Thou Shalt Not Zone: The Overbroad Applications and Troubling Implications of RLUIPA's Land Use Provisions

Daniel P. Lennington[†]

I. INTRODUCTION

Imagine that you live in a peaceful, quiet neighborhood and that the house next door to you has just been sold. But curiously, you hear rumors that the house has not been purchased by a family or individual, but by a *church* of all things. Being a conscientious yet perplexed neighbor, you walk next door to meet your new neighbors and inquire into their intentions.

The church's pastor greets you in the front yard and excitedly explains, "Yes, this is just the perfect site. Our members are so happy. Once we tear down this old house, we'll build our dream church in its place."

"But sir, this is a residential neighborhood. I don't think they'll let you have a church here," you laugh nervously.

"Yes, I can see that the parking might be a bit tight here on Sundays, but it won't be that bad. Believe me. We've looked everywhere, and this is the best location for us."

Next imagine that the local zoning board understandably denies the church's request for a special use permit, citing traffic concerns and the small lot size. According to your local government at least, the church cannot build next door to you.

---

† Daniel P. Lennington is a trial and appellate attorney with the Grand Rapids, Michigan, law firm of Warner Norcross & Judd LLP. He currently serves as the chairman of the Georgetown Charter Township Zoning Board of Appeals. Georgetown Township is home to nearly 42,000 residents and boasts one of the highest church-to-person ratios in Michigan, making church zoning a frequently reoccurring issue. The Author has first-hand experience with the matters discussed in this article: during his tenure as chairman, the Board has been made a party to a lawsuit alleging violations of the Religious Land Use and Institutionalized Persons Act. *See* Great Lakes Soc'y v. Georgetown Charter Twp. Zoning Bd. of Appeals, No. 03-4599-AA (Mich. Cir. Ct. filed Apr. 1, 2003). Additionally, the Author has seen this issue from the other side, as pro bono counsel to a church.

The reality of this situation is that, according to numerous courts throughout the United States, the local zoning board just violated a federal statute by placing a "substantial burden" on the church's "religious exercise."

Since its enactment in 2000, the Religious Land Use and Institutionalized Persons Act (RLUIPA)[1] has been used by many courts to strike down reasonable and nondiscriminatory attempts by local governments to apply zoning ordinances to churches and other religious uses of real property. However, this overbroad application is at odds with Congress' intent in passing RLUIPA, which was aimed at preventing local governments from intentionally discriminating against religious land uses.[2] Moreover, the troubling trend in the caselaw interpreting RLUIPA is that churches may very well become immune from local zoning laws—if they are not already.

Even so, the problem is not necessarily with the courts. The problem is with the overly broad plain language of RLUIPA, which prohibits the application of any land use regulation that places a "substantial burden" on a "religious exercise," unless that land use regulation can meet the nearly insurmountable standards of strict scrutiny.[3] Although this is a problem, it is a problem that can easily be fixed.

With five years of caselaw interpreting RLUIPA and a split among the courts regarding the breadth of the statute, now is an appropriate time to examine the statute's track record and consider its future. This Article will first examine RLUIPA's background, its text, and exactly what Congress intended when it passed the statute. Next, this Article will explain how courts have split on the application of RLUIPA's land use provisions, and in some cases, made it nearly impossible to zone churches, synagogues, mosques or any other religious land uses. Finally, this Article will propose a simple solution—an amendment to RLUIPA, which will restore congressional intent while allowing local zoning authorities to do their job of enforcing order through zoning ordinances.

II. RLUIPA'S REACTIONARY BEGINNINGS

A. Congress and the Courts Play Tug of War with the Free Exercise Clause

RLUIPA is the latest skirmish in a tug of war between Congress and the Supreme Court over the meaning and application of the Free Ex-

1. *See* 42 U.S.C. §§ 2000cc, 2000cc-1 to -5 (2003).
2. *See* discussion *infra* Part II.B.2.a.
3. *See* 42 U.S.C. § 2000cc(a)(1).

ercise Clause of the United States Constitution.[4] As explained in this section, while the Supreme Court has narrowly interpreted the right to Free Exercise, Congress has reacted by passing legislation, like RLUIPA, that aims at granting more (or different) rights than those recognized in the Constitution.

These skirmishes between Congress and the Supreme Court started in 1990, when the Supreme Court held that generally applicable laws were constitutional, even if they substantially burdened a person's religious exercise.[5] In *Employment Division v. Smith*, the Supreme Court upheld the constitutionality of a state law banning the possession of the hallucinogenic substance peyote, even though peyote was frequently incorporated into Native American religious practices.[6] The statute was generally applicable, and did not provide an exception for religious use of the substance.[7] According to the Court in *Smith*, so long as a state law was generally applicable, any incidental impediments on religious exercise did not violate the Free Exercise Clause of the Constitution.[8]

Congress did not agree with the Court's decision. In 1993, Congress set out to overturn *Smith* by passing the Religious Freedom Resto-

---

4. The familiar text of the First Amendment reads as follows: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I. *See generally* THE HERITAGE GUIDE TO THE CONSTITUTION 307–11 (Edwin Meese III et al. eds., 2005) (providing an excellent, yet concise, description of the Free Exercise Clause, its background, and the applicable caselaw); ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1020–37 (1997) (same); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990) (providing a more comprehensive understanding of the Free Exercise Clause).

5. Employment Div. v. Smith, 494 U.S. 872 (1990), *superseded by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488.

6. Peyote is a hallucinogenic narcotic that is considered to be a sacrament by the members of the Native American Church. *See, e.g.,* People v. Woody, 394 P.2d 813, 817–18 (Cal. 1964) (describing generally peyote and how it is used in religious ceremonies). *See generally* OMER C. STEWART, PEYOTE RELIGION: A HISTORY 327–36 (1987) (describing modern uses of peyote and its importance to the Native American Church).

7. *Smith*, 494 U.S. at 878–82.

> Oregon law prohibited the knowing or intentional possession of a controlled substance, unless the substance was prescribed by a medical practitioner. The law define[d] "controlled substance" as drugs classified in Schedules I through V of the Federal Controlled Substances Act. [Those who violated] this provision were guilty of a Class B felony. Peyote is a controlled substance because it derives from the plant *Lophophora Williamsii Lemaire*.

Id. at 874 (internal citations omitted).

8. *Id.* at 885. Justice Scalia, writing for the court, explained that the "government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of its public policy, 'cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development.'" *Id.* (citing Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 451 (1988)).

ration Act, or RFRA.[9] This was Congress' first attempt to provide more protection of free exercise than the courts were allowing. In particular, under RFRA Congress required courts to apply strict scrutiny to generally applicable laws that interfered with a person's exercise of religion, even though *Smith* only required rational basis scrutiny of generally applicable laws.[10] More specifically, RFRA broadly prohibited states and the federal government from placing a "substantial burden" on a religious exercise, without the government first demonstrating that the action was in furtherance of a compelling governmental interest and the least restrictive means of furthering that compelling interest.[11] A direct response to *Smith* (and a blatant attempt to re-write constitutional standards), RFRA provided that even laws of general applicability would be subject to strict scrutiny.[12]

---

9. 42 U.S.C. §§ 2000bb, 2000bb-1 to -4 (2003). Congress' express reaction to the *Smith* decision is well-documented. Congressional findings are incorporated directly into RFRA, and provide:

> (a) Findings
>
> The Congress finds that—
>
> (1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;
>
> (2) laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;
>
> (3) governments should not substantially burden religious exercise without compelling justification;
>
> (4) in Employment Division v. Smith, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and
>
> (5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.
>
> (b) Purposes
>
> The purposes of this chapter are—
>
> (1) to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and
>
> (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

42 U.S.C. § 2000bb(a), (b).

10. Congress meant to restore a previous line of cases in which the Supreme Court held that strict scrutiny should be used in evaluating laws burdening free exercise of religion. *See, e.g.,* Wisconsin v. Yoder, 406 U.S. 205, 235–36 (1972) (holding that the Free Exercise Clause provided the Amish with an exemption to compulsory school attendance laws); Sherbert v. Verner, 374 U.S. 398, 403–04 (1963) (mandating an exemption to a state law that prevented a Seventh-Day Adventist from receiving unemployment benefits because the claimant could not work on Saturdays).

11. 42 U.S.C. § 2000bb-1(b).

12. The text of RFRA provides, "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability . . . ." *Id.* § 2000bb-1(a).

According to the Supreme Court, strict scrutiny requires a state to "demonstrate a compelling interest and show that it has adopted the least restrictive means of achieving that interest . . . ." It is the "most demanding test known to constitutional law." City of Boerne v. Flores, 521 U.S. 507, 534

After Congress enacted RFRA, the Supreme Court tugged back by invalidating the statute in *City of Boerne v. Flores*.[13] At its core, *City of Boerne* was a zoning case—local zoning authorities denied a church's request for a building permit.[14] The church sued under RFRA, claiming that the denial of the permit was a substantial burden on its religious exercise.[15]

The Supreme Court ruled against the church and invalidated RFRA as an unconstitutional exercise of power.[16] In essence, the Court told Congress that it did not have the power to rewrite the Constitution. Congress had relied on Section Five of the Fourteenth Amendment when it enacted RFRA.[17] That section permits Congress to enforce the provisions of the Fourteenth Amendment, which according to an earlier Court case incorporates the Free Exercise Clause.[18] Consequently, Congress may protect the right to free exercise by enacting appropriate legislation.[19]

The Court rejected Congress' authority to pass RFRA and explained that Section Five of the Fourteenth Amendment gives Congress the power to remedy and prevent unconstitutional behavior.[20] However,

---

(1997). "If 'compelling interest' really means what it says . . . many laws will not meet the test." *Smith*, 494 U.S. at 888.

13. 521 U.S. 507 (1997).

14. *Id.* at 511. Like many of the cases arising under RLUIPA's land use provisions, discussed *infra*, *City of Boerne* involved a church that was denied a permit to build pursuant to a zoning ordinance. This particular church, St. Peter Catholic Church, seated only about 230 worshippers. *Id.* at 512. The church, being in a historic district, sought a permit from the city's Historic Landmark Commission to expand the church. *Id.* The Commission denied the request. *Id.*; *see also* Flores v. City of Boerne, 73 F.3d 1352, 1354 (5th Cir. 1996) (describing the background of the case in more detail), *rev'd*, 521 U.S. 507 (1997).

15. *City of Boerne*, 521 U.S. at 512.

16. RFRA still applies to the federal government because Congress' constitutional power to bind the federal government was not based on Section 5 of the Fourteenth Amendment. *See* Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal, 126 S. Ct. 1211, 1216–17 (2006) (applying RFRA to the federal government); O'Bryan v. Bureau of Prisons, 349 F.3d 399, 401 (7th Cir. 2003); Guam v. Guerrero, 290 F.3d 1210, 1220–22 (9th Cir. 2002); Kikumura v. Hurley, 242 F.3d 950, 958–60 (10th Cir. 2001); Sutton v. Providence St. Joseph Med. Ctr., 192 F.3d 826, 831–34 (9th Cir. 1999); *In re* Young, 141 F.3d 854, 858–59 (8th Cir. 1998).

17. Section Five of the Fourteenth Amendment provides, "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5.

18. Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) (holding that the "fundamental concept of liberty embodied in [the Fourteenth Amendment's Due Process Clause] embraces the liberties guaranteed by the First Amendment").

19. *See* Civil Rights Cases, 109 U.S. 3, 13–14 (1883) (holding that under Section Five of the Fourteenth Amendment, Congress does not have the power to pass "general legislation upon the rights of the citizen, but corrective legislation, that is, such as may be necessary and proper for counteracting such laws as the States may adopt or enforce, and which, by the amendment, they are prohibited from making or enforcing").

20. *City of Boerne*, 521 U.S. at 519; *see also* South Carolina v. Katzenbach, 383 U.S. 301, 326 (1966) (describing Congress' power under Section Five of the Fourteenth Amendment as "remedial").

Congress must make findings concerning the unconstitutional behavior, and the law must appropriately address that unconstitutional behavior.[21] Justice Kennedy wrote for the Court, "[t]he appropriateness of remedial measures must be considered in light of the evil presented . . . . Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one."[22]

RFRA was not so narrowly tailored.[23] In fact, to the Court RFRA looked like an express attempt to overturn *Smith* (which it was) and to redefine the Free Exercise Clause. The Court wrote:

> Regardless of the state of the legislative record, RFRA cannot be considered remedial, preventative legislation, if those terms are to have any meaning. RFRA is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior. It appears, instead, to attempt a substantive change in constitutional protections.[24]

According to the Court, although Congress may have remedial power to enforce the Constitution under Section Five of the Fourteenth Amendment, Congress could not rewrite what the Constitution says.[25] And what the Constitution says, according to the Court, is that laws of general applicability are not subject to a strict scrutiny analysis.[26]

In summary, the *Smith* decision was restored by the Supreme Court, and Congress' attempt to broadly define Constitutional standards was struck down. However, many in Congress saw some remaining hope in

---

21. *See City of Boerne*, 521 U.S. at 519.

22. *Id.* at 530.

23. *Id.*

24. *Id.* at 532. In an oft quoted passage in *City of Boerne*, Justice Kennedy announced a new test for a Section Five analysis, the so-called "congruence and proportionality" test. He wrote that laws passed by Congress under this section must reflect "proportionality or congruence between the means adopted and the legitimate end to be achieved." *Id.* at 533.

25. The Court's language at the end of the opinion is both powerful and memorable:

> Our national experience teaches that the Constitution is preserved best when each part of the Government respects both the Constitution and the proper actions and determinations of the other branches. When the Court has interpreted the Constitution, it has acted within the province of the Judicial Branch, which embraces the Duty to say what the law is. *Marbury v. Madison*, 1 Cranch, at 177, 2 L. Ed. 60. When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including *stare decisis*, and contrary expectations must be disappointed. RFRA was designed to control cases and controversies, such as the one before us; but as the provisions of the federal statute here invoked are beyond congressional authority, it is this Court's precedent, not RFRA, which must control.

City of Boerne, 521 U.S. at 535–36.

26. *Id.* at 533–34.

the *City of Boerne* decision and decided to go back to the drawing board and create a statute that protected religious liberties while meeting the Supreme Court's approval.

B. Back to the Drawing Board: Congress Passes RLUIPA

With RFRA out the window, Congress did what it does best—it held hearings. In fact, Congress held hearings on how it should respond just three weeks after the *City of Boerne* decision was handed down.[27]

The hearings produced mountains of evidence of religious discrimination throughout American society.[28] In particular, Congress compiled evidence of religious discrimination in the zoning context. The hearings revealed that "[c]hurches in general, and new, small, or unfamiliar churches in particular, are frequently discriminated against on the fact of zoning codes and also in the highly individualized and discretionary processes of land use regulation."[29] Although this discrimination is sometimes explicit, more often than not "discrimination lurks behind such vague and universally applicable reasons as traffic, aesthetics, or 'not consistent with the city's land use plan.'"[30] This hidden discrimination becomes evident when churches and other religious institutions are treated differently under the same or similar circumstances than non-religious institutions or businesses.[31]

Nearly all of the evidence compiled by Congress was anecdotal.[32] For example, one report describes an effort by local zoning officials in

---

27. *See Protecting Religious Freedom After Boerne v. Flores: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary,* 105th Cong. 50-378 (1997).

28. *Id.*; *Protecting Religious Freedom After Boerne v. Flores (Part II): Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary,* 105th Cong., 57-221 (1998); *Protecting Religious Freedom After Boerne v. Flores (Part III): Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary,* 105th Cong., 57-227 (1998). *See also Religious Liberty Protection Act of 1999*, *Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 105th Cong. 62-491 (1999); *Religious Liberty Protection Act of 1998*, *Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 105th Cong. 59-929 (1998). The Senate Judiciary Committee held hearings on June 23, 1999, and September 9, 1999. *See Religious Liberty: Hearing Before the S. Comm. on the Judiciary*, 106th Cong. 106-689 (1999).

29. 146 CONG. REC. S7774 (daily ed. July 27, 2000) (Joint Statement of Sen. Hatch and Sen. Kennedy on the Religious Land Use and Institutionalized Persons Act of 2000).

30. *Id.*

31. Some more radical commentators have even asserted that some local communities are becoming hotbeds of religious, racial, and social intolerance, caused by fear and isolation. *See* Richard Damstra, Note, *Don't Fence Us Out: The Municipal Power to Ban Gated Communities and the Federal Takings Clause*, 35 VAL. U. L. REV. 525, 532–33 (2000).

32. 146 CONG. REC. E1564 (daily ed. Sept. 22, 2000) (statement of Rep. Hyde). Not everyone is convinced that the congressional findings were accurate. One comprehensive study of discrimination against religious congregations concluded that "it is extraordinarily uncommon for congregations to be denied permission by government authorities to engage in the activities in which they wish to engage." *See* Mark Chaves & William Tsitsos, *Are Congregations Constrained by Govern-*

Palos Heights, Illinois to stop a mosque from locating in their city.[33] The report describes how the Muslim group was compared to Adolf Hitler and how they were told to "go back to their own countries."[34] In another case, local officials in El Cajon, California refused to allow a church to build in a residential neighborhood because the residents feared that it would "bring indigent people into their neighborhood."[35] The report also includes several instances of churches apparently being treated differently than similarly situated non-religious uses.[36]

Based on this evidence of intentional religious discrimination in the zoning context, Congress set out to draft a more limited statute than RFRA,[37] which would be based on the congressional findings showing religious discrimination, and be more narrowly tailored to address that discrimination.[38] After several more rounds of hearings, Congress settled on RLUIPA, which was signed by President Clinton on September 22, 2000.[39]

RLUIPA does not, as RFRA did, attempt to bar all state and federal laws that substantially burden religious exercise. Instead, RLUIPA focuses on two specific areas of American society: prisons and zoning.[40] The law generally provides that within these two areas, no government shall pass a law that substantially burdens a religious exercise, unless the law can meet strict scrutiny.[41]

---

ment? Empirical Results from the National Congregations Study, 42 J. CHURCH & ST. 335, 342 (2000).

33. 146 CONG. REC. E1564.

34. *Id.*

35. *Id.* at E1565.

36. *Id.* at E1564–67. Several of these examples of discriminatory treatment included individuals who were punished for holding prayer meetings at their home. In Denver, Colorado, the city sent a cease-and-desist letter to a couple who was holding one prayer meeting at their home each month. *Id.* at E1566. In Onalaska, Wisconsin, the mayor filed complaints against a pastor and his wife who were holding weekly bible studies at their home. The report states that the "mayor expressed an inability to understand why the pastor would invite five college students to his home rather than holding the meetings at church." *Id.*

37. RLUIPA's main sponsor in the House stated that his goal was to set about drafting a bill "that will not be subject to the same challenge that succeeded in *Boerne*." 146 CONG. REC. E1234 (daily ed. July 14, 2000) (Rep. Canady).

38. Bills circulating in Congress were originally broader than RLUIPA turned out to be. *See* H.R. 1691, 106th Cong. (1st Sess. 1999) ("Religious Liberty Protection Act of 1999") (prohibiting substantial burdens on a religious exercise in any case that affected interstate commerce or involved federal financial assistance); H.R. 4019, 105th Cong. (2d Sess. 1998) ("Religious Liberty Protection Act of 1998").

39. *Signing Statement of President William J. Clinton for the Religious Land Use and Institutionalized Persons Act of 2000* (Sept. 22, 2000), http://www.findarticles.com/p/articles/mi_m2889/is_38_36/ai_66935285.

40. 42 U.S.C. § 2000cc (2003) (zoning); *Id.* § 2000cc-1 (institutionalized persons).

41. This Article concerns RLUIPA's land use provisions. RLUIPA's institutionalized persons provisions were discussed in detail by the Supreme Court just recently. *See* Cutter v. Wilkinson, 544

1. The Nuts and Bolts of RLUIPA's Land Use Provisions

RLUIPA's land use provisions are generally divided into two parts. The first part prohibits government from imposing a substantial burden on a religious exercise, absent a showing of strict scrutiny.[42] This part reads:

> (a)(1) No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that the imposition of the burden on that person, assembly, or institution—
>
> (A) is in furtherance of a compelling governmental interest; and
>
> (B) is the least restrictive means of furthering that compelling governmental interest.[43]

There are three definitions that are important to this section regarding a substantial burden on a religious exercise. First, the prohibition extends only to a substantial burden caused by the implementation or imposition of a "land use regulation," which is defined as any "zoning or landmarking law, or application of such a law, that limits or restricts a claimant's use or development of land . . . ."[44] For example, if a local zoning board denies a church's request for a rezoning, a variance, or a special use permit to build a new church or to expand an existing church, then that action constitutes the implementation of a "land use regulation."[45] On the other hand, if government is not enforcing the zoning code, for example, by mandating a sewer or water hook-up, then that action is not an implementation of a land use regulation because it is not undertaken pursuant to a zoning law.[46] The key inquiry at this stage is whether the action concerns zoning or something else.[47]

U.S. 709 (2005) (holding that the prisoner provisions were constitutional, but not discussing the zoning provisions). *See generally* Derek L. Gaubatz, *RLUIPA at Four: Evaluating the Success and Constitutionality of RLUIPA's Prisoner Provisions*, 28 HARV. J.L. & PUB. POL'Y 501 (2005) (summarizing, in a very comprehensive manner, the institutionalized persons provisions of RLUIPA).

42. 42 U.S.C. § 2000cc(a)(1).

43. *Id.*

44. *Id.* § 2000cc-5(5).

45. *See, e.g.*, Living Water Church of God v. Charter Twp. of Meridian, 384 F. Supp. 2d 1123, 1129 (W.D. Mich. 2005) (stating that a township's denial of a special use permit to build a church in excess of 25,000 square feet was unquestionably an implementation of a land use regulation).

46. Second Baptist Church of Leechburg v. Gilpin Twp., 118 F. App'x 615, 617 (3d Cir. 2004) (holding that a township's mandatory "tap-in" ordinance did not amount to a land use regulation because it was not enacted pursuant to a zoning law).

47. *See* Prater v. City of Burnside, 289 F.3d 417, 434 (6th Cir. 2000) ("[A] government agency implements a 'land use regulation only when it acts pursuant to a 'zoning or landmarking law' that

Second, the term "religious exercise" is broadly defined in the statute as any exercise of religion, whether or not compelled by, or central to, a system or religious belief.[48] Therefore, under RLUIPA, courts do not need to analyze whether a religious activity is an integral part of one's faith, as had been required by earlier Supreme Court precedent.[49] Most importantly is that the definition of "religious exercise" includes the use of a building that will be used for a religious exercise.[50] Therefore, if a church wants to build a building, even if it is a school or a nursing home, then that building is actually a "religious exercise."[51]

Third, and finally, the term "substantial burden" is not defined in RLUIPA's text.[52] The legislative history provides that "substantial burden" is to be defined as consistent with the Supreme Court's previous interpretation of the term "substantial burden" on a religious exercise.[53] However, the question of what constitutes a "substantial burden" is far from clear, and has lead to confusion and a split among the courts, as well as the overbroad applications of RLUIPA that are described more fully below.[54]

---

limits the manner in which a claimant may develop or use the property in which the claimant has an interest."); *accord* House of Fire Christian Church v. Zoning Bd. of Adjust., 879 A.2d 1212, 1223 (N.J. Super. Ct. App. Div. 2005).

48. 42 U.S.C. § 2000cc-5(7)(A) (2003).

49. Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1226 (11th Cir. 2004).

50. 42 U.S.C. § 2000cc-5(7)(B).

51. *See, e.g.*, Greater Bible Way Temple of Jackson v. City of Jackson, 708 N.W.2d 756, 761 (Mich. Ct. App. 2005) (holding that the building of an assisted living facility constituted a religious exercise); Shepherd Montessori Ctr. Milan v. Ann Arbor Charter Twp., 675 N.W.2d 271, 280–81 (Mich. Ct. App. 2003) (holding that the building of a school constituted a religious exercise).

52. *See* 42 U.S.C. § 2000cc-5.

53. 146 CONG. REC. S7776 (daily ed. July 27, 2000). The text of this statement reads:

> 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 this act should be interpreted by reference to Supreme Court jurisprudence . . . . The term "substantial burden" as used in this Act is not intended to be given any broader interpretation than the Supreme Court's articulation of the concept of substantial burden or religious exercise.

Id.

54. *See* discussion *infra* Part III.B. To meet constitutional requirements, RLUIPA next lays out the three circumstances in which its substantial burden prohibition applies. First, RLUIPA applies when the substantial burden is imposed within a program that receives federal financial assistance. 42 U.S.C. § 2000cc(a)(2)(A). This section seeks to fall within Congress' power under the Spending Clause. *See* U.S. CONST. art. I, § 8, cl. 1. *See generally* South Dakota v. Dole, 483 U.S. 203 (1987) (explaining the parameters of congressional power under the Spending Clause). Second, RLUIPA applies when the substantial burden affects interstate commerce. 42 U.S.C. § 2000cc(a)(2)(B). This section seeks to fall within Congress' power under the Commerce Clause. *See* U.S. CONST. art. I, § 8, cl. 3. *See generally* United States v. Lopez, 514 U.S. 549 (1995) (explaining the requirement of a jurisdictional hook for Congress to properly exercise power under the Commerce Clause). Third, RLUIPA applies when the substantial burden is imposed within the context of a system of "individualized assessments." 42 U.S.C. § 2000cc(a)(2)(C). These three jurisdictional "hooks" address

The second part of RLUIPA's land use provision prohibits "discrimination and exclusion."[55] This part provides that (1) governments shall not treat a religious assembly or institution on less equal terms than a non-religious assembly or institution;[56] (2) governments shall not impose a land use regulation that discriminates on the basis of religion or religious denomination;[57] and (3) governments shall not totally exclude or unreasonably limit religious assemblies, institutions, or structures within a jurisdiction.[58] This second part has been infrequently applied and seldom used by plaintiffs.[59] Moreover, it has generally not been attacked in the courts as either overbroad or unconstitutional.

---

the constitutionality of the statute, which is outside the scope of this Article. *See generally* Freedom Baptist Church of Delaware County v. Twp. of Middletown, 204 F. Supp. 2d 857 (E.D. Pa. 2002) (finding RLUIPA constitutional). *But see* Elsinore Christian Ctr. v. City of Lake Elsinore, 291 F. Supp. 2d 1083 (C.D. Cal. 2003) (finding RLUIPA unconstitutional). In any event, it is worth noting a few points about the final jurisdictional "hook" concerning individualized assessments, which apparently stems from Congress' power to enforce the Free Exercise Clause through Section Five of the Fourteenth Amendment. As the Supreme Court held in *Smith*, laws of general applicability that incidentally burden religious exercise are only subject to rational basis scrutiny. Employment Div. v. Smith, 494 U.S. 872, 878–82 (1990). RLUIPA attempts to get around this general rule by describing the application of land use regulations as a system of "individualized assessments." 42 U.S.C. § 2000cc(a)(2)(C). This test harkens back to an earlier case, *Sherbert v. Verner*, in which the Supreme Court held that South Carolina's unemployment compensation system had to provide an exemption for a claimant that could not work on Saturdays because of her religious beliefs. 374 U.S. 398, 410 (1963). The *Sherbert* court held that because the unemployment compensation system provided exemptions for other non-religious reasons, it had to also provide a religious exemption. *Id.* at 403–04. In other words, *Sherbert* applied strict scrutiny to an "individualized governmental assessment." *Smith*, 494 U.S. at 883. However, as the Court in *Smith* explained, "[w]e have never invalidated any governmental action on the basis of the *Sherbert* test except the denial of unemployment compensation." *Id.* Therefore, to apply strict scrutiny in the zoning context based solely on this "individualized assessments" argument seems dubious, at best. Moreover, if a zoning board's application of a law of general applicability to an individual applicant is an "individualized assessment," then it would seem that any criminal law (including, say, prosecution for the possession of peyote) would be an application of a general law to a specific person. *See id.* at 883–84 (stating that a ban against peyote possession was a generally applicable law, even though it was applied in a specific circumstance); *cf.* Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. City of W. Linn, 86 P.3d 1140, 1148 (Or. Ct. App. 2004), *aff'd*, 111 P.3d 1123 (Or. 2005) ("Thus, even assuming that a governmental entity's enactments are neutral laws of general applicability, their application to particular facts nevertheless can constitute an individualized assessment . . . ."). Using *Sherbert* to support RLUIPA's land use provisions seems to run into even more problems when one considers the fact that *City of Boerne* was a zoning case, where individualized assessments were made that substantially burdened the applicant's religion, yet the Court did not apply strict scrutiny. *See* City of Boerne v. Flores, 521 U.S. 507, 533–36 (1997).

55. 42 U.S.C. § 2000cc(b).

56. *Id.* § 2000cc(b)(1).

57. *Id.* § 2000cc(b)(2).

58. *Id.* § 2000cc(b)(3).

59. *See, e.g.*, Primera Inglesia Bautista Hispana of Boca Raton, Inc. v. Broward County, 450 F.3d 1295 (11th Cir. 2006) (finding no violation of RLUIPA's equal terms provision in the denial of a variance); The Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch, 406 F. Supp. 2d 507, 516–17 (D. N.J. 2005) (analyzing the few RLUIPA cases that have been based on subsection (b) of

2. Congressional Intent and RLUIPA

Even though congressional intent is never exactly crystal clear and many judges criticize its use in interpreting a statute,[60] one of the best ways to decide whether a law is working or not is to explore what the lawmakers actually intended when they passed the law.[61]

A review of RLUIPA's available legislative history shows that Congress had two important and overriding intentions when it passed the statute. First, Congress hoped to stop intentional discrimination by local zoning authorities against religious assemblies and institutions.[62] Second, Congress did not intend for religious institutions to be immune from local zoning laws.[63] After reviewing Congress' clear intent in these two areas, it will become apparent that RLUIPA is written in an overbroad manner, which has lead to overbroad applications by the courts.

a. Congress Wanted to Stop Discrimination by Local Zoning Officials

As explained in more detail above, Congress compiled "massive" evidence of religious discrimination within the context of local zoning.[64] However, this record is not merely a compilation of inconveniences and difficulties encountered by religious institutions. The overriding message from the legislative history is that religious institutions suffer from *intentional* discrimination in the zoning context; it is this *intentional* discrimination that RLUIPA seeks to remedy. Therefore, to the extent that RLUIPA is being applied to reach nondiscriminatory conduct, those applications are incompatible with congressional intent.

RLUIPA's land use provisions). *See also* Guru Nanak Sikh Soc'y v. County of Sutter, 326 F. Supp. 2d 1140, 1155 (E.D. Cal. 2003) (applying the nondiscrimination provision); Freedom Baptist Church of Delaware County v. Twp. of Middletown, 204 F. Supp. 2d 857, 870–71 (E.D. Pa. 2002) (same); Ventura County Christian High Sch. v. City of San Buenaventura, 233 F. Supp. 2d 1241, 1246–47 (C.D. Cal. 2002) (same).

60. Justice Scalia has chided the Court for its use of "so-called legislative history" and its "silly" fascination with "the files of Congress." United States v. Estate of Romani, 523 U.S. 517, 536 (1998) (Scalia, J., concurring in part); *see also* INS v. Cardoza-Fonseca, 480 U.S. 421, 452–53 (Scalia, J., concurring) ("Judges interpret laws rather than reconstruct legislators' intentions."). The late Judge Harold Leventhal of the D.C. Circuit once quipped that using legislative history was like "looking over a crowd and picking out your friends." Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983). On the other hand, at least two justices strongly endorse the use of legislative history. *See* Koons Buick Pontiac GMC, Inc. v. Nigh, 543 U.S. 50, 65–66 (Stephens, J. concurring) (arguing that the Court should look to legislative history instead of relying on the "rote repetition of canons of statutory construction").

61. *See generally* Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845 (1992) (advocating the careful and reasoned use of legislative history).

62. *See infra* notes 64–72 and accompanying text.

63. *See infra* notes 73–76 and accompanying text.

64. 146 CONG. REC. S7774 (daily ed. July 27, 2000).

RLUIPA's two chief sponsors in the Senate, Senators Kennedy and Hatch, echoed this sentiment in their formal statements.[65] They described RLUIPA as a law aimed at intentionally discriminatory zoning practices, not at mere inconveniences or difficulties encountered by churches and similar institutions.[66] The two Senators generally described this intentional discrimination by arguing that the record showed that "zoning boards use [their] authority in discriminatory ways."[67] Often times, according to the Senators, the discrimination is "covert," and religious institutions, such as churches, are either explicitly discriminated against or treated differently than similarly situated non-religious institutions.[68]

> These individualized [zoning] assessments readily lend themselves to discrimination, and they also make it difficult to prove discrimination in any individual case. But the committees in each house have examined large numbers of cases, and the hearing record reveals a widespread pattern of discrimination against churches as compared to secular places of assembly, and of discrimination against small and unfamiliar denominations as compared to larger and more familiar ones.[69]

Presumably, Congress chose to cast a wide net in seeking to eradicate this covert discrimination by barring "substantial burdens" on religious activity, rather than just aiming RLUIPA at clearly intentional discrimination.

On the House side, RLUIPA's other chief sponsor, Representative Canady, also explained that RLUIPA was prompted by "brazen" acts of "intentional" religious discrimination.[70] In his introductory statement, Representative Canady stated that the land use provisions in RLUIPA were "designed to remedy the well-documented and abusive treatment

---

65. *Id.*

66. *Id.*

67. *Id.* In a separate statement, Senator Kennedy stated that "the evidence is clear that local land use laws often have the discriminatory effect of burdening the free exercise of religion." 146 CONG. REC. S6688 (daily ed. July 13, 2000) (statement of Sen. Kennedy).

68. 146 CONG. REC. S7775 (daily ed. July 27, 2000).

69. *Id.*

70. 146 CONG. REC. E1235 (daily ed. July 14, 2000). Rep. Canady further described some specifics of "brazen" religious discrimination in the record:

> Some [land use regulations] *deliberately* exclude all new churches from an entire city, others refuse to permit churches to use existing buildings that non-religious assemblies had previously used, and some *intentionally* changed a zone to exclude a church. For example, churches who applied for permits to use a flower shop, a bank, and a theater were excluded when the land use regulators rezoned each small parcel of land into a tiny manufacturing zone.

Id. (emphasis added).

suffered by religious individuals and organizations in the land use context."[71]

From a review of this legislative history and the stated purpose of the RLUIPA from its chief sponsors, it is clear that Congress was not merely attempting to remedy difficulties or obstacles that religious institutions may face at the local zoning level. In fact, every local zoning ordinance presents difficulties or obstacles for any applicant—religious or non-religious.[72] What is clear is that RLUIPA seeks to stop intentionally discriminatory zoning practices that treat churches and other religious institutions unfairly.[73] As explained more fully below, many courts have applied a much broader version of RLUIPA—a version that is probably (yet unintentionally) supported by the overbroad plain language of the act.[74]

b. Congress Did Not Intend to Make Religious Institutions Immune from Local Zoning Laws

Apart from seeking to stop intentional discrimination, Congress also did not believe that RLUIPA would shield religious groups from zoning ordinances. The Hatch-Kennedy Joint Statement contains an entirely separate section entitled, "Not land use immunity."[75] This section reads:

> This Act does not provide religious institutions with immunity from land use regulations, nor does it relieve religious institutions from applying for variances, special permits or exceptions, hardship ap-

---

71. *Id.*

72. In a pre-RLUIPA case concerning the Free Exercise Clause, the 7th Circuit described the problems presented by any zoning ordinance:

> Whatever specific difficulties [plaintiff church] claims to have encountered, they are the same ones that face all [land users]. The harsh reality of the marketplace sometimes dictates that certain facilities are not available to those who desire them.

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

73. This reading of the legislative history is supported by a recent case. *See* Faith Temple Church v. Town of Brighton, 405 F. Supp. 2d 250 (W.D.N.Y. 2005). In that case, the court wrote:

> The legislative history indicates that Congress was concerned about local governments' use of their zoning authority to discriminate against religious groups by making it difficult or impossible for them to build places of worship or other facilities, *see, e.g.,* 146 CONG. REC. E1564, 2000 WL 1369379 (Sept. 21, 2000) (statement of Rep. Hyde regarding "zoning conflicts between churches and cities"); 146 CONG. REC. E1234, 2000 WL 976598 (July 13, 2000) (statement of Rep. Canady noting instances where a municipality "intentionally change[d] a zone to exclude a church") . . . .

Id. at 255.

74. *See infra* notes 137–65 and accompanying text.

75. 146 CONG. REC. S7776 (daily ed. July 27, 2000).

> proval, or other relief provisions in land use regulations, where available without discrimination or unfair delay.[76]

Senator Hatch echoed this in his own speech, stating that RLUIPA "does not provide a religious assembly from immunity from zoning regulation."[77]

With these two congressional intentions in mind—prohibiting intentional discrimination and not granting immunity from local zoning[78]—we may now move to an analysis of the caselaw applying RLUIPA over the past five years. Unfortunately, many courts have gone past these two goals and have prohibited much more than intentional discrimination which, in turn, has given religious groups a type of immunity from local zoning regulations.

III. THE COURTS APPLY RLUIPA AND THE PROBLEMS BEGIN

Over the past five years, courts throughout the country have attempted to apply RLUIPA's land use provisions to specific factual situations. As explained above, RLUIPA prohibits the government from implementing or enforcing a land use regulation that imposes a substantial burden on a religious exercise.[79] For the most part, courts have generally agreed on when a "land use regulation" is implemented or imposed by a government;[80] they have agreed on what constitutes a "religious exer-

---

76. *Id.*

77. 146 CONG. REC. S6688 (daily ed. July 13, 2000) (statement of Sen. Hatch).

78. This argument concerning immunity has also been accepted by the courts:

> The legislative history of the statute also reflects that although Congress was concerned with discrimination against religious organizations, it did not intend to relieve such organizations from zoning ordinances or from special permit requirements. A joint statement issued by the sponsors of the legislation, Senators Orrin Hatch and Ted Kennedy, specifically explains that "[t]his Act does not provide religious institutions with immunity from land use regulation, nor does it relieve religious institutions from applying for variances, special permits or exceptions, hardship approval, or other relief provisions in land use regulations, where available without discrimination or unfair delay." 146 CONG. REC. S7774-01, at S7776. Clearly, it was not the intent of Congress to force municipalities to allow their residents to operate a religious institution in a residential subdivision.

Konikov v. Orange County, 302 F. Supp. 2d 1328, 1346 (M.D. Fla. 2004), *aff'd in part, rev'd in part*, 410 F.3d 1317 (11th Cir. 2005).

79. 42 U.S.C. § 2000cc(a)(1) (2003).

80. The question of what constitutes a "land use regulation" is rather straightforward because the term is defined in the statute. The term means any "zoning or landmarking law, or application of such a law, that limits or restricts a claimant's use or development of land . . . ." *Id.* § 2000cc-5(5). Cases generally hold that when a local government board or commission acts pursuant to a zoning ordinance, such as denying a variance, special use permit, or otherwise enforcing a zoning ordinance, then that action constitutes an implementation of a land use regulation. *See, e.g.,* Prater v. City of Burnside, 289 F.3d 417, 434 (6th Cir. 2002) (holding that a city's decision to develop a piece of property was not an implementation of a land use regulation); Faith Temple Church v. Town of Brighton, 405 F. Supp. 2d 250, 254–55 (W.D.N.Y. 2005) (holding that a town's use of eminent

cise";[81] and they have almost universally agreed that strict scrutiny is impossible for local zoning officials to meet.[82] What the courts have split on is the key question presented by RLUIPA: what constitutes a "substantial burden" on a religious exercise?

Courts have generally split into two camps on the "substantial burden" question. On the one hand, many courts have interpreted substantial

---

domain power was not an implementation of a land use regulation); St. John's United Church of Christ v. City of Chicago, 401 F. Supp. 2d 887, 899–901 (N.D. Ill. 2005) (same); Episcopal Student Found. v. City of Ann Arbor, 341 F. Supp. 2d 691, 698–99 (E.D. Mich. 2004) (holding that a historic commission's decision to deny a church's demolition permit application pursuant to a city ordinance governing historical preservation constituted the implementation of a land use regulation); Liberty Road Christian Sch. v. Todd County Health Dep't, No. 2004-CA-001583, 2005 WL 2240482, at *5 (Ky. Ct. App. Sept. 16, 2005) (holding that a health department's civil complaint against a school for violation of sanitary standards was not a land use regulation).

81. Religious exercise is broadly defined in the statute as any exercise of religion, whether or not compelled by, or central to, a system or religious belief. 42 U.S.C. § 2000cc-5(7)(A). This is substantially broader than religious exercise as defined in constitutional law, where courts inquire into whether the belief is sincere and central to a religious belief system. *See* Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1225–26 (11th Cir. 2004). Moreover, religious exercise includes the use of any building in which a religious exercise may take place. 42 U.S.C. § 2000cc-5(7)(B). Courts have generally agreed on what constitutes a religious exercise. *See, e.g.,* Living Water Church of God v. Charter Twp. of Meridian, 384 F. Supp. 2d 1123, 1129–30 (W.D. Mich. 2005) (holding that a church's operation of a religious school constituted an exercise of religion); *Episcopal Student Found.*, 341 F. Supp. 2d at 700–01 (deciding that a religious student organization's weekly social gatherings were a religious exercise); Murphy v. Zoning Comm'n of New Milford, 148 F. Supp. 2d 173, 188–89 (D. Conn. 2001) (finding that homeowners' weekly prayer meetings constituted a religious exercise); Shepherd Montessori Ctr. Milan v. Ann Arbor Charter Twp., 675 N.W.2d 271, 280–81 (Mich. Ct. App. 2003) (holding that a religious school constitutes a religious exercise). Note, however, that even though this definition of religious exercise is generally undisputed, its breadth has nonetheless contributed to the overbroad application of the statute.

82. Compelling governmental interest is defined narrowly. Traffic is definitely not a compelling governmental interest (*see Murphy*, 148 F. Supp. 2d at 190) and neither is parking (*see* Westchester Day School v. Village of Mamaroneck, 280 F. Supp. 2d 230, 242 (S.D.N.Y. 2003)). A township's interest in density may be an "undeniably . . . valid interest," but it is not compelling. *Living Water Church of God*, 384 F. Supp. 2d at 1134–36 (holding that a township's interest in large buildings negatively impacting adjacent property owners, neighborhoods, and public infrastructure was not a compelling governmental interest); *see also* Greater Bible Way Temple of Jackson v. City of Jackson, 708 N.W.2d 756, 762–63 (Mich. Ct. App. 2005) (holding that traffic, blight, and urban sprawl are not compelling governmental interests). These cases applying strict scrutiny beg the question, could *any* governmental interest that zoning ordinances address be "compelling"? The answer is probably no. Strict scrutiny has probably never been met by any local government in a RLUIPA zoning case where a substantial burden was found by a court. In fact, only one case in which strict scrutiny might have been met has been found. *See* Konikov v. Orange County, 302 F. Supp. 2d 1328, 1345 (M.D. Fla. 2004), *aff'd in part, rev'd in part*, 410 F.3d 1317 (11th Cir. 2005) (arguing, in the alternative, that if the question of strict scrutiny had to be addressed by the court, then the government may have had a compelling governmental objective in encouraging peaceful and safe residential areas). I would suggest, however, that *Konikov* is an anomaly. Strict scrutiny is nearly impossible to meet, and surely not by fuzzy concepts of "peaceful" and "safe" residential areas. It is the "most demanding test known to constitutional law." City of Boerne v. Flores, 521 U.S. 507, 534 (1997). "If compelling interest really means what it says, many laws will not meet the test." Employment Div. v. Smith, 494 U.S. 872, 888 (1990) (internal citations and quotations omitted).

burden narrowly, and held that mere inconveniences or difficulties experienced by churches do not constitute substantial burdens.[83] So long as the church is not completely prevented from religious exercise, then RLUIPA is not violated.[84] These cases apply a standard set out by the Seventh Circuit, which requires a showing that the plaintiff's religious exercise was made "effectively impracticable" by the local zoning decision.[85]

On the other hand, several other courts have interpreted substantial burden broadly, holding that any obstacle placed in front of a religious exercise must be subjected to strict scrutiny.[86] These courts apply a test that only requires a showing that the plaintiff encountered "delay, uncertainty, and expense" as a result of the local zoning decision.[87] This next section will explore each of these camps in detail.[88]

---

83. *See infra* notes 87–136 and accompanying text.

84. *Id.*

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

86. *See infra* notes 137–65 and accompanying text.

87. *Id.*

88. In order to understand these RLUIPA zoning cases in context, a short primer on zoning law is necessary. Zoning has been described as "public control of private land." 1 ANDERSON'S AMERICAN LAW OF ZONING § 1.02 (4th ed. 1996). *See generally*, Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (holding that zoning was constitutional). The general concept is that certain types of uses—residential, commercial, industrial—are permitted only in certain areas of a jurisdiction. *Id.* at 379–80. Local governments establish zoning ordinances that control the location of these uses, and more specific circumstances of each use. For example, zoning ordinances require residential homes to be set back from the street for a certain distance, that certain large buildings to be located on larger sized lots, that signs be of a certain size and location, that fences only be a certain height, et cetera. *See, e.g.*, GEORGETOWN TOWNSHIP, MICH., ZONING ORDINANCE ch. 3, §§ 3.3–3.8 (establishing set backs, fence size, lot size, and square footage for residential homes), *available at* http://www.gtwp.com/minutes/ZoningOrd/Index.htm. The types of zoning regulations are endless. Depending on the local government, a zoning ordinance can be very relaxed or very stringent in its regulation of uses. 1 ANDERSON'S AMERICAN LAW OF ZONING, *supra*, § 1.02 ("These intricate restrictions did not emerge full-blown from the minds of contemporary planners or lawyers. They grew slowly from the modest restrictions of common law until this century, when they developed rapidly into the extravagant restrains of modern zoning.")

In the RLUIPA cases described in this section, there are three common types of zoning circumstances that may impact a church: requests to rezone, special use permits, and variances. First, many times churches own (or want to own) a piece of property that is not zoned to allow churches. The church may then apply to have the property rezoned into a type of district that allows a church. Second, churches may need to apply for a special use permit before it builds in a certain district. Special use permits are frequently required of churches, hospitals, day care centers, schools, and bed and breakfasts, just to name a few. *See, e.g.*, GEORGETOWN TOWNSHIP, MICH., ZONING ORDINANCE, ch. 9, § 9.3, *available at* http://www.gtwp.com/minutes/ZoningOrd/Index.htm. Third and finally, sometimes a church will want to construct a building that is bigger or otherwise different from the requirements in the ordinance. In this circumstance, the church may request a variance from the local government, that is, ask the local government to "vary" from the normal application of the ordinance.

A. Cases Interpreting Substantial Burden Narrowly

1. "Substantial Burden" and the *C.L.U.B.* Decision

In one of the first RLUIPA cases to reach a federal court of appeals, *C.L.U.B. v. City of Chicago*, the Seventh Circuit laid out the analytical framework that would come to support the narrow reading of "substantial burden" by many courts.[89] In this case, several churches generally challenged Chicago's zoning ordinance.[90] As with most zoning ordinances throughout the United States, Chicago's ordinance broadly divided the city into the following zones: R (residential), B (business), C (commercial), and M (manufacturing).[91] Churches were permitted as of right in R zones; however, if a church wanted to operate in a B or C zone, then the church had to first obtain a special use permit.[92] The special use permit process allowed Chicago to condition approval of the building on certain factors, such as design, location, and operation to ensure that the use would not conflict with public health, safety, or welfare, or substantially affect the value of a neighboring property.[93]

The Seventh Circuit's decision focused on the question of what should be the definition of "substantial burden," which is not defined in RLUIPA.[94] The court noted that under RFRA, it had previously defined

89. 342 F.3d 752 (7th Cir. 2003).

90. *Id.* at 755–56.

91. Each of these zones was then subdivided into numbered districts and subdistricts. For example, C1, C2, and C3 would all be commercial districts but would permit different type of commercial uses. *Id.* at 755.

92. *Id*. Before a church could locate in the M zone, the City Council of Chicago would have to vote in favor of the proposal and effectively rezone the targeted property. *Id.*

93. In fact, the stated purpose of Chicago's zoning code was "to promote and to protect the public health, safety, morals, comfort, convenience, and the general welfare of the people" and "to protect the character and maintain the stability for residential, business, commercial, and manufacturing areas within the City, and to promote the orderly and beneficial development of such areas." *Id.* at 755 (internal citations omitted).

94. The term "substantial burden" is not defined in RLUIPA. However, the legislative history indicates that Congress intended this phrase to be interpreted as it had been under RFRA and according to First Amendment jurisprudence. 146 CONG. REC. S7776 (daily ed. July 27, 2000) (Joint Statement of Sen. Hatch and Sen. Kennedy on the Religious Land Use and Institutionalized Persons Act of 2000) ("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."). Apparently, Congress had in mind Supreme Court cases like *Lyng v. Northwest Indian Cemetery Protective Association*, where the Court stated that for a governmental regulation to substantially burden a religious activity, that regulation must have a tendency to coerce individuals into acting contrary to their religious beliefs. 485 U.S. 439, 450–51 (1988); *see also* Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707, 717–18 (1981) (holding that a substantial burden exists where the government puts "substantial pressure on an adherent to modify his behavior and to violate his beliefs"). However, many courts have chosen alternative definitions because Congress chose to define "religious activity" broadly to include the mere *use* of a building by a church or other religious institution. *See* 42 U.S.C. § 2000cc-5(7)(B) (2003).

substantial burden as one that "forces adherents of a religion to refrain from religiously motivated conduct, inhibits or constrains conduct or expression that manifests a central tenet of a person's religious beliefs, or compels conduct or expression that is contrary to those beliefs."[95] However, the court noted that this definition would become unworkable once RLUIPA's broad definition of "religious exercise"—which includes the mere use of property for religious purposes—was inserted.[96] The court wrote:

> Application of the substantial burden provision to a regulation inhibiting or constraining *any* religious exercise, including the use of property for religious purposes, would render meaningless the word "substantial," because the slightest obstacle to religious exercise incidental to the regulation of land use—however minor the burden it were to impose—could then constitute a burden sufficient to trigger RLUIPA's requirement that the regulation advance a compelling governmental interest by the least restrictive means.[97]

Accordingly, fully aware of the statutory problem created by the broad definition of the term "religious exercise," the Seventh Circuit defined substantial burden more narrowly: "a substantial burden on a 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."[98]

Applying this "effectively impracticable" standard, the Seventh Circuit made a number of important observations with regard to the application of zoning regulations to churches and other religious institutions. First of all, the plaintiffs had argued that costs, procedural requirements, and the politics of applying for special use permits was a substantial burden on their religious exercise.[99] The court noted in response that these burdens are merely incidental to high-density urban land use.[100] Furthermore, these difficulties are "ordinary" and encoun-

---

95. *C.L.U.B.*, 342 F.3d at 761 (citing Mack v. O'Leary, 80 F.3d 1175, 1179 (7th Cir. 1996)).

96. *Id.*; 42 U.S.C. § 2000cc-5(7)(B). Under RFRA and the First Amendment, the definition of "religious exercise" was constrained to the "observation of a central religious belief or practice." *See* Hernandez v. Comm'r, 490 U.S. 680, 699 (1989); Hicks v. Garner, 69 F.3d 22, 26 n.22 (5th Cir. 1995) (collecting cases defining a "substantial burden on a person's religious practice" under RFRA). Under RLUIPA, however, that definition was broadened to include a religious exercise's use of property (such as a church using a piece of property to expand). *See* 42 U.S.C. § 2000cc-5(7)(B).

97. *C.L.U.B.*, 342 F.3d at 761 (emphasis in original).

98. *Id.*

99. *Id.*

100. *Id.*

tered by all land users.[101] Moreover, the mere fact that the plaintiffs were able to locate within the city was significant, demonstrating that the zoning ordinance was not a substantial burden.[102]

> Otherwise, compliance with RLUIPA would require municipal governments not merely to treat religious land uses on an equal footing with nonreligious land uses, but rather to favor them in the form of an outright exemption from land-use regulations. Unfortunately for Appellants, no such free pass for religious land uses masquerades among the legitimate protections RLUIPA affords to religious exercise.[103]

Based on this analysis, the Seventh Circuit affirmed the dismissal of the plaintiffs' lawsuit, and held that Chicago's ordinance was not a substantial burden on a religious exercise—the ordinance did not make a religious exercise "effectively impracticable."[104]

2. Several Circuits Join the Seventh Circuit in Interpreting "Substantial Burden" Narrowly

Within a few months of the Seventh Circuit's decision in *C.L.U.B.*, the Ninth Circuit also joined the ranks in interpreting "substantial burden" narrowly.[105] In *San Jose Christian College v. City of Morgan*

---

101. *Id.* The court quoted *Love Church v. City of Evanston*, 896 F.2d 1082 (7th Cir. 1990), which held, "[w]hatever specific difficulties [plaintiff church] claims to have encountered, they are the same ones that face all [land users]. The harsh reality of the marketplace sometimes dictates that certain facilities are not available to those who desire them." *Id.* at 1086 (alteration in original); *see also* Stuart Circle Parish v. Bd. of Zoning Appeals, 946 F. Supp. 1225, 1237 (E.D. Va. 1996) ("It is well established that there is no substantial burden placed on an individual's free exercise of religion where a law or policy merely 'operates so as to make the practice of [the individual's] religious beliefs more expensive.'") (quoting Braunfeld v. Brown, 366 U.S. 599, 605 (1961)).

102. *C.L.U.B.*, 342 F.3d at 761.

103. *Id.* at 762.

104. *Id.*

105. There are some pre-*C.L.U.B.* cases narrowly interpreting "substantial burden" that are worth noting. However, *C.L.U.B.* is merely noted first in this article because it was the first influential circuit level case that has been cited in virtually every RLUIPA case since it was handed down. *See* Vineyard Christian Fellowship of Evanston, Inc. v. City of Evanston, 250 F. Supp. 2d 961, 991 (N.D. Ill. 2003) (holding that a government's refusal to issue a permit was not a substantial burden, since "Congress did not intend to change traditional Supreme Court jurisprudence on the definition of substantial burden," meaning that if conduct did not violate the Free Exercise Clause, it would not violate RLUIPA's land use provisions); Grace United Methodist Church v. City of Cheyenne, 235 F. Supp. 2d 1186, 1197 (D. Wyo. 2002) (denying plaintiff summary judgment on issue of whether denial of religious day care permit was a substantial burden, but also explaining that for "a government regulation to substantially burden religious activity, it must have the tendency to coerce individuals into acting contrary to their beliefs"); San Jose Christian Coll. v. City of Morgan Hill, No. C01-20857, 2002 WL 971779, at *2 (N.D. Cal. Mar. 5, 2002) (holding that a city's refusal to rezone property to permit a religious school was not a substantial burden, and stating that to show a substantial burden, a plaintiff must show that the government is preventing him from doing something *which the faith mandates*); N. Pac. Union Conference Ass'n of the Seventh-Day Adventists v. Clark

Hill,[106] a religious college petitioned the City of Morgan Hill to rezone a piece of property so that a college could be built.[107] The city denied the request for two reasons. First, the religious college refused to comply with the permit application procedures concerning environmental impacts.[108] Second, a city task force concluded that the city desperately needed a hospital, and this particular piece of property was the only suitable location for a hospital in the city.[109] Accordingly, the city concluded that the property should not be rezoned to permit the college.[110]

Relying on *C.L.U.B.* and the plain meaning of the term "substantial burden," the Ninth Circuit held that the city's denial of the rezoning request did not violate RLUIPA.[111] The court laid out the following test: "the government is prohibited from imposing or implementing a land use regulation in a manner that imposes a significantly great restriction or onus on any exercise of religion [without meeting strict scrutiny]."[112]

Applying this test, the Ninth Circuit reasoned that while the religious college may not be able to operate at the specific site that it wanted, there was no evidence that the college was precluded from operating elsewhere in the city.[113] Moreover, there was no evidence that the city was holding the college to a different standard than it held other non-religious institutions.[114]

County, 74 P.3d 140, 147 (Wa. Ct. App. 2003) (holding that a county's denial of a permit allowing a church to construct a church administrative building in an agricultural zone did not violate RLUIPA because the denial did not prevent the church's members from observing their religious tenets).

106. 360 F.3d 1024 (9th Cir. 2004).

107. *Id.* at 1027.

108. *Id.* at 1028.

109. *Id.* at 1029.

110. *Id.*

111. *Id*. at 1035–36.

112. *Id.* The court relied on the dictionary for its definition of "substantial burden." The court wrote:

> To determine the "plain meaning" of a term undefined by a statute, resort to a dictionary is permissible. *See* United States v. Sherburne, 249 F.3d 1121, 1126 (9th Cir. 2001). A "burden" is "something that is oppressive." Black's Law Dictionary 190 (7th ed. 1999). "Substantial," in turn, is defined as "considerable in quantity" or "significantly great." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1170 (10th ed. 2002). Thus, for a land use regulation to impose a "substantial burden," it must be "oppressive" to a "significantly great" extent. That is, a "substantial burden" on "religious exercise" must impose a significantly great restriction or onus upon such exercise.

Id. at 1034.

113. *Id*. at 1035.

114. *Id.* Very recently, the Ninth Circuit again applied this narrow test in *Guru Nanak Sikh Society of Yuba City v County of Sutter*, __ F.3d __, 2006 WL 2129737 (9th Cir. Aug. 1, 2006). In this case, a Sikh Temple applied for a conditional use permit to build a temple near Yuba City. The county planning commission denied the request, citing traffic and noise concerns. The temple then attempted to placate the commission by purchasing a larger lot out in an agricultural area, but the commission denied this second request for a conditional use permit. Applying the test from *San Jose*

The Third Circuit soon joined the Seventh and the Ninth Circuits in a narrow application of RLUIPA's substantial burden provision. In *Lighthouse Institute v. City of Long Branch*, a church wanted to build in a commercial area of Long Branch, New Jersey.[115] However, the ordinance only permitted certain uses in a commercial district, such as assembly halls, movie theaters, and bowling alleys.[116] Churches were not permitted.[117] In denying the church's request for a preliminary injunction, the Third Circuit held that the ordinance was not a substantial burden on religious exercise.[118] Quoting *C.L.U.B.*, the Third Circuit stated that "substantial burden" meant that the government was rendering the plaintiff's religious exercise "effectively impracticable."[119]

However, this was not the case in *Long Branch*. The ordinance did not prevent churches from operating in other parts of Long Branch, thereby making religious exercise "effectively impracticable."[120] The ordinance merely precluded churches from locating in one specific two-block district.[121] Furthermore, there was no evidence that the church was being treated any differently than any other non-religious institution.[122]

The Eleventh Circuit also joined its sister circuits in narrowly applying RLUIPA's substantial burden provision. In *Midrash Sephardi, Inc. v. Town of Surfside*, two synagogues challenged a town ordinance prohibiting churches and synagogues from operating in a business district.[123] The synagogues claimed that requiring them to build outside of the business district would force their members, who did not drive cars

---

Christian, the Ninth Circuit held that it was impossible for the Sikh Temple to build anywhere in the county because all of the concerns cited by the first denial were satisfied in the second application for a conditional use permit. This constituted the imposition of a land use regulation that imposed a substantial burden that is "oppressive" to a "significantly great" extent, according to the Ninth Circuit.

115. 100 F. App'x 70 (3d Cir. 2004).

116. *Id.* at 74.

117. *Id.*

118. *Id.* at 77–78.

119. *Id.* at 76–77.

120. *Id.*

121. This was the "Central Commercial District." The city's ordinance identified the permitted uses in the Central Commercial District, which included, among other things, assembly halls, bowling alleys, and movie theaters. *See id.* at 74 (discussing City of Long Branch Ordinance, No. 20-6.13(A)(3)). Because churches were not identified as permitted uses, they were not allowed.

122. *Id.* at 77.

123. 366 F.3d 1214 (11th Cir. 2004). Churches and synagogues were prohibited in Surfside's downtown business district. This district comprises two blocks that were for "retail shopping and personal service needs of the town's residents and tourists," according to the ordinance. *See id.* at 1219–20 (discussing Town of Surfside City Ordinance, § 90-152). This section further explains that the regulations are intended to "prevent uses and activities which might be noisy, offensive, obnoxious, or incongruous in behavior, tone or appearance and which might be difficult to police." *Id.* at 1220.

due to religious beliefs, to walk farther to attend services.[124] Moreover, the synagogues claimed that they would not be able to find land or a facility large enough to congregants outside of the business district.[125]

The Eleventh Circuit ultimately held that the town's ordinance did not substantially burden the synagogues.[126] Importantly, however, the court also applied a test different from the Seventh Circuit's decision in *C.L.U.B.* The Eleventh Circuit wrote:

> [A] "substantial burden" must place more than an inconvenience on religious exercise; a "substantial burden" is akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly. Thus, a substantial burden can result from pressure that tends to force adherents to forego religious precepts or from pressure that mandates religious conduct.[127]

Although the focus in *Midrash Sephardi* is on the pressure exerted on the plaintiff, the result is actually not that different from *C.L.U.B.*'s "effectively impracticable" test (although *Midrash Sephardi* has certainly been applied more broadly than its plain language suggests).[128] If a decision by a local zoning board amounted to "significant pressure" that "directly coerces" a plaintiff to forego religious precepts, that decision would make that plaintiff's religious exercise "effectively impracticable" for all intents and purposes. In any event, this is merely an issue of semantics. What really matters is the result. *Midrash Sephardi* held that forbidding a synagogue from locating in a specific district was not a substantial burden, even though the plaintiff would encounter hardships, such as possibly not finding a suitable site outside of the district or forcing their congregants to walk longer distances to the synagogue. While the language is different, it is clear that this result reveals that *Midrash Sephardi* is actually a case that applies the narrow interpretation of RLUIPA's substantial burden provision.

These four circuit courts—the Seventh, Ninth, Third, and Eleventh—have laid the groundwork for a narrow application of RLUIPA's substantial burden provision. They provide that substantial burden means a "significantly great restriction" that renders a religious exercise "effectively impracticable." While some lower courts have adopted this analy-

---

124. *Id.* at 1227.

125. *Id.* at 1227, n.11.

126. *Id.* at 1228.

127. *Id.* at 1227. The Eleventh Circuit stated that *C.L.U.B.*'s "effectively impracticable" test would render meaningless RLUIPA's total exclusion provision. *Id.*; *see* 42 U.S.C. § 2000cc(b)(3) (2003). This provision provides that "[n]o government shall impose or implement a land use regulation that (A) totally excludes religious assemblies from a jurisdiction; or (B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction." *Id.*

128. *See infra* notes 134–36 and accompanying text.

sis, other courts (including some federal courts of appeal) have roundly rejected such a narrow reading of RLUIPA as we will see more below.

3. District Courts and State Courts Follow Suit and Interpret "Substantial Burden" Narrowly

Since the Seventh, Ninth, Third, and Eleventh Circuits rendered their opinions narrowly applying RLUIPA's substantial burden provision, a number of lower courts have followed suit. These cases hold that simply denying a church's request to operate in a specific location is not a substantial burden.[129] It is not enough for a church to just claim that it really wanted to build on that site, or that it really wanted to design its building in a particular way; churches must comply with the ordinances like everyone else.[130] Moreover, in these cases, the churches have not successfully argued that they would be substantially burdened by expending additional time, money, and other resources to find a suitable site, or to submit a new permit application that would possibly lead to approval.[131] As the circuit courts held, the government's denial must be a "significantly great restriction" making religious exercise "effectively impracticable."

In a case that is a good representative of many of these lower court decisions, *City of West Linn,* the Oregon Supreme Court considered a local zoning board's denial of a church's conditional use permit.[132] The zoning board denied the permit because the proposed building was too large for the neighborhood; there were inadequate buffer zones between

---

129. *See, e.g.,* The Williams Island Synagogue, Inc. v. City of Aventura, 358 F. Supp. 2d 1207 (S.D. Fla. 2005) (holding that a denial of a special use permit for a new synagogue did not constitute a substantial burden even though the current synagogue's size and location interfered with the congregants' strict adherence to their faith); Vision Church v. Vill. of Long Grove, 397 F. Supp. 2d 917 (N.D. Ill. 2005) (holding that limitations placed on the size of a church do not constitute a substantial burden on religious exercise); The Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch, 406 F. Supp. 2d 507 (D. N.J. 2005) (upholding an ordinance that prohibited churches within a redevelopment zone because churches were permitted elsewhere within the city); Episcopal Student Found. v. City of Ann Arbor, 341 F. Supp. 2d 691 (E.D. Mich. 2004) (holding that a failure to grant a permit to demolish a building and construct a church was not a substantial burden, even though the denial resulted in more expense and difficulty for the church).

130. *See, e.g.,* Sisters of St. Francis Health Servs., Inc. v. Morgan County, Indiana, 397 F. Supp. 2d 1032 (S.D. Ind. 2005) (holding that a moratorium on all hospital construction did not constitute a substantial burden even though it prevented the construction of a religious hospital).

131. *See, e.g.,* Cambodian Buddhist Soc'y v. Newtown Planning and Zoning Comm'n, 40 Conn. L. Rptr. 410 (Conn. Super. Ct. 2005) (upholding a zoning board's denial of a special use permit for a Buddhist temple in a residential zone); Corp. of the Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. City of W. Linn, 86 P.3d 1140, 1156 (Or. Ct. App. 2004), *aff'd*, 111 P.3d 1123 (Or. 2005) (holding that it is not a substantial burden to prevent a church from constructing a building of a "particular design . . . on a particular parcel").

132. Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. City of W. Linn, 111 P.3d 1123 (Or. 2005).

the proposed building and the neighbors; and the local roads were not adequate to serve the proposed church.[133] The church claimed that the denial led to several adverse consequences: the church had to redesign its proposed building, submit a new application, and in the meantime, church members would continue to face crowded conditions at their current church.[134] In affirming dismissal of the church's RLUIPA claim, the Oregon Supreme Court held that these consequences did not amount to a substantial burden.[135] The court looked to *C.L.U.B.* and *Midrash Sephardi* and concluded that the definitions of substantial burden in these two cases were compatible, and that both definitions required dismissal of the plaintiff's claims.[136] While the plaintiffs in *City of West Linn* encountered hardship, such as delay, expense, and the inconvenience of dealing with crowded quarters at the church's current location, these consequences were not substantial burdens.[137] The court wrote:

> There is no evidence in the record to suggest that the crowded conditions at the meetinghouse have forced the church to turn away anyone who wished to attend church or to eliminate or reduce church activities. Nor is there any evidence in the record to suggest that the city's denial was motivated by religious animus. In short, nothing in the record suggests that requiring the church to submit a new application would pressure the church to forgo or modify the expression of a religious belief . . . .[138]

City of West Linn is an excellent example of the cases narrowly interpreting RLUIPA's substantial burden provision because it explains that substantial burden is something more than delay, uncertainty, or additional expenses. But as explained below, this approach has been abandoned by a different group of courts that apply RLUIPA's substantial burden provision in an exceedingly broad manner, and have therefore created conflict and confusion in the law.

B. Cases Interpreting Substantial Burden Broadly

1. The Seventh Circuit Changes its Mind in *City of New Berlin*

In many other courts, especially more recent decisions, nearly every zoning decision affecting a church or other religious group is deemed to be a substantial burden on a religious exercise. A typical case manifest-

133. *Id.* at 1125.
134. *Id.* at 1130–31.
135. *Id.*
136. *Id.* at 1129–30.
137. *Id.*
138. *Id.* at 1130.

ing this hostility towards local zoning decisions is actually a Seventh Circuit case, *Saints Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin*, which broke from the earlier *C.L.U.B.* decision and created a split among the circuits as to the scope of RLUIPA's substantial burden provision.[139] In *City of New Berlin*, a church requested that a fourteen acre parcel of land be rezoned from residential to institutional.[140] The church had hoped to use the parcel to build a $12 million building for worship and other uses.[141] The city, however, denied the request, and the church sued under RLUIPA, claiming that the denial was a substantial burden on religious exercise.[142]

Judge Posner, writing for the court, artfully dodged the *C.L.U.B.* court's narrow definition of substantial burden by merely stating that *C.L.U.B.*'s facts were distinguishable from this case.[143] With almost no analysis of the definition of substantial burden, Judge Posner wrote: "The burden here was substantial. The Church could have searched around for other parcels of land . . ., or it could have continued filing applications with the City, but in either case there would have been delay, uncertainty, and expense."[144]

---

139. 396 F.3d 895 (7th Cir. 2005). This case is referred to as *City of New Berlin* for convenience.

140. *Id.* at 898.

141. *Id.*

142. *Id.* The city was concerned that if the church was unable to raise the money necessary to build the church, it would have to sell the parcel, and then the new owner could take advantage of the new zoning status, yet not be bound by the restrictions agreed to by the church. *Id*.

143. *Id.* at 899. Judge Posner wrote,

> But in *CLUB* the plaintiff churches were challenging Chicago's zoning ordinance which—unlike New Berlin's—allows churches to build in areas zoned residential, though it requires them to obtain a permit to build in areas zoned commercial. The requirement of seeking a permit, given that churches don't need one to build in a residential zone, seemed to the panel majority in *CLUB* not to place a substantial burden on the churches.

Id. Judge Posner here is not really offering a justification for why *C.L.U.B.*'s substantial burden definition should not apply. It really does not matter whether a permit is required—the definition of substantial burden should still be the same. In any event, it is clear from this passage that Judge Posner is merely attempting to discredit the "panel majority" decision that "seemed" to find that Chicago complied with RLUIPA, rather than actually confronting *C.L.U.B.*'s analysis. (Judge Posner dissented in *C.L.U.B.* and apparently found two like-minded panelists in *City of New Berlin*.).

144. *Id.* at 900. Instead of analyzing the definition of substantial burden, Judge Posner actually invented a completely novel theory that is not supported by any statutory language or legislative history of RLUIPA, or any case. He wrote that the substantial burden provision "backstops the explicit prohibition of religious discrimination in the later section of the Act, much as the disparate-impact theory of employment discrimination backstops the prohibition of intentional discrimination." *Id.* If Judge Posner were to read the legislative history, he would have realized that RLUIPA's goal was to stop intentional religious discrimination, and there was no intent to give churches a free pass to avoid zoning decisions that inconvenience a church's plans. *See supra* notes 51–76 and accompany text.

In this case, the Seventh Circuit is demonstrating a significant departure from previous circuit court opinions, as well as an earlier Seventh Circuit opinion. The previous cases had specifically held that delay, uncertainty, and expense caused by a zoning decision was *not* a substantial burden—it was more akin to an inconvenience.[145] But Judge Posner rejected that view, and as a result, many courts have started to adopt a broad definition of the phrase "substantial burden on religious exercise."[146]

2. The Lower Courts Apply *City of New Berlin*

A classic example of this overbroad application by the lower courts is *Living Water Church of God v. Charter Township of Meridian*.[147] In this case, Meridian Township's ordinance required churches, and a variety of other non-single family dwellings, to obtain a special use permit before building in a residential zone.[148] The ordinance also required an

---

145. *See, e.g.*, Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214 (11th Cir. 2004) (holding that there was no substantial burden even though the synagogues' members would be burdened by walking additional blocks to get to the building, and even though the synagogues claimed that they would not be able to find land or a facility large enough to serve congregants outside of the business district).

146. *City of New Berlin*, 396 F.3d at 900.

147. 384 F. Supp. 2d 1123 (W.D. Mich. 2005).

148. *Id.* at 1126. The court's opinion suggests that only "religious and educational" institutions are required to obtain special use permits, perhaps in an attempt to paint the ordinance in a discriminatory light. *Id.* However, a quick review of the Meridian Township ordinance shows that there are thirteen separate uses that are all required to obtain permits—not just religious or educational institutions. The ordinance reads:

> The following uses of land and structures may be permitted by the application for and the issuance of a special use permit as provided for in article VI of this chapter.
>
> (1) Golf driving ranges or miniature golf courses . . . .
>
> (2) Club buildings for outdoor sports. Such as golf and skiing . . . .
>
> (3) Public riding stables and livestock auction yards.
>
> (4) Greenhouses and nurseries selling at retail on the premises.
>
> (5) Veterinary hospitals, clinics, or commercial kennels.
>
> (6) Game or hunting preserves operated for profit.
>
> (7) Institutions for human care. Hospitals, sanitariums, nursing, or convalescent homes, homes for the aged and other similar institutions . . . .
>
> (8) Religious institutions. Churches, convents, or similar institutions . . . .
>
> (9) Public, private, or quasipublic education and social institutions . . . .
>
> (10) Camps for outdoor activities.
>
> (11) Sand or gravel pits, quarries, incinerators, junk yards, sanitary fills, public or semiprivate sewage treatment and disposal installations . . . .
>
> (12) Cemeteries . . . .
>
> (13) Airports.

MERIDIAN TOWNSHIP ORDINANCES, ch. 86, art. IV, div. 2, § 86-368(c), *available at* http://www.meridian.mi.us.

additional special use permit for buildings in excess of 25,000 square feet.[149]

The township board originally granted the church a permit, but when the church came back for an additional permit to construct a 35,000 square foot Christian school next to the existing church, the township denied the permit application.[150] The board concluded that the 35,000 square foot building was simply out of proportion with the church's six acre lot size; in other words, the lot was too small for the building.[151]

The Western District of Michigan held that the township's denial imposed a substantial burden on the church.[152] The church, according to the court, "is unable to practice its religious beliefs in its current location because the facilities are too small for the needs of the congregation and staff."[153] The court determined that it was just not "feasible" to have the church and the school in two different locations.[154] Moreover, if the church had to look to another site to build, then it would have to resubmit an application—apparently a substantial obstacle in the court's eyes.[155] Relying chiefly on *City of New Berlin*, the court concluded that the township's decision was a substantial burden because it would lead to "delay, expense, and uncertainty."[156]

In another Michigan case, the Michigan Court of Appeals quite possibly established the high-water mark for excessively overbroad applications of RLUIPA. In *City of Jackson*, a church wanted to build an assisted living center on the lot next to the church.[157] To accomplish this business endeavor, the church needed the city to rezone the property next door from single-family residential to multiple-family residential.[158] The

149. *Living Water Church of God*, 384 F. Supp. 2d at 1126.

150. *Id.* at 1128.

151. *Id.*

152. *Id.* at 1134.

153. *Id.* at 1133.

154. *Id.* The court wrote that "Plaintiff's attempts to operate the church and the school in two separate locations in the past has been hampered by issues associated with transportation, costs and shared employees. There is no guarantee that the school and church could build anywhere else in the Township." *Id.*

155. *Id.* at 1134.

156. *Id.* The court also curtly noted that the township's decision rendered the plaintiff's ability to use its property for religious purposes "effectively impracticable," citing *C.L.U.B.*'s narrow test. However, it is hard to imagine that the Seventh Circuit's *C.L.U.B.* panel would agree that a decision requiring delay and expense would render a religious exercise "effectively impracticable."

157. Greater Bible Way Temple of Jackson v. City of Jackson, 708 N.W.2d 756, 759 (Mich. Ct. App. 2005).

158. *Id.*

city rejected the proposal, citing traffic concerns and urban sprawl,[159] and the church sued.[160] In holding that the city violated RLUIPA by denying a rezoning request, the court explained that the assisted living center needed to be close to the church.[161] Although there were other locations in the city where the center could be built, the court stated that it was necessary for the center to be in close proximity to the church.[162] Moreover, alternatives were not as economically feasible.[163] All of this, according to the court, established that the city's refusal to rezone the property was a substantial burden on a religious exercise.[164]

These cases establish that even the slightest interference with a religious exercise can constitute a substantial burden.[165] Following this line of cases, some courts have simply held that it is a substantial burden if a church cannot build on land that it owns.[166] Rejecting the "effectively impracticable" test set forth in *C.L.U.B.*, these cases look to merely whether a church or other religious institution was "inhibited" from what it wanted to do, that is, to build where and how it wanted.[167]

---

159. The court did not find that sprawl, blight, and traffic concerns constituted compelling governmental reasons for denying the request to rezone the property. *Id.* at 763.

160. *Id.* at 759.

161. *Id.* at 762.

162. *Id.*

163. *Id.*

164. *Id.*

165. One of the consequences of this broad interpretation of substantial burden is that more cases will go to trial and fewer cases will result in summary judgment. *See, e.g.,* Westchester Day Sch. v. Vill. of Mamroneck, 379 F. Supp. 2d 550 (S.D.N.Y. 2005); Shepherd Montessori Ctr. Milan v. Ann Arbor Twp., 675 N.W.2d 271 (Mich. Ct. App. 2004).

166. *See, e.g.,* Chase v. City of Portsmouth, No. Civ.A. 2:05CV446, 2005 WL 3079065 (E.D. Va. Nov. 16, 2005) (holding that a plaintiff's inability to use a parcel of property purchased for a church constitutes a substantial burden because of the costs associated with finding another suitable piece of property); Congregation of Kol Ami v. Abington Twp., No. Civ.A. 01-1919, 2004 WL 1837037, at * 9 (E.D. Pa. Aug. 17, 2004) ("Under the statute, developing and operating a place of worship at 1908 Robert Road *is* free exercise."); Castle Hills First Baptist Church v. City of Castle Hills, No. SA-01-CA-1149-RF, 2004 WL 546792, at *9 (W.D. Tex. Mar. 17, 2004) ("The City's refusal to accept the Church's fourth floor SUP application is a substantial burden on a sincerely held religious belief because it entirely precludes the Church from seeking a permit needed for religious use of *existing* property and facility.") (emphasis added); Elsinore Christian Ctr. v. City of Lake Elsinore, 291 F. Supp. 2d 1083, 1091 (C.D. Cal. 2003) (holding that a mere denial of a permit to develop property constitutes a substantial burden on a religious exercise); Cottonwood Christian Ctr. v. Cypress Redev. Agency, 218 F. Supp. 2d 1203, 1226 (C.D. Cal. 2002) (holding that a denial of an application to build a church on its property constituted a substantial burden because "[p]reventing a church from building a worship site fundamentally inhibits its ability to practice its religion").

167. *See, e.g.*, Guru Nanak Sikh Soc'y of Yuba City v. County of Sutter, 326 F. Supp. 2d 1140, 1154 (E.D. Cal. 2003) (rejecting *C.L.U.B.* and applying the standard "actually inhibits religious practice by virtue of a land use decision").

IV. WHAT TO DO WITH RLUIPA

A. What's The Problem?

As seen by the different outcomes discussed above, there is clear confusion in the law over the meaning of substantial burden in RLUIPA. If a church wants to build in a certain location but the government denies the request, has there been a substantial burden on a religious exercise? As seen above, many courts say "no," while many others say "yes."[168]

The problem with RLUIPA, however, is *not* that the courts are split. In fact, it is understandable why the courts diverge on this issue. The plain language of the statute seems to dictate a result that, if carried to its logical extreme, would give religious institutions a free pass when confronted with local zoning issues.[169] But Congress never intended that result. Therefore, the problem is not with the courts but with the language of RLUIPA itself, which conflicts with congressional intent.[170]

Read literally, RLUIPA's substantial burden provides that the government cannot impose any burden on a religious exercise that turns out to be substantial.[171] And as the *C.L.U.B.* decision recognized, the problem is that the definition of "religious exercise" is so broad that it in-

---

168. *See supra* notes 87–165 and accompanying text.

169. The Supreme Court has recently decided that the plain language should trump legislative history, even if the two conflict. The case of *Exxon Mobil Corporation v. Allapattah Services, Inc*., 125 S. Ct. 2611 (2005), raised the question of what happens when the plain language of a statute comes into conflict with a "virtual billboard of congressional intent" regarding its meaning. *Id.* at 2629 (Stephens, J. dissenting). The underlying issue facing the Court in *Exxon Mobil* was how federal courts should apply the diversity jurisdiction requirements of 28 U.S.C. § 1332 to cases involving more than one plaintiff. In a 5-4 decision, the Court came down on the side of the statutory text. *See id.* at 2619–27. While the Court acknowledged that this holding was in direct conflict with the legislative history of the statute, it emphasized that where the statute is clear on its face, "the authoritative statement is the statutory text, not the legislative history or any other extrinsic material." *Id.* at 2626.

170. The *Exxon Mobil* case also criticizes the use of legislative history. The Court pointed out that "legislative history is itself often murky, ambiguous, and contradictory." *Id.* Moreover, because legislative materials are not subject to the requirements of Article I, they may give "unrepresentative committee members—or, worse yet, unelected staffers and lobbyists—both the power and the incentive to attempt strategic manipulations of legislative history to secure results they were unable to achieve through the statutory text." *Id.* The Court noted that both of these criticisms of legislative history are "right on the mark" in the case of § 1367. *Id.* The Court believed the legislative history reflects "a deliberate effort to amend [the] statute through a committee report." *Id.* at 2627. Thus, while the Court stopped short of holding that the use of legislative history is never appropriate, it clearly signaled that such use is to be disfavored by the courts. Under the Court's holding, legislative history is inappropriate in the case of an unambiguous statute, even if it suggests an intent directly contrary to the language of the statute itself. *See id.* at 2626 ("We need not comment here on whether these problems are sufficiently prevalent to render legislative history inherently unreliable in all circumstances, a point on which Members of this Court have disagreed.").

171. 42 U.S.C. § 2000cc(a)(1) (2003).

cludes the mere use of a building by a religious institution.[172] Accordingly, under RLUIPA, it is unlawful for the government to place a substantial burden on the use of a building.[173] In other words, the government *cannot* prohibit a church from building in a certain location. Moreover, the plain language of RLUIPA probably prevents a government from telling a religious institution anything about its proposed building or that building's proposed use—how big it can be, where it should sit on the lot, whether it can be expanded, what the hours of operation can be, and even whether the proposed use can be a nursing home, hospital, school, or college. All of these burdens would be substantial according to the literal text of RLUIPA.[174]

Any decision of the government that is contrary to the religious institution's desires would be a substantial burden on the institution's use of that land or that proposed building. If the religious institution really wants to do something, say, build a college in a residential neighborhood, wouldn't a decision prohibiting that proposal be substantial? It seems the answer is "yes." As many courts have decided, as explained above, denying that request would cause the religious institution to sell its land, find new land, buy new land, come up with a new proposal and a new design, and then go through the whole zoning process again. This is the very delay, expense, and uncertainty that many courts have pointed to as substantial. And, based on the plain language of RLUIPA, these courts are probably right. This type of denial is probably a substantial burden.

These results are a problem. RLUIPA was never meant to go this far. RLUIPA was never meant to prevent a township from telling a church that it cannot build an assisted living center in a residentially zoned area.[175] RLUIPA was never meant to prevent a city from telling a church that it cannot build a 35,000 square foot school on a disproportionately small lot.[176]

Instead, RLUIPA was meant to address intentional discrimination.[177] The legislative history is replete with concern that churches and other religious institutions were being discriminated against by the government. And more importantly, the legislative history specifically states

172. C.L.U.B.v. City of Chicago, 342 F.3d 752, 761 (7th Cir. 2003).

173. *Id.*

174. *Id.*

175. However, this was the result in *Greater Bible Way Temple of Jackson v. City of Jackson*, 708 N.W.2d 756 (Mich. Ct. App. 2005).

176. However, this was the result in *Living Water Church of God v. Charter Township of Meridian*, 384 F. Supp. 2d 1123 (W.D. Mich. 2005).

177. 146 CONG. REC. S7774 (daily ed. July 27, 2000) (Joint Statement of Sen. Hatch and Sen. Kennedy) (stating that RLUIPA was aimed at "zoning boards [that] use [their] authority in discriminatory ways").

that churches and other religious institutions are not supposed to receive special treatment or immunity from local zoning laws.

B. How can RLUIPA be Amended?

The specific mechanical problem with RLUIPA is subsection (a). This section provides that:

> No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that the imposition of the burden on that person, assembly, or institution—
>
> (A) is in furtherance of a compelling governmental interest; and
>
> (B) is the least restrictive means of furthering that compelling governmental interest.[178]

There is nothing wrong with subsection (b) of RLUIPA's land use provisions. This section reaches overt intentional discrimination. It provides that (1) governments shall not treat a religious assembly or institution on less equal terms than a non-religious assembly or institution;[179] (2) governments shall not impose a land use regulation that discriminates on the basis or religion;[180] and (3) governments shall not totally exclude and unreasonably limit religious assemblies, institutions, or structures within a jurisdiction.[181]

You may ask, if Congress just wanted to reach intentional discrimination, then isn't that problem solved by subsection (b)? Yes, but subsection (b) on its face only reaches overt intentional discrimination.[182] Congress felt that it needed to do something more to reach discrimination that was not so overt.[183] In effect, Congress wanted to cast a wide net so that all religious discrimination was stamped out.[184] According to the legislative history, oftentimes discrimination is "covert," and religious

178. 42 U.S.C. § 2000cc(a)(1) (2003).

179. *Id.* § 2000cc(b)(1).

180. *Id.* § 2000cc(b)(2).

181. *Id.* § 2000cc(b)(3).

182. If an ordinance excludes a religion from a district or treats a religious institution from a similarly situated non-religious institution, that would certainly qualify as "overt," as opposed to the subtle, covert discrimination that Congress was concerned about.

183. 146 CONG. REC. S7775 (daily ed. July 27, 2000) (describing how most discrimination is "covert," therefore implying the necessity of a wide net to stamp out this type of discrimination).

184. *Id.*

institutions, such as churches, are discriminated against in subtle ways that are not so easily proven.[185]

> These individualized [zoning] assessments readily lend themselves to discrimination, and they also make it difficult to prove discrimination in any individual case. But the committees in each house have examined large numbers of cases, and the hearing record reveals a widespread pattern of discrimination against churches as compared to secular places of assembly, and of discrimination against small and unfamiliar denominations as compared to larger and more familiar ones.[186]

As a result, Congress cast a wide net with the substantial burden provision—a much wider net than the discrimination prohibitions in subsection (b). But, unintentionally, Congress' net also captures purely innocent behavior of local zoning boards—behavior that Congress never meant to reach because it is not intentionally discriminatory—as was seen above.[187] In fact, the decisions described in this Article that strike down local zoning decisions do not even suggest that these local zoning authorities had any discriminatory animus towards the religious applicant.[188] Remember, Congress did not want to give a free pass to religious institutions or to make them immune from land use decisions:

> This Act does not provide religious institutions with immunity from land use regulations, nor does it relieve religious institutions from applying for variances, special permits or exceptions, hardship approval, or other relief provisions in land use regulations, where available without discrimination or unfair delay.[189]

C. The Proposed Amendment and Why it Will Work

The goal of the amendment proposed in this Article is twofold. First, this proposal will scale back the size of Congress' net, in order to reach only intentional discrimination. Second, this proposal will still be aimed at the covert, hard-to-catch discrimination that is sometimes present in local zoning decisions. This proposed amendment to subsection (a) is listed as follows:

> (a)(1) No government shall impose or implement a land use regulation in **an intentionally discriminatory** manner that imposes a substantial burden on the religious exercise of a person, including a re-

185. *Id.*
186. *Id.*
187. *See supra* notes 62–72 and accompanying text.
188. *See supra* notes 137–65 and accompanying text.
189. 146 CONG. REC. at S7776.

ligious assembly or institution~~, unless the government demonstrates that the imposition of the burden on that person, assembly, or institution~~

~~(A) is in furtherance of a compelling governmental interest; and~~

~~(B) is the least restrictive means of furthering that compelling governmental interest.~~

(a)(2) To prove liability under this subsection, a plaintiff shall first establish a prima facie case of intentional discrimination by showing that (A) the government has imposed or implemented a land use regulation; (B) the regulation has placed a substantial burden on the plaintiff's religious exercise; and (C) there is record evidence giving rise to an implication that the government's decision was discriminatory. If the plaintiff can make this showing, then the burden of production shifts to the defendant to proffer a legitimate, nondiscriminatory reason for the decision. If the defendant can meet its burden, then the final burden rests with the plaintiff to prove that the defendant's stated reason for the decision is a mere pretext for discrimination.

(a)(3) At any time, the defendant may escape liability by demonstrating that the imposition of the burden on that person, assembly, or institution (A) is in furtherance of a compelling governmental interest; and (B) is the least restrictive means of furthering that compelling governmental interest.

This revision is based, in large part, on the way courts handle claims of race discrimination in the employment context.[190] Courts have often said that claims of race discrimination are generally not easy to prove with direct,[191] or "overt," evidence of discrimination.[192] Accord-

190. *See* Texas Dep't of Cmty. Affairs v. Burdine, 405 U.S. 248 (1981); McDonnell Douglas v. Green, 411 U.S. 792 (1973).

191. Direct evidence of race-based discrimination usually requires an "unmistakable verbal assertion that the plaintiff was treated adversely because of his race." Paasewe v. Ohio Arts Council, 74 F. App'x 505, 507 (6th Cir. 2003) (citing Smith v. Chrysler Corp., 155 F.3d 799, 805 (6th Cir. 1998)).

192. The Michigan Supreme Court has cogently written:

> In many cases, however, no direct evidence of impermissible bias can be located. In order to avoid summary disposition, the plaintiff must then proceed through the familiar steps set forth in *McDonnell Douglas* . . . . The *McDonnell Douglas* approach allows a plaintiff to present a rebuttable prima facie case on the basis of proofs from which a factfinder could infer that the plaintiff was the victim of unlawful discrimination.

Hazle v. Ford Motor Co., 628 N.W.2d 515, 520–21 (Mich. 2001) (internal citations and quotations omitted).

ingly, courts have used this same indirect method of proving discrimination that reaches "covert" discriminatory decisions.[193] The method casts a wider net, but it does not reach completely innocent conduct.[194]

To explain how this amended RLUIPA will work, we will reexamine the introduction to this article.[195] In that scenario, a church purchases a lot in a residential neighborhood and then asks the township for a special use permit to construct a church.[196] The township then denies the application because of traffic concerns and a small lot size.

If the church were to sue under the amended RLUIPA, it would have to establish a prima facie case of discrimination by proffering evidence that (A) the government has imposed or implemented a land use regulation; (B) the regulation has placed a substantial burden on the plaintiff's religious exercise; and (C) there is record evidence giving rise to an implication that the government's decision was discriminatory.

The church could easily show that the government imposed a land use regulation. However, the next two elements of the prima facie case would not be so easy. To show a substantial burden, the church would likely have to submit evidence demonstrating that there were no alternative locations in the township, or that it could not afford to sell and pur-

---

193. *See Burdine*, 405 U.S. 248; *McDonnell Douglas,* 411 U.S. 792.

194. Under *McDonnell Douglas*, a plaintiff must first offer a "prima facie case" of discrimination by presenting evidence that (1) she belongs to a protected class, (2) she suffered an adverse employment action, (3) she was qualified for the position, and (4) the job was given to another person under circumstances giving rise to an inference of unlawful discrimination. *McDonnell Douglas*, 411 U.S. at 802. When the plaintiff has sufficiently established a prima facie case, a presumption of discrimination arises. Once a plaintiff establishes a prima facie case of discrimination, the defendant has the opportunity to articulate a legitimate, nondiscriminatory reason for its employment decision in an effort to rebut the presumption created by the plaintiff's prima facie case. *Id.* Once the defendant fulfills this requirement,

> [t]he plaintiff retains the burden of persuasion. She now must have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision. This burden now merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination. She may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.

Burdine, 405 U.S. at 255.

195. Some may argue that RLUIPA could be amended by a simple redefining of the term "substantial burden" to include only intentional discrimination. However, this would belie the plain language of the phrase "substantial burden on religious activity," which does not, as currently written, indicate any level of *mens rea* or intentional conduct on behalf of the defendant. The Supreme Court certainly instructs lower courts to look at the plain language, *Exxon Mobil Corp. v. Allapattah Servs., Inc*., 125 S. Ct. 2611 (2005), and redefining a term to mean something that it does not seems more cumbersome than the solution suggested by this Article.

196. Assume for the purposes of this hypothetical that in the township's residential zone, houses are permitted as of right, but churches need special use permits.

chase another tract of land.[197] This type of financial burden would certainly be substantial.[198]

The final element will probably be the most difficult. To satisfy this element, the church would likely have to show that other similarly situated, non-religious applicants were treated more favorably.[199] For example, the church could show that just down the street, a meeting hall was granted a special use permit on the same size lot for a similar sized building. The church could also use other types of evidence that might give rise to an inference of discrimination, such as discriminatory comments made at a local hearing or a history of decisions with a disparate impact on one type of religion or all religions.

Assuming that the church was able to make out a prima facie case of discrimination, the burden would then shift to the township to articulate a legitimate nondiscriminatory reason for the decision.[200] The township would explain that the lot was too small and that traffic was a concern. Merely proffering this explanation would satisfy the township's burden.

After the township proffered this explanation, the church would have the ability to explain that these stated reasons are a mere pretext for discrimination.[201] For example, the church could show that these reasons are not true because there is enough parking in the area, or that other similar buildings in the township were not deemed to be on too small of lots. In other words, the goal of the final stage is to prove that the township is really lying, and that the real reason for the decision was based on religious discrimination.

Critics of this new approach may argue that it guts RLUIPA and removes the protections that the substantial burden test currently provides. Critics may also argue that this places a new burden on churches, which they may not be able to meet. It is true, of course, that this new statutory amendment places a burden on religious institutions to establish the presence of religious discrimination instead of merely proving that a substantial burden exists. However, this new approach is more consistent with congressional intent than the current statute. Congress never in-

197. In most of the cases examined above, the churches would have been able to demonstrate this hardship by showing that they could not find other suitable locations. *See, e.g.*, San Jose Christian Coll. v. City of Morgan Hill, 360 F.3d 1024 (9th Cir. 2004).

198. *See, e.g.*, Saints Constantine and Helen Greek Orthodox Church, Inc. v. City of New Berlin, 396 F.3d 895 (7th Cir. 2005).

199. *See, e.g.*, Town v. Michigan Bell Tel. Co., 568 N.W.2d 64, 70 (Mich. 1997) (applying the burden shifting analysis in an age case, the plaintiff was unable to show that a similarly situated employee was treated more favorably).

200. *See, e.g.,* Texas Dep't of Cmty. Affairs v. Burdine, 405 U.S. 248 (1981).

201. *Id.*

tended for RLUIPA to provide a free pass to religious institutions, and Congress also never thought that the "delay, uncertainty, and expense" created by your average zoning decision would amount to a violation of RLUIPA. Congress meant to attack religious discrimination, not merely burdens on religion.

In any event, whatever the factual situations that may arise under this proposed amendment, this new method of proof puts the burden back on the plaintiff, where it should have been all along. It is, after all, the plaintiff's case. With the way the current statute is set up, including its nearly-impossible-to-prove strict scrutiny test, the plaintiff bears a minimal burden of just proving that there was a substantial burden. In effect, if there was a substantial burden, then RLUIPA is a de facto strict liability statute. Moreover, it is a free pass for religious institutions. This proposal seeks to correct that mistake, and to restore Congress' goal of reaching only religious discrimination—whether that discrimination is overt or covert.

V. CONCLUSION

RLUIPA's land use provisions are broken. When Congress passed the statute, it relied on mountains of evidence of religious discrimination in the local planning and zoning context. In reviewing this evidence, Congress came to the understandable conclusion that much of the discrimination was hidden, or covert. As a result, Congress chose to cast a wide net to capture this discrimination by prohibiting any land use decisions that substantially burden the exercise of religion.

As we can now see from five years of caselaw applying this substantial burden provision, the net is just too big. This has resulted in confusion in the law and, in many cases, overbroad applications of a statute that Congress meant to be a tool against intentional religious discrimination, not an impediment to the valid application of local zoning ordinances.

Luckily, these problems and confusion can be resolved with a simple amendment to RLUIPA. As a model, Congress should adopt a proof scheme similar to the tests applied to combat race discrimination in employment decisions. Here, as in race discrimination cases, plaintiffs are usually not able to come up with direct evidence of discrimination. Therefore, this Article's proposed amendment to RLUIPA adopts an approach that allows plaintiffs the ability to call into question a zoning decision through the indirect, burden-shifting method of proof. If this test is adopted, it will fulfill Congress' two intentions in passing the statute: it will prohibit intentional discrimination against religious institutions in the zoning context, but will not giving churches and other religious insti-

tutions immunity from generally applicable, nondiscriminatory zoning decisions.