

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

CONGREGATION KOL AMI and RABBI ELLIOT HOLIN	:	
	:	CIVIL ACTION
	:	No. 01-1919
v.	:	
	:	
ABINGTON TOWNSHIP; BOARD OF COMMISSIONERS OF ABINGTON TOWNSHIP; THE ZONING HEARING BOARD OF ABINGTON TOWNSHIP and LAWRENCE T. MATTEO, JR., in his official capacity as Director of Code Enforcement of Abington Township	:	

**PLAINTIFFS- OPPOSITION TO DEFENDANTS’
SUPPLEMENTAL MEMORANDUM OF LAW IN SUPPORT
OF THEIR MOTION FOR SUMMARY JUDGMENT**

Plaintiffs Congregation Kol Ami and Elliot Holin file this opposition to Defendants’ supplemental memorandum regarding the recent decisions in *Al Ghashiyah v. Wis. Dept. of Corrections*, No. 01-C-10, 2003 WL 1089526 (E.D. Wis. Mar. 4, 2003) and *Madison v. Riter*, 240 F. Supp. 2d 566 (W.D. Va. 2003).

ARGUMENT

I. The Recent *Madison* and *Al Ghashiyah* Opinions Are Poorly Reasoned, Flouting Supreme Court and Circuit Precedent, and Adopting Arguments That Have Been Uniformly Rejected by Every Other Court to Address Them.

As the Congregation’s Opposition Brief has already explained, RLUIPA satisfies all three elements of the *Lemon* test: (1) it has a secular purpose, to minimize government interference with religious exercise; (2) it does not have the primary effect of advancing religion, because deregulating religious exercise (even exclusively, as religious accommodation laws do) does not involve the government *itself* advancing religion; (3) it does not excessively entangle

government with religion, because its purpose and effect is exactly the opposite, to diminish government interference with religious exercise.

Thus, when similar Establishment Clause arguments were raised against RFRA – which was even more protective of religious exercise (and only religious exercise) – every single Court of Appeals, and all but one sitting Justice of the Supreme Court, rejected those arguments. Courts of Appeals have also been unanimous in rejecting Establishment Clause challenges to special protections for religious exercise contained in some local land-use laws. And, until two months ago, every Establishment Clause challenge against RLUIPA had been rejected. These cases merely follow a long line of judicial decisions that allow – and even extol – legislative and executive actions that specially alleviate burdens on religious exercise, because they “follow[] the best of our traditions.” *Zorach v. Clauson*, 343 U.S. 306, 314 (1952).

In a supplemental brief, the Township now cites – for the very first time¹ – decisions of the first two federal courts ever to strike down any part of RLUIPA on Establishment Clause grounds (or, for that matter, any other ground). *See Al Ghashiyah v. Wis. Dept. of Corrections*, No. 01-C-10, 2003 WL 1089526 (E.D. Wis. Mar. 4, 2003); *Madison v. Riter*, 240 F. Supp. 2d 566 (W.D. Va. 2003) (interlocutory appeal certified to the Fourth Circuit). As will be explained

¹ In its recent motion for leave to file a reply brief, the Township faults the Congregation for highlighting the Township’s failure to cite even a single case striking down RLUIPA in its motion for summary judgment – even though that statement is true – because the Congregation should have received the Township’s supplemental brief before the Congregation filed its response. What the Township notably omits is that it served its supplemental memorandum by first-class mail on March 11, 2003, three days before the extended deadline for the Congregation’s opposition brief. The Township never mentioned its intention to file the supplemental memorandum (notwithstanding the extensive conversations regarding the briefing schedule), and never requested the Congregation’s consent to file that memorandum, which was not accompanied by a motion for leave to file. The Congregation notes additionally that the *Madison* decision was issued on January 23, 2003, before the Township filed its motion for summary judgment. Rather than include it in their initial brief (or promptly thereafter), the Township preferred instead to wait until three days before the Congregation’s opposition filing to cite it, and then to deliver the citing memorandum by mail. Thus, the Congregation respectfully requests that this Court either strike the Township’s supplemental memorandum entirely, or accept this opposition brief for filing in response.

further below, these opinions defy, distort or ignore the heavy weight of authority against them, including controlling Circuit and Supreme Court precedent.

A. RLUIPA Has a Secular Purpose

The extreme position reflected in these opinions does not deter the Township from pushing the limits even farther. Specifically, in addressing the first prong of the *Lemon* test, the Township claims that “the *Madison* Court concluded that there is no secular purpose behind RLUIPA.” Supp. Mem. 4. In fact, the *Madison* court reached the opposite conclusion. *See Madison*, 240 F. Supp. 2d at 572 n.4 (“The Supreme Court has already held that the stated secular purpose of RLUIPA, to protect the free exercise of religion, is a permissible secular purpose, even if there is some question as to whether the purpose is in fact genuine. *See Amos*, 483 U.S. at 335.”). Similarly, the *Al Ghashiyah* court stopped just short of the radical holding that the purpose of accommodating religious exercise is not secular or is otherwise impermissible. *Al Ghashiyah*, 2003 WL 1089526, at *7 (“By providing more protection for inmates’ religious rights than any other rights Congress could reasonably be aid [sic] to have abandoned neutrality and acted with the purpose of furthering religion. However, I need not make that finding....”). Instead, the *Madison* and *Al Ghashiyah* courts relied primarily on the “effects” and “entanglement” parts of the *Lemon* test to strike down RLUIPA.

B. The Primary Effect of RLUIPA Is Not to Advance Religion

Regarding effects, the Township’s and the *Madison* court’s argument essentially boils down to one point, restated several ways: that the Establishment Clause forbids legislative accommodations of religious exercise if they accommodate only religious exercise. Supp. Mem. 4-5 (quoting portions of *Madison* that fault RLUIPA for “providing more protection for inmates’

religious rights than any other rights,” “singl[ing] out religious rights from other fundamental rights,” “privileging religious rights over all other fundamental rights,” etc.).

The main problem with this position is that the Supreme Court – and the litany of lower courts willing to follow it, including this Court – have squarely rejected this very same argument, over and over again.² Notably, the Fourth Circuit explicitly rejected this argument in *Ehlers-Renzi v. Connelly Sch. of the Holy Child*, 224 F.3d 283, 291 (4th Cir. 2000) (rejecting plaintiff’s argument that “the exemption impermissibly advances religion by ‘providing religious organizations an exclusive benefit.’”), *cert. denied*, 531 U.S. 1192 (2001), but the *Madison* court – a district court within the Fourth Circuit – fails to cite *Ehlers-Renzi* even once, not to mention attempt to distinguish it.³

There is also a conceptual problem underlying *Madison*’s reasoning. The Establishment Clause certainly *does* require some form of “neutrality,” as both *Madison* and the Defendants argue. But the neutrality that is required is among religions, and between religion and irreligion – *not* between “Religious Rights” and “All Other Fundamental Rights.” *Madison*, 240 F. Supp. 2d at 572. It is true that government cannot prefer the religious over the nonreligious: the state

² *See, e.g., Amos*, 483 U.S. at 338 (“Where ... government acts with the proper purpose of lifting a regulation that burdens the exercise of religion, we see no reason to require that the exemption comes packaged with benefits to secular entities.”); *Mayweathers*, 314 F.3d at 1069 (“The statute does not violate the Establishment Clause just because it seeks to lift burdens on religious worship in institutions without affording corresponding protection to secular activities or to non-religious prisoners.”); *Johnson*, 223 F. Supp. 2d at 826 (concluding that, after *Amos*, “it does not follow, as Defendants argue, that merely because Congress has acted to provide religious activity with special protection and has not done the same for secular activity, that Congress has advanced religion.”); *Gerhardt*, 221 F.Supp.2d at 847 (“Finally, the [*Amos*] Court rejected the notion that a law which singles out religions for the benefit it confers is *per se* unconstitutional.”). *See also Freedom Baptist Church*, 204 F. Supp. 2d at 865 n.9 (noting that *Amos*, “constitutes something of a silver bullet against any residual Establishment Clause concerns.”).

³ Similarly, although the *Al Ghashiyah* court does not *completely* ignore the controlling authority of *Sasnett v. Sullivan*, 91 F.3d 1018 (7th Cir. 1998), *vacated on other grounds*, 521 U.S. 1114 (1997), it pays only lip service to that decision. In one of its several exercises in legal invention, the *Al Ghashiyah* court claims – without any citation to authority – that the Seventh Circuit’s express adoption of the Establishment Clause reasoning of the Fifth Circuit is somehow less authoritative than if the Seventh Circuit had restated that reasoning itself. *Al Ghashiyah*, 2003 WL 1089526, at *3-*4. As with *Madison*, the *Al Ghashiyah* court’s flouting of Circuit precedent not only suggests the fate of the decision on appeal, but it is exemplary of the quality and candor of legal reasoning throughout the opinion.

cannot imprison those that refuse to believe in a Creator, or withhold welfare checks from the atheist. But the government can – and often does – protect a single fundamental right (including the right to free religious exercise) in a particular piece of legislation or regulation such as RLUIPA. Such government actions do not “prefer” religion over irreligion. Instead, they simply protect or reinforce the *right* to religious exercise.

In addition, the reasoning of *Madison* defies logic. If the purpose of the Establishment Clause really were to preclude laws that *single out* religious exercise for protection from government interference, then the Establishment Clause would squarely contradict the Free Exercise Clause, which does precisely that. *See Lynch v. Donnelly*, 465 U.S. 668, 673 (1984) (“Nor does the Constitution require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any.”).

There are practical problems as well. On this view, the Establishment Clause would run amok, invalidating wholesale the legion acts of the political branches – legislative and executive, federal, state, and local – whose purpose and effect is solely the accommodation of religious exercise.⁴ Another strange consequence of this reasoning is that, if legislative and executive officials would merely tack on to each protection of religious exercise the protection of another fundamental right, then the entire (allegedly grievous) constitutional problem would disappear. Similarly, if the exclusive protection of religious exercise could create an Establishment Clause problem for undue favor of religion, then the legislative reinforcement of other fundamental

⁴ In Pennsylvania alone, these include, among others, the following: The Pennsylvania Religious Freedom Protection Act, 71 P.S. § 2401 *et seq.*; 4 P.S. § 64.1 (permitting exhibition of motion pictures by churches at any time); 10 P.S. § 355 (religious organization immunity from liability); 23 Pa. C.S.A. § 2725 (permitting adoption intermediary to honor preference of natural parents as to religious faith of the adopted child); 24 P.S. § 14-1419 (religious exemption to medical or dental examination or treatment); 24 P.S. § 15-1546 (release of public school students for religious instruction); 44 P.S. § 40.8 (designation of “Commonwealth Day of Prayer and Celebration of Religious Freedom”); 77 P.S. § 484 (exemption from Workmen’s Insurance Fund for members of certain religious sects).

rights should require a specific reinforcement of religious exercise in order to avoid a Free Exercise problem. The Establishment Clause does not exist to require government actors to undertake silly, formalistic exercises of this sort.

Finally, there is an historical problem. As argued previously, accommodations of religious exercise (only) are so numerous because they represent a time-honored American tradition, one that is all the more imperative since *Employment Division v. Smith* narrowed the role of the judiciary in this area.⁵ For all these reasons, the Township’s claim of impermissible “effects” based on *Madison* should be rejected.⁶

C. RLUIPA Does Not Create an Excessive Government Entanglement with Religion

The core “entanglement” argument in *Madison* and *Al Ghashiyah* – that protecting religious exercise requires government officials to distinguish religious exercise from all other behavior – fares no better. As already discussed, this argument has been uniformly rejected, because it precludes government accommodation of religious exercise in any degree. *See* Pltfs. Opp. Mem. 107 (citing *Johnson* and *Charles*). *See also Mockaitis v. Harclerod*, 104 F.3d

⁵ *See Bd. of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 705 (1994) (“Our cases leave no doubt that in commanding neutrality the Religion Clauses do not require the government to be oblivious to impositions that legitimate exercises of state power may place on religious belief and practice.”); *Walz v. Tax Comm’r*, 397 U.S. 664, 673 (1970) (“Few concepts are more deeply embedded in the fabric of our national life ... than for the government to exercise *at the very least* this kind of benevolent neutrality toward churches and religious exercise generally so long as none was favored over others and none suffered interference.”) (emphasis added); *Zorach v. Clauson*, 343 U.S. 306, 314 (1952) (accommodating religious exercise “follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs.”). *See also* Pltfs. Opp. Mem. 103-07 & nn. 81-82 (discussing Supreme Court’s emphasis on importance of accommodation through political process, and its explicit approval of accommodations for religious use of peyote exclusively, and religious headwear exclusively).

⁶ Although the *Al Ghashiyah* decision essentially parrots the reasoning of *Madison* and extended excerpts from it, *Al Ghashiyah* does add a few more novelties of its own. For example, it manufactures a new three-part test for “effects” within the three-part *Lemon* test – just what Establishment Clause jurisprudence needs. *See Al Ghashiyah*, 2003 WL 1089526, at *8 (enumerating three-part test for determining impermissible primary effect). True to form in that opinion, the test is based primarily on a law review article, *see id.* (citing Idelman article), though it adds select citations to a few Supreme Court opinions, most especially the Court’s badly fractured decision regarding tax subsidies in *Texas Monthly v. Bullock*, 489 U.S. 1 (1989). *See id.* at *8 nn. 8-11. This inventive analytical structure should be rejected out of hand.

1522, 1530 (9th Cir.) (“Of course, application of RFRA, like the application of the First Amendment itself and any objection made under this amendment, requires a court to determine what is a religion and to define an exercise of it. There is no excessive entanglement.”), *overruled on other grounds*, 521 U.S. 507 (1997).⁷

These decisions similarly claim that RLUIPA’s definition of “religious exercise” tends to increase, rather than decrease, religious entanglements. *See Al Ghashiyah*, 2003 WL 1089526, at * 15; *Madison*, 240 F. Supp. 2d at 579. To begin with, defining “religious exercise” to “include any exercise of religion, whether or not compelled by, or central to, a system of religious belief,” RLUIPA § 8(7)(A), precisely tracks Supreme Court precedent, and so entails no greater entanglement problem than the ordinary application of Free Exercise doctrine. Moreover, that doctrine itself is designed to minimize entanglement by precluding inquiry into the rationality of a belief, or its centrality to a religious system. *See, e.g., Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989) (“It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants’ interpretations of those creeds.”); *Thomas v. Review Bd. of Ind.*, 450 U.S. 707, 714 (1981) (“[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.”); *id.* at 716 (“Courts are not arbiters of scriptural interpretation.”). Thus, RLUIPA’s definition of religious exercise, like Free Exercise doctrine itself, tends to avoid rather than create excessive government entanglements with religion.

⁷ Here again, we see the flagrant disregard of controlling Circuit precedent by the *Al Ghashiyah* court. The court does cite *Cohen v. Des Plaines*, 8 F.3d 484, 487 (7th Cir. 1993) (upholding zoning ordinance that allowed churches to operate day-care centers in single-family residential districts, while requiring other operators of day-care centers to obtain special use permits), but only at the end of its opinion in order to distinguish it from the case before the court, presumably on the ground that the prisoner’s religious exercise represented a for-profit enterprise. *See Al Ghashiyah*, 2003 WL 1089526, at *16. Although the court noted *Cohen*’s conclusion that “rather than fostering entanglement, the ordinance affected a more complete separation of church and state,” it neglected to discuss this conclusion anywhere in its own discussion of entanglement. *See id.* at *13-*14 (discussing entanglement, but not *Cohen*). Instead, the court preferred to rely on its bald assertion that RLUIPA fosters entanglement, and then claim it is a basis for distinguishing *Cohen*. *See id.* at *16.

Thus, because *Madison* and *Al Ghashiyah* do not alter the Establishment Clause analysis set forth in the Congregation's opposition brief, the Establishment Clause challenge to RLUIPA should still be rejected.

CONCLUSION

For the foregoing reasons, Defendants' Motion for Summary Judgment should be denied.

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Respectfully submitted,

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