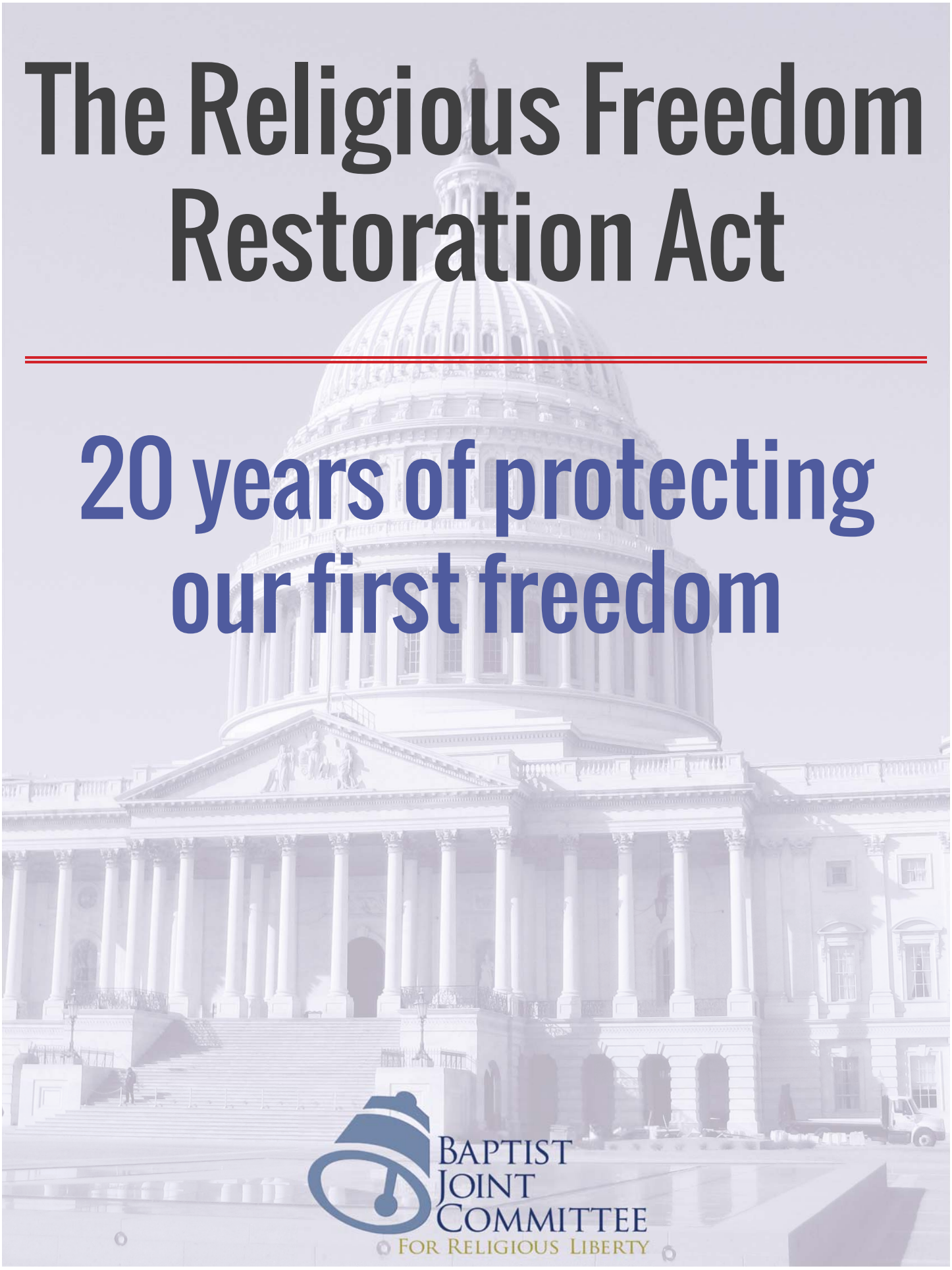
The Religious Freedom Restoration Act

20 years of protecting our first freedom



Baptist Joint Committee
For Religious Liberty

The Religious Freedom Restoration Act

Twenty years ago, a broad and diverse coalition of religious liberty advocates welcomed passage of the Religious Freedom Restoration Act (RFRA), a law that resulted from several years of hard work and reflected a shared commitment to protecting the free exercise of religion in America. RFRA created a statutory right that would apply broadly to ensure that government did not substantially burden the exercise of religion without a compelling reason for doing so. Known as "strict scrutiny" in constitutional law terminology, this stringent legal standard requires that the government satisfy a high burden of proof before infringing citizens' rights.

The story of RFRA began in 1990, when the U.S. Supreme Court shocked many religious and civil liberty advocates by announcing in *Employment Division v. Smith* that the First Amendment is not violated when neutral, generally applicable laws conflict with religious practices. This less demanding standard previously had applied only in specific contexts such as prisons and the military. *Smith* was a departure from other Court decisions interpreting the Free Exercise Clause as a far higher bar to government limitations on religious practices. The new standard generated widespread concern that it threatened minority and mainstream religious groups alike, leaving them vulnerable to potentially onerous government burdens on religion. In response, an extraordinary coalition of organizations coalesced to push for federal legislation that would "restore" the pre-*Smith* compelling interest standard.

RFRA was first introduced in the 101st Congress in 1990 and reintroduced in the 102nd Congress but was never reported out of committee, stalled largely as a result of concerns from Catholic and other pro-life groups that the legislation could create a claim for religiously-motivated abortion. Some also asserted that RFRA could be used to challenge the tax-exempt status of religious organizations or to prevent them from participating in government programs. In order to reach a compromise, and thereby garner greater support, the legislative record in the 103rd Congress was further developed to make clear that RFRA did not "expand, contract or alter the ability of a claimant to obtain relief" beyond the pre-*Smith* state of the law. Further, language was added to the text of the bill noting that it did not affect the First Amendment's Establishment Clause in any way. These changes paved the way for RFRA's passage, and it was signed into law by President Bill Clinton on November 16, 1993. Because the Supreme Court later held that RFRA was unconstitutional as applied to the states, many states have enacted similar legislation to constrain state government actions.

Coalition members recognized at the time that RFRA provided a high standard for all free exercise claims without regard to any particular religious practice or desired outcome, and that it would produce different results according to the facts of individual disputes. Still, common ground lay in the belief that all Americans have a right to exercise their religion.

Two decades later, opinions about RFRA vary. Some prior RFRA advocates now express concerns about its application in particular contexts, such as its interaction with civil rights and health care laws; others argue RFRA has not lived up to its promise of providing meaningful protection for religious liberty for all. Others conclude that RFRA, while not perfectly applied in every case, has on balance provided much needed protection against governmental interference with the exercise of religion.

This anniversary provides an opportunity to reflect on the current state of religious liberty, using RFRA as a lens for highlighting the importance of a shared understanding of religious freedom and considering the extent to which such understanding does or can exist today. Even as we acknowledge contemporary disagreements about the application of religious liberty principles, we should seek and cultivate areas of consensus. The story of RFRA serves as a reminder that cooperation and respect for differences are necessary to maximize religious freedom in ways that are mutually beneficial for all.

Free Exercise in America: The high water mark

Prior to 1990, the U.S. Supreme Court had interpreted the First Amendment to mean that only governmental interests of the highest order could justify restrictions on the free exercise of religion. Two decisions in particular, *Sherbert v. Verner* and *Wisconsin v. Yoder*, marked the height of constitutional free exercise protection.

Sherbert v. Verner 374 U.S. 398 (1963)

In *Sherbert v. Verner*, the U.S. Supreme Court announced a new test for interpreting the Free Exercise Clause. This standard, known as the compelling interest test, erected a high bar to government interference with religion. The case was brought by Adell Sherbert, a Seventh-day Adventist, who was fired from her job at a textile mill when she refused to work on Saturday, her Sabbath. In turn, the state of South Carolina denied Sherbert's application for unemployment compensation. According to state officials, Sherbert was ineligible for those benefits because she had "failed, without good cause ... to accept available suitable work," despite her religious reasons for doing so. Sherbert argued that this disqualification for public benefits violated her constitutional free exercise rights.

Siding with Sherbert, the Court found that the state's denial of benefits imposed a clear, though indirect, burden on Sherbert's practice of religion. The state's regulation "force[d] her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand." This burden, the Court said, was analogous to fining Sherbert for worshiping on Saturday. The Free Exercise Clause prohibited South Carolina from "condition[ing] the availability of benefits upon [Sherbert's] willingness to violate a cardinal principle of her religious faith."

The Court also held that no compelling state interest justified such a "substantial infringement of [Sherbert's] First Amendment right," observing that "[o]nly the gravest abuses, endangering paramount [state] interests, give occasion for permissible limitation." South Carolina had not shown, beyond hypothetical speculation, that any such danger would result from awarding Sherbert unemployment benefits. The Court concluded by "reaffirm[ing] ... that no State may exclude ... the members of any [] faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation."

Wisconsin v. Yoder 406 U.S. 205 (1972)

Wisconsin v. Yoder involved three Old Order Amish families who refused to send their children, ages 14 and 15, to any formal school beyond the eighth grade. They did so in accordance with their "fundamental belief that salvation requires life in a church community separate and apart from the world and worldly influence." They maintained that, if forced by the state to send their children to high school, "they would not only expose themselves to the danger of the censure of the church community, but ... also endanger their own salvation and that of their children." The parents were convicted of violating a Wisconsin law that required all children to attend school until age 16. They filed a lawsuit, alleging that the application of the compulsory attendance law violated their First Amendment rights.

The Supreme Court agreed that "enforcement of the State's requirement ... would gravely endanger if not destroy the free exercise of [the Amish families'] religious beliefs." It held that the government's asserted interest in universal compulsory education did not justify such a "severe interference with religious freedom."

Applying a "compelling state interest test," the Court explained that even state interests of great importance are subject to "a balancing process when [they] impinge[] on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment, and the traditional interests of parents with respect to the religious upbringing of their children ... ." It also noted that "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." Here, despite Wisconsin's "admittedly strong" interest in maintaining a general system of compulsory education, the State's reasons were not sufficiently compelling to deny the Amish a constitutionally-grounded free exercise exemption.

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The U.S. Supreme Court hands down its decision in *Employment Division v. Smith*, declaring that the First Amendment's Free Exercise Clause does not prohibit neutral, generally applicable laws that burden religious practice. *Smith* involved two Native Americans whose religious ceremonies included ingestion of the illegal hallucinogenic drug peyote. As a result of this practice, they were fired from their jobs as drug rehabilitation counselors and subsequently denied unemployment benefits by the state of Oregon. In denying their free exercise claim, the Supreme Court departs from the longstanding principle that government must demonstrate a "compelling state interest" before interfering with religious practices. This ruling runs counter to decades of court precedent and mobilizes a broad, diverse range of religious liberty advocates to take corrective action.

APRIL 17, 1990

President Bill Clinton is joined by Vice Pres on Nov. 16, 1993, as he signs the landmark I porters shown are (from left): Rep. Don Edw Gore; Rep. Charles Schumer, D-N.Y.; Sen. H Mark Hatfield, R-Ore.

After being approved by unanimous voice vote in the House of Representatives, RFRA passes the Senate 97-3.

OCT. 27, 1993

JUNE 11, 1993

In *Church of the Lukumi Babalu Aye v. City of Hialeah*, its first free exercise case after *Smith*, the Supreme Court invalidates a Florida city ordinance prohibiting animal sacrifices performed as part of religious rituals. The challenged regulations were passed after residents learned that a Santeria church, whose members practice animal sacrifice as part of their religious ceremonies, planned to establish a presence within the city limits. The regulations exempted animal slaughter undertaken for a number of non-religious purposes, such as food consumption. Unlike the law upheld in *Smith*, these regulations were neither neutral nor generally applicable and were thus subject to strict scrutiny review.

"The bill we are reintroducing today restores the compelling interest test by statute. Not every free exercise claim will prevail. The previous standard had worked well for many years, and it deserves to be reinstated. Few issues are more fundamental to our country. America was founded as a land of religious freedom and a haven from religious persecution."

-Sen. Ted Kennedy, D-Mass.

ION OF RFRA

sident Al Gore and members of Congress Religious Freedom Restoration Act. Sup- wards, D-Calif.; Sen. Orrin Hatch, R-Utah; Howard Metzenbaum, D-Ohio; and Sen.

A unanimous Supreme Court decides *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, in which it strictly enforces RFRA's standard requiring government to prove that infringements on religious exercise are justified by a compelling state interest. The Court rejects the government's argument that it has a compelling interest in applying the Controlled Substances Act without allowing exceptions for a small religious sect that ingests a prohibited substance as part of its religious ceremonies. This is the first RFRA case to reach the Court since 1997, when it invalidated RFRA's application to state laws in *Boerne*.

FEBRUARY 21, 2006

JUNE 25, 1997

The U.S. Supreme Court holds in *City of Boerne v. Flores* that RFRA, as applied to the states, is an unconstitutional exercise of congressional power. RFRA continues to apply to the federal government but is no longer enforceable against state and local governments.

2000

Congress passes the Religious Land Use and Institutionalized Persons Act, providing enhanced free exercise protections in the areas of land use and citizens in government custody.

2011-PRESENT

The Obama administration announces that, under the Affordable Care Act, all employer-provided health insurance plans must cover FDA-approved contraceptive methods. Dozens of nonprofit and for-profit employers challenge the requirement in courts around the country, raising free exercise and RFRA claims. While the rule is subsequently amended to exempt religious employers and accommodate objecting religiously-affiliated employers, it continues to apply to secular, for-profit employers. Federal courts of appeals disagree over whether secular corporations can "exercise religion" under the statute. Petitions for review are pending before the U.S. Supreme Court.

"The free exercise of religion is not a 'luxury' afforded our citizenry, but a well conceived and fundamental right. It is clear to me a legislative response is essential to the preservation of the full range of religious freedoms the First Amendment guarantees to the American people. This bill will reaffirm those rights."

-Sen. Orrin Hatch, R-Utah

Coalition for the Free Exercise of Religion

200 Maryland Avenue, N.E. * Washington, DC 20002 * (202) 544-4226

October 20, 1993

Dear Senator,

I am writing on behalf of the Coalition for the Free Exercise of Religion to request your enthusiastic support for the Religious Freedom Restoration Act of 1993. (S. 578) As you know, this bill may come to the floor as early as Friday, October 22, 1993.

No right of American citizenship is more precious than religious liberty. The Supreme Court's infamous Employment Division v. Smith diluted that right and has led to more than 60 reported decisions against religious claimants. The House of Representatives responded to this crisis on May 11 by passing the RFRA unanimously. We urge you to do the same.

A final request: Please vote against the Reid Amendment exempting prisons from the bill. The Report of the Senate Judicial Committee makes clear that courts should be particularly deferential to the expert opinions of prison administrators but, as Attorney General Reno has pointed out, even prisoners should have some religious rights.

Please join with Senators Hatch and Kennedy as they seek to restore religious liberty for all Americans.

Gratefully,

Oliver Thomas

Oliver S. Thomas
Chair

OST/li

Remarks of President Bill Clinton on the Religious Freedom Restoration Act

Delivered Nov. 16, 1993, on the South Lawn of the White House at the signing ceremony

Thank you very much ... to the Members of Congress, the chaplains of the House and the Senate, and to all of you who worked so hard to help this day become a reality. Let me especially thank the Coalition for the Free Exercise of Religion for the central role they played in drafting this legislation and working so hard for its passage.

It is interesting to note ... what a broad coalition of Americans came together to make this bill a reality; interesting to note that the coalition produced a 97-to-3 vote in the United States Senate and a bill that had such broad support it was adopted on a voice vote in the House. I'm told that, as many of the people in the coalition worked together across ideological and religious lines, some new friendships were formed and some new trust was established, which shows, I suppose that the power of God is such that even in the legislative process miracles can happen. [*Laughter*]

We all have a shared desire here to protect perhaps the most precious of all American liberties, religious freedom. Usually the signing of legislation by a President is a ministerial act, often a quiet ending to a turbulent legislative process. Today this event assumes a more majestic quality because of our ability together to affirm the historic role that people of faith have played in the history of this country and the constitutional protections those who profess and express their faith have always demanded and cherished. ...

The free exercise of religion has been called the first freedom, that which originally sparked the development of the full range of the Bill of Rights. Our Founders cared a lot about religion. And one of the reasons they worked so hard to get the first amendment into the Bill of Rights at the head of the class is that they well understood what could happen to this country, how both religion and Government could be perverted if there were not some space created and some protection provided. They knew that religion helps to give our people the character without which a democracy cannot survive. They knew that there needed to be a space of freedom between Government and people of faith that otherwise Government might usurp.

They have seen now, all of us, that religion and religious institutions have brought forth faith and discipline, community and responsibility over two centuries for ourselves and enabled us to live together in ways that I believe would not have been possible. We are, after all, the oldest democracy now in history and probably the most truly multiethnic society on the face of the Earth. And I am convinced that neither one of those things would be true today had it not been for the importance of the first amendment and the fact that we have kept faith with it for 200 years.

At the Nov. 16, 1993, signing ceremony, President Bill Clinton (left) shares a laugh with Oliver Thomas (right), the chair of the Coalition for the Free Exercise of Religion, and James Dunn (center), the executive director of the Baptist Joint Committee.

What this law basically says is that the Government should be held to a very high level of proof before it interferes with someone's free exercise of religion. This judgment is shared by the people of the United States as well as by the Congress. We believe strongly that we can never, we can never be too vigilant in this work. ...

... We are a people of faith. We have been so secure in that faith that we have enshrined in our Constitution protection for people who profess no faith. And good for us for doing so. That is what the first amendment is all about. But let us never believe that the freedom of religion imposes on any of us some responsibility to run from our convictions. Let us instead respect one another's faiths, fight to the death to preserve the rights of every American to practice whatever convictions he or she has, but bring our values back to the table of American discourse to heal our troubled land.

Thank you very much.

Above excerpts are printed from remarks as recorded in the Federal Register's Public Papers of the President

CHAPTER 21B—
RELIGIOUS FREEDOM RESTORATION

§ 2000bb. Congressional findings and declaration of purposes

(a) Findings

The Congress finds that—

(1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;

(2) laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;

(3) governments should not substantially burden religious exercise without compelling justification;

(4) in Employment Division v. Smith, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and

(5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.

(b) Purposes

The purposes of this chapter are—

(1) to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and

(2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

§ 2000bb–1. Free exercise of religion protected

(a) In general

Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.

(b) Exception

Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(c) Judicial relief

A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

§ 2000bb–2. Definitions

As used in this chapter—

(1) the term "government" includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, or of a covered entity;

(2) the term "covered entity" means the District of Columbia, the Commonwealth of Puerto Rico, and each territory and possession of the United States;

(3) the term "demonstrates" means meets the burdens of going forward with the evidence and of persuasion; and

(4) the term "exercise of religion" means religious exercise, as defined in section 2000cc–5 of this title.

§ 2000bb–3. Applicability

(a) In general

This chapter applies to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993.

(b) Rule of construction

Federal statutory law adopted after November 16, 1993, is subject to this chapter unless such law explicitly excludes such application by reference to this chapter.

(c) Religious belief unaffected

Nothing in this chapter shall be construed to authorize any government to burden any religious belief.

§ 2000bb–4. Establishment clause unaffected

Nothing in this chapter shall be construed to affect, interpret, or in any way address that portion of the First Amendment prohibiting laws respecting the establishment of religion (referred to in this section as the "Establishment Clause"). Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this chapter. As used in this section, the term "granting", used with respect to government funding, benefits, or exemptions, does not include the denial of government funding, benefits, or exemptions.

CHAPTER 21C—PROTECTION OF RELIGIOUS EXERCISE IN LAND USE AND BY INSTITUTIONALIZED PERSONS

§ 2000cc–5. Definitions

(7) Religious exercise

(A) In general

The term "religious exercise" includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.

(B) Rule

The use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose.

When Congress passed the Religious Land Use and Institutionalized Persons Act of 2000, it also amended RFRA to reflect that RFRA applies to the federal government only and incorporates RLUIPA's definition of "religious exercise."