Fordham Urban Law Journal

Volume 39 | Number 4 Article 6

February 2016

RLUIPA: Necessary, Modest, and Under-Enforced

Douglas Laycock
University of Virginia

Luke W. Goodrich
Becket Fund for Religious Liberty

RLUIPA: NECESSARY, MODEST, AND UNDER-ENFORCED

Douglas Laycock[*] *& Luke W. Goodrich*[**]

INTRODUCTION

Churches are often unpopular in the zoning context.[1] They are unpopular in residential zones because they allegedly generate too much traffic, noise, and congestion. They are unpopular in commercial zones because they allegedly generate too little traffic and not enough "synergy" with surrounding businesses. And they are unpopular with city officials because they are tax exempt. Sometimes they are un-

[*] Robert E. Scott Distinguished Professor of Law, Horace W. Goldsmith Research Professor of Law, and Professor of Religious Studies, University of Virginia, and Alice McKean Young Regents Chair in Law Emeritus, University of Texas at Austin. I am grateful to Kent Piacenti for research assistance.

[**] Deputy General Counsel, The Becket Fund for Religious Liberty.

1. We use the term "church" generically to refer to synagogues, mosques, temples, and other religious institutions.

popular simply because their religion is unpopular—as with Muslims after 9/11 and sometimes with other minority faiths.

But building churches is also a core First Amendment activity. In every major religion, believers gather together for shared rituals and communal expressions of faith. They cannot do so without a physical space. Thus, a restriction on the ability to build a church is a restriction on the free exercise of religion.

The zoning process exists to implement the goals of land-use regulation; the process, and the activists and decision makers within that process, often have little concern for the countervailing interests protected by the First Amendment. In most cases, the zoning process is highly individualized and discretionary. In most jurisdictions, local officials have broad discretion to deny permits and exclude churches based on vague standards—such as whether a use is "consistent with the character of the neighborhood," or "consistent with the health, safety, and welfare of the community." As a result, core First Amendment rights are placed at the mercy of a standardless licensing system that makes it easy for local officials to disguise regulation of churches that is arbitrary, discriminatory, or both.

To remedy this problem, Congress passed the Religious Land Use and Institutionalized Persons Act (RLUIPA). In nine hearings over the course of three years, Congress amassed substantial evidence—both anecdotal and statistical—of widespread resistance to churches in the zoning context, including discrimination against smaller and less popular faiths.[2] These hearings concerned a broader bill, the proposed Religious Liberty Protection Act (RLPA), that never passed.[3] RLUIPA was carved out of that bill, passed with over-

2. H.R. REP. NO. 106-219, at 18–24 (1999) (summarizing hearing record); Douglas Laycock, *State RFRAs and Land Use Regulation*, 32 U.C. DAVIS L. REV. 755, 769–83 (1999) (reviewing the hearing record); *see also* 146 CONG. REC. S7774, S7774 (daily ed. July 27, 2000) (joint statement of Sen. Hatch and Sen. Kennedy) [hereinafter Hatch-Kennedy Statement] (citing "massive evidence" of widespread discrimination against churches).

3. *See* H.R. REP. NO. 106-219 (1999) (reporting RLPA to the floor). The Hatch-Kennedy Statement, *supra* note 2, was the "Manager's Statement" on RLUIPA. 146 Cong. Rec. at S7774. This Manager's Statement and committee report, and the many committee hearings held on RLPA, are the legislative history of RLUIPA. The Supreme Court has relied on the Manager's Statement and the hearing record in resolving a constitutional challenge to the prison provisions of RLUIPA. Cutter v. Wilkinson, 544 U.S. 709, 716–17 & n.5 (2005).

whelming, bipartisan support,[4] and was signed into law by President Clinton on September 22, 2000.[5]

The land-use section of RLUIPA has four substantive provisions. One subsection provides for a form of religious exemption: if a land-use regulation substantially burdens the free exercise of religion, the government must show that that burden serves a compelling interest by the least restrictive means.[6] Two subsections directly address discrimination: a jurisdiction cannot treat a religious assembly or institution on less than equal terms with a secular assembly or institution,[7] and it cannot discriminate on the basis of religion or religious denomination.[8] And one subsection directly addresses exclusion: land-use regulation may not totally exclude religious assemblies[9] or unreasonably limit religious assemblies, institutions, or structures within a jurisdiction.[10] The substantial-burden and equal-terms provisions have been the most important and generated the most litigation. A substantial-burden claim, but not a claim under any of the other sections, requires an additional showing to demonstrate congressional authority to regulate: either an effect on commerce[11] or that the land-use regulator had authority to make an individualized assessment of the proposed use of the property.[12] And only the substantial-burden section permits a defense of compelling government interest.[13]

Since 2000, RLUIPA has become a pillar of civil rights protection for churches. Churches have litigated numerous cases to favorable judgment. Many more have settled. The Department of Justice (DOJ) has filed numerous cases challenging outright discrimination against churches. And RLUIPA has been uniformly and repeatedly upheld against constitutional challenge.[14]

4. It passed both the House and Senate by unanimous consent. *See Bill Summary & Status 106th Congress (1999–2000) S.2869 All Congressional Actions*, THOMAS, http://thomas.loc.gov/cgi-bin/bdquery/z?d106:SN02869:@@@X (last visited June 1, 2012).

5. Pub. L. No. 106-274, 114 Stat. 803 (2000).

6. *See* 42 U.S.C. § 2000cc(a)(1) (2006).

7. 42 U.S.C. § 2000cc(b)(1).

8. 42 U.S.C. § 2000cc(b)(2).

9. 42 U.S.C. § 2000cc(b)(3)(A).

10. 42 U.S.C. § 2000cc(b)(3)(B).

11. 42 U.S.C. § 2000cc(a)(2)(B).

12. 42 U.S.C. § 2000cc(a)(2)(C).

13. *See infra* notes 221–26 and accompanying text.

14. *See, e.g.*, Cutter v. Wilkinson, 544 U.S. 709, 719–26 (2005) (upholding RLUIPA's prisoner provisions against Establishment Clause attack); Westchester Day Sch. v. Vill. of Mamaroneck, 504 F.3d 338, 353–56 (2d Cir. 2007) (upholding

Yet some criticisms of RLUIPA persist. This Article addresses two of the most common. One criticism is that RLUIPA was unnecessary. According to this critique, there is "precious little proof of discrimination" in the land-use context.[15] And even if there were, churches could sue under the Free Exercise Clause.

The other common criticism is that RLUIPA dramatically slants the playing field in favor of churches, giving them nearly carte blanche to ignore local zoning laws.[16] According to this criticism, local officials have been "terrorized" by religious landowners[17] and

RLUIPA's land use provisions as valid exercise of commerce power, and also rejecting attacks based on Tenth Amendment and Establishment Clause); Guru Nanak Sikh Soc'y of Yuba City v. Cnty. of Sutter, 456 F.3d 978, 992–95 (9th Cir. 2006) (upholding RLUIPA's land use provisions as valid exercise of Congressional power to enforce the Fourteenth Amendment); Sts. Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin, 396 F.3d 895, 897 (7th Cir. 2005) ("Applications (1) and (2) [of RLUIPA] are supported by Congress's spending and commerce powers, and (3) codifies *Sherbert v. Verner*. . . . [C]reation of a federal judicial remedy for conduct contrary to [*Sherbert's*] doctrine is an uncontroversial use of section 5 [of the Fourteenth Amendment]."); Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1237–42 (2004) (upholding RLUIPA's equal-terms provision as valid exercise of power to enforce Fourteenth Amendment, and also rejecting attacks based on Tenth Amendment and Establishment Clause).

For substantial-burden claims with an effect on commerce, RLUIPA's standards need not be based on constitutional standards, although they are. For equal-terms, discrimination, and exclusion or limitation claims, and for substantial-burden claims with no demonstrated effect on commerce, RLUIPA's reach must be proportionate and congruent to judicial interpretations of constitutional rights. City of Boerne v. Flores, 521 U.S. 507, 520 (1997). As the cases cited in the first paragraph of this note illustrate, the courts have properly held that it is. RLUIPA's specific standards are closely tied to judicial interpretations of the Free Speech and Free Exercise Clauses. *See* Hatch-Kennedy Statement, *supra* note 2, at S7775–76; H.R. REP. NO. 106-219, at 28–29 (1999); Cong. Rec. E1563 (daily ed., Sept. 22, 2000) (remarks of Mr. Canady). The congressional findings and hearing record and the close tracking of judicial interpretations of the clauses all show that "many of the laws affected by" RLUIPA "have a significant likelihood of being unconstitutional." *City of Boerne*, 521 U.S. at 532. The constitutional standard is "many," not necessarily all, and "significant likelihood," not necessarily certainty.

15. Marci Hamilton, *The Federal Government's Intervention on Behalf of Religious Entities in Local Land Use Disputes: Why it's a Terrible Idea*, FINDLAW (Nov. 6, 2003), http://writ.news.findlaw.com/hamilton/20031106.html.

16. Patricia E. Salkin & Amy Lavine, *The Genesis of RLUIPA and Federalism: Evaluating the Creation of a Federal Statutory Right and Its Impact on Local Government*, 40 URB. LAW. 195, 256 (2008) ("RLUIPA has not leveled the playing field for certain groups who might face discrimination, but rather it is [sic] has given religious groups almost free reign [sic] to control community development in the name of religious exercise.").

17. Marci Hamilton, *The Circus that Is RLUIPA: How the Land-Use Law that Favors Religious Landowners Is Introducing Chaos into the Local Land Use Process*, FINDLAW (Nov. 30, 2006), http:// writ.news.findlaw.com/hamilton/20061130.html.

have begun to "rubber stamp" any new religious development, to the detriment of local communities.[18]

Both of these criticisms are unfounded. As explained in Part I, twelve years of precedent show that RLUIPA was and is needed. Churches continue to face hostility and discrimination in the zoning context, and RLUIPA rightly assists courts in bringing the First Amendment to bear.

As explained in Part II, RLUIPA does not give churches carte blanche to ignore zoning regulations. Rather, most courts have reasonably interpreted RLUIPA to require cities to make adequate property available for churches. But churches still lose when they overreach.

As explained in Part III, RLUIPA is actually somewhat underenforced. Some judges have shown a reluctance to strike down local zoning decisions under a federal law—either because of their faith in the local zoning process, their commitment to federalism, or their hostility to religious exemptions. Thus, in important ways and in many courtrooms, RLUIPA still falls short of providing full protection for First Amendment rights.

I. THE NEED FOR RLUIPA

Some scholars have criticized RLUIPA as unnecessary. But numerous cases show that churches continue to face hostility in the zoning context. It is easy to hide that hostility, given the highly discretionary nature of zoning decisions. Thus, RLUIPA has helped courts ferret out hostility and protect the First Amendment rights of churches.

A. Religious or Racial Hostility

In some areas of the country, some churches are unpopular because of religious or racial discrimination. Many cases show that discrimination remains a significant problem.

The most obvious example is widespread hostility to Muslim mosques. In 2010, a proposal to build an Islamic community center near (not at or on) Ground Zero gained nationwide attention and

18. Salkin & Lavine, *supra* note 16, at 252 (quoting Press Release, Office of Hon. Patrick Withers, *Legislator Withers Demands Changes in Religious Land Use Law* (Jan. 11, 2007)) (internal quotation marks omitted); *id.* at 256 (claiming that RLUIPA "has proven to be a nightmare for local government officials and for communities").

significant opposition.[19] But that was only the most high-profile dispute. In the last three years, the Pew Research Center has documented community resistance to thirty-seven different mosques or Islamic centers.[20] Often, the resistance is phrased in terms of concerns about traffic, parking, noise, or property values, but sometimes the resistance is overtly anti-Islamic.[21] When this Article was presented, all three speakers agreed that there is discrimination against Muslims.[22]

Muslims are not the only religious group that faces hostility. Orthodox Jews, and especially Hasidic Jews, have also faced strong resistance in many communities. In part, this is because Orthodox Jews must live within walking distance of their synagogue in order to comply with religious rules concerning the Sabbath, so they tend to cluster in a particular neighborhood. Sometimes this clustering is viewed as a threat—because Hasidic Jews are sometimes viewed as cultural outsiders, as not supporting the public schools, or as exercising undue po-

19. Brown v. N.Y.C. Landmarks Pres. Comm'n, Nos. 110334/2010 (N.Y. Sup. Ct. filed Aug. 4, 2010) (a lawsuit filed by the American Center for Law and Justice that sought to prevent construction of the Islamic community center in lower Manhattan); Eric Treene, *RLUIPA and Mosques: Enforcing a Fundamental Right in Challenging Times*, 10 FIRST AMEND. L. REV. 330 (2012) (reviewing mosque disputes and anti-Muslim violence around the country); Laurie Goodstein, *Across Nation, Mosque Projects Meet Opposition*, N.Y. TIMES, Aug. 8, 2010, at A1.

20. *Controversies Over Mosques and Islamic Centers Across the U.S.*, PEW RESEARCH CTR.'S FORUM ON RELIGION & PUBLIC LIFE (Sept. 29, 2011), http://features.pewforum.org/muslim/assets/mosque-map-all-text%209-29-11.pdf (last visited June 1, 2012) [hereinafter PEW RESEARCH CTR.]; *see also Map—Nationwide Anti-Mosque Activity*, AM. CIVIL LIBERTIES UNION, http://www.aclu.org/maps/map-nationwide-anti-mosque-activity (last visited June 1, 2012) (collecting reports of vandalism, arson, and similar attacks on mosques).

21. PEW RESEARCH CTR., *supra* note 20, at 1; *see also* Hatch-Kennedy Statement, *supra* note 2, at S7774 ("Sometimes, zoning board members or neighborhood residents explicitly offer race or religion as the reason to exclude a proposed church, especially in cases of black churches and Jewish shuls and synagogues. More often, discrimination lurks behind such vague and universally applicable reasons as traffic, aesthetics, or 'not consistent with the city's land use plan.'").

22. *See The Impact of the Religious Land Use and Institutionalized Persons Act on States and Local Governments* (Jan. 7, 2012), http://www.aals.org/am2012/podcasts/7_A15b_R21_STATEANDLOCALGVTLAW_Edited.mp3 [hereinafter Recording of Oral Presentations] ("Across our culture we have pervasive discrimination against Islam." (Prof. Hamilton at about 20:30)); *id.* ("There often is unfortunately opposition that is actually or apparently motivated by religious prejudice or sometimes also racial or ethnic prejudice. And I fully agree that the religious institutions that face this are mosques, synagogues—doesn't matter if it's Orthodox or not—Buddhist and Hindu temples, non-white Christian churches, and to a somewhat lesser extent, evangelical churches. I think that is absolutely clear." (Prof. Weinstein at about 47:35)).

litical clout by voting as a bloc. Thus, some communities have opposed the location of a new Orthodox synagogue for fear that Orthodox Jews will move in and take over the community.

One example is Rockland County, New York, where Orthodox Jews have faced bitter opposition and have had to file numerous RLUIPA lawsuits. In *LeBlanc-Sternberg v. Fletcher*,[23] which predates the enactment of RLUIPA, the court found ample evidence to support a jury finding that the Village of Airmont was created for the express purpose of excluding Hasidic Jews. More recently, in *United States v. Village of Airmont*,[24] the Department of Justice alleged that the Village enacted a ban on boarding schools with the specific motive to keep out Hasidic Jews, who educate their young men in boarding schools called yeshivas. After a federal court rejected the Village's motion to dismiss, the Village settled the case by agreeing to amend its zoning code and permit a yeshiva.[25] Rockland County may be unique in the frequency and persistence of efforts to exclude Orthodox Jews, but there are similar disputes in smaller numbers elsewhere.[26] Other minority faiths have also faced a disproportionate

23. 67 F.3d 412, 430–31 (2d Cir. 1995).

24. U. S. DEP'T OF JUSTICE, REPORT ON THE TENTH ANNIVERSARY OF THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT 8 (2010), *available at* http://www.justice.gov/crt/rluipa_report_092210.pdf [hereinafter TENTH ANNIVERSARY REPORT]; *see also* Congregation Mischknois Lavier Yakov, Inc. v. Bd. of Trs. of Airmont, 301 F. App'x 14 (2d Cir. 2008) (refusing to vacate consent decree with private plaintiff allowing construction of a residential school).

25. *See* Consent Decree, United States v. Vill. of Airmont, No. 05-cv-5520 (LAK) (PED) (S.D.N.Y. May 6, 2011), ECF No. 53, *available at* http://www.justice.gov/crt/about/hce/documents/airmontsettle.pdf; *see also* Bikur Cholim, Inc. v. Vill. of Suffern, 664 F. Supp. 2d 267 (S.D.N.Y. 2009) (challenging another Rockland County village's refusal to permit a guest house within walking distance of hospital where observant Jews could stay when visiting the sick). Much other RLUIPA litigation in Rockland County is unreported; both sides agree that the volume of such litigation is large. *See* Roman P. Storzer, *Testimony Before the Rockland County Legislature* (Mar. 18, 2008), *available at* http://www.storzerandgreene.com/images/www.tartikovcollege.com.pdf ("Zoning laws have been used in the County time and time again to discriminate against and burden the religious exercise of an identifiable group that constitutes a substantial minority of the population: Hasidic Jews."); *The Religious Land Use and Institutionalized Persons Act (RLUIPA) and Ramapo's Adult Student Housing (ASH) Law*, PRESERVE RAMAPO, http://www.preserveramapo.org/RLUIPA%20and%20ASH/RLUIPA%20and%20ASH%20Content%20Page.htm (last visited Apr. 17, 2012) (offering commentary on numerous disputes from perspective of strong opposition to RLUIPA).

26. *See* Westchester Day Sch. v. Vill. of Mamaroneck, 504 F.3d 338, 344, 357 (2d Cir. 2007) (ordering Village to permit construction of additional classroom building on School's largely undeveloped twenty-six-acre tract); Konikov v. Orange Cnty., 410 F.3d 1317, 1328 (11th Cir. 2005) (finding equal-terms violation in enforcement action against rabbi for holding prayer services in his home, where enforcement officers tes-

share of opposition in the zoning context. Several prominent cases have involved Sikhs[27] or Buddhists.[28]

Another example is Centro Espírita Beneficente União do Vegetal (UDV), a Brazilian-based religion that uses a mildly hallucinogenic tea in its services.[29] The church's legal right to practice this sacrament has been vindicated in the district court, the court of appeals, and 8-0 in the Supreme Court of the United States,[30] but the church has now been forced to start over in RLUIPA litigation.[31] The county refused permission to build a place of worship on 2.5 acres in a lightly developed semi-rural area, and it clearly indicated that the church will never be permitted to build anywhere in the county.[32] The county seeks

tified that groups could gather in residences two to three times a week for secular purposes but not for religious purposes); Congregation Etz Chaim v. City of Los Angeles, No. CV 10-1587 CAS (Ex) (C.D. Cal. July 11, 2011) (finding substantial-burden and equal-terms violations; this case is further discussed *infra* notes 263–304 and accompanying text); Chabad of Nova, Inc. v. City of Cooper City, 575 F. Supp. 2d 1280, 1291 (S.D. Fla. 2008) (finding that City had unreasonably limited places of religious assembly and made it essentially impossible for new churches or synagogues to locate in city); Hollywood Cmty. Synagogue, Inc. v. City of Hollywood, 436 F. Supp. 2d 1325 (S.D. Fla. 2006) (finding constitutional violation where City denied special exception because synagogue was "too controversial"); Hollywood Cmty. Synagogue, Inc. v. City of Hollywood, 430 F. Supp. 2d 1296, 1315 (S.D. Fla. 2006) (finding "ample evidence of a City policy and practice of harassment and selective enforcement against the Synagogue"); Chabad Chevra, LLC v. City of Hartford, No. CV1060038475, 2011 WL 7029763 (Conn. Super. Ct. Dec. 15, 2011) (vacating order to cease and desist religious use following sale of building, and concluding that "the only apparent distinction between the activities of the prior owner and Chabad Chevra is their religion, Christianity and Judaism.").

27. Guru Nanak Sikh Soc'y of Yuba City v. Cnty. of Sutter, 456 F.3d 978, 981–82 (9th Cir. 2006). *Guru Nanak* is discussed *infra* note 63 and accompanying text, as an example of NIMBY opposition.

28. Vietnamese Buddhism Study Temple in Am. v. City of Garden Grove, 460 F. Supp. 2d 1165 (C.D. Cal. 2006) (granting preliminary injunction against apparent facial violation of RLUIPA's equal-terms provision); Cambodian Buddhist Soc'y of Conn., Inc. v. Planning & Zoning Comm'n of Newtown, 941 A.2d 868, 873 (Conn. 2008) (interpreting RLUIPA not to apply). *Cambodian Buddhist* is further discussed *infra* notes 166–73 and accompanying text as an example of under-enforcement.

29. Gonzales v. O Centro Espírita Beneficente União do Vegetal, 546 U.S. 418, 423 (2006).

30. O Centro Espírita Beneficiente União do Vegetal v. Ashcroft, 282 F. Supp. 2d 1236 (D.N.M. 2002), *aff'd*, 342 F.3d 1170 (10th Cir. 2003), *aff'd en banc*, 389 F.3d 973 (10th Cir. 2004), *aff'd sub nom.*, Gonzales v. O Centro Espírita Beneficente União do Vegetal, 546 U.S. 418 (2006).

31. Complaint for Injunctive Relief, Declaratory Judgment, and Damages, O Centro Espírita Beneficente União do Vegetal v. Bd. of Cnty. Comm'rs, No. 12-cv-00105 (D.N.M. Feb. 2, 2012), ECF No. 1.

32. *See* UDV Temple, Case No. MP/PDP 09-5300, ¶¶ 31–40 (Bd. of Cnty. Comm'rs of Santa Fe Cnty. 2011), *available at* http://www.co.santa-fe.nm.us/documents/agendas/packet_materials/XIA1and2.pdf (denying the application on multiple

to use its zoning power to effectively ban a religion whose right to exist has been expressly affirmed by the highest Court in the land.

Christians sometimes also draw a hostile reaction. Sometimes it is because they are on one end of the country's political spectrum and are unpopular with their political opponents. Other times it is because the congregation consists of ethnic or racial minorities. In West Mifflin, Pennsylvania, for example, a predominantly white Baptist church sold its building to a predominantly black Baptist church, but the city refused to issue an occupancy permit to the new owners. The city granted the permit only after DOJ opened an investigation under RLUIPA.[33] Similarly, when a predominantly African-American congregation sought to move into Rockaway Township, New Jersey, which is 89% white, the town passed a new zoning provision blocking part of the church's plans. After the church sued, and DOJ opened an investigation, the town permitted the church to proceed.[34]

Of course, not all cases involve hostility to racial or religious minorities. But a substantial fraction of cases do. Jews, Muslims, Buddhists, and Hindus constitute only about 3% of the United States population.[35] But in the first ten years under RLUIPA, they represented 34% of DOJ's caseload.[36] Cases involving racial-minority Christian congregations represented another 30%.[37] Thus, 64% of all DOJ investigations involved racial or religious minorities. A pre-RLUIPA study of church zoning disputes that produced reported opinions found similar disparities.[38]

Religious hostility is especially problematic in the zoning process because it is easy to mask, and officials of course have strong incen-

grounds, mostly relating to the church's use of the tea, and concluding that "Santa Fe has a compelling interest in not setting a precedent that transforms it into a mecca for drug use."). (Two decisions are reported at this URL; scroll down seven pages to find the UDV decision.)

33. RELIGIOUS FREEDOM IN FOCUS (U. S. Dep't of Justice, Civil Rights Div., Wash., D.C.), Feb. 2004, *available at* http://www.justice.gov/crt/spec_topics/religiousdiscrimination/newsletter/focus_1.htm.

34. RELIGIOUS FREEDOM IN FOCUS (U. S. Dep't of Justice, Civil Rights Div., Wash., D.C.), Mar. 2007, *available at* http://www.justice.gov/crt/spec_topics/religiousdiscrimination/newsletter/focus_23.htm.

35. Barry A. Kosmin & Ariela Keysar, *American Religious Identification Survey*, INST. FOR THE STUDY OF SECULARISM IN SOC'Y & CULTURE 5, tbl.3 (2009), http://commons.trincoll.edu/aris/files/2011/08/ARIS_Report_2008.pdf.

36. *See* TENTH ANNIVERSARY REPORT, *supra* note 24, at 6.

37. *See id.*

38. *See* Von G. Keetch & Matthew K. Richards, *The Need for Legislation to Enshrine Free Exercise in the Land Use Context*, 32 U.C. DAVIS L. REV. 725, 729–30, 736–42 (1999).

tives to mask it. Zoning ordinances often require churches to obtain a special-use permit, and special-use permits are often subject to vague conditions or to the broad discretion of local officials.[39] Thus, hostile officials can reject churches based on unsubstantiated concerns about traffic, parking, noise, or property values. Or they can reject churches based on vague concerns about the "character of the neighborhood," or "general welfare."[40] Either way, religious hostility can be very hard to detect. And judicial review under ordinary state zoning law is highly deferential in most states.[41]

Moxley v. Town of Walkersville[42] provides an example of how the special permit process can be misused. There, a group of Ahmadiyya Muslims sought to purchase a 224-acre farm in the agricultural zone of Walkersville, Maryland.[43] They planned to build a mosque for approximately twenty local families and a residence for the imam and groundskeeper.[44] The two buildings would have covered only 6.7% of the property.[45] They also wanted to hold an annual religious event that would use an additional 26.7% of the property three days per year.[46] Churches were permitted in agricultural zones by special exception, and the Muslim group applied for one.[47]

Although a staff report concluded that the use was consistent with the agricultural area, the zoning board unanimously rejected the application, eventually citing concerns about traffic, water, sewage, and fire and rescue.[48] During the same period, however, the zoning board approved a larger school on a smaller parcel in an agricultural area.[49] The board also permitted an annual carnival that was larger than the

39. *See* Laycock, *supra* note 2, at 764–65.

40. *Id.* at 776.

41. *See* 8 PATRICK J. ROHAN, ZONING AND LAND USE CONTROLS § 44.02[4][a] (2008) ("In reviewing board actions as to special exceptions the courts do not make new or substitute judgments, but restrict themselves to determining whether there has been illegality, arbitrariness, or abuse of discretion; in other words, whether the findings and order of the local agency are against the manifest weight of the evidence.").

42. 601 F. Supp. 2d 648 (D. Md. 2009).

43. *Id.* at 652.

44. *Id.* at 653.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* at 656.

49. *Id.* at 655 n.5.

Muslim group's event just 200 yards from the Muslim group's property.[50]

Was this a case of religious discrimination? We certainly think so, but that is hard to prove. In the lawsuit, the owner of the farm alleged that three of the town commissioners held private meetings with local residents to strategize about how to keep the Muslims out without violating RLUIPA.[51] Citizens and local officials were also quoted in various media outlets as expressing great hostility toward Muslims.[52] But the denial of a special exception was easy to justify under the highly discretionary zoning code; it would be hard to predict the outcome of a lawsuit under state law, and hard to be entirely confident of proving discrimination directly under the Constitution. But in response to a lawsuit alleging both constitutional violations and RLUIPA violations, the town settled by buying the land, paying more than its annual budget to make the Muslim group go away.[53]

As this case illustrates, RLUIPA cases can include counts directly under the Free Exercise Clause, just as they could before RLUIPA. RLUIPA adds two things that have made an important difference. First, RLUIPA has translated the majestic generality of the Free Exercise Clause into more specific standards tailored to the land-use context. These specific standards focus the attention of judges and litigators and simplify the proof required to make out a claim. The church no longer has to explain to a skeptical judge how a case about a zoning decision is analogous to a case about animal sacrifice.[54]

Second, and perhaps even more important, RLUIPA is based on an extensive hearing record in which Congress found a widespread pattern of arbitrary or discriminatory zoning of churches. The specific statutory standards, and especially the Congressional findings and hearing record, have educated judges to take these claims seriously. In pre-RLUIPA free exercise cases, judges saw one claim at a time against a background of zoning regulation that was presumed to be fair and neutral. But Congress was able to look at a broad range of

50. *Id.*

51. *Id.* at 654, 663.

52. *Id.* at 654–55.

53. Ron Cassie, *Walkersville to Borrow $800K Toward Purchase of Moxley Farm*, FREDERICK NEWS POST (Oct. 30, 2009), http://www.fredericknewspost.com/sections/news/display.htm?StoryID=97142 (describing annual operating budget of $3 million and purchase price of $4.71 million).

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

church zoning cases and reveal the pattern of widespread hostility to churches.

B. NIMBY Resistance

Even in the absence of anti-religious animus, churches are often subject to NIMBY resistance—the classic land-use demand to build somewhere else, but Not In My Back Yard. Nearby residents often cite concerns about increased traffic and noise, environmental harms, loss of open space or farmland, aesthetics, or general loss of property values.

Although many land uses face opposition for the same reasons, churches are especially vulnerable. A new movie theater, grocery store, or Walmart can expect at least some support from residents who expect to patronize it, be employed by it, or gain tax revenue from it. But the vast majority of residents know they will never attend a proposed new church. Some are already committed to another church; others have no interest in attending any church. Thus, for most residents, any cost from a new church, however small, exceeds the expected benefit.[55]

So residents or local officials say things like: "No family wants to live near a religious temple with all the excessive crowds, traffic, and noise;"[56] "what I hear from residents is that they don't feel like these churches are being an asset to the community;"[57] and "there will never be another mega church . . . in Boulder County."[58] This Boulder County official openly stated a policy of total exclusion of an important category of churches. But the less dramatic sentiments, when generalized, also lead toward a de facto policy of deliberate exclusion. If churches are not an asset, and if no one wants to live near them, then they cannot go anywhere. The problem with NIMBY objections is that everywhere is someone's backyard.

A classic example of a NIMBY case is *Westchester Day School v. Village of Mamaroneck*.[59] There, a Jewish day school applied for a

55. *See* Laycock, *supra* note 2, at 759.

56. Guru Nanak Sikh Soc'y of Yuba City v. Cnty. of Sutter, 456 F.3d 978, 992 n.19 (9th Cir. 2006) (finding violation of RLUIPA's substantial-burden provision).

57. Reaching Hearts Int'l, Inc. v. Prince George's Cnty., 584 F. Supp. 2d 766, 782 (D. Md. 2008) (upholding jury finding of actual motive of religious discrimination against Seventh-day Adventist congregation), *aff'd*, 368 F. App'x 370 (4th Cir. 2010).

58. Rocky Mountain Christian Church v. Bd. of Cnty. Comm'rs, 613 F.3d 1229, 1238 (10th Cir. 2010) (finding violations of RLUIPA's equal-terms and unreasonable-limitation provisions).

59. 504 F.3d 338 (2d Cir. 2007).

permit to expand its facilities. In response to "intense and unrelenting pressure from politically well-connected neighboring residents," the zoning board denied the permit, citing concerns about traffic, parking, aesthetics, and intensity of use.[60] But after a seven-day bench trial, the district judge found that the stated concerns were unsupported by the evidence and that the permit denial was "arbitrary and capricious."[61] After the court of appeals affirmed, the city settled the claims for $4.75 million.[62]

Another example of NIMBY opposition is *Guru Nanak Sikh Society v. County of Sutter*.[63] There, a Sikh group sought a permit to build a temple on two acres in a low-density residential area.[64] The planning division recommended granting the permit, but the planning commission voted unanimously to reject it, citing neighbors' concerns about noise and traffic.[65] So the Sikh group bought a twenty-nine-acre parcel in a rural area and applied again.[66] This time, the commission granted the permit, but the county board of supervisors unanimously withdrew it, based on concerns about "leapfrog development" and a desire to maintain agricultural land.[67] So first the Sikhs proposed building too close to their neighbors (noise and traffic), and then they proposed building too far from their neighbors ("leapfrog development"). Where were they supposed to go? The Ninth Circuit held that "[t]he net effect of the County's two denials" was to "shrink the large amount of land theoretically available to Guru Nanak under the Zoning Code to several scattered parcels that the County may or may not ultimately approve."[68]

Similarly, in *Reaching Hearts International, Inc. v. Prince George's County*,[69] a Seventh-day Adventist congregation purchased property intending to build a church and related facilities. Although churches were permitted in the zoning district as a matter of right, the county denied permission to change the property's sewer and water classifi-

60. Westchester Day Sch. v. Vill. of Mamaroneck, 417 F. Supp. 2d 477, 536, 551–54, 564–68, 570 (S.D.N.Y. 2006).

61. *Id.* at 569.

62. *Settlement in Mamaroneck*, J. NEWS (Westchester County), Jan. 15, 2008, at B6.

63. 456 F.3d 978 (9th Cir. 2006).

64. *Id.* at 981–82.

65. *Id.* at 982.

66. *Id.*

67. *Id.* at 973–84, 990.

68. *Id.* at 991–92.

69. 584 F. Supp. 2d 766 (D. Md. 2008), *aff'd*, 368 F. App'x 370 (4th Cir. 2010)

cation, thus blocking the church.[70] "Many other properties received approval for sewer and water reclassifications in 2003 and 2005, but Reaching Hearts—the only church property—was denied such a reclassification."[71]

After a seven-day trial, the jury awarded $3.7 million in damages to the church, and expressly found religious discrimination on a special verdict.[72] As the district judge explained in upholding the verdict:

> As here, it is not common for land use decision-makers to expressly offer religion as their reason to exclude a church. As noted by Senators Hatch and Kennedy, "[m]ore often, discrimination lurks behind such vague and universally applicable reasons as traffic, aesthetics, or 'not consistent with the city's land use plan,'" and unfortunately these "forms of discrimination are very widespread." . . . Here, a jury reasonably concluded that religious discrimination was afoot, and this Court sees no reason to disturb that finding.[73]

As the court indicated, local officials disclaimed any anti-religious animus. Instead, they couched their objections in NIMBY terms: "[The Council] do[es]n't oppose churches, the concern we have is that sometimes churches eat up a lot of land that could be used for other things."[74] "[W]e are losing tax money and retail and increasingly, churches are requiring more space."[75] This was the case in which a defendant official said that "what I hear from residents is that they don't feel like these churches are being an asset to the community."[76]

Another prominent NIMBY case is *Rocky Mountain Christian Church v. Board of County Commissioners of Boulder County*.[77] There, a growing evangelical Christian church and school sought to expand its campus in a rural part of Boulder County.[78] The county rejected most of the church's proposal, citing concerns about increased traffic, loss of open space, and "the welfare of the residents of Boulder County."[79] After a twelve-day trial, a jury found that the

70. 368 F. App'x at 371.
71. *Id.*
72. 584 F. Supp. 2d at 780.
73. *Id.* at 784 (quoting Hatch-Kennedy Statement, *supra* note 2, at S7774–75).
74. *Id.* at 782.
75. *Id.*
76. *Id.*
77. 613 F.3d 1229 (10th Cir. 2010).
78. *Id.* at 1234.
79. *Id.*

county had violated RLUIPA's equal-terms provision by treating the church worse than a nearby private school.[80]

When these Articles were presented, Professor Hamilton said that "most of the opposition in a—to a new religious use or expansion is probably NIMBY. But I defend NIMBY."[81] She made a similar point, somewhat less explicitly, in an earlier Article.[82] Defending NIMBY gives property owners an effective veto over the use of any nearby property, and any effect of a new use, however modest or tangential, may lead them to use that veto. In this view, an additional hundred cars a day is "a seismic change" to residential owners.[83] So local officials should always be permitted to exclude churches when neighbors object.

There are many problems with this argument; we will note here the three most important. First, giving neighbors a veto over the location of churches means that an exercise of constitutional rights is subjected to the standardless whim of neighbors who are under no obligation to adhere to any rules or to give any weight whatever to the free exercise of religion.

Second, if NIMBY objections are always a legitimate basis for excluding churches, then churches can always be excluded—because neighbors can always find or imagine a reason to object. As the cases described above illustrate, no lot is large enough, no site is isolated enough, no traffic impact is small enough, to avoid the NIMBY objections of neighbors who want no new development and certainly no new development from someone else's religion. If generalized into policy, deference to NIMBY objections would result in total exclusion of churches. But churches have a First Amendment right to exist and to exercise their religions, and therefore, they must have a First Amendment right to be located somewhere.

80. *Id.* at 1235–36.

81. Recording of Oral Presentations, *supra* note 22, at 1:29:00.

82. Marci Hamilton, *Struggling with Churches as Neighbors: Land Use Conflicts Between Religious Institutions and Those Who Reside Nearby*, FINDLAW (Jan. 17, 2002), http://writ.news.findlaw.com/Hamilton/20020117.html ("Short of the extremely rare example in which true religious discrimination occurs, towns and cities must have the latitude to zone real property in the best interest of all. If that means zoning religious buildings' new intensive uses out of residential districts, the Constitution is not violated . . . . There can be no constitutional right for this new breed of houses of worship to claim locations in the midst residential [sic]. At a minimum, local communities should have the power to place restrictions on hours and occupancy to keep the new uses in tempo with the residential neighborhood.").

83. MARCI HAMILTON, GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW 101 (2005).

Third, given the discretion inherent in the zoning process, it is very difficult to tell when NIMBY complaints are legitimate, when they are exaggerated expressions of opposition to all new development, and when they are a pretext for anti-religious animus. Such animus raises First Amendment concerns in a way that anti-freeway animus or anti-Walmart animus does not. Thus, where First Amendment rights are at stake, RLUIPA rightly requires closer scrutiny of NIMBY complaints. And as the trials discussed above have shown, NIMBY complaints often serve as a pretext for hostile and unequal treatment of churches.

C. Taxes and Commerce

Churches also face hostility in the zoning context because they are tax exempt, and local officials do not like taking property off the tax rolls. Some opponents of RLUIPA have argued that tax revenue is a perfectly permissible, and indeed compelling, land-use interest. But if that were so, then even more clearly than with NIMBY objections, there would be grounds to exclude any new church from any jurisdiction in the country. Existing churches would be grandfathered in, and no new church could ever form.

The classic tax-base case is *Cottonwood Christian Center v. Cypress Redevelopment Agency*.[84] There, a large Christian church assembled an eighteen-acre site from six smaller and undeveloped properties.[85] But once the larger site had been assembled, the city decided that it wanted a Costco instead, and it therefore denied the church a permit and sought to condemn the property.[86] In response to a lawsuit under RLUIPA, the city argued that it had a compelling governmental interest in generating tax revenue.[87] The court rejected that argument, for the obvious and generally applicable reason that "[i]f revenue generation were a compelling state interest, municipalities could exclude all religious institutions from their cities."[88]

Churches also face opposition on the closely related ground that they put a damper on commercial or entertainment districts. According to many land-use planners, it would be "very undesirable for a large church to displace sales tax generating business/commercial property with our required parking and buildings and have a giant

84. 218 F. Supp. 2d 1203 (C.D. Cal. 2002).
85. *Id.* at 1212–13.
86. *Id.* at 1214–15.
87. *Id.* at 1228.
88. *Id.*

'hole' in a retail area that is relatively empty six days a week."[89] Somewhat ironically, this quotation is from a letter from a pastor attempting to persuade the city to at least let his church locate in a manufacturing district. But cities routinely make variations on this argument in RLUIPA cases involving property in commercial zones. Thus, churches are unwanted in rural and residential districts because they generate too much traffic, and unwanted in commercial districts because they generate too little.[90] Once again, the bottom line is that churches can be excluded everywhere.

One example is *Elijah Group, Inc. v. City of Leon Valley*.[91] There, a city banned churches from a retail corridor, in part because they are "relatively empty six days a week."[92] But the terms of the city's zoning code did not fit its alleged government interest, because the city permitted the church to use the site five days a week as a daycare center.[93] So the only direct effect of the ban on churches was to ensure that the building remained empty on Sundays. Perhaps the city also assumed that the church could not afford two sites, so that barring Sunday use would also force the church to close the daycare center. The city permitted a variety of other non-retail uses in the retail corridor, including private clubs.[94] The Fifth Circuit held that the ban on churches violated RLUIPA's equal-terms provision, because it could not be squared with the city's more favorable treatment of private clubs.[95]

Similarly, in *Centro Familiar Cristiano Buenas Nuevas v. City of Yuma*,[96] the city sought to revive its main street with a "mixture of commercial, cultural, governmental, and residential uses that will help to ensure a lively pedestrian-oriented district."[97] Churches were per-

89. Vineyard Christian Fellowship of Evanston, Inc. v. City of Evanston, 250 F. Supp. 2d 961, 967 (N.D. Ill. 2003).

90. Hatch-Kennedy Statement, *supra* note 2, at S7774–75 ("Churches have been excluded from residential zones because they generate too much traffic, and from commercial zones because they don't generate enough traffic.").

91. 643 F.3d 419 (5th Cir. 2011).

92. Defendant's Response to Plaintiff's Objections to Magistrate's Report and Recommendation at 11, Elijah Group, Inc. v. City of Leon Valley, No. SA-08-CV-0907 OG (NN), 2009 WL 3247996 (W.D. Tex. Oct. 2, 2009), ECF No. 45 (quoting *Vineyard Christian*, 250 F. Supp. 2d at 967).

93. *Elijah Group*, 643 F.3d at 421.

94. *Id.* at 424.

95. *Id.*

96. 651 F.3d 1163 (9th Cir. 2011).

97. *Id.* at 1165.

mitted only with a conditional-use permit.[98] When a church sought to occupy a large, vacant building that had once served as factory and warehouse, the city refused a permit, preferring "a vacant hulk" to a church.[99] As the Ninth Circuit explained: "This is a sort of reverse urban blight case, with the twist that instead of bars and nightclubs being treated as blighting their more genteel environs, the church is treated as blighting the bar and nightclub district."[100]

There was one potentially difficult issue lurking in the case: no liquor license could be issued within 300 feet of a church.[101] And under Supreme Court precedent, the church is not allowed to waive the restriction, lest it acquire de facto control over part of the city's zoning authority.[102] RLUIPA's equal-terms provision requires that churches be allowed to locate in the entertainment district if secular places of public assembly could locate there,[103] but the state restriction on liquor licenses would then prevent any new establishments with liquor licenses from locating there. The combination of state law and Supreme Court precedent created an automatic and non-waivable NIMBY power in the church that was inconsistent with the policy of RLUIPA. These laws separating bars from churches were enacted in an era—the Arizona provision appears to date from 1950[104]—when churches were favored uses and when it never occurred to anyone that churches would someday have trouble finding places to worship. RLUIPA responds to a new problem and enacts a different policy: churches are entitled to locate where secular places of assembly can locate, and they can move in next to bars if they choose. We agree that a church that so chooses should not then be able to veto all new liquor licenses in the neighborhood.

The Ninth Circuit held that excluding the church violated RLUIPA. The liquor-license problem was of the state's own creation, and the state solved it by authorizing the city to waive the 300-foot restriction.[105] But even apart from the liquor-license issue, there

98. *Id.* at 1166.

99. *Id.* at 1165–66.

100. *Id.* at 1165.

101. *Id.* at 1166.

102. Larkin v. Grendel's Den Inc., 459 U.S. 116 (1982).

103. 42 U.S.C. § 2000cc(b)(1) (2006).

104. Act Relating to Liquor Licenses and Control, ch. 60, § 5, 1951 Ariz. Sess. Laws 671, 677. Although it was published in the 1951 Session Laws, this Act was passed in the 1950 First Special Session.

105. ARIZ. REV. STAT. ANN. § 4-207(C)(4) (West 2010); *Centro Familiar*, 651 F.3d at 1167 n.10.

were serious problems with the city's argument. First, the city's ordinance treated not just churches but *all* religious organizations worse than nonreligious membership organizations, regardless of their effect on liquor licenses.[106] Second, the city permitted many uses as of right that "would have [had] the same practical effect as a church of blighting a potential block of bars and nightclubs"—including apartment buildings, post offices, and even prisons.[107] Thus, the city's alleged commercial concerns did not justify excluding the church.

By contrast, two other circuits have upheld the exclusion of churches based on commercial concerns.[108] We discuss these cases below when we consider the underenforcement of RLUIPA.

D. Collective Action

All of these factors—religious hostility, NIMBY resistance, and objections based on taxes and commerce—combine to make churches a uniquely disfavored land use. Residential neighbors do not like churches because they fear that churches will create traffic or noise, or harm property values; local officials do not like churches because they do not pay taxes; and land-use planners do not like churches because they allegedly disrupt residential, retail, commercial, or entertainment districts. Beyond that, the vast majority of residents anticipate no benefit from a new church, and some residents may be openly hostile.

Very few land uses come with all of these "problems." Movie theaters and auditoriums create traffic and noise like churches (often far more frequently), but they generate tax revenue and are viewed as contributing to a commercial or retail district. Schools create traffic and do not pay taxes, but they are viewed as necessary assets to the community. Churches, by contrast, are uniquely unwanted in the zoning process.

This widespread resistance to churches results in a collective action problem. If one suburb is open to churches, and its near neighbors are not, the open suburb may become overloaded. The perception is that too many churches will move in, reducing the tax base and upsetting local residents. Thus, the incentive is for every jurisdiction to exclude at least as much as neighboring jurisdictions, and maybe a little

106. *Centro Familiar*, 651 F.3d at 1174.

107. *Id.* at 1174–75.

108. *See* River of Life Kingdom Ministries v. Vill. of Hazel Crest, 611 F.3d 367 (7th Cir. 2010) (en banc); Lighthouse Inst. for Evangelism v. City of Long Branch, 510 F.3d 253 (3d Cir. 2007).

more.[109] Not every jurisdiction succumbs to these forces, but many do. No one has ever claimed that land-use regulation is hostile to churches in every local jurisdiction in the United States. But hostile land-use regulation is a serious problem where it exists, and it exists in many places.

Opponents of RLUIPA have dismissed the congressional hearing record on the basis of data reported in an article by Mark Chaves and William Tsitsos.[110] Scholars more neutral[111] or friendly[112] towards RLUIPA have also cited this data. Chaves and Tsitsos report that of all congregations in their sample who sought any kind of permit or license from a government body, only one percent were denied.[113] But this interesting statistic is irrelevant to RLUIPA, because only two percent of these applications involved zoning.[114] Professor Chaves and his team simply were not able to study zoning applications, and what they did study casts no light on the zoning issue. Permits for carnivals, spaghetti suppers, or bingo games, and building permits for interior renovations or modest exterior additions like a new porch or a wheelchair ramp, do not draw the same political opposition and do not go through the same regulatory process as zoning applications. A building project that requires a conditional-use permit is fundamentally different from one that does not. This and other serious difficulties in applying the Chaves data to RLUIPA were explained to the Senate Judiciary Committee during the RLPA hearings.[115] Nothing

109. *Cf.* Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1221–22 (11th Cir. 2004) (town arguing that allowing churches in the business district would erode the tax base, make it more difficult to compete for businesses with a nearby town, and threaten the economic stability of the town).

110. Mark Chaves & William Tsitsos, *Are Congregations Constrained by Government? Empirical Results from the National Congregations Study*, 42 J. CHURCH & STATE 335 (2000). RLUIPA opponents who rely on this study include CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION 271 & n.67 (2007), and Marci A. Hamilton, *Federalism and the Public Good: The True Story Behind the Religious Land Use and Institutionalized Persons Act*, 78 IND. L.J. 311, 351–52 & nn.161–64 (2003).

111. Robert W. Tuttle, *How Firm a Foundation? Protecting Religious Land Uses After* Boerne, 68 GEO. WASH. L. REV. 861, 863 n.23 (2000).

112. *See* Ashira Pelman Ostrow, *Judicial Review of Local Land Use Decisions: Lessons from RLUIPA*, 31 HARV. J.L. & PUB. POL'Y 717, 754 & n.176 (2008) (citing Chaves & Tsitsos, *supra* note 110).

113. Chaves & Tsitsos, *supra* note 110, at 341.

114. *Id.* at 340 tbl.1.

115. *Religious Liberty: Hearing Before the S. Comm. on the Judiciary*, 106th Cong. 149–51 (1999) (statement of Douglas Laycock).

in the Chaves data is inconsistent with the evidence of the hearing record and the twelve years of litigation since RLUIPA was enacted.

This is equally true of a study by a Yale law student who found little evidence of zoning discrimination against churches in New Haven.[116] Good for New Haven. But no one ever claimed that churches face hostile zoning in every jurisdiction in the country. The claim has always been that churches face hostile zoning in enough jurisdictions to be a significant problem for religious liberty. And the evidence of that continues to accumulate.

II. MODERATE ENFORCEMENT OF RLUIPA

A second criticism of RLUIPA is that it makes churches largely "immune from local zoning laws."[117] According to this view, courts have aggressively interpreted RLUIPA, giving churches "an unfair advantage" in the land-use process.[118] Because of this unfair advantage, "towns and cities [are] being terrorized by overzealous organizations representing religious landowners,"[119] and the mere invocation of RLUIPA is enough to frighten local officials into "'rubber stamp' approval of any development proposed by a religious organization."[120]

Twelve years of experience under RLUIPA have exposed this rhetoric as greatly exaggerated. Churches are not immune from zoning. They must go through the zoning process, and they lose when they overreach. Governments can avoid most problems under RLUIPA if they treat churches equally and ensure that there are adequate opportunities for them to locate within the jurisdiction. Gov-

116. Stephen Clowney, Comment, *An Empirical Look at Churches in the Zoning Process*, 116 YALE L.J. 859, 863 (2007).

117. Daniel P. Lennington, *Thou Shalt Not Zone: The Overbroad Applications and Troubling Implications of RLUIPA's Land Use Provisions*, 29 SEATTLE U. L. REV. 805, 806 (2006); *see also* Salkin & Lavine, *supra* note 16, at 256 ("RLUIPA has not leveled the playing field for certain groups who might face discrimination, but rather it is [sic] has given religious groups almost free reign [sic] to control community development in the name of religious exercise.").

118. Salkin & Lavine, *supra* note 16, at 255; *see also* Hamilton, *supra* note 15 (claim that RLUIPA "torque[s] all local land use decisionmaking in favor of all churches and synagogues and mosques").

119. Hamilton, *supra* note 17.

120. Salkin & Lavine, *supra* note 16, at 252 (quoting Press Release, Office of Hon. Patrick Withers, *Legislator Withers Demands Changes in Religious Land Use Law* (Jan. 11, 2007); *see also id.* at 256 (stating that RLUIPA "has proven to be a nightmare for local government officials and for communities").

ernments can regulate the location of churches if they do not use that power to discriminate or exclude.

A. No Avoiding the Land-Use Process

Courts have repeatedly rejected the claim that it violates RLUIPA to require churches to apply for a permit or go through a costly land-use process. In *San Jose Christian College v. City of Morgan Hill*,[121] a Christian college filed a re-zoning application seeking permission to use property as a college. The city rejected the application as "incomplete," and the college sued under RLUIPA.[122] The Ninth Circuit held that there was no substantial burden under RLUIPA, because it appeared that the college was "simply adverse to complying with the [zoning] ordinance's requirements."[123] The court said that if the college would submit a complete application, "it is not at all apparent that its re-zoning application will be denied."[124]

Similarly, in *Civil Liberties for Urban Believers v. City of Chicago*,[125] five Chicago-area churches sued under RLUIPA, challenging the city's zoning ordinance based on the difficulties they faced in obtaining special use permits. But all five churches had eventually found a place to meet.[126] The Seventh Circuit rejected their claims, emphasizing that "the costs, procedural requirements, and inherent political aspects" of the special-use process are "incidental to any high-density urban land use" and thus "do not amount to a substantial burden on religious exercise."[127]

In other words, RLUIPA does not grant a "free pass for religious land uses."[128] Churches are subject to the ordinary delay, inconvenience, and expense of complying with local land-use procedures.

B. No Free Pass for Commercial Activities

A variation on the "free pass" argument is the contention that because RLUIPA defines "religious exercise" to include "any exercise of religion, whether or not compelled by, or central to, a system of re-

121. 360 F.3d 1024 (9th Cir. 2004).
122. *Id.* at 1028–29.
123. *Id.* at 1035.
124. *Id.*
125. 342 F.3d 752 (7th Cir. 2003).
126. *Id.* at 756–58.
127. *Id.* at 761.
128. *Id.* at 762.

ligious belief,"[129] it allows religious groups to claim "that virtually any activity is religious, merely because it is done by them."[130] Thus, "[c]atering halls are religious; day-care centers are religious, and so on," and it is "difficult, if not impossible, for local communities to challenge such claims, even when they seem more opportunistic than authentic."[131]

This criticism is not true either. RLUIPA's definition of religious exercise, which is in fact tautological, states that all religious exercise is included, and rejects cases that divided religious exercise into protected and unprotected categories based on the court's assessment of the intensity of religious motivation or the centrality of the practice to a larger body of belief.[132] The court still must determine that the proposed use of property is an exercise of religion.

Religious groups frequently lose under RLUIPA when they seek special treatment for uses that resemble a commercial activity more than a church. In *Grace United Methodist Church v. City of Cheyenne*,[133] for example, a church sought a variance so that it could operate a 100-child daycare center in a residential zone. The church planned to charge a market rate for its services and to hire caregivers who were not members of the church.[134] Internal correspondence

129. 42 U.S.C. § 2000cc-5(7)(A) (2006).

130. Hamilton, *supra* note 17.

131. *Id.*; *see also* Diane K. Hook, Comment, *The Religious Land Use and Institutionalized Persons Act of 2000: Congress' New Twist on "Speak Softly and Carry a Big Stick,"* 34 URB. LAW. 829, 854 (2002) (predicting that RLUIPA would unduly protect accessory uses such as "parochial schools, day care centers, playgrounds, baseball or softball fields, homeless shelters, administrative buildings, cemeteries, and coffee houses"); Sara C. Galvan, Note, *Beyond Worship: The Religious Land Use and Institutionalized Persons Act of 2000 and Religious Institutions' Auxiliary Uses*, 24 YALE L. & POL'Y REV. 207, 220 (2006) (suggesting that RLUIPA has "expand[ed] the class of protected religious uses to all auxiliary uses").

132. *See* H.R. REP. NO. 106-219, at 30 (1999) (stating that this definition "clarif[ies] issues that had generated litigation under RFRA"); *see also* Hatch-Kennedy Statement, *supra* note 2, at S7776 ("[N]ot every activity carried out by a religious entity or individual constitutes 'religious exercise.' In many cases, real property is used by religious institutions for purposes that are comparable to those carried out by other institutions. While recognizing that these activities or facilities may be owned, sponsored or operated by a religious institution, or may permit a religious institution to obtain additional funds to further its religious activities, this alone does not automatically bring these activities or facilities within the bill's definition or [sic] 'religious exercise.' For example, a burden on a commercial building, which is connected to religious exercise primarily by the fact that the proceeds from the building's operation would be used to support religious exercise, is not a substantial burden on 'religious exercise.'").

133. 451 F.3d 643 (10th Cir. 2006).

134. *Id.* at 648.

from the church also suggested that the daycare center "seems to look more like a commercial venture and less like a religious function."[135] The jury agreed: it rejected the church's RLUIPA claim on the ground that it "had failed to prove the proposed operation of the daycare center was a sincere exercise of religion."[136]

Similarly, in *Greater Bible Way Temple of Jackson v. City of Jackson*,[137] a church sought rezoning so that it could build an assisted living center for the elderly and disabled. The city refused, and the church sued under RLUIPA. The Michigan Supreme Court rejected the claim on the ground that building an apartment complex was not a religious exercise:

> No evidence has been presented to establish that the proposed apartment complex would be used for religious worship or for any other religious activity. Instead, it appears that the only connection between the proposed apartment complex and "religious exercise" is the fact that the apartment complex would be owned by a religious institution. Generally, the building of an apartment complex would be considered a commercial exercise, not a religious exercise. The fact that the apartment complex would be owned by a religious institution does not transform the building of an apartment complex into a "religious exercise," unless the term is to be deprived of all practical meaning.[138]

This analysis is questionable on the facts of the case, because the "apartment complex" would actually have been "an assisted living center for elderly and disabled people," and an integral part of the church's religious mission.[139] But judicial resistance to such characterizations is common, and the principle is sound: RLUIPA does not protect commercial investments owned by churches. Other courts have reached similar results.[140]

---

135. *Id.* at 664.

136. *Id.* at 648.

137. 733 N.W.2d 734 (Mich. 2007).

138. *Id.* at 746.

139. Greater Bible Way Temple of Jackson v. City of Jackson, 708 N.W.2d 756, 759–61 (Mich. Ct. App. 2005), *rev'd*, 733 N.W.2d 734 (Mich. 2007).

140. *See* Bram Alden, Comment, *Reconsidering RLUIPA: Do Religious Land Use Protections Really Benefit Religious Land Users?*, 57 UCLA L. REV. 1779, 1793–95 (2010) (discussing cases finding no "religious exercise"); *see also* Cathedral Church of The Intercessor v. Inc. Vill. of Malverne, 353 F. Supp. 2d 375, 390–91 (E.D.N.Y. 2005) (finding no substantial burden in part because "while some of the expansion plans dealt with development of the sanctuary area, the majority of it was in building out administrative offices. Simply because the Church is a religious institution does not mean it receives an unencumbered right to zoning approval for non-religious uses."); *cf.* Ridley Park United Methodist Church v. Zoning Hearing Bd. Ridley Park

In *Calvary Christian Center v. City of Fredericksburg*,[141] a church sought to lease its building to a for-profit, secular school serving disabled children. The court rejected the church's RLUIPA claim, finding that no religious exercise was involved; rather, the tenant was "a for-profit school that would just happen to be housed in a church."[142]

In *Scottish Rite Cathedral Association v. City of Los Angeles*,[143] a Masonic temple sought permission to rent out its facilities for cultural and commercial events that would fund its religious activities. Treating Masonic rituals as religious, the court held that "a burden on a commercial enterprise used to fund a religious organization does not constitute a substantial burden on 'religious exercise' within the meaning of RLUIPA."[144]

In *Glenside Center, Inc. v. Abington Township Zoning Hearing Board*,[145] the court rejected a RLUIPA claim by an organization hosting Alcoholics Anonymous meetings, concluding that "the group meetings are for the purpose of treating addictions and not for exercising religion."[146]

None of this is to say that religious groups always lose when they invoke RLUIPA in support of religious activities beyond the church itself.[147] Nor are all of the decisions above necessarily correct. Some seem clearly correct; others might reasonably have been decided the other way if the court had more sympathetically considered the claimant's religious motivation. But right or wrong, these decisions confirm that RLUIPA has not given religious groups carte blanche to

Borough, 920 A.2d 953, 957–61 (Pa. Commw. Ct. 2007) (rejecting a claim by a church daycare under the state Religious Freedom Protection Act, which has a narrower definition of "substantial burden," because "daycare is not a fundamental religious activity of a church").

141. 800 F. Supp. 2d 760 (E.D. Va. 2011).

142. *Id.* at 772.

143. 67 Cal. Rptr. 3d 207 (Cal. Dist. Ct. App. 2007).

144. *Id.* at 216.

145. 973 A.2d 10 (Pa. Commw. Ct. 2009).

146. *Id.* at 18.

147. *See* Westchester Day Sch. v. Vill. of Mamaroneck, 504 F.3d 338, 347–48 (2d Cir. 2007) (protecting a freestanding Jewish school under RLUIPA); Men of Destiny Ministries, Inc. v. Osceola Cnty., No. 6:06-cv-624-Orl-31DAB, 2006 WL 3219321, at *4 (M.D. Fla. Nov. 6, 2006) (finding that a faith-based drug-and-alcohol treatment center was the exercise of religion, but denying claim on merits). There are also cases where the court assumed (without deciding) that a religiously affiliated organization was engaged in an exercise of religion but rejected the RLUIPA claim on other grounds. *See, e.g.*, Sisters of St. Francis Health Servs., Inc. v. Morgan Cnty., 397 F. Supp. 2d 1032, 1050 (S.D. Ind. 2005) (nonprofit hospital); Ventura Cnty. Christian High Sch. v. City of San Buenaventura, 233 F. Supp. 2d 1241, 1243, 1246–51 (C.D. Cal. 2002) (religious high school).

treat "virtually any activity [a]s religious."[148] Rather, courts have carefully considered whether a particular activity is religious exercise, and have rejected claims where they are not persuaded that it is.

C. No Substantial Burden When There Are Ready Alternatives

Even when an activity is undisputedly religious, courts have rejected RLUIPA claims on the ground that the church has failed to demonstrate a "substantial burden." Typically, this occurs when the particular location at issue has no religious significance and there are "quick, reliable, and financially feasible alternatives"[149] that meet the church's needs, or "plenty of land" available to churches.[150] In *World Outreach Conference Center v. City of Chicago*,[151] for example, a church sought to demolish an apartment house that was adjacent to its building and to construct a "Family Life Center" in its place. The city refused, deeming the apartment house to be a landmark.[152] The Seventh Circuit rejected the church's RLUIPA claim, because the church had a "suitable alternative site for building a family-life center"—a vacant portion of property it already owned—and the city committed itself to let the church build on it, so there was no substantial burden.[153] Other cases have employed similar reasoning, sometimes on more marginal facts.[154]

Such reasoning is appropriate when there really are "quick, reliable, and financially feasible alternatives," or there really is "plenty of

148. Hamilton, *supra* note 17.

149. *Westchester*, 504 F.3d at 352.

150. Petra Presbyterian Church v. Vill. of Northbrook, 489 F.3d 846, 851 (7th Cir. 2007) ("When there is plenty of land on which religious organizations can build churches (or, as is common nowadays, convert to churches buildings previously intended for some other use) in a community, the fact that they are not permitted to build everywhere does not create a substantial burden.").

151. 591 F.3d 531 (7th Cir. 2009).

152. *Id.* at 538–39.

153. *Id.* at 539.

154. *See, e.g.*, Int'l Church of Foursquare Gospel v. City of San Leandro, 634 F.3d 1037, 1045 (9th Cir. 2011) (reversing a summary judgment on the ground of no substantial burden, where church's realtor had offered evidence that "no other suitable sites exist in the City to house the Church's expanded operations"), *cert. denied*, 132 S. Ct. 251 (2011); Calvary Christian Ctr. v. City of Fredericksburg 800 F. Supp. 2d 760, 774 (E.D. Va. 2011) (refusing preliminary injunction where the church "has not pled facts to show a lack of alternatives to the proposed site for the day school"); Wesleyan Methodist Church of Canisteo v. Vill. of Canisteo, 792 F. Supp. 2d 667, 674 (W.D.N.Y. 2011) (dismissing claim where the church acknowledged "that it had several other alternatives available to it, including building new structures on its existing property").

land" available. But such reasoning could lead to a de facto repealer of RLUIPA's substantial-burden section if applied indiscriminately to any possibility of an alternative location. It cannot be enough that after suit is filed, the city identifies one or a few parcels somewhere. Nor can churches be required to retain an expert witness to prove a negative, analyzing every parcel in the jurisdiction to show that no alternatives were available. Few, if any, churches could afford that. It should be enough for the church's real estate agent to describe the search that resulted in the site selected.

If a city wants to defend on the ground that other sites are available, those sites must be available in fact and not just in theory, and their availability must be apparent with reasonable search efforts. There must be sites available for churches of the full range of sizes and financial means. Megachurches may present difficult issues, but they are a constitutionally protected form of religious exercise and have to go somewhere. At the other extreme, half of all churches have fifty or fewer actively participating adults.[155] They need sites that are small and inexpensive, often rented in houses or storefronts.

If a city is to rely on the availability of other sites, churches must have a way of learning what sites are available. A city should not be permitted to argue that sites are available if those sites are subject to a conditional-use permit or similar requirement and the city refuses to provide reliable guidance about whether it will grant the permit. The permit process forces churches into a guessing game, in which they have to acquire a site, or acquire a lengthy option on a site, and then seek permission to use it in a political process that, for the reasons already discussed,[156] is often hostile to their interests. The process can turn into a game of gotcha, in which the available site is always some other site, but never the site the church has actually purchased—which seems to be what was happening to the Sikhs in *Guru Nanak*.[157] If a city is unable or unwilling to make a range of sites available as of right, then it must be more accommodating when a church seeks to use the site it could find, or it must provide reliable guidance to churches about what it will and will not approve.

Neither RLUIPA nor the typical state law of land-use regulation requires cities to help churches find sites. But both cities and churches would be better off if cities did so. If a city wants to direct the loca-

155. MARK CHAVES, CONGREGATIONS IN AMERICA 18 (2004).

156. *See supra* notes 19–109 and accompanying text.

157. Guru Nanak Sikh Soc'y of Yuba City v. Cnty. of Sutter, 456 F.3d 978 (9th Cir. 2006); *see supra* note 63 and accompanying text.

tion of churches and also avoid RLUIPA litigation, then it will build RLUIPA into its land-use process and it will provide advice and guidance to churches seeking to locate in places acceptable to the city.

We mention these points to avoid being misunderstood. Churches lose when the city disapproves one site but other sites were freely available, and this pattern helps to demonstrate that RLUIPA is not a repealer of land-use regulation as it applies to churches. And we agree that some of these losses were deserved. But courts must be cautious with this doctrine, and realistic about the many problems churches face in the land-use process, lest reliance on the theoretical or after-the-fact availability of other sites turn into a repealer of RLUIPA's substantial-burden provision.

III. UNDER-ENFORCEMENT OF RLUIPA

RLUIPA has, if anything, been under enforced. This under-enforcement has surfaced with respect to both the substantial-burden provision and the equal-terms provision, and it has resulted in lengthy litigation, and sometimes losses, in cases that churches should have easily won.

A. Judicial Reluctance

Some judges have appeared reluctant to fully enforce RLUIPA. There are several possible reasons for this reluctance. One is faith in the local land-use process. Some judges may believe that the local land-use process works fine; that churches do not often face either hostility or discrimination; or that federal judges should be deferential on such a traditionally local matter.[158] Such a judge's inclination would be to construe RLUIPA narrowly.

A stronger version of this view would be that federal interference with local land-use regulation is illegitimate and to be minimized. This sentiment seems to be prevalent in state courts, where RLUIPA cases have sometimes received a hostile reception.

An example is *Greater Bible Way Temple of Jackson v. City of Jackson*,[159] in which a church sought rezoning to build an assisted liv-

158. *See, e.g.*, River of Life Kingdom Ministries v. Vill. of Hazel Crest, 611 F.3d 367, 388–89 (7th Cir. 2010) (en banc) (Sykes, J., dissenting) (criticizing the majority for its "emphasis on the police-power legitimacy of exclusionary zoning" and a resulting "deference toward land-use regulation that is fundamentally inconsistent with RLUIPA and the First Amendment's guarantee of the right of free religious exercise").

159. 733 N.W.2d 734 (Mich. 2007).

ing center for the elderly and disabled. As discussed above, the court rejected the claim on the questionable but at least plausible ground that housing the elderly and disabled was not a religious exercise.[160] But it did not stop there. The court also held that even if housing the needy were a religious exercise, the church had not suffered a substantial burden;[161] that even if the church had suffered a substantial burden, the denial of rezoning was the least restrictive means of furthering a compelling interest in maintaining the character of the neighborhood;[162] and that even if the city had not shown a compelling governmental interest, RLUIPA did not apply to a denial of rezoning in the first place.[163] The court went out of its way to opine on four independent bases for rejecting the RLUIPA claim, even though any one of the four would have sufficed. In the course of doing so, it adopted extremely narrow definitions of "substantial burden" and "individualized assessment," and an extremely broad definition of "compelling governmental interest." As three justices pointed out, all but one of these determinations were unnecessary dicta.[164] But the effect has been to gut RLUIPA in Michigan state courts. In the nearly six years since *Greater Bible Way*, no reported RLUIPA claim in a Michigan state court has survived summary judgment.[165]

Another example is *Cambodian Buddhist Society of Connecticut, Inc. v. Planning and Zoning Commission of Newton*, in which the Connecticut Supreme Court held that the denial of a "special exception" to build a Buddhist temple was not subject to RLUIPA.[166] Remarkably, the court held that the denial of a "special exception" did not involve an "individualized assessment" under RLUIPA—even though the denial of the special exception required the zoning commission to conduct an individualized review of the temple's potential

160. *Id.* at 745–46; *see supra* note 137 and accompanying text.

161. 733 N.W.2d at 746–50.

162. *Id.* at 751–54.

163. *Id.* at 742–44.

164. *Id.* at 755 (Cavanagh, J., concurring); *id.* (Kelly, J., concurring).

165. *See* Great Lakes Soc'y v. Georgetown Charter Twp., Nos. 296370, 296372, 2011 WL 1600496, at *6–11 (Mich. Ct. App. Apr. 28, 2011) (granting summary judgment to township on equal-terms and nondiscrimination claims); Great Lakes Soc'y v. Georgetown Charter Twp., 761 N.W.2d 371, 387–89 (Mich. Ct. App. 2008) (granting summary judgment to township on substantial-burden claim); Shepherd Montessori Ctr. Milan v. Ann Arbor Charter Twp., 761 N.W.2d 230 (Mich. Ct. App. 2008) (reversing summary judgment for the plaintiff on the RLUIPA claim on the basis of *Greater Bible Way,* but directing summary judgment for the plaintiff on its equal-protection claim), *rev'd on the equal-protection claim*, 783 N.W.2d 695 (Mich. 2010).

166. 941 A.2d 868 (Conn. 2008).

impact on the surrounding area.[167] This decision is clearly wrong, goes against every other court to address the question[168] and clear congressional intent,[169] and dramatically reduces the applicability of RLUIPA's substantial-burden provision in Connecticut state courts.

Even if the court's interpretation of "individualized assessment" were right, the judgment would still be wrong. The substantial-burden provision also applies when a substantial burden "would affect . . . commerce . . . among the several States."[170] The construction of a 6000-square-foot meeting hall, which would hold five major Buddhist festivals annually,[171] would plainly have affected commerce. The construction workers on the project would undoubtedly have been subject to federal labor and employment regulation based on the Commerce Clause,[172] the completed building would have been heated, cooled, and insured in interstate commerce, and the festivals, even if nonprofit, would have been an activity in commerce.[173] But churches and their lawyers have not litigated the Commerce Clause

167. *Id.* at 892–93.

168. *See, e.g.*, Guru Nanak Sikh Soc'y of Yuba City v. Cnty. of Sutter, 456 F.3d 978, 986–87 (9th Cir. 2006) (holding that the denial of a conditional-use permit was an individualized assessment); Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1219, 1225 (11th Cir. 2004) (finding a town's zoning ordinance, which required churches and synagogues to obtain conditional-use permits to locate in most areas, to be "quintessentially an 'individual assessment' regime"); Church of Scientology of Ga., Inc. v. City of Sandy Springs, No. 1:10-CV-00082-AT, 2012 WL 500263, at *15 n.20 (N.D. Ga. Feb. 10, 2012) (collecting cases). One court has held that a denial of *rezoning* is not an individualized assessment, *see Greater Bible Way*, 733 N.W.2d at 743–44, but that court expressly distinguished denial of a variance, *id.* at 744 n.14, and in any event, that conclusion is also wrong. *See, e.g.*, Sts. Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin, 396 F.3d 895 (7th Cir. 2005) (treating the denial of rezoning as subject to RLUIPA); San Jose Christian Coll. v. City of Morgan Hill, 360 F.3d 1024 (9th Cir. 2004) (same). The allegedly contrary cases on which the Connecticut court relied mostly predated RLUIPA, and none were an interpretation of RLUIPA's individualized-assessment provision.

169. *See* H.R. REP. NO. 106-219, at 17 (1999) ("Local land use regulation, which lacks objective, generally applicable standards, and instead relies on discretionary, individualized determinations, presents a problem that Congress has closely scrutinized and found to warrant remedial measures under its Section 5 enforcement authority."); *id.* at 25 ("Land use regulation is commonly administered through individualized processes not controlled by neutral and generally applicable rules.").

170. 42 U.S.C. § 2000cc(a)(2)(B) (2006).

171. *See Cambodian Buddhist*, 941 A.2d at 874–75.

172. *See, e.g.*, Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616 (1975) (applying labor laws and antitrust laws to dispute between construction company and construction union).

173. *See, e.g.*, Camps Newfound/Owatanna, Inc. v. Town of Harrison, 520 U.S. 564, 572–75 (1997) (holding that non-profit activities affect commerce and that a tax on real estate can discriminate against interstate commerce).

question in subsequent cases. There has been no reported RLUIPA decision in any Connecticut state court in the four years since *Cambodian Buddhist*. Lawyers appear to have read this opinion as a signal of general hostility to the statute.

Setting aside federalism concerns, some judges are simply hostile to religious exemptions. This hostility can stem from a belief that religious exemptions are bad policy, that they are best left to the legislature, or that they violate the Establishment Clause. Only RLUIPA's substantial-burden provision actually creates a form of religious exemption, but judicial hostility to exemptions can spill over to the strong antidiscrimination protections in the equal-terms and nondiscrimination provisions, and to the exclusion-and-limitation provision, which is based on more general First Amendment protections that cover speech as well as religion.[174]

The notion that RLUIPA violates the Establishment Clause should have been put to rest by the Supreme Court's decision in *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*.[175] There, the Court unanimously upheld Title VII's religious exemption, explaining that "it is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions."[176] Nevertheless, in 2003, the Sixth Circuit struck down RLUIPA's prisoner provisions as a violation of the Establishment Clause. The Supreme Court unanimously reversed in *Cutter v. Wilkinson*,[177] explaining that RLUIPA's prisoner provision is "compatible with the Establishment Clause because it alleviates exceptional government-created burdens on private religious exercise,"[178] and noting that under the Sixth Circuit's view, "all manner of religious accommodations would fall."[179] In addition to *Amos* and *Cutter*, the Court has unanimously stated the same rule three other times in well-considered dicta as it addressed related issues about religious exemptions.[180] This repeated unanimity makes clear that occasional deci-

174. *See* Schad v. Borough of Mt. Ephraim, 452 U.S. 61, 67–77 (1981) (restricting use of zoning power to exclude "a broad category of protected expression" from a jurisdiction).

175. 483 U.S. 327 (1987).

176. *Id.* at 335.

177. 544 U.S. 709 (2005).

178. *Id.* at 720.

179. *Id.* at 724.

180. *See* Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 705 (1994) (stating that "the Constitution allows the State to accommodate religious

sions invalidating particular exemptions as potentially discriminatory[181] or too absolute[182] deal with special cases and do not undermine the general rule upholding exemptions to relieve burdens on the free exercise of religion.

These cases are equally applicable to RLUIPA's land-use provisions. But despite five unanimous repetitions of the point, some courts continue to suggest that RLUIPA must be construed narrowly to avoid violating the Establishment Clause. As one court put it: "'RLUIPA occupies a treacherous narrow zone between the Free Exercise Clause . . . and the Establishment Clause' and compels states to 'pursue a course of neutrality towards religion, favoring neither one religion over others nor religious adherents collectively over nonadherents.'"[183]

needs by alleviating special burdens" and reaffirming *Amos*); *id.* at 711–12 (Stevens, J., concurring) (distinguishing the facts of *Grumet* from "a decision to grant an exemption from a burdensome general rule"); *id.* at 716 (O'Connor, J., concurring) ("The Constitution permits '*nondiscriminatory* religious-practice exemption[s]'" (quoting Emp't Div. v. Smith, 494 U.S. 872, 890 (1990) (emphasis by Justice O'Connor))); *id.* at 723–24 (Kennedy, J., concurring) (approving *Amos* and similar cases); *id.* at 744 (Scalia, J., dissenting) ("The Court has also long acknowledged the permissibility of legislative accommodation."); Emp't Div. v. Smith, 494 U.S. 872, 890 (1990) ("a nondiscriminatory religious-practice exemption is permitted"); *id.* at 893–97 (O'Connor, J., concurring) (arguing that regulatory exemptions for religious practice are not just permitted, but constitutionally required); Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 18 n.8 (1989) (plurality opinion) (approving *Amos*); *id.* at 28 (Blackmun, J., concurring) (approving *Amos*); *id.* at 38–40 (Scalia, J., dissenting) (arguing that regulatory and tax exemptions are generally permitted and sometimes required). Justice White's brief concurrence in *Texas Monthly*, *id.* at 25–26, said nothing about the exemption issue, but his views were clear because he had written the Court's opinion in *Amos. See also* Douglas Laycock, *Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause*, 81 NOTRE DAME L. REV. 1793 (2006) (demonstrating that there is no support in the original understanding for the view that regulatory exemptions for religious practice raise an Establishment Clause issue, and arguing that exemptions are fundamentally different from financial support).

181. *See Grumet*, 512 U.S. at 705 (objecting that "[h]ere the benefit flows only to a single sect").

182. *See* Estate of Thornton v. Caldor, Inc., 472 U.S. 703, 710 (1985) (objecting to "unyielding weighting in favor of Sabbath observers").

183. Westchester Day Sch. v. Vill. of Mamaroneck, 379 F. Supp. 2d 550, 558 (S.D.N.Y. 2005) (quoting Westchester Day Sch. v. Vill. of Mamaroneck, 368 F.3d 183, 189 (2d Cir. 2004) (quoting (in the second internal quotation) *Grumet*, 512 U.S. at 696 (plurality opinion))); *see also* Scottish Rite Cathedral Ass'n of L.A. v. City of Los Angeles, 67 Cal. Rptr. 3d 207, 215 (Cal. Dist. Ct. App. 2007) (quoting an overlapping passage from *Westchester*, 386 F.3d at 189); Cambodian Buddhist Soc'y of Conn., Inc. v. Newtown Planning & Zoning Comm'n, No. CV030350572S, 2005 WL 3370834, at *9 (Conn. Super. Ct. Nov. 18, 2005) (same). *Cf.* Living Water Church of God v. Charter Twp. of Meridian, 258 F. App'x 729, 741 n.6 (6th Cir. 2007) (inter-

Other courts have expressed hostility to religious exemptions as a matter of institutional competence. According to these courts, judges should not be in the business of drawing a line between religious accommodations and government interests; that task should be left to the political branches.

A prominent example is *Potter v. District of Columbia*,[184] which involved the Religious Freedom Restoration Act, a statute with a substantial-burden provision that applies to all federal regulation. The question was whether requiring firefighters to shave their religiously mandated beards was the least restrictive means of furthering a compelling governmental interest. Judge Robertson was not happy with the question: "The dispute in these RFRA cases," he said, "is precisely the sort of police power matter that is best entrusted to the politically accountable branches."[185] In his view, "Courts have little competence" to decide the scope of religious exemptions, and "[w]ithout RFRA, it would not be the business of the judicial branch" to do so.[186] "Yet, whether or not it was wise to assign such questions to the courts, Congress has done so, and I am charged with answering them here."[187]

Judge Robertson ultimately ruled in favor of the religious claimant.[188] But his sentiment—that judges should not second-guess the legislature's denial of a religious exemption—is common. It animated the Supreme Court's decision in *Employment Division v. Smith*.[189]

In part for the reasons reviewed in Part I, we think this suspicion of religious exemptions is especially mistaken as applied to RLUIPA. Congress created a judicial check and balance to local land-use regulation of churches because that regulatory process is individualized and highly discretionary, subject to political pressures from constituents with no obligation to take any account of religious liberty, not infrequently hostile to religious uses in general or to minority religious

preting 'substantial burden' narrowly, lest RLUIPA become "vulnerable to attack under the Court's 'Establishment Clause' jurisprudence").

184. Nos. 01-1189 (JR), 05-1792 (JR), 2007 WL 2892685 (D.D.C. Sept. 28, 2007).

185. *Id.* at *1.

186. *Id.*

187. *Id.*

188. *Id.* at *9.

189. 494 U.S. 872, 890 (1990) (concluding that political discrimination against religious minorities is preferable to a system "in which judges weigh the social importance of all laws against the centrality of all religious beliefs"); *see* Gonzales v. O Centro Espírita Beneficente União do Vegetal, 546 U.S. 418, 439 (2006) (noting that government had argued for narrow interpretation of RFRA by citing "the very sort of difficulties" the Court had relied on in *Smith*).

uses in particular, and apart from RLUIPA, often subject only to highly deferential judicial review. But whatever its merits, the view that judges should not decide religious exemption cases is abroad in the land, and it likely plays a role in some of the under-enforcement of RLUIPA.

B. Substantial Burden

One area of under-enforcement is RLUIPA's substantial-burden provision, which requires the government to satisfy strict scrutiny whenever a land-use regulation imposes a substantial burden on religious exercise.[190] RLUIPA does not define "substantial burden." In accordance with the legislative history, several courts have held that it should be interpreted "by reference to Supreme Court jurisprudence."[191] This congressional deference to precedent was a compromise. We never found out whether Congress could have agreed on a definition of burden, because People For the American Way (PFAW) steadfastly insisted that it would oppose any bill that attempted a definition.[192] And because the religious groups could not pass a bill without the support of the secular civil liberties groups, PFAW had an effective veto.

The Supreme Court's jurisprudence on substantial burden does not provide detailed guidance in RLUIPA cases. The Court treated burden as obvious when religiously motivated conduct was prohibited,[193] or penalized with loss of government benefits.[194] And it found no burden when believers complained about the government's management of its own property or operations in cases where religiously motivated conduct had not been regulated at all.[195] The cases on loss of government benefits make clear that government can substantially burden religious exercise without making it impossible. But those

190. 42 U.S.C. § 2000cc(a) (2006).

191. Abdulhaseeb v. Calbone, 600 F.3d 1301, 1315 (10th Cir. 2010) (quoting Hatch-Kennedy Statement, *supra* note 2, at S7776); Westchester Day Sch. v. Vill. of Mamaroneck, 504 F.3d 338, 348 (2d Cir. 2007) (same); Vision Church v. Vill. of Long Grove, 468 F.3d 975, 997 (7th Cir. 2006) (same).

192. This history does not appear to have made it into the written record, but Professor Laycock vividly recalls the frustrated discussion of this point within the Coalition for the Free Exercise of Religion.

193. *See* Wisconsin v. Yoder, 406 U.S. 205, 218 (1972).

194. *See, e.g.*, Frazee v. Dep't of Emp't Sec., 489 U.S. 829 (1989); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987); Thomas v. Review Bd., 450 U.S. 707 (1981); Sherbert v. Verner, 374 U.S. 398 (1963).

195. *See* Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988); Bowen v. Roy, 476 U.S. 693 (1986).

cases do not strike all judges as clearly analogous to the typical land-use case, in which government regulation makes religious exercise much more difficult. If courts focus only on the legislative deference to Supreme Court precedent, and do not take account of RLUIPA's underlying purpose, they have ample flexibility to interpret "substantial burden" in ways that implement, undermine, or effectively repeal RLUIPA's substantial-burden provision.

Several courts have recognized that "a burden need not be found insuperable to be held substantial."[196] Thus, for example, courts have found a substantial burden where a church is confined to religiously inadequate facilities;[197] where a church has "no quick, reliable, or economically feasible alternatives";[198] where a city has rejected a church's request on arbitrary or inconsistent grounds,[199] has rejected reasonable compromise measures,[200] or has subjected the church to unfair dealing;[201] or where a church suffers "delay, uncertainty, and expense" during the zoning process—especially when there is a

196. *See, e.g.*, Int'l Church of the Foursquare Gospel v. City of San Leandro, 634 F.3d 1037, 1046 (9th Cir.), *cert. denied*, 132 S. Ct. 251 (2011); *Westchester Day Sch.*, 504 F.3d at 349; Sts. Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin, 396 F.3d 895, 901 (7th Cir. 2005); Reaching Hearts Int'l, Inc. v. Prince George's Cnty., 584 F. Supp. 2d 766, 785 n.14 (D. Md. 2008).

197. *Westchester Day Sch.*, 504 F.3d at 352 (finding a substantial burden where a zoning board's decision confined a religious school to an inadequate facility); *Sts. Constantine & Helen*, 396 F.3d at 898, 901 (holding that denial of a zoning variance was a substantial burden on a church that was outgrowing its existing facilities in a nearby town when that denial resulted in significant delay, uncertainty, and expense).

198. *Westchester Day Sch.*, 504 F.3d at 352–53; *see also* Guru Nanak Sikh Soc'y of Yuba City v. Cnty. of Sutter, 456 F.3d 978, 992 (9th Cir. 2006) (finding a substantial burden where the county had "to a significantly great extent lessened the prospect of Guru Nanak being able to construct a temple in the future"); Islamic Ctr. of Mississippi, Inc. v. City of Starkville, 840 F.2d 293, 299 (5th Cir. 1988) (finding a substantial burden under the Free Exercise Clause where the city made a mosque "relatively inaccessible within the city limits to Muslims who lack automobile transportation"); Barr v. City of Sinton, 295 S.W.3d 287, 305 (Tex. 2009) (finding a substantial burden under Texas RFRA where "alternatives for the religious exercise are severely restricted").

199. *See Westchester Day Sch.*, 504 F.3d at 350–52 (emphasizing the arbitrary nature of zoning denial in finding a substantial burden); *Guru Nanak*, 456 F.3d at 990–91 (noting "inconsistent decision-making" in finding a substantial burden, because it implied that no permit application would ever be granted).

200. *See Sts. Constantine & Helen*, 396 F.3d at 898, 901 (considering the rejection of a mitigation measure that would "limit the parcel to church-related uses" in finding a substantial burden); *Guru Nanak*, 456 F.3d at 991 (considering the county's "disregard[], without explanation, . . . of various mitigation conditions" in finding a substantial burden).

201. *See* World Outreach Conference Ctr. v. City of Chicago, 591 F.3d 531, 537–38 (7th Cir. 2009).

"whiff of bad faith" from the city[202] or when the church is impecunious.[203]

In contrast with these decisions, some courts have adopted a much higher bar for what constitutes a substantial burden. In one early case, the Seventh Circuit held that a land-use regulation imposes a substantial burden only when it "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."[204] In fact, this is often the effect of exclusionary zoning of churches. But this standard is also too restrictive, extremely difficult to prove, and inconsistent with the statutory text. As the Eleventh Circuit pointed out,[205] the Seventh Circuit's standard equates the substantial-burden provision with RLUIPA's separate provision that prohibits a jurisdiction from "totally exclud[ing]" or "unreasonably limit[ing]" religious assemblies.[206] And depending on how a court interprets "effectively impracticable," this standard would potentially allow cities to defend by always pointing to Eldorado—someplace else, perhaps real and identified, but more likely vague and theoretical, where the church might someday, somehow, be allowed to locate. Fortunately, at least two circuits have explicitly repudiated this standard,[207] and the Seventh Circuit seemed to quietly abandon it,[208] at least for a time.

But the standard, and the sentiment embodied in it, still hangs around. The Seventh Circuit invoked it once again in *Vision Church v. Village of Long Grove*.[209] The city involuntarily annexed the church's property to gain jurisdiction over it, enacted a new ordinance specifically designed to limit the church's size, limited the church's size to less than sixty percent of what it proposed, and restricted the

202. *Sts. Constantine & Helen*, 396 F.3d at 901.

203. *World Outreach*, 591 F.3d at 537 ("[B]urden is relative to the weakness of the burdened.") (internal citations omitted).

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

205. Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1227 & n.10 (11th Cir. 2004).

206. 42 U.S.C. § 2000cc(b)(3) (2006).

207. *See* Guru Nanak Sikh Soc'y of Yuba City v. Cnty. of Sutter, 456 F.3d 978, 988 n.12 (9th Cir. 2006) (rejecting "effectively impracticable" standard); *Midrash Sephardi*, 366 F.3d at 1227 (same).

208. *See, e.g.*, *World Outreach*, 591 F.3d 531, 537–38 (finding a substantial burden without mentioning the "effectively impracticable" standard); *Sts. Constantine & Helen*, 396 F.3d at 899–901 (same).

209. 468 F.3d 975, 997 (7th Cir. 2006).

number and size of religious services the church could hold.[210] The Seventh Circuit acknowledged that some of these restrictions were "troublesome," but it accepted the city's rationalizations, and it found no substantial burden because, in its view, the larger facility was needed only for future growth and was not needed imminently.[211] The court also rejected an equal-terms claim, explaining away the city's approval of a much larger school on adjoining property on the ground that the school had been approved before the new ordinance had been enacted.[212]

Another troubling example is *Living Water Church of God v. Charter Township*,[213] where a growing church applied for a permit to expand its building from 10,925 square feet to 34,989 square feet. The Planning Commission recommended approval, but the Township Board refused to approve anything larger than 25,000 square feet.[214] The district court found, in considerable detail, that a 25,000-square-foot building would be inadequate for the church's needs.[215] The Sixth Circuit quoted these findings,[216] and it did not hold that they were clearly erroneous.[217] Instead, it largely ignored them. It said that the question is whether the church suffers a substantial burden "*now*—not five, ten or twenty years from now."[218] But the district court's finding had been about now, and not about the distant future. Then the Sixth Circuit listed a number of things the church could do in a 25,000-square-foot building, and it ignored or dismissed as irrelevant the many things the district court had found that it could not do in a 25,000-square-foot building.[219] The opinion is inexplicable apart from the court's view that substantial burden must be narrowly interpreted to avoid imagined difficulties under the Establishment Clause, a view wholly at odds with Supreme Court precedent.[220]

210. *See id.* at 981–84, 997–99.
211. *Id.* at 999–1000.
212. *Id.* at 987 & n.11, 1003.
213. 258 F. App'x 729 (6th Cir. 2007).
214. *Id.* at 731–32.
215. Living Water Church of God v. Charter Twp., 384 F. Supp. 2d 1123, 1133–34 (W.D. Mich. 2005), *rev'd*, 258 F. App'x 729 (6th Cir. 2007).
216. *Living Water Church of God*, 258 F. App'x at 737–38.
217. *Id.* at 739.
218. *Id.* at 738.
219. *Id.* at 738–39.
220. *See supra* notes 175–82 and accompanying text.

C. Equal Terms

Another area of visible under-enforcement is RLUIPA's equal-terms provision. This provision makes it unlawful to "impose or implement a land-use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution."[221] It is apparent on the face of the statute that the substantial-burden provision contains a defense of compelling government interest, and that the equal-terms provision does not. The substantial-burden provision is in subsection (a)(1), and the compelling-interest defense is embedded in a sentence that states the rule on substantial burdens.[222] The equal-terms, nondiscrimination, and exclusion-and-limitation provisions are in the three subsections of section (b), and no defense is stated for any of them.[223]

This distinction did not happen by accident. The predecessor bill, the proposed Religious Liberty Protection Act, from the very beginning pointedly provided a standard of justification for substantial burdens, but none for excluding religious assemblies in places where secular assemblies were permitted.[224] This language was further refined in the 1999 version of the bill, but the distinction with respect to standards of justification remained.[225] It was retained in the final lan-

221. 42 U.S.C. § 2000cc(b)(1) (2006).

222. 42 U.S.C. § 2000cc(a)(1). The jurisdictional prerequisites are stated in subsection (a)(2), so that they too apply only to the substantial-burden provision. 42 U.S.C. § 2000cc(a)(2).

223. 42 U.S.C. § 2000cc(b).

224. The Religious Liberty Protection Act, as of June 1998, is reprinted in *Religious Liberty Protection Act of 1998*, *Hearings Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary on H.R. 4019*, 105th Cong. 1–4 (1998) [hereinafter *1998 House Hearing*]. Proposed § 3(b) provided:

> (1) LIMITATION ON LAND USE REGULATION.—No government shall impose a land use regulation that—
>
> (A) substantially burdens religious exercise, unless the burden is the least restrictive means to prevent substantial and tangible harm to neighboring properties or to the public health or safety;
>
> (B) denies religious assemblies a reasonable location in the jurisdiction; or
>
> (C) excludes religious assemblies from areas in which nonreligious assemblies are permitted.

Id. at 2.

225. The bill is reprinted in H.R. REP. NO. 106-219, at 2–4 (1999). Proposed § 3(b) provided:

> (1) Limitation on land use regulation.—
>
> (A) Where, in applying or implementing any land use regulation or exemption, or system of land use regulations or exemptions, a government has the authority to make individualized assessments of the proposed uses to

guage of RLUIPA.[226] Despite the clarity of the statutory text, several courts have generally imposed limiting constructions on the equal-terms provision, refusing to interpret it according to its terms.

There are two types of equal-terms challenges: facial and as-applied.[227] A facial challenge is available when a zoning ordinance differentiates between religious assemblies and nonreligious assemblies on its face—for example, by permitting private clubs to locate in a district by right, but excluding churches.[228] An as-applied challenge is available when a zoning ordinance treats religious assemblies equally on its face but unequally in practice—for example, where an ordinance permits both private clubs and churches to apply for permits, yet private clubs receive them more readily.[229]

> which real property would be put, the government may not impose a substantial burden on a person's religious exercise, unless the government demonstrates that application of the burden to the person is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest.
>
> (B) No government shall impose or implement a land use regulation in a manner that does not treat religious assemblies or institutions on equal terms with nonreligious assemblies or institutions.
>
> (C) No government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination.
>
> (D) No government with zoning authority shall unreasonably exclude from the jurisdiction over which it has authority, or unreasonably limit within that jurisdiction, assemblies or institutions principally devoted to religious exercise.

Id. at 2.

226. Of course this distinction did not persist by accident through multiple drafts and three years of deliberation. Supporters of the bill repeatedly discussed whether there should be a compelling-interest exception to the equal-terms provision. The view that prevailed was that there are no acceptable justifications for such discrimination. But so far as we are aware, none of these discussions were on the record.

227. *See* Konikov v. Orange Cnty., 410 F.3d 1317, 1324 (11th Cir. 2005); *cf.* Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward Cnty., 450 F.3d 1295, 1308 (11th Cir. 2006) (identifying a third possibility: a challenge to "a facially neutral statute that is nevertheless 'gerrymandered' to place a burden solely on religious, as opposed to nonreligious, assemblies or institutions").

228. *See* Digrugilliers v. Consol. City of Indianapolis, 506 F.3d 612, 614–15, 618 (7th Cir. 2007) (finding a possible equal-terms violation because the city allowed "auditoriums, assembly halls, [and] community centers" as a matter of right, but required churches to obtain a variance); Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1220, 1231 (11th Cir. 2004) (finding equal-terms violation where ordinance allowed not-for-profit associations for "social, educational, or recreational purposes," but not for religious purposes) (emphasis omitted).

229. *See* Rocky Mountain Christian Church v. Bd. of Cnty. Comm'rs of Boulder Cnty., 613 F.3d 1229, 1236–38 (10th Cir. 2010) (finding an equal-terms violation where a county granted a permit to a school but not to a similarly situated church);

The circuits are currently split on the legal standard governing a facial equal-terms challenge. Relying on RLIUPA's plain language, the Eleventh Circuit holds that "[t]here are four elements of an Equal Terms violation: (1) the plaintiff must be a religious assembly or institution, (2) subject to a land use regulation, that (3) treats the religious assembly on less than equal terms, with (4) a nonreligious assembly or institution."[230] The dissenters in the Third and Seventh Circuits advocated for a similar plain-language approach.[231]

Under this approach, to make a prima facie case, the plaintiff need only identify a religious assembly, identify a secular assembly, and then show that a land-use regulation treats the religious assembly less favorably on its face.[232] So, for example, if a zoning ordinance excludes churches where it permits private clubs, it violates the equal-terms provision.[233] The Eleventh Circuit then allows the government an opportunity to satisfy strict scrutiny[234]—a departure from the text, but as we shall see, a far smaller departure than that in some other circuits. At least the burden of justification is on the government, and the standard of justification is high.

The Third and Seventh Circuits, by contrast, have added a fifth element to the test for a prima facie equal-terms violation. In these circuits, it is not enough to show that a zoning ordinance treats religious assemblies worse than secular assemblies; the plaintiff must also show that the religious assembly and secular assemblies "are similarly situated as to the regulatory purpose" of the ordinance.[235] So, for example, a city can exclude churches and permit private clubs, as long as

Konikov, 410 F.3d at 1327–29 (finding an equal-terms violation where a county interpreted its facially neutral ordinance in a way that disfavored religious assemblies).

230. *Primera Iglesia*, 450 F.3d at 1307.

231. *See* River of Life Kingdom Ministries v. Vill. of Hazel Crest, 611 F.3d 367, 389 (7th Cir. 2010) (en banc) (Sykes, J., dissenting) ("The Eleventh Circuit correctly reads the provision textually, without glossing it with an artificial 'similarly situated comparator' requirement . . . ."); Lighthouse Inst. for Evangelism v. City of Long Branch, 510 F.3d 253, 283 (3d Cir. 2007) (Jordan, J., concurring in part and dissenting in part) ("The correct analysis should begin and, to the extent possible, end with the language of the statute.").

232. *See Midrash Sephardi*, 366 F.3d at 1230–31.

233. *See id.* at 1231.

234. *See id.* at 1235.

235. *Lighthouse Inst.*, 510 F.3d at 266 (emphasis omitted). The Seventh Circuit uses a slightly different formulation, asking whether the religious and nonreligious assemblies are similarly situated as to "accepted zoning criteria." *River of Life*, 611 F.3d at 371 (emphasis omitted). According to the Ninth Circuit, this variation makes little difference. Centro Familiar Cristiano Buenas Nuevas v. City of Yuma, 651 F.3d 1163, 1172–73 (9th Cir. 2011).

the exclusion of churches serves a legitimate regulatory purpose—such as creating an "entertainment area . . . full of restaurants, bars, and clubs."[236] This reading allows for an individualized, discretionary administration of land-use regulation, and consequently, a high potential for discrimination—the exact outcomes Congress was trying to eliminate. The Ninth Circuit also adopted the "similarly situated as to regulatory purpose" test,[237] but it requires the government to show that the two places of assembly are not similarly situated.[238] The court said that making the "similarly situated" requirement part of a prima facie case would be inconsistent with both the statutory text[239] and a provision that expressly puts the burden of persuasion on the government once the claimant shows a prima facie case.[240]

Regardless of who has the burden of persuasion, this test of "similarly situated as to regulatory purpose" is impossible to square with the text or policy of RLUIPA. Congress easily could have added a "similarly situated" requirement to the equal-terms provision by stating, "No government shall impose or implement a land-use regulation in a manner that treats a religious assembly or institution on less than equal terms with a [similarly situated] nonreligious assembly or institution."[241] Congress has used the term "similarly situated" some ninety-six times.[242] Or it could have prohibited discrimination "because of," or "on the basis of," the religious nature of the assembly—as it did in the adjacent subsection of RLUIPA, prohibiting any "land use regulation that discriminates against any assembly or institution on

236. *Lighthouse Inst.,* 510 F.3d at 270–71.

237. *Centro Familiar*, 651 F.3d at 1172.

238. *Id.* at 1171–73 & n.47.

239. *Id.* at 1171–72.

240. *See id.* at 1171; *see also* 42 U.S.C. § 2000cc-2(b) (2006). The court also rejected a defense of compelling government interest as inconsistent with the statutory text. *Centro Familiar*, 651 F.3d at 1171–72.

241. 42 U.S.C. § 2000cc(b)(1) (language in brackets added).

242. This count is based on a search in the text field of Westlaw's USC database on March 7, 2012. Many of these uses of "similarly situated" bar discrimination, for example, in statutes regarding labor and employment ("similarly situated" employees, 29 U.S.C. § 2931(a)(1)(A) (2006)), employment benefits ("similarly situated" employees, 29 U.S.C. § 623(i)(10)(A)(i) (2006)), criminal procedure ("similarly situated" defendants, 18 U.S.C. § 5037(c)(2) (2006)), and the Armed Forces ("similarly situated members of . . . the uniformed services," 37 U.S.C. § 403(g)(4) (2006)). Elsewhere in the Code, the phrase is found in sections as diverse as the Internal Revenue Code ("similarly situated beneficiaries," 26 U.S.C. § 4980B(f)(2)(A) (2006)), copyright laws ("similarly situated music users," 17 U.S.C. § 513(7) (2006)), environmental laws ("similarly situated" lands, 16 U.S.C. § 1134(b) (2006)), and securities laws ("similarly situated" underwriters, 15 U.S.C. § 77k(e) (2006)).

the basis of religion or religious denomination."[243] That language can be plausibly read to incorporate the standards developed under the 228 or so statutory provisions that prohibit discrimination "because of" or "on the basis of" some protected category.[244] The equal-terms provision means something different from, and something in addition to, the nondiscrimination provision.

Following its successful experience with the Equal Access Act,[245] another religious liberty statute where Congress anticipated resistance, Congress chose instead to enact the equal-terms provision as a flat objective rule. Congress specified the way in which the two land uses must be similar: they must both fall within the categories of "assembly" or "institution."[246] If so, they must be regulated on equal terms.

According to the Seventh Circuit, "'equality' is a complex concept," and "[t]he fact that two land uses share a dictionary definition doesn't make them 'equal' within the meaning of a statute."[247] But the statute does not require the land uses to be equal, or even require the "effects" of the land uses to be equal. It requires the "terms" on which they are "treat[ed]" to be equal.[248] The difference is significant. Suppose, for example, that Congress prohibited governments from

243. 42 U.S.C. § 2000cc(b)(2) (2006).

244. This number is based on a search in the text field of Westlaw's USC database for "discriminat! /s 'on the basis of'" or "discriminat! /s 'because of'" on June 2, 2012. This count includes a small number of false hits, where the search terms were not related to each other in the sentence. On the other hand, it is not adjusted for a much larger number of sections that use the search terms multiple times, creating multiple prohibitions.

245. 20 U.S.C. § 4071 (2006) (requiring nondiscriminatory access to "limited open forum," and providing that a "limited open forum" exists in any school that permits "one or more noncurriculum related student groups to meet on school premises during noninstructional time"). The Court rejected the argument that this language should be read to incorporate the pre-existing standard developed in the Court's "limited public forum" cases. "Congress' deliberate choice to use a different term—and to define that term—can only mean that it intended to establish a standard different from the one established by our free speech cases." Bd. of Educ. of Westside Cmty. Schs. v. Mergens, 496 U.S. 226, 242 (1990). The same reasoning applies to RLUIPA's equal-terms provision. Congress did not include a definition, but it used language obviously different from typical nondiscrimination statutes. That difference in language states a different intended meaning. *See* 42 U.S.C. § 2000cc(b)(1) (2006).

246. Konikov v. Orange Cnty., 410 F.3d 1317, 1324 (11th Cir. 2005); Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1230 (11th Cir. 2004).

247. River of Life Kingdom Ministries v. Vill. of Hazel Crest, 611 F.3d 367, 371 (7th Cir. 2010) (en banc); *see also* Centro Familiar Cristiano Buenas Nuevas v. City of Yuma, 651 F.3d 1163, 1172 (9th Cir. 2011) ("Under the equal terms provision, analysis should focus on what 'equal' means in the context.").

248. 42 U.S.C. § 2000cc(b)(1).

treating a religious assembly on less than equal terms with a single family home. In this context, the plain meaning of "equal terms" would be that churches and single family homes must be subject to the same zoning requirements. Requiring that churches also show they were "similarly situated" to single family homes would make no sense. The statutory text has the same meaning when it is religious and secular assemblies that must be treated on equal terms. In short, the focus should be on the equality of "terms"—the legal rules and government decisions to which places of assembly are subject. These "terms" are much more readily ascertainable than the equality of "use" or "effects."

There is nothing strange about choosing the categories of assemblies and institutions as the relevant basis for evaluating equal treatment. Of course, religious assemblies and nonreligious assemblies will not always have identical land-use effects. But no two land uses ever have completely identical effects. Congress made the entirely rational judgment that a gathering for a religious purpose (like a church) will have similar land-use effects as a gathering for a nonreligious purpose (like a club or movie theater).

But what about big religious assemblies versus small secular assemblies? According to the Third Circuit, the plain-language approach produces an absurd result: "[I]f a town allows a local, ten-member book club to meet in the senior center, it must also permit a large church with a thousand members . . . to locate in the same neighborhood regardless of the impact such a religious entity might have . . . ."[249]

This argument is a red herring. Under the equal-terms provision, a city can place any restrictions on churches it wants *as long as it places the same restriction on nonreligious assemblies*. It can limit churches and book clubs alike to 10 seats, or to 1000 seats, or to any other number. Or, more commonly, it can limit the size of buildings, e.g., "no places of public assembly larger than 15,000 square feet." If a city is worried about traffic, it can impose traffic restrictions: e.g., limiting the size and capacity of assembly buildings permitted on certain types of roads. If the city is worried about parking, it can impose parking restrictions: e.g., requiring all assemblies to provide four off-street parking spaces per 1000 square feet of assembly space. If it is worried

249. Lighthouse Inst. for Evangelism v. City of Long Branch, 510 F.3d 253, 268 (3d Cir. 2007); *accord Centro Familiar*, 651 F.3d at 1172 ("Likewise, a ten-member book club is equal to a ten-member church for purposes of parking burdens on a street, but unequal to a 1000–member church.").

about aesthetics, it can impose aesthetic restrictions: e.g., requiring all assemblies to have 100-foot setbacks and landscaping buffers.

And if a city is worried about unforeseen circumstances, it can even impose a broad, catch-all requirement: e.g., that all assembly uses be "consistent with the characteristics of the neighborhood"—so long as that requirement is applied evenly to religious and non-religious assemblies. Such a vague standard would be vulnerable to an as-applied equal-terms challenge if it were enforced unevenly against churches, and any of these provisions might be challenged under the substantial-burden provision. But like all the other examples listed here, such a standard on its face would be invulnerable to an equal-terms challenge. In an equal-terms challenge, it matters not how burdensome and unjustified the regulation, so long as religious assemblies are treated the same as nonreligious assemblies both facially and in practice.

Cities impose these sorts of limits and requirements all the time. All the examples in the last two paragraphs (except for the book club and church from the Third Circuit's opinion) are drawn from the "Public Assembly Ordinance" upheld in *Vision Church v. Village of Long Grove*.[250]

The Third Circuit's "similarly situated" test also raises more questions than it answers. First, how does a court determine an ordinance's "regulatory purpose"? There are several possible approaches. The court could look for statements of purpose in the ordinance itself.[251] But those are often absent. It could defer to the purpose stated in the government's litigation papers. But that makes it easy to circumvent RLUIPA. Or the court could look for an "objective" purpose by considering how the zoning code operates and the other types of uses it permits.[252] But that inquiry is highly flexible and easy to manipulate. RLUIPA's text provides no guidance for these choices: under the plain language, regulatory purpose is irrelevant to equal terms. The only question is whether the same rules are applied to both religious and secular assemblies.

250. 468 F.3d 975, 993–94 (7th Cir. 2006). *See* LONG GROVE, ILL., VILLAGE CODE § 5-9-12 (2009), *available at* http://www.sterlingcodifiers.com/codebook/index.php?book_id=363.

251. *See Lighthouse Inst.*, 510 F.3d at 258.

252. *See id.* at 271–72.

The Seventh Circuit tried to solve this problem by substituting "accepted zoning criteria" for "regulatory purpose."[253] But as the court itself acknowledged, this approach is "less than airtight";[254] it merely trades one set of problems for another. Courts in the Seventh Circuit now have to figure out what "zoning criteria" are "accepted." We know parking and traffic count; but what about furthering economic development, or generating municipal revenue?[255]

Once a court determines the "regulatory purpose" or "accepted zoning criteria," it must decide whether the two uses being considered are "similarly situated" with respect to that purpose or those criteria. This presents difficult questions. For example, does a secular auditorium contribute more to a "sustainable retail 'main' street" than a church?[256] Is a private club more consistent with economic development than a church? Such questions can easily turn an equal-terms case into a battle of expert witnesses, each opining on whether a given secular assembly contributes more to the regulatory purpose than a church, or conflicts with the regulatory purpose less. Alternatively, these questions result in courts deciding zoning policy questions based on their intuition. Nothing in the text or history of RLUIPA requires or permits this complicated, standardless inquiry to take the place of the easily administrable, bright-line rule that Congress enacted.

The "regulatory purpose" test also makes it easy to circumvent the statute. A city can nearly always come up with some plausible-sounding explanation for why it treats churches worse than other assemblies. The most obvious reason is that churches are tax exempt. So if generating municipal revenue is an accepted criterion or purpose,[257] churches can be treated worse than every assembly that is not tax exempt. That result, which would justify total exclusion of churches, cannot be squared with RLUIPA's text, history, or purpose.[258]

253. River of Life Kingdom Ministries v. Vill. of Hazel Crest, 611 F.3d 367, 371 (7th Cir. 2010) (en banc).

254. *Id.* at 374.

255. *Id.* at 373.

256. *Lighthouse Inst.*, 510 F.3d at 270.

257. *River of Life*, 611 F.3d at 373.

258. *See* Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1231 n.14 (11th Cir. 2004) ("Zoning codes frequently exclude churches in places where they permit theaters, meeting halls, and other places where large groups of people assemble for secular purposes." (quoting Hatch-Kennedy Statement, *supra* note 2)).

Even under the plain-language approach, a court has to decide which uses constitute an "assembly." That is easy for private clubs, meeting halls, community centers, auditoriums, and movie theaters, but some uses are harder to classify—such as restaurants, hotels, health clubs, or daycare centers.[259] The Eleventh Circuit and the dissent in the Seventh Circuit defined "assembly" as a "group of persons *organized and united* for some common purpose."[260] Thus, patrons at a restaurant may be a "group of persons" with a "common purpose" (eating and drinking), but they are not, in the ordinary sense, "organized and united" for that purpose—any more than a rush-hour crowd of pedestrians in New York City is "organized and united for some common purpose." Put another way, an "assembly" is different from a "crowd" or a "group." It is not just a collection of separate individuals who happen to be in the same place at the same time; it is a group organized and united for a common purpose. This understanding of "assembly" will provide adequate guidance in the vast majority of cases. It also has the virtue of being rooted in the text of the statute.

The bottom line is that several circuits have sharply narrowed the equal-terms provision. Under a plain-language approach, the churches in *Lighthouse* and *River of Life* would have prevailed.[261] But under the "regulatory purpose" and "zoning criteria" tests, they lost. It remains to be seen to what extent these tests will be used in the future to narrow the equal-terms provision. In theory, the "accepted zoning criteria" test could be applied stringently, identifying only those zoning criteria acceptable to the policies of RLUIPA, thus minimizing the damage to the statute.[262] But at a minimum, these tests introduce a significant amount of uncertainty into what should be a clear, bright-line rule.

259. *River of Life*, 611 F.3d at 390 (Sykes, J., dissenting).

260. *Id.* at 389 (Sykes, J., dissenting) (emphasis added) (quoting BLACK'S LAW DICTIONARY 132 (9th ed. 2009)); *Midrash Sephardi*, 366 F.3d at 1230 (emphasis added) (quoting BLACK'S LAW DICTIONARY 111 (7th ed. 1999)).

261. *See River of Life*, 611 F.3d at 377, 389 (Sykes, J., dissenting); *Lighthouse Inst.*, 510 F.3d at 277, 283 (Jordan, J., concurring in part and dissenting in part).

262. *See* Centro Familiar Cristiano Buenas Nuevas v. City of Yuma, 651 F.3d 1163, 1173 (9th Cir. 2011).

D. *Congregation Etz Chaim v. City of Los Angeles*

The difficulty of enforcing RLUIPA is illustrated by *Congregation Etz Chaim v. City of Los Angeles*,[263] a case involving a small Hasidic *shul* in the Hancock Park neighborhood of Los Angeles. The case has been dragging through state and federal courts for nearly fifteen years.[264]

The case is thus older than RLUIPA, and it was one of the principal examples of the problem that Congress intended RLUIPA to fix. The congregation's rabbi testified about the case with great effect at a House committee hearing on the bill.[265] Other witnesses later referred to his testimony in their own testimony.[266] The House Committee on the Judiciary included the case in the committee report on the Religious Liberty Protection Act.[267] Senator Kennedy described the case on the floor when he introduced the bill that became RLUIPA.[268] Rep. Hyde included the case in a list of examples submitted as an extension of his remarks, after enactment but prior to signing by the President.[269] If RLUIPA cannot protect this *shul*, then it has failed to achieve an obvious part of the congressional purpose.

And yet the case drags on, with the city and the neighbors making arguments that would effectively nullify RLUIPA if accepted. The congregation first filed suit in July 1997.[270] After four years of litigation, the case settled, with the city agreeing to permit the *shul* subject to several mitigating conditions.[271] The city issued a building permit,

263. Congregation Etz Chaim v. City of Los Angeles, No. CV 97-5042 CAS (Ex.), 2009 WL 1293257 (C.D. Cal. May 5, 2009).

264. *See id.* at *1–5 (reviewing the procedural history of the case to that point).

265. *Protecting Religious Freedom After* Boerne v. Flores*, Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 105th Cong. 32–36 (1998) (statement of Rabbi Chaim Baruch Rubin, Congregation Etz Chaim, Los Angeles, California).

266. *See Religious Liberty Protection Act of 1999. Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary on H.R. 1691*, 106th Cong. 94 (1999) (prepared statement of Rabbi David Saperstein); *1998 House Hearing*, *supra* note 224, at 228 (prepared statement of Douglas Laycock).

267. H. REP. NO. 106-219, at 22 (1999).

268. 146 Cong. Rec. S6678-02, S6689 (daily ed. July 13, 2000) (statement of Sen. Kennedy).

269. 146 Cong. Rec. E1564-01, E1566 (daily ed. Sept. 22, 2000) (statement of Rep. Hyde).

270. Congregation Etz Chaim v. City of Los Angeles, No. CV 97-5042 CAS (Ex), 2009 WL 1293257, at *1 (C.D. Cal., May 5, 2009).

271. *Id.* at *1–2; Notice of Dismissal and Proposed Order at 7, Congregation Etz Chaim v. City of Los Angeles, No. 97-5042 HLH (Ex) (C.D. Cal. Feb. 4, 2002), ECF No. 166-1 [hereinafter Etz Chaim Settlement].

then promptly attempted to revoke it, and unsuccessfully appealed a decision that the permit was valid and binding.[272]

In July 2003, nearly two years after the settlement, a group of neighbors challenged the settlement agreement in federal court,[273] and another neighbor filed a state-court lawsuit.[274] After four more years of litigation, the Ninth Circuit vacated the settlement agreement, requiring the *shul* either to file a new permit application or to show that the city had violated RLUIPA.[275] The court held that a settlement could not bypass the procedural steps of the conditional-use permit process without proof of a violation of federal law.[276] This holding is understandable, but it also presents a systemic problem for RLUIPA enforcement. It means that cities cannot settle RLUIPA cases without the consent or at least the acquiescence of every single neighbor. This vastly increases the number of parties with an effective veto over any settlement, and may result in much unnecessary litigation. It remains to be seen whether cities faced with neighbors demanding RLUIPA violations will be willing and able to stipulate to the evidence that proves the violation.

The *shul* refiled its RLUIPA claims, but the court dismissed the case as not yet ripe: maybe the city would now grant a permit on a renewed application.[277] So the *shul* again applied for a permit, seeking permission for the same use the city had agreed to allow in the settlement.[278] But the city again denied a permit, expressing fear that it would set a precedent for allowing churches.[279] So the *shul* again filed its RLUIPA suit. The city unsuccessfully argued that the decision of the zoning board was res judicata in the RLUIPA case,[280] which of course would be the end of RLUIPA.

272. Congregation Etz Chaim v. City of Los Angeles, 371 F.3d 1122, 1123–27 (9th Cir. 2004).

273. *Etz Chaim*, 2009 WL 1293257, at *1–2.

274. *Id.* at *4.

275. *See* League of Residential Neighborhood Advocates v. City of Los Angeles, 498 F.3d 1052 (9th Cir. 2007).

276. *Id.* at 1058.

277. *Etz Chaim*, 2009 WL 1293257, at *5–10.

278. *See* Order Granting Plaintiffs' Motion for Partial Summary Judgment and Denying Defendant's Motion for Summary Judgment at 19, Congregation Etz Chaim v. City of Los Angeles, No. CV 10-1587 CAS (Ex) (C.D. Cal. July 11, 2011), ECF No. 157 [hereinafter Etz Chaim Summary Judgment].

279. *Id.* at 12–13.

280. [Order Denying] Defendant's Motion for Judgment on the Pleadings, Congregation Etz Chaim v. City of Los Angeles, No. CV 10-1587 CAS (Ex) (C.D. Cal. Jan. 6, 2011), ECF No. 62.

In July 2011, after fourteen years of litigation, the district court granted the *shul* partial summary judgment on both its substantial-burden claim and its equal-terms claim, and preliminarily enjoined the city from enforcing its zoning ordinance to prevent use of the property consistent with the *shul*'s permit application.[281] The settlement agreement, and thus the permit application and the injunction, limited services to sixty people on the High Holy Days, to fifty on the Sabbath, and to much smaller numbers on weekdays.[282] It also expressly prohibited "weddings, receptions or banquets of any kind, fund raising activities, day care, or funerals," and "signs, posters or flyers."[283] So this *shul* is not, and under this injunction can never be, a full-service synagogue.

Viewing the facts in the light most favorable to the city,[284] the court found that the zoning code permitted religious uses in the neighborhood with a conditional-use permit, but the city had made clear that it would never grant a permit to the *shul*.[285] The court noted that the *shul* had encountered frequent hostility to its permit application,[286] and that despite the city's argument that the findings of the zoning board should be res judicata, the zoning board had indicated that it could not and would not apply RLUIPA to the case.[287]

The court found a substantial burden, rejecting the city's argument that the *shul* could move to a nearby commercial zone or that its residents could attend nearby synagogues.[288] The court found that many of the *shul*'s members were physically unable to walk to the more distant locations,[289] and that the other synagogues practiced a different branch of Judaism and conducted services in a different language.[290]

The city had denied the permit on the ground that it wanted to preserve the residential character of the neighborhood, and that it wanted to avoid a precedent for religious uses.[291] The first reason was inconsistent with the many nonresidential uses the city had already

281. Etz Chaim Summary Judgment, *supra* note 278, at 19.
282. Etz Chaim Settlement, *supra* note 271, at 5–6.
283. *Id.* at 6.
284. Etz Chaim Summary Judgment, *supra* note 278, at 4.
285. *Id.* at 12.
286. *Id.* at 11.
287. *Id.*
288. *Id.* at 11–13.
289. *Id.* at 12.
290. *Id.* at 12–13.
291. *Id.* at 12.

allowed.[292] The second reason would nullify RLUIPA;[293] it amounted to saying that we exclude churches because they are churches and we wish to exclude them.

The city's other stated reason for refusing the permit was fear of traffic and parking problems.[294] This is always pretextual in Orthodox Jewish cases; here as in other such cases, the worshipers all walk to services as a matter of religious obligation.[295] But in this case, it gets worse. The *shul* is on the corner of two major thoroughfares, Highland Avenue and Third Street, that carry 80,000 cars a day.[296] In the 2001 settlement agreement, the city had required the *shul* to remove its parking spaces.[297] Now it defended its denial of a permit on the ground that there were no parking spaces.[298]

The court also found an equal-terms violation, on the basis of the many other nonresidential uses already in the neighborhood.[299] The city defended principally on the ground that these uses predated the current zoning policy.[300] The court rejected this argument for the sound reason that "one of the stated purposes of RLUIPA was to prevent discriminating against new religious entities in favor of already established religious and nonreligious entities."[301] The court also noted that these institutions had been built at a time when Jews were not allowed to buy houses in Hancock Park,[302] so they had missed their chance to be grandfathered in. The court did not rely on

292. *Id.* at 12–13.

293. *Id.* at 13.

294. *Id.* at 12.

295. *Id.* at 11.

296. Plaintiffs Congregation Etz Chaim of Hancock Park and Congregation Etz Chaim's [Proposed] Statement of Uncontroverted Facts and Conclusions of Law ¶ 37, Congregation Etz Chaim v. City of Los Angeles, No. CV 10-01587 (CAS) (Ex) (C.D. Cal. Mar. 28, 2011), ECF No. 84 [hereinafter Plaintiffs' Undisputed Facts]. We do not rely on this document for any point that is in any way controverted in the city's [Proposed] Statement of Uncontroverted Facts and Conclusions of Law, Congregation Etz Chaim v. City of Los Angeles, No. CV 10-01587 CAS (Ex) (C.D. Cal. Mar. 28, 2011), ECF No. 82 [hereinafter Defendant's Undisputed Facts]. The *shul* and the intersection are readily visible on the satellite view of Google Maps for 303 S. Highland Ave., Los Angeles, CA.

297. Etz Chaim Summary Judgment, *supra* note 278, at 12.

298. *Id.*

299. *Id.* at 13–17.

300. *Id.* at 15.

301. *Id.* at 15 n.5 (quoting Statement of Interest of the United States in Support of Plaintiffs' Motion for Partial Summary Judgment and in Opposition to Defendant's Motion for Summary Judgment at 20, Congregation Etz Chaim v. City of Los Angeles, No. CV 10-01587 (CAS) (Ex) (C.D. Cal. Apr. 28, 2011)).

302. *Id.*

the fact, but the *shul* noted that there were several Christian churches and parochial schools in the neighborhood.[303] The city said that some of these were properly zoned,[304] which does not answer the question of why they got zoning but the *shul* did not.

It remains to be seen what will happen on appeal. But this should have been an easy case. The fact that the *shul* has had to litigate it for fifteen years and counting shows that enforcement of RLUIPA is not yet what it should be. Congress was trying to protect churches from the forces that too often seek to exclude them from jurisdictions, but those forces still have many opportunities to throw sand in the gears of RLUIPA enforcement.

CONCLUSION

RLUIPA was and is needed. Churches continue to be a disfavored use in the zoning context and fundamental First Amendment rights continue to be subject to highly discretionary decisions by local officials.

With regard to adult entertainment establishments, the courts readily brought the First Amendment to bear on the zoning process.[305] But with regard to churches, the techniques of exclusion were subtler, and courts were slower to recognize those techniques and respond. Thus, it was RLUIPA that brought the First Amendment to bear on the zoning process.

Over the twelve years since its enactment, RLUIPA has proven its worth. Churches have brought numerous successful lawsuits protecting their core First Amendment rights, and many more cases have settled. Local officials are now on notice that they cannot treat churches as a disfavored land use, despite the issues with NIMBY neighbors, tax collection, or commercial districts, or fear of Muslims or other prejudices among their constituents.

But that does not mean that RLUIPA gives churches a free pass on zoning. Cities can still impose reasonable land-use conditions if they do not overreach and if they ensure that churches have ample opportunity to locate within the jurisdiction. The key question going forward is whether courts will fully enforce RLUIPA according to its terms—in particular, the key substantial-burden and equal-terms

303. Plaintiffs' Undisputed Facts, *supra* note 296, ¶¶ 102, 118, 120, 122.

304. Defendant's Undisputed Facts, *supra* note 296, ¶¶ 31, 33–34.

305. *See* Shelley Ross Saxer, *Eminent Domain Actions Targeting First Amendment Land Uses*, 69 MO. L. REV. 653, 654–61 (2004).

provisions. But if the first twelve years are any indication, RLUIPA will continue to be a pillar of civil rights protection for churches in the years to come.