

# Comment

## The Religious Land Use and Institutionalized Persons Act of 2000 and Its Effect on Eleventh Circuit Law

### I. INTRODUCTION

The Religious Land Use and Institutionalized Persons Act of 2000 (“RLUIPA”)<sup>1</sup> was enacted by Congress in response to the Supreme Court overruling the Religious Freedom Restoration Act of 1993<sup>2</sup> (“RFRA”) and as an extension of the Civil Rights of Institutionalized Persons Act.<sup>3</sup> RLUIPA is intended “to protect religious liberty”<sup>4</sup> and prohibits discrimination based on religion in two areas: land use regulations and religious rights for institutionalized persons.<sup>5</sup> Generally, the religious land use provisions prevent state and local governments from creating improper zoning restrictions that unduly prohibit religious organizations from holding meetings, locating in a specific area, or expanding their

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

2. *City of Boerne v. Flores*, 521 U.S. 507, 536; 42 U.S.C. § 2000bb to 2000bb-4 (2000).

3. 42 U.S.C. §§ 1997–1997j (2000).

4. Library of Congress, Summary, *available at* <http://thomas.loc.gov> (last visited Nov. 21, 2005).

5. 42 U.S.C. §§ 2000cc to 2000cc-5.

current building.<sup>6</sup> The institutionalized persons<sup>7</sup> provisions prohibit facilities from unduly burdening an inmate's religious practice by, for example, not supplying a diet the inmate can eat, not allowing the inmate to celebrate religious holy days, or prohibiting an inmate from possessing religious property.<sup>8</sup>

The coupling of these two topics into one act was an odd decision on Congress's part, and there appears to be no reason for the pairing other than the fact that RLUIPA's predecessor, RFRA, also addressed both issues. Because of the extreme difference in the topics covered by RLUIPA, most law review articles focus solely on either land use regulations or rights for institutionalized persons. But this Article is intended to broadly address both topics to serve as a type of "one-stop shopping" for anyone needing general information about RLUIPA.<sup>9</sup> In addition, the Article will specifically discuss the effects of RLUIPA on Eleventh Circuit law.

## II. HISTORY OF THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT OF 2000 ("RLUIPA")

### A. *Leading Up to RLUIPA: Congress and the Supreme Court Battle Over Whether Strict Scrutiny Applies to Laws of General Applicability*

Senator Orrin Hatch introduced RLUIPA on July 13, 2000.<sup>10</sup> The bill proceeded quickly through the legislative process and was signed into law on September 22, 2000.<sup>11</sup> RLUIPA is Congress's third attempt to strengthen religious liberty rights in its battle with the Supreme Court over the content of the Free Exercise<sup>12</sup> and Establishment Clauses.<sup>13</sup> The first attempt was made when Congress overwhelmingly passed the Religious Freedom Restoration Act of 1993 ("RFRA").<sup>14</sup> RFRA was Congress's response to the Supreme Court's decision in *Employment*

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6. 42 U.S.C. § 2000cc.

7. Institutionalized persons include those housed in prisons, homes for the chronically ill and disabled, mental hospitals, nursing homes, and other similar institutions. 106 CONG. REC. S7774 (daily ed. July 27, 2000) (statement of Sen. Hatch).

8. 42 U.S.C. § 2000cc-1.

9. The Author recognizes that discussing both topics in one article will seem disjointed. To help prevent confusion, the Author has tried to make it clear at all times which provisions of RLUIPA are being discussed.

10. 106 CONG. REC. S6687-6688 (daily ed. July 13, 2000) (statement of Sen. Hatch).

11. Library of Congress, Summary, available at <http://thomas.loc.gov> (last visited Nov. 21, 2005).

12. U.S. CONST. amend. I, cl. 2.

13. U.S. CONST. amend. I, cl. 1.

14. 42 U.S.C. § 2000bb to 2000bb-4.

*Division, Department of Human Resources of Oregon v. Smith*,<sup>15</sup> in which the Court held that laws of general applicability, or laws that do not specifically target a religious practice, cannot be challenged under the Free Exercise Clause.<sup>16</sup>

In *Smith*, two employees at a private drug rehabilitation clinic were fired because of their religious use of peyote. The employees then applied for unemployment benefits, but were denied because an Oregon state law<sup>17</sup> prohibited issuing unemployment benefits to those employees who were fired for misconduct, including use of a controlled substance. The employees challenged the Oregon law, claiming the denial of unemployment benefits violated their Free Exercise rights.<sup>18</sup> The Court held that the Oregon law prohibiting use of controlled substances was not directed at preventing religious practices and, therefore, the law was one of general applicability.<sup>19</sup> Laws of general applicability are not subject to the strict scrutiny standards set out in *Sherbert v. Verner*,<sup>20</sup> which applied strict scrutiny only to those laws of individualized assessment.<sup>21</sup> Because the Oregon law was one of general applicability, it was not subject to strict scrutiny. The law passed the lower scrutiny level the Court applied and did not violate the Free Exercise Clause.<sup>22</sup> Therefore, the State of Oregon could deny unemployment benefits to the employees without fear of violating First Amendment rights.<sup>23</sup> In response to *Smith*, Congress enacted RFRA, which reinstated the strict scrutiny standard for laws burdening religious practice, whether generally or individually.<sup>24</sup>

In addition to land use provisions, institutionalized persons provisions were also included in RFRA.<sup>25</sup> When the provisions were added, several members of Congress raised concerns that the provisions would open the floodgates of litigation and cause prisons to lose control over prisoners.<sup>26</sup> In response to these concerns, Congress passed the Prison Litigation Reform Act ("PLRA") in 1995.<sup>27</sup> PLRA was intended to

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15. 494 U.S. 872 (1990).

16. *Id.* at 882.

17. ORE. REV. STAT. § 475.992(4) (2003 & Supp. 2004).

18. *Smith*, 494 U.S. at 874.

19. *Id.* at 882.

20. 374 U.S. 398 (1963).

21. *Smith*, 494 U.S. at 882.

22. *Id.* at 890.

23. *Id.*

24. 106 CONG. REC. E1235 (daily ed. July 14, 2000) (statement of Rep. Canady).

25. See 106 CONG. REC. S7778 (daily ed. July 27, 2000) (statement of Sen. Reid).

26. *Id.*

27. 18 U.S.C. § 3626 (2000); 28 U.S.C. § 1932 (2000).

prevent prisoners from bringing frivolous lawsuits against the government and to give courts the power to dismiss such frivolous suits.<sup>28</sup>

In 1997 the Supreme Court invalidated RFRA in *City of Boerne* (“*City*”) *v. Flores*,<sup>29</sup> holding that Congress overstepped the bounds of its Section Five power of the Fourteenth Amendment.<sup>30</sup> In *City of Boerne*, the City denied a permit application submitted by the Archbishop of San Antonio. In the application, the Archbishop requested permission to enlarge the Saint Peter Catholic Church (“Church”) to better accommodate its growing congregation. The city council denied the permit because the Church fell within the ordinances of the Historic Landmark Commission, meaning the Church had to maintain the historic structure of its building. Adding onto the church building would have violated the ordinances. The Archbishop filed suit and claimed the denial violated the Church’s Free Exercise rights under RFRA.<sup>31</sup>

The Court assessed whether Congress overstepped its Section Five power of the Fourteenth Amendment “‘to enforce’ by ‘appropriate legislation’ the constitutional guarantee that no State shall deprive any person of ‘life, liberty, or property, without due process of law’ nor deny any person ‘equal protection of the laws.’”<sup>32</sup> The Court stated the Section Five enforcement power is remedial rather than substantive in nature.<sup>33</sup> Congress cannot create new constitutional rights through its use of the Section Five power, but may only ensure that states observe and protect the rights already created in the Constitution.<sup>34</sup> Congress’s response under the Section Five power must be proportionate and congruent to the harm caused by the state laws.<sup>35</sup> The Court held that RFRA created new substantive rights instead of protecting those already existing within the Constitution.<sup>36</sup> Congress exceeded its Section Five authority by creating a law that infiltrated every “level of government, displacing laws[,] and prohibiting official actions of almost every description and regardless of subject matter.”<sup>37</sup> Because RFRA was disproportionate and incongruent to the problems it sought to resolve, the Court held that RFRA was unconstitutional.<sup>38</sup>

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28. *Id.*

29. 521 U.S. 507 (1997).

30. *Id.* at 536.

31. *Id.* at 511-12.

32. *Id.* at 517 (quoting U.S. CONST. amend. XIV, § 1, § 5).

33. *Id.* at 520.

34. *Id.*

35. *Id.* at 530.

36. *Id.* at 532.

37. *Id.*

38. *Id.* at 536.

In response to the Court overruling RFRA, the 106th Congress made a second attempt to prevent religious discrimination in land use regulations and apply strict scrutiny to such laws: the Religious Liberty Protection Act ("RLPA").<sup>39</sup> RLPA based its authority on the Spending Clause.<sup>40</sup> The bill passed the House of Representatives, but stalled in the Senate. Some Senators feared the bill, if passed, would supersede and disrupt civil rights, specifically in the areas of employment and housing.<sup>41</sup> As a result of these concerns, the bill failed to pass the Senate and did not become law.

RLUIPA was Congress's third and most recent attempt to create a law restoring strict scrutiny review of generally applicable laws. Senators Hatch and Kennedy, the bill's main sponsors, attempted to mend the problems discovered in RFRA and RLPA, while also staying within the confines of Congress's constitutional limits as defined by the Supreme Court. The First Amendment addresses religion in two clauses: the Free Exercise Clause<sup>42</sup> and the Establishment Clause.<sup>43</sup> Every law Congress enacts must abide by both of these competing clauses. Therefore, when enacting RLUIPA, Congress had to abide by the Supreme Court's jurisprudence interpreting both clauses. *Smith* and *City of Boerne* interpreted and outlined the boundaries of the Free Exercise Clause, whereas *Lemon v. Kurtzman*<sup>44</sup> set out the limits of congressional power under the Establishment Clause.<sup>45</sup> The Court in *Lemon* held that a statute does not violate the Establishment Clause if: (1) the statute has a secular legislative purpose; (2) the statute's principal or primary effect is one that neither advances nor inhibits religion; and (3) the statute does not foster an excessive government entanglement with religion.<sup>46</sup> Senators Hatch and Kennedy corrected the problems in RFRA and RLPA, ensured all of the tests for constitutionality were met, and introduced RLUIPA.<sup>47</sup>

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39. 106 CONG. REC. S7778 (daily ed. July 27, 2000) (statement of Sen. Reid).

40. *Id.*; U.S. CONST. art. I, § 8, cl. 1.

41. 106 CONG. REC. S7778 (daily ed. July 27, 2000) (statement of Sen. Reid). Because the bill provided strict scrutiny for laws applied to the homosexual community and disabled citizens, Senators were concerned the bill would supersede civil rights laws that give only intermediate scrutiny to laws discriminating against these groups. *Id.*

42. U.S. CONST. amend. I, cl. 2. The Free Exercise Clause states that, "Congress shall make no law . . . prohibiting the free exercise" of religion. *Id.*

43. U.S. CONST. amend. I, cl. 1. The Establishment Clause states, "Congress shall make no law respecting an establishment of religion." *Id.*

44. 403 U.S. 602 (1971).

45. *Id.* at 612-13.

46. *Id.*

47. See 106 CONG. REC. S7778 (daily ed. July 27, 2000) (statement of Sen. Reid).

Upon introduction of RLUIPA, several Senators raised the same concerns about possible floods of litigation if the institutionalized persons provisions remained in RLUIPA as they expressed when debating RFRA. In their joint statement, Senators Hatch and Kennedy countered these arguments by citing reports on the effect of RFRA's institutionalized persons provisions on the amount of prison litigation.<sup>48</sup> The Senators pointed out that frivolous claims were successfully barred by PLRA and would prevent any frivolous claims brought under RLUIPA. In addition, the Department of Justice reported to the Senators that RFRA, with its similar provisions to RLUIPA, did not result in a flood of litigation, much less in frivolous litigation. In fact, the Federal Bureau of Prisons reported only sixty-five RFRA suits within the six years of RFRA's existence.<sup>49</sup> Empirical studies also showed that RFRA led to only a slight increase in claims filed. These claims were considered by the study to be more meritorious than other prisoner claims.<sup>50</sup>

Despite these studies and statistics failing to support the notion that litigation would increase dramatically at the passage of RLUIPA, some Senators remained concerned.<sup>51</sup> Specifically, Senator Reid continued to express the concern he harbored from the debate over RFRA that prisoners "have become entirely too litigious."<sup>52</sup> Senator Reid based his argument on the fact that, in 1993, 1400 more lawsuits were filed by federal prisoners against the government than were filed by the government against criminals.<sup>53</sup> He was concerned that RLUIPA would decrease the amount of control prison employees have and would threaten the safety of these employees.<sup>54</sup>

The Senators for and against the institutionalized persons provisions compromised to allow the bill to pass through the Senate. Senator Hatch, head of the Judiciary Committee, agreed to hold a hearing during the next year to investigate the impact of RLUIPA on the nation's institutions and on the employees of these institutions.<sup>55</sup> Senators Hatch and Reid also agreed to request that the General Accounting Office conduct a study on the effects of RFRA on the nation's prisons before, during, and after PLRA. This study would give a better idea of

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48. 106 CONG. REC. S7775 (daily ed. July 27, 2000) (statement of Sen. Hatch).

49. *Id.*

50. *Id.* (citing Lee Boothby & Nicholas P. Miller, *Prisoner Claims for Religious Freedom and State RFRA's*, 32 U.C. DAVIS L. REV. 573 (1999)).

51. 106 CONG. REC. S7778 (daily ed. July 27, 2000) (statement of Sen. Kennedy).

52. 106 CONG. REC. S7779 (daily ed. July 27, 2000) (statement of Sen. Reid).

53. *Id.*

54. *Id.*

55. *Id.*

RLUIPA's effect on prisoners' litigiousness. In addition, the Senators agreed to request that the General Accounting Office perform a study on the effects of RLUIPA on the nation's prisons.<sup>56</sup> Upon announcing this compromise, the bill was read for the third time and passed the Senate.<sup>57</sup>

### *B. Authority and Application*

**1. Authority for RLUIPA.** RLUIPA applies only to the extent of Congress's powers under the Commerce Clause,<sup>58</sup> the Spending Clause,<sup>59</sup> and Section Five of the Fourteenth Amendment.<sup>60</sup> The land use provisions are mainly based on the Commerce Clause,<sup>61</sup> whereas the institutionalized persons provisions are mainly based on the Spending Clause.<sup>62</sup> Both provisions are limited by the Section Five power. Under the Commerce Clause, Congress must have a basis for belief that each case concerning burdens on religious exercise, when accumulated, would affect interstate commerce.<sup>63</sup> The sum of all such burdens on religious exercise must substantially affect interstate commerce in the aggregate.<sup>64</sup>

Under the Spending Clause, Congress can attach germane conditions to federal spending, as long as the condition is unambiguous and in furtherance of the general welfare.<sup>65</sup> On this point of authority, Senator Hatch stated that the institutionalized persons provisions of RLUIPA based on the Spending Clause are modeled after similar civil rights provisions previously held constitutional.<sup>66</sup> The restrictions only apply to those institutions receiving federal funds, making RLUIPA fall within the Spending Clause power.<sup>67</sup> Section Five of the Fourteenth Amendment gives Congress the power to enforce the Constitution within states when it has "reason to believe that many of the laws affected by the congressional enactment have a significant likelihood of being

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56. *Id.*

57. *Id.*

58. U.S. CONST. art I, § 8, cl. 3.

59. U.S. CONST. art I, § 8, cl. 1.

60. U.S. CONST. amend. XIV, § 5; 106 CONG. REC. S7774 (daily ed. July 27, 2000) (statement of Sen. Hatch).

61. 42 U.S.C. § 2000cc(a)(2) (2000).

62. 42 U.S.C. § 2000cc-1(b) (2000).

63. *United States v. Lopez*, 514 U.S. 549, 561 (1995).

64. *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 586 (1997).

65. *South Dakota v. Dole*, 483 U.S. 203, 207 (1987).

66. 106 Cong. Rec. S7775 (daily ed. July 27, 2000) (statement of Sen. Hatch); *see* 42 U.S.C. §§ 2000a to 2000h-6 (2000 & Supp. II 2002).

67. 42 U.S.C. § 2000cc-1(b)(1) (2000).

unconstitutional.”<sup>68</sup> In addition, the law must be a proportionate and congruent response to the problem Congress has discovered in the states.<sup>69</sup> Senator Hatch stated Congress had a “reason to believe” that laws or regulations of many states would result in violating the Constitution.<sup>70</sup> He reasoned that any law placing a significant burden on religious practice goes against the Free Exercise<sup>71</sup> and the Free Speech<sup>72</sup> Clauses of the Constitution.<sup>73</sup> Senator Hatch also stated that RLUIPA is congruent and proportionate because it does not totally exempt religious organizations from land use regulations, but requires more fully justified reasoning by the governmental entity for limiting the presence of religious organizations by its zoning ordinances.<sup>74</sup> RLUIPA is also congruent and proportionate because it does not prohibit institutions from restricting some religious behavior, but requires those restrictions meet the strict scrutiny standard.

**2. Application of RLUIPA.** In an attempt to ensure the Supreme Court would find no faults with RLUIPA, Congress patterned the statute after provisions of the Civil Rights Act of 1964.<sup>75</sup> To succeed in a RLUIPA claim, a plaintiff must first show that the regulation imposes a substantial burden on the plaintiff’s religious exercise. If the plaintiff cannot prove this substantial burden, the claim fails. If the plaintiff can prove there is a substantial burden on religious exercise, the burden of proof shifts to the government to prove it has a compelling governmental interest for the regulation. If the government does prove a compelling interest, it must also prove the interest is achieved by the narrowest possible means.<sup>76</sup> This process applies to both the land use provisions and the institutionalized persons provisions.

### *C. Evidence Supporting the Need for RLUIPA*

The sponsoring Senators spent three years holding evidentiary hearings to support the need for RLUIPA. Both the Senate Committee

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68. *City of Boerne v. Flores*, 521 U.S. 507, 532 (1997).

69. 106 CONG. REC. S7775 (daily ed. July 27, 2000) (statement of Sen. Hatch).

70. 106 CONG. REC. S7775-S7776 (daily ed. July 27, 2000) (statement of Sen. Hatch).

71. U.S. CONST. amend. I, cl. 2.

72. U.S. CONST. amend. I, cl. 3. The Free Speech Clause states that, “Congress shall make no law . . . abridging the freedom of speech.” *Id.*

73. 106 CONG. REC. S7776 (daily ed. July 27, 2000) (statement of Sen. Hatch).

74. 106 CONG. REC. S7775 (daily ed. July 27, 2000) (statement of Sen. Hatch).

75. 42 U.S.C. §§ 2000a to 2000h-6 (2000 & Supp. II 2002).

76. 42 U.S.C. §§ 2000cc(a)(1), 2000cc-1(a) (2000).

on the Judiciary and the House Subcommittee on the Constitution held these evidentiary hearings.<sup>77</sup>

**1. Land Use Provisions.** Both Committees compiled evidence of discrimination against various types of churches in their ability to buy, rent, or build space in which to worship. The Committees discovered that land use regulations often work to exclude churches from certain areas. The explanation given for the exclusion is usually to prevent traffic or to uphold the aesthetic quality of the area. But often these explanations are given only to exclude churches that may be small, new, or misunderstood.<sup>78</sup>

Specific examples of discrimination against churches abound and were collected in the evidentiary hearings held by the Senate and House Committees. For example, an Orthodox Jewish congregation in Los Angeles was prohibited from meeting in a residential house they rented for such purpose. The congregation consisted of ten to fifteen men who met daily for prayer and forty to fifty mostly elderly people who met on the Sabbath and holidays for prayer and study. Those who met on the Sabbath traveled to the service on foot because they were prohibited from using mechanical forms of transport on the Sabbath. After neighbors complained of the possible effect of the congregation on property values, the city council rejected the congregation's petition for a special use permit to continue meeting in its current location. The city council rejected the petition even though it allowed similar groups, such as schools, book clubs, and embassy parties, to meet in the area. Although over 80,000 cars traveled through the area per day, the city council deemed a few dozen people walking through the neighborhood too much of a danger to property values to allow the congregation to continue to meet there.<sup>79</sup>

In another example of the discriminatory use of land use regulations, the City of Forest Hills, Tennessee ("City") created a new zone for use only by educational and religious organizations. However, the zone was limited only to churches that were already in existence. The City very rarely granted conditional use permits or changed the zoning designation. The Church of Jesus Christ of Latter Day Saints ("Church") needed a temple in Forest Hills. The Church owned land within the city limits and requested a zone change for the property. The City rejected the request. In response, the Church bought another parcel of land that was previously owned by a different church and was surrounded by

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77. 106 CONG. REC. S7774 (daily ed. July 27, 2000) (statement of Sen. Hatch).

78. *Id.*

79. 106 CONG. REC. S6689 (daily ed. July 13, 2000) (statement of Sen. Kennedy).

other denominations. Yet again the City rejected the Church's petition, backing its decision with concerns about traffic. The City's determination effectively barred all Mormon worship within the City limits.<sup>80</sup>

In Richmond, Virginia ("City") the City passed an ordinance that allowed churches to feed only thirty hungry and homeless people on a total of seven days between the dates of October 1 and April 1. In addition to these limitations, the churches were required to pay a \$1000 fee, plus \$100 per acre affected by the activity. The ordinance only regulated places of worship, not other institutions, and only applied to feeding those who were hungry and homeless. These churches were being charged a fee most could not pay and effectively being prohibited from performing an act that is a central tenet of the Christian faith: to help those in need.<sup>81</sup>

**2. Institutionalized Persons.** The Committees also collected several examples of very restrictive prohibitions imposed on prisoners and others in institutions. For example, one prison recorded the confession between a prisoner and the Roman Catholic chaplain.<sup>82</sup> Another prison prevented prisoners from wearing religious jewelry, including crosses.<sup>83</sup> In still another example, a prison allowed an Episcopal prisoner to attend service, but did not allow him to take communion.<sup>84</sup>

### III. REACTIONS TO THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT OF 2000 ("RLUIPA")

#### A. Land Use Provisions

**1. Constitutionality.** The circuits are split as to whether the land use provisions of RLUIPA are constitutional.<sup>85</sup> To complicate the split in authority, courts have held RLUIPA constitutional or unconstitutional on different grounds. For example, the court in *Murphy v. Zoning*

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80. *Id.*

81. 106 CONG. REC. S6689-90 (daily ed. July 27, 2000) (statement of Sen. Kennedy). Several more examples are listed in the speech. *See id.*

82. 106 CONG. REC. S7775 (daily ed. July 27, 2000) (statement of Sen. Hatch) (citing *Mockaitis v. Harclerod*, 104 F.3d 1522 (9th Cir. 1997)).

83. *Id.* (citing *Sasnett v. Sullivan*, 197 F.3d 290 (7th Cir. 1999)).

84. *Id.* (citing *McClellan v. Keen*, settled in District of Colorado (1994)).

85. *Compare* *Murphy v. Zoning Comm'n of Town of New Milford*, 289 F. Supp. 2d 87 (D. Conn. 2003); *with* *Elsinore Christian Ctr. v. City of Lake Elsinore*, 270 F. Supp. 1163 (C.D. Cal. 2003).

*Commission of Town of New Milford*<sup>86</sup> held RLUIPA constitutional because it does not violate the Establishment Clause under the *Lemon v. Kurtzman*<sup>87</sup> test,<sup>88</sup> while the court in *Guru Nanak Sikh Society of Yuba City v. County of Sutter*<sup>89</sup> held RLUIPA constitutional under the Section Five power of the Fourteenth Amendment. In contrast, the court in *Elsinore Christian Center v. City of Lake Elsinore*<sup>90</sup> held RLUIPA unconstitutional because it overstepped Congress's bounds under the Section Five<sup>91</sup> power of the Fourteenth Amendment.<sup>92</sup> Reviewing the various opinions should help discern the stronger arguments and predict how the Supreme Court would hold if it heard a land use provisions case.

In *Murphy*, a resident of the City of New Milford hosted prayer groups in his residential home. The prayer meetings generally lasted two hours on Sunday afternoons. The number of people attending the weekly meetings varied, but was never less than twelve people per week. The meetings were not open to the public. Over a four month period, the residents' neighbors complained to the zoning board about the high number of cars parked in the area during these Sunday afternoon meetings. The zoning board issued a cease and desist order, prohibiting the residents from holding the weekly prayer meetings. Attendance at the meetings declined because people were afraid they would be arrested for attending the meetings.<sup>93</sup> The district court went on to find RLUIPA constitutional under the Section Five power and the Establishment Clause.<sup>94</sup>

First, the district court addressed whether Congress exceeded the Section Five power when enacting RLUIPA.<sup>95</sup> Laws authorized by Section Five must pass two tests.<sup>96</sup> First, Congress must have uncovered a history and pattern of unconstitutional conduct, although this is not a determinative factor in Section Five inquiry.<sup>97</sup> Second, the

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86. 289 F. Supp. 2d 87 (D. Conn. 2003).

87. 403 U.S. 602 (1971).

88. *Murphy*, 289 F. Supp. 2d at 122.

89. 326 F. Supp. 2d 1140 (E.D. Cal. 2003).

90. 270 F. Supp. 2d 1163 (C.D. Cal. 2003). Interestingly, this court is in the same circuit as the court in *Guru Nanak*.

91. U.S. CONST. amend. XIV, § 5.

92. *Murphy*, 289 F. Supp. 2d at 112; U.S. CONST. amend. XIV.

93. *Murphy*, 289 F. Supp. 2d at 93-99.

94. *Id.* at 121, 124; U.S. CONST. amend. I, cl. 1.

95. *Murphy*, 289 F. Supp. 2d at 117.

96. *Id.* at 118 (quoting *CSX Transp., Inc. v. New York State Office of Real Property Services*, 306 F.3d 87, 96-97 (2d Cir. 2002)).

97. *Id.*

legislation must be proportionate and congruent to the problem it addresses.<sup>98</sup> The district court concluded that Congress had compiled massive amounts of data supporting a pattern and history of discrimination against religion in land use regulations, thus meeting the first requirement of proper Section Five power usage.<sup>99</sup>

The district court then moved to the issue of proportionality and congruence.<sup>100</sup> Congress is prohibited from creating new rights within the Constitution by use of the Section Five power.<sup>101</sup> Instead, Congress may only create laws under the Section Five power that codify the rights set out in the Constitution and ensure the states will not violate these rights.<sup>102</sup> The courts interpret the rights given in the Constitution and the extent of these rights.<sup>103</sup> Therefore, any law Congress creates must comply with the holdings of the courts defining the constitutional rights.<sup>104</sup> RLUIPA only applies strict scrutiny to laws involving individualized assessments.<sup>105</sup> Therefore, RLUIPA is in line with Supreme Court cases, such as *Smith*<sup>106</sup> and *City of Boerne*,<sup>107</sup> holding that strict scrutiny is only applicable to cases of individualized applicability, not general applicability.<sup>108</sup> Also, RLUIPA does not create rights not already granted by the Constitution.<sup>109</sup> Having decided RLUIPA does not create new rights, the next issue was whether RLUIPA is a congruent and proportionate response to the problem of discriminatory land use regulations.<sup>110</sup> Without much discussion, the court concluded Congress created a proportionate response, even if RLUIPA covered slightly more conduct than that covered by the Constitution.<sup>111</sup>

Next, the district court addressed RLUIPA's constitutionality under the Establishment Clause.<sup>112</sup> Legislation that is constitutional under the Establishment Clause, must pass the *Lemon* test. RLUIPA passes

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98. *Id.*

99. *Id.*

100. *Id.*

101. *See id.* at 118-19.

102. *See id.* at 119.

103. *See id.*

104. *See id.*

105. *Id.* (citing 42 U.S.C. §§ 2000cc(a)(1), 2000(a)(2)(C)).

106. 494 U.S. 872 (1990).

107. 521 U.S. 507 (1997).

108. *Murphy*, 289 F. Supp. 2d at 119.

109. *Id.*

110. *Id.* at 120.

111. *Id.* at 121.

112. *Id.* at 122.

all three elements of the *Lemon* test.<sup>113</sup> First, RLUIPA has a secular purpose: to alleviate governmental interference with a religious organization carrying out its religious mission.<sup>114</sup> Second, RLUIPA does not advance or inhibit religion because it only allows churches to advance their religion, which is the purpose of a church.<sup>115</sup> Finally, RLUIPA does not excessively entangle the government with religion, but effectuates a more complete separation of church and state by prohibiting the state from regulating religion through land use regulations.<sup>116</sup> The purpose of RLUIPA is in direct opposition to religious entanglement.<sup>117</sup> Overall, the district court in *Murphy* found RLUIPA constitutional under both the Section Five power and the Establishment Clause.<sup>118</sup>

The court in *Guru Nanak Sikh Society of Yuba City v. County of Sutter*<sup>119</sup> also found RLUIPA constitutional under the Section Five power.<sup>120</sup> In *Guru Nanak*, a church (“Society”) sought a conditional use permit to locate its building on a parcel of land zoned agricultural. This was the Society’s second attempt to obtain a conditional use permit. The first application was denied because the property was located in a residential area. Originally, the second application for a conditional use permit was granted with special conditions attached to the permit. However, the residents surrounding the Society’s second property appealed the decision. On appeal, the Board of Supervisors (“Board”) denied the permit, stating the proposed use of the property as a temple would be detrimental to the health, safety, and general welfare of those residing in the neighborhood. The Board also stated the proposed use would injure property improvement and the general welfare of the county. The Society filed suit against the county.<sup>121</sup>

The court in *Guru Nanak* went through much the same analysis as the court in *Murphy*. After a brief discussion of *City of Boerne*, the court stated that the constitutionality of RLUIPA rests on whether the statute is a proportionate response to the problems Congress discovered and seeks only to enforce the rights the Constitution guarantees.<sup>122</sup>

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113. *Id.* at 123.

114. *Id.*

115. *Id.* at 124.

116. *Id.*

117. *Id.*

118. *Id.* at 126.

119. 326 F. Supp. 2d 1140 (E.D. Cal. 2003).

120. *Id.* at 1161.

121. *Id.* at 1142-48.

122. *Id.* at 1160.

RLUIPA does not codify rights beyond the Constitution.<sup>123</sup> Additionally, Congress compiled enough evidence to support a need for the legislation.<sup>124</sup> Because there was a significant problem of nationwide religious discrimination, the court held RLUIPA is a proportionate response and is a constitutional exercise of Congress's Section Five power.<sup>125</sup>

In contrast to the courts in *Murphy* and *Guru Nanak*, the court in *Elsinore Christian Center v. City of Lake Elsinore* ("City")<sup>126</sup> held RLUIPA unconstitutional under the Section Five power<sup>127</sup> and under the Commerce Clause.<sup>128</sup> In *Elsinore Christian Center*, a church sought to relocate to a building three blocks from its current location. The church cited lack of parking and inconvenience of the current location as reasons for the move to the new location. The church was in purchase negotiations with the owner of the new property, a school that was leasing the property to a grocery store. The new property was located in an area characterized as blighted and run down. The church's application for a conditional use permit was denied because, the city council stated, the church would take away a much needed grocery store and jobs for the surrounding community. The church filed suit against the City, claiming its constitutional rights were violated by the denial of the conditional use permit.<sup>129</sup>

The court considered and rejected two arguments for the validity of RLUIPA.<sup>130</sup> The first argument was that RLUIPA correctly applies the *Sherbert*<sup>131</sup> test, which states that strict scrutiny must be applied to individualized assessments that affect religious activities.<sup>132</sup> The second argument was, "to the extent RLUIPA exceeds existing constitutional protections, it is a valid prophylactic enactment."<sup>133</sup> The court did not accept the first argument because it did not view the *Sherbert* test to extend beyond the circumstances of *Sherbert* itself: denial of unemployment benefits.<sup>134</sup> The court rejected the second argument because RLUIPA protects much more than the Supreme Court has

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123. *Id.*

124. *Id.* at 1161.

125. *Id.*

126. 291 F. Supp. 2d 1083 (C.D. Cal. 2003).

127. *Id.* at 1102.

128. *Id.* at 1104.

129. *Id.* at 1085-87.

130. *Id.* at 1097.

131. 374 U.S. 398 (1963).

132. *Elsinore*, 291 F. Supp. 2d at 1097.

133. *Id.*

134. *Id.*

determined the First Amendment protects.<sup>135</sup> In Supreme Court jurisprudence, only religious beliefs that are central tenets of the religion are protected by the First and Fourteenth Amendments.<sup>136</sup> Therefore, RLUIPA may only protect central religious beliefs, and the court concluded suits may only be brought when a central belief has been substantially burdened.<sup>137</sup> The court failed to find that having a specific place to worship was a central tenet. A First Amendment claim did not exist in this case.<sup>138</sup> If the First Amendment does not support the claim, Congress cannot use its Section Five power to create a right that does not exist in the Constitution.<sup>139</sup> Because no right existed, Congress exceeded its Section Five power by creating a right to bring suit for a violation of a non-central tenet of a religion.<sup>140</sup>

Even if a First Amendment claim did exist, RLUIPA does not meet the two requirements for a valid law under the Section Five power: (1) history and evidence of the problem confronted; and (2) proportionate and congruent response to the problem.<sup>141</sup> The court was unimpressed with the amount of data Congress accumulated when researching whether to enact RLUIPA and did not consider the evidence substantial to support the need for RLUIPA.<sup>142</sup> Because there was little evidence of a need for RLUIPA, the court also found Congress's response to be incongruent and vastly out of proportion to the problem.<sup>143</sup> Therefore, the court found that RLUIPA exceeded Congress's Section Five power and held it unconstitutional.<sup>144</sup>

**2. "Religious Exercise" Under RLUIPA.** "Religious exercise" is defined in RLUIPA as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief."<sup>145</sup> Courts have only vaguely clarified what exactly constitutes a religious exercise. A weekly

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135. *Id.* at 1098.

136. *Id.*

137. *Id.* But RLUIPA, by definition, includes religious practices that are not central tenets. 42 U.S.C. § 2000cc-5(7)(A) (2000). Under RLUIPA, religious exercise includes "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." *Id.*

138. *Elsinore*, 291 F. Supp. 2d at 1099.

139. *Id.* at 1100.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.* at 1102.

144. *Id.*

145. 42 U.S.C. § 2000cc-5(7)(A) (2000).

prayer meeting was considered religious exercise.<sup>146</sup> A student religious organization's activities were also religious exercise, even if mainly social in nature and a non-central tenet, because the activities were sincerely held aspects of the religion.<sup>147</sup> However, having a specific place to worship has been found not to constitute a protected religious activity mainly because the court refused to apply RLUIPA's definition of religious exercise.<sup>148</sup> From these cases, it appears the activities that occur within the church building *are* religious exercise, but having a building in which to worship is *not* a religious exercise. What exactly constitutes religious exercise must be further clarified by the courts.

**3. "Substantial Burden" on Religious Exercise.** All federal circuits tend to apply the same definition of "substantial burden," that is, whether the congregation was required to change its behavior concerning a sincerely held belief to comply with a law.<sup>149</sup> Therefore, the courts also tend to find substantial burdens on religious practice in similar situations.<sup>150</sup> In cases where the hardship placed on a church is temporary or where the church has a choice about the amount of hardship it places on itself, the courts often find there is no substantial burden.<sup>151</sup>

For example, in *Episcopal Student Foundation v. City of Ann Arbor*,<sup>152</sup> the district court held no substantial burden existed on the religious practices of a student religious organization that was denied a permit to tear down and rebuild its historic building.<sup>153</sup> The Episcopal Student Foundation ("Foundation") was located in a building called the Canterbury House in the historic district of the City of Ann Arbor, Michigan. The Foundation reached out to students at the University of Michigan, hoping to provide a safe and healthy alternative to the usual college party scene. The Foundation considered its social events vital to the Foundation's growth and also considered having all its members in

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146. *Murphy v. Zoning Comm'n of Town of New Milford*, 289 F. Supp. 2d 87, 113 (D. Conn. 2003).

147. *Episcopal Student Found. v. City of Ann Arbor*, 341 F. Supp. 2d 691, 700 (E.D. Mich. 2004).

148. *Elsinore*, 291 F. Supp. 2d at 1098.

149. *See* *Guru Nanak Sikh Society of Yuba City v. County of Sutter*, 326 F. Supp. 2d 1140, 1151-52 (E.D. Cal. 2003).

150. *See id.*; *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. City of West Linn*, 111 P.3d 1123, 1130 (Or. 2005).

151. *Episcopal Student Found. v. City of Ann Arbor*, 341 F. Supp. 2d 691 (E.D. Mich. 2004).

152. 341 F. Supp. 2d 691 (E.D. Mich. 2004).

153. *Id.* at 709.

one building to worship a central tenet of its religion. The Foundation claimed it had outgrown its facilities, and no manner of renovation or addition to the Canterbury House would allow it to fully accommodate its new growth. It also contended that relocation was not an option because of the high price of real estate and its need to be close to the college campus. The Foundation applied for a permit to tear down the Canterbury House to build a new and larger building in its place. The permit was denied, although with a note that the Historic Commission would consider granting a permit that would allow additions to the current building. The Foundation brought suit after the denial of the permit application.<sup>154</sup>

The court held the Historic Commission did not place a substantial burden on the Foundation's religious exercise.<sup>155</sup>

[T]his is not a case where [the Foundation] must choose between exercising its religious beliefs and forgoing significant government benefits or incurring criminal or financial penalties. Nor does the denial of [the Foundation's] permit prevent it from pursuing its religious beliefs, coerce its members into abandoning or violating those beliefs, or dissuade members from practicing their faith.<sup>156</sup>

In fact, the court pointed out that the Foundation had the solution to many of its problems in its control.<sup>157</sup> The Foundation was renting out the second story, one half of its building, to commercial tenants, and was also participating and carrying out the exact activities it complained were being substantially burdened.<sup>158</sup> The Foundation could easily resolve the burdens it faced by expanding to the second story. Monetary and logistical burdens do not always rise to the level of a substantial burden under RLUIPA.<sup>159</sup>

The court in *Civil Liberties for Urban Believers ("C.L.U.B.") v. City of Chicago*<sup>160</sup> also found no substantial burden on religious exercise.<sup>161</sup> C.L.U.B. plaintiffs included five churches located in the Chicago area that were all denied special use permits. After denial, every church found another location for their worship centers. C.L.U.B. sued the City of Chicago, claiming the denial of the original applications created a substantial burden on religious exercise because the churches spent

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154. *Id.* at 693-96.

155. *Id.* at 704.

156. *Id.*

157. *Id.*

158. *Id.* at 705.

159. *Id.* at 706.

160. 342 F.3d 752 (7th Cir. 2003).

161. *Id.* at 761.

large amounts of money repeating the application process and locating suitable property for the church buildings.<sup>162</sup>

The court held a land use regulation that imposes a substantial burden on religious exercise under RLUIPA must be one that bears “direct, primary, and fundamental responsibility” for rendering religious exercise “effectively impracticable.”<sup>163</sup> Conditions that are common to any urban area, such as high real estate prices and procedural requirements to obtain a permit, do not amount to a substantial burden on religious exercise.<sup>164</sup> A substantial burden on an individual’s religious exercise does not exist where a law or policy simply makes the practice of the individual’s religious beliefs more expensive.<sup>165</sup>

The Supreme Court of Oregon also failed to find a substantial burden in *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints (“Church”) v. City of West Linn*.<sup>166</sup> The Church was denied a conditional use permit to locate a church building within the City of West Linn (“City”). The Church had a building in another town, but hoped to relocate to better accommodate its growing congregation. In denying the conditional use permit, the City stated it would most likely approve another of the Church’s plans if the Church would make some changes. The Church brought suit, alleging the City had imposed a substantial burden on the Church’s religious practices.<sup>167</sup>

The court held a substantial burden exists only when the government regulation pressures or forces the individual to choose between (1) following religious precepts and forfeiting certain benefits or (2) abandoning one or more of those precepts to obtain the benefits.<sup>168</sup> The burdens placed on the Church to submit a new application were not on the level necessary to constitute a substantial burden.<sup>169</sup> The burdens would not require the Church to forgo or modify any religious belief.<sup>170</sup> In addition, the negatives of the additional cost and effort of submitting a new application would be short-lived.<sup>171</sup> Therefore, no substantial burden existed on the Church.<sup>172</sup>

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162. *Id.* at 756-59.

163. *Id.* at 761.

164. *Id.*

165. *Id.* at 762.

166. 111 P.3d 1123 (Or. 2005).

167. *Id.* at 1123-26.

168. *Id.* at 1130 (citing *Sherbert v. Verner*, 374 U.S. 398, 404 (1963)).

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

In those cases where the congregation has no choice about where to build its church or where to worship, the courts find a substantial burden placed on the congregation's religious exercise.<sup>173</sup> For example, recall that *Murphy v. Zoning Commission of Town of New Milford*<sup>174</sup> concerned a small prayer group that was ordered to cease and desist its meetings in a residential neighborhood. The zoning commission claimed it was concerned with the large number of cars parked in the street for the meetings. However, the cease and desist order only prohibited the number of people allowed in the prayer group host's house, going so far as to name a specific number of relatives and non-relatives that could be in the house at once, but did not mention the number of cars parked on the street or on the property.<sup>175</sup> Before holding RLUIPA constitutional, the court declared the zoning commission had imposed a substantial burden on the prayer group.<sup>176</sup>

RLUIPA applies almost the exact standard as Free Exercise<sup>177</sup> jurisprudence: a substantial burden on a religious exercise must be justified by a compelling governmental purpose and be narrowly tailored to achieve that compelling governmental purpose.<sup>178</sup> Having already declared the zoning commission violated the prayer group's Free Exercise rights, the court also held the prayer group was entitled to summary judgment on its RLUIPA claim because of the substantial burden that was not narrowly tailored to achieve a compelling governmental interest.<sup>179</sup> In *Murphy*, the substantial burden existed because the prayer group no longer had a place to meet, and the members of the group stopped attending because they were afraid of the legal repercussions of attending the meetings.<sup>180</sup> This change in behavior, fear, and lack of a meeting place constituted a substantial burden.<sup>181</sup>

The court in *Elsinore Christian Center v. City of Lake Elsinore*<sup>182</sup> also found a substantial burden on religious exercise.<sup>183</sup> Recall that this case concerned a church that sought to relocate to a blighted urban area, taking over the property currently leased to a grocery store. The

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173. *Murphy v. Zoning Comm'n of Town of New Milford*, 289 F. Supp. 2d 87, 113 (D. Conn. 2003).

174. 289 F. Supp. 2d 87 (D. Conn. 2003).

175. *Id.* at 97.

176. *Id.* at 113.

177. U.S. CONST. amend I, cl.2.

178. *Murphy*, 289 F. Supp. 2d at 113.

179. *Id.*

180. *Id.* at 94.

181. *Id.* at 113.

182. 291 F. Supp. 2d 1083 (C.D. Cal. 2003).

183. *Id.* at 1091.

zoning commission denied the church's conditional use permit application and claimed the area needed the grocery store and the jobs the store brought with it.<sup>184</sup> In assessing the government's action of denying the conditional use permit, the court applied the strict scrutiny standard.<sup>185</sup> Denying the conditional use permit substantially burdened the Church's religious exercise because the denial completely barred the Church's use of the land.<sup>186</sup> In addition, RLUIPA specifically states that religious exercises do not have to be a central tenet to the religion to qualify for RLUIPA protection.<sup>187</sup> This definition was intended to upset the Free Exercise jurisprudence, which requires religious exercises must be sincerely held and a central tenet to the religion before a court may find a substantial burden.<sup>188</sup> The court took RLUIPA's definition of religious exercise at face value, determining that use of land did not have to be a central tenet to be substantially burdened.<sup>189</sup> "[T]here can be no doubt that the City's action denying use of the Subject Property is a 'substantial burden' on that use."<sup>190</sup> Even though land use is not a central tenet, it is a religious practice that can be substantially burdened.<sup>191</sup> According to this court, denying use of a piece of land qualifies as a substantial burden.<sup>192</sup>

Recall that in *Guru Nanak Sikh Society of Yuba City v. County of Sutter*,<sup>193</sup> a Sikh Temple sought to relocate into an agricultural area. The zoning commission denied the permit application.<sup>194</sup> The court stated that a substantial burden must be more than an inconvenience.<sup>195</sup> The law or regulation must have the effect of coercing the religious constituents into action contrary to their religious beliefs.<sup>196</sup> If the government regulation only has the incidental effect of making it more difficult to practice religious activity, the regulation does not constitute a substantial burden.<sup>197</sup> The court summarized these definitions, stating that "the governmental conduct being challenged

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184. *Id.* at 1085-86.

185. *Id.* at 1089.

186. *Id.* at 1090. RLUIPA defines religious exercise to include the conversion of real property. 42 U.S.C. § 2000cc-5 (2000).

187. *Elsinore*, 291 F. Supp. 2d at 1091.

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. 326 F. Supp. 2d 1140 (E.D. Cal. 2003).

194. *Id.* at 1143-46.

195. *Id.* at 1151.

196. *Id.*

197. *Id.*

must *actually inhibit* religious activity in a concrete way, and cause more than a mere inconvenience.<sup>198</sup> Preventing a church from building a worship site certainly inhibits the church's ability to practice its religion.<sup>199</sup> The court concluded that the plaintiffs had established that their practice of religion was inhibited.<sup>200</sup> Therefore, a substantial burden existed.<sup>201</sup>

These courts have looked at similar behavior and circumstances, but some courts have found a substantial burden while others have not. For example, some courts have found prima facie evidence of a substantial burden simply because a church was denied a conditional use permit.<sup>202</sup> Other courts have not found a substantial burden where the church was denied a conditional use permit because the church had another place to meet.<sup>203</sup> It appears whether a court will find a substantial burden depends on if the church in question has a choice about where to locate its worship services. If the church is out of options, the court will most likely find a substantial burden. If the church has options, or additional burdens will only place an insignificant financial burden on the church, the courts are less likely to find a substantial burden.

**4. Compelling Governmental Interest.** The courts are also split over what constitutes a compelling governmental interest. For example, in *Murphy*, protecting the health and safety of a local community was a compelling governmental interest,<sup>204</sup> whereas in *Guru Nanak*, similar concerns, such as traffic and parking concerns and protecting agricultural interests, were not compelling.<sup>205</sup> Even though both cases contained similar circumstances, the courts reached different conclusions about whether the governmental interest was compelling. Both of those cases also found a violation of RLUIPA and held RLUIPA constitutional.<sup>206</sup> It almost seems that once a court finds a substantial burden, it will most

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198. *Id.* at 1152 (emphasis in original).

199. *Id.*

200. *Id.* at 1154.

201. *Id.*

202. *E.g.*, *Elsinore Christian Center v. City of Lake Elsinore*, 291 F. Supp. 2d 1083, 1091 (C.D. Cal. 2003).

203. *E.g.*, *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 762 (7th Cir. 2003).

204. *Murphy v. Zoning Comm'n of Town of New Milford*, 289 F. Supp. 2d. 87, 108 n.23 (D. Conn. 2003).

205. *Guru Nanak Sikh Society of Yuba City v. County of Sutter*, 326 F. Supp. 2d 1140, 1154 (E.D. Cal. 2003).

206. *Id.* at 1154, 1160; *Murphy*, 289 F. Supp. 2d at 113, 121, 124.

likely find a violation of RLUIPA. Apparently, the major hurdle for a plaintiff to succeed on a RLUIPA claim is to prove a substantial burden on religious exercise exists.

*B. Institutionalized Persons*

**1. Constitutionality.** The Supreme Court, in *Cutter v. Wilkinson*,<sup>207</sup> held the institutionalized persons provisions of RLUIPA are constitutional.<sup>208</sup> In *Cutter*, current and former inmates of the Ohio Department of Rehabilitation and Correction (“DRC”) claimed their religious freedom was violated because they were not allowed to practice their religions of Satanism, Wicca, Asatru, and Church of Jesus Christ Christian.<sup>209</sup> The inmates claimed the DRC violated their religious rights in many ways, including

retaliating and discriminating against them for exercising their nontraditional faiths, denying them access to religious literature, denying them the same opportunities for group worship that are granted to adherents of mainstream religions, forbidding them to adhere to the dress and appearance mandates of their religions, withholding religious ceremonial items that are substantially identical to those that the adherents of mainstream religions are permitted, and failing to provide a chaplain trained in their faith.<sup>210</sup>

The prison officials brought a facial challenge to RLUIPA, stating it unconstitutionally establishes religion in violation of the First Amendment.<sup>211</sup> Preliminarily, the Court noted that “there is room for play in the joints” between the Free Exercise and the Establishment Clauses, which allows the government to accommodate religious practice without offending the Establishment Clause.<sup>212</sup> In that light, the Court determined RLUIPA does not violate the Establishment Clause because it does not exceed the limits permissible for government accommodation of religious practice.<sup>213</sup>

The Court briefly recounted the history leading up to RLUIPA, including *Employment Division, Department of Human Resources of Oregon v. Smith*,<sup>214</sup> the enactment of the Religious Freedom and

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207. 125 S. Ct. 2113 (2005).

208. *Id.* at 2125.

209. *Id.* at 2116-17.

210. *Id.* at 2117.

211. *Id.*

212. *Id.* (quoting *Locke v. Davey*, 540 U.S. 712, 718 (2004)).

213. *Id.*

214. 494 U.S. 872 (1990).

Restoration Act (“RFRA”),<sup>215</sup> and *City of Boerne v. Flores*,<sup>216</sup> in which the Court held RFRA unconstitutional.<sup>217</sup> Next, the Court confronted the constitutional issues facing RLUIPA.<sup>218</sup> RLUIPA must, and does, fit in that narrow corridor between the Free Exercise Clause and the Establishment Clause.<sup>219</sup> It does not violate the Establishment Clause because it alleviates substantial burdens and interference the government creates on religious exercise.<sup>220</sup> RLUIPA protects those individuals who are at the mercy of the government by allowing them to properly exercise their religion.<sup>221</sup> RLUIPA also does not raise an individual’s religious beliefs above the institution’s need for order and safety, and does not elevate one type or sect of religion over any other.<sup>222</sup> It applies the same amount of protection to each and every sect and, therefore, neither promotes nor establishes a preferred or favored religion.<sup>223</sup> Because the DRC brought only a facial challenge to RLUIPA and not an as-applied challenge, the Court did not decide whether RLUIPA had been violated in each of the inmate’s claims.<sup>224</sup> Instead, the Court only determined that RLUIPA did not violate the Establishment Clause of the Constitution and is a valid exercise of Congress’s authority.<sup>225</sup>

Justice Thomas wrote a concurring opinion in *Cutter*, explaining why “a proper historical understanding of the [Establishment] Clause as a federalism provision leads to the same conclusion” that the institutionalized persons provisions of RLUIPA are constitutional.<sup>226</sup> The Establishment Clause was intended to prevent interference with state establishments and is a federalism provision protecting state establishments from federal interference.<sup>227</sup> In addition, the Clause proscribes Congress from making laws that establish religion, but does not proscribe making laws about religion generally.<sup>228</sup> Because the reach of RLUIPA extends only to those states that accept federal funds, the

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215. 42 U.S.C. §§ 2000bb to 2000bb-4 (2000).

216. 521 U.S. 507 (1997).

217. *Cutter*, 125 S. Ct. at 2117-19.

218. *Id.* at 2121.

219. *Id.*

220. *Id.*

221. *Id.* at 2122.

222. *Id.*

223. *Id.* at 2123.

224. *Id.* at 2125.

225. *Id.*

226. *Id.* (Thomas, J., concurring).

227. *Id.* at 2126 (Thomas, J., concurring).

228. *Id.* at 2127 (Thomas, J., concurring).

states voluntarily accept Congress's condition of not substantially burdening institutionalized persons' rights.<sup>229</sup> Justice Thomas's basic point was that Congress stayed within the bounds of the Establishment Clause and did not violate federalism principles.<sup>230</sup>

**2. "Religious Exercise" Under RLUIPA.** The practices courts have considered religious exercise under the institutionalized persons provisions of RLUIPA differ significantly from what constitutes religious exercise under the land use provisions.<sup>231</sup> Attending religious services and observing holy days "easily qualify" as religious exercise.<sup>232</sup> However, grooming habits and behaviors, such as whether a prisoner should be required to shave,<sup>233</sup> or how long a prisoner's hair can be,<sup>234</sup> are also religious exercise. Additionally, prisoner eating habits qualify as religious exercise.<sup>235</sup> The following cases illustrate how courts have determined what constitutes religious exercise.

In *Mayweathers v. Terhune*,<sup>236</sup> inmates were punished for missing work or class assignments to attend the weekly Jumua'ah Sabbath service of the Muslim religion. The inmates participated in a work program that rewarded them for attendance at work or class by reducing their prison sentence. For each day missed, the inmates were punished and could have been sent to a higher security prison or given a longer sentence. In addition, the inmates were subject to punishment for maintaining a one-half inch beard as prescribed by the Muslim religion. Maintaining a beard of any length is prohibited by the security provisions of the prison and could result in progressive discipline.<sup>237</sup> The court never addressed whether attendance at a Sabbath service or having a beard is religious practice. Instead, the court moved directly to whether the rules against these practices were substantial burdens.<sup>238</sup> Therefore, the court presumed the inmates' behaviors were religious exercises.<sup>239</sup>

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229. *Id.* at 2129 (Thomas, J., concurring).

230. *Id.* at 2125 (Thomas, J., concurring).

231. The definition of religious exercise under the land use provisions includes having a building for worship, social and outreach activities, etc. See 42 U.S.C. § 2000cc-5(7)(A) (2000); *Episcopal Student Found. v. City of Ann Arbor*, 341 F. Supp. 2d 691, 700 (E.D. Mich. 2004).

232. *Adkins v. Kaspar*, 393 F.3d 559, 568 (5th Cir. 2004).

233. See *Mayweathers v. Terhune*, 328 F. Supp. 1086, 1094 (E.D. Cal. 2004).

234. See *Warsoldier v. Woodford*, 418 F.3d 989, 997 (9th Cir. 2005).

235. See *Shakur v. Selsky*, 391 F.3d 106, 120 (2d Cir. 2004).

236. 328 F. Supp. 2d 1086 (E.D. Cal. 2004).

237. *Id.* at 1089-91.

238. *Id.* at 1073-94.

239. *Id.*

In *Warsoldier v. Woodford*,<sup>240</sup> an inmate (“Warsoldier”) brought suit against the California Department of Corrections (“CDC”). Warsoldier claimed the CDC’s grooming policy, which prohibited inmates from having hair longer than three inches, violated his sincerely held religious beliefs. Warsoldier was a Native American and adhered to a religion that prohibited him from cutting his hair unless a loved one passed away. Warsoldier believed that long hair symbolizes the wisdom a person acquires during his lifetime. If the person cuts his hair, he will lose all wisdom and will not be able to join his loved ones in the afterlife. The CDC issued three notices to Warsoldier of grooming policy violations. After hearings on the violation notices, the CDC classified Warsoldier as a program failure. Because of this designation, Warsoldier lost many prison privileges, including phone call rights and a reduced monthly draw at the prison store.<sup>241</sup>

The CDC regulations prohibiting male inmates from maintaining long hair did not provide for a religious exception.<sup>242</sup> Warsoldier claimed this prohibition placed a substantial burden on his religious exercise.<sup>243</sup> The court never addressed whether hair length is a religious exercise. Instead, the court assumed not cutting one’s hair constitutes a religious belief and held the punishments imposed on Warsoldier were substantial burdens on his religious beliefs.<sup>244</sup>

In addition to prisoner grooming habits, a prisoner’s diet may also qualify as religious exercise. In *Madison v. Riter*,<sup>245</sup> an inmate (“Madison”) brought suit against the Virginia Department of Corrections (“VDC”) for violating his rights under RLUIPA. Madison was a member of the Church of God and Saints in Christ. His religion required that he follow the dietary guidelines of the Hebrew Scriptures. The VDC denied Madison’s requests for a kosher diet because it doubted the sincerity of his beliefs and considered the dietary alternatives available to him sufficient.<sup>246</sup> This court also never specifically addressed whether dietary mandates of a religion are religious exercises, but assumed they were and continued with its analysis.<sup>247</sup>

**3. “Substantial Burden” on Religious Exercise.** The main question in whether a regulation has placed a substantial burden on an

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240. 418 F.3d 989 (9th Cir. 2005).

241. *Id.* at 991-92.

242. *Id.* at 995 (citing CAL. CODE REGS. tit. 15, § 3062(e) (2006)).

243. *Id.*

244. *Id.* at 996.

245. 355 F.3d 310 (4th Cir. 2003).

246. *Id.* at 313-14.

247. *Id.* at 314.

institutionalized person's religious exercise is whether the regulation has caused the inmate to change behavior to obey a rule that goes against the inmate's sincerely held belief.<sup>248</sup> Courts facing similar fact patterns have found both substantial and insubstantial burdens caused by nearly identical regulations.

For example, the court in *Mayweathers v. Terhune*<sup>249</sup> found a substantial burden on religious exercise when inmates were punished for having a beard and attending an hour-long Sabbath service each Friday.<sup>250</sup> In comparison, the court in *Adkins v. Kaspar*<sup>251</sup> found no substantial burden where an inmate ("Adkins") was not allowed to assemble on every Sabbath to exercise the religious beliefs of the Yahweh Evangelical Assembly ("YEA").<sup>252</sup> The volunteers needed to lead the YEA services were not available. No prison regulation prevented Adkins from attending YEA services.<sup>253</sup> The court first determined that attending Sabbath and holy day services "easily qualify" as religious exercise under RLUIPA's definition.<sup>254</sup> Next, the court moved to whether a substantial burden on Adkins's religious beliefs existed.<sup>255</sup> A substantial burden exists if the government action or regulation "pressures the adherent to significantly modify his religious behavior and significantly violate his religious beliefs."<sup>256</sup> Further, a government action significantly burdens religious exercise if it makes the adherent violate his beliefs or choose between either enjoying a non-trivial and generally available benefit, or following his religious beliefs.<sup>257</sup>

At the prison housing Adkins, every religious group was required to have a qualified outside volunteer present at religious services.<sup>258</sup> No prison regulation prohibited YEA gatherings. It was only the lack of volunteers that stopped YEA meetings. If volunteers were available, YEA followers would have been allowed to participate in every YEA holy day and Sabbath.<sup>259</sup> Because only the absence of a sufficient number of volunteers prevented YEA gatherings, the prison system did not place

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248. *Williams v. Bitner*, 359 F. Supp. 2d 370, 375 (M.D. Pa. 2005).

249. 328 F. Supp. 2d 1086 (E.D. Cal. 2004).

250. *Id.* at 1093-94.

251. 393 F.3d 559 (5th Cir. 2004).

252. *Id.* at 570.

253. *Id.* at 562.

254. *Id.* at 568.

255. *Id.*

256. *Id.* at 570.

257. *Id.*

258. *Id.* at 571.

259. *Id.* at 570.

a substantial burden on the YEA religious exercise.<sup>260</sup> Therefore, no substantial burden existed on YEA religion.<sup>261</sup> It appears from *Mayweathers* and *Adkins* that a substantial burden exists when the burden is a direct result of a prison regulation rather than an indirect result.

**4. Compelling Governmental Interest.** Courts have consistently found that prison safety and public safety are compelling governmental interests.<sup>262</sup> Because an institution will almost always put forth safety concerns as its compelling interest, the main question in the institution-alized persons cases is whether the methods imposed on the prisoners are the least restrictive means of achieving the interest. To prove the institution did not use the least restrictive means available, a claimant may present evidence that a similar institution has employed a less restrictive means of achieving the same purpose.<sup>263</sup>

In *Charles v. Verhagen*,<sup>264</sup> an inmate (“Charles”) brought a RLUIPA claim against the Wisconsin Department of Corrections (“DOC”) because the DOC officials prevented him from possessing prayer oil in his cell and from celebrating several Muslim religious feasts. Prison regulations allowed Muslim inmates to have religious books and publications, prayer beads, a prayer rug, and a kufi cap. Islamic prayer oil was not included on the list of approved Muslim religious items, although similar types of body oils and lotions were allowed for other inmates. The DOC justified its regulations by claiming the overcrowding in prisons necessitated streamlined procedures for handling issues, such as inmates’ personal property.<sup>265</sup> The appellate court held the prison regulation restricting the amount of religious property in an inmate’s possession was not the least restrictive means of ensuring prison safety.<sup>266</sup> The prison could have removed some non-religious property to allow the inmate to possess more religious property, while maintaining the mandated quantity of personal property the inmate was permitted.<sup>267</sup>

In *Williams v. Bitner*,<sup>268</sup> an inmate (“Williams”) believed that pork products were unfit for eating or handling. Consequently, he refused to participate in handling or preparing any pork for consumption in the

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260. *Id.*

261. *Id.*

262. *Warsoldier v. Woodford*, 418 F.3d 989, 998 (9th Cir. 2005).

263. *Id.* at 999.

264. 348 F.3d 601 (7th Cir. 2003).

265. *Id.* at 604-05.

266. *Id.* at 611.

267. *Id.*

268. 359 F. Supp. 2d 370 (M.D. Pa. 2005).

prison. Williams arranged with the lead inmate-cooks to change positions in the kitchen when pork was prepared. The arrangement appeared to work well until one afternoon when a prison official (“Wyland”) noticed a shortage of available inmate-cooks. Although the food preparations would have been completed in time for lunch, Wyland ordered Williams to resume his position as a cook and prepare the pork for lunch. Williams refused. Wyland informed his supervisor (“Emel”) of Williams’s refusal. Emel ordered Williams to participate in the pork preparation and offered gloves for the task, a solution other Muslim inmates had found acceptable. Williams again refused to participate in the pork preparation. Emel subsequently fired Williams from his kitchen job and issued a misconduct citation. As a result of the citation, for thirty days Williams was only allowed to leave his cell for meal times and religious services. Williams’s security ranking was also raised from low to medium.<sup>269</sup>

The court first found that inducing Williams to choose between his religious beliefs or avoiding a prison sanction imposed a substantial burden on Williams’s religious beliefs.<sup>270</sup> Next, the court determined the method used by the prison was not the least restrictive means of furthering a compelling interest.<sup>271</sup> Although institutional order and safety is a compelling interest, the methods employed here were not in furtherance of that interest.<sup>272</sup> Williams did not cause a disturbance by offering an explanation for refusing to change assignments.<sup>273</sup> Issuing the misconduct citation was also unnecessary to ensure inmate discipline because it did not ensure the food would be prepared on time.<sup>274</sup> Even though the officials had a compelling interest to prevent chaos in the prison, issuing a citation against Williams was not in furtherance of the prison’s goal.<sup>275</sup> The district court allowed Williams’s RLUIPA claim to survive the prison’s summary judgment motion.<sup>276</sup>

In another case, *Murphy v. Missouri Department of Corrections*,<sup>277</sup> an inmate (“Murphy”) brought suit against the Missouri Department of Corrections (“DOC”) for violation of his rights under RLUIPA. Murphy belonged to a white supremacist group known as the Christian

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269. *Id.* at 372-74.

270. *Id.* at 376.

271. *Id.*

272. *Id.*

273. *Id.*

274. *Id.*

275. *Id.*

276. *Id.* at 380.

277. 372 F.3d 979 (8th Cir. 2004).

Separatist Church Society (“CSC”). The CSC believes that white people should separate themselves from all other races because white people are specially chosen and blessed by God. Murphy filed the proper paperwork to gain the same recognition and accommodations as other religions within the prison system. The DOC granted the CSC members individual accommodations, but denied group worship. The DOC stated the denial of group worship was intended to prevent racial violence within the prison, which can easily be fueled by racial separation and inflammatory rhetoric. The district court granted the DOC’s motion for summary judgment, and Murphy appealed.<sup>278</sup>

Even if the prison regulations placed a substantial burden on Murphy’s religious exercise, prison safety and security are compelling governmental interests.<sup>279</sup> “The threat of racial violence is of course a valid security concern, but to satisfy RLUIPA’s higher standard of review, prison authorities must provide some basis for their concern that racial violence will result for any accommodation of CSC’s request” for group worship.<sup>280</sup> A question of fact existed about whether any lesser restrictive means than preclusion of group worship were available to the DOC.<sup>281</sup> The DOC had not considered any alternative to denying group worship.<sup>282</sup> Therefore, the court remanded the RLUIPA claim to the district court for further fact finding on whether denial of group worship was a narrowly tailored method to achieve the prison’s interest.<sup>283</sup>

The courts tend to be harsh on the prisons when analyzing whether the prison regulations are narrowly tailored. The prisons must show they have considered more than one alternative to allow the inmate to practice his religion.<sup>284</sup> In addition, the regulation must not force the inmate to choose between violating a sincerely held religious belief and suffering punishment.<sup>285</sup> With this high level of scrutiny applied to institutional regulations, it seems that once an inmate proves a substantial burden, the inmate will most likely win on a RLUIPA claim. Institutions will rarely be able to prove the burdening regulation is narrowly tailored.

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278. *Id.* at 981-82.

279. *Id.* at 988.

280. *Id.* at 989.

281. *Id.*

282. *Id.*

283. *Id.*

284. *Warsoldier v. Woodford*, 418 F.3d 989, 999 (9th Cir. 2005).

285. *Williams*, 359 F. Supp. 2d at 376.

IV. EFFECT OF THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT OF 2000 ("RLUIPA") ON ELEVENTH CIRCUIT LAW

The Eleventh Circuit has also confronted RLUIPA issues. Below is a summary of some of the RLUIPA cases decided within the Eleventh Circuit.

A. *Land Use Provisions*

1. **Midrash Sephardi, Inc. v. Town of Surfside.** In *Midrash Sephardi, Inc. v. Town of Surfside*,<sup>286</sup> the Eleventh Circuit held a violation of RLUIPA existed and held RLUIPA constitutional under the First,<sup>287</sup> Tenth,<sup>288</sup> and Fourteenth Amendments.<sup>289</sup> Jewish synagogues, Midrash and Young Israel ("Congregations"), were located in the Surfside, Florida area. The City of Surfside ("Surfside") had a permissive zoning scheme, meaning any use not specifically permitted by the zoning ordinances was prohibited. Churches and synagogues were only allowed in the residential district and were prohibited in the business district. However, both Congregations were located in Surfside's business district. Midrash had applied for a conditional use permit, but was denied, while Young Israel never applied for a conditional use permit. The Congregations did not want to relocate to the residential district because they practiced Orthodox Judaism, which requires all members to walk to the services. Relocating the synagogues to a residential area would have been beyond walking distance for many of the members, especially the elderly.<sup>290</sup>

Surfside claimed that allowing churches and synagogues in the business district would erode Surfside's tax base and would result in economic hardship for its citizens. Surfside allowed private clubs and similar social organizations to locate within the business district, even though many of these organizations met less frequently than the Congregations and at times when the surrounding businesses were closed. Defending this position, Surfside claimed these clubs created a synergy with the businesses located within the district, whereas churches and synagogues would detract from that synergy. Surfside brought suit against the Congregations for violations of the zoning ordinances. The actions were later dismissed. In July 1999, the

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286. 366 F.3d 1214 (11th Cir. 2004).

287. U.S. CONST. amend I.

288. U.S. CONST. amend X.

289. U.S. CONST. amend XIV; *Midrash Sephardi*, 366 F.3d at 1219.

290. *Midrash Sephardi*, 366 F.3d at 1219-21.

Congregations filed suit seeking declaratory and injunctive relief. Surfside filed a counterclaim for declaratory and injunctive relief, civil penalties, and attorney fees. The trial court granted summary judgment in favor of Surfside. The Congregations appealed.<sup>291</sup>

The Congregations claimed Surfside violated RLUIPA under Subsection (a),<sup>292</sup> the substantial burden provision, and also under Subsection (b),<sup>293</sup> the disparate treatment provision. The Congregations argued that Subsection (a) and Subsection (b) of RLUIPA are independent of one another. Subsection (b) is unique for three main reasons. First, Subsection (b) does not require that the church meet a jurisdictional requirement. Second, Subsection (b) does not have a “similarly situated” requirement usually found in equal protection claims, even though the section sounds like an equal protection provision. Third, Subsection (b)(1) renders any municipality strictly liable for a violation, unlike applying strict scrutiny to a municipality’s violation under Subsection (a).<sup>294</sup>

The court addressed each claim in turn. For the substantial burden claim, the court determined that the Congregations met the jurisdictional requirements of RLUIPA<sup>295</sup> because they fell into the “individualized assessment” category.<sup>296</sup> Next, noting that RLUIPA itself defines religious exercise, the court decided no further definition was needed.<sup>297</sup> RLUIPA defines religious exercise to include practices that are not compelled by or central to a system of religion.<sup>298</sup> Although having a place of worship is not a central tenet to religion, it falls within RLUIPA’s definition of religious practice.<sup>299</sup>

Next, the court determined the issue of whether Surfside placed a substantial burden on the Congregations’ religious practices. The court applied the ordinary and natural meaning of “substantial burden” because RLUIPA does not define the term.<sup>300</sup> A substantial burden exists when “a regulation completely prevents the individual from engaging in religiously mandated activity, or if the regulation requires participation in an activity prohibited by religion.”<sup>301</sup> A substantial

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291. *Id.* at 1221-22.

292. 42 U.S.C. § 2000cc(a) (2000).

293. 42 U.S.C. § 2000cc(b)(1).

294. *Midrash Sephardi*, 366 F.3d at 1229.

295. 42 U.S.C. § 2000cc(a)(2).

296. *Midrash Sephardi*, 366 F.3d at 1225.

297. *Id.* at 1226.

298. 42 U.S.C. § 2000cc-5(7)(A).

299. *Midrash Sephardi*, 366 F.3d at 1226.

300. *Id.*

301. *Id.* at 1227 (citing *Cheffer v. Reno*, 55 F.3d 1517, 1522 (11th Cir. 1995)).

burden is more than an incidental effect on religious exercise.<sup>302</sup> The Congregations argued three reasons why Surfside had imposed a substantial burden: (1) relocation would have required the congregants to walk further, which would be much more difficult for the very young, very old, or the very ill;<sup>303</sup> (2) the Congregations would not be able to find suitable alternative space in the designated district; and (3) the burden of applying for a conditional use permit was substantial.<sup>304</sup> First, the court rejected that walking farther was a substantial burden because it did not amount to what the Supreme Court has designated as a substantial burden.<sup>305</sup> Second, the court rejected that not being able to find suitable real estate was a substantial burden because all land users face the issue of finding suitable property, not just churches.<sup>306</sup> Third, the court rejected that applying for a conditional use permit was a substantial burden because all land users have to go through the same process.<sup>307</sup> Reasonable “run of the mill” zoning considerations are not substantial burdens on religious exercise.<sup>308</sup> In short, the court held no substantial burden existed under Subsection (a).<sup>309</sup>

The court next addressed the Congregations’ second claim that Surfside violated Subsection (b) of RLUIPA by treating a religious assembly differently from other types of assemblies.<sup>310</sup> Both social clubs and the Congregations fell within the category of “assembly or institution” as defined by RLUIPA.<sup>311</sup> RLUIPA requires that governments treat churches and other similar assemblies equally.<sup>312</sup> Here, however, Surfside allowed social clubs to locate within the business district, while prohibiting churches from locating there. These social “clubs and lodges endanger[ed] Surfside’s interest in retail synergy as much or more than churches and synagogues. Surfside’s failure to treat the analogous groups equally indicate[d] that Surfside improperly targeted religious assemblies.”<sup>313</sup> Therefore, Surfside violated Subsec-

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302. *Id.*

303. *Id.*

304. *Id.* at 1227 n.11.

305. *Id.* at 1228.

306. *Id.* at 1227 n.11.

307. *Id.*

308. *Id.*

309. *Id.*

310. 42 U.S.C. § 2000cc(b)(1). Section 2000cc(b)(1) states, “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 nonreligious assembly or institution.” *Id.*

311. *Midrash Sephardi*, 366 F.3d at 1229.

312. 42 U.S.C. § 2000cc(b)(1).

313. *Midrash Sephardi*, 366 F.3d at 1235.

tion (b) by treating the Congregations differently from the social clubs.<sup>314</sup>

The court determined that the Surfside Zoning Ordinance (“SZO”) prohibiting churches from locating in the business district was not a neutral law, meaning strict scrutiny applied.<sup>315</sup> Because the SZO was both overinclusive and underinclusive, it was not narrowly tailored and failed strict scrutiny.<sup>316</sup> The SZO’s purpose of promoting retail activity and synergy was overinclusive because the Congregations also contributed to the retail and commercial activity of the business district.<sup>317</sup> In addition, the SZO was underinclusive because it did not include synagogues and churches within the definition of social clubs, even though some social clubs allowed in the business district met more infrequently than the Congregations.<sup>318</sup> Because the SZO was underinclusive and overinclusive, it was not narrowly tailored.<sup>319</sup> Therefore, the SZO failed the strict scrutiny test and violated RLUIPA.<sup>320</sup>

Next, the court addressed RLUIPA’s constitutionality and, specifically, Congress’s authority to pass RLUIPA under Section Five of the Fourteenth Amendment,<sup>321</sup> the Establishment Clause,<sup>322</sup> and the Tenth Amendment.<sup>323</sup> The court held Section (b) of RLUIPA is a constitutional use of the Section Five power because its remedial nature is congruent and proportionate to the problem of discrimination against religious exercise in land use regulations.<sup>324</sup>

A law passes muster under the Establishment Clause as long as it has a secular legislative purpose, the primary effect neither advances nor inhibits religion, and the law does not foster excessive government entanglement with religion.<sup>325</sup> The purpose of RLUIPA is to alleviate government interference with religion and, therefore, RLUIPA has a secular purpose.<sup>326</sup> RLUIPA meets the second prong of the test because it neither advances nor inhibits religion, but makes it easier for

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314. *Id.* at 1231.

315. *Id.* at 1232.

316. *Id.* at 1233-34.

317. *Id.* at 1233.

318. *Id.* at 1234.

319. *Id.* at 1235.

320. *Id.*

321. U.S. CONST. amend. XIV, § 5.

322. U.S. CONST. amend. I, cl. 1.

323. U.S. CONST. amend. X; *Midrash Sephardi*, 366 F.3d at 1235.

324. *Midrash Sephardi*, 366 F.3d at 1239-40.

325. *Id.* at 1240 (citing *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971)).

326. *Id.* at 1240-41.

churches and synagogues to advance religion.<sup>327</sup> RLUIPA does not excessively entangle the government with religion because RLUIPA: (1) does not require states to excessively monitor land use regulations to ensure the government does not sponsor or inhibit religion; (2) does not require the government to acquire an expertise in religion; and (3) does not require the state or local officials to evaluate the merits of a particular religion.<sup>328</sup> Therefore, the third and final prong of the test is met, and RLUIPA passes muster under the Establishment Clause.<sup>329</sup>

RLUIPA also falls within Congress's authority under the Tenth Amendment.<sup>330</sup> The Tenth Amendment allows Congress to govern the states in areas covered by the Constitution and not expressly delegated to the states.<sup>331</sup> Because Congress has authority under both the First and Fourteenth Amendments, the Constitution authorizes Congress to pass RLUIPA.<sup>332</sup> Therefore, Congress did not violate the Tenth Amendment because it had constitutional authority to pass RLUIPA under other provisions of the Constitution.<sup>333</sup> Additionally, RLUIPA does not require the states to implement a federal regulatory program.<sup>334</sup> It leaves the states free to eliminate religious discrimination in any way they choose.<sup>335</sup> Therefore, RLUIPA is constitutional under the Tenth Amendment.<sup>336</sup>

Having held RLUIPA constitutional and also finding that Surfside's SZO violated Subsection (b) of RLUIPA, the court reversed the decision of the district court and remanded for further proceedings.<sup>337</sup>

**2. Konikov v. Orange County, Florida.** In *Konikov v. Orange County, Florida*,<sup>338</sup> in a per curiam opinion, the Eleventh Circuit held the district court erred in granting summary judgment to Orange County on Konikov's RLUIPA claim.<sup>339</sup> Konikov lived in Orange County ("County") in a house zoned R-1A. The zone allowed single-family homes, accessory buildings, home occupations, model homes, and family

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327. *Id.* at 1241.

328. *Id.*

329. *Id.* at 1242.

330. *Id.*

331. *Id.*

332. *Id.*

333. *Id.*

334. *Id.*

335. *Id.* (citing *Printz v. United States*, 521 U.S. 898, 935 (1997)).

336. *Id.*

337. *Id.* at 1243.

338. 410 F.3d 1317 (11th Cir. 2005).

339. *Id.* at 1319.

day care homes. All other land uses, including churches and day care centers, were required to receive special permission from the County before locating in the zone. Konikov was a *Chabad* rabbi, a movement within Orthodox Judaism, and operated his ministry out of his own home.<sup>340</sup>

The zoning board issued citation notices to Konikov for use of his home as a synagogue without special permission. Konikov did not bring his property into compliance by stopping the worship services or by applying for a permit for the use. The County began fining Konikov fifty dollars for every day Konikov did not correct the problem. Konikov never applied for a conditional use permit and did not appeal the zoning board's decision to fine him. Instead, Konikov brought suit against the County.<sup>341</sup>

Konikov challenged the County's ordinances under Subsections (a) and (b) of RLUIPA: the substantial burden and disparate treatment provisions. After determining that Konikov met the jurisdictional requirement of individualized assessment, the court discussed the Subsection (a) claim and concluded there was no substantial burden on Konikov's religious practice.<sup>342</sup> The zoning board would allow Konikov to apply for a special exception and did not completely prohibit religious uses on the property.<sup>343</sup> Applying for a special exception does not coerce a religious adherent to conform his behavior to a regulation.<sup>344</sup> Therefore, no substantial burden on Konikov's religious exercise existed, and the substantial burden claim failed.<sup>345</sup>

Konikov also challenged the ordinances under the equal terms provisions of RLUIPA in two ways: (1) facially, meaning he challenged the distinctions made by the ordinances; and (2) as applied, meaning he challenged how the County implemented the ordinances. In the facial challenge, Konikov claimed the uses permitted in the residential district as of right (family day care homes, home occupations, etc.) should be classified as "assemblies or institutions" under RLUIPA. Because those uses were allowed in the zone without needing permission, they were given preferential treatment over religious uses, which must obtain permission to locate in the residential district. The court determined none of the permitted uses constituted assemblies or institutions as the

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340. *Id.* at 1320.

341. *Id.* at 1320-21.

342. *Id.* at 1323.

343. *Id.*

344. *Id.* at 1323-24.

345. *Id.* at 1324.

words are commonly defined.<sup>346</sup> Because none of the permitted uses fell within RLUIPA's definition of assemblies or institutions, RLUIPA did not apply, and Konikov's facial challenge to the ordinances failed.<sup>347</sup>

In his "as applied" claim, Konikov contended the County implemented the ordinances in a way that treated religious organizations on less than equal terms with other non-religious organizations. The court noted that a group assembling at a house in the residential district two or three times per week, such as a Cub Scout group, would not be a violation of the ordinances.<sup>348</sup> But if the group had a religious purpose and met two or three times per week, such as Konikov's group, the group would violate the ordinances.<sup>349</sup> It was the purpose of the meeting, not the frequency of the meetings, that created an ordinance violation.<sup>350</sup> Because the ordinance did not treat religious and non-religious groups the same, the court held there was an equal terms violation.<sup>351</sup> The court also held the ordinance did not pass strict scrutiny because the County failed to present a compelling interest for the differential treatment of religious and non-religious institutions.<sup>352</sup>

**3. Williams Island Synagogue, Inc. v. Town of Aventura.** In *Williams Island Synagogue, Inc. v. Town of Aventura*,<sup>353</sup> the Williams Island Synagogue ("Synagogue") worshiped in a building that did not conform to the tenets of Orthodox Judaism. The building forced late female worshipers to cross through the male section of the synagogue, which distracted the men from prayer and worship. In addition, the Kiddush, the ceremonial blessing of wine and the meal following Sabbath services, was made in the prayer area while services were ending and caused another distraction to the prayer and worship. Finally, the building faced north by northeast and did not allow the congregants to face east toward Jerusalem as required by the religion.<sup>354</sup>

However, the Synagogue's rabbi, Rabbi Horowitz, admitted these problems could easily be avoided. First, the Synagogue could prohibit the women preparing the Kiddush from talking until services were over.

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346. *Id.* at 1325-26.

347. *Id.* at 1326.

348. *Id.* at 1328.

349. *Id.*

350. *Id.*

351. *Id.* at 1329.

352. *Id.*

353. 358 F. Supp. 2d 1207 (S.D. Fla. 2005).

354. *Id.* at 1209.

Second, the congregants could rotate their chairs or bodies to face east, although it was inconvenient. Third, both male and female latecomers to the services were equally distracting to worship. Rabbi Horowitz claimed all these problems could be completely alleviated by relocating the church to another building.<sup>355</sup>

The proposed building was located on the bottom floor of a parking garage, accessible only by a driveway used as a delivery entrance and pedestrian path. The building the Synagogue wished to use contained a large room utilized by the residents of the condominium building next to the parking garage. To use this building, the Synagogue would have to obtain a conditional use permit, whereas the condominium residents' use of the party room was allowed by right. The Synagogue applied for a conditional use permit, but was denied. The Synagogue brought suit, claiming the Town of Aventura ("Aventura") violated both the substantial burden provision<sup>356</sup> as well as the disparate treatment provision<sup>357</sup> of RLUIPA. Aventura filed a motion for summary judgment.<sup>358</sup>

First, the court addressed the substantial burden claim.<sup>359</sup> Rabbi Horowitz admitted the Synagogue had solved the problems with the current building. Although moving the Synagogue to the new building would make practicing its religion easier, denying the permit did not force the Synagogue's congregation to change its behaviors or beliefs.<sup>360</sup> RLUIPA does not protect congregations from all distractions when practicing religion, but only protects against substantial burdens on religious practice.<sup>361</sup> Because, as a matter of law, there was no substantial burden placed on the Synagogue's religious practice, the court granted summary judgment in favor of Aventura on the substantial burden claim.<sup>362</sup>

The court next considered the Synagogue's disparate treatment claim.<sup>363</sup> The Synagogue claimed Aventura treated it on less than equal terms with a nonreligious assembly or institution: the residents

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355. *Id.* at 1209-10.

356. 42 U.S.C. § 2000cc(a)(1) (2000).

357. 42 U.S.C. § 2000cc(b)(1).

358. *Williams Island*, 358 F. Supp. 2d at 1210-13.

359. *Id.* at 1214. A substantial burden is one that puts significant pressure on a religious adherent and directly coerces the person to change his beliefs or behavior to conform to the law or regulation. *Id.* (quoting *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004)).

360. *Id.*

361. *Id.* at 1215.

362. *Id.* at 1216.

363. *Id.*

were allowed to use the party room at the proposed location.<sup>364</sup> According to Aventura, the party room was an accessory to the adjacent condominium building and was zoned for residential use. Therefore, the residents could use the room freely.<sup>365</sup> Churches and other social institutions had to apply for a conditional use permit before using the rooms in that building.<sup>366</sup> Both religious and non-religious uses had to apply for a conditional use permit before they would be allowed to locate within a residential district, where the proposed location sits.<sup>367</sup> RLUIPA does not require municipalities to treat religious uses the same as residential uses, just similar assemblies.<sup>368</sup> Because the party room was a residential use, it was not a religious assembly or institution as defined by RLUIPA.<sup>369</sup> Therefore, the Synagogue's disparate treatment claim failed, and the court granted Aventura's motion for summary judgment on this claim as well.<sup>370</sup>

**4. The Eleventh Circuit Compared with Other Circuits.** Unlike some circuits, the Eleventh Circuit has held RLUIPA constitutional under the First, Tenth, and Fourteenth Amendments.<sup>371</sup> The Eleventh Circuit is unique from the others in that it has yet to find a substantial burden placed on religious exercise. Instead, every successful RLUIPA claim has been under the disparate treatment section of RLUIPA.<sup>372</sup> Although it appears the Eleventh Circuit's definition of substantial burden is much narrower than the definition in other circuits, two of the three RLUIPA claims discussed above succeeded. Therefore, it appears the Eleventh Circuit may be more lenient toward those claiming disparate treatment in land use regulations than other circuits.<sup>373</sup>

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364. *Id.*

365. *Id.* at 1216-17.

366. *Id.* at 1217.

367. *Id.* at 1218.

368. *Id.*

369. *Id.*

370. *Id.*

371. *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1219 (11th Cir. 2004).

372. *See id.* at 1231; *Konikov v. Orange County, Florida*, 410 F.3d 1317, 1329 (11th Cir. 2005).

373. *See Elsinore Christian Ctr. v. City of Lake Elsinore*, 291 F. Supp. 2d 1083, 1102 (C.D. Cal. 2003) (holding RLUIPA unconstitutional); *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 762 (7th Cir. 2003) (finding no substantial burden when churches were precluded from locating in specific zoning districts).

*B. Institutionalized Persons*

**1. Benning v. Georgia.** In *Benning v. Georgia*,<sup>374</sup> Ralph Benning (“Benning”) was a Torah observant Jew and an inmate in the Georgia prison system. Because of his religious beliefs, Benning made a request to the Georgia Department of Corrections (“DOC”) for a kosher diet, for permission to wear a yarmulke at all times, and for permission to observe specific holy days and ceremonies. The DOC denied all of his requests. Benning brought suit, alleging violations of RLUIPA. The DOC defended the suit by arguing RLUIPA is unconstitutional under the Spending Clause,<sup>375</sup> the Establishment Clause, and the Tenth Amendment.<sup>376</sup>

The DOC’s argument was a facial challenge to RLUIPA. To succeed, the DOC had to show that no situation exists in which the act would be valid.<sup>377</sup> Even if the act could operate unconstitutionally under some circumstances, the act may not be wholly invalid.<sup>378</sup> This burden is the most difficult statutory challenge to achieve.

Congress properly used its authority under the Spending Clause to enact RLUIPA.<sup>379</sup> Congress stayed within the bounds of the four restrictions on the Spending Clause power: (1) conditions attached to spending federal funds must be related to the general welfare; (2) conditions on states receiving federal funds must be unambiguous so the states can take the money knowing the conditions attached to it; (3) federal grants may be illegitimate if unrelated to the federal interest in particular national projects; and (4) no condition on receiving federal funds may violate another provision of the Constitution.<sup>380</sup> Georgia admitted that RLUIPA serves the general welfare, and, therefore, the court held there was no reason to address the first requirement of a valid exercise of Congress’s Spending Clause.<sup>381</sup>

First, Georgia claimed RLUIPA’s conditions for accepting federal funding were ambiguous. Georgia stated RLUIPA’s conditions did not put states on notice that they were waiving immunity to suits and did not inform states they could accept or reject funds. Also, Georgia

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374. 391 F.3d 1299 (11th Cir. 2004).

375. U.S. CONST. art. I, § 8, cl. 1.

376. *Benning*, 391 F.3d at 1303.

377. *Id.* at 1304 (quoting *Horton v. City of St. Augustine*, 272 F.3d 1318, 1329 (11th Cir. 2001)).

378. *Id.* (quoting *Horton v. City of St. Augustine*, 272 F.3d 1318, 1329 (11th Cir. 2001)).

379. *Id.* at 1305.

380. *Id.*

381. *Id.*

claimed the federal grants did not mention the requirements RLUIPA imposes on the states, and the least restrictive means standard was too ambiguous for a state to make an informed choice before accepting the federal funding.<sup>382</sup> The court failed to see validity in any of these arguments.<sup>383</sup> RLUIPA section 2000cc-2(a) specifically states that prisoners may bring suit under RLUIPA against the government, which is defined to include states.<sup>384</sup> Therefore, states are on notice that they may be sued under RLUIPA.<sup>385</sup> Additionally, Congress has no obligation to inform states that they can decline federal funds and not be bound by the conditions placed on receipt of the money.<sup>386</sup> Also, the least restrictive means test is not ambiguous because the test has been in existence for quite some time and is well known among all the states.<sup>387</sup>

Georgia next argued that the federal funds were not related to RLUIPA's objectives, an argument the court also rejected.<sup>388</sup> The requirement of relatedness between the purpose of RLUIPA and the funding is the minimal test of rationality.<sup>389</sup> RLUIPA easily meets the rationality standard because both the protection of the religious exercise of prisoners and their rehabilitation are rational goals of Congress, which are related to the state prisons' use of federal funds.<sup>390</sup> Therefore, the condition on spending was rationally related to the purpose of RLUIPA, meaning Georgia's argument failed in this regard as well.

Having discerned that Congress did not exceed its Spending power, the court next moved to consider RLUIPA's constitutionality under the Tenth Amendment.<sup>391</sup> Georgia argued Congress violated the Tenth Amendment because RLUIPA interferes with the core state function of administering prisons. But because the enactment of RLUIPA is within an enumerated power of Congress (the Spending Clause), the Tenth Amendment does not apply.<sup>392</sup> Georgia also argued that RLUIPA invaded the purview of state power to an extent that violates the Tenth Amendment.<sup>393</sup> However, RLUIPA's "core policy is not to regulate the

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382. *Id.*

383. *Id.*

384. 42 U.S.C. § 2000cc-2(a) (2000).

385. *Benning*, 391 F.3d at 1305-06.

386. *Id.* at 1306.

387. *Id.*

388. *Id.* at 1307.

389. *Id.* at 1307-08.

390. *Id.* at 1308.

391. *Id.*

392. *Id.*

393. *Id.*

states or compel their enforcement of a federal regulatory program, but to protect the exercise of religion.<sup>394</sup> RLUIPA does not violate the Tenth Amendment because it fails to compel the states to regulate in a specified manner and is a valid exercise of Congress's Spending power.<sup>395</sup>

The court next rejected Georgia's argument that RLUIPA violates the Establishment Clause under the *Lemon*<sup>396</sup> test.<sup>397</sup> Under the first requirement, a statute must have a secular purpose, meaning the statute cannot promote a particular point of view in religious matters.<sup>398</sup> When a law's purpose is to alleviate interference with religious exercise, the statutory purpose does not violate the Establishment Clause.<sup>399</sup> RLUIPA focuses on the rehabilitation of prisoners, a completely secular purpose, which means the first element of the *Lemon* test is met.<sup>400</sup>

Georgia also argued that RLUIPA violated the second prong of the *Lemon* test by (1) giving unique advantages to prisoners because of their religion and (2) imposing improper burdens on third parties.<sup>401</sup> First, "[i]f, as Georgia argue[d], protecting religious exercise rights alone reflects an impermissible bias in favor of religion, then protecting any fundamental right other than religion would reflect impermissible bias against religion."<sup>402</sup> Additionally, to refuse some accommodation of religious exercise in prisons would result in hostility, not neutrality toward religion. Hostility is also prohibited by the First Amendment under the Free Exercise Clause.<sup>403</sup> Therefore, RLUIPA does not require states to give unique advantages to religious prisoners.

Second, Georgia argued that RLUIPA violated the Establishment Clause by imposing improper burdens on third parties.<sup>404</sup> The improper burden Georgia referred to was that the DOC would be prevented from providing other services to pay for the religious accommodations

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394. *Id.* at 1309 (quoting *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1243 (11th Cir. 2001)).

395. *Id.*

396. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). The *Lemon* test requires that statutes: (1) have a secular purpose; (2) the primary effect must neither advance nor inhibit religion; and (3) not excessively entangle government with religion. *Id.*

397. *Benning*, 391 F.3d at 1309.

398. *Id.* (quoting *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 335 (1987)).

399. *Id.* at 1310 (quoting *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1241 (11th Cir. 2001)).

400. *Id.*

401. *Id.*

402. *Id.*

403. *Id.* at 1312.

404. *Id.*

required by RLUIPA. But again, Georgia could refuse to accept the money, and the non-religious prisoners would not be burdened by Georgia's receipt of federal funds.<sup>405</sup> Georgia could not complain about the subsequent costs of RLUIPA because Georgia consented to the conditions imposed by using the federal money.<sup>406</sup>

Finally, Georgia argued that RLUIPA violated the third prong of the *Lemon* test because RLUIPA causes excessive government entanglement with religion by forcing institutions to assess the validity of each religious request, no matter the expense or disruption, and question the centrality of the beliefs and practices of the faith.<sup>407</sup> The argument failed for two alternative reasons. First, RLUIPA's definition of religion eliminated the need of states to determine the sincerity or centrality of a belief.<sup>408</sup> Second, the First Amendment already requires the state to determine the sincerity and centrality of the belief the prisoner asserts.<sup>409</sup> Therefore, RLUIPA does not alter the nature of government entanglement with prisoners' religion.<sup>410</sup> The court never discussed the issue of whether Benning's claims were valid under RLUIPA because that issue was not before it.<sup>411</sup> The court held RLUIPA constitutional under the Spending Clause and affirmed the district court.<sup>412</sup>

**2. Brunskill v. Boyd.** In *Brunskill v. Boyd*,<sup>413</sup> Brunskill was a Native American inmate who practiced the Tobacco Indian religion. His religion prohibited Brunskill from cutting his hair unless a loved one passed away. However, the Florida Department of Corrections ("DOC") enforced a policy that required inmates to maintain hair no longer than three inches and required Brunskill to regularly cut his hair. The prison also refused to allow Brunskill to possess various religious materials, including tobacco, sage, cedar, sweetgrass, beads, leather, thread, needles, and feathers. The DOC prohibited these materials for health, safety, and security reasons not otherwise specified. The DOC formed a Native American religious program to better enable inmates to practice

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405. *Id.*

406. *Id.*

407. *Id.* at 1313.

408. *Id.* Religious exercise is defined to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A) (2000).

409. *Benning*, 391 F.3d at 1313.

410. *Id.*

411. *Id.*

412. *Id.*

413. 141 Fed. Appx. 771 (11th Cir. 2005).

their faith. Brunskill brought suit, claiming the DOC violated his rights under RLUIPA.<sup>414</sup>

The court gave a quick holding on Brunskill's RLUIPA claim and provided little explanation.<sup>415</sup> First, the institutionalized persons provisions of RLUIPA are constitutional.<sup>416</sup> Next, the court held that the district court did not err in granting summary judgment in favor of the DOC on Brunskill's claims about the hair length policy and denial of religious materials.<sup>417</sup> The DOC's decisions and policies were the least restrictive means of furthering the compelling governmental interest in prison security and safety.<sup>418</sup> The court did not address how these policies were the least restrictive ones available. In addition, the court held that Brunskill never demonstrated that the denial of religious materials was a substantial burden.<sup>419</sup> The court gave little to no reasoning for its holdings, giving no indication for future cases of what constitutes the least restrictive means or a substantial burden. Future complainants have little guidance to determine if their RLUIPA claim will succeed.

**3. *Cutter v. Wilkinson's*<sup>420</sup> *Effect on Eleventh Circuit Law.*** Although both the Eleventh Circuit's and the Supreme Court's jurisprudence agree that RLUIPA is constitutional, they do so on different grounds. The Supreme Court held RLUIPA constitutional under the Establishment Clause,<sup>421</sup> whereas the Eleventh Circuit held it constitutional under the Spending Clause.<sup>422</sup> Neither the Supreme Court nor the Eleventh Circuit gave much guidance on what constitutes a violation of RLUIPA. The Eleventh Circuit completely glossed over any analysis of why the Florida Department of Corrections had correctly followed the restrictions of RLUIPA, giving little guidance as to what would be a violation.<sup>423</sup> Additionally, the Supreme Court did not even address whether the plaintiffs' rights were violated in *Cutter v. Wilkinson*, but addressed only the constitutionality of RLUIPA.<sup>424</sup>

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414. *Id.* at 773.

415. *Id.* at 775-76.

416. *Id.* at 775 (citing *Benning v. Georgia*, 391 F.3d 1299, 1303 (11th Cir. 2004)).

417. *Id.* at 776.

418. *Id.*

419. *Id.*

420. 125 S. Ct. 2113 (2005).

421. *Id.* at 2117.

422. *Benning v. Georgia*, 391 F.3d 1299, 1305 (11th Cir. 2004).

423. *Brunskill v. Boyd*, 141 Fed. Appx. at 776.

424. *Cutter*, 125 S. Ct. at 2117.

The effect of *Cutter* on Eleventh Circuit precedent will be small. The Eleventh Circuit held RLUIPA constitutional, and will not be overturned in that regard. The Supreme Court gave no guidance as to what constitutes a RLUIPA violation, meaning the Eleventh Circuit is free to continue developing its own precedent about the restrictions and boundaries of RLUIPA. The Eleventh Circuit will not have to change its direction at all unless the Supreme Court changes its own position.

## V. CONCLUSION

### A. *Comments on the Land Use Provisions of the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA")*

The Supreme Court has yet to decide the constitutionality of RLUIPA's land use provisions, leaving it to speculation whether the Court will find the provisions pass muster or not. But the Court is highly likely to grant certiorari on a land use case because of the varying treatment and interpretation of RLUIPA across the nation's circuits and because the Court has previously considered similar statutes worthy of its review.<sup>425</sup> The Court specifically mentioned the land use provisions of RLUIPA in its review of the institutionalized persons provisions in *Cutter v. Wilkinson*.<sup>426</sup> The Court stated that the land use provisions were not before the Court and, therefore, the Court would express no view on the validity of those sections.<sup>427</sup> This statement seems like a foreshadowing of a grant of certiorari for a land use provisions case.

If the Court hears a land use case, the main issue will be whether RLUIPA will withstand the Court's scrutiny and pass constitutional muster. Because RLUIPA is a revised version of RFRA, it helps to look at *City of Boerne v. Flores*,<sup>428</sup> in which the Court struck down the Religious Freedom Restoration Act ("RFRA").<sup>429</sup> If Congress addressed all the Court's concerns with RFRA, the Court would be more likely to hold RLUIPA constitutional. The Court stated that RFRA was not remedial or preventative legislation because it was too sweeping and intruded at "every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter."<sup>430</sup> RFRA applied to every type of law, whether generally applicable or not, and to every agency and official, whether local, state,

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425. See *City of Boerne v. Flores*, 521 U.S. 507 (1997).

426. 125 S. Ct. 2113 (2005).

427. *Id.* at 2118 n.3.

428. 521 U.S. 507 (1997).

429. *Id.* at 536.

430. *Id.* at 532.

or federal.<sup>431</sup> The problem of land use discrimination did not require the extensive solution Congress supplied through RFRA. Under the Section Five<sup>432</sup> power, Congress's response must be proportionate and remedial in nature, not disproportionate and creating new rights not established in the Constitution.<sup>433</sup> Because Congress gave a far-reaching solution to a rather small problem, the Court held RFRA unconstitutional.<sup>434</sup>

From the Court's reasoning in *City of Boerne*, it appears Congress must have done two things when enacting RLUIPA to ensure its constitutionality: (1) make extensive findings of the problems with land use provisions and discrimination against religions to show the problem is widespread and serious; and (2) tone down the statutory language, so that the statute is more proportionate to the problem. As long as RLUIPA has much more evidence supporting its existence and is not as far-reaching as RFRA, the Court would probably find RLUIPA constitutional.

The Court's analysis in *Cutter v. Wilkinson*<sup>435</sup> could also give some insight into how the Court would interpret RLUIPA's land use provisions. In *Cutter*, the Court held the institutionalized persons provisions constitutional under the Establishment Clause.<sup>436</sup> Even though the institutionalized persons provisions are different in some ways from the land use provisions, their application to a group of people who practice religion is the same. The institutionalized persons provisions passed the requirements of the Establishment Clause because the provisions do not differentiate among faiths<sup>437</sup> and because they alleviate exceptional burdens imposed by the government on private religious exercise.<sup>438</sup> Both of these reasons for finding the institutionalized persons provisions constitutional exist in the land use provisions as well. The land use provisions do not differentiate among faiths and work to alleviate government-created burdens. From this analysis, it appears the land use provisions would be constitutional under the Establishment Clause.

Recall that RLUIPA's authority also rests on the Commerce Clause.<sup>439</sup> Following Commerce Clause cases of recent Supreme Court history, it seems the RLUIPA land use provisions would be constitution-

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431. *Id.*

432. U.S. CONST. amend. XIV, § 5.

433. *City of Boerne*, 521 U.S. at 536.

434. *Id.*

435. 125 S. Ct. 2113 (2005).

436. *Cutter*, 125 S. Ct. at 2125; U.S. CONST. amend I, cl. 1.

437. *Cutter*, 125 S. Ct. at 2123.

438. *Id.* at 2121.

439. U.S. CONST. art. I, § 8, cl.3.

al. Congress has power to regulate in three areas under the Commerce Clause: (1) channels of interstate commerce; (2) to protect the instrumentalities of interstate commerce; and (3) activities that substantially affect interstate commerce.<sup>440</sup> In both *United States v. Lopez*<sup>441</sup> and *United States v. Morrison*,<sup>442</sup> the Supreme Court invalidated statutes based on the Commerce Clause because the statutes did not regulate economic activity substantially affecting interstate commerce.<sup>443</sup> In *Lopez*, the Court invalidated the Gun-Free School Zones Act of 1990,<sup>444</sup> stating that the law was “a criminal statute that by its terms ha[d] nothing to do with ‘commerce’ or any sort of economic enterprise, however broadly one might define those terms.”<sup>445</sup> Later, in *Morrison*, the Court invalidated the Violence Against Women Act of 1994,<sup>446</sup> stating a review of Commerce Clause “case law demonstrates that in those cases where we have sustained federal regulation of intrastate activity based upon the activity’s substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor.”<sup>447</sup> From these two cases, it is clear that any statute based on the Commerce Clause that claims to regulate an activity substantially affecting interstate commerce, as RLUIPA does, must regulate some sort of economic activity and not an activity wholly unrelated to economics.

In RLUIPA, there is a tenuous relationship between land use provisions, economic activity, and interstate commerce. As Senator Hatch explained, substantial burdens placed on religious exercise affect interstate commerce because religious organizations must have property on which to worship.<sup>448</sup> The organizations must either buy or rent the property, and they have to build some sort of structure in which to worship. These activities of buying, renting, and building are economic in nature and, taken in the aggregate, could affect interstate commerce. The weak connection of small churches affecting national commerce is no weaker than the connection accepted by the Court in *Wickard v. Filburn*,<sup>449</sup> in which one farmer producing crops for his own family was deemed to affect interstate commerce.<sup>450</sup> Because RLUIPA regulates

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440. *United States v. Lopez*, 514 U.S. 549, 558-59 (1995).

441. 514 U.S. 549 (1995).

442. 529 U.S. 598 (2000).

443. *Lopez*, 514 U.S. at 561; *Morrison*, 529 U.S. at 611.

444. 18 U.S.C. § 922(g)(1)(A) (2000 & Supp. II 2002).

445. *Lopez*, 514 U.S. at 560.

446. 42 U.S.C. § 13981 (2000).

447. *Morrison*, 529 U.S. at 611.

448. 106 CONG. REC. S7775 (daily ed. July 27, 2000) (statement by Sen. Hatch).

449. 317 U.S. 111 (1942).

450. *Id.* at 128-29.

economic activity, the Supreme Court would probably find the land use provisions constitutional under the Commerce Clause.

The circuits seem especially split over whether RLUIPA is a constitutional use of Congress's Section Five power under the Fourteenth Amendment.<sup>451</sup> Congress used this power to protect citizens' First Amendment rights. Therefore, whether Congress overstepped the Section Five power depends on whether Congress violated the Establishment Clause of the First Amendment. The circuits that held RLUIPA unconstitutional stretched to make an argument for Congress exceeding its Section Five power. For example, the Central District of California held RLUIPA unconstitutional under the Section Five power because Congress created a right instead of remedying a problem.<sup>452</sup> Only through a very narrow reading of *Sherbert v. Verner* was the court able to say Congress created a remedial mountain out of a discriminatory mole hill. The court stated *Sherbert*<sup>453</sup> applied only to unemployment cases in which individualized *exemptions* were granted for secular reasons, but not for religious reasons.<sup>454</sup> This narrow reading seems to confine the Supreme Court's holding to a much smaller area of law than the Court intended. There is no reason why the Court would confine strict scrutiny only to individualized exemptions in unemployment cases, when individualized *assessments* in many other areas have the same potential to discriminate. Common sense leads one to believe that individualized assessments in many areas of law, such as land use regulations, should also be subject to strict scrutiny. The Central District of California wrongly read the Supreme Court's intentions in *Sherbert*, and the court wrongly held that RLUIPA is an unconstitutional exercise of Congress's Section Five power.

In contrast, the arguments supporting RLUIPA's constitutionality are much stronger and sounder. In *Guru Nanak Sikh Society of Yuba City v. County of Sutter*,<sup>455</sup> for instance, the Eastern District of California held exactly the opposite of its sister court in the Central District of California.<sup>456</sup> Specifically, the Eastern District stated that individualized exemptions and individualized assessments are essentially the same.<sup>457</sup> The court did not draw the petty distinction between individ-

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451. U.S. CONST. amend. XIV, § 5.

452. *Elsinore Christian Ctr. v. City of Lake Elsinore*, 291 F. Supp. 2d 1083, 1102 (C.D. Cal. 2003).

453. 374 U.S. 398 (1963).

454. *Id.* at 1097, 1098.

455. 326 F. Supp. 2d 1140 (E.D. Cal. 2003).

456. *Id.* at 1159-60.

457. *Id.*

ualized assessments and exemptions, and held that RLUIPA fell within the confines of *Sherbert* and *Smith*.<sup>458</sup> In other words, Congress corrected the problems the Supreme Court found with the Religious Freedom Restoration Act ("RFRA") in *City of Boerne v. Flores*<sup>459</sup> and created a constitutional statute. Between these two arguments for and against RLUIPA's constitutionality, the one supporting RLUIPA is much stronger. Congress worked diligently to ensure RLUIPA fit within all of the Court's previous holdings on the Establishment Clause and the Section Five power. It appears Congress has created a constitutional statute.

*B. Comments on the Institutionalized Persons Provisions of RLUIPA*

The Court did not decide every issue in *Cutter v. Wilkinson*.<sup>460</sup> It declined to consider the constitutionality of the institutionalized persons provisions under the Spending Clause, the Commerce Clause, and the Tenth Amendment.<sup>461</sup> These could be issues for future review and possible invalidation of these provisions of RLUIPA. The Court also only addressed RLUIPA's constitutionality; it did not address what constitutes a violation of RLUIPA. It remains unclear what is considered a substantial burden on religious exercise or what is considered narrow tailoring to achieve the compelling governmental purpose of institutional safety and health. With one Supreme Court case on the institutionalized persons provisions, it is less likely the Court will take on another case of this kind. Instead, the Court is more likely to take on a land use provisions case.

*C. Final Thought*

Overall it appears Congress has created a constitutional statute that protects religious organizations from discriminating land use regulations and protects institutionalized persons from unnecessary substantial burdens on religious exercise. Most likely, a land use case will make its way to the Supreme Court over the next few years, whereas an institutionalized persons case is unlikely to do so in the near future. It appears Congress's diligence and efforts were a success. RLUIPA is here to stay.

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458. *Id.*

459. 521 U.S. 507 (1997).

460. 125 S. Ct. 2113 (2005).

461. *Id.* at 2120 n.7.