


**RLUIPA Defense:
Avoiding and Defending
RLUIPA Claims
2015-2016 Update**

Land Use & Sustainable Development Law
Institute Bagels with the Boards CLEs

SEPTEMBER 23, 2016



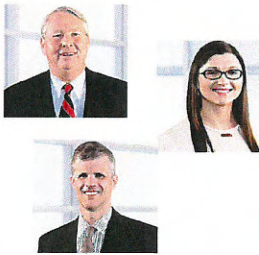
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The Law Center is part of the Touro College system.

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MAJOR DEVELOPMENTS SINCE LAST TIME?

- Yes & No
 - Still no SCOTUS Land Use Case
 - Impact of RFRA and Prisoner cases?
 - Potential substantial burden shift in the Seventh Circuit?



HISTORY & INTENT

- *Sherbert v. Verner*, 374 U.S. 398 (1963)
- *Employment Div. v. Smith*, 494 U.S. 872 (1990)
- *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993)
- Religious Freedom Restoration Act of 1993
- *City of Boerne v. Flores*, 521 U.S. 507 (1997)



RLUIPA

The Basics:

Substantial Burden

42 U.S.C. § 2000cc(a)

Equal Terms

42 U.S.C. § 2000cc(b)(1)

Nondiscrimination

42 U.S.C. § 2000cc(b)(2)

Exclusions and Limitations

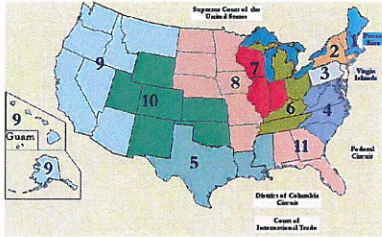
42 U.S.C. § 2000cc(b)(3)



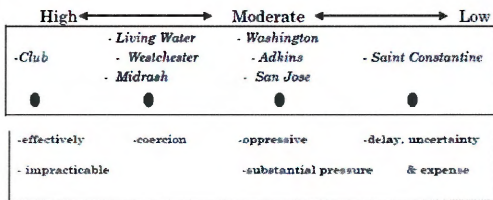
WHAT ARE THE MOST COMMON CLAIMS AND MOST CONTESTED RLUIPA ISSUES?

- Substantial Burden
- Compelling Governmental Interest
- Least Restrictive Means
- Equal Terms - Comparators

SUBSTANTIAL BURDEN IN THE CIRCUITS



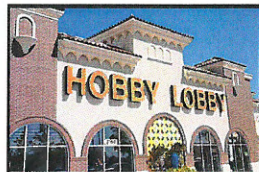
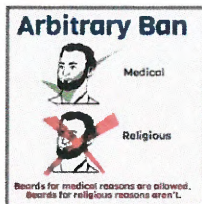
SUBSTANTIAL BURDEN IN THE CIRCUITS



WHAT CONSTITUTES A "SUBSTANTIAL BURDEN" ON RELIGIOUS EXERCISE?

- | | |
|--|---|
| <p><u>Very Likely Yes</u></p> <ul style="list-style-type: none"> ○ Nowhere to locate in the jurisdiction. ○ Unable to use property for religious purposes. ○ Imposing excessive and unjustified delay, uncertainty or expense. ○ Religious animus expressed by City Officials. | <p><u>Very Likely No</u></p> <ul style="list-style-type: none"> * Timely denial that leaves other sites available. * Denial that has a minimum impact. * Denial where no reasonable expectation of an approval. * Personal preference, cost, inconvenience. |
|--|---|

IMPACT OF *HOBBY LOBBY* AND *HOLT V. HOBBS*?



Both *Holt* and *Hobby Lobby* may impact how courts evaluate whether a governmental interest is "compelling" and furthered by "the least restrictive means" available.

IMPACT OF *HOBBY LOBBY* AND *HOLT V. HOBBS*?

- The Seventh Circuit has concluded that *Holt* and *Hobby Lobby* articulated a substantial burden standard "much easier to satisfy" than that previously used in the circuit.
- Is *C.L.U.B. v. City of Chicago*, No. 01-4030 (7th Cir. 2003) still good law?



COMPELLING INTERESTS

- MERE SPECULATION, not compelling; need specific evidence that religious use at issue jeopardizes the municipality's stated interests
- Compelling interests are interests of the highest order (public health and safety)



EXAMPLES OF COMPELLING INTERESTS

- Preservation of a municipality's rural and rustic single family residential character of a residential zone. *Eagle Cove Camp Conf. Ctr. v. Town of Woodboro*, 734 F.3d 673 (7th Cir. 2013)
- Ensuring the safety of residential neighborhoods through zoning. *Westchester Day School v. Mamaroneck*, 417 F.Supp. 2d 477, 551 (S.D.N.Y. 2006), 504 F.3d 338 (2d Cir. 2007)
- Traffic? Possibly. *Westchester Day Sch. v. Vill. of Mamaroneck* (2d Cir. 2004)
- Not compelling? Property values, revenue generation.

LEAST RESTRICTIVE MEANS

- "We do not doubt that cost may be an important factor in the least restrictive means analysis ... Government may need to expend additional funds to accommodate citizens' religious beliefs." *Burwell v. Hobby Lobby*, 134 S. Ct. 2751 (2014)
- "The least-restrictive-means standard is exceptionally demanding,' and it requires the government to 'sho[w] that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting part[y].'" *Holt v. Hobbs*, 135 S.Ct. 853 (2015)(quoting *Hobby Lobby*)

MORE ON LEAST RESTRICTIVE MEANS

- Denial of zoning application without consideration of any conditions or alternatives fails this test. *Westchester Day Sch.* (2d Cir. 2007)
- "But nothing in the Court's opinion suggests that prison officials must refute every conceivable option to satisfy RLUIPA's least restrictive means requirement." *Holt v. Hobbs* (2015) (Sotomayor, J., concurring) (emphasis added)
- Must strike "delicate balance" between religious practice and governmental interest. *Jova v. Smith*, 582 F.3d 410, 416 (2d Cir. 2009)

EQUAL TERMS: MORE CIRCUIT VARIABILITY

secular assemblies that are similarly situated *as to the regulatory purpose*. (3rd Cir., Lighthouse)

secular comparator, similarly situated with respect to an *accepted zoning criteria* (7th Cir., River of Life Kingdom)

a church and school were insufficiently comparable, given that the properties *sought different forms of zoning relief from different land use authorities applying "sharply different" criteria*. (11th Cir., Primera Iglesia)

(1) the regulatory purpose or zoning criterion behind the regulation, *as stated explicitly in the text* of the ordinance or regulation; and (2) whether the religious assembly or institution is treated as well as every other nonreligious assembly or institution that is "similarly situated" *with respect to the stated purpose or criterion*. (5th Cir., Opulent Life Church)

INDIVIDUAL LIABILITY

- o RLUIPA creates an express private cause of action allowing relief against a *government*. 42 U.S.C. § 2000cc-2(a).
- o In *Sossamon v. Texas*, the Supreme Court held that sovereign immunity forecloses the availability of money damages as a remedy against states and state actors in their official capacities under RLUIPA. 131 S. Ct. 1651, 1663 (2011)(A Prisoner Case).
- o Does this holding extend to land uses cases?
- o A resounding yes from the Sixth Circuit



AVOIDING A RLUIPA CLAIM

- o Assess your zoning code
 - How are *all* assembly uses treated?
 - Do distinct standards apply to places of worship?
- o What other RLUIPA provisions are commonly a part of facial claims?



AVOIDING A RLUIPA CLAIM

- When an application under your zoning code is filed by a religious organization, perform a RLUIPA analysis
 - Determine from the applicant the reasons for the application (i.e. what burdens on religion now exist)
 - Attempt to identify and measure the burden that might be imposed if the application is denied in whole or in part
 - Compare the nature and extent of the application to that of other applicants that could be regarded as comparators
 - Attempt to determine the risk of an equal terms claim if application is denied in whole or in part

AVOIDING A RLUIPA CLAIM

- Invite the applicant to propose a less intensive use (can municipal goals be met in a less restrictive manner?)
- Negotiate a new location
- Plan for religious use
- Educate local officials
- RLUIPA's Safe Harbor provision
- Insure that RLUIPA claims are covered under your governmental liability policy

DEFENDING A RLUIPA CLAIM

- Invariably Expensive
 - Time and Money – lawyers, coincident environmental proceedings, experts (land use, damages, environmental)
- Probably document intensive
 - Equal terms, free exercise, facial, and as-applied challenges usually involve extensive documentation
 - Document Intensive
- Cases are fact intensive

DEFENDING A RLUIPA CLAIM

- Once brought, rarely settled
 - Legal fees
 - Cases become matters of faith to plaintiffs
- Difficult to defend at trial
 - Most are claimed to a jury
 - God vs. Government bias potential
 - Cross-examination of church officials requires tact not ferocity
 - Jury instructions invariably confusing
 - Federal judiciary rarely has RLUIPA or land use experience



THANKS FOR HAVING US!

- Questions, Comments & War Stories?



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