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Supreme Court's decision affirms reasonable legislative accommodations

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Like many lawyers, I wake up on Mondays in May and June with a bit of nervous excitement. On those days, the Supreme Court announces the remaining decisions of its term. With the drafting of advocacy briefs and the drama of oral arguments well in the past, each new week is a step closer to judgment day.

At stake in *Cutter vs. Wilkinson*, the Court's most recent religious liberty decision, was the constitutionality of a law in which the BJC is heavily invested: the Religious Land Use and Institutionalized Persons Act (RLUIPA). In 2000, the BJC led the broad coalition of religious and civil liberties groups that supported the law's passage in Congress. The law provides protections for religious freedom in two specific contexts, namely prisons and land use.

In *Cutter*, the State of Ohio claimed that the prisoner provisions unconstitutionally favored religion by failing to give similar rights to nonreligious prisoners. Surprisingly, the U.S. Circuit Court for the Sixth Circuit agreed. Just after Memorial Day, the Supreme Court released its decision. The immediate news was quite good: the Court upheld RLUIPA in a unanimous decision by Justice Ruth Bader Ginsburg. While the ruling leaves open some questions, such as how the Court would rule on specific applications of RLUIPA, several aspects of *Cutter* are noteworthy because they reinforce basic premises of the First Amendment, and in doing so, bolster the BJC's efforts to protect religious liberty for all.

First, the decision recognizes religious practice sometimes calls for accommodation. While our laws tend to accommodate the religious majority, adherents of minority faiths often need special treatment to obtain authentic religious freedom. The Court noted that the "exercise of religion" involves not just beliefs but physical acts. At times, the physical acts of religious practitioners rely on accommodation from government.

RLUIPA operates in the context of prisons, where the government's burden on religion (and indeed all areas of a prisoner's life) is palpable. The Court had no trouble endorsing the purpose of the statute as valid, finding that 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."

Second, legislative accommodations of religion to promote free exercise do not necessarily run afoul of the

Establishment Clause. In several cases, the Court has referred to an acceptable area of legislative action that fits in the space between what free exercise requires and no establishment prohibits. RLUIPA, the Court found, fits comfortably in the "the corridor between the Religion Clauses," where there is "play in the joints."

Ohio had challenged the law on its face, claiming it was necessarily unconstitutional because it offered special treatment to religious prisoners, with no equivalent accommodation to others. The Court rejected that restrictive view of accommodations, noting that it was contrary to a long tradition of legitimate accommodations of religion.

As the Court explained, Ohio's position was incompatible with a basic reading of the First Amendment: "The first of the two Clauses, commonly called the Establishment Clause, commands a separation of church and state. The second, the Free Exercise Clause, requires government respect for, and noninterference with, the religious beliefs and practices of our Nation's people. While the two Clauses express complementary values, they often exert conflicting pressures."

This interpretation of the religion clauses affirms the BJC's sensibly centrist approach to vigorous advocacy both for no establishment and for free exercise.

Third, valid concerns about government promotion of religion or favoritism toward certain religions limit the extent of government accommodation. *Cutter* did not uphold any specific religious practice for prisoners. Indeed, the Court's decision noted the challenges prisoners must overcome. In the case of RLUIPA, many of the concerns about measuring the rights of prisoners against the needs of prisons were actually written into the statute, demonstrating that the goal of Congress was to provide religious accommodation, not to interfere with legitimate security concerns.

The Court found that RLUIPA was compatible with the Constitution "because it alleviates exceptional government-created burdens on private religious exercise." Beyond the specific context of prisons, the Court noted that when evaluating similar laws courts must take notice of the burdens a requested accommodation would impose on non-beneficiaries and must ensure that accommodations are administered neutrally among different faiths.

No doubt, challenges to RLUIPA's prison provisions will recur. Religious accommodation cases will remain hard fought. Still, *Cutter* is a very positive milestone. It affirms religious freedom as a fundamental value, legitimately protected by laws that ensure free exercise for all.