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I. INTRODUCTION

In 1983, when St. John's Evangelical Lutheran Church challenged the City of Hoboken's use of its zoning power to shut down the church's homeless shelter, the New Jersey Superior Court expressed outrage.[1] In a brief opinion, the court wrote,

> The harm here is obvious, imminent and severe. If the shelter is closed its occupants will be left without food or shelter. Government alone is not presently able to cope with this grave social problem. St. John's represents the only bulwark these homeless people have. To tear that bulwark away would be a travesty of justice and compassion. Any inconvenience to the City of Hoboken and its other residents pales into insignificance when contrasted with what the occupants of the shelter would have to face if turned out into the city streets in winter weather.[2]

Today, this weighing of the social importance of a church's practice is absent from judicial analysis in religious-land-use cases. In its place is a long line of inconsistent precedent and statutes, each attempting to articulate a test that accurately reflects the true meaning of the right to free exercise of religion.

Since the United States Supreme Court narrowed its interpretation of the Free Exercise Clause[3] in *Employment Division, Department of Human Resources v. Smith*,[4] the controversy over the proper treatment of religious land use has continued to challenge courts. Congress re-

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[1] *See* St. John's Evangelical Lutheran Church v. City of Hoboken, 479 A.2d 935, 939 (N.J. Super. Ct. Law Div. 1983).

[2] *Id.* (citation omitted).

[3] U.S. CONST. amend. I.

[4] *See* Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 890 (1990) ("But to say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required, and that the appropriate occasions for its creation can be discerned by the courts.").

sponded swiftly to *Smith*, enacting a statute to make the free exercise of religion broader than the *Smith* Court had envisioned. These statutory changes, however, led to a series of inconsistent decisions in the area of religious land use.

Currently, temporary homeless shelters or tent cities pose new problems for courts struggling to find the proper analysis for determining whether restrictions on religious land use run afoul of the Free Exercise Clause. By enacting the Religious Land Use and Institutionalized Persons Act (RLUIPA) in 2000,[5] Congress provided a statutory solution to some religious-land-use problems. But the statute's intended goal—broadening the scope of free exercise after *Smith*—is not always served in cases where churches are hosting homeless shelters. Some circuit courts have defined RLUIPA's requirement of a "substantial burden on a religious exercise" in a restrictive way and thus have impeded the statute's intended protections for religious land uses.[6] Conversely, in some cases, *Smith* works to protect religious institutions subject to unfavorable city ordinances.[7] Due to this discrepancy, courts need to streamline their approach to religious-land-use cases to establish reliable precedent and restore public confidence in fair adjudication.

Although *Smith* articulates a standard for the application of the Free Exercise Clause, it has been subject to inconsistent application and much confusion. The unique case of tent cities shows the need for a clearer, more precisely defined test. RLUIPA provides the applicable standard in the tent city context, but its failure to define what constitutes a "substantial burden on religious exercise" has also caused inconsistency. To resolve this definitional confusion, federal courts should model a new test from the Washington Supreme

[5] Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc (2006).

[6] *See* Vision Church v. Vill. of Long Grove, 468 F.3d 975, 997 (7th Cir. 2006) (adding that a substantial burden must render the religious exercise "effectively impractical" (citing Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752, 761 (7th Cir. 2003))); San Jose Christian Coll. v. City of Morgan Hill, 360 F.3d 1024, 1034 (9th Cir. 2004) (defining substantial burden as "a significantly great restriction or onus upon such exercise").

[7] *See* First Vagabonds Church of God v. City of Orlando, 578 F. Supp. 2d 1353, 1362 (M.D. Fla. 2008) (ruling in favor of a church whose meal program for the homeless was shut down by city ordinance where the church showed that the ordinance, although neutral and generally applicable, had no legitimate government interest); Fifth Ave. Presbyterian v. City of New York, No. 01 Civ. 11493, 2004 U.S. Dist. LEXIS 22185, at *40–41 (S.D.N.Y. Oct. 29, 2004) (holding for a church which passively permitted homeless persons to sleep on its steps during the night after the local government used local laws to force the homeless off the steps), *aff'd* 177 F. App'x 198 (2d Cir. 2006).

Court's standard for substantial burden, which takes into account both the context of the situation and the alternatives available to churches when determining if a substantial burden exists under RLUIPA.

This Comment examines the controversy created by the tests as applied in religious-land-use cases and how the tests have fared when religious exercise involves providing services to homeless persons at the expense of the surrounding community's right to a quiet and safe neighborhood. Part II examines the development of the Free Exercise Clause and religious-land-use regulation. Part III shows how the constitutional and congressional tests for Free Exercise Clause violations have been applied when cities deny churches the ability to host homeless shelters or feeding programs on their property and, in particular, looks at the conflict that the tests have created for these types of cases. Lastly, Part IV explores the unique issues tent cities have posed for courts and how a proper definition of a substantial burden under RLUIPA could resolve these issues in a way that fairly balances the interests of local governments and religious freedom.

II. FREE EXERCISE AND RELIGIOUS LAND USE: COURT VERSUS CONGRESS

Constitutional challenges under the Free Exercise Clause first appeared in the twentieth century. Initially, the Supreme Court expansively defined the right to free exercise of religion and treated it similarly to other rights.[8] In the past two decades, however, the Court has curtailed the free exercise right and has made it more difficult for churches to challenge neutral and generally applicable government measures that burden their religious practices.[9] This has made it especially difficult for churches to challenge land-use regulations and has set shaky precedent for new religious land uses.

A. The Free Exercise Clause in the Twentieth Century

In the nineteenth century, upon first review of the Free Exercise Clause, the Supreme Court determined the Clause to mean that

[8] *See* Sherbert v. Verner, 374 U.S. 398, 403 (1963) (requiring a showing of a compelling government interest to regulate religious conduct).

[9] *See* Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 531 (1993) (stating that neutral laws effecting religious practice need not be justified by a compelling government interest); Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 885 (1990); *see also* Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 HARV. L. REV. 155, 200–13 (2004) (chronicling the changes to the Supreme Court's approach in the last two decades).

"Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order."[10] Almost a century later in 1963, the Court articulated a strict scrutiny standard for any government action that burdened the free exercise of religion.[11]

In *Sherbert v. Verner*, a Seventh Day Adventist was fired from her job when she refused to work on her Saturday Sabbath day.[12] She was then denied unemployment benefits for failing to take available jobs that would require her to work on Saturdays.[13] The Court ruled that the state's interest in preventing fraudulent benefits claims was not served by this denial of benefits.[14] Ultimately, the Court adopted the standard that "governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest."[15] This broad reading of the Clause proved fruitful for churches bringing claims under the Free Exercise Clause because they received the benefit of the most demanding level of scrutiny for any interference with their free exercise rights, including those laws that apply neutrally.[16]

Nearly three decades later, the law shifted again. In *Employment Division, Department of Human Resources v. Smith*, the Court limited the *Sherbert* rule to those government actions that are not generally applicable and neutral.[17] Justice Scalia reasoned that *Sherbert* "stand[s] for the proposition that where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason."[18] If a law meets the threshold standard of neutrality and general applicability, the government does not need to show that the action is narrowly tailored to

[10] Reynolds v. United States, 98 U.S. 145, 164 (1878).

[11] *See* Sherbert v. Verner, 374 U.S. 398, 403 (1963) ("[A]ny incidental burden on the free exercise of appellant's religion may be justified by a 'compelling state interest in the regulation of a subject within the State's constitutional power to regulate.'" (quoting NAACP v. Button, 371 U.S. 415, 438 (1963))).

[12] *See id.* at 399.

[13] *See id.* at 400.

[14] *See id.* at 407–09.

[15] Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 883 (1990) (citing *Sherbert*, 374 U.S. at 402–03).

[16] *See* City of Boerne v. Flores, 521 U.S. 507, 513 (1997) ("The application of the *Sherbert* test, the *Smith* decision explained, would have produced an anomaly in the law, a constitutional right to ignore neutral laws of general applicability.").

[17] *See Smith*, 494 U.S. at 884.

[18] *Id.* at 884 (citing Bowen v. Roy, 476 U.S. 693, 708 (1986)).

achieve a compelling interest, even if the law burdens religious exercise.[19]

Thus, if the government action that allegedly violates religious freedom applies to all persons generally and is not targeted to discriminate against a specific group, then courts will review its constitutionality under a rational basis standard of review, asking whether the government action is rationally related to a legitimate government purpose.[20] If the government action is not neutral and generally applicable to all, then the court will review its constitutionality under strict scrutiny, asking whether the government action is narrowly tailored to achieve a compelling government interest.[21] Applying this reasoning, the Court in *Smith* found that the plaintiff's use of peyote, in violation of a neutral and generally applicable criminal law, did not exempt them from the law and its consequences, including the loss of unemployment benefits.[22]

The holding of *Smith*, however, left open many questions. Justice Scalia did not explain how narrowly or broadly to interpret the *Sherbert* exception for laws that are not neutral and generally applicable—those "individualized [government] assessments."[23] Does the exception only apply to discretionary benefits programs like in *Sherbert* or does it extend to local government zoning decisions? With no guidance as to the scope of the exception, lower courts are split on whether the exception applies to zoning-board decisions to grant or deny applications for variances, conditional permits, or accessory-use permits.[24]

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[19] *See id.* at 886 n.3 ("Our conclusion that generally applicable, religion-neutral laws that have the effect of burdening a particular religious practice need not be justified by a compelling governmental interest is the only approach compatible with these precedents.").

[20] *See* Church of the Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 531 (1993); Family Life Church v. City of Elgin, 561 F. Supp. 2d 978, 986 (N.D. Ill. 2008).

[21] *See Church of the Lukumi Babalu Aye*, 508 U.S. at 531–32; *Family Life Church*, 561 F. Supp. 2d at 986.

[22] *See Smith*, 494 U.S. at 890.

[23] *See* Carol M. Kaplan, *The Devil is in the Details: Neutral, Generally Applicable Laws and Exceptions from* Smith, 75 N.Y.U. L. REV. 1045, 1047 (2000); *see also* Ashira Pelman Ostrow, *Judicial Review of Local Land Use Decisions: Lessons from RLUIPA*, 31 HARV. J.L. & PUB. POL'Y 717, 745 (2008) (noting that "the Supreme Court has not explicitly provided a standard by which to distinguish between laws of general applicability and individualized assessments").

[24] *Compare* Hale O Kaula Church v. Maui Planning Comm'n, 229 F. Supp. 2d 1056, 1072–73 (D. Haw. 2002) (finding that regardless of RLUIPA the court could review the city's denial of a special zoning permit based on system of individualized exemptions under strict scrutiny), Keeler v. Mayor of Cumberland, 940 F. Supp. 879, 886 (D. Md. 1996) (finding the compelling interest test under *Smith* applied to a his-

Additionally, *Smith* created the "hybrid situation," which posits that an alleged free exercise violation must be combined with an alleged violation of another constitutional right to invalidate a neutral and generally applicable law.[25] In dictum, Justice Scalia wrote that up until *Smith*, the Court had only upheld a challenge to a neutral and generally applicable law based on a religious belief when the case involved a claim under both the Free Exercise Clause and another constitutionally recognized right—historically, either a free speech or parental right.[26] Two constitutional rights—each alone not enough to overturn a law—may be sufficient when combined together to obtain higher judicial scrutiny to invalidate the law.[27] While the parties in *Smith* never raised this argument, Justice Scalia's dictum is often relied upon in free exercise cases.[28]

The Court applied the *Smith* test in *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*,[29] finding that a city's ordinance prohibiting ritual animal sacrifices was not neutral and generally applicable and could

toric preservation ordinance that created a system of individualized exemptions), *and* Alpine Christian Fellowship v. Cnty. Comm'rs, 870 F. Supp. 991, 993–94 (D. Colo. 1994) (reviewing the city's denial of a zoning permit to a church under strict scrutiny), *with* Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752, 764 (7th Cir. 2003) (finding that because everyone seeking a special zoning permit was subjected to the same process and no discriminatory means were used by the zoning board, the zoning permit process was not one of individualized exemptions), *and* Mount Elliott Cemetery Ass'n v. City of Troy, 171 F.3d 398, 403 (6th Cir. 1999) (finding that the zoning ordinance was a neutral and generally applicable law under *Smith* where plaintiff challenged the rezoning request).

[25] *See* Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 881–82 (1990).

[26] *See id.* at 881.

> The present case does not present such a hybrid situation, but a free exercise claim unconnected with any communicative activity or parental right. Respondents urge us to hold, quite simply, that when otherwise prohibitable conduct is accompanied by religious convictions, not only the convictions but the conduct itself must be free from governmental regulation. We have never held that, and decline to do so now.

Id. at 882.

[27] *See* Richard F. Duncan, *Free Exercise Is Dead, Long Life Free Exercise:* Smith, Lukumi *and the General Applicability Requirement*, 3 U. PA. J. CONST. L. 850, 857 (2001).

> The mechanics of the hybrid theory work something like this: neither free exercise nor parental rights standing alone can reach the results in [Wisconsin v. Yoder, 406 U.S. 205 (1972)], but somehow when the two claims are 'hybridized' or linked together they can do the work. Thus, two insufficient constitutional interests—when combined—equal one sufficient hybrid claim.

Id.

[28] *See id.* at 858; Ira C. Lupu, Comment, Employment Division v. Smith *and the Decline of Supreme Court-Centrism*, 1993 BYU L. REV. 259, 267 (1993).

[29] Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993).

not survive strict scrutiny.[30] The Court found that the local government enacted the ordinance specifically to prohibit the church from practicing animal sacrifices and not for the health and safety reasons that the government had presented.[31]

In his concurring opinion, Justice Souter attacked *Smith* and the hybrid method, stating "[i]f a hybrid claim is simply one in which another constitutional right is implicated, then the hybrid exception would probably be so vast as to swallow the *Smith* [test]."[32] The petitioner would only have to pair two rights together to obtain strict scrutiny under the *Smith* test,[33] even if the law burdening religious exercise is neutral and generally applicable. Justice Souter pointed out, however, that there would be no reason to pair free exercise and another right, if the plaintiff could win solely on the basis of the right paired with free exercise.[34]

B. Congressional Response to Smith

The *Smith* ruling sparked criticism from all sides.[35] In an effort to undo *Smith*, Congress enacted the Religious Freedom Restoration Act (RFRA) in 1993.[36] RFRA reinstated strict scrutiny for cases where

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[30] See *id.* at 547.

> Neutrality and general applicability are interrelated, and, as becomes apparent in this case, failure to satisfy one requirement is a likely indication that the other has not been satisfied. A law failing to satisfy these requirements must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest. These ordinances fail to satisfy the *Smith* requirements.

Id. at 531–32.

[31] *See id.* at 545.

[32] *Id.* at 567 (Souter, J., concurring).

[33] *See id.*

[34] *See id.*

[35] *See* City of Boerne v. Flores, 521 U.S. 507, 544–45 (1997) (O'Connor, J., dissenting) (arguing that *Smith* was wrongly decided); 146 CONG. REC. S7774, 7777 (daily ed. July 27, 2000) (joint statement of Sen. Hatch and Sen. Kennedy) (citing a letter from Coalition for the Free Exercise of Religion stating that there are "continuing sources of free exercise problems in the wake of the U.S. Supreme Court's decision in Employment Division v. Smith"); 139 CONG. REC. H2356 (daily ed. May 11, 1993) (statement of Rep. Brooks) ("The Supreme Court's decision 3 years ago transformed a most hallowed liberty into a mundane concept with little more status than a fishing license-thus subjecting religious freedom to the whims of Government officials. . . . Passage of this legislation is the only means to restore substance to the constitutional guarantee of religious freedom.").

[36] 42 U.S.C. § 2000bb(a) (2006). The statute states, in part, the following:

> (a) The Congress finds that—

the government has "substantially burdened a person's free exercise of religion" even if the burden results from neutral and generally applicable government actions or laws.[37]

RFRA, however, had its own critics. Professor Ira Lupu suggested that RFRA may not have produced the intended benefits after all.[38] Ultimately, the Act was unsuccessful, resulting in far fewer grants of relief than denials under it.[39] Its application also demon-

> (1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;
> (2) laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;
> (3) governments should not substantially burden religious exercise without compelling justification;
> (4) in Employment Division v. Smith, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and
> (5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.

Id.

[37] § 2000bb-1(a)–(b). The act states, in part, the following:

> (a) In general. Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).
> (b) Exception. Government may substantially burden a person's exercise of religion only if it 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.

Id.

[38] *See* Ira C. Lupu, *The Failure of RFRA*, 20 U. ARK. LITTLE ROCK L.J. 575, 586 (1998) ("Moreover, the world of RFRA may have been filled with barely visible benefits, included increased bargaining leverage for religious interests and an increased feeling of security among the deeply religious, as well as hard-to-calculate costs, including social resentment over particular RFRA claims and the civic stresses caused by the necessity to defend against them."). For another critique of RFRA, see Amy Adamczyk et al., *Documenting the Effects of* Smith *and RFRA*, 46 J. CHURCH & STATE 237 (2004).

[39] Professor Lupu observed that:

> We will never know how many RFRA victories these cases might have produced had [*City of Boerne v. Flores*] not terminated their RFRA claims, as it did for all cases involving state law (i.e., the huge majority of them). But we do know that 143 of the 168 produced denials of relief, only twenty-five claims produced grants of relief (for an overall win percentage of 15% of cases decided on the merits), and that nine of these twenty-five were in prisoner litigation, which typically involved the most basic infringements of religious liberty.

Lupu, *supra* note 38, at 591.

strated that judges are uncomfortable exempting religion from the law, for fear of religious favoritism or a "slippery slope."[40] In 1997, the Court invalidated RFRA as an unconstitutional use of congressional enforcement power.[41] The decision rendered the statute inapplicable to state government action but held that it still applied to federal government action.

Nevertheless, Congress enacted another law, RLUIPA, in an attempt to protect religious freedom.[42] RLUIPA created a safeguard for religious institutions previously unable to combat generally applicable land-use regulations. The statute prohibits governments from enacting "a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution" unless the government acts to further a compelling government interest using the least restrictive means.[43]

The Act was intended to eliminate the distinction between discriminatory laws and laws of general and neutral applicability in the context of land-use regulations.[44] Congress gave the Act a broad

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[40] *See id.* at 593.

[41] *See* City of Boerne v. Flores, 521 U.S. 507, 535 (1997); *see also* Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 424 n.1 (2006) ("As originally enacted, RFRA applied to States as well as the Federal Government. In *City of Boerne v. Flores*, we held the application to States to be beyond Congress' legislative authority under § 5 of the Fourteenth Amendment." (internal citations omitted)).

[42] *See* 42 U.S.C. § 2000cc (2006).

[43] § 2000cc(a)(1). The act states:

> (a) Substantial burdens.
>
> (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 the government demonstrates that imposition of the burden on that person, assembly, or institution–
>
> (A) is in furtherance of a compelling governmental interest; and
>
> (B) is the least restrictive means of furthering that compelling governmental interest.

Id.

[44] *See* 146 CONG. REC. S7774, 7774 (joint statement of Sen. Hatch and Sen. Kennedy).

> Churches in general, and new, small, or unfamiliar churches in particular, are frequently discriminated against on the face of zoning codes and also in the highly individualized and discretionary processes of land use regulation. Zoning codes frequently exclude churches in places where they permit theaters, meeting halls, and other places where large groups of people assemble for secular purposes. Or the codes permit churches only with individualized permission from the zoning board, and zoning boards use that authority in discriminatory ways.

scope and application to protect free exercise of religion.[45] The Act defines "religious exercise" expansively as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief," [46] eliminating any requirement of showing that the practice is necessary to the religion.[47] For religious institutions seeking to provide homeless services, this provision is important because the religious activity need not be a required practice for all members of the religion. The statute also does not require any pairing of rights to obtain strict scrutiny as *Smith* contemplated.[48]

III. CURRENT CONFLICTS IN RELIGIOUS LAND USE: USING PROPERTY FOR HOMELESS SERVICES

Courts have had to adapt to the changes in religious-land-use law quickly, but courts are also struggling as churches seek to expand their presence and become active in the community. Temporary homeless shelters, often termed "tent cities," present one of these challenges. The shelters, which are set up temporarily on church property and often run by a secular organization, present a challenge for courts in applying religious-land-use laws and ultimately reveal flaws in the standards governing religious land use. Because the circumstances of tent cities are so unique, courts are given an opportunity to clarify the reach of the present law.

Id.; *see also* Cutter v. Wilkinson, 544 U.S. 709, 714 (2005) ("RLUIPA is the latest of long-running congressional efforts to accord religious exercise heightened protection from government-imposed burdens, consistent with this Court's precedents."); David L. Abney, *Religion and Housing for the Homeless, Using the First Amendment and the Religious Land Use Act to Convert Religious Faith into Safe, Affordable Housing*, 8 SCHOLAR 1, 10 (2005).

[45] *See* § 2000cc-3(g) ("This Act shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this Act and the Constitution.").

[46] § 2000cc-5(7)(A).

[47] *See, e.g.*, Stuart Circle Parish v. Bd. of Zoning Appeals, 946 F. Supp. 1225, 1239 (E.D. Va. 1996) (requiring plaintiff church to show "that it was central to their faith to invite the homeless into the church in order to establish a climate of worship"). *But see* Westgate Tabernacle, Inc. v. Palm Beach Cnty., 14 So. 3d 1027, 1032 (Fla. Dist. Ct. App. 2009) ("Even assuming the [city] prohibited homeless shelters outright on RH-zoned property, Westgate would still fail to prove a substantial burden [under RLUIPA], because it did not show that running a homeless shelter at its specific location was fundamental to its religious exercise."), *reh'g denied*, No. 4d07-3792, 2009 Fla. App. LEXIS 12352 (Aug. 13, 2009).

[48] *See* Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 881–82 (1990).

A. Finding Help in Religion

When homeless populations rise, cities—often faced with complaints and without the resources to solve the homelessness problem—have created statutes, such as anti-camping or sleeping and panhandling statutes, to keep order in the community.[49] In many instances homeless people sleeping on public property become subject to police "sweeps" in which officers strictly enforce these laws, rather than solely in instances of specific complaints.[50] Courts have typically upheld these laws against legal challenges because of public health and safety concerns, deferring to city governments.[51]

The statutes, however, only temporarily disperse the homeless, especially when shelters become overcrowded.[52] While it seems that cities, both large and small, contain several places for the homeless to take shelter during the days and nights, these shelters often are not located near schools, shopping, government-aid programs, or other services the homeless need and do not provide access to reliable transportation to get them to these locations.[53] Even if shelters are available, at least one court has recognized that many homeless

[49] *See, e.g.*, Joel v. City of Orlando, 232 F.3d 1353, 1362 (11th Cir. 2000) (upholding a city ordinance prohibiting camping on public property); *see also* Roulette v. City of Seattle, 97 F.3d 300, 306 (9th Cir. 1996) (upholding a city ordinance prohibiting sitting or lying on public sidewalks around commercial areas); ATLANTA, GA., CODE OF ORDINANCES § 43-1 (2009) (prohibiting solicitation of money in certain public areas); CLEVELAND, OH., CODE § 605.031 (2009) (prohibiting repeated solicitations after a person first refuses); CINCINNATI, OH., CODE § 910-12 (2009) (prohibiting solicitation of money in certain public areas).

[50] *See, e.g.*, Paul Shockley, *Ex-Officers Defend Raid*, DAILY SENTINEL (Grand Junction, Co.) (June 21, 2010), http://www.gjsentinel.com/news/articles/exofficers_defend_raid; Michelle Smith, *R.I. Tent City Residents Forced to Move*, LEDGER (Lakeland, Fla.) Sept. 6, 2009, at A2, *available at* http://www.theledger.com/article/20090905/news/909055050; Susan Poag, *Homeless Sweep Under Expressway*, TIMES-PICAYUNE (Sept. 1, 2009), http://www.nola.com/news/index.ssf/2009/09/homeless_sweep.html; Mike Carter and Drew DeSilver, *Dozens Protest Homeless Sweeps with City Hall Camp-Out*, SEATTLE TIMES (June 9, 2008), http://seattletimes.nwsource.com/html/localnews/2004466035_homeless09m.html.

[51] *See* Joel v. City of Orlando, 232 F.3d at 1362 (upholding a city ordinance prohibiting camping on public property); Roulette v. City of Seattle, 97 F.3d at 306 (upholding a city ordinance prohibiting sitting or lying on public sidewalks around commercial areas); Ulmer v. Mun. Ct., 127 Cal. Rptr. 445, 447 (Cal. Ct. App. 1976) (upholding a statute prohibiting the solicitation of funds without a permit against a First Amendment challenge).

[52] St. John's Evangelical Lutheran Church v. City of Hoboken, 479 A.2d 935, 939 (N.J. Super. Ct. Law Div. 1983) (observing that when homeless shelters are closed, homeless individuals are forced to return to the streets).

[53] *See* Abney, *supra* note 44, at 2.

people "are 'service resistant,' and would be as unlikely to stay in an indoor church shelter as in a City shelter."[54]

Churches can offer a solution to these problems by permitting homeless shelters on property protected by RLUIPA and the Free Exercise Clause. While many churches organize and manage homeless shelters, increasingly the homeless have organized into secular camps, asking churches for temporary use of their land to set up a camp undisturbed by police.[55] These tent cities have appeared all over the country, including Columbus, Ohio; Athens, Georgia; Chatanooga, Tennessee; Seattle, Washington; and Ontario, California.[56] Groups of around 100 homeless people organize most tent cities and become a mobilized community.[57] Host churches and other donors often provide meals, portable restrooms, and other services.[58]

B. Local Governments' Police Power to Regulate

Many cities have resisted the alliance between homeless camps and religious institutions. Using zoning laws, public-nuisance laws, and the public interest in health and safety, cities and residents have challenged homeless encampments on church properties.[59] Zoning regulations permit cities to section off land for certain uses in the in-

[54] Fifth Ave. Presbyterian v. City of New York, No. 01 Civ. 11493, 2004 U.S. Dist. LEXIS 22185, at *11 (S.D.N.Y. Oct. 29, 2004).

[55] *See generally Tent Cities*, SEATTLE HOUSING AND RESOURCE EFFORT/WOMEN'S HOUSING AND EQUALITY LEAGUE (SHARE/WHEEL), http://www.sharewheel.org/Home/tent-cities (last visited Jan. 12, 2011) [hereinafter SHARE/WHEEL]; PINELLAS HOPE, http://www.pinellashope.org (last visited Jan. 14, 2010); Melanie C. Johnson, *Tent City in Ontario Offers Shelter, Services*, PRESS ENTERPRISE (Riverside, Cal.), Dec. 28, 2007, at B1, *available at* http://www.pe.com/localnews/inland/stories/PE_News_Local_D_tentcity28.2915a96.html; Dave Askins, *Laws of Physics: Homeless Camp Moves*, ANN ARBOR CHRON. (Sept. 2, 2009), http://annarborchronicle.com/2009/09/02/laws-of-physics-homeless-camp-moves.

[56] *See* Evelyn Nieves, *In Hard Times, Tent Cities Rise Across the Country*, ASSOCIATED PRESS (Sept. 18, 2008), http://www.usatoday.com/news/nation/2008-09-18-3933748920_x.htm. "The phenomenon of encampments has caught advocacy groups somewhat by surprise, largely because of how quickly they have sprung up." *Id.*

[57] *See* SHARE/WHEEL, *supra* note 55; *see also* PINELLAS HOPE, *supra* note 55.

[58] *See id.*

[59] *See, e.g.*, Don Mann, *Tent City 4 Coming Again to Woodinville*, WOODINVILLE WKLY. (June 21, 2010), http://www.nwnews.com/index.php?id=1569:tent-city-4-coming-again-to-woodinville&option=com_content&catid=34:news&Itemid=72; *Mercer Island Residents Look to Stop Tent City in Court*, MERCER ISLAND REP. (July 16, 2008), http://www.pnwlocalnews.com/east_king/mir/news/28076489.html; *see also* Chandra Broadwater, *Hillsborough Officials' Sudden Interest in Homeless Camp Riles Opponents*, ST. PETERSBURG TIMES (July 22, 2009), http://www.tampabay.com/news/growth/article1020464.ece.

terest of public health and safety. Most churches exist in residential zones that tend to have strict regulations on the use of the land.[60] Some zoning ordinances directly limit meal or housing programs for the homeless;[61] others require conditional use permits[62] or semi-public use permits[63] to host these programs. For the larger outdoor camps, most cities—if they do not prohibit the encampment outright—require churches to obtain temporary permits.[64] Allowing churches to host homeless shelters and homeless service programs, however, can disrupt zoning purposes—the more variances and conditional permits granted, the more distorted zoning plans become.

Because of the public health and safety concerns that zoning is designed to protect, homeless programs face much opposition. Cities have been reluctant to grant permits for housing and meal programs because these programs bring outsiders into communities, which can cause problems.[65] Although some homeless individuals are simply persons who have been victims of bad financial luck, many others are ex-offenders, parolees, mentally handicapped, or alcohol or drug abusers.[66] Tent cities pose an additional difficulty. The camps can con-

[60] *See* Shelley Rose Saxer, *When Religion Becomes a Nuisance: Balancing Land Use and Religious Freedom When Activities of Religious Institutions Bring Outsiders into the Neighborhood*, 84 KY. L.J. 507, 526 (1995).

[61] *See, e.g.*, Stuart Circle Parish v. Bd. of Zoning Appeals, 946 F. Supp. 1225, 1228 (E.D. Va. 1996) (concerning zoning code limiting feeding programs to thirty individuals for seven days in a six month period); Western Presbyterian Church v. Bd. of Zoning Adjustment, 849 F. Supp. 77, 78 (D.D.C. 1994) (concerning a statute regulating programs conducted by churches in residential zones such as feeding programs).

[62] *See, e.g.*, Westgate Tabernacle, Inc. v. Palm Beach Cnty., 14 So. 3d 1027, 1029 (Fla. Dist. Ct. App. 2009) (regarding a conditional use permit to operate a homeless shelter), *reh'g denied*, No. 4d07-3792, 2009 Fla. App. LEXIS 12352 (Aug. 13, 2009); Family Life Church v. City of Elgin, 561 F. Supp. 2d 978, 982 (N.D. Ill. 2008) (regarding the application for a conditional use permit to operate a homeless shelter).

[63] *See, e.g.*, Daytona Rescue Mission, Inc. v. City of Daytona Beach, 885 F. Supp. 1554, 1556 (M.D. Fla. 1995) (concerning an application for a semi-public use permit to house homeless).

[64] *See, e.g.*, City of Woodinville v. Northshore United Church of Christ, 211 P.3d 406, 408 (Wash. 2009) (concerning the attainment of a temporary use permit to host a tent city on church property); *Tent City—Temporary Homeless Encampments*, MUN. RESEARCH AND SERVS. CTR. OF WASH., http://www.mrsc.org/Subjects/Housing/tentcity/tentcity.aspx (last visited Jan. 14, 2010) (listing permits required for Washington cities).

[65] *See generally* Saxer, *supra* note 60 (discussing the conflict between city residents and religious programs that serve nonresidents).

[66] *See* Damien Cave and Lynn Waddell, *'Tent City' of Homeless Is Rejected in Florida*, N.Y. TIMES, Oct. 14, 2009, at A21, *available at* http://www.nytimes.com/2009/10/14/us/14homeless.html; Evelyn Nieves, *supra* note 56; Jennifer Levitz, *Cities Tolerate Homeless Camps*, WALL ST. J., Aug. 11, 2009, at A3, *available at* http://online.wsj.com/article/SB124994409537920819.html; s*ee also* Jennifer Lebo-

tain over 100 people, all housed outdoors, without the support of twenty-four hour staff that a homeless shelter provides.[67] The camps, however, are usually temporary and move from location to location every few months in an effort to ease the concerns that arise in each community.[68] Despite their impermanence, many cities have refused to allow churches to host any kind of homeless camp.[69] In some cases the residents file suit or petition the local government to stop churches from hosting tent cities.[70]

C. The Shelter Cases

While RLUIPA and the Free Exercise Clause have given religious institutions an advantage over other property owners wishing to conduct programs for the homeless on their property, religious institutions still must overcome a difficult burden with any religious-land-use test: *Smith*, RFRA, or RLUIPA. Churches have long fought against local zoning ordinances prohibiting shelters and large meal minis-

vich, *Miami Threatens to Fine State over Sex-Offender Camp*, MIAMI HERALD (Aug. 7, 2009), http://www.miamiherald.com/news/southflorida/story/1175176.html?storylink=mirelated.

[67] *See* SHARE/WHEEL, *supra* note 55; PINELLAS HOPE, *supra* note 55; *see also* Jennifer Levitz, *supra* note 66.

[68] *See* SHARE/WHEEL, *supra* note 55; Nicole Tsong, *Belle's First United Methodist Seeks Permit to Host Tent City*, SEATTLE TIMES (Aug. 20, 2009), http://seattletimes.nwsource.com/html/bellevueblog/2009701487_firstunitedmethodistappliesfortentcity4permit.html.

[69] *See* Steve Bauer, *Champaign Official: Court Proper Arena for Tent City Fight*, NEWS-GAZETTE, (Aug. 29, 2009), http://www.newsgazette.com/news/politics/2009/08/29/champaign_official_court_proper_arena_for_tent_city_fight (city would only permit tent city group of homeless persons if the church housed them in a semi-permanent structure); Damien Cave and Lynn Waddell, *supra* note 66 (County Commission rejected permanent "Tent City" hosted on land owned by the Catholic church in Tampa); *see also* City of Woodinville v. Northshore United Church of Christ, 211 P.3d 406, 408 (Wash. 2009) (city refused to consider temporary use permit application for church to host tent city for a three month period); City of Bothell v. Catholic Archbishop of Seattle, No. 04-2-11578 SEA (WA King County Super. Ct., June 10, 2004), http://www.mrsc.org/Subjects/Housing/tentcity/tentcity.aspx (denying a city's preliminary injunction seeking to enjoin a church from continuing to host a tent city); Nicole Tsong, *Clergy Dispute Mercer Island's Tent City Rules*, SEATTLE TIMES,(Apr, 2, 2010), http://seattletimes.nwsource.com/html/localnews/2011347755_mercertent15m.html. *But see* An Act Relating to the Housing of Homeless Persons of Property Owned or Controlled by a Church, ch. 36.01, sec. 2, § (1)–(2)(a), 2010 ESHB 1956 (Wash.) (enacting a law in Washington State that now permits religious organizations to host tent cities but also permits local governments to regulate so long as the regulation does not impose a substantial burden on the religious organization and are necessary to protect public health and safety).

[70] *See Mercer Island Residents*, *supra* note 59; *see also* Chandra Broadwater, *supra* note 59.

tries in the residential zones where most churches are located. These cases, however, only offer a history of confused application of the various free exercise tests, producing conflicting results.

1. Constitutional Analysis

A decade before *Smith*, the New Jersey Superior Court, in *St. John's Evangelical Lutheran Church v. City of Hoboken*, articulated one of the broadest approaches taken towards the Free Exercise right.[71] The case involved a city's challenge to a church-run homeless shelter in the basement of the church.[72] In upholding the church's right to sponsor the homeless shelter against local zoning ordinances, the New Jersey Superior Court explained the importance of churches hosting these programs; for centuries, sheltering the homeless was a religious activity that benefited communities.[73] The court concluded that churches should not be required to meet the same health and safety standards as commercial establishments such as hotels.[74] After *Smith*, however, courts began paying less attention to the religious freedom of churches to run beneficial homeless programs for the community and instead have become more deferential to city zoning practices.

Many courts have denied relief to churches that do not follow applicable code procedures, either by failing to apply for a permit or failing to fix building and fire code violations.[75] For example, in *First Assembly of God v. Collier County*, the city charged the church with violating several zoning ordinances and denied the church an accessory-use permit to run a homeless shelter.[76] The court found the zoning ordinances neutral and generally applicable; it noted that the

[71] *See* St. John's Evangelical Lutheran Church v. City of Hoboken, 479 A.2d 935 (N.J. Super. Ct. Law Div. 1983).

[72] *See id.* at 937.

[73] *See id.*

[74] *See id.* at 939.

[75] *See, e.g.*, First Assembly of God v. Collier Cnty., 20 F.3d 419 (11th Cir. 1994) (denying relief to a church that operated a homeless shelter in violation local zoning and building codes); Family Life Church v. City of Elgin, 561 F. Supp. 2d 978, 982 (N.D. Ill. 2008) (denying relief for a church that operated a homeless shelter in without a required permit and later denied a permit when it failed to correct building code violations); Westgate Tabernacle, Inc. v. Palm Beach Cnty., 14 So. 3d 1027, 1032–33 (Fla. Dist. Ct. App. 2009) (denying relief to a church who failed to acquire a permit to operate a homeless shelter), *reh'g denied*, No. 4d07-3792, 2009 Fla. App. LEXIS 12352 (Aug. 13, 2009).

[76] 20 F.3d 419, 420 (11th Cir. 1994).

city's interests in health and safety outweighed the burden on the church to relocate the shelter to a place zoned for such usage.[77]

Although courts are deferential to city zoning procedures and regulations, they have been less willing to uphold excessive restrictions on homeless shelters and meal programs under the Free Exercise Clause.[78] In *First Vagabonds Church of God v. City of Orlando*, a religious congregation of homeless people that conducted group meals and religious services weekly in a city park challenged an ordinance requiring a permit for these gatherings and limiting those permits to two per year.[79] The court agreed with the church's assertion that the city violated its congregation's free exercise rights and freedom of assembly rights.[80] Using the *Smith* test, the court first determined that the statute was neutral and generally applicable, as it applied to all permit seekers alike.[81] Then the court applied rational basis review but found that even under this deferential standard, the city had no legitimate interest in implementing an ordinance that so greatly restricted the religious practice.[82]

Echoes of *St. John's*, however, still resonate in some cases. In *Western Presbyterian Church v. Board of Zoning Adjustment*, the Western Presbyterian Church operated a meal program in its church for homeless persons.[83] When the church and its program moved to another location, the city refused to let it continue its service and denied the church a zoning variance.[84] The court awarded a preliminary injunction to the church, preventing the city from shutting down the homeless shelter because the court found no justifiable interest in restricting homeless services to certain areas of the city under the *Smith* test and RFRA.[85] The court noted that "by requiring the

[77] *Id.* at 423–24. The court cites to a three-factor test to determine if zoning laws violate the Free Exercise Clause used prior to *Smith*: "First, the government regulation must regulate religious conduct, not belief. Second, the law must have a secular purpose and a secular effect. Third, once these two thresholds are crossed, the court engages in a balancing of competing governmental and religious interests." *Id.* at 424 (citing Grosz v. Miami Beach, 721 F.2d 729, 733 (11th Cir. 1983)).

[78] *See, e.g.*, First Vagabonds Church of God v. City of Orlando, 578 F. Supp. 2d 1353 (M.D. Fla. 2008); Stuart Circle Parish v. Bd. of Zoning Appeals, 946 F. Supp. 1225, 1239–40 (E.D. Va. 1996).

[79] *See First Vagabonds Church of God*, 578 F. Supp. 2d at 1357–58.

[80] *See id.* at 1361–62. Another party to the case raised a free speech claim, which the court found was violated. *Id.* at 1361.

[81] *See id.* at 1361–62.

[82] *See id.* at 1362.

[83] *See* 849 F. Supp. 77, 78 (D.D.C. 1994).

[84] *See id.*

[85] *See id.* at 78–79.

Church peremptorily to discontinue an important social welfare and religious program that has been in existence for over 10 years constitutes irreparable injury."[86]

Another court was similarly deferential to a church in *Fifth Avenue Presbyterian Church v. City of New York*.[87] The church permitted homeless people to sleep on the steps of the church's entrance.[88] Two years later, the city told the church that it would not permit the homeless to sleep there, and police came and removed persons sleeping on the steps during the night.[89] The court found that RLUIPA did not apply because the church was conducting a religious exercise that constituted a proper accessory use of its property; the city did not prohibit persons from sleeping on church property but used public nuisance laws to force them off the property.[90] Using the *Smith* test, the court rejected the city's argument that the substantial burden on the church's religious exercise could be eliminated through the use of an indoor shelter; instead, the court suggested that the judiciary should not become involved in an inquiry about whether a substantial burden could be eliminated through other means while still respecting religious exercise.[91] After finding the city did not fairly enforce its neutral and generally applicable laws, the court applied strict scrutiny.[92] The court found that the city's actions were not narrowly tailored because the police enforced the local laws under-inclusively and over-inclusively—arresting all persons on the property in that specific area of the city if just one person violated the law.[93]

2. Analysis under RFRA

Arguably, RFRA provided the most expansive support for religious institutions by reinstating heightened scrutiny for any substantial burden on a religious exercise.[94] Yet even this favorable approach

[86] *Id.* at 79.

[87] *See* No. 01 Civ. 11493, 2004 U.S. Dist. LEXIS 22185 (S.D.N.Y. Oct. 29, 2004), *aff'd* 177 F. App'x 198 (2d Cir. 2006).

[88] *Id.* at *2.

[89] *Id.* at *3.

[90] *Id.* at *13–15.

[91] *See id.* at *8–10. "Adopting defendant's approach would subject plaintiffs to a far higher standard than is required by the Second Circuit's directive that demonstrating a substantial burden is not a particularly onerous task. A limited judicial inquiry is necessary because it respects the danger of under judicial involvement in religious activity." *Id.* at *9–10 (internal quotations and citations omitted).

[92] *See id.* at *12–14, *39.

[93] *See Fifth Ave. Presbyterian*, 2004 U.S. Dist. LEXIS 22185 at *12–14, *39.

[94] *See* Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1(a)–(b) (2006).

to churches produces mixed results. In *Daytona Rescue Mission, Inc. v. City of Daytona*, a religious non-profit organization, Daytona Rescue Mission, Inc., brought suit against the city of Daytona under RFRA and the Florida version of RFRA after the city refused to allow a homeless shelter on the church's newly acquired property.[95] Unlike the court in *Western Presbyterian*, the district court found no substantial burden because the church failed to show that the zoning code prohibited it from hosting a shelter or other homeless program anywhere within the city's limits.[96] The court found that the city, in drafting its zoning ordinances, had a compelling interest in regulating homeless shelters and food banks, and the zoning regulations in the city code constituted the least restrictive means.[97] The church, therefore, had to buy other land in a zone that allowed such uses in order to construct a homeless shelter.[98]

As applied to more restrictive zoning regulations, however, the statute works to favor religious institutions. Stuart Circle Parish challenged a local zoning ordinance that limited meal and housing programs for the homeless to only seven days within a seven-month period and to no more than thirty persons.[99] The church served meals every Sunday as part of its worship service.[100] Under RFRA, the court found that making the church spread out its meal ministry throughout its six churches to fit within the zoning statute would be too much of a burden.[101] The city failed to show that it had a compelling state interest that would justify the restrictions placed on the church; neighborhood complaints were not enough.[102] Still, this higher standard of scrutiny under RFRA may not be necessary for these cases because the more restrictive local ordinances on land use will likely be unable to pass rational basis review as articulated in *First Vagabonds Church* above.[103]

[95] *See* 885 F. Supp. 1554, 1555–56 (M.D. Fla. 1995).

[96] *Id.* at 1560.

[97] *Id.*

[98] *See id.*

[99] *See* Stuart Circle Parish v. Bd. of Zoning Appeals, 946 F. Supp. 1225, 1228 (E.D. Va. 1996).

[100] *Id.*

[101] *See id.* at 1238–39.

[102] *See id.* at 1239.

[103] *See* First Vagabonds Church of God v. City of Orlando, 578 F. Supp. 2d 1353, 1361–62 (M.D. Fla. 2008).

3. Analysis under RLUIPA

After the Court invalidated RFRA as it applies to the states, Congress enacted a similar statute but restricted its application to religious land use and the Free Exercise rights of institutionalized persons.[104] By mandating a strict scrutiny standard for substantial burdens on religious land use, RLUIPA was, in part, intended to protect religious land use against zoning ordinances that unduly restrict religious exercise.[105] For churches challenging local zoning ordinances, so that congregations may organize a homeless shelter, this is a difficult standard to meet because of the deference given to local zoning boards and the notion that running a homeless shelter is not a necessary religious practice.

In May 2009, the Florida Court of Appeals denied a church's free exercise claim under RLUIPA where the church refused to apply for a permit for its homeless shelter and incurred fines for continuing operations.[106] Narrowing the application of the Free Exercise Clause, the court found that the church failed to show a substantial burden "because it did not show that running a homeless shelter at its specific location was fundamental to its religious exercise"[107]—a requirement not listed in the statute.[108] In addition, the court noted that a church must also exhaust all administrative remedies before bringing a claim.[109]

Similarly, Family Life Church was denied relief for operating a homeless shelter in violation of zoning laws.[110] The church also needed a conditional use permit to continue providing services.[111] When the church filed for the permit, inspectors found 105 violations

[104] *See* 42 U.S.C. § 2000cc (2006).

[105] *See* 146 CONG. REC. S 7774 (daily ed. July 27, 2000) (joint statement of Sen. Hatch and Sen. Kennedy) (stating a need for the legislation because "[c]hurches in general, and new, small, or unfamiliar churches in particular, are frequently discriminated against on the face of zoning codes and also in the highly individualized and discretionary processes of land use regulation").

[106] *See* Westgate Tabernacle, Inc. v. Palm Beach Cnty., 14 So. 3d 1027, 1029–30 (Fla. Dist. Ct. App. 2009), *reh'g denied*, No. 4d07-3792, 2009 Fla. App. LEXIS 12352 (Aug. 13, 2009). The church also brought a claim under the Florida Religious Freedom Restoration Act, but the court stated the same analysis is used under RLUIPA. *Id.* at 1030.

[107] *Id.* at 1032.

[108] *See* § 2000cc-5(7)(A) ("The term 'religious exercise' includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.").

[109] *See Westgate Tabernacle*, 14 So. 3d at 1032.

[110] *See* Family Life Church v. City of Elgin, 561 F. Supp. 2d 978, 981 (N.D. Ill. 2008).

[111] *See id.*

of the city codes.[112] After an eight-month application process, the city denied the church's application.[113] The court found no substantial burden on religious exercise; a delay in the permit process and other regulations for the operation of a shelter were only incidental burdens.[114]

D. Conflicting Precedent

Within these cases, courts have ruled consistently where certain fact patterns are involved. If a church fails to utilize the zoning process to address its grievance, as in *First Assembly of God*, *Westgate Tabernacle*, and *Family Life Church*, courts will refuse relief.[115] If the zoning regulations on land use are unnecessarily excessive, however, courts are comfortable using Free Exercise to invalidate the statutes as they apply to the church.[116] Problems arise when a court must decide how to evaluate a substantial burden on religious exercise under the religious-land-use tests. RLUIPA does not define substantial burden, but Congress articulated that it intended the definition to be interpreted in light of Supreme Court precedent.[117]

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[112] *See id.* at 983.

[113] *See id.* at 987.

[114] *See id.* at 987–88. The court stated, "[m]uch of the burden on Family Life was self-imposed by its premature opening of the shelter before seeking a permit." *Id.* at 988.

[115] *See, e.g.*, First Assembly of God v. Collier Cnty., 20 F.3d 419, 424 (11th Cir. 1994); Westgate Tabernacle, Inc. v. Palm Beach Cnty., 14 So. 3d 1027, 1031–32 (Fla. Dist. Ct. App. 2009), *reh'g denied*, No. 4d07-3792, 2009 Fla. App. LEXIS 12352 (Aug. 13, 2009); *Family Life Church*, 561 F. Supp. 2d at 988.

[116] *See, e.g.*, First Vagabonds Church of God v. City of Orlando, 578 F. Supp. 2d 1353, 1357–58 (M.D. Fla. 2008); Stuart Circle Parish v. Bd. of Zoning Appeals, 946 F. Supp. 1225 (E.D. Va. 1996).

[117] *See* 146 CONG. REC. S7774, 7776 (daily ed. July 27, 2000) (joint statement of Sen. Hatch, Sen. Kennedy, and Sen. Reid) ("The Act does not include a definition of the term 'substantial burden' because it is not the intent of this Act to create a new standard for the definition of 'substantial burden' on religious exercise. Instead, that term as used in the Act should be interpreted by reference to Supreme Court jurisprudence. . . . The term 'substantial burden' as used in this Act is not intended to be given any broader interpretation than the Supreme Court's articulation of the concept of substantial burden or religious exercise."); *see also* Westchester Day Sch. v. Vill. of Mamaroneck, 504 F.3d 338, 348 (2d Cir. 2007) ("Since substantial burden is a term of art in the Supreme Court's free exercise jurisprudence, we assume that Congress, by using it, planned to incorporate the cluster of ideas associated with the Court's use of it."); Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1226 (11th Cir. 2004) ("The Supreme Court's definition of 'substantial burden' within its free exercise cases is instructive in determining what Congress understood 'substantial burden' to mean in RLUIPA.").

The Supreme Court, however, has offered little help in this area. Years before the enactment of RFRA and RLUIPA, the Court defined substantial burden as "[w]here the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs."[118]

Read broadly—as RLUIPA intends the definition of substantial burden[119]—this definition protects free exercise by requiring only a showing of pressure to modify, but not an actual violation of, one's beliefs to establish a substantial burden. In interpreting RLUIPA and the Free Exercise Clause under *Smith*, the circuit courts have drawn from this earlier definition but have failed to come to a consensus on a proper definition in the religious-land-use cases.

The First, Third, Fourth, and Seventh Circuits have taken part of the Supreme Court's definition, holding that a substantial burden exists "when the government put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs."[120] The Seventh Circuit, which the Northern District of Illinois was bound to follow in *Family Life Church*, also added that the government action "necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise . . . effectively impracticable."[121]

The Fifth Circuit follows a similar but more stringent definition—that the person must "significantly modify" his behavior and violate his beliefs.[122] The Ninth and Eleventh Circuits take different

[118] Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707, 718 (1981).

[119] *See* Washington v. Klem, 497 F.3d 272, 280 (3d Cir. 2007) (With RLUIPA, "Congress intended to create a broad definition of substantial burden.").

[120] Vision Church v. Vill. of Long Grove, 468 F.3d 975, 997 (7th Cir. 2006) (internal quotations omitted) (citing Hobbie v. Unemployment Appeals Comm'n of Florida, 480 U.S. 136, 141 (1987)); *see Thomas*, 450 U.S. at 718 (A substantial burden exists when the government is "putting substantial pressure on an adherent to modify his behavior and to violate his beliefs."); *see also* Washington v. Klem, 497 F.3d 272, 280 (3d Cir. 2007) (The Third Circuit also accepts a showing that "a follower is forced to choose between following the precepts of his religion and forfeiting benefits otherwise generally available to other[s] . . . versus abandoning one of the precepts of his religion in order to receive a benefit."); Spratt v. R.I. Dep't of Corr., 482 F.3d 33, 38 (1st Cir. 2007); Lovelace v. Lee, 472 F.3d 174, 187 (4th Cir. 2006).

[121] *Vision Church*, 468 F.3d at 997 (citing Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752, 761 (7th Cir. 2003)); Family Life Church v. City of Elgin, 561 F. Supp. 2d 978, 987 (N.D. Ill. 2008). The Seventh Circuit cites to both the Supreme Court definition in *Hobbie v. Unemployment Appeals Comm'n of Florida*, 480 U.S. 136, 141 (1987) and the definition in *Civil Liberties for Urban Believers*, 342 F.3d at 761.

[122] Adkins v. Kaspar, 393 F.3d 559, 570 (5th Cir. 2004) (holding that substantial burden "truly pressures the adherent to significantly modify his religious behavior

approaches under RLUIPA, defining substantial burden as a "significant" restriction or pressure.[123] This pressure must be "great"[124] or "tend[] to force adherents to forego religious precepts."[125]

The Second Circuit has reasoned that because the Supreme Court held that "generally applicable burdens, neutrally applied are not 'substantial,'"[126] the court will look at additional factors to determine whether a substantial burden exists, including whether the church had "quick, reliable, and financially feasible alternatives" and whether the zoning decision was conditional or absolute.[127] Following Second Circuit precedent, the court in *Fifth Avenue Presbyterian* added that finding a substantial burden is "not a particularly onerous task."[128]

These inconsistent definitions of substantial burden have created a spectrum of government actions that constitute a substantial burden. For example, the Second Circuit found a substantial burden where a village denied the zoning application of a Jewish day school that wished to expand on its own land to meet its growing needs because no quick and financially feasible alternatives for the school existed, and the denial was absolute.[129] The Seventh Circuit, however, found no substantial burden when a village put restrictions on the size of a church and the religious activities that a church could

and significantly violates his religious beliefs"). The Fifth Circuit clarified that "significant" means "it either (1) influences the adherent to act in a way that violates his religious beliefs, or (2) forces the adherent to choose between, on the one hand, enjoying some generally available, non-trivial benefit, and, on the other hand, following his religious beliefs." *Id.*

[123] *See* San Jose Christian Coll. v. City of Morgan Hill, 360 F.3d 1024, 1034 (9th Cir. 2004) (defining substantial burden as "a significantly great restriction or onus upon such exercise"); Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1227 (11th Cir. 2004) (defining substantial burden under RLUIPA as "significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly").

[124] *San Jose Christian Coll.*, 360 F.3d at 1034 (defining substantial burden as "a significantly great restriction or onus upon such exercise").

[125] *Midrash Sephardi*, 366 F.3d at 1227.

[126] Westchester Day Sch. v. Vill. of Mamaroneck, 504 F.3d 338, 350 (2d Cir. 2007) (citing Jimmy Swaggart Ministries v. Bd. of Equalization, 493 U.S. 378, 389–91 (1990)).

[127] *Id.* at 352.

[128] Fifth Ave. Presbyterian Church v. City of New York, No. 01–11493, 2004 U.S. Dist. LEXIS 22185, at *9 (S.D.N.Y. Oct. 28, 2004) (citing McEachin v. McGuinnis, 357 F.3d 197, 202 (2d Cir. 2004)).

[129] *See Westchester Day Sch.*, 504 F.3d at 352–53.

hold because the restrictions were "merely incidental" and did not render the practice effectively impracticable.[130]

The different ways of approaching what constitutes a substantial burden have contributed to the contradictory results of the shelter cases, including the conflicting results in *Western Presbyterian* and *Daytona Rescue Mission*.[131] The court in *Western Presbyterian* concluded that the church met the substantial burden requirement by showing that serving the homeless is an integral part of its faith;[132] however, the court in *Daytona Rescue Mission* explicitly rejected the same argument and proposed a more stringent standard for substantial burden.[133] As long as the church could serve the homeless anywhere in the city limits, the absolute denial to do so in a specific location was not a substantial burden.[134]

The danger in the various substantial burden tests concerns how many exceptions to neutral and generally applicable laws courts should afford religious institutions. By granting many exemptions, courts run the risk of a slippery slope that opens the door too wide for religious freedom—to the point that the court may begin to allow certain activities that would be impermissible if not for the cloak of religion shielding churches from the government's police power.[135] Church-hosted tent cities walk the fine line between these tests. In many cases, the practice of hosting a tent city is not an indispensable practice to the church, but it is part of a mission of the church to serve others and help the community.[136] An outright denial to host tent cities is too burdensome, but these tests offer different conclu-

[130] Vision Church v. Vill. of Long Grove, 468 F.3d 975, 998–99 (7th Cir. 2006).

[131] *Compare* Daytona Rescue Mission, Inc. v. City of Daytona, 885 F. Supp. 1554, 1555–56 (M.D. Fla. 1995) (finding no substantial burden when city denied permit for church to build a homeless shelter on newly acquired property), *with* Western Presbyterian Church v. Bd. of Zoning Adjustment, 849 F. Supp. 77, 79 (D.D.C. 1994) (finding a substantial burden when city denied permit for church to host homeless feeding program at new church location).

[132] *See Western Presbyterian*, 849 F. Supp. at 79.

[133] *See Daytona Rescue Mission*, 885 F. Supp. at 1560.

[134] *See id.*

[135] *See* Lupu, *supra* note 38, at 593 ("Better no exemptions, they might well say, than a pattern of exemptions riddled by religious favoritism."); Frederick Mark Gedicks, *An Unfirm Foundation: The Regrettable Indefensibility of Religious Exemptions*, 20 U. ARK. LITTLE ROCK L.J. 555, 574 (1998) ("There no longer exists a plausible explanation of why religious believers- and only believers- are constitutionally entitled to be excused from complying with otherwise legitimate laws that burden practices motivated by moral belief.").

[136] *See* Levitz, *supra* note 66; *Tent City 4*, LAKE WASH. UNITED METHODIST CHURCH, http://www.lwumc.com/tentcityhtml (last visited Jan. 14, 2010).

sions as to the extent of the burden that a city can place on the practice of hosting tent cities.

IV. THE DIFFICULTY IN ASSESSING CLAIMS OF CHURCH-HOSTED TENT CITIES

The debate on the definition of substantial burden further affects religious institutions wishing to host tent cities on their property. While many municipal courts have arbitrated fights between churches hosting tent cities and local governments, only one precedential case has emerged recently. The case, argued in the Washington state court system, advances a broader definition of a substantial burden.[137]

A. Lessons from Washington

The facts are similar to those of the shelter cases. In 2004, the City of Woodinville, SHARE/WHEEL, and Northshore Church entered into a contract permitting a tent city to stay on church-owned property for a three-month period, provided it obtained a valid temporary-use permit.[138] As another host site withdrew for the May through July months, Northshore agreed to apply quickly for a temporary use permit to allow the camp to stay on its property.[139] A few months before the church applied, however, the city put a six-month moratorium for sustainable development studies on all land use permit applications in residential zones where the church was situated.[140] The city refused to process the application in light of the moratorium and additionally refused to allow the tent city to camp outside the areas covered by the moratorium.[141] Northshore Church allowed the tent city to use its property anyway, and the city brought suit.[142] The Washington Supreme Court held that the city's refusal to process the church's requested permit on the basis of the moratorium violated the Free Exercise Clause of the Washington State Constitution.[143]

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[137] *See* City of Woodinville v. Northshore United Church of Christ, 211 P.3d 406, 411 n.4 (Wash. 2009).

[138] *See id.* at 408.

[139] *See id.*

[140] *See id.*

[141] *See id.*

[142] *See id.*

[143] *See Northshore*, 211 P.3d at 411. The Washington State Constitution states:

> Absolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion; but the liberty of conscience hereby secured shall not be so con-

While noting that the state's protection of free exercise is broader than the protection granted in the federal Constitution, Justice Johnson wrote that the church only needs to show that the government action substantially burdens a sincerely held religious belief the church wishes to exercise.[144] Because the city conceded that hosting the tent city is part of the church's free exercise, the issue of whether providing for the homeless reflected a sincerely held religious belief was not discussed, though the court noted that the church had not engaged in this type of activity previously.[145] The case turned on whether the city's refusal to process the permit because of the moratorium substantially burdened the church's free exercise.[146] This assessment, according to Justice Johnson, requires the court to examine the context of the burden and to "look at any alternatives the regulation leaves open"[147]—a test similar to the Second Circuit's but without the "substantial pressure" language or a second inquiry to determine if the denial was conditional or absolute.[148] Accordingly, the court found that refusing to process a permit was a substantial burden.[149]

The *Northshore* case offered hope for churches—in Washington at least—to expand tent city programs in their communities. But does the Washington Supreme Court's deferential approach to religious institutions go too far? The substantial burden standard articulated by the court considered the effect of the tent city on neighbors; however, it found that this was better settled by reasonable city regulations.[150] Additionally, the city did not deny the permit outright but merely delayed the process. The court, however, found this excuse unavailing.[151] Perhaps the city would have had a stronger case had it fought the religious exercise issue because the church had never

> strued as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state.

WASH. CONST. art. I § 11.

[144] *See Northshore*, 211 P.3d at 409–11.

[145] *See id.* at 410.

[146] *See id.*

[147] *Id.* at 411 n.4. "For example . . . the Church conceded it would be possible to house Tent City inside the Church. Worship traditionally takes place inside a church and this alternative would obviate many of the neighbor/city legitimate concerns. We make no decision on such a regulation because the City did not allow such alternative." *Id.*

[148] Westchester Day Sch. v. Vill of Mamaroneck, 504 F.3d 338, 352 (2d Cir. 2007) (requiring courts to look at financially feasible alternatives and whether the denial of a permit was conditional or absolute).

[149] *See Northshore*, 211 P.3d at 411.

[150] *See id.*

[151] *See id.*

hosted a camp in the past, and thus this activity was not a central religious exercise of the church.

But this case may also represent undue judicial activism in a struggling economy, a similar theme found both in *St. John's* and *Western Presbyterian*.[152] Professor William P. Marshall argues that judges often do not give substantial weight to the state's interest in a given situation because it is unlikely that one exemption will threaten that interest.[153] Even so, the tent city in *Northshore* complicates judicial assessment under the Free Exercise Clause or religious-land-use statute because other interests are involved, including public nuisance and safety concerns due to the size of the camp.[154] The church is not just asking for an exemption to practice a specific religious ritual, like the use of peyote; it is asking to do something that affects the entire community.

B. How Church-Hosted Tent Cities Expose Flaws in Free Exercise

In *Northshore* the church met a complete ban on permit applications.[155] If a city ordinance is more narrowly tailored than that in *Northshore* and bans outdoor camps in residential zones or refuses an application for a temporary homeless camp out of concern for the surrounding community, how should a court react?[156] Tent cities are

[152] *See* St. John's Evangelical Lutheran Church v. City of Hoboken, 479 A.2d 935 (N.J. Super. Ct. Law Div. 1983); Western Presbyterian Church v. Bd. of Zoning Adjustment, 849 F. Supp. 77 (D.D.C. 1994).

[153] *See* William P. Marshall, Correspondence on Free Exercise Revisionism, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308, 312 (1991).

[154] *See Northshore*, 211 P.3d at 411.

[155] In fact, a year after *Northshore* was decided, the state of Washington passed a law, which prohibits local governments from "impos[ing] conditions other than those necessary to protect public health and safety and that do not substantially burden the decisions or actions of a religious organizations." An Act Relating to the Housing of Homeless Persons of Property Owned or Controlled by a Church, ch. 36.01, sec. 2, § (2)(a), 2010 ESHB 1956 (Wash.). This law, however, fails to solve the definitional problem of the "substantial burden" language.

[156] One editorial explains the conflict between neighbors and churches when a church sought permission to use their land for a tent city:

> Organizers of Hillsborough Cares tried to make their plan work with generous buffer zones, a single entrance, a tall fence and setbacks even wider than required for building a jail. They promised strict screening of residents. They talked about police presence and brought off-duty officers from Pinellas Hope who said reassuring things. They set a maximum stay of 90 consecutive days. In short, they offered up everything but a drawbridge and a moat.
>
> None of it was enough [for the city commission].

unique. They offer a solution to problems of homelessness in communities and overcrowded shelters, yet they can be a real—although often temporary—nuisance due to both their size and the fact that they are located outdoors. These situations walk the fine line of religious freedom, but because of the unusual nature of tent cities, RLUIPA and the *Smith* test provide no clear answers on which side of the line these cases should fall.

1. Substantial Burden on a Religious Exercise

Both RLUIPA and the *Smith* test require that the religious institution demonstrate a substantial burden on a religious exercise in order to survive a claim. RLUIPA offers an expansive definition of "religious exercise" but fails to define "substantial burden" in the statute, leaving it up to the courts to decide.[157] Thus, courts have been forced to rely on the varying circuit courts' definitions when applying either the *Smith* test or RLUIPA.[158] But the facts surrounding tent cities present a more difficult issue.

Churches do not run, organize, or control tent cities; rather, tent cities are a separate secular organization of homeless people.[159] Churches and other religious institutions cooperate with tent cities by providing the property, monetary donations to maintain the camp, and often meals on a daily basis.[160] The religious exercise in these situations is unclear; should it be considered a meal ministry, or can

Sue Carlton, *Tent City Plans Die but Hope Shouldn't*, ST. PETERSBURG TIMES, Oct. 14, 2009, at B1, *available at* http://www.tampabay.com/news/humaninterest/tent-city-plans-die-but-hope-shouldnt/1043722.

[157] "The term 'religious exercise' includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A) (2006).

[158] *See, e.g.*, Vision Church v. Vill. of Long Grove, 468 F.3d 975, 997 (7th Cir. 2006) (defining substantial burden as "when the government put[s] 'substantial pressure on an adherent to modify his behavior and to violate his beliefs'" (quoting Hobbie v. Unemployment Appeals Comm'n of Florida, 480 U.S. 136, 141 (1987))); Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1227 (11th Cir. 2004) (defining substantial burden under RLUIPA as "significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly"); San Jose Christian Coll. v. City of Morgan Hill, 360 F.3d 1024, 1034 (9th Cir. 2004) (defining substantial burden as "a significantly great restriction or onus upon such exercise"). *But see* Westchester Day Sch. v. Vill. of Mamaroneck, 504 F.3d 338, 352 (2d Cir. 2007) (looking at additional factors to determine a substantial burden including whether the church had "quick, reliable, and financially feasible alternatives" and whether the zoning decision was conditional).

[159] *See* Levitz, *supra* note 66; SHARE/WHEEL, *supra* note 55.

[160] *See* Levitz, *supra* note 66; Tsong, *supra* note 68; Debera Carlton Harrell, *Ballard Hosts Tent City*, SEATTLE P-I (Feb. 29, 2008), http://www.seattlepi.com/local/353338_ballard01.html; *see also* Mann, *supra* note 59.

camp-hosting be characterized as a religious exercise? If courts are unable to determine the religious exercise in question, they will be unable to determine whether the government's actions substantially burden that exercise.

Although tent cities have been present throughout history, church-hosted tent cities are a relatively new phenomenon.[161] Most churches have never hosted tent cities, or even housed or fed the homeless on their property.[162] In *St. John's*, *Western Presbyterian*, and *Stuart Circle Parish*, the courts took the history of hosting homeless programs at the church into account.[163] And the Washington Supreme Court in *Northshore* commented that the church had never before engaged in any homeless services, let alone hosting a tent city.[164] Churches starting new ministries, such as those wanting to host homeless shelters, may have difficulty showing the city's denial of a permit is a substantial burden.

Additionally, many of these churches host these camps temporarily.[165] While this weakens the government's nuisance claim, courts may not view this temporary activity, one that could be done year-round and more substantially, as an important religious practice or as a valid religious exercise under the *Smith* test. The RLUIPA statute offers a broader definition of religious exercise—exercise that does not have to be central to or compelled by the religious belief.[166] Courts in general are deferential to churches when making a finding as to whether the religious belief is valid,[167] and in some cases, like

[161] *See* Evelyn Nieves, *supra* note 56.

[162] *See generally* City of Woodinville v. Northshore United Church of Christ, 211 P.3d 406, 410 (Wash. 2009) ("There is no issue raised here of whether hosting Tent City is important or central to the Church's exercise (though the Church has never before engaged in such practice around or in its church)."); Jennifer Levitz, *supra* note 63; Tsong, *supra* note 68; Debera Carlton Harrell, *supra* note 160.

[163] *See* Stuart Circle Parish v. Bd. of Zoning Appeals, 946 F. Supp. 1225, 1239 (E.D. Va. 1996); Western Presbyterian Church v. Bd. of Zoning Adjustment, 849 F. Supp. 77, 79 (D.D.C. 1994); St. John's Evangelical Lutheran Church v. City of Hoboken, 479 A.2d 935, 939 (N.J. Super. Ct. Law Div. 1983).

[164] *Northshore*, 211 P.3d at 410 (noting that "the Church has never before engaged in such [a] practice.").

[165] *See generally id.*; Levitz, *supra* note 66; Tsong, *supra* note 68; Harrell, *supra* note 160.

[166] *See* 42 U.S.C. § 2000cc–5 (7)(A) (2006) ("The term 'religious exercise' includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.").

[167] *See* Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 887 (1990); Hernandez v. Comm'r, 490 U.S. 680, 699 (1989) ("It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of

Northshore, the local government does not challenge the validity of the religious exercise.[168] Nevertheless, the centrality or importance of the religious exercise to the religion is still a factor courts consider when evaluating cases under RLUIPA.[169]

For example, in *Westgate Tabernacle*, the court found the church failed to satisfy the substantial burden standard because it was unable to "show that running a homeless shelter at its specific location was fundamental to its religious exercise."[170] The court reasoned that the church could have found other suitable property in an appropriately zoned area for its shelter.[171] In this instance, the broad standard offered by RLUIPA becomes almost meaningless. Churches wishing to host tent cities will still bear as difficult of a burden of showing that the activity is central to their religious exercise as they would have under the *Smith* test because many have not hosted homeless camps on their property before.

The tests of the circuit courts offer little hope for tent cities. The Seventh Circuit offers a definition requiring judges to determine the most minimal activities or facilities the church needs to practice.[172] By denying permits to churches to host tent cities outside, the Seventh Circuit test would not render the religious exercise of serving the poor "effectively impractical" if churches could choose to let the homeless sleep inside their churches. And the Second Circuit's broader definition ignores the context of the individual situation.[173]

particular litigants' interpretations of those creeds."); Shakur v. Schriro, 514 F.3d 878, 884 (9th Cir. 2008); McEachin v. McGuinnis, 357 F.3d 197, 201 (2d Cir. 2004).

[168] *See Northshore*, 211 P.3d at 410 ("The City conceded in its briefing in this case the Church's sincerity of belief."); Westgate Tabernacle, Inc. v. Palm Beach Cnty., 14 So. 3d 1027, 1031 (Fla. Dist. Ct. App. 2009) ("The County does not dispute that the plaintiffs house the homeless based on deeply cherished religious beliefs."), *reh'g denied*, No. 4d07-3792, 2009 Fla. App. LEXIS 12352 (Aug. 13, 2009).

[169] *See, e.g.*, Stuart Circle Parish v. Bd. of Zoning Appeals, 946 F. Supp. 1225, 1239 (E.D. Va. 1996) ("However, the plaintiffs showed that it was central to their faith to invite the homeless into the church in order to establish a climate of worship."); *Westgate Tabernacle*, 14 So. 3d at 1032 ("Even assuming the [city] prohibited homeless shelters outright on RH-zoned property, Westgate would still fail to prove a substantial burden, because it did not show that running a homeless shelter at its specific location was fundamental to its religious exercise.").

[170] *Westgate Tabernacle*, 14 So. 3d at 1032.

[171] *See id.*

[172] *See* Vision Church v. Vill. of Long Grove, 468 F.3d 975, 997 (7th Cir. 2006) (citing Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752, 761 (7th Cir. 2003)); Family Life Church v. City of Elgin, 561 F. Supp. 2d 978, 987 (N.D. Ill. 2008).

[173] *See* Westchester Day Sch. v. Vill. of Mamaroneck, 504 F.3d 338, 350 (2d Cir. 2007) (citing Jimmy Swaggart Ministries v. Bd. of Equalization, 493 U.S. 378, 389–91 (1990)).

Housing the tent-city residents indoors could also be a financially feasible alternative that is accepted by the Second Circuit.[174]

Homeless people who do not desire to be in shelters —or in-door-church housing, which resembles shelter living—organized tent cities as an alternative.[175] Many of these persons are service resistant, and the freedom of the outdoor camp is what attracted them to tent cities in the first place.[176] If courts force churches to host camps indoors, tent cities might look for suitable camp property elsewhere, inhibiting churches from hosting programs at all. It seems unlikely that the Constitution would doom this practice from the beginning.

2. RLUIPA and *Smith* Test Provide Same Protection

RLUIPA may prove unhelpful in other ways as well. It is possible, however, that zoning decisions could receive the strict scrutiny standard under one interpretation of *Smith*, negating the need for RLUIPA in religious-land-use cases, because many zoning decisions are "individual assessments."[177] In fact, some courts have held that zoning board decisions do receive strict scrutiny under *Smith*.[178] In the case of tent cities, unless the city has a flat prohibition on tent ci-

[174] *See id.* at 352.

[175] *See* Rocky Neptun, *Renters Union Calls for Tent City in San Diego,* S.F. BAY AREA INDEP. MEDIA CTR. (Dec. 30, 2009, 10:32 PM), http://www.indybay.org/newsitems/2009/12/30/18633908.php (A homeless man, responding to reporter's question regarding his dislike of shelter: "'Shelters are fine institutions, but not everyone belongs in an institution,' he chortles. 'I tried going a few times but it is such a demeaning process; some staff treat you as public vermin, criminals and sickos, while, others order you about like little children or mental retards.'"); Shannon Moriarity, *The Dismantling of Nickelsville*, END HOMELESSNESS (Oct. 2, 2009, 8:12 PM), http://homelessness.change.org/blog/view/the_dismantling_of_nickelsville ("To those who called [the tent city] 'home' for the past year, it was more than a place to sleep. It was a community where people typically shunned by society were accepted. It was a place where 'power in numbers' meant safety, assistance, and having a voice."). *See generally* SHARE/WHEEL, *supra* note 55.

[176] *See id.*

[177] Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 884 (1990) (citing Bowen v. Roy, 476 U.S. 693, 708 (1986)) ("[W]here the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason.").

[178] *See, e.g.*, Hale O Kaula Church v. Maui Planning Comm'n, 229 F. Supp. 2d 1056, 1072–73 (D. Haw. 2002) (finding that regardless of RLUIPA the court could review the city's denial of a special zoning permit based on system of individualized exemptions under strict scrutiny); Keeler v. Mayor of Cumberland, 940 F. Supp. 879, 886 (D. Md. 1996) (finding the compelling interest test under *Smith* applied to a historic preservation ordinance that created a system of individualized exemptions); Alpine Christian Fellowship v. County Comm'rs, 870 F. Supp. 991, 993–94 (D. Colo. 1994) (reviewing the city's denial of a zoning permit to a church under strict scrutiny).

ties—which is unlikely to pass rational basis review—most churches must apply for a zoning variance or a conditional or temporary use permit.[179] During the permit process, the local zoning board makes an individual determination on whether to grant the church an exception to zoning regulations, much like the discretion the government has in deciding whether or not to give employment benefits that justified the *Sherbert* decision.[180] Therefore, under *Smith*, church-hosted tent city cases will be subject to strict scrutiny just as they are under RLUIPA.

Judges also may be reluctant to give exemptions to churches out of fear that one religion will be favored over another or out of skepticism regarding what constitutes an exercise of religious beliefs.[181] When the religious belief is not so clear, such as the case with tent cities, the reluctance of judges to grant relief under either RLUIPA or the Free Exercise Clause of the First Amendment may increase.

C. Clearing up the Tests: Possible Solutions

The protections of the Free Exercise Clause remain weak in comparison to other First Amendment rights.[182] Congress has responded by enacting statutes, RFRA and RLUIPA, in an effort to protect the Free Exercise right. While the first attempt failed both constitutionally and in practice, the second attempt has also proven flawed. The Court, however, is unlikely to overrule *Smith* or find a workable alternative to its test to overcome the criticism it has sparked and the confusion over the individualized exemptions and hybrid requirement.[183] Thus, Congress must revise RLUIPA to avoid the flaws that are exposed by the church-hosted homeless shelter cases. This can be achieved by creating a uniform test for "substantial burden" under the statute.

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[179] If a religious institution fails to exhaust administrative remedies by at least applying for a permit and abiding by local laws, then the court will likely rule in favor of the city. *See* Westgate Tabernacle, Inc. v. Palm Beach Cnty., 14 So. 3d 1027, 1032 (Fla. Dist. Ct. App. 2009) ("A church must exhaust its administrative remedies and cannot merely predict that it would be denied the permit if it were to apply." (citing Konikov v. Orange Cnty., 302 F. Supp. 2d 1328, 1342 (M.D. Fla. 2003)), *reh'g denied*, No. 4d07-3792, 2009 Fla. App. LEXIS 12352 (Aug. 13, 2009).

[180] *See* Sherbert v. Verner, 374 U.S. 398, 406 (1963).

[181] *See* Lupu, *supra* note 38, at 593.

[182] *See* City of Boerne v. Flores, 521 U.S. 507, 545 (1997) (O'Connor, J., dissenting) (arguing that *Smith* improperly restricted the Free Exercise Clause and reinterpretation is needed to "put our First Amendment jurisprudence back on course").

[183] *See supra* Part II.A–B.

The substantial burden definition of the Seventh, Ninth, and Eleventh Circuits as substantial or significant pressure to compel a believer to change his or her religious behavior and beliefs[184] is ambiguous and subjective. It requires judges to assess the importance of the religious practice to the individual's or church's religious beliefs, a result RLUIPA clearly intended to prevent with its expansive definition of religious exercise.[185] It also fails to take into account the context of each situation. This is especially important in tent city cases where a religious exercise of providing shelter for those who are in need may be accomplished in a way that creates less of a nuisance for the surrounding community. Often cities will conditionally deny a permit, refusing to grant the permit unless certain conditions are met.[186] Under the Seventh Circuit test, a conditional denial would not in many cases render the practice "effectively impracticable"—and it did not in *Family Life Church*.[187]

The Washington Supreme Court test for substantial burden offers a better solution. There, the court looked at the alternatives available to churches and individuals to practice their faith under the challenged government regulation.[188] While this invites subjective determinations by judges, it correctly takes into account the context of each set of facts. Thus, a church wishing to host a tent city must clearly define the religious practice that it is seeking to promote, whether it is a general ministry to help others or a more specific be-

[184] *See* Vision Church v. Vill. of Long Grove, 468 F.3d 975, 997 (7th Cir. 2006) (defining substantial burden as "when the government put[s] 'substantial pressure on an adherent to modify his behavior and to violate his beliefs'" (quoting Hobbie v. Unemployment Appeals Comm'n of Florida, 480 U.S. 136, 141 (1987))); Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1227 (11th Cir. 2004) (defining substantial burden under RLUIPA as "significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly"); San Jose Christian Coll. v. City of Morgan Hill, 360 F.3d 1024, 1034 (9th Cir. 2004).

[185] *See* 42 U.S.C. § 2000cc-5(7)(A) ("The term 'religious exercise' includes any exercise of religion, *whether or not compelled by*, or central to, a system of religious belief." (emphasis added)).

[186] *See, e.g.*, Westchester Day Sch. v. Vill. of Mamaroneck, 504 F.3d 338 (2d Cir. 2007) (issuing a "negative declaration" that denied a religious institution a permit to expand their facilities contingent on a environmental impact finding); Tustin Heights Assoc. v. Bd. of Supervisors, 170 Cal. App. 2d 619 (Cal. Ct. App. 1959) (denying a permit to build a church because of space concerns but granting a permit once amendments were made to plan); Bethel Evangelical Lutheran Church v. Morton, 559 N.E.2d 533 (Ill. App. Ct. 1990) (granting a permit to a religious school on the condition that the expansion included an enrollment cap).

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

[188] *See Westchester Day Sch.*, 504 F.3d at 352; City of Woodinville v. Northshore United Church of Christ, 211 P.3d. 406, 411, n.4 (Wash. 2009).

lief in ensuring that everyone has appropriate shelter, and it must further show that no other alternative would be available. In some instances, complying with applicable zoning regulations may leave open options for a church to host the camp with certain reasonable restrictions.[189] By looking at the available options for the church or individual, courts can strike a compromise between the city and the church to balance the interests at stake and prevent churches from taking advantage of the expansive definition of religious exercise in RLUIPA.

In addition, policy concerns may play a bigger role in church-hosted tent cities, which a clearer definition of substantial burden would overcome. Tent cities provide a solution to a community problem, and churches have the ability and resources to support the camps, alleviating the burden on local governments to deal with the problem of homelessness. These camps, however, will impact the community and those living near the churches.[190] Context is important for courts.[191] If there are other possible locations for the church to host a shelter, regardless of expense, courts may adjust their substantial burden determination.[192] By creating a rule that forces courts to look at context, courts have the ability to examine factors that contribute to a city's decision to deny a permit, including public nuisance concerns.

Therefore, Congress should articulate a uniform test for substantial burden under RLUIPA that incorporates the *Northshore* test and a

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[189] *See, e.g.*, *Northshore*, 211 P.3d. at 411, n.4 ("[T]he Church conceded it would be possible to house Tent City inside the Church. Worship traditionally takes place inside a church and this alternative would obviate many of the neighbor/city legitimate concerns.").

[190] *Id.* at 411.

> Housing the homeless affects those outside the church in a ways that private prayer or religious services inside the church buildings do not. Indeed, a homeless encampment likely affects the neighbors who live nearby far more than it impacts most parishioners who spend only hours in church weekly while neighbors must live continuously with the encampment.

Id.

[191] *See, e.g.*, *id.*

[192] *See* Braunfeld v. Brown, 366 U.S. 599, 605 (1961) (Generally applicable laws that do not come with criminal prosecution but only "make the practice of their religious beliefs more expensive" do not impose a substantial burden.); Daytona Rescue Mission v. City of Daytona Beach, 885 F. Supp. 1554, 1559 (M.D. Fla. 1995) (denying relief in part because other facilities existed within city limits where the shelter could be located); Westgate Tabernacle, Inc. v. Palm Beach Cnty., 14 So. 3d 1027, 1032–33 (Fla. Dist. Ct. App. 2009) (denying relief where church could have found other suitable property in a differently zoned area for its shelter), *reh'g denied*, No. 4d07-3792, 2009 Fla. App. LEXIS 12352 (Aug. 13, 2009).

consideration of the totality of circumstances surrounding the alleged substantial burden on religious exercise. A model test for a substantial burden on a religious exercise would state the following:

> Considering all the factors surrounding the burden on religious exercise, a substantial burden exists where no reasonable alternative is available for the church to continue its religious exercise.

Under this test, a conflict similar to the one between *Western Presbyterian* and *Daytona Beach* may still arise as differing courts emphasize various factors, but a uniform test will lessen the opportunity for those results. Some scholars have argued that allowing judges to deny or grant exemptions based on weighing the interests of the city and the church in each individual situation will lead to inconsistent results and that courts should give more deference to legislative decisions.[193] A test that looks at the context of each situation may have an effect of inconsistent results in similar cases—whereas a test that lists specific factors draws a bright line to distinguish between cases—but certain contextual factors will distinguish cases. There needs to be an effective check on zoning board decisions when a fundamental right is involved, especially because zoning boards are made up of politicians and others who may be swayed by the majority.[194] Granting too much deference to local zoning boards in these cases will only add to the inconsistency because different communities have different values; this proposed test allows courts to evaluate carefully the reasoning behind a zoning board's decision.

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[193] *See* MARCI A. HAMILTON, GOD V. THE GAVEL: RELIGION AND THE RULE OF LAW 295–98 (2005); Marshall, *supra* note 153, at 311–12.

[194] *See* Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685, 721 (1992).

> But the peculiar circumstances of minority religions and the danger of religious majoritarianism make it necessary to buttress the political checks with constitutional protections when the objection is based on adherence to religion (which, given the majoritarian character of the rule, will virtually always be a minority religion).

Id. Ira C. Lupu, *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion*, 140 U. PA. L. REV. 555, 604 (1991).

> Exemptions granted by judges will rest exclusively on a foundation of general norms, applicable to free exercise claims from foundation of general norms, applicable to free exercise claims from across the "spectral march" these cases exhibit. In contrast, voluntary accommodations will rest on an uneasy and unprincipled foundation of concern for religious liberty and the political strength of pro-accommodation forces. Without the force of general principle, there can be no guarantee that like claims to accommodation will be treated alike; without such like treatment, equal religious liberty will be perpetually undermined.

By amending RLUIPA to include a uniform test for substantial burden that looks at the totality of the circumstances and the available alternatives to the religious organization, Congress can eliminate the confusion over the application of the statute. Closer religious exercise cases, like church-hosted tent cities, will be decided more consistently according to the facts of each case.

V. CONCLUSION

Since *Sherbert*, courts and Congress have failed to articulate a workable test for the Free Exercise Clause, which has caused problems for courts ruling on religious-land-use cases. RLUIPA has provided a clearer standard for religious-land-use cases by articulating a strict scrutiny standard for substantial burdens on religious land use, but it also contains ambiguity with regard to what constitutes a substantial burden. Church-hosted tent cities illustrate the extent of the problems with RLUIPA, but these cases demonstrate that a workable substantial burden test within the statute could alleviate its inconsistent application in the lower courts. The Washington Supreme Court has provided a basis for developing a practical test by examining the context of each situation and the alternatives left open to churches to continue their religious exercise following the government action in question. This approach takes into account each individual set of facts, which is important in situations like tent cities, where the competing interests of the city and the church are strong on both sides. The Free Exercise Clause has evolved in a short time from *Sherbert* to *Smith* and has taken on new challenges from the shelter cases to *Northshore*. While the test does not currently embrace what the New Jersey Superior Court envisioned in *St. John's*, a clear statutory test will permit courts, at the very least, to rule fairly in religious-land-use cases.