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Civil Liberties for Urban Believers v. City of Chicago: A Defining Case for the Substantial Burden Test under the Religious Land Use and Institutionalized Persons Act Note

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NOTE

Civil Liberties for Urban Believers v. City of Chicago: A Defining Case for the Substantial Burden Test Under the Religious Land Use and Institutionalized Persons Act

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I. INTRODUCTION

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[1] The First Amendment protects the most basic and coveted rights of all persons in the United States. Among them are the rights to free speech, assembly, association, petition, press, and religion.[2] Religious freedom is protected by two clauses in the First Amendment—the Establishment Clause and the Free Exercise Clause.[3] A strict interpretation of the two clauses can seem inconsistent;[4] however, in *Walz v. Tax Commissioner of New York*, the Supreme Court established that there is "play in the joints" between these two clauses for some regulation by the Congress and state legislatures.[5] Land use laws, along with the Religious Land Use and Institutionalized Persons Act, are laws that fall within the joints.

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1. U.S. CONST. amend. I.

2. *Id.*

3. *Id.*

4. Walz v. Tax Comm'n, 397 U.S. 664, 668-69 (1970).

5. *Id.* at 669 ("The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for *play in the joints* productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.") (emphasis added).

The Religious Land Use and Institutionalized Persons Act (RLUIPA)[6] was passed by Congress and signed into law by President Clinton on September 22, 2000.[7] It was passed in response to a long line of First Amendment cases and a congressional law that altered the level of scrutiny laws received when faced with a challenge under the Free Exercise Clause.[8] This casenote discusses RLUIPA and its application in the case of the *Civil Liberties for Urban Believers v. City of Chicago, (C.L.U.B.)*.[9] It argues that the Seventh Circuit, in *C.L.U.B.*, applied the correct interpretation of the substantial burden test under RLUIPA. Before discussing *C.L.U.B.* in Part II of this casenote, a brief history of First Amendment jurisprudence surrounding the Establishment Clause, Free Exercise Clause, and the invalidation of the Religious Freedom Restoration Act (RFRA) is provided. Part III of this casenote discusses RLUIPA. Part IV reviews *C.L.U.B.* and argues that, in deciding *C.L.U.B.*, the Seventh Circuit established the proper interpretation of the substantial burden test under RLUIPA. Finally, Part V discusses how other courts are either following suit behind the Seventh Circuit by adopting a narrow interpretation of the substantial burden test or departing from the reasoning of the Seventh Circuit and adopting a broad view of the substantial burden test. Part V also illustrates the practical effects of broad and narrow interpretations of the substantial burden test and discusses the implications of RLUIPA beyond the First Amendment.

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6. Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc to 2000cc-5 (2000).

7. William John Kearns, Jr., Religious Land Use and Institutionalized Persons Act: Impact of Statute on Local Zoning Regulations and on the Operation of Prisons and Jails, Georgetown University Law Center Continuing Legal Education 21st Annual Section 1983 Civil Rights Litigation Seminar (May 1-2, 2003), *available at* 2003 WL 22002105, at *3.

8. *See* Sherbert v. Verner, 374 U.S. 398 (1963) (articulating a strict scrutiny standard to apply to Free Exercise claims); Wisconsin v. Yoder, 406 U.S. 205 (1972) (reaffirming the *Sherbert* strict scrutiny test); Employment Div. v. Smith, 494 U.S. 872 (1990) (reversing the *Sherbert/Yoder* strict scrutiny standard of review and imposing a rational basis standard of review on Free Exercise claims that challenge neutral laws of general applicability); Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb to 2000bb-4 (2000) (originally enacted in 1993) (restoring the *Sherbert/Yoder* strict scrutiny standard to Free Exercise claims); City of Boerne v. Flores, 521 U.S. 507 (1997) (striking down RFRA as unconstitutional as applied to the states as beyond the scope of section 5 of the Fourteenth Amendment).

9. Civil Liberties for Urban Believers v. City of Chicago (*C.L.U.B.*), 342 F.3d 752 (7th Cir. 2003), *cert. denied*, 541 U.S. 1096 (2004).

II. FIRST AMENDMENT JURISPRUDENCE AND THE RELIGIOUS FREEDOM RESTORATION ACT

The First Amendment to the United States Constitution, which was made applicable to the states through the Due Process Clause of the Fourteenth Amendment,[10] protects individual religious freedom in two ways: It protects the individual from the establishment of a religion by the state,[11] and it protects the rights of an individual to exercise his or her religion free of undue government intervention.[12] Between these two protections, however, there is room for some government regulation of religion.[13] The question, then, is how much regulation is allowed? The pursuit of the answer to this question has left us with a rich body of constitutional law discussed briefly below.[14]

The longstanding test to determine whether a law violates the Establishment Clause was first articulated by the United States Supreme Court in the case of *Lemon v. Kurtzman*.[15] Under the *Lemon* test, a law will be upheld under the Establishment Clause if it (1) has a secular purpose, (2) is neutral toward religion, and (3) does not cause excessive government entanglement with religion.[16] Contemplation of the *Lemon* test in the context of RLUIPA is important when considering the level of protection that RLUIPA provides for religious entities. If RLUIPA provides protection to religious land uses beyond that which is provided to

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10. Everson v. Bd. of Ed., 330 U.S. 1, 15-16 (1947) ("The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church . . . pass laws which aid one religion, aid all religions, or prefer one religion over another . . . force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion . . . . Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.'") (citation omitted); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) ("The fundamental concept of liberty embodied in [the Fourteenth] Amendment embraces the liberties guaranteed by the First Amendment."). *See also* RONALD D. ROTUNDA & JOHN E. NOWAK, 5 TREATISE ON CONSTITUTIONAL LAW–SUBSTANCE & PROCEDURE § 21.1 (3d ed. 1999).

11. U.S. CONST. amend. I.

12. *Id.*

13. Walz v. Tax Comm'n, 397 U.S. 664 (1970).

14. For a comprehensive discussion of the United States Supreme Court's First Amendment Jurisprudence under the religion clauses, *see* ROTUNDA & NOWAK, *supra* note 10, §§ 21.1-.16.

15. 403 U.S. 602 (1971).

16. *Id.* at 612-613.

other land uses, rather than merely placing religious land uses on equal footing, then RLUIPA will likely violate the neutrality prong of the *Lemon* test.[17]

The constitutional test that courts apply when they are required to decide whether a law violates the Free Exercise Clause of the First Amendment has not been as clear as the Establishment Clause's *Lemon* test. In spite of this, the cases of *Sherbert v. Verner*[18] and *Wisconsin v. Yoder*[19] offer a good starting point for the discussion of the test courts should apply when faced with a Free Exercise claim. In *Sherbert*, the Court articulated a two-part strict scrutiny test to determine whether a law violates an individual's Free Exercise rights.[20] First, the plaintiff must establish that the law imposed a substantial burden on religious exercise.[21] After the plaintiff meets this burden, the government must then show a compelling interest to justify that burden on the plaintiff's right to free exercise.[22] The Court reinforced this test in *Yoder* when it said, "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."[23]

The case of *Employment Division, Department of Human Resources v. Smith*, however, undid this approach.[24] In *Smith*, the Supreme Court of the United States considered whether "the Free Exercise Clause of the First Amendment permits the State of Oregon to include religiously inspired peyote use within the reach of its general criminal prohibition on use of that drug . . . ."[25] The petitioners in *Smith* were fired from their jobs for ingesting peyote during a religious ceremony. At the time, the use of peyote was prohibited under Oregon's drug laws.[26] When the petitioners tried to claim unemployment benefits from the state, their claim

17. *See* Westchester Day Sch. v. Vill. of Mamaroneck, 386 F.3d 183, 188-90 (2d Cir. 2004).

18. 374 U.S. 398 (1963).

19. 406 U.S. 205 (1972).

20. ROTUNDA & NOWAK, *supra* note 10, § 21.8.

21. *Sherbert*, 374 U.S. at 403; *see also id.*

22. *Sherbert*, 374 U.S. at 406; *see also* ROTUNDA & NOWAK, *supra* note 10, § 21.8.

23. *Yoder*, 406 U.S. at 215; *see also* Scott David Godshall, *Land Use Regulation and the Free Exercise Clause*, 84 COLUM. L. REV. 1562, 1572-73 (1984). (At the time this article was written, the *Sherbert/Yoder* test was controlling on Free Exercise claims. This article discusses the cases together and the test that they articulate.)

24. 494 U.S. 872 (1990).

25. *Id.* at 874.

26. *Id.*

was denied because they were fired for work-related misconduct.[27] The Court held that the Oregon prohibition of sacramental peyote use could survive a constitutional challenge under the Free Exercise Clause.[28] Moreover, *Smith* established that "valid and neutral laws of general applicability" that have an incidental effect of burdening religion are evaluated using rational basis scrutiny.[29] Strict scrutiny still applies, however, if the action is a "hybrid" action combining a Free Exercise claim with another constitutional claim, or if the law is not a neutral law of general applicability—in other words, if the law is targeted at religion.[30] Some commentators have argued that *Smith* does not apply to land use laws because land use laws, by nature, are not neutral laws of general applicability.[31] However, courts seem to disagree and have applied *Smith* in zoning and landmark preservation cases.[32]

In response to *Smith*, Congress took action and passed the Religious Freedom Restoration Act (RFRA).[33] Through RFRA, Congress explicitly sought to restore the strict scrutiny test articulated in *Sherbert* and *Yoder* to laws that were challenged as violative of the Free Exercise Clause. To avoid confusion regarding its intention, Congress clearly stated, "[t]he purposes of this act are–(1) to restore the compelling interest test set forth in *Sher-*

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27. *Id.*

28. *Id.* at 893.

29. *Id.* at 879-85.

30. *Id.* at 881 ("The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press . . . .") (citations omitted); Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 546 (1993) ("A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny. To satisfy the commands of the First Amendment, a law restrictive of religious practice must advance 'interests of the highest order' and must be narrowly tailored in pursuit of those interests.") (citations omitted).

31. *See* Roman P. Storzer & Anthony R. Picarello, Jr., *The Religious Land Use and Institutionalized Persons Act of 2000: A Constitutional Response to Unconstitutional Zoning Practices*, 9 GEO. MASON L. REV. 929 (2001); Catherine Maxson, *"Their Preservation is Our Sacred Trust"—Judicially Mandated Free Exercise Exemptions to Historic Preservation Ordinances under* Employment Division v. Smith, 45 B.C. L. REV. 205 (2003); Sara Smolik, Note, *The Utility and Efficacy of the RLUIPA: Was it a Waste?*, 31 B.C. ENVTL. AFF. L. REV. 723 (2004).

32. *See* DOUGLAS W. KMIEC, ZONING AND PLANNING DESKBOOK § 7:46 (2d ed. 2001); C.L.U. v. City of Chicago, 157 F. Supp. 2d 903, 914 (N.D. Ill. 2001) (applying *Smith* to a Free Exercise challenge of a zoning law); St. Bartholomew's Church v. City of New York, 914 F.2d 348 (2d Cir. 1990) (applying *Smith* to a Free Exercise challenge of a landmark preservation law).

33. Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb to 2000bb-4.

bert v. Verner and *Wisconsin v. Yoder* and to guarantee its application in all cases where free exercise of religion is substantially burdened."[34]

In reestablishing strict scrutiny review of Free Exercise claims, Congress relied on its enforcement powers in section five of the Fourteenth Amendment to make RFRA applicable to the states.[35] RFRA was short lived, however, and the Court in *City of Boerne v. Flores*[36] struck down RFRA as applied to the states. The Court held that RFRA was beyond the scope of authority granted to Congress in section five of the Fourteenth Amendment.[37] In response, Congress passed RLUIPA, a more refined and narrow form of RFRA.[38]

III. THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT

A. The Provisions of the Religious Land Use and Institutionalized Persons Act

In the eloquent words of Judge Pallmeyer of the District Court for the Northern District of Illinois:

> Few principles are more venerable or more passionately held in American society than those of local control over land use and the right to assemble and worship where one chooses. On occasion, these principles conflict, and the right to assemble in a location of choice must be balanced against the need of a city to continue to grow economically, to provide adequate municipal services to its residents, and to continue to attract businesses and consumers.[39]

RLUIPA, through its special consideration of the burdens that state and municipal laws place on religion, seeks to address the important issue articulated by Judge Pallmeyer. RLUIPA was in-

34. 42 U.S.C. § 2000bb.

35. *See* City of Boerne v. Flores, 521 U.S. 507, 516 (1997).

36. *Id.* at 531.

37. *Id.* It is worth mentioning that RFRA is still valid as applied to the federal government. The Court in *City of Boerne* held that Congress exceeded its authority under section 5 of the Fourteenth Amendment in enacting RFRA and enforcing its provisions on the states. *Id.* Under article I, section 8, of the United States Constitution, however, Congress has the authority to apply RFRA to the federal government. KMIEC, *supra* note 32, § 7.46 n.50.

38. *See* Storzer & Picarello, Jr., *supra* note 31, at 943-46.

39. Vineyard Christian Fellowship of Evanston, Inc. v. City of Evanston, 250 F. Supp. 2d 961, 963 (2003).

troduced in both the House of Representatives and the Senate on July 13, 2000.[40] RLUIPA was virtually unopposed, and Congress passed the Act pursuant to its authority under the Commerce Clause, the Spending Clause, and section five of the Fourteenth Amendment[41] on July 26, 2000.[42] President Clinton signed RLUIPA into law on September 22, 2000.[43] RLUIPA is comprised of two prominent sections. The first is the land use provision,[44] and the second is the institutionalized persons provision.[45] The land use provision of RLUIPA states that:

> No government shall impose or implement a land use regulation in a manner that imposes a *substantial burden* on the religious exercise of a person . . . unless the government demonstrates that . . . the burden . . . (A) is in furtherance of a compelling government interest; and (B) is the least restrictive means of furthering that compelling governmental interest.[46]

Furthermore, the land use provision of RLUIPA requires the government to treat religious land uses on equal terms with non-religious land uses.[47] RLUIPA also prohibits the government from discriminating against institutions on the basis of religion or religious denomination.[48] Finally, RLUIPA precludes the government from totally excluding or unreasonably limiting religious land uses from a jurisdiction.[49] For the purposes of RLUIPA, the government defines the term "land use regulation" as "a zoning or landmarking law, or the application of such a law, that limits or restricts a claimant's use or development of land . . . ."[50] Under RLUIPA, the plaintiff bears the initial burden of persuasion and is

40. Kearns, *supra* note 7, at 3.
41. *See* 42 U.S.C. § 2000cc(a)(2).
42. *Id.*
43. *Id.*
44. 42 U.S.C. § 2000cc.
45. *Id.* § 2000cc-1. Although an in-depth discussion of the institutionalized persons provision is beyond the scope of this article, this clause prohibits the government from imposing a substantial burden on the religious exercise of persons residing in or confined to an institution without furthering a compelling government interest through the least restrictive means of accomplishing that interest. *Id.* This provision has been invoked most often by persons confined in prisons. *See, e.g.*, Mayweathers v. Newland, 314 F.3d 1062 (9th Cir. 2002); Charles v. Verhagen, 348 F.3d 601 (7th Cir. 2003).
46. 42 U.S.C. § 2000cc(a)(1)(A)-(B) (emphasis added).
47. *Id.* § 2000cc(b)(1).
48. *Id.* § 2000cc(b)(2).
49. *Id.* § 2000cc(b)(3)(A)-(B).
50. *Id.* § 2000cc-5(5).

required to show that the government has imposed a substantial burden on plaintiff's exercise of religion.[51] After the plaintiff meets this burden, the government then has the burden of proving that the restriction placed on religious land use furthers a compelling government interest and the regulation is the least restrictive means of achieving that compelling interest.[52]

The *C.L.U.B.* case, citing RLUIPA's legislative history, indicates that the substantial burden standard under RLUIPA is a codification of existing First Amendment jurisprudence.[53] Indeed, one can infer from the language of the statute that RLUIPA was meant as a codification of existing First Amendment jurisprudence.[54] RLUIPA does, however, make one clear break with traditional First Amendment jurisprudence in that it defines religious exercise in broader terms than prior definitions of religious exercise.[55] Under traditional First Amendment jurisprudence, religious exercise was narrowly defined as activities that were central to religious practice, or actions that were compelled by a religion.[56] Under RLUIPA, religious exercise is defined to include not only activities central to religious practice, but also "[t]he use, building, or conversion of real property for the purpose of religious exercise . . . [if the] person or entity that uses or intends to use the property [uses the property] for that purpose."[57] It is precisely because of this break with traditional First Amendment jurisprudence that a narrow view of the substantial burden standard is required.[58] RLUIPA is only implicated when a law rises to the

51. *Id.* § 2000cc-2(b).

52. *Id.*

53. C.L.U.B. v. City of Chicago, 342 F.3d 752, 760-61 (7th Cir. 2003) ("The term 'substantial burden' as used in this Act is not intended to be given any broader interpretation than the Supreme Court's articulation of the concept of substantial burden or religious exercise." (quoting 146 CONG. REC. 7774-01, 7776 (2000))).

54. 42 U.S.C. § 2000cc-2(b).

55. *Compare* 42 U.S.C. § 2000cc-5(7)(B), *with C.L.U.B.*, 342 F.3d at 760-61 (citing various prior cases defining religious practice including Sherbert v. Verner, 374 U.S. 398 (1963), Thomas v. Review Bd. of the Ind. Emp. Sec. Div., 450 U.S. 707 (1981), and Hernandez v. Comm'r, 490 U.S. 680 (1989) ("religious exercise as 'the observation of a central religious belief or practice'") (citation omitted)).

56. *C.L.U.B.*, 342 F.3d at 760-61 (citing *Sherbert*, 374 U.S. at 404 ("religious exercise as adherence to the central precepts of a religion"), *Thomas*, 450 U.S. at 718 ("religious exercise as behavior and beliefs compelled by a particular religion"), and *Hernandez*, 490 U.S. at 699 ("religious exercise as 'the observation of a central religious belief or practice'")).

57. 42 U.S.C. § 2000cc-5(7)(B).

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

level of imposing a substantial burden on religious exercise.[59] In several cases, even where there is a law in place that may limit the use of land for a religious purpose, RLUIPA will not be applicable if the law is not found to substantially burden religion.[60]

B. The Constitutionality of the Religious Land Use and Institutionalized Persons Act

Although there has been a vigorous debate about the facial constitutionality of RLUIPA,[61] a recent decision by the United States Supreme Court may have quieted the debate.[62] In *Cutter v. Wilkinson*, the United States Supreme Court upheld the institutionalized persons provision of RLUIPA as constitutionally valid on its face under the Establishment Clause.[63] In so doing, the unanimous Court, speaking through Justice Ginsburg, reasoned that RLUIPA, on its face, merely "alleviates exceptional government-created burdens on private religious exercise."[64] Despite the fact that *Cutter* was a case brought under the institutionalized persons provision, its result is likely to extend to facial challenges

59. 42 U.S.C. § 2000cc(a). *See also* Wendie L. Kellington, Historical Evolution of RLUIPA, Land Use Institute: Planning, Regulation, Litigation, Eminent Domain, and Compensation, American Law Institute–American Bar Association Continuing Legal Education (Aug. 26-28, 2004), *available at* SK002 ALI-ABA 797.

60. *See, e.g.*, San Jose Christian Coll. v. City of Morgan Hill, 360 F.3d 1024 (9th Cir. 2004) (holding that the City of Morgan Hill's zoning ordinance did not impose a substantial burden on religion and adopting the substantial burden standard articulated by the Seventh Circuit in *C.L.U.B*); Konikov v. Orange County, 302 F. Supp. 2d 1328 (M.D. Fl. 2004) (adopting the substantial burden test articulated by the Seventh Circuit in *C.L.U.B.* and granting the defendant-county's motion for summary judgment on the plaintiff's claim that a county zoning ordinance violated RLUIPA because the zoning ordinance did not impose a substantial burden on religious exercise).

61. *Compare* Storzer & Picarello, Jr., *supra* note 31 (arguing that RLUIPA is constitutional under section 5 of the Fourteenth Amendment, the Commerce Clause, the Spending Clause, and the Establishment Clause), *and* Shawn Jensvold, Comment, *The Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA): A Valid Exercise of Congressional Power?*, 16 BYU J. PUB. L. 1 (2001) (arguing that RLUIPA is constitutional under section 5 of the Fourteenth Amendment), *with* Joshua R. Geller, *The Religious Land Use and Institutionalized Persons Act of 2000: An Unconstitutional Exercise of Congress's Power Under Section Five of The Fourteenth Amendment*, 6 N.Y.U. J. LEGIS. & PUB. POL'Y 561 (2002/2003) (arguing that RLUIPA is unconstitutional under section 5 of the Fourteenth Amendment), *and* Ada-Marie Walsh, *Religious Land Use and Institutionalized Persons Act of 2000: Unconstitutional and Unnecessary*, 10 WM. & MARY BILL RTS. J. 189 (2001) (arguing that RLUIPA is invalid under the Establishment Clause, the Tenth Amendment, and the Commerce Clause).

62. Cutter v. Wilkinson, 125 S. Ct. 2113 (2005).

63. *Id.* at 2117.

64. *Id.* at 2121.

of the land use provision.[65] Notwithstanding any other potential arguments against the facial constitutionality of the land use provision, such as commerce and spending clause arguments, this article accepts the facial constitutionality of the entire statute.[66] The issue considered here is the interpretation of the substantial burden test and its implication on the constitutionality of RLUIPA as the statute is applied.

IV. *CIVIL LIBERTIES FOR URBAN BELIEVERS V. CITY OF CHICAGO*

The plaintiffs in *C.L.U.B.* were an association of Chicago area churches; the Civil Liberties for Urban Believers; and five individual member churches, which were directly impacted by Chicago's zoning laws.[67] The defendant in *C.L.U.B.* was the City of Chicago. The *C.L.U.B.* case raised the issue of whether Chicago's zoning ordinance imposed a substantial burden on the religious exercise of the plaintiffs.[68] Under Chicago's zoning laws in place at the time the action was filed, zoning districts in the city consisted of residential zones, business zones, commercial zones, and manufacturing zones.[69] Most of the land available for development in the city was zoned residential.[70] Religious land uses were zoned as-of-right[71] in residential districts and were designated as special uses[72] in all business and commercial districts relevant to the case.[73] Chicago's zoning ordinance required all special uses, regardless of the nature of the use, to apply to the Zoning Board of

65. David L. Hudson, Jr., A Lower Bar to Religion Behind Bars: Religious Practice Law for Inmates; Path Cleared for Land Use Provision, *available at* http://www.abanet.org/journal/ereport/jn3relig.html (last visited Aug. 17, 2005).

66. *Id.*

67. C.L.U.B. v. City of Chicago, 342 F.3d 752, 755 (7th Cir. 2003) (the five member-church plaintiffs were Christ Center Church, Christian Bible Church, Mount Zion Church, Christian Covenant Church, and His Word Church).

68. *Id.* at 760-61.

69. *Id.* at 755-59.

70. *Id.*

71. As-of-right use is defined as "a use of land that is permitted as a principal use in a zoning district." JOHN R. NOLON, WELL GROUNDED: USING LOCAL LAND USE AUTHORITY TO ACHIEVE SMART GROWTH 446 (2001).

72. "*Special uses* are uses that, because of their widely varying land use and operational characteristics, require case-by-case review in order to determine whether they will be compatible with surrounding uses and development patterns. Case-by-case review is intended to ensure consideration of the *special use's* anticipated land use, site design and operational impacts." CHI., ILL., ZONING ORDINANCE § 17-13-0901 (2004).

73. *C.L.U.B.*, 342 F.3d at 755-59.

Appeals (hereinafter "ZBA") for a special use permit.[74] In the midst of the litigation of this case, Chicago amended its zoning laws in February 2000 to ensure that religious land uses and other assembly-oriented land uses (such as clubs, meeting halls, and lodges) were treated equally in business, commercial, and manufacturing zones.[75] Additionally,

> [the] amendments . . . (i) exempt[ed] churches from the requirement that a Special Use applicant affirmatively demonstrate that the proposed use 'is necessary for the public convenience at that location' and (ii) provide that a Special Use permit shall automatically issue in the event that the ZBA fails to render a decision within 120 days of the date of application.[76]

The plaintiffs contended that Chicago's zoning laws violated their rights under RLUIPA.[77] Additionally, the plaintiffs claimed that the Chicago zoning laws violated their First Amendment rights to free exercise of religion, speech, and assembly, and their Fourteenth Amendment rights to equal protection and due process.[78] The five individual church plaintiffs in this case had several attributes in common: Each of the five individual member church plaintiffs were located in business or commercial zones throughout Chicago;[79] each was denied a special use permit upon application or rescinded their application for a special use permit to operate a church because of community opposition;[80] and each

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74. *Id.*

75. *Id.* at 758.

76. *Id.*

77. *Id.* Actually, this case was filed before RLUIPA was signed into law by President Clinton in 2000. Initially, the case was filed under the RFRA which, as mentioned above, was struck down by the Court in the *City of Boerne v. Flores*. City of Boerne v. Flores, 521 U.S. 507, 516 (1997). The appellant/plaintiffs amended their complaint to remove their claim under RFRA when it was held unconstitutional as applied to the states. *C.L.U.B.*, 342 F.3d at 758. When RLUIPA was signed into law, the appellant/plaintiffs again amended their complaint to include a claim under RLUIPA. *Id.*

78. *C.L.U.B.*, 342 F.3d at 763-68. The Seventh Circuit found each of C.L.U.B.'s constitutional claims without merit and ruled in favor of the City of Chicago. *Id.* at 764-66.

79. *Id.* at 756-58 (Christ Center Church was located in a commercial district; Christian Bible Church was located in a business district; Mount Zion Church was located in a commercial district; Christian Covenant Church was located in a commercial district; and His Word Church was located in a commercial district).

80. *Id.* at 756-57 (Christ Center Church was denied a special use permit; Christian Bible Church was denied a special use permit; Mount Zion Church withdrew its application for a special use permit due to community opposition; Christian Covenant Church was ordered to stop using leased space as a church and in turn decided not to

had found a location in which they were permitted to operate a church as a special use or as-of-right.[81]

The litigation in *C.L.U.B.* began in 1994, and a very long, complex history with several decisions of the district court has since ensued.[82] The decision relevant to this casenote is the decision written by Judge Hibbler of the District Court for the Northern District of Illinois on March 30, 2001.[83] It was in this decision that the district court considered the plaintiffs' RLUIPA claim for the first time.[84] On the plaintiffs' RLUIPA claim, the court easily and with little discussion granted the city's motion for summary judgment.[85] In so doing, the court stated that RLUIPA was not implicated in this case because the Chicago Zoning Ordinance as amended did not impose a substantial burden on religious exercise.[86]

The Seventh Circuit Court of Appeals reviewed the district court's grant of summary judgment in favor of the city and affirmed the determination of the district court.[87] In affirming the district court's grant of summary judgment, the Seventh Circuit

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purchase the building out of fear that a special use permit would not be granted; and His Word Church withdrew its application for a special use permit as a result of a rezoning of the building where the church was leasing space).

81. *Id.* (Christ Center Church eventually obtained a special use permit and operates in a commercial district; Christian Bible Church obtained a special use permit and operates in a business district; Mount Zion Church owns and meets at a church in a commercial district; Christian Covenant Church owns and meets at a church in a residential district where churches are allowed as-of-right; and His Word Church also meets in a church which they own and operate in a residential district).

82. C.L.U.B. v. City of Chicago, No. 94 C 6151, 1996 U.S. Dist. LEXIS 2230 (N.D. Ill. 1996), *rev'd and remanded sub nom.* Iglesia De La Biblia Abierta v. Banks, 129 F.3d 899 (7th Cir. 1997), *reh'g denied*, No. 97-1041, 1997 U.S. App. LEXIS 34546 (7th Cir. 1997), *summary judgment granted sub nom.* C.L.U.B. v. City of Chicago, 157 F. Supp. 2d 903 (N.D. Ill. 2001), *reconsideration denied*, No. 94 C 6151, 2002 U.S. Dist. LEXIS 5913 (N.D. Ill. 2002), *aff'd*, 342 F.3d 752 (7th Cir. 2003), *reh'g en banc denied*, No. 01-4030, 2003 U.S. App. LEXIS 24176 (7th Cir. 2003), *cert. denied*, 541 U.S. 1096 (2004).

83. C.L.U.B. v. City of Chicago, 157 F. Supp. 2d 903 (N.D. Ill. 2001).

84. *Id.* at 916-17. In this opinion, the court also dealt with the plaintiffs' Free Exercise claim and held that *Smith* applied because the zoning ordinances were laws of general application because they regulated the use of land, not religion. In light of the determination that *Smith* applies, the court held that "the Zoning Ordinance and related provisions are valid neutral and generally applicable zoning regulations that impose no substantial burden on the free exercise of religion." *Id.* at 915.

85. *Id.*

86. *Id.* at 916-17.

87. *C.L.U.B.*, 342 F.3d at 768.

articulated a standard for the substantial burden test under RLUIPA.[88] The court stated that:

> [I]n the context of RLUIPA's broad definition of religious exercise, a land-use regulation that imposes 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 regulation's jurisdiction generally—effectively impracticable.[89]

By adopting this test, the Seventh Circuit rejected the broader substantial burden test that it adopted when analyzing a claim under RFRA.[90] The court reasoned that RLUIPA's expansive view with regard to religious exercise necessitates a narrower reading of the substantial burden standard because applying a more extensive definition of "substantial burden" would render the word "substantial" meaningless.[91]

The appellants argued that the high cost and scarcity of land coupled with the process of obtaining a special use permit caused a substantial burden on their religious exercise.[92] The court rejected this argument and reasoned that the obstacles that the plaintiffs cited were "incidental to any high-density urban land use";[93] therefore, religious land uses are on equal footing with other uses allowed by special permit.[94] The court went on to reason that if RLUIPA was to apply in this case, it would favor religious land uses over other land uses allowed by special permit.[95] Such favoritism could violate the First Amendment's Establishment Clause.[96]

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88. *Id.* at 761.

89. *Id.*

90. *Id.* ("[W]ithin the meaning of RFRA, a substantial burden on religious exercise 'is one that forces adherents of a religion to refrain from religiously motivated conduct, inhibits or constrains conduct or expression that manifests a central tenant of a person's religious beliefs, or compels conduct or expression that is contrary to those beliefs.'" (quoting Mack v. O'Leary, 80 F.3d 1175, 1179 (7th Cir. 1996), *vacated on other grounds*, 522 U.S. 801 (1997))).

91. *Id.* (the court reasoned that because the definition of religious exercise was so expansive, a broad interpretation of substantial burden would cause any burden, no matter how minor, to be "substantial").

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* at 762.

96. *Id.* at 761; *see also* Westchester Day Sch. v. Vill. of Mamaroneck, 386 F.3d 183, 189 (2d Cir. 2004).

V. CASES THAT FOLLOW AND CASES THAT DEPART FROM THE SUBSTANTIAL BURDEN STANDARD ARTICULATED IN THE *C.L.U.B.* CASE

Several courts have followed the restrictive view of the substantial burden standard, such as the Seventh Circuit's application in the *C.L.U.B.* case,[97] and several courts have departed from the practical analysis of the Seventh Circuit.[98] The cases extending the reasoning in *C.L.U.B.* recognize the practical implications on land use law and the Establishment Clause that flow from an expansive view of the substantial burden standard under RLUIPA.[99] Those that diverge from the Seventh Circuit effectively state that any land use law that burdens religion creates a substantial burden that implicates RLUIPA.[100]

A. Cases that Follow the Seventh Circuit's Substantial Burden Standard

San Jose Christian College v. City of Morgan Hill[101] is an example of a case that follows the reasoning of the substantial burden test articulated in *C.L.U.B.* In that case, San Jose Christian College sought to change land originally dedicated for use as a hospital in a planned unit development (PUD) to land associated with the college.[102] Initially, the school submitted a plan showing a new gymnasium, playing fields, and a theatre/chapel that would eventually accommodate 1200 students.[103] When the city asked

97. *See* Corp. of the Presiding Bishop v. City of W. Linn, 86 P.3d 1140, 1152-54 (Or. Ct. App. 2004) (discussing at length the Seventh Circuit's decision in *C.L.U.B.* and subsequent decisions under RLUIPA that follow the Seventh Circuit's reasoning in *C.L.U.B.*, including San Jose Christian Coll. v. City of Morgan Hill, 360 F.3d 1024 (9th Cir. 2004)); *see also* Vineyard Christian Fellowship of Evanston, Inc. v. City of Evanston, 250 F. Supp. 2d 961, 991 (N.D. Ill. 2003); *see also* Konikov v. Orange County, 302 F. Supp. 2d 1328 (M.D. Fla. 2004), *aff'd in part, rev'd in part on other grounds*, 410 F.3d 1317 (11th Cir. 2005).

98. *See Corp. of the Presiding Bishop*, 86 P.3d at 1154 (discussing at length the Seventh Circuit's decision in *C.L.U.B.* and subsequent decisions under RLUIPA that depart from the substantial burden standard articulated in *C.L.U.B.* including Elsinore Christian Ctr. v. City of Lake Elsinore, 291 F. Supp. 2d 1083 (C.D. Cal. 2003)); *see also* Murphy v. Zoning Comm'n, 148 F. Supp. 2d 173 (D. Conn. 2001); *see also* Congregation Kol Ami v. Abington Twp., 2004 U.S. Dist. LEXIS 16397, at *1 (E.D. Pa. 2004).

99. *See Konikov*, 302 F. Supp. 2d at 1345.

100. *Congregation Kol Ami*, No. 01-1919, 2004 U.S. Dist. LEXIS 16387, at *26-29.

101. San Jose Christian Coll. v. City of Morgan Hill, 360 F.3d 1024 (9th Cir. 2004).

102. *Id.* at 1027-28.

103. *Id.*

for a more specific application detailing the college's plans, the college scaled back its plans to include only the use of current buildings for a population of 400 students.[104] The city denied the college's application because the college did not comply with the city's application requirements.[105] In response to the city's denial, the college brought suit under, *inter alia*, RLUIPA.[106] The district court granted summary judgment in favor of Morgan Hill, holding that RLUIPA was not "triggered" because the zoning law did not impose a substantial burden on religious exercise.[107] The Ninth Circuit affirmed and held that "for a land use regulation to impose a 'substantial burden' it must be 'oppressive' and to a 'significantly great' extent."[108] In light of this interpretation, the court stated that in this case the college "is simply adverse to complying with the PUD ordinance requirements";[109] and the city's requirement that the college submit a *complete* application is not a burden on religious exercise.[110] The court went on to point out that the holding in this case is "entirely consistent with the Seventh Circuit's recent ruling in [*C.L.U.B.*]."[111]

Following suit behind the Seventh and Ninth Circuits, the District Court for the Middle District of Florida adopted the Seventh Circuit's approach to RLUIPA's substantial burden standard in *Konikov v. Orange County*.[112] In *Konikov*, the plaintiff owned land within an Orange County subdivision, which was zoned for residential use.[113] In Orange County, religious land uses were permitted as-of-right in several districts; however in residential districts, religious land uses were only permitted if special exception approval was obtained.[114] Several neighbors complained to the local zoning enforcement agent that the plaintiff was operating a place of worship at his home without special exception approval.[115] The Code Enforcement Board held a hearing and decided that the plaintiff was, in fact, "operating a religious organ-

104. *Id.* at 1028-29.
105. *Id.* at 1029.
106. *Id.*
107. San Jose Christian Coll. v. City of Morgan Hill, No. C01-20857(RMW), 2001 U.S. Dist. LEXIS 23162, at *15 (N.D. Ca. 2001), *aff'd*, 360 F.3d 1024 (9th Cir. 2004).
108. *San Jose Christian Coll.*, 360 F.3d at 1034.
109. *Id.* at 1035.
110. *Id.* at 1334-35.
111. *Id.*
112. Konikov v. Orange County, 302 F. Supp. 2d 1328 (M.D. Fla. 2003).
113. *Id.* at 1331-32.
114. *Id.* at 1332.
115. *Id.* at 1332-35.

ization from a residential property without special exception approval and thus was in violation of [the zoning code]."[116] Rather than applying for special exception approval, the plaintiff filed this action claiming that the county zoning ordinance violated, *inter alia*, RLUIPA.[117] On the plaintiff's RLUIPA claim, the court held that the protections of RLUIPA were not implicated because the plaintiff was unable to show that the special use exception requirement constituted a substantial burden under the statute.[118] The court here fully adopted the substantial burden test and rationale of the Seventh Circuit in *C.L.U.B.*, concluding that a broad approach to the substantial burden standard would render the word "substantial" meaningless.[119]

Although the Second Circuit has not formally adopted an interpretation of the substantial burden test under RLUIPA, the case of *Westchester Day School v. Village of Mamaroneck* offers an interesting discussion of RLUIPA.[120] In that case, a religious school brought suit against the Village of Mamaroneck alleging that the village's denial of a special use permit for which the school applied violated RLUIPA.[121] The school submitted an application for a special use permit to the village to enable the school to build additional buildings and improve existing buildings.[122] Part of the improvements to the school would be used for secular purposes and part of the improvements would be used for religious purposes.[123] The village, after a suit involving issues under New York's State Environmental Quality Review Act ("SEQRA"), denied the special use permit because of traffic and parking concerns.[124] The district court granted summary judgment in favor of the plaintiff, Westchester Day School, and ordered that the village grant the plaintiff a special use permit.[125] The district court reasoned that the denial of the special use permit did, in fact, impose a substantial burden on religion because the present facilities limited the ability of the school's students to gather, pray, and be edu-

116. *Id.* at 1336.
117. *Id.*
118. *Id.* at 1344.
119. *Id.*
120. Westchester Day Sch. v. Vill. of Mamaroneck, 386 F.3d 183 (2d Cir. 2004).
121. *Id.* at 184-85.
122. *Id.* at 185.
123. *Id.*
124. *Id.* at 185-86.
125. Westchester Day Sch. v. Vill. of Mamaroneck, 280 F. Supp. 2d 230, 243 (S.D.N.Y. 2003).

cated.[126] In finding that the village's denial of the special use permit did impose a substantial burden on the religious exercise of the students at the school, the court went on to hold that the traffic and parking concerns articulated by the village's Zoning Board of Appeals were not sufficient to meet the compelling interest test under RLUIPA.[127] Because the court did not find a compelling state interest, the district court did not need to address the last part of the RLUIPA standard—whether the village's action was the least restrictive means of achieving a compelling state interest.[128] Despite this finding, the court, in dicta, expressed doubt that it would be able to find that the *complete* denial of the special use permit would meet the least restrictive means standard.[129]

On appeal, the Second Circuit vacated and remanded the judgment, finding that summary judgment was not appropriate at this stage of the lawsuit.[130] Furthermore, the Second Circuit commented on the district court's interpretation of the substantial burden test under RLUIPA.[131] In so commenting, the Second Circuit expressed doubt that a substantial burden standard as broad as the one applied by the district court, which, as mentioned above, encompassed the religious and non-religious activities of the school under the banner of religion because the school was a religious school, would withstand an Establishment Clause challenge.[132] The court reserved judgment on this issue here, but by discussing RLUIPA's place in the narrow zone between the Establishment Clause and the Free Exercise Clause, hinted at the fact that it would adopt a test similar to the test adopted in *C.L.U.B.* to save RLUIPA from violating the Establishment Clause.[133]

To summarize, the *C.L.U.B.* case and the *San Jose Christian College* case clearly articulate a substantial burden standard under RLUIPA that will withstand Establishment Clause scrutiny under the *Lemon* test.[134] This logic, as we have seen, was also adopted in the *Konikov* case.[135] Finally, although not adopted

126. *Id.* at 241-42.
127. *Id.*
128. *Id.* at n.9.
129. *Id.*
130. Westchester Day Sch. v. Vill. of Mamaroneck, 386 F.3d 183, 185 (2d Cir. 2004).
131. *Id.* at 189.
132. *Id.*
133. *Id.* at 189-90.
134. C.L.U.B. v. City of Chicago, 342 F.3d 752, 761 (7th Cir. 2003); San Jose Christian Coll. v. City of Morgan Hill, 360 F.3d 1024, 1045 (9th Cir. 2004).
135. Konikov v. Orange County, 302 F. Supp. 2d 1328, 1344 (M.D. Fla. 2003).

by the Second Circuit in *Westchester Day School*, the court hinted that the substantial burden test must impose a standard much like that adopted in *C.L.U.B.*, *San Jose Christian College*, and *Konikov* to ensure that RLUIPA, as applied, is constitutional under the Establishment Clause.[136] The next section of this article will examine the cases that have departed from the standard articulated in *C.L.U.B.*, and have imposed a more lenient form of the substantial burden test under RLUIPA.

B. Cases that Depart from the Seventh Circuit's Substantial Burden Standard

Contrary to the approach adopted by the Seventh Circuit in *C.L.U.B.*, in *Congregation Kol Ami v. Abington Township*,[137] the Eastern District of Pennsylvania adopted a broad interpretation of the substantial burden test under RLUIPA. The defendant there was Abington Township, Pennsylvania. Abington's zoning laws did not allow religious land uses in R-1 zoning districts (residential districts) as-of-right or by special exception unless the Zoning Hearing Board of Adjustments of Abington (ZHA) granted a variance.[138] In Abington, religious land uses are allowed as-of-right in CS districts (community service districts) and M districts (mixed use districts).[139] Additionally, religious land uses are allowed by special exception (which requires the owner to demonstrate that the land use is consistent with the public interest before it is approved), in A-O districts (apartment-office districts).[140]

The plaintiff in *Congregation Kol Ami* was a Reform Jewish Synagogue that had been operating as a nonprofit corporation in the Philadelphia area for approximately ten years.[141] Plaintiff entered into an agreement to purchase land in an R-1 zoning district in Abington Township.[142] After entering into the agreement, the plaintiff filed an application with the ZHA and requested a vari-

136. *Westchester Day Sch.*, 386 F.3d at 189-90.

137. Congregation Kol Ami v. Abington Twp., No. 01-1919, 2004 U.S. Dist. LEXIS 16397, at *1 (E.D. Pa. 2004).

138. *Id.* at *6. Although religious land uses and other land uses are not allowed as-of-right or by special exception, parties interested in using the land for such purposes may apply for variances within R-1 zoning district. *Id.* In order to be granted a variance, the applicant must show an unnecessary hardship, making the grant of a variance an exception rather than the normal course of events. *Id.*

139. *Id.* at *7.

140. *Id.*

141. *Id.* at *3.

142. *Id.* at *9.

ance to build a temple that would facilitate "*Shabbat* services on alternate Fridays and Saturdays, Hebrew classes on Wednesdays, and religious classes for two hours on Sunday mornings."[143] The ZHA denied the plaintiff's application for a variance to build the synagogue finding that the plaintiff had not met the heavy burden imposed by the variance standard.[144] Rather than filing an appeal, plaintiffs brought an action seeking injunctive, declaratory, and compensatory relief under, *inter alia*, RLUIPA by claiming that the Abington zoning ordinance imposed a substantial burden on the free exercise of religion.[145]

Although the zoning ordinance did not impose a substantial burden on the free exercise of religion under traditional First Amendment jurisprudence,[146] the district court held that "RLUIPA imposes a broad test for determining what is a substantial burden."[147] Because the court found that the substantial burden standard is broader under RLUIPA than under traditional First Amendment jurisprudence, it held that the zoning ordinance did impose a substantial burden on the plaintiff's free exercise.[148] Although the court did not articulate a clear test for other courts to follow when interpreting the substantial burden language of RLUIPA, it reasoned that Congress intended the broad interpretation of substantial burden because of the broad definition of religious exercise under the statute.[149] It then cited various cases that held that municipal ordinances imposed a substantial burden on the free exercise of the plaintiff.[150]

The court further held that RLUIPA was constitutional under the Fourteenth Amendment, the Commerce Clause, the Tenth Amendment, and the Establishment Clause.[151] When analyzing RLUIPA under the Establishment Clause, the court applied the *Lemon* test.[152] It held that RLUIPA does not violate the Estab-

143. *Id.*
144. *Id.*
145. *Id.* at *10.
146. *Id.* at *13.
147. *Id.* at *25.
148. *Id.*
149. *Id.* at *26-27.
150. *Id.* at *26-29 (citing Cottonwood Christian Ctr. v. Cypress Redevelopment Agency, 218 F. Supp. 2d 1203 (C.D. Cal. 2002); DiLaura v. Ann Arbor Charter Twp., 30 F. App'x 501 (6th Cir. 2002); Murphy Zoning Comm'n v. Town of New Millford, 148 F. Supp. 2d 173 (D. Conn. 2001)).
151. *Id.* at *26-50.
152. Lemon v. Kurtzman, 403 U.S. 602, 612 (1971) (articulating the test to determine whether a law is violative of the Establishment Clause. The test consists of a

lishment Clause because: (1) RLUIPA has a secular purpose, namely "'to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions'";[153] (2) "RLUIPA does not have the primary effect of advancing religion,"[154] (in other words, RLUIPA is neutral toward religion because it simply alleviates the burden on religion); and (3) "RLUIPA does not create excessive [government] entanglement with [religion.]"[155] If anything, RLUIPA lessens government entanglement with religion because it explicitly defines religious exercise, and local governments no longer need to inquire whether an applicant's activity is "religious exercise" under the First Amendment.[156]

C. Practical Application of Each Standard

In its analysis, the court in *Congregation Kol Ami* failed to realize the practical implications of its broad interpretation of the substantial burden test on the second element of the *Lemon* test. The practical implications of this expansive view were addressed in *C.L.U.B.* and *Westchester Day School*.[157] As the Second Circuit in *Westchester Day School* warned, a broad interpretation of the substantial burden test could lead to the government favoring religious land uses over nonreligious land uses, which would run afoul of the second prong of the *Lemon* test (the neutrality prong) and the Establishment Clause.[158] This is so because of the broad definition of religious exercise under RLUIPA, which includes, for

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three prong analysis and the law must pass each prong of the analysis. The three prongs are (1) "the statute must have a secular legislative purpose"; (2) its "principal or primary effect must be one that neither advances nor inhibits religion"; and (3) the statute must not cause excessive government entanglement with religion) (citations omitted).

153. *Congregation Kol Ami*, 2004 U.S. Dist. LEXIS 16397, at *46 (E.D. Pa. 2004) (quoting Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 335 (1987)).

154. *Id.* at *46-47.

155. *Id.* at *48.

156. *Id.*

157. C.L.U.B. v. City of Chicago, 342 F.3d 752, 761-62 (7th Cir. 2003) (stating that if the court exempted the plaintiff churches from the application requirements under the zoning laws because they pose a substantial burden, RLUIPA would impermissibly put religious land uses at an advantage over all other urban land uses); Westchester Day Sch. v. Vill. of Mamaroneck, 386 F.3d 183, 189 (2d Cir. 2004).

158. *Westchester Day Sch.*, 386 F.3d at 189.

example, the construction of a building.[159] Because religious exercise is defined so broadly, the following scenario illustrates the constitutional problem that RLUIPA may face if the substantial burden test is interpreted too broadly.[160]

Both a religious school and a private, non-religious school seek to add a library[161] to the existing school. The physical conditions of the schools and the land use laws that apply to the schools are identical. The proposed library at each school exceeds the lot coverage required by local zoning laws and, therefore, each school is required to seek an area variance from the municipality in order to add the library. Neither school qualifies for a variance under the statute authorizing local government to grant variances. Under a broad interpretation of the substantial burden test, such as the interpretation applied in *Congregation Kol Ami*, the municipality would be *required* under RLUIPA to allow the religious school to construct the library, while local land use laws would *prohibit* the local government from granting an area variance to the non-religious school. This unequal outcome is so because the court in *Congregation Kol Ami* made it clear that essentially any burden to the use of the land by a religious entity constituted a substantial burden, thereby implicating RLUIPA.[162] Clearly this outcome violates the Establishment Clause because it gives the religious land use an advantage over the secular land use rather than simply placing the two uses on equal footing.

On the other hand, under the test applied by the Seventh Circuit in *C.L.U.B.* and the Ninth Circuit in *San Jose Christian College*, RLUIPA would not be implicated by the hypothetical situation described above because the court would not find a substantial burden. Under the test articulated by the Seventh Circuit, the only "land-use regulation[s] that impose[ ] a substantial burden on religious exercise [are] one[s] that necessarily bear[ ] direct, primary, and fundamental responsibility for rendering re-

159. "The use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose." 42 U.S.C. § 2000cc-5(7)(B).

160. *See generally Westchester Day Sch.*, 386 F.3d at 189 (establishing the basic premise for the hypothetical illustration in this paper); *see also* Walsh, *supra* note 61, at 205 (putting forth a similar hypothetical situation to demonstrate the potential Establishment Clause issue facing RLUIPA).

161. For the purpose of this illustration, the author assumes that the library at the religious school will be used for secular purposes.

162. Congregation Kol Ami v. Abington Twp., No. 01-1919, 2004 U.S. Dist. LEXIS 16397, at *26-29 (E.D. Pa. 2004).

ligious exercise—including the use of real property for the purpose thereof within the regulated jurisdiction generally—effectively impracticable."[163] Under the assumed scenario, the fact that zoning laws do not allow the school to build a secular library does not render the use of the land "effectively impracticable" for religious exercise. Therefore, RLUIPA would not be implicated. RLUIPA would be available to the religious school, however, if it could not carry out the function of religious education in the building as it was currently situated and there was no other feasible location for the school, thereby rendering religious exercise effectively impractical.

The hypothetical illustration above clearly shows that a narrow view of the substantial burden test is in the best interest of local land use authorities and religious entities. The narrow view allows local land use authorities to plan and zone in the best interest of the residents and the community, while offering protection to the religious land use from exclusionary zoning under the guise of some legitimate purpose. In the end, the narrow view offers more protection to religious entities than the broad view. The broad interpretation will inevitably violate the Establishment Clause, leaving religious entities with no strict scrutiny protection unless they present a hybrid claim or can show that the law is not a neutral law of general applicability.[164]

D. Issues and Concerns Raised by RLUIPA Beyond the First Amendment's Establishment Clause

It is worth mentioning that beyond the constraints of the First Amendment, there are other concerns arising out of a broad interpretation of RLUIPA. One major concern is the advent of the "megachurch."[165] "'Megachurches' are defined as churches [or any other religious establishment with similar characteristics] with congregations over 2,000 that provide a multitude of services outside of the traditional Sunday service."[166] Because of the large congregation, numerous services, and the large physical size of the church, congregations find it easiest to establish megachurches in

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

164. *Id.* at 761-62; *Westchester Day Sch.*, 386 F.3d at 189.

165. For a comprehensive discussion of RLUIPA and megachurches, see Jonathan D. Weiss & Randy Lowell, *Supersizing Religion: Megachurches, Sprawl, and Smart Growth*, 21 ST. LOUIS U. PUB. L. REV. 313 (2002). *See also* David B. Zucco, Note, *Super-sized with Fries: Regulation Religious Land Use in the Era of Megachurches*, 88 MINN. L. REV. 416 (2003).

166. Weiss & Lowell, *supra* note 165, at 314.

suburban or exurban areas.[167] Additionally, megachurches are usually developed in residential areas.[168]

While megachurches provide positive community environments for their members, they can pose problems for surrounding communities.[169] Megachurches, as noted above, go beyond Sunday services; and can include "day care facilities, athletic fields, classrooms, hotels, convention centers, skate parks, restaurants, . . . bookstores, gyms, and dormitories."[170] One megachurch, the Brentwood Baptist Church in Houston, Texas, even includes a McDonald's restaurant.[171] These accessory services may prove to be problematic from a land use and land planning perspective, if RLUIPA is applied in a broad manner. Under the broad interpretation of the substantial burden standard set forth in *Congregation Kol Ami,* the above-listed activities, such as restaurants, hotels, and convention centers, could find their way into residential neighborhoods because they would be protected by RLUIPA.[172] This would have a detrimental effect on neighbors, municipalities, and the environment by greatly increasing noise, traffic, stormwater runoff due to increased ground coverage, and a decline in commercial districts.[173] One author argues that the solution to this problem is to zone megachurches absolutely in non-residential areas.[174] However, this practical solution could prove unworkable if the broad interpretation of RLUIPA is adopted because the laws excluding megachurches from residential areas will likely be seen as imposing a substantial burden and be struck down, thereby subjecting municipalities to the negative effects mentioned above. If courts would adopt the narrow view of RLUIPA, however, municipalities would be permitted to restrict megachurches to non-residential areas because, as long as the church has a place to establish in the community, the zoning law would not pose a substantial burden.[175] Again, enforcing RLUIPA in this respect will protect the rights of the church by ensuring that it is not entirely and invidiously excluded from a municipality

167. *Id.*
168. *Id.* at 317.
169. *Id.* at 316.
170. *Id.* at 317.
171. Patricia Leigh Brown, *Megachurches as Minitowns*, N.Y. TIMES, May 9, 2002, at F1.
172. *See generally* Congregation Kol Ami v. Abington Twp., No. 01-1919, 2004 U.S. Dist. LEXIS 16397, at *1 (E.D. Pa. 2004).
173. *See* Weiss & Lowell, *supra* note 165.
174. Zucco, *supra* note 165.
175. C.L.U.B. v. City of Chicago, 342 F.3d 752, 761 (7th Cir. 2003).

in which it wishes to serve its members. This approach will also protect the integrity of municipal land use laws and the broader community from the detrimental environmental impacts of sprawl.

A second concern is the manner in which courts will construe the definition of land use regulation under RLUIPA. As noted above, RLUIPA defines the term "land use regulation" as "a zoning or landmarking law, or the application of such a law, that limits or restricts a claimant's use or development of land . . . ."[176] The question then becomes whether building codes, infrastructure provisions, local environmental laws, and other similar types of local laws relating to the use of land will be construed as zoning laws.[177] This is an important issue because these types of regulations directly impact the heath and safety of all members of a community. To date, few claims have been brought which ask the court to define the contours of the statutory definition of land use regulations. However, the Third Circuit recently considered such a case.[178] In *Second Baptist Church v. Gilpin Township*, the township passed an ordinance that required all building within 150 feet of a sewer line to "tap-in" to the sewer system.[179] After extending the town sewer line to within 138 feet of the plaintiff-church's property, the township notified the church that they would be required to "tap-in" to the sewer system.[180] The church refused to comply, arguing that the burden imposed on the church was too great and brought this action under, *inter alia*, RLUIPA.[181] The Third Circuit, affirming the district court's judgment granting the township's motion to dismiss the RLUIPA claim, held that the mandatory "tap-in" ordinance was not a zoning law, and therefore RLUIPA was not implicated.[182] Other courts faced with similar challenges should follow the plain language interpretation of RLUIPA articulated by the Third Circuit in *Second Baptist Church*.

176. 42 U.S.C. § 2000cc-5(5).

177. Walsh, *supra* note 61, at 197. (Although this article does not discuss in detail the implications of RLUIPA beyond traditional zoning laws, it does suggest that a broad interpretation of RLUIPA may call into question the validity of fire, safety, and health regulations as applied to religious land uses.)

178. Second Baptist Church v. Gilpin Twp., No. 04-1434, 2004 U.S. App. LEXIS 26858, at *1 (3d Cir. 2004).

179. *Id.* at *3.

180. *Id.*

181. *Id.*

182. *Id.* at *6-7.

VI. CONCLUSION

In enacting RLUIPA, Congress sought to "'remedy the well documented discriminatory and abusive treatment suffered by religious individuals and organizations in the land use context'"[183] by ensuring that religious land uses would not be intentionally zoned out of our cities and towns. If RLUIPA is to protect these precious rights, it seems obvious that the restrictive view of the substantial burden test is required. By adopting the narrow interpretation of the substantial burden test, clearly articulated by the Seventh Circuit in *C.L.U.B.* and adopted by *San Jose Christian College* and *Konikov*, local land use laws and religious land uses are provided with the proper level of protection. Religious persons and institutions are protected by the narrow interpretation of the substantial burden test because it limits the chance that RLUIPA will violate the Establishment Clause in an as-applied challenge. Moreover, local governments are assured that the local zoning ordinances they pass will be carried out in accordance with their comprehensive plan for the benefit of the residents of the municipality. Citizens and congregation members, who are often one and the same, will be served because the comprehensive plan adopted by their local legislature to encourage appropriate development and conservation, and the zoning laws enacted to achieve those ends, will be upheld. Thus, citizens and congregation members will have a place to worship.

183. Grace United Methodist Church v. City of Cheyenne, 235 F. Supp. 2d 1186, 1193 (D. Wyo. 2002) (quoting RLUIPA's Legislative History, 146 CONG. REC. E. 1234, 1235 (July 14, 2000)).