

RELIGION LAW

Expert Analysis

The Long Reach of the Federal Gov't In Protecting Religious Liberty

Private litigation often ends up striking down unconstitutional limitations on religious freedom, including, of course, in cases that reach the Supreme Court of the United States, as has been discussed in recent columns in this space. See, e.g., Barry Black, “Supreme Court Rules in Favor of Religious Liberty in Two School Cases,” *NYLJ* (Aug. 25, 2022).

The law, however, offers a number of other avenues that also can be used to protect and enhance religious freedom. Among the most significant are the steps that the federal government can and does take in this area.

This column will first discuss efforts the federal government has made to educate itself and others on issues that are



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important to the religious community worldwide. Next, it will describe the Justice Department’s enforcement of the Religious Land Use and Institutionalized Persons Act (RLUIPA) in actions against local governments, including in the New York metropolitan area. Finally, it will examine ways in which the federal government has held itself accountable to follow the important principles of religious freedom.

Education

One area in which the government has focused its educational efforts is increasing protections for places of worship and people of faith, both domestically and abroad. For example, on September 19, the U.S. Department of Homeland Security (DHS)

announced the appointment of 25 members to what it referred to as a “reinvigorated” Faith-Based Security Advisory Council. Members represent various faith communities and a diversity of denominations, including from the Christian, Hindu, Jewish, Muslim, and Sikh communities, as well as from law enforcement. The Council is intended to provide advice to the DHS on diverse homeland security matters, including on its work to protect houses of

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worship. See also Barry Black and Lane Paulsen, “Security for Houses of Worship: The Law, and Practical Steps To Take,” *NYLJ* (March 5, 2020).

Other recent notable educational developments include U.S. Attorneys’ Offices offering

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“Protecting Houses of Worship” safety training, and testimony titled “Violent Extremism and Terrorism: Examining the Threat to Houses of Worship and Public Spaces” by a senior FBI official to the Senate Homeland Security and Governmental Affairs Committee.

The government’s efforts in support of religious freedom are also international in their goals, as evidenced by the recent reauthorization of the U.S. Commission on International Religious Freedom, as well as the U.S. State Department’s annual review of every country in the world and its public designation of countries that have engaged in egregious or severe violations of religious freedom.

Enforcement

The Religious Land Use and Institutionalized Persons Act (RLUIPA) permits religious institutions and people of faith, as well as the U.S. government, to challenge land use regulations that place a substantial burden on religious exercise or that discriminate on the basis of religion. See Barry Black and Sarah E. Child, “How RLUIPA Protects the Right To Use Land for Religious Purposes,” *NYLJ* (May 27, 2021). The Justice Department has recently brought or resolved a number of significant RLUIPA actions across the country.

For example, several months ago, the Justice Department (DOJ) reached a settlement resolving allegations that the

Village of Walthill, Nebraska, violated a church’s rights under RLUIPA. The DOJ alleged that the village unlawfully refused to grant the necessary permits required for Light of the World Gospel Ministries Inc. (LOTW), a nondenominational Christian Church, to construct a new church building on land it owns in a commercial district of the village. Under the village’s zoning code, churches and other religious institutions are required to obtain a special use permit to operate anywhere in the village.

The DOJ alleged that the village’s refusal to allow LOTW to construct a new church on its property substantially burdened its religious exercise. The lawsuit also alleged that the village treated LOTW less favorably than nonreligious assemblies and institutions that were allowed to construct buildings for noncommercial uses in the same district during the same period.

The settlement provided for the approval of the necessary permits so that LOTW could construct a new, multi-use church facility in downtown Walthill; prohibited the village from engaging in future violations of RLUIPA; mandated RLUIPA training for village board members and staff; and required that the village provide notice to the public regarding rights protected by RLUIPA and comply with recordkeeping and reporting requirements.

Last year, in another notable case, the Justice Department dismissed a RLUIPA lawsuit against

Stafford County, Virginia, after the county repealed ordinances that prevented the All Muslim Association of America (AMAA) from developing a religious cemetery for persons of the Islamic faith; approved the AMAA’s site plan for the cemetery; and, in a private settlement with the AMAA to resolve a lawsuit filed by the AMAA, agreed to pay \$500,000 in damages to the AMAA.

The Justice Department also has sought to enforce RLUIPA locally.

For example, this past June, the Justice Department resolved a lawsuit against Jackson Township, New Jersey, for allegedly discriminatory ordinances targeting Orthodox Jewish religious schools. The township and the Jackson Planning Board settled allegations that they violated RLUIPA and the federal Fair Housing Act when they passed and applied a series of discriminatory zoning ordinances that intentionally targeted the Orthodox Jewish community by prohibiting religious schools and associated dormitories.

And, last year, the DOJ reached an agreement with the Township of Toms River, New Jersey, to resolve allegations that the township violated RLUIPA by severely restricting where houses of worship could locate within its jurisdiction. The DOJ alleged that, since 2009, Toms River had enacted a series of revisions to its zoning code—including a 10-acre parcel minimum requirement—that greatly reduced both

the number of zoning districts in which houses of worship could locate and the number of sites available for houses of worship.

As part of the consent decree, the township agreed to revise its zoning code to reduce the minimum acreage required for a house of worship in many zoning districts from 10 acres to two acres; allow houses of worship as-of-right in certain zoning districts; allow smaller houses of worship to be located on minor collector roads; and treat houses of worship on comparable terms to nonreligious places of assembly. The consent decree also required the township to train its officials and employees on RLUIPA's requirements and establish a procedure for receiving and resolving RLUIPA complaints, among other relief.

Government Accountability

The federal government has also developed reporting mechanisms to increase its own accountability under the First Amendment and religious freedom statutes.

Under the Religious Freedom Restoration Act (RFRA), the “[g]overnment shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability,” unless the government “demonstrates that application of the burden to the [organization]—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that

compelling governmental interest.” 42 U.S.C. §2000bb-1(a)-(b). In 2020, the U.S. Department of Education (the department) introduced a RFRA Information Submission Process whereby individuals could email the department to report allegations that the department—through, for example, its rulemaking, programs, or grant terms—substantially burdened their religious exercise. Upon receipt of such complaints, the department committed to work with any relevant program offices or federal agencies to review the information

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and determine whether further investigation was warranted.

That same year, the department also launched a Free Speech hotline where students and faculty members could file complaints of censorship of religious and other protected speech. This held the agency accountable to investigate whether institutions that were recipients of federal funds were engaged in any disqualifying conduct.

Other federal agencies have created similar portals. For example, any individual may file a Conscience or Religious Freedom Complaint with the Department of Health and Human Services’

Office of Civil Rights if he or she believes that a health care provider or government agency engaged in discrimination on the basis of conscience or religious freedom, coerced an individual into violating his or her conscience or religious beliefs, or burdened an individual’s free exercise of religion.

By fostering its own accountability to these principles, the federal government sets an example for all governments to honor religious freedom.

Conclusion

Advocates for the religious community will continue to assert that more can and should be done to protect their institutions and to ensure their members’ ability to practice their religion. Yet increased education, enforcement, and accountability may lead to a broader acceptance of religious freedom and a greater ability of people to exercise their First Amendment rights in peace.