

SIX FACT PATTERNS OF SUBSTANTIAL BURDEN IN RLUIPA: LESSONS FOR POTENTIAL LITIGANTS

Karla L. Chaffee and Dwight H. Merriam***

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INTRODUCTION

The First Amendment plainly reads, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof”¹ In 2000, Congress passed the Religious Land Use and Institutionalized Persons Act (RLUIPA),² establishing a general rule that “[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”³ To RLUIPA’s supporters, the act is an important step toward protecting America’s “robust history of religious tolerance” and the promise of the First Amendment’s religious freedom clause;⁴ RLUIPA simply levels the playing field between religious and secular land users.⁵ To others, RLUIPA unjustly favors religious institutions over the valid interests of neighboring, secular, land users.⁶ Those who take this view often question both the need

* Karla L. Chaffee is a student at Vermont Law School and expects to graduate with a JD and a Masters of Studies in Environmental Law in May 2009.

** Dwight Merriam is a partner at Robinson & Cole LLP in Hartford, Connecticut. His practice includes representation in RLUIPA cases.

¹ U.S. CONST. art. I.

² Religious Freedom and Restoration Act of 2000, 42 U.S.C. §§ 2000cc–2000cc-5 (2006); 42 U.S.C. § 2000cc (2006).

³ § 2000cc(a)(1).

⁴ Anti-Defamation League, *ADL Supports Federal Statute in Religious-Freedom Land Use Cases* (June 22, 2005), http://www.adl.org/religious_freedom/land_use_case.asp (last visited Feb. 16, 2009).

⁵ For example, local governments may feel pressure to exclude churches from downtown or commercial areas due to loss of tax revenue and retail-generating traffic. Roman P. Storzer & Anthony R. Picarello, Jr., *The Religious Land Use And Institutionalized Persons Act of 2000: A Constitutional Response to Unconstitutional Zoning Practices*, 9 GEO. MASON L. REV. 929, 930 (2001). There is also pressure to exclude religious institutions from residential areas due to concerns over traffic and noise. *Id.* Some believe this pressure causes religious institutions to be “routinely burdened by overzealous, religiously insensitive, or actively hostile zoning and landmarking authorities.” *Id.*

⁶ See Marci Hamilton, *When Churches Seek to Host Tent Cities of Homeless Persons, Can Localities Deny a Permit? The Controversy in Washington State, and What State Legislators Should do About It*, FINDLAW, Mar. 08, 2007 [hereinafter *Tent Cities*], <http://writ.news.findlaw.com/hamilton/20070308.html> (illustrating that “the Religious Land Use and Institutionalized Persons Act ensures that in such litigation, the valid interests of neighborhood residents are given short shrift.”); see also Marci A. Hamilton, *Federalism and the Public Good: The True Story Behind the Religious Land Use and Institutionalized Persons Act*, 78 IND. L.J. 311, 354-56 (2003) [hereinafter *Federalism*] (discussing

for⁷ and constitutionality of RLUIPA.⁸

Part I of this article briefly addresses the controversy surrounding RLUIPA and how the Act has modified the legal landscape for both religious institutions and local governments. Part II provides an overview of the Supreme Court jurisprudence and precipitant political reaction that led to RLUIPA's passage. Next, Part III explains RLUIPA's basic framework. Part IV addresses common themes and factual trends apparent in existing RLUIPA case law. Finally, Part V provides recommendations for local governments, religious institutions, and Congress.

I. RLUIPA'S IMPACT & CONTROVERSY

No matter how one perceives the need for RLUIPA, it is unquestionable that RLUIPA has changed the legal landscape for local governments and religious institutions alike. According to

how RLUIPA violates principles of federalism); Richard C. Schragger, *The Role of the Local in the Doctrine and Discourse of Religious Liberty*, 117 HARV. L. REV. 1810, 1839 (2004) (explaining that “[t]o its critics, RLUIPA is a dramatic interference with local power to enforce generally applicable zoning rules and an unnecessarily broad exemption that allows religious organizations (and no others) to flout a community’s reasonable land-use concerns.” (internal citation omitted)).

⁷ Schragger, *supra* note 6, at 1815 (questioning the need for RLUIPA and the proposition that “local political institutions are often hostile to religious minorities”); Diane K. Hook, Comment, *The Religious Land Use and Institutionalized Persons Act of 2000: Congress’ New Twist on “Speak Softly and Carry a Big Stick,”* 34 URB. LAW. 829, 851 (2002) (“[I]t is difficult to accept that there is a pervasive and widespread discrimination against religious entities After all, it is difficult to reside in a community without being within a short driving distance of a community church or mega-church that occupies several acres of land.”).

⁸ See, e.g., Julie M. Osborn, *RLUIPA’s Land Use Provisions: Congress’ Unconstitutional Response to City of Boerne*, 28 ENVIRONS ENVTL. L. & POL’Y J. 155, 156–57 (2004) (stating that, with RLUIPA, Congress did not provide a congruent and proportional remedy for intentional discrimination in land use decisions); Ada-Marie Walsh, *Religious Land Use and Institutionalized Persons Act of 2000: Unconstitutional and Unnecessary*, 10 WM. & MARY BILL RTS. J. 189, 201 (2001) (arguing RLUIPA is unconstitutional and unnecessary); Stanton K. Oishi, Comment, *RFRA II: The Failure of the Religious Land Use and Institutionalized Persons Act of 2000 Under Section 5 of the Fourteenth Amendment*, 25 U. HAW. L. REV. 131, 152-55 (2002) (“This comment argues that RLUIPA, although narrower in scope than RFRA, similarly fails under the congruence and proportionality analysis set forth in *City of Boerne*.”). These arguments notwithstanding, the provision of RLUIPA dealing with institutionalized persons was upheld as constitutional in *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005) (“On its face, the Act qualifies as a permissible legislative accommodation of religion that is not barred by the Establishment Clause.”).

one commentator, with RLUIPA, “Congress has shifted the balance of power between individuals and groups who claim religious reasons for the use of their real property and the communities in which they are embedded, setting the course for an unprecedented clash of religious values and community interests.”⁹ In a collection of articles published the year following RLUIPA’s passage, another commentator predicted that RLUIPA “will increase the likelihood that disputes regarding religious land uses will end up in court.”¹⁰ The variety of RLUIPA cases discussed in this article indicates that these predictions are at least anecdotally true. RLUIPA cases are fact intensive, their outcomes are hard to predict, and the standards applied by courts in interpreting RLUIPA vary from jurisdiction to jurisdiction.

RLUIPA claims can also be expensive for local governments. For example, in 2008 the Village of Mamaroneck, New York, paid Westchester Day School, a private Jewish School, \$4.75 million to settle a RLUIPA claim.¹¹ The \$4.75 million price seemed like a bargain in light of the fact that the school could have pursued an additional \$17.25 million in damages for attorneys’ fees, increased construction costs, and lost funding.¹² The opportunity for such large settlements and the chance to recover attorneys’ fees¹³ have caused some to argue that RLUIPA “gives religious land owners an almost irresistible incentive to assert claims of religious discrimination if they face opposition to their use or proposal”¹⁴

Despite the possible financial consequences for local

⁹ Jeffrey H. Goldfien, *Thou Shalt Love Thy Neighbor: RLUIPA and the Mediation of Religious Land Use Disputes*, 2006 J. DISP. RESOL. 435 (2006). Goldfien also concludes that “RLUIPA has the potential to bring divisive religious disputes to every community in America.” *Id.* at 437.

¹⁰ Amanda Hiller, *Zoning of Religious Land Uses: The Impact of the Religious Land Use and Institutionalized Persons Act of 2000*, in TRENDS IN LAND USE LAW FROM A TO Z: ADULT USES TO ZONING 97, 113 (Patricia E. Salkin ed., 2001).

¹¹ Posting of Stephanie Harrington to <http://harringtononline.blogspot.com/2008/01/mamaroneck-village-settles-day-school.html> (Jan. 14, 2008, 17:32 EST).

¹² *Id.* The settlement was in addition to over \$900,000 in the village’s own legal fees. *Id.*

¹³ 42 U.S.C. § 1988(b) (2000).

¹⁴ Goldfien, *supra* note 9, at 436. See also Patricia E. Salkin & Amy Lavine, *The Genesis of RLUIPA and Federalism: Evaluating the Creation of a Federal Statutory Right and its Impact on Local Government*, 40 URB. LAW. 195, 251 (2008) (quoting Goldfien); *Tent Cities*, *supra* note 6 (“RLUIPA unfairly slants the playing field in favor of religious land users, including by allowing attorneys’ fees to those who prevail in defending even unreasonable ‘religious’ uses of land.”).

governments, some contend that religious discrimination in the zoning context is rampant, and that RLUIPA is a needed remedy.¹⁵ One commentator found that “[a]ccording to zoning boards, mayors, and city planners across the nation, churches may belong neither on Main Street nor in residential neighborhoods.”¹⁶ This assessment may describe the experiences of some religious institutions. For example, attorney Daniel Dalton recently wrote about his experience representing Lighthouse Community Church of God in a RLUIPA claim against the City of Southfield, Michigan.¹⁷ Although Lighthouse attempted to meet all of the city’s requests over a multi-year application process, the city ultimately refused Lighthouse’s request to occupy a two story building in a district where churches were permissible uses.¹⁸ City officials initially supported the application, but that support quickly evaporated after a developer proposed to use Lighthouse’s property as part of a \$30 million gated residential community.¹⁹ Mr. Dalton reflected on the ongoing saga: “At every turn, city officials have continually erected insurmountable roadblocks that prevent the church from using its building for worship and congregational functions.”²⁰

At the other end of the spectrum, however, are municipal leaders who sincerely wish to guide the growth in their communities in a way that preserves land and a lifestyle that residents cherish. Sometimes, a religious institution’s land use request cannot be reconciled with these goals. As one city planner described the reasons for denying the Rocky Mountain Christian Church’s request to expand its current facilities in Boulder, Colorado:

People are always trying to develop their properties to the limits of the law and sometimes beyond, [but the worst suburban sprawl is the consequence of] lots of little decisions that have this cumulative effect. We’re trying to resist this death by a thousand cuts, and preserve the land where we can.²¹

¹⁵ See, e.g., Ashira Pelman Ostrow, *Judicial Review of Local Land Use Decisions: Lessons From RLUIPA*, 31 HARV. J.L. & PUB. POL’Y 717, 753–54 (2008) (expressing that “RLUIPA was enacted to protect religious land users from religious discrimination in the highly discretionary zoning process.”).

¹⁶ Storzer & Picarello, *supra* note 5, at 929.

¹⁷ Daniel Dalton, *The Lighthouse Story*, PLAN. & ENVTL. L., Apr. 2007, at 3.

¹⁸ *Id.*

¹⁹ *Id.* at 4.

²⁰ *Id.* at 5.

²¹ Diana B. Henriques, *Religion Trumps Regulation as Legal Exemptions Grow*, N.Y. TIMES, Oct. 8, 2006, at 1. When Rocky Mountain Christian Church (RMCC) applied for the permit denied by Boulder County, it was operating in an

Although this article provides a brief discussion of the legislative history behind RLUIPA, it does not assess whether religious discrimination in the zoning context is prevalent or consequential. The need for RLUIPA has been discussed by other commentators.²² Instead, this article will focus on lessons learned from RLUIPA litigation over the past eight years.

II. THE ROAD LEADING CONGRESS TO RLUIPA

Before evaluating the text of RLUIPA, one should be familiar with both the political climate under which RLUIPA was passed and the evolution of the Supreme Court's free exercise jurisprudence over the last half century. In the landmark 1963 case, *Sherbert v. Verner*, the Supreme Court held that strict scrutiny should apply to judicial review of actions burdening religious freedom.²³ In this case, the plaintiff, a member of the Seventh-day Adventist Church, was fired and then denied unemployment benefits because she refused to work on Saturday, the day of her Sabbath.²⁴ The Court held that disqualification from unemployment benefits clearly burdened the free exercise of her religion.²⁵ The disqualification presented an undue burden because it forced the plaintiff "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."²⁶

Almost ten years after *Sherbert*, the Court revisited the free exercise standard in *Wisconsin v. Yoder*.²⁷ Here, the Court

115,200 square foot facility. Graham S. Billingsley & Dwight H. Merriam, *Successful Planning and Regulation in the Shadow of RLUIPA*, PLAN. & ENVTL. L., Apr. 2007, at 7. RMCC's proposed addition would have as much additional floor space as found in a Home Depot store. *Id.*

²² See, e.g., *supra* notes 4-8.

²³ *Sherbert v. Verner*, 374 U.S. 398, 406 (1963) (considering whether a compelling state interest justifies an infringement on plaintiff's free exercise rights). Some view *Sherbert* as a departure from formerly dominant free exercise jurisprudence. MARCI A. HAMILTON, GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW 216 (2005) [hereinafter GOD VS. GAVEL].

²⁴ *Sherbert*, 374 U.S. at 399.

²⁵ *Id.* at 403.

²⁶ *Id.* at 404.

²⁷ *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972). Erwin Chemerinsky notes that between 1960 and 1990, other than in *Yoder* and unemployment compensation cases, the Court never found a violation of the free exercise clause. ERWIN CHEMEKINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1254 (3d ed. 2006). The Court instead declined to allow an exemption to law based on the free exercise clause. *Id.* at 1253.

considered a compulsory education law as applied to Amish children after eighth grade; the children's parents claimed that it violated their Amish religious beliefs and practices.²⁸ The Court stated that "[a] regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion."²⁹ According to the Court, the burden imposed by the compulsory attendance law was "not only severe, but inescapable, for the Wisconsin law affirmatively compels them . . . to perform acts undeniably at odds with fundamental tenets of their religious beliefs."³⁰

Several subsequent cases in the unemployment context upheld the *Sherbert* and *Yoder* standard. In *Thomas v. Review Board of Indiana Employment Security Division*, the Court held that when there is "substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists."³¹ Next, in *Hobbie v. Unemployment Appeals Commission*, the Court applied the same strict scrutiny test.³² The Court found that the State had imposed a burden on religious exercise because, as in *Sherbert* and *Thomas*, "the employee was forced to choose between fidelity to religious belief and continued employment; the forfeiture of unemployment benefits for choosing the former over the latter brings unlawful coercion to bear on the employee's choice."³³

Then, in 1990, the Court decided *Employment Division v. Smith*,³⁴ which some believe "expressly changed the law of the free exercise clause."³⁵ In this case, two members of a Native American Church contested the state's refusal to grant them a religious exemption from laws prohibiting the use of peyote,

²⁸ *Yoder*, 406 U.S. at 207-09.

²⁹ *Id.* at 220 (citing *Sherbert*, 374 U.S. at 398).

³⁰ *Id.* at 218.

³¹ *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 718 (1981).

³² *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 141 (1987).

³³ *Id.* at 144. *See also* *Frazee v. Ill. Dep't of Employment Sec.*, 489 U.S. 829, 834 (1989) (finding a violation of the First Amendment when plaintiff was denied unemployment benefits after refusing to work on Sunday, even though plaintiff was not a member of a particular Christian sect).

³⁴ *Employment Div., Dep't of Human Res. v. Smith*, 494 U.S. 872 (1990).

³⁵ CHEMERINSKY, *supra* note 27, at 1258. *But see* GOD VS. GAVEL, *supra* note 23, at 214 (viewing *Smith* as a return to pre-1963 dominant jurisprudence, based in principles of republicanism, which treats religious beliefs as fully protected under the Constitution but subjects religious conduct to the rule of law).

which is both a controlled substance and a sacrament of the Church.³⁶ Limiting the *Sherbert* line of cases to the unemployment context where eligibility rules often require an individualized governmental assessment before the grant or denial of benefits,³⁷ the Court held 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 on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).’”³⁸ Under the *Smith* standard, “merely the incidental effect of a generally applicable and otherwise valid provision” does not violate the First Amendment.³⁹

In her concurrence, Justice O’Connor disagreed with this standard, stating that the decision disregarded the Court’s “consistent application of free exercise doctrine to cases involving generally applicable regulations that burden religious conduct.”⁴⁰ Vying for the retention of the strict scrutiny test, Justice O’Connor reasoned, “[i]f the First Amendment is to have any vitality, it ought not be construed to cover only the extreme and hypothetical situation in which a State directly targets a religious practice.”⁴¹ The dissent, written by Justice Blackmun, also argued that state statutes burdening religious freedom should be subject to strict scrutiny.⁴²

The majority’s holding in *Smith* “was not well accepted.”⁴³ Congress expressly addressed the Supreme Court’s *Smith* decision by enacting the Religious Freedom Restoration Act (RFRA),⁴⁴ which was intended to change the standard applied to all future free exercise cases.⁴⁵ Congress intended to restore the

³⁶ *Smith*, 494 U.S. at 874.

³⁷ *Id.* at 884. The majority also explained that its “decisions in the unemployment cases stand for the proposition that where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of ‘religious hardship’ without compelling reason.” *Id.*

³⁸ *Id.* at 879 (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982)).

³⁹ *Id.* at 878.

⁴⁰ *Id.* at 892 (O’Connor, J., concurring).

⁴¹ *Id.* at 894.

⁴² *Smith*, 494 U.S. at 908-09 (Blackmun, J., dissenting).

⁴³ Salkin & Lavine, *supra* note 14, at 203. See also Hiller, *supra* note 10, at 101 (quoting one commentator who stated that the *Smith* decision was “a constitutional bombshell that all but destroyed the free exercise clause.”).

⁴⁴ Religious Freedom and Restoration Act of 1993, 42 U.S.C. §§ 2000bb-2000bb-4 (2000).

⁴⁵ § 2000bb(a). Congress found that

(4) [I]n *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

compelling interest test from *Sherbert* and *Yoder* “and to guarantee its application in all cases where free exercise of religion is substantially burdened[.]”⁴⁶ RFRA, however, was short lived. In 1997 the Court decided *City of Boerne v. Flores*, holding that RFRA was an unconstitutional attempt to exercise Congress’s remedial power under § 5 of the Fourteenth Amendment.⁴⁷ Since RFRA applied to all free exercise claims, the Court found that “RFRA is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior.”⁴⁸ The Court was primarily concerned with the broad brush applied by RFRA: the law would cause “intrusion at every level of government,” prohibit lawful government action, and lacked a termination date.⁴⁹ Finding RFRA lacked any proportionality or congruence to Congress’ objective, the Court held RFRA exceeded Congress’s authority under the Constitution.⁵⁰

After the Court’s decision in *Boerne*, Congress’s response was, once again, “prompt.”⁵¹ In fact, Congress held hearings on how to handle *Boerne* just three weeks after the case was decided.⁵² According to the Department of Justice, Congress gathered “massive evidence” in nine hearings over three years that religious institutions faced “widespread discrimination . . . by state and local officials in land-use decisions.”⁵³ These hearings resulted in the Religious Liberty Protection Act of 1999 (RLPA), which applied to all forms of free exercise.⁵⁴ Congress hoped to avoid the constitutional infirmity of RFRA, and based its authority on the Commerce and Spending Clause as well as § 5 of

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.

⁴⁶ § 2000bb(b)(1).

⁴⁷ *City of Boerne v. Flores*, 521 U.S. 507, 532 (1997).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 536.

⁵¹ Hiller, *supra* note 10, at 103.

⁵² Daniel P. Lenington, *Thou Shalt Not Zone: The Overbroad Applications and Troubling Implications of RLUIPA’s Land Use Provisions*, 29 SEATTLE U. L. REV. 805, 811 (2006).

⁵³ *Protection of Religious Land Uses*, U.S. DEP’T OF JUSTICE (The First Freedom Project, Washington, D.C.), Feb. 2007, available at http://www.firstfreedom.gov/ff_landuse.html. *But see infra* notes 61–62.

⁵⁴ Hiller, *supra* note 10, at 103. *See also* 145 CONG. REC. H5580-02 (1999) (debating the adoption of the Religious Liberty Protection Act of 1999).

the Fourteenth Amendment.⁵⁵ RLPA, however, was never considered by the Senate due to fears that the Act could undermine local antidiscrimination measures.⁵⁶

In the following year, RLUIPA was enacted in its final form. RLUIPA is limited to the protection of religious land uses⁵⁷ and the free exercise of institutionalized persons.⁵⁸ These categories were chosen based on the evidence presented at the RLPA hearings.⁵⁹ There is substantial disagreement, however, over the adequacy of the evidence gathered and the process followed at the Congressional hearings. Those who support the Bill believe Congress had before it ample evidence to show that religious institutions are “particularly susceptible to religious discrimination”⁶⁰ Others point out that the evidence of religious discrimination in the land use context was mostly anecdotal, with compelling and emotional stories of intentional discrimination.⁶¹ Some also question the adequacy of the Congressional debate over the bill.⁶²

⁵⁵ Religious Liberty Protection Act of 1999, H.R. 1691, 106th Cong. § 2(a) (1999).

(a) General Rule. -Except as provided in subsection (b), a government shall not substantially burden a person's religious exercise- (1) in a program or activity, operated by a government, that receives Federal financial assistance; or (2) in any case in which the substantial burden on the person's religious exercise affects, or in which a removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes

⁵⁶ Hiller, *supra* note 10, at 103.

⁵⁷ 42 U.S.C. § 2000cc (2000).

⁵⁸ § 2000cc-1.

⁵⁹ Hiller, *supra* note 10, at 103-04.

⁶⁰ Ostrow, *supra* note 15, at 741.

⁶¹ Marci Hamilton, who testified at the RLPA hearings on constitutional issues, has documented and discussed the procedure followed at the hearings. See GOD VS. GAVEL, *supra* note 23, at 87 (discussing Congress' failure to investigate all of the adverse consequences of RLUIPA); *Federalism*, *supra* note 6, at 331, 334 (noting a lack of testimony representing local government interests at the RLPA hearings); Lenington, *supra* note 52, at 811; Salkin & Lavine, *supra* note 14, at 257 (“[C]ritics have challenged the legitimacy of the data Congress relied on, suggesting it was merely anecdotal.”).

⁶² See Marci Hamilton, *The Circus That is RLUIPA: How the Land-Use Law that Favors Religious Landowners is Introducing Chaos into the Local Land Use Process*, FINDLAW, Nov. 30, 2006, <http://writ.news.findlaw.com/hamilton/0061130.html> (last visited Mar. 31, 2009) (noting that President Clinton signed RLUIPA although “only a handful” of Congressional members were present for the vote).

III. RLUIPA: The Basic Framework

The first section of RLUIPA sets out the general rule that “[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”⁶³ unless the burden “is in furtherance of a compelling governmental interest; and is the least restrictive means of furthering that compelling governmental interest.”⁶⁴ Through this provision, Congress once again restored the Court’s pre-*Smith* compelling interest jurisprudence.⁶⁵ RLUIPA also provides three “jurisdictional hooks:”⁶⁶ the Spending Clause, the Commerce Clause, and Congress’s enforcement power under the Fourteenth Amendment.⁶⁷ Even so, it remains somewhat uncertain whether RLUIPA’s land use provision is a constitutional exercise of Congressional authority because the Supreme Court has not examined RLUIPA in this context. Although the majority of lower federal courts have upheld the provision, a few commentators continue to question its constitutionality.⁶⁸

RLUIPA’s general rule contains three key phrases: “No government shall impose or implement a *land use regulation* in a manner that imposes a *substantial burden* on the *religious*

⁶³ 42 U.S.C. § 2000cc(a)(1) (2000). RLUIPA also contains a “discrimination and exclusion” provision that prohibits governments from treating religious land uses “on less than equal terms with a nonreligious assembly or institution,” imposing land use regulations that discriminate against religious institutions, or imposing a regulation that totally excludes or “unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.” § 2000cc (b).

⁶⁴ § 2000cc(a)(1)(A)-(B).

⁶⁵ See, e.g., 146 CONG. REC. S7774-76 (2000) (joint statement of Sens. Hatch and Kennedy):

The Act does not include a definition of the term ‘substantial burden’ because it is not the intent of this Act to create a new standard for the definition of ‘substantial burden’ on religious exercise. Instead, that term as used in the Act should be interpreted by reference to Supreme Court jurisprudence. Nothing in this Act, including the requirement in Section 5(g) that its terms be broadly construed, is intended to change that principle. The term ‘substantial burden’ as used in this Act is not intended to be given any broader interpretation than the Supreme Court’s articulation of the concept of substantial burden or religious exercise.

⁶⁶ Salkin & Lavine, *supra* note 14, at 210.

⁶⁷ 42 U.S.C. § 2000cc(a)(2) (2000). See also *Guru Nanak Sikh Soc’y of Yuba City v. County of Sutter*, 456 F.3d 978, 986 (9th Cir. 2006) (explaining RLUIPA is implemented only if one of three conditions is met: implication of the spending clause or the commerce clause, or when the government makes an individualized assessment in the implementation of a land use regulation).

⁶⁸ Salkin & Lavine, *supra* note 14, at 209-10.

exercise of a person”⁶⁹ A “land use regulation” is defined broadly, including any law or application thereof that limits or restricts the use or development of a claimant’s land.⁷⁰ The definition of religious exercise is similarly broad, including:

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

. . .

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.⁷¹

Conspicuously absent from the statute is a definition for a “substantial burden.”⁷² RLUIPA claims are fact driven, especially regarding the question of substantial burden, and courts view the facts of a particular case consistent with how they choose to define substantial burden. After more than eight years of litigation under RLUIPA, a broadly applied definition of a substantial burden has not emerged, and since the Supreme Court has recently denied certiorari in multiple RLUIPA land use cases,⁷³ a dominant definition is unlikely to emerge anytime soon.

It is helpful to consider how different courts have defined substantial burden in terms of a sliding scale. At one end of the scale, with the highest threshold, rests a case decided by the Seventh Circuit, *City League of Urban Believers v. Chicago (CLUB)* in which the court stated:

[I]n the context of RLUIPA’s broad definition of religious exercise, a land-use regulation that imposes a substantial burden on

⁶⁹ 42 U.S.C. § 2000cc(a)(1) (2000) (emphasis added).

⁷⁰ § 2000cc-5(5) (2000):

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.

⁷¹ § 2000cc-5(7) (2000).

⁷² 146 CONG. REC. S7774-76 (2000) (joint statement of Sens. Hatch and Kennedy).

⁷³ See, e.g., *Vision Church v. Vill. of Long Grove*, 468 F.3d 975 (7th Cir. 2007), *en banc reh’g denied, cert. denied*, 128 S.Ct. 77 (2007); *Petra Presbyterian Church v. Vill. of Northbrook*, 489 F.3d 846 (7th Cir. 2007), *cert. denied*, 128 S.Ct. 914 (2008); *Living Water Church of God v. Charter Twp. of Meridian*, 258 F. App’x 729 (6th Cir. 2007), *cert. denied*, 128 S.Ct. 2903 (2008); *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 100 F. App’x 70 (3d Cir. 2004) (unpublished), *cert. denied*, 543 U.S. 1120 (2005); *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752 (7th Cir. 2003), *cert. denied*, 542 U.S. 1096 (2004).

religious exercise is one that necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise—including the use of real property for the purpose thereof within the regulated jurisdiction generally—*effectively impracticable*.⁷⁴

Next in line, we have cases that discuss “substantial burden” as pressure that directly “coerces” individuals to modify their religious belief. In *Midrash Sephardi, Inc. v. Surfside*, the Eleventh Circuit held that “a ‘substantial burden’ must place more than an inconvenience on religious exercise; a ‘substantial burden’ is akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly.”⁷⁵ The Second Circuit has adopted the *Midrash* test as well,⁷⁶ and in an unpublished decision, the Sixth Circuit adopted a similar standard.⁷⁷

Several courts rest in the middle of the scale. The Ninth Circuit is the only circuit to adopt a dictionary definition of a “substantial burden.” Looking to the plain language of the statute, the court held that a substantial burden must be “‘oppressive’ to a ‘significantly great’ extent . . . and must impose a significantly great restriction or onus.”⁷⁸ The Third and Fifth

⁷⁴ *CLUB*, 342 F.3d at 761 (emphasis added). Some courts have indicated that *CLUB*’s “effectively impracticable” standard is superfluous because it is coextensive with § 2000cc(b)(3) which prohibits unreasonable limits or total exclusion of religious exercise from a jurisdiction. *Cambodian Buddhist Soc’y of Conn., Inc. v. Planning and Zoning Comm’n of Newtown*, 941 A.2d 868, 887 (Conn. 2008).

⁷⁵ *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004).

⁷⁶ *Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F.3d 338, 349 (2nd Cir. 2007) (“[W]hen there has been a denial of a religious institution’s building application, courts appropriately speak of government action that directly *coerces* the religious institution to change its behavior, rather than government action that forces the religious entity to choose between religious precepts and government benefits.”).

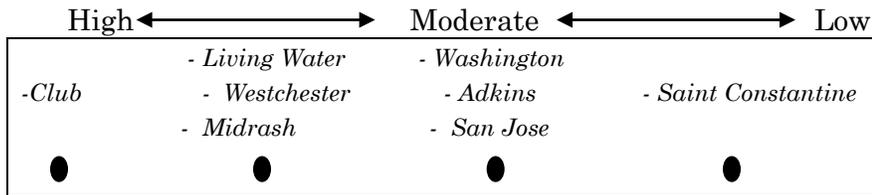
⁷⁷ *Living Water*, 258 F. App’x at 737 (“[T]hough the government action may make religious exercise more expensive or difficult, does the government action place substantial pressure on a religious institution to violate its religious beliefs or effectively bar a religious institution from using its property in the exercise of its religion?”). *See also* Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. City of West Linn, 111 P.3d 1123, 1130 (Or. 2005) (“[W]e conclude that a government regulation imposes a substantial burden on religious exercise only if it ‘pressures’ or ‘forces’ a choice between following religious precepts and forfeiting certain benefits, on the one hand, and abandoning one or more of those precepts in order to obtain the benefits, on the other.”).

⁷⁸ *See* *San Jose Christian Coll. v. City of Morgan Hill*, 360 F. 3d 1024, 1034 (9th Cir. 2004), *and* *Guru Nanak Sikh Soc’y of Yuba City v. County of Sutter*, 456 F.3d 978, 988-89 (9th Cir. 2006) (relying on Merriam-Webster’s Collegiate Dictionary to define “substantial burden”).

Circuits have addressed RLUIPA’s substantial burden language in the prison context and share identical standards, speaking of “substantial pressure” that alters religiously motivated behavior.⁷⁹

Finally, at the far end of the scale, lies a second Seventh Circuit opinion. In *Saints Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin*, the court stated that “delay, uncertainty, and expense” may impose a substantial burden, and that even if a burden is not “insuperable,” it is not necessarily “insubstantial.”⁸⁰ Although the *Saints Constantine & Helen* and *CLUB* standards appear a world apart, the Seventh Circuit did not directly address the apparent disparity in two subsequent cases.⁸¹

Table 1: Substantial Burden Threshold



⁷⁹ *Adkins v. Kaspar*, 393 F.3d 559, 569 (5th Cir. 2004); *Washington v. Klem*, 497 F.3d 272, 280 n.7 (3d Cir. 2007) (adopting the *Adkins* definition of “substantial burden”). See also *Lovelace v. Lee*, 472 F.3d 174, 187 (4th Cir. 2006) (following “the Supreme Court’s guidance in the Free Exercise Clause context and conclud[ing] that, for RLUIPA purposes, a substantial burden on religious exercise occurs when a state or local government, through act or omission, ‘put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs.’”) (quoting *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 718 (1981)); *Spratt v. R.I. Dept. of Corr.*, 482 F.3d 33, 38 (1st Cir. 2007) (considering, in dicta, that the definition of substantial burden from *Thomas* may apply to RLUIPA).

⁸⁰ *Saints Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 895, 901 (7th Cir. 2005).

⁸¹ *Petra Presbyterian Church v. Vill. of Northbrook*, 489 F.3d 846 (7th Cir. 2007); *Vision Church, United Methodist v. Vill. of Long Grove*, 468 F.3d 975 (7th Cir. 2007). Subsequent district court cases in the Seventh Circuit appear to apply a relatively high bar in the substantial burden analysis. See, e.g., *Calvary Temple Assembly of God v. City of Marinette*, No. 6-C-1148, 2008 WL 2837774, at *9 (E.D. Wisc. July 21, 2008) (Stating:

The fact that Calvary may incur additional expense to sell its Parkdale Drive Property so that it can purchase a property in a district that allows professional offices does not amount to a substantial burden on religious exercise. Accordingly, Calvary has failed to show that any financial burden resulting from its inability to use its Parkdale Drive Property as a professional counseling office imposed a substantial burden on its religious exercise under RLUIPA.).

-effectively	-coercion	-oppressive	-delay, uncertainty
- impracticable		-substantial pressure	& expense

IV. COMMON THEMES AND FACTUAL TRENDS: FORECASTING FOR THE FUTURE

Since the courts have failed to reach consensus on the definition of a “substantial burden,” it is not surprising that courts differ on the factors considered (and the weight accorded to each) when determining whether a “substantial burden” exists. Substantial burden determinations are fact-driven.⁸² For this reason, the outcomes of RLUIPA land use cases remain difficult to predict, which contributes to the controversy discussed in Part I of this article. Holdings in RLUIPA cases may be unpredictable; however, an examination of the factual circumstances that seem to have influenced various courts over the last eight years is not futile. A close evaluation of the factual trends emerging in RLUIPA cases may help reduce uncertainty and the potential for local government and religious land use clashes in the future.

⁸² *Adkins*, 393 F.3d at 571. The fact-specific nature of the substantial burden determination is not limited to the land use context. In *Adkins*, the Fifth Circuit held there was no substantial burden when members of the Yahweh Evangelical Assembly could not gather to worship together in prison on Sabbath and holy days without the presence of a qualified volunteer. On almost identical facts, in *Mayfield v. Texas Dep’t of Criminal Justice*, the court applied the same definition of substantial burden but refused to grant summary judgment in favor of the prison. The cases differed because in *Mayfield* there was no evidence presented on how often a volunteer could provide services and the plaintiffs did not have alternative means, like watching religious videos, to practice their religion. *Mayfield v. Texas Dep’t of Criminal Justice*, 529 F.3d 599, 614-15 (5th Cir. 2008). See also *Editor’s Note*, PLAN. & ENVTL. L., Apr. 2007, at 3 (“these decisions are very dependant on the facts”); Jennifer S. Evens-Cowley & Kenneth Pearlman, *Six Flags Over Jesus: RLUIPA, Megachurches, and Zoning*, 21 TUL. ENVTL. L.J. 203, 220 (2008) (“What becomes apparent in reading the existing [RLUIPA land use] decisions is that they are highly fact intensive.”); Edward W. McClenathan, *Swinging the Big Stick: How the Circuits Have Interpreted RLUIPA and What Practitioners Need To Know*, 36 REAL. EST. L. J. 405, 426 (2008) (“If there is one final thought the writer would like to convey to practitioners that find themselves in the throes of a RLUIPA land use case, it is that nearly without exception, whether district court or circuit, these RLUIPA cases have been decided on the facts.”).

A. The Financial Hardship Imposed

1. Financial hardship does not automatically amount to a substantial burden

As discussed above, *CLUB*'s "effectively impracticable" standard is a high bar for religious institutions to meet. According to *CLUB*, churches required to obtain costly special use permits to build in a variety of city zones did not suffer a substantial burden. In this case, an association of Chicago area churches claimed that a city zoning ordinance that required special use approval for churches to operate in commercial and business districts, and which limited their operation in manufacturing areas, violated RLUIPA and the churches' constitutional rights.⁸³ The cost to the applicant for obtaining a special use approval averaged \$5,000.⁸⁴ The churches also alleged that although churches were allowed as of right in residential zones, the scarcity of affordable and suitable land in residential zones within the city, combined with the cost of approval in other districts, imposed a substantial burden.⁸⁵ The court rejected these arguments, finding that the financial hardship imposed was "incidental to any high-density urban land use" and that while the expense may contribute to difficulties suffered by Chicago area churches, the strain had not made religious exercise impracticable in Chicago, or even discouraged institutions from attempting to locate within the city.⁸⁶

The Sixth Circuit's view concerning financial hardship is similar to that explained in *CLUB*. In *Living Water Church of God v. Meridian*, the court held that the township's failure to extend a special use permit to build a school and daycare larger than 25,000 square feet did not impose a substantial burden.⁸⁷ Although that court "decline[d] to set a bright line test by which to 'measure' a substantial burden," the court considered the following framework: "though the government action *may make religious exercise more expensive or difficult*, does the government action place substantial pressure on a religious institution to violate its religious beliefs or effectively bar a religious institution

⁸³ *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 755-56 (7th Cir. 2003).

⁸⁴ *Id.* at 756.

⁸⁵ *Id.* at 761.

⁸⁶ *Id.*

⁸⁷ *Living Water Church of God v. Charter Twp. of Meridian*, 258 F. App'x 729, 739 (6th Cir. 2007).

from using its property in the exercise of its religion?”⁸⁸ In reaching its conclusion, the court recognized that its decision would “certainly result in additional expense and delay for Living Water”—the church would have to reenter the costly design and application phase.⁸⁹ But since the township’s denial did not require Living Water to modify or forego religious beliefs, the court concluded that the burden did not reach the level of a RLUIPA violation.⁹⁰

Several cases hold that the cost incurred by a religious institution when it must rent alternative or additional facilities, in light of a building permit denial, does not impose a substantial burden. In *Lighthouse Institute for Evangelism v. Long Branch*, the Third Circuit did not find a substantial burden when the plaintiffs had operated for years at a rental location in the same district where they wished to build a new facility.⁹¹ The court revisited the case three years later, but the substantial burden issue was not addressed on appeal.⁹²

In *Episcopal Student Foundation v. City of Ann Arbor*, the Canterbury House, an instrumentality of the Episcopal Church, claimed it was substantially burdened when the City of Ann Arbor’s historic commission denied a permit to demolish its current worship facility and construct an expanded facility.⁹³ The court found that Canterbury House was not substantially burdened despite its claim that the current facility was inadequate to meet the institution’s needs. The court explained that Canterbury House could have leased or subleased another facility for the congregation to meet as a whole.⁹⁴ The court

⁸⁸ *Id.* at 737 (emphasis added).

⁸⁹ *Id.* at 741.

⁹⁰ *Id.* See also *Calvary Temple Assembly of God v. City of Marinette*, No. 6-C-1148, 2008 WL 2837774, at *9 (E.D. Wis. July 21, 2008); *Timberline Baptist Church v. Washington County*, 154 P.3d 759, 771 (Or. App. 2007) (“[P]etitioner essentially has taken the position that the need to look for and acquire other property is itself a substantial burden, because such a search would be time consuming and costly. However, such a showing is insufficient. There was no evidence that a reasonable search and acquisition would have required the interruption or cessation of the church’s present activities; it merely would have required a delay and some unknown expense.”).

⁹¹ *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 100 F. App’x 70, 77 (3rd Cir. 2004).

⁹² *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 257 n.4 (3rd Cir. 2007).

⁹³ *Episcopal Student Found. v. City of Ann Arbor*, 341 F. Supp. 2d 691, 695 (E.D. Mich. 2004).

⁹⁴ *Id.* at 704 (“[T]he Court fails to understand how Defendants’ permit denial substantially burdens Plaintiff’s religious exercise when the solution to a

stated: “Although ‘[t]hese alternatives may be less appealing or more costly,’ neither the RLUIPA, nor the Constitution, requires Ann Arbor to subsidize the real estate market.”⁹⁵

In *Vineyard Christian Fellowship of Evanston, Inc. v. City of Evanston*, the plaintiff church claimed that it was substantially burdened because it was denied use of its own property for religious purposes.⁹⁶ Since the church had the opportunity to continue to lease space for worship, the court found it was not substantially burdened under RLUIPA or the Free Exercise clause.⁹⁷ Sympathetic to the church’s plight, yet denying relief, the court stated:

The court does not turn a blind eye to the practical consequences of this ruling. Vineyard’s evidence leaves no doubt that its inability to worship at the subject property has been costly and that the church would benefit from owning and administering the facility in which its congregation worships. In light of the caselaw, however, the court concludes that these monetary and logistical burdens do not rise to the level of a substantial burden⁹⁸

2. Financial hardship may be important in finding a substantial burden

Although numerous courts have found that financial hardship alone does not impose a substantial burden,⁹⁹ this factor continues to be relevant in many courts’ substantial burden analyses. Two years after the Seventh Circuit issued the *CLUB* decision, for example, the same court decided *Saints Constantine*, which is often cited for the proposition that “delay, uncertainty, and expense” may impose a substantial burden.¹⁰⁰ In this case, a

majority of Plaintiff’s myriad constraints appears to lie within Plaintiff’s control.”).

⁹⁵ *Id.* (footnote omitted).

⁹⁶ *Vineyard Christian Fellowship of Evanston, Inc. v. City of Evanston*, 250 F. Supp. 2d 961, 990 (N.D. Ill. 2003).

⁹⁷ *Id.* at 991.

⁹⁸ *Id.* at 987. *See also* *Patel v. U.S. Bureau of Prisons*, 515 F.3d 807, 814 (8th Cir. 2008) (finding no substantial burden when plaintiff was required to purchase his own halal meals in order to conform to his religiously imposed diet); *Love Church v. City of Evanston*, 671 F. Supp. 508, 513-14 (N.D. Ill. 1987) (finding, on a First Amendment claim, no substantial burden when the plaintiffs did not demonstrate that they could not lease or sublease other suitable properties within the city).

⁹⁹ Salkin & Lavine, *supra* note 14, at 230.

¹⁰⁰ *Saints Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 895, 901 (7th Cir. 2005). *See, e.g.*, *Living Water Church of God v. Charter Twp. of Meridian*, 258 F. App’x 729, 735 (6th Cir. 2007) (“Several years later, the Seventh Circuit relaxed its definition of substantial burden, finding [in *Saints Constantine*] that where the city’s denial of a rezoning permit

church wished to build on fourteen acres of its forty-acre parcel in a residential zone. The church proposed a planned unit development (PUD) to allay the city's fears that some other institution would be allowed to build on the parcel if the area was rezoned and the church failed to raise adequate money for construction. The city denied the application, requiring the church either to look for a new parcel or continue to file new applications with the city. After chiding the zoning board for legal ignorance (the board failed to recognize the PUD as binding and ran with the land), and recognizing that the city did not offer a substantiated reason for denial, the Seventh Circuit, in an opinion by Judge Posner, held that although the burden was not insuperable, it was not insubstantial.¹⁰¹ Although plaintiffs' attorneys may cite *Saints Constantine* for the proposition that any delay, uncertainty, or expense imposes a substantial burden, the facts in *Saints Constantine* are easily distinguished.¹⁰² Underlying issues of fairness permeated the court's decision. In his conclusion, Posner noted that the city had been "playing a delaying game" and that the city's reasons for denial were "legal chimeras."¹⁰³ For this reason, several courts have limited *Saints Constantine's* holding to situations where local governments arbitrarily apply the law or abuse its discretion.¹⁰⁴

The Second Circuit also evaluates financial strain when considering the weight of the burden imposed on religious institutions. In *Westchester Day School v. Mamaroneck*, the court stated three factors relevant to the substantial burden analysis.

would require the church to search for other parcels of land or file more applications with the city, the resulting 'delay, uncertainty, and expense' constituted a substantial burden."); *Guru Nanak Sikh Soc'y of Yuba City v. County of Sutter*, 456 F.3d 978, 990-91 (9th Cir. 2006) (discussing the uncertainty of future conditional use permit applications); *Lighthouse Cmty. Church of God v. City of Southfield*, No. 05-40220, 2007 WL 30280, at *9 (E.D. Mich. Jan. 3, 2007) (finding that forcing a church to sell its current property and search for another is more than a mere inconvenience and constituted a substantial burden).

¹⁰¹ *Saints Constantine*, 396 F.3d at 901.

¹⁰² See, e.g., *Calvary Temple Assembly of God v. City of Marinette*, No. 06-C-1148, 2008 WL 2837774, at *8 (E.D. Wis. July 21, 2008) (distinguishing the facts of the case from *Saints Constantine*).

¹⁰³ *Saints Constantine*, 396 F.3d at 899-900.

¹⁰⁴ *Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F.3d 338, 350-51 (2d Cir. 2007); *Sutter*, 456 F.3d at 989; *Cambodian Buddhist Soc'y of Conn. v. Planning and Zoning Comm'n of Newtown*, 941 A.2d 868, 887 n.18 (Conn. 2008) (stating that that *Saints Constantine* "stands for the proposition that, when the government has acted arbitrarily and capriciously in prohibiting a religious land use, no further demonstration of a substantial burden is required.").

First, the court asked whether the land use decision was a result of a generally applicable, legitimate, and neutral law. If so, the court will not find a substantial burden unless the law is applied “arbitrarily, capriciously, or unlawfully.”¹⁰⁵ The court also considered “(1) whether there [were] quick, reliable, and financially feasible alternatives WDS [could have] utilized to meet its religious needs . . . and (2) whether the denial was conditional [or definitive].”¹⁰⁶ Significant findings were presented at trial that the School could not fulfill its mission without expansion, that new facilities were required to meet the needs of existing students, and that there were no economically feasible alternatives to the school’s proposed plan.¹⁰⁷ These factors, combined with the arbitrary nature of the zoning board’s denial, led the court to find a substantial burden.¹⁰⁸

B. The Adequacy of Current Facilities and the Availability of Less Drastic Measures

RLUIPA plaintiffs have alleged a substantial burden when their entire congregation is unable to worship together at one time. They argue that limitations in the size of its current facilities and the subsequent denial of a permit to build or expand effectively bar them from fulfilling their religious mission; for many religious institutions, the ability to worship together constitutes a central tenet of their faith.¹⁰⁹ Since the ability to worship together is crucial for many, some courts seem reluctant to grant summary judgment to local governments defending decisions to limit or deny churches’ requests to build or expand in order to accommodate a growing congregation.

For example, in *Church of Hills of Township of Bedminster v. Township of Bedminster*, the district court refused to grant summary judgment in favor of Bedminster Township because the court could not determine whether the inability of the

¹⁰⁵ *Westchester Day Sch.*, 504 F.3d at 350.

¹⁰⁶ *Id.* at 352.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 352-53.

¹⁰⁹ *See, e.g., Cottonwood Christian Ctr. v. Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203, 1227 (C.D. Cal. 2002) (noting that “Cottonwood here has demonstrated that meeting in one location at one time, as well as providing numerous ministries, are central to its faith.”); *Castle Hills First Baptist Church v. City of Castle Hills*, No. SA-01-CA-1149-RF, 2004 WL 546792, at *11 (W.D. Tex. Mar. 17, 2004) (explaining that “[i]nherent in any religion is a community of worship, rather than just the faith or conduct of a lone worshiper.”).

congregation to attend one service at one time might impose a substantial burden.¹¹⁰ The church claimed that as part of its religious beliefs the entire congregation should attend services together, but the congregation had recently expanded in size and the church was forced to hold both an 8:00 a.m. and 3:00 p.m. service on Sundays.¹¹¹ One result of the split services was a cut in service time from the three and a half hours, as mandated by the church's beliefs, to less than two hours.¹¹² The church also sought space "to provide a Sunday school for older youths, a religious library, a Christian bookstore, dedicated prayer rooms, a choir room, facilities for religious wedding services, and other facilities to accommodate its various ministries."¹¹³

The *Bedminster* court cited multiple reasons for denying the church's permit, including that an "application with a facility of its magnitude would essentially change the entire character of the neighborhood" and that it was inconsistent with Bedminster's Master Plan.¹¹⁴ Without discussing the merits of Bedminster's permit denial, the court turned to RLUIPA's legislative history and found that "[t]he need for religious institutions to have the ability to develop 'a physical space adequate to their needs and consistent with their theological requirements' is at the heart of the RLUIPA's land-use provisions."¹¹⁵ The court then refused to grant summary judgment in Bedminster's favor because, on the facts presented, it was unable to assess whether a substantial burden was imposed.¹¹⁶ In doing so, however, the court rejected Bedminster's assertion that "the fact that the Plaintiffs cannot engage in worship with their entire congregation at the same time and place does not and cannot establish a substantial burden."¹¹⁷

Similarly, the fact that a plaintiff congregation's current facilities were woefully inadequate and that the congregation was growing at a rapid pace seemed to influence the court's decision in *Cottonwood Christian Center v. Cypress Redevelopment*

¹¹⁰ *Church of Hills of Twp. of Bedminster v. Twp. of Bedminster*, No. Civ. 05-332(SRC), 2006 WL 462674, at *6 (D.N.J. Feb. 24, 2004).

¹¹¹ *Id.* at *1.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.* at *2.

¹¹⁵ *Church of Hills*, 2006 WL 462674, at *5 (citing 146 CONG. REC. S7774 (2000) (joint statement of Sens. Hatch and Kennedy)).

¹¹⁶ *Id.* at *6.

¹¹⁷ *Id.*

Agency.¹¹⁸ Cottonwood, a non-denominational Christian church, sought to build a 4,700-seat auditorium on eighteen acres it had slowly acquired in Cypress, California.¹¹⁹ Cypress, however, had other plans for the property. The city concurrently initiated an eminent domain proceeding on Cottonwood's property, hoping to attract a major discount retailer such as Costco.¹²⁰ Cottonwood had "grown remarkably" since its founding in 1983, expanding from fifty members to over 4,000 adults and 1,200 children.¹²¹ Since Cottonwood's current facility could only accommodate 700 people, the church was taking measures, more drastic than those cited in *Bedminster*, to provide services for all of its members: "Cottonwood holds six worship services each weekend, four on Sunday and two on Saturday. Because of insufficient parking on site, Cottonwood has instituted a 'shuttle ministry,' whereby it transports attendees from off-site parking lots to its church facility."¹²² The court also noted that size limitations restricted Cottonwood's ability to accommodate all people who wanted to attend worship services, conduct outreach to new members, and conduct various programs from the church.¹²³

After finding that Cottonwood had a fair probability of success on the merits of its RLUIPA and other claims, the court enjoined the city from exercising its eminent domain power over the property.¹²⁴ The court's questionable reasoning has led some commentators to argue that the court's interpretation of a substantial burden "appears to grant religious organizations carte blanche in determining the size and location of their worship houses."¹²⁵ First, the court rejected an interpretation of "substantial burden" that would require religious institutions to show that the government action coerced individuals into violating a tenet of their belief.¹²⁶ Then the court went on to reason that preventing a religious institution from building "fundamentally inhibits its ability to practice its religion. Churches are central to the religious exercise of most religions. If

¹¹⁸ *Cottonwood Christian Ctr. v. Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203, 1226 (C.D. Cal. 2002).

¹¹⁹ *Id.* at 1209.

¹²⁰ *Id.*

¹²¹ *Id.* at 1211.

¹²² *Id.* at 1212.

¹²³ *Cottonwood Christian Ctr.*, 218 F. Supp. 2d. at 1212.

¹²⁴ *Id.* at 1232.

¹²⁵ Howard D. Geneslaw & Michael Miceli, *Religious Land and Institutionalized Persons Act A Substantial Burden?*, N.J. LAW.: WKLY. NEWSPAPER, Apr. 3, 2006, at A6.

¹²⁶ *Cottonwood*, 218 F. Supp. 2d at 1226-27.

Cottonwood could not build a church, it could not exist.”¹²⁷ The court also seemed to imply that the city should not and cannot limit the size of Cottonwood’s new facility: “[B]eyond the fundamental need to have a church, Cottonwood has shown a religious need to have a large and multi-faceted church.”¹²⁸

A similar result was reached by a federal district court in New York in *Cathedral Church of the Intercessor v. Incorporated Village of Malverne*.¹²⁹ The court provided little analysis, yet held the plaintiffs provided ample evidence of a substantial burden.¹³⁰ Finding that the church’s Sunday services were limited in time and content, that children were forced to attend Sunday school in a rented building, and that the church was compelled to hold three Sunday services, the court stated these constraints rose “above the level of ‘mere inconvenience.’”¹³¹

Even if the reasoning in cases like *Bedminster*, *Cottonwood*, and *Malverne* is troubling for RLUIPA defendants, a number of courts have distinguished them on factual bases.¹³² For example, in *Episcopal Student Foundation v. City of Ann Arbor*, the court

¹²⁷ *Id.* at 1226.

¹²⁸ *Id.* at 1227. *Cottonwood* was one of the first RLUIPA land use cases decided in California. Since it was decided, the Ninth Circuit has not adopted a similar analysis. See, e.g., *Guru Nanak Sikh Soc’y of Yuba City v. County of Sutter*, 456 F.3d 978, 988 (9th Cir. 2006) (holding that a substantial burden must place more than an inconvenience on religious exercise); *San Jose Christian Coll. v. City of Morgan Hill*, 360 F.3d 1024, 1034 (9th Cir. 2004) (holding that a regulation must be “oppressive” to a “significantly great extent” in order to constitute a substantial burden).

¹²⁹ *Cathedral Church of the Intercessor v. Inc. Vill. of Malverne*, No. CV 02-2989(TCP)(MO), 2006 WL 572855, at *1 (E.D.N.Y. Mar. 6, 2006).

¹³⁰ *Id.* at *8.

¹³¹ *Id.*

¹³² There are, however, a handful of recent district court cases that adopt a similar approach to the substantial burden analysis in these three cases. See, e.g., *Church of Universal Love and Music v. Fayette County*, No. 06-872, 2008 WL 4006690, at *7–8 (W.D. Pa. Aug. 26, 2008) (“Defendants argue that their governmental actions did not completely prohibit Plaintiffs from engaging in their religious exercise, noting that they could go elsewhere within the county This argument fails for two reasons. First, RLUIPA specifically defines as religious exercise, the use of real property for the purpose of religious exercise Second, Resolution 04-95 on its face bars Plaintiff from any religious us [sic] of the Pritts Property Thus, the Defendants have imposed a substantial burden on Plaintiffs.” (citation and emphasis omitted)); *Congregation Kol Ami v. Abington Twp.*, No. Civ.A. 01-1919, 2004 WL 1837037, at *9 (E.D. Pa. Aug. 17, 2004), *amended by* 2004 WL 2137819 (E.D. Pa. Sept. 21, 2004) (“Under the statute, developing and operating a place of worship at 1908 Robert Road is free exercise. There can be no reasonable dispute that the Ordinance and the denial of the variance, which have effectively prevented the Plaintiffs from engaging in this ‘free exercise,’ create a substantial burden within the meaning of the [RLUIPA].”).

declined to follow *Cottonwood* and noted several distinguishing points. First, there was “strong evidence” of a discriminatory intent to limit Cottonwood’s religious use of the property.¹³³ Next, noting that a substantial burden was a question of degree, the court gave weight to *Cottonwood*’s rapid expansion in membership.¹³⁴ Also, the court noted that Cottonwood had “explored and exhausted its options before filing suit,” and finally, that the church had spent five years searching for a suitable property and three years to obtain zoning approval.¹³⁵

Other factors also limit the impact of cases like *Bedminster*, *Cottonwood*, and *Malverne*. First, some courts have limited their evaluation of a substantial burden to the current situation of the religious institution; these courts will not consider the possibility that a congregation will grow larger at some point in the future. In one case, a court refused to find a substantial burden when a city denied a church’s application for a six acre, supplemental parking lot.¹³⁶ The church complained that its existing parking lot was insufficient because it limited the church’s ability to attract new members, and it possibly caused current members to drive away in frustration even if the lot was not filled to capacity.¹³⁷ The proposed parking lot, which was “for planned Church growth”¹³⁸ did not prevent churchgoers from attending worship, and because the church had practical alternatives to the requested lot, the court upheld the city’s denial.¹³⁹ The court recognized that the denial burdened the church, and that “the Church ideally would have an unlimited and ever-expanding place of worship with open doors and a parking space for all who would enter.”¹⁴⁰ According to the court, however, this burden was “neither substantial nor undue.”¹⁴¹

A similar result was reached in the Sixth Circuit’s *Living Water* decision. In order for the church to build the sanctuary and school it desired, the township required two special use permits: one to build in a residential zone, and another to build a

¹³³ *Episcopal Student Found. v. City of Ann Arbor*, 341 F. Supp. 2d 691, 707 (E.D. Mich. 2004).

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *City of Castle Hills First Baptist Church v. City of Castle Hills*, No. SA-01-CA-1149-RF, 2004 WL 546792, at *11 (W.D. Tex. Mar. 17, 2004).

¹³⁷ *Id.* at *5.

¹³⁸ *Id.*

¹³⁹ *Id.* at *12, 20.

¹⁴⁰ *Id.* at *11.

¹⁴¹ *City of Castle Hills First Baptist Church*, No. SA-01-CA-1149-RF, 2004 WL 546792, at *11.

facility larger than 25,000 square feet.¹⁴² In 2003, after Living Water's original permits expired, the planning board granted a permit for non-residential use in a residential zone, but it denied a permit to build in excess of 25,000 square feet.¹⁴³ The court recognized that Living Water was burdened by the denial, but noted that the fact that Living Water's current facility was too small was no reason to give the church "free reign" to build a facility to any size it desired.¹⁴⁴ The court prefaced this analysis by stating, "[t]he question before us here is whether the Township's denial substantially burdens Living Water's religious exercise *now*—not five, ten or twenty years from now—based on the facts in the record."¹⁴⁵

Next, some courts will consider whether a religious institution has an actual need for the requested expansion, or whether the institution can meet its needs through less drastic measures. A hypothetical situation presented by the Second Circuit explains this consideration well:

Imagine, for example, a situation where a school could easily rearrange existing classrooms to meet its religious needs in the face of a rejected application to renovate. In such case, the denial would not substantially threaten the institution's religious exercise, and there would be no substantial burden, even though the school was refused the opportunity to expand its facilities.¹⁴⁶

In the same vein, if a religious institution's request appears unreasonable or excessive, a court is unlikely to find a substantial burden. For example, the plaintiff in *Episcopal Student*, the Canterbury House, was denied its request to demolish an historic structure after claiming that its only reasonable alternative was to "demolish its current facility and build a larger, 'multi-faceted' facility."¹⁴⁷ The court rejected Canterbury House's complaint, unable to understand how it was burdened when "the solution to a majority of Plaintiff's myriad constraints appears to lie within Plaintiff's control."¹⁴⁸ The court found that Canterbury House had multiple options: it could have stopped leasing the second

¹⁴² *Living Water Church of God v. Charter Twp. of Meridian*, 258 F. App'x 729, 730 (6th Cir. 2007).

¹⁴³ *Id.* at 732.

¹⁴⁴ *Id.* at 739.

¹⁴⁵ *Id.* at 738.

¹⁴⁶ *Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F.3d 338, 349 (2d Cir. 2007). See also Salkin & Lavine, *supra* note 14, at 232 (quoting *id.* at 349).

¹⁴⁷ *Episcopal Student Found. v. City of Ann Arbor*, 341 F. Supp. 2d 691, 703 (E.D. Mich. 2004).

¹⁴⁸ *Id.* at 704.

floor of its building to commercial tenants; it could have worshiped as a whole through various activities, at various places throughout the city; or it could have rented adequately large facilities to meet as a whole.¹⁴⁹

In a recent state appeals court decision, the Maryland Special Appeals Court also considered reasonable alternatives to a church's request. In this case, an Evangelical church requested a variance to erect a 250-square-foot sign with a "changeable copy" electronic message section.¹⁵⁰ After an extensive review of federal circuit court cases interpreting a substantial burden, the court stated that "it is important to consider whether there are effective alternatives to the denied proposed use."¹⁵¹ Since the church had multiple alternatives for publicizing its mission to the surrounding community, including a sign which conformed to the zoning regulations applicable to commercial billboards, the court did not find a substantial burden.¹⁵²

When courts attempt to measure the burden imposed by a local government's denial of the right to build or expand to meet the needs of a growing congregation, there is an inherent tension. On one hand, courts recognize it is essential for many faiths that the congregation has the ability to worship together as one body. On the other hand, courts may inject an element of practicality into the discussion: if the religious institution has found a way to accommodate its needs in the past, it should be able to continue on the same course without suffering a substantial burden. Such reasoning seems to underlie the courts' opinions in cases like *Lighthouse Institute for Evangelism*¹⁵³ and *Vineyard Christian Fellowship of Evanston*.¹⁵⁴ Also, it seems improbable that courts will permit religious facilities to grow without size limits; there must be a point where reasonable size restraints are recognized. Nevertheless, it remains difficult to predict how courts will weigh the burden imposed by an institution's current, yet inadequate, facility. As noted by Patricia Salkin and Amy Lavine, "[t]he cases involving religious organizations' requests to expand their existing facilities are fact intensive, and few generalizations can

¹⁴⁹ *Id.* at 704-05.

¹⁵⁰ *Trinity Assembly of God of Baltimore City, Inc. v. People's Counsel for Baltimore County*, 941 A.2d 560, 563 (Md. Ct. Spec. App. 2008).

¹⁵¹ *Id.* at 574.

¹⁵² *Id.*

¹⁵³ *Lighthouse Cmty. Church of God v. City of Southfield*, No. 05-40220, 2007 WL 30280 (E.D. Mich. Jan. 3, 2007).

¹⁵⁴ *Vineyard Christian Fellowship of Evanston, Inc. v. City of Evanston*, 250 F. Supp. 2d 961 (N.D. Ill. 2003).

be made.”¹⁵⁵

C. *The Availability of Other Suitable Property*

If a local government denies a religious institution’s request to build on a particular site, courts may look to the availability of other suitable properties or building sites when considering whether the institution is substantially burdened. For instance, in *Westchester Day School*, the court found that a new building, required for the school’s expansion, could only be located at the one site identified by the plaintiffs.¹⁵⁶ The fact that the school had no reasonable alternatives to the proposed site influenced the court’s decision.¹⁵⁷

In the majority of cases, however, it is more difficult to establish a substantial burden when plaintiffs fail to show the scarcity of other suitable properties. In *Timberline Baptist Church v. Washington County*, a religious school was denied a permit to build a school on a site outside of Washington County’s urban growth boundary (UGB).¹⁵⁸ According to Washington County Development Code § 430-121.3, all schools outside of the UGB must “be scaled to serve the rural population”.¹⁵⁹ Since the proposed school failed to meet this requirement, the school’s permit application was denied.¹⁶⁰ After an extensive discussion of how other courts have interpreted the substantial burden provision, the court, relying on the Oregon Supreme Court’s decision in *Corporation of the Presiding Bishop*,¹⁶¹ stated that to show a substantial burden the plaintiff must prove that a “land use decision has forced the applicant to forgo its religious precepts.”¹⁶² Since the school failed to show that any one of the properties on the market within the UGB at the time of its

¹⁵⁵ Salkin & Lavine, *supra* note 14, at 231.

¹⁵⁶ *Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F.3d 338, 352 (2d Cir. 2007).

¹⁵⁷ *Id.*

¹⁵⁸ *Timberline Baptist Church v. Washington County*, 154 P.3d 759, 760 (Or. Ct. App. 2007).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 761.

¹⁶¹ *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. City of West Linn*, 111 P.3d 1123, 1130 (Or. 2005) (concluding that “government regulation imposes a substantial burden on religious exercise only if it ‘pressures’ or ‘forces’ a choice between following religious precepts and forfeiting certain benefits, on the one hand, and abandoning one or more of those precepts in order to obtain the benefits, on the other.” (citing *Sherbert v. Verner*, 374 U.S. 398, 404 (1963))).

¹⁶² *Timberline Baptist Church*, 154 P.3d at 771.

purchase was inadequate, the court found it was not substantially burdened.¹⁶³

The Seventh and Ninth Circuits appear to follow the same path in cases where religious institutions dispute the denial of the right to build on a specific property. In *Petra Presbyterian Church v. Village of Northbrook*, the plaintiffs challenged a city ordinance that did not allow churches to locate within an industrial zone.¹⁶⁴ For such a plaintiff to prevail it “would have to show that a paucity of other land available for churches made the exclusion from the industrial zone a substantial burden to it.”¹⁶⁵ The Ninth Circuit used similar reasoning to uphold a finding of no substantial burden: “while the . . . College [was] unable to provide education and/or worship at the Property, there is no evidence in the record demonstrating that [the] College was precluded from using other sites within the city.”¹⁶⁶

Some courts, however, have refused to even consider the availability of other suitable properties in the substantial burden analysis. In *Midrash Sephardi, Inc. v. Town of Surfside*, the Eleventh Circuit squarely rejected the plaintiff’s suggestion that it would not be able to find a facility to accommodate its congregation within the RD-1 two-family residential district, which was the only district where churches were allowed through a conditional use permit (CUP).¹⁶⁷ According to the court, the fact that “the congregations may be unable to find suitable alternative space does not create a substantial burden within the meaning of

¹⁶³ *Id.* at 767.

¹⁶⁴ *Petra Presbyterian Church v. Vill. of Northbrook*, 489 F.3d 846, 847 (7th Cir. 2007).

¹⁶⁵ *Id.* at 851.

¹⁶⁶ *San Jose Christian Coll. v. City of Morgan Hill*, 360 F.3d 1024, 1035 (9th Cir. 2004). *See also* *Int’l Church of the Foursquare Gospel v. City of San Leandro*, No. C 07-3605 PJH, 2007 WL 2904046, at *13 (N.D. Cal. Oct. 2, 2007) (noting that “[w]hile it is true that under *Guru Nanak*, a religious group need not show that there is no other possible location where it could build its church, it is not true that there is no need for any showing at all.”). At least one court, however, has applied exactly the opposite reasoning to a substantial burden claim. In *Lighthouse Community Church of God v. City of Southfield*, the court rejected the defendant’s argument that the plaintiffs were not excluded from exercising their religion at other sites throughout the city. *Lighthouse Cmty. Church of God v. City of Southfield*, No. 05-40220, 2007 WL 30280, at *8 (E.D. Mich. Jan. 3, 2007). After citing the Seventh Circuit’s decision in *Saints Constantine & Helen*, the court held that requiring the church to sell its current property and search for other sites within the city was more than a “mere inconvenience” and imposed a substantial burden. *Id.* at *8-9.

¹⁶⁷ *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1219, 1227 n.11 (11th Cir. 2004).

RLUIPA.”¹⁶⁸ The court reasoned that the burden placed on the plaintiffs was the same as that faced by any land user, and that “[t]he harsh reality of the marketplace sometimes dictates that certain facilities are not available to those who desire them.”¹⁶⁹ The court ultimately held that the city ordinance which excluded churches and synagogues from the business district where private clubs and lodges were permitted did not impose a substantial burden, but that it did violate the equal terms provision of RLUIPA.¹⁷⁰

The Eleventh Circuit’s approach in *Midrash* is similar to that taken by the Seventh Circuit in *CLUB*. As noted previously, the court in *CLUB* rejected the plaintiffs’ argument that the scarcity of affordable land in the permissible zone created a substantial burden.¹⁷¹ It also noted the “harsh reality of the market place” and rejected the plaintiffs’ claim.¹⁷² The court was concerned that considering the availability of other suitable properties would place religious institutions on more than equal footing with non-religious land users.¹⁷³

D. Inconvenience Imposed on Institution Members

The courts are fairly uniform in holding that religious institutions must show more than a “mere inconvenience” to establish a substantial burden, and the Eleventh Circuit’s case, *Midrash Sephardi*, is often cited for this proposition.¹⁷⁴ In this

¹⁶⁸ *Id.* at 1227 n.11.

¹⁶⁹ *Id.* (citing *Love Church v. City of Evanston*, 896 F.2d 1082, 1086 (7th Cir.1990)).

¹⁷⁰ *Id.* at 1228, 1231.

¹⁷¹ *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 761 (7th Cir. 2003).

¹⁷² *Id.* at 761-62.

¹⁷³ *Id.* at 762.

¹⁷⁴ Several cases cite *Midrash Sephardi, Inc. v. Town of Surfside* for the proposition that a substantial burden is something more than a “mere inconvenience.” *See, e.g.*, *Smith v. Allen*, 502 F.3d 1255, 1278 (11th Cir. 2007); *Living Water Church of God v. Charter Twp. of Meridian*, 258 F. App’x 729, 739 (6th Cir. 2007); *Vision Church v. Vill. of Long Grove*, 468 F.3d 975, 999 (7th Cir. 2006); *Calvary Temple Assembly of God v. City of Marinette*, No. 06-C-1148, 2008 WL 2837774, at *7 (E.D. Wis. July 21, 2008). *See also* *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 660 n.4 (10th Cir. 2006) (concluding that “for a burden on religion to be ‘substantial,’ the government regulation must compel action or inaction with respect to the sincerely held belief; mere inconvenience to the religious institution is insufficient.”); *Mintz v. Roman Catholic Bishop of Springfield*, 424 F. Supp. 2d 309, 319-20 (D. Mass. 2006); *Greater Bible Way Temple of Jackson v. City of Jackson*, 733 N.W.2d 734, 750 (Mich. 2007) (noting that “[a] mere inconvenience or irritation does not

case two synagogues sued the town of Surfside, Florida,¹⁷⁵ and as noted above, the court rejected the argument that the synagogues were burdened by the lack of available land.¹⁷⁶ The plaintiffs also claimed that property in the permitted zone was outside of the walking range of a number of its members,¹⁷⁷ and because many members of the synagogues practiced Orthodox Judaism, which prevents adherents from using cars or other means of transportation during Sabbath and on religious holidays, members (especially the very young, ill, and elderly) would be substantially burdened by a location far from their homes.¹⁷⁸ This inconvenience, it was argued, could cause many members to stop attending services, decreasing attendance significantly and possibly causing the synagogues to stop services all together.¹⁷⁹

The court, however, found little merit in this line of reasoning. According to the court, “[w]hile walking may be burdensome and ‘walking farther’ may be even more so, we cannot say that walking a few extra blocks is ‘substantial,’ as the term is used in RLUIPA, and as suggested by the Supreme Court.”¹⁸⁰ The court also suggested that those who wish to practice Orthodox Judaism often relocate to sites near synagogues; the synagogue does not move to them.¹⁸¹ Finally, the court warned that finding a substantial burden in this case would “run the risk of impermissibly favoring religion over other secular institutions, or of favoring some religious faiths over others.”¹⁸²

In another case, a church bought a single family home located next to its existing facilities for the purpose of operating a wellness and counseling center to serve church members and the general public. The property was zoned residential.¹⁸³ The city denied the church’s application for a special exemption after finding the wellness center qualified as a “professional office,” a use prohibited in that district.¹⁸⁴ The church contended that the permit denial imposed a substantial burden because purchasing an alternative site was cost prohibitive, and “the location

constitute a ‘substantial burden.’”).

¹⁷⁵ *Midrash Sephardi*, 366 F.3d at 1218-19.

¹⁷⁶ *Id.* at 1228.

¹⁷⁷ *Id.* at 1221.

¹⁷⁸ *Id.* at 1221, 1227.

¹⁷⁹ *Id.* at 1227.

¹⁸⁰ *Midrash Sephardi*, 366 F.3d at 1228.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Calvary Temple Assembly of God v. City of Marinette*, No. 06-C-1148, 2008 WL 2837774, at *1-2 (E.D. Wis. July 21, 2008).

¹⁸⁴ *Id.* at *3.

adjacent to the church would be convenient for counselors and clients alike”¹⁸⁵ The court concluded that the slight burden imposed on counselors and clients was “simply not sufficient” to establish a substantial burden.¹⁸⁶

Similarly, when a religious institution is merely burdened “aesthetically” there is no RLUIPA substantial burden.¹⁸⁷ A federal district court in New York summarily dismissed a congregation’s claim that the erection of a cellular monopole adjacent to the congregation’s sanctuary imposed a substantial burden.¹⁸⁸ Finding no protectable interest in the subject matter or cell tower site, the court denied the church’s motion to intervene in a case between Omnipoint Communications and the City of White Plains.¹⁸⁹

E. Issues of Fairness

We have already indicated that *Saints Constantine’s* “delay, uncertainty, and expense” language was certainly influenced by, if not a product of, underlying issues of fairness.¹⁹⁰ In fact, in most cases, a court’s substantial burden analysis is likely to be influenced by the presence or absence of discriminatory treatment.¹⁹¹ Reading an element of fairness into the substantial burden analysis, however, raises two issues, each noted by Salkin and Lavine. First, such an approach tends to make RLUIPA’s “anti-discrimination provisions superfluous.”¹⁹² Second, if

¹⁸⁵ *Id.* at *8.

¹⁸⁶ *Id.* at *9.

¹⁸⁷ *Omnipoint Commc’ns, Inc., v. City of White Plains*, 202 F.R.D. 402, 403 (S.D.N.Y. 2001).

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 404.

¹⁹⁰ See *supra* notes 100-05 and accompanying text (discussing *Saints Constantine & Helen Greek Orthodox Church v. City of New Berlin*, 396 F.3d 895, 899-901 (7th Cir. 2005)). See also *Cambodian Buddhist Soc’y of Conn., Inc. v. Planning & Zoning Comm’n of Newtown*, 941 A.2d 868, 887 (Conn. 2008) (“[*Saints Constantine*] stands for the proposition that, when the government has acted arbitrarily and capriciously in prohibiting a religious land use, no further demonstration of a substantial burden is required.”).

¹⁹¹ Salkin & Lavine, *supra* note 14, at 233 (citing *Westchester Day Sch. v. Vill. Of Mamaroneck*, 504 F.3d 338, 351–52 (2d Cir. 2007); *Saints Constantine*, 396 F.3d at 901; *Cambodian Buddhist Soc’y*, 641 A.D.2d at 891–92).

¹⁹² Salkin & Lavine, *supra* note 14, at 233 (citing *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004); *Cambodian Buddhist Soc’y*, 641 A.D.2d at 887). See also 42 U.S.C. § 2000cc(b) (2000) (banning discrimination and exclusion). The Seventh Circuit provides some explanation for RLUIPA’s repetitious nature. After noting that “nonprofessionals operating without procedural safeguards” may engage in subtle forms of discrimination,

RLUIPA's substantial burden provision is read as intending to codify the Supreme Court's existing free exercise jurisprudence, the statute illustrates Congress' misunderstanding of the free exercise cases.¹⁹³ Under free exercise jurisprudence, non-neutral laws and laws applied in a discriminatory manner are already subject to strict scrutiny.¹⁹⁴

Still, issues of fairness must be considered by litigants on both sides before evaluating their chances in either bringing or defending a substantial burden claim. Underlying issues of fairness were influential in the Ninth Circuit's decision in *Guru Nanak Sikh Society of Yuba City v. County of Sutter*.¹⁹⁵ In 2001, Guru Nanak Sikh Society applied for a conditional use permit ("CUP") in a residential zone on its 1.89 acre property located in Yuba City.¹⁹⁶ The county planning commission denied the CUP after public concern was raised over noise, traffic, and interference with the existing neighborhood.¹⁹⁷ After this denial, Guru Nanak Sikh Society bought another 28.79 acre property on land zoned for agricultural use.¹⁹⁸ Guru Nanak Sikh Society agreed to accept all conditions imposed on its application, but the county board of supervisors denied its application based on "the right to farm," the desire to keep the land agricultural, and concerns that the proposed temple "was too far away from the city."¹⁹⁹ It was important to the court that the broad reasons given for the denial of both permits could have applied to any future application and that Guru Nanak Sikh Society agreed to

the court explained, that "the 'substantial burden' provision backstops the explicit prohibition of religious discrimination in the later section of [RLUIPA], much as the disparate-impact theory of employment discrimination backstops the prohibition of intentional discrimination." *Saints Constantine*, 396 F.3d at 900. The same court stated that "denial was so utterly groundless [in *Saints Constantine*] as to create an inference of religious discrimination, so that the case could equally have been decided under the 'less than equal terms' provision of RLUIPA, which does not require a showing of substantial burden." *Petra Presbyterian Church v. Vill. of Northbrook*, 489 F.3d 846, 851 (7th Cir. 2007).

¹⁹³ Salkin & Lavine, *supra* note 14, at 233. See also 146 CONG. REC. S7776 (2000) (joint statement of Sens. Hatch and Kennedy) ("The Act does not include a definition of the term 'substantial burden' because it is not the intent of this Act to create a new standard for the definition of 'substantial burden' on religious exercise. Instead, *that term as used in the Act should be interpreted by reference to Supreme Court jurisprudence.*" (emphasis added)).

¹⁹⁴ Salkin & Lavine, *supra* note 14, at 233-34.

¹⁹⁵ *Guru Nanak Sikh Soc'y of Yuba City v. County of Sutter*, 456 F.3d 978 (9th Cir. 2006).

¹⁹⁶ *Id.* at 981-82.

¹⁹⁷ *Id.* at 982.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 983-84.

all mitigation measures proposed by the county.²⁰⁰ Since the county's actions "to a significantly great extent lessened the prospect of Guru Nanak being able to construct a temple in the future, the County ha[d] imposed a substantial burden" ²⁰¹

Issues of fairness were also raised in *Westchester Day School*, where the court concluded that the permit denial was "arbitrary and capricious."²⁰² Here, the reasons for the permit denial were not supported by evidence on the record and were based on improper considerations such as miscalculations and fears about future expansion.²⁰³ Similarly, one case held that a substantial burden is imposed when a local government fails to even consider a religious institution's application to modify the use of its own property.²⁰⁴

The fairness analysis, however, cuts both ways. The issue in *Petra Presbyterian Church v. Village of Northbrook* was whether a church could rely on the invalidity of a 1988 discriminatory ordinance (membership organizations were allowed in industrial zones but churches were excluded) even after the village restructured the ordinance to exclude all membership organizations in 2003.²⁰⁵ Petra purchased the property at issue and began operating it as a church in September 2000, after the city planning commission recommended denial of its application to rezone.²⁰⁶ Since Petra had never officially obtained a permit to operate as a church in an industrial zone, the city sought an injunction against Petra in 2003.²⁰⁷ Finding that Petra had no

²⁰⁰ *Guru Nanak Sikh Soc'y of Yuba City*, 456 F.3d at 989. This reasoning is similar to the reasoning applied by the court in *Saints Constantine*: "The burden here was substantial. The Church could have searched around for other parcels of land . . . or it could have continued filing applications with the City, but in either case there would have been delay, uncertainty, and expense." *Saints Constantine & Helen Greek Orthodox Church, Inc. v. City of Berlin*, 396 F.3d 895, 901 (7th Cir. 2005). In both cases, it was possible that the plaintiffs could find a property the municipality approved of. "However, RLUIPA does not contemplate that local governments can use broad and discretionary land use rationales as leverage to select the precise parcel of land where a religious group can worship." *Guru Nanak Soc'y*, 456 F.3d at 992 n.20. Neither defendant in these cases could provide a fair, factually supported reason for permit denial.

²⁰¹ *Guru Nanak Soc'y*, 456 F.3d at 992.

²⁰² *Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F.3d 338, 351 (2d Cir. 2007).

²⁰³ *Id.*

²⁰⁴ *Castle Hills First Baptist, Church v. City of Castle Hills*, No. SA-01-CA-1149-RF, 2004 WL 546792, at *9 (W.D. Tex. Mar. 17, 2004).

²⁰⁵ *Petra Presbyterian Church v. Vill. of Northbrook*, 489 F.3d 846, 848 (7th Cir. 2007).

²⁰⁶ *Id.* at 847-48.

²⁰⁷ *Id.* at 848.

“vested right” in the illegality of the former ordinance, the court stated, “[h]aving decided to go ahead and purchase the property outright after it knew that the permit would be denied, Petra assumed the risk of having to sell the property and find an alternative site for its church”²⁰⁸

Other courts have easily distinguished *Saints Constantine* when religious institutions had “no reasonable expectation” that they would receive approval for the project they desired.²⁰⁹ When a religious institution buys a piece of property in a zone where its desired use is not as of right, it assumes the risk of permit denial.²¹⁰ Similarly, delays associated with the permitting process usually will not constitute a substantial burden. In *Family Life Church v. City of Elgin*, an eight-month application process did not create a substantial burden.²¹¹ Reasoning that *Saints Constantine*, “does not . . . mean that all delays, uncertainties and expenses are substantially burdensome,” the court rejected Family Life’s claim.²¹² Likewise, requiring that a religious institution apply for variances or special permits does not, standing alone, impose a substantial burden.²¹³

F. Likelihood Permit Will be Granted with Little Modification

How a religious institution is treated in the first instance may affect how a court addresses the issue of substantial burden. When issues of fairness are not at play, and it is likely that a local government will grant an applicant’s request after some modification, courts tend not to find a substantial burden. For instance, in a 2005 case, the Oregon Supreme Court found that the denial of a CUP to construct a church that would cover 2.03 acres on a 3.85-acre plot in a residential zone might have imposed a hardship, but did not impose a substantial burden.²¹⁴ The city council gave very specific reasons for denying the permit, and

²⁰⁸ *Id.* at 848, 851.

²⁰⁹ *Calvary Temple Assembly of God v. City of Marinette*, No. 6-C-1148, 2008 WL 2837774, at *8 (E.D. Wis. July 2008).

²¹⁰ *Id.* (citing *Petra Presbyterian Church*, 489 F.3d at 851).

²¹¹ *Family Life Church v. City Of Elgin*, 561 F. Supp. 2d 978, 987 (N.D. Ill. 2008).

²¹² *Id.*

²¹³ See *Konikov v. Orange County*, 410 F.3d 1317, 1323–24 (11th Cir. 2005) (failing to find a substantial burden when plaintiff failed to apply for a special exception to hold Torah study and religious celebrations in his residential home, even though religious organizations are allowed as a special use).

²¹⁴ *Corp. of the Presiding Bishop of the Church of Latter-Day Saints v. City of West Linn*, 111 P.3d 1123, 1130 (Or. 2005).

there was no indication that the CUP would not be granted if the church modified its proposal.²¹⁵ The church also had options at its disposal to meet the requests of the city, including the opportunity to buy more of the surrounding land and to provide for additional buffering from surrounding uses.²¹⁶

The Seventh Circuit applied similar reasoning to the case of *Vision Church v. Village of Long Grove*. Here, the court held that it was not a substantial burden to require a church to comply with a 55,000-square-foot building size limitation.²¹⁷ The court explained that “[n]otably, the record indicate[d] that, had Vision complied with maximum size requirements . . . there likely would be a church complex currently being constructed”²¹⁸ Also, the fact that a local government requires a religious institution to submit a complete application will not impose a substantial burden. In one case, the Ninth Circuit rejected a substantial burden claim, stating that “[t]he City’s ordinance imposes no restriction whatsoever on College’s religious exercise; it merely requires College to submit a *complete* application, as is required of all applicants. Should College comply with this request, it is not at all apparent that its re-zoning application will be denied.”²¹⁹

V. LESSONS LEARNED & RECOMMENDATIONS²²⁰

What do these judicial decisions actually mean for governments and religious institutions? The following recommendations are based on what might have been done to prevent litigation, or when litigation was unavoidable, to make RLUIPA case resolution more expeditious.

²¹⁵ *Id.* at 467. See also *Timberline Baptist Church v. Washington County*, 154 P.3d 759, 771 (Or. Ct. App. 2007) (declining to find a substantial burden when church was not allowed to construct a school outside of the UGB that served urban students when the church could have chosen from twenty properties inside of the UGB).

²¹⁶ *Corp. of the Presiding Bishop*, 111 P.3d at 1130.

²¹⁷ *Vision Church, United Methodist v. Vill. of Long Grove*, 468 F.3d 975, 993-94 (7th Cir. 2007).

²¹⁸ *Id.* at 999.

²¹⁹ *San Jose Christian Coll. v. City of Morgan Hill*, 360 F.3d 1024, 1035 (9th Cir. 2004).

²²⁰ For more detailed guidance for local governments, see Dwight H. Merriam, *One (1) Ounce of RLUIPA Prevention*, MUN. LAW., May/June 2008, at 10 [hereinafter *RLUIPA Prevention*]; Dwight H. Merriam, *How Local Governments Can Nip RLUIPA Claims in the Bud*, in RLUIPA READER: RELIGIOUS LAND USES, ZONING, AND THE COURTS (Michael S. Giaimo & Lora A. Lucero eds., forthcoming Apr. 2009) [hereinafter *RLUIPA READER*].

A. For Local Governments

1. Ensure zoning regulations provide equal treatment

Single use zones have been an essential element of the American planning system ever since Justice Sutherland wrote that “[a] nuisance may be merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard.”²²¹ The Congressional sponsors of RLUIPA never intended RLUIPA to abolish this traditional concept.²²² However, the justification for fine-grained separation of distinct land uses evaporates when local governments begin to place similar uses on unequal footing. Land planners should recognize that the impacts religious institutions have on their community are the same as those made by any other public assembly use. “[S]ize, harmony with the neighborhood, impact on property values, traffic, lighting, hours of operation, and management of events[,]”²²³ are considerations for churches, mosques, and synagogues as well as for the local elementary school, theater, or YMCA.

This article deals primarily with RLUIPA’s substantial burden provision, but unequal regulation can cause local governments to violate other RLUIPA provisions.²²⁴ For instance, in *Midrash Sephardi, Inc. v. Town of Surfside*, the court held that the city ordinance at issue did not impose a substantial burden, but that it did violate the equal terms provision of RLUIPA.²²⁵ Providing equal treatment for similar uses will also help avoid constitutional claims. Religious institutions that claim a violation of RLUIPA’s discrimination and exclusions section also often file an Equal Protection claim.²²⁶

²²¹ *Vill. of Euclid v. Amber Realty Co.*, 272 U.S. 365, 388 (1926).

²²² See 146 CONG. REC. S7776 (2000) (joint statement of Sens. Hatch and Kennedy) (“This Act does not provide religious institutions with immunity from land use regulation . . .”).

²²³ Merriam, *RLUIPA Prevention*, *supra* note 220, at 11.

²²⁴ 42 U.S.C. § 2000cc(b) (2000) (banning discrimination and exclusion of religious uses).

²²⁵ *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1228, 1235 (11th Cir. 2004).

²²⁶ See, e.g., *Vision Church, United Methodist v. Vill. of Long Grove*, 468 F.3d 975, 985 (explaining “Counts V and VI allege that the Village violated the Fourteenth Amendment Equal Protection Clause and RLUIPA’s ‘[e]qual terms’ provision . . .”); *Konikov v. Orange County*, 410 F.3d 1317, 1319 n.1, 1323-24 (finding no substantial burden when plaintiff failed to apply for a special exception in order to hold Torah study and religious celebrations in his residential home, but not reaching plaintiff’s Equal Protection claim on grounds that the constitutional claim relied on the same theory as the RLUIPA equal

Some case law also supports the view that neutral, generally applicable laws, created with the intent to protect health and safety, do not violate RLUIPA because they do not enable an “individualized assessment.”²²⁷ If a court adopts this reasoning, it need not even reach the question of substantial burden. The Connecticut Supreme Court took this approach in *Cambodian Buddhist Society of Connecticut, Inc. v. Planning and Zoning Commission*, and held that regulations that apply to all land owners without discrimination do “not constitute an ‘individualized assessment’ under existing first amendment jurisprudence” and thus, the substantial burden provision of RLUIPA did not apply.²²⁸

2. Provide for suitable alternative locations for religious use

Local governments should ensure that religious institutions have the opportunity to locate within their communities by providing zones where they can locate as of right or through the conditional use approval process. The cases discussed in Part IV.C. indicate that many courts are less likely to find a substantial burden when religious institutions have various alternatives and suitable properties available. Many municipal officials have learned to head off First Amendment claims by adult entertainment businesses through providing preplanned space for these controversial uses.²²⁹ The same strategy could be applied to zoning in anticipation of religious uses.

Timberline Baptist suggests that local governments can and should plan for their municipality’s future growth.²³⁰ In this case,

terms claim).

²²⁷ *Cambodian Buddhist Soc’y of Conn., Inc. v. Planning and Zoning Comm’n of Newtown*, 941 A.2d 868, 892 (Conn. 2008).

²²⁸ *Id.* Similarly, in *Greater Bible Way Temple*, the Michigan Supreme Court found that the city’s decision not to rezone land across from a church to accommodate an apartment building did not constitute an “individualized assessment.” The court reasoned that since a “decision whether to rezone property does not involve consideration of only a particular or specific user or only a particular or specific project; rather, it involves the enactment of a new rule of general applicability, a new rule that governs all persons and all projects,” RLUIPA’s substantial burden provision was inapplicable. *Greater Bible Way Temple of Jackson v. City of Jackson*, 733 N.W.2d 734, 744 (Mich. 2007). See also Salkin & Lavine, *supra* note 14, at 238–46 (explaining how RLUIPA’s individualized assessment provision has been interpreted by the courts, and discussing both the *Cambodian Buddhist* and *Greater Bible Way* cases).

²²⁹ Merriam, *RLUIPA Prevention*, *supra* note 220, at 11.

²³⁰ *Timberline Baptist Church v. Washington County*, 154 P.3d 759, 760 (Ct.

a permit applicant failed to show that it did not have adequate opportunities to locate within the county's Urban Growth Boundary (UGB), as the county provided evidence showing sixteen suitable properties for sale inside of the UGB.²³¹ As the first state to require state-wide comprehensive planning,²³² Oregon has a strong history of ensuring planned growth, and RLUIPA should not interfere with this statewide policy. Holdings in cases like *Timberline Baptist* ensure that, as long as religious institutions have adequate opportunities to locate in areas designated for growth, a community's planning goals will be respected.²³³

3. Produce an adequate and accurate record for decision

The importance of a complete and adequate record that reflects rational decision making cannot be overstated. A good record helps in the substantial burden analysis. If a substantial burden is found, the record is also important for local governments in proving a "compelling governmental interest," which justifies its action.²³⁴

In *Westchester Day School v. Village of Mamaroneck*, the district court found that the zoning board's reasons for its special permit denial were not supported by the record and were largely based on factual errors.²³⁵ The zoning board also gave undue deference to a small, but influential, group of neighbors who

App. Or. 2007).

²³¹ *Id.* at 762.

²³² Ed Bolen et al., *Smart Growth: A Review of Programs State by State*, 8 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 145, 207 (2002) ("Oregon's Land Use Planning Act of 1973 . . . is the nation's oldest comprehensive planning statute.").

²³³ No case reviewed established a bright line rule indicating exactly how much land should be available for religious institutions. In the context of providing adequate land for adult entertainment uses, "the allocation of some surplus of land area to overcome imperfect markets" is sufficient. Merriam, *RLUIPA Prevention*, *supra* note 220, at 12. As discussed at *supra* notes 165-171 and accompanying text, some courts do not even require this showing in the substantial burden analysis. Providing suitable alternatives, however, is the best practice because: 1) it shows that local governments make affirmative efforts to help religious organizations, and 2) it may reduce claims under RLUIPA's "exclusions and limits" provision. See 42 U.S.C. § 2000cc(b)(3) (2000).

²³⁴ 42 U.S.C. § 2000cc(a)(1)(A). The plaintiff bears the burden of persuasion to show its religious exercise was substantially burdened. The defendant carries the burden for any other element of the claim. § 2000cc-2 (b).

²³⁵ *Westchester Day School v. Vill. of Mamaroneck*, 504 F.3d 338, 346 (2d Cir. 2007).

opposed the project.²³⁶ The Second Circuit expressly found it relevant to the substantial burden analysis that the zoning board's decision was made with "an arbitrary blindness to the facts" and was not based on substantial evidence in the record.²³⁷ Without the support of the record, the zoning board's decision failed to withstand the scrutiny of a substantial burden analysis.

In contrast, the City of West Linn, Oregon, provided four unambiguous reasons, based on its community development code, for permit denial in *Corporation of the Presiding Bishop*.²³⁸ The court gave weight to the fact that "[t]he city gave specific reasons for denying the first application, and [that] nothing in the record indicate[d] that the city would not approve a revised application that met its concerns."²³⁹ Because the record substantially supported the city's actions, and "nothing in the record suggest[ed] that requiring the church to submit a new application would pressure the church to forgo or modify the expression of a religious belief," the court found no substantial burden.²⁴⁰

A local government should also ensure that the record is based on sound legal reasoning. In *Saints Constantine*, the city claimed to have denied the church's application because it feared that a non-religious institution would develop the proposed site if the church failed to raise enough money to build.²⁴¹ These fears, however, were not supported by legal reality.²⁴² The Seventh Circuit was willing to peek behind the veil of the flawed record and assess the city's actual reasons for denial: "It seemed obvious that the mayor, unless deeply confused about the law, was playing a delaying game."²⁴³

4. Provide realistic suggestions that align governmental and institutional objectives

In developing an adequate record local governments should realistically evaluate an institution's ability to address the reasons for permit denial. If a local government's reasoning

²³⁶ *Id.*

²³⁷ *Id.* at 351-52.

²³⁸ *Corp. of the Presiding Bishop of the Church of Latter-Day Saints v. City of West Linn*, 111 P.3d 1123, 1125 (Or. 2005).

²³⁹ *Id.* at 1130.

²⁴⁰ *Id.*

²⁴¹ *Saints Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 895, 898 (7th Cir. 2005).

²⁴² *Id.*

²⁴³ *Id.* at 899.

provides no alternative avenue for an institution to practice its religion, a court may find that the denial “coerces” individuals to modify their religious beliefs,²⁴⁴ or even makes religious exercise “effectively impracticable.”²⁴⁵ For example, the court in *Guru Nanak Sikh Society of Yuba City v. County of Sutter* recognized that the government’s multiple permit denials and the broad reasons given for each denial significantly reduced the prospects of Guru Nanak Sikh Society ever gaining approval.²⁴⁶ Compare Guru Nanak Sikh Society’s experience to the plaintiff in *Corporation of the Presiding Bishop*. In this case, the court did not find a substantial burden, relying on the fact that the church could have met the city’s reasons for denial if it bought surrounding land or provided additional buffering.²⁴⁷

Reasonable size restrictions that do not affect the ability of the members of an institution to worship together have generally been upheld. The Seventh Circuit’s decision in *Vision Church*²⁴⁸ and the Sixth Circuit’s decision in *Living Water* support this view.²⁴⁹ Such restrictions allow local governments to maintain the character of their neighborhoods, without preventing religious institutions from practicing at a context-appropriate scale. Even so, local governments run into problems when permit denials actually prevent people from worshiping together. Cases like *Bedminster*, *Cottonwood*, and *Malverne*, discussed in Part IV. B., remind us of this. It remains difficult to evaluate, under the various definitions of a substantial burden, where courts will draw a line between reasonable size restrictions and a church’s desire to expand in order to accommodate growing congregations.²⁵⁰

²⁴⁴ *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004).

²⁴⁵ *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 761 (7th Cir. 2003).

²⁴⁶ *Guru Nanak Sikh Soc’y of Yuba City v. County of Sutter*, 456 F.3d 978, 991-92 (9th Cir. 2006).

²⁴⁷ *Corp. of the Presiding Bishop of the Church of Latter-Day Saints v. City of West Linn*, 111 P.3d 1123, 1130 (Or. 2005).

²⁴⁸ *Vision Church, United Methodist v. Vill. of Long Grove*, 468 F.3d 975, 993-94 (7th Cir. 2006).

²⁴⁹ *Living Water Church of God v. Charter Twp. of Meridian*, 258 F. App’x 729, 739 (6th Cir. 2007).

²⁵⁰ Compare *id.* at 739 (finding denial of permit that prevents a church from building a gymnasium is not a substantial burden), with *Cathedral Church of the Intercessor v. Incorporated Vill. of Malverne*, No. CV 02-2989(TCP)(MO), 2006 WL 572855, at *8-9 (E.D.N.Y. Mar. 6, 2006) (finding a substantial burden due to limited space for church members).

5. Be willing to accept a conforming application

If an adequate record is developed chronicling the reasons for an appropriate denial of an institution's first application, a local government must be prepared to accept a subsequent application that addresses the local government's original concerns. If a religious institution shows a willingness to accommodate all reasonable requests, subsequent permit denials may appear arbitrary.

For example, in *Guru Nanak Society*, the plaintiffs were more than accommodating to all of the municipality's requests. They relocated from Yuba City after citizens voiced concerns over noise, traffic, and interference with the existing neighborhoods; they bought a 28.79 acre parcel on area zoned agricultural, providing a large buffer from neighboring properties; and they agreed to accept all conditions proposed by the planning division.²⁵¹ After Guru Nanak Sikh Society's second permit was denied, the court expressed concern that Guru Nanak Sikh Society would never be able to gain approval because the county's broad reasons for denial could apply to any subsequent application.²⁵²

B. For Religious Institutions

1. Understand that RLUIPA's substantial burden provision does not alter a religious institution's obligation to comply with existing zoning regulations

Religious institutions must be aware that RLUIPA does not amount to immunity from local land use regulation. Courts have consistently held against institutions making RLUIPA claims without first complying with at least the rudiments of the local land use approval process. Just like any other land user, religious institutions are required to apply for special exemptions,²⁵³ to file complete applications,²⁵⁴ and to follow

²⁵¹ *Guru Nanak Soc'y*, 456 F.3d at 990-91.

²⁵² *Id.* at 992.

²⁵³ See *Konikov v. Orange County*, 410 F.3d 1317, 1323-24 (11th Cir. 2005) (finding no substantial burden when plaintiff failed to apply for a special exemption permitting religious organization to hold study and religious celebrations in a residential home).

²⁵⁴ See *San Jose Christian Coll. v. City of Morgan Hill*, 360 F.3d 1024, 1035 (9th Cir. 2004) (concluding "[t]he City's ordinance imposes no restriction whatsoever on College's religious exercise; it merely requires College to submit a complete application[.]"); *International Church of the Foursquare Gospel v. City of San Leandro*, No. 07-3605 PJH, 2007 WL 2904046, at *13 (N.D. Cal. Oct. 2,

existing zoning requirements.²⁵⁵ The delay²⁵⁶ and cost²⁵⁷ associated with a typical application process also fail to rise to the level of a substantial burden. Courts are unwilling to interpret RLUIPA as a “free pass”²⁵⁸ and religious institutions that fail to follow the proper procedural avenues are unlikely to prevail in a RLUIPA action.

Courts and commentators have noted that this approach is consistent with the legislative intent behind RLUIPA. As Daniel P. Lenington points out, Senator Hatch and Senator Kennedy, co-sponsors of RLUIPA, produced a joint statement with a section entitled “Not land use immunity.”²⁵⁹ A pertinent section of the statement reads, “[t]his Act does not provide religious institutions with immunity from land use regulations, nor does it relieve religious institutions from applying for variances, special permits or exceptions, hardship approval, or other relief provisions in land use regulations, where available without discrimination or unfair delay.”²⁶⁰ Religious institutions should keep this provision in mind before considering legal action under RLUIPA.

2. Rely on the law at the time of application and realize the law may change

As discussed above, the *Petra* case indicates that a religious institution has no “vested right” in the illegality of a former ordinance.²⁶¹ Religious institutions should also be aware that a local government can avoid the force of RLUIPA by changing the policy or practice which created the substantial burden in the first place. RLUIPA provides that:

A government may avoid the preemptive force of any provision of this chapter by changing the policy or practice that results in a

2007) (refusing to rule on the likelihood of plaintiff's success on an incomplete application).

²⁵⁵ *Greater Bible Way Temple of Jackson v. City of Jackson*, 733 N.W.2d 734, 749 (Mich. 2007) (“[I]n the realm of building apartments, plaintiff has to follow the law like everyone else.”).

²⁵⁶ *Family Life Church v. City of Elgin*, 561 F. Supp. 2d 978, 987 (N.D. Ill. 2008).

²⁵⁷ See notes and accompanying texts, *supra* Part IV. A. 1., for a discussion regarding when a financial hardship does amount to a substantial burden.

²⁵⁸ *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 762 (7th Cir. 2003).

²⁵⁹ Lenington, *supra* note 52, at 818.

²⁶⁰ *Id.* at 818-19 (citing 146 CONG. REC. S7776 (2000) (joint statement of Sens. Hatch and Kennedy)).

²⁶¹ *Petra Presbyterian Church v. Vill. of Northbrook*, 489 F.3d 846, 849 (7th Cir. 2007).

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.²⁶²

This provision gives local governments discretion to retain the policy that currently burdens a religious institution. For instance, if Town X excludes churches from industrial zones, but allows other assembly uses, the ordinance probably violates RLUIPA's equal terms provision. To avoid "the preemptive force" of RLUIPA, Town X may choose to exclude *all* assembly uses from the industrial zone.

3. Assess current, not future needs

Several courts have declined to find a substantial burden when religious institutions' requests are based on projected future needs.²⁶³ When preparing an application for any special exception or approval, religious institutions should develop evidence that shows how current size constraints hinder their religious exercise. This approach worked for the church in *Cottonwood Christian Center v. Cypress Redevelopment Agency*.²⁶⁴ The court clearly sympathized with Cottonwood's effort to provide service to its present members, despite the size limitations of its current facility.²⁶⁵ Courts are unlikely to look as favorably upon a claim where the institution provides no showing of hardship or when the institution is simply planning for some tangential growth at some point in the future.

4. Consider all reasonable alternatives

Why demolish an historic building when modest renovations will do? Even with RLUIPA, courts will continue to ask plainly common sense questions.²⁶⁶ Similarly, if a local government

²⁶² 42 U.S.C. § 2000cc-3(e) (2000).

²⁶³ *Living Water Church of God v. Charter Twp. of Meridian*, 258 F. App'x 729, 738 (6th Cir. 2007) ("The question before us here is whether the Township's denial substantially burdens Living Water's religious exercise *now*—not five, ten or twenty years from now—based on the facts in the record."); *Castle Hills First Baptist Church v. City of Castle Hills*, No. SA-01-CA-1149-RF, 2004 WL 546792, at *11 (W.D. Tex. Mar. 17, 2004) (finding no substantial burden when application for supplemental parking lot was denied).

²⁶⁴ *Cottonwood Christian Ctr. v. Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203, 1226-27 (C.D. Cal. 2002).

²⁶⁵ *Id.* at 1212, 1227.

²⁶⁶ *See generally*, *Episcopal Student Found. v. City of Ann Arbor*, 341 F. Supp. 2d 691 (E.D. Mich. 2004).

denies an application for specific reasons, a religious institution should consider how to modify its existing application without sacrificing the essential elements of its request. As discussed in the recommendations to local governments, courts do consider whether religious institutions are willing to accommodate reasonable requests. If a local government requests more buffering, modifications to the parking scheme, or a reduction in square footage, the expense incurred by modifying your plans may be far less than the legal and expert witness fees associated with pursuing a RULIPA claim. It may also be reasonable to open a satellite facility or conduct multiple services. As a general rule, “mere inconveniences” do not rise to the level of a RLUIPA violation,²⁶⁷ and most courts hold that financial hardship alone does not impose a substantial burden.²⁶⁸

This recommendation is not meant to discount, however, the fact that some governmental requests may be unreasonable, or that some local governments may never be willing to compromise.²⁶⁹ In such cases, RLUIPA may provide the type of effective tool Congress intended. The real challenge, then, comes in anticipating a local government’s willingness to facilitate a satisfying resolution for everyone. Religious institutions can help in this process by communicating early and often with the appropriate planning staff, and anticipating conflicts as early as possible.

C. For Congress

Some commentators argue that when Congress enacted RLUIPA it sought to endorse a law that prevented only *intentional* discrimination by local governments against religious institutions.²⁷⁰ Since its passage, however, RLUIPA has been applied to invalidate neutral and generally applicable land use regulations imposed by local governments without any apparent discriminatory animus.²⁷¹ The high cost to local governments in a

²⁶⁷ See notes and accompanying text, *supra* Part IV. D. (considering the inconveniences imposed on institution members).

²⁶⁸ See *supra* Part IV. A. (examining the financial burdens imposed).

²⁶⁹ See Dalton, *supra* note 17, at 6 (reflecting “[i]n hindsight, however, my client and I should have understood that the city never intended to resolve this case . . . [W]e should have filed suit immediately.”).

²⁷⁰ Lenington, *supra* note 52, at 806.

²⁷¹ *Id.* However, Congress arguably intended for RLUIPA to remedy *covert* discrimination. As a prophylactic law, it necessarily entails that some non-discriminatory regulations will be struck down. See Nelson Tebbe, Address at

RLUIPA defeat, combined with the inconsistent judicial interpretation of a substantial burden, has caused some local governments to eschew their legitimate planning goals as applied to religious institutions.²⁷² If Congress truly meant that RLUIPA is “[n]ot land use immunity,”²⁷³ the statute must be revisited to clarify how and when local governments can regulate religious land uses.

Congress could modify § 2000cc(a) of the Act to include a good faith exemption for local governments acting in pursuit of legitimate land planning goals. A new provision, § 2000cc(a)(3), could incorporate mitigating factors that tend to show that local governments are acting in a non-discriminatory manner. This revision would retain the additional protection of the substantial burden provision, a provision meant to protect against “covert” discrimination²⁷⁴ as well as the clearly intentional discrimination banned by § 2000cc(b).²⁷⁵ The new section might read:

No substantial burden exists when governments impose reasonable size and use limitations on a proposed religious land use. Reasonableness is judged by taking into account at the time of the challenged decision the size of a parcel, the character of surrounding land uses, and any formally adopted land use plan.

This additional provision would help local governments maintain the character of their communities, and would help maintain policies in states like Oregon that promote strong advance land use planning. With this addition, RLUIPA will continue to protect religious institutions without providing what some feel is an unfair advantage over secular land users. Most importantly, this or a similar revision is required to reduce uncertainty for local governments and religious institutions alike, by providing guidance on the meaning of a substantial burden. Until Congress amends RLUIPA, or the Supreme Court chooses to provide definitive guidance, inconsistent judicial interpretation will continue.

the Albany Government Law Review Symposium: God and the Land, Condemning Religion: The Political Economy of RLUIPA (Oct. 2, 2008) *available at* <http://lawoftheland.wordpress.com/2008/10/05> (follow “Hear Leading Judges, Academics and Practitioners Discuss Religion and Land Use” hyperlink; then follow “panel 2 audio” hyperlink).

²⁷² Schragger, *supra* note 6, at 1839 (citing Hamilton, *Federalism*, *supra* note 6, at 335-41).

²⁷³ Lenington, *supra* note 52, at 818.

²⁷⁴ *Id.* at 817.

²⁷⁵ 42 U.S.C. § 2000cc(b) (2000) (banning discrimination and exclusions).

CONCLUSION

Whether one believes RLUIPA is an important tool in preventing religious discrimination or an unnecessary and unjust exercise of Congressional power, it is now a part of the legal landscape for religious institutions and local governments alike. Congress's failure to define a substantial burden has led to inconsistent judicial interpretations, producing definitions that range on scale from "effectively impracticable" to a much lower bar. Even without a prevailing definition for a substantial burden, potential litigants on both sides may benefit from an evaluation of the fact patterns that have influenced courts over the past eight years. The recommendations in this article are made with the hope that religious institutions and local governments can avoid unnecessary RLUIPA litigation as we all adjust to RLUIPA's impact on the local land use planning and regulation.