DEFENDANTS' PROPOSED JURY INSTRUCTION NO. 1

RLUIPA—"SUBSTANTIAL BURDEN" CLAIM—REDWOOD'S *PRIMA FACIE* CASE—INTRODUCTION

Redwood has sued the County under the Religious Land Use and Institutionalized Persons Act, also known by its initials, "RLUIPA." The purpose of RLUIPA is to alleviate discrimination against religious institutions in land use proceedings. RLUIPA serves this purpose by empowering the courts to step in and correct the zoning process when it improperly discriminates against religious institutions.[1] RLUIPA was not intended to provide religious institutions with immunity from land use regulations or to exempt religious institutions from generally applicable burdens.[2]

Redwood makes three separate claims under RLUIPA:

- A "substantial burden" claim.
- An "equal terms" claim.
- An "unreasonable limitation" claim.[3]

You must consider each of these RLUIPA claims separately to see whether Redwood has proved that claim. There will be separate instructions for each RLUIPA claim.

Redwood's first RLUIPA claim is its "substantial burden" claim. Before it can win on its "substantial burden" claim, Redwood must prove by a preponderance of the evidence that the County's decision to deny Redwood's CUP application imposes a substantial burden on Redwood's religious exercise.[4]

To decide whether Redwood has met this burden, you need to apply the proper definitions of "imposes," "religious exercise," and "substantial burden." The next three instructions will define those terms, in that order.

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[1] *See* the Court's Jan. 27, 2007 MIL order at 12.

[2] *See* the Court's Jan. 27, 2007 MIL order at 6 (citing 146 Cong. Rec. S7776).

[3] First Amended Complaint, Counts I, II, and III

[4] 42 U.S.C. § 2000cc(a)(1).

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DEFENDANTS' PROPOSED JURY INSTRUCTION NO. 2

RLUIPA—"SUBSTANTIAL BURDEN" CLAIM—REDWOOD'S *PRIMA FACIE* CASE—DEFINITION OF "IMPOSES"

To win on its "substantial burden" claim, Redwood must prove that the County's decision to deny Redwood's CUP application "imposes" a substantial burden on Redwood's religious exercise.[5]

To "impose" means to bring something about, as if by force.[6] If the substantial burden would have happened anyway, then it was not "imposed" by the County's decision to deny Redwood's CUP application, and Redwood cannot win on its "substantial burden" claim. For example, the substantial burden was not "imposed" by the County's decision if it was caused by Redwood's failure to submit relevant evidence to the County.

[5] 42 U.S.C. § 2000cc(a)(1) ("No government shall impose or implement a land use regulation in a manner that ***imposes*** a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless [etc.]. . . .") (emphasis added); 42 U.S.C. § 2000cc-2(b) ("[T]he plaintiff shall bear the burden of persuasion on whether the law (including a regulation) or government practice that is challenged by the claim substantially burdens the plaintiff's exercise of religion.").

[6] Merriam-Webster's Collegiate Dictionary 625 (11th ed. 2003) (impose: "to establish or bring about as if by force").

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DEFENDANTS' PROPOSED JURY INSTRUCTION NO. 3

RLUIPA—"SUBSTANTIAL BURDEN" CLAIM—REDWOOD'S *PRIMA FACIE* CASE—DEFINITION OF "RELIGIOUS EXERCISE"

"Religious exercise" includes any religious practice, whether or not it is required by, or central to, a system of religious belief.[7] The use, building, or conversion of real property for the purpose of religious exercise is considered to be religious exercise by the person or entity that uses or intends to use the property for that purpose.[8]

However, not every activity carried out by a religious entity or individual constitutes "religious exercise." In many cases, real property is used by religious institutions for purposes that are comparable to those carried out by other institutions. Even though these activities or facilities may be owned, sponsored or operated by a religious institution, or may permit a religious institution to obtain additional funds to further its religious activities, this alone does not automatically bring these activities or facilities within RLUIPA's definition of "religious exercise." For example, a burden on a commercial building, which is connected to religious exercise primarily by the fact that the proceeds from the building's operation would be used to support religious exercise, is not a substantial burden on 'religious exercise.'"[9]

Therefore, "religious exercise" does not include practices or activities that are not religious. For example, it does not include things that students at non-religious schools do, like learning to read, solving a math problem, performing a lab experiment, doing gymnastics, playing a basketball game, or practicing a musical instrument.[10]

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[7] 42 U.S.C. § 2000cc-5(7)(A).

[8] 42 U.S.C. § 2000cc-5(7)(B).

[9] *See* 146 Cong. Rec. S7774-01, S7776 (2001) (joint statement of Sens. Hatch & Kennedy).

[10] *See generally Westchester Day Sch. v. Village of Mamaroneck*, 386 F.3d 183, 189-90 (2d Cir. 2004); 146 Cong. Rec. S7774-01, S7776 (2001) (joint statement of Sens. Hatch & Kennedy).

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DEFENDANTS' PROPOSED JURY INSTRUCTION NO. 4

RLUIPA—"SUBSTANTIAL BURDEN" CLAIM—REDWOOD'S *PRIMA FACIE* CASE—DEFINITION OF "SUBSTANTIAL BURDEN" (PART I—BURDENS THAT ARE "SUBSTANTIAL")

For a land use decision to impose a "substantial burden," it must be oppressive to a significantly great extent. A "substantial burden" must place more than an inconvenience on religious exercise.[11] Rather, a "substantial burden" must impose a "significantly great restriction or burden on religious exercise."[12]

To prove that the County imposed a "significantly great restriction or burden" on Redwood's religious exercise, Redwood must prove by a preponderance of the evidence that the County's decision to deny Redwood's CUP application coerced Redwood's members into modifying their religious practices and violating their religious beliefs.[13]

For example, the government coerces someone into violating his or her religious beliefs, or modifying his or her religious practices, when it:

- imposes special restrictions or disadvantages on someone based on his or her religious views or religious status,
- punishes the expression of religious beliefs that the government disagrees with,[14] or

[11] *See Guru Nanak Sikh Soc'y of Yuba City v. County of Sutter*, 456 F.3d 978, 988 (9th Cir. 2006).

[12] *See Guru Nanak Sikh Soc'y of Yuba City v. County of Sutter*, 456 F.3d 978, 988 (9th Cir. 2006).

[13] *See Guru Nanak Sikh Soc'y of Yuba City v. County of Sutter*, 456 F.3d 978, 988 (9th Cir. 2006) (plaintiff must show that defendant's conduct placed "'substantial pressure on an adherent to modify his behavior and to violate his beliefs,'" or that the defendant's conduct had a "'tendency to coerce individuals into acting contrary to their religious beliefs.'") (quoting *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450-451 (1988) and *Thomas v. Review Bd. of the Ind. Employment Sec. Div.*, 450 U.S. 707, 717-18 (1981)); *see also Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1226-27 (11th Cir. 2004) (substantial burden occurs only when "an individual is required to 'choose between following the precepts of her religion . . . and abandoning one of the precepts of her religion . . . on the other'"—that is, where "a regulation completely prevents the individual from engaging in religiously mandated activity, or . . . requires participation in an activity prohibited by religion") (quoting *Sherbert v. Verner*, 374 U.S. 398, 404 (1963)).

[14] *Harper v. Poway Unified School Dist.*, 445 F.3d 1166, 1188 (9th Cir. 2006), *reh'g en banc denied*, 455 F.3d 1052 (9th Cir. 2006), *petition for cert. filed on different issue*, 75 U.S.L.W. 3248 (U.S. Oct. 26, 2006) (No. 06-595). *Poway* articulates the traditional "substantial burden"

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- bans religious conduct only when that conduct was performed for religious reasons, or only because of the religious belief that it displayed.[15]

When you are deciding whether Redwood has proven a "substantial burden" on its religious exercise, you must **not** consider the generally applicable costs and requirements of pursuing a CUP application, or the inherent political aspects of that process. These are not "substantial" burdens, because RLUIPA does not excuse Redwood from generally applicable burdens. Therefore, you cannot find that going through the CUP process imposed a "substantial burden" on Redwood's religious exercise unless Redwood has proven that the process involved significant irregularities or discrimination based on religion.[16]

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test under the Free Exercise Clause. *See also Sherbert v. Verner*, 374 U.S. 398, 402 (1963) ("The door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious beliefs as such, ... Government may neither compel affirmation of a repugnant belief, . . . nor penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities, . . . nor employ the taxing power to inhibit the dissemination of particular religious views . . . .").

RLUIPA employs the same test. *See Episcopal Student Found. v. City of Ann Arbor*, 341 F. Supp. 2d 691, 701 (E.D. Mich. 2004) ("As several courts have observed, the RLUIPA's history demonstrates that Congress intended to leave intact the traditional 'substantial burden' test, as defined by the Supreme Court's free exercise jurisprudence."); 146 Cong. Rec. 7774-01, 7776 (joint statement of Sens. Hatch & Kennedy) ("The term 'substantial burden' as used in [RLUIPA] is not intended to be given any broader interpretation than the Supreme Court's articulation of the concept of substantial burden on religious exercise"). Indeed, *it could not be otherwise*; for "[l]egislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is. It has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation. Were it not so, what Congress would be enforcing would no longer be, in any meaningful sense, the 'provisions of [the Fourteenth Amendment].'" *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997).

[15] *See Employment Div., Dep't of Human Resources of Ore. v. Smith*, 494 U.S. 872, 877-78 (1990) ("But the 'exercise of religion' often involves not only belief and profession but the performance of (or abstention from) physical acts: assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, abstaining from certain foods or certain modes of transportation. It would be true, we think (though no case of ours has involved the point), that a State would be 'prohibiting the free exercise [of religion]' if it sought to ban such acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display. It would doubtless be unconstitutional, for example, to ban the casting of 'statues that are to be used for worship purposes,' or to prohibit bowing down before a golden calf.").

[16] *See* the Court's Jan. 27, 2007 MIL order at 6.

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DEFENDANTS' PROPOSED JURY INSTRUCTION NO. 5

RLUIPA—"SUBSTANTIAL BURDEN" CLAIM—REDWOOD'S BURDEN EVIDENCE LIMITED BY COUNTY'S AFFIRMATIVE DEFENSE OF WAIVER

The County claims that the specific "substantial burdens" that Redwood may complain about in this lawsuit are limited by the affirmative defense of "waiver." "Waiver" occurs when someone intentionally gives up a legal right that he or she knows she has.[17] The County claims that, back when the County was considering Redwood's CUP application, Redwood failed to present evidence to the County about some of the "substantial burdens" that it now says the County imposed on it. If the County proves its "waiver" defense, you must disregard any evidence about Redwood's "substantial burdens" that Redwood failed to present to the County during the administrative process.

To win on its "waiver" defense, the County must prove all of the following facts by a preponderance of the evidence:

(1) Some of the evidence that Redwood now uses to support its claim that the County imposed a "substantial burden" on it was not presented to the County back when the County was considering Redwood's CUP application; and

(2) Redwood knew that it had a right to present that evidence to the County; and

(3) Redwood intentionally failed to submit that evidence to the County.

[17] *See U.S. v. Evans-Martinez*, 448 F.3d 1163, 1166 (9th Cir. 2006).

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DEFENDANTS' PROPOSED JURY INSTRUCTION NO. 6

RLUIPA—"SUBSTANTIAL BURDEN" CLAIM—REDWOOD'S *PRIMA FACIE* CASE—DEFINITION OF "SUBSTANTIAL BURDEN" (PART II—BURDENS THAT ARE MERELY INCIDENTAL)

I instruct you that, under the law, the following burdens are merely "incidental," not "substantial," under RLUIPA.

- It is not a substantial burden that the County's action prevented Redwood from building as large a school as it would like. RLUIPA does not guarantee that Redwood may build a complex as large as it desires. The County can control growth and expansion within the limits of the area that it governs.[18]
- It is not a substantial burden that the County's action prevented Redwood from building its school wherever it wanted. RLUIPA does not give religious organizations a legal right to build their facilities wherever they please.[19] RLUIPA does not favor religious organizations over other organizations and people.[20] RLUIPA does not give religious organizations an exemption from land use regulations that apply to others.[21]
- It is not a substantial burden that the County's application of the law caused Redwood expense or inconvenience. A mere inconvenience is not enough to meet the "substantial burden" requirement, nor is it a substantial burden when a land use regulation merely makes the practice of religious beliefs more expensive.[22]

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[18] *See Vision Church v. Village of Long Grove*, 397 F. Supp. 2d 917, 929 (N.D. Ill. 2005).

[19] *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 658 (10th Cir. 2006); *see also Messiah Baptist Church v. County of Jefferson*, 859 F.2d 820, 826 (10th Cir. 1988).

[20] *See Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 762 (7th Cir. 2003) ("[N]o . . . free pass for religious land uses masquerades among the legitimate protections [that] RLUIPA affords to religious exercise."); *Westchester Day Sch. v. Village of Mamaroneck*, 386 F.3d 183, 189-90 (2d Cir. 2004) (RLUIPA "occupies a treacherous narrow zone between the Free Exercise Clause . . . and the Establishment Clause," and should not be interpreted as going "into the constitutionally impermissible zone of entwining government with religion in a manner that prefers religion over irreligion and confers special benefits on it.").

[21] *Lighthouse Inst. for Evangelism v. City of Long Branch*, 406 F. Supp. 2d 507, 517 (D.N.J. 2005) (quoting 146 Cong. Rec. S7776 (joint statement of Sens. Hatch and Kennedy)).

[22] *Lighthouse Inst. for Evangelism v. City of Long Branch*, 406 F. Supp. 2d 507, 515 (D.N.J. 2005) (quoting *Braunfeld v. Brown*, 366 U.S. 599, 605 (1961)).

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- It is not a substantial burden that the CUP process was long, costly, and uncertain. The siting of a large building often involves multiple applications by the builder, changes requested by a city planning commission or city council based on zoning and similar requirements, and related legal, architectural, and engineering costs. But these, in themselves, are not enough to establish a "substantial burden" under RLUIPA.[23]
- It is not a substantial burden if the County's action merely prevented Redwood from changing its religious practice (as opposed to restricting an existing religious practice).[24]

If you apply the standards in Instructions **[4 and 6]**, and you find that Redwood has **failed** to prove that the County's CUP denial imposed a "substantial burden" on Redwood's religious exercise, then Redwood cannot win on its "substantial burden" claim under RLUIPA. In that case, you must skip the rest of the instructions about this claim and skip to Instruction **[10]**.

Even if you find that Redwood proved that the County imposed a "substantial burden" on its religious exercise, Redwood still must prove that its substantial burden claim meets one of three "jurisdictional" requirements. The next Instruction discusses those jurisdictional requirements.

[23] *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).

[24] *See Christian Gospel Church, Inc. v. City and County of San Francisco*, 896 F.2d 1221, 1224 (9th Cir. 1990) ("The burden on religious practice is *not great* when the government action, in this case the denial of a use permit, does not restrict current religious practice but rather *prevents a change in religious practice*.") (emphasis added).

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DEFENDANTS' PROPOSED JURY INSTRUCTION NO. 7

RLUIPA—"SUBSTANTIAL BURDEN" CLAIM—JURISDICTION

To win on its "substantial burden" claim, Redwood must prove by a preponderance of the evidence that the substantial burden that the County imposed on its religious exercise fits at least one of these three descriptions:

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

(2) The substantial burden affects, or removing that substantial burden would affect, commerce with foreign nations, among the States, or with Indian tribes; or

(3) The substantial burden was imposed while implementing land use regulations under which the County makes individualized assessments of the proposed uses for the property involved. (A "land use regulation" is a zoning law, or the application of a zoning law, that limited or restricted Redwood's use or development of its land.[25] Redwood and the County agree that this case involved the County's application of County ordinances and general plans that would be considered "land use regulations" under RLUIPA.)

But even if Redwood proves this, the County still can defeat Redwood's "substantial burden" claim by proving that the County's actions were justified. This is an affirmative defense, and it is explained in the next instruction.

Source: 42 U.S.C.A. § 2000cc(a)(2)(A), (B) & (C).

[25] 42 U.S.C. § 2000cc-5(5).

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DEFENDANTS' PROPOSED JURY INSTRUCTION NO. 8

RLUIPA—"SUBSTANTIAL BURDEN" CLAIM—COUNTY'S JUSTIFICATIONS—INTRODUCTION / "COMPELLING GOVERNMENTAL INTEREST"

To win on the affirmative defense that its actions were justified, the County must prove by a preponderance of the evidence that its decision to deny the CUP was the "least restrictive means" of furthering a "compelling governmental interest."[26]

The County asserts that it has a "compelling governmental interest" in

- maintaining and enforcing a fair and neutral system of zoning laws;
- protecting the rural character of the Castro Valley area where Redwood wants to build its school;
- preserving a coherent land use zoning plan;
- preserving open space from excessive development;
- controlling excessive noise;
- controlling the impact of vehicular traffic; and
- preserving non-religious historic buildings from destruction.[27]

You must decide whether **any** (or all) of these interests were legitimate and sufficiently compelling to qualify as a "compelling governmental interest."[28]

If the answer to that question is "no," then Redwood wins on its "substantial burden" claim under RLUIPA.

But if the answer to that question is "yes," you must then decide whether denying

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[26] 42 U.S.C. § 2000cc(a)(1)(A) & (B).

[27] *See Christian Gospel Church, Inc. v. City and County of San Francisco*, 896 F.2d 1221, 1224 (9th Cir. 1990); *Grosz v. City of Miami Beach, Fla.*, 721 F.2d 729, 733, 738 (11th Cir. 1983) (quoting *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926) (reversing district court's erroneous judgment that a city's "interest in enforcing its zoning laws did not rise to the level of a compelling state interest . . . ."); *Konikov v. Orange County*, 302 F. Supp. 2d 1328, 1343 (M.D. Fla. 2003) (holding that Orange County zoning scheme satisfied strict scrutiny), *aff'd in part, rev'd in part and remanded*, 410 F.3d 1317 (11th Cir. 2005); *Daytona Rescue Mission, Inc. v. City of Daytona Beach*, 885 F. Supp. 1554 (M.D. Fla. 1995); *First Baptist Church of Perrine v. Miami-Dade County*, 768 So. 2d. 1114, 1118 (Fla. App. 2000); *see also Westchester Day School v. Village of Mamaroneck*, 386 F.3d 183, 191 (2d Cir. 2004) ("We know of no controlling authority, either in the Supreme Court or any circuit holding that traffic problems are incapable of being deemed compelling.").

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Redwood's CUP application was the "least restrictive means" of furthering those interests. That is the subject of the next instruction.

[28] *See* Court's Jan. 26, 2007 MIL order at 1.

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DEFENDANTS' PROPOSED JURY INSTRUCTION NO. 9

RLUIPA—"SUBSTANTIAL BURDEN" CLAIM—COUNTY'S JUSTIFICATIONS—"LEAST RESTRICTIVE MEANS"

Redwood wanted a 650-student combined junior-high and high-school campus. The County denied the CUP for that project. Redwood claims that, instead of denying the CUP, the County could have adopted the less restrictive alternative of granting a CUP that restricts the school to significantly less than 650 students. But the County claims that, at the time that the County made its final decision, Redwood did not want and did not seek approval for a school with significantly less than 650 students.

For the County to prove that it used the "least restrictive means," it must prove one of the following two things by a preponderance of the evidence. The County must prove either:

(1) That approving a CUP that restricts the school to significantly less than 650 students would not have furthered the County's compelling governmental interests as effectively as denying the CUP did;[29] or

(2) That Redwood did not ask the County to approve a school with significantly fewer than 650 students.[30]

If you find that the County proved either of these two things, then the County has defeated Redwood's "substantial burden" claim under RLUIPA.

If you do **not** find that the County proved either of these two things, then Redwood wins on its "substantial burden" claim under RLUIPA.

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[29] *See Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 126 S.Ct. 1211, 1219 (2006) (holding that RFRA plaintiff who demonstrated substantial burden was likely to prevail at trial "unless the Government has shown that [the plaintiff's] proposed less restrictive alternatives are less effective than" enforcing the challenged law) (quoting *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, 666 (2004)).

[30] *See Hamilton v. Schriro*, 74 F.3d 1545, 1556-57 (8th Cir. 1996) (where claimant will not consider less restrictive alternatives, government passes the least-restrictive-means test as a matter of law).

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DEFENDANTS' PROPOSED JURY INSTRUCTION NO. 10

RLUIPA—"EQUAL TERMS" CLAIM—INTRODUCTION

Redwood's second RLUIPA claim is its "equal terms" claim. To win on its "equal terms" claim, Redwood must first prove by a preponderance of the evidence that, by denying Redwood's CUP application, the County treated Redwood on less than equal terms with a similarly situated nonreligious assembly or institution.[31]

Even if Redwood proves this, Redwood will still lose on its "equal terms" claim if it fails to prove that the County's treatment of Redwood was not rationally related to any legitimate County interest.[32] To prove this, Redwood must show that the County's denial of Redwood's

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[31] *See* the Court's Jan. 27, 2007 MIL order at 7; 42 U.S.C. § 2000cc(b)(1); *Primera Iglesia Bautista Hispana v. Broward County*, 450 F.3d 1295, 1313-14 (11th Cir. 2006) ("And without identifying a similarly situated nonreligious comparator that received favorable treatment, Primera failed to establish a prima facie Equal Terms violation.") (emphasis added); *Lighthouse Institute for Evangelism Inc. v. City of Long Branch*, 2004 WL 1179268, at **4 (3d Cir. May 28, 2004) ("[T]he Mission also failed to produce evidence to support its contention that the secular assemblies it identified were actually similarly situated such that a meaningful comparison could be made under this provision.") (emphasis added); *Guru Nanak Sikh Society of Yuba City v. County of Sutter*, 326 F. Supp. 2d 1140, 1155 (E.D. Cal. 2003) (faulting plaintiffs for having "pointed to no similarly situated entities that received disparate treatment.") (emphasis added); *Petra Presbyterian Church v. Village of Northbrook*, 2003 WL 22048089, at *12 (N.D. Ill. Aug. 29, 2003) ("Petra has not cited any authority indicating either that restaurants and bars are "similarly situated" assembly uses or that this is sufficient to constitute a violation of RLUIPA.") (emphasis added); *Ventura County Christian High School v. City of San Buenaventura*, 233 F. Supp. 2d 1241, 1247 (C.D. Cal. 2002) ("[E]valuating plaintiffs' claims under either RLUIPA or the Equal Protection Clause of the Fourteenth Amendment, the Court must first inquire as to whether defendants have treated plaintiffs in an unequal manner to similarly situated entities.") (emphasis added).

[32] Section 2(a) of RLUIPA—the "General Rule/substantial burden" test—expressly includes a "strict scrutiny" test. *See* 42 U.S.C. § 2000cc(a)(1)(A) and (B). In contrast, § 2(b)—which contains the statute's "Equal Terms" and "Exclusions and Limits" language—contains no language telling courts what level of scrutiny to apply. *See* U.S.C. § 2000cc(b). Even though the strict-scrutiny standard applies to § 2(a), it should not automatically apply to § 2(b), for three reasons.

First, a standard as extraordinary and intrusive as strict scrutiny should not be inferred into a statute, but should be plainly stated by the drafters. Under the "plain statement rule," "if Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'" *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). Applying strict scrutiny to all land-use decisions in the United States would represented a "considerable congressional intrusion into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens . . . ." *City of Boerne v. Flores*, 521 U.S. 507, 509 (1997) (invalidating RFRA). Accordingly, if Congress meant to extend strict scrutiny to claims based on RLUIPA's Equal Terms and Exclusions and Limits provisions, it had to so by means of a plain statement. It did not.

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CUP application was completely irrational or lacking in any conceivable relationship to any of the governmental interests described in Instruction **[8]**.[33]

To decide whether Redwood has met this burden, you need to apply the proper definitions of "less than equal terms," "nonreligious," "assembly or institution," "similarly situated," "rationally related," and "legitimate interest." The next six instructions will define those terms, in that order.

Second, "[i]t is well settled that '"[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."'" *Duncan v. Walker*, 533 U.S. 167, 173 (2001) (quoting *Bates v. United States*, 522 U.S. 23, 29-30 (1997)). Thus, the Court should find that Congress acted intentionally when it included the strict scrutiny standard in § 2(a) while excluding it from § 2(b).

Third, the Supreme Court has held that, "[i]n determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy." *Crandon v. U.S.*, 494 U.S. 152 (1990). One "object and policy" of RLUIPA's Equal Terms provision was to codify pre-existing Equal Protection jurisprudence and make it applicable to land-use decisions. Thus, in *Ventura County Christian High School v. City of San Buenaventura*, 233 F. Supp. 2d 1241, 1246 (C.D. Cal. 2002), the court stated that "[s]ection 2(b) of RLUIPA codifies 'existing Supreme Court decisions under the Free Exercise and Establishment Clauses of the First Amendment as well as under the Equal Protection Clause of the Fourteenth Amendment.'" *Id*. at 158. But pre-existing Equal Protection jurisprudence requires rational-basis review of laws that do not involve a suspect or quasi-suspect classification. *See San Jose Christian College v. City of Morgan Hill*, 360 F.3d 1024, 1031 (9th Cir. 2004) ("If the zoning law is of general application and is not targeted at religion, it is subject only to rational basis scrutiny, even though it may have an incidental effect of burdening religion."); *Ball v. Massanari*, 254 F.3d 817, 823 (9th Cir. 2001). Therefore, rational-basis review should govern § 2(b) of RLUIPA, including its Equal Terms and Exclusions and Limits provisions.

[33] *Pennell v. City of San Jose*, 485 U.S. 1, 14 (1988) (citation omitted); *National Ass'n for Advancement of Psychoanalysis v. California Bd. of Psychology*, 228 F.3d 1043, 1050-51 (9th Cir. 2000); *see also U.S. v. Harding*, 971 F.2d 410, 413 (9th Cir. 1992) ("The burden falls on the party attempting to disprove the existence of a rational relationship . . . ."); Erwin Chemerinsky, Constitutional Law Principles and Policies 530 (1997) ("The challenger has the burden of proof under rational basis review.").

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DEFENDANTS' PROPOSED JURY INSTRUCTION NO. 11

RLUIPA—"EQUAL TERMS" CLAIM—DEFINITION OF "LESS THAN EQUAL TERMS"

To win on its "equal terms" claim, Redwood must prove that, by denying Redwood's CUP application, the County treated Redwood on "less than equal terms" with a similarly situated nonreligious assembly or institution.[34] To be treated on "less than equal terms" means to be treated less favorably, unequally, or disparately.[35]

The law requires that the County give equal treatment, not special or better treatment, to a religious assembly or institution.[36] To win, Redwood must identify at least one similarly situated nonreligious assembly or institution that the County treated more favorably than it treated Redwood.[37]

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[34] *See* the Court's Jan. 27, 2007 MIL order at 7.

[35] *See Primera Iglesia Bautista Hispana v. Broward County*, 450 F.3d 1295, 1313-14 (11th Cir. 2006) ("And without identifying a similarly situated nonreligious comparator that received favorable treatment, Primera failed to establish a prima facie Equal Terms violation.") (emphasis added); *Vision Church v. Village of Long Grov*e, 397 F. Supp. 2d 917, 930 (N.D. Ill. 2005) ("Vision, however, has not identified a non-religious group that has received more favorable treatment.") (emphasis added); *Guru Nanak Sikh Society of Yuba City v. County of Sutter*, 326 F. Supp. 2d 1140, 1155 (E.D. Cal. 2003) ("They have pointed to no similarly situated entities that received disparate treatment.") (emphasis added); *Ventura County Christian High School v. City of San Buenaventura*, 233 F. Supp. 2d 1241, 1247 (C.D. Cal. 2002) ("[E]valuating plaintiffs' claims under either RLUIPA or the Equal Protection Clause of the Fourteenth Amendment, the Court must first inquire as to whether defendants have treated plaintiffs in an unequal manner to similarly situated entities.") (emphasis added).

[36] *See Primera Iglesia*, 450 F.3d at 1313 ("The bottom line, fatal for Primera's statutory claim, is that RLUIPA's Equal Terms provision requires equal treatment, not special treatment.")

[37] *See id*. at 1313-14 ("And without identifying a similarly situated nonreligious comparator that received favorable treatment, Primera failed to establish a prima facie Equal Terms violation."); *Vision Church*, 397 F. Supp. 2d at 930 ("Vision, however, has not identified a non-religious group that has received more favorable treatment."); *Ventura County*, 233 F. Supp. 2d at 1247 ("[E]valuating plaintiffs' claims under either RLUIPA or the Equal Protection Clause of the Fourteenth Amendment, the Court must first inquire as to whether defendants have treated plaintiffs in an unequal manner to similarly situated entities.").

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DEFENDANTS' PROPOSED JURY INSTRUCTION NO. 12

RLUIPA—"EQUAL TERMS" CLAIM—DEFINITION OF "NONRELIGIOUS"

To win on its "equal terms" claim, Redwood must prove that, by denying Redwood's CUP application, the County treated Redwood on less than equal terms with a similarly situated "nonreligious" assembly or institution.[38]

You should give the term "nonreligious" its ordinary and natural meaning.[39] For instance, something that is "nonreligious" does not manifest devotion to and reflect the nature of the divine.[40]

[38] *See* the Court's Jan. 27, 2007 MIL order at 7.

[39] *See Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward County*, 450 F.3d 1295, 1307 n.6 (11th Cir. 2006) ("Although the statute does not define the term 'religious,' we give this common term it its natural meaning: 'relating to that which is acknowledged as ultimate reality: manifesting devotion to and reflecting the nature of the divine or that which one holds to be of ultimate importance.'") (quoting Webster's Third New International Dictionary (2002)); *see also Nat'l Coal Ass'n v. Chater*, 81 F.3d 1077, 1081 (11th Cir. 1996) ("Terms that are not defined in the statute . . . are given their ordinary or natural meaning.").

[40] *See* Webster's Third New International Dictionary (2002) (defining "religious").

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DEFENDANTS' PROPOSED JURY INSTRUCTION NO. 13

RLUIPA—"EQUAL TERMS" CLAIM—DEFINITION OF "ASSEMBLY OR INSTITUTION"

To win on its "equal terms" claim, Redwood must prove that, by denying Redwood's CUP application, the County treated Redwood on less than equal terms with a similarly situated nonreligious "assembly or institution."[41]

An "assembly" is a company of persons collected together in one place, usually for some common purpose.[42] An "institution" is an established society, corporation, establishment, or foundation, especially of a public character.[43] An assembly or institution cannot be, for instance, a residential use.[44]

[41] *See* the Court's Jan. 27, 2007 MIL order at 7.

[42] *See Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1230 (11th Cir. 2004) (quoting Webster's 3d New Int'l Unabridged Dictionary 131 (1993)); Black's Law Dictionary 111 (7th ed. 1999)); *Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward County*, 450 F.3d 1295, 1307 n.6 (11th Cir. 2006) ("We have defined an 'assembly' as 'a company of persons collected together in one place and usually for some common purpose (as deliberation and legislation, worship, or social entertainment).'").

[43] *See Midrash Sephardi*, 366 F.3d at 1230-31 (quoting Webster's 3d New Int'l Unabridged Dictionary 1171 (1993); Black's Law Dictionary 801 (7th ed. 1999)); *Primera Iglesia*, 450 F.3d at 1307 n.6 ("[A]n 'institution' as 'an established society or corporation: an establishment or foundation especially of a public character.'") (quoting *Konikov v. Orange County, Fla.*, 410 F.3d 1317, 1325 (11th Cir.2005) (internal quotation marks omitted)).

[44] *See Williams Island Synagogue v. City of Aventura*, 358 F. Supp. 2d 1207, 1218 (S.D. Fla. 2005) ("As a residential use, it is not a nonreligious assembly or institution for the purposes of comparison under RLUIPA and Plaintiff's disparate treatment claims therefore fails as a matter of law.").

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DEFENDANTS' PROPOSED JURY INSTRUCTION NO. 14

RLUIPA—"EQUAL TERMS" CLAIM—DEFINITION OF "SIMILARLY SITUATED"

To win on its "equal terms" claim, Redwood must prove that, by denying Redwood's CUP application, the County treated Redwood on less than equal terms with a nonreligious assembly or institution that is "similarly situated" to Redwood.[45] A "similarly situated" assembly or institution is one that

1. is in the same zoning district as Redwood;[46] and

2. wants to build a facility that has the same intended uses as Redwood's proposed school;[47] and

3. has been analyzed under the same regulatory standard as Redwood's CUP application was;[48] and

4. has been seeking the same type of zoning relief that Redwood does—a conditional use permit.[49]

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[45] *See* the Court's Jan. 27, 2007 MIL order at 7.

[46] *See Williams Island Synagogue v. City of Aventura*, 329 F. Supp. 2d 1319, 1326 (S.D. Fla. 2004) (emphasis added) (finding that the "relevant considerations as to Plaintiff's disparate treatment claim are the procedural differences between what is required of Plaintiff and what is required of those private organizations occupying a space under comparable circumstances within the same zoning district.") (emphasis added); *Kol Ami v. Abington Township*, 309 F.3d 120, 137 (3d Cir. 2002) (holding that determining whether an entity is "similarly situated" under Equal Protection law requires court to "examine whether the complaining party is similarly situated to other uses . . . in a certain zone.") (emphasis added). *See also Primera Iglesia Bautista Hispana*, 450 F.3d at 1311 (rejecting Equal Terms claim under similarly-situated analysis because plaintiff and comparator were subject to different zoning laws and thus not subject to the same challenged regulation); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214 (11th Cir. 2004) (applying natural-perimeter analysis and analyzing the particular zoning ordinance, § 90-152, that applied to the business district where plaintiffs' congregation met, to determine whether plaintiff was treated unequally vis a vis other uses allowed in the business district); *Konikov v. Orange County, Florida*, 410 F.3d 1317, 1320, 1325-26, 1328 (11th Cir. 2005) (rejecting Equal Terms facial violation by comparing plaintiff to other uses allowed in the R-1-A zone where plaintiff lived and upholding "as applied" claim by reviewing whether plaintiffs' religious meetings at his house were treated differently than social or family gatherings would be treated at other houses in the same zoning district).

[47] *Lighthouse Inst. for Evangelism v. City of Long Branch*, 406 F. Supp. 2d 507, 518 (D.N.J. 2005) (holding that the plaintiff church was not similarly situated with the nonsecular assemblies it presented as comparators because "its intended uses are a house of worship, staging of religious plays, a commercial store specializing in religious material and a soup kitchen," and "[t]his combination of intended uses has no similarly situated counterpart in the permitted uses set out by" plaintiffs.).

[48] *See id.*

[49] *See Primera Iglesia*, 450 F.3d at 1311 (holding that when two entities seek "markedly different forms of zoning relief, from different decision-making bodies, under sharply different

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Redwood must prove by a preponderance of the evidence that at least one nonreligious assembly or institution meets all of these requirements. If Redwood fails to do so, it cannot win on its "equal terms" claim, because different treatment of dissimilarly situated assemblies or institutions is not enough for Redwood to win.[50]

I instruct you that public schools and private schools like Redwood are not "similarly situated" because public schools go through an entirely different land use approval process under state law.[51] Therefore, you cannot compare Redwood with any public school for purposes of this "Equal Terms" claim.

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provisions of local law," the entities "are not similarly situated.").

[50] *See id.* at 1311.

[51] *See* the Court's Jan. 27, 2007 MIL order at 7.

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DEFENDANTS' PROPOSED JURY INSTRUCTION NO. 15

RLUIPA—"EQUAL TERMS" CLAIM—DEFINITION OF "RATIONALLY RELATED"

To win on its "equal terms" claim, Redwood must prove that the County's worse treatment of Redwood was not "rationally related" to any legitimate County interest.[52] In other

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[52] RLUIPA's "General Rule/substantial burden" test (RLUIPA § 2(a)(1)(A) & (B), 42 U.S.C. § 2000cc(a)(1)(A) & (B)) expressly includes a "strict scrutiny" test. In contrast, RLUIPA's "Equal Terms" and "Exclusions and Limits" provisions (RLUIPA § 2(b), 42 U.S.C. § 2000cc(b)) contain no language specifying the appropriate level of judicial scrutiny.

Even though the strict-scrutiny standard applies to RLUIPA's "General Rule/substantial burden" test, it should not apply to RLUIPA's Equal Terms and Exclusions and Limits provisions, for at least three reasons.

First, a standard as extraordinary and intrusive as strict scrutiny should not be inferred into a statute, but should be plainly stated by the drafters. Under the "plain statement rule," "if Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'" *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). Applying strict scrutiny to all land-use decisions in the United States would have represented a "considerable congressional intrusion into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens . . . ." *City of Boerne v. Flores*, 521 U.S. 507, 509 (1997) (invalidating RFRA). Accordingly, if Congress had intended to extend strict scrutiny to claims based on RLUIPA's Equal Terms and Exclusions and Limits provisions, it would have plainly stated that intention. It did not; and such a radical intention may not be presumed.

Second, "[i]t is well settled that '"[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."'" *Duncan v. Walker*, 533 U.S. 167, 173 (2001) (quoting *Bates v. United States*, 522 U.S. 23, 29-30 (1997)). Thus, the Court should find that Congress "acted intentionally and purposely" when it included the strict-scrutiny standard in "General Rule/substantial burden" test while excluding it from the Equal Terms and Exclusions and Limits provisions.

Third, the Supreme Court has held that, "[i]n determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy." *Crandon v. U.S.*, 494 U.S. 152 (1990). One "object and policy" of RLUIPA's Equal Terms provision was to codify pre-existing Equal Protection jurisprudence and make it applicable to land-use decisions. Thus, in *Ventura County Christian High School v. City of San Buenaventura*, 233 F. Supp. 2d 1241, 1246 (C.D. Cal. 2002), the court stated that RLUIPA's Equal Terms and Exclusions and Limits provisions "codif[y] 'existing Supreme Court decisions under the Free Exercise and Establishment Clauses of the First Amendment as well as under the Equal Protection Clause of the Fourteenth Amendment.'" *Id*. at 158; *see also Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 406 F. Supp. 2d 507, 517 (D.N.J. 2005) ("As legislative history makes clear and courts have concluded, the RLUIPA was designed to codify the constitutional provision of equal protection in the context of zoning ordinances."). But pre-RLUIPA (and current) Equal Protection jurisprudence requires rational-basis review of laws that do not involve a suspect or quasi-suspect classification. *See San Jose Christian College v. City of Morgan Hill*, 360 F.3d 1024, 1031 (9th Cir. 2004) ("If the zoning law is of general application and is not targeted at religion, it is subject only to rational basis scrutiny, even though it may have an incidental effect of burdening religion."); *Ball v. Massanari*, 254 F.3d 817, 823 (9th Cir. 2001). Therefore, rational-basis review should govern RLUIPA's Equal Terms and Exclusions and Limits provisions.

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words, Redwood must show that the County's denial of Redwood's CUP application was completely irrational or lacking in any conceivable relationship to any of the governmental interests described in Instruction **[8]**.[53]

[53] *Pennell v. City of San Jose*, 485 U.S. 1, 14 (1988) (citation omitted); *National Ass'n for Advancement of Psychoanalysis v. California Bd. of Psychology*, 228 F.3d 1043, 1050-51 (9th Cir. 2000); *see also U.S. v. Harding*, 971 F.2d 410, 413 (9th Cir. 1992) ("The burden falls on the party attempting to disprove the existence of a rational relationship . . . ."); Erwin Chemerinsky, Constitutional Law Principles and Policies 530 (1997) ("The challenger has the burden of proof under rational basis review.").

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DEFENDANTS' PROPOSED JURY INSTRUCTION NO. 16

RLUIPA—"EQUAL TERMS" CLAIM—DEFINITION OF "LEGITIMATE COUNTY INTEREST"

To win on its "equal terms" claim, Redwood must prove that the County's worse treatment of Redwood was not rationally related to any "legitimate County interest." In other words, Redwood must show that the County's denial of Redwood's CUP application was completely irrational or lacking in any conceivable relationship to any of the governmental interests described in Instruction **[8]**.[54] You are instructed that the County's land use regulations serve a legitimate County interest.[55]

[54] *Pennell v. City of San Jose*, 485 U.S. 1, 14 (1988) (citation omitted); *National Ass'n for Advancement of Psychoanalysis v. California Bd. of Psychology*, 228 F.3d 1043, 1050-51 (9th Cir. 2000); *see also U.S. v. Harding*, 971 F.2d 410, 413 (9th Cir. 1992) ("The burden falls on the party attempting to disprove the existence of a rational relationship . . . ."); Erwin Chemerinsky, Constitutional Law Principles and Policies 530 (1997) ("The challenger has the burden of proof under rational basis review.").

[55] *See Waimea Bay Assoc. One, LLC v. Young*, 438 F. Supp. 2d 1186, 1191 (D. Hawaii 2006) ("Courts have generally recognized that land use regulations . . . serve a legitimate state interest.").

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DEFENDANTS' PROPOSED JURY INSTRUCTION NO. 17

RLUIPA—"UNREASONABLE LIMITATIONS" CLAIM

Redwood's third RLUIPA claim is its "unreasonable limitations" claim. To win on this claim, Redwood must prove by a preponderance of the evidence that the County's ordinances unreasonably limited Redwood within Alameda County.

To win on this claim, Redwood must prove that the County's ordinances (a) imposed restrictions on Redwood that limited the places in Alameda County where Redwood could build its school, but (b) did not impose such restrictions on similarly situated entities. ("Similarly situated" was defined in Instruction **[14]**.)[56]

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[56] *See* the Court's Jan. 27, 2007 MIL order at 7; 42 U.S.C. § 2000cc(b)(3)(B).

RLUIPA's "unreasonable limitation" clause (RLUIPA § 2(b)(3)(B), 42 U.S.C. § 2000cc(b)(3)(B)) is the geographic "flip side" of its "exclusion clause" (RLUIPA § 2(b)(3)(A), 42 U.S.C. § 2000cc(b)(3)(A)). While the exclusion clause targets land-use regulations that "totally exclud[e] religious assemblies **from** a jurisdiction," the unreasonable-limitation clause targets land use regulations that "unreasonably limi[t] religious assemblies, institutions, or structures **within** a jurisdiction." (Emphases added). Both clauses target *geographic* limitations on religious entities. Thus, a local government cannot unreasonably restict the *places* within its jurisdiction where a religious entity or structure may be located.

Because there is no case law on point, the Court must apply canons of statutory construction to interpret the meaning of the "unreasonable limitation" clause. "When we look to the plain language of a statute in order to interpret its meaning, we do more than view words or sub-sections in isolation. We derive meaning from context, and this requires reading the relevant statutory provisions as a whole." *In re Rufener Const., Inc*., 53 F.3d 1064, 1067 (9th Cir. 1995). And under "the established interpretative canons of *noscitur a sociis* and *ejusdem generis*," a specific phrase may limit a more general one that follows. *Wash. State Dep't of Social and Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 384 (2003). "The maxim *noscitur a sociis*"—that "'words are known by their companions'"—"is often wisely applied where a word is capable of many meanings[,] in order to avoid the giving of unintended breadth to the Acts of Congress." *Id*. at 384-85 (citation omitted).

Accordingly, the Court should read the exclusion clause's explicit reference to geographic restrictions as limiting the range of meanings attributable to the "unreasonable limitation" clause that appears later in the same textual sentence. The result is that a local government cannot unreasonably restict the *places* within its jurisdiction where a religious entity or structure may be located.

A *non-geographic* interpretation of the "unreasonable limitation" clause would render it largely, if not entirely, duplicative of the "substantial burden" test set forth in RLUIPA §2(a)(1), 42 U.S.C. § 2000cc(a)(1). This would violate "accepted canons of statutory interpretation" that require courts to "interpret statutes as a whole, giving effect to each word and making every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless or superfluous." *Boise Cascade Corp. v. U.S. E.P.A.*, 942 F.2d 1427, 1432 (9th Cir. 1991).

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Even if Redwood proves this, Redwood will still lose on its "unreasonable limitations " claim if it fails to prove that the County's decision to deny Redwood's CUP application was not rationally related to any legitimate County interest.[57] To prove this, Redwood must show that the County's denial of Redwood's CUP application was completely irrational or lacking in any conceivable relationship to any of the governmental interests described in Instruction **[8]**.[58]

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[57] Section 2(a) of RLUIPA—the "General Rule/substantial burden" test—expressly includes a "strict scrutiny" test. *See* 42 U.S.C. § 2000cc(a)(1)(A) and (B). In contrast, § 2(b)—which contains the statute's "Equal Terms" and "Exclusions and Limits" language—contains no language telling courts what level of scrutiny to apply. *See* U.S.C. § 2000cc(b). Even though the strict-scrutiny standard applies to § 2(a), it should not automatically apply to § 2(b), for three reasons.

First, a standard as extraordinary and intrusive as strict scrutiny should not be inferred into a statute, but should be plainly stated by the drafters. Under the "plain statement rule," "if Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'" *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). Applying strict scrutiny to all land-use decisions in the United States would represented a "considerable congressional intrusion into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens . . . ." *City of Boerne v. Flores*, 521 U.S. 507, 509 (1997) (invalidating RFRA). Accordingly, if Congress meant to extend strict scrutiny to claims based on RLUIPA's Equal Terms and Exclusions and Limits provisions, it had to so by means of a plain statement. It did not.

Second, "[i]t is well settled that '"[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."'" *Duncan v. Walker*, 533 U.S. 167, 173 (2001) (quoting *Bates v. United States*, 522 U.S. 23, 29-30 (1997)). Thus, the Court should find that Congress acted intentionally when it included the strict scrutiny standard in § 2(a) while excluding it from § 2(b).

Third, the Supreme Court has held that, "[i]n determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy." *Crandon v. U.S.*, 494 U.S. 152 (1990). One "object and policy" of RLUIPA's Equal Terms provision was to codify pre-existing Equal Protection jurisprudence and make it applicable to land-use decisions. Thus, in *Ventura County Christian High School v. City of San Buenaventura*, 233 F. Supp. 2d 1241, 1246 (C.D. Cal. 2002), the court stated that "[s]ection 2(b) of RLUIPA codifies 'existing Supreme Court decisions under the Free Exercise and Establishment Clauses of the First Amendment as well as under the Equal Protection Clause of the Fourteenth Amendment.'" *Id*. at 158. But pre-existing Equal Protection jurisprudence requires rational-basis review of laws that do not involve a suspect or quasi-suspect classification. *See San Jose Christian College v. City of Morgan Hill*, 360 F.3d 1024, 1031 (9th Cir. 2004) ("If the zoning law is of general application and is not targeted at religion, it is subject only to rational basis scrutiny, even though it may have an incidental effect of burdening religion."); *Ball v. Massanari*, 254 F.3d 817, 823 (9th Cir. 2001). Therefore, rational-basis review should govern § 2(b) of RLUIPA, including its Equal Terms and Exclusions and Limits provisions.

[58] *Pennell v. City of San Jose*, 485 U.S. 1, 14 (1988) (citation omitted); *National Ass'n for Advancement of Psychoanalysis v. California Bd. of Psychology*, 228 F.3d 1043, 1050-51 (9th Cir. 2000); *see also U.S. v. Harding*, 971 F.2d 410, 413 (9th Cir. 1992) ("The burden falls on the

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DEFENDANTS' PROPOSED JURY INSTRUCTION NO. 18

RLUIPA—"INTENTIONAL VIOLATION" OF RLUIPA

If you found that Redwood should win on any of its RLUIPA claims ("substantial burden," "equal terms," or "unreasonable limitation"), then you must decide whether the County violated RLUIPA intentionally.[59] "Intentionally" means either of the following things:

(1) That the County denied Redwood's CUP application because it specifically wanted to

- impose a substantial burden on Redwood's religious exercise, or
- treat Redwood on less than equal terms with a similarly situated nonreligious assembly or institution, or
- unreasonably limit the places in Alameda County where Redwood could build its school.

(2) That the County was deliberately indifferent to the strong likelihood that denying Redwood's CUP application would

- impose a substantial burden on Redwood's religious exercise, or
- treat Redwood on less than equal terms with a similarly situated nonreligious assembly or institution, or
- unreasonably limit the places in Alameda County where Redwood could build its school.[60]

"Deliberately indifferent" means that the County (1) knew that denying the CUP was substantially likely to harm Redwood's rights under RLUIPA and (2) denied the CUP anyway.[61]

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party attempting to disprove the existence of a rational relationship . . . ."); Erwin Chemerinsky, Constitutional Law Principles and Policies 530 (1997) ("The challenger has the burden of proof under rational basis review.").

[59] *See* the Court's Jan. 27, 2007 order at 11-13 (citing *Ferguson v. City of Phoenix*, 157 F.3d 668, 674 (9th Cir. 1998)).

[60] *See Ferguson v. City of Phoenix*, 157 F.3d 668, 675 (9th Cir. 1998); *see also Duvall v. County of Kitsap*, 260 F.3d 1124, 1138-39 (9th Cir. 2001).

[61] *See Duvall v. County of Kitsap*, 260 F.3d 1124, 1139 (9th Cir. 2001).

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DEFENDANTS' PROPOSED JURY INSTRUCTION NO. 19

VIOLATIONS OF FEDERAL CIVIL RIGHTS—ELEMENTS AND BURDEN OF PROOF

[Redwood and the County have reached a compromise on this instruction.]

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DEFENDANTS' PROPOSED JURY INSTRUCTION NO. 20

MUNICIPAL LIABILITY

You cannot hold the County liable for violating Redwood's constitutional rights unless Redwood has proven by a preponderance of the evidence that the County denied Redwood's CUP application because it wanted to violate Redwood's constitutional rights or at least was deliberately indifferent to those rights.[62] "Deliberately indifferent" means that the County (1) knew that denying the CUP was substantially likely to harm Redwood's constitutional rights and (2) denied the CUP anyway.[63]

[62] *See Miller v. Cal.*, 355 F.3d 1172, 1177 (9th Cir. 2004); *Blair v. City of Pomona*, 223 F.3d 1074, 1079 (9th Cir. 2000); *Van Ort v. Estate of Stanewich*, 92 F.3d 831, 835 (9th Cir. 1996).

[63] *See Duvall v. County of Kitsap*, 260 F.3d 1124, 1139 (9th Cir. 2001).

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DEFENDANTS' PROPOSED JURY INSTRUCTION NO. 21

UNITED STATES CONSTITUTION—FREE EXERCISE CLAUSE

Redwood claims that the County's denial of Redwood's CUP application violated the Free Exercise Clause of the First Amendment to the United States Constitution. The Free Exercise Clause provides that the government shall make no law prohibiting the free exercise of religion. The Clause prohibits the government from forcing someone to affirm a religious belief, punishing the expression of religious doctrines that it believes to be false, imposing special burdens on the basis of religious views or religious status, taking sides in religious controversies,[64] or banning conduct only when that conduct is performed for religious reasons, or only because of the religious belief that it displays.[65]

To win on its Free Exercise Clause Claim, Redwood must prove <u>all</u> of the following things by a preponderance of the evidence:

(1) That the CUP denial imposes a "substantial burden" on Redwood's religious exercise.[66] Therefore, Redwood cannot succeed on this claim unless you already have found that Redwood proved that it suffered a "substantial burden," as defined by Instructions **[4 and 6]**.

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[64] *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1186 (9th Cir. 2006), *reh'g en banc denied*, 455 F.3d 1052 (9th Cir. 2006), *petition for cert. on different issue filed*, 75 U.S.L.W. 3248 (U.S. Oct. 26, 2006) (No. 06-595); *see also id.*, 445 F.3d at 1188.

[65] *See Employment Div., Dep't of Human Resources of Ore. v. Smith*, 494 U.S. 872, 877-78 (1990) ("But the 'exercise of religion' often involves not only belief and profession but the performance of (or abstention from) physical acts: assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, abstaining from certain foods or certain modes of transportation. It would be true, we think (though no case of ours has involved the point), that a State would be 'prohibiting the free exercise [of religion]' if it sought to ban such acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display. It would doubtless be unconstitutional, for example, to ban the casting of 'statues that are to be used for worship purposes,' or to prohibit bowing down before a golden calf.").

[66] *See Episcopal Student Found. v. City of Ann Arbor*, 341 F. Supp. 2d 691, 701 (E.D. Mich. 2004) ("As several courts have observed, the RLUIPA's history demonstrates that Congress intended to leave intact the traditional 'substantial burden' test, as defined by the Supreme Court's free exercise jurisprudence."); *see* 146 Cong. Rec. 7774-01, 7776 ("The term 'substantial burden' as used in [RLUIPA] is not intended to be given any broader interpretation than the Supreme Court's articulation of the concept of substantial burden on religious exercise").

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(2) That the County, by violating Redwood's right to free exercise of religion, treated Redwood worse than similarly situated entities.[67] The term "similarly situated" is defined in Instruction **[14.]**

But even if Redwood has proved both (1) and (2), Redwood still must prove one of the following two things by a preponderance of the evidence before it can win on its Free Exercise Clause Claim. Redwood must prove either:

(3-a) That the County denied Redwood's CUP application based on deliberate discrimination against religious exercise. In other words, Redwood must prove that the County denied the CUP because it wanted to restrict Redwood's religious practices, and that it wanted to restrict those practices because of their religious nature.[68] If Redwood proves this, then the County still can win by proving the affirmative defense that its conduct furthered a compelling governmental interest by the least restrictive means.

(3-b) That the CUP denial was completely irrational, meaning that it lacked any conceivable relationship to any of the governmental interests described in Instruction **[8]**.[69]

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[67] *See* the Court's Jan. 27, 2007 MIL at 7.

[68] *See San Jose Christian College v. City of Morgan Hill*, 360 F.3d 1024, 1030-32 (9th Cir. 2004).

[69] *See San Jose Christian College v. City of Morgan Hill*, 360 F.3d 1024, 1030-32 (9th Cir. 2004).

Regarding the applicability of rational-basis review, *see Harper v. Poway Unified Sch. Dist*., 445 F.3d 1166, 1186 (9th Cir. 2006) (observing that "[t]he *Sherbert* [strict scrutiny] test was later largely discarded in *Smith*, which 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)." . . . The Court held that a neutral law of general applicability need not be supported by a compelling governmental interest even though it has the incidental effect of burdening religion."); *San Jose Christian College v. City of Morgan Hill*, 360 F.3d 1024, 1031 (9th Cir. 2004) ("If the zoning law is of general application and is not targeted at religion, it is subject only to rational basis scrutiny, even though it may have an incidental effect of burdening religion.").

Regarding the burden of proof when applying rational-basis review, *see Pennell v. City of San Jose*, 485 U.S. 1, 14 (1988) (citation omitted); *Nat'l Ass'n for Advancement of Psychoanalysis v. California Bd. of Psychology*, 228 F.3d 1043, 1050-51 (9th Cir. 2000); *see also U.S. v. Harding*, 971 F.2d 410, 413 (9th Cir. 1992) ("The burden falls on the party attempting to disprove the existence of a rational relationship . . . ."); Erwin Chemerinsky, Constitutional Law Principles and Policies 530 (1997) ("The challenger has the burden of proof under rational basis review.").

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DEFENDANTS' PROPOSED JURY INSTRUCTION NO. 22

UNITED STATES CONSTITUTION—"FREEDOM OF ASSOCIATION" CLAIM

Freedom of association is a fundamental right protected by the First Amendment to United States Constitution. "Association" means a group of people organized for some common purpose, such as advancing their beliefs or ideas.[70]

To win on its "freedom of association" claim, Redwood must prove all of the following things:

(1) That the County caused a "significant interference" with the freedom of Redwood's members to associate.[71] A land use regulation causes "significant interference" with the freedom of association only if it acts as a complete ban on the right of group members to associate.[72] Therefore, you must find that Redwood has failed to prove its "freedom of association" claim unless you find that the County's decision to deny Redwood's CUP application effectively prohibited Redwood's students, parents, and faculty from associating with each other at all.

(2) That the County, by significantly interfering with the freedom of Redwood's members to associate, treated Redwood worse than similarly situated entities.[73] The term "similarly situated" is defined in Instruction **[14.]**

(3) That the conduct that violated the freedom of association of Redwood's members was not rationally related to any legitimate County interest.[74] In other words, Redwood must

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[70] Oxford American Dictionary (Heald Colleges Edition) at 48; *NAACP v. Alabama ex. rel. Patterson*, 357 U.S. 449, 460 (1958)

[71] *Bates v. City of Little Rock*, 361 U.S. 516, 523-24 (1960); *Kusper v. Pontikes*, 414 U.S. 51, 56-57 (1973).

[72] *Village of Belle Terre v. Boraas*, 416 U.S. 1, 7-8 (1974) (holding that a neutral zoning ordinance of generally applicability "involve[d] no 'fundamental' right guaranteed by the Constitution, such as . . . the right of association[.]"); *Doe v. City of Butler, Pa.*, 892 F.2d 315, 322-23 (3d Cir. 1989) ("The zoning occupancy limitation challenged here does nothing to prevent plaintiffs from associating with each other, and with others similarly situated."); *San Jose Christian College v. Morgan Hill*, 360 F. 3d 1024, 1033 (9th Cir. 2004) ("The fact that the church's congregants cannot assemble at that precise location does not equate to a denial of assembly altogether.").

[73] *See* the Court's Jan. 27, 2007 MIL at 7.

[74] *See Doe v. City of Butler, Pa*., 892 F.2d 315, 318 (3d Cir. 1989) ("[W]e must uphold a zoning

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show that the County's denial of Redwood's CUP application was completely irrational or lacking in any conceivable relationship to any of the governmental interests described in Instruction **[8]**.[75]

ordinance if the legislation is reasonable and not arbitrary and bears a rational relationship to a permissible state objective. . . . Moreover, 'the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way.'").

[75] *Pennell v. City of San Jose*, 485 U.S. 1, 14 (1988) (citation omitted); *National Ass'n for Advancement of Psychoanalysis v. Cal. Bd. of Psychology*, 228 F.3d 1043, 1050-51 (9th Cir. 2000); *see also U.S. v. Harding*, 971 F.2d 410, 413 (9th Cir. 1992) ("The burden falls on the party attempting to disprove the existence of a rational relationship . . . ."); Erwin Chemerinsky, Constitutional Law Principles and Policies 530 (1997) ("The challenger has the burden of proof under rational basis review.").

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DEFENDANTS' PROPOSED JURY INSTRUCTION NO. 23

DAMAGES—PROOF

It is the duty of the Court to instruct you about the measure of damages.

Redwood has the burden of proving damages by a preponderance of the evidence. Damages means the amount of money which will reasonably and fairly compensate Redwood for any injury that you find was caused by the County.

Redwood seeks two types of damages:

(1) Damages due to increased construction costs. Redwood claims that it would cost more to build the school now than it would have if Redwood had been able to start the project in late 2004.

(2) Damages due to decreased enrollment. Redwood claims that the County's denial of the CUP caused the school's enrollment to drop, hurting it financially. The County claims that Redwood's enrollment drop was not caused by the County's CUP denial.

[Redwood may not recover as damages the generally applicable costs of pursuing a CUP application.[76]]

Redwood has the burden of proving damages by a preponderance of the evidence, and it is for you to determine what damages, if any, have been proved.

Your award must be based upon evidence and not upon speculation, guesswork or conjecture.

Source: 9TH CIR. CIV. JURY INSTR. 7.1 (2001)

[76] *See* the Court's Jan. 27, 2007 MIL order at 6 (citing 146 Cong. Rec. S7776).

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DEFENDANTS' PROPOSED JURY INSTRUCTION NO. 24

DAMAGES—MITIGATION

Redwood has a duty to use reasonable efforts to mitigate damages. To mitigate means to avoid or reduce damages.

The County has the burden of proving by a preponderance of the evidence:

1. that Redwood failed to use reasonable efforts to mitigate damages; and

2. the amount by which damages would have been mitigated.

Source: 9TH CIR. CIV. JURY INSTR. 7.3 (2001)

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DEFENDANTS' PROPOSED JURY INSTRUCTION NO. 25

DAMAGES ARISING IN THE FUTURE—DISCOUNT TO PRESENT CASH VALUE

Any award for future economic damages must be for the present cash value of those damages.

Present cash value means the sum of money needed now, which, when invested at a reasonable rate of return, will pay future damages at the times and in the amounts that you find the damages [will be incurred] [or] [would have been received].

The rate of return to be applied in determining present cash value should be the interest that can reasonably be expected from safe investments that can be made by a person of ordinary prudence, who has ordinary financial experience and skill. [You should also consider decreases in the value of money which may be caused by future inflation.]

Source: 9TH CIR. CIV. JURY INSTR. 7.4 (2001)

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