**Federal Regulation Affecting Land Use**
**Religious Land Use and Institutionalized Persons Act**
**(RLUIPA)**
**ABA STATE AND LOCAL GOVERNMENT SECTION**
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## I. Introduction

This paper focuses on the land use provisions of the Religious Land Use and Institutionalized Persons Act (RLUIPA), and summarizes relevant caselaw and the history of the federal constitutional and statutory precedents upon which it is based.

## II. Purpose and Structure of RLUIPA

RLUIPA is a federal civil rights statute codified at 42 U.S.C.A. § 2000cc. It is designed to enforce the United States Constitution First Amendment's protection for religious free exercise.[2] RLUIPA safeguards religious exercise by prohibiting governmental imposition of substantial burdens on religious free exercise without in the absence of demonstrating a compelling state interest implemented through the least restrictive means[3]; by prohibiting the treatment of religious land uses on less than equal terms than non-religious land uses;[4] by prohibiting discrimination against religious exercise and religions;[5] by prohibiting the total exclusion of religious exercise from a community[6]; and by prohibiting the imposition of unreasonable limits on religious "assemblies, institutions and structures".[7]

The substantial burden prohibition applies in the context of state and local governments making individualized determinations implementing land use regulations,[8] defined to

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[2] 146 CONG. REC. 16,699 (2000) (Joint statement of Sen. Hatch and Sen. Kennedy "the land use sections of the bill . . . enforce the Free Exercise . . . Clause as interpreted by the Supreme Court."); 146 CONG. REC. 16,622 (statement of Rep. Canady: "The Religious Land Use and Institutionalized Persons Act is a bill designed to protect the free exercise of religion"); *see also Vision Church v. Village of Long Grove*, 468 F3d 975, fn 12 (2006); *Freedom Baptist Church of Delaware County v. Township of Middletown,* 204 F.Supp.2d 857 (E.D.Pa. 2002) (upholding RLUIPA against the claim that Congress exceeded its authority under the Commerce Clause when it adopted the legislation; also holding that RLUIPA's substantial burden, equal terms and exclusion provisions do not violate the Free Exercise Clause of the First Amendment but instead codify First Amendment jurisprudence).

[3] 42 USC § 2000cc Sec. 2(a)(1).

[4] 42 USC § 2000cc Sec. 2(b)(1).

[5] 42 USC § 2000cc Sec 2(b)(2).

[6] 42 USC § 2000cc Sec. 2(b)(3)(A).

[7] 42 USC § 2000cc Sec. 2(b)(3)(B).

[8] The meaning of "and use regulation" has been itself the subject of controversy. One court has decided that an annexation ordinance is not a "land use regulation" subject to RLUIPA's requirements. *Vision Church v. City of Long Grove*, 468 F3d 975, 997-998 (2006). Another has decided that requirements of building codes and the Americans with Disabilities Act are not land use or land marking laws. *Anselmo v. County of Shasta Cal*., 873 F. Supp2d 1247 (2012); yet another court held application of a building code

include land marking laws.[9] RLUIPA authorizes substantial burdens on religious exercise if the government demonstrates that its imposition is supported by a compelling governmental interest and furthered through the least restrictive means. This defense is not listed as defense to RLUIPA's prohibitions expressed in 42 U.S.C.A. § 2000cc Sec. 2(b).[10]

RLUIPA applies to "a state, county, municipality, or other governmental entity created under the authority of a State; and any branch, department, agency, instrumentality, or official of an entity [previously] listed."[11] Structurally, each of RLUIPA's restrictions and prohibitions operate independently of one another.[12]

RLUIPA is to be construed broadly to protect religious exercise "to the maximum extent permitted by the terms of this chapter and the Constitution."[13] RLUIPA protects "exercise of religion" defined broadly: "any exercise of religion, whether or not compelled by, or central to, a system of religious belief…The use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose."[14] The Supreme Court has stated in a case brought under a statute similar to RLUIPA – the Religious Freedom, Restoration Act or "RFRA" - that federal courts have "no business" addressing whether a religious belief is reasonable.[15] The Supreme Court further states that courts will not scrutinize claims of religious belief; rather:

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did apply a land use regulation for purposes of RLUIPA. *United States v. Cty. of Culpeper, Virginia*, 245 F.Supp.3d 758, 764–65 (W.D. Va. 2017). A court determined that a local requirement to hook into a public sewer system is neither a land use nor a land marking regulation under RLUIPA and, therefore, a challenge to a requirement to hook into the public sewer system is not cognizable under RLUIPA. *Second Baptist Church of Leechburg v. Gilpin Tp*, 118 Fed. Appx. 615 (3rd Cir 2004) (unpublished). But another court decided that an application for a sewer permit did involve the application of a land use regulation for purposes of what was an ultimately successful RLUIPA claim. *Garden State Islamic Center v. City of Vineland*, 358 F. Supp3d 377, 384-385 (2018). A court determined that a local decision to construct a roadway is not the implementation of a land use regulation as defined in RLUIPA. *Prater v. City of Burnside*, 289 F3.d 417,434 (6th Cir. 2002), *cert. den.* 537 U.S. 1018 (2002) ("a government agency implements a 'land use regulation' only when it acts pursuant to a 'zoning or landmarking law' that limits the manner in which a claimant may develop or use property in which the claimant has an interest.") Finally, because RLUIPA's land use regulation is one that restricts a claimant's ability to use land in which he holds a property interest, where a minister wants to start a ministry on property that the city owns and plans to demolish, has been held to not state a RLUIPA claim. *Taylor v. City of Gary,* 233 Fed. Appx. 561 (7th Cir. 2007) (unpublished). Generally, eminent domain regulations are not considered land use regulations. But this too is not uniform and is discussed in greater detail later in this paper.

[9] 42 USC § 2000cc Sec. 2 and Sec. (5)(g).

[10] *See New Life Ministries v. Charter Tp of Mt. Morris*, (Unreported, 2006 WL 2583254, E.D. Mich., September 07, 2006); *but see Konokov v. Orange County, Fla.,* 410 F.3d 1317, 1329 n 6 (11th Cir 2005) (determining compelling governmental interest test is not satisfied in an equal terms case).

[11] 42 U.S.C.A. § 2000cc Sec. 2 and Sec. 8(4).

[12] Compare 42 U.S.C.A. § 2000cc(2)(a) with 42 U.S.C.A. 2000cc(2)(b) and (3); *see Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1229 (11th Cir. 2004), *cert den* 125 S Ct 1295 (2005); *and see Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 762 (7th Cir. 2003).

[13] *Id.* at § 2000cc Sec. 5(g).

[14] 42 U.S.C.A. § 2000cc Sec. 8(7).

[15] *Burwell v. Hobby Lobby Stores, Inc*., 134 S.Ct. 2751, 2778 (2014).

> "The Court's "narrow function ... is to determine" whether the plaintiffs' asserted religious belief reflects "an honest conviction[.]"[16]

RLUIPA was co-sponsored by Senators Edward Kennedy and Orrin Hatch as a means to enforce First Amendment principles. They explained:

> "[t]he right to assemble for worship is at the very core of the free exercise of religion. Churches and synagogues cannot function without a physical space adequate to their needs and consistent with their theological requirements. The right to build, buy, or rent such a space is an indispensable adjunct of the core First Amendment right to assemble for religious purposes."[17]

RLUIPA is remedial. Congress determined that local zoning authorities used land use laws to substantially burden the free exercise of religion or directly or indirectly or discriminate against religious free exercise or particular faiths and that RLUIPA was designed to remedy these violations.[18] RLUIPA acknowledges that local land use regulatory authorities have significant discretion to make zoning decisions under the police power to legislate for the public's health, safety and welfare. RLUIPA builds on Supreme Court precedents:

> "The power of local governments to zone and control land use is undoubtedly broad and its proper exercise is an essential aspect of achieving a satisfactory quality of life in both urban and rural communities. *But the zoning power is not infinite and unchallengeable; it 'must be exercised within constitutional limits*.' Accordingly, it is subject to judicial review; and [as] is most often the case, the standard of review is determined by the nature of the right assertedly threatened or violated rather than by the power being exercised or the specific limitation imposed."[19] (Emphasis supplied.)

RLUIPA recognizes serious constitutional risks attend local regulators possessing substantial discretion in matters affecting individual liberty. As the Supreme Court explained in *West Virginia Board of Education v. Barnette:* "small and local authority may feel less sense of responsibility to the Constitution and agencies of publicity may be less vigilant in calling it into account."[20] RLUIPA's legislative history purports to

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[16] *Burwell v. Hobby Lobby Stores, Inc*., 134 S.Ct. 2751 (2014), *citing Thomas v. Review Bd. of Indiana Employment Security Div.,* 450 U.S. 707, 716 (1981) in a Religious Freedom Restoration Act (RFRA) case.

[17] 146 Cong. Rec. S77745 (July 27, 2000) (joint statement of Senators Hatch and Kennedy) [hereinafter "Joint Statement"] *Quoted in Cambodian Buddhist Society of CT., Inc. v. Newtown Planning and Zoning Com'n*, 2005 WL 3370834, slip op 6 (Conn. Super., 2005) (unpublished).

[18] "[RLUIPA] applies the standard of the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1 (1994): if government substantially burdens the exercise of religion, it must demonstrate that imposing that burden on the claimant serves a compelling interest by the least restrictive means. In addition, with respect to land use regulation, the bill specifically prohibits various forms of religious discrimination and exclusion." Joint Statement 146 Cong. Rec. 7774-01.

[19] *Schaad v. Borough of Ephraim*, 452 U.S. 61, 68 (1981) (emphasis supplied) (citations omitted).

[20] 319 U.S. 624, 637 (1943).

include examples of such improper actions by "small and local" land use authorities that had vested themselves with great discretion and significantly adversely affected the free exercise of religion.[21] Lower courts have similarly recognized that government can achieve inappropriate burdens on free exercise as well as nefarious ends without providing direct evidence proving that it is doing so.[22] In *Garden State Islamic Ctr. v. City of Vineland*, 358 F. Supp. 3d 377, 380–81 (D.N.J. 2018), the court explained:

> Although RLUIPA does not define "substantial burden," several courts note that "[t]he goal of the substantial burden provision is to combat[ ] subtle forms of discrimination by land use authorities that may occur when a state delegates essentially standardless discretion to nonprofessionals operating without procedural safeguards. *Hunt Valley Baptist Church v. Baltimore County, Maryland*, 2017 WL 4801542, at *24 (quoting *Chabad Lubavitch of Litchfield Cty., Inc. v. Litchfield Historic Dist. Comm'n*, 768 F.3d 183, 196 (2d Cir. 2014) (quoting *Sts. Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 895, 900 (7th Cir. 2005)) (internal citations omitted))."

The weight of Supreme Court case law does not appear to require evidence of animus or hostility for a successful First Amendment claim.[23] RLUIPA generally does not require animus either, although evidence of it has bolstered RLUIPA claims:

> "The substantial burden claim 'does not require a showing of discriminatory governmental conduct.' *Andon, LLC v. City of Newport News, Va*., 813 F.3d 510, 514 (4th Cir. 2016); *Bethel World Outreach Ministries v. Montgomery Cty. Council*, 706 F.3d 548, 557 (4th Cir. 2013) (recognizing that substantial burden provision protects against both discriminatory and non-discriminatory conduct that imposes a substantial burden on religion). To state a substantial burden claim, a plaintiff 'must show that a government's imposition of a regulation regarding land use, or application of such a regulation, caused a hardship that substantially affected the plaintiff's right of religious exercise.' *Andon*, 813 F.3d at 514; *see also* 146 Cong. Rec. S7, 774–01, 2000 WL 1079346, at *S7777 ('It is important to note that RLUIPA does not provide a religious assembly with immunity from zoning regulation.')

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[21] *See* 146 CONG. REC. 14,283 (2000) (statement of Sen. Hatch that land use regulations are a "seemingly insurmountable barrier" to the free exercise of religion); 146 CONG. REC. 14,285 (statement of Sen. Edward Kennedy); 146 CONG. REC. 16,698 (joint statement of Sen. Hatch and Sen. Kennedy "new, small, or unfamiliar churches in particular, are frequently discriminated against."

[22] In *American Friends of the Society of St. Pius, Inc., v. Schwab*, 417 N.Y.S.2d 991 (N.Y. App. Div. 1979), the court observed:

> "[H]uman experience teaches us that public officials, when faced with pressure to bar church uses by those residing in a residential neighborhood, tend to avoid any appearance of an antireligious stance and temper their decision by carefully couching their grounds [on some other basis]."

[23] *See Sherbert v. Verner*, 374 U.S. 398 (1963); *Hobbie v. Unemployment Appeals Comm'n of Fla*., 480 U.S. 136 (1987); *Wisconsin v. Yoder*, 406 U.S. 205, 220 -221 (1972).

> "Plaintiffs argue that '[i]nvidious motive is not a necessary element,' but rather '[a]ll you need is that the state actor meant to single out a plaintiff because of the protected characteristic itself.' (*Id*. at 15 (quoting *Hassan v. City of New York*, 804 F.3d 277, 297 (3d Cir. 2015)))
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> > "The land-use provisions of RLUIPA are structured to create a clear divide between claims under section 2(a) (the Substantial Burdens section) and section 2(b) (the Discrimination and Exclusion section, of which the Equal Terms [P]rovision [and also the Nondiscrimination Provision are] a part). Since the Substantial Burden[s] section includes a strict scrutiny provision and the Discrimination and Exclusion section does not, we conclude this "disparate exclusion" was part of the intent of Congress and not an oversight."

*Garden State Islamic Ctr. v. City of Vineland*, 358 F. Supp. 3d 377, 381 (D.N.J. 2018).

Of course, RLUIPA's anti-discrimination clause (42 USC 2000cc(b)(2) requires direct or inferential evidence of discriminatory intent or animus.[24]

State and local governments may "avoid the preemptive force of any provision of [RLUIPA] by changing the policy or practice that results in a substantial burden on religious exercise."[25] While this refers to the imposition of substantial burdens, it is likely that governments may also avoid liability for violations of the equal terms and nondiscrimination provisions of RLUIPA by equalizing the restrictions in the disputed standard.[26] In this regard, the Joint Statement explains:

> "The state may eliminate the discrimination or burden in any way it chooses, so long as the discrimination or substantial burden is actually eliminated."[27]

Care must be taken in settling RLUIPA claims. At least two courts have determined that settlement of a RLUIPA claim that allowed the sought after religious exercise in exchange for the dismissal of RLUIPA litigation, was invalid because local land use standards were disregarded in the settlement without a "clear" finding of a RLUIPA violation.[28]

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[24] *Hunt Valley Baptist Church v. Baltimore County*, 2007 WL 172496 *29-32 (D.S.C. 2007).
[25] 42 U.S.C.A. § 2000cc Sec. 5(e).
[26] *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 762 (7th Cir. 2003); *Petra Presbyterian Church v. Village of Northbrook*, 409 F.Supp.2d 1001, 1008 (N.D.Ill. 2006), *aff'd* 489 F.3d 846 (7th Cir., 2007), *cert den*. 552 U.S. 1131 (2008).
[27] Joint Statement 146 Cong. Rec. 7776-01.
[28] *League of Residential Neighborhood Advocates v. City of Los Angeles*, 498 F.3d 1052 (9th Cir. 2007); *Christian Methodist Episcopal Church v. Montgomery*, 2007 WL 172496, *6 (D.S.C. 2007).

RLUIPA provides for attorney fees under 42 U.S.C.A. § 1983 and 42 U.S.C.A. § 1988(b).[29] A reduction in attorney fees to a prevailing plaintiff in the amount of 60% to reflect it only won on one of its RLUIPA claims, has been held to be a n abuse of discretion.[30] Courts are split on whether damages can be assessed against a local government for violating RLUIPA.[31] A prevailing RLUIPA plaintiff may obtain an award of attorney fees without an award of damages for harm.[32] Expert fees may be recoverable under RLUIPA.[33] While 42 USC 1983 makes no distinction between prevailing plaintiffs versus prevailing defendants, the general rule is that defendants may not be awarded fees under 42 USC 1983. In *Anselmo v. County of Shasta*, 2013 WL 3773893 (2013),[34] the court explained the rules regarding attorney fee awards to defendants under 42 USC 1983:

> "To be awarded fees, a prevailing defendant must demonstrate that the "plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." *Christiansburg Garment Co. v. E.E.O.C.,* 434 U.S. 412, 421, 98 S.Ct. 694, 54 L.Ed.2d 648 (1978). This standard is 'stringent,' *Hughes v. Rowe,* 449 U.S. 5, 14, 101 S.Ct. 173, 66 L.Ed.2d 163 (1980), and the Ninth Circuit repeatedly has recognized that attorney's fees in civil rights cases 'should only be awarded to a defendant in exceptional circumstances.' *Saman v. Robbins,* 173 F.3d 1150, 1157 (9th Cir.1999) (quoting *Barry v. Fowler,* 902 F.2d 770, 773 (9th Cir.1990)) (internal quotation mark omitted); *see Braunstein v. Ariz. Dep't of Transp.,* 683 F.3d 1177, 1187 (9th Cir.2012); *Harris v. Maricopa Cnty. Superior Court,* 631 F.3d 963, 968 (9th Cir.2011)."

A RLUIPA plaintiff must produce prima facie evidence to support a claim alleging a violation. When this burden is carried, the government is required to bear the burden of persuasion on any element of the claim other than the RLUIPA plaintiff is always required to bear the burden of persuasion on whether the challenged law or practice substantially burdens the exercise of religion.[35] Moreover, if the RLUIPA claim shows a

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[29] 42 U.S.C.A. § 2000cc –4(c). *See DiLaura v. Tp of Ann Arbor***,** 471 F.3d 666 (2006) (fees awarded); *but see House of Fire Christian Church v. Zoning Bd. Of Adjustment of City of Clifton*, 379 N.J. Super. 526, 879 A.2d 1212 (2005) (on appeal, trial court order directing municipality to pay attorney fees to church was reversed on grounds that RLUIPA claim was not ripe); *and see Town of Mt. Pleasant v. Legion of Christ. Inc.*, 850 N.E.2d 1147 (2006) (Where religious organization prevails in a zoning dispute on state law basis, regardless of whether they may have also been able to prevail under RLUIPA, they are not the "prevailing party" under RLUIPA and attorney fees will not be awarded).

[30] *DiLaura v. Township of Ann Arbor*, 471 F3d 666 (2006).

[31] *See for example Lighthouse Community Church of God v. City of Southfield*, 2007 WL 756647 (E.D. Mich. Mar 07, 2007) (unreported); *but see Madison v. Virginia,* 474 F.3d 118, 123 (4th Cir. 2006) (in prisoner context, damages not awardable under RLUIPA.)

[32] *DiLaura v. Ann Arbor Charter Tp*, 471 F3d 666, 671 (2006).

[33] *For example, compare New Life Ministries v. Charter Tp. of Mt. Morris*, 2006 WL 2927674 (E.D.Mich., 2006). (Unreported.) (no expert witness fees*) with Maranatha High School v. The City of Sierra Madre*, (unreported) 2003 WL 25338413 (C.D. Cal. 2003) (court refusal to strike prayer for consultant fees for design and architecture).

[34] The court did however award the prevailing defendant its costs for printing and transcripts in the amount of $6740.77.

[35] 42 U.S.C.A. § 2000cc Sec. 4(b).

substantial burden, then the government bears the burden of persuasion to establish the substantial burden imposed on religious exercise serves a compelling governmental interest and that any such interest is advanced using the least restrictive means available.[36] RLUIPA's legislative history explains Congress' rationale for the assignment of litigation burdens:

> "Section 3(a) provides that if a claimant demonstrates a prima facie violation of the Free Exercise Clause, the burden of persuasion then shifts to the government on all issues except burden on religious exercise. No element of the Court's definition of a free exercise violation is changed, but in cases where a court is unsure of the facts, the risk of nonpersuasion is placed on government instead of on the claim of religious liberty. This provision facilitates enforcement of the constitutional right as the Supreme Court has defined it. *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997), of course reaffirms broad Congressional power to enforce constitutional rights as interpreted by the Supreme Court."
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> "* * * The one issue on which the religious claimant always retains the burden of persuasion is burden on religion. Note that in the free exercise context, the claimant need prove only a burden, not a substantial burden. The lower courts have held that where the burdensome rule is not generally applicable, any burden requires compelling justification. *Hartmann* v. *Stone*, 68 F.3d 973, 978–79 & nn. 3–4 (6th Cir. 1995); *Brown* v. *Borough of Mahaffey*, 35 F.3d 846, 849–50 (3d Cir. 1994); *Rader* v. *Johnston*, 924 F. Supp. 1540, 1543 n.2 (D. Neb. 1996)."[37]

RLUIPA contemplates that standing to assert a RLUIPA claim or defense is governed by the rules of standing established under Article III of the Unites States Constitution.[38]

Because RLUIPA's purpose is to enforce the First Amendment, First Amendment jurisprudence and its historical and legal underpinnings is helpful to understand RLUIPA.

## III. Principles Guiding American Jurisprudence Regarding Religion

The United States was the first government since Roman times where the leader was not selected by a deity, but rather by the people whom the leader governed.[39] Escaping the influence of the hereditary government of a monarchy whose absolute and unquestioned authority was bestowed by a particular God, was the government model

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[36] *Id.*

[37] Testimony of Douglas Laycock University of Texas Law School, June 23, 1998, Senate Committee on the Judiciary, Hearing on S. 2148: The Religious Liberty Protection Act of 1998.

[38] 42 U.S.C.A. § 2000cc Sec. 4(a); *see DiLaura v. Ann Arbor Charter Tp,* 30 Fed. Appx. 501, 506-07 (6th Cir. Feb.25, 2002) (unpublished).

[39] "All hereditary government is in its nature tyranny. An heritable crown, or an heritable throne, or by what other fanciful name such things may be called, have no other significant explanation than that mankind are heritable property. To inherit a government, is to inherit the people, as if they were flocks and herds." Thomas Paine, *The Rights of Man*.

firmly rejected. The freedom sought to be enshrined by the United States form of government was freedom to be governed by the rule of law established wholly apart from any particular religious doctrine and never enforced by any particular religious establishment. In *Everson v. Board of Education of Ewing Tp.,* the Supreme Court explained the history to be avoided:

> "A large proportion of the early settlers of this country came here from Europe to escape the bondage of laws which compelled them to support and attend government favored churches. The centuries immediately before and contemporaneous with the colonization of America had been filled with turmoil, civil strife, and persecutions, generated in large part by established sects determined to maintain their absolute political and religious supremacy. With the power of government supporting them, at various times and places, Catholics had persecuted Protestants, Protestants had persecuted Catholics, Protestant sects had persecuted other Protestant sects, Catholics of one shade of belief had persecuted Catholics of another shade of belief, and all of these had from time to time persecuted Jews. In efforts to force loyalty to whatever religious group happened to be on top and in league with the government of a particular time and place, men and women had been fined, cast in jail, cruelly tortured, and killed. Among the offenses for which these punishments had been inflicted were such things as speaking disrespectfully of the views of ministers of government-established churches, nonattendance at those churches, expressions of non-belief in their doctrines, and failure to pay taxes and tithes to support them."[40]

Thus, without a doubt the separation of church and state was a fundamental rationale for the formation of the United States. An important corollary premise is that citizens must be allowed freedom of religious exercise, without prohibition or compulsion by the state. Key to these foundational premises for our form of government is the expectation of tolerance for a religious marketplace and for freedom within that marketplace. For the religious marketplace to work, there must be a multiplicity of religious faiths; with no directly or indirectly state sponsored faith or on the numbers or types of faiths that might exist. Disguised religious litmus tests of any stripe are as repugnant as overt ones. In *Lyng v. Northwest Indian Cemetery Prot. Assn*., the court explained that Federalist Paper 10 "suggest[ed] that the effects of religious factionalism are best restrained through competition among a multiplicity of religious sects)."[41] Evidence of the efficacy of this principle is that religious assemblies of all faiths have long been integrated within their communities. No one assembly or institution is allowed by governmental authority to dominate any other and no religious intuition or faith can be prohibited. Relatedly, the

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[40] 330 U.S. 1, 9 (1947).

[41] 485 U.S. 439 (1988); Federalist No. 10 states, "A religious sect may degenerate into a political faction in a part of the Confederacy; but the variety of sects dispersed over the entire face of it must secure the national councils against any danger from that source. A rage for paper money, for an abolition of debts, for an equal division of property, or for any other improper or wicked project, will be less apt to pervade the whole body of the Union than a particular member of it; in the same proportion as such a malady is more likely to taint a particular county or district, than an entire State."

proximity of houses of worship to believers provides Americans with realistic opportunities for religious interaction and instruction. It is fundamentally *not* the role of government to restrict opportunities the governed seek for religious guidance in the faith of their choice. Governmental restrictions in the religious marketplace are a formula for religious intolerance and dominance.

Zoning restrictions have the unique potential to stifle or install any use, including religious ones. Improper exercise of local zoning power is most likely to be achieved indirectly. Indirect favoritism or extinguishment of particular faiths in a community, or the unavailability of competing faiths in a community, can follow an outgrowth of planning decisions regardless of whether discriminatory or exclusionary consequences are by design.

Few would dispute that zoning decisions are, without some external restraint, subjective, discretionary and capable of resting on a foundation of speculative and emotional evidence. In RLUIPA. Congress decided that without specific restraint, the discretion afforded local officials to make individual land use decisions had been and could continue to be used to deny religious exercises.
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## IV. Key First Amendment Free Exercise Cases Considered in Developing RLUIPA

The First Amendment to the United States Constitution provides in relevant part:

> "Congress shall make no law respecting the establishment of religion, or *prohibiting the free exercise thereof* * * *" U.S. Const., Amdt. 1.

In the landmark case of *Employment Division v. Smith* in 1990, the Supreme Court established that neutral, generally applicable laws that have an incidental effect on religion are subject to only a rational basis test.[43] This was a significant departure from previous Supreme Court precedents. In *Smith,* a state law criminalized the ingestion of Peyote by Native American state workers who used the drug for sacramental purposes as part of a ceremony of the Native American Church.[44] The Native Americans were fired by their state employer for participating in the ceremony and were denied unemployment compensation because they were fired for breaking state law.[45] They claimed in such circumstances, being fired and denied unemployment compensation for religious exercise violated the free exercise clause.[46]

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[43] 494 U.S. 872 (1990).

[44] Id at 874.

[45] Id.

[46] Today, Native Americans could not be fired for ingesting Peyote in religious ceremonies. After *Smith,* the federal Controlled Substances Act was amended to authorize such Native American religious use of Peyote. 21 CFR § 1307.31; 42 U.S.C. § 1996a(b)(1). *See Gonzales v. O. Centro Espirita Beneficente Uniao do Vegetal,* 546 U.S. 418, 420-421 (2006).

Justice Scalia's majority opinion explained "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability.'"[47] Instead, the court explained that strict scrutiny is imposed whenever the state has a system of "individual exemptions" that requires individualized consideration of a person's situation.[48] The court also explained that if a facially neutral law of general applicability imposes a substantial burden on religion, then it is subject to the compelling state interest test. [49] In this regard, the Supreme Court stated: "[a] regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion."[50] On the merits, the court decided that under the rational basis test, the state's interest in preventing illegal drug use authorized the state to refuse unemployment benefits without violating the First Amendment.[51] In so doing, the Court effectively limited first amendment strict scrutiny to situations in which the government singles out a particular religion and intentionally limits the rights of its members.[52]

*Smith* also set forth the idea that "hybrid" claims will be subject to higher scrutiny. Hybrid claims are ones that involve laws of general application that burden free exercise *and* some other constitutional right.[53] The Smith court wrote, "[T]he only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved...the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press…or the rights of parents to direct the education of their children."[54]

The principles set forth in *Smith* were further fleshed out by the United States Supreme Court three years later in *Church of the Lukumi Babalu Aye v. City of Hialeah.*[55] There, the Court determined that a local ordinance forbidding the "unnecessary killing of an animal in a public or private ritual or ceremony not for the primary purpose of food consumption" was unconstitutional. [56] The court found that the local law was not neutral or generally applicable because it allowed animals to be killed for food, research, hides, and recreation, but not for the type of animal sacrifices used in Santeria.[57] The Supreme Court explained: "[f]acial neutrality is not determinative. The Free Exercise Clause…extends beyond facial discrimination [and] forbids subtle departures from neutrality and covert suppression of religious beliefs."[58]

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[47] 494 U.S. 872, 879.
[48] *Employment Division v. Smith*, 494 U.S. 872, 884 (*quoting Browen v. Roy*, 476 U.S. 693 (1986).
[49] *See generally Wisconsin v. Yoder*, 406 U.S. 205 (1972).
[50] *Id* at 220. *Wisconsin v. Yoder's* articulation of the Free Exercise analysis was in the nature of a balancing act where the rights to religious freedom began with a heavy weight in the balance.
[51] *Id* at 890.
[52] Kenneth Marin, *Employment Division v. Smith*: The Supreme Court Alters the State of Free Exercise Doctrine, 40 Am. U. L. Rev. 1431 (1991).
[53] Id. at 881-2.
[54] Id. at 881.
[55] *Church of the Lukumi Babalu Aye v. City of Hialeah,* 508 US 520 (1993).
[56] Id.
[57] Id. at 527.
[58] 508 U.S. 520 (1993).

The Court explained the following three-step analysis is to be used to determine an enactments neutrality: First, examine the text of the law; the text of a law may not "discriminate on its face." A law lacks facial neutrality if it refers to a religious practice without secular meaning discernable from the language or context.[59] Second examine the object of the enactment. If the object of the law, either directly or indirectly, is to infringe upon or restrict religious practice, then the law is not neutral. Third, examine the surrounding circumstances of the law's adoption to determine circumstantial non-neutrality:

> "Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality. The Free Exercise clause protects against governmental hostility, which is masked as well as overt. 'The Court must survey meticulously the circumstances of governmental categories to eliminate… religious gerrymandering.'"[60]

In this regard, it is relevant whether the impacts that the state says it is avoiding in the disputed law are, in reality, tolerated by the state in nonreligious contexts. [61] Applying these factors, the *Lukumi* Court unanimously decided the challenged ordinance was neither neutral nor generally applicable. Rather, the Court determined there was evidence that the disputed ordinance targeted the Santeria religion. Under these circumstances, the *Lukumi* Court applied of strict scrutiny to decide the denial of land use authority for the religious assembly at issue violated the free exercise clause.[62] Once strict scrutiny is applied, a regulation rarely survives, and the City of Hialeah regulation at issue fared no better. The Court explained that the *Lukumi* ordinances fell "well below the minimum necessary to protect First Amendment rights."[63] Accordingly, the Court struck down the disputed regulation, explaining that the city could use other means to achieve its goals of protecting public health and preventing cruelty to animals without burdening the Santeria religion.[64]

Therefore, threshold questions in determining whether a law is constitutional under the Free Exercise clause in light of *Smith* and *Lukumi*, is whether the disputed law is neutral, whether it is generally applicable and whether its effect on free exercise is incidental. Under these precedents, laws that are not neutral or not generally applicable must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest if the law burdens a particular religious practice.

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[59] Id. at 533.
[60] Id. at 534.
[61] *See generally Murphy v. Zoning Comm'n of Town of New Milford*, 289 F. Supp. 2d 87 (D. Conn. 2003) vacated on other grounds. Murphy v. New Milford Zoning Comm'n, 402 F.3d 342 (2d Cir. 2005); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993); *Locke v. Davey* 540 U.S. 712 (2004).
[62] Abran Kean, Free Exercise: Neutrality, Animus and A Breath of Life into Substantial Burden, 82 Denv. U. L. Rev. 401, 409 (2004).
[63] Id. at 543.
[64] 508 US 520, 544-545

The United States Supreme Court in *Locke v. Davey* carved out an exception to the *Smith/Lukumi* neutrality rules, in a case representing the "play in the joints" in free exercise jurisprudence.[65] There, Washington State's constitution prohibited "even indirectly funding religious instruction that will prepare students for the ministry."[66] The Supreme Court explained that prohibiting payments for religious instruction is consistent with the history of the United States:

> "Even though the differently worded Washington Constitution draws a more stringent line than that drawn by the United States Constitution, the interest it seeks to further is scarcely novel. In fact, we can think of few areas in which a State's antiestablishment interests come more into play. Since the founding of our country, there have been popular uprisings against procuring taxpayer funds to support church leaders, which was one of the hallmarks of an "established" religion. See R. Butts, The American Tradition in Religion and Education 15–17, 19–20, 26–37 (1950); F. Lambert, The Founding Fathers and the Place of Religion in America 188 (2003) ("In defending their religious liberty against overreaching clergy, Americans in all regions found that Radical Whig ideas best framed their argument that state-supported clergy undermined liberty of conscience and should be opposed"); *see also* J. Madison, Memorial and Remonstrance Against Religious Assessments, reprinted in *Everson v. Board of Ed. of Ewing,* 330 U.S. 1, 65, 68, 67 S.Ct. 504, 91 L.Ed. 711 (1947) appendix to dissent of Rutledge, J.) (noting the dangers to civil liberties from supporting clergy with public funds)."[67]

Accordingly, in *Locke*, the Supreme Court decided that even though the statute at issue was not neutral, its purpose was to be consistent with the state constitution in order to avoid liability for establishment of religion. The court explained that such purpose was permissible and prevented the disputed law from running afoul of the free exercise clause:

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[65] *Locke v. Davey*, 540 US 712, 719. This built on *Walz v. Tax Commission of City of New York,* 397 U.S. 664, 669, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970), which upheld property tax exemptions for religious organizations despite a tax payer's assertion that the exemptions forced him to support churches against his will and also resulted in the establishment of religion. The Court disagreed on both counts. The *Walz* Court explained the tension between the Free Exercise and Establishment Clauses:

> *"*The course of constitutional neutrality in this area cannot be an absolutely straight line; rigidity could well defeat the basic purpose of these provisions, which is to insure that no religion is sponsored or favored, none commanded, and none inhibited. The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts t*here is room for play in the joints productive of benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference*." (Emphasis supplied.)

[66] *Id.*

[67] Footnotes omitted.

> "Without a presumption of unconstitutionality, Davey's claim must fail. The State's interest in not funding the pursuit of devotional degrees is substantial and the exclusion of such funding places a relatively minor burden on Promise Scholars. If any room exists between the two Religion Clauses, it must be here."[68]

The Court upheld the state funding statute -- a state funded scholarship -- that excluded the study of theology from being considered for an award.

Presenting the other side of the *Locke* coin is *United States v. Lee*.[69] In *Lee*, Amish believers objected on religious grounds to paying social security taxes.[70] The Court determined the governmental interest in requiring all citizens to pay taxes was substantial and sufficiently weighty to place a burden on the free exercise of religion.[71] The Court explained, "The tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief…[b]ecause the broad public interest in maintaining a sound tax system is of such a high order, religious belief in conflict with the payment of taxes affords no basis for resisting the tax."[72] In other words, *Lee* established that a substantial burden on religion is justified by a "broad public interest in maintaining a sound tax system," free of 'myriad exceptions flowing from a wide variety of religious beliefs.'[73]

Similarly, in *Hernandez v. Commissioner*, (the case which is the genesis of the specific "substantial burden" free exercise test),[74] members of the Church of Scientology were denied a charitable deduction on federal taxes.[75] They claimed that paying for "audit" sessions or church-training classes should be treated as a charitable deduction.[76] The Court upheld the government's denial of the claimed exemptions, explaining:[77]

> "The free exercise inquiry asks whether government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden. It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds."

Although the Court articulated doubt that failure to offer an exemption was a "substantial burden" on religion, it never decided that issue deciding that since: "even a substantial burden would be justified by the broad public interest in maintaining a sound tax system."

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[68] *Locke v. Davey*, 540 US 725.
[69] *United States v. Lee*, 455 U.S. 252 (1982).
[70] Id.
[71] Id.
[72] Id. at 259.
[73] Id.
[74] *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989).
[75] Hernandez v. Commissioner, 490 U.S. 680 (1989).
[76] Id.
[77] Id.

## V. Other First Amendment Cases Illustrating the Application of the Free Exercise Clause

*Sherbert v. Verner*, supplied the traditional framework for the Free Exercise analysis under the strict scrutiny standard.[78] There, the availability of unemployment compensation was conditioned on the plaintiff's willingness to violate a cardinal principle of her religious faith, working on Saturdays. In explaining the reason why the state rule was subject to strict scrutiny and the requirement for a justifying compelling state interest, the Court explained:

> *"*It is basic that no showing of merely a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, 'only the gravest abuses, endangering paramount interests, give occasion for permissible limitation.'"[79]

The Court found that denial of unemployment benefits was indistinct from requiring a person to pay a civil penalty, explaining that the state had: "force[d] [the applicant] to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand."[80] In *Smith,* the Supreme Court:

> "*rejected the interpretation of the Free Exercise Clause announced in Sherbert v. Verner,* 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963), and, in accord with earlier cases, see *Smith,* 494 U.S., at 879–880, 884–885, 110 S.Ct. 1595, held that the Constitution does not require judges to engage in a case-by-case assessment of the religious burdens imposed by facially constitutional laws. *Id.,* at 883–890, 110 S.Ct. 1595."[81] (Emphasis supplied.)

In a subsequent federal statute, the "Religious Freedom Restoration Act" or RFRA, Congress stated it was restoring the "compelling state interest" test of *Sherbert* and *Wisconsin v. Yoder*.[82] In *O. Centro*, the Supreme Court reinforced that this was RFRA's effect.[83] RLUIPA and RFRA have almost identical provisions regarding the triggers for the substantial burden and compelling state interest tests. Thus, the manner in which RFRA's substantial burden and compelling state interests are applied are relevant to RLUIPA.

In *Wisconsin v. Yoder*, the Court expanded the scope of the Free Exercise clause strict scrutiny test to criminal law.[84] In that case, the Court struck down a state statute

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[78] *Sherbert v. Verner* 374 U.S. 398 (1963).
[79] *Id.* at 406-7
[80] *Id.*
[81] *Gonzales v. O. Centro Espirita Beneficente Uniao do Vegetal,* 546 U.S. 418 (2006).
[82] 406 U.S. 205 (1972).
[83] *O. Centro , supra*, 546 US 431.
[84] *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

requiring Amish parents to send their children to secondary school. The Court found that the statute improperly burdened free exercise of religion and, on balance that the state failed to establish a sufficiently compelling government interest given the circumstances.[85] The Court found that application of the statute to the Amish would "gravely endanger if not destroy the free exercise of [their] religious beliefs."[86] Of note was the Court's recognition of a fundamental right possessed by parents with respect to the religious upbringing of their children.[87]

In *McDaniel v. Paty,* a candidate for public office sought a declaratory judgment that his opponent should be disqualified by a state law that prohibited ministers from holding office.[88] Again relying on the *Sherbert* analysis, the Court determined that conditioning a governmental benefit on surrender of a religious right, violated the Free Exercise Clause.[89] The Court focused on the asserted governmental interest rather than the weight of the burden on the free exercise of religion, finding that the government's interest in "antiestablishment" of religion had not been shown.[90] The Court observed that when the country was initially being founded, preventing ministers from holding office might have been a legitimate concern.[91] However, the Court explained that in the context of the 20th century, the state failed to prove the state's fear of ministers in office was still a legitimate antiestablishment concern. The danger that "if elected to public office [ministers] would necessarily exercise their powers…to promote the interests of one sect or thwart the interests of another" was not modernly supported by the "American experience."[92] It is important to pause at this juncture and reflect on a comparison of *Locke v. Davey* and *McDaniel*.

*Locke v. Davey* rejects the latter analysis regarding antiestablishment concerns. The two opinions are hard, if not impossible, to reconcile. One explanation perhaps is that the majority opinion in *McDaniel* was joined by only 4 justices. The balance of the *McDaniel* approving justices filed concurring opinions. Thus, there is strictly no majority analysis to point to in *McDaniel*. On the other hand, the *Locke* analysis is joined by 7 justices, with two (Scalia and Thomas) dissenting. Thus, it can perhaps be inferred that the *Locke* analysis reflects the majority and prevailing view regarding discriminatory statutes and rules that are rooted in an antiestablishment purpose.

In *Gillette v. United States*, the Military Selective Service Act of 1967, which exempted from military service any person who "objected to war in any form" was tested.[93] There, Gillette was convicted of failure to report for induction into the armed forces, and defended on the ground that he was a conscientious objector to the Vietnam War.[94] He

[85] *Wisonsin v. Yoder*, 406 U.S. 205 (1972).
[86] Id at 219.
[87] Id.
[88] *McDaniel v. Paty*, 435 U.S. 618 (1978).
[89] Id.
[90] Id.
[91] Id. at 628.
[92] Id. at 628-9.
[93] 401 U.S. 437 (1971).
[94] Id. at 437-8.

claimed that he had a deep religious conviction that Vietnam in particular was an "unjust war, which he claimed precluded him from participation.[95] The Court characterized the case as presenting a tension between Congress' power to raise and support armies and the religious guarantees of the First Amendment ultimately holding that the "incidental" burden on religion was justified by substantial government interests related to military conscription.[96] In order to be neutral for Establishment Clause purposes, the Court stated that a law must be secular in purpose, even-handed in operation, and neutral in primary impact.[97] Because the Act met those criteria, Congress' decision to exempt from military service only those who objected to participation in all wars was a permissibly neutral law.[98]

Applying the compelling state interest/least restrictive means test, the Court sustained two free exercise challenges to statutory schemes that denied unemployment benefits to individuals.[99] In *Thomas v. Review Board,* the Supreme Court held that the denial of unemployment benefits to a Jehovah's Witness applicant whose religion forbade him to fabricate weapons violated the claimant's right to free exercise of his religion.[100] In *Hobbie v. Unemployment Appeals Comm'n.,* the Court reversed a denial of unemployment benefits where a worker, who was a recent convert to the Seventh-Day Adventist religion, advised her employer she needed to begin observing her Sabbath by not working on that day.[101] In denying her benefits, the Unemployment Commission classified her refusal to work on Saturday as "misconduct" under the statute.[102] The Court held that this refusal of benefits violated the Free Exercise clause and noted that extension of benefits did not violate the Establishment clause because it reflected neutrality on religious differences.[103]

In *Lyng v. Northwest Indian Cemetery Protection Assn.* the Court refused to prohibit the federal government from harvesting timber and constructing a road through a portion of national land traditionally used for religious purposes by Native American tribes.[104] Characterizing the claimant's position as one creating a "servitude" on land owned by the government, the Court held that the government's use of its own land for harvesting timber may not be circumscribed by the needs for the free exercise of a Native American religion that cherishes the natural environment for some of its practices.[105] The Court explained:

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[95] Id. at 437.
[96] Id. at 461-2.
[97] Id. at 449.
[98] Id. at 452.
[99] *See Thomas v. Review Board, Indiana Employment Security Div*., 450 U.S. 707 (1981); *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 144 (1987).
[100] *Thomas v. Review Board, Indiana Employment Security Div*., 450 U.S. 707 (1981).
[101] *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 144 (1987).
[102] Id.
[103] Id.
[104] *Lyng v. Northwest Indian Cemetery Protection Assn*., 485 U.S. 439 (1988).
[105] Id.

> "Incidental effects of government programs, which may interfere with the practice of certain religions, but which have no tendency to coerce individuals into acting contrary to their religious beliefs, do not require the government to bring forward a compelling justification for its otherwise lawful actions."[106]

In *Cleburne Living Center v. City of Cleburne*, [107] the Court explained that applying a rational basis test (because the interests at stake were not properly characterized as fundamental constitutional rights) to a zoning classification that treated group homes for the retarded differently than other homes for nonretarded people was irrational and failed the rational basis test. *Cleburne* is important for its holding that government must demonstrate that the prohibited or restricted use in the zoning district has some facially threatening impacts not present from the uses permitted in the zone. Importantly to the constitutional analysis, the case holds that speculation is not the equivalent of substantial evidence. [108]

*Cam v. Marion County*, while a district court case, is particularly interesting in the land use context. [109] This case acknowledges the applicability of the compelling interest test, but the court explained that Oregon's "high value farm land" zoning rules prohibiting new churches, failed to pass even the rational basis test in the First Amendment land use context. [110] The court found an Oregon land use program, as applied to a particular church, violated the First Amendment under even the rational basis test. First, the court said that the state tolerated the same structure with the same impacts when it was a barn as when it was a church. As a barn, square dancing and social gatherings were allowed. But as soon as the county "discovered" people praying in the barn, the adherents were subject to code compliance action for violating zoning laws that did not allow churches. Second, the instigator of the code compliance case was a rival church. The rival church while virtually "across the street" and on an identical type of land, was allowed by zoning authorities. The court stated it was improper for the county to lend its power to one sect of religion over another and that was while unintended, what, in effect, the county had done. [111]

## VI. The Religious Freedom Restoration Act

In 1993 Congress adopted the Religious Freedom Restoration Act (RFRA) in response to the Supreme Court's *Smith* decision. RFRA was adopted for the express purposes of "restor[ing] the compelling interest test as set forth in *Sherbert v. Verner* and *Wisconsin v Yoder* and to guarantee its application in all cases where free exercise of religion is substantially burdened; and to provide a claim or defense to persons whose religious exercise is substantially burdened by government." [112]

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[106] Id. at 440.
[107] *Cleburne Living Center v. City of Cleburne*, 473 U.S. 432 (1985).
[108] *Id*.
[109] See *Cam v. Marion County*, 987 F. Supp 854 (1997).
[110] *Id*.
[111] *Id*.
[112] 42 U.S.C. 2000bb (citations omitted).

RFRA's reach applied to any state or local activity that substantially burdened religion and required that any such substantial burden be justified by a compelling governmental interest implemented by the least restrictive means available. Unlike RLUIPA, RFRA was not limited to land use regulations or institutionalized persons.

However, RFRA's provisions applicable to state and local government, were overturned just four years after its enactment in *City of Boerne v. Flores*. [113] In *Boerne*, a Catholic Church sought to enlarge a church to add capacity for the growing membership.[114] The city denied the church's request for a permit to enlarge the facility asserting that its historic designation prevented the proposal because the proposal would alter the historic structure.[115] The church challenged the city's denial under RFRA.[116] The Courts held RFRA unconstitutional based on a separation of powers analysis under Section 5 of the Fourteenth amendment.[117] The Court explained that for Congress' 14th Amendment's Article 5 powers to be exercised there must be evidence of abuses of First Amendment rights and the RFRA record lacked such evidence. The Court elaborated that Congress had a great deal of latitude to provide a "proportionate and congruent" response to a national constitutional problem, but it had to establish evidence of the problem. The Court explained that Congress had not established there was a problem to justify the RFRA "solution." However, Congress will receive great deference on its factual findings. On this, the *Boerne* Court explained:

> "When Congress acts within its sphere of power and responsibilities, it has not just the right but the duty to make its own informed judgment on the meaning and force of the Constitution. This has been clear from the early days of the Republic. In 1789, when a Member of the House of Representatives objected to a debate on the constitutionality of legislation based on the theory that "it would be officious" to consider the constitutionality of a measure that did not affect the House, James Madison explained that 'it is incontrovertibly of as much importance to this branch of the Government as to any other, that the constitution should be preserved entire. It is our duty.' Were it otherwise, we would not afford Congress the presumption of validity its enactments now enjoy."[118]

*Boerne* only overturned RFRA as applied to nonfederal government actors. However, RFRA continues to be a valid exercise of Congressional authority over *federal* governmental actors.[119] Therefore, all federal programs are subject to RFRA, not RLUIPA.

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[113] *City of Boerne v. Flores,* 521 U.S. 507 (1997).
[114] Id. at 507.
[115] Id.
[116] Id.
[117] Id.
[118] Id. at 535. (citations omitted).
[119] *Burwell v. Hobby Lobby Stores, Inc*., 134 S.Ct. 2751, 2778 (2014); *Gonzales v. O. Centro Espirita Beneficente Uniao do Vegetal,* 546 U.S. 418 (2006); s*ee also Saenz v. Department of Interior* 297 F3d 1116, 1125 (10th Cir., 2001); *Kikumura v. Hurley*, 242 F3d 950, 958-59 (10th Cir 2001); *Sutton v.*

## VII RLUIPA's Prohibitions

### 1. Substantial Burden

RLUIPA restricts the imposition of governmentally imposed substantial burdens on the free exercise of religion in the context of land use regulations and land marking laws: "[n]o government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including an assembly or institution."[120] However, if the government establishes that the substantial burden is supported by a compelling governmental interest, which is furthered through the least restrictive means available, the substantial burden does not violate RLUIPA.[121]

RLUIPA's substantial burden restriction applies where the substantial burden is imposed: (1) in connection with a federally-funded activity; (2) where the burden affects interstate commerce or among Indian tribes; or (3) for the implementation or imposition of a land use regulation, where the burden is imposed in the context of a scheme whereby the state makes "individualized assessments" regarding the property involved.[122]

RLUIPA does not define the term "substantial burden."[123] Courts have resorted to previous Supreme Court definitions of the term[124] as well as a dictionary definition.[125] However, the United States Supreme Court has never had occasion to apply the substantial burden test in the context of a land use regulation. Thus, Supreme Court precedents are not particularly satisfying and if the RLUIPA analysis were strictly limited to them, there would likely never be an occasion where a land use or land marking law "substantially burdened" religious exercise. In this regard, the 9th Circuit, in *Navajo Nation v. U.S Forest Serv.*,[126] recited Supreme Court's substantial burden precedents, handed down in other contexts, to say "a 'substantial burden' is imposed *only* when

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*Providence St. Joseph Med. Ctr*., 192 F3d 836 (9th Cir., 1999), *Christians v. Crystal Evangelical Free Church*, 141 F.3d 854 (8th Cir., 1998), *cert den.* 525 US 811 (1998).

[120] 42 U.S.C.A. § 2000cc Sec. 2(a)(1).

[121] 42 U.S.C.A. § 2000cc-Sec. 2(a)(1)(A) and (B).

[122] 42 U.S.C.A. § 2000cc Sec. 2(a)(2).

[123] This is intentional. The Congressional Joint Statement of RLUIPA's co-sponsors explains that RLUIPA's failure to define the term "substantial burden" is designed to leave it with its First Amendment meaning:

> "The Act does not include a definition of the term 'substantial burden' because it is not the intent of this Act to create a new standard for the definition of 'substantial burden' on religious exercise. Instead, that term as used in the Act should be interpreted by reference to Supreme Court jurisprudence. Nothing in this Act, including the requirement in Section 5(g) that its terms be broadly construed, is intended to change that principle. The term 'substantial burden' as used in this Act is not intended to be given any broader interpretation than the Supreme Court's articulation of the concept of substantial burden or religious exercise." Joint Statement 146 Cong. Rec. 7776-01.

[124] *Westchester Day School v. Village of Mamaroneck,* 504 F.3d 338 (2nd Cir., 2007)*; Midrash Sephardi, Inc. v. Town of Surfside,* 366 F.3d 1214, 1227 (11th Cir. 2004), *cert den* 125 S Ct 1295 (2005).

[125] *San Jose Christian College v. City of Morgan Hill,* 360 F.3d 1024, 1034 (9th Cir. 2004).

[126] 535 F.3d 1058, 1069–70 (9th Cir 2008) (en banc).

individuals are forced to choose between following the tenets of their religion and receiving a governmental benefit (*Sherbert*) or coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions (*Yoder*). Any burden imposed on the exercise of religion short of that described by *Sherbert a*nd *Yoder* is not a 'substantial burden' within the meaning of RFRA.. . . .")

The Supreme Court has applied the "substantial burden" test post-RLUIPA, including the "compelling state interest" defense, in two RFRA cases that are instructive, although again in such a different context as not to be conclusive.[127] Concerning the substantial burden test, in *Burwell v. Hobby Lobby Stores*, *Inc*., the Supreme Court stated that the federal Affordable Care Act's requirement to provide insurance coverage for contraception "substantially burdened" the plaintiff's religious free exercise because (1) plaintiffs have a sincere religious belief that life begins at conception, (2) the required contraception covers methods of birth control that may result in the destruction of an embryo, and (3) by requiring plaintiff's to arrange for such insurance coverage, they are mandated to engage in conduct that seriously violates their religious beliefs. In *O.Centro*, the Supreme Court determined that a federal refusal to exempt "a Christian Spiritist sect based in Brazil" from restrictions under the Controlled Substances Act from making a hoasca tea as a part of the religious use of that controlled substances, substantially burdened a sincere religious exercise. The court further explained that since the Controlled Substances Act exempted from its provisions Native Americans ingesting Peyote, that there could be no compelling state interest supporting the restriction on the Christian Spiritists.

The federal circuits have had significant experience applying RLUIPA, and its "substantial burden' test, in the land use context. It is fair to say that the circuits differently characterize the actions that can constitute a substantial burden on religious exercise under RLUIPA.[128] Even within particular circuits, it is impossible to draw any particular bright line to identify those actions that will constitute a substantial burden and those that do not.

A substantial burden is unlikely to be found where the burden is self-imposed. Thus, where a religious organization continues to construct a facility even though aware the construction violates a private covenant, it is not a substantial burden when a court orders the building to be razed.[129]

In *Bethel World Outreach Ministries v. Mongomery County Council*,[130], the Fourth Circuit court succinctly explained the substantial burden tests that had

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[127] *Burwell v. Hobby Lobby Stores, Inc*., 134 S.Ct. 2751, 2778 (2014); *Gonzales v. O. Centro Espirita Beneficente Uniao do Vegetal,* 546 U.S. 418 (2006).

[128] *Compare Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752 (7th Cir. 2003) (substantial burden is where alleged conduct has rendered the religious institutions religious practice "effectively impracticable") *with Westchester Day School v. Village of Mamaroneck*, 504 F.3d 338 (2d Cir. 2007).

[129] *Friends of Lubavitch v. Baltimore County, Maryland*, 421 F.Supp.3d 146 (D. Md. 2019).

[130] 706 F3d 548, 557 (2013).

evolved in the various circuits in the land use context. The *Bethel World* court explained that a RLUIPA plaintiff:

> "can succeed on a substantial burden claim by establishing that a government regulation puts substantial pressure on it to modify its behavior. *See Westchester Day Sch.*, 504 F.3d at 349 ('[In the land use context,] courts appropriately speak of government action that directly *coerces* the religious institution to change its behavior....' (emphasis in original)); *Guru Nanak Sikh Soc'y of Yuba City v. Cnty. of Sutter*, 456 F.3d 978, 988–89 (9th Cir. 2006) ("[A] substantial burden on religious exercise must impose a significantly great restriction or onus upon such exercise." (internal quotation marks omitted)); *Midrash Sephardi, Inc. v. Town of Surfside,* 366 F.3d 1214, 1227 (11th Cir. 2004) ('[A] substantial burden is akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly.' (internal quotation marks omitted)); *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 761 (7th Cir. 2003) ('[A] land-use regulation that imposes a substantial burden on religious exercise is one that necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise—including the use of real property for the purpose thereof within the regulated jurisdiction generally—effectively impracticable.'). We believe that this standard best accords with RLUIPA.'

The court in *Bethel World*, acknowledged that RLUIPA precedents developed on the "Institutionalized" persons side of the law were unhelpful because the contexts were significantly different. The *Bethel World* court decided a land use regulation substantially burdens religious free exercise where it causes the religious claimant to "change its behavior"[131] and that "when a religious organization buys property reasonably expecting to build a church, governmental action impeding the building of that church may impose a substantial burden." It was relevant that there was significant evidence that the plaintiff's existing religious facilities were inadequate to serve the plaintiff's religious needs. The evidence was also that the church purchased the subject property in a reasonable and good faith belief that it could construct a church on the property at issue. It was also relevant that the defendant county changed its ordinance after the church bought the property to wholly prohibit any church structure on the property at all, as opposed to limiting the type of scope of allowed structures. The court finally explained a RLUIPA claimant need not show that the disputed land use regulation "targets" particular religious beliefs or practices to impose a substantial burden.

In other cases, as in *Bethel World*, the fact that the religious exercise is wholly denied tends to support substantial burden claim: "[t]he burden on the Church's use of land in this case is not only substantial but entire. By denying the conditional use permit, the City has effectively barred any use by the Church of the real property in question."[132] In

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[131] *Id.*

[132] *Elsinore Christian Ctr. v. City of Lake Elsinore,* 291 F.Supp.2d 1083, 1090 (C.D.Cal. 2003); *rev'd on other grounds*, *cert. dismissed* 128 S.Ct. 6 (2007).

*Elsinore Christian Ctr. v. City of Lake Elsinore,*[133] the district court determined that the city's professed interest in curbing urban blight did not constitute a compelling governmental interest and that denial of the application was not the least restrictive means to further the governmental interest.[134]

The Eleventh Circuit perhaps begs the question by observing that "reasonable 'run of the mill zoning considerations do not constitute substantial burdens."[135] The Second Circuit has explained that to show a substantial burden under RLUIPA, "the burden need not be found insuperable to be substantial."[136]

The Seventh Circuit applies a narrow interpretation and considers whether the "alleged offensive conduct has rendered the religious institutions religious practice "effectively impracticable."[137] Applying this standard, the 7th Circuit in *Eagle Cove Camp & Conference Ctrv. Town of Woodboro,* held that the denial of Eagle Cove's application to operate a year-round Bible camp on land that the organization had purchased did not substantially burden its religious exercise.[138] The court held that time and money spent on rezoning applications did not constitute *prima facie* evidence of a substantial burden. In making its determination, the court considered that Eagle Cove could operate elsewhere.[139] The court stated that the burden must, "be truly substantial" and "to hold otherwise would permit religious organizations to supplant even facially-neutral zoning restrictions under the auspices of religious freedom."[140] Similarly, in *Petra Presbyterian Church v. Village of Northbrook*,[141] the 7th Circuit explained: "When there is plenty of land on which religious organizations can build churches ... in a community, the fact that they are not permitted to build everywhere does not create a substantial burden."[142] The Seventh Circuit standard if applied broadly could merge RLUIPA's "substantial burden" prong with its "total exclusion" prong.[143] However, the 7th Cir does not apparently require a showing of total exclusion to meet the "effectively impractical" standard. In this regard, in *Saints Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin,*[144] the 7th Circuit explained that to prove a substantial burden under RLUIPA, a religious group need not "show that there was no other parcel of land on which it could

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[133] The district court, however, decided that RLUIPA was unconstitutional. The 9th circuit reversed that determination but affirmed the finding of a RLUIPA violation. *Elsinore Christian Ctr. v. City of Lake Elsinore,* 291 F.Supp.2d 1083, 1090 (C.D.Cal.2003); *rev'd on other grounds*197 Fed. Appx (2006), *cert. dismissed* 128 S.Ct. 6 (2007).

[134] *Elsinore Christian Ctr. v. City of Lake Elsinore,* 291 F.Supp.2d 1083, 1090 (C.D.Cal.2003); *rev'd on other grounds* 197 Fed. Appx (2006), *cert. dismissed* 128 S.Ct. 6 (2007).

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

[136] *Westchester Day Sch. v. Vill. of Mamaroneck*, 514 F.3d 338 (2d. Cir. 2007).

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

[138] *Eagle Cove Camp & Conference Ctr., Inc. v. Town of Woodboro, Wis*., 734 F.3d 673 (7th Cir. 2013) *cert. denied*, 2014 WL 1757838 (U.S. May 5, 2014)

[139] *Id*.

[140] *Id. citing Petra Presbyterian Church v. Vill. of Northbrook*, 489 F.3d 846, 851 (7th Cir. 2007).

[141] 489 F.3d 846, 851 (7th Cir.2007).

[142] *Petra,* 489 F3d at 851.

[143] *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004) ("we decline to adopt the Seventh Circuit's definition-which would render [42 USC 2000cc Sec.2(b)(3)(A)'s] total exclusion prohibition meaningless").

[144] 396 F.3d 895, 899-900 (7th Cir. 2005).

build its church". In finding a substantial burden, the *Saints Constantine* court explained that "considerable "delay, uncertainty and expense" constituted a substantial burden on religious exercise.

Similar to the Eleventh Circuit, the Second Circuit has decided a "substantial burden" exists where a village denied a permit on arbitrary grounds, which "coerced" the religious institution to modify its religious practice.[145]

According to the Ninth Circuit, a "substantial burden" is one that is "'oppressive' to a 'significantly great' extent."[146] Thus, a land use restriction that prohibited a rancher from building a chapel on his ranch, forcing him to drive three hours every day in order to worship in accordance with his religious beliefs: "is more than mere inconvenience and is an allegation of a significantly great restriction upon [plaintiff's] religious exercise." The court decided these facts were adequate to allow the case to proceed to trial on the issue of fact of whether the burden is in fact a "substantial" one.[147]

Financial considerations standing alone have rarely resulted in a finding of a substantial burden in the absence of being coupled with unreasonable delay. Thus, in *Vineyard Christian Fellowship of Evanston v. City of Evanston*, [148] the court determined that a church's First Amendment rights were not substantially burdened by a zoning ordinance prohibiting religious institutions from conducting worship services within the district. [149] The court explained where a disputed regulation "merely" operates so as to make religious exercise more expensive [it] does not constitute a substantial burden.[150] The court noted that although the Church had "undoubtedly suffered serious hardships, first in its attempt to find a suitable property, and, once it found one…in attempting to win approval for the intended uses," that nevertheless, the burden imposed by the land use regulation at issue was not substantial.[151]

On the other hand, the cost of being forced to use alternate locations for religious exercise can be relevant to the substantial burden determination.[152] In a case demonstrating that the substantial burden test employed by the court directly determines the outcome, a state appellate court decided that the denial of a religious daycare facility's application to expand to add a religious primary school can impose a substantial burden on religious exercise and remanded for trial. [153] Persuasive evidence to the state appellate court was

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[145] *Westchester Day Sch. v. Vill. Of Mamaroneck*, 504 F. 3d 338 (2d. Cir. 2007).
[146] *San Jose Christian College v. City of Morgan Hill,* 360 F.3d 1024, 1034 (9th Cir. 2004).
[147] *Anselmo v. County of Shasta,* 873 F. Supp 2d 1247, 1258 (2012).
[148] *Vineyard Christian Fellowship of Evanston, Inc., v. City of Evanston,* 250 F. Supp 2d 961, 991-92 (N.D. Ill., 2003).
[149] *Id.,* 250 F. Supp. 2d 961, 985.
[150] *Id,* 250 F. Supp 2d 961, 991-92.
[151] *Id* 250 F. Supp 2d 961, 991-92.
[152] *Shepherd Montessori Center Milan v. Ann Arbor Charter Tp.,* 275 Mich. App. 597, 746 N.W.2d 105 (Mich. App., 2007), v*acated* 480 Mich. 1143 (2008); *but see Vineyard Christian Fellowship v. City of Evanston,* 250 F.Supp.2d 961, 991 (N.D. Ill.2003) (regulation that "merely operates so as to make religious exercise more expensive does not constitute a substantial burden").
[153] *Shepherd Montessori Ctr. Milan v. Ann Arbor Charter Twp.,* 275 Mich. App. 597, 739 N.W.2d 664 (2007) *vacated* 480 Mich. 1143, 746 N.W.2d 105 (2008); *accord Westchester Day School v. Village of*

that it would be infeasible to establish the school in a location apart from its day care facility "because of the burdens of having duplicate administration" and whether a separate location apart from the day care was far from where parents worked. [154] It was also not clear the religious school could be successful at another location.[155] The Michigan Supreme Court, however, vacated the Michigan Court of Appeal's decision and remanded it to apply *different tests* to decide whether a substantial burden had been imposed, ordering the lower appellate court to:

> "reconsider whether the denial of the zoning variance imposed a 'substantial burden' on the plaintiff's religious exercise, *i.e*., whether the denial of the variance 'coerce[s] individuals into acting contrary to their religious beliefs.' 'A mere inconvenience or irritation' or 'something that simply makes it more difficult in some respect to practice one's religion does not constitute a 'substantial burden.'"[156] (Citations omitted.)

The Michigan Supreme Court's remand was based on its earlier decision in *Greater Bible Way Temple of Jackson v. City of Jackson*[157] which case had applied RLUIPA's substantial burden prong using the above quoted tests. In *Greater Bible Way*, the plaintiff church wished to build an apartment complex across from its church for its members. In order to do so, the church needed to rezone the property across the street form single family residential to multifamily residential. The city refused to approve the requested rezone and the church sued under RLUIPA. The Michigan Supreme Court decided that under the above articulated tests, the city had not "substantially burdened" plaintiff's religious exercise. In *Greater Bible Way*, the Michigan Supreme Court explained:

> "The city is not forbidding plaintiff from building an apartment complex; it is simply regulating where that apartment complex can be built. If plaintiff wants to build an apartment complex, it can do so; it just has to build it on property that is zoned for apartment complexes. If plaintiff wants to use the property for housing, then it can build single-family residences on the property. In other words, in the realm of building apartments, plaintiff has to follow the law like everyone else.
>
> "While [the zoning ordinance] may contribute to the ordinary difficulties associated with location (by any person or entity, religious or nonreligious) in a large city, it does not prohibit plaintiff from providing housing. Whatever specific difficulties [plaintiff church] claims to have encountered, they are the same ones that face all [land users]. The city has not done

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*Mamaroneck* 504 F. 3d 338 (C.A.2 N.Y., 2007)*; but see Grace United Methodist Church v. City of Cheyenne,* 451 F.3d 643, 662 (C.A.10, 2006) (denial of religiously run daycare not a violation of RLUIPA, holding the fact that local land use restrictions make it 'more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs' do not constitute substantial burdens on the exercise of religion.)

[154] Id.

[155] Id.

[156] 480 Mich. 1143, 746 N.W.2d 105 (2008)

[157] 478 Mich 373, 733 N.W.2d 734 (Mich 2007).

> anything to coerce plaintiff into acting contrary to its religious beliefs, and, thus, it has not substantially burdened plaintiff's exercise of religion."[158]

On remand, the lower appellate court changed its decision -- from a finding of a substantial burden to a finding of no substantial burden -- based on the stricter test the Supreme Court required. The appellate court explained the Michigan Supreme Court's interpretation of RLUIPA compelled a finding that no substantial burden had been imposed by the denial of the day care center. In its remand decision, the Michigan Court of Appeals stated:

> "plaintiff must show that the denial of the variance request "coerces" individuals into acting contrary to their religious beliefs. Plaintiff did not show that the denial of the variance forces plaintiff to do something that its religion prohibits, or refrain from doing something that its religion requires. Plaintiff did not allege that the property at issue has religious significance or that plaintiff's faith requires a school at that particular site. Rather, the evidence suggests that, notwithstanding substantial evidence of prohibitive cost and a lack of available, suitable space, plaintiff *could* operate its school at another location in the surrounding area, and plaintiff conducted a real estate search toward that end. In other words, plaintiff may operate a faith-based school, but it must do so on property that is zoned for schools. Under the Supreme Court's reasoning, the denial of the variance does not constitute a substantial burden on plaintiff's religious exercise and, therefore, the trial court correctly granted summary disposition to defendants on the RLUIPA claims.[159]

An interesting note to how this case concluded is that the lower appellate court did find that because the same property had received approval for a secular 100 child daycare and the court found the Township had conceded that it was "similarly situated," that the Township's denial of the plaintiff's daycare in the same physical space denied the church, violated Constitutional rights to equal protection. The case was then again appealed to the Michigan Supreme Court.[160] The Michigan Supreme Court again reversed. This time the Supreme Court decided the lower appellate court erred in finding an equal protection decision and again reversed. The Supreme Court stated that the lower appellate court had taken the Township's concession that the secular and religious uses were similarly situated out of context: "plaintiff argues that this is a concession that the entities are similarly situated, defendants' statement only sets forth that the entities are similar to the degree that they both operate daycare facilities. However, the relevant inquiry in this instance focuses on Shepherd Montessori's current variance request as compared to Rainbow Rascals's previously granted requests."[161] The Michigan Supreme Court

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[158] *Greater Bible Way, supra,* 478 Mich. at 401-402, 733 N.W.2d 734 (quotation marks and citations omitted).
[159] *Shepherd Montessori Center Milan v. Ann Arbor Charter Tp*., 280 Mich App 449, 761 N.W.2d 230, 233 (2008), *rev'd on other gnds* 486 Mich 311, 783 N.W.2d 695 (2010) (Citations omitted.)
[160] *Shepherd Montessori Center Milan v. Ann Arbor Tp.,* 486 Mich 311, 783 N.W.2d 695 (2010), *cert den*. 131 S. Ct 1594 (2011).
[161] *Id* 783 N.W.2d at 699.

decided that the two uses were not similarly situated – Rainbow Rascals received approval for a daycare and Shepherd wanted to expand its day care to include a primary K-3 school – and decided there was no equal protection violation.

However, where a religious school that has no ready alternatives, or where the alternatives require substantial 'delay, uncertainty, and expense,' a complete denial of the school's application might be indicative of a substantial burden."[162] On the other hand, where an existing facility is inadequate for religious worship, but the local government denies permission to relocate to a facility in a residential zone where religious uses are only conditionally allowed, denial of land use permission has been held to not offend RLUIPA.[163]

Where a congregation requires more space for its congregation, it is generally a substantial burden to deny it that space.[164] However, one court has decided "RLUIPA only protects religious institutions that currently have inadequate facilities."[165]

It has generally been relevant to a finding of a RLUIPA violation that a religious claimant applies for approvals on various properties and is denied. In *Guru Nanak Sikh Society of Yuba City v. County of Sutter*, Sikh religious organization challenged two different county denials of a conditional use permit (CUP) for construction of Sikh temple.[166] In the first denial, the county forbade construction of the temple in a general agricultural zone and the second county denial forbade construction of the temple in a residential zone. There was no county zone where the temple was a use permitted outright. The temple was a conditional use in both the agricultural and residential districts. The plaintiff sued the county and individual decision makers on a variety of bases including RLUIPA to compel approval of the proposed temple. The *Guru* court agreed that Yuba County had substantially burdened plaintiff's religious exercise.

A court has found that where property was donated to a religious organization for purposes of a religious retreat, refusal of the local government to authorize retreat use constituted a substantial burden.[167]

A local government's refusal to issue a conditional use permit for an alcohol and drug treatment center for men has been found not to impose a substantial burden on religious

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[162] *Westchester Day School v. Village of Mamaroneck* 504 F.3d 338 (C.A.2 N.Y., 2007) (citations omitted) *quoting Saints Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin,* 396 F.3d 895, 901 (7th Cir. 2005); *see Living Water Church of God v. Meridian Charter Twp.,* 384 F.Supp.2d 1123, 1134 (W.D. Mich., 2005) (substantial burden found where "petitioner was a small church with limited funds"); *but see Greater Bible Way Temple of Jackson v. City of Jackson,* 478 Mich. 373, 733 N.W.2d 734, 750 n 23 (2007) (rejecting this view).

[163] *Williams Island Synagogue, Inc. v. City of Aventura*, 358 F. Supp. 2d 1207 (S.D. Fla. 2005), *aff'd* 144 Fed App. 857 (11th Cir. 2005).

[164] *Mintz v. Roman Catholic Bishop of Springfield,* 424 F. Supp 2d 309, 322 (D. Mass. 2006).

[165] *Roman Catholic Archdiocese of Kansas City v. City of Mission Woods*, 337 F. Supp3d 1122 (2018).

[166] *Guru Nanak Sikh Society of Yuba City v. County of Sutter*, 326 F.Supp.2d 1128, *aff'd* 456 F3d 978 (9th Cir. 2006).

[167] *DiLaura v. Tp of Ann Arbor*, 112 Fed. Appx. 445 (C.A. 6 2004) (unpublished), *cert den*. 128 S.Ct. 651 (2007).

exercise of the organization running the program. [168] In that case, the court determined that the religious organization was free to relocate to another location in the county where the proposed facility could operate as of right.[169] The court also considered the fact that the religious organization could operate its ministry by other methods-such as a non-residential facility which would not run afoul of the requirements of the zoning ordinance.[170] The court stated that to prevail, the religious claimant would have to show that it could not operate its alcohol and drug treatment program anywhere else – adopting the 7th Circuit's "effectively impracticable" standard. The court viewed the land use permission denial as posing an inconvenience rather than a substantial burden on religious exercise.[171]

In a similar vein, denial of day care uses does not impose a substantial burden where the evidence established that the refusal to allow a church run daycare "only had a *de minimis* impact on the Church's opportunity to…teach religious classes."[172] This determination was based on the fact that the Sunday school, vacation Bible school, religious workshops, special holiday services and counseling all provided alternative means for religious instruction.[173] Because the Church failed to meet its burden of proving that it was substantially denied a reasonable opportunity to engage in activities that were fundamental to its religion, denial of permission to operate a daycare facility was not a substantial burden.[174] A denial of a request for an outdoor homeless camp was determined to be a substantial burden (under state constitutional protections for religion) where the record did demonstrated that the church was prevented from effectively ministering to the homeless on its property.[175] On the other hand, denial of hiking trails and a campground did not impose a substantial burden on religion because, "neither the Church nor its visitors [would] be required to forego or modify the exercise of their religion" as a consequence of these elements of a religious center being denied.[176]

Buddhist followers failed to show that they were denied a reasonable opportunity to engage in activities that were fundamental to their religion when they claimed that they could not "simply build a Buddhist temple anywhere" and that a "temple site had[d] to be conducive to creating a peaceful meditative environment." [177] The court determined that the followers would have had to claim that "locating [the] house of worship in a residential area [was] a basic tenet of [their] faith."[178]

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[168] *Men of Destiny Ministries, Inc. v. Osceola County* 2006 WL 3219321 (M.D. Fla. 2006) (unpublished).
[169] *Id*.
[170] *Id.*
[171] *Id.*
[172] *Ridley Park United Methodist Church v. Zoning Hearing Bd. Ridley Park Borough*, 920 A.2d 953, 960 (Pa. Cmwlth., 2007).
[173] *Id.*
[174] *Ridley Park United Methodist Church v. Zoning Hearing Bd. Ridley Park Borough*, 920 A.2d 953, 960 (Pa. Cmwlth., 2007).
[175] *City of Woodinville v. Northshore United Church of Christ*, 166 Wash.2d 633, 211 P3d 406 (2009).
[176] *City of Hope v. Sadsbury Township Zoning Hearing Board,* 890 A 2d 1137, 1149 (2006).
[177] *Cambodian Buddhist Society of CT., Inc. v. Newtown Planning and Zoning Com'n,* 2005 WL 3370834, slip op 12 (Conn. Super. 2005) (unpublished).
[178] Id.

A governmental refusal to allow adequate parking for a religious land use has been characterized as a substantial burden where a parking ordinance prohibited a Church from using the building for religious exercise.[179] Conversely, refusal to allow land use permission for adequate parking has also *not* been characterized as imposing a RLUIPA substantial burden where physical access was not completely precluded.[180] Additionally, a local requirement that a development of any kind not have more than fifteen percent pavement coverage was found to not amount to a substantial burden.[181]

An Oregon court determined that the requirement to submit a second land use application did not impose a substantial burden where there was no showing of animus toward the religious exercise.[182]

In sum, the substantial burden precedents are all over the map. The best that can be said is that a religious claimant should study its particular circuit and generally can improve its chance at a RLUIPA substantial burden claim by:

1. Showing the property is particularly important to the particular religious exercise;
2. Relatedly showing refusal to allow the religious exercise on the particular property adversely affects the religious mission or purpose.
3. That the religious plaintiff has applied in other locations and been turned down.
4. That the religious plaintiff has responded to local government concerns by adjusting the application.

### 1.B Compelling State Interest

Concerning the compelling state interest defense available to governmental entities when the religious plaintiff shows a substantial burden, there are some relatively recent Supreme Court precedents to consider. In *O. Centro*, the Supreme Court explained that:

> "[t]he Government can demonstrate a compelling interest in uniform application of a particular program by offering evidence that granting the requested religious accommodations would seriously compromise its ability to administer the program."[183]

The Court further explained:

> "RFRA requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the

[179] *Lighthouse Community Church of God v. City of Southfield*, 2007 WL 30280 (E.D.Mich., 2007).
[180] *Castle Hills First Baptist Church v. City of Castle Hills*, 2004 WL 546792 (W.D. Tex. Mar. 17, 2004) (unreported).
[181] *St. Gabriel's Syrian Orthodox Church v. Planning Bd. of the Borough of Haworth*, 2006 WL 3500965, (N.J. Super. A.D., 2006).
[182] *Corporation of the Presiding Bishop v. City of West Linn,* 111 P3d 1123 (May 2005).
[183] *O. Centro*, 546 US 434.

> person' - the particular claimant whose sincere exercise of religion is being substantially burdened."[184]

RLUIPA is similarly worded except it requires demonstration that the test is met for "the person, assembly, or institution."[185]

Moreover, in *Burwell*, the Supreme Court articulated the compelling state interest test as follows:

> "It "requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened." *O Centro,* 546 U.S., at 430–431, 126 S.Ct. 1211 (quoting § 2000bb–1(b)). This requires us to "loo[k] beyond broadly formulated interests" and to "scrutiniz[e] the asserted harm of granting specific exemptions to particular religious claimants"—in other words, to look to the marginal interest in enforcing the contraceptive mandate in these cases. *O Centro, supra,* at 431, 126 S.Ct. 1211."

The *Burwell* Court "presumed" but did not decide, there was a compelling state interest in the disputed provisions.

In *O Centro*, the Supreme Court explained the compelling state interest test:

> "RFRA requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law "to the person"—the particular claimant whose sincere exercise of religion is being substantially burdened. 42 U.S.C. § 2000bb–1(b). RFRA expressly adopted the compelling interest test "as set forth in *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963) and Wisconsin v. Yoder, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972)." § 2000bb(b)(1). In each of those cases, this Court looked beyond broadly formulated interests justifying the general applicability of government mandates and scrutinized the asserted harm of granting specific exemptions to particular religious claimants. In *Yoder,* for example, we permitted an exemption for Amish children from a compulsory school attendance law. We recognized that the State had a 'paramount' interest in education, but held that 'despite its admitted validity in the generality of cases, we must searchingly examine the interests that the State seeks to promote ... and the impediment to those objectives that would flow from recognizing *the claimed Amish exemption*.' 406 U.S., at 213, 221, 92 S.Ct. 1526 (emphasis added). The Court explained that the State needed "to show with more particularity how its admittedly strong interest ... would be adversely affected by granting an exemption *to the Amish*."[186]

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[184] *O. Centro* , 546 US 430-431
[185] 42 USC 2000cc Sec 2(a)(1).
[186] 546 US 430-431.

The Supreme Court specifically rejected that a general or "categorical" justification was a "compelling state interest." Further, the court explained:

> "The Government's argument echoes the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make one for everybody, so no exceptions. But RFRA operates by mandating consideration, under the compelling interest test, of exceptions to "rule[s] of general applicability."[187]

The Federal Circuits have struggled with the compelling state interest defense. The federal circuits have acknowledged that a compelling interest is one of "the highest order."[188] A court has stated that a general interest in land use controls, including in "ensuring residents' safety through traffic regulations" rather than a specific interest, is unlikely to constitute a "compelling governmental interest."[189] It has been determined that a governmental interest in protecting the "health, safety and general welfare" by "reducing traffic and minimizing activity in that general area" is not compelling, where the applicable land use rules "would permit the use of the Church site for a municipal use, private nonprofit library or museum, post office or medical professional offices".[190] One court has held that traffic safety is not a compelling governmental interest that can justify a substantial burden on religious exercise.[191]

It has also been determined that a local government does not state a compelling interest in denying an application for a church expansion and remodel where the governmental interests can be served with conditions of approval.[192] A court has determined that concerns about "blight" and "revenue generation" are not compelling interests under RLUIPA.[193]

However, another court has found that local government has a compelling governmental interest in enforcing general land use regulations.[194] This seems contrary to the Supreme Court precedent in *O. Centro that requires not a categorical but an individualized analysis*. Similarly, it is likely that general claims about traffic or other land use related problems would not be compelling governmental interests in the absence of some

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[187] 546 U.S. 436.
[188] *Westchester Day School v. Village of Mamaroneck* 504 F.3d 338 (2nd Cir., 2007)*, citing Church of the Lukumi Bablu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 546 (1993).
[189] *Westchester Day School v. Village of Mamaroneck* 504 F.3d 338 (2nd Cir., 2007)*; see also Elsinore Christian Center v. City of Lake Elsinore*, 291 F. Supp. 2d 1083, 1090 (C.D. Cal. Aug. 21, 2003), *rev'd on other grounds* 197 Fed. Appx. 718 (9th Cir. 2006) (unpublished), *cert dism*. 551 U.S. 1176 (2007).
[190] *Mintz v. Roman Catholic Bishop of Springfield***,** 424 F.Supp.2d 309 (2006); *but see Roman Catholic Archdiocese of Kansas City v. City of Mission Woods*, 337 F. Supp 3d 1122 (2018)..
[191] *Rocky Mountain Christian Church v. Bd. of Cty. Comm'rs of Boulder Cty.*, 612 F.Supp.2d 1163, 1175 (D. Colo. 2009), *aff'd* 613 F3d 1229 (10th Cir 2010); *cert den*. 562 US 1136 (2011).
[192] *Castle Hills First Baptist Church v. City of Castle Hills,* 2004 WL 546792, 16 (W.D.Tex. 2004) (unreported).
[193] *Cottonwood Christian Center v. Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203, 1227-28 (C.D. Cal. 2002).
[194] *Murphy v. Zoning Comm'n of the Town of New Milford,* 148 F.Supp.2d 173, 190 (D.Conn.2001).

particularized problem related to the RLUIPA plaintiff.[195] Given the traditional application of the compelling governmental interest test has determined that a state requirement for compulsory secondary education was too heavy a burden on the Amish faith and the state's interest in compulsory secondary education was not determined to suffice, general land use concerns are unlikely to be more weighty than the governments interest in education children.[196]. Therefore, there is room for skepticism about how useful the compelling governmental interest is as a defense to RLUIPA substantial burden claims.

### 2. Equal Terms

Under RLUIPA, government is forbidden from imposing or implementing "a land use regulation that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution."[197] This is the so-called "equal terms" provision. Moreover, "[t]he meaning of 'religious assembly or institution' in the Religious Land Use and Institutionalized Persons Act is a question of federal rather than state law".[198]

Under RLUIPA's equal terms provisions "the question is whether the land use regulation or its enforcement treats religious assemblies and institutions on less than equal terms with nonreligious assemblies and institutions."[199] One court stated, in finding a violation of RLUIPA's equal terms clause, that: "In other words, a group meeting with the same frequency as *[the religious one]* would not violate the Code, *so long as religion is not discussed*. This is the heart of our discomfort with the enforcement of this provision."[200] (Emphasis supplied.)

A federal district court granted summary judgment in favor of a religious claimant because the local zoning ordinance did not permit buildings used for religious services in the zoning district, even though the district permitted theaters, schools and various kinds of organizations in those areas.[201] Another district court held that RLUIPA plaintiff pleaded an equal terms because a county's resource conservation zone purpose to protect water supplies, allowed public schools as of right, but required churches to obtain special

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[195] *Westchester Day School v. Village of Mamaroneck, supra,* 386 F.3d at 191. "While it is true that there are no authoritative cases holding that a traffic concern satisfies the 'compelling interest' test, nor are there authoritative cases holding that a traffic concern cannot satisfy the test." 386 F.3d at 191. *See also Cambodian Buddhist Society of CT., Inc. v. Newtown Planning and Zoning Com'n*, 2005 WL 3370834, *15 (Conn. Super. 2005) (unpublished) (declining to express an opinion on whether traffic issues could rise to a compelling governmental interest).

[196] *Wisconsin v. Yoder*, 406 U.S. 205, 220 (1972).

[197] 42 U.S.C.A. § 2000cc(2)(b)(1).

[198] *Konikov v. Orange County,* 410 F.3d 1317, 1324-25 (11th Cir.2005) (per curium); *Midrash Sephardi, Inc. v. Town of Surfside,* 366 F.3d 1214, 1229-31 (11th Cir.2004)." *Digrugilliers v. Consolidated City of Indianapolis*, 506 F3d 612 (2nd Cir., 2007).

[199] *Konikov v. Orange County, Fla.,* 410 F.3d 1317, 1324 (11th Cir. 2005).

[200] *Konikov v. Orange County*, 410 F.3d 1317, 1329 (11th Cir. 2005).

[201] *New Life Ministries v. Charter Tp of Mt. Morris*, (unreported, 2006 WL 2583254, E.D. Mich., September 07, 2006).

exception, when there was no showing that churches had more deleterious effect on water supplies than public schools.[202]

The Eleventh Circuit has decided that there are three different types of "equal terms" violations: (1) where a local ordinance facially treats religious and nonreligious assemblies or institutions on different terms; (2) where a facially neutral ordinance is "gerrymandered" to place a burden solely on religious, as opposed to nonreligious, assemblies or institutions; or (3) where a neutral ordinance is selectively enforced against religious, as opposed to nonreligious assemblies or institutions.[203] The Seventh Circuit has generally accepted that this describes the potential types of equal terms violations, although as we will see below, applies a different test to the first type. [204]

The primary legal issue under the equal terms provision is the "comparator" to which the religious land use must be treated on equal terms to "nonreligious assembly or institution" uses. Some courts have taken a fairly straightforward approach to the "comparator" issue. Thus, as noted above, the Eleventh Circuit has found equal terms violations where a local ordinance treats religious and nonreligious assembly and institutional uses differently. Consequently, in *Midrash Sephardi, Inc. v. Town of Surfside*,[205] resorted to the dictionary to determine whether comparator nonreligious land uses allowed by a local zoning ordinance where religious land uses are forbidden, were a proper comparator "assembly or institution" use. Based on the dictionary definition of "assembly" or "institution," the Eleventh Circuit decided in *Midrash* that it is contrary to RLUIPA's equal terms provisions for a zoning ordinance to exclude churches and synagogues from locations where private clubs and places of public assembly are authorized.[206]

The Ninth Circuit takes a slightly different approach to the Eleventh Circuit. In *Centro Familiar Cristiano Buenas Nuevas v. City of Yuma*[207], the Ninth Circuit decided that where a city code excluded religious institutions but allowed nonreligious institutions this violated the equal terms provision focusing on the "accepted zoning criteria." In other words, where the regulations on their face appear to treat religious land uses differently than their secular comparators, is there a regulatory purpose that can justify the distinction, apart from the fact that the entity is a religious one?[208] Here, the ordinance allowed "membership organizations (except religious organizations (SIC 86))." The court explained:

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[202] *Hunt Valley Baptist Church v. Baltimore County*, No. 17-0804, (D. Md. Feb. 10, 2020).
[203] *Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward County,* 450 F.3d 1295, 1308 (11th Cir., 2006)
[204] *Vision Church v. Village of Long Grove,* 468 F3d 975 1004 (7th Cir 2006).
[205] 366 F.3d 1214 (11th Cir. 2004).
[206] *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214 (11th Cir. 2004), *cert den.* 125 S Ct 1295 (2005); *New Life Ministries v. Charter Tp of Mt. Morris*, (unreported, 2006 WL 2583254, E.D. Mich., September 07, 2006).
[207] 651 F.3d 1163 (9th Cir. 2011).
[208] *See also Holy Ghost Revival Ministries v. City of Marysville*, 98 F Supp3d 1153 (2015).

> "The City Code does not address vehicular traffic or parking needs, as a neutral restriction on the size of membership organizations might. It does not address generation of tax revenue, since it allows all sorts of non-taxpayers to operate as of right, such as the United States Postal Service, museums, and zoos. The church exception does not address the "street of fun" criterion, since the city allows jails and prisons to operate on the three-block Old Town Main Street.
>
> "The only criterion that may justify the exception for churches is the damper they put on liquor licenses for bars and nightclubs. Schools, which also invoke the damper, are also required to have conditional use permits before they operate. However, there are three reasons that, taken together, explain why the 300–foot restriction on liquor licenses does not vitiate the inequality.
>
> First, the language of the City Code says "religious organizations," not "uses which would impair issuance of liquor licenses."

The Seventh Circuit takes a different approach. The Seventh Circuit determined that the 11th and 9th Circuit approaches are "too friendly to religious land uses and maybe even violat[e] the First Amendment's prohibition against establishment of religion by discriminating in favor of religion"[209] and developed its own test of whether a land use regulation violated RLUIPA's equal terms provision. Thus, in *River of Life v. Village of Hazel Crest*,[210], in an *en banc* decision written by Judge Posner, the Seventh Circuit decided the best approach was to look at the impacts of allowed non-religious assembly and institutional uses and compare those impacts with the impacts of religious assembly and institutional uses to decide whether the uses are treated on equal terms. The relevant impacts are those drawn from approval criteria in the local land use regulation. Thus, approval criteria for adequate parking or transportation systems would result in a comparison of the transportation impacts of a religious land use to a nonreligious assembly or institutional and use. If the impacts are roughly equivalent, then they must be treated on equal terms.

In *River of Life*, the city had amended its zoning ordinance to prohibit new noncommercial uses from the commercial district, excluding churches, community centers, schools and art galleries but allowing gymnasiums. The court observed the "[e]xclusion of churches from a commercial zone * * * along with other noncommercial assemblies, such as exhibition halls, clubs, and homeless shelters" was not unique to the defendant city. The court explained that "generating municipal revenue and providing ample and convenient shopping for residents" which "can be promoted by setting aside some land for commercial uses only, which generate tax revenues."[211] The court decided that the gymnasium was not a proper comparator to the proposed church because it was a "commercial assembly" and the proposed church was not. Therefore, the court affirmed

[209] *River of Life Kingdom Ministries v. Village of Hazel Crest*, 611 F3d 367, 700 (2010).
[210] 611 F.3d 367 (7th Cir. 2010).
[211] 611 F.3d 373.

the district's court's determination that the disputed ordinance did not violate RLUIPA's equal terms provision.

The Seventh Circuit has further decided that where religious assemblies and institutions are allowed only conditionally (as are certain other assembly and institutional uses), but "restaurants, tearooms, taverns and health clubs" are not subject to the same special use standards, that this is not a violation of RLUIPA's equal terms requirements.[212] Similarly, approval of a school under special use criteria but denial of a church under the same criteria, was held not to present an equal terms violation.[213]

In *Petra Presbyterian Church v. Village of Northbrook*,[214] the Seventh Circuit also explained that it would not make a finding of a RLUIPA violation where an ordinance had been amended in response to RLUIPA to avoid equal terms liability, even though the church filed its RLUIPA claim before the local ordinance had been amended. Judge Posner quipped: "We cannot find any basis, whether in cases or other conventional sources of law, or in good sense, for the proposition that the federal Constitution forbids a state that has prevented a use of property by means of an invalid (even an unconstitutional) enactment to continue to prevent that use by means of a valid one. From the proposition that the Village should not have discriminated in the industrial zone in favor of secular membership organizations it does not follow that when it eliminated the discrimination by banning all membership organizations from the zone, this entitled the victim of the discrimination to claim, by way of remedy, discrimination in *its* favor."[215]

*Elijah Group, Inc. v. City of Leon Valley,*[216] the Fifth Circuit explained to show a RLUIPA equal terms violation "requires that the religious institution in question be compared to a nonreligious counterpart, or 'comparator.'"[217] The court declined to apply a bright line test from other circuits and instead decided that a RLUIPA plaintiff must "show more than simply that its religious use is forbidden and some other nonreligious use is permitted. The 'less than equal terms' must be measured by the ordinance itself and the criteria by which it treats institutions differently."[218] The *Elijah Group* court decided that the land use restriction at issue violated RLUIPA's equal terms clause because it "treats the Church on terms that are less than equal to the terms on which it treats similarly situated nonreligious institutions."[219]

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[212] *Vision Church v. Village of Long Grove*, 468 F.3d 975, 990 (7th Cir. 2006).
[213] *Id* at 1000.
[214] *Petra Presbyterian Church v. Village of Northbrook,* 489 F.3d 846, 849 (7th Cir. 2007).
[215] *Petra Presbyterian Church v. Village of Northbrook,* 489 F.3d 846, 849 (7th Cir., 2007); *but see Opulent Life Church v. City of Holly Springs*, 697 F3d 279 (2012) (amendment of land use law that violates RLUIPA does not moot a RLUIPA claim where plaintiff seeks damages and attorney fees).
[216] 643 F.3d 419 (5th Cir.2011).
[217] *Id.* at 422.
[218] *Id.* at 424.
[219] *Id.*

Relying on *Elija Group*, the Fifth Circuit decided in *Opulent Life Church v. City of Holly Springs*,[220] that where plaintiff pleads that an ordinance "expressly differentiates religious land uses from nonreligious land uses" the plaintiff pleads a "prima facie" equal terms violation.[221] But that is not the end of the matter. To find for the RLUIPA plaintiff, the court explained the following analysis was required:

> "In this circuit, "[t]he 'less than equal terms' must be measured by the ordinance itself and the criteria by which it treats institutions differently." *Id.* In accord with this instruction, and building on the similar approaches of our sister circuits, we must determine:
>
> (1) the regulatory purpose or zoning criterion behind the regulation at issue, as stated explicitly in the text of the ordinance or regulation; and (2) whether the religious assembly or institution is treated as well as every other nonreligious assembly or institution that is "similarly situated" with respect to the stated purpose or criterion. Where, as here, the religious assembly or institution establishes a prima facie case, the government must affirmatively satisfy this two-part test to bear its burden of persuasion on this element of the plaintiff's Equal Terms Clause claim."[222]

The court went on to explain what the city was required to do to avoid RLUIPA equal terms liability:

> "To bear its burden, Holly Springs must first identify the regulatory purpose or zoning criterion that explains the religious facilities ban, as stated explicitly in the text of the ordinance, and then show that it has treated religious facilities on equivalent terms as all nonreligious institutions that are similarly situated with respect to that stated purpose or criterion." [223]

The *Opulent Life Church* court also stated it was no defense to an equal terms violation that a religious claimant could meet elsewhere in the jurisdiction.[224] The court decided the ordinance at issue violated the equal terms prohibition because it prohibited churches but other similar, noncommercial comparators were allowed.

Similarly, another court explained: "The existence of alternative sites for a church is relevant only when a zoning ordinance is challenged as imposing a 'substantial burden'

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[220] 697 F3d 279 (2012).
[221] The 9th Circuit has similarly decided this issue in *Centro Familiar, supra* 651 F3d at 1171.
[222] 697 F3d at 292-293.
[223] 697 F3d at 293.
[224] 697 F3d fn. 15. In making its point, the *Opulent Life Church* court cited other RLUIPA clauses where such an inquiry would be relevant and also the following Supreme Court precedent: *cf. Se.Promotions, Ltd. v. Conrad,* 420 U.S. 546, 556, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975) ("[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." (internal quotation marks omitted)).

on religious uses of land[225] under a different section of the federal Act from the equal-terms section at issue in this appeal.[226] The equal-terms provision in RLUIPA is violated whenever religious land uses are treated worse than comparable nonreligious ones, whether or not the discrimination imposes a substantial burden on the religious uses.[227] If proof of substantial burden were an ingredient of the equal-terms provision, the provisions would be identical, which could not have been Congress's intent." [228]

The *Opulent Life Church* court includes a good summary of the various circuit's approaches to RLUIPA's equal terms provisions as follows:

> "In one camp is the Eleventh Circuit, which treats all land use regulations that facially differentiate between religious and nonreligious institutions as violations of the Clause, but will nonetheless uphold such a regulation if it survives strict scrutiny review. *See Midrash Sephardi, Inc. v. Town of Surfside,* 366 F.3d 1214, 1231–35 (11th Cir.2004). The other camp includes the Third, Seventh, and Ninth Circuits. Those circuits hold that a violation of the Equal Terms Clause occurs only if a religious institution is treated less well than a similarly situated nonreligious comparator. The Third Circuit requires the comparator to be "similarly situated *as to the regulatory purpose.* " *Lighthouse Inst.,* 510 F.3d at 266. The Seventh and Ninth Circuits require a comparator that is similarly situated with respect to "accepted zoning criteria." *Centro Familiar,* 651 F.3d at 1172–73; *River of Life Kingdom Ministries v. Vill. of Hazel Crest, Ill.,* 611 F.3d 367, 371–73 (7th Cir. 2010) (en banc)."[229]

Finally, we note that state courts tasked to decide RLUIPA claims are generally consistent with federal authorities. Similar, to the 7th Circuit's decision in *Petra Presbyterian Church v. City of Northbrook*,[230] an Illinois state court refused to apply RLUIPA to assist with vesting a claim in a situation where a church began operating under the theory that the zoning ordinance was unlawful.[231] The state court determined that "vested rights are acquired by attempting to comply with an ordinance as written. [W]hen a party expends substantial time and effort attempting to comply with an ordinance as it then exists and the legislative body amends the ordinance, the party may acquire a vested right to proceed under the old ordinance. Here, however, [the church]

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[225] *Saints Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin,* 396 F.3d 895, 899-900 (7th Cir.2005); *see also Midrash Sephardi, Inc. v. Town of Surfside, supra,* 366 F.3d at 1227-28; *San Jose Christian College v. City of Morgan Hill,* 360 F.3d 1024, 1035 (9th Cir.2004),

[226] 42 U.S.C. § 2000cc(a)(1).

[227] *Vision Church v. Village of Long Grove,* 468 F.3d 975, 1002-03 (7th Cir.2006); *Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward County,* 450 F.3d 1295, 1308 (11th Cir.2006); *Midrash Sephardi, Inc. v. Town of Surfside, [*366 F.3d 1214, 1229 (11th Cir. 2004), *cert den* 125 S Ct 1295 (2005)] at 1228-31.

[228] *Digrugilliers v. Consolidated City of Indianapolis*, 506 F3d 612 (2nd Cir., 2007).

[229] 697 F3d 279, 291-292 (footnote omitted).

[230] *Petra Presbyterian Church v. Village of Northbrook,* 489 F.3d 846, 849 (C.A.7 2007).

[231] *City of Elgin v. All Nations Worship Center,* 369 Ill.App.3d 664, 668, 860 N.E.2d 853, 857 (Ill.App. 2 Dist., 2006).

proceeded *in violation* of the zoning ordinance as written. It is difficult to see how [a church] can claim a vested right to ignore the existing ordinance."[232]

3.Discrimination

RLUIPA's nondiscrimination provision provides that "[n]o government shall impose or implement a land use regulation that discriminates against any assembly or religious institution on the basis of religion or religious denomination." 42 U.S.C. § 2000cc(b)(2). To establish a RLUIPA claim under this clause, the religious claimant must show discriminatory intent.[233] Several factors are probative of discriminatory intent and no one factor is dispositive:

> "(1) evidence of a 'consistent pattern' of actions by the decision-making body disparately impacting members of a particular class of persons; (2) historical background of the decision, which may take into account any history of discrimination by the decision-making body or the jurisdiction it represents; (3) the specific sequence of events leading up to the particular decision being challenged, including any significant departures from normal procedures; and (4) contemporary statements by decision-makers on the record or in minutes of their meetings."[234]

Discriminatory purpose may be inferred. Thus, where governing body twice voted in favor of denial after its planning staff had recommended approval and where neighbors expressed severe religious and racial bias in their testimony to governing body, the county determined denial was plausibly the result of unlawful discrimination.[235] Similarly, a non-discrimination RLUIPA claim is shown if there is evidence that the challenged government "decision was motivated at least in part by discriminatory intent, which is evaluated using the 'sensitive inquiry' established in *Village of Arlington Heights v. Metropolitan Housing Development Corp*., 429 U.S. 252, 266–68, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977)."[236]

**3.Exclusion**

RLUIPA's total exclusion clause, 42 U.S.C. § 2000cc(b)(3)(A), prohibits a local government from completely excluding religious land uses within its borders. Few cases are presented with a claim under this part of RLUIPA. It presents a high bar. In *Vision Church v. Vill. Of Long Grove*, the Seventh Circuit held that that the government

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[232] *Id*.
[233] *Redemption Community Church v. City of Laurel*, 333 F Supp3d 521 (2018); *Jesus Christ is Answer Ministries, Inc. v. Baltimore Cty.*, 303 F. Supp. 3d 378, 397 (D. Md. 2018).
[234] *Reaching Hearts Int'l, Inc. v. Prince George's Cty.*, 584 F.Supp.2d 766, 781 (D. Md. 2008); *Redemption Cmty. Church v. City of Laurel, Maryland,* 333 F. Supp. 3d 521, 533 (D. Md. 2018).
[235] *Jesus Christ is the Answer Ministries, Inc. v. Baltimore County, Maryland*, 915 F.3d 256 (4th Cir. 2019), *as amended* (Feb. 25, 2019); *accord Congregation Rabbinical College of Tartikov v. Village of Pomona*, 945 F.3d 83 (2d Cir. 2019).
[236] *Friends of Lubavitch v. Baltimore Cty., Maryland*, 421 F. Supp. 3d 146, 166 (D. Md. 2019).

defendant, "by permitting churches in all residential districts as a special use, has not completely or totally excluded religious assemblies from its jurisdiction."[237]

### 3. Unreasonably Restricts

RLUIPA's unreasonable limitation provision prohibits the imposition or implementation of a land use regulation that "unreasonably limits religious assemblies, institutions, or structures within a jurisdiction." 42 USC 2000cc(b)(3)(B). This clause applies where land use regulations make it unreasonably difficult for a religious land use to locate anywhere within a jurisdiction's borders.[238]

## XII. Ripeness

There is no textual ripeness prerequisite to a RLUIPA claim.[239] The Supreme Court has long held that civil rights claims are not subject to a ripeness requirement.[240] RLUIPA should be no different.[241] Nevertheless, some federal courts have imposed a "ripeness" test on RLUIPA claims analogizing RLUIPA to unconstitutional taking cases under the Fifth and Fourteenth Amendments to the United States Constitutions. The idea being that there must be "some degree of finality" concerning the local government's application of its regulations before a court can know that there is a RLUIPA violation.[242]

That said, RLUIPA ripeness does not include filing state court or other appellate review processes outside the control of the local government alleged to have violated RLUIPA.[243] However, local governments wishing to raise "ripeness" as a defense to a

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[237] 468 F.3d 975, 990 (7th Cir. 2006).

[238] *Bethel World Outreach Ministries v. Montgomery City Council,* 706 F.3d 548, 560 (2013).

[239] In *Roman Catholic Bishop of Springfield v. City of Springfiled*, 724 F3d 78 (2013), the First Circuit decided that where there is no dispute that a restrictive zoning ordinance designating a church as a historic landmark will be enforced against a religious land use to prevent the demolition of the existing church building as the church planned, there is a "live controversy between the parties" and the matter is ripe. The court explained it was unnecessary to submit an application for a hardship variance for the RLUIPA claim to be ripe. *Accord Temple B'Nai Zion, Inc., v. City of Sunny Isles Beach, Fla*., 727 F3d 1349 (2013).

[240] "In *Patsy [v. Bd. of Regents of State of Florida, 457 US 496 (1982)]*, the Supreme Court said, 457 U.S. at 516, 102 S.Ct. 2557: '[W]e conclude that exhaustion of state administrative remedies should not be required as a prerequisite to bringing an action pursuant to § 1983.' *See also Porter v. Nussle*, 534 U.S. 516, 523, 122 S.Ct. 983, 152 L.Ed.2d 12 (2002) ('Ordinarily, plaintiffs pursuing civil rights claims under 42 U.S.C. § 1983 need not exhaust administrative remedies before filing suit in court."); *Talbot v*, 118 F.3d at 218 ("Since *Patsy*, the Supreme Court, this court, and other circuit courts of appeals have confirmed that, as a general rule, exhaustion of state administrative remedies is not required prior to bringing suit under § 1983.'). *Hunt Valley Baptist Church, Inc. v. Baltimore Cty., Maryland*, 2017 WL 4801542, at *21 (D. Md. Oct. 24, 2017).

[241] "*Dilaura v. Ann Arbor Charter Twp.*, 30 Fed.Appx. 501, 507 (6th Cir. 2002) ("[E]xhaustion of administrative remedies is not required for RLUIPA claims when brought as part of a § 1983 action.") *Hunt Valley Baptist Church, Inc. v. Baltimore Cty., Maryland*, 2017 WL 4801542, at *21 (D. Md. Oct. 24, 2017).

[242] *Id.*

[243] "It does not appear that Congress intended to create an exhaustion requirement as to RLUIPA. *See* 42 U.S.C. §§ 2000CC *et seq.* The Church was not required to exhaust the County or State appellate process before pursuing its federal constitutional claims under § 1983 or its statutory claim under RLUIPA." *Hunt*

RLUIPA claim, must consider the nature of the religious claimants alleged violation. A RLUIPA claim arising due to disparate treatment in the land use application process, is likely ripe before a final decision is made in that process.[244] And, in any event, ripeness does not apply to a facial RLUIPA claim.[245]

While the United States Supreme Court has recently overturned part of its "ripeness" rule for unconstitutional taking claims in *Knick v. Township of Scott*, 139 S. Ct. 2162 (June 21, 2019), *Knick* does not directly affect the "ripeness" rule applied by some courts in RLUIPA cases. *Knick* overrules one of the two ripeness prongs of *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985) - the requirement to seek compensation in state court: "We now conclude that the state-litigation requirement imposes an unjustifiable burden on takings plaintiffs, conflicts with the rest of our takings jurisprudence, and must be overruled." *Knick*, 139 S.Ct 2167. The *Knick* court left the *Williamson County* first prong, intact. The first ripeness prong requires a final determination from the local government on the disputed land use controversy so the court can see how far the local regulation goes. Otherwise, under taking jurisprudence, the high court explained it was unable to ascertain whether a local regulation "goes too far" without a final determination at the highest local level available, is made. *Knick*, however, does signal that the United Supreme Court is impatient with what it may view as gamesmanship.

Ripeness can be raised at any point in the litigation of a RLUIPA claim. Three factors are generally considered to determine whether a plaintiff's claim is ripe for adjudication: the likelihood that the harm alleged by the plaintiffs will occur, whether the factual record is sufficiently developed to produce a fair adjudication of the merits of the parties' respective claims and the hardship to the parties if judicial relief is denied at that stage in the proceedings. [246]

The Fifth Circuit, in *Opulent Life v. Holly Springs*,[247] in finding the RLUIPA case ripe for review, set out a succinct and thoughtful footnote explaining the status of the ripeness requirement in RLUIPA litigation.

Regardless, some courts have created a ripeness hard stop. In this regard, *Murphy v. Town of New Milford*, 402 F.3d 342, 348 (2nd Cir., 2005), determines that ripeness is "jurisdictional" to a RLUIPA claim. However, this is likely incorrect, as ripeness is

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*Valley Baptist Church, Inc. v. Baltimore Cty., Maryland*, No. CV ELH-17-804, 2017 WL 4801542, at *21 (D. Md. Oct. 24, 2017); *Diocese of Rockville Ctr.*, 2012 WL 1392365, at *7 ("The Diocese's failure to commence [a state court] proceeding to request review of the Resolution does not render its claims unripe for judicial review given that the administrative process, per se, had run its course.").

[244] *Garden State Islamic Center v. City of Vineland*, 358 F.Supp3d 377, 382-84 (2018); *United States v. Cty. of Culpeper, Virginia*, 245 F.Supp.3d 758, 764–65 (W.D. Va. 2017); *Redemption Community Church v. City of Laurel*, 333 F. Supp3d 521, 530 (2018).

[245] *Redemption Community Church v. City of Laurel Maryland*, 333 F .Supp3d 521, 530 (2018).

[246] *Tree of Life Christian Sch. v. City of Upper Arlington*, 888 F. Supp. 2d 883, 892 (S.D. Ohio 2012), *rev'd on other grounds* 536 Fed App 580 (2013).

[247] 697 F3d 279, fn 7.

generally regarded as a prudential consideration.[248] In *Miles Christi Religious Order v. Township of Northville*,[249] the court characterized the "ripeness" issue as a "prudential" requirement and determined that the relevant administrative agency must act on an application of the zoning ordinance to the property in dispute before a RLUIPA claim may be brought. In *Miles*, the Township asked the religious order file a site plan for parking and the religious order refused.

The Second Circuit applied *Williamson County Regional Planning Commission v. Hamilton Bank's (Williamson County)*[250] "prong-one finality requirement" to require the RLUIPA claimant to first obtain a "final, definitive position from local authorities as to how their property may be used" before bringing the RLUIPA claim to federal court.[251] In *Congregation Anshei Roosevelt v. Planning & Zoning Bd.,*[252] the court affirmed dismissal of a RLUIPA claim on the basis that it was not ripe citing *Williamson County*. On the other hand, other courts have specifically rejected that RLUIPA contains any ripeness requirement.[253]

On the other hand, in *Rocky Mountain Christian Church v. Board of County Commissioners of Boulder* a RLUIPA claim was ripe where delay of review would cause hardship to the church and where the resolution of the lawsuit would not inappropriately interfere with further administrative action.[254] The hardship in that case consisted of a lengthy process of submitting special use applications, which would not resolve uncertainty about how the applicable law controlled that process.[255]

In *Guatay Christian Fellowship v. County of San Diego*, the Ninth Circuit determined that a church's RLUIPA challenge of a permit denial was not ripe where the church had failed to complete even one full-use permit application. [256] This resulted in the court being unable to discern whether there was a true case or controversy, and any resulting injury.[257]

*Sisters of St. Francis Health Services v. Morgan County Indiana* also treated the ripeness issue.[258] There a hospital run by a religious organization as a part of its religious mission to heal the sick, filed a facial RLUIPA challenge against a construction moratorium and a

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[248] *Redemption Community Church v. City of Laurel*, 333 F.Supp3d 521, 530 (2018); *see Suitum v. Tahoe Reg'l Planning Agency,* 520 U.S. 725, 734, 117 S.Ct. 1659, 137 L.Ed.2d 980 (1997); *Stop the Beach Renourishment, Inc. v. Florida Dep't of Envtl. Prot.*, 560 U.S. 702, 728, 130 S.Ct. 2592, 177 L.Ed.2d 184 (2010).
[249] 629 F3d 533 (6th Cir 2010).
[250]473 US 172, 189 (1985).
[251] 473 U.S. at 189.
[252] 338 Fed.Appx. 214, 219 (3rd Cir., 2009)
[253] *DiLaura v. Ann Arbor Charter Tp,* 30 Fed. Appx. 501, 504-05 (6th Cir. Feb.25, 2002) (unpublished).
[254] *Rocky Mountain Christian Church v. Board of County Commissioners of Boulder County*, 481 F.Supp.2d 1213 (D. Colo, 2007).
[255] *Id.* at 1218.
[256] *Guatay Christian Fellowship v. Cnty. of San Diego*, 670 F.3d 957, 980 (9th Cir. 2011).
[257] *Id.* at 980.
[258] *Sisters of St. Francis Health Services v. Morgan County, Indiana*, 397 F.Supp.2d 1032 (SD Ind, 2005).

new requirement that no hospital construction be pursued without a permit.[259] The court found that the RLUIPA claim was ripe even though the hospital had not yet sought an exception to the moratorium.[260] The court explained that the hospital's claim that going through the permit exception process would itself impose a substantial burden on its religious exercise was ripe.[261] However, the court determined that the burden imposed under the challenged ordinance was not substantial on its face and therefore decided there was no RLUIPA violation. Since the burden imposed was the permit exception application process itself, the court would not presume that the challenged ordinance would be implied in a way that imposed a substantial burden.[262]

## XIII. Does Eminent Domain Trigger RLUIPA?

It is unclear whether the exercise of the power of eminent domain will trigger RLUIPA. Some decisions hold that RLUIPA is not triggered by the exercise of eminent domain and a few decisions go the opposite direction, although the weight seems to be that eminent domain does not trigger RLUIPA.[263]

In *City and County of Honolulu v. Sherman*, the court came to this conclusion.[264] Specifically, in this case, the City and County of Honolulu filed condemnation action against church as owner of condominium complex, pursuant to ordinance authorizing eminent domain actions for lease-to-fee conversions of leased-fee interests (sort of a statutory Law in Shelley's Case conversion).[265] The Hawaii Supreme Court held that on its face the ordinance did not violate RLUIPA because it was neither a zoning law nor a landmarking law, and therefore did not constitute a "land use regulation."[266] The court determined that if Congress had intended RLUIPA to apply to the exercise of eminent domain, it would have so stated.[267]

On the other hand, dicta in *Cottonwood Christian Center v. Cypress Redevelopment Agency,* holds to the contrary ("[e]ven if [it] were only considering the condemnation proceedings, they would fall under RLUIPA's land use regulation [definition]."[268]

## IX. Pleading RLUIPA –

### 1. Adequacy of Allegations

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[259] *Id.*
[260] *Id*.
[261] *Id*., at 1050.
[262] *Id*.
[263] *See St. John's United Church of Christ v. City of Chicago*, 2007 WL 2669403, 23 (C.A.7 2007); *Faith Temple Church v. Town of Brighton*, 405 F Supp2d 250 (2005).
[264] *City & County of Honolulu v. Sherman*, 129 P.3d 542 (2006)
[265] *Id*.
[266] *Id.*
[267] *Id.; accord St. John's United Church of Christ v. City of Chicago, 502 F3d 616 (2007); Faith Temple Church v. Town of Brighton*, 405 F Supp2d 450 (2005).
[268] *Cottonwood Christian Center v. Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203, 1222 n 9 (C.D. Cal. 2002).

RLUIPA allegations must be sufficiently pleaded "to state a claim for relief that is plausible on its face."[269] While "detailed factual allegations" are unnecessary, it is insufficient to plead "bald accusations or mere speculation."[270] A recent decision declined to dismiss a RLUIPA substantial burden claim explaining the minimal pleading requirements:

> "Based on the foregoing, and viewing the facts in the light most favorable to the plaintiff, as I must, the Church has plausibly alleged that it reasonably expected to build a house of worship on the Property. The fact that the Church lacked any *guarantee* from the County does not preclude this conclusion. *See Bethel*, 706 F.3d at 558 ("[M]odern zoning practices are such that landowners are rarely *guaranteed* approvals.") (emphasis in original).[271]

**2. Damages**

In *Sossamon v. Texas*,[272] the United States Supreme Court decided that RLUIPA does not unambiguously abrogate the sovereign immunity of the states from RLUIPA damage claims.[273] However, several lower federal courts have determined that RLUIPA authorizes money damages against political subdivisions of the various states. In *Opulent Life Church v. City of Holly Springs*,[274] the court explained RLUIPA's damage formulation as follows:

> "money damages are available under RLUIPA against political subdivisions of states, such as municipalities and counties. See e.g. *Centro Familiar Cristiano Buenas Nuevas v. City of Yuma,* 651 F.3d 1163, 1168–69 (9th Cir.2011) (holding that municipalities and counties may be liable for money damages under RLUIPA); *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch,* 510 F.3d 253, 260–61 (3d Cir., 2007) (same); *see also Mt. Healthy City Sch. Dist. Bd. Of Educ. v. Doyle,* 429 U.S. 274, 280–81, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977) (recognizing that political subdivisions of states do not enjoy Eleventh Amendment immunity). Under Supreme Court precedent, money damages are available against municipal entities unless "Congress has given clear direction that it intends to *exclude*

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[269] "To survive a motion under Fed. R. Civ. P. 12(b)(6), a complaint must contain facts sufficient to 'state a claim to relief that is plausible on its face.' *Twombly*, 550 U.S. at 570, 127 S.Ct. 1955; *see Ashcroft v. Iqbal*, 556 U.S. 662, 684, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) ('Our decision in *Twombly* expounded the pleading standard for 'all civil actions' ....' (citation omitted)); *see also Willner v. Dimon*, 849 F.3d 93, 112 (4th Cir. 2017)." *Hunt Valley Baptist Church, Inc. v. Baltimore Cty., Maryland*, No. CV ELH-17-804, 2017 WL 4801542, at *14 (D. Md. Oct. 24, 2017).

[270] *Id.*

[271] *Hunt Valley Baptist Church, Inc. v. Baltimore Cty., Maryland*, 2017 WL 4801542, at *28 (D. Md. Oct. 24, 2017).

[272] 131 S.Ct. 1651 (2011)

[273] 42 USC 2000cc Sec (4)(a) "A person may assert a violation of this chapter as a claim or defense in a judicial proceeding and obtain appropriate relief against a government."

[274] 697 F3d 279, 290.

> a damages remedy" from a cognizable cause of action. *Sossamon,* 131 S.Ct. at 1660 (citing *Franklin v. Gwinnett Cnty. Pub. Sch.,* 503 U.S. 60, 70–71, 112 S.Ct. 1028, 117 L.Ed.2d 208 (1992)). RLUIPA contains no indication, much less clear direction that it intends to exclude a money damages remedy. Thus, municipalities and counties may be held liable for money damages under RLUIPA, but states may not."

Similarly, the Ninth Circuit has decided that RLUIPA allows damage awards.[275]

One court has made clear that damages are unlikely to be resolved in Motions for Summary Judgment pleadings: "that nature and amount of damages proximately caused by the denial of the parking variance is a matter for plaintiff to prove at trial."[276]

RLUIPA is an Independent Claim

RLUIPA claims are self-executing and need not be brought through 42 USC 1983. 42 U.S.C. § 2000cc–2(a). Several courts have reinforced that RLUIPA is an independent claim and need not (indeed cannot) be pleaded as a 42 U.S.C.A. § 1983 claim: "A plaintiff may not use §1983 where the underlying statute has its own "comprehensive enforcement scheme."[277] RLUIPA must be pleaded as an independent cause of action. The litigator should consult its circuit to decide the precise pleading mechanics.[278]

One of the harshest outcomes of not pleading RLUIPA as an independent claim is demonstrated in *Christian Methodist Episcopal Church v. Montgomery*.[279] In this case, a religious organization plaintiff moved into building and began holding religious services without checking about whether zoning district allowed such use of building. Then a short time later, began making renovations to the building, including remodeling the kitchen and bathrooms, without building permits.[280] Plaintiffs did not own the building but rather were tenants.[281] The city placed stop work order on construction activity. Plaintiff then filed an application for a building permit. However, the city determined building permit could not be granted because religious services were not allowed in zoning district. Therefore, the building permit application was denied and plaintiff was advised to apply for and obtain a zoning variance or to rezone the subject property. However, because plaintiffs were tenants and not owners, the court also sustained the city's refusal to allow the plaintiff religious organization to apply for the needed rezone

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[275] *Centro Familiar Cristiano Buenas Nuevas v. City of Yuma,* 651 F3d 1163 (2011).
[276] *Lighthouse Institute for Evangelism v. City of Long Branch*, 2010 WL 1491079 (2010).
[277] *Christian Methodist Episcopal Church v. Montgomery*, 2007 WL 172496, *6 (D.S.C.) (D.S.C. 2007), *Chase v. City of Portsmouth,* 2005 WL 3079065 at 5 (E.D.Va.2005) (unpublished) (dismissing § 1983 claim asserting violation of RLUIPA), *citing City of Rancho Palos Verdes v. Abrams,* 544 U.S. 113 (2005).
[278] *See DiLaura v. Ann Arbor Charter Tp,* 30 Fed. Appx. 501 (6th Cir. Feb.25, 2002) (unpublished); *see also DiLaura v. Ann Arbor Charter Tp*, 112 Fed Appx 445 (unpublished); *see also DiLaura v. Ann Arbor Charter Tp*, 471 F3d 666 (2006) (RLUIPA claims brought independently, as well as through 42 U.S.C.A. § 1983.)
[279] 2007 WL 172496 (D.S.C. 2007) (unreported).
[280] *Id*. at *2.
[281] *Id.*

or variance without express permission from the owners to do so. Plaintiff filed complaint alleging denial of building permit and refusal to allow plaintiff tenants to apply for the needed permission violated organization's civil rights under 42 USC §1983 in two counts. The first alleged violation of the First Amendment to the United States Constitution. The second 42 USC 1983 claim alleged a RLUIPA violation. There was no independent RLUIPA claim pleaded. Neither claim sought injunctive or declaratory relief; rather both claims sought money damages alone.[282]

The court dismissed the RLUIPA claim in its entirety because it was not brought independently but rather relied entirely upon 42 USC 1983:

> "For the first time in their memorandum in opposition to the motion for summary judgment and at the hearing on the motion for summary judgment, counsel for the plaintiffs took the position that his second cause of action is no longer a § 1983 claim but is rather an independent claim under RLUIPA. He has not filed a motion to amend his pleadings, nor have the defendants indicated a consent to such an amendment. Clearly, he pled the second cause of action as a § 1983 claim. RLUIPA allows for remedial relief for a violation. 'A person may assert a violation of this chapter as a claim or defense in a judicial proceeding and obtain appropriate relief against a government.' 42 U.S.C. § 2000cc–2(a). 'A plaintiff may not use Section 1983 where the underlying statute has its own comprehensive enforcement scheme.' *Chase v. City of Portsmouth,* 2005 WL 3079065 at *5 (E.D.Va.2005) (unpublished) (dismissing § 1983 claim asserting violation of RLUIPA), *citing City of Rancho Palos Verdes v. Abrams,* 544 U.S. 113 (2005). Therefore, the plaintiffs' second cause of action is DISMISSED, since a § 1983 action does not lie under RLUIPA. *Christian Methodist Episcopal Church v. Montgomery*, No. CIVA 4:94CV22322 RBH, 2007 WL 172496, at *6 (D.S.C. Jan. 18, 2007). (Unpublished).

### 3. Injunctive Relief

When a court decides a law likely violates RLUIPA and that the matter should go to trial on the merits, a preliminary injunction will likely be granted against the offending land use regulation. In *Opulent Life Church*, the court explained that infringement of a claimant's rights under RLUIPA constitutes irreparable injury. The court cited RFRA precedents to explain:

> "In the closely related RFRA context (the predecessor statute to RLUIPA), courts have recognized that this same principle applies. *See Kikumura v. Hurley,* 242 F.3d 950, 963 (10th Cir.2001) ("[C]ourts have held that a plaintiff satisfies the irreparable harm analysis by alleging a violation of RFRA.")

[282] Id.

## X. Individual Decision-Maker Immunity/ Legislative Immunity Quasi-Judicial Immunity

The language of RLUIPA appears to explicitly provide for personal capacity claims against individuals where it defines government as, "a State, county, municipality, or other governmental entity created under the authority of a State; any branch, department, agency, instrumentality, or official of an entity listed above; and any other person acting under color of state law.[283] A court recently explained:

> "In the absence of any controlling or other appellate authority on this question, this Court finds the relevant RLUIPA provision similar to § 1983, which has been held to allow actions against officials in their personal capacities. *Powell v. Ridge,* 189 F.3d 387, 401 (3d Cir.1999)."[284]

The Fourth Circuit allowed a suit to go forward under RLUIPA in a personal capacity basis, but left open the issue of whether RLUIPA allows damages against state and local officials sued in their personal capacity.[285] That court also noted that "district courts are split on this question."[286]

In *Smith v. Allen*, the Eleventh Circuit determined that Congress was without power to provide for personal capacity suits for money damages.[287] The court explained that "[a] flaw with the [argument that RLUIPA permits personal capacity suits] is that section 3 of RLUIPA was enacted pursuant to Congress' Spending Power under Article 1 of the constitution" and that "the Spending Power cannot be used to subject individual defendants, such as state employees, to individual liability in a private cause of action.[288]

The court in *Moxley v. Town of Walkersville* agreed with the reasoning in *Smith* and explicitly stated that a personal capacity suit may not proceed against an individual defendant under RLUIPA.[289] The court clarified that legislative immunity serves as a defense only to personal capacity claims. It provides no defense to official capacity claims since such claims are merely another way of suing a municipality, such as a town.[290]

*Moxley* also treated the issue of legislative immunity explaining that, "legislative immunity only attaches to legislative actions." There, a Muslim church challenged a denial of a special exception to use agricultural land as a mosque.[291] The court set forth a

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[283] 42 U.S.C S 2000cc Sec 8(4)
[284] *Israelite Church of God in Jesus Christ, Inc. v. City of Hackensack*, 2012 WL 3284054, at *6 (D.N.J. Aug. 10, 2012).
[285] *Lovelace v. Lee*, 472 F.3d 174 (4th Cir. 2006).
[286] Id.
[287] *Smith v. Allen*, 502 F.3d 1255 (11th Cir. 2007).
[288] Id. at 1272-74.
[289] *Moxley*, 601 F. Supp.2nd at 660.
[290] Id.
[291] Id.

two-step test for determining whether an act is legislative or administrative.[292] First, a court must focus on the nature of facts used to reach the decision and then the particularity of the impact of the state action.[293] The court found that the plaintiff's had adequately alleged facts sufficient to preclude summary judgment on the issue where the were able to show that the zoning ordinances created a general community policy.[294]
Legislative immunity was also explored in *Kaahaumanu v. County of Maui*.[295] Where county denied conditional use permit (CUP) sought by religious claimants and wedding operator to conduct weddings on wedding operator's property, the court determined such CUP denial is not a legislative act, but rather a quasi-judicial one.[296] The court applied a multi-factor test to determine whether land use decision process was legislative.[297] The court expressly did not address the extent to which there may be quasi-judicial immunity available to the individual defendants.[298]

If the federal court abstains under *Younger* abstention, then there is greater opportunity to remedy the RLUIPA concern without federal court intervention.

> "cannot avoid *Rooker-Feldman* by simply not submitting his claim in state court"). Beth-El's claims under § 1983, RLUIPA, and RFRA are all targeted to overturn the state-court judgments, and as such, they are barred by *Rooker-Feldman*. Accordingly, we VACATE the grant of the preliminary injunction and remand with instructions to dismiss this case for lack of subject-matter jurisdiction."[299]

## XI. Summary

Nearly 20 years later, RLUIPA jurisprudence is still evolving. Each RLUIPA case is fact intensive and legally distinct, circuit to circuit, case to case. The practitioner must evaluate each case in light of current precedents in the particular circuit. Unfortunately, there are few bright lines.

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[292] Id. at 660.
[293] Id.
[294] Id.
[295] 315 F.3d 1215 (9th Cir 2003)
[296] Id.
[297] In addition to other research, attorneys should look to the law of the state or circuit in which the RLUIPA claim is brought to determine whether the challenged local action is legislative in nature. For example, the Arizona state courts have rejected the *Kaahumanu* analysis for determining whether an action is legislative. *See Redelsperger v. City of Avondale*, 207 Ariz. 430, 433, 87 P3d 843, 846 (2004) *and see Zamsky v. Hansell,* 933 F2d 677 (9th Cir. 1991) (rejecting both legislative and quasi-judicial immunity for individual defendants in a land use case); *see also Buckles v. King County*, 191 F.3d 1127, 1133 (1999) (applying quasi-judicial immunity).
[298] *See Id.,* 315 F3d 1215, 1224 n 8.
[299] *Beth-El All Nations Church v. City of Chicago*, 486 F.3d 286, 294 (C.A.7 2007).