Instead, the Court found that the possession of a gun in a local school zone was "in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce." The Court then ruled that the law was unconstitutional in that Congress had exceeded its powers under the Commerce Clause to enact it.

Two years later, in *Printz v. United States*,¹¹ the Court ruled that provisions of the Brady Handgun Violence Prevention Act that required local police chiefs to conduct background checks on gun purchasers were unconstitutional.

Here, the Court recognized that because there was no constitutional text speaking to whether Congress could

compel state officers to execute federal laws, it examined the "historical understanding" of the Constitution's structure and "the very principle of separate state sovereignty" to conclude that Congress had gone too far.

Then, in *United States v. Morrison*,¹² the Court found a section of the Violence Against Women Act of 1994 that provided a civil remedy for the victims of gender-motivated violence to be unconstitutional.

The Court observed that gender-motivated crimes of violence were not, "in any sense of the phrase, economic activity."

In addition, the Court said, like the Gun-Free School Zones Act at issue in *Lopez*, the Violence Against Women Act contained no jurisdictional element establishing that the federal cause of action was pursuant to Congress' power to regulate interstate commerce.

The Court concluded that if it permitted the statute to stand, it would mean that Congress could use the Commerce Clause "to completely obliterate the Constitution's distinction between national and local authority." In the Court's view, "[t]he Constitution requires a distinction between what is truly national and what is truly local."

Conclusion

These three decisions and other recent opinions set forth a clear view of

the view of the majority of the current Court with respect to federalism and federal and local power.

They suggest that the Court very well may place RLUIPA in the same category as the Gun-Free School Zones law, the Brady Act, and the Violence Against Women statute when given the opportunity. After all, what can be more "truly local" than determining land use in one's neighborhood, especially when such use complies with the municipality's well-considered comprehensive plan?

NOTES:

1. 494 U.S. 872 (1990).
2. See, e.g., *Hobbie v. Unemployment Appeals Comm'n of Florida*, 480 U.S. 136 (1987); *Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707 (1981).
3. 42 U.S.C. 2000bb.
4. 521 U.S. 507 (1997).
5. 42 U.S.C. 2000cc(a)(1).
6. U.S. Const. art. I, Sec. 8, cls. 1, 3.
7. 204 F.Supp.2d 857 (E.D.Pa. 2002).
8. 2002 WL 1827845 (C.D. Cal. Aug. 6, 2002).
9. See, e.g., *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 507-10 (1980).
10. 514 U.S. 549 (1995).
11. 521 U.S. 898 (1997).
12. 529 U.S. 598 (2000).