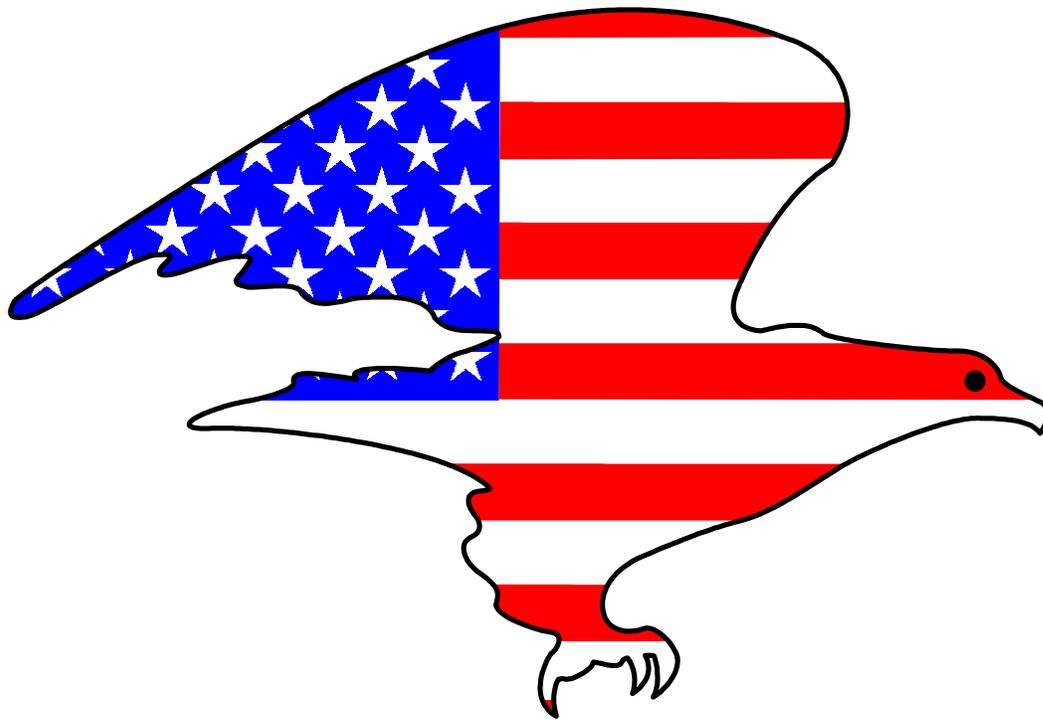


**Questions & Answers**  
**About the**  
**Federal Religious**  
**Land Use Law of 2000**



**SIDLEY AUSTIN BROWN & WOOD'S**  
**Religious Institutions Group**  
**and the**  
**RLUIPA Litigation Task Force**

**Does your church, temple, or synagogue want to build, expand, or remodel a sanctuary?**

**Does your religious mission include soup kitchens, homeless shelters, or other community ministries?**

**Are you part of a home-based Bible study or worship group?**



Involvement in any of these activities can bring you or your ministry into conflict with land-use and zoning laws. In the past, such conflicts frequently left churches and other religious groups at the mercy of the largely unfettered discretion of local officials and land use boards.

But now that the Religious Land Use and Institutionalized Persons Act (“RLUIPA”) has become law, religious groups have a powerful new tool on their side. Under RLUIPA, government officials and zoning boards must now give due deference to the rights of religious groups to use their property and carry out their ministries to further their religious missions.

This booklet gives an overview of RLUIPA and explains how its provisions can benefit religious groups. It was prepared and reviewed by attorneys and others associated with the Coalition for the Free Exercise of Religion, a national alliance of more than 70 religious and civil rights groups dedicated to preserving our nation’s heritage of religious freedom.

For more information about this booklet or its content, please contact Gene Schaerr or Nicholas Miller of Sidley & Austin’s Religious Institutions Practice Group:

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## **Q & A About the Federal Religious Land Use Law of 2000**

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### **Why This Booklet?**

The Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) is a powerful tool to protect the religious rights of individuals and institutions in the use of their land and buildings. This booklet aims to give both the layperson and the attorney in general practice a simple overview of the Act's land-use provisions. The booklet also points out some practical considerations to be aware of in invoking the statute, and addresses some basic questions about the constitutionality of the Act. The text of the Act is reprinted in Appendix A, at the end of this booklet.

Attorneys in the Religious Institution Practice Group at the Washington, D.C. office of the law firm of Sidley Austin Brown & Wood have taken a leading role in developing and writing this booklet. The booklet has also been informed by the comments and suggestions of a wide group of religious and civil rights leaders and attorneys from the RLUIPA Litigation Task Force of the Coalition for the Free Exercise of Religion.

Although this booklet summarizes the Act and the operation of its land-use provisions, the information herein is not intended as legal advice. The facts of each case, as well as the applicable law of each jurisdiction, are unique. If legal action under the Act is being considered, an attorney should be consulted.

### **1. What is RLUIPA?**

Its full name is the Religious Land Use and Institutionalized Persons Act of 2000, or RLUIPA for short.<sup>1</sup> RLUIPA is a law designed to protect religious assemblies and institutions from zoning and historic landmark laws that substantially interfere with their religious free exercise. The law was passed unanimously by both houses of Congress in the summer of 2000 and signed into law by President Clinton on September 22 of the same year.<sup>2</sup> RLUIPA protects individuals and religious institutions, including churches, mosques, and synagogues, in their use of land and build-

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ings for religious purposes.

In addition to its land-use provisions, the Act also protects the religious rights of prisoners and other persons in government custody. Information regarding that important part of the Act can be found in a separate publication entitled “Prisoners and Religious Freedom: Questions and Answers.”<sup>3</sup>

### **2. Why is religious land-use protection needed?**

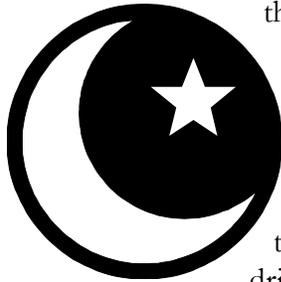
Congress passed the Act in response to widespread discrimination against religious institutions exhibited by many zoning and landmarking boards.<sup>4</sup> The need for a legislative remedy has been particularly acute since 1997 when the U.S. Supreme Court, in *City of Boerne v. Flores*,<sup>5</sup> struck down the portion of the Religious Freedom Restoration Act that had provided protection to religious groups from state and local regulations substantially burdening religious practices. In many cases, home worship meetings and Bible studies have been prohibited, church soup kitchens and homeless shelters have been closed, churches have been prevented from remodeling or expanding worship space, and religious assemblies have been denied the opportunity to build in a locality altogether<sup>3/4</sup>all in the name of land-use regulation.<sup>6</sup>

***Land-use regulations were often applied more onerously to religious minorities***

Further, land-use regulations were often applied more onerously to religious minorities. A recent pre-RLUIPA study shows that, although small religious groups account for less than 9% of the population, they were parties to nearly 50% of the reported decisions in which lawsuits were filed to obtain permission to build a facility for religious use.<sup>7</sup> On the other hand, large religious groups, which represent about 65% of the population, accounted for only 31% of church location lawsuits. This means

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that a minority religious group is over *ten times* more likely to need to file suit to gain approval for erecting a religious building.

The litigation success rates of minority and majority religious groups in these cases are about equal, demonstrating that the higher numbers of minority cases are not driven by frivolous claims. Rather, the evidence indicates that many localities have used facially neutral zoning laws to exclude religious groups that are small, unpopular, or simply lack political influence. This has the effect of maintaining the religious status quo in a community by excluding newer religious groups, and by preventing established churches and congregations from developing new ministries and services. Many localities may wish to keep out religious organizations because they are tax exempt and reduce municipal tax revenues. Whatever the reason, RLUIPA will help religious groups challenge this kind of exclusion.

### **3. Doesn't the U.S. Constitution already protect religious freedom with respect to land use?**

Not really, at least as it has been recently interpreted by the courts. In the last ten years the U.S. Supreme Court has greatly diminished the strength of the religious protection provided under the First Amendment to the U.S. Constitution.

Prior to 1990, the U.S. Supreme Court held that the Free Exercise Clause of the First Amendment protected religious conduct from laws that imposed a substantial burden and were not the least restrictive means of accomplishing some compelling government interest in protecting life, health, safety, liberty, or some other similarly weighty community concern.<sup>8</sup> But in the 1990 case of *Employment Division v. Smith*,<sup>9</sup> the Court decided that, in most situations, the Free Exercise Clause would no longer protect religious practices from laws that are neutral towards religion

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and applicable equally to both religious and non-religious conduct.

The following example illustrates how this reasoning may apply in practice: Under the Court's reasoning, a law forbidding drinking wine as part of the sacrament of communion<sup>3/4</sup>but permitting alcohol consumption for secular purposes<sup>3/4</sup>would be viewed as improperly targeting religion and would be unconstitutional under *Smith*. If, however, a law forbade *all* alcohol consumption whether for sacred or secular purposes (for instance, in the case of a completely "dry county"), that law would be neutral and generally applicable. Accordingly, courts would not view such a law as raising Free Exercise concerns because it does not specifically target religion; rather, it targets all alcohol consumed for any purpose. Nevertheless, as critics of *Smith* point out, such a law would be a real burden on religious groups that consume wine for sacramental purposes.

Because many laws that substantially interfere with religious practice are neutral and generally applicable, the *Smith* decision dealt a severe blow to religious groups.<sup>10</sup> The problems were especially apparent in the land-use context because the standards for zoning and historic landmarking not only are generally neutral towards religion, but also are often vague and subjective. This leaves considerable discretion, often virtually unfettered, in the hands of local zoning officials.

In a recent zoning study, for instance, half of the churches surveyed said that there were no clear rules that applied in their land-use request.<sup>11</sup> Rather, the decision was up to the discretion of a land-use official or board, who had wide latitude to grant or deny the permit based on personal, subjective views about the religious organization.

This is a recipe for discrimination, and helps explain the vastly higher rate of adverse land-use decisions involving religious minorities. Congress passed RLUIPA in response to these pervasive reports of discrimination and other unfairness in land-

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use decisions.

### **4. How do RLUIPA's religious land-use provisions operate?**

The land-use provisions are found under Section 2 of the Act (see the text of the bill printed in Appendix A, at the end of this booklet), and consist of two main parts. The first part, Section 2(a), subjects land-use regulations that substantially burden the free exercise of religion to a “compelling interest” test, a test applied by courts to protect fundamental constitutional rights.<sup>12</sup>

To invoke the compelling interest test, religious claimants<sup>13</sup> must first show that “a zoning or landmarking law,”<sup>14</sup> imposes a “substantial burden”—something more than an inconvenience or minimal intrusion or minor expense—on their “religious exercise.”<sup>15</sup> Land-use officials, in turn, must show the existence of some “compelling interest,” an interest of the highest order, such as a demonstrable need to protect health, safety, or other essential concern of public welfare. Local or state officials must also show

***See [www.rluipa.com](http://www.rluipa.com) for further discussion of RLUIPA***

that there are no “less restrictive means” of protecting that compelling interest.<sup>16</sup> After a claimant shows that

the land-use regulation places a substantial burden on its religious exercise, the regulation will be invalid unless the government can show either that the regulation is narrowly tailored to further a compelling state interest or that the claim does not fit within the jurisdictional scope of the Act.<sup>17</sup>

The second part of the Act, Section 2(b), guarantees equal treatment among different faith groups and between religious and comparable secular institutions. One clause prevents religious assemblies and institutions from being treated worse than similar nonreligious assemblies or institutions; for example, permitting

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theaters or other secular assemblies, but barring churches. A second provision forbids the government from discriminating against religious groups on the basis of their religion.<sup>18</sup> Other provisions prevent zoning officials from totally excluding religious assemblies from a jurisdiction,<sup>19</sup> or from unreasonably limiting religious assemblies or institutions within a jurisdiction. All of these provisions help ensure that religious assemblies and institutions can exist within a community and that they are not targeted for exclusion or unequal treatment because of their religious character.

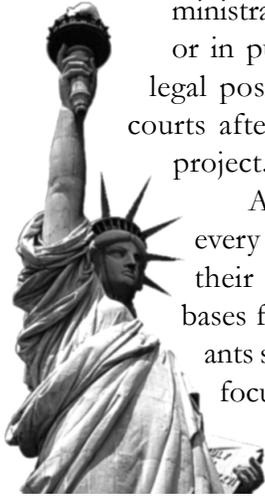
### **5. How can my church, synagogue, mosque, or other religious institution actually use these provisions?**

The goal of most religious groups is to reach and serve their communities. As a general rule, lawsuits between neighbors, or prospective neighbors, build walls rather than bridges. Accordingly, religious groups should reasonably pursue informal and negotiated means of reaching compromises with local officials before filing a RLUIPA lawsuit<sup>3/4</sup>although certainly RLUIPA and its requirements can and should be raised in these pre-suit negotiations. A peaceful resolution of land-use conflicts will benefit a religious group's reputation in the community, and avoid costly and time-consuming litigation.

But once conciliatory approaches are reasonably attempted, and if the group's religious mission is still burdened, a RLUIPA lawsuit should be considered. RLUIPA itself does not require exhaustion of state or local administrative remedies. But for a case to be ripe for a RLUIPA challenge, claimants generally will need at least a clear, adverse, decision regarding their proposed land-use or building project from a local zoning board or other government authority. Beyond this, claimants who seek variances and explore other administrative means of achieving their land-use goals may find they can solve their problems short of a lawsuit. In any event, claimants who reasonably use available ad-

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ministrative processes, whether in seeking variances or in pursuing appeals, may well be in a stronger legal position than if they proceed directly to the courts after an initial denial of a proposed land-use project.

As a general rule, claimants should invoke every part of RLUIPA that reasonably applies to their case, including all relevant constitutional bases for applying the statute. Beyond this, claimants should prioritize their claims in a manner that focuses on those provisions under which they will likely have the greatest success. Claimants should first try to raise their claims under one or more of the equal treatment clauses in the Act (Sec. 2(b)).<sup>20</sup>

Claimants should also consider the compelling interest section (Sec. 2(a)). It covers situations in which a land-use regulation imposes a substantial burden on religious exercise. Congress, to ensure that it was acting within the scope of its constitutional authority, carefully limited Section 2(a)'s application to three circumstances.<sup>21</sup> Claimants should plead and try to prove as many of these three circumstances as apply to their situation.

First, claimants should consider the “individualized assessments” provision. It applies where government makes<sup>3/4</sup>or has in place formal or informal procedures or practices that permit the government to make<sup>3/4</sup>individualized assessments about the claimant’s proposed use for the property involved.<sup>22</sup> Because nearly all land-use regulations have mechanisms to deal with property on an individual, case-by-case basis, this provision is likely to apply to many claimants’ situations.

Second, claimants should consider whether the Commerce Clause provision applies to their circumstances.<sup>23</sup> This provision will broadly apply to most land-use rulings because such

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decisions deal directly with the commercial activities of building and land development. When invoking the commerce provision, claimants should give careful thought to the evidence that shows the proposed land-use project impacts commerce. They should plan to submit project budgets, lists of out-of-state building supplies, and any relevant rental contract information (such as information about the owner that would show connections with out-of-state businesses or corporations).

Evidence of purely in-state commercial activity is also relevant and useful. But if the evidence is limited to in-state commercial activity, it gives the government a better chance of showing that the activity does not, in the aggregate, substantially impact interstate commerce. The government has two specific opportunities to defeat a claim based on the commerce provision—first by rebutting the claimant’s efforts to show that the burden on that claimant’s religious activities affects commerce, and second by showing that all similar burdens “would not lead in the aggregate to a substantial effect on commerce.”<sup>24</sup>

Third, claimants should also demonstrate, if possible, that the Spending Clause provision applies to their situations.<sup>25</sup> This provision bars governments from placing a substantial burden on programs or activities that receive federal financial assistance. It is uncertain how many government departments that operate zoning boards receive federal support. Even so, the impact of this provision may be broader than it first appears. If any activity within a government department or program receives federal support, the entire department or program will be subject to RLUIPA.<sup>26</sup>

In sum, both of RLUIPA’s land-use sections are important. In many cases, claimants will do best to invoke both Section 2(a) and Section 2(b). Claimants also should raise, when applicable, claims under the U.S. Constitution, the state constitution, and any available state religious freedom acts.<sup>27</sup> They should also plead 42 U.S.C. §§ 1983 and 1988(b), as the Act explicitly allows for attorneys’ fees under these sections in successful cases.<sup>28</sup> The Act

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also allows for other “appropriate relief,”<sup>29</sup> including injunctive relief and monetary damages against counties, municipalities, and state and local officials sued in their official *and* personal capacities.<sup>30</sup>

### **6. Can these provisions protect me in the use of my home or business for religious purposes?**

Yes. Prior to the passage of RLUIPA, government interference with the use of private homes and residences for religious purposes posed a real threat to religious liberty. In a number of states, home Bible studies were ordered closed because they allegedly violated local zoning ordinances. In other states, home synagogues for Orthodox Jews were shut down—in one instance for alleged parking and traffic problems, even though all the members *walked* to worship services on the Sabbath. Such cases will likely come out differently under RLUIPA, which extends beyond churches and in-

cludes homes, residences, and any other property used for religious purposes.

The Act’s protections also extend to businesses and commercial facilities

that wish to use a portion of their facilities for prayer meetings or Bible studies. RLUIPA, however, only protects the portion of the building actually used for the religious activity. Thus, a chapel within a larger commercial building would be protected from land-use regulation that restricted religious practices, but the other areas of the commercial building would not be protected.<sup>31</sup> Commercial activity carried out by a church, such as the renting of church property to a secular business, is not generally considered

***Prior to the passage of RLUIPA, government interference with the use of private homes and residences for religious purposes posed a real threat to religious liberty.***

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religious activity, even if the church will use the profits from the commercial activity for religious purposes. Thus, church property used for ongoing, for-profit commercial activity is unlikely to be protected under RLUIPA.

### **7. Does the Act immunize churches and other religious properties from land-use, zoning, and landmarking regulations?**

No. All land-use regulations presumptively apply to religious buildings until a claimant makes a showing that a land-use regulation imposes a substantial burden on a sincerely held religious belief or activity. Thus, as discussed above, potential claimants will need to follow local land-use regulations and procedures until they are faced with a government decision that discriminates or places a substantial burden on their religious practice. They then can try to show that the Act has been violated.

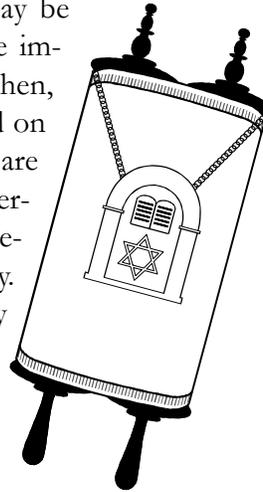
Even then, many zoning and building regulations regarding structural integrity and construction requirements, fire and flood safety, sanitation regulations, and similar health and safety requirements may well be found supported by a compelling governmental interest. Less fundamental state interests, such as historic preservation, the character of the community, neighborhood diversity, are more susceptible to RLUIPA challenges. But even these less weighty state concerns will not automatically lose to claims of religious freedom. For example, a 5,000-seat mega-church may not, even after RLUIPA, be permitted on a small lot in a purely residential neighborhood. Thus, both the government and religious groups have an incentive to explore opportunities for compromises that will allow religious assemblies to fulfill their religious missions and yet allow localities to protect legitimate interests in neighborhood character and quality of life.

Issues such as adequate parking, vehicular traffic, noise and congestion, and environmental concerns will likely fall into an

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intermediate category. Such concerns may be regarded as compelling interests when the impact is severe or substantial. But even then, substantially burdensome regulations based on these concerns will violate RLUIPA if they are not narrowly tailored to the underlying interest. Parking and traffic restrictions must relate to the actual needs of the community. Thus, if traffic congestion is a weekday problem, a church that will operate on weekends and evenings should not be denied a permit for building or expansion because of traffic concerns.



### 8. Is RLUIPA constitutional?

While only the U.S. Supreme Court can definitively answer this question, the Congress, the President, the U.S. Department of Justice, and numerous religious and civil liberties scholars and lawyers involved in its enactment believe the answer is “yes.” Congress passed RLUIPA after extensive consideration of the constitutional limits on congressional power as expressed by the Supreme Court. At numerous committee hearings, prominent legal scholars, religious liberty lawyers, and civil rights and religious leaders testified about widespread discrimination in land-use regulation and about how Congress could constitutionally remedy such discrimination. In all, Congress held six House committee hearings and three Senate committee hearings that included discussions of religious land-use concerns.

The end result of this work is a statute carefully calibrated to pass constitutional muster. RLUIPA relies upon three different sources of congressional power.

First, RLUIPA is supported by Congress’ power under Section 5 of the Fourteenth Amendment to pass civil-rights enforcement legislation. RLUIPA attempts to remedy violations of both

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the Equal Protection Clause of the Fourteenth Amendment and the Free Exercise Clause of the First Amendment. As required by the U.S. Supreme Court's decision in *City of Boerne v. Flores*,<sup>32</sup> the legislative history of RLUIPA details widespread constitutional violations relating to the regulation of religious groups' use of land. The Act also tracks the legal standards set out in the Court's decisions in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*<sup>33</sup> and *Employment Division v. Smith*.<sup>34</sup>

Second, the Act draws upon the federal power to regulate interstate commerce. While the U.S. Supreme Court has recently set limits upon that power,<sup>35</sup> the Act's provisions fall within these limits, as



zoning and land-marking decisions are central to the commercial activity of building and property development. The impact of these enterprises on interstate commerce is generally indisputable, and the Act requires that this connection be shown in each RLUIPA case in which commerce is invoked as a basis for application of the statute.

Third, RLUIPA requires that all recipients of federal money consent to abide by the Act's "substantial burden" provisions in relation to land-use regulation in programs and activities supported by federal aid. RLUIPA can be applied where nondiscrimination is germane to the federal spending program—a standard that the U.S. Supreme Court has broadly applied in upholding analogous provisions in other federal laws.<sup>36</sup>

In sum, courts should find RLUIPA to be a constitutionally sound effort to protect the free exercise of religion. In addition, courts should find that RLUIPA complies with the Establishment

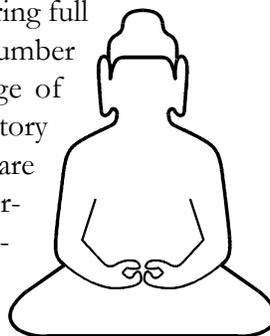
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Clause. Religious discrimination against persons and institutions is illegal, and Congress has the power to protect religion without such efforts constituting an establishment of religion.<sup>37</sup> Courts should see RLUIPA for what it is—a reasonable effort to guarantee the American values of religious freedom and tolerance.

### 9. Where can I find further information and assistance?

RLUIPA is an important step in restoring full legal protection for religious freedom. A number of claimants have already taken advantage of the Act to challenge onerous or discriminatory zoning requirements. More such challenges are expected. The Coalition for the Free Exercise of Religion, the association of civil-rights and religious organizations that assisted in the passage of the Act, has established a RLUIPA Litigation Task Force to track litigation under the Act.



The Task Force can provide interested parties with information regarding how RLUIPA can be used responsibly and effectively. Some of this information can be found at the web-site [www.rluipa.com](http://www.rluipa.com). Moreover, the Coalition may file *amicus curiae* briefs<sup>38</sup> in cases where the constitutionality of RLUIPA is challenged.

Finally, the U.S. Department of Justice must be notified whenever the constitutionality of a federal statute is questioned in a federal court proceeding<sup>39</sup> and it is in any claimant's interest to notify the Department if RLUIPA's constitutionality is called into question in state court. The number to call is 202-514-4785.

Cooperation between persons and groups committed to the great principles of religious liberty can help us all stay vigilant in defense of our first freedom.

**Dated: January 29, 2001**

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### Endnotes

<sup>1</sup> RLUIPA was given Public Law No. 106-274 and has been codified at 42 U.S.C. § 2000cc. The text of the law can be found in Appendix A to this booklet. RLUIPA may be pronounced “ar-loo-pa.”

<sup>2</sup> On that same day, President Clinton released a statement saying that the “Act recognizes the importance the free exercise of religion plays in our democratic society.” Statement on Signing the Religious Land Use and Institutionalized Persons Act of 2000, 36 *Weekly Comp. Pres. Doc.* 2168, 2168 (Sept. 22, 2000). For the full text of the President’s statement regarding RLUIPA, see Appendix B.

<sup>3</sup> This booklet on prisoner issues under RLUIPA is forthcoming from Prison Fellowship Ministries. For more information contact Pat Nolan at P.O. Box 16069, Washington, D.C., 20041-6069 or (703) 478-0100.

<sup>4</sup> The gravity of this discrimination is extensively documented in the congressional hearings that led to the passage of RLUIPA. During the 12 months prior to the Act’s passage, six House committee hearings and three Senate committee hearings explored the widespread land-use problems faced by religious groups. Some of RLUIPA’s legislative history, including a listing of land-use problems faced by religious groups, can be found at [www.rluipa.com](http://www.rluipa.com).

<sup>5</sup> 521 U.S. 507 (1997).

<sup>6</sup> For the documentation of these and other land-use difficulties faced by religious groups, see a report prepared by the Christian Legal Society and entered into the Congressional Record on September 22, 2000. 146 Cong. Rec. E1564-67 (daily ed. Sept. 22, 2000) (statement of Hon. Henry J. Hyde). A copy of this legislative history can be found at [rluipa.com/generaldocs/HouseLegisHistory-Part2.html](http://rluipa.com/generaldocs/HouseLegisHistory-Part2.html).

<sup>7</sup> Von G. Keetch and Matthew K. Richards, “The Need for Legislation to Enshrine Free Exercise in the Land Use Context,” 32 *U.C. Davis L. Rev.* 725 (1999). A “small religious group” is a denomination to which less than 1.5% of the population belongs. A “large religious group” is a denomination to which more than 1.5% of the population belongs.

<sup>8</sup> *Hobbie v. Unemployment Appeals Comm’n*, 480 U.S. 136 (1987) (employee’s unemployment benefits protected when job was lost because of observance of holy days even when religious conversion occurred after hiring); *Thomas v. Review Bd.*, 450 U.S. 707 (1981) (Jehovah’s Witness protected in religious conviction against making war materials); *McDaniel v. Paty*, 435 U.S. 618 (1978) (state cannot inquire into religious belief as condition of employment); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (Amish protected in religious conviction regarding need to educate children at home after age of 14); *Sherbert v. Verner*, 374 U.S. 398 (1963) (Sabbath-keeper’s convictions protected).

<sup>9</sup> 494 U.S. 872 (1990).

<sup>10</sup> Nonetheless, some scholars believe that if a land-use decision involves an

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“individualized governmental assessment,” *Smith* would not preclude applying “the *Sherbert* test, [under which] government actions that substantially burden a religious practice must be justified by a compelling governmental interest.” *Smith*, 494 U.S. at 883-84. Accordingly, potential RLUIPA claimants should consider making this constitutional argument in addition to pursuing the explicit remedies available under RLUIPA.

<sup>11</sup> This report and its implications are more fully discussed in Douglas Laycock, “State RFRA’s and Land Use Regulation,” 32 *U.C. Davis L. Rev.* 755, 767-68 (1999).

<sup>12</sup> The phrase “compelling governmental interest” found at Sec. 2(a)(1)(A) is intended to codify the traditional compelling interest test used to protect fundamental rights. See Rep. Canady’s September 22, 2000 remarks on RLUIPA. 146 Cong. Rec. E1563-64 (daily ed. Sept. 22, 2000) (statement of Hon. Charles T. Canady).

<sup>13</sup> A claimant must have some property interest in the regulated land, such as ownership, leasehold, easement, servitude, etc. Sec. 8(5).

<sup>14</sup> See Sec. 8(5), which also requires that the law “limits or restricts a claimant’s use or development of land (including a structure affixed to land).”

<sup>15</sup> The “religious exercise” can be that of individuals or assemblies and institutions, and it includes any exercise of religion, “whether or not compelled by, or central to, a system of religious belief.” Sec. 8(7). This latter definition is consistent with the definition of religion in First Amendment law, but was explicitly placed in the Act because of narrower definitions of religious exercise that began appearing in some courts in the 1990s.

<sup>16</sup> The “least restrictive means” analysis has been an integral part of the compelling interest test for more than thirty years. *Church of the Lukumi Babalu Aye v. Hialeah*, 508 U.S. 520, 578 (1993) (state must “justify that burden by showing that it is the *least restrictive means of achieving* some compelling state interest”); *Thomas v. Review Bd.*, 450 U.S. 707, 718 (1981) (state’s intrusion on religious conduct must be “the *least restrictive means of achieving* some compelling state interest”) (emphasis added); *Sherbert v. Verner*, 374 U.S. 398, 407 (1963) (state must “demonstrate that *no alternative forms of regulation* would combat such abuses without infringing First Amendment rights”).

<sup>17</sup> Sec. 4(b).

<sup>18</sup> There is some overlap among these two clauses of Sec. 2(b), but clause 2(b)(1) more squarely addresses the case in which the unequal treatment of religious land use does not fall into any apparent pattern, whereas clause 2(b)(2) deals with cases where religion is subject to a more systematic unequal treatment.

<sup>19</sup> This clause, Sec. 2(b)(3)(A), is the only provision of Sec. 2 that applies to “religious assemblies” but not to “institutions” as well. The legislative history indicates that this was to accommodate small towns that might allow no institu-

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tional structures, religious or secular, within their limits. See the comments of RLUIPA sponsor Representative Charles Canady on September 22, 2000 in the Congressional Record. 146 Cong. Rec. E1563-64 (daily ed. Sept. 22, 2000) (statement of Hon. Charles T. Canady). Rep. Canady's section-by-section analysis of RLUIPA can also be found at [www.rluipa.com/generaldocs/HouseLegisHistory-Part3.html](http://www.rluipa.com/generaldocs/HouseLegisHistory-Part3.html).

<sup>20</sup> Counsel will generally want to give priority among those clauses to “Nondiscrimination,” Sec. 2(b)(2), then to “Equal Terms,” Sec. 2(b)(1), and then to “Exclusions and Limits,” Sec. 2(b)(3). Note that overt religious discrimination, which can often be shown by a pattern or practice and is targeted by Sec. 2(b)(2), violates not only RLUIPA, but the First Amendment as well

<sup>21</sup> Sec. 2(a)(2).

<sup>22</sup> Sec. 2(a)(2)(C).

<sup>23</sup> Sec. 2(a)(2)(B). The Act does not define religion as commerce, but stands for the unremarkable proposition that religious activity can affect commerce.

<sup>24</sup> Sec. 4(b) (“Burden of Persuasion”) and Sec. 4(g) (“Limitation”).

<sup>25</sup> Sec. 2(a)(2)(A).

<sup>26</sup> See the expansive definition of “program or activity” at 42 U.S.C. 2000d-4a, which is incorporated into RLUIPA at Sec. 8(6). Claimant's should be aware that any “program or activity” that they intend on bringing a RLUIPA claim against will need to have actually received a payment of federal funds sometime after the President signed RLUIPA on September 22, 2000. This is necessary to meet the requirement that states make a knowing acceptance of any conditions that go with federal funding, as required in *South Dakota v. Dole*, 483 U.S. 203, 207 (1987).

<sup>27</sup> See the companion booklet entitled “Questions and Answers About State Religious Freedom Acts,” available from the publishers of the present booklet.

<sup>28</sup> Sec. 4(d).

<sup>29</sup> Sec. 4(a).

<sup>30</sup> See 42 U.S.C. § 1983. Money damage awards against the state or state employees in their official capacity will likely be prevented by the doctrine of sovereign immunity, which the Act does not abrogate.

<sup>31</sup> See the last page of Rep. Charles Canady's “Section by Section Analysis” of September 21, 2000. 146 Cong. Rec. E1563-64 (daily ed. Sept. 22, 2000) (statement of Hon. Charles T. Canady).

<sup>32</sup> See the answer to Question 3, above.

<sup>33</sup> 508 U.S. 520, 546 (1993).

<sup>34</sup> 494 U.S. 872, 884 (1990).

<sup>35</sup> See, e.g., *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, \_\_\_ U.S. \_\_\_ (2001); *United States v. Morrison*, 120 S. Ct. 1740 (2000); *United States v. Lopez*, 514 U.S. 549 (1995).

## **Q & A About the Federal Religious Land Use Law of 2000**

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<sup>36</sup> See *South Dakota v. Dole*, 483 U.S. 203 (1987).

<sup>37</sup> See *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327, 338 (1987) (holding that a Title VII statutory provision that accommodates religion has a legitimate secular purpose); accord *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 144-45 (1987); *Wisconsin v. Yoder*, 406 U.S. 205, 235 n.22 (1972); *Walz v. Tax Comm'n*, 397 U.S. 664, 673 (1970).

<sup>38</sup> Many courts have provisions to permit interested persons who are not parties to a lawsuit to file an *amicus curiae*, or “friend of the court,” brief to help further explain the legal or factual issues to the court.

<sup>39</sup> 28 U.S.C. § 2403(a).

## Appendix A

PUBLIC LAW 106-274—SEPT. 22, 2000

114 STAT. 803

Public Law 106—274  
106th Congress

An Act

Sept. 22, 2000

To protect religious liberty, and for other purposes.

[S. 2869]

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

Religious Land  
Use and  
Institutionalized  
Persons Act of  
2000.  
42 USC 2000cc  
note.  
42 USC 2000cc.

### SECTION 1. SHORT TITLE.

This Act may be cited as the “Religious Land Use and Institutionalized Persons Act of 2000”.

### SEC. 2. PROTECTION OF LAND USE AS RELIGIOUS EXERCISE.

#### (a) SUBSTANTIAL BURDENS.—

(1) GENERAL RULE.—No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution—

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

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

(2) SCOPE OF APPLICATION.—This subsection applies in any case in which—

(A) the substantial burden is imposed in a program or activity that receives Federal financial assistance, even if the burden results from a rule of general applicability;

(B) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, even if the burden results from a rule of general applicability; or

(C) 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 involved.

#### (b) DISCRIMINATION AND EXCLUSION.—

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

(2) NONDISCRIMINATION.—No government shall impose or implement a land use regulation that discriminates against

any assembly or institution on the basis of religion or religious denomination.

(3) EXCLUSIONS AND LIMITS.—No government shall impose or implement a land use regulation that—

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

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

42 USC  
2000cc-1. **SEC. 3. PROTECTION OF RELIGIOUS EXERCISE OF INSTITUTIONALIZED PERSONS.**

(a) GENERAL RULE.—No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, as defined in section 2 of the Civil Rights of Institutionalized Persons Act (42 U.S.C. 1997), even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person—

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

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

(b) SCOPE OF APPLICATION.—This section applies in any case in which—

(1) the substantial burden is imposed in a program or activity that receives Federal financial assistance; or

(2) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes.

**SEC. 4. JUDICIAL RELIEF.**

42 USC  
2000cc-2.

(a) CAUSE OF ACTION.—A person may assert a violation of this Act as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

(b) BURDEN OF PERSUASION.—If a plaintiff produces prima facie evidence to support a claim alleging a violation of the Free Exercise Clause or a violation of section 2, the government shall bear the burden of persuasion on any element of the claim, except that the plaintiff shall bear the burden of persuasion on whether the law (including a regulation) or government practice that is challenged by the claim substantially burdens the plaintiffs exercise of religion.

(c) FULL FAITH AND CREDIT.—Adjudication of a claim of a violation of section 2 in a non-Federal forum shall not be entitled to full faith and credit in a Federal court unless the claimant had a full and fair adjudication of that claim in the non-Federal forum.

(d) ATTORNEYS' FEES.—Section 722(b) of the Revised Statutes (42 U.S.C. 1988(b)) is amended—

(1) by inserting “the Religious Land Use and Institutionalized Persons Act of 2000,” after “Religious Freedom Restoration Act of 1993,”; and

(2) by striking the comma that follows a comma.

(e) PRISONERS.—Nothing in this Act shall be construed to amend or repeal the Prison Litigation Reform Act of 1995 (including provisions of law amended by that Act).

(f) **AUTHORITY OF UNITED STATES TO ENFORCE THIS ACT.**—The United States may bring an action for injunctive or declaratory relief to enforce compliance with this Act. Nothing in this subsection shall be construed to deny, impair, or otherwise affect any right or authority of the Attorney General, the United States, or any agency, officer, or employee of the United States, acting under any law other than this subsection, to institute or intervene in any proceeding.

(g) **LIMITATION.**—If the only jurisdictional basis for applying a provision of this Act is a claim that a substantial burden by a government on religious exercise affects, or that removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, the provision shall not apply if the government demonstrates that all substantial burdens on, or the removal of all substantial burdens from, similar religious exercise throughout the Nation would not lead in the aggregate to a substantial effect on commerce with foreign nations, among the several States, or with Indian tribes.

#### **SEC. 5. RULES OF CONSTRUCTION.**

42 USC  
2000cc-3.

(a) **RELIGIOUS BELIEF UNAFFECTED.**—Nothing in this Act shall be construed to authorize any government to burden any religious belief.

(b) **RELIGIOUS EXERCISE NOT REGULATED.**—Nothing in this Act shall create any basis for restricting or burdening religious exercise or for claims against a religious organization including any religiously affiliated school or university, not acting under color of law.

(c) **CLAIMS TO FUNDING UNAFFECTED.**—Nothing in this Act shall create or preclude a right of any religious organization to receive funding or other assistance from a government, or of any person to receive government funding for a religious activity, but this Act may require a government to incur expenses in its own operations to avoid imposing a substantial burden on religious exercise.

(d) **OTHER AUTHORITY TO IMPOSE CONDITIONS ON FUNDING UNAFFECTED.**—Nothing in this Act shall—

(1) authorize a government to regulate or affect, directly or indirectly, the activities or policies of a person other than a government as a condition of receiving funding or other assistance; or

(2) restrict any authority that may exist under other law to so regulate or affect, except as provided in this Act.

(e) **GOVERNMENTAL DISCRETION IN ALLEVIATING BURDENS ON RELIGIOUS EXERCISE.**—A government may avoid the preemptive force of any provision of this Act by changing the policy or practice that results in a substantial burden on religious exercise, by retaining the policy or practice and exempting the substantially burdened religious exercise, by providing exemptions from the policy or practice for applications that substantially burden religious exercise, or by any other means that eliminates the substantial burden.

(f) **EFFECT ON OTHER LAW.**—With respect to a claim brought under this Act, proof that a substantial burden on a person's religious exercise affects, or removal of that burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, shall not establish any inference or presumption

that Congress intends that any religious exercise is, or is not, subject to any law other than this Act.

(g) BROAD CONSTRUCTION.—This Act shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this Act and the Constitution.

(h) NO PREEMPTION OR REPEAL.—Nothing in this Act shall be construed to preempt State law, or repeal Federal law, that is equally as protective of religious exercise as, or more protective of religious exercise than, this Act.

(i) SEVERABILITY.—If any provision of this Act or of an amendment made by this Act, or any application of such provision to any person or circumstance, is held to be unconstitutional, the remainder of this Act, the amendments made by this Act, and the application of the provision to any other person or circumstance shall not be affected.

42 USC  
2000cc-4.

**SEC. 6. ESTABLISHMENT CLAUSE UNAFFECTED.**

Nothing in this Act shall be construed to affect, interpret, or in any way address that portion of the first amendment to the Constitution prohibiting laws respecting an establishment of religion (referred to in this section as the “Establishment Clause”). Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this Act. In this section, the term “granting”, used with respect to government funding, benefits, or exemptions, does not include the denial of government funding, benefits, or exemptions.

**SEC. 7. AMENDMENTS TO RELIGIOUS FREEDOM RESTORATION ACT.**

(a) DEFINITIONS.—Section 5 of the Religious Freedom Restoration Act of 1993 (42 U.S.C. 2000bb-2) is amended—

(1) in paragraph (1), by striking “a State, or a subdivision of a State” and inserting “or of a covered entity”;

(2) in paragraph (2), by striking “term” and all that follows through “includes” and inserting “term ‘covered entity’ means”; and

(3) in paragraph (4), by striking all after “means” and inserting “religious exercise, as defined in section 8 of the Religious Land Use and Institutionalized Persons Act of 2000.”

(b) CONFORMING AMENDMENT.—Section 6(a) of the Religious Freedom Restoration Act of 1993 (42 U.S.C. 2000bb-3(a)) is amended by striking “and State”.

42 USC  
2000cc-5.

**SEC. 8. DEFINITIONS.**

In this Act:

(1) CLAIMANT.—The term “claimant” means a person raising a claim or defense under this Act.

(2) DEMONSTRATES.—The term “demonstrates” means meets the burdens of going forward with the evidence and of persuasion.

(3) FREE EXERCISE CLAUSE.—The term “Free Exercise Clause” means that portion of the first amendment to the Constitution that proscribes laws prohibiting the free exercise of religion.

(4) GOVERNMENT.—The term “government”—

(A) means—

(i) a State, county, municipality, or other governmental entity created under the authority of a State;

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(ii) any branch, department, agency, instrumentality, or official of an entity listed in clause (i); and

(iii) any other person acting under color of State law; and

(B) for the purposes of sections 4(b) and 5, includes the United States, a branch, department, agency, instrumentality, or official of the United States, and any other person acting under color of Federal law.

(5) LAND USE REGULATION.—The term “land use regulation” means 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.

(6) PROGRAM OR ACTIVITY.—The term “program or activity” means all of the operations of any entity as described in paragraph (1) or (2) of section 606 of the Civil Rights Act of 1964 (42 U.S.C. 2000d-4a).

(7) 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.

Approved September 22, 2000.

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LEGISLATIVE HISTORY—S. 2869:

CONGRESSIONAL RECORD, Vol. 146 (2000):

July 27, considered and passed Senate and House.

WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS, Vol. 36 (2000):

Sept. 22, Presidential statement.

## **Appendix B**

*Sept. 22/ Administration of William J. Clinton, 2000*

### **Statement on Signing the Religious Land Use and Institutionalized Persons Act of 2000**

*September 22, 2000*

Today I am pleased to sign into law S. 2869, the “Religious Land Use and Institutionalized Persons Act of 2000,” which will provide important protections for religious exercise in America. This Act will, in certain cases, forbid State and local governments from imposing a substantial burden on the exercise of religion unless they could demonstrate that imposition of such a burden is the least restrictive means of furthering a compelling governmental interest. The Act would protect the exercise of religion in two situations: (1) where State and local governments seek to impose or implement a zoning or landmark law in a manner that imposes a substantial burden on religious exercise and (2) where State and local governments seek to impose a substantial burden on the religious exercise of persons residing or confined to certain institutions.

I applaud the Congress, particularly Senators Kennedy, Hatch, Reid, and Schumer, and Representatives Canady and Nadler for their hard work in passing this legislation. The Religious Land Use and Institutionalized Persons Act will provide protection for one of our country’s greatest liberties – the exercise of religion – while carefully preserving the civil rights of all Americans. Just as I fully supported the Religious Freedom Restoration Act in 1993, I support Senator Kennedy’s and Hatch’s bill. Religious liberty is a constitutional value of the highest order, and the Framers of the Constitution included protection for the free exercise of religion in the very first Amendment. This Act recognizes the importance of the free exercise of religion plays in our democratic society.

I also want to thank the Coalition for the Free Exercise of Religion and the civil rights community for the central role they played in crafting this legislation. Their work in passing this legislation once again demonstrates that people of all political bents and faiths can work together for a common purpose that benefits all Americans.

**William J. Clinton**

The White House  
September 22, 2000.