HOW MUNICIPALITIES ARE DEFENDING AND WINNING FREE EXERCISE AND RLUIPA CASES

Adam M. Kingsley
Senior Counsel
Holland & Knight LLP
Chicago, Illinois
(312) 928-6027
adam.kingsley@hklaw.com

I. Today's Environment and Players.

The free exercise clause of the First Amendment, the equal protection clause of the Fourteenth Amendment, and legislation, specifically the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. §2000cc, *et seq.*, provide religious bodies with arguments that heightened scrutiny applies to municipal regulation of religious land uses. In the sections below, I discuss municipal regulation of religious uses, including churches and auxiliary uses, and the standards by which municipal zoning decisions regarding these uses are evaluated.

The enactment of legislation, especially the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. §2000cc, *et seq.*, has triggered a surge in litigation regarding municipal regulation of religious uses. Religious organizations and churches, which include houses of religious worship, such as synagogues, mosques, and home-based worship centers, view this statute as a valuable tool in their efforts to secure preferred locations. Religious bodies have been aided in their efforts by well-organized groups willing to provide legal support, including The Becket Fund (www.rluipa.com) and the Pacific Justice Institute (www.pacificjustice.org). *See generally* Alan C. Weinstein, RLUIPA: Where Are We Now? Where Are We Headed? American Planning Association, Planning & Environmental Law Vol. 58, No. 2, pp. 3-4 (suggesting factors that have contributed to increase in church zoning litigation). In turn, municipalities defending their zoning codes and land use decisions have found allies in the National League of Cities, the International Municipal Lawyers Association, the American Planning Association, and the National Trust for Historic Preservation.

The United States Department of Justice has also become embroiled in RLUIPA litigation, most often as an amicus defending the constitutionality of RLUIPA. However, in *Hale O Kaula Church v. Maui Planning Commission*, 229 F.Supp.2d 1056 (D.Haw. 2002), the Civil Rights Division of the Department of Justice intervened in an existing lawsuit, joined with the plaintiff church, and filed its own action against a municipality. *See United States v. Maui County*, 298 F.Supp.2d 1010 (D.Haw. 2003) (upholding right of United States to act as plaintiff in RLUIPA action).

II. Types of Challenges.

Like most other zoning litigation, church-related disputes usually involve an individual or organization's desire to locate and operate at a site and a municipality's decision to regulate land use in a contrary manner. Churches have challenged both municipal zoning schemes as a whole, and specific zoning decisions (*e.g.*, denial of a special use permit). Some of the typical challenges are discussed below.

A. Facial Challenges to Municipal Zoning Schemes.

Municipal zoning schemes most always divide a municipality into general use districts (*e.g.*, residential, manufacturing, commercial), permit certain uses as of right in certain districts, and allow other uses as special uses in certain districts. A "facial" challenge is a challenge to a municipality's overall zoning scheme or a part of its scheme. Usually, facial challenges occur when a church-plaintiff believes that the municipality's scheme, as a whole, makes it too difficult for the church to locate suitable property in the municipality.

For example, in *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752 (7th Cir. 2003), *cert. denied* 124 S.Ct. 2816 (2004), a group of churches raised a facial challenge to Chicago's

business, commercial, and manufacturing classifications. The plaintiffs argued that the city's scheme was unconstitutional because churches are required to obtain special use permits to locate in business and commercial districts, and are completely excluded from manufacturing districts. The challenge was facial in the sense that the churches did not attempt to obtain special use permits for specific locations but argued instead that the very need to obtain permits in business and commercial districts, and the complete exclusion from manufacturing districts, was illegal.

Likewise, in *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1223-24 (11th Cir. 2004), the church plaintiffs challenged an ordinance prohibiting churches in the town's RD-1 district and the court found the challenge ripe even though the plaintiffs had not identified particular properties at which they would locate. And in *Hale O Kaula Church v. Maui Planning Commission,* 229 F.Supp.2d 1056 (D.Haw. 2002), the plaintiff's claims included a facial challenge to Hawaii's zoning scheme, which requires churches to obtain special use permits to locate in agricultural districts.

B. "As Applied" Challenges to Zoning Decisions.

"As applied" challenges to municipal decisions, *i.e.*, challenges to site specific zoning decisions, are more prevalent than facial challenges. In recent years, churches have sued municipalities over a variety of municipal land use decisions. The following are examples of "as applied" challenges.

1. Zoning of Particular Site/Failure To Rezone.

Mount Elliott Cemetery Ass'n v. City of Troy, 171 F.3d 398, 401 (6th Cir. 1999). Operator of Catholic cemetery requested that the City of Troy rezone 88 acres from R-1D (single-family residential) to C-F (community facilities) to allow for creation of a new cemetery. The city refused the request to rezone, and the operator filed suit.

San Jose Christian College v. City of Morgan Hill, 360 F.3d 1024 (9th Cir. 2004). The plaintiff asked that property zoned for hospital use be rezoned for educational use to allow a private Christian college to locate and operate. The city refused to rezone the property, and the college brought suit.

Vineyard Christian Fellowship of Evanston, Inc. v. City of Evanston, 250 F.Supp.2d 961 (N.D.Ill. 2003). Vineyard Christian Fellowship purchased property in an Office district, where churches were not allowed as either permitted or special uses. The church petitioned for a text amendment to change the permitted uses in the Office district to allow churches. After the city council rejected the proposed amendment, the church sued, seeking an order allowing it to operate at the site.

Petra Presbyterian Church v. Village of Northbrook, 2003 WL 22048089 (N.D. Ill. 2003) (report and recommendation of Magistrate Judge Nolan), objections overruled, 2004 WL 442630 (N.D. Ill. 2004). The plaintiff church purchased property in an industrial park district, where churches were not allowed. The Church initially petitioned for a zoning change but abandoned the rezoning process. The church then sued, seeking an order to allow it to operate at the site.

2. Denial of a Special Use Permit, Conditional Use Permit, or Variance.

Congregation Kol Ami v. Abington Township, 309 F.3d 120, 124 (3d Cir. 2002). Church which had entered a contract to purchase a 10.9-acre parcel zoned for residential use, applied for a variance and was turned down by the township's zoning hearing board. The church sued and asked that the court invalidate the requirement that the church obtain a variance to operate at the location in question.

Freedom Baptist Church of Delaware County v. Township of Middletown, 204 F.Supp.2d 857 (E.D.Pa. 2002). Freedom Baptist Church, which was leasing space in an office building, was informed by the township zoning officer that it needed a variance to operate. The church applied for a variance, but was turned down by the zoning hearing board. The church challenged both the requirement that it obtain a variance and the decision of the board denying the variance.

Ventura County Christian High School v. City of San Buenaventura, 233 F.Supp.2d 1241 (C.D.Cal. 2002). A Christian high school planned to install and use modular classrooms on school district property. The city informed the high school that it needed to obtain a conditional use permit to operate the classrooms. The high school submitted a "pre-application" for a conditional use permit, but after the city informed the high school of its conditions and requirements for issuing the permit, the high school refused to continue with the application process and filed suit.

Grace United Methodist Church v. City of Cheyenne, 235 F.Supp.2d 1186, 1188 (D.Wyo. 2002). Church brought suit over the city's denial of an application to open a daycare facility as an auxiliary use to the church, which was located in a low-density residential district.

North Pacific Union Conference Association of Seventh-Day Adventists v. Clark County, Washington, 118 Wash.App. 22, 74 P.3d 140 (2003). Hearing examiner and the county board refused to issue a conditional use permit to church association which sought to construct its regional headquarters in an agricultural district. The Seventh-Day Adventists church sued to have the permit issued.

Hale O Kaula Church v. Maui Planning Commission, 229 F.Supp.2d 1056 (D.Haw. 2002). Church brought suit over the county's failure to issue a special use permit for the operation of a church in an agricultural district.

International Church of Foursquare Gospel v. City of Chicago Heights, 955 F.Supp. 878 (N.D.Ill. 1996). Church sought, and was denied, a special use permit to locate in a former department store in a business district. The city refused to grant a special use permit, and the church filed suit.

3. Application of Building Codes and Life Safety Codes to Churches.

Murphy v. Zoning Commission of Town of New Milford, 289 F.Supp.2d 87, 93 – 94 (D.Conn. 2003). The plaintiff, an individual, conducted prayer meetings with up to 40 people at his home. The town issued a cease-and-desist order, citing violations of the town's regulations regarding accessory uses in residential neighborhoods, large assemblies of people in single-family neighborhoods, and parking in the rear yard of homes. The plaintiff sued the town, raising an "as applied" challenge against the enforcement of the town's regulations and ordinances.

Peace Lutheran Church & Academy v. Village of Sussex, 246 Wis.2d 502, 631 N.W.2d 229 (App. 2001). Peace Lutheran Church and Academy refused to install a sprinkler system in a church

building and argued that fire code requirement is a violation of the Wisconsin Constitution guaranteeing freedom of worship and liberty of conscience. The court refused to grant the church a variance and ordered that it comply with the village's fire protection code, holding that requiring the church to install a fire sprinkler system in the building was not a violation of its constitutional free exercise rights.

4. Condemnation of Property Associated with Religious Activity.

Cottonwood Christian Center v. Cypress Redevelopment Agency, 218 F.Supp.2d 1203, 1209 (C.D.Cal. 2002). Church acquired an 18-acre parcel for future development. As part of the redevelopment plan, the defendant sent notice of its intent to condemn the property. The church sued to prevent condemnation from going forward.

Thiry v. Carlson, 78 F.3d 1491 (10th Cir. 1996). The proposed area of condemnation for a public highway project included a child's gravesite. The parents of the deceased child sued to prevent condemnation.

St. John's United Church of Christ v. City of Chicago, No. 03 C 3726 (N.D.Ill.) As part of its O'Hare Airport expansion plan, the City of Chicago identified areas that would be subject to negotiated purchase and/or condemnation. Two church-affiliated cemeteries were included in the land acquisition area, and the city was intending to acquire property and relocate the graves. Churches and relatives of the persons buried at the cemetery filed suit to prevent acquisition and relocation. (Defendant's Motion to Dismiss Pending.)

C. Venue Issues

1. Municipality as Defendant in Declaratory Judgment Action.

As shown above, federal courts have been the venue for the majority of litigation involving religious land use. In most of these cases, the plaintiff church has filed suit to preemptively enjoin a municipality from applying its zoning code or enforcing its land use decision. Since plaintiff churches usually opt to bring federal RLUIPA claims or claims under the U.S. Constitution, these plaintiffs have the option of bringing suit in federal court, provided that their claims are ripe and they have standing. *Cf. Love Church v. City of Evanston,* 896 F.2d 1082 (7th Cir. 1990) (church lacked standing to challenge zoning code because economic factors, not provisions zoning code, were cause of church's inability to find suitable location). If an initial action is brought in state court, a municipality obviously has the option of removing it to federal court if the complaint contains constitutional or RLUIPA-based claims.

2. Municipality as Plaintiff in Enforcement Action.

Although churches have been proactive in recent years, land use litigation can also begin with municipal enforcement of zoning or building codes. In these types of cases, municipalities bring suit through traditional code enforcement litigation, and churches may respond by raising statutory or constitutional defenses. *See, e.g., City of Chicago Heights v. Living Word Outreach Full Gospel Church & Ministries, Inc.*, 196 Ill.2d 1, 749 N.E.2d 916 (Ill. 2001).

The presence of these federal defenses/counterclaims does not, however, allow a municipality to remove the suit to federal court. *See, e.g., Vorhees v. Naper Aero Club, Inc.*, 272 F.3d 398, 402 (7th Cir. 2001) (under "well-pleaded complaint" rule, federally based counterclaims or affirmative

defenses to state claims do not provide the basis for removal to federal court). Therefore, federal claims and defenses, often involving issues of constitutional and statutory interpretation, may well be litigated in the state courts.

III. Legal Theory No. 1 -- Free Exercise Clause of the United States Constitution.

A. Churches and Land Use Litigation Prior to *Smith.*

Prior to the enactment of the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. §2000cc, *et seq.*, and its predecessor, the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. §2000bb, *et seq.*, the majority of religious land use disputes were litigated under the free exercise clause of the First Amendment. In a series of cases decided in the 1980s, federal courts of appeal generally upheld municipal zoning schemes and individual zoning decisions, even when such regulations deprived churches of their preferred location. *See, e.g., Christian Gospel Church, Inc. v. City & County of San Francisco*, 896 F.2d 1221 (9th Cir.), *cert. denied*, 111 S.Ct. 559 (1990); *Messiah Baptist Church v. County of Jefferson*, 859 F.2d 820 (10th Cir. 1988), *cert. denied*, 109 S.Ct. 1638 (1989); *Grosz v. City of Miami Beach*, 721 F.2d 729 (11th Cir. 1983), *cert. denied*, 105 S.Ct. 108 (1984); *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood*, 699 F.2d 303 (6th Cir.), *cert. denied*, 104 S.Ct. 72 (1983). *See also Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. City of Porterville*, 90 Cal.App.2d 656, 203 P.2d 823, *appeal dismissed*, 70 S.Ct. 78 (1949).

Under these cases, laws that prevent individuals from worshiping at their preferred location do not "compel or prohibit" particular religious practices, are not an "undue burden" on the exercise of religion, and, therefore, do not violate the free exercise clause. The cases also recognize that municipalities have legitimate reasons for distinguishing between churches and other land uses, and for categorizing churches as a distinct use. This general trend found exception in cases in which the church plaintiff could prove animus or in cases in which the church could demonstrate that the land use regulation effectively deprived the church of the ability to locate anywhere in the municipality. *See, e.g., Islamic Center of Mississippi, Inc. v. City of Starkville*, 840 F.2d 293 (5th Cir. 1988). Many courts continue to use these federal appellate decisions as a touchstone for evaluating free exercise claims.

B. The Legacy of *Employment Division, Department of Human Resources of Oregon v. Smith.*

In 1990, the United States Supreme Court decided *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 110 S.Ct. 1595 (1990). Although *Smith* itself was not a land use case, it triggered a series of events that resulted in the passage of RLUIPA ten years later.

Smith held that the free exercise clause of the First Amendment does not require municipalities to exempt religious behavior from neutral and generally applicable laws, such as the anti-peyote law at issue in *Smith.* Under *Smith,* neutral and generally applicable laws should be evaluated under a rational basis test even if the degree of burden placed on the individual's exercise of religion is substantial.

Smith left open the possibility that heightened scrutiny would apply when the municipality used a system of individualized assessments and that system proved adverse to religious conduct. *Smith* also suggested that a law that unduly burdens the exercise of religion is subject to strict scrutiny

if the law is not neutral or not generally applicable. Three years after *Smith*, in *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 113 S.Ct. 2217 (1993), the Supreme Court reiterated the *Smith* rule and expanded on the concepts of "neutrality" and "general applicability."

Because neither *Smith* nor *Lukumi* is a land use case, their impact on religious land use litigation is tangential and inferential. It is, therefore, not surprising that churches and municipalities have interpreted these two cases in antagonistic ways. The same will undoubtedly be true of the Supreme Court's recent decision in *Locke v. Davey*, __ U.S. __, 124 S.Ct. 1307 (2004) (upholding Washington State's college scholarship program against free exercise and equal protection), and various dispute about the meaning of the free exercise clause in the specific context of municipal land use decisions will continue to fester until they are resolved by the Supreme Court.

1. Can a Zoning Scheme Be Neutral and Generally Applicable if it Treats Churches as Distinct Uses?

The Supreme Court's use of the terms "neutral" and "generally applicable" in *Smith* and *Lukumi* is a subject of debate. For example, municipal zoning schemes often classify churches in a unique way and do not group churches with other "assembly uses." Churches have argued that such schemes single out churches for unique treatment, are not "neutral and generally applicable" laws, and, therefore, are subject to strict scrutiny. Municipalities have responded that it is legal to treat churches as distinct uses, and that municipal zoning schemes are neutral and generally applicable as long as the object of the law is to promote harmonious zoning and not to injure churches.

In *Civil Liberties for Urban Believers*, the Seventh Circuit upheld a zoning scheme that treated churches as distinct uses. The court concluded that the city's scheme was neutral and generally applicable and should be evaluated under the rational basis test even though the city classified "churches" as a distinct use. In making this finding, the court held that a zoning ordinance that defines churches as a distinct category of land use is, nevertheless, neutral and generally applicable under *Smith* and *Lukumi* because a comprehensive zoning scheme necessarily regulates all land uses and because churches are afforded many opportunities to locate in the city. *See Civil Liberties for Urban Believers*, 342 F.3d at 763-64.

This understanding of the terms "neutral" and "generally applicable" -- which focuses on the overall treatment of churches rather than the plain text of a zoning ordinance -- finds support in *Locke v. Davey*. In *Locke*, the State of Washington excluded certain devotional theology programs from its college scholarship program. Davey, a would-be minister, was denied a scholarship by the State. Davey argued that the program, on its face, distinguished between secular and religious education and was, therefore, not neutral under *Lukumi*. The Supreme Court agreed that the statute was not facially neutral but, per the Court, this lack of neutral did not mandate heightened under the free exercise clause. *See Locke*, 124 S.Ct. at 1312-13. Rather than focusing on the text of the law, the Court concentrated on the question of whether the law was the product of anti-religious animus or hostility and found that it was not so motivated. *Id*., at 1312-15.

If applied to the zoning context, *Locke* suggests that the focus of any free exercise challenge should be on the object or effect of a zoning ordinance, not the text of the ordinance *per se*. This should prove a favorable test for municipalities in that they need not abandon "churches" or "religious institutions" as a distinct land use category.

2. Is Heightened Scrutiny Called For When Individualized Assessments Are Used?

The reference to "individualized assessments" in *Smith,* is another heated point of contention between churches and municipalities. Churches have argued that any use of individualized assessments by a municipality, *e.g.*, the requirement of special or conditional use permits, triggers strict scrutiny. Municipalities have countered that strict scrutiny is required only when a scheme calling for "individualized assessments" is not open to churches or is applied in a discriminatory fashion.

Courts are deeply divided on this issue. *Compare Hale O Kaula Church v. Maui Planning Commission,* 229 F.Supp.2d 1056, 1072 – 1073 (D.Haw. 2002) (mere use of scheme employing special use permits triggers strict scrutiny, per *Smith*), *and Cottonwood Christian Center v. Cypress Redevelopment Agency,* 218 F.Supp.2d 1203, 1222 – 1223 (C.D.Cal. 2002) (same), *with Civil Liberties for Urban Believers,* 342 F.3d at 764 (no strict scrutiny unless churches are denied opportunity for exemptions); *Rector, Wardens & Members of St. Bartholomew's Church v. City of New York,* 914 F.2d 348, 354 (2d Cir. 1990) (use of individualized assessments as part of landmarking scheme does not trigger strict scrutiny), *cert. denied,* 111 S.Ct. 1103 (1991); *Grace United Methodist Church v. City of Cheyenne,* 235 F.Supp.2d 1186, 1200 (D.Wyo. 2002). ("Several federal courts have held that land use regulations, i.e. zoning ordinances, are neutral and generally applicable notwithstanding that they may have individualized procedures for obtaining special use permits or variances."); *Elsinore Christian Center v. City of Lake Elsinore,* 291 F.Supp.2d 1083, 1097 – 1099 (C.D.Cal. 2003) (specifically rejecting the reasoning of *Hale O Kaula, supra,* and *Cottonwood Christian*). *See also* Weinstein, RLUIPA: Where Are We Now? Where Are We Headed?, p. 11 (noting debate concerning "individualized assessments" and 'individualized exemptions").

Further, as discussed below, defining the constitutional rule on this point will likely decide whether RLUIPA parallels the Constitution or defies it. *Compare Freedom Baptist Church of Delaware County v. Township of Middletown,* 204 F.Supp.2d 857, 873 – 874 (E.D.Pa. 2002) (RLUIPA constitutional because it matches Smith's "individualized assessment" rule), *with Elsinore Christian Center, supra,* 270 F.Supp.2d 1163 at 1169 – 1170 (RLUIPA unconstitutional because it deviates from *Smith's* individualized assessment rule).

IV. Legal Theory No. 2 -- Equal Protection Clause of the United States Constitution.

A. The Reappearance of Equal Protection.

Prior to Smith, the vast majority of church zoning cases were litigated as free exercise cases. Recently, however, Equal Protection has emerged as an alternative theory for church plaintiffs, especially when plaintiffs can point to "similarly situated" uses that have received preferential treatment as compared to churches. *See, e.g., Congregation Kol Ami,* 309 F.3d at 126 – 130 (alleged equal protection violation when zoning code did not allow synagogue to operate in residential district, but allowed country club to operate as a special use); *Vineyard Christian Fellowship of Evanston, Inc.,* 250 F.Supp.2d at 975 (alleged equal protection violation when zoning code permitted "cultural facilities" and "membership organizations," but not churches, in office district); *Civil Liberties for Urban Believers,* 342 F.3d at 756 – 758 (alleged equal protection violation when prior version of zoning code required churches to obtain special use permits to locate in business and commercial districts but allowed community centers and meeting halls to locate in those districts as of right).

B. What Level of Scrutiny?

Under an equal protection theory, the first crucial question is what standard of review to apply. Churches have argued that strict scrutiny applies to any law that makes churches a distinct use. *See, e.g., Vineyard Christian, supra,* 250 F.Supp.2d at 975 – 977 (agreeing with plaintiff that strict scrutiny applies if churches are treated as distinct uses and comparable uses have greater rights than churches within challenged zoning classification). *See also Town of Surfside*, 366 F.3d at 1231-33 (under *Lukumi,* ordinance that treated churches differently than secular assembly uses would be subject to strict scrutiny).

Municipalities have argued for application of the rational basis test, the standard test for municipal zoning decisions. *See Civil Liberties for Urban Believers,* 342 F.3d at 766 (rational basis was appropriate test for facial challenge to zoning code); *Congregation Kol Ami,* 309 F.3d at 133 – 135 (rational basis test applied to zoning code treatment of churches as compared to country clubs); *Cornerstone Bible Church v. City of Hastings,* 948 F.2d 464, 472 n. 13 (8th Cir. 1991) (applied rational basis test to distinction in zoning code between churches and other uses, including private clubs); *Christian Gospel Church, Inc. v. City & County of San Francisco,* 896 F.2d 1221, 1225 (9th Cir.) (churches are not a suspect class for equal protection analysis). *See also KDM v. Reedsport School District*, 196 F.3d 1046, 1052 (9th Cir. 1999) (for equal protection purposes, parochial school students, as distinct from public school students, are not suspect class entitled to heightened scrutiny), *cert. denied,* 531 U.S 1010 (2000); *Cohen v. City of Des Plaines,* 8 F.3d 484 (7th Cir. 1993) (ordinance favoring church-based daycare over similar non-religious uses evaluated under rational basis standard); *Griffin High School v. Illinois High School Ass'n,* 822 F.2d 671 (7th Cir. 1987) (distinctions between public school students and private school students evaluated under rational basis test).

Locke v. Davey lends support to the use of the rational basis test for two reasons. First, as discussed above, *Locke* rejects the suggestion that strict scrutiny is triggered merely by a religious-based distinction within an ordinance. Second, *Locke* specifically held that where a free exercise challenge to a statute is rejected, an equal protection challenge to that same statute is subject to rational basis scrutiny. *Locke*, 124 S. Ct. at 1312, n. 3 (citing *Johnson v. Robison*, 415 U.S. 361, 375, n. 14 (1974)).

C. Applying the Test.

Even when courts agree that the rational basis test is the appropriate test evaluating equal protection claims, applying the test has created confusion. For example, when the plaintiff church's equal protection claim is based on a distinction between churches and non-religious assembly uses, *e.g.,* the plaintiff church is given less freedom to operate in a given district than a non-religious assembly use, the plaintiff church will often cite *City of Cleburne, Texas v. Cleburne Living Center, Inc.*, 473 U.S. 432, 105 S.Ct. 3249 (1985). In *Cleburne,* the Supreme Court used the rational basis test but found no reasonable basis for the municipality's distinction between group homes for the mentally ill and other group homes.

Plaintiff churches assert that municipalities must allow churches to locate wherever non-religious assembly uses are allowed because there is no meaningful difference between churches and these other uses. Some courts are in agreement. *See, e.g., Vineyard Christian,* 250 F.Supp.2d at 978 – 979 (under rational basis test, no reason to exclude church from office district because there was no meaningful difference between church and permitted uses, such as AA meetings or production of *Fiddler on the Roof*). *See also Town of Surfside,* 366 F.3d at 1231-34 (if objective differences exist

between church and secular assembly uses, court may infer that different treatment of churches is for improper purpose and apply strict scrutiny).

Other courts applying the rational basis test have, however, recognized the "enormously broad leeway afforded municipalities in making land use decisions" and put the burden of proving irrationality squarely on the plaintiff church. *Congregation Kol Ami,* 309 F.3d at 143. Under this analysis, the plaintiff church must demonstrate that the alleged comparable use is, in all functional respects, "similarly situated" to the church, that the church is just as compatible with surrounding uses as the alleged "similarly situated" use, and that the municipality's overall treatment of churches in its zoning scheme is irrational. *Id*., 309 F.3d at 140-43. *See also Konikov v. Orange County, Florida,* 302 F. Supp.2d 1328, 1347-49 (M.D. Fla. 2004) (no violation of equal protection where religious institution was required to obtain special use permit, but "model homes," "home occupations," and "daycare facilities" were allowed as of right in residential district; secular uses considered to be of different character than religious institution).

V. Legal Theory No. 3 – Religious Land Use and Institutionalized Persons Act.

A. A Brief History — RFRA, *City of Boerne*, and RLUIPA

1. RFRA

The decision in *Smith* prompted Congress to pass the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. §2000bb, *et seq.* As the title of the Act implies, Congress was attempting to restore rights that it believed were diminished by *Smith.* Under RFRA, a law that placed a substantial burden on the exercise of religion was invalid unless the law was "in furtherance of a compelling governmental interest" and was the "least restrictive means" of furthering that interest. *See Mack v. O'Leary,* 80 F.3d 1175, 1178 (7th Cir. 1996), *vacated by O'Leary v. Mack,* 151 F.3d 1033 (7th Cir.), *in light of City of Boerne v. Flores*, 521 U.S. 507, 117 S.Ct. 2157 (1997).

The federal RFRA clearly governed land use laws and zoning decisions, among other laws. In applying RFRA, the crucial question for courts was whether a particular decision imposed a substantial burden on religious exercise. *Compare International Church of Foursquare Gospel v. City of Chicago Heights,* 955 F.Supp. 878, 880 (denial of special use permit to operate church in former department store was not substantial burden because other locations were available), *and Daytona Rescue Mission, Inc. v. City of Daytona Beach,* 885 F.Supp. 1554 (M.D.Fla. 1995) (neither requirement that church obtain special use permit to operate homeless shelter nor denial of church's special use application was substantial burden on religious exercise), *with Western Presbyterian Church v. Board of Zoning Adjustment of District of Columbia,* 862 F.Supp. 538 (D.D.C. 1994) (denial of special use permit to operate kitchen for feeding homeless was substantial burden on plaintiff's exercise of religion).

2. City of Boerne

By grafting a "substantial burden" exception to the general rule in *Smith* (*i.e.,* that rational basis is the appropriate test for neutral and generally applicable laws), the Religious Freedom Restoration Act "enlarge[d] the free-exercise right beyond the constitutional bounds set forth in Smith." *Mack v. O'Leary,* 80 F.3d at 1178. In establishing a statutory scheme whereby a municipal zoning law or zoning decision could be constitutional (per *Smith's* interpretation of the free exercise clause) but illegal (under RFRA), RFRA itself became the subject of constitutional challenges.

In *City of Boerne v. Flores*, 521 U.S. 507, 117 S.Ct. 2157 (1997), the Supreme Court took up the challenge to RFRA and invalidated the statute. The Court held that RFRA created a statutory scheme that significantly deviated from the free exercise clause. Therefore, in enacting RFRA, Congress exceeded the scope of its power under §5 of the Fourteenth Amendment.

The Court noted that under §5, Congress has the power to "enforce" the Constitution. This enforcement may take the form of a statutory scheme that does not mirror the constitutional standard. For example, the Voting Rights Act of 1965 and subsequent amendments go beyond the strict bounds of the Fifteenth Amendment but essentially enforce the Fifteenth Amendment by rooting out unconstitutional conduct. *Boerne,* 117 S.Ct. at 2163 – 2164. *See also Holmes v. Marion County Office of Family & Children*, 349 F.3d 914, 920 (7th Cir. 2003) ("Congress can't change the constitutional rule of decision, but it may add teeth so that the Constitution's rule has practical bite.")

But, as described in *Boerne,* RFRA did not fit this profile. The problem with RFRA was two-fold. First, by deviating from the constitutional standard and substituting a "substantial burden" test, RFRA outlawed a wide variety of state and local laws that were, in fact, constitutional. *Boerne,* 117 S.Ct. at 2170 – 2171. Second, the legislative record behind RFRA did not show a pattern of wide-ranging constitutional violations and, therefore, did not demonstrate the necessity for such sweeping "remedial" legislation. *Id*., 117 S.Ct. at 2169. Based on these flaws, the Supreme Court concluded that RFRA did not enforce the free exercise clause; rather, it rewrote the free exercise clause. Because "legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause," *id*., 117 S.Ct. at 2164, the Court found RFRA unconstitutional.

3. RLUIPA

Just as Congress responded to *Smith* by passing RFRA, Congress responded to *City of Boerne* by passing the Religious Land Use and Institutionalized Persons Act in September 2000. RLUIPA's supporters and advocates (including the Department of Justice) maintain that RLUIPA cured the constitutional problems inherent in RFRA by more closely hewing to, if not mirroring, the constitutional standard, as articulated in *Smith* and *Lukumi*. RLUIPA has spawned scores of cases in which its meaning, its application, and its constitutionality have been debated. Most of these issues have yet to be resolved by a consensus of courts.

B. Application of RLUIPA

The federal Religious Freedom Restoration Act applied to a vast array of municipal laws. In contrast, RLUIPA's application is limited to "land use regulation." See 42 U.S.C. §§2000cc(a)(1), 2000cc(b). RLUIPA defines "land use regulation" as "a zoning or landmark law, or the application of such law, that limits or restricts a claimant's use or development of land (including a structure affixed to land)." 42 U.S.C. §2000cc-5(5).

Courts have held that RLUIPA applies to many municipal land use decisions, including provisions of municipal zoning codes, enforcement of zoning codes, decisions to grant or deny special and conditional use permits (whether made administratively or legislatively), and decisions regarding rezoning applications or proposed text amendments. One court has suggested that RLUIPA is applicable to the condemnation of church property. *See Cottonwood Christian Center v. Cypress Redevelopment Agency*, 218 F.Supp.2d 1203, 1222 (C.D.Cal. 2002). However, it is not self-evident that condemnation is a "zoning or landmarking law" or the application of such a law.

There are limits to RLUIPA's reach. For example, in *Prater v. City of Burnside*, 289 F.3d 417, 432 – 433 (6th Cir. 2002), the Sixth Circuit held that the city's decision to extend a roadway (in a manner that allegedly impacted a church's ability to expand) was not a "zoning or landmarking law" or the application of such a law. Therefore, the court concluded, RLUIPA did not apply. And although no reported case has squarely addressed it, both the express language of RLUIPA and its legislative history suggest that the statute is inapplicable to building code regulations, such as construction standards and fire safety requirements. These types of regulations do not fit within RLUIPA's scope. *See* 146 Cong.Rec. S10992 (Oct. 25, 2000) (colloquy between Senators Dewine and Kennedy).

1. RLUIPA §2(a) — Substantial Burden on Religious Exercise.

Section 2(a) of RLUIPA (42 U.S.C. §2000cc(a)) sets forth the first of the Act's substantive provisions. Section 2(a)(1) sets forth the following general rule:

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

Section 2(a)(2) identifies the scope of the general rule and defines the circumstances under which the general rule is applicable. Per §2(a)(2), the general rule applies when

> (A) the substantial burden is imposed in a program or activity that *receives Federal financial assistance;*
>
> (B) the substantial burden affects, or removal of that substantial burden would affect, *commerce* . . . among the several States. . . ; or
>
> (C) the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a *government makes,* or has in place formal or informal procedures or practices that permit the government to make, *individualized assessments* of the proposed uses for the property involved. [Emphasis added.]

a. Religious Exercise

A "substantial burden" on "religious exercise" is the key concept in RLUIPA's general rule. RLUIPA defines "religious exercise" to include the "use, building, or conversion of real property for the purpose of religious exercise." 42 U.S.C. §2000cc-5(7)(B). Thus, any land use law that limits or restricts the location of a church necessarily affects religious exercise. The operation of accessory uses (*e.g.*, religious high school, daycare center, homeless shelter) may not, however, constitute religious exercise. *See, e.g., Grace United Methodist Church,* 235 F.Supp.2d at 1197 (issue of material facts as to whether operation of daycare center affiliated with church was religious exercise).

Indeed, RLUIPA's legislative history scales back the scope of the term "religious exercise" by recognizing that not every land use or building owned or operated by a place of worship constitutes a use for religious purposes:

> The definition of "religious exercise" under this Act includes the "use, building, or conversion" of real property for religious exercise. *However, not every activity carried out by a religious entity or individual constitutes religious exercise.* In many cases, real property is used by religious institutions for purposes that are comparable to those carried out by other institutions. While recognizing that these activities or facilities may be owned, sponsored or operated by a religious institution, or may permit a religious institution to obtain additional funds to further its religious activities, this alone does not automatically bring these activities or facilities within the bill's definition of "religious exercise." *For example, a burden on a commercial building, which is connected to religious exercise primarily by the fact that the proceeds from the building's operation would be used to support religious exercise, is not a substantial burden on religious exercise.* 146 Cong.Rec. S7776 (July 27, 2000) (Joint Statement of Senators Hatch and Kennedy) **[**Emphasis added.**]**

b. Substantial Burden

What is a "substantial burden" on religious exercise? Some courts evaluating whether a particular restriction constitutes a "substantial burden" have latched onto pre-RFRA cases and have held that the inability to locate a church at one's preferred site is not a "substantial burden," especially when reasonable alternative locations are available. *Civil Liberties for Urban Believers v. City of Chicago,* 342 F.3d at 761 (church's alleged hardship and inconvenience in finding acceptable location is not a substantial burden); *Town of Surfside,* 366 F.3d at 1226-27 (burden on congregants of having to walk several extra blocks was not a substantial burden); *San Jose Christian College v. City of Morgan Hill,* 360 F. 3d at 1034-35 (inability to locate religious college at preferred site was not a substantial burden); *Petra Presbyterian Church v. Village of Northbrook,* 2003 WL 22048089, *11-*12 (no "substantial burden" when church could locate in 70 percent of village's geographic area, either as of right or with special use permit); *Konikov v. Orange County,* 302 F. Supp. 2d at 1341 (inability to operate temple out of residential home was not a substantial burden); *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. City of West Linn,* 192 Or.App. 567, 86 P.3d 1140, 1156 (Or.App. 2004) (city's denial of conditional use permit to church that desired to build meeting house in a residential district was not a substantial burden where other locations and other building configurations were possible); *North Pacific Union Conference Association of Seventh-Day Adventists v. Clark County, Washington,* 118 Wash.App. 22, 74 P.3d 140, 147 (Wash.App. 2003) (inability to locate regional headquarters at preferred site not substantial burden).

This reference to pre-RFRA case law accords with the legislative history of RLUIPA, which states that the term "substantial burden" is "not intended to be given any broader interpretation than the Supreme Court's articulation of the concept of substantial burden." *See* 146 Cong.Rec. S7776 (July 27, 2000). *See also International Church of Foursquare Gospel v. City of Chicago Heights,* 955 F.Supp. 878, 879 – 880 (N.D.Ill. 1996) (under RFRA's "substantial burden" standard, church did not experience substantial burden when City of Chicago Heights refused to issue special use permit for church's preferred location in B-2 district; city zoning code allowed many reasonable alternatives for church to locate in city).

Other courts, however, have found a substantial burden when a church has been unable to operate in accord with its own "sincere beliefs," including beliefs about the appropriate place and circumstances of worship. *See Murphy v. Zoning Commission of Town of New Milford*, 289 F.Supp.2d 87, 113 – 114 (D.Conn. 2003) (limiting at-home prayer sessions to a maximum of 25 people would impose substantial burden on plaintiff's exercise of religion); *Cottonwood Christian Center v. Cypress Redevelopment Agency*, 218 F.Supp.2d 1203, 1226 – 1227 (C.D.Cal. 2002) (depriving large church of preferred site on which to build new worship center would constitute substantial burden); *Westchester Day School v. Village of Mamaroneck*, 280 F.Supp.2d 230, 240 – 241 (S.D.N.Y. 2003) (denial of special use permit was substantial burden on religious exercise where it prevented religious day schools from expanding and modernizing); *Castle Hills First Baptist Church v. City of Castle Hills*, 2004 WL 546792 (W.D. Tex. 2004) (refusal to consider application for expansion of church building was a substantial burden, but denial of special use permit to expand parking lot was not a substantial burden). *See also Elsinore Christian Center v. City of Lake Elsinore*, 291 F.Supp.2d 1083 (C.D.Cal. 2003) (under RLUIPA, any restriction on church's use of land is "substantial burden," -- but because RLUIPA's standard is far different from constitutional standard, as expressed in *Smith*, RLUIPA is unconstitutional).

Both municipalities and churches will have a much better understanding of their respective rights and obligations once courts reach a consensus and the meaning of the term "substantial burden."

c. Compelling Governmental Interest/Least Restrictive Means

Sections 2(a)(1)(A) and 2(a)(1)(B) of RLUIPA codify the strict scrutiny test that has devolved from the constitutional decisions of the United States Supreme Court. 42 U.S.C. §§2000cc(a)(1)(A), 2000cc(a)(1)(B). If the general rule (*i.e.*, substantial burden on religious exercise) has been met, these provisions give a municipality the opportunity to salvage the regulation or decision in question. To overcome a showing of substantial burden, the municipality must demonstrate that its regulation or decision:

> (A) is in furtherance of *a compelling governmental interest;* and
>
> (B) is the *least restrictive means* of furthering that compelling governmental interest. [Emphasis added.]

Most RLUIPA cases have turned on the question of whether a "substantial burden" exists and few have reached the questions of compelling governmental interest and least restrictive means. In other contexts, these standards have proved exacting and difficult to meet.

In *Elsinore Christian Center*, 291 F.Supp.2d at 1089 – 1096, the court found that the city's actions were a "substantial burden" under RLUIPA's new definition of the term, thus requiring the defendant to prove (1) a "compelling governmental interest" in the denial, and (2) that the denial was "narrowly tailored" to fit the compelling interest. The court found that parking and traffic concerns did not rise to the level of a "compelling" interest, nor did maintaining a significant tax base. The court recognized that "curbing urban blight" was probably of "paramount importance" but that the city's denial of the conditional use permit was not narrowly tailored to achieving this goal.

Likewise, in *Cottonwood Christian Center*, 218 F.Supp.2d at 1213, 1229, the city defendant denied the plaintiff church a permit for a church with a 4,700 seat auditorium and later began eminent domain proceedings against the church. The church thereafter brought suit alleging RLUIPA

violations, among others. The court applied the "strict scrutiny" standard and found that the city's determination of the area as "blighted" was not supported enough by fact to constitute a "compelling" interest; the court also dismissed the city's tax-base arguments as non-compelling. The court found that the city had not used the least restrictive means in furthering its interests, equating the city's eminent domain tactics to "using a sledgehammer to kill an ant." *Id.*

2. RLUIPA §2(b) — Treatment on Equal Terms, Discrimination and Exclusion.

Section 2(b) of RLUIPA (42 U.S.C. §2000cc(b)) contains the statute's second set of substantive provisions. Section 2(b) is titled "Discrimination and exclusion" and is broken down into three subsections: "Equal terms"; "Nondiscrimination"; and "Exclusions and limits." Unlike §2(a), these provisions are not triggered by the showing of a substantial burden, nor may they be overcome by a showing of compelling interest.

a. Less than Equal Terms

Section 2(b)(1) of RLUIPA provides that "[n]o government shall impose or implement a land use regulation that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution." 42 U.S.C. §2000cc(b)(1). Supporters of RLUIPA argue that this provision is designed to mirror both the equal protection clause and the rule in *City of Cleburne, Texas v. Cleburne Living Center, Inc.,* 473 U.S. 432, 105 S.Ct. 3249 (1985), by requiring that churches be given the same zoning prerogatives as non-religious assemblies or institutions, such as meeting halls, community centers, and country clubs.

The key phrase "equal terms" is not defined in the statute, but it is clear that churches are treated on equal terms when zoning requirements applicable to churches are also applicable to other comparable uses. *See Ventura County Christian High School v. City of San Buenaventura,* 233 F.Supp.2d 1241, 1249 – 1251 (C.D.Cal. 2002) (no violation of §2(b)(1) when secular uses, as well as churches, were required to obtain conditional use permits to operate on city property); *Hale O Kaula Church v. Maui Planning Commission,* 229 F.Supp.2d 1056, 1070 – 1071 (D.Haw. 2002) (churches not treated on "less than equal terms" when all non-agricultural uses were required to obtain permit to operate in agricultural district). *See also Petra Presbyterian Church,* 2003 WL 22048089, * 12 (under revised zoning code church and secular assembly uses treated on "equal terms" because both are excluded from Industrial districts).

The more difficult question is whether municipalities can make <u>any</u> distinctions between churches and non-religious institutions or must do away with any distinct "church" classification. Municipalities maintain that §2(b)(1) does not bar them from treating churches as unique uses, with distinct rules to govern their location. Indeed, municipalities maintain that §2(b)(1) does not prohibit them from placing stricter limits on churches — as compared to non-religious institutions — in certain zoning districts, as long as the overall zoning scheme provides churches as much latitude as secular uses.

For example, in *Civil Liberties for Urban Believers,* the city successfully defended a zoning scheme in which some non-religious assembly uses were given greater rights than churches in manufacturing districts, but churches were given greater rights in residential districts — which made up the majority of land in the city. The city argued that churches were not treated on less than equal terms because, overall, the city's zoning scheme was favorable to churches even if secular assembly uses were preferred in certain districts. *Id.,* 342 F.3d at 766-67

However, in *Town of Surfside*, 366 F.3d at 1229-35, the Eleventh Circuit used the "equal terms" provision to invalidate a distinction between churches and secular assembly uses. Significantly, the Court viewed the "equal terms" provision as essentially identical to the constitutional equal protection test and its decision did not turn on any distinction between the equal protection clause and Section 2(b).

b. Discrimination in Application

Section 2(b)(2) of RLUIPA provides that "[n]o government shall impose or implement a land use regulation that discriminates against any assembly or instruction on the basis of religion or religious denomination." 42 U.S.C. §2000cc(b)(2). No reported cases have interpreted this section.

c. Complete Exclusion of Churches from Municipality

Section 2(b)(3) provides that "[n]o government shall impose or implement a land use regulation that (A) totally excludes religious assemblies from a jurisdiction; or (B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction." 42 U.S.C. §2000(b)(3).

Although no reported cases have interpreted part (A) of this section, earlier court decisions have suggested that zoning ordinances must allow religious uses to exist as permitted uses in at least one zoning district. For example, in *Love Church v. City of Evanston*, 671 F.Supp. 515 (N.D.Ill. 1987), *vacated for lack of standing*, 896 F.2d 1082 (7th Cir. 1990), the city's zoning ordinance did not permit churches to exist as permitted uses anywhere within its municipal boundaries, although churches were allowed in any residential or business/commercial district provided they secured special use permits. The court held that this zoning regulation of churches was unconstitutional under the equal protection clause. The court pointed to other jurisdictions that have held a municipality may not exclude churches from every district within its boundary. *Roman Catholic Archbishop of Detroit v. Village of Orchard Lake*, 333 Mich. 389, 53 N.W.2d 308 (1952); *North Shore Unitarian Society, Inc. v. Village of Plandome*, 200 Misc. 524, 109 N.Y.S.2d 803 (1951). Additionally, the court relied on the Supreme Court's cases finding that a municipality may not totally exclude a land use that the First Amendment protects. *See City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 89 L.Ed.2d 29, 106 S.Ct. 925, 928 (1986) (total ban on adult theaters may not be constitutional); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68 L.Ed.2d 671 101 S.Ct. 2176 (1981) (municipality may not ban live entertainment from its boundaries); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976) (total ban on adult theaters may not be constitutional).

Municipalities and their counsel should review their zoning ordinances for conflicts with §2(b)(3) of RLUIPA and act promptly to update any conflicting zoning regulations. For example, there are municipalities in Illinois that adopted, in the late 1980s and early 1990s, zoning ordinances that classify places of worship in all or most zoning districts as special uses or conditional uses. This classification scheme may run afoul of §2(b)(3) and the instructive lesson of *Love Church, supra.*

With respect to RLUIPA §2(b)(3)(B), a claim that an ordinance "unreasonably limits" church uses appears to be governed by the same considerations that go toward determining substantial burden (*e.g.*, other available land, no discriminatory intent). *See Petra Presbyterian*, 2003 WL 22048089 at *11-*12 (no violation of §2(b)(3) when 70 percent of village available for church use).

3. RLUIPA §5(e) — Governmental Discretion in Alleviating Burdens on Religious Exercise.

Section 5(e) of RLUIPA provides that an "exemption" may be granted by a government to avoid burdening religious exercise:

> *A government may avoid the preemptive force of any provision of this Act by changing the policy or practice* that results in a substantial burden on religious exercise, by retaining the policy or practice and exempting the substantially burdened religious exercise, by *providing exemptions* from the policy or practice for applications that substantially burden religious exercise, *or by any other means that eliminates the substantial burden.* 42 U.S.C. §2000cc-3(e). [Emphasis added.]

RLUIPA's legislative history offers some gloss on §5(e) when it states:

> In any case in which the government provides prima facie evidence that it has made, or has offered in writing to make, a specific accommodation to relieve such a substantial burden, the claimant has the burden of persuasion that the proposed accommodation is either unreasonable or ineffective in relieving the substantial burden. 146 Cong.Rec. S7776 (July 27, 2000).

Section 5(e) gives municipalities an opportunity to amend their zoning codes or change disputed practices to avoid an adverse RLUIPA determination. For example, in *Civil Liberties for Urban Believers,* the city amended its zoning code while litigation was pending. The code amendments more squarely placed churches on equal footing with secular assembly uses. Citing §5(e), the Seventh Circuit held that the amendments mooted the question of whether the prior version of the ordinance complied with RLUIPA. *Id*., 342 F.3d at 762. *See also Petra Presbyterian,* 2003 WL 22048089 at *6. Under this reading, §5(e) allows municipalities to defeat claims for attorneys' fees (and possibly damages as well) by taking proactive steps in response to an RLUIPA complaint.

4. Attorneys' Fees Under RLUIPA; 42 U.S.C. §1988; *Buckhannon*

RLUIPA incorporates by reference the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. §1988 (RLUIPA actually amended §722(b), 42 U.S.C. §1988(b), to include RLUIPA). Thus, the "prevailing party" in the litigation may recover attorneys' fees and litigation costs.

In *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources,* 532 U.S. 598, 121 S.Ct. 1835 (2001), the Supreme Court clarified "prevailing party" status for awards of statutory attorneys' fees and costs. In ruling, the Court rejected the "catalyst theory" for determining whether to award attorneys' fees to a civil rights plaintiff under federal statutes, including the Americans with Disabilities Act (ADA) and the Fair Housing Act Amendments (FHAA). The Court held that the term "prevailing party" in these federal statutes (and under the §1988 provisions) does not include a party that has failed to secure a judgment on the merits of a court-ordered consent decree but has nonetheless achieved the desired result because the lawsuit brought about a voluntary change in the defendant's conduct. However, the Court recognized under federal law that "so long as the plaintiff has a cause of action for damages, a defendant's change in conduct will not moot the case." 121 S.Ct. at 1842.

Under *Buckhannon,* a municipality may avoid the attorney-shifting provision of §1988 if it acts quickly and unilaterally in remedying the offending ordinance or action, thereby mooting the claim for injunctive relief. *See, e.g., Federation of Advertising Industry Representatives, Inc. v. City of Chicago,* 326 F.3d 924 (7th Cir. 2003) (injunctive claim mooted by repeal of ordinance and no

viable damage claim). *Buckhannon* dovetails with RLUIPA §5(e), discussed above, in that it gives municipalities an opportunity to alter their conduct without being exposed to attorneys' fees. Under one interpretation, §5(e) goes even further than *Buckhannon* and can be used to moot damage claims in addition to claims for injunctive relief.

VI. Constitutional Challenges to RLUIPA

A. Congress' Authority Under the Fourteenth Amendment

In defending Religious Land Use and Institutionalized Persons Act claims, municipalities have advanced the argument that RLUIPA itself is unconstitutional. The starting place for this argument is the Supreme Court's decision in *City of Boerne*, in which the federal Religious Freedom Restoration Act was declared unconstitutional because it exceeded Congress' power under §5 of the Fourteenth Amendment. On its face, RLUIPA is very similar to RFRA, and there is good reason to suspect that the newer statute is also unconstitutional.

RLUIPA's supporters argue that the statute avoids RFRA's infirmities by codifying the constitutional standard articulated in *Smith* and other cases. If RLUIPA truly mirrors the Constitution, Congress cannot be accused of rewriting the Constitution, but if RLUIPA departs from the Constitution, RLUIPA's defenders must show that RLUIPA "enforces" the Constitution and is a "congruent and proportional" measure. *See City of Boerne. See also Marion County Office of Family & Children*, 349 F.3d at 919-20 (discussing concept of "congruent and proportional" legislation).

Thus the constitutionality of RLUIPA is dependent on the meaning of the Constitution, specifically, the free exercise and equal protection clauses, and we cannot determine if RLUIPA is constitutional until the Constitution itself is parsed.

B. RLUIPA §2(a)(2)(C) and the Free Exercise Clause

Section 2(a)(2)(C) of RLUIPA provides that the "General Rule" of §2(a), *i.e.*, the substantial burden test, applies when a municipality uses a system of individualized assessments. 42 U.S.C. §2000cc(a)(2)(C). We know from *Smith*, and *City of Boerne* that the Constitution does not require municipalities to make special exceptions from general laws, even when the burden on religious exercise is substantial. *See Marion County Office of Family & Children*, 349 F.3d at 919 ("A requirement of accommodation does not 'enforce' the free exercise clause . . . for *Smith* holds that a state complies with the free exercise clause by maintaining neutrality toward religiously motivated practices."). How then does RLUIPA, which requires accommodation upon the showing of a substantial burden, embody the free exercise clause?

RLUIPA's defenders assert that *Smith's* rule does not apply when a system of individualized assessments (*e.g.*, special use permits, individualized rezonings, variances) is used and that the very adoption of such a scheme triggers strict scrutiny of any decision made under the scheme. *See, e.g., Freedom Baptist Church of Delaware County*, 204 F.Supp.2d at 868 – 869) ("What Congress has manifestly done in [§2(a)(2)(c)] is to codify the individualized assessment jurisprudence in Free Exercise cases that originated with the Supreme Court's decision in *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790 (1963).").

However, the better argument is that mere use of individualized assessments does not trigger strict scrutiny, and the rational basis test continues to apply unless the system of individualized assessments is not available to churches or is used in a discriminatory manner. *See, e.g., Civil*

Liberties for Urban Believers, 342 F.3d at 764 ("It is clear to this Court that it is neither the policy nor the practice of Chicago to refuse to extend to churches its system of individualized exemptions and, thus, that the [Chicago Zoning Ordinance] is a generally applicable system of land-use regulation."); *Elsinore Christian Center*, 291 F.Supp.2d at 1099 (under the constitutional rule, adoption of conditional use permit process would not trigger strict scrutiny unless city refused to extend system to churches; RLUIPA, to contrary, calls for strict scrutiny whenever such system is employed). If this analysis is correct, then it becomes clear that §2(a)(2)(C) deviates from the establishment clause and, like RFRA, is unconstitutional. *Id.*, 291 F.Supp.2d at 1104.

C. RLUIPA §2(b) and the Equal Protection Clause

Supporters of RLUIPA argue that §2(b) mirrors both the equal protection clause and the free exercise clause by prohibiting "unequal treatment" of religiously motivated conduct as compared to secular conduct. *See, e.g., Freedom Baptist Church of Delaware County*, 204 F.Supp.2d at 869 – 870. However, under the equal protection clause, it is debatable whether strict scrutiny applies to distinction between churches and secular uses. *Compare Civil Liberties for Urban Believers*, 342 F.3d at 766 (rational basis review applicable to city's overall zoning scheme), *and Congregation Kol Ami*, 309 F.3d at 133 – 135, 143 – 144 (rational basis scrutiny applied to distinction between synagogue and country club), *with Freedom Baptist*, *supra*, 204 F.Supp.2d at 870 (strict scrutiny applies to laws that "distinguish on the basis of religion").

Further, even if strict scrutiny applies, the equal protection clause gives municipalities the chance to defend a classification by demonstrating a compelling governmental interest. Section 2(b)(1) of RLUIPA establishes a different standard — it imposes absolute liability for "less than equal treatment," and there is no opportunity for demonstrating that the disparate treatment is justified by a compelling governmental interest. This deviation from the Constitution raises serious questions about the viability of §2(b)(1).

In a possible attempt to "remedy" §2(b)(1) deficiencies, the Eleventh Circuit rejected the Department of Justice's contention that §2(b)(1) is a strict liability statute – which is, indeed, the way the section is written. Instead, the Court incorporated its understanding of the constitutional equal protection test (which included strict scrutiny) into the statute, thereby matching the statute with the constitution. *See Town of Surfside*, 366 F.3d at 1231. RLUIPA's most fervent support would not trim the statute in such a manner, but their expansive reading would, paradoxically, make the statute even more constitutionally suspect.

D. "Congruent and Proportional" Response

Even if, as suggested above, RLUIPA is more demanding on municipalities than is the Constitution, it could "enforce" the Constitution if it were a "congruent and proportional" response to a pattern of concealed constitutional violations. In *City of Boerne*, 117 S.Ct. at 2168 – 2169, the Supreme Court noted that the RFRA's legislative history failed to demonstrate that states and municipalities have engaged in covert land use discrimination against churches. As the Seventh Circuit has boldly commented: "Section 5 does not condition legislative power on the ability of interest groups or committee chairmen to ladle anecdotes into hearing transcripts. Legislative power under §5 depends upon the state of the world, not the state of the Congressional Record." *Marion County Office of Family & Children*, 349 F.3d at 921 (neither legislative record nor government brief demonstrated that public employers had engaged in pattern of discrimination based on employees' religion; §701(j) of Title VII declared unconstitutional as a non-congruent departure from free exercise clause).

RLUIPA's supporters assert that RLUIPA's legislative history is more powerful than RFRA's and demonstrates a pattern of municipal discrimination in the land use context. Municipalities retort that the legislative record is no more persuasive than RFRA's and does not justify the departure from the constitutional standard. *See Elsinore Christian Center,* 291 F.Supp.2d at 1099 – 1102.

E. Congress' Authority Under the Commerce Clause

Section 2(a)(2)(B) of RLUIPA makes §2(a)'s general rule applicable when "the substantial burden affects, or removal of that substantial burden would affect, commerce . . . among the several states." This is an attempt to find authority for RLUIPA in Congress' power under the commerce clause. See U.S. Const. art. I, §8, cl. 3.

Section 2(a)(2)(B) requires the plaintiff church to make a showing that the municipal act in question affects interstate commerce. But even if a church plaintiff can demonstrate this affect in a particular case, it is questionable whether Congress' power under the commerce clause can extend to local zoning decisions. *See United States v. Morrison,* 529 U.S. 598, 120 S.Ct. 1740, 1752 – 1753 (2000) (Violence Against Women Act struck down as beyond Congress' authority under the commerce clause; bounds of commerce power would not extend to regulation of matter of traditional state regulation, even if, in aggregate, such activities substantially affect commerce). *See also Elsinore Christian Center,* 291 F.Supp.2d at 1102 – 1104 (RLUIPA §2(a)(2)(B) not justified by commerce clause). *But see Westchester Day School v. Village of Mamaroneck,* 280 F.Supp.2d 230, 237 – 238 (S.D.N.Y. 2003) (RLUIPA justified by commerce clause).

F. RLUIPA and the Establishment Clause

Some commentators have suggested that RLUIPA violates the establishment clause of the Constitution because it gives religiously motivated conduct greater protection than secular conduct. With respect to RFRA, this argument was embraced by Justice Stevens in *City of Boerne,* 117 S.Ct. at 2172 (Stevens, J. concurring). Two federal appellate cases (albeit each with a dissenting judge) suggest, however, that preferential treatment for churches in the land use context does not violate the establishment clause. *See Boyajian v. Gatzunis,* 212 F.3d 1 (1st Cir. 2000); *Ehlers-Renzi v. Connelly School of the Holy Child, Inc.,* 224 F. 3d 283 (4th Cir. 2000). In *Town of Surfside,* 366 F.3d at 1240-42, the Eleventh Circuit specifically rejected an Establishment Clause challenge to RLUIPA and an Establishment Clause attack seems the least promising of the constitutional challenges.[1]

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[1] Parts of this paper also appear in Adam M. Kingsley and Michael T. Jurusik, Illinois Land Use Law, Chapter 14 (First Amendment and Land Use) , Sections 14.32-14.75 (Illinois Institute for Continuing Legal Education 2004)