RELIGIOUS FREEDOM VIOLATIONS BY GOVERNMENT ENTITIES

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Publications and Lectures

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I. INTRODUCTION

"Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof" are our Religion clauses- the Establishment Clause and the Free Exercise Clause of the First Amendment.[1] Thousands of cases have been litigated over these two short clauses. To a typical practitioner, this is an unfamiliar area and can quickly and easily become overwhelming.

This paper is a broad survey, attempting to lay out the numerous areas and situations in which a government entity could be sued under the Religion Clauses. It is not meant to be exhaustive within each area/scenario but to at least mention one main case in each area to get a litigator started and aware. An entire paper could have been written on any one of the individual and numerous areas covered. If you get a case on any of the specific areas, feel free to call. The author of this paper heads a non-profit which works exclusively on these issues, and all assistance is confidential and free of charge.

"We are a religious people whose institutions presuppose a Supreme Being." *Zorach v. Clauson*, 343 U.S. 306, 313 (1952). As such, cases under the Religion Clauses are very important to us. Our Founders "knew that the First Amendment, which tried to put an end to governmental control of religion and of prayer, was not written to destroy either. They knew rather that it was written to quiet well-justified fears which nearly all of them felt arising out of an awareness that governments of the past had shackled men's tongues to make them speak only the religious thoughts that government wanted to speak…"*Engel v. Vitale*, 370 U.S. 421, 435 (1962). The Supreme Court has currently settled on the solution being neutrality toward religion and among religions, starting with *School District of Abington Township, Pennsylvania v. Schempp*, 374 U.S. 203 (1963). The concept of neutrality is not, however, the panacea some hoped it might be, and it may not even be consistent with the Constitution.[2] Unfortunately, the case law is often inconsistent, and each area has to be viewed individually and case by case.

II. ESTABLISHMENT CLAUSE:

The case of *Lemon v. Kurtzman* has been the most often applied test in Establishment Clause jurisprudence. This test has three prongs: (1) the governmental act must have a secular legislative purpose; (2) second, "its principal or primary effect must be one that neither advances nor inhibits religion; finally the act must not foster an excessive government entanglement with religion." *Id*. at 612-13; *Lee v. Weisman*, 505 U.S. 577, 602-3 (1992). While it has waned in popularity and even recent use, it is still the test most often used.

However, a point often missed is that it is necessary only to have *a secular* purpose, and it does not forbid a religious purpose to exist as well. The Court has cautioned against a narrow interpretation of its precedent stating that "were the test that the government must have 'exclusively secular objectives,' much of the conduct and legislation this Court has approved in the past would have been invalidated." *Lynch v. Donelly*, 465 U.S. 668, 681 (1984) n.6 (citing numerous examples of permissible cases where government acts had both a secular and religious purpose and/or benefit). See *Elk Grove Unified School Dist. et al. v. Newdow, et. al.*, _ U.S. _, 124 S.Ct. 2301, 2325 (2004) (O'Connor, J., concurring) ("It is true that some of the legislators who voted to add the phrase 'under God' to the Pledge may have done so in an attempt to attach to it an overtly religious message….But their intentions cannot, on their own, decide our inquiry. First of all, those legislators also had permissible secular objectives in mind—they meant, for example, to acknowledge the religious origins of our Nation's belief in the 'individuality and the dignity of the human being.'… Second—and more critically—the *subsequent* social and cultural history of the Pledge shows that its original secular character was not transformed by its amendment.").

The second prong of the *Lemon* test is whether the primary effect of the government's action either advances or inhibits religion. *Lemon*, 403 U.S. at 612-13. This effect prong has been further refined by Justice O'Connor's "endorsement test" as illuminated in the Court's opinion in *Capitol Square Review and Advisory Board v. Pinette*, 515 U.S. 753, 778-780 (1995) (O'Connor, J., concurring). According to Justice O'Connor in the context of religious displays on government property, endorsement *vel non* is to be judged by a "reasonable observer" who is "deemed aware of the history and context of the community and forum in which the religious display appears." *Id*. at 780. The court must ask "what viewers may fairly understand to be the purpose of the display." *County of Allegheny v. ACLU*, 492 U.S. 573, 595 (1989); *Lynch*, 465 U.S. at 692 (O'Connor, J., concurring). A "reasonable" observer is not a hyper-sensitive objector

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[1] The author would like to thank staff, especially Jonathan Saenz, for substantial work on this paper. All errors are mine.

[2] The Free Exercise Clause, for example advances religion and is not "neutral" between religion and non-religion.

who is offended by the mere presence of a religious symbol anywhere on government property.[3] Current Establishment Clause jurisprudence, especially in religious display cases, has thus been focused on context, as influenced by Justice O'Connor's endorsement test.

Many government actions in our nation's history did, in fact, promote or endorse religion in general. See, e.g., *County of Allegheny*, 492 U.S. at 670-673(1989) (Kennedy, J., concurring in part and dissenting in part). In fact, the Free Exercise Clause itself is an endorsement or advancement of religion in general. It is questionable whether the endorsement test will continue in the future, now that Justice O'Connor has left the Court. Many believe a new and more consistent approach is in order.

Neutrality, not hostility or antipathy, is the current standard for Establishment Clause cases. Government is neither to push nor restrict religious expression. The concept of equal access is a great example. Religious groups must be allowed the same access to government facilities and benefits as other groups. With these basic principles laid out, we now turn to specific scenarios and areas where government entities are sued.

A. Religion in Public Schools

More cases have been generated involving public schools than any other area under the Establishment Clause. The following sections are some of the more common public school case scenarios. [4]

1. Teacher Speech

School administrators cannot prohibit religious discussions among teachers occurring outside of the classroom setting and not in the presence of students. *Texas State Teachers Association v. Garland Ind. Sch. Dist.*, 777 F.2d 1046, 1053 (5th Cir. 1985), *affirmed*, 479 U.S. 801 (1986). Teacher communications may only be suppressed when "the expression or its method of exercise materially and substantially interferes with the activities or discipline of the school." *Shanley v. Northeast Ind. Sch. Dist.*, 462 F.2d 960, 969 (5th Cir. 1972); *see also Tinker*, 393 U.S. at 505. Policies that prohibit all speech on a given topic are unconstitutional, even if they are rarely or never enforced. *See Texas State Teachers Association*, 777 F.2d at 1055. Teachers and administrators are thus free to fully communicate their beliefs to their colleagues much in the same way teachers are allowed to discuss football games, theater productions, movies and the family vacation.

There is no question that the speech of teachers when they are acting in their official capacity may be partially restricted by the government. However, when teachers speak or act in their individual capacity, their speech enjoys co-extensive protection with other citizens at large.

In *Wigg v. Sioux Falls Sch. Dist.*, 382 F.3d 807 (8th Cir. 2004), a teacher desired to teach religion to elementary school children as a teacher in the Good News Club on school premises directly after school hours. The purpose of the Good News Club and the objective of the teacher was to "evangelize boys and girls with the Gospel of the Lord Jesus Christ and establish (disciple) them in the Word of God and in the local church for Christian living." The Court distinguished analysis that may be familiar with attorneys for public entities under *Pickering v. Board of Ed.*, 391 U.S. 563 (1968) and held that a school district may not prohibit a teacher's private religious speech, despite Establishment Clause concerns.

Thus, a teacher may evangelize impressionable elementary students on school premises, directly after the conclusion of the official school day. The facts of this case are especially interesting because children as young as five years old attend elementary school and also attend Good News Club meetings. *See also Good News Club v. Milford Cent. Sch. Dist.*, 533 U.S. 98 (2001). Yet, the Court wholly rejected the Establishment Clause defense of the school district. Thus, teachers enjoy all the free speech rights that accompany citizenship in the United States and those rights can only be restricted, and then only partially, when acting in their official capacity as representatives of the government.

Teacher and other school employee speech may only be restricted when such speech is attributable to the government, such as when the teacher is on contract time and is performing official functions and duties, and not speaking a personal message in such a context. School officials are prohibited from leading classes in prayer, devotional readings from religious

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[3] "Nearly any government action could be overturned as a violation of the Establishment Clause if a "heckler's veto" sufficed to show that its message was one of endorsement." *Newdow*, 124 S.Ct. at 2321-22; see *Pinette*, 515 U.S., at 780 ("There is always *someone* who, with a particular quantum of knowledge, reasonably might perceive a particular action as an endorsement of religion").

[4] The most common constitutional public school cases may well be violations of student speech and expression. This paper focuses only on the Religion Clauses and not the Free Speech Clause, which would be a whole additional paper. Suffice it to say, however, that student religious speech is Free Speech and the Establishment Clause is no justification for censorship of student religious speech. *Board of Ed. of Westside Comm. Sch. v. Mergens*, 496 U.S. 226, 250 (1990) (there is a "crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect").

texts or other religious activities. *See Engel v. Vitale*, 370 U.S. 421 (1962); *School Dist. of Abington Twp. v. Schempp*, 374 U.S. 203 (1963). School district employees are prohibited by the Establishment Clause from promoting or denigrating religion on behalf of the district.

A school employee wears two hats. In light of *Wigg* discussed above, a teacher may be constitutionally prohibited from leading a group of school children in prayer in her classroom at 1:59pm, and at 2:01pm a school district may be constitutionally prohibited from stopping the same teacher from leading the same group of school children in prayer in her classroom. This example highlights the "crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Board of Ed. of Westside Comm. Sch. v. Mergens*, 496 U.S. 226, 250 (1990).

2. Religion in the Curriculum

There is no constitutional restriction to teaching about religion. *See School Dist. of Abington Township v. Schempp*, 374 U.S. 203 (1963) ("In addition, it might well be said that one's education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization. It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be affected consistently with the First Amendment.") Indeed, no education would be complete without an exploration of the Bible and varying religions and the role they have played in art and history.

Using the curriculum to promote a particular religion, however, is not allowed. In *Edwards v. Aguillard*, 482 U.S. 578 (1987), the Court struck down a law requiring the teaching of creation in all Louisiana public schools. The Court found a purely religious purpose by those who passed the law. The Court also made it clear that "teaching a variety of scientific theories about the origins of humankind to schoolchildren" would be constitutional as long as not done religiously. *Id.* at 594; s*ee also Epperson v. Arkansas*, 393 U.S. 97 (1968)(court struck down state public school ban on teaching of evolution).

3. Released Time for Off-Site Religious Instruction

In *Zorach v. Clausen*, 343 U.S. 306 (1952), a groups of parents sued the City of New York Board of Education and various others, claiming the state statute that allowed for students to be released for one hour per week to receive religious education at an off-site location was unconstitutional. The Supreme Court disagreed and upheld the statute, because the "'released time' program involves neither religious instruction in public school classrooms nor the expenditure of public funds." *Id*. at 308-9; *but see McCollum v. Board of Education*, 333 U.S. 203 (1948) (Court invalidated practice of allowing religious instructors to enter public school campus to engage in religious instruction of school children during school day).

4. School Prayer

Statutes requiring government prayer or Bible reading at the beginning of each school day over schoolchildren were struck down in the early 1960s. *See Engel v. Vitale*, 370 U.S. 421 (1962); *School Dist. of Abington Twp. v. Schempp*, 374 U.S. 203 (1963). More recent cases are thus over areas such as football games or graduations or areas more resembling student speech, which would thus be protected under the First Amendment.

In *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000), a group of public school students and parents sued the Santa Fe school district alleging that the school policy of permitting prayer before football games violated the Establishment Clause. The prayers were given over the school's public address system, a speaker was selected by a majority of the student body, and the prayer took place on government property and at government sponsored events. The Court found that the express purpose of the prayer policy encouraged a religious message, and the audience would perceive the message as the school district's views. *Id*. at 308. The Court noted the school had a student chaplain before the new "Prayer" Policy and held that the prayers were not private speech, thus violating the Establishment Clause. *Id*. at 318; *but see Adler v. Duval County*, 250 F.3d 1330 (11th Cir. 2001), *cert. denied*, 534 U.S. 1065 (2001) (policy permitting high school seniors to vote on delivery by a student of a message at graduation did not violate the Establishment Clause. The Court found that the *Adler* case differed from *Santa Fe* in two respects (1) the speech was not "subject to particular regulations that confine the content and topic of the student's message" and (2) the terms of the policy did not "invite[s] [or] encourage[s] religious messages." *Id*. at 1336.

5. Moments of Silence, Meditation, & "Voluntary Prayer"

In *Wallace v. Jaffree*, 472 U.S. 38 (1985), a parent of public school children filed suit against the school board members, various school officials, and teachers, challenging the constitutionality of an Alabama statute authorizing a daily period of silence for meditation or voluntary prayer. The Court held that the statute violated the Establishment Clause. The earlier version

of the statute regarding a period of silence mentioned using such time only for "meditation." *Id*. at 40. The lower court upheld the constitutionality of this statute allowing for a period of silence and meditation and the parents did not challenge this holding. *Jaffree v. James*, 544 F.Supp. 727 (S.D. Ala. 1982). The legislative sponsor of the amended version of the statute stated that the sole purpose of the change in the statute by adding the words "voluntary prayer" was to "return voluntary prayer to our schools." *Wallace,* 472 U.S. at 43, 56-60. The court found there to be no secular purpose and a clear "endorsement and promotion of prayer" as a "favored practice." *Id*. at 59-60. Even in striking down the Alabama statute, however, the Justices made clear that a true moment of silence statute would be permitted. *See also Bown v. Gwinnett County Sch. Dist.*, 112 F.3d 1464 (11th Cir. 1997) (court upheld statute requiring a period of quiet reflection in public schools); and *Brown v. Gilmore*, 258 F.3d 265 (4th Cir. 2001) (statute mandating a "minute of silence" in public schools upheld).

6. Graduation Ceremony

In *Lee v. Weisman*, 505 U.S. 577 (1992), a public school student and her father sued the school principal and the local School Committee to enjoin public school official from inviting a clergy member to recite a prayer at a public middle school or high school graduation ceremony. The Court held that the school's involvement in giving the prayer violated the Establishment Clause. *Id*. at 597. School officials (1) had decided that there would be prayer at the ceremony, (2) selected the clergymen to conduct the prayer, (3) gave the clergymen content guidelines to make the prayers "nonsectarian," and required the students to stand and remain silent during the prayer. *Id*. at 581, 583. The Court considered such extensive governmental involvement and coercion to be unconstitutional. In distinguishing this case from the Court's approval of legislative prayers it stated that:

> "The atmosphere at the opening of a session of a state legislature where adults are free to enter and leave with little comment and for any number of reasons cannot compare with the constraining potential of the one school event most important for the student to attend. The influence and force of a formal exercise in a school graduation are far greater than the prayer exercise we condoned in *Marsh*.

Id. at 597**.** *But see Jones v. Clear Creek Indep. Sch. Dist*., 977 F.2d 963, 971 (5th Cir. 1992), *cert denied*, 508 U.S. 967 (1993) (student-led graduation prayer allowed, high school seniors older and…"all students… participated in the decision of whether prayers [would] be given" and knew not government act).

7. Pledge of Allegiance

In *Elk Grove United Sch. Dist. v. Newdow*, an elementary school student's father brought suit challenging teacher-led recitation of the Pledge of Allegiance. 542 U.S. 1 (2004) ("I do not believe that the phrase "under God" in the Pledge converts its recital into a 'religious exercise'…[i]nstead, it is a declaration of belief in allegiance and loyalty to the United States flag and the Republic that it represents. The phrase 'under God' is in no sense a prayer, nor an endorsement of any religion") (REHNQUIST, C.J., concurring in the judgment). The Court held that the father did not have prudential standing to sue on his child's behalf, after the Ninth Circuit Court of Appeals struck down such practice. The case is now on its way back up to higher courts again. S*ee Newdow v. Cong. of the United States*, 383 F. Supp. 2d 1229, 1240-3 (E.D. Cal. 2005) ('[O]ne nation under God' phrase from Pledge of Allegiance renders school policy unconstitutional as it "has a coercive effect"…and the "'subtle and indirect' social pressure in the classroom tells opposers they are 'outsiders.'"); *citing Newdow v. United States Cong*., 328 F.3d 466, 488 (9th Cir. 2002) ; and *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943) (public school student cannot be compelled, against his or her religious beliefs, to salute the American flag or recite the Pledge of Allegiance). The author of this paper highly doubts the U.S. Supreme Court will strike down the Pledge of Allegiance.

8. Equal Access for Religious Groups

In Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001), a Christian club for children, and its members, sued the local school district, alleging that the school's refusal to allow the club to use its facilities violated the club's free speech rights. Notably, the Court stated that the unconstitutional viewpoint discrimination was not necessary for the school to avoid conflicts with the Establishment Clause, since the meetings were held after school hours, were not school sponsored, were open to any student who obtained parental consent, and the school opened its facilities to other organizations as well. *Id.* at 112-113. *See also Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Board of Ed. of Westside Comm. Sch. v. Mergens*, 496 U.S. 226, 250 (1990) (Equal Access required during school-Court held that Equal Access Act did not violate the Establishment Clause as it enforces the rights, among others, of student-led, student initiated religious clubs to be treated the same as other students groups); and

Widmar v. Vincent, 454 U.S. 263, 269 (1981) (Court held that student group at a public university had the right to meet on campus for prayer, bible study, and religious discussion as long as the meetings were voluntary, student-initiated and did not leave the impression that the meetings were state sponsored or endorsed). Religious groups get the same access and benefits as other groups, during and before and after school.

9. Religious Music

In *Doe v. Duncanville I.S.D.*, 70 F.3d 402 (5th Cir. 1995), the Fifth Circuit ruled that the school choir singing a majority of religious songs did not violate the Establishment Clause, nor did making the school song a religious song. Art and music often involve religious subjects or thoughts, and most of the choir music which exists is religious. We certainly do not want to ban Handel's Messiah.

Similarly, in *Bauchman v. W. High School*, 132 F.3d 542 (10th Cir. 1997), a Jewish student sued, among others, the public high school, arguing that the school music teacher's choice of clearly Christian music and Christian sites for the high school choir's performances violated the Establishment Clause. The Court held that the plaintiff's allegations could not form the basis for an Establishment Clause violation.

10. Financial Aid for Religious Schools/ Students

In *Zelman v. Simmons-Harris* 536 U.S. 639 (2002), a group of Ohio taxpayers sued various school officials to enjoin the application of school voucher program. This program allowed students of underperforming schools to use government benefits toward public or private, and religious or non-religious educational choices. The Court held that "where a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine independent private choice, the program is not readily subject to challenge under the Establishment Clause." *Id*. at 652. This is the key analysis and safe zone in any aid to religion case: a neutral program where aid only touches religion as a result of genuine private choice.

In Mitchell v. Helms, 530 U.S. 793 (2000), residents of a local school district sued the state superintendent of instruction, state treasurer, Secretary of the United States Department of Education, and other various governmental agencies. The residents challenged the constitutionality of state and federal school aid programs, under which the federal government would distribute funds to state and local agencies, which would in turn lend educational materials and equipment to both public and private schools, many of which are religious schools. Under such statute, the materials and equipment must be "secular, neutral, and nonideological," and the private schools cannot obtain ownership control over such items. *Id*. at 802-3. The Court held that the program, as applied, did not violate the Establishment Clause. According to the Court, "[i]f a program offers permissible aid to the religious (including the pervasively sectarian), the a-religious, and the irreligious, it is a mystery which view of religion the government has established, and thus a mystery what the constitutional violation would be." *Id*. at 827. Regarding the purpose of such aid, the court stated that "[i]f the government, seeking to further some legitimate secular purpose, offers aid on the same terms, without regard to religion, to all who adequately further that purpose, then it is fair to say that any aid going to a religious recipient only has the effect of furthering that secular purpose." *Id*. at 810.

In *Everson v. Board of Education*, 330 U.S. 1, 3 (1947), the Court upheld a New Jersey statute and resolution that provided for the reimbursement of parents for their costs to have their children use public transportation go to and from parochial schools. Funding was constitutional because it served a public function. The Court equated such a practice to having "state-paid" police protect children as they make their way to and from school, and having police and fire protection as well as public sewage disposal services. *Id*. at 17-18. "State power is no more to be used so as to handicap religions than it is to favor them." *Id*. at 18.

B. Aid and Faith Based Programs

A recent controversy has arisen around whether religious groups may be included in aid received through government programs. So far, it appears the same rules apply here as elsewhere: there is no violation if the program is neutral between religion and non-religion and has a secular end.

In *Bowen v. Kendrick*, 487 U.S. 589 (1988), plaintiffs challenged a grant program to help reduce adolescent sexuality and pregnancy. Plaintiffs contended that religious recipients receiving government money violated the Establishment Clause. The Court upheld the program nationwide, stating that the program made grants neutrally available to all, whether religious or non-religious, and thus did not violate the Establishment Clause.

In *Freedom from Religion Found., Inc. v. McCallum*, 324 F.3d 880 (7th Cir. 2003), a group of taxpayers, along with the Freedom From Religion organization, sought to enjoin Wisconsin correctional authorities from funding a halfway house that incorporated Christianity into its treatment program. Parole officers who recommend the halfway house

were required to offer the offender a secular halfway house as an alternative. A parole officer would not recommend the halfway house to an offender who had no Christian identity and religious interest and would not advise anyone to convert to Christianity in order to get the most out of the halfway house. The court noted that there was no evidence that in recommending the halfway house a parole officer would be influenced by his own religious beliefs. The choice had to be private and therefore was offender's choice. The court held that the funding did not violate the Establishment Clause and therefore affirmed the district court's decision. "If recommending a religious institution constituted an establishment of religion, a public school guidance counselor could not recommend that a student apply to a Catholic college even if the counselor thought that the particular college would be the best choice for the particular student. And, coming closer to home, a parole officer could not recommend to a parolee who had a serious drinking problem that he enroll in Alcoholics Anonymous, even if the officer believed that this was the only alcoholic-treatment program that would keep the parolee from committing further crimes. To suppose such recommendations unlawful would be to adopt a doctrinaire interpretation of the establishment clause remote from its underlying purpose and historical understanding." *Id*. at 883.

C. Religious Displays/Ten Commandments

In *Van Orden v. Perry*, 125 S. Ct. 2854 (2005), an individual brought suit against Texas Governor, Rick Perry, and other state officials asserting that a six feet tall Ten Commandments monument on the capitol's grounds violated the Establishment Clause of the First Amendment. The Court held that the monument did not violate the Establishment Clause. *Cf., McCreary County v. ACLU*, 125 S. Ct. 2722 (2005)(court struck down Ten Commandments display where display was inside courthouse and the county specifically sought a religious display); and *ACLU of Ky. v. Mercer County*, 432 F.3d 624 (6th Cir. 2005) (Ten Commandments display in county courthouse upheld as part of "Foundations of American Law and Government" display).

The Court stated that while the Ten Commandments were undoubtedly religious in nature, they also had "undeniable historical meaning." *Van Orden*, 125 S.Ct. at 2863. The monument was presented to the State and paid for by the Fraternal Order of Eagles, who has presented similar monuments to numerous governmental bodies across the country. Chief Justice Rehnquist found it significant that this monument was situated amongst many other monuments and historical markers that were all part of a central theme of the "State's political and legal history." *Id*. at 2864; *See also Van Orden v. Perry, et. al.*, 351 F.3d 173, 177 (5th Cir. 2003)(finding significant that all seventeen monuments on Capitol grounds registered as a historical landmark); and *County of Allegheny*, 492 U.S. at 619, 635(indicating relevance of common theme, suggesting likelihood for one display to be not singled out as religious if it is part of common theme of collection of displays).

Justice Breyer, who concurred in the judgment but wrote a separate opinion, found it significant that "40 years passed in which the presence of this monument, legally speaking went unchallenged (until the single legal objection raised by petitioner)." *Van Orden*, 125 S.Ct. 2870; *see also Freethought Soc'y v. Chester County*, 334 F.3d 247 (3d Cir. 2003) (reasonable observer aware of Ten Commandments' plaque's 82 year-old history would not view its presence as an endorsement of religion, and county's refusal to remove the plaque because it was part of the building's historic façade constituted a legitimate secular purpose); and *ACLU Nev. Found. V. City of Plattsmouth*, 419 F.3d 772 (8th Cir. 2005)(display did not violate the Establishment Clause; displayed without objection for several decades, away from city hall, and Ten Commandments had undeniable historic meaning).

Justice Breyer explained, "simply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause." *Id*. at 2863. According to *Lemon* and as cemented in *Lynch*, it is necessary only to have *a secular* purpose, and it does not forbid a religious purpose to exist as well. The Court has cautioned against a narrow interpretation of its precedent stating that "were the test that the government must have 'exclusively secular objectives,' much of the conduct and legislation this Court has approved in the past would have been invalidated." *Lynch*, 465 U.S. at 681 n.6 (citing numerous examples of permissible cases where government acts had both a secular and religious purpose and/or benefit).

The Court's Ten Commandments ruling was different from that in *Stone v. Graham*, 449 U.S. 39 (1980), where the Court held that a Kentucky statute requiring the posting of Ten Commandments in all public school classrooms had was religious in nature and thus violated the Establishment Clause. The Court in *Van Orden* distinguished its decision from *Stone* because of the difference in context as there are "particular concerns that arise in the context of public elementary and secondary schools" with students who are required to attend, versus voluntary passers-by, such as Mr. Van Orden. *Id*. at 2864-5.

The key factor in any attack on a religious display is context. The Supreme Court has held that religious displays are unconstitutional when alone, but the same displays are constitutionally permissible when

accompanied by similar secular messages or context. *See County of Allegheny v. ACLU*, 492 U.S. 573, 597 (1989) (menorah outside of courtroom allowed, crèche alone inside courthouse removed)[5]; *see also Lynch*, *supra*; *Cf. Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995) (unattended cross allowed on the state capitol's grounds where state did not sponsor the private party's expression, capitol grounds had been held open for public speech, and the display was allowed through an application process applied uniformly to all other private groups).

In *Lynch*, the Court upheld the display of a crèche as a part of a larger display that included other symbols of the Christmas holiday season. The city of Pawtucket, Rhode Island, annually constructed, for over forty years, a Christmas display in a park owned by a nonprofit organization. 465 U.S. at 671. The display included a Santa Claus house, Christmas tree, a banner reading "Seasons Greetings," and a Nativity Scene. Plaintiffs sued in Federal District Court challenging the inclusion of the Nativity Scene ("crèche") in the display, arguing that its inclusion violated the Establishment Clause. The Court held that, despite the crèche's religious significance, including it in the context of other seasonal symbols as part of a larger "Season's Greetings" display did not violate the Establishment Clause. *Id*. at 687.

> "To forbid the use of this one passive symbol -- the crèche -- at the very time people are taking note of the season with Christmas hymns and carols in public schools and other public places, and while the Congress and legislatures open sessions with prayers by paid chaplains, would be a stilted overreaction contrary to our history and to our holdings."

Id. at 686. The Court has cautioned against focusing on the "religious component of any activity" as it found error by the lower court for focusing "almost exclusively" on the crèche in the larger "Christmas Holiday Season" display that contained secular elements as well.[6]

In *Lambeth v. Bd. of Comm'rs of Davidson County*, 407 F.3d 266 (4th Cir. 2005), *cert. denied*, 126 S.Ct. 647 (2005), a group of attorneys sued the county board of commissioners alleging the county board of commissioners' decision to authorize the inscription of "In God We Trust" on the façade of a government building violated the Establishment Clause. The court found no violation of the Establishment Clause because:

> "[a] reasonable observer contemplating the inscription of the phrase on the Government Center would recognize [such inscription] as recently installed, but also as incorporating familiar words - a phrase with religious overtones, to be sure, but also one long-used, with all its accompanying secular and patriotic connotations as our national motto and currency inscription."

Id. at 272. The court concluded that no excessive entanglement existed because this inscription did not require any further monitoring or maintenance by the government. *See also ACLU v. Capitol Square Review & Advisory Bd*., 243 F.3d 289 (6th Cir. 2001) (en banc) (court upheld statute recognizing Ohio state motto "With God All Things Are Possible").

In *Staley v. Harris County*, 332 F.Supp.2d 1030 (S.D. Tex. 20004), a local attorney sued Harris County, seeking removal of a Christian Bible from a monument located near the entrance to the county courthouse for forty years. The monument was to a philanthropist who was generous to the poor. The monument included a Bible to reflect that he was generous because of his Christian faith. The Court focused on the Bible and found that its purpose was to encourage others to read the Bible. The court held that the monument violated the Establishment Clause, regardless of the fact that it was built and maintained by a private organization with such organization's name inscribed on the front of the monument. *Id*. at 1033. The court ordered the removal of only the Bible from the monument and left the rest of the monument intact. *Id*. at 1040-41. The case is now on appeal at the Fifth Circuit.

D. City Seals and Symbols

In *Briggs v. Mississippi*, 331 F.3d 499 (5th Cir. 2003), *cert. dismissed*, 540 U.S. 1108 (2003), a Mississippi resident filed a complaint alleging that the state's decision to use public funds and property to fly the Mississippi flag, which includes a religious symbol, on public property violated the Establishment Clause. Applying *Lemon*, the court held that flying the state flag did not violate the Establishment Clause. The court's decision "focus[ed] on the display as an entirety, and on its contextual history, not merely on

[5] The crèche in *County of Allegheny* predominated the inside courthouse main staircase in "most beautiful," and "most public part of the courthouse staircase," not in proximity to other displays, the crèche beared a banner with the words "Gloria In Excelsis Deo," with the explanation "this display is donated by the Holy Name Society," indicating a purpose of glorifying God, while not in the context of other monuments or displays, and was clearly a religious symbol of the Christmas season. *County of Allegheny*, 492 U.S. at 579-81(crèche held unconstitutional endorsement of religion).

[6] *Lynch*, 465 U.S. at 680.

the portion of the display claimed to constitute a religious symbol" and concluded that an opposite decision would not be neutrality, but hostility toward religion. *Id*. at 506, 508; *see also Murray v. City of Austin*, 947 F.2d 147 (5th Cir. 1991) (court upheld City of Austin's inclusion of the cross in the city's insignia as representation of city's namesake, Stephen F. Austin), *cert. denied*, 505 U.S. 1219 (1992); *but see Robinson v. City of Edmond*, 68 F.3d 1226 (10th Cir. 1995)(cross on seal violated Establishment Clause as it was "unmistakably religious," and was a prominent symbol on the seal), *cert. denied*, 517 U.S. 1201 (1996). One can only wait for the lawsuit against Corpus Christi ("Body of Christ").

E. Legislative Prayer

In *Marsh v. Chambers*, a state legislator brought suit against the state treasurer and various other governmental officials and agencies to challenge the constitutionality of the Nebraska state legislature opening each proceeding with a prayer by a chaplain paid for by public funds. The Court held that, even though the prayer followed Judeo Christian tradition and chaplains of only one denomination had been selected for quite some time, the prayer did not violate the Establishment Clause. 463 U.S. at 793-94. The Court evaluated the historical significance of such a long historic practice, put in place by the Founders the at same time they passed the Establishment Clause, and found that the practice as such is constitutional in this context. *Id*. at 792. The court was not persuaded otherwise by the fact that the chaplain was of only one denomination for 16 years, was paid at public expense, and the prayers were in the Judeo-Christian tradition. *Id*. at 793.

Invocations are not only allowed, but when a diverse group of religious practitioners have given the invocations, this further amplifies the constitutionality of the invocations. *See Murray v. Austin*, 947 F.2d 147, 155 (5th Cir. 1991) (following the U.S. Supreme Court's holding constitutional legislative prayer "based on both the practice's unique history and the lack of any evidence tending to show that "'the prayer opportunity [was] exploited to proselytize or advance any one, or to disparage any other, faith or belief'" to uphold city's insignia), *citing Marsh*, 462 U.S. 794-95; *see also Bogen v. Doty*, 598 F.2d 1110 (8th Cir. 1979) (upholding prayers before county board meetings); *Van Zandt v. Thompson*, 839 F.2d 1215 (7th Cir. 1988) (court upheld setting aside room in Illinois state capitol for individual legislators to take part in personal prayer and meditation); and *Society of Separationists, Inc. v. Whitehead*, 870 P.2d 916 (Utah 1993) (upholding prayers before city council meetings). *But see Wynne v. Town of Great Falls*, 376 F.3d 292 (4th Cir. 2004), *cert. denied* 125 S. Ct. 2990 (2005) (council's practice of opening its sessions with a Christian prayer referring to "Jesus," "Jesus Christ," "Christ," and "Savior," and excluding other deities violated the Establishment Clause).

F. Aid to Religious College Students

In *Witters v. Wash. Dept. of Servs. For the Blind*, 474 U.S. 481 (1986), a blind student who was pursuing a biblical studies degree at a Christian college, appealed his denial of vocational financial aid assistance from the state. The Court held that the religion clauses did not preclude the state from providing vocational rehabilitation assistance in the form of financial aid to a blind person who was studying at a Christian college to become a pastor, missionary, or youth director. The Court explained its decision as follows:

> It is well settled that the Establishment Clause is not violated every time money previously in the possession of a State is conveyed to a religious institution. For example, a State may issue a paycheck to one of its employees, who may then donate all or part of that paycheck to a religious institution, all without constitutional barrier; and the State may do so even knowing that the employee so intends to dispose of his salary. It is equally well settled, on the other hand, that the State may not grant aid to a religious school, whether cash or in kind, where the effect of the aid is "that of a direct subsidy to the religious school" from the State. *Grand Rapids School District v. Ball*, 473 U.S. 373, 394 (1985). Aid may have that effect even though it takes the form of aid to students or parents. *See, e. g., Wolman v. Walter*, 433 U.S. 229, 248-251 (1977); *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973); *Sloan v. Lemon*, 413 U.S. 825 (1973).

Id. at 486-487. Again, the standard is neutral treatment.

G. Chaplains and the Military

Chaplain cases are different than the usual case. They involve government bringing religion to citizens otherwise captive (prison or military). It is not considered a constitutional violation. *Katcoff v. Marsh*, 755 F.2d 223 (2d Cir. 1985). The court held that the military generally does not violate the Establishment Clause by providing chaplains. *Id*. at 224. In fact, the Free Exercise Clause requires the military to provide chaplains so that members of the

Armed Services can practice their religion. *Id*. But the court remanded the case on the issue of whether providing military chaplains in a large urban area where civilian clergy are readily available is also constitutional. *Id*. at 225.

In Carter v. Broadlawns Med. Ctr., 857 F.2d 448 (8th Cir. 1988), *cert. denied*, 489 U.S. 1096 (1989), a taxpayer brought an action challenging the county hospital's decision to hire a chaplain, alleging that the hiring violated the Establishment Clause. The court held that neither the hiring of the chaplain nor the decision to allow him to counsel outpatients and their families violated the Establishment Clause. The court found a secular purpose in the chaplaincy's goal to meet the medical center's "holistic" treatment approach, that the chaplain reduced the state's entanglement with religion, no advancement of religion existed where chaplain could provide religious and nonreligious counseling, and such practice is an appropriate accommodation of patients' free exercise rights of seeking religious counseling. *Id*. at 455-57.

In *Anderson v. Laird*, 466 F.2d 283 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 1076 (1972), plaintiffs brought suit on behalf of cadets at three federal military academies, arguing that compulsory chapel attendance for cadets violates the religion clauses of the First Amendment. The court held that the regulations mandating cadet attendance in chapel violated the Establishment Clause.

H. Designation of Religious Holidays

In Cammack v. Waihee, 932 F.2d 765 (9th Cir. 1991), *cert. denied*, 505 U.S. 1219 (1992), the Governor and other state officials were sued by a taxpayer who brought suit to challenge the Hawaii statute that declared Good Friday a legal holiday. The court held that the statute did not violate the Establishment Clause because the legislature enacted the statute for a secular purpose, observance of the holiday did not endorse religion any more than Sunday closing laws, and any entanglement that could be shown was not the "comprehensive" and "enduring" entanglement that runs afoul of the religion clauses. *Id*. at 781. Other courts have made similar rulings. *See Keonick v. Felton*, 190 F.3d 259 (4th Cir. 1999) (school holidays on Good Friday and Monday after Easter held constitutional), *cert. denied*., 528 U.S. 1118 (2000); *Granzeier v. Middleton*, 173 F.3d 568 (6th Cir. 1999) (Good Friday closing of government buildings held constitutional); *Bridenbaugh v. O'Bannon*, 185 F.3d 796 (7th Cir. 1999) (Good Friday as paid holiday for state employee does not violate the Establishment Clause), *cert. denied*, 529 U.S. 1003 (2000).

I. Places of Worship as Election Polling Stations

In *Otero v. State Election Bd. of Okla.*, 975 F.2d 738 (10th Cir. 1992), *cert. denied*, 507 U.S. 977 (1993) an atheist filed suit against the state election board and various other governmental agencies and officials, asserting that the use of churches as polling stations violated the Establishment Clause. The Court held that the use of churches as election polling stations did not violate the Establishment Clause because it did not excessively entangle the government with the church and served the secular purpose of providing a place for people to vote. *Id*. at 740-41.

J. Denominational Preferences

While it may be obvious to some, a government statute may not provide an exemption for some religious groups and not others. It may not favor one denomination above another. In *Larson v. Valente*, 456 U.S. 228 (1982), parties sued the State Commissioner of Securities and State Attorney General for a statute which required registration and reporting but exempted religious organizations that receive more than half of their total contributions from members or affiliated organizations, thus supporting some denominations over others. The Court found such denominational preference to be subject to strict scrutiny and declared the statute unconstitutional.

III. FREE EXERCISE CLAUSE:

Free Exercise of religion is the major reason our Founders fled to this country. It is a precious and core freedom. Often, officials mistakenly think religious beliefs are protected but not actions. It is not the Free "Belief" Clause. It is the Free "Exercise" Clause. The focus of the Founders was on protecting actions.

"At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 532 (1993). The difficulty in analysis often occurs when the government action is neutral, yet has the effect of burdening religion. The standard for many years was laid out in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972). Based on these cases, the standard by which to apply a Free Exercise claim was strict scrutiny; the governmental entity would have to show (1) a compelling interest that would justify the government's burden on the free exercise of religion and (2) that this compelling interest was being met through the least restrictive means available on religion.

Under *Smith*, however, the Court modified this strict scrutiny analysis in some Free Exercise Clause cases. In *Smith*, the Plaintiffs were denied state

unemployment compensation after being fired by a private drug rehabilitation organization for hallucinogenic drug use. Plaintiffs claimed the statutory denial of state unemployment benefits due to termination for "misconduct" violated the Free Exercise Clause since the drug use at issue was limited to ceremonial religious rituals of their Native American Church. *Smith*, 494 U.S. at 884. The approach in this case was that the Free Exercise Clause does not relieve an individual of the obligation to comply with a law that incidentally forbids (or requires) the performance of an act that his religious belief requires (or forbids) if the law is not specifically directed to religious practice and is otherwise constitutional as applied to those who engage in the specified act for nonreligious reasons. The case has numerous limitations- applying only to cases involving criminal statues, laws of general applicability (no exemptions), non-employment benefits cases, and cases with no individualized decision-making or other constitutional claims.

Congress's response to the *Smith* decision was the Religious Freedom Restoration Act (RFRA) (reinstituting the *Sherbert-Yoder* compelling interest test in all cases as statutory protection against substantial burdens on religious exercise). RFRA currently applies to actions of the federal government, and Texas has passed its own RFRA as to state and local governments.

A. Unemployment Compensation Cases

In *Sherbert*, the Court upheld the Free Exercise rights of an individual to collect unemployment benefits after being fired for refusing to work on the Sabbath. The Court found that the state had burdened religion and provided no compelling interest to justify a refusal to provide an exemption to this individual. Subsequently, the Court held that a state "may not constitutionally apply the eligibility provisions [for unemployment compensation] so as to constrain a worker to abandon his religious convictions respecting the day of rest." 374 U.S. at 409-410.

Similarly, in *Thomas v. Review Bd.*, 450 U.S. 707 (1981), the Court held that a state's denial of unemployment compensation benefits to an individual who quit his job for religious reasons violated his Free Exercise rights. The Court, applying strict scrutiny, held that the state could not demonstrate any compelling interest that would justify the intrusion. The Court spoke clearly saying that "[w]here the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists" and is 'substantial.'" *Id*. at 717-18.

B. Parental Rights

In *Wisconsin v. Yoder*, the Court affirmed the overturned truancy conviction of Amish parents, who refused to send their students to schools after eighth grade and were convicted of violating State compulsory school-attendance law, requiring school attendance until the age of 16. 406 U.S. 205 (1972). The Court held that the state's interest in education must be balanced against the liberty interests protected by the Free Exercise Clause. The court concluded that a generally applicable law that is "neutral on its face" may in application offend the "constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion." *Id*. at 221, *citing Sherbert supra*. Also relying on the famous cases of *Meyer v. Nebraska*, 262 U.S. 390 (1923) and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), the Court held that the right of a parent to direct the upbringing and education of their child is one of the most fundamental of rights and must be protected, especially more so when it is a religiously motivated action by the parents and thus Free Exercise as well.

In *Barrow v. Greenville I.S.D.*, a qualified educator was told by the Superintendent that she would not be promoted to assistant principal unless she agreed to take her own children out of a private Christian school. 332 F.3d 844 (5th Cir. 2003), *cert. denied*, 540 U.S. 1005 (2003). The court of appeals reversed a lower court decision against Barrow and found that "public-school employees like Barrow have a protected right to educate their children in [a religious] private school" and "the state cannot take an adverse employment action against a public-school employee for exercising this right unless it can prove that the employee's selection of private school materially and substantially affects the state's educational mission." *Id*. at 848. The court of appeals ruled that a "violation of a constitutional right is shown." *Id*.

C. Religious Attire

Several courts, relying on the Free Exercise Clause, have addressed the right to wear religious attire. In *Goldman v. Weinberger*, 475 U.S. 503 (1986), the United States Air Force was sued by a man who was an Orthodox Jew and an ordained rabbi, who was ordered not to wear a yarmulke while on duty and in uniform as a commissioned officer in the Air Force, pursuant to an Air Force regulation proscribing indoor headgear. The Court ruled that the Free Exercise Clause is not offended by the headgear restriction even though its effect is to limit compliance with religious headwear rituals. *Id*. at 510. The Court concluded that the challenged "regulation reasonably and evenhandedly regulates dress in the interest of the military's perceived need for uniformity." *Id*. The

Court's analysis did not rely, however, on the *Sherbert* or *Yoder* analysis. Instead it drew a distinction between military society as a "specialized society, and "civilian society." *Id*. at 506. (internal citations omitted). Restrictions on individual autonomy are much more permissible in the military.

In *Fraternal Order of Police v. City of Newark*, 170 F.3d 359 (3rd Cir. 1999), *cert denied*, 528 U.S. 817 (1999), the Third Circuit found the Free Exercise rights of Muslim officers were violated by the police department when they were not allowed to wear beards for religious reasons when others were allowed to use an exception to the no-beard policy, for medical reasons. The court found this to be a violation of Free Exercise, applying strict scrutiny analysis. "When the government makes a value judgment in favor of secular motivations [for exemptions to a law], but not religious motivations, the government's actions must survive heightened scrutiny" and the government must have a compelling reason for such action. *Id*. at 364-66, n.7.

A similar decision was made in *Rader v. Johnson*, where a federal district court found that a student's Free Exercise rights were violated by a state university, who required freshman to live in campus housing for one year. The student objected and wanted to be granted an exception, as others had been granted for non-religious reasons, so he could live in a Christian housing facility. 924 F.Supp 1540 (D.Neb. 1996). The court applied strict scrutiny, since an exemption had been allowed before, and the court found in favor of the religious plaintiff.

D. Clergy Eligible for Public Office &No Religious Test

In *McDaniel v. Paty*, on Free Exercise grounds, the Court struck down a Tennessee law that prohibited clergy members from serving as state legislators. 435 U.S. 618 (1978). The Court ruled that Tennessee's clergy-disqualification provision was unconstitutional because it forbids McDaniel from exercising his right to be a minister and his right to be a legislator or delegate simultaneously because the State has conditioned the exercise of one on the surrender of the other. Earlier, in *Torcaso v. Watkins*, 367 U.S. 488 (1961) the Plaintiff sued the local county clerk after he was denied a notary commission because he refused to declare a belief in God. The court found that the Maryland test for public office could not be enforced because it was a "religious test" prohibited by the Constitution.

E. Suppression of Religious Worship

In *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993), the Court struck down a city ordinance that forbid the ritual slaughter of animals. After Petitioner church leased land and announced its plans to establish worship facilities, the City Council quickly established ordinances prohibiting animal sacrifices, which it knew to be a component of the church's religious worship rituals. The ordinances were crafted to isolate religiously based animal killing (killing for sport or food was not prohibited). The ordinances could not withstand the strict scrutiny required to meet the *Smith* standard because they were "overbroad or under inclusive in substantial respects." *Id*. at 546. "The proferred objectives [were] not pursued with respect to analogous nonreligious conduct and those interests could be achieved by narrower ordinances that burdened religion to a far lesser degree." *Id*. The Court recognized that "[a] law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny. To satisfy the commands of the First Amendment, a law restrictive of religious practice must advance 'interests of the highest order' and must be narrowly tailored in pursuit of those interests." *Id.* at 546 (citations omitted).

IV. RELIGIOUS FREEDOM RESTORATION ACT CASES

In response to the Supreme Court's ruling in *Smith*, the United States Congress passed the Religious Freedom Restoration Act of 1993 ("RFRA"). 42 USCS § 2000bb (1993). The purpose of RFRA was to reestablish the compelling interest test in *Sherbert* to require all substantial government burdens on religious exercise to be "in furtherance of a compelling interest; and . . . the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b). RFRA applies to "all cases where free exercise of religion is substantially burdened" and "even if the burden results from a rule of general applicability." 42 U.S.C. § 2000bb-1 (a), (c). However, the Court partially overruled RFRA in *City of Boerne v. Flores*, 521 U.S. 507 (1997).

In *City of Boerne v. Flores*, after local zoning authorities denied a Catholic Archbishop a building permit to enlarge a church, the Archbishop brought suit against the city challenging the permit denial under RFRA. 521 U.S. 507 (1997). The Court held that Congress did not have the power under § 5 of the Fourteenth Amendment to the United States Constitution to enforce RFRA on the States. *Id*. at 519. However, the federal RFRA remains valid as applied to actions of the federal government, and several states, including Texas,[7] have passed their own version of RFRA.

[7] TEX. CIV. PRAC. & REM. CODE § 110 et seq. (Vernon 2005).

In *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 126 S. Ct. 1211 (2006), the Court interpreted RFRA to require the strict scrutiny test, which the government failed to meet regarding its restraint on the religious practices of particular church members. Members of a church (UDV) filed suit for declaratory and injunctive relief arising from government restraint of its use of DMT, a substance regulated by the Controlled Substances Act. UDV asserted that such restraint, by impairing its communal religious practice of consuming a hallucinogenic tea containing DMT, violates RFRA. The Court held that the government failed to demonstrate a compelling interest in barring the UDV's sacramental use of the hallucinogenic tea (at least at the preliminary injunction stage). "RFRA requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person' -- the particular claimant whose sincere exercise of religion is being substantially burdened" and the notion that there could be no RFRA exceptions at all to the Controlled Substances Act was expressly rejected. *Id*. at 1221. The Court concluded- an interest is not truly compelling if harm of the same sort is left unprotected. *Id*. at 1222; *see Church of Lukumi Babalu Aye, Inc. v. Haileah*, 508 U.S. 520, 547 (1993) ("It is established in our strict scrutiny jurisprudence that 'a law cannot be regarded as protecting an interest 'of the highest order' . . . when it leaves appreciable damage to that supposedly vital interest unprohibited'" (quoting *Florida Star v. B.J.F*., 491 U.S. 524, 541-542 (1989) (SCALIA, J., concurring in part and concurring in judgment)).

V. RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT (RLUIPA) CASES

Further, in response to the *City of Boerne* case, Congress responded by passing RLUIPA. 42 U.S.C. § 2000cc (2000). This law created a focused amount of protection as applied to land use laws (zoning) and laws governing institutionalized persons (such as prisoners and patients at facilities for the mentally ill). The purpose of legislation is to "provide protection for houses of worship and other religious assemblies from restrictive land use regulation that often prevents the practice of faith." 146 Cong. Rec. S6687 (daily ed. July 13, 2000) (statement of Sen. Hatch).

In *Cutter v. Wilkinson*, 544 U.S. 709, 125 S.Ct. 2113, 2121 (2005), the Court held that RLUIPA was constitutional. See also *Castle Hills First Baptist Church v. City of Castle Hills*, 2004 LEXIS 4669 (W.D. Tex. March 17, 2004) (RLUIPA held constitutional in a land use case); *Adkins v. Kaspar*, 393 F.3d 559 (5th Cir. 2004) (RLUIPA applied in prisoner case), *cert. denied*, 125 S.Ct. 2549 (2005); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d. 1214, 1235-43 (11th Cir. 2004) (RLUIPA held constitutional in land use case), *cert. denied*, 543 U.S. 1146 (2005). In *Cutter*, current and former inmates of state institutions sued the Director of State Correction Facilities alleging that prison officials violated RLUIPA by failing to accommodate an exercise of their "non-mainstream" religions. The Supreme Court held that § 3 of RLUIPA facially qualified as a permissible accommodation of religion. *Id*. The court found that § 3 is Establishment Clause compatible "because it alleviates exceptional government-created burdens on private religious exercise." *Id*. The Court cautioned that in order to properly apply RLUIPA, "courts must take adequate account of the burdens a requested accommodation may impose on non-beneficiaries, and they must be satisfied that the Act's prescriptions are and will be administered neutrally among different faiths." *Id*. at 2121. RLUIPA "protects institutionalized persons who are unable freely to attend to their religious needs and are, therefore, dependent on the government's permission and accommodation for exercise of their religion." *Id*. at 2122. But the Act does not "elevate accommodation of religious observances over an institution's need to maintain order and safety." *Id*. These are clear compelling interests in prison.[8]

[8] Prison cases are difficult. *See Gooden v. Grain*, 405 F. Supp. 2d 714 (E.D. Tex. 2005)(Muslim inmate alleged that he should be permitted to grow a quarter inch beard in accordance with his religious beliefs. He argued that denying him the right to grow a quarter inch beard for religious reasons while allowing other inmates to grow quarter inch beards for medical reasons violated his rights under the Equal Protection Clause and RLUIPA. The court dismissed the complaint with prejudice because (1) Islamic scholars were not in agreement as to whether Muslim men must grow beards, (2) the inmate was clearly permitted to practice the fundamental aspects of his religious beliefs and the grooming policy did not impose a substantial burden on the practice of his religious beliefs, and (3) even if the grooming code placed a substantial burden on the inmate's practice of his religious beliefs, the grooming code furthered the compelling governmental interest of security and did so by the least restrictive means); *Baranowski v. Hart*, 2005 U.S. Dist. LEXIS 36231 (S.D. Tex., 2005)(Prison inmates asserted that the prison's refusal to serve kosher meals, its failure to provide Friday services, its failure to provide Saturday morning services with showers, and the holding of Friday evening services in a classroom instead of the chapel violated RLUIPA. The district court held that these limitations were the result of prison staff and space limitations, as well as financial burdens, which were valid penological interests. Because the inmate did not assert that defendants denied or restricted his right to practice Judaism in his cell, nor that he had no other alternative means of practicing his religious faith. Further, the RLUIPA claim would fail even assuming the inmate were to establish a

VI. CONCLUSION

Religious liberty suits can be complicated. They may involve the Free Exercise Clause, the Establishment Clause, or both. They usually implicate numerous federal and state statutes as well, including RLUIPA, federal RFRA, Texas RFRA, the Equal Access Act, labor laws, and numerous contiguous accompanying violations as well. Feel free to call for ideas or assistance. Religious liberty is important and should be protected with all the knowledge, excellence and wisdom available. It is a core freedom worth protecting and defending with the best legal work we can provide.

substantial burden on the practice of his religion because the prison's financial, safety, space, and security concerns, and the goal of maintaining a neutral policy of religious accommodation, were compelling governmental interests).