THE PEW FORUM ON RELIGION & PUBLIC LIFE

The Supreme Court's Decision in *Cutter v. Wilkinson*

The Constitutional Status of the Religious Land Use and Institutionalized Persons Act

On May 31, 2005, the Supreme Court unanimously upheld the constitutionality of Section 3 of the Religious Land Use and Institutionalized Persons Act of 2000 (commonly known as RLUIPA). RLUIPA is a federal statute that aims in part to protect the religious freedom of prison inmates and others held in state-run institutions. The court's opinion in *Cutter v. Wilkinson* (No. 03–9877) came as a surprise, both for its unanimity and for the relatively brief time (10 weeks) between the oral argument in March and the issuance of the opinion. Writing for the entire court, Justice Ruth Bader Ginsburg concluded that Section 3 of the statute is a valid legislative accommodation of the religious needs of persons confined to state custody. (*Cutter* did not involve a challenge to Section 2 of RLUIPA, which protects religious institutions in situations involving state and local land-use regulations.)

The State of Ohio had challenged RLUIPA's constitutionality, arguing that it violates the First Amendment's prohibition on the establishment of religion. Section 3 of the law requires that prison officials accommodate inmates' religious needs in certain cases, even if doing so means exempting the inmates from general prison rules. Since the law does not also require prison officials to similarly accommodate inmates' secular needs or desires, Ohio claimed the statute impermissibly advances religion. The state also argued that the law creates incentives for prisoners to feign religious belief in order to gain privileges.

The court rejected these arguments, but it did so in a way that may significantly limit the force of Section 3 as it is construed and applied in the lower courts. Indeed, Justice Ginsburg's analysis of the statute will probably make it difficult for inmates to successfully bring a suit under RLUIPA in certain circumstances. (See section below, **Applying RLUIPA.**)

Justice Ginsburg's analysis of the Establishment Clause arguments against Section 3 emphasized several important aspects of the prison setting. Religious practices that are completely unregulated outside of prison — choice of diet, clothing, grooming or assembling for worship, for example — are heavily regulated inside such institutions. Congress drafted Section 3 not to promote religion among inmates who otherwise would refrain from adopting faith practices, Ginsburg argued, but rather to require the states to relieve at least some highly limiting restrictions on prisoners

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and other institutionalized persons who desire to practice their faith. As the court put it, "RLUIPA's institutionalized persons provision [is] compatible with the Establishment Clause because it alleviates exceptional government-created burdens on private religious exercise" (slip op. at 9).

While upholding Section 3 in the context of the Establishment Clause, Ginsburg did not address a number of other anti-RLUIPA arguments that the State of Ohio had raised before the high court. These include assertions that in passing RLUIPA, Congress had exceeded its authority to regulate states under the Spending Power as well as the Commerce Clause of the Constitution. Ohio's arguments also included the novel assertion that the Establishment Clause had a "federalism component" that limited the power of Congress to impose a regime of religious accommodation on the states, even if a state is free to impose such a regime on itself. Justice Ginsburg noted that the Court of Appeals had not considered any of these arguments, and thus remanded the case to that court for further consideration. Justice Clarence Thomas wrote a concurring opinion, in which he addressed Ohio's argument about the federalism component in the Establishment Clause, but he concluded that the contention was without merit in this case.

Cutter reaffirms the basic proposition asserted in *Amos* that, under some circumstances, legislatures may relieve religious persons or entities of government-imposed obligations or restrictions.

The Cutter *Opinion*

The core of Ginsburg's argument in *Cutter* rests on a justification akin to one used by the high court in *Corp. of Presiding Bishops v. Amos,* a 1987 decision that upheld the exemption for religious organizations from the prohibition on religious discrimination in employment. *Cutter* reaffirms the basic proposition asserted in *Amos* that, under some circumstances, legislatures may relieve religious persons or entities of government-imposed obligations or restrictions. (This case is discussed at length in a backgrounder on *Cutter v. Wilkinson,* published by the Pew Forum on March 17, 2005.) This proposition has been made all the more important by the Supreme Court's 1990 opinion in *Employment Division v. Smith* (also discussed in the *Cutter* backgrounder), which held that judges may not impose religious accommodations as a constitutional mandate. *Smith* left such work entirely in the hands of legislatures. Hence, without legislative accommodations, such as those spawned by Section 3 of RLUIPA, there would be no governmental accommodations of religious practice at all, a result highly likely to prejudice religious minorities.

Ginsburg also asserted that accommodations under Section 3 constitute an example of the "play in the joints" (slip op. at 9) between the First Amendment's Free Exercise Clause, which guarantees religious freedom, and the Establishment Clause, which limits government support of religious commitment.

After analyzing the statute's acceptability under the Establishment Clause, the court in *Cutter* went on to articulate a more specific justification for RLUIPA, emphasizing the evidence before Congress that majority faiths are frequently favored and minority faiths frequently disadvantaged in the administration of prisons. In particular, the opinion noted, Congress had before it a record of discrimination against Muslims and Jews, and evidence that prison officials frequently mistreated prisoners' sacred items, including "the Bible, the Koran, and the Talmud…." (slip op., note 5). One possibly could see a connection between this

observation in the opinion and the recent news reports about insensitivity to the Islamic faith of persons in the custody of the U.S. Armed Forces.

Finally, it is worth noting the unanimity of the Court in *Cutter.* It was widely expected that Justice John Paul Stevens would vote to strike down Section 3. Justice Stevens, alone among the justices, had written an opinion in an earlier case, *City of Boerne v. Flores,* arguing that a more far-reaching predecessor to RLUIPA, the Religious Freedom Restoration Act (RFRA), had violated the Establishment Clause because it favored religious over secular activity. So why did Justice Stevens join the majority in *Cutter*? Perhaps he was persuaded that most RLUIPA claims were likely to fail even if the law itself was upheld (see below).

Applying RLUIPA

Despite the court's willingness to unanimously uphold Section 3 on its face, the opinion also reflects some very important qualifications on the ways in which lower courts should apply RLUIPA to prison officials. First, the court in *Cutter* assumed that RLUIPA will be applied in ways that show substantial deference to the judgment of prison administrators about security concerns. As Justice Ginsburg wrote: "We do not read RLUIPA to elevate accommodation of religious observances over an institution's need to maintain order and safety" (slip op. at 12).

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RLUIPA's language, imposing a burden on state officials to show that limits on religious practice are the "least restrictive means" to achieve a "compelling state interest," might of course be thought to elevate religious practice in just that way. Nevertheless, Justice Ginsburg laconically dismissed that view of RLUIPA by arguing that "context matters" when deciding what are "compelling interests." Moreover, she did not even mention the statute's requirement that the state employ the "least restrictive means" when abridging religious freedom. *Cutter* therefore sends a powerful signal to lower courts that they should apply RLUIPA "in an appropriately balanced way, with particular sensitivity to security concerns" (slip op. at 12).

This interpretive gloss on RLUIPA, applied by the court in the name of the Constitution as well as by reference to legislative intent (slip op. at 13), is likely to mean that many claims under Section 3 will be difficult to win. Religious practices that do not threaten security, such as dietary concerns advanced by Jews or Muslims, stand the best chance of prevailing under the statute. Similarly, RLUIPA claims based on sectarian discrimination — for example, that some groups are allowed to have their own worship services and others are not — may prove successful if the prison lacks a security-related justification for the difference in treatment. Indeed, the court applauds the fact that RLUIPA "does not differentiate among bona fide faiths" (slip op. at 13).

In contrast, RLUIPA claims that might create legitimate security concerns — such as those involving hair length, beards, dress or the possession of sacred objects — are likely to fare worse under the view of the law advanced in *Cutter.* Revealingly, the court dismissed Ohio's argument that religious prisoners would be able to obtain faith-based racist literature while non-religious prisoners, unaided by RLUIPA, would be denied such books. Ginsburg noted that "the government's countervailing compelling interest in not facilitating inflammatory racist activity that could imperil prison security and order" would allow the literature to be banned for both religious and non-religious inmates (slip op. at 12, n.11). Moreover, the court reaffirmed that "prison officials may appropriately question whether a prisoner's

religiosity, asserted as a basis for a requested accommodation, is authentic" (slip op. at 15, n. 13).

The *Cutter* opinion also suggests that those accommodations that "impose unjustified burdens on other institutionalized persons" (slip op. at 16) would also represent unwarranted and unconstitutional applications of RLUIPA. Arguably every accommodation requires some reallocation of resources and risk, and will therefore have some impact on others within the prison. Although the court does not give examples of burdens on third parties, its citation of *Estate of Thornton v. Caldor,* which invalidated a law requiring private employers to recognize employee Sabbath days without regard to the burden thereby imposed on other employees, gives the flavor of what may qualify as an "unjustified burden" on others. Perhaps any accommodation that undermines prison security creates a constitutionally unjustifiable risk of harm to prison guards and other inmates.

More broadly, the court's emphasis on the potential burdens on third parties leaves open a great many questions about the scope of permissible accommodations in other non-institutional settings. For example, legislative accommodations of the rights of religious parents to depart from child-rearing norms, such as faith healing in place of conventional medical treatment, might be viewed as unconstitutionally imposing excessive costs on the children subject to those practices.

In spite of these caveats, the court's opinion in *Cutter* guarantees that Section 3 claims will continue to be filed on behalf of prisoners. Lower courts that have been holding such claims pending the outcome in *Cutter* will now resume hearing them. But *Cutter's* broad and repeated references to the need for deference to prison officials on security matters suggest that a significant proportion of RLUIPA claims will fail. *Cutter's* overarching theory that RLUIPA's test of "compelling interests" should be construed contextually may also have spill-over effects on the land-use process governed by Section 2 of RLUIPA, where a different set of opposing governmental and private interests will come into play.

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