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Supplementary Material

Chapter 11: The Contemporary Era—Individual Rights/Religion/Free Exercise

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Cutter v. Wilkinson, 544 U.S. 709 (2005)

Jon Cutter was a Satanist, imprisoned in an Ohio penitentiary. Cutter and other members of non-traditional religions sued Reginald Wilkinson, the director of the Ohio Department of Rehabilitation and Correction, claiming that they were being denied the right to conduct religious services, denied access to a chaplain who practiced their religion, and denied access to literature and items they needed to practice their religion. They based their lawsuit on the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), which declared that states laws that burdened the free exercise rights of persons in prison had to meet a compelling interest test. Ohio responded to the lawsuit by insisting that RLUIPA was unconstitutional. A lower federal court denied Ohio's motion to dismiss the case, but that ruling was reversed by the Court of Appeals for the Sixth Circuit. Cutter appealed to the Supreme Court of the United States.

An interesting diversity of organizations filed amicus briefs. Eight states, the National League of Cities, a conservative public interest group, and an alliance of law enforcement officials filed briefs urging the Supreme Court to dismiss the case. The brief for the American Jail Association declared,

> *The least restrictive means test—mandated by the Religious Land Use And Institutionalized Persons Act ("RLUIPA") and the former Religious Freedom Restoration Act ("RFRA")—has greatly exacerbated gang members' abuse of religious accommodations. Specifically, the least restrictive means test has: (1) promoted the proliferation of various religions, including numerous pagan "religions" dominated by white supremacists, such as Odinism and Asatru; (2) caused the number of inmate "religious" demands to skyrocket, creating an excessive burden on correctional chaplains and officials, and often causing a reduction in the provision of religious services to inmates.*

The United States, prominent liberal public interest groups, associations of prison chaplains, and an alliance of very conservative religious groups filed briefs urging the court to sustain RLUIPA. The brief for the American Correctional Chaplains Association stated,

> *Congress understood that, for many prisoners, the ability to practice their faiths plays a central role in their ability to rehabilitate themselves while in prison and after release. Accordingly, by promoting religious accommodation in prisons, RLUIPA promotes the important secular objective of helping to rehabilitate religiously inclined prisoners and ex-prisoners. This too is a valid, secular purpose, and its effectuation is therefore a permissible effect.*

The Supreme Court unanimously declared RLUIPA constitutional. Justice Ginsburg's majority opinion asserted that the federal law was a legitimate accommodation for religion that acknowledged the distinctive religious needs of prisoners. Was this argument sound? Congress passed RLUIPA under the spending and commerce clauses, hence, Ginsburg did not have to consider whether the measure was a legitimate exercise of Congressional power under Section 5 of the Fourteenth Amendment. Suppose Congress had attempted to exercise Section 5 powers. Is RLUIPA different in some way from the Religious Freedom Restoration Act of 1993 that was declared unconstitutional in Boerne v. Flores *(1997)?*

JUSTICE GINSBURG delivered the opinion of the Court.

RLUIPA is the latest of long-running congressional efforts to accord religious exercise heightened protection from government-imposed burdens, consistent with this Court's precedents. Ten years before RLUIPA's enactment, the Court held, in *Employment Div., Dept. of Human Resources of Ore. v. Smith* (1990), that the First Amendment's Free Exercise Clause does not inhibit enforcement of otherwise valid laws of general application that incidentally burden religious conduct. . . .

Responding to Smith, Congress enacted the Religious Freedom Restoration Act of 1993 (RFRA). RFRA "prohibits '[g]overnment' from 'substantially burden[ing]' a person's exercise of religion even if the burden results from a rule of general applicability unless the government can demonstrate the burden '(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.'" . . . In *City of Boerne v. Flores* (1997), this Court invalidated RFRA as applied to States and their subdivisions, holding that the Act exceeded Congress' remedial powers under the Fourteenth Amendment.

Congress again responded, this time by enacting RLUIPA. . . . Section 3, at issue here, provides that "[n]o [state or local] government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution," unless the government shows that the burden furthers "a compelling governmental interest" and does so by "the least restrictive means."

Before enacting § 3, Congress documented, in hearings spanning three years, that "frivolous or arbitrary" barriers impeded institutionalized persons' religious exercise. . . . To secure redress for inmates who encountered undue barriers to their religious observances, Congress carried over from RFRA the "compelling governmental interest"/"least restrictive means" standard. . . .

. . .

Our decisions recognize that "there is room for play in the joints" between the [Establishment and Free Exercise] Clauses, some space for legislative action neither compelled by the Free Exercise Clause nor prohibited by the Establishment Clause. . . . [W]e hold that § 3 of RLUIPA fits within the corridor between the Religion Clauses: On its face, the Act qualifies as a permissible legislative accommodation of religion that is not barred by the Establishment Clause.

Foremost, we find RLUIPA's institutionalized-persons provision compatible with the Establishment Clause because it alleviates exceptional government-created burdens on private religious exercise. . . . Section 3 covers state-run institutions—mental hospitals, prisons, and the like—in which the government exerts a degree of control unparalleled in civilian society and severely disabling to private religious exercise. RLUIPA thus protects institutionalized persons who are unable freely to attend to their religious needs and are therefore dependent on the government's permission and accommodation for exercise of their religion.

. . .

We have no cause to believe that RLUIPA would not be applied in an appropriately balanced way, with particular sensitivity to security concerns. While the Act adopts a "compelling governmental interest" standard, "[c]ontext matters" in the application of that standard. Lawmakers supporting RLUIPA were mindful of the urgency of discipline, order, safety, and security in penal institutions. They anticipated that courts would apply the Act's standard with "due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security and discipline, consistent with consideration of costs and limited resources."

Finally, RLUIPA does not differentiate among bona fide faiths. . . . It confers no privileged status on any particular religious sect, and singles out no bona fide faith for disadvantageous treatment.

. . .

Should inmate requests for religious accommodations become excessive, impose unjustified burdens on other institutionalized persons, or jeopardize the effective functioning of an institution, the facility would be free to resist the imposition. In that event, adjudication in as-applied challenges would be in order.

JUSTICE THOMAS, concurring.

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The Establishment Clause provides that "Congress shall make no law respecting an establishment of religion." As I have explained, an important function of the Clause was to "ma[ke] clear that Congress could not interfere with state establishments." The Clause, then, "is best understood as a federalism provision" that "protects state establishments from federal interference." . . .

. . . The Clause prohibits Congress from enacting legislation "respecting an establishment of religion" (emphasis added); it does not prohibit Congress from enacting legislation "respecting religion" or "taking cognizance of religion." At the founding, establishment involved "'coercion of religious orthodoxy and of financial support by force of law and threat of penalty,' " . . . To proscribe Congress from making laws "respecting an establishment of religion," therefore, was to forbid legislation respecting coercive state establishments, not to preclude Congress from legislating on religion generally.

On its face—the relevant inquiry, as this is a facial challenge—RLUIPA is not a law "respecting an establishment of religion." . . . This provision does not prohibit or interfere with state establishments, since no State has established (or constitutionally could establish, given an incorporated Clause) a religion. Nor does the provision require a State to establish a religion: It does not force a State to coerce religious observance or payment of taxes supporting clergy, or require a State to prefer one religious sect over another. It is a law respecting religion, but not one respecting an establishment of religion.

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