Congressional Intent v. Judicial Reality:
The Practical Effects of the Religious Land Use and Institutionalized Persons Act of 2000

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I. INTRODUCTION

[1] The Religious Land Use and Institutionalized Persons Act of 2000[1] (hereinafter "RLUIPA") is the most recent attempt in a long line of Congressional efforts to protect the free exercise rights of individuals and religious institutions. RLUIPA provides that no government can substantially burden the free exercise rights of an individual or religious organization, by the use or application of zoning laws, unless the government making the denial is able to show that it is the least restrictive means of accomplishing a compelling governmental interest.[2] This note will examine the practical effects of RLUIPA by first suggesting an appropriate definition of the term "substantial burden" as used in this piece of legislation, and then applying the substantial burden test to a factual situation presented to the Eastern District of Pennsylvania.[3] Although there has been much debate about the constitutionality of RLUIPA since the Supreme Court of

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[1] Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §§ 2000cc – 2000cc-5 (2000).

[2] *Id.* Specifically, RLUIPA states:

> 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.

[3] *See* Freedom Baptist Church of Delaware County v. Township of Middletown, 204 F. Supp. 2d 857 (E.D. Pa. 2002).

the United States has yet to review the statute, this note will assume that the Supreme Court would find RLUIPA constitutional. Further, although RLUIPA also includes a second section addressing the religious freedom rights of institutionalized persons, this note will focus solely on the portion of the act that addresses land use regulations.

[2] One of the major difficulties in evaluating the practical effects of RLUIPA is that Congress did not define several of the most pertinent terms in the statute.[4] "Substantial burden" is one such key term.[5] Congress merely notes that its intention is *not* to change the meaning of that phrase under Supreme Court jurisprudence construing the term in other situations and under other legislative acts,[6] without elaborating on exactly how it believed the Supreme Court of the United States had previously defined "substantial burden."

[3] This Note submits that under the most appropriate standard, a burden on religious exercise is substantial when (1) it affects a sincerely held religious belief, and (2) it imposes more than a mere inconvenience on the religious adherent or organization. The practical results of this definition are twofold. First, because the substantial burden standard is far-reaching when combined with the broad definition of religious exercise contained in RLUIPA, many additional litigants will assert free exercise rights under this legislation than would assert them under the First Amendment alone. Second, although the courts will initially hesitate to expand the definition of substantial burden beyond the definition established by earlier Supreme Court jurisprudence, RLUIPA provides the courts the flexibility to do just that. As the courts see a broader array of factual scenarios, due to the broad sweep of RLUIPA, and if they apply the

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[4] Shawn Jensvold, Note, *The Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA): A Valid Exercise of Congressional Power?*, 16 BYU J. Pub. L. 1, *18-19 (2001).

[5] *Id.* at 18.

[6] *See* 146 Cong. Rec. S7774-01, S7776.

standard suggested in this Note, religious plaintiffs may yet obtain the wider protection under RLUIPA that Congress intended to create.

II. SUMMARY OF PRIOR LAW

[4] In drafting RLUIPA, Congress crafted the statute with carefully chosen language that it believed would ensure its Constitutionality under Supreme Court review. Specifically, Congress picked out statements from several Supreme Court opinions and echoed, almost verbatim, the same language in the provisions of RLUIPA. To determine the appropriate definition of a substantial burden, we must first understand why Congress chose the language it did. Therefore, this Note will review the case law that led to the development of RLUIPA.

[5] In *Employment Division v. Smith*,[7] the United States Supreme Court refused to apply the strict scrutiny/compelling governmental interest standard of review to cases in which a plaintiff claims that a rule of general applicability infringes upon its free exercise rights.[8] The Court reasoned that where an otherwise valid rule of general applicability has the unintended effect of curbing a religious practice, that rule may still be constitutional and enforceable.[9] However, the

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[7] Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872 (1990). In this case, respondents were fired from their jobs after ingesting peyote for sacramental purposes. *Id.* at 874. When the respondents applied for unemployment compensation, the Employment Division denied the application since petitioners had been fired for work-related misconduct. *Id.* The Oregon Supreme Court held that the sacramental use of peyote was a criminal act that did not fall under any exception to the general rule prohibiting drug use, despite the religious reasons for the use. *Id*. at 874-76.

[8] *Id*. at 882; *see also* Von G. Keetch & Matthew K. Richards, *The Need for Legislation to Enshrine Free Exercise in the Land Use Context,* 32 U.C. DAVIS L. REV. 725, 725-26 (1999) ("Rather than demand strict scrutiny of the regulation, the Smith Court declared that 'neutral' laws of 'general applicability' are not entitled to any special scrutiny, regardless of their impact on religious free exercise, so long as they are not specifically aimed at, or overtly hostile to, religion."). *Id.* at 725-726.

[9] *Smith*, 494 U.S. at 887-88.

Court recognized an exception to this holding, noting that where the rule complained of (1) allowed individualized governmental assessment, and (2) resulted in a substantial burden on free exercise rights, the Court had applied, and would continue to apply, strict scrutiny,[10] using the *Sherbert* balancing test.[11] According to the Court in *Smith*, "[u]nder the *Sherbert* test, governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest."[12]

[6] Congress responded to the Supreme Court's decision in *Smith* by enacting the Religious Freedom Restoration Act of 1993[13] (hereinafter "RFRA"). Through the RFRA, Congress

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[10] *Id.* at 884. The Court further stated that its "decisions in the unemployment cases stand for the proposition that where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason." *Id*. (citing Bowen v. Roy, 476 U.S. 693, 708 (1986)).

[11] *See* Sherbert v. Verner, 374 U.S. 398 (1963).

[12] *Smith*, 494 U.S. at 883 (quoting *Sherbert*, 374 U.S. at 402-03). Ultimately, however, the Court declined to apply the *Sherbert* test in *Smith*, since the criminal law complained of was one of general applicability that had the unintended effect of substantially burdening free exercise, but required no individual assessment. *Id*. at 884.

[13] 42 U.S.C. § 2000bb (1993). The RFRA provides:

> [I]n Employment Division v. Smith, the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and . . . the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.

42 U.S.C. § 2000bb(a)(4)-(5) (citation omitted). As the United States Supreme Court summarized in *City of Boerne v. Flores*,

> RFRA prohibits 'government' from 'substantially burdening' a person's exercise of religion even if the burden results from a rule of general applicability unless the government can demonstrate the burden '(1) is in furtherance of . . . a compelling governmental

attempted to resurrect the *Sherbert* balancing test that the Supreme Court had all but eliminated in the *Smith* decision when it refused to apply strict scrutiny in cases that did not reflect discriminatory intent.[14] The RFRA essentially reinstated the *Sherbert* balancing test by requiring the court to apply strict scrutiny where a religious plaintiff showed that a rule of general applicability imposed a substantial burden on its free exercise rights.[15]

[7] As it turns out, the RFRA was short-lived in its applicability to the states. In *City of Boerne v. Flores*,[16] the United States Supreme Court found that Congress had exceeded its section five[17] powers by imposing the RFRA on state governments.[18] Although the Court agreed that Congress has the power to enforce the Free Exercise Clause under the Fourteenth Amendment and previous case law,[19] the Court held that the RFRA extended beyond the mere

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> interest; and (2) is the least restrictive means of furthering that compelling governmental interest.

521 U.S. 507, 514-16 (1997) (quoting 42 U.S.C. § 2000bb(b)).

[14] 42 U.S.C.S. § 2000bb(b)(1).

[15] 42 U.S.C.S. § 2000bb(b)(2).

[16] 521 U.S. 507 (1997).

[17] The Fourteenth Amendment provides that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . without due process of law." U.S. CONST. amend. XIV, § 1. Further, "[t]he Congress shall have the power to enforce, by appropriate legislation" this provision. *Id*. at § 5.

[18] *City of Boerne*, 521 U.S. at 519 ("The [Fourteenth] Amendment and § 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the states. Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause.").

[19] *Id.* (citing Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) (holding that the Fourteenth Amendment incorporated the First Amendment)).

remedial powers provided for in the section five enforcement clause of the Fourteenth Amendment.[20]

[8] The majority in *Boerne* emphasized that the "RFRA is . . . out of proportion to a supposed remedial or preventive object . . . . Sweeping coverage ensures its intrusion at every level of government . . . . Any law is subject to challenge at any time by any individual who alleges a substantial burden on his or her free exercise of religion."[21]

[9] Congress understood the combination of the Court's condemnation of the sweeping language of the RFRA in *Boerne*[22] and the exception highlighted in *Smith*,[23] to imply that the Court might approve a similar, but more narrowly tailored, version of the RFRA.[24] Congress'

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[20] *Id*. at 532 ("RFRA cannot be considered remedial, preventive legislation, if those terms are to have any meaning."). *Id*. Further, the Court pointedly stated that, under the Fourteenth Amendment, Congress "has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation" while "[t]he power to interpret the Constitution . . . remains in the Judiciary." *Id*. at 519, 524. In addition to being an unacceptable expansion of Congressional power, the RFRA, according to the Supreme Court, also lacked sufficient factual findings to demonstrate a pattern of religious discrimination that would necessitate such a law. *Id*. at 530- 31 (citations omitted) ("RFRA's legislative record lacks examples of modern instance of generally applicable laws passed because of religious bigotry . . . . It is difficult to maintain that . . . [the anecdotal evidence] indicate[s] some widespread pattern of religious discrimination in this country.").

[21] *City of Boerne*, 521 U.S. at 532.

[22] 521 U.S. 507 (1997).

[23] 494 U.S. 872 (1990).

[24] *See* 146 CONG. REC. S5791 (daily ed. June 9, 1998) (statement of Sen. Hatch). Senator Hatch proclaimed:

> Last year, when the Supreme Court struck down part of the Religious Freedom and Restoration Act in the case of City of Boerne versus Flores – and Act that sought to redress a threat to religious liberty of the Court's own making – we who value the free exercise of religion vowed we would rebuild our coalition and craft a solution which appropriately defers to the Court's decision. Well, we have done so . . . . Where adjustment in general rules can

first attempt at such a statute was the Religious Liberty and Protection Act of 1998 (hereinafter "RLPA").[25]

[10] The RLPA was intended to be a fairly broad protection of religious freedom, providing in part that no government could substantially burden religious exercise.[26] The RLPA, as predecessor to RLUIPA, shared a few common characteristics. First, it called for a substantial burden standard.[27] Second, it required the courts to apply strict scrutiny review when a religious plaintiff made a prima facie showing of a substantial burden.[28] Third, the RLPA broadly defined the term "religious exercise."[29] However, the RLPA differed from the future RLUIPA significantly in its scope: the RLPA did not specifically target the practices of local zoning boards or the religious rights of inmates, but applied to any government operated program or

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> possibly be made to accommodate this most basic liberty, it ought and must be made. As our government exists to guarantee such freedoms, government should only in the rarest instances itself infringe on this most basic and foundational freedom.

Id.

[25] H.R. 4019, 105th Cong. (1998).

[26] The RLPA provided that "the government shall not substantially burden a person's religious exercise – (1) in a program or activity, operated by a government, that receives Federal financial assistance; or (2) in or affecting commerce with foreign nations, among the several States, or with the Indian tribes" unless the burden is the least restrictive means of furthering a compelling governmental interest. *Id*. at § 2(a)(1)-(2).

[27] *Id*. at § 2(a).

[28] *See infra* note 32.

[29] H.R. 4019, 105th Cong. § 8(1) (1998) ("The term 'religious exercise' means an act or refusal to act that is substantially motivated by a religious belief, whether or not the act or refusal is compulsory or central to a larger system of religious belief . . . ."). Under RLUIPA, "the term 'religious exercise' includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief. [This definition includes] [t]he use, building or conversion of real property for the purpose of religious exercise." 42 U.S.C. § 2000cc-5(7)(A)-(B) (2000).

activity that received Federal financial assistance.[30] Another difference between the RLPA, which was never passed, and RLUIPA, which became federal law in 2000, is that the RLPA never attempted to define the term substantial burden. As we will see, RLUIPA does attempt to offer some guidance in construing the term.[31]

III. RLUIPA[32]

[11] Congress' most recent attempt to legislate against governmental infringement upon the free exercise rights of individuals and assemblies manifests itself in RLUIPA.[33] Congress designed RLUIPA to enforce the free exercise rights guaranteed in the First Amendment. RLUIPA's general rule provides:

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[30] *Id*. at § 2(a)(1). Although RLUIPA contains similar language regarding entities receiving Federal financial assistance, it applies only within the zoning law context. *See* 42 U.S.C. 2000cc § 2 (2000).

[31] *See infra* note 40.

[32] 42 U.S.C. §§ 2000cc – 2000cc-5 (2000). The Supreme Court of the United States has not yet addressed the constitutionality of RLUIPA, though many scholars have hypothesized that the Supreme Court would strike it down just as it struck down the Religious Freedom and Restoration Act ("RFRA") in City of Boerne v. Flores, 521 U.S. 507 (1997) (holding that RFRA was an unconstitutional exercise of Congressional power when applied to state governments). Arguments for finding RLUIPA unconstitutional include: (a) RLUIPA is outside Congress' Section 5 and Fourteenth Amendment powers; (b) Congress failed to accumulate sufficient factual findings to support the underlying theory of RLUIPA that zoning laws perpetuate a pattern of discrimination against religious institutions; and (c) RLUIPA requires courts to apply a strict scrutiny standard in a situation that would not normally receive strict scrutiny under Employment Div. Dep't of Human Res. of Or. v. Smith, 494 U.S. 872 (1990), since zoning laws are rules of general applicability and usually do not receive strict scrutiny. Adams, Caroline R., Note, *The Constitutional Validity of the Religious Land Use and Institutionalized Persons Act of 2000: Will RLUIPA's Strict Scrutiny Survive the Supreme Court's Strict Scrutiny?*, 70 FORDHAM L. REV. 2361 (2002).

[33] RLUIPA was co-sponsored by: Senators Robert F. Bennett, Michael D. Crapo, Thomas A. Daschle, Tim Hutchinson, Edward M. Kennedy, Joseph I. Lieberman, Charles E. Schumer, Gordon Smith and Representatives Sanford D. Bishop, Jr., Roy Blunt, Merrill Cook, Chet Edwards, Barney Frank, Jerrold Nadler, Lee Terry, and Robert Wexler. S. 2869, 106th Cong. (2000); H.R. 4862 106th Cong. (2000). President Clinton signed RLUIPA into law on

> 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 the 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."[34]

[12] In this section of the Act, Congress specifically requires the government to make an exemption to a zoning rule of general applicability where the rule substantially burdens free exercise rights.[35] In doing so, Congress again attempted to resurrect the *Sherbert* balancing test (rejected by the Supreme Court in *Smith*) by packaging zoning laws as a type of individualized governmental assessment.[36] Importantly, the language in RLUIPA closely mirrors the language of the RFRA, which the Supreme Court struck down in 1997.[37] However, Congress attempted to fit this statute into the Supreme Court's general rule in *Smith*, (i.e., rules of general applicability are not subject to strict scrutiny)[38] by specifically containing the applicability to cases in which

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September 22, 2000, stating, "Religious liberty is a constitutional value of the highest order, and the Framers of the Constitution included protection for the free exercise of religion in the very first Amendment. This Act recognizes the importance the free exercise of religion plays in our democratic society." *See* S. 2869, 106th Cong. (2000) and H.R. 4862, 106th Cong. (2000).

[34] 42 U.S.C. § 2000cc(2)(a) (2000). The Act also provides a similar protection of the free exercise rights of institutionalized persons; however, as noted in the introduction, this note focuses only on the land use provision. *See* 42 U.S.C. § 2000cc-1(2000).

[35] 42 U.S.C. § 2000cc(a)(1) (2000).

[36] *See also* 146 Cong. Rec. S7774 (daily ed. July 27, 2000) (joint statement of Sen. Orrin G. Hatch and Sen. Edward M. Kennedy: "Churches in general and new, small, or unfamiliar churches in particular, are frequently discriminated against on the face of zoning codes and also in the highly individualized and discriminatory processes of land use regulation.").

[37] *See, e.g.*, Prater v. City of Burnside, Kentucky, 289 F.3d 417, 432 (6th Cir. 2002) (characterizing RLUIPA as an amendment to the RFRA).

[38] *See* 42 U.S.C. § 2000cc(a)(2)(C) ("This subsection applies in any case in which – the substantial burden is imposed in the implementation of a land use regulation . . . under which a

the government, via zoning laws, makes individual assessments.[39] Further, Congress apparently interpreted the Supreme Court's discussion of the RFRA in *Boerne* as suggesting that although the RFRA was too broad, a more narrowly tailored version could be a constitutional exercise of its section five enforcement powers.[40] Thus, Congress limited RLUIPA to the two relatively narrow situations covered by land use regulations and rules applying to institutionalized persons.[41]

[13] The Congressional Record reveals much about the legislative intent behind RLUIPA. In explaining the need for an Act like RLUIPA to replace the RFRA and the never-passed RLPA, Senator Edward M. Kennedy announced that, "after numerous Congressional hearings on

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government makes . . . individualized assessments of the proposed uses for the property involved."). Note that, under this provision, RLUIPA could apply to virtually every zoning decision rendered by a government agency so long as the religious plaintiff can make a prima facie showing of a substantial burden. Thus, an accurate determination of the proper substantial burden standard is a crucial step in RLUIPA analysis.

[39] 146 Cong. Rec. S7774-01 (daily ed. July 27, 2000) (joint statement of Sen. Edward M. Kennedy and Sen. Orrin G. Hatch: "The General Rules [sic] in 2(a)(1), requiring that substantial burdens on religious exercise be justified by a compelling interest, applies . . . to cases where government has authority to make individualized assessments of the proposed uses to which the property will be put.").

[40] *Id*. ("Each subsection closely tracks the legal standards in one or more Supreme Court opinions, codifying those standards for greater visibility and easier enforceability."). However, the Court in *Boerne* never explicitly stated that it would accept a more narrowly tailored version of the act.

[41] Congress also preemptively asserts its commerce clause powers as a constitutional basis for RLUIPA within the text of the Act. 42 U.S.C. § 2000cc(a)(2)(B) (2000). Congress also attempted to provide a complete factual record on which it based its finding in response to the Supreme Court's criticism in *Boerne*. For example, Congress relied on a law review article by written by Von G. Keetch and Matthew K. Richards that summarizing a study conducted Professor W. Cole Durham, Jr. at Brigham Young University's J. Reuben Clark Law School. One conclusion that both the authors and the study reached was that in some instances, "local communities set broad 'generally applicable' and 'neutral' policies and development plans without any attempt to understand the religious beliefs affected thereby, and without any attempt to craft the often minimal exceptions necessary to allow full religious liberty." Keetch & Richards, *supra* note 8, at 726-27.

religious liberties, the evidence is clear that local land use laws often have the discriminatory effect of burdening the free exercise of religion."[42] Further, as Senator Orrin G. Hatch noted, before RLUIPA existed, "an assembly whose religious practice [was] burdened by an otherwise 'generally applicable' and 'neutral' law [could] obtain relief only by carrying the heavy burden of proving that there is an unconstitutional motivation behind a law . . . ."[43]

[14] The legislative history, in addition to the explicit language of the statute itself, indicates that in enacting RLUIPA Congress intended not to create a *new* right, but to "*enforce* the right to assemble for worship or other religious exercise under the Free Exercise Clause."[44] This intent is also evidenced by the fact that Congress based the Constitutionality of RLUIPA, in part, on its enforcement power under the Fourteenth Amendment.[45] RLUIPA is, therefore, a concerted effort by Congress to make it easier for plaintiffs asserting a substantial burden on their free exercise rights to state a claim by shedding the requirement that the zoning law have an "unconstitutional motivation."[46]

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[42] 146 Cong. Rec. S6688 (daily ed. July 27, 2000) (statement of Sen. Edward M. Kennedy). *See also* Keetch & Richards, *supra* note 7, at 728 (zoning officials rarely make facially discriminatory decisions, instead "they offer traffic, drainage, sewage, and the environment as plausible concerns, raise issues of compatibility with the surrounding neighborhood, change zoning, declare a structure a historic landmark, or impose prohibitively expensive design requirements").

[43] 146 Cong. Rec. S6688 (daily ed. July 27, 2000) (statement of Sen. Orrin G. Hatch).

[44] *Id.* at S7774-1 (daily ed. July 27, 2000) (joint statement of Sen. Orrin G. Hatch and Sen. Edward M. Kennedy) (emphasis added).

[45] U.S. CONST. amend. XIV, § 5; *see supra* note 14.

[46] *See supra* note 19 and accompanying text.

[15] Further, under Section 4(a) of RLUIPA, Congress shifted the burden of proving that the zoning law in question is the least restrictive means of furthering a compelling governmental interest from the plaintiff to the government, "where the claimant shows a prima facie violation of the Free Exercise Clause."[47] Congress again attempted to make it easier for those legitimately claiming that the government imposed "substantial burden" on their free exercise rights to obtain relief, without disregarding zoning laws altogether.[48]

[16] In light of this Congressional intent, a clear understanding of the term "substantial burden" is crucial to a correct application of RLUIPA since this inquiry is the threshold that a plaintiff must cross to trigger the benefit of the burden switch that accompanies strict scrutiny analysis.

IV. DEFINING "SUBSTANTIAL BURDEN"

[17] In order to understand the practical effects of RLUIPA, we must first determine the meaning of "substantial burden" in the RLUIPA context, as it would be applied by a court of law. While not specifically defining the term in the text of RLUIPA, Congress does attempt to offer some guidance in construing the substantial burden standard to be applied.

A. Substantial Burden According to Congress

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[47] 146 Cong. Rec. S7775 (daily ed. July 27, 2000) (joint statement of Sen. Orrin G. Hatch and Sen. Edward M. Kennedy).

[48] *Id*.

> The General Rule does not exempt religious uses from land use regulation; rather it requires regulators to more fully justify substantial burdens on religious exercise. This duty of justification under a heightened standard of review is proportionate to the widespread discrimination and to the even more widespread individualized assessments, and it is directly responsive to the difficulty of proof in individual cases.

[18] In enacting RLUIPA, Congress clearly intended not to introduce a new definition of "substantial burden."[49] In their joint statement, Senators Hatch and Kennedy announced: "[I]t is not the intent of this Act to create a new standard for the definition of 'substantial burden' on religious exercise. Instead, that term as used in the Act should be interpreted by reference to Supreme Court jurisprudence."[50] While Congress may have believed that it had issued a clear rule for courts to follow, Congress in fact made only a limited effort to aid a claimant or a court of law in construing "substantial burden" in the religious exercise context. The "substantial burden" standard is a term of art, defined by prior case law, not a brightline test. As this Note will demonstrate, the Supreme Court has developed a body of case law defining the substantial burden standard in the context of the First Amendment, but it has not addressed the term in the land use context.[51]

B. Substantial Burden According to Supreme Court Jurisprudence

[19] Following the instructions of Congress, courts must turn to Supreme Court jurisprudence construing the term "substantial burden" in order to determine the applicable meaning of the term under RLUIPA. Synthesizing the definition, by studying Supreme Court cases that construe "substantial burden" in non-RLUIPA free exercise litigation, suggests that, typically, the Supreme Court has considered three major factors: (1) the plaintiff's sincerity in the religious belief that has allegedly been burdened;[52] (2) whether the burdened belief is a central tenet of the

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[49] *See id*.

[50] *Id*.

[51] *See infra* note 109.

[52] *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972).

religion;[53] and (3) whether the burden forces a religious adherent or institution to choose between complying with secular law or following a religious belief or practice.[54]

[20] For example, in *Sherbert v. Verner*,[55] an employer fired one of its employees who refused, due to her religious beliefs, to work on Saturdays when the company changed to a six-day workweek. The State of South Carolina subsequently refused to grant the ex-employee unemployment benefits because she did not qualify under a statute that required good cause to refuse work.[56] The Court in *Sherbert* found that the denial of unemployment benefits substantially burdened the free exercise rights of the employee[57] because she was forced "to choose between following the precepts of her religion and forfeiting benefits, on one hand, and abandoning one of the precepts of religion in order to accept work, on the other hand. . . ."[58]

[21] In *Wisconsin v. Yoder*,[59] the Supreme Court addressed the issue of substantial burden in the free exercise context. There, two Amish parents who were criminally convicted for failing to send their children to high school, on the basis of a religious belief, challenged the

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[53] *Id*.

[54] *See* Sherbert v. Verner, 374 U.S. 398 (1963).

[55] 374 U.S. 398 (1963).

[56] The statute disallowed such benefits where the employee has "failed, without good cause . . . to accept available suitable work when offered him by the employment office or the employer." *Id*. at 400.

[57] *Id*. at 403.

[58] *Id*. at 404. The Court further noted that a substantial burden can exist in a variety of circumstances, whether the burdened benefit is a gratuitous privilege granted by the state or a Constitutionally guaranteed right. *Id*. at 404. After determining that a substantial burden existed, the Court went on to apply the compelling governmental interest-least restrictive means test, and, holding in favor of the ex-employee, found that no such state interest sufficiently overcame the her free exercise rights. *Id*. at 409.

[59] 406 U.S. 205 (1972).

constitutionality of the state's law mandating high school attendance until age sixteen.[60] In finding that the state had imposed a substantial burden on the free exercise rights of both the parents and children and had also failed to satisfy the compelling governmental interest-least restrictive means test, the Court focused on the fact that avoiding worldly influences is a central tenet of the Amish religion.[61]

[22] Although the Court did not specifically define the term "substantial burden," *Yoder* provides some guidance in determining which factors are of significance in the analysis. Among those factors are: (1) the centrality of the belief to the religion;[62] (2) whether or not the religious adherent must choose between following a religious or secular law;[63] and (3) sincerity of the plaintiff's religious belief.[64]

[23] In *Thomas v. Review Board of the Indiana Employment Security Division*,[65] the Court held that,

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[60] *Id*. at 207-08.

[61] *Id*. at 218. The Court concluded that forcing the Amish to send their children to high school "substantially interfere[ed] with the religious development of the Amish child . . . [and] contravene[d] the basic religious tenets and practice of the Amish faith, both as to the parent and the child." *Id*.

[62] *Id*. at 216. The court held that avoiding worldly influence is a "response to their literal interpretation of the Biblical injunction from the Epistle of Paul to the Romans, 'be not conformed to this world' . . . . This command is fundamental to the Amish faith." *Id.*

[63] *Id*. at 217. The court recognized that "[t]he impact of the compulsory attendance law on respondents' practice of the Amish religion is not only severe, but inescapable, for the Wisconsin law affirmatively compels them, under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs." *Id.* at 218.

[64] *Yoder*, 406 U.S. at 216. The court stated, "[T]he traditional way of life of the Amish is not merely a matter of personal preference, but one of deep religious conviction . . . ." *Id.*

[65] 450 U.S. 707 (1981).

> [w]here the state conditions receipt of an important benefit upon conduct proscribed by a religious faith . . . thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.[66]

[24] Thus, in *Thomas*, the Supreme Court concluded that an unemployment review board had violated the free exercise rights of an individual who quit his job because it conflicted with sincerely held religious beliefs when his employer transferred to him to a department that produced weapons.[67] Essentially, the Court determined that the individual's free exercise rights had been substantially burdened since the law forced him to choose between performing a task that offended his religious beliefs or receiving income.[68]

[25] In light of the foregoing cases, this Note concludes that, under Supreme Court jurisprudence, in determining whether a facially neutral law substantially burdens an individual's non-RLUIPA free exercise rights, the Court conducts a factually-intensive inquiry, focusing on three factors: (1) whether the belief is sincerely held; (2) whether the belief is a central tenet of the religion; and (3) whether the religious adherent has to choose between following secular law

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[66] *Id*. at 717-18.

[67] Indiana state law disallowed unemployment benefits to individuals who voluntarily quit their jobs without good cause. *Id*. at 709 n.1. This case is an example of the unemployment situation specifically contemplated by the Court in *Smith* since it is a rule that requires individualized assessment, increasing the likelihood of a discriminatory effect.

[68] Importantly, the Court recognized that the employee had been transferred to a different department, temporarily losing the chance to choose a job that did not involve weapons production. *Id*. at 718. Additionally, because the individual's free exercise rights were substantially burdened, the Court applied the compelling governmental interest-least restrictive means test and found that the state failed to "justify the burden placed on free exercise of religion." *Id*. at 719.

and adhering to a central tenet of his or her religion.[69] After determining that a substantial burden exists, the Court has consistently applied strict scrutiny and asked whether the law is the least restrictive means of furthering a compelling governmental interest.

C. Substantial Burden According to Lower Federal Courts

[26] After reviewing RLUIPA case law and the statute itself, it is clear that, despite the apparent intent of Congress, applying the substantial burden test to land use laws differs from applying the substantial burden test to the cases in which the Supreme Court has done so in other free exercise litigation.[70] Since Congress instructs the courts to apply the substantial burden test consistently with prior case law, the same factors should apply in determining whether a substantial burden exists under RLUIPA. However, Congress complicated its instruction when it

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[69] *See supra* notes 57-59.

[70] Congress instructs the courts to follow Supreme Court precedent in applying the substantial burden test under RLUIPA, but the Supreme Court has yet to decide a land use-free exercise case. Further, this directive ignores an entire body of case law created in the lower federal courts, which have already construed substantial burden in the land use context, making it even more difficult to define substantial burden under RLUIPA since it is almost impossible to predict whether the lower federal courts will follow the instructions of Congress and only look to Supreme Court precedent or whether they will turn to their own earlier jurisprudence in RLUIPA litigation. *See, e.g*., Stuart Circle Parish v. Board of Zoning Appeals, 946 F. Supp. 1225 (E.D. Va. 1996) (granting temporary restraining order, pursuant to First Amendment and RFRA, against zoning board because board's prevention of church's "meal ministry" to the homeless burdened church's free exercise rights and was not justified by a compelling government interest); Alpine Christian Fellowship v. County Commissioners, 870 F. Supp. 991 (D. Colo. 1994) (holding that county's denial of special permit that would allow church to operate religious school in residential area violated First Amendment because religious education was integral to church's religious beliefs); Rector, Wardens, and Members of Vestry of St. Bartholomew's Church v. City of New York, 914 F.2d 348 (2d Cir. 1998) (holding that city's landmarks law did not unconstitutionally infringe upon church's free exercise rights because the generally applicable rule did not deny church the ability to practice religion); Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood, Ohio, 699 F.2d 303 (6th Cir. 1983) (holding that congregation's First Amendment rights had not been violated by zoning law that prohibited construction of place of worship on land congregation owned because economic burden does not rise to the level of unconstitutional infringement).

also extended the definition of religious exercise under RLUIPA to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief."[71] Consequently, Congress eliminated one of the three factors considered by the Supreme Court in determining whether a substantial burden exists.

[27] RLUIPA case law still retains the premise, set forth by the Supreme Court, that the government cannot substantially burden free exercise under the guise of a facially neutral, generally applicable law unless it is the least restrictive means of furthering a compelling governmental interest.[72] However, the key change is that this test now applies to a much broader range of cases. RLUIPA specifically targets land use laws because, although they are facially neutral, they require individualized assessment (much like unemployment benefits) in their applications.[73] This Note suggests that, in applying the substantial burden standard under RLUIPA, lower federal courts have begun to define a substantial burden as one that (1) affects a sincerely held religious belief, and (2) is more than a mere inconvenience to the religious organization or adherent.[74]

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[71] 42 U.S.C. § 2000cc-5(7)(A) (2000).

[72] *See* 42 U.S.C. § 2000cc(a)(1) (2000).

[73] Thus, RLUIPA appears to be consistent with the general rule and exception set forth in *Smith*. It makes sense, also, that under RLUIPA the definition of substantial burden must expand beyond the definition developed by the Supreme Court in other contexts because many zoning laws may yield a discriminatory effect on religious adherents and organizations without endangering the practice of a central tenet of the religion. For example, a zoning law would typically restrict where an organization might build a house of worship. While not entirely preventing the practice of the religion, the law automatically limits the organization's ability to fully realize its religious freedom rights.

[74] By excluding the requirement that the burdened belief be a central tenet of the religion, Congress created a much more subjective test. Under the definition developed by the Supreme Court, a plaintiff could have called an expert witness to testify to the role that a particular belief or action plays in the religion. Under RLUIPA, however, a court will only be evaluating

[28] In the two years since Congress passed and President Clinton signed RLUIPA, several federal courts have construed the term with varying results. For example, the Northern District of California held in *San Jose Christian College v. Morgan Hill*,[75] an unreported opinion, that in order for the substantial burden test to apply to a religious plaintiff, the burden must affect a tenet or belief central to a religious doctrine in direct contrast to the textual requirement of RLUIPA to disregard the centrality of the tenet.[76] The court recognized that Congress intended the courts to apply the same definition of "substantial burden" under RLUIPA as it would have under the RFRA.[77] Relying on the Ninth Circuit's[78] definition of substantial burden in non-RLUIPA litigation, the court in *San Jose* explained,

> the religious adherent . . . has the obligation to prove that a governmental [action] burdens the adherent's practice of his or her religion . . . by preventing him or her from engaging in conduct or having a religious experience which the faith mandates. This interference must be more than an inconvenience . . . .[79]

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subjective evidence from the individual or organization that can claim that virtually any activity is an exercise of religious beliefs. Echoing pre-RLUIPA Supreme Court jurisprudence, courts have noted that when a zoning law forces the religious organization or adherent to choose between violating either secular law or religious doctrine, then it almost certainly imposes a substantial burden.

[75] San Jose Christian College v. City of Morgan Hill, No. C091-20857, 2001 N.D. Cal. WL 1862224, at *3 (N.D. Cal. Nov. 14, 2001) (citing Bryant v. Gomez, 46 F.3d 948, 949 (9th Cir. 1995)). In *San Jose* the plaintiff had unsuccessfully applied to rezone property it had purchased so that it could use the site for a college campus. *Id*. at *1. The property had previously been used as a hospital. *Id*.

[76] *See* 42 U.S.C. § 2000cc-5(7)(A) (2000).

[77] *San Jose*, 2001 N.D. Cal. WL 1862224, at *2.

[78] Arguably, the district court should have looked directly to Supreme Court jurisprudence according to the explicit terms of RLUIPA. This is only one example of how the courts have ignored several of Congress' directions in the RLUIPA context.

[79] *Id.* at *2.

[29] Applying this standard in *San Jose*, the district court held that no substantial burden existed because the act of building a school was not a central tenet of the religion,[80] regardless of whether the religious group believed that it was God's will that they build a college.[81]

[30] Despite these shortcomings, the court in *San Jose* did make one useful comment. It explained that RLUIPA is self-limiting and is not automatically triggered by the mere fact that a religious organization seeks a permit since the act requires a substantial burden on the free exercise of religion, and not just a burden on the activities sponsored by a religious organization.[82]

[31] In *Murphy v. Zoning Commission of the Town of New Milford*,[83] the District of Connecticut first stated that "the showing required for a 'substantial burden' has not been fully articulated by the courts and has been defined in several ways,"[84] and then held that "[f]oregoing or modifying the practice of one's religion because of governmental interference or fear of punishment by the government is precisely the type of 'substantial burden' Congress intended to trigger RLUIPA's protections."[85] In *Murphy*, the court held that the town's decision, under a

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[80] However, the Northern District of California erred in its construction of substantial burden since the text of RLUIPA itself provides that a substantial burden is *not* defined by the centrality of the tenet to the religion.

[81] *San Jose*, 2001 N.D. Cal. WL 1862224, at *3. The court also noted that the plaintiffs had failed to convincingly show that "using the property as a Christian college is necessarily a 'religious use' of the property." *Id.* at *4.

[82] *Id*. at *5. In other words, the burden must be more than an inconvenience to a religious organization or adherent.

[83] 148 F. Supp. 2d 173 (D. Conn. 2001).

[84] *Id*. at 188.

[85] *Id*. at 189. Obviously, doing so would be more than an inconvenience.

zoning law, to limit the number of people that petitioners could have at their home for a weekly prayer group substantially burdened their free exercise rights where participants feared criminal sanction for not complying with the zoning law.[86] Although in this case the court focused on the fact that the petitioners would have to choose between following secular law or their religious beliefs, the court also noted that participants in the prayer group sincerely believed that prayer could help those who needed it, and, therefore, the rule imposed more than a mere inconvenience on petitioners' religious practice.[87]

[32] Importantly, the court in *Murphy*, unlike the court in *San Jose*, recognized that in non-RLUIPA substantial burden cases, the burden must affect a central tenet or belief of a religious practice,[88] while RLUIPA itself applies to "*any* exercise of religion, whether or not compelled by, or central to a system of religious belief."[89] The court in *Murphy* concluded that Congress intended that "some of the language used by the Supreme Court in discussing 'substantial burden[s]' be applied in a broader context."[90]

[33] Despite the broad definition of religious exercise, courts have been cautious in applying the substantial burden test: not every inconvenience to a religious organization or religious adherent automatically constitutes a substantial burden. For example, in *Omnipoint*

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[86] *Id*.

[87] *Id.*

[88] *Id*. at 188.

[89] 42 U.S.C. § 2000cc-5(7)(A) (emphasis added). RLUIPA also specifies that, "[t]he 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).

[90] *Murphy*, 148 F. Supp. 2d at 188.

Communications, Inc. v. City of White Plains,[91] the Southern District of New York held that the Congregation would not suffer a substantial burden on its free exercise of religion if a monopole was constructed on adjacent property since such an aesthetic intrusion did not affect the Congregation's continued ability to worship.[92] The construction of the monopole, though perhaps not aesthetically pleasing, did not even amount to an inconvenience, let alone affect the practice of a sincerely held religious belief.

[34] Again, in *C.L.U.B. v. City of Chicago*,[93] the Northern District of Illinois found that no substantial burden existed under RLUIPA.[94] The court held that since the City had amended its ordinance to treat similarly situated secular and religious entities the same, C.L.U.B. did not bear a substantial burden on its free exercise rights relative to those similarly situated secular organizations.[95] The court then concluded that RLUIPA did not apply to the present case[96] since

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[91] 202 F.R.D. 402 (S.D.N.Y. 2001). Congregation Kol Ami ("Congregation") opposed construction of a monopole on property adjacent to its synagogue, claiming that the structure would ruin the view from the synagogue's sanctuary. *Id*. at 403.

[92] *Id*.

[93] 157 F. Supp. 2d 903 (N.D. Ill. 2001). "C.L.U.B." stands for Civil Liberties for Urban Believers.

[94] *Id*. at 915. In *C.L.U.B.,* the plaintiff, acting on behalf of five religious organizations, claimed that the city of Chicago's zoning laws suppressed religious celebration by allowing religious institutions in only one of its four zones without a special use permit, offering evidence of the expensive and time consuming process required to obtain such a permit. *Id.* at ___. The court recognized that "[t]he overall cost of obtaining a special use permit ranges from $4,000 to $5,000; moreover if property is used in violation of the Zoning Ordinance, the City may impose daily fines and issue injunctions." *Id*. at 906. Additionally, C.L.U.B. presented evidence of specific instances in which it took religious organizations several years and/or several attempts at different locations to gain approval for the establishment of a house of worship. *Id*. at 907-08. Plaintiffs further argued that other secular institutions with similar uses did not need to get a permit. *Id*.

[95] *Id*. at 915. Specifically, the city amended its ordinance to (1) require clubs, lodges, meeting halls, recreation buildings and community centers to obtain the same type of use permit as

plaintiffs had made no prima facie showing of a substantial burden under the amended, generally applicable zoning law.[97]

[35] Most recently in *Grace United Methodist Church v. City of Cheyenne*,[98] the District of Wyoming denied plaintiff's motion for summary judgment under RLUIPA. The Court held, in part, that a genuine issue of material fact existed as to whether the zoning regulations imposed a substantial burden on the church[99] by prohibiting the church from building an addition to be used as a day care.[100]

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religious organizations, and (2) to no longer require that religious organizations demonstrate the proposed use was necessary for the public convenience at that location. *Id.* at ___. This type of complaint is also consistent with Congressional findings associated with RLUIPA: "Zoning codes frequently exclude churches in places where they permit theaters, meeting halls, and other places where large groups of people assemble for secular purposes." 146 Cong. Rec. S7775 (daily ed. July 27, 2000) (joint statement of Sen. Edward M. Kennedy and Sen. Orrin G. Hatch).

[96] *Id*. at 917. Notably, the court did not determine the effects on free exercise of the amended zoning law; that is, the court did not look for any possible remaining discriminatory effects, an examination required by RLUIPA. For example, RLUIPA requires the court to ask whether the secular organizations were more likely to be approved for the permit sought. Did it routinely take less time for a secular organization than a religious one to get the permit? Does the expense or time spent in conforming with the zoning law force religious organizations or individuals to forego any religious exercise?

[97] *C.L.U.B.*, 157 F. Supp. 2d at 917. Arguably, however, the Northern District of Illinois missed the point here. Congress enacted the statute because free exercise is a protected constitutional right, whereas the activities that would occur in the other buildings, now also required to obtain the special use permit, are not so elevated. Apparently, the court concluded that no substantial burden existed *because* the rule is generally applicable, but Congress would likely instruct that this situation is precisely where RLUIPA should apply. The burden upon C.L.U.B. is the same as before the City amended its zoning laws. The City merely removed any possibility that its zoning law discriminated on its face, but it did not remove any of the hurdles that the religious organizations must jump.

[98] Grace United Methodist Church v. City of Cheyenne, No. 02-CV-035-B, 2002 WL 31831443 (D. Wyo. Dec. 16, 2002).

[99] *Id*. at 1196. Additionally, this case presents the question whether operating a day care in this instance even constitutes a sincere religious exercise under RLUIPA. *See id.* at 1197. However,

[36] Explaining the substantial burden standard, the court first stated that a substantial burden must affect a sincerely held religious belief.[101] The court then stated that:

> [A] government regulation does not substantially burden religious activity when it only has an incidental effect that makes it more difficult to practice the religion . . . . Thus, for a burden on religion to be substantial, the government regulation must compel action or inaction with respect to the sincerely held belief; mere inconvenience to the religious institution or adherent is insufficient.[102]

[37] The court went on to specifically consider substantial burden as it has been applied in the RLUIPA context, emphasizing the difference between an inconvenience and a substantial burden.[103] Adopting the language used by the court in *Murphy*, the court in *Grace* held that a substantial burden is one that has a "'chilling effect' on the exercise of religion."[104] The court held that requiring the church to operate its day care center in another area in the city constituted

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assuming that operation of a day care center qualified as religious activity, the court would still have to decide whether denying the license imposed a substantial burden on the church.

[100] *Id*. at 1189. Such a land use in a residential area of the city contravened of zoning laws. *Id*. The city's Development Director denied the church's application for a day care license, and the Board of Adjustment denied the Church's appeal. *Id*. at 1189-90. The Church asserted that "the proposed 'day care' was, in fact a religious school designed to provide Christian education to children who would otherwise be placed in secular pre-school or day care . . . would constitute an outreach mission to bring young people and families into Christianity." *Id*. (internal citations omitted). The court also questioned whether labeling a day care center a religious school converted it to a protected exercise of religion. *Id.* at 1196-97.

[101] *Id.* at 1194 (citing *Wisconsin v. Yoder*, 406 U.S. 205, 215-19 (1972)).

[102] *Id*. (citing *Thomas v. Review Board of the Indiana Employment Security Division*, 450 U.S. at 717-18; *Thiry v. Carlson,* 78 F.3d 1491, 1495 (10th Cir. 1996); *Werner v. McCotter*, 49 F.3d 1476, 1480 (10th Cir. 1995); *Jolly v. Coughlin*, 76 F.3d 468, 477 (2d Cir. 1996)).

[103] *Id*. at 1194.

[104] *Id*. (citing *Murphy*, 148 F. Supp. 2d at 188-89).

a mere inconvenience because it did not have the chilling effect of forcing the church to modify or violate its religious beliefs.[105]

D. The Appropriate Definition of Substantial Burden Under RLUIPA.

[38] As the case law indicates, the standard for substantial burden is unclear and varies in some degree among the circuits. Notably, the Supreme Court has never applied the substantial burden test in the land use context.[106] However, this Note submits that under Supreme Court[107] and RLUIPA precedent, a substantial burden is one that: (1) affects a sincerely held religious belief; and (2) is more than a mere inconvenience on religious organizations' or adherents' religious practices.[108] This definition modifies earlier Supreme Court jurisprudence regarding substantial burden, since under RLUIPA, the burden does not necessarily have to affect a belief central to the religion. This is also unlike the substantial burden standard in previous free exercise litigation outside of the land use context.[109]

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[105] *Id*. at 1194. *But cf.* Henderson v. Kennedy, 265 F.3d 1072, 1074 (D.C. Cir. 2001) (holding that, under RLUIPA, zoning regulation that prohibited plaintiffs from selling T-shirts on the National Mall constituted a mere inconvenience on religious exercise since there were many other areas in the city where plaintiffs could spread the gospel).

[106] *See* Jensvold, *supra* note 4, at *18-19.

[107] Importantly, the U.S. Supreme Court has yet to address RLUIPA in any context; thus, any previous construction of "substantial burden" by the Supreme Court comes in the context of the RFRA or general First Amendment litigation. However, Supreme Court jurisprudence is still instructive since Congress directed that the definition of "substantial burden" under RLUIPA mirror the already established definition as determined by the Supreme Court in other contexts.

[108] *See generally* San Jose Christian College, 2001 WL 1862224; Omnipoint Communications, 202 F.R.D. 402; C.L.U.B., 157 F. Supp. 2d 903.

[109] *See* 42 U.S.C. § 2000cc-5(70(B); *supra* note 66. In those cases the lower federal courts correctly considered the centrality of the affected belief because they were applying the more general Supreme Court substantial burden standard under the First Amendment, and not the more broadly applicable RLUIPA definition of substantial burden.

[39] While it appears that this broad definition creates a more easily satisfied test, in fact it may still be difficult for plaintiffs to prove that a substantial burden exists. Because the court will be unlikely to doubt the sincerity of the belief unless government the government-imposed burden very clearly affects no belief at all,[110] many plaintiffs should satisfy the first element.[111] However, the plaintiff must then prove that the burden is more than an inconvenience. In the zoning context, and under RLUIPA which defines construction or conversion of a building as religious exercise,[112] virtually any decision denying a religious organization a special use permit forces the religious organization to choose between subjecting itself to fines and other retribution from the state or foregoing a religiously motivated activity. But, under previous case law (both non-RLUIPA and RLUIPA-based) the courts have been careful to distinguish between truly substantial burdens and those requirements that impose a mere inconvenience.[113]

[40] It is this final determination that will provide the biggest challenge to RLUIPA plaintiffs.[114] If Congress had not decided that under RLUIPA a religious adherent or

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[110] *See infra* Omnipoint Communications (construction of monopole on property adjacent to synagogue not a substantial burden since its only offense was aesthetic in nature).

[111] *But see* San Jose, 2001 N.D. Cal. WL 1862224 (parenthetical explanation); Grace, 235 F. 2d 1186 (year) (holding that a prohibition against building a religious school did not create a substantial burden because it amounted only to an inconvenience). Neither court reconciled this outcome with 42 U.S.C. § 2000cc-5(7)(B) under which constructing a building itself can constitute protected religious exercise.

[112] This is also apparent under RLUIPA, which defines construction or conversion of a building as religious exercise. 42 U.S.C. § 2000cc-5(7)(B) (2000).

[113] This has occurred in both non-RLUIPA and RLUIPA-based cases.

[114] Realistically, in determining whether a burden is more than a mere inconvenience, the court will ask whether the burden forces the religious adherent to choose between complying with secular law or complying with religious doctrine. However, RLUIPA's sweep could be applied in much broader contexts. As noted in *C.L.U.B.*, "A substantial burden exists when the government pressures a plaintiff to modify her behavior and violate her beliefs, by, for example,

organization could be burdened regardless of whether or not the belief or practice was central to the religion, then courts could look to the centrality of the belief to determine whether or not the burden was anything more than a mere inconvenience as they had done in RFRA and First Amendment litigation.[115] Under RLUIPA, however, if the affected belief is not central to the religious doctrine the plaintiff can still provide some other convincing evidence demonstrating that the burden is more than a mere inconvenience. Under RLUIPA, the courts must determine whether a substantial burden exists without the aid of the centrality guideline. As a result, the courts retain fairly broad and subjective discretion in determining whether the plaintiff has made a prima facie showing of a substantial burden under RLUIPA. Realistically, the courts have applied, and will likely continue to apply, the new substantial burden standard cautiously.[116]

V. POTENTIAL APPLICATIONS OF THE SUBSTANTIAL BURDEN TEST UNDER RLUIPA

A. The Options

[41] The broad discretion retained by the courts makes it difficult to evaluate the practical effects of RLUIPA. Moreover, only a few cases have construed "substantial burden" in the RLUIPA context, and these cases are the only tools for predicting the circumstances under which

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discriminating against her because of her religious belief, inhibiting her dissemination of particular religious views or pressuring her to forgo a religious practice." C.L.U.B., 157 F. Supp. 2d 903, 914 (N.D. Ill. 2001) (citations omitted).

[115] Even now, if the burden effects a central tenet, then it most likely constitutes a substantial burden.

[116] This hesitation may be due to several causes. For example, (1) courts may not realize that the standard is broader under RLUIPA and rely strictly on Supreme Court cases; (2) courts may doubt that Congress actually intended to broaden the substantial burden standard since its direction to follow Supreme Court precedent conflicts with its definition of religious exercise; or (3) courts may take a prudential approach and worry about future line-drawing difficulties.

a zoning law imposes more than a mere inconvenience in future litigation. Courts face several potential approaches to the substantial burden analysis, but only one of which conforms to Congressional intent and the text of the Act itself.

[42] First, a court could ignore RLUIPA's internal instruction to follow Supreme Court jurisprudence, and, instead, it could apply the substantial burden definition as developed by its own earlier case law construing the term in any religious freedom context.[117] Such an analysis would likely include previous land use cases. While the Supreme Court has not applied the substantial burden standard in the land-use context, lower federal courts have done so.[118] The lower federal courts have also applied the standards set forth by the Supreme Court in non-land use, free exercise situations.

[43] Although this approach may help keep new case law internally consistent with prior case law concerning land use regulations, this approach would yield several unintended results. First, it clearly contradicts a plain-meaning reading of the statute and thwarts Congressional intent. Second, the Supreme Court has not yet addressed substantial burden on free exercise in the land use context, and, presumably, Congress knew this when it created RLUIPA but instructed courts

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[117] In fact, the court in *San Jose Christian College* did so, citing Ninth Circuit case law defining substantial burden in another free exercise context. *See* San Jose Christian College v. City of Morgan Hill, No. C091-20857, 2001 N.D. Cal. WL 1862224 (N.D. Cal. Nov. 14, 2001) (*citing* Bryant v. Gomez, 46 F. 3d 948, 949 (9th Cir. 1995) (*quoting* Graham v. C.I.R., 822 F. 2d 844, 850-51 (9th Cir. 1987). Thus, in *San Jose*, where the court focused on the centrality of building a college to the religion of the plaintiff, the court completely ignored the section of RLUIPA disregarding the prior requirement that the burdened practice be central to the religion. CITE. Regardless of the correctness of the outcome, the court in *San Jose* applied the wrong test in the RLUIPA context.

[118] Rector, Wardens, and Members of Vestry of St. Bartholomew's Church v. City of New York, 914 F. 2d 348 (2d Cir. 1998); Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood, Ohio, 699 F. 2d 303 (6th Cir. 1983); Stuart City Parish v. Board of Zoning Appeals, 946 F. Supp. 1225 (E.D. Va. 1996); Alpine Christian Fellowship v. County Commissioners, 870 F. Supp. 991 (D. Colo. 1994).

to follow Supreme Court precedent anyway.[119] Third, this approach would likely lead to consideration of different or additional factors in each circuit or district since each would develop its own variation on the standard of substantial burden.[120]

[44] Second, the lower federal courts could look only to Supreme Court jurisprudence construing the term substantial burden in the free exercise context. While this approach strictly complies with the mandate of RLUIPA, it too presents several unintended difficulties. First, this approach ignores the additional instruction from Congress, within the text of the statute, that the burdened exercise need not be a central tenet of the religion[121] because Supreme Court jurisprudence explicitly relies on the centrality of the belief to the religion in determining if a substantial burden exists. Second, it ignores the earlier, albeit limited, RLUIPA precedent some courts have already established in construing substantial burden.[122] Third, focusing only on Supreme Court jurisprudence forces the lower federal courts to completely ignore their body of case law regarding free exercise rights in the non-land use context.[123]

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[119] This Note suggests that Congress specifically intended for lower federal courts to ignore case law construing the term substantial burden in non-religious land use cases and look only to Supreme Court jurisprudence construing the standard in the more general free exercise context.

[120] While this commonly occurs under federal law, the text of RLUIPA suggests that Congress wanted to avoid this diversion when it referred the lower courts directly to established Supreme Court jurisprudence.

[121] 42 U.S.C. § 2000cc-5(7)(A) (2000).

[122] Thus, it puts the courts in the same difficult position as the first approach of balancing a set of factors that Congress did not actually intend them to consider in the decision-making process.

[123] Arguably, however, Congress anticipated and intended such a result when it directed the courts to apply the standard developed by the Supreme Court.

[45] Finally, in the method that most closely to conforms to the requirements set forth by Congress, the courts would consider the factors enumerated in Supreme Court jurisprudence,[124] *excluding* the centrality of the belief to the religion, per Congress' instructions.[125] Further, the courts would ignore prior lower and intermediate federal court decisions construing substantial burden in non-religious land use contexts, while considering the relevant body of law already developed under RLUIPA.[126] Through this approach the courts will be able to construct a consistent definition in the RLUIPA context, without trying to reconcile the earlier land use case law in non-RLUIPA litigation. The courts will thus create a new, targeted body of case law directly connected to, and based upon, the requirements of RLUIPA. This approach is most appropriate because it not only conforms to Congress' instructions, but it is also the only option that will effectuate the Congressional purpose of making it easier for religious plaintiffs to obtain relief.[127]

[46] Therefore, this Note submits that a substantial burden under RLUIPA (1) affects a sincerely held religious belief; and (2) imposes more than a mere inconvenience on the religious adherent or organization. In determining whether the burden is greater than an inconvenience,

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[124] The courts should consult cases such as: *Sherbert v. Verner*, 374 U.S. 398 (1963); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Thomas v. Review Board of the Indiana Employment Security Division*, 450 U.S. 707 (1981); and *Employment Division Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990).

[125] 42 U.S.C. § 2000cc-5(7)(A)-(B) (2000).

[126] Although this approach literally ignores an entire body of case law, it is the one most consistent with the Congressional intent reflected in the text of RLUIPA. *See supra* note 115.

[127] Remember, once the plaintiff makes a prima facie showing of a substantial burden, it has triggered strict scrutiny review and the consequent burden switch. Thus, courts must recognize the broad substantial burden standard that Congress has created to fulfill RLUIPA's purpose.

the courts should perform a fact-intensive inquiry and seek guidance in those few cases that have already applied RLUIPA without considering the centrality of the belief to the religion.[128]

[47] Due to the broad definition of religious exercise contained in the text of RLUIPA,[129] the second element will, in most cases, likely be the more difficult for the plaintiff to prove.[130] It will require a subjective, factually-intensive inquiry by the court to determine if the new matter is more like the cases in which the other federal courts found that the burden was more than a mere inconvenience or more like the situations in which courts have found no substantial burden to exist.[131]

[48] Assuming that the courts follow this approach in RLUIPA litigation, the religious adherent or organization may still have difficulty crossing the initial threshold of showing the existence of a substantial burden or, at least, will not have an easier time demonstrating a substantial burden under RLUIPA than it would have directly under the First Amendment, despite of Congress' attempt to make it easier for a plaintiff to demonstrate a substantial burden

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[128] This third approach is the one adopted by the court in *Murphy*, where the court described a substantial burden as one that affected any exercise of religion whether or not the exercise was a central tenet of the religion and noted that, as a result, Congress must have intended the Supreme Court's earlier jurisprudence construing the term to be applied in a broader context. *Murphy,* 148 F. Supp. 2d at 188-89 (citing 42 U.S.C. § 2000cc-5(7)(A) (2000)). The court in *Grace* also applied this approach, first considering the definition of substantial burden under Supreme Court cases such as *Yoder* and *Thomas*, and then going on to discuss the standard under RLUIPA as applied in cases such as *Murphy, San Jose,* and *Henderson*. *See Grace*, 235 F. 2d 1193-95. This approach also incorporates the rulings set forth in *Omnipoint Communications* and *C.L.U.B.* which, consistent with Supreme Court jurisprudence, both recognized that, even under the broadly applicable RLUIPA, the burden must be more than a mere inconvenience to the religious adherent or organization to qualify as a substantial burden. *See* Omnipoint Comm. V. City of White Plains, 202 F.R.D. 402 (S.D.N.Y. 2001), C.L.U.B., 157 F. Supp. 2d at 903 (YEAR).

[129] 42 U.S.C. § 2000cc-5(7)(A)-(B) (2000).

[130] *But see Grace*, 235 F. 2d at 1193-94.

[131] Although this test will likely be difficult to apply, Congress has created this test, and the courts should honor Congressional intent.

by expanding the definition of religious exercise and eliminating the requirement of intentional discrimination. Because of the highly subjective and fact-intensive nature of the standard, courts will be able to reasonably find that compliance with such a zoning law is only an inconvenience to the religious adherent or organization rather than a substantial burden by cautiously applying the definition.[132]

B. An Example

[49] The only court in the Third Circuit to have considered the application of RLUIPA in the zoning context is the Eastern District of Pennsylvania, and it did so in *Freedom Baptist Church of Delaware County v. Township of Middletown*.[133] There, however, the court determined that RLUIPA was constitutional, thereby denying the township's motion to dismiss,[134] but did not apply RLUIPA substantively.

[50] In *Freedom Baptist*, the township zoning officer "advised one of the owners of the building that the Church's use of the property violated the Township zoning ordinances . . . [and]

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[132] However, the text of RLUIPA also provides that plaintiffs who can show that the zoning laws (1) treat a religious assembly on less than equal terms with a nonreligious assembly; (2) implement a land use regulation that discriminates against an institution on the basis of religion; (3) totally excludes from, or unreasonably limits religious assemblies or structures within, a jurisdiction, the plaintiff would not also have to show a substantial burden. 42 U.S.C. § 2000cc-2(b)(1)–(3) (2000). *See, e.g.*, C.L.U.B., 157 F. Supp. 2d 903 (N.D. Ill. 2001) (holding no substantial burden existed where both secular and religious organizations had to comply with the same inconvenient zoning laws); *Murphy*, 148 F. Supp. 2d 173 (D. Conn. 2001) (holding substantial burden existed because zoning law imposed more than a mere inconvenience upon religious adherents where it prohibited prayer group of twenty-five or more people from meeting in adherents' home). Thus, where a plaintiff fails to show a substantial burden under section one, it can always try to show a discriminatory effect under section two.

[133] 204 F. Supp. 2d 857 (E.D. Pa. 2002). Plaintiff Freedom Baptist Church is a twenty-five member non-denominational religious organization that established a house of worship in Middletown, Pennsylvania. *Id.* at 859. The Church leased out half of the first floor of an office building and held services on Sunday mornings and evenings and on Wednesday evenings. *Id.*

[134] *Id*. at 874 ("We therefore conclude that the RLUIPA's land use provisions are constitutional on their face as applied to states and municipalities.").

'directed that the use of the property for worship services cease.'"[135] In litigation, the plaintiff alleged that the township imposed a substantial burden on its free exercise rights.[136] In this case, the Church could likely show that when the township zoning officer forced it to cease worship services, he imposed a substantial burden on the Church, and, thus, succeed on the merits.

[51] As explained above, this Note suggests that the proper method for determining whether a substantial burden exists is: first, to determine if the zoning law affects a sincerely held religious belief; and second, to determine if it imposes more than a mere inconvenience by looking to cases such as *Murphy* and *Omnipoint Communications*[137] that have already applied RLUIPA, as well as Supreme Court cases such as *Sherbert*, *Yoder*, and *Thomas* which have construed

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[135] *Id*. (internal citations omitted). The Middletown Zoning Hearing board denied the Church's application for a use variance, and the Church appealed to the Court of Common Pleas of Delaware County, Pennsylvania. *Id*. The Church alleged that, although the variance was eventually granted, it incurred the cost of seeking the variance that similarly situated secular organizations would not have had to bear. *Freedom Baptist*, 204 F. Supp. 2d at 874 n. 2. In addition to their substantial burden claim, plaintiff can also assert claims under section two of RLUIPA. *Id.* at 869.

[136] *Id*. The Church further alleged that,

> [i]n those districts where religious worship is an allowed use, it is claimed to be a 'conditional use and is subject to onerous requirements, i.e., there must be a minimum lot of five (5) acres as well as parking requirements,' and the 'land requirement alone would make it next to impossible for a new church to locate within the Township' because such a parcel 'within the Township would be prohibitively expensive and it is also unlikely that there would be available land to meet the requirement.'

Id. (internal citations omitted).

[137] This Note suggests that the Eastern District of Pennsylvania, and future courts, should disregard the decisions issued in *San Jose* and *C.L.U.B.* since each applied an incorrect definition of substantial burden in reaching its decision that no substantial burden existed. *See supra* notes 74 and 91 and accompanying text.

substantial burden more generally in the free exercise context. Importantly, the court should not consider the centrality of the burdened exercise to the belief system.

[52] Here, it is very likely that the Eastern District of Pennsylvania would find that religious services held twice on Sundays and once on Wednesdays are part of a sincerely held religious belief.[138] Thus, the plaintiff would easily satisfy the first element of the substantial burden standard. Examining Supreme Court jurisprudence in the general free exercise context, we find that if the government forces a religious adherent or organization to forego a religious practice in order to comply with a secular law that allows individualized assessments, then it has imposed a substantial burden. For example, in *Sherbert*, where the state denied the plaintiff unemployment benefits when she refused to work on Saturdays due to her religious beliefs, the Supreme Court found that the denial imposed a substantial burden under the First Amendment.[139] Similarly, in *Yoder*, Amish parents and their children suffered a substantial burden on their religious freedom where they were forced to either follow secular law, which required the minors to attend school until age sixteen, and thereby violate their religious beliefs, or face criminal prosecution.[140] Again, the plaintiff in *Thomas* suffered a substantial burden when the state found him ineligible for unemployment benefits when he lost his job for refusing to assist in the production of weapons since it violated his religious beliefs.[141] In each case, receipt of a governmental benefit

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[138] Indeed, the court could find that participation in such services is a central tenet of the Church's religious doctrine. However, such a finding would be unnecessary under RLUIPA and would only further confuse the substantial burden standard.

[139] *Sherbert*, 374 U.S. at 404; *see also supra* note 163 and accompanying text.

[140] *Yoder*, 406 U.S. at 218; *see also supra* note 70 and accompanying text.

[141] *Thomas*, 450 U.S. at 718; *see also supra* note 74 and accompanying text.

or compliance with a secular law forced the plaintiff to forego a religious practice, and therefore, each suffered a substantial burden.

[53] The Church in *Freedom Baptist* faced a similar dilemma: in order to comply with the township zoning officer's command to cease using the leased space as a place of worship, the members of the congregation were forced to forego their religious practice of community prayer on Sundays and Wednesdays. Thus, Supreme Court jurisprudence alone suggests that the congregation members in *Freedom Baptist* suffered more than a mere inconvenience and were denied their First Amendment free exercise rights, enforceable through RLUIPA.[142]

[54] Additionally, however, the Eastern District of Pennsylvania should consider the factual situations that were considered more than a mere inconvenience under prior, although admittedly non-binding, RLUIPA precedent in its determination of whether a substantial burden exists here. These cases also indicate that where a religious adherent or organization foregoes or modifies a religious practice in order to comply with a zoning law, the state has imposed more than a mere inconvenience upon the religious entity. For example, in *Murphy*, the District of Connecticut found that a substantial burden existed under the RLUIPA standard where the religious adherents were forced to cease weekly prayer group meetings, held in plaintiffs' home, in order to comply with zoning regulations for residential areas.[143] Additionally, in *Grace*, the court held, in part, that because the zoning law prohibiting use of the church property as a day care facility did not have the "chilling effect" of forcing the plaintiff to forego or modify a sincerely held religious

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[142] Note that while attending services might also constitute a central tenet of the religious belief system, the court should not consider this as a factor. Even without determining the centrality of the belief, the court can reasonably conclude that a substantial burden exists because the church was forced to forego a legitimate, sincerely held exercise of its religious freedom.

[143] *Murphy*, 148 F. Supp. 2d at 189; *see also supra* note 93 and accompanying text.

practice,[144] the church had suffered only a mere inconvenience. Similarly in *Henderson*, cited by the court in *Grace*, the religious plaintiffs could sell t-shirts in any number of locations in the city zoned for such activity.[145] Additionally, the Southern District of New York held in *Omnipoint Communications* that plaintiff Congregation Kol Ami did not suffer a substantial burden where the zoning commission allowed construction of a monopole on adjacent property, since the pole affected no religious practice whatsoever.[146]

[55] In *Freedom Baptist*, the township zoning officer forced the plaintiff to forego weekly worship services in order to comply with the zoning law.[147] Further, the zoning regulations that forced the plaintiff to forego worship services, at least temporarily, very likely imposed a sufficient "chilling effect," rather than a mere inconvenience, on plaintiff's free exercise rights.[148] This case is very similar to the factual situation in *Murphy*,[149] and the imposition is

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[144] In *Grace*, the plaintiff argued that operation of its day care amounted to operation of a religious school. *Grace*, 235 F. Supp 2d at 1191. The Court also appeared skeptical as to the sincerity of this asserted belief. *See id.* at 1197. Further, the court doubted that operation of a day care (even a religious one) qualified as a religious exercise under RLUIPA. *See id.* at *10.

[145] Grace, 235 F. Supp. 2d at 1197.

[146] *Omnipoint Communications*, 202 F.D.R. at 403; *see also supra* note 99 and accompanying text.

[147] Regardless of whether these services are central to the congregation's religious practices under Supreme Court jurisprudence, they would be included in RLUIPA's broad definition of religious exercise, and would therefore be protected religious activity. 42 U.S.C. § 2000cc-5(7)(A) (2000).

[148] *But see C.L.U.B.*, cite needed (noting that because similarly situated secular organizations had to jump through the same hoops, the religious organizations did not bear a substantial burden on their religious freedom when forced to comply with a generally applicable zoning law). However, this Note suggests that in *C.L.U.B.*, the court confused the substantial burden subsection of RLUIPA with the subsection protecting against discrimination and exclusion.

[149] *See* Murphy, 148 F. Supp. 2d at 173. In *Freedom Baptist*, the church held services in an office building that had apparently been an appropriate use of the land. *See* Freedom Baptist, 204 F. Supp. 2d. at 859. The original order to cease appears to have been based solely on the fact

much greater than the objection on aesthetic grounds presented in *Omnipoint Communications* or the objections to location asserted in both *Grace* and *Henderson.*

[56] Therefore, under the standard suggested by this Note, the plaintiff in *Freedom Baptist* should be able to show that it suffered more than a mere inconvenience upon a sincerely held religious belief, thereby satisfying the substantial burden standard. After making this prima facie showing, the Church would be entitled to strict scrutiny review, shifting the burden to the government to show that the zoning requirement is the least restrictive means of furthering a compelling governmental interest.[150]

V. THE PRACTICAL EFFECTS OF RLUIPA

[57] Because the factual situation in *Freedom Baptist* is so similar to that in *Murphy,* it is perhaps a relatively easy case.[151] However, in cases that are not so clear cut, the outcome is much less obvious since the lower federal courts retain very broad discretion in determining which factual scenarios have a "chilling effect" on religious exercise and those that impose a mere inconvenience. Suppose, for example, that a zoning law allows a religious organization to construct a place of worship, but that location happens to be adjacent to a noisy and frequently

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the use of the land was a religious activity. *Id*. Additionally, the contrast between *Murphy* and *Freedom Baptist* only suggests that the court would consider this order to cease a substantial burden. That is, the court allowed the plaintiffs in *Murphy* to continue using their residence, located in a cul de sac, for a weekly prayer group that at least twenty-five people attended. Here, the entire congregation consists of twenty-five people and property once used as office space could presumably accommodate twenty-five people more easily and safely than a residence.

[150] 42 U.S.C. § 20000cc(a)(1)(A)-(B) (2000).

[151] It is especially straight-forward since the Eastern District of Pennsylvania could get away with, incorrectly, applying the substantial burden standard as articulated by the Supreme Court because weekly worship is very likely a central tenet of the church's religious doctrine without struggling with the complexities of the substantial burden standard that this Note has attempted to highlight.

used train track. Because of the location, the passing train regularly interrupts religious services. Members of the congregation become distracted and annoyed by the racket the train causes. While not forcing any member to forego, nor even modify, a religious practice, the zoning law clearly forces the congregation to suffer, at least, an inconvenience by making it more difficult to pray or focus on a sermon.

[58] However, does the zoning regulation requiring the congregation to accept this noise constitute anything more than a mere inconvenience? It certainly seems worse than the aesthetic objection raised in *Omnipoint Communications*. Additionally, unlike the plaintiffs in *Grace* and *Henderson,* the hypothetical religious organization does not have the option of relocating to another area due to the restrictive zoning laws. A court could reasonably conclude that because the organization does not have the option of relocation, the zoning law relegating the congregation to a lot adjacent to an active train track results in a "chilling effect" on the religious exercise of the congregation; the court could conclude that the regulation imposes a substantial burden on the congregation, though not as extreme as the situation in *Murphy* where the religious adherents were forced to forego a religious exercise.

[59] But compare the hypothetical above with a similar situation. The same zoning law locates the church along a high-traffic road; members of the congregation are disturbed during services by the sounds of traffic, including car horns, emergency vehicle sirens, buses and large trucks. However, the noise is much less substantial than that which the congregation by the train track endures. If the court in the first hypothetical holds that a zoning law requiring the organization to accept excessive noise imposes more than a mere inconvenience, could it say the same in the roadside case? Or is the second hypothetical more similar to an aesthetic objection? Conceivably, the court could find that although the traffic makes it a little more difficult to

practice a religious belief, it amounts only to an inconvenience. The court could also reasonably conclude that if the noise from a train can impose a substantial burden, so can noise from automobile traffic and, consequently, hold that the zoning law imposes a substantial burden on the second religious organization as well.

[60] These hypothetical situations illustrate that the substantial burden standard provides no bright line rule for courts to apply. The standard is so factually-intensive that courts will retain an enormous amount of discretion. As a result, although many more litigants will likely assert violations of their First Amendment rights under RLUIPA's substantial burden standard than would have without RLUIPA, courts will likely be cautious in finding for the plaintiffs since, as the above hypotheticals illustrate, drawing the line between a substantial burden and a mere inconvenience becomes very tenuous very quickly.[152] The vague definition of substantial burden, which depends on an equally vague determination of whether a religious adherent or organization has suffered a mere inconvenience, will likely encourage courts to hesitate to expand substantial burden beyond situations in which the plaintiff is forced to forego or modify its religious practice.

[61] This hesitation to extend the substantial burden definition means that plaintiffs will likely be unable to obtain the burden shift that accompanies strict scrutiny review. Without the burden shift, plaintiffs are in the same position that they would be in if they had bypassed RLUIPA and directly asserted their First Amendment rights. Rather than forcing the governmental defendant to show that the zoning law is the least restrictive means of furthering a compelling

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[152] Although the judiciary often faces such factually-sensitive inquiries in other litigation, here courts face the particular danger of using pre-RLUIPA Supreme Court jurisprudence as their sole guidance. As demonstrated in this Note, such a standard does not correctly reflect RLUIPA's substantial burden standard or the intent of Congress.

governmental interest, the plaintiff would continue to bear the burden of proving a discriminatory effect and intent.

[62] As already noted, Congress enacted RLUIPA because it wanted to make it easier for religious adherents and organizations to state a free exercise claim, trigger the burden switch, and obtain relief. However, the substantial burden provision alone appears to be unlikely to accomplish this purpose. Although RLUIPA explicitly states that the centrality of the religious exercise to the religious doctrine is irrelevant, only in the case where the zoning law affected a central tenet of the religion did a court find that it imposed a substantial burden under RLUIPA.[153] As more plaintiffs attempt to take advantage of the broad definition of religious exercise and the favorable substantial burden standard under RLUIPA, courts will likely face a broad range of factual scenarios. Should courts apply the substantial burden standard set forth in this Note, they will have both the opportunity and the flexibility to apply the broader substantial burden standard Congress intended to establish.

VI. CONCLUSION

[63] Under RLUIPA, a religious organization suffers a substantial burden on its free exercise rights, as guaranteed by the First Amendment, where a zoning law (1) affects a sincerely held religious belief; and (2) imposes more than a mere inconvenience on religious exercise. When applying this standard, courts should first consider non-land use Supreme Court jurisprudence construing substantial burden, disregarding the centrality of the belief to the religious doctrine. The court should next consider the available RLUIPA case law developed in the lower federal courts, and finally, it should apply a factually intensive inquiry to determine whether the religious organization or adherent has suffered a substantial burden.

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[153] *See Murphy*, 148 F. Supp. 2d 173.

[64] The practical effects of RLUIPA under this approach are twofold. First, it will encourage more litigants to bring suit. Second, as a result of this increase in litigation, courts will have the requisite flexibility to broaden the definition of substantial burden in accordance with the text of RLUIPA and Congressional intent, although this expansion will likely be hesitant, and at least initially, more limited than Congress would have liked.