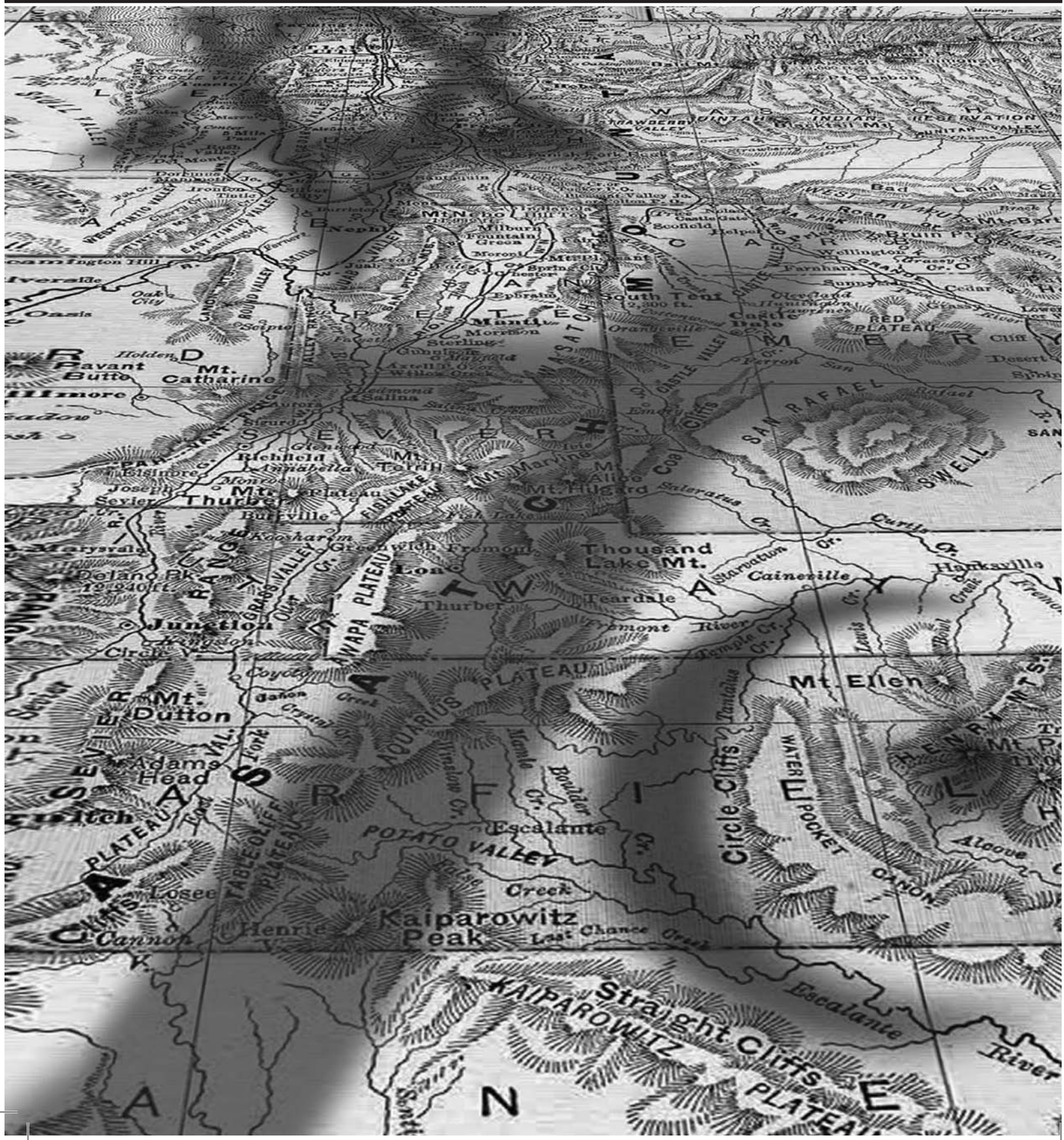
Avoiding "Substantial Burdens" on Religious Land Use Applicants

by Lora A. Lucero



Local governments are admonished not to "substantially burden" a religious land use applicant's right to free exercise, but the Religious Land Use and Institutionalized Persons Act of 2000[1] (RLUIPA) does not define the term, leaving everyone, including the courts, in a quandary. Nearly a decade after RLUIPA was signed into law by President Clinton, a review of the decisions that have grappled with "substantial burden" indicates there have been relatively few instances where the courts have found that the local government substantially burdened the religious land use applicant.

This commentary is divided into two parts. In this first article, some of the perplexing definitions of "substantial burden" are provided, along with cases where no "substantial burden" was found. In the next article, the decisions holding that a "substantial burden" existed will be examined in greater detail to glean some lessons for planners and local government attorneys.

Reviewing 76 reported decisions between 2001 and July 2009 which addressed the "substantial burden" issue in the RLUIPA land use context, I found only 17 in which the court ruled in the applicant's favor on the "substantial burden" issue. Decisions where a substantial burden on the religious land use applicant was found and which will be discussed in greater detail in the next article include: *DiLaura v. Tp. of Ann Arbor*,[2] *Cottonwood Christian Ctr. v. Cypress Redev. Agency*,[3] *Murphy v. Zoning Comm'n of Town of New Milford*,[4] *Guru Nanak Sikh Soc. of Yuba City v. County of Sutter*,[5] *Shepherd Montessori Ctr. Milan v. Ann Arbor Charter Tp.*,[6] *Congregation Kol Ami v. Abington Tp.*,[7] *Sts. Constantine and Helen Greek Orthodox Church, Inc. v. City of New Berlin*,[8] *Westchester Day School v. Village of Mamaroneck*,[9] and several others.[10]

The odds are definitely in favor of the local government. However, what these ratios fail to reveal is the added factor of how many times a local government capitulated prior to trial when confronted with threatened RLUIPA litigation. Since RLUIPA allows a successful religious land use applicant to obtain attorneys' fees – with no such opportunity for a local government that succeeds in defending itself against a RLUIPA claim – there is probably a stronger motivation for a local government to settle a claim and avoid RLUIPA litigation.

The joint statement issued by Senators Orrin Hatch and Edward Kennedy on the purpose of RLUIPA provides that "it [was] not the intent of [RLUIPA] to create a new standard for the definition of 'substantial burden' on religious exercise. Instead that term as used in [RLUIPA] should be interpreted by reference to Supreme Court jurisprudence."[11] The sponsors also noted that "[t]his Act does not provide religious institutions with immunity from land use regulation, nor does it relieve religious institutions from applying for variances, special permits or exceptions, hardship approval, or other relief provisions in land use regulations, where available without discrimination or unfair delay."[12]

If RLUIPA accomplished nothing more than to reset the clock back to the pre-*Smith* jurisprudence,[13] city planners and local government attorneys might not feel such consternation. However, RLUIPA broadened the definition of "religious exercise" to include "[t]he use, building, or conversion of real property for the purpose of religious exercise" with respect to "the person or entity that uses or intends to use the property for that purpose."[14] "Religious exercise" also includes "any exercise of religion, whether or not compelled by, or central to, a system of religious belief."[15] This tension was summed up well by the Connecticut Supreme Court in one RLUIPA case:

> [I]nterpreting the substantial burden provision of RLUIPA as creating a significantly broader right than that guaranteed by the free exercise clause would render the statute constitutionally suspect under [*Boerne v. Flores*]. On the other hand, interpreting the provision as creating a right with precisely the same scope and contours as that guaranteed by the free exercise clause would ignore the statute's express terms and effectively render it superfluous.[16]

What's a court suppose to do?

"Substantial Burden" Defined

The federal circuit courts of appeals have not settled on a single definition or test for "substantial burden." In the U.S. Court of Appeals for the Ninth Circuit, a land use regulation "must be 'oppressive' to a 'significantly great extent' … imposing a significantly great restriction or onus upon religious exercise."[17] The Eleventh Circuit defines a "substantial burden" as one that causes "more than an inconvenience on religious exercise; it must place significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly. A 'substantial burden' may result from pressure that tends to force adherents to forego religious precepts or from pressure that mandates religious conduct."[18] However, legitimate and "run of the mill" zoning requirements rarely, if ever, will rise to the level of a substantial burden.[19] The Fourth Circuit, in a RLUIPA case in the context of institutionalized persons, held that "a substantial burden on religious exercise occurs when a … government, through act or omission, 'put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs.'"[20] The U.S. District Court for the District of Maryland appears to have accepted this definition in the land use context.[21]

The Eighth Circuit holds that the government action must bear on "some central tenet" of an applicant's religious belief system, or prevent the applicant from engaging in an exercise that is "fundamental" to that belief system.[22] The Seventh Circuit has fashioned the "effectively impractical" standard in a 2003 case: "A land use regulation that imposes

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a substantial burden on religious exercise is one that necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise – including the use of real property for the purpose thereof within the regulated jurisdiction generally – effectively impracticable."[23] While the court appeared to retreat from that standard in 2005, when it decided that a city's denial of a rezoning permit constituted a substantial burden because it required the applicant church to search for other parcels of land or file more applications, resulting in "delay, uncertainty, and expense,"[24] the Seventh Circuit returned to the 2003 definition in 2006, when it held that a village's "conditions on the approval of the permit limiting the size of the buildings, the number of services, the use of the surrounding outdoor areas, and the number of major activities to be conducted in the course of the week, did not impose a substantial burden."[25]

The Third Circuit says a "substantial burden" is one that "necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise… effectively impracticable."[26] On the other hand, in the Tenth Circuit, no substantial burden can be found where "the incidental effects of otherwise lawful government programs 'make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs.'"[27]

No "Substantial Burden"

Although local government attorneys might best divine what constitutes a "substantial burden" by focusing on the few cases in which the courts have actually found such a burden occurred, a brief review of instances where there was no "substantial burden" is heartening. A word of caution, however – every decision is very fact-specific, and it is important to read the *entire* opinion in order to appreciate the nuances in the ruling. On the plus side, RLUIPA facts can be juicy, and many decisions could compete with John Grisham's story-telling abilities.

Communication Antennas. A 150-foot monopole, with antennas and associated equipment, built on property located next to a synagogue, is not a substantial burden and does not affect the synagogue at all, except, perhaps, aesthetically.[28]

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Walking. Excluding churches and synagogues from a business district, which requires some people to walk further to attend services, is not a substantial burden. "While we certainly sympathize with those congregants who endure Floridian heat and humidity to walk to services, the burden of walking a few extra blocks, made greater by Mother Nature's occasional incorrigibility, is not 'substantial' within the meaning of RLUIPA."[29]

Spending Money and Logistical Burdens. A congregation that owned property within a city but was barred by the city's zoning ordinance from using the property for worship or prayer, argued that it was "forced to spend a considerable amount of money to rent space" for a place to hold worship services, and complained "about the inconvenience of having to set up the worship space in the high school auditorium every week and defer to the high school's needs if there [was] a conflict."[30] However, such monetary and logistical burdens do not rise to the level of a substantial burden on a congregation's constitutional free exercise rights, and the congregation's RLUIPA claim failed for the same reason that its free exercise claim failed.[31]

Administrative Building in an Agricultural District. The denial of a permit to build a 40,000 square-foot church administrative office building in a county's agricultural district – where churches were allowed but office buildings were not – was not a substantial burden. The church failed to show that the county's decision "interfere[d] with a central belief of the Church's religious doctrine."[32]

Requiring a Special Use Permit. Chicago's zoning ordinance allows churches "by right" in all residential zones, but requires a special use permit to operate in commercial and business areas, and limits churches in manufacturing areas. This was found not to impose a substantial burden. Various churches argued that the scarcity of affordable land available for development in residential zones, along with the costs, procedural requirements, and the inherent political aspects of the special use, map amendment, and planned development approval processes, imposed a substantial burden. The court disagreed, noting:

> these conditions – which are incidental to any high-density urban land use – do not amount to a substantial burden on religious exercise. While they may contribute to the ordinary difficulties associated with location (by any person or entity, religious or nonreligious) in a large city, they do not render impracticable the use of real property in Chicago for religious exercise, much less discourage churches from locating or attempting to locate in Chicago. … Unfortunately for Appellants, no such free pass for religious land uses masquerades among the legitimate protections RLUIPA affords to religious exercise.[33]

Denial of Rezoning. A religiously-affiliated college maintained that a denial of its rezoning application (to allow it to build an educational facility with outdoor sports fields, a gymnasium, a theater/chapel, and student residence halls for 1,200 students) was a substantial burden. The Ninth Circuit concluded the college was "simply adverse to complying with the PUD ordinance's requirements," and the college was required to submit a complete application just like all other applicants.[34] In another case, a church sought to construct an apartment complex on property it owned across the street from its church. The property was zoned for single-family residential use, with single-family homes on either side, and the property required rezoning to multiple-family residential use. After the city denied the church's rezoning request, the Supreme Court of Michigan agreed, finding that building

an apartment complex did not constitute a "religious exercise."[35] Even assuming this could be a religious exercise, the court explained that if the church wanted "to build an apartment complex, it [could] do so; it just ha[d] to build it on property … zoned for apartment complexes. … In other words, in the realm of building apartments, plaintiff has to follow the law like everyone else."[36] Accordingly, the refusal to rezone was not a substantial burden.

Denial of Conditional Use Permit. A church wanted to build a meetinghouse, 16,558 square feet in area and 28 feet tall, on a 5.64-acre tract zoned single-family residential, which required a conditional use permit (CUP). The city rejected the application because "the parcel was too small to accommodate the buffers of vegetation and distance" required for a meetinghouse of that size in that location, but noted that "it could approve a site plan that included a building of the same size on a larger lot with adequate buffering."[37] The court held that it was not a substantial burden to require the church to submit a new application,[38] referring to *Westchester Day School v. Village of Mamaroneck*. There, the Second Circuit noted that the denial of a specific proposal may constitute a substantial burden when a "board's stated willingness is disingenuous, or cure of the problems noted by the board would impose so great an economic burden as to make amendment unworkable, or where the change demanded would itself constitute a burden on religious exercise."[39] A mere denial, without more, however, was not a substantial burden.

Denial of a Soup Kitchen. Where a redevelopment ordinance did not allow a church to operate a soup kitchen within a redevelopment zone, a court held there was no substantial burden in requiring the church to relocate outside of the narrowly-drawn redevelopment zone.[40]

Denial of Demolition Permit. A religious organization serving university students wanted to demolish its current building so it could construct a larger building on the site, but the historic district commission denied its request for a demolition permit. Noting that the religious organization could, instead, use the second floor (half of its current building space, which was leased to commercial tenants), the district court was "not convinced that the lack of a designated meditation space or student lounge imposes a substantial burden" on the organization.[41]

Distractions. An Orthodox Jewish congregation had grown and the rabbi wanted to relocate because of the distractions in the current location (e.g., female congregants who arrived late for prayer services had to pass through the section reserved for men to get to the side reserved for women; and the Kiddush, a ceremonial blessing of the wine and meal, was prepared in the prayer area while services were ending). The city denied the CUP because the proposed location did not have adequate parking and a walkway would not provide safe pedestrian access. The district court found the denial did not substantially burden the congregation's ability to worship according to their beliefs, and the distractions did not rise to the level of a substantial burden.[42]

Applying for Special Exception. A county's zoning code required a special exception for religious organizations and day-care centers located in certain residential districts. A rabbi was issued with a code violation notice for operating a synagogue in his residence and was told the corrective action would be for him to apply for a special exception. He refused to apply and eventually, a lien was placed against his property. The Eleventh Circuit held that requiring an application for a special exception did not pose a substantial burden because it did "not coerce conformity of a religious adherent's behavior."[43]

Denial of Permit for Large Building. Many RLUIPA cases involve growing congregations that need more space. In one case, a church was denied a special use permit (SUP) to construct a school and church building. It had previously received an SUP for a 10,925 square-foot building to use as a sanctuary and a day-care for 40 children, and another SUP to increase the day-care to 72 children and build a 28,500 square-foot elementary school for 280 students. After the SUP expired in 2001, the church submitted a new application, to build a 34,989 square-foot school. The board denied this SUP application because the proposed facility, in relation to the size of the site, was out of proportion to similarly-situated schools and combined church and school facilities, and was inconsistent with the review criteria and standards for the granting of a SUP. The church framed the RLUIPA argument as a "size issue" and argued that "anything less than the addition of a 34,989 square-foot building on its property prevent[ed] it from fulfilling its ministries and missions."[44] The Sixth Circuit declined to "set a bright line test by which to 'measure' a substantial burden," reversing the lower court.[45] Even though the denial of the SUP might make the applicant's religious exercise more expensive or difficult, it did not "place substantial pressure" on the church "to violate its religious beliefs or effectively bar the church from using its property in the exercise of its religion."[46]

No Churches in Industrial Zones. After a church purchased a warehouse in an industrial zone and began using it as a church, a village sought an injunction against it based on violations of the building code. The church countered with a RLUIPA suit, claiming that the zoning code substantially burdened its free exercise rights because no churches were allowed within the industrial zone. The court, however, decided that a "ban on churches in the industrial zone [could not] in itself constitute a substantial burden on religion, because then every zoning ordinance that didn't permit churches everywhere would be a prima facie violation of RLUIPA."[47]

Denial of Campground, Hiking Trails. A church wanted to develop its 24-acre parcel for a non-denominational ministry campus, to include a campground and hiking trails. The city denied the campground and hiking trails because these were not accessory uses for a church or worship center. A court ruled the denial did not impose a substantial burden on the church's exercise of religion in violation of RLUIPA.[48] The ordinance defined "accessory use" as "[a] use or structure customarily incidental and subordinate to the principal use or structure."[49] A campground was not an accessory use to a church/worship center and the hiking trails would relate primarily to the campground and campers.[50]

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"Substantial Burdens"

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Conclusion

Stay tuned for part two of this article in the January/February 2010 *Municipal Lawyer*, where more RLUIPA decisions deciphering the "substantial burden" conundrum will be digested.

Notes

1. 42 U.S.C.A. § 2000cc, *et seq.* (West 2009).
2. 112 Fed. Appx. 445 (6th Cir. 2004).
3. 218 F. Supp.2d 1203 (C.D. Cal. 2002).
4. 289 F. Supp.2d 87 (D. Conn. 2003), *vacated*, 402 F.3d 342 (2d Cir. 2005).
5. 456 F.3d 978 (9th Cir. 2006).
6. 739 N.W.2d 664 (Mich. Ct. App. 2007), *vacated*, 746 N.W.2d 105 (Mich. 2008), *on remand*, 761 N.W.2d 230 (Mich. Ct. App. 2008).
7. No. Civ.A. 01-1919, 2004 WL 1837037 (E.D. Pa. Aug. 17, 2004).
8. 396 F.3d 895 (7th Cir. 2005).
9. 504 F.3d 338 (2d Cir. 2007).
10. Mintz v. Roman Catholic Bishop of Springfield, 424 F. Supp.2d 309 (D. Mass. 2006), Lighthouse Cmty. Church of God v. City of Southfield, No. 05-40220, 2007 WL 30280 (E.D. Mich. Jan. 03, 2007), City of Woodinville v. Northshore United Church of Christ, 211 P.3d 406 (Wash. 2009), Rocky Mountain Christian Church v. Bd. of County Comm'rs of Boulder, 612 F. Supp.2d 1163 (D. Colo. 2009), Grace Church of North County v. City of San Diego, 555 F. Supp.2d 1126 (S.D. Cal. 2008), Church of Universal Love and Music v. Fayette County, No. 06-872, 2008 WL 4006690 (W.D. Pa. Aug. 26, 2008), Reaching Hearts Int'l, Inc. v. Prince George's County, 584 F. Supp.2d 766 (D.Md. 2008), Guatay Christian Fellowship v. County of San Diego, No. 08cv1406 JM(CAB), 2008 WL 4949895 (S.D. Cal. Nov. 18, 2008), Barr v. City of Sinton, No. 06-0074, 2009 WL 1712798 (Tex. June 19, 2009), and Merced v. Kasson, Nos. 08-10358, 08-10506, 2009 WL 2343172 (5th Cir. July 31, 2009).
11. 146 Cong. Rec. 16,700 (2000).
12. *Id.*
13. Employment Div., Dept. of Human Res. of Oregon v. Smith, 494 U.S. 872 (1990) (addressing the validity of laws that have the effect of burdening particular religious practices).
14. 42 U.S.C. § 2000cc-5 (7)(B) (2000).
15. 42 U.S.C. § 2000cc-5 (7)(A) (2000).
16. Cambodian Buddhist Soc. of Connecticut, Inc. v. Planning and Zoning Comm'n of the Town of Newtown, 941 A.2d 868, 890 (Conn. 2008).
17. Guru Nanak Sikh Soc. of Yuba City v. County of Sutter, 456 F.3d 978, 988 (9th Cir. 2006); San Jose Christian Coll. v. City of Morgan Hill, 360 F.3d 1024, 1034 (9th Cir. 2004).
18. Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1227 (11th Cir. 2004).
19. *Id.*
20. Lovelace v. Lee, 472 F.3d 174, 187 (4th Cir. 2006).
21. Reaching Hearts Int'l, Inc. v. Prince George's County, 584 F. Supp.2d 766, 785-86 (D. Md.2008) (approving jury instructions consistent with *Lovelace*).
22. Murphy v. Mo. Dept of Corr., 372 F.3d 979, 988 (8th Cir. 2004).
23. Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752, 761 (7th Cir. 2003).
24. Sts. Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin, 396 F.3d 895, 901 (7th Cir. 2005).
25. Vision Church v. Village of Long Grove, 468 F.3d 975, 997-1000 (7th Cir. 2006).
26. Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch, 100 Fed. Appx. 70 (3d Cir. 2004).
27. Grace United Methodist Church v. City of Cheyenne, 451 F.3d 643 (10th Cir. 2006).
28. Omnipoint Communications, Inc. v. City of White Plains, 202 F.R.D. 402 (S.D.N.Y. 2001).
29. Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1228 (11th Cir. 2004).
30. Vineyard Christian Fellowship of Evanston, Inc. v. City of Evanston, 250 F. Supp.2d 961, 986 (N.D. Ill. 2003).
31. *Id.*
32. N. Pac. Union Conf. Ass'n of Seventh Day Adventists v. Clark County, 74 P.3d 140, 147 (Wash. Ct. App. 2003).
33. Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752, 761 (7th Cir. 2003).
34. San Jose Christian Coll. v. City of Morgan Hill, 360 F.3d 1024, 1035 (9th Cir. 2004).
35. Greater Bible Way Temple of Jackson v. City of Jackson, 733 N.W.2d 734, 746 (Mich. 2007).
36. *Id.* at 750.
37. Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. City of West Linn, 111 P.3d 1123, 1125 (Or. 2005).
38. *Id.* at 1130.
39. 386 F.3d 183, 188 n.3 (2d Cir. 2004).
40. Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch, 406 F. Supp.2d 507 (D.N. J. 2005).
41. Episcopal Student Found. v. City of Ann Arbor, 341 F. Supp.2d 691 (E.D. Mich. 2004).
42. Williams Island Synagogue, Inc. v. City of Aventura, 358 F. Supp.2d 1207 (S.D. Fla. 2005).
43. Konikov v. Orange County, 410 F.3d 1317, 1323-24 (11th Cir. 2005).
44. Living Water Church of God v. Charter Tp. of Meridian, 258 Fed. Appx. 729, 737 (6th Cir. 2007).
45. *Id.*
46. *Id.*
47. Petra Presbyterian Church v. Village of Northbrook, 489 F.3d 846 (7th Cir. 2007).
48. City of Hope v. Sadsbury Tp. Zoning Hearing Bd., 890 A.2d 1137 (Pa. Commw. Ct. 2006).
49. *Id.* at 1140 n.1.
50. *Id.* at 1145. **ML**

High-Profile Litigation

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call the reporter back before his or her publication deadline. Refute the opposing party's spin, redefine the message, and, if necessary, consider holding a follow-up press conference.

During Trial, Monitor the Blogs

During trial, there may be second-guessing from many sources, including the public, the media, and even public officials. Litigation counsel for employers should avoid the temptation to get caught up in a media sideshow and, instead, should stick to focusing on a well-thought-out