



H.B. 423

124th General Assembly
(As Introduced)

Reps. Flowers, Raga, Willamowski, Carmichael, Roman, Schaffer, Collier, Seitz, Womer Benjamin, Hagan, Fessler, Reidelbach, White

BILL SUMMARY

- Provides that, in most cases, county and township zoning regulations cannot be adopted, implemented, or enforced in a manner imposing a "substantial burden" on "religious exercise."
- Prohibits the adoption, implementation, or enforcement of a county or township zoning regulation that treats a religious assembly or institution in certain ways.

CONTENT AND OPERATION

Current laws regarding free exercise of religion

The free exercise of religion is currently protected under state and federal law--the First Amendment to the United States Constitution and Section 7 of Article I of the Ohio Constitution. The U.S. Constitution not only protects the right to the free exercise of religion but also prohibits laws respecting the establishment of religion. The Ohio Constitution states that, while "no preference shall be given, by law, to any religious society . . . , it shall be the duty of the General Assembly to pass suitable laws, to protect every religious denomination in the peaceable enjoyment of its own mode of public worship"

The 106th Congress passed the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) which prohibits any government from imposing or implementing land use regulations (zoning or "landmarking" laws) "in a manner that imposes a substantial burden on the religious exercise of a person" unless the government demonstrates that the burden is "in the furtherance of a compelling governmental interest" and "the least restrictive means of furthering

that . . . interest."¹ This act applies when the substantial burden (1) is imposed in programs or activities that receive federal financial assistance, (2) affects (or its removal affects) foreign or interstate commerce, or (3) is imposed in the "implementation of . . . land use regulations, under which a government makes . . . individualized assessments of the proposed uses for the property involved." Presumably, then, the RLUIPA is meant to apply to local zoning laws as land use regulations.

In addition, the RLUIPA prohibits any government from imposing or implementing (1) "a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution," (2) "a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination," or (3) "a land use regulation that . . . totally excludes religious assemblies from a jurisdiction . . . [or] unreasonably limits religious assemblies, institutions, or structures within a jurisdiction." This, too, presumably is meant to apply to local zoning laws as land use regulations.

An aggrieved party can sue under the RLUIPA, or the federal government may bring an action for injunctive or declaratory relief to enforce compliance with the act. (See **COMMENT 1**.)

Changes proposed by the bill

The bill prohibits county or township zoning regulations from being *adopted, implemented, or enforced* "in a manner that imposes a substantial burden on religious exercise" unless it is demonstrated by the zoning commission, board of county commissioners, board of township trustees, or board of zoning appeals (as applicable) that "the burden [imposed] on an individual, religious assembly, or religious institution" is both "in the furtherance of a compelling governmental interest" and "the least restrictive means of furthering that compelling governmental interest" (secs. 303.213(B) and 519.213(B)).² In this context, the bill defines "religious exercise" generally as any exercise of religion by an individual, or by a religious assembly or institution, whether or not compelled by, or central to, a system of religious belief. That definition also includes the use, building, or conversion of real property in connection with a system of religious belief. (Secs. 303.213(A)(2) and 519.213(A)(2).) (See **COMMENT 2**.)

¹ "Landmarking" laws apparently are historic preservation or historic landmark laws.

² This "demonstration" means the governmental entity must meet the burden of going forward with evidence and the burden of persuasion (secs. 303.213(A)(1) and 519.213(A)(1)).

The bill also prohibits a county or township zoning regulation from being adopted, implemented, or enforced if it does any of the following (secs. 303.213(C) and 519.213(C)):

- Treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution;
- Discriminates against any assembly or institution on the basis of religion or religious denomination;
- Totally excludes religious assemblies or institutions from the unincorporated territory of the county or township (as applicable);
- Unreasonably limits religious assemblies, institutions, buildings, or structures within the territory mentioned above.³

COMMENT

1. **Federal statutory issues.** Assuming enforcement of H.B. 423 is through the courts, the RLUIPA appears to accomplish the same purposes as the bill (and probably additional purposes). The bill applies to the adoption, implementation, and enforcement of zoning regulations, and the federal law applies to the imposition and implementation of land use regulations.

Although the RLUIPA has not been challenged in court, there have been some concerns as to its constitutionality. Its predecessor was the federal Religious Freedom Restoration Act of 1993 (RFRA). In a recent law review article, Professor Brian Freeman of Capital University Law School summarized the history of the RFRA as follows:

... [RFRA was] an attempt to undo the impact of *Smith* [a case applying a rational basis standard of review to valid, neutral statutes of general applicability, like zoning statutes] and return to the reasoning of *Sherbert* and *Wisconsin v. Yoder* [cases involving strict judicial scrutiny and applying a compelling state interest standard]. RFRA was intended to restore the test of strict judicial scrutiny whenever a person's free exercise of religion was substantially burdened, even if the burden resulted from a neutral law of general applicability. RFRA provided that when the free

³ *It would appear that these four types of conduct are currently protected against by the First Amendment to and the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution and by similar provisions in the Ohio Constitution.*

exercise of religion was substantially burdened, any governmental body, whether federal or state, was required to prove that the burden it had imposed furthered a compelling governmental interest and that the burden was the least restrictive means to further that interest.⁴

However, the United States Supreme Court in *City of Boerne v. Flores*, 521 U.S. 507 (1997), found Congress exceeded the scope of its powers under the Enforcement Clause of the Fourteenth Amendment in adopting RFRA provisions imposing requirements on the states. The Court stated that Congress had the power to enforce the Free Exercise Clause of the First Amendment (i.e., the free exercise of religion) via the Fourteenth Amendment, *but did not have the power to alter the meaning of that clause*. Thus, the RFRA was held to be unconstitutional. Because it found Congress was acting beyond its scope of powers, the Court's majority opinion did not further address any First Amendment issues that the RFRA also may have raised.

The current federal act, the RLUIPA, is Congress' follow-up attempt to enact a law applying the "strict judicial scrutiny" test whenever a person's free exercise of religion is "substantially burdened." While the RLUIPA is currently the law, it is likely that it too may be challenged in court on a variety of constitutional grounds. Thus, it is not clear if this federal act will withstand a constitutional challenge.

The RLUIPA, by its own terms, does not preempt any state law, thus including that proposed in H.B. 423, that is "equally . . . or more protective of religious exercise" than the federal law. However, that non-preemption of the federal law permitting states to enact their own laws presumes there are no *constitutional* issues that may preclude states from also enacting such laws. (See **COMMENT 3** below.)

2. **Drafting issues**. The definitions in and the structure of the bill raise several questions of interpretation. First, "religious exercise" is defined as "any exercise of religion by an individual, or by a religious assembly or institution, *whether or not compelled by, or central to, a system of religious belief*" (emphasis added). This definition is somewhat circular and very broad, especially since an individual's exercise of religion need not be compelled by, or central to, a system of religious belief. Could this definition mean that *any* act of an individual might be found to be a "religious exercise" since there need not be a connection to a compulsory or central religious belief? Does it mean that an individual need

⁴ Freeman, "TRENDS IN FIRST AMENDMENT JURISPRUDENCE: Expiating the Sins of Yoder and Smith: Toward a Unified Theory of First Amendment Exemptions From Neutral Laws of General Applicability," 66 Mo. L. Rev. 9, 20 (Winter 2001).

merely allege an act to be a religious exercise in order for the adoption, implementation, or enforcement of a zoning regulation to be called into question?

Second, the bill provides that the county and township zoning laws do not confer power on zoning entities to impose "a substantial burden on religious exercise" unless the zoning entity "demonstrates" that the burden is (a) in furtherance of a compelling governmental interest and (b) is the least restrictive means of furthering that interest. Although the bill defines "demonstrates" to mean "the burden of going forward with evidence and the burden of persuasion," it is not clear how these elements are to be applied. On one hand, the bill purports to limit the scope of zoning power and may imply those burdens have to be sustained *during the process* of adopting, implementing, or enforcing zoning regulations, but, on the other hand, the bill's language may imply the need for a zoning entity--after it has adopted, implemented, or enforced zoning regulations--to justify those regulations in a *court action* challenging their legality. Alternatively, the bill's language could be interpreted as requiring court action *before* any such zoning action is taken. Thus, the bill's provisions may need to be clarified to address the fundamental "operation" issue and, once that issue is resolved, to address other procedural matters.

3. **Constitutional issues.** Without a court ruling, it is unclear whether the bill meets constitutional standards. There are several constitutional issues that could be raised in a court challenge to its provisions, including (a) whether they violate the Establishment Clause of the First Amendment to the U.S. Constitution, (b) whether they violate the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution, and (c) whether the First Amendment's religion clauses *preclude* legislation that provides additional/enhanced protections. On the latter issue, Professor Freeman's law review article provides a summary of the First Amendment's religion clauses and demonstrates the difficulty of predicting whether a legislative proposal violates the U.S. Constitution:

For over fifty years, the United States Supreme Court has recognized the tension between the religion clauses of the First Amendment. The Establishment Clause prohibits government from aiding religion; the Free Exercise Clause prohibits government from inhibiting religion. Taken together, the two clauses mean that religion shall neither incur the government's hostility nor receive its support. . . . Thus, the government must remain neutral in religious matters.⁵

⁵ Freeman, *TRENDS IN FIRST AMENDMENT JURISPRUDENCE . . .*, *supra*, at 9.

...

... Although the [United States Supreme] Court often refers to the neutrality objective of the Religion Clauses, it has not devised a single test that applies to both. Consequently, a decision to give maximum protection to one clause inevitably conflicts with the test used to judge the other. . . .⁶

...

Smith is now the controlling case regarding what level of scrutiny should be applied when reviewing a claim for an exemption from a valid, neutral law of general applicability for religiously motivated conduct.⁷ . . . The majority opinion of Justice Scalia . . . held that, because the applicants violated a valid and neutral statute of general applicability, the Free Exercise Clause was not implicated and therefore strict judicial scrutiny was inapplicable. Rather, Justice Scalia stated that the appropriate standard of review was rational basis review.⁸

Clearly, a court interpretation is necessary to answer the potential constitutional issues surrounding H.B. 423. To add to the uncertainty, the Ohio Supreme Court has recently held that "the Ohio Constitution's free exercise . . . [provision] is broader [than the U.S. Constitution's provision], and we therefore vary from the federal test for religiously neutral, evenly applied government actions."⁹ The Ohio Supreme Court stated the "long held" Ohio constitutional standard regarding free exercise claims is that "the state enactment must serve a compelling state interest and must be the least restrictive means of furthering that interest."¹⁰ This, of course, raises a question about the constitutionality of the Ohio standard of review in light of the judicial

⁶ *Id.* at 10.

⁷ *Id.* at 13.

⁸ *Id.* at 14.

⁹ *Humphrey v. Lane* (2000), 89 Ohio St.3d 62, 68.

¹⁰ *Id.* at 68.

constructions of the standards of review applicable to the religion clauses of the First Amendment to the U.S. Constitution--a question that has not yet been litigated. The ultimate question seems to be, however, what is a permissible standard of review under the U.S. Constitution.

HISTORY

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