The Religious Land Use and Institutionalized Persons Act—Recent Decisions and Developments

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In 2000, Congress passed the Religious Land Use and Institutionalized Persons Act,[1] ("RLUIPA") in an effort to level the playing field between religious and nonreligious institutions in the areas of land use and zoning. Before RLUIPA's passage, there was an alarming and rising trend in the United States in which religious entities were being subjected to unequal treatment by municipalities enforcing local land use regulations when compared with similar secular counterparts. Municipalities historically have treated religious institutions more poorly than secular entities for a number of reasons, ranging from the fact religious institutions are exempt from paying property taxes and thus inhibit a municipality's ability to raise revenue, to more blatant and intentional discrimination based on the views of certain religious sects. Because of this discrimination, Congress realized that religious liberty was at a crossroads and it was vital to take vigorous action to curb this disparate treatment. Now, RLUIPA requires local land use decisions that burden religious exercise to satisfy the demanding "strict scrutiny" standard of review in order to be upheld.

In the thirteen years that RLUIPA has been in effect, federal courts have come to a general consensus that the Act is constitutional. From there, however, courts have been far more varied in interpreting and applying the specific principles contained in RLUIPA's land use provisions. Since RLUIPA litigation is a relatively new area, the body of case law interpreting the Act is constantly developing and changing. Below are summaries of various noteworthy RLUIPA decisions from courts across the country issued in the last 18 months that pro-

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1. 42 U.S.C. §§ 2000cc—2000cc-5 (2012).

vide a general synopsis of the dynamic and evolving area of religious land use litigation.

I. Equal Terms Cases

One of the most frequently litigated provisions of RLUIPA is what is known as the "equal terms" clause. The clause specifically prohibits a governmental entity from treating a religious institution on "less than equal terms with a nonreligious assembly or institution."[2] Below are some decisions from the past year that interpreted the equal terms clause.

A Washington district court applied the similarly-situated standard in applying RLUIPA's equal terms clause in *Victory Center v. City of Kelso.*[3] The Victory Center, a non-denominational Christian congregation operating an educational and cultural center, sought to move its premises to a vacant storefront in the City's center.[4] At the same time, Kelso was attempting to update its zoning ordinances to create a four-block pedestrian-friendly commercial area in the same area.[5] The City's new ordinances specifically prohibited several uses, including "religious facilities," but allowed "educational, cultural, or governmental uses."[6]

After Victory Center signed a lease for a building in the City center,[7] it received notice from the City that its presence violated the new zoning ordinances. Victory Center responded that it was not a church, but a "cultural and educational center," which the regulations permitted.[8] The City ultimately determined the Center was operating as a "community center," which violated the new zoning code, and the City Hearing Examiner agreed.[9] In response, Victory Center filed suit alleging violations of RLUIPA and the First and Fourteenth Amendments of the United States Constitution.[10]

In addressing Victory Center's RLUIPA claims, the district court first determined that the City's zoning regulations did not substantially

2. 42 U.S.C. § 2000cc(b)(1) (2012).
3. No. 3:10-cv-5826-RBL, 2012 U.S. Dist. LEXIS 47890 (W.D. Wash. Apr. 4, 2012).
4. *Id.* at *1-2.
5. *Id.* at *2.
6. *Id.* at *2-3.
7. *Id.* at *3-4.
8. *Id.* at *4.
9. *Id.* at *4-5.
10. *Id.* at *5.

burden[11] Victory Center's religious exercise.[12] Victory Center could choose to move its facility anywhere outside the City's four-block commercial zone, which equated to less than one percent of zoned land within the City, without substantially impeding its ability to engage in its religious activities.[13]

However, the court further held that the question remained to be decided as to whether the City treated Victory Center differently than secular institutions in violation of RLUIPA's equal terms clause.[14] The court applied the Ninth Circuit's standard that states a violation exists if the City's land use ordinances treat Victory Center "on a less than equal basis with a secular comparator, similarly situated with respect to an accepted zoning criteria."[15] The City's new zoning ordinances specifically excluded a variety of secular comparators from the same zone, including club houses, recreation facilities, and fitness centers. However, the code made specific exceptions for "educational, cultural, or governmental" uses, without more thoroughly explaining which entities qualify as such uses.[16] Without further explanation, the court found that questions of fact remain with respect to Victory Center's equal terms claim, and thus summary judgment was not proper.[17]

Another recent case addressed the effect of a City ordinance that facially distinguishes between religious and nonreligious entities with respect to RLUIPA's equal terms clause. In *Opulent Life Church v. City of Holly Springs,*[18] the United States Court of Appeals for the Fifth Circuit determined that a Mississippi federal district court erred in denying the Church's motion for a preliminary injunction in a RLUIPA action.[19] Opulent Life Church, a small Christian congregation, wished to expand its membership and occupy a larger facility within Holly Springs.[20] The Church found a suitable facility in the City's main business district and executed a lease agreement for it.[21] Soon after, the City's Planning Commission denied the Church's renovation permit

11. For a discussion of "substantial burdens" under RLUIPA, *see infra,* Part II.
12. *Victory Center,* 2012 U.S. Dist. LEXIS 47890 at *11.
13. *Id.*
14. *Id.* at *17 (quoting *Centro Familiar Cristiano Buenas Nueavas v. City of Yuma,* 651 F.3d 1163, 1170-73 (9th Cir. 2011).
15. *Id.* at *15.
16. *Id.* at *16.
17. *Id.* at *17.
18. 697 F.3d 279 (5th Cir. 2012).
19. *Id.* at 299.
20. *Id.* at 282.
21. *Id.* at 282-83.

application on the basis that the application failed to meet certain zoning ordinance requirements, which applied only to churches.[22]

In response, the Church filed suit alleging provisions of the zoning ordinance were facial and as-applied violations of RLUIPA because they only applied to churches.[23] The Church also sought an injunction to enjoin the City from enforcing the contested zoning provisions.[24] The district court denied the injunction, after concluding that the Church did not "show a substantial threat of irreparable harm."[25]

The night before oral argument before the Fifth Circuit, the City amended its zoning ordinance and replaced the language that barred only "churches" from the courthouse district to now exclude "churches, temples, synagogues, mosques and other religious facilities."[26] The Fifth Circuit, in addressing the denial of the Church's preliminary injunction application, determined the Church had established a *prima facie* case that the City violated RLUIPA's equal terms clause by facially differentiating between religious and nonreligious land uses in its zoning ordinance.[27] The Court then articulated its approach for determining when a religious entity has been treated on "less than equal terms" with a similarly situated secular comparator.

> [W]e must determine: (1) the regulatory purpose or zoning criterion behind the regulation at issue, as stated explicitly in the text of the ordinance or regulation; and (2) whether the religious assembly or institution is treated as well as every other nonreligious assembly or institution that is "similarly situated" with respect to the stated purpose or criterion.[28]

While the City conceded that its older ordinance provisions clearly violated the equal terms clause, the Fifth Circuit further held that the new ordinance, which excludes "churches, temples, synagogues, mosques and other religious facilities," also is a *prima facie* violation.[29] Even though the new ordinance no longer specifically singles out "churches," it still differentiates between religious and nonreligious institutions.[30] After establishing this *prima facie* case, the burden shifts to the City to identify a valid purpose for the ban. Acknowledging that the City never argued the ban's justifications, the Fifth Circuit

22. *Id.* at 283.
23. *Id.* at 284.
24. *Id.*
25. *Id.*
26. *Id.* at 284-85.
27. *Id.* at 291.
28. *Id.* at 292-93.
29. *Id.* at 293.
30. *Id.*

remanded the case to give the City an opportunity to rebut the *prima facie* violation found to lie within the newly amended ordinance.[31]

The Fifth Circuit concluded that the Church sufficiently demonstrated it would suffer irreparable harm if an injunction was not issued.[32] The Court emphasized that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury,"[33] and noted this standard applies to RLUIPA, which was adopted for the purpose of enforcing the First Amendment's broad protection of religious exercise.[34] This case is another example of courts' high regard for religious liberty and land use rights under both the Constitution and RLUIPA. It also demonstrates how the preliminary injunction is a powerful tool for religious entities in RLUIPA or Constitutional cases.

In another recent equal terms decision, *Chabad Lubavitch of Litchfield County v. Borough of Litchfield,*[35] the United States District Court for the District of Connecticut found no RLUIPA equal terms violations when a Jewish congregation was denied a certificate of appropriateness to build in an historic district.[36] Chabad Lubavitch purchased a 19th-century home in order to house its expanding congregation.[37] In order to preserve its historical character, the Borough had established a Historic District Commission to control construction and modification of historical structures.[38]

After purchasing the historic home, Chabad proposed various renovations and modifications, including the addition of three stories and 17,000 square feet to the 2,600 square foot structure.[39] The Historic Commission denied the application, but permitted Chabad to resubmit an application to include an addition that was not larger than the original house.[40] Instead of resubmitting its proposal, Chabad filed suit under RLUIPA, seeking declaratory relief and damages based on the purported discriminatory behavior of the Borough, the Historic District Commission, and various members of the Commission.[41] In re-

31. *Id.* at 294.
32. *Id.* at 295.
33. *Id.* (quoting *Elrod v. Burns,* 427 U.S. 347, 373 (1976) (internal quotations omitted)).
34. *Id.*
35. 853 F. Supp. 2d 214 (D. Conn. 2011).
36. *Id.* at 228-29.
37. *Id.* at 220.
38. *Id.* at 219.
39. *Id.* at 220.
40. *Id.*
41. *Id.*

sponse, Defendants moved for summary judgment on all the counts filed against them.[42]

The district court began its analysis by quickly dismissing Chabad's substantial burden argument, noting that most courts look to the United State Supreme Court's free exercise jurisprudence when addressing whether a substantial burden exists.[43] In this case, the Borough's historic preservation laws were neutral and thus cannot be considered a substantial burden on religious exercise "as a matter of law."[44] The law requiring a certificate of appropriateness to erect or alter a structure within the historic district provided that "[n]o building or structure" shall be modified without an appropriate certificate, and thus did not differentiate between religious and non-religious assemblies on its face.[45] Because Chabad could not demonstrate a substantial burden, it then needed to demonstrate that the Borough lacked a rational basis for its law.[46] Here, the court found that "[t]he preservation of aesthetic values is recognized as a legitimate government interest," and therefore the law survived rational basis review.[47]

Next, the court addressed Chabad's equal terms claim. The court initially noted the Second Circuit's lack of clearly defined guidelines regarding how to properly identify an appropriate secular comparator.[48] The court then explained the proper inquiry was whether secular and religious institutions are treated equally under the Borough's law, and noted that Chabad bore the initial burden of providing evidence of a violation by the Borough.[49] The three alleged secular comparators to which Chabad pointed were not valid comparators. The first proposed comparator, a library, was not similarly situated because its addition was not approved by the Historic District Commission.[50] The second, a home, was not a valid comparator because Chabad could provide no record of the Commission permitting an addition on the home.[51] The third, a present-day office building, was also not a valid comparator because there was no record from Chabad that the Commission

42. *Id.*
43. *Id.* at 222.
44. *Id.* at 223.
45. *Id.* at 224.
46. *Id.* at 225.
47. *Id.*
48. *Id.* at 226.
49. *Id.*
50. *Id.* at 226-27.
51. *Id.* at 227-28.

permitted an addition on the office.[52] Because none of these homes were similarly situated secular comparators, Chabad failed to establish a *prima facie* RLUIPA equal terms clause claim.[53]

This case shows the struggle many circuit courts of appeals are encountering or have encountered when attempting to clearly delineate the requirements to qualify as a valid secular comparator for purposes of the Equal Terms clause. While many circuits have reached decisions providing these guidelines, others (including the Second Circuit) still struggle to properly set forth the proper rules for its lower courts to construe with respect to the Equal Terms clause.

II. Substantial Burden Cases

Another important and often litigated RLUIPA provision is known as the substantial burden clause, which provides 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, including a religious assembly or institution . . . ."[54] The clause also provides a narrow exception: a government's imposition of a burden is permissible if it "is in furtherance of a compelling governmental interest; and is the least restrictive means of furthering that compelling governmental interest."[55] This clause, like the equal terms clause, is often the subject of litigation in federal courts across the country. Below are some examples of the different ways in which courts have interpreted the substantial burden clause.

A recent case litigated by the author in the United States District Court for the Southern District of California, *Academy of Our Lady of Peace v. City of San Diego*[56] construed whether San Diego imposed a substantial burden on a Catholic school when it denied the school permits to construct new facilities on its campus.[57] San Diego refused to grant a Modernization Plan the Academy of Our Lady of Peace ("OLP") submitted to the City.[58] OLP is the only all-girls Catholic school operating in the City of San Diego, and has been located at

52. *Id.* at 228-29.
53. *Id.* at 229.
54. 42 U.S.C. § 2000cc(a)(1) (2012).
55. § 2000cc(a)(1)(A)-(B).
56. No. 3:09-cv-00962-CAB-MDD (S.D. Cal. 2012).
57. Order Granting in Part and Denying in part Defendant's Motion for Summary Judgment, No. 09cv962-CAB (MDD) (S.D. Cal. May 11, 2012) ECF 159 at 3-4.
58. *Id.* at 1.

its current site since 1925.[59] The last classroom constructed on OLP's campus was built in 1965, and a new gymnasium had been added in the mid-1990s. For the last two decades, OLP had felt constrained in its limited facilities.[60] OLP then consulted its architect to help determine the best way to resolve the issue.[61] When working on a plan to modernize OLP's campus, its architect learned of and, for the first time, informed OLP of an existing Conditional Use Permit ("CUP") on the property to which OLP was subject. The CUP was based on information the contractor who built the gymnasium in 1995 had provided, and limited OLP to 640 students and 46 staff. At the time OLP first learned of the CUP, it had more than 640 students enrolled.[62]

OLP then voluntarily self-disclosed its CUP violation to the City and took steps to remedy the issue. OLP also continued working on a plan to modernize its campus. In May 2007, OLP submitted its modernization plan application to the City.[63] The plan called for removing three homes that OLP owned on property adjacent to the campus. In September 2008, the City's Planning Commission unanimously voted to approve OLP's Modernization Plan. The neighbors who opposed OLP's plan appealed the Planning Commission's decision to the City Council.[64]

The City Council held a hearing on the appeal in January 2009, but withheld its decision. Soon after, one Council member met with a City staff member and requested that the staff member reverse his earlier findings that supported OLP's plan. The staff member had never before been asked to make reverse findings.[65] In March 2009, City Council met again regarding OLP's plan, and this time a majority voted to deny the Modernization Plan.[66]

Two months later, OLP filed suit, alleging the City's March 2009 decision substantially burdened OLP's religious exercise. The City denied any improper conduct, and instead contended that the City Council's actions were required under the California Environmental Quality

59. Memorandum of Points and Authorities In Response to City's Renewed Motion for Judgment as a Matter of Law at 5, n. 1, Academy of Our Lady of Peace v. City of San Diego, (No. 3:09-cv-00962-CAB-MDD), (S.D. Cal. Dec. 13, 2012).
60. *Id.* at 3.
61. *Id.*
62. *Id.* at 4.
63. *Id.* at 8.
64. *Id.* at 9.
65. *Id.* at 10.
66. *Id.* at 11.

Act ("CEQA"). On October 19, 2012, a jury found in favor of OLP and awarded OLP more than $1.1 million in damages.[67]

The Northern District of Illinois also interpreted the substantial burden clause in a recent decision in *Liberty Temple Full Gospel Church, Inc. v. Village of Bolingbrook.*[68] Liberty Temple's ("the Church") congregation of fewer than 100 members held its services in a local Holiday Inn.[69] The Church began to look for a permanent location in Bolingbrook (the "Village"), but was not encouraged by its search.[70] The first location looked promising, but the landlord warned the Church that the Mayor did not want new churches opening in the Village because they "do not produce any tax revenue."[71] Despite the landlord's warning, Church members met with the Mayor, who rejected their proposal because of alleged deficiencies in the building such as lack of bathrooms, parking, and handicap access.[72]

The Church continued looking for a new facility that addressed the prior location's shortcomings, and when the Church believed it had found a proper facility, instead of discussing the location with the mayor, a Church Elder consulted the Village's zoning map and code himself.[73] The map had not been properly updated, and mistakenly led the elder to believe the new facility was properly zoned for church use.[74] Based on this belief, the Church applied for a building permit.[75] The Village rejected the permit application and informed the Church that it needed a special use permit to operate out of the facility.[76]

Church representatives next directly approached the Mayor about using the facility, who allegedly told the representatives he would consider allowing the Church to operate if they promised to leave the Village in two years.[77] When the Church again tried to submit a building permit application and the Village again rejected the application, the Church filed suit under RLUIPA.[78] The Village in turn moved for

67. Dana Littlefield, *North Park School Wins $1.1M Verdict Against City,* SAN DIEGO UNION-TRIB., Oct. 19, 2012 *available at* http://www.utsandiego.com/news/2012/Oct/19/north-park-school-wins-11-million-verdict-against-/.
68. 868 F. Supp. 2d 765 (N.D. Ill. 2012).
69. *Id.* at 766.
70. *See id.* (describing the opposition the Church faced trying to secure a location).
71. *Id.*
72. *Id.*
73. *Id. at* 767.
74. *Id.*
75. *Id.*
76. *Id.* at 768.
77. *Id.*
78. *Id.*

summary judgment, alleging it did not substantially burden the Church because the Church never applied for a special use permit.[79]

In its decision, the district court addressed whether the Village's actions constituted a substantial burden. The court predominately relied on the Seventh Circuit's opinion in *World Outreach Conference Center v. City of Chicago.*[80] In *World Outreach,* which held that denying a permit to a religious organization that reasonably believed it had the necessary zoning approval may impose a substantial burden under RLUIPA,[81] a religious organization attempted to grandfather in a building's nonconforming use so it could use the facility as affordable housing for the poor.[82] Based on this analysis, the court found that whether the Church reasonably believed its property was zoned for church use constituted an issue of material fact and thus summary judgment was not proper.[83]

Another recent case determined the enforcement of neutral regulations requiring the addition of a sprinkler system and the procurement of a special use permit were not unlawful substantial burdens under RLUIPA. In *Affordable Recovery Housing v. City of Blue Island,*[84] a faith-based organization that provided recovery and housing services requested a preliminary injunction to prevent the City of Blue Island from enforcing its zoning and fire codes against the organization.[85] After Affordable Recovery Housing ("ARH") filed its initial renovation plan, the City responded that ARH needed to install a fire alarm and smoke detectors, as well as a sprinkler system in the future.[86]

When ARH failed to comply with the City's requirements, the City ordered ARH to cease operations and vacate the premises.[87] ARH then filed suit, alleging the City violated its First Amendment rights and RLUIPA, and seeking to enjoin the City from enforcing the aforementioned portions of its zoning and fire codes.[88] Specifically, the center alleged that the City's requirement that ARH vacate the premises and

79. *Id.*
80. 591 F.3d 531 (7th Cir. 2009).
81. *Id.* at 537.
82. *Id.* at 535-37.
83. *Liberty Temple,* 868 F. Supp. 2d at 770-71.
84. No. 12-cv-4241, 2012 U.S. Dist. LEXIS 97621 (N.D. Ill. July 13, 2012).
85. *Id.*
86. *Id.* at *2.
87. *Id.* at *5.
88. *Id.* at *8.

find alternative housing for its clients imposed a substantial burden under RLUIPA.[89]

The court disagreed with ARH, finding that neither the requirement to obtain a special use permit nor the requirement to install a sprinkler system imposed a substantial burden.[90] The court specifically noted that RLUIPA's purpose is not to render religious institutions immune from local land use regulations or to give religious institutions special treatment.[91] Here, the provisions at issue were facially neutral and "impose[d] modest burdens that likely could have been satisfied by now had [ARH] focused on them at the outset of its venture."[92] For this reason, ARH was unable to demonstrate that the City's actions imposed a substantial burden, and its request for a preliminary injunction was consequently denied.[93]

Another recent case addressed whether a municipality's extreme delay in making a decision about a religious entity's zoning application could constitute a substantial burden under RLUIPA. In *Israelite Church of God in Jesus Christ, Inc. v. City of Hackensack,*[94] the Church alleged the City imposed a substantial burden by refusing to approve a zoning application for almost four years.[95] The Church alleged that the City's delay caused "substantial damages in rent and other costs of the vacant building, as well as professional fees for the variance application," and amounted to a taking in violation of the Fifth Amendment.[96] Although the fact that the City ultimately granted the zoning permit raised issues about the ripeness of the claim[97] the Court held that the costs associated with the delay, if proved to be true, would amount to an unlawful substantial burden under RLUIPA and accordingly denied the City's motion to dismiss. The court explained that a City dragging its feet could be enough to support a RLUIPA substantial burden claim, and to hold differently would create "a gaping loophole" in RLUIPA that would be "quite inconsistent with Congress's intent" to afford "broad protection of religious exercise . . . ."[98]

89. *Id.*at *13.
90. *Id.* at *16.
91. *Id.* at *14-15.
92. *Id.* at *16.
93. *Id.* at *38.
94. No. 11-5960 (SRC), 2012 U.S. Dist. LEXIS 112793 (D. N.J. Aug. 09, 2012).
95. *Id.* at *4.
96. *Id.*
97. *See infra,* Part III.
98. *Israelite Church of God in Jesus Christ, Inc.,* 2012 U.S. Dist. LEXIS 112793 at *14-15 (citing 42 U.S.C. § 2000cc–3(g)).

In *Anselmo v. County of Shasta,*[99] the Eastern District of California allowed an individual plaintiff to proceed under RLUIPA's substantial burden provision when he was denied the right to build a religious temple on his ranch.[100] The rancher and winery owner, Anselmo, was a devout Roman Catholic who had to drive three hours every day to worship.[101] He submitted an application to construct a private chapel on 435 acres of his land, but Shasta County refused to allow the temple's construction.[102] The acreage was zoned "Exclusive Agriculture" so as to preserve land with agricultural value.[103] The County alleged that the chapel was inconsistent with the Exclusive Agriculture zoning and that the plans did not comply with the Americans with Disabilities Act.[104]

The court noted that a determination of whether a substantial burden has been imposed is a question of fact, and concluded Anselmo adequately alleged that the County substantially burdened his religious exercise.[105] The court further determined that the County official who was a named individual defendant had qualified immunity as to a claim for money damages under the substantial burden provision.[106]

This case demonstrates the strong factual inquiries that must be made to properly analyze a RLUIPA claim, particularly with respect to the substantial burden provision. For this reason, courts are often reluctant to grant summary judgment on a substantial burden claim so long as the plaintiff makes some factual showing in support of his claim.

III. RLUIPA and the Ripeness Doctrine

Ripeness is a particularly important issue in the realm of RLUIPA litigation, as it is an argument that can be raised at any point in the litigation. Three factors are generally considered to determine whether a plaintiff's claim is ripe for adjudication:

> (1) the likelihood that the harm alleged by the plaintiffs will ever come to pass; (2) whether the factual record is sufficiently developed to produce a fair adjudication of the merits of the parties' respective claims; and (3) the hardship to the parties if judicial relief is denied at this stage in the proceedings.[107]

99. 873 F. Supp. 2d 1247 (E.D. Cal. 2012).
100. *Id.* at 1258-59.
101. *Id.*
102. *Id.* at 1253.
103. *Id.* at 1251.
104. *Id.* at 1253.
105. *Id.* at 1259.
106. *Id.* at 1264.
107. Tree of Life Christian Sch. v. City of Upper Arlington, 888 F. Supp. 2d 883, 892 (S.D. Ohio 2012).

Consequently, even where a defendant fails to raise the issue in its initial response, the argument is not waived.[108] Ripeness for RLUIPA claims is unique because although in the land use context, finality is required, for First Amendment claims, such as RLUIPA, "the ripeness doctrine is somewhat relaxed."[109] This distinction is highlighted in *Israelite Church of God in Jesus Christ, Inc. v. City of Hackensack.*[110]

The Church's RLUIPA claim was based upon the City's four-year delay in granting a permit, and the City argued the claim never ripened because the Church's application was ultimately granted.[111] The City relied on United States Supreme Court Takings Clause precedent to support its position that the claim was not ripe until the decision was final, but the court explained that such takings cases are "not on all fours, as the instant case in not a taking case."[112]

The district court applied the standard set forth in *Murphy v. New Milford Zoning Commission,*[113] to determine the ripeness of the Church's claim, asking first "whether the locality's action had inflicted an immediate injury on the plaintiffs" and then "whether the existing record clearly defined the plaintiffs' injury."[114] The court found that both questions could be answered affirmatively because (1) the City's four-year delay caused the Church to lose out on using the building it was paying for during those years, and (2) the Church exhausted all available administrative remedies when it appealed and obtained a final decision from City officials.[115]

Israelite Church expressly rebuts the argument that the level of exhaustion required in the takings realm must be transposed to claims brought under RLUIPA. Applying the finality requirement associated with land use and takings claims to RLUIPA claims violates both the spirit and letter of the Act, as well as claims under the First and Fourteenth Amendments, which are often raised simultaneously with RLUIPA claims.

A recent case from the Southern District of Ohio demonstrates the seemingly harsh result that may arise if a plaintiff does not fully com-

108. *Id.* at n.3.
109. *Id.* at 892 (quoting Dougherty v. Town of N. Hempstead, 282 F.3d 83, 90 (2d Cir. 2002)).
110. 2012 U.S. Dist. LEXIS 112793.
111. *Id.* at *4.
112. *Id.* at *6.
113. 402 F.3d 342 (2d Cir. 2005).
114. *Israelite Church of God in Jesus Christ, Inc.,* 2012 U.S. Dist. LEXIS 112793 at *8.
115. Id. at *8-10.

ply with local land use regulations before filing a RLUIPA suit. In *Tree of Life Christian School v. City of Upper Arlington,*[116] a private Christian school sought new property in an effort to expand its ministry and, after two years of looking, it purchased a commercial office building.[117] The City is mostly residential, with only 4.7% of its land being zoned "commercial" and only 1.1% zoned for office use, and consequently must maximize its opportunities for potential commercial use.[118] The building purchased by Tree of Life was located within the City's "Office and Research District" ("ORD"), and operating a private school was not contained in the permissible uses under the City's regulations.[119] Tree of Life was informed on three occasions over a course of a year that operating a school within the ORD district was not permitted and that it would need to apply for rezoning of its property in order to operate a school at the office building.[120] It had applied for conditional use permits, and appealed after they were denied, but it never initiated the rezoning process.[121]

After another unsuccessful appeal, and never having followed the City's request to apply for rezoning of the property, Tree of Life filed suit and alleged the City's actions violated RLUIPA and the First and Fourteenth Amendments.[122] Before dealing with the substantive claims on summary judgment, the court first addressed the City's argument that the matter was not ripe for review.[123] The City contended the case was not ripe because it never had a chance "to apply the prescribed rezoning standards to Plaintiff's proposed use of its facility, there are no records of or any arguments regarding the merits of a rezoning application, and there is no way to determine if the harm alleged by Plaintiff will ever come to pass."[124] In contrast, Tree of Life argued its claim was ripe because it had received a final decision regarding its application for a conditional use permit and appealed that decision as far as possible at the state administrative level.[125] The court determined it was not proper to inject itself into a local governmental process when the dispute was not yet fully de-

116. 888 F. Supp. 2d 883 (S.D. Ohio 2012).
117. *Id.* at 886.
118. *Id.*
119. *Id.* at 886-87.
120. *Id.* at 888-89.
121. *Id.*
122. *Id.* at 889-90.
123. *Id.* at 891.
124. *Id.* at 892.
125. *Id.*

fined.[126] Because the City had no chance to establish a record about a potential proposed zoning as Tree of Life never applied for rezoning, the matter was not yet ripe.[127]

This decision should serve as a strong reminder to RLUIPA plaintiffs that courts generally require a party fully to comply with a local zoning scheme as closely as possible before that party may proceed with a federal lawsuit. This means submitting the *correct* type of application to local decision makers and investigating or following through with whatever warnings or advice they give. Tree of Life ignored the language of the zoning ordinance and the City's advice to file for rezoning, and as a result its case failed before the court could even reach the merits. This decision serves as a cautionary tale for other religious institutions to fully and accurately comply with local zoning regulations before delving into litigation.

IV. Miscellaneous RLUIPA Cases

A recent unpublished decision from the Second Circuit Court of Appeals addressed res judicata and standing concerns with respect to a RLUIPA claim. In *Kiryas Joel Alliance v. Village of Kiryas Joel,*[128] the court affirmed a decision from the Southern District of New York that found plaintiffs lacked standing, failed to state a claim for which relief could be granted, and raised claims that were barred by res judicata.[129] Plaintiffs were members of a dissident Jewish population and lived in the Village of Kiryas Joel, an area populated exclusively by followers of the Kiryas Joel Alliance.[130] Some of the plaintiff's members did not support the present leader of the sect, resulting in the group becoming dissident.[131] Plaintiff alleged that members who supported the leader occupied the local government, and in these positions discriminated against plaintiff's members who did not support the sect's leader.[132]

The Second Circuit first addressed whether the district court properly determined that Plaintiffs' claims were barred by res judicata. Under res judicata, a "final judgment on the merits" bars a party from re-litigating issues it could have raised in the first action.[133]

126. *Id.* at 895.
127. *Id.* at 897.
128. 495 Fed. Appx. 183 (2d Cir. 2012).
129. *Id.* at 186.
130. *Id.* at 185-86.
131. *Id.* at 186.
132. *Id.*
133. *Id.* at 186.

For res judicata to bar a plaintiff's claims, the second suit must arise out of "the same nucleus of operative facts" as the first.[134] Here, res judicata barred Plaintiffs' RLUIPA claims since they had litigated the same issues—whether they were unlawfully prevented from using the property in the Village to use as a synagogue—to finality in prior state court cases.[135] While Plaintiffs claimed the instant case presented new facts, the court disagreed, and further stated that res judicata could not be avoided by simply trying to split up claims or by alleging alternative theories of recovery in separate actions.[136]

The court then addressed whether Plaintiffs had standing to allege the claims of certain individuals who were not a party to the action. Plaintiffs alleged that since Kiryas Joel Alliance was a nonprofit association that advocated for the citizens of the Defendant Village, it had representative standing to assert claims on behalf of the members.[137] The court again disagreed, because an organization may only have standing for § 1983 claims over individuals who are members.[138] While the plaintiffs could not assert claims on behalf of the non-member individuals, the court determined that it could continue with its own specific claim that it was forced to divert funds in order to provide security for one of its members.[139]

Another case, *Reaching Hearts International, Inc. v. Prince George's County*[140] also addressed res judicata and collateral estoppel arguments in the context of a RLUIPA claim. The case was a part of a dispute that had been ongoing for over eight years.[141] Reaching Hearts International ("RHI") initially filed a complaint in 2005 against the County, alleging violations of RLUIPA and the Equal Protection Clause when the County denied RHI's applications for water and sewer service change.[142] The County also enacted an ordinance that prohibited a non-residential building from locating within 2,500 feet of a drinking water reservoir, effectively preventing RHI from being able to construct a church on its own land.[143]

134. *Id.* at 187 (internal quotation omitted).
135. *Id.*
136. *Id.* at 188.
137. *Id.* at 189.
138. *Id.*
139. *Id.*
140. 831 F. Supp. 2d 871 (D. Md. 2011).
141. *Id.* at 873.
142. *Id.* at 873-74.
143. *Id.* at 874.

The case proceeded to trial in 2008, and the jury ruled in favor of RHI and found that the County's actions were in part motivated by religious discrimination.[144] The court awarded damages of $3.7 million.[145] The district court upheld the jury's verdict, found the County's ordinance unconstitutional, and ordered the County to process RHI's applications without any religious discrimination.[146] After the County denied, in part, an application filed by RHI in August 2010, the court ordered the County to provide evidence justifying the denial in light of the earlier decision.[147] Soon after, the County Council granted part of RHI's application, but denied the remainder. The Council tried to justify its decision by claiming RHI's plans posed a variety of environmental issues and created problems with the character of the neighborhood.[148]

RHI then brought the instant action. The County alleged it successfully complied with the court's prior order, and also that collateral estoppel and res judicata prevented RHI from being able to re-apply for a water and sewer service category change.[149] The County further argued that judicial estoppel mandated RHI submit an application identical to its previous proposal.[150] In addressing the res judicata and collateral estoppel arguments, the court found that the previous decision was based on "a pattern of actions that indicated the County's discriminatory animus" rather than one particular application.[151] In addition, each of RHI's applications contained different specific facts and allegations, and thus the new application was not barred by res judicata or collateral estoppel.[152]

With respect to the County's allegation that judicial estoppel applied, the court determined that while RHI changed its arguments from the first case to the instant, RHI never acted in bad faith when doing so.[153] Since RHI had no intention to mislead, judicial estoppel did not apply.[154] The court noted that it remained "cautiously optimis-

144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.*
149. *Id.* at 880.
150. *Id.*
151. *Id.* at 881-82.
152. *Id.*
153. *Id.* at 882-83.
154. *Id.*

tic" that the County would properly handle the application, but if it did not, the court would order discovery and a trial on the matter.[155]

Another interesting decision addressed the issue of whether a governmental entity could compel a Christian school to reveal the identity of one of its major donors in order to help support the government's defense to the school's substantial burden claim under RLUIPA. In *Tree of Life Christian Schools v. City of Upper Arlington,* discussed above with regard to its dismissal on ripeness grounds,[156] a judge allowed a donor who pledged $6.5 million to a Christian school to remain anonymous in an earlier proceeding.[157] Tree of Life had filed a RLUIPA lawsuit against Upper Arlington after the City denied the school's conditional use permit application.[158] The City sought to discover the identity of the anonymous donor (who pledged the entire $6.5 million needed to purchase the property in issue), but the School claimed the donor conditioned the pledge on his or her anonymity.[159] The City sought to depose the donor and inquire as to whether the donor would donate money toward the purchase of another similar piece of property, and whether the donor was able to pay the outstanding balance ($5 million) of the proposed donation.[160] The City alleged this information was relevant to determine whether its actions imposed a substantial burden on Tree of Life's religious exercise.[161]

Tree of Life vehemently opposed the City's request to reveal the donor's identity, claiming that divulging the donor's identity would violate Tree of Life's First Amendment right to association, as it could jeopardize the relationship between the School and the donor and possibly even future donations from others.[162] The court agreed that identifying the anonymous donor would violate the School's First Amendment associational rights.[163] In response to the City's contention that deposing the donor was necessary to defend itself, the court found that the City had other sources of information regarding the School's finances and the donor was not essential to its potential defense.[164]

155. *Id.* at 886.
156. *See* supra § III.
157. No. 2:11-cv-00009, 2012 U.S. Dist. LEXIS 32205 at * 1 (S.D. Ohio Mar. 12, 2012).
158. *Id.* at *1-2.
159. *Id.* at *2.
160. *Id.* at *3.
161. *Id.*
162. *Id.* at *3-4.
163. *Id.* at *9-10.
164. *Id.* at *10-11.

Accordingly, the potential infringement on Tree of Life's First Amendment rights and on its relationship with the donor substantially outweighed any potential benefit the disclosure would provide for the City.[165]

Another longstanding case from the Ninth Circuit recently addressed the issue of whether a church's loss of monetary contributions from anticipated new parishioners is an appropriate form of damages under RLUIPA. In *International Church of Foursquare Gospel v. City of San Leandro,*[166] the Northern District of California decided the Church could recover monetary damages for the City's violations of RLUIPA's substantial burden provision, but dismissed the Church's claim for purported lost contributions.[167] The Church calculated into its damages total an amount ranging from $10,400,000 to $14,320,000 that constituted the "lost collection plate revenues from anticipated parishioners who did not materialize as new church members, calculated at a rate of $118 per person per month."[168] On one hand, the court found the inquiry into whether the Church would have continued growing at its normal rate absent the City's interference was merely speculative, and the Church could not show any relationship between the City's actions and its claimed lost contributions, and therefore the lost contributions damages claim was dismissed.[169] On the other hand, the court rejected the City's argument that an award of damages under RLUIPA would amount to unjust enrichment, because RLUIPA specifically allows for "appropriate relief" to be awarded for a violation, and the Ninth Circuit has interpreted this to include monetary damages.[170] As such, a damages award does not violate the Establishment Clause as a preference for religion over non-religion, but awarding lost future collections was not appropriate relief.[171]

Another unique decision this year came from the Second Circuit Court of Appeals in *Fortress Bible Church v. Feiner.*[172] The case was the first to address whether a state's environmental quality law

165. *Id.* at *12-13.
166. 902 F. Supp. 2d 1286 (N.D. Cal. Aug. 20, 2012). For a more in-depth discussion of the *International Church* case and its recent settlement announcement, see *infra* note 199.
167. *Id.* at 1294.
168. *Id.* at 1292.
169. *Id.* at 1294.
170. *Id.* at 1292 (citing *Centro Familiar Cristiano Buenas Nuevas v. City of Yuma,* 651 F.3d 1163 (9th Cir. 2011)).
171. *Id.* at 1294.
172. 694 F.3d 208 (2d Cir. 2012).

constitutes a "land use regulation" for purposes of RLUIPA's application.[173] In 1998, Fortress Bible Church ("the Church") purchased a 6.5 acre vacant tract of land in the Town of Greenburgh and intended to build a worship facility that could accommodate 500 people and a school for 150 students.[174] Before the Church could begin its project, it needed approval from the Town. Its plans involved three discretionary land use approvals, and as a result triggered New York's State Environmental Quality Review Act ("SEQRA").[175] SEQRA requires analyses of the potential environmental impacts of certain land use developments, including the effects of traffic and property access.[176]

Beginning in 1998, the Town conducted a nearly five-year review of the Church's project, and the Church made various changes to its plans in order to comply with the Town's requirements.[177] In mid-2003, when the plans had still not been approved, the Church filed suit and alleged various violations of RLUIPA and the United States Constitution.[178] The Church also sought an order requiring the Town to finish its SEQRA review and to approve the Church's project.[179]

After a twenty-six day bench trial, the district judge found that the Town violated the Church's rights under RLUIPA, the Free Exercise Clause, and the Equal Protection Clause.[180] The court further determined the Town acted in bad faith and used the SEQRA process as a means of blocking the Church's development plans.[181] The court deemed the SEQRA review effectively approved and ordered the Town to allow the Church's project to continue without interruption.[182]

The Town appealed, and the Second Circuit affirmed the judgment.[183] The court first rejected the Town's contention that RLUIPA was inapplicable because SEQRA is not a valid "land use regulation" as RLUIPA requires.[184] The court determined that while an environmental quality law does not automatically implicate RLUIPA, it may do so when applied in a way to determine issues surrounding a

173. *Id.* at 216.
174. *Id.* at 213.
175. *Id.* at 217.
176. *Id.*
177. *Id.* at 213-15.
178. *Id.* at 214.
179. *Id.*
180. *Id.* at 215 (citing *Fortress Bible Church v. Feiner,* 734 F. Supp. 2d 409, 522-23 (S.D.N.Y. 2010)).
181. *Fortress Bible,* 694 F.3d at 215.
182. *Id.*
183. *Id.* at 225.
184. *Id.* at 216-17 (citing 42 U.S.C. § 2000cc(a)(1)).

land use proposal.[185] Here, the Town intertwined the SEQRA review process with its zoning regulation, and specifically with the Church's review when the Town focused its review on zoning issues rather than environmental issues.[186] The court specifically noted that if RLUIPA was inapplicable to zoning actions conducted under the guise of an environmental quality review, towns would essentially be able to insulate their zoning decisions from all RLUIPA review.[187] The Second Circuit went on to find the Town's actions substantially burdened the Church's religious exercise because the Town's stated willingness to consider any modified plans from the Church was disingenuous.[188] This decision is noteworthy and will have a significant impact on future RLUIPA decisions, given that states like California,[189] Washington,[190] and Massachusetts[191] have already adopted similar environmental laws, and other states in the future will surely follow suit with similar laws.

V. Recent RLUIPA Settlements

In 2011, the Fifth Circuit addressed the proper test to use to interpret RLUIPA's equal terms clause, a provision that has previously caused a split among several other circuits. In *Elijah Group, Inc. v. City of Leon Valley,*[192] the city of Leon Valley ("the City") amended its zoning code in a way that effectively prohibited the Elijah Group ("the Church") from conducting religious services on premises it leased in the City.[193] The Church claimed the City's new ordinance violated the equal terms and substantial burden provisions of RLUIPA.[194] The district court disagreed and dismissed the Church's claims.[195] The Church appealed, and the Fifth Circuit unanimously held that the ordinance was facially invalid under the equal terms clause, as

185. *Id.* at 217.
186. *Id.*
187. *Id.* at 218 ("We decline to endorse a process that would allow a town to evade RLUIPA by what essentially amounts to a re-characterization of its zoning decisions.").
188. *Id.* at 219.
189. California Environmental Quality Act, CAL. PUB. RES. CODE §§ 21000-21189.3 (West 2007).
190. WASH. REV. CODE § 43.21C.010-.914 (West 2009).
191. Massachusetts Environmental Policy Act, Mass. Gen. Laws ch. 30, § 61-62I (2008).
192. 643 F.3d 419 (5th Cir. 2011).
193. *Id.* at 421.
194. *Id.*
195. *Id.*

it treated the Church differently than other nonretail, nonreligious institutions.[196]

On May 3, 2012, the Becket Fund announced that Elijah Group and the City had reached a settlement agreement. After five years of litigation, the City ultimately agreed to allow the Church to hold religious services on its leased premises and to pay $250,000 in legal fees.[197] This case serves as an important and cautionary reminder to municipalities that prolonged RLUIPA litigation can be quite expensive and may not end favorably. This uncertainty therefore provides a strong incentive to settle in many instances, rather than risk a loss and possibly a costly jury verdict at trial.

Another major RLUIPA settlement was announced in the case of *United States v. City of Walnut.*[198] The issues began in 2001, when the Chung Tai International Chan Buddhist Association (the "Association") initially submitted plans to build a Buddhist temple on a parcel within the City.[199] After numerous hearings, the City eventually voted in 2008 to deny the Association the conditional use permit it requested.[200] The U.S. Department of Justice ("DOJ") filed suit in September 2010, alleging the City discriminated against the Association by denying the conditional use permit. The Association intervened as a plaintiff in the suit in an attempt to recover monetary damages.[201]

In August 2011, the City and the DOJ reached a settlement agreement. Under the agreement, the City also agreed "not to impose differential zoning or building requirements on other houses of worship," and "that its leaders and managers, and certain city employees, will attend training on the requirements of RLUIPA."[202] The City further agreed to clarify its appeals process for religious entities and to periodically report to the DOJ.[203] In May 2012, the Walnut City Council voted to approve a $900,000 settlement. One of the City Council members cited the need for closure in the more than decade-long

196. *Id.* at 422.

197. *Church Wins Zoning Appeal; City Surrenders,* THE BECKET FUND FOR RELIGIOUS LIBERTY (May 3, 2012), http://www.becketfund.org/church-wins-zoning-appeal-city-surrenders.

198. No. 2:10-cv-06774-GW—MAN (C.D. Cal. Aug. 04, 2011).

199. Melanie C. Johnson, *Walnut Council Votes to Settle Religious Discrimination Suit,* WALNUT PATCH (May 23, 2012).

200. *Id.*

201. *Id.*

202. Press Release, *Justice Department Resolves Lawsuit Alleging Religious Discrimination by Walnut, California,* U.S. DEPARTMENT OF JUSTICE (AUG. 3, 2011), http://www.justice.gov/opa/pr/2011/August/11-crt-1004.html.

203. *Id.*

saga as the principal reason the City Council unanimously approved the settlement.[204] This settlement agreement serves as another stark reminder of the enormous costs connected with religious discrimination, and how these costs are so often passed on to taxpayers when a municipality loses.

Another substantial RLUIPA settlement was announced in September 2012 in the case of *International Church of Foursquare Gospel v. City of San Leandro.*[205] The City of San Leandro, California agreed to pay $2.3 million to the International Church of the Foursquare Gospel to end the five-year litigation between the parties.[206] The case proceeded through the Ninth Circuit before the United States Supreme Court ultimately denied certiorari in October 2011.[207] This author submitted an amicus brief to the Ninth Circuit Court of Appeals in support of the Church, which the Court used in its opinion affirming the Church's religious liberty under RLUIPA.

In background, the Church attempted to relocate its rapidly growing congregation to an area within an industrial zone in the City of San Leandro in 2007.[208] The City refused the Church's proposal, finding that it conflicted with the zoning code that set the land aside for manufacturing uses, although the City did allow entertainment activities and commercial recreation to operate in industrial zones.[209] In 2011, the Ninth Circuit determined the City's actions imposed a substantial burden on the Church. The City appealed to the United States Supreme Court, which denied certiorari.[210]

On September 25, 2012, San Leandro's Mayor announced the City would pay the Church $2.3 million in exchange for the Church dismissing all its claims against the City and agreeing to make no additional RLUIPA challenges with respect to any other sites within the City.[211] Additionally, the City admitted no liability and also made

204. Johnson, *supra* note 199.

205. No. C 07-3605 PJH, 2012 U.S. Dist. LEXIS 117347 (N.D. Cal. Aug. 20, 2012).

206. Settlement Agreement and Mutual Release, 1-2, *available at* http://www.sanleandrobytes.com/archives/Settlement_agreement_ICFG.pdf.

207. City of San Leandro v. Int'l Church of Foursquare Gospel, 132 S. Ct. 251 (2011).

208. *See* Int'l Church of the Foursquare Gospel v. City of San Leandro, 634 F.3d 1037, 1039 (9th Cir. 2011).

209. *Id.*

210. City of San Leandro v. Int'l Church of Foursquare Gospel, 132 S. Ct. 251 (2011).

211. Press Release, City of San Leandro, City of San Leandro and International Church of Four Square Gospel Resolve Lawsuit (Sept. 25, 2012), http://www.sanleandro.org/civica/press/display.asp?layout = 1&Entry = 190.

no changes to its general plan or zoning provisions.[212] Fortunately for the City's taxpayers, the $2.3 million was completely covered under the City's self-insurance fund and reserve account, meaning no special assessment had to be made to raise taxes in order to cover the settlement amount.[213] In the press release, the Mayor noted: "[t]he City had a strong defense on International Church of Foursquare Gospel's RLUIPA claim. However, trials are inherently unpredictable. Had the City lost, the Church's remaining damages plus legal fees could have exceeded $7 million. Settling the case now was the prudent course of action."[214] This statement is indicative of the beliefs of many municipalities across the country: that it is more beneficial to the municipalities (and the taxpayers living in those municipalities) to settle rather than engage in protracted, unpredictable litigation that risks an even larger monetary loss.

VI. The Individual Mandate Cases

One more place to look for help in understanding what a "substantial burden" is within the context of the Free Exercise Clause of the First Amendment and the Religious Freedom Restoration Act is the numerous individual mandate cases presently being litigated throughout the United States.

The Patient Protection and Affordable Care Act ("ACA"),[215] requires that group health insurance plans cover certain preventable medical services without cost sharing. The coverage mandate is the result of a complex history of Congressional legislation and agency rulemaking involving the Department of Labor, Treasury, and Health and Human Services. In March 2010, Congress enacted the ACA as well as the Health Care and Education Reconciliation Act. These acts established a number of requirements relating to the "group health plan[s]," a term which encompasses employer plans that provide health care coverage to employees, regardless of whether the plans are insured or self-insured.[216] The Health Resources and Services Administration (HRSA) commissioned the Institute of Medicine (IOM) to develop recommendations for the HSRS guidelines. The IOM published a report which proposed, among other things, that insurance

212. *Id.*
213. *Id.*
214. *Id.*
215. Pub. L. No. 111-148, 124 Stat. 119 (2010).
216. 42 U.S.C. § 300gg-91(a)(1) (2012); 75 Fed. Reg. 41,726-727 (July 19, 2010).

plans cover "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity."[217] Included among the FDA approved contraceptive methods are abortion related drugs.

HRSA adopted IOM's recommendations on August 1, 2011. Two days later, the interim rules were adopted to exclude non-profit religious entities.[218] On February 15, 2012, the Departments finalized the rules without addressing the impact of the coverage mandate on for profit entities operated and owned by individuals with deeply held religious beliefs who oppose the requirement to pay for their employees' contraceptives and abortions. The failure to comply with the Coverage Mandate may result in substantial penalties. Under the Internal Revenue Code, large employers (those who employ over 50 people) and fail to offer "full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan" can be assessed an annual fine of $2,000 per full-time employee.[219] An additional tax of $100 per employee per day may be imposed for "any failure of a group health plan" to provide required coverage.[220]

Soon thereafter, a collection of lawsuits were filed challenging the mandate requirement to pay for contraceptives and abortions. At the heart of the cases is whether the requirement to pay for contraceptive and abortions is a "substantial burden" under the Free Exercise Clause of the First Amendment or the Religious Freedom Restoration Act ("RFRA").[221] RFRA prohibits the government from "substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability."[222] A substantial burden is permissible under RFRA, however, if the government "demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."[223] In

217. *Women's Preventative Services: Required Health Plan Coverage Guidelines,* U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, http//www.hrsa.gov/womens guidelines (last visited May 22, 2013).

218. 45 C.F.R. § 147.130(a)(1)(iv)(B)(HHS) (2011).

219. 26 U.S.C. § 4980H(a), (c)(1) (2012).

220. 26 U.S.C. § 4980D(b) (2012); *see also,* 42 U.S.C. § 300gg-22(b)(2)(C)(i) (2010) (providing penalties of up to $100 per person per day for failure to satisfy coverage requirements).

221. 42 U.S.C. §§ 2000bb—2000bb-4 (2012).

222. *Id.* § 2000bb-1(a).

223. *Id.*

other words, the Court applies strict scrutiny to federal statutes that substantially burden the free exercise of religion.[224] As with RLUIPA, Congress made the express choice to leave the term "substantial burden" undefined resulting in a variety of definitions for us to consider.

As of January 15, 2013, there have been fourteen decisions applying RFRA and the Free Exercise Clause to substantial burden claims arising out of the mandate cases.[225] The variety of decisions has caused a significant amount of confusion within the Circuits as to what a substantial burden actually is within the context of religious beliefs. On December 20, 2012, for example, the Tenth Circuit Court of Appeals denied an injunction to one of the highest-profile plaintiffs, Hobby Lobby. The court concluded that concerns by the craft chain's owners, the evangelical philanthropist Green family, that "funds [might] subsidize someone else's participation in an activity condemned by plaintiff[s'] religion" were not a substantial burden to the Greens' religious exercise.[226] The United States Supreme Court then refused to hear the appeal as the case is still pending below. The following week, the Seventh Circuit Court of Appeals rejected the Tenth Circuit's decision concluding that it "misunderstands the substance of the claim."[227] In affirming an injunction, the Seventh Circuit held that, "[t]he religious-liberty violation at issue here is the *coerced coverage* of contraception, abortifacients, sterilization, and related services, *not*—or perhaps more precisely, *not only*—in the later pur-

224. *See, e.g.,* Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 424 (2006).

225. Nine courts granted injunctive relief. *See* Korte v. Sebelius, No. 12-3841, 2012 U.S. App. LEXIS 26734, *14 (7th Cir. Dec. 28, 2012); Triune Health Grp., Inc. v. U.S. Dep't of Health & Human Servs., No. 1:12-cv-06756, slip op. at 1 (N.D.Ill. Jan. 3, 2012); Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs., No. 2:12-CV-92, 2012 WL 6738489, at **7(E.D. Mo. Dec. 31, 2012); Monaghan v. Sebelius, No. 12-15488, 2012 WL 6738476, *3-6 (E.D. Mich. Dec.30, 2012); Conestoga Wood Specialties Corp. v. Sebelius, No. 12-6744, slip op. at 1 (E.D. Pa. Dec. 28, 2012); Am. Pulverizer Co.v. U.S. No. 12-3459-CV-S-RED, slip op. at 6 (W.D. Mo. Dec. 20, 2012); Tyndale House Publishers, Inc. v. Sebelius, No. 12-1635 (RBW), 2012 WL 5817323, *10-18 (D.D.C. Nov. 16, 2012); Legatus v. Sebelius, No. 12-12061, 2012 WL 5359630, *6 (E.D.Mich. Oct. 31, 2012); Newland v. Sebelius, No. 1:12-cv-1123, 2012 WL 3069154, *6-8 (D. Colo. July 27, 2012). Four courts denied injunctive relief. *See* Autocam Corp. v. Sebelius, Case No. 1:12-cv-01096, slip op. at 3 (6th Cir., Dec. 28, 2012); Hobby Lobby Stores v. Sebelius, No. 12-6294, 2012 WL 6930302, at *3 (10th Cir. Dec. 20, 2012); Grote Indus. v. Sebelius, No. 4:12-cv-00134, 2012 WL 6725905, at *6-7 (S.D. Ind. Dec. 27, 2012) and Annex Medical Inc. v. Sebelius, No. 12-2804 (DSD/SER), 2013 WL 101927, *6 (D. Minn. Jan. 8, 2013).

226. Hobby Lobby Stores v. Sebelius, No. 12-6294, 2012 WL 6930302, at *3 (10th Cir. Dec. 20, 2012).

227. *Korte,* 2012 U.S. App. LEXIS 26734 at *10.

chase or use of contraception or related services."[228] As a result, the judges ruled 2–1 that the construction company's Catholic owners had established "a reasonable likelihood of success on their claim that the contraception mandate imposes a substantial burden on their religious exercise," and noted "the burden will be on the government to demonstrate that the contraception mandate is the least restrictive means of furthering a compelling governmental interest."[229]

The United States Supreme Court may soon weigh in on the issue of defining the term "substantial burden" within the meaning of RFRA and within the context of the mandate issue. On November 26, 2012, the Supreme Court remanded *Liberty University v. Geithner* back to the Fourth Circuit Court of Appeals to have it address the constitutionality of the mandate requiring employers to provide insurance that includes coverage for contraceptives and abortions under the First Amendment's Free Exercise clause.[230] It is anticipated that the decision will return to the Court regardless of how the Fourth Circuit rules in that case.

VII. Conclusion

The cases discussed are just a sample of the cases being decided by federal courts nationwide. In the thirteen years since RLUIPA was adopted, the courts have been working diligently to interpret the meaning of the statute's various provisions, as well as to provide guidance for future courts addressing similar RLUIPA claims. While the progress being made by these courts is evident, several of the aforementioned cases demonstrate that uncertainty and ambiguity remain with respect to many areas of RLUIPA interpretation. This uncertainty and ambiguity will surely lead to more litigation in the coming years, and will provide further opportunity for federal courts across the country to evolve the realm of RLUIPA jurisprudence.

228. *Id.* at *10 (emphasis in original).
229. *Id.* at *12.
230. 133 S.Ct. 679 (2012).