RELIGIOUS LIBERTY LAW SECTION

STATE BAR OF ARIZONA

Newsletter / JUNE 2018

FROM *the* EDITOR

Welcome to the inaugural issue of the *Religious Liberty Law Section Newsletter* – a publication of the Religious Liberty Law Section.

It has been wisely stated that, in a republic, it is necessary to have frequent recourse to basic principles. I think the same is true for the Religious Liberty Law Section. It seems appropriate, then, that the very first message from the current Editor of this Newsletter should be a reminder of what the mission of the Religious Liberty Law Section is – because the purpose of this Newsletter is to advance that mission.

The Section's Mission Statement states that "the Religious Liberty Law Section of the State Bar of Arizona is formed to educate, to discuss, and to disseminate information regarding, as well as to advance and to protect, the basic human and constitutional right of religious liberty through law."

According to its Mission Statement, representative topics of interest to the Section include the legal and philosophical foundations of religious liberty; the history of religious liberty and religious liberty law; the Establishment and Free Exercise clauses of the U.S. Constitution; religious liberty protections in the Arizona Constitution; statutory religious liberty protections; religious discrimination under Title VII, Title IX and other federal and state laws; international religious liberty protections; and current religious liberty violations at both the domestic and international levels.

That's a lot of ground to cover – and I look forward to covering that ground with you in this and future issues of the *Religious Liberty Law Section Newsletter.*

Bradley S. Abramson

Bradley S. Abramson, Editor

QUOTE DU JOUR

"My prayer shall ever be that this Nation, under God, may vindicate through all coming time the sanctity of the right of all within our borders to the free exercise of religion according to the dictates of conscience."

— **Franklin D. Roosevelt**

IN *this* ISSUE

Published by the Religious Liberty Law Section of The State Bar of Arizona.

FROM *the* CHAIR

Over the past year, it has been my pleasure to serve as the Chair of the Religious Liberty Law Section of the State Bar—one of a small handful of such sections among state bar associations across the country.

In its first two years of existence, our young-but-enthusiastic Section put on an engaging and thought-provoking State Bar Convention Seminar last year, addressing the intersection of religious liberty rights and anti-discrimination laws, the videos of which are available under "Resources" on page 13. We are set to follow that up with an impressive seminar at this year's convention on Friday, June 29, addressing issues of religion in the workplace. We hope you will join us. You can register for this year's convention CLE via the link on page 12.

In addition, this year we have also kicked off our CLE series, with an in-person session on legislative prayer in the fall, and a spring webinar this past February on religion in schools. Several more CLE offerings are in the works for this fall. Stay tuned!

I am now particularly pleased to see our Section Newsletter get off the ground, as the next step in developing content and resources to assist Section members and the community at large in fulfilling the Section's mission. At its core, that mission is "to educate, to discuss, and to disseminate information regarding, as well as to advance and to protect, the basic human and constitutional right of religious liberty through law." ***[read full mission statement]***

As commercial litigator-turned-school lawyer by trade, my professional involvement in religious liberty issues tends to come up in the education context—e.g., prayers at graduation or other ceremonies; student bible clubs; curricular content involving religious issues, and the like.

Just as I was preparing this note, a decision came down from the 7th Circuit on a case involving Establishment Clause compliance with respect to a "Christmas Spectacular" program. *Freedom from Religion Foundation, Inc. v. Concord Community Schs.*, Nos. 17-1683, 17-1592 (Slip Op.) (7th Cir., Mar, 21, 2018). Ultimately, the Seventh Circuit upheld a modified version of the Christmas Spectacular, which included four and a half minute song and explanation of Kwanzaa and Hanukkah, followed by twenty minutes of Christmas songs, including "Jesus, Jesus, Rest Your Head" and "O Holy Night." The Christmas portion of the program also included a nativity scene appearing on the stage for two minutes. An earlier version of the show—which the court struck down as in violation of the Establishment Clause—had included a live nativity scene (with student actors) and readings from the New Testament, while omitting any references to Hanukkah, Kwanzaa, or other religious or cultural holiday traditions.

In its ruling, the court noted a "depressingly steady stream of First Amendment cases, in which one party wishes to express its religious views in the public sphere and the other party asserts that the Establishment Clause would be violated by the display." Begrudgingly accepting that the parties had cast the court "in the uncomfortable role of Grinch," the court went on to apply a very fact-specific analysis, under a variety of "tests" the Supreme Court has established over the years—including the *Lemon*/purpose test, the endorsement test, and the coercion test.

The Seventh Circuit, like many courts before it—including the Supreme Court—noted "flaws" in each of these tests—none of which has proved to be a consistent, objective predictor of outcomes. And while debates surrounding these tests, combined with the natural tension between Establishment and Free-Exercise clauses, make it difficult to predict outcomes in individual cases, one thing is clear: quality advocacy by educated lawyers plays an important role in protecting against the erosion of religious liberty. To that end, we hope you find this periodic newsletter, along with our CLE offerings, Convention seminar, and other resources of the Section helpful to you, as we seek to "advance and protect, the basic human and constitutional right of religious liberty through law."

David D. Garner
David D. Garner, Chair

SELECTED CASE LAW *Updates*

CASE 1 ***Sprague v. Spokane Valley Fire Department, et al.***, 409 P.3d 160 (Wash. 2018). In a 5 to 4 decision, the Supreme Court of the State of Washington issued its opinion in *Sprague v. Spokane Valley Fire Department, et al.*

At issue in the case was the Fire Department's termination of Captain Jonathan Sprague for persistently including religious comments in e-mails he sent through the Department's computer systems and items he posted on the Department's electronic bulletin board. In a disciplinary letter the Department sent Sprague prior to terminating him, the Department stated: "The inappropriate and prohibited behavior involved written content that was of a religious nature, including religious symbols.... The inappropriate and prohibited behavior involved the use of language and written content that was of a religious nature, specifically the quotation of scripture."

The basis of the Department's position with respect to its prohibition of religious content was "to separate church from state." The Department also argued that it needed to restrict Sprague's religious speech because the speech was coercive to other employees, that its restrictions were necessary in order to prevent discrimination, and that the restrictions were necessary in order to preserve a loyal employment relationship.

Relying upon three U.S. Supreme Court cases – *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993), *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995), and *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001) – the Washington Supreme Court concluded that the Fire Department violated Sprague's First Amendment right to free speech when it prohibited Sprague's speech based upon the fact that it was religious. As the court explained, its holding recognizes that "when a government permits speech, it may not discriminate against only certain viewpoints – whether those viewpoints are religious or not" and reiterated that permitting equal access to a governmentally created non-public forum does not constitute the endorsement of religion. The court denied the Department's rationales for restricting Sprague's speech – finding that the Department's duty under nondiscrimination laws did not outweigh Sprague's interest in speaking; that there was no evidence that Sprague's statements created an issue of discipline or upset harmony among Department employees; and that an appeal for esprit de corps does not justify an unconstitutional speech restriction.

(Four of the nine Justices concurred in part and dissented in part, stating that they would have remanded the case for further fact-finding on whether the Fire Department had an unwritten policy or practice that was specifically hostile to religious viewpoints.)

CASE 2 ***Cochran v. City of Atlanta, et al.***, 2017 WL 7038794 (2018). In *Cochran*, the issue concerned whether the City of Atlanta could fire the City's Fire Chief for publishing a religious guide book for men that included passages indicating that, in accordance with the Bible and historic Christian teaching, sex outside of the confines of marriage between a man and a woman is contrary to God's will.

One of Chief Cochran's claims was that the City's termination of his employment constituted a violation of his constitutional right to freely exercise his religion, because in terminating him the City targeted his expression of sincerely held religious beliefs regarding marriage and sexuality. The City contended that Cochran was not terminated because of his religious beliefs but because his publication of the book without the City's prior permission violated the City's pre-clearance rules that require City employees to seek permission from the City's Board of Ethics and supervisors prior to beginning any outside employment.

The Court held that the City's action did not violate Cochran's free exercise rights under a rational basis scrutiny standard because the pre-clearance rules were neutral and generally applicable, did not address religion, were not passed because of religious motivations, and applied equally to all employees and outside employment. However, the Court found that the City's pre-clearance rules did operate as an unconstitutional prior restraint on Cochran's speech and invested the City with an unconstitutional level of unbridled discretion, thereby rendering the City's termination of Cochran unlawful.

CASE 3 *Miller and Cathy's Creations, Inc., d/b/a Tastries v. California Dept. of Fair Employment and Housing.*

On February 5, 2018, the Superior Court of California denied California's request for a preliminary injunction against Cathy Miller and "Tastries," a small bakery in Bakersfield, California. The State brought the action under the State's Unruh Civil Rights Act, alleging that Miller and Tastries unlawfully discriminated against a same-sex couple when they declined to bake a custom wedding cake for the couple on the ground of the business owner's deeply held religious conviction that same-sex marriages violate a Biblical command that marriage is only between a man and a woman.

In denying the State's requested injunction, the court set forth the history of the U.S. Supreme Court's compelled speech jurisprudence. The court rejected the State's contention that baking a custom wedding cake did not constitute speech, finding that a wedding cake "is not just a cake in a Free Speech analysis. It is an artistic expression by the person making it that is to be used traditionally as a centerpiece in the celebration of a marriage. There could not be a greater form of expressive conduct." The court stated that the same-sex couple "plan a celebration to declare the validity of their marital union and their enduring love for one another" and that "The State asks this court to compel Miller against her will and religion to allow her artistic expression in celebration of marriage to be co-opted to promote the message desired by same-sex marital partners, and with which Miller disagrees."

Further, the court held that the State's interest in preventing discrimination in the marketplace did not outweigh Miller's Free Speech rights in this context. The court stated "No court evaluates Free Speech rights against the interest of the State in enforcing public access laws in a vacuum, without regard to circumstances, history, culture, social norms, and the application of common sense. Here, Miller's desire to express through her wedding cakes that marriage is a sacramental commitment between a man and a woman that should be celebrated, while she will not express the same sentiment toward same-sex unions, is not trivial, arbitrary, nonsensical, or outrageous. Miller is expressing a belief that is part of the orthodox doctrines of all three world Abrahamic religions, if not also part of the orthodox beliefs of Hinduism and major sects of Buddhism."

The court also rejected the State's argument that the same-sex couple's dignity harm suffered on account of being denied Miller's services (particularly when Miller provided a referral to another bakery that could bake the cake without violating the baker's conscience), is not sufficient to deny constitutional protection to Miller. The court cited *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995) for the proposition that "the State's interest in eliminating dignitary harms is not compelling where, as here, the cause of the harm is another person's decision not to engage in expression."

Due to the fact that the court decided the case on Free Speech principles, it did not reach Miller's Free Exercise of Religion claim.

CASE 4 *American Humanist Association, et al. v. Maryland-National Capital Park and Planning Commission, and intervenors The American Legion, et al.*,

874 F.3d 195 (4th Cir. 2017). On October 18, 2017 the U.S. Court of Appeals for the 4th Circuit held that a 40 foot tall cross, erected in 1925 to honor 49 World War I soldiers, violated the Establishment Clause of the First Amendment. On March 2, 2018 the Court denied a petition for a rehearing *en banc*.

The court noted that the cross – situated on a publicly owned traffic island at the intersection of three highways – is part of a memorial park also containing a War of 1812 memorial, a World War II memorial, a Korean and Vietnam veterans memorial, a September 11th memorial walkway, and an American flag. The court also found that the cross-shaped memorial contains an American Legion star on it inscribed with "U.S."; has the words "valor," "endurance," "courage," and "devotion" on its base; and a plaque listing the names of the 49 Prince George's County soldiers who the memorial honors, as well as a quote by President Woodrow Wilson that reads" The right is more precious than peace. We shall fight for the things we have always carried nearest our hearts. To such a task we dedicate our lives." Since taking over the memorial in 1961, the Maryland-National Capital Park and Planning Commission spent approximately $117,000 to maintain the memorial and set aside an additional $100,000 for renovations, $5,000 of which had been spent at the time of the litigation.

The court found that the memorial constituted an establishment of religion in violation of the First Amendment. The court also found that the memorial excessively entangled the government in religion.

In coming to its conclusion, the court applied the three-pronged test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971) – even though, as the court recognized, a plurality of the Supreme Court in *Van Orden v. Perry*, 545 U.S. 677 (2005) held that the *Lemon* test was "not useful" in a case, such as this, where the challenged governmental activity is a passive monument. The court relied upon Justice Breyer's concurring opinion in *Van Orden* which stated that the *Lemon* test continues to act as a "useful guidepost[]" in Establishment Clause cases involving monuments.

In applying the *Lemon* test, the court found that the Park Commission passed the first prong of the test because government preservation of a significant war memorial is a legitimate secular purpose.

However, the court held that the historical meaning and physical setting of the cross-shaped memorial – particularly its size, but also its history and its relationship to the other memorials in the Park – overshadowed its secular elements so that a reasonable observer would fairly understand the memorial to have the primary effect of endorsing religion – and, therefore, violated the Establishment Clause.

The court found that the cross-shaped memorial failed the third prong of the *Lemon* test as well, due to the Park Commission's expenditure of significant public funds to maintain the memorial and because of the size and manner of the memorial in relation to the surrounding memorials.

The court recognized that Establishment Clause cases are fact-specific and that its decision is confined to the unique facts of this case.

The Chief Judge dissented from the court's finding that the cross-shaped memorial violated the Establishment Clause. Chief Judge Gregory held that the Establishment Clause does not require the government to purge from the public sphere any reference to religion. In his view, the majority misapplied *Lemon* and *Van Orden* because it subordinated the Memorial's secular history and elements while focusing on the obvious religious nature of Latin crosses themselves; constructed a reasonable observer who ignores certain elements of the Memorial and reaches unreasonable conclusions; and confuses maintenance of a highway median and monument in a state park with excessive religious entanglement. In support of his dissent, Judge Gregory referred to the language in *Van Orden* that devotion to the concept of neutrality must not be allowed to lead to an extreme commitment to the secular, or even active hostility to the religious.

In its *en banc* Order, the court stated, in conclusion, that "the majority opinion is a faithful application of the law." Four judges dissented, opining that they would have reheard the case, with Judge Niemeyer concluding that, with respect to the majority opinion – "The Establishment Clause was never intended to be so interpreted, and the Supreme Court has never so interpreted it."

CASE 5 *Freedom From Religion Foundation v. Morris County Board of Chosen Freeholders*, 2018 WL 1832631 (New Jersey 2018).

On April 18, 2018 the Supreme Court of New Jersey held that a county grant of $4.6 million to 12 local operating churches under a publicly funded historic preservation fund trust violated the New Jersey Constitution and that denying the churches such grants did not violate the churches' rights under the Free Exercise Clause of the First Amendment of the U.S. Constitution.

The Court analyzed the issues under the "Religious Aid Clause" of the New Jersey Constitution, which provides that no person shall "be obliged to pay tithes, taxes, or other rates for building or repairing any church or churches, place or places of worship, or for the maintenance of any minister or ministry, contrary to what he believes to be right or has deliberately and voluntarily engaged to perform." The Court traced the provision back to the earliest years of the state's independence, thereby avoiding a claim that the provision was a state version of the failed federal Blaine Amendment, a 19th century attempt to prohibit the use of public funds for religious – in particular Roman Catholic – schools.

The court held that the use of public funds to pay for repairs to operating churches with active congregations "violated the plain language of the Religious Aid Clause" and that there was "no exception for historic preservation."

The court then turned to the question of whether the Religious Aid Clause – as applied in this case – violated the churches' First Amendment Free Exercise rights? In this analysis, the court was called upon to address the recent U.S. Supreme Court case of *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S.Ct. 2012 (2017), in which the high court struck down as unconstitutional a Missouri playground resurfacing grant program, on the basis that the program categorically denied churches the ability to participate. The New Jersey Supreme Court rejected *Trinity Lutheran's* applicability to the New Jersey historic preservation program because, the court said, unlike the *Trinity Lutheran* case, in the New Jersey historic preservation program "the Churches are not being denied grant funds because they are religious institutions; they are being denied public funds because of what they plan to do – and in many cases have done: use public funds to repair church buildings so that religious worship services can be held there. This case" – the court held – "does not involve the expenditure of taxpayer money for non-religious uses, such as the playground resurfacing in *Trinity Lutheran*." Therefore, the court held that "the application of the Religious Aid Clause in this case does not violate the Free Exercise Clause."

The court did not reach an Establishment Clause claim and rejected an Equal Protection defense.

Finally, because the court did not know the extent to which the funds had already been spent in good faith reliance on the grant process and the trial court's ruling upholding the grants, the court declined to unwind the grants and applied its holding only prospectively.

In a concurring opinion, Justice Solomon agreed that the distribution of grant money to the churches was contrary to the plain language of the Religious Aid Clause of the New Jersey Constitution, but wrote separately to express his opinion that – under *Trinity Lutheran* – the Religious Aid Clause cannot categorically bar churches with active congregations from receiving funds that promote a substantial government purpose, such as historic preservation. Such a blanket exclusion – he opined – violates the Free Exercise Clause and the U.S. Supreme Court's opinion in *Trinity Lutheran*. He concurred in the majority opinion, however, on the basis of the fact that, under the terms of the grant program, only four specified types of entities were eligible for the grants – one of which were religious institutions, which made the grant program neither facially neutral nor neutral in its application. "[H]ad Morris County's program been applied in a fundamentally neutral manner" – he wrote – "the Religious Aid Clause could not bar funding to an otherwise qualified religious institution."

CASE 6

Masterpiece Cakeshop, Ltd., et al. v. Colorado Civil Rights Commission, et al., ___ U.S. ___ (2018). Immediately prior to publication of this Newsletter, the U.S. Supreme Court announced its decision in *Masterpiece Cakeshop, Ltd., et al. v. Colorado Civil Rights Commission*, in which the high court addressed the intersection of the constitutional right of free exercise of religion and nondiscrimination laws. This important case will be addressed in the next issue of the Religious Liberty Law Section Newsletter.

CASE 7

Brush & Nib Studio, LC, et al. v. City of Phoenix, ___ P.3d ___ (App. 2018). Within three days of the Supreme Court's decision in *Masterpiece Cakeshop*, the Arizona Court of Appeals announced its decision in *Brush & Nib Studio, LC, et al. v. City of Phoenix* in which the court applied the *Masterpiece Cakeshop* decision to a calligraphy and hand-painting business raising free speech and free exercise challenges to the City of Phoenix's public accommodation ordinance. This case, too, will be discussed in the next issue of the Religious Liberty Law Section Newsletter.

ARTICLES *of* NOTE

Luke W. Goodrich & Rachel N. Busick, *Sex, Drugs, and Eagle Feathers: An Empirical Study of Federal Religious Freedom Cases*, 48 Seton Hall L. Rev. 353 (2018).

AUTHORS' SUMMARY:

"This Article presents one of the first empirical studies of federal religious freedom cases since the Supreme Court's landmark decision in *Hobby Lobby*. Critics of *Hobby Lobby* predicted that it would open the floodgates to a host of novel claims, transforming 'religious freedom' from a shield for protecting religious minorities into a sword for imposing Christian values in the areas of abortion, contraception, and gay rights. Our study finds that this prediction is unsupported. Instead we find that religious freedom cases remain scarce. Successful cases are even scarcer. Religious minorities remain significantly overrepresented in religious freedom cases; Christians remain significantly underrepresented. And while there was an uptick of litigation over the Affordable Care Act's contraception mandate – culminating in *Hobby Lobby* and *Little Sisters of the Poor* – those cases have subsided, and no similar cases have materialized. Courts continue to weed out weak or insincere religious freedom claims; if anything, religious freedom protections are underenforced."

Landon Schnabel and Sean Bock. 2017. *The Persistent and Exceptional Intensity of American Religion: A Response to Recent Research.* Sociological Science 4: 686-700.

AUTHORS' ABSTRACT:

"Recent research argues that the United States is secularizing, that this religious change is consistent with the secularization thesis, and that American religion is not exceptional. But we show that rather than religion fading into irrelevance as the secularization thesis would suggest, intense religion – strong affiliation, very frequent practice, literalism, and evangelicalism – is persistent and, in fact, only moderate religion is on the decline in the United States. We also show that in comparable countries, intense religion is on the decline or already at very low levels. Therefore, the intensity of American religion is actually becoming more exceptional over time. We conclude that intense religion in the United States is persistent and exceptional in ways that do not fit the secularization thesis."

FEATURE ARTICLE

RELIGIOUS LAND USE *and* ZONING[1]

By Daniel P. Dalton

Did you know that there is a federal law that addresses religious land use and zoning? Despite its passage by a unanimous Congress in 2000, many attorneys, community leaders and religious leaders have never heard of The Religious Land Use and Institutionalized Persons Act (RLUIPA), the law that levels the playing field between religious and secular assembly uses. This article briefly describes the law for your consideration in a religious land use dispute.

Congress enacted RLUIPA's land use provisions to enforce, by statutory right, four different constitutional prohibitions that Congress found states and localities were frequently violating in that context.[2]

1. Substantial Burden claims.

Section (a)(1)of RLUIPA provides that no state or local 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 is both "in furtherance of a compelling governmental interest" and "the least restrictive means" of furthering that interest.*[3]

This requirement has three separate jurisdictional hooks. First, Section (a)(1) applies in any case where "the substantial burden is imposed in the implementation of 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 of the proposed uses for the property."[4] Congress enacted Section (a)(1), as made applicable by Section (a)(2)(C), to codify the Free Exercise Clause "individualized assessments" doctrine set forth in *Employment Div. v. Smith*.[5]

[1] Daniel P. Dalton, Esq., Dalton & Tomich, PLC. You can learn more about RLUIPA at www.attorneysforlanduse.com

[2] *See* Joint Statement, *supra* n. 42, 146 Cong. Rec. at S7775.

[3] 42 U.S.C. § 2000cc (a)(1), (a)(1)(A), (a)(1)(B).

[4] 42 U.S.C. § 2000cc (a)(2)(C).

[5] See Joint Statement, *supra* n. 42, 146 Cong. Rec. at S7775. *See also* House Judiciary Comm., Religious Liberty Protection Act of 1999, H.R. Rep. No. 106-219, at 17.

ABOUT THE AUTHOR

Daniel P. Dalton is the nation's preeminent expert in the Religious Land Use and Institutionalized Persons Act, also known as RLUIPA. He is one of the country's most experienced attorneys in representing churches and other religious institutions in land use and zoning cases and is the author of the only book dedicated to the topic – *"Litigating Land Use Cases"* published by the American Bar Association. Daniel Dalton is a founding member of Dalton & Tomich, PLC.

Second, Section (a)(1) applies where "the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes."[6] This "jurisdictional element" requires a case-by-case analysis of the effect of the substantial burden on interstate commerce, and it is designed to ensure that this part of RLUIPA extends only as far as the Commerce Clause permits.[7]

Of important note is that Congress deliberately chose not to define the term "substantial burden" but rather intended the term to be defined by applicable Supreme Court decisions. The effect of not defining the term was that courts were left to decide which definition of "substantial burden" they wanted to apply to a pending matter. As a result, there is no uniformity across the United States as to what a "substantial burden" on religious exercise is. This, in turn, has resulted in many different definitions across the federal and state courts, which have led to confusing and contradictory decisions.

Congress did provide an affirmative defense to a governmental body when a religious use meets its burden under Section (a)(2)(B) of demonstrating an effect on commerce. The governmental entity may demonstrate that the statute is inapplicable because the type of burden does not have a substantial effect on commerce.[8]

Third, Section (a)(1) applies where "the substantial burden is imposed in a program or activity that receives federal financial assistance."[9] Examples where this jurisdictional hook might apply include religious soup kitchens that receive federal financial assistance.

2. Equal Terms claims

Section (b)(1), commonly known as the "equal terms" prong of RLUIPA, prohibits governmental entities from imposing or implementing land use regulations "in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution."[10] The intent of this provision is to codify the Supreme Court's decision that the Free Exercise Clause forbids the government to pursue its interests only against conduct that is motivated by religious belief.[11]

3. Nondiscrimination claims

Section (b)(2), commonly known as the "nondiscrimination" prong of RLUIPA, prohibits governmental entities from imposing or implementing land use regulations in a manner that "discriminates against any assembly or institution on the basis of religion or religious denomination."[12] Congress enacted this section to codify the antidiscrimination principles of the Free Exercise, Establishment, and Equal Protection Clauses, with the understanding that this section will overlap to some degree with Section (b)(1).[13]

4. Exclusions and Unreasonable Limitations claims

Section (b)(3), known as the "exclusions and unreasonable limitations" prong of RLUIPA, prohibits governmental entities from imposing or implementing a land use regulation that "totally excludes religious assemblies from a

6 42 U.S.C. § 2000cc (a)(2)(B).

7 *See* Joint Statement, *supra* n. 42, 146 Cong. Rec. at S7774; 146 Cong. Rec. at E1563 (Sept. 22, 2000) (daily ed.) (statement of Rep. Canady); H.R. Rep. No. 106-219, at 16.

8 42 U.S.C. § 2000cc-2(g).

9 42 U.S.C. § 2000cc(a)(2)(A).

10 42 U.S.C. § 2000cc(b)(1).

11 See 146 Cong. Rec. E1563 (Sept. 22, 2000) (daily ed.) (statement of Rep. Canady); H.R. Rep. No. 106-219, at 17.

12 42 U.S.C. § 2000cc(b)(2).

13 146 Cong. Rec. E1563 (daily ed.) (remarks of Rep. Canady).

jurisdiction" or "unreasonably limits religious assemblies, institutions, or structures within a jurisdiction."[14] Congress included this part of RLUIPA with the intent that it would codify decisions prohibiting both total or effective exclusions of First Amendment activity from an entire jurisdiction and unreasonable restrictions on First Amendment activities in that jurisdiction.[15]

5. Miscellaneous Components of RLUIPA

It is very important to review the statute in its entirety when evaluating a RLUIPA claim or defending the same. For example, Congress provided in section 2000cc-2 for judicial relief to an aggrieved person and set forth burdens of persuasion and other standing considerations. RLUIPA Section 2000cc-3 sets forth the mandate that the act be given broad rules of construction, while Section 2000cc-5 provides a list of definitions applicable to the act. Congress further provided, in Section 2000cc-4, that RLUIPA does not affect the First Amendment's Establishment Clause.

In addition, Congress specifically defines a "land use regulation" as: "a zoning or landmarking law, or the application of such a law, that limits or restricts a claimant's use or development of land (including a structure affixed to land), if the claimant has an ownership, leasehold, easement, servitude, or other property interest in the regulated land or a contract or option to acquire such an interest."[16]

Under this definition, a government entity or agency implements a land use regulation when it acts pursuant to a zoning law that limits the manner in which a claimant may develop or use property in which the claimant has an interest.[17] In addition, Congress provided the following definition of "religious exercise":

> (A) In general. The term "religious exercise" includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.
>
> (B) Rule. The use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose.[18]

Finally, Congress provided a "safe harbor" defense for communities under the act within Section (3)(e). Although governments sometimes use the safe harbor provision to correct violations and escape liability, the provision has been rarely interpreted and applied by the courts.

6. Remedies: Damages, Equitable Relief and Attorney Fees

The interests and goals of the religious organization that puts forward RLUIPA claims are typically much broader than those of a typical client seeking monetary damages. In fact, many RLUIPA clients might not have suffered a significant economic loss. That is why being familiar with RLUIPA's remedies is integral.

a. Appropriate Relief

RLUIPA's provision that authorizes a cause of action states that "[a] person may assert a violation of this chapter as a claim or defense in a judicial proceeding and obtain appropriate relief against a government."[19] While the

[14] 42 U.S.C. § 2000cc(b)(3)(A) (the exclusions provisions), (b)(3)(B) (the unreasonable limitations provisions).

[15] 146 Cong. Rec. at S7775; H.R. Rep. No. 106-219, at 17.

[16] 42 U.S.C. § 2000cc-5(5).

[17] *Prater v. City of Burnside*, 289 F.3d 417, 434 (6th Cir. 2002).

[18] 42 U.S.C. § 2000cc-7.

phrase "appropriate relief" may seem simple enough, these two words have turned out to be more problematic than one would imagine.

b. Injunctive Relief

It appears to be universally accepted that RLUIPA's remedy provision that provides for "appropriate relief" includes injunctive relief. The question that many courts have is whether it includes damages.

c. Money Damages

Because there is such a great conflict among federal district courts regarding the availability of damages in a RLUIPA action, the only truly reliable reasoning can be found in Congress's legislative history. It is clear that when it enacted the statute in 2000, Congress's use of the term of art "appropriate relief" in RLUIPA, enacted against the backdrop of *Franklin* and *Burlington*,[20] can only mean that Congress intended monetary damages to be one of the remedies available to successful RLUIPA plaintiffs. Indeed, it would be especially ironic if Congress's use of a term of art that underscores the *breadth* of available relief prompted the courts instead to *narrow* the scope of that relief.

7. Recovery of Attorney Fees in Religious Land Use Cases

Under 42 U.S.C. § 1988(b), courts are able to award reasonable attorney fees to the prevailing party in an action that seeks to protect the plaintiff's civil rights. The statute specifically states that successful RLUIPA plaintiffs are entitled to recover their attorney fees from liable defendants.[21]

Under 42 U.S.C. § 1988(b), "the court, in its discretion, may allow the prevailing party" in a RLUIPA action to recover "a reasonable attorney's fee as part of the costs." In determining whether a plaintiff is a "prevailing party" within the meaning of § 1988, "the touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties."[22] A material alteration requires that "[t]he plaintiff . . . obtain an enforceable judgment against the defendant from whom fees are sought, *or comparable relief through a consent decree or settlement*."[23] In summary, attorney fees and cost are available for a successful claimant under RLUIPA.

Conclusion

Unfortunately, there are a lot of misunderstandings, and perhaps hostility, about how religious entities should be handled when it comes to land use. I help religious entities navigate the path of approval of a religious use, or in the event the use is denied, and the community violates the law, litigate land use claims on behalf of religious entities throughout the United States. The primary tool that I rely upon is RLUIPA—the Religious Land Use and Institutionalized Persons Act. According to the legislative history, this law was passed to protect religious organizations from a real or perceived trend of being treated differently than secular land use. This was likely motivated by the fact that most religious land use is tax-exempt. RLUIPA is the great equalizer in land use law; it truly levels the playing field for religious entities.

[19] 42 U.S.C. § 2000cc-2(a) (2000).

[20] *Sch. Comm. of Burlington, Mass. v. Dep't of Educ. of Mass.*, 471 U.S. 359, 369 (1996) (defining "appropriate" relief to include compensatory damages).

[21] *Id.*

[22] *Farrar v. Hobby*, 506 U.S. 103, 111 (1992) (internal citations omitted).

[23] *Id.* (emphasis added).

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2018 CONVENTION – RELIGIOUS LIBERTY LAW SECTION ANNUAL MEETING AND CLE

On Friday, June 29, 2018, 8:45 a.m. to noon, at the **State Bar of Arizona 2018 Convention**, the Religious Liberty Law Section will hold its **Annual Meeting** in accordance with Article 4.1 of the Religious Liberty Law Section Bylaws. Following the Annual Meeting, the Religious Liberty Law Section, in conjunction with the Employment and Labor Law Section, will present the **CLE seminar**:

"Religion and the Workplace: Navigating the Issues for Employers and Employees."
3 CLE Credit Hours, including 1 Ethics Credit Hour.

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The State Bar of Arizona 2018 Convention will take place at the Sheraton Grand at Wild Horse Pass in Chandler, AZ

RESOURCES

CLE VIDEOS

2017 ANNUAL CONVENTION CLE

Introduction: Religious Liberty Law Section CLE at the Arizona State Bar Association 2017 Annual Convention, held on June 16, 2017

Presenter: David Garner (Osborn Maledon, P.A.)

[watch video]

Historical foundations of religious liberty law

Presenter: Professor Owen Anderson (Arizona State University)

[watch video]

Debate: Resolving conflicts between religious liberty and anti-discrimination laws

Participants: Jenny Pizer (Lambda Legal), Kristen Waggoner (Alliance Defending Freedom), Alexander Dushku (Kirton McConkie)

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Panel Discussion: High profile religious liberty law issues

Moderator: Robert Erven Brown (Gallagher & Kennedy PA)
Panelists: Eric Baxter (The Becket Fund for Religious Liberty), Alexander Dushku (Kirton McConkie), Will Gaona (ACLU of Arizona), Jenny Pizer (Lambda Legal), Professor James Sonne (Stanford Law School), and Kristen Waggoner (Alliance Defending Freedom)

[watch video]

Access the entire program for CLE credit at:

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