

# Individual liability under religious freedom law?

By Daniel P. Bane

Most land use and real estate practitioners are aware of the Religious Land Use and Institutionalized Persons Act, which was enacted in 2000 to correct problems with the Religious Freedom Restoration Act of 1993. In broad terms, RLUIPA prohibits religious discrimination or the imposition of “substantial burdens” on religious exercise. It applies exclusively to land use regulations and prisons. RLUIPA’s land use provisions state “[n]o government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person” or otherwise discriminates against religious institutions.

RLUIPA land use claims arise in various contexts, but the most common example is where a religious institution seeks a discretionary approval to either build or expand in residential or commercial areas. Residents often express concerns over noise, traffic and parking impacts, while cities are often protective of sales tax generating commercial districts. In either case, religious institutions may be considered undesirable uses which the city seeks to either discourage or limit through the imposition of zoning regulations. *See, e.g., Int’l Church of Foursquare Gospel v. City of San Leandro*, 673 F.3d 1059 (9th Cir. 2011) (holding a city cannot use zoning laws to prevent the building and use of a church because it prefers a taxable use of the property).

Since its enactment, the boundaries of RLUIPA and its available remedies have steadily materialized through case law. For example, decisional law clarifies that states may not be sued for monetary damages under RLUIPA due to sovereign immunity. *See Sossamon v. Texas*, 563 U.S. 277 (2011). However, RLUIPA does permit the recovery of monetary damages against cities and other local governmental agencies. *See Centro Familiar Cristiano Buenas Nuevas v. City of Yuma*, 651 F.3d 1163 (9th Cir. 2011). Yet despite the significant body of law that has developed, the important question remains as to whether RLUIPA authorizes monetary damages claims against local public officials in the land use context.

RLUIPA’s express language appears

to create a private action against local government officials. Under the act, “government” is defined to include “any other person acting under color of State law.” This language is also used in 42 U.S.C. Section 1983, which the U.S. Supreme Court has long held confers personal liability to local public officials concerning deprivations of civil rights. *See Kentucky v. Graham*, 473 U.S. 159, 166 (1985) (holding language of Section 1983 renders a government official personally liable when “the official, acting under color of state law, caused the deprivation of a federal right.”).

## It will likely be some time before a circuit court answers the question of whether public officials may be subject to individual liability under RLUIPA.

Accordingly, several circuit and district courts have concluded that RLUIPA’s plain language contemplates damages claims against officials in their individual capacities. *See, e.g., Nelson v. Miller*, 570 F.3d 868, 886 (7th Cir. 2009); *Sossamon v. Texas*, 560 F.3d 316, 327 (5th Cir. 2009). Indeed, the 9th U.S. Circuit Court of Appeals recently avowed “our inquiry to determine whether a defendant acted ‘under color of State law’ is the same under RLUIPA as it is under § 1983.” *Florer v. Congregation Pidyon Shevuyim, N.A.*, 639 F.3d 916, 922 (9th Cir. 2011). Thus, any lingering doubt regarding whether RLUIPA’s express language contemplates individual liability for local public officials should be resolved in favor of allowing such claims.

However, the 9th Circuit recently held that, because the RLUIPA claim at issue was invoked under the spending clause power, state prison officials could not be personally liable because they were not the recipients of any government funding. *Wood v. Yordy*, 753 F.3d 899, 904 (9th Cir. 2014). The 9th Circuit reasoned, “[i]f an individual acts under color of state law to burden a plaintiff’s rights to religious exercise, the plaintiff can sue the government. [RLUIPA] does not authorize suits against a person in anything other than an official or governmental capacity, for it is only

in that capacity that the [federal] funds are received. That is the only reading of [RLUIPA] that is consistent with the decisions of our sister circuits and the constitutional limitations on the Spending Clause that the Supreme Court has recognized.”

It is easy to misconstrue this passage as a complete prohibition on RLUIPA individual-capacity suits. But Wood is not so sweeping and, taken in the appropriate context, stands only for the narrow proposition RLUIPA claims may not be brought against state prison officials where the spending clause is the sole jurisdictional basis invoked. Importantly, RLUIPA is split into two distinct sections: Section 2 addresses religious discrimination/burdens in the land use context, while Section 3 deals with religious discrimination/burdens in the prison context. Prison claims may be invoked under either the commerce or spending clause. However, RLUIPA claims in the prison context are principally invoked under the spending clause because state prisons typically receive federal funding. Few, if any, RLUIPA prison claims have facts justifying the invocation of the commerce clause powers. *See, e.g., Smith v. Allen*, 502 F.3d 1255, 1274 n.9 (acknowledging “RLUIPA purports to contain a Commerce Clause underpinning” but finding “no evidence that a state prison’s denial of an individual prisoner’s [religious exercise] would ‘affect [ ] interstate commerce.’”) Thus, in practice, RLUIPA prison cases are invoked almost exclusively under the spending clause power.

In contrast, RLUIPA’s land use provisions may be invoked under either the spending clause, commerce clause, or enforcement clause powers. Unlike prison cases, RLUIPA land use claims principally invoke Congress’ enforcement clause powers because land use decisions involve individualized governmental assessments. *See Guru Nanak Sikh Soc. of Yuba City v. County of Sutter*, 456 F.3d 978, 993-95 (9th Cir. 2006) (upholding RLUIPA Section 2 provisions as a valid exercise of Congress’ enforcement clause power because they target individualized governmental assessments which violate an individual’s religious exercise). Accordingly, the spending clause concerns expressed by the 9th Circuit in Wood have no application to RLUIPA claims where either the

commerce clause or enforcement clause serve as the jurisdictional hook. In fact, just days after Wood was decided, the 9th Circuit left the door open for RLUIPA individual capacity suits invoked on grounds other than the spending clause power clarifying “[t]here is a chance that, if invoked under the Commerce Clause, RLUIPA would support [an individual-capacity] claim.” *See Cotton v. Cate*, 2014 WL 2696738, at \*1 (9th Cir. June 16, 2014) (unpublished).

Moreover, Congress’ enforcement clause powers are unquestionably sufficient to support individual capacity claims. Indeed, Section 1983 was held to be a valid exercise of Congress’ enforcement clause powers. *See Crumpton v. Gates*, 947 F.2d 1418, 1420 (9th Cir. 1991) (“Congress enacted section 1983 pursuant to its power under section 5 of the Fourteenth Amendment to adopt ‘appropriate legislation’ to enforce the Fourteenth Amendment.”). And, it is beyond dispute that local public officials may be personally liable pursuant to Section 1983. Thus, it appears local public officials may be sued in their individual capacities under RLUIPA where Congress’ commerce clause or enforcement clause powers are invoked.

It will likely be some time before a circuit court answers the question of whether public officials may be subject to individual liability under RLUIPA. Nevertheless, a plaintiff bringing a RLUIPA action against a city or other local public agency should consider whether it is appropriate under the facts of the case to include individual capacity claims against the public officials involved. In a particularly egregious case, the inclusion of individual defendants could pave the way for a punitive damages claim that would not otherwise be available. Likewise, counsel advising cities and other local agencies should be aware (and make their clients aware) of the potential for individual capacity claims under RLUIPA.



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