WISCONSIN LEGISLATIVE COUNCIL
INFORMATION MEMORANDUM

Freedom of Religious Exercise: State and Federal Law

The U.S. Supreme Court decision in *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. ____ (2014), together with recent legislative actions in other states, has heightened media attention regarding the statutory and constitutional laws relating to the free exercise of religion. This Information Memorandum provides an overview of the key state and federal laws on that topic and a brief introduction to the differences between them.

The First Amendment to the U.S. Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof ...." Article I, Section 18 of the Wisconsin Constitution similarly prohibits the government from interfering with religious worship and the "rights of conscience." The Wisconsin Constitution has generally been interpreted to restrict government action in more circumstances than does the U.S. Constitution. Two federal statutes provide additional restrictions on government burdens on religious exercise, although they apply to state and local government actions only in limited circumstances.

FEDERAL LAW

At the federal level, the First Amendment to the U.S. Constitution limits governments' ability to restrict religious exercise. Two federal statutes, both enacted in response to decisions of the U.S. Supreme Court interpreting the First Amendment, provide additional restrictions.

FIRST AMENDMENT TO THE U.S. CONSTITUTION

The First Amendment to the U.S. Constitution provides, in part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...."[1] Although the First Amendment's "establishment" and "free exercise" clauses necessarily interrelate, the two clauses have distinct legal histories and standards. The federal statutes discussed below and the recent, high-profile legislative actions in other states primarily respond to and affect case law arising under the free exercise clause, which prohibits government actions that unconstitutionally restrict the free exercise of religion.

One of the more challenging interpretational issues relating to the free exercise clause has arisen in the context of generally applicable laws – i.e., laws that do not specifically address religion but may nonetheless affect a given religious practice. A key question that arises is:

[1] Although the First Amendment refers to "Congress," it also applies to states and local governments, through the incorporation of the First Amendment in the Fourteenth Amendment to the U.S. Constitution. [See *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Everson v. Board of Education*, 330 U.S. 1 (1947).]

when must the government provide an exception to a generally applicable law in order to avoid an unconstitutional restriction of religious exercise?

During much of the 1960s, 1970s, and 1980s, the U.S. Supreme Court applied a "strict scrutiny"-like test in cases challenging generally applicable laws on free exercise grounds. [See especially *Sherbert v. Verner*, 374 U.S. 398 (1963); *Wisconsin v. Yoder*, 406 U.S. 205 (1972).] That test required that if a law placed a burden on religious exercise, in order for the law to be found constitutional, that burden must be outweighed by a compelling government interest that the law was designed to achieve. In addition, the burden must be the least restrictive means of accomplishing the government's interest. Although some government actions were upheld under that test, that interpretation of the free exercise clause was generally viewed as providing relatively rigorous protections for religious practice.

The U.S. Supreme Court reversed course in 1990, when it held in *Employment Division v. Smith*, 494 U.S. 872, that laws that are neutral (i.e., not specifically addressing religious practice) and generally applied may be constitutionally applied to religious actions. The Court stated that "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability ....." [494 U.S. at 879 (quotation and citation omitted).]

The "neutrality" standard adopted in *Smith* continues to be the primary test applied by the federal courts in most cases challenging the application of a generally applicable law under the free exercise clause. Under that standard, if a law has only an "incidental" effect on religious practice, it will generally be upheld against a challenge brought under the free exercise clause.[2]

RELIGIOUS FREEDOM RESTORATION ACT

The federal Religious Freedom Restoration Act (RFRA) provides statutory protections for the exercise of religion. Congress enacted RFRA in 1993, in response to the *Smith* decision, discussed above. The stated purposes of the act were "to restore the compelling interest test [used by the Court prior to *Smith*] and guarantee its application in all cases where free exercise of religion is substantially burdened" and "to provide a claim or defense to persons whose religious exercise is substantially burdened by government." [42 U.S.C. s. 2000bb (b).]

Statutory Test and Cause of Action

RFRA provides a statutory test governing challenges brought to laws that are claimed to interfere with religious exercise. Specifically, RFRA prohibits government entities and officials, broadly defined, from "substantially burdening" a person's exercise of religion, even if the burden results from a rule of general applicability, unless the entity or official can demonstrate that the burden satisfies both of the following criteria:

- The burden is in furtherance of a compelling governmental interest.

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[2] However, the U.S. Supreme Court has declined to apply *Smith* in recent cases involving the application of generally applicable employment discrimination laws to internal management decisions made by religious institutions, holding that in such cases, a "ministerial exception" applies. [See, e.g., *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. __ (2012).]

- The burden is the least restrictive means of furthering that compelling governmental interest.

[42 U.S.C. s. 2000bb-1 (a) and (b).]

As enacted, RFRA defined "religious exercise" to mean "the exercise of religion under the First Amendment." As amended by the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), RFRA's definition of "religious exercise" includes "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." [42 U.S.C. s. 2000bb-2 (4).] Thus, the current definition of "exercise of religion" under RFRA is arguably broader than the definition of religion under the First Amendment's free exercise clause.

RFRA also provides a legal cause of action. A person whose religious exercise has been burdened in violation of the act may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against the government official or entity that imposed the burden.[3] [42 U.S.C. s. 2000bb-1 (c).]

Application to the States

Although Congress intended RFRA to apply to actions of state and local governments, the act applies only to the federal government. That limited application resulted from a 1997 U.S. Supreme Court decision, *City of Boerne v. Flores*, 521 U.S. 507 (1997).

In the case, the federal government argued that a broad application of the act was authorized under Section 5 of the Fourteenth Amendment to the U.S. Constitution, which states that "Congress shall have power to enforce, by appropriate legislation, the provisions of" the Fourteenth Amendment. The U.S. Supreme Court noted that legislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement powers under the Fourteenth Amendment. However, the Court held that legislation that alters the scope of the free exercise clause exceeds those powers.

Since the *City of Boerne* decision, federal courts have applied RFRA only in free exercise cases challenging federal government actions. In response, various states have enacted statutes and constitutional amendments to apply RFRA-like requirements at the state and local level.

RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT

RLUIPA was enacted in response to the *City of Boerne* decision, described above. RLUIPA establishes the same statutory test as RFRA. However, it applies in a narrower set of circumstances.

Whereas RFRA applies to all laws that substantially burden religious exercise, RLUIPA only applies to the following types of government actions:

- State and local land use regulations that are implemented in a manner that allows a state or local government to make individualized assessments regarding proposed property uses.

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[3] There is some disagreement among the federal courts about whether a RFRA claim or defense may be brought against a party that is not the government in suits brought by citizens to enforce federal laws.

- Restrictions on the exercise of religion by persons institutionalized in state or locally run prisons, mental hospitals, juvenile detention facilities, and nursing homes.

[42 U.S.C. s. 2000cc; 42 U.S.C. s. 2000cc-1.]

RLUIPA requires that both types of actions are subject to the strict scrutiny test set forth in RFRA if both of the following are true:

- The action imposes a substantial burden on an individual's or institution's exercise of religion; and
- The burden is imposed in a program that receives federal financial assistance, or the burden (or its removal) affects interstate commerce or commerce with foreign or tribal nations.

[42 U.S.C. s. 2000cc (a); 42 U.S.C. s. 2000cc-1 (a).]

In 2005, the U.S. Supreme Court upheld the part of RLUIPA that addresses restrictions on religious exercise by incarcerated persons. [*Cutter v. Wilkinson* 544 U.S. 709 (2005).] The Court held that RLUIPA's protection for incarcerated persons "fits within the corridor" between the Free Exercise and Establishment Clauses. [*Id.* At 720.] The Court has not yet addressed the constitutionality of RLUIPA's land use provisions.

WISCONSIN LAW

In Wisconsin, protections similar to those provided under RFRA are provided under the state constitution. Article I, Section 18 of the Wisconsin Constitution, sometimes referred to as the "right of conscience" provision, is analogous to the religion clauses of the First Amendment to the U.S. Constitution but contains a different, and fuller, description of the right conferred. The provision states:

> **The right of every person to worship Almighty God according to the dictates of conscience shall never be infringed**; nor shall any person be compelled to attend, erect or support any place of worship, or to maintain any ministry, without consent; **nor shall any control of, or interference with, the rights of conscience be permitted**, or any preference be given by law to any religious establishments or modes of worship; nor shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries. [Emphasis added.]

In *State v. Miller*, 549 N.W.2d 235 (1996), the Wisconsin Supreme Court noted that Article I, Section 18 of the Wisconsin Constitution shares an underlying purpose with the First Amendment to the U.S. Constitution. However, the Wisconsin Supreme Court emphasized that its interpretation of Article I, Section 18 is not constrained by the U.S. Supreme Court's interpretation of the First Amendment.

Instead, the Wisconsin Supreme Court held that a person challenging the application of a state or local government law under Article I, Section 18 must first prove that he or she has a sincerely held religious belief that is burdened by the relevant law. If that belief is proven, the

government must then prove that the law is based on a compelling governmental interest and that the interest cannot be served by a less restrictive alternative.

This compelling interest/least restrictive means test can be reiterated as a four-part test, in which a person challenging a law must prove that: (1) the person has a sincerely held religious belief; and (2) the belief is burdened by the application of the state law at issue. If the person successfully establishes these two elements, then the state has the burden to prove that: (3) the law is based on a compelling state interest; and (4) the state interest cannot be served by a less restrictive alternative. In *Miller*, the Court noted that its test under Article I, Section 18 is derived from U.S. Supreme Court case law preceding the U.S. Supreme Court decision in *Employment Division v. Smith*, described above.

DIFFERENCES BETWEEN STATE AND FEDERAL LAW

As discussed, the Wisconsin Supreme Court has characterized Article I, Section 18 of the Wisconsin Constitution as providing a more extensive protection of religious exercise than the First Amendment of the U.S. Constitution provides. As currently interpreted, the Wisconsin Constitution provides a protection that is very similar to the protection provided under RFRA.[4]

The legal standard governing the extent to which government may burden religious exercise is substantially the same under RFRA and Article I, Section 18 of the Wisconsin Constitution. As mentioned, the compelling interest/least restrictive means test applied by the Wisconsin Supreme Court under Article I, Section 18 of the Wisconsin Constitution, is derived from the same federal case law that RFRA was enacted to reaffirm. The articulations of the applicable legal standards under the two sources of law are virtually identical.

However, in future cases, it is possible that the Wisconsin Constitution would be interpreted to apply to a somewhat different scope of entities and activities than the scope of entities and activities to which RFRA applies. In *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. ___ (2014), the U.S. Supreme Court held that RFRA applies to certain closely held for-profit corporations. The Wisconsin Supreme Court has not addressed whether Article I, Section 18 of the Wisconsin Constitution applies to such corporations. In addition, as mentioned, RFRA's definition of "religious exercise" arguably extends to activities that fall outside the scope of the free exercise clause of the First Amendment. Because RFRA is statutory and generally does not apply to the states, the Wisconsin Supreme Court would not be obligated to follow federal judicial precedents interpreting RFRA in a case arising under Article I, Section 18 of the Wisconsin Constitution.

This memorandum is not a policy statement of the Joint Legislative Council or its staff.

This memorandum was prepared by Anna Henning, Staff Attorney, on April 21, 2015.

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[4] The Wisconsin Supreme Court has reaffirmed the compelling interest/least restrictive means test relatively recently. [See *Coulee Catholic Schools v. Labor and Industry Review Commission*, 2009 WI 88 at fn. 27 ("We still believe ... that [the standard articulated in *Miller*] is the appropriate standard under the Wisconsin Constitution for most laws burdening religious belief.").]

WISCONSIN LEGISLATIVE COUNCIL
One East Main Street, Suite 401 • P.O. Box 2536 • Madison, WI 53701-2536
Telephone: (608) 266-1304 • Fax: (608) 266-3830
Email: leg.council@legis.wisconsin.gov
http://www.legis.wisconsin.gov/lc