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The Effect of the Supreme Court's decision in *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal* on RLUIPA cases

On February 21, 2006, the United States Supreme Court issued a watershed decision in *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, No. 04-1084, 546 U.S. __ (2006) (find a copy of the opinion [here](#)), applying the federal Religious Freedom Restoration Act (the predecessor to the Religious Land Use and Institutionalized Persons Act) against the federal government. While the decision is nominally about a separate statute protecting religious exercise and about drug use, its implications for church zoning issues are significant.

Constitutionality of Statutory Accommodations of Religion

Municipalities across the nation are defending against RLUIPA claims by suggesting that the statute is unconstitutional. They believe that RLUIPA violates the Establishment Clause of the First Amendment, “Separation of Powers,” and that Congress lacked the authority under the Enforcement and Commerce Clauses to enact the statute. *O Centro* effectively disposes of the first two arguments.

Establishment Clause. The opinion should finally lay to rest any argument that RLUIPA violates the Establishment Clause of the First Amendment. While it did not specifically rule on the issue, the Supreme Court applied the statute, noting:

In *Cutter v. Wilkinson*, 544 U.S. __ (2005), we held that the Religious Land Use and Institutionalized Persons Act of 2000, which allows federal and state prisoners to seek religious accommodations pursuant to the same standard as set forth in RFRA, does not violate the Establishment Clause.

Slip op. at 15. Again, since RFRA is much broader in scope than, and is not limited by the jurisdictional elements of RLUIPA, it is a clear implication that RLUIPA does not violate the Establishment Clause. As such, it also does away with the argument proposed by some that RLUIPA somehow violates the Establishment Clause—as opposed to narrower accommodations of religious exercise—because an across-the-board accommodation is less constitutional than a targeted one.

“*Separation of Powers.*” The Supreme Court’s decision also implicitly foreclosed any argument that RLUIPA violates the doctrine of “separation of powers.” While this nebulous concept is raised time and time again as a defense to illegal zoning practices, no court has ever found such a violation in the context of RLUIPA or similar statutes. The Supreme Court certainly accepts the role of the judiciary in protecting such rights:

We reaffirmed just last Term the feasibility of case-by-case consideration of religious exemptions to generally applicable rules. . . . We had “no cause to believe” that the compelling interest test “would not be applied in an appropriately balanced way” to specific claims for exemptions as they arose. [*Cutter v. Wilkinson*], at __ (slip op., at 12). Nothing in our opinion suggested that courts were not up to the task.

. . . .

. . . . Congress has determined that courts should strike sensible balances, pursuant to a compelling interest test that requires the Government to address the particular practice at issue.

Slip op. at 15, 18 (emphasis added). It is also significant that RFRA applies to all regulation, and is therefore much broader in scope—and would theoretically be a worse violation of the “separation of powers” doctrine, if any such thing existed in a judicial sense—than the zoning and institutionalized persons contexts affected by RLUIPA.

The Free Exercise Clause and Strict Scrutiny

The Court recognized that the Free Exercise Clause’s rational basis standard of review in *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872 (1990), applies only to “generally applicable laws.” This is in contrast to arguments commonly made by municipalities that a church must prove “animus” or “hostility” to obtain heightened judicial scrutiny under the Free Exercise Clause. This is not correct; all that must be demonstrated is that a law is not “generally applicable,” for example, similar to the across-the-board prohibition on drug use in *Smith*.

This is highly relevant in the church zoning context, since denial of permits and variances have been held time and time again by the courts to not be “generally applicable laws,” but rather highly individualized assessments. Invariably, some permit and variance applications are granted and some are denied—depending on the municipalities’ highly individualized discretion. Therefore, strict scrutiny continues to apply under the Free Exercise Clause as well as RLUIPA.

What Constitutes “Strict Scrutiny”?

Perhaps the most important impact of the *O Centro* decision will be to define the requirements of the strict scrutiny test of RFRA (and, by necessary implication, RLUIPA). It held that a “categorical approach” was improper, and that the compelling interest test must be “satisfied through application of the challenged law ‘to the person’—the particular claimant whose sincere exercise of religious is being substantially burdened.” Slip op. at 9 (emphasis added). In other words, the government can no longer claim that its interest in “passing drug laws” or in “enforcing a zoning code” is compelling. It must prove that such enforcement is necessary in the specific context involved.

The Supreme Court rejected a deferential analysis that only looked generally at the statutory scheme involved:

[T]his Court looked beyond broadly formulated interests justifying the general applicability of government mandates and scrutinized the asserted harm of granting specific exemptions to particular religious claimants. In *Yoder*, for example, we permitted an exemption for Amish children from a compulsory school attendance law. We recognized that the State had a “paramount” interest in education, but held that “despite its admitted validity in the generality of cases, we must searchingly examine the interests that the State seeks to promote . . . and the impediment to those objectives that would flow from recognizing the claimed Amish exemption.” 406 U. S., at 213, 221 (emphasis added). The Court explained that the State needed “to show with more particularity how its admittedly strong interest . . . would be adversely affected by granting an exemption to the Amish.” *Id.*, at 236 (emphasis added).

In *Sherbert*, the Court upheld a particular claim to a religious exemption from a state law denying unemployment benefits to those who would not work on Saturdays, but explained that it was not announcing a constitutional right to unemployment benefits for “all persons whose religious convictions are the cause of their unemployment.” 374 U. S., at 410 (emphasis added). The Court distinguished the case “in which an employee’s religious convictions serve to make him a nonproductive member of society.” *Ibid.*; see also *Smith*, 494 U. S., at 899 (O’Connor, J., concurring in judgment) (strict scrutiny “at least requires a case-by-case determination of the question, sensitive to the facts of each particular claim”). Outside the Free Exercise area as well, the Court has noted that “[c]ontext matters” in applying the compelling interest test, *Grutter v. Bollinger*, 539 U.S. 306, 327 (2003), and has emphasized that “strict scrutiny does take ‘relevant differences’ into account—indeed, that is its fundamental purpose,” *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 228 (1995).

Slip op. at 9-10 (emphasis added). The Court acknowledged that the while the use of the drug at issue was “exceptionally dangerous . . . there is no indication that Congress, in classifying DMT, considered the harms posed by the particular use at issue here—the circumscribed, sacramental use of *hoasca* by the UDV.” *Id.* at 11. Similarly, even if a municipality’s zoning ordinance is generally of a “paramount” interest—which it usually is not—it must prove that it has a compelling interest in denying permits to churches in the context of their specific applications.

Finally, the Supreme Court held that where a statutory scheme makes exceptions available for certain reasons, the government is less likely to have a compelling interest in applying a law to specific religious conduct:

This conclusion is reinforced by the Controlled Substances Act itself. The Act contains a provision authorizing the Attorney General to “waive the requirement for registration of certain manufacturers, distributors, or dispensers if he finds it consistent with the public health and safety.” 21 U.S.C. § 822(d). The fact that the Act itself contemplates that exempting

certain people from its requirements would be “consistent with the public health and safety” indicates that congressional findings with respect to Schedule I substances should not carry the determinative weight, for RFRA purposes, that the Government would ascribe to them.

Slip op. at 11-12. This is a strong interpretation of the “least restrictive means” requirement, and should prove helpful to religious institutions claiming that substantially burdensome zoning actions violate RLUIPA.