

Right up front: Mother Earth Ministries-ATC is *not* an advocacy group: we can't and don't offer legal advice, do research, put inmates in touch with attorneys, or assist inmates in any other way with lawsuits; and we don't work to change policies in any prisons.

Our general and specific advice to inmates who are unsatisfied with the religious programs at their facility is to "kite the chaplain," and to follow grievance procedures to the letter, and, if necessary and possible, to involve their own attorneys.

*We offer this brochure – the text of the Act and commentary from the DOJ and courts – for information only.*

June 2, 2005  
106th CONGRESS  
2d Session  
S. 2869

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AN ACT

to protect religious liberty, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the 'Religious Land Use and Institutionalized Persons Act of 2000'.

SEC. 2. PROTECTION OF LAND USE AS RELIGIOUS EXERCISE.

(a) SUBSTANTIAL BURDENS

(1) GENERAL RULE No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution—

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

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

(2) SCOPE OF APPLICATION- This subsection applies in any case in which—

(A) the substantial burden is imposed in a program or activity that receives Federal financial assistance, even if the burden results from a rule of general applicability;

(B) the substantial burden affects, or removal of that substantial burden would affect, commerce with

foreign nations, among the several States, or with Indian tribes, even if the burden results from a rule of general applicability; or

(C) the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved.

(b) DISCRIMINATION AND EXCLUSION

(1) EQUAL TERMS- No government shall impose or implement 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) NONDISCRIMINATION- No government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination.

(3) EXCLUSIONS AND LIMITS- No government shall impose or implement a land use regulation that—

(A) totally excludes religious assemblies from a jurisdiction; or

(B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.

SEC. 3. PROTECTION OF RELIGIOUS EXERCISE OF INSTITUTIONALIZED PERSONS.

(a) GENERAL RULE- No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, as defined in section 2 of the Civil Rights of Institutionalized Persons Act (42 U.S.C. 1997), even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person—

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

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

(b) SCOPE OF APPLICATION- This section applies in any case in which—

(1) the substantial burden is imposed in a program or activity that receives Federal financial assistance; or

(2) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes.

SEC. 4. JUDICIAL RELIEF.

(a) CAUSE OF ACTION- A person may assert a violation of this Act 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.

(b) BURDEN OF PERSUASION- If a plaintiff produces prima facie evidence to support a claim alleging a violation of the Free Exercise Clause or a violation of section 2, the government shall bear the burden of persuasion on any element of the claim, except that the plaintiff shall bear the burden of persuasion on whether the law (including a regulation) or government practice that is challenged by the claim substantially burdens the plaintiff's exercise of religion.

(c) FULL FAITH AND CREDIT- Adjudication of a claim of a violation of section 2 in a non-Federal forum shall not be entitled to full faith and credit in a Federal court unless the claimant had a full and fair adjudication of that claim in the non-Federal forum.

(d) ATTORNEYS' FEES- Section 722(b) of the Revised Statutes (42 U.S.C. 1988(b)) is amended—

(1) by inserting 'the Religious Land Use and Institutionalized Persons Act of 2000,' after 'Religious Freedom Restoration Act of 1993,'; and

(2) by striking the comma that follows a comma.

(e) PRISONERS- Nothing in this Act shall be construed to amend or repeal the Prison Litigation Reform Act of 1995 (including provisions of law amended by that Act).

(f) AUTHORITY OF UNITED STATES TO ENFORCE THIS ACT- The United States may bring an action for injunctive or declaratory relief to enforce compliance with this Act. Nothing in this subsection shall be construed to deny, impair, or otherwise affect any right or authority of the Attorney General, the United States, or any agency, officer, or employee of the United States, acting under any law other than this subsection, to institute or intervene in any proceeding.

(g) LIMITATION- If the only jurisdictional basis for applying a provision of this Act is a claim that a substantial burden by a government on religious exercise affects, or that removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, the provision shall not apply if the government demonstrates that all substantial burdens on, or the removal of all substantial burdens from, similar religious exercise throughout the Nation would not lead in the aggregate to a substantial effect on commerce with foreign nations, among the several States, or with Indian tribes.

SEC. 5. RULES OF CONSTRUCTION.

(a) RELIGIOUS BELIEF UNAFFECTED- Nothing in this Act shall be construed to authorize any government to burden any religious belief.

(b) RELIGIOUS EXERCISE NOT REGULATED- Nothing in this Act shall create any basis for restricting or burdening religious exercise or for claims against a religious organization including any religiously affiliated school or university, not acting under color of law.

(c) CLAIMS TO FUNDING UNAFFECTED- Nothing in this Act shall create or preclude a right of any religious organization to receive funding or other assistance from a government, or of any person to receive government funding for a religious activity, but this Act may require a government to incur expenses in its own operations to avoid imposing a substantial burden on religious exercise.

(d) OTHER AUTHORITY TO IMPOSE CONDITIONS ON FUNDING UNAFFECTED- Nothing in this Act shall--

(1) authorize a government to regulate or affect, directly or indirectly, the activities or policies of a person other than a government as a condition of receiving funding or other assistance; or

(2) restrict any authority that may exist under other law to so regulate or affect, except as provided in this Act.

(e) GOVERNMENTAL DISCRETION IN ALLEVIATING BURDENS ON RELIGIOUS EXERCISE- A government may avoid the preemptive force of any provision of this Act by changing the policy or practice that results in a substantial burden on religious exercise, by retaining the policy or practice and exempting the substantially burdened religious exercise, by providing exemptions from the policy or practice for applications that substantially burden religious exercise, or by any other means that eliminates the substantial burden.

(f) EFFECT ON OTHER LAW- With respect to a claim brought under this Act, proof that a substantial burden on a person's religious exercise affects, or removal of that burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, shall not establish any inference or presumption that Congress intends that any religious exercise is, or is not, subject to any law other than this Act.

(g) BROAD CONSTRUCTION- This Act shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this Act and the Constitution.

(h) NO PREEMPTION OR REPEAL- Nothing in this Act shall be construed to preempt State law, or repeal Federal law, that is equally as protective of religious exercise as, or more protective of religious exercise than, this Act.

(i) SEVERABILITY- If any provision of this Act or of an amendment made by this Act, or any application of such provision to any person or circumstance, is held to be unconstitutional, the remainder of this Act, the amendments made by this Act, and the application of the provision to any other person or circumstance shall not be affected.

SEC. 6. ESTABLISHMENT CLAUSE UNAFFECTED. Nothing in this Act shall be construed to affect, interpret, or in any way address that portion of the first amendment to the Constitution prohibiting laws respecting an 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 Act.

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.

#### SEC. 7. AMENDMENTS TO RELIGIOUS FREEDOM RESTORATION ACT.

(a) DEFINITIONS- Section 5 of the Religious Freedom Restoration Act of 1993 (42 U.S.C. 2000bb-2) is amended--

(1) in paragraph (1), by striking 'a State, or a subdivision of a State' and inserting 'or of a covered entity';

(2) in paragraph (2), by striking 'term' and all that follows through 'includes' and inserting 'term 'covered entity' means'; and

(3) in paragraph (4), by striking all after 'means' and inserting 'religious exercise, as defined in section 8 of the Religious Land Use and Institutionalized Persons Act of 2000.'

(b) CONFORMING AMENDMENT- Section 6(a) of the Religious Freedom Restoration Act of 1993 (42 U.S.C. 2000bb-3(a)) is amended by striking 'and State'.

#### SEC. 8. DEFINITIONS.

In this Act:

(1) CLAIMANT- The term 'claimant' means a person raising a claim or defense under this Act.

(2) DEMONSTRATES- The term 'demonstrates' means meets the burdens of going forward with the evidence and of persuasion.

(3) FREE EXERCISE CLAUSE- The term 'Free Exercise Clause' means that portion of the first amendment to the Constitution that proscribes laws prohibiting the free exercise of religion.

(4) GOVERNMENT- The term 'government'--

(A) means--

(i) a State, county, municipality, or other governmental entity created under the authority of a State;

(ii) any branch, department, agency, instrumentality, or official of an entity listed in clause (i); and

(iii) any other person acting under color of State law; and

(B) for the purposes of sections 4(b) and 5, includes the United States, a branch, department, agency, instrumentality, or official of the United States, and any other person acting under color of Federal law.

(5) LAND USE REGULATION- The term 'land use regulation' means a zoning or landmarking law, or the application of such a law, that limits or restricts a claimant's use or development of land (including a structure affixed to land), if the claimant has an ownership, leasehold, easement, servitude, or other property interest in the regulated land or a contract or option to acquire such an interest.

(6) PROGRAM OR ACTIVITY- The term 'program or activity' means all of the operations of any entity as described in

paragraph (1) or (2) of section 606 of the Civil Rights Act of 1964 (42 U.S.C. 2000d-4a).

#### (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.

**No one should rely solely on this brochure for the substance or citations in any lawsuit s/he may file on the basis of the RLUIPA or any other Amendment or law. MEM volunteers are not attorneys, and do not offer legal advice. The interpretations included here are from the DOJ and courts.**

From a Department of Justice (Civil Rights Division) website updated in 2008:

In passing this law, Congress found that the right to assemble for worship is at the very core of the free exercise of religion. Religious assemblies cannot function without a physical space adequate to their needs and consistent with their theological requirements. The right to build, buy, or rent such a space is an indispensable adjunct of the core First Amendment right to assemble for religious purposes. Religious assemblies, especially, new, small, or unfamiliar ones, may be illegally discriminated against on the face of zoning codes and also in the highly individualized and discretionary processes of land use regulation. Zoning codes and landmarking laws may illegally exclude religious assemblies in places where they permit theaters, meeting halls, and other places where large groups of people assemble for secular purposes. Or the zoning codes or landmarking laws may permit religious assemblies only with individualized permission from the zoning board or landmarking commission, and zoning boards or landmarking commission may use that authority in illegally discriminatory ways.

To address these concerns, RLUIPA prohibits zoning and landmarking laws that substantially burden the religious exercise of churches or other religious assemblies or institutions absent the least restrictive means of furthering a compelling governmental interest. This prohibition applies in any situation where: (i) the state or local government entity imposing

the substantial burden receives federal funding; (ii) the substantial burden affects, or removal of the substantial burden would affect, interstate commerce; or (iii) the substantial burden arises from the state or local government's formal or informal procedures for making individualized assessments of a property's uses.

In addition, RLUIPA prohibits zoning and landmarking laws that: (1) treat churches or other religious assemblies or institutions on less than equal terms with nonreligious institutions; (2) discriminate against any assemblies or institutions on the basis of religion or religious denomination; (3) totally exclude religious assemblies from a jurisdiction; or (4) unreasonably limit religious assemblies, institutions, or structures within a jurisdiction.

The Department of Justice can investigate alleged RLUIPA violations and bring a lawsuit to enforce the statute. The Department can obtain injunctive, but not monetary, relief. Individuals, houses of worship, and other religious institutions can also bring a lawsuit in federal or state court to enforce RLUIPA.

The following examples come from another Department of Justice (Civil Rights Division) web page (emphasis theirs):

\* *A prison makes no provision for kosher meals, despite the repeated requests of three Jewish prisoners who have identified a low-cost provider of such meals.*

\* *Catholic prisoners seek space in a prison chapel on Sunday and permission for a volunteer priest to come in to say Mass, but are told that they should attend the nondenominational Christian service run by the prison's Protestant chaplain.*

\* *A Native American prisoner has his medicine bag confiscated during intake to a prison, although other prisoners are permitted to keep rosary beads, crosses, and other physically equivalent small religious items.*

RLUIPA, discussed with regard to zoning and landmarking law above, also contains a provision protecting the religious exercise of inmates and other persons confined to certain institutions. RLUIPA requires that actions by officials which impose a substantial burden on the institutionalized person's religious exercise must be justified by a compelling government interest and must be the least restrictive means available to achieve that interest. The Division's Special Litigation Section ((202) 514-6255) is

authorized to bring RLUIPA cases involving institutionalized persons. The mailing address is: Special Litigation Section, U.S. Department of Justice, 950 Pennsylvania Ave., N.W., Washington, D.C. 20530. Further information is available at [www.usdoj.gov/crt/split](http://www.usdoj.gov/crt/split).

In *Cutter v. Wilkinson* (544 U.S. 709 (2005)), addressing the constitutionality of the RLUIPA, Supreme Court Justice Ruth Bader Ginsberg said, "It confers no privileged status on any particular religious sect, and singles out no bona fide faith for disadvantageous treatment," and added, "We do not read (the law) to elevate accommodation of religious observances over an institution's need to maintain order and safety."

Another significant aspect of the 2005 ruling in *Cutter v. Wilkinson* is that the part of RLUIPA dealing with inmates "qualifies as a permissible legislative accommodation of religion that is not barred by the Establishment Clause."

From *McAlister v. Livingston*, (Appeal from the United States District Court for the Southern District of Texas, Houston, No. H-05-3228), we have this discussion/analysis/interpretation:

"... RLUIPA requires that: No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution . . . even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person—

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

(2) is the least restrictive means of furthering that compelling governmental interest. 42 U.S.C. § 2000cc-1(a). "RLUIPA imposes a higher burden than does the First Amendment in that the statute requires prison regulators to put forth a stronger justification for regulations that impinge on the religious practices of prison inmates." *Mayfield*, 529 F.3d at 612. Yet balancing this higher burden is a legislative expectation that "courts entertaining complaints under [RLUIPA] would accord due deference to the experience and expertise of prison and jail administrators." *Cutter v. Wilkinson*, 544 U.S. 709, 717 (2005) (finding that RLUIPA does not conflict

with the Establishment Clause) (internal quotation marks and citation omitted).

The Supreme Court has indicated that RLUIPA must be applied "with particular sensitivity to security concerns," and a consideration of the need to maintain "good order, security and discipline." *Id.* at 722, 723.

The RLUIPA framework requires that a court ask two initial questions:

(1) is the burdened activity religious exercise? and (2) is that burden substantial?

*See Mayfield*, 529 F.3d at 613. "Religious exercise" is defined broadly as: "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A).

[*See also*] *Cutter*, 544 U.S. at 725, n.13. ("RLUIPA bars inquiry into whether a particular belief or practice is 'central' to a prisoner's religion [but] does not preclude inquiry into the sincerity of a prisoner's professed religiosity."); *Sossamon v. Lone Star State of Tex.*, 560 F.3d 316, 332 (5th Cir. 2009) ("The practice burdened need not be central to the adherent's belief system, but the adherent must have an honest belief that the practice is important to his free exercise of religion.")

RLUIPA does not define "substantial burden," but in *Adkins v. Kaspar*, we supplied the following definition:

[A] government action or regulation creates a "substantial burden" on a religious exercise if it truly pressures the adherent to significantly modify his religious behavior and significantly violate his religious beliefs. . . . [T]he effect of a government action or regulation is significant when it either (1) influences the adherent to act in a way that violates his religious beliefs, or (2) forces the adherent to choose between, on the one hand, enjoying some generally available, non-trivial benefit, and, on the other hand, following his religious beliefs. 393 F.3d at 570.

We emphasized in *Adkins* that this test does not "require that the religious exercise that is claimed to be thus burdened be central to the adherent's religious belief system."



Citing the RLUIPA doesn't guarantee that all religious requests will be granted. However, at least

some case law so far supports accommodation of minority religions.

Definitions and descriptions of Pagan/Heathen beliefs, rites, and religious items vary from state to state, and some are far from what practitioners on the outside would recognize. What accommodations are made for Pagan and Heathen inmates varies among states, institutions and custody levels. Determining what Pagan and Heathen inmates “need” for their practice is also difficult.

Commonly denied are books illustrating skyclad rituals and literature with instructions for making mead and/or athames. Tarot cards, Runes, and pentagrams are more and more frequently allowed. Some items are allowed for group use but not for individuals.

Some denials are based on misunderstanding of an item’s significance and/or use, and on concerned officials overlooking that the accessories of *any* religion can be used to influence and intimidate. Court rejections of such denials have often noted that banning minority religious items is seldom the “least restrictive” way to prevent a behavioral problem.

In *Enchantment Encumbered: the Study and Practice of Wicca in Restricted Environments*, MEM priestesses Carol Garr and Ashleen O’Gaea point out that “The concept of ‘required items’ tends to put Wiccans at a disadvantage, for Wicca does not ‘require’ things of its followers the way some other religions do.” Because prison religious programs are most often supervised by non-Pagans and Wicca is still not well known, there can be confusion about the use of various religious items, and what Wiccan and other Neo-Pagan and Heathen inmates should be allowed to have.

Security concerns and conclusions vary from state to state, and questions about the “least restrictive” way to maintain safety and security are answered differently. The RLUIPA (and other laws) will both raise more questions for courts to answer *and* help resolve those issues.

Something else that will help is better and wider understanding of all minority religions. But the subject of minority religions is itself under challenge, although setbacks in this arena don’t preclude Wiccans, other Neo-Pagans, and Heathens from achieving small victories in various local, county, state, and federal institutions.

While we wait for more progress to be made, the RLUIPA may be of help to some inmates in facilities that accept federal funds.

With the right app on your  
Smartphone, use this QR code to connect  
with our website.



### Mother Earth Ministries-ATC

Mother Earth Ministries’ mission is to provide accurate information about Wicca and other Neo-Pagan religions to interested inmates and prison staff, and to facilitate Pagan prisoners’ study and practice of their religions.

We do this by leading ritual in some Tucson units of Arizona’s state prisons (and by request at some federal facilities in Tucson); and by offering brochures and by-mail consultation and counseling to inmates all over the country.

Our book, *Enchantment Encumbered: the Study and Practice of Wicca in Restricted Environments*, is available through Amazon.com, from the publisher through our website (MotherEarthMinistries.org), and by mail for \$20 (including postage) from Mother Earth Ministries, Post Office Box 35906, Tucson, AZ, 85740-5906. MEM accepts checks, money orders, and stamps in payment; orders will not ship until checks/MOs clear.

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Our general and specific advice to inmates who are unsatisfied with the religious programs at their facility is to “kite the chaplain,” and to follow grievance procedures to the letter, and, if necessary and possible, to involve their own attorneys.

We offer this brochure for information only, and not as an endorsement of any individual’s or group’s complaint, contention, grievance or lawsuit.



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# Mother Earth Ministries offers the text and legal commentary on the RLUIPA

## the Religious Land Use and Institutionalized Persons Act

This brochure presents the full text of the RLUIPA and some commentary from various sources.

Mother Earth Ministries is *not* an advocacy group and *cannot* do research, offer legal advice, or assist inmates with the preparation of complaints, grievances, or lawsuits, but we are often asked for procedural advice. Our answer is always to “kite the chaplain,” to follow grievance procedures to the letter, and when it’s appropriate and possible, to involve legal counsel.

The Religious Land Use and Institutionalized Persons Act of 2000 is still subject to some challenges, but the Supreme Court has ruled that the RLUIPA is constitutional.

If you have questions about how the RLUIPA applies to your grievance or case, please contact your lawyer or seek legal counsel.

MEM volunteers cannot suggest anything beyond kiting the chaplain, filing a formal grievance following the procedures at your facility, and contacting the ACLU or other advocacy groups – and we regret that we cannot help inmates do any of these things.