"BLESSING-IN-DISGUISE": A HOPEFUL ENDING TO UNCERTAINTY FOR RELIGIOUS INSTITUTIONS' RIGHTS UNDER COVID-19 GOVERNMENTS ACTS

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INTRODUCTION

The COVID-19 pandemic has caused uncertainty and financial hardship on religious institutions in the United States. In-person religious services have come to an abrupt halt, or greatly limited, due to the COVID-19 indoor gatherings restrictions. As a result, many religious institutions have struggled to function both financially and in their ability to freely exercise religion.

Although Congress did not anticipate a global pandemic with such detrimental consequences to religious institutions, it did enact the Religious Land Use and Institutionalized Persons Act in 2000 ("RLUIPA") to protect religious institutions from governmental land-use restrictions during ordinary times.[1] Comprised of three provisions, the RLUIPA was designed to protect the free exercise of religious activities by institutions from unnecessary government interference.[2] Although the purpose of the statute may seem clear on its face, the federal circuit courts have interpreted the RLUIPA differently. The combination of inconsistent understandings of the RLUIPA and the devastating impact of COVID-19 have created much uncertainty and financial hardships upon religious institutions.

Since the RLUIPA was enacted in 2000, the United States Supreme Court ("Court") has refrained from interfering in the circuit court split, and it has routinely denied multiple petitions for writ of certiorari.[3] Whereas all would agree that one would need to search long and far to identify something positive resulting from the COVID-19 pandemic, there may be a "blessing-in-disguise" for religious institutions. Specifically, the devastating impact of the

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

[2] 146 CONG. REC. 1234, 1235 (2000).

[3] *See* Rocky Mt. Christian Church v. Bd. of Cty. Comm'rs, 613 F.3d 1229 (10th Cir. 2010), *cert. denied*, 131 S. Ct. 978 (2011); *see also* Tree of Life Christian Sch. v. City of Upper Arlington, 905 F.3d 357 (6th Cir. 2018), *cert. denied*, 139 S. Ct. 2011 (2019); *see also* Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch, 510 F.3d 253 (3d Cir. 2007), *cert. denied*, 553 U.S. 1065 (2008).

pandemic may cause the Court to reconsider the status quo and clarify the meaning of the RLUIPA by granting a petition for writ of certiorari. This prospect is based upon the stark difference between the underlying facts of the cases denied by the Court during ordinary times and the COVID-19 facts which will likely accompany a case on the horizon.

CONGRESSIONAL HISTORY OF RLUIPA

The first step in unpacking this argument is to understand the congressional history of the RLUIPA. Congress enacted the RLUIPA in response to two rulings by the Court which Congress believed weakened the constitutional protections of religious freedom.[4] The first ruling was in *Smith*[5] and the second ruling was in *Boerne*.[6]

In *Smith*, the Court held that government actions under neutral laws of general applicability were not subject to challenge under the Free Exercise Clause even if they substantially burdened religious practice.[7] In effect, the Court in *Smith* abandoned the well-established strict scrutiny standard in this context.[8]

In response to the *Smith* decision, Congress enacted the Religious Freedom Restoration Act ("RFRA") in 1993.[9] The RFRA sought to restore the strict scrutiny standard for governmental actions that substantially burdened religious exercise.[10] Congress based its authority to pass the RFRA on Section 5 of the 14th Amendment.[11] Shortly after its enactment, the RFRA was challenged for its constitutionality in *Boerne*.[12] The Court in *Boerne*

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[4] 146 CONG. REC. 1234, 1235 (2000).
[5] Emp't Div. v. Smith, 494 U.S. 872 (1990).
[6] City of Boerne v. Flores, 521 U.S. 507 (1997).
[7] *Smith*, 494 U.S. at 882 ("Respondents urge us to hold, quite simply, that when otherwise prohibitable conduct is accompanied by religious convictions, not only the convictions but the conduct itself must be free from governmental regulation. We have never held that, and decline to do so now.").
[8] *See Id.* at 908 (Blackmun, J., dissenting) (asserting that the majority concluded that strict scrutiny of a state law burdening the free exercise of religion is a "luxury" which was not intended by the Founders).
[9] Religious Freedom Restoration Act (RFRA) of 1993, Pub. L. No. 103-141, 1993 U.S.C.C.A.N. (107 Stat.) 1488, *invalidated by* City of Boerne v. Flores, 521 U.S. 507 (1997).
[10] 139 CONG. REC. 2356 (1993).
[11] 106 CONG. REC. 1235 ("RFRA was based in part on the power of Congress under Section 5 of the 14th Amendment to 'enforce, by appropriate legislation, the provisions' of the 14th Amendment.").
[12] *Boerne*, 521 U.S. at 512.

struck down the statute because Congress exceeded its proper powers under Section 5 of the 14th Amendment.[13]

Following these rulings, then-Congressman Charles Canady ("Canady") introduced the RLUIPA bill to protect religious freedom in a way which would not be subject to the same challenge that prevailed in *Boerne*.[14] Generally, the bill was designed to protect the free exercise of religion from unnecessary government interference.[15] Furthermore, Canady explained that "the legislation uses the recognized constitutional authority of the Congress to protect one of the most fundamental aspects of religious freedom – the right to gather and worship – and to protect the religious exercise of a class of people particularly vulnerable to government regulation."[16]

On the day before the RLUIPA was enacted, Canady explained the purposes behind each of the bill's three operative provisions.[17] First, the equal-terms provision was intended to prevent a land-use ordinance from treating religious institutions on less than equal terms than nonreligious entities.[18] Second, the exclusions and limitations provision was intended to prohibit a government from unreasonably excluding religious institutions from a jurisdiction or unreasonably limiting them within a jurisdiction.[19] Third, the substantial burden provision was intended to prohibit a government from issuing a land-use ordinance in a way that imposes a substantial burden on religious institutions.[20] However, such a land-use ordinance may survive if it was in furtherance of a compelling governmental interest and was the least restrictive means of furthering that compelling governmental interest.[21] In essence, Congress wrote the substantial burden provision in a way to restore the strict scrutiny standard in religion-based cases.[22]

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[13] *Id.* at 534 (finding that requiring a government to satisfy strict scrutiny would be "a considerable congressional intrusion into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens.").
[14] 106 CONG. REC. 1235.
[15] *Id.*
[16] *Id.*
[17] 155 CONG. REC. 1563.
[18] *Id.*
[19] *Id.* ("What is reasonable must be determined in light of all the facts, including the actual availability of land and the economics of religious organizations.").
[20] *Id.*
[21] *Id.*
[22] *Id.*

Congress ensured that the RLUIPA would be enforced in federal courts by implementing its standing provision.[23] As described below, Congress vested authority in federal courts to review cases and controversies involving the RLUIPA.[24] As with most laws passed by Congress, however, federal courts may only review such a case if it has Article III standing.[25]

From a real-world perspective, Congress emphasized that the RLUIPA would be of great significance to people of faith.[26] Since the *Boerne* decision, the rate at which local governments have implemented land-use ordinances has increased.[27] Generally, commercial districts are the only feasible avenue for the location of religious institutions.[28] In some areas, however, land-use regulations allow churches to locate in residential areas only.[29] This dynamic gives the appearance that local governments are being generous to religious institutions whereas religious institutions believe that the opposite is true.[30] Therefore, the RLUIPA was intended to protect religious institutions against adverse land-use ordinances.

PRE-COVID-19 CIRCUIT SPLIT

After reviewing the RLUIPA's congressional history, the next step in the analysis is to identify how federal circuit courts have applied the standing provision and the substantial burden provision.

Standing Provision

The RLUIPA states that the question of whether a religious institution has "standing to assert a claim or defense under this section shall be governed by the general rules of standing under Article III of the Constitution."[31] A religious institution may only bring an RLUIPA claim if it satisfies the Article III standing

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[23] 42 U.S.C. § 2000cc-2(a).
[24] *See infra* notes 32-34.
[25] 155 CONG. REC. 1563.
[26] *Id.*
[27] *See Zoning Insights: Explore Data from the National Longitudinal Land Use Survey*, Metro. Hous. and Cmty. Ctr. (2019), https://www.urban.org/policy-centers/metropolitan-housing-and-communities-policy-center/projects/zoning-insights-explore-data-national-longitudinal-land-use-survey.
[28] 155 CONG. REC. 1563.
[29] *Id.*
[30] *Id.*
[31] 42 U.S.C. § 2000cc-2(a).

requirements.[32] The doctrine of "ripeness" makes up a piece of the Article III standing puzzle.[33] The Court in *Williamson County* developed criteria for ripeness in land-use disputes: a takings claim was "not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue."[34] In effect, the *Williamson County* decision created a split among the federal circuit courts because its holding gave great weight to considering "ripeness" for RLUIPA claims arising in the land-use context.

On one side of the circuit split, courts have found that a religious institution has standing to bring a RLUIPA claim as soon as the government issues the land-use ordinance. For example, the First Circuit in *Roman Catholic Bishop* found that a church's RLUIPA claim had standing based solely on the fact that its property became subject to the recently-enacted city ordinance.[35] The City of Springfield ("Springfield") issued an ordinance which created a historic district encompassing a church owned by the Roman Catholic Bishop ("RCB").[36] Under the ordinance, RCB could not make any changes that affected the exterior of the church without the permission of Springfield.[37] While RCB made alterations to the exterior of its church, it did not submit any plan to Springfield regarding those changes.[38] On appeal, the First Circuit determined that Springfield's ordinance sufficed to confer standing: "Because these challenges rest solely on the existence of the Ordinance, no further factual development is necessary, and the Ordinance's existence does confront RCB with a 'direct and

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[32] Lujan v. Defenders of Wildlife, 504 U.S. 555, 559 (1992) (establishing that the "irreducible constitutional minimum" of standing requires a plaintiff to prove three elements: (1) the plaintiff has suffered a concrete injury; (2) that injury is fairly traceable to actions of the defendant; and (3) it must be likely that the injury will be redressed by a favorable decision).

[33] *See* Duke Power Co. v. Carolina Envtl. Study Grp., 438 U.S. 59, 81-82 (1978).

[34] Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 186 (1985), *overruled by* Knick v. Twp. of Scott, 139 S. Ct. 2162 (2019).

[35] Roman Catholic Bishop v. City of Springfield, 724 F.3d 78, 92-93 (1st Cir. 2013).

[36] *Id.* at 86-87.

[37] *Id.* at 83.

[38] *Id.* at 91.

immediate dilemma.'"[39] The First Circuit concluded that RCB had standing as soon as it was subject to the ordinance.[40]

In support of the First Circuit, the Fifth Circuit in *Opulent Life Church* interpreted the standing provision of the RLUIPA in similar fashion.[41] In *Opulent Life Church*, Opulent Life Church ("Opulent Life") sought to relocate its church to a bigger facility in the City of Holly Springs ("Holly Springs").[42] Opulent Life found a property in Holly Spring's central business district.[43] Less than four months after signing the lease, Opulent Life applied for a renovation permit and submitted a building plan to Holly Springs. Holly Springs denied such requests due to Opulent Life's failure to meet the requirements of its zoning ordinance.[44] Specifically, Opulent Life failed to satisfy a provision which required that 60% of property owners within a 1300-foot radius approve the property's use as a church.[45]

Opulent Life brought suit against Holly Springs under the RLUIPA.[46] The district court found that the RLUIPA claim lacked standing because Opulent Life did not show that there was irreparable harm.[47] On appeal, Holly Springs argued that Opulent Life did not have standing.[48] The Fifth Circuit disagreed and found that the claim had standing: "Opulent Life already faced considerable hardship absent immediate judicial review … Now Opulent Life would suffer even more acute hardship were review to be withheld."[49]

More recently, the Seventh Circuit in *Church of Our Lord & Savior Jesus Christ* ruled consistently with the First and Fifth Circuit's approach to standing of a RLUIPA claim.[50] In *Church of*

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[39] *Id.* at 92-93 (quoting Sindicato Puertorriqueno de Trabajadores v. Fortuno, 699 F.3d 1, 9 (1st Cir. 2012)).
[40] *Id.* at 92.
[41] Opulent Life Church v. City of Holly Springs, 697 F.3d 279, 286-88 (5th Cir. 2012).
[42] *Id.* at 282.
[43] *Id.*
[44] *Id.* at 283.
[45] *Id.*
[46] *Id.* at 284.
[47] *Id.* (recognizing that the district court relied upon the fact that OLC had not suffered the threat of irreparable harm because it was still able to meet at their location).
[48] *Id.* at 285.
[49] *Id.* at 288.
[50] Church of Our Lord & Savior Jesus Christ v. City of Markham, 913 F.3d 670, 677-79 (7th Cir. 2019).

Our Lord & Savior Jesus Christ, the Church of Our Lord & Savior Jesus Christ ("Lord & Savior") argued that the city's zoning ordinance did not allow religious-use anywhere within the jurisdiction unless it was granted a conditional-use permit.[51] On appeal, the Seventh Circuit held that Lord & Savior's challenge to the ordinance under the RLUIPA had standing even if it had not sought a permit.[52]

Lastly, the Eleventh Circuit in *Midrash* found that the mere enactment of a land-use ordinance conferred standing as to a RLUIPA claim.[53] In *Midrash*, the Town of Surfside ("Surfside") was divided into eight zoning districts.[54] Religious institutions were zoned in the residential district and prohibited from locating in the business district.[55] Midrash Sephardi ("Midrash") was an orthodox synagogue, and its congregation leased the second floor of a bank in the business district to hold services.[56] Surfside denied Midrash's application for a special-use permit because the congregation did not provide written permission from the bank.[57] In response, Midrash neither appealed the denial nor reapplied for a new special-use permit or variance with permission from the bank.[58] Instead, Midrash filed suit against Surfside under the RLUIPA.[59]

The district court granted summary judgment to Surfside for a lack of standing.[60] On appeal, Surfside argued that the RLUIPA claim lacked standing because Midrash neither attempted to relocate to an appropriate district nor obtained permission to stay put through a special-use permit.[61] The Eleventh Circuit stated that "Surfside's argument misses the point of the congregation's contention: even if a 'suitable property' existed in RD-1 district, the

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[51] *Id.* at 672.
[52] *Id.* at 678 (noting that, "[a]lthough [it has] not addressed this specific question, [it has] declined to apply *Williamson County's* final decision test to other non-Takings Clause challenges to local zoning codes.").
[53] Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214 (11th Cir. 2004).
[54] *Id.* at 1219.
[55] *Id.* (recognizing that Surfside also required churches and synagogues to obtain a conditional-use permit).
[56] *Id.* at 1220.
[57] *Id.*
[58] *Id.*
[59] *Id.* at 1222.
[60] *Id.* at 1224 ("The district court determined that the synagogues lacked standing to contest the constitutionality of § 90-41 because by failing to follow procedures for obtaining a CUP, the congregations had not suffered an injury because of the application of § 90-41.").
[61] *Id.*

congregations believe they have a legal right to remain in the business district."[62] Thus, the Eleventh Circuit found that Midrash suffered the requisite injury for standing due to Surfside's multiple attempts to enforce the ordinance.[63]

On the other side of the circuit split, courts have required a religious institution to prove something additional beyond the mere enactment of a land-use ordinance for a RLUIPA claim to have standing. For example, the Third Circuit in *Congregation Anshei Roosevelt* took this approach.[64] The Congregation Anshei Roosevelt ("Roosevelt") entered into a contract with the Yeshiva[65] under the following conditions: the Yeshiva would provide Roosevelt with rabbinical services in exchange for being allowed to study and worship at the synagogue.[66] After the Yeshiva began its services, a concerned citizen's group complained to the Borough of Roosevelt's Zoning Board ("Board") that the synagogue was being used for a private school in violation of a local ordinance.[67] The Board determined that contracting with the Yeshiva made it a boarding school which required Roosevelt to file a variance application pursuant to the local ordinance.[68]

The district court dismissed Roosevelt's RLUIPA claim based on its lack of ripeness.[69] Roosevelt relied upon *Williamson Cty.* in arguing that the matter was ripe for review because the Board's decision was a final determination.[70] Based upon a fact-specific inquiry, the Third Circuit found that an application for a variance might or might not be required to establish ripeness of the RLUIPA claim: "The factual record is not sufficiently developed to decide fully the RLUIPA claim here, and the Board has not issued

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[62] *Id.*
[63] *Id.* at 1224-25.
[64] Congregation Anshei Roosevelt v. Planning & Zoning Bd. of Roosevelt, 338 F. App'x 214, 217 (3d Cir. 2009).
[65] An Orthodox Jewish School for the religious and secular education of children of elementary school age; an Orthodox Jewish school of higher instruction in Jewish learning, chiefly for students preparing to enter the rabbinate. *Yeshiva, Dictionary.com*, https://www.dictionary.com/browse/yeshiva?s=t (last visited Mar. 7, 2021).
[66] *Congregation Anshei Roosevelt*, 338 F. App'x at 215.
[67] *Id.* at 216 (noting that "although a house of worship may have religious classes, in this case the students were outside late at night and the activity that was not a religious exercise")
[68] *Id.*
[69] *Id.* at 215.
[70] *Id.* at 216.

a definitive position as to the extent the Yeshiva can operate on the synagogue property."[71] The Third Circuit was reluctant to find that Roosevelt's permit made the RLUIPA claim ripe.[72]

Similarly, the Sixth Circuit in *Miles Christi Religious Order* also denied a request to hear a RLUIPA claim due to its lack of standing.[73] In *Miles Christi Religious Order*, the Miles Christi Religious Order ("Miles Christi") owned a house in a residential neighborhood of Northville.[74] Miles Christi's popularity caused an increase of traffic in the neighborhood.[75] Since there was not enough parking for service attendees, Miles Christi allowed them to park on its grass.[76] After receiving local complaints, Northville officials presented an ordinance requiring Miles Christi to provide a sketch plan of its parking situation.[77] A few months later, Miles Christi continued its services without ever providing Northville with a sketch plan.[78] As a result, Northville officials issued a ticket to Miles Christi for violating the ordinance.[79]

The district court dismissed Miles Christi's RLUIPA claim for its lack of standing because it had not received a final decision regarding the status of its property.[80] On appeal, the Sixth Circuit found that the Church's RLUIPA claim was not sufficiently ripe because it had not even submitted the sketch plan nor sought a variance.[81] In relying upon *Williamson Cty.*, the Sixth Circuit determined what constituted a "final decision" in the context of the Northville Code.[82] The Sixth Circuit found that the act of "reviewing" the "initial decision" was the only way Northville could take "a definitive position on the issue."[83] Since Miles Christi had never submitted a sketch of its plans, Northville never made a final decision.[84] Thus, the Sixth Circuit affirmed the district court's

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[71] *Id.* at 218.
[72] *Id.* at 219.
[73] Miles Christi Religious Ord. v. Twp. of Northville, 629 F.3d 533, 535 (6th Cir. 2010).
[74] *Id.* at 535.
[75] *Id.*
[76] *Id.* at 536.
[77] *Id.*
[78] *Id.*
[79] Miles, 629 F.3d at 536.
[80] *Id.* at 537.
[81] *Id.* at 538.
[82] *Id.* at 541.
[83] *Id.*
[84] *Id.*

dismissal for lack of standing since the RLUIPA claim lacked ripeness.[85]

Similar to the Third and Sixth Circuits, the Ninth Circuit in *Guatay Christian Fellowship* held that a RLUIPA claim was ripe enough to confer standing only if the religious institution had applied for a permit pursuant to an ordinance.[86] In *Guatay Christian Fellowship*, Guatay Christian Fellowship ("Fellowship") was located in a district subject to a land ordinance.[87] In order for Fellowship to remain in the district, it was required to apply for a permit pursuant to an ordinance.[88] In failing to do so, Fellowship was "required to notify the church staff to cease using the building for religious assembly within 30 days of the notice."[89] On appeal, the Ninth Circuit considered *Williamson Cty.* to determine whether the dispute was ripe enough to establish standing.[90] If Fellowship had applied for a permit beforehand, any denial of it would constitute a final decision which could have conferred standing.[91]

Substantial Burden Provision

The substantial burden provision of the RLUIPA is as follows: "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."[92] The source of the circuit split is traced to the text of the statute itself and legislative intent.[93] The text of the statute fails to provide any guidance on what constitutes a substantial burden. Instead, Senators Hatch and Kennedy submitted a joint statement

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[85] *Id.*

[86] Guatay Christian Fellowship v. Cty. Of San Diego, 670 F.3d 957, 980 (9th Cir. 2011).

[87] *Id.* at 960.

[88] *Id.* at 960-61.

[89] *Id.* at 964, 969.

[90] *Id.* at 969.

[91] *Id.* at 979 ("[T]he Church here has not alleged a colorable argument of immediate injury: it did not need to vacate the premises upon receipt of the County's communications, and it is currently enjoying use of the building for the pendency of this suit.").

[92] 42 U.S.C. § 2000cc(a).

[93] Adam J. MacLeod, *Resurrecting the Bogeyman: The Curious Forms of the Substantial Burden test in RLUIPA*, 40 REAL EST. L.J. 115, 118-19 (2011).

into the Congressional Record explaining the lack of a statutory definition:

> The Act does not include a definition of the term "substantial burden" because it is not the intent of the Act to create a new standard for the definition of "substantial burden" on religious exercise. Instead, the term as used in the Act should be interpreted by reference to Supreme Court jurisprudence. Nothing in this Act … is intended to change that principle. The term "substantial burden" as used in this Act is not intended to be given any broader interpretation that the Supreme Court's articulation of the concept of substantial burden on religious exercise.[94]

Even with this declaration of strict scrutiny being the proper standard[95], federal courts have stilled differed over what constitutes a substantial burden. While there is much case law applying the strict scrutiny standard to matters involving the infringement of fundamental rights or suspect classifications, federal courts have had little experience applying strict scrutiny to land-use ordinances infringing upon the rights of religious institutions.

At the core of the circuit split, there are three factors which courts have considered in determining whether a government's land-use ordinance imposes a substantial burden on a religious institution. The first factor is the "Functionality Factor": whether a substantial burden is imposed by a land-use ordinance when a religious institution is completely or nearly completely unable to carry out its functions.[96] The second factor is the "Financial Impact Factor": whether the financial impact of a permit denial imposes a substantial burden on a religious institution.[97] The third factor is the "Other Viable Options Factor": whether a land-use ordinance imposes a substantial burden when there are other viable options or sites for relocation.[98]

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[94] 146 CONG. REC. S7776 (daily ed. July 27, 2000) (joint statement of Sen. Hatch & Sen. Kennedy).
[95] *Id.*
[96] This term is not universally-accepted by the legal world. Instead, this term is used for the purpose of simplifying the argument in the Note.
[97] *Id.*
[98] *Id.*

(1) FUNCTIONALITY FACTOR

The Seventh Circuit first considered the Functionality Factor.[99] In *Civil Liberties for Urban Believers*, Christ Church sought to relocate its building to the residential district of Chicago in order to comply with an ordinance.[100] Throughout the process of entering into a lease for a new building, Christ Church claimed that it had "paid substantial attorney's fees, appraisal fees, zoning application charges, title charges, and other expenses attempting to find suitable property."[101] Christ Church filed a RLUIPA claim, alleging that those fees had placed a substantial burden on its free exercise of religion.[102] On appeal, the Seventh Circuit set forth that "a land-use regulation that imposes a substantial burden on religious exercise is one that necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise – including the use of real property for the purpose thereof within the regulated jurisdiction generally – effectively impracticable."[103] In applying the Functionality Factor, the Seventh Circuit found that the alleged burdens were merely conditions that do not amount to a substantial burden on religious exercise.[104] While such expenses and losses tend to arise when relocating, the Seventh Circuit made clear that "they do not render impracticable the use of real property in Chicago for religious exercise, much less discourage churches from locating or attempting to locate in Chicago."[105]

Similarly, the Ninth Circuit applied the Functionality Factor in finding that two denials of conditional-use permits substantially burdened a religious institution's plan to build a temple.[106] In *Guru Nanak Sikh Society of Yuba City*, Guru Nanak sought a conditional-use permit so that it could build a Sikh temple.[107] The permit stated

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[99] Civ. Liberties for Urban Believers v. City of Chi., 342 F.3d 752, 761 (7th Cir. 2003).

[100] *Id.* at 756.
[101] *Id.*
[102] *Id.* at 759.
[103] *Id.* at 761.
[104] *Id.*
[105] *Id.*; *See also Midrash Sephardi, Inc.*, 366 F.3d at 1227 ("A 'substantial burden must place more than an inconvenience on religious exercise; a 'substantial burden' is akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly.").
[106] Guru Nanak Sikh Society of Yuba City v. County of Sutter, 456 F.3d 978, 991-92 (9th Cir. 2006).
[107] *Id.* at 981.

that the temple would occupy a small portion of the land and that it complied with all requirements set forth by Sutter County.[108] Although the Planning Division of Sutter County approved the permit, its Board of Supervisors reversed the decision because the development would constitute "leapfrog development."[109]

The district court granted summary judgment for Guru Nanak because "the denial of the use permit, particularly coupled with the denial of [Guru Nanak's] previous application, actually inhibited [Guru Nanak's] religious exercise."[110] On appeal, the Ninth Circuit determined that the substantial burden test should focus on the actions of Sutter County.[111] In effect, Sutter County's disregard for Guru Nanak's accepted conditions significantly lessened the prospect of Guru Nanak being able to construct a temple in the future.[112] Thus, the Ninth Circuit found that Sutter County had imposed a substantial burden on Guru Nanak to function as a religious institution.[113]

(2) FINANCIAL IMPACT FACTOR

The First Circuit in *Roman Catholic Bishop of Springfield* found it unnecessary to consider the Financial Impact Factor.[114] Based upon the facts above[115], the district court granted summary judgment for Springfield on Our Lady's substantial burden claim.[116] On appeal, the First Circuit found that the expenses resulting in the church's permit getting denied was not a substantial burden because the "mere existence of some expenses does not put 'substantial pressure on [the church] to modify its behavior."[117] Thus, the First Circuit affirmed the district court's finding of summary judgment for Springfield.[118]

Similarly, a district court in the Eleventh Circuit refused to consider any financial consequences resulting from relocation as a

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[108] *Id.* at 982.
[109] A "leapfrog development" is a development that jumped over other urbanized areas resulting in disproportionate development. *See id.* at 983-84.
[110] *Id.* at 984.
[111] *Id.* at 991-92.
[112] *Id.*
[113] *Id.*
[114] *Roman Catholic Bishop of Springfield*, 724 F.3d at 88.
[115] *See supra* text accompanying notes 34-37.
[116] *Roman Catholic Bishop of Springfield*, 724 F.3d at 88-89.
[117] *Id.* at 99 (quoting Bethel World Outreach Ministries v. Montgomery Cty. Council, 706 F.3d 548, 556 (4th Cir. 2013)).
[118] *Id.*

substantial burden.[119] In *Church of Our Savior*, the Church of Our Savior ("Our Savior") brought a RLUIPA claim against Jacksonville Beach.[120] Specifically, Our Savior claimed that Jacksonville Beach imposed a substantial burden when its permit was denied.[121] In further support, Our Savior struggled to find a new location because there were no other available sites in its price-range.[122] The district court rejected this argument: "However, that other suitable land is not available in Jacksonville Beach at a price the Church can afford is a burden imposed by the market, not one the City created by denying the Church a CUP."[123]

On the other side of the split, the Seventh Circuit relied on the Financial Impact Factor in determining whether a substantial burden existed.[124] In *St. Constantine*, the Sts. Constantine & Helen Greek Orthodox Church ("Sts. Constantine") acquired a forty-acre tract of land in the residential district of New Berlin.[125] Pursuant to an ordinance, Sts. Constantine applied for permission to rezone its property from residential to institutional so that it could build its church.[126] After rejecting the application, New Berlin offered Sts. Constantine a one-year deadline to notify New Berlin of its course of action.[127]

In filing its RLUIPA suit, Sts. Constantine argued that New Berlin placed a substantial burden on its religious exercise by denying the rezoning application.[128] The district court granted summary judgment for New Berlin because Sts. Constantine failed to offer any evidence that there were no other parcels of land on which its church could have built.[129] On appeal, the Seventh Circuit found that the burden was substantial: "The Church could have

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[119] Church of Our Savior v. City of Jacksonville Beach, 69 F. Supp. 3d 1299, 1314-16 (M.D. Fla. 2014).
[120] *Id.* at 1311.
[121] *Id.* at 1313-14.
[122] *Id.* at 1314.
[123] *Id.* at 1316 (citing *Midrash*, 366 F.3d at 1227, n. 11 ("[W]hatever specific difficulties the plaintiff church claims to have encountered, they are the same ones that face all land users, not merely churches.")).
[124] Sts. Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin, 396 F.3d 895, 901 (7th Cir. 2005).
[125] *Id.* at 898 (explaining that the purpose of this purchase was due to the lack of space in its initial building for religious services).
[126] *Id.*
[127] *Id.* at 899.
[128] *Id.*
[129] *Id.* at 901.

searched around for other parcels of land (though a lot more effort would have been involved in such a search than, as the City would have it, calling up some real estate agents), or it could have continued filing applications with the City, but in either case there would have been delay, uncertainty, and expense."[130]

(3) OTHER VIABLE OPTIONS FACTOR

On one side of the split, the Seventh Circuit refused to apply the Other Viable Options Factor in determining whether a substantial burden existed.[131] In *Eagle Cove Camp & Conf.*, the Town of Woodboro ("Woodboro") adopted a land-use plan which sought to "encourage low density single family residential development for its lake-and-river-front properties."[132] Eagle Cove Camp & Conference ("Eagle Cove") intended to build a Bible camp on its lake-front property in Woodboro.[133] The eastern parcel of the property was zoned as Single Family Residential and the western parcel was zoned Residential and Farming.[134] In order to comply with the land-use plan, Eagle Cove filed a petition with Woodboro to rezone its property as a Recreational zoning district.[135] Woodboro denied the petition, reasoning "that the recreational camp was not consistent with the goals of maintaining the rural and rustic character of Woodboro and would conflict with the existing single-family development surrounding Squash Lake."[136] Eagle Cove responded by seeking to obtain a conditional-use permit.[137] Woodboro again denied Eagle Cove.[138]

Eagle Cove then brought a substantial burden claim against Woodboro, alleging that the denial disallowed it from seeking any

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[130] *Id.*

[131] Eagle Cove Camp & Conf. Ctr., Inc. v. Town of Woodboro, 734 F.3d 673, 681 (7th Cir. 2013).

[132] *Id.* at 676 ("The plan incorporated a survey Woodboro took that found the majority of the residents desired to maintain the town's rural and rustic character.").

[133] *Id.* at 677.

[134] *Id.* ("The purpose of the Single Family Residential District is to provide an area of quiet seclusion for families.").

[135] *Id.*

[136] *Id.*

[137] *Id.* at 677-78 ("Eagle Cove attached an 'Overall Site Plan' with the application, which included plans for a lodge in excess of 106,000 square feet. The proposed Bible camp would have a maximum capacity of 348 campers and also accommodate 60 people in outdoor camping sites.").

[138] *Id.* at 678

other viable sites to a build a Bible camp.[139] Despite Eagle Cove spending considerable amounts of time and money on the petitions, the district court found that those hardships did not entitle it to relief as a substantial burden.[140] On appeal, the Seventh Circuit first established that even though Eagle Cove spent considerable time and money on the petitions for rezoning, it did not constitute a substantial burden.[141] Next, the Seventh Circuit found that the means of zoning the area around Squash lake for single family purposes was sufficient to carry out Woodboro's compelling interest.[142] Instead of inhibiting Eagle Cove's religious activity, the zoning regulation merely encouraged "an area of quiet seclusion for families around Squash Lake."[143] Importantly, the Seventh Circuit considered the fact that Eagle Cove had not even attempted to locate other suitable locations for its Bible Camp; it was not the land-use regulation that created a substantial burden, but rather "Eagle Cove's insistence that the expansive, year-round Bible camp be placed on the subject property."[144] Interestingly, it is reasonable to believe that the Seventh Circuit would have found a substantial burden if Eagle Cove had attempted to relocate to an acceptable district in Woodboro.

Similar to the Seventh Circuit, the Eleventh Circuit found that the absence of other viable land did not create a substantial burden.[145] The facts of *Midrash* regarding standing also support the Eleventh Circuit's finding on the substantial burden claim.[146] The Eleventh Circuit expressly rejected the approach taken by the Seventh Circuit in *Eagle Cove Camp & Conf.*[147] Instead, the

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[139] *Id.*

[140] *Id.* at 678-79.

[141] *Id.* at 681-82 (citing *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 761 (7th Cir. 2003) ("That [Appellants] expended considerable time and money … does not entitle them to relief under RLUIPA's substantial burden provision.")).

[142] *Id.* at 682 ("The County had a compelling interest in preserving the rural and rustic character of the Town as well as the single-family development around Squash Lake.").

[143] *Id.*

[144] *Id.* at 681 (citing Pretra Presbyterian Church v. Vill. Of Northbrook, 489 F.3d 846, 851 (7th Cir. 2007) ("When there is plenty of land on which religious organizations can build churches … in a community, the fact that they are not permitted to build everywhere does not create a substantial burden.")).

[145] *Midrash*, 366 F.3d at 1228.

[146] *See supra* text accompanying notes 52-56.

[147] *Midrash*, 366 F.3d at 1227 ("While we decline to adopt the Seventh Circuit's definition – which would render § b(3)'s total exclusion prohibition meaningless –

Eleventh Circuit stated that "a 'substantial burden' must place more than an inconvenience on religious exercise; a 'substantial burden' is akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly."[148] Midrash claimed that the fact that it was forced to relocate constituted a substantial burden because such a move would require its members to walk farther.[149] The Eleventh Circuit rejected this argument because "while walking may be burdensome and 'walking farther' may be even more so, we cannot say that walking a few extra blocks is 'substantial,' as the term is used in RLUIPA, and as suggested by the Supreme Court."[150] If Midrash's argument had prevailed, the Eleventh Circuit recognized that "it would [be] almost impossible for a municipality to ensure that no individual will be burdened by the walk to a religious assembly."[151] The Eleventh Circuit concluded its finding from a practical perspective: "In any given congregation, some members will necessarily walk farther than others, and, inevitably, some congregants will have greater difficulty walking than others … [and thus] the burden of walking a few extra blocks, made greater by Mother Nature's occasional incorrigibility, is not 'substantial' within the meaning of the RLUIPA."[152]

On the other side of the circuit split, the Ninth Circuit relied heavily on the Other Viable Options Factor in determining whether a substantial burden existed.[153] In *International Church of the Foursquare Gospel*, the International Church of the Foursquare Gospel ("Foursquare Gospel") was located in the City of San

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we agree that 'substantial burden' requires something more than an incidental effect on religious exercise.").

[148] *Id.*

[149] *Id.* ("[] suggest[ing] that the additional blocks would greatly burden congregants who are ill, young or very old. The inconvenience occasioned on these congregants would cause them to stop attending services altogether, significantly impairing the synagogues' operation.").

[150] *Id.* at 1228 (arriving at its decision based upon evidence of the district being in the geographic center of a relatively small municipality and deposition testimony indicating that such congregants customarily move where synagogues are located rather than expecting the synagogues to move closer to them).

[151] Although these facts were not present, the Eleventh Circuit seemed to be offering guidance to the lower courts on how to analyze such a scenario in the future. *Id.*

[152] *Id.* (implementing a very "real-world" perspective as to the kinds of burdens that are substantial enough to violate the RLUIPA).

[153] Int'l Church of Foursquare Gospel v. City of San Leandro, 673 F.3d 1059, 1068 (9th Cir. 2011).

Leandro ("San Leandro") and its membership had increased significantly.[154] Foursquare Gospel began to look for a larger property and found a site located on two parcels in San Leandro's Industrial Park district which was designed to "preserve an environment for industrial and technological activity."[155] At the time that Foursquare Gospel identified the property as a potential site, the San Leandro Zoning Code did not allow "assembly uses" to locate in the district, but did allow relocation to residential districts provided it obtained a conditional-use permit.[156] After entering into a lease for the property, Foursquare Gospel petitioned to amend the zoning ordinance. [157] San Leandro then denied the petition.[158]

In assessing Foursquare Gospel's RLUIPA claim against San Leandro, the district court found that the denial of the conditional-use permit did not impose a substantial burden.[159] On appeal, the Ninth Circuit scrutinized the district court's analysis.[160] In relying upon *Westchester Day School*[161], the Ninth Circuit held that the district court erred in failing to consider whether a lack of other viable sites for relocation imposed a substantial burden on Foursquare Gospel.[162] The Ninth Circuit found that "it is certainly more than the scintilla of evidence required to defeat summary judgment."[163]

RECENT PETITION DENIAL

The next step in the analysis is a discussion of a recent petition for writ of certiorari in order to understand what pre-COVID-19 issues and facts the Court will not review.

Facts

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[154] *Id.* at 1061.

[155] *Id.* at 1061-62 ("The property is adjacent to several manufacturing plants and is surrounded by numerous other industrial and light-industrial uses.").

[156] *Id.* at 1062.

[157] *Id.*

[158] *Id.* at 1062-65.

[159] *Id.* at 1065.

[160] *Id.* at 1066-67 ("The district court, by concluding that the Zoning Code as a neutral law of general applicability could impose only an incidental burden on religious exercise, committed reversible legal error.").

[161] Westchester Day Sch. V. Vill. Of Mamaroneck, 504 F.3d 338, 352 (2d Cir. 2007) (accepting the religious school's experts' testimony as conclusive evidence that the specified property was the only site that would accommodate its new building).

[162] *Int'l Church of Foursquare Gospel*, 673 F.3d at 1067.

[163] *Id.*; *see* Anderson v. Liberty Lobby, 477 U.S. 242, 252 (1986) (establishing that in order to defeat a motion for summary judgment, the non-moving party must present more than a "mere … scintilla of evidence" that an issue of fact exists).

The Rabbinical College of Tartikov, Inc. ("Tartikov") was a religious corporation formed on August 1, 2004 in the Village of Pomona ("Pomona").[164] Due to the lack of rabbinical judges in the United States[165], Tartikov sought to educate students in its proposed rabbinical college.[166] Specifically, Tartikov planned to include "somewhere between 50 and 250 units of housing, which will be apartments that have 3 or 4 bedrooms, ranging in size from 1800-2000 square feet."[167] The purpose of the proposed rabbinical college was to offer "an immersive Torah Community, which enables the college to train full-time rabbinical judges."[168]

Prior to the dispute involving Tartikov, Pomona adopted a master plan "to maintain the low density residential character of the Village" in response to rapid population growth. Yeshiva Spring Valley, another religious institution, sought to build a church on the property to the Pomona Planning Board. Following the hearing, the Pomona's Board of Trustees adopted Local Law 1 of 2001 ("Law 1"), which subjected certain "educational institutions" to restrictions under the special permit approval process.[169] Since Yeshiva Spring Valley passed as a suitable candidate, then-Mayor Herbert Marshall emphasized in a letter that the religious institution "must be treated no different[ly] than any other residences or planned residences within the community" because residents "simply do not have the right to choose who [their] neighbors will be."[170]

Subsequently, Tartikov purchased a 100-acre parcel of land in the R-40 district of Pomona from Yeshiva Spring Valley.[171] The R-40 district allowed only 40,000 square feet per lot for the development of single-family homes.[172] At that time, Tartikov

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[164] *Tartikov*, 138 F. Supp. 3d at 371.
[165] *Id.* (according to their belief, Orthodox Jews are not supposed to resolve conflicts in the secular court system, but must have their conflicts adjudicated before rabbinical judges applying Jewish law).
[166] *Id.*
[167] *Id.* at 372.
[168] *Id.*
[169] Law 1 defined "educational institution" as "[a]ny school or other organization or institution conducting a regularly scheduled comprehensive curriculum of academic and/or alternative vocational instruction similar to that furnished by kindergartens, primary[,] or second schools and operating under the Education Law of New York State, and duly licensed by the State of New York." *Id.* at 373; Local Law 1 of 2001, as codified at Village Code §§ 130-4, 130-10.
[170] *Tartikov*, 138 F. Supp. 3d at 374.
[171] *Id.*
[172] *Id.*

believed that the subject property was the only available parcel suitable for its proposed rabbinical college under Law 1.[173]

On September 24, 2004, Pomona's Board of Trustees adopted Local Law 5 of 2004 ("Law 5"), which redefined "educational institution"[174] and promulgated requirements for the construction of dormitories.[175] Law 5 provided that "[a] dormitory is permitted as an accessory use to an educational use and that there shall be not more than one dormitory building on a lot."[176] Law 5 made clear that "[s]ingle-family, two-family, and/or multi-family dwelling units other than as described above shall not be considered to be dormitories or part of dormitories."[177]

In November of 2004, Pomona learned that Tartikov had purchased the subject property for the purpose of building a rabbinical college.[178] Pomona also learned that Tartikov planned to house 4,500 students.[179] After hearing this, Pomona adopted Local Law 1 of 2007 ("Law 1"), which was allegedly aimed to bar Tartikov's proposed rabbinical college.[180] Specifically, Law 1 mandated that "[a] dormitory building shall not occupy more than twenty (20) percent of the total square footage of all buildings on the lot."[181] It was clear that Law 1 made it difficult for Tartikov to build its proposed rabbinical college.

United States District Court for the Southern District of New York

Tartikov filed a substantial burden claim under the RLUIPA against Pomona, alleging that the Local Laws prevented the construction of its proposed rabbinical college.[182] Since Pomona's R-40 district was limited to only residential-use, Tartikov was required to apply for a special-use permit in order to build its proposed rabbinical college as an educational institution.[183] Even if

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[173] *Id.*

[174] Law 5 redefined "educational institution" as "[a]ny private or religious elementary, junior high or high school, college, graduate[,] or post-graduate school conducting a full-time curriculum of instruction … accredited by the New York State Education Department or similar recognized accrediting agency." *Id.* at 375.

[175] *Tartikov*, 138 F. Supp. 3d at 375.

[176] Law 5 further defined a "dormitory" as "a building … [which contains] sleeping quarters for administrative staff, faculty[,] or students." *Id.*

[177] *Id.*

[178] *Id.*

[179] *Id.*

[180] *Id.* at 376.

[181] *Tartikov*, 138 F. Supp. 3d at 376.

[182] *Id.* at 377-78.

[183] *Id.*

it had applied, Tartikov alleged that it would have been difficult to succeed due to the strict requirements of a "dormitory" under Law 1.[184]

The district court first addressed the issue of whether the substantial burden claim had standing.[185] Pomona argued that the claim was unripe because Tartikov did not file an application for a special-use permit and, thus, Pomona had not made a final decision.[186] In response, Tartikov argued that a final decision was not necessary to confer standing based upon the text of the RLUIPA.[187] In assessing both arguments, the district court agreed with Tartikov because "a substantial burden can be imposed by the mere enactment of an ordinance." Thus, Tartikov's substantial burden claim had standing to be brought against Pomona.[188]

Next, the district court ruled on the merits of Tartikov's substantial burden claim.[189] The district court began its analysis by determining whether the supposed activities to be conducted on the proposed rabbinical college constituted "religious exercise" under the substantial burden provision.[190] In relying upon *Westchester Day School*, the district court believed "any exercise of religion, whether or not compelled by, or central to, a system of religious belief" as "religious exercise."[191] Furthermore, the district court established that "religious exercise" under the RLUIPA should be defined broadly "to the maximum extent permitted by the terms of this chapter and the Constitution."[192] Thus, the district court found that it was clear that the multi-family dormitories Tartikov sought to build were intended to exercise religion."[193]

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[184] *Id.* at 378.
[185] *Id.* at 380.
[186] *Id* at 385.*; see Defs.'* Mem. 36-37.
[187] *Id.*; *see* Pls.' Mem. 10-11.
[188] *Id.* (citing Elijah Group, Inc. v. City of Leon Valley, 643 F.3d 419, 422 (5th Cir. 2011) ("When we focus on the text of the Clause, we read it as prohibiting the government from 'imposing,' i.e., enacting, a facially discriminatory ordinance or 'implementing,' i.e. enforcing a[n ordinance]."); Roman Catholic Diocese of Rockville Ctr. V. Inc. Vill. Of Old Westbury, 2012 U.S. Dist. LEXIS 56694, 2012 WL 1392365 at *8 (E.D.N.Y. Apr. 23, 2012).
[189] *Tartikov*, 138 F. Supp. 3d at 431.
[190] *Id.*
[191] *Id.* (quoting *Westchester Day Sch.*, 386 F.3d at 186).
[192] *Id.* (quoting 42 U.S.C. § 2000cc-3(g)).
[193] *Id.*

The district court then determined what constituted a "substantial burden" as stated in the RLUIPA.[194] First, the district court recognized that "the Second Circuit has held that a land use regulation constitutes a 'substantial burden' within the meaning of RLUIPA if it 'directly coerces the religious institution to change its behavior.'"[195] In relying upon this test, the district court acknowledged that merely requiring religious institutions to apply for a permit or variance does not coerce them to change its behavior.[196] Instead, a substantial burden exists where an ordinance imposes significant "delay, uncertainty, and expense."[197] The district court found that Tartikov established an issue of material fact as to whether a substantial burden violated its religious exercise because Pomona's Laws completely prevented Tartikov from building and operating a rabbinical college.[198]

Lastly, the district court determined whether Pomona's Laws passed the strict scrutiny standard.[199] As to Pomona's motion for summary judgment, the fact that other religious and educational uses were permitted in the R-40 district was irrelevant.[200] Thus, Pomona was not entitled to summary judgment on Tartikov's substantial burden claim since it was Tartikov's right to determine its religious exercise.[201]

As to whether Tartikov was entitled to summary judgment, the district court noted that this was a more difficult decision. Although "religious institutions do not have a constitutional right

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[194] *Id.*

[195] *Tartikov*, 138 F. Supp. 3d at 431 (quoting *Westchester Day Sch. II*, 504 F.3d at 349).

[196] *Id.* (citing *Fortress Bible Church*, 694 F.3d at 219 ("A denial of a religious institution's building application is likely not a substantial burden if it leaves open the possibility of modification and resubmission.")); Konikov v. Orange Cty., 410 F.3d 1317, 1323 (11th Cir. 2005) ("[R]equiring applications for variances, special permits, or other relief provisions [does] not offend RLUIPA's goals.")).

[197] *Id.* at 433 (quoting *Sts. Constantine & Helen*, 396 F.3d at 901); *see also Westchester Day Sch. II*, 504 F.3d at 349 (finding a substantial burden where the complete denial of a religious institution's application results in substantial "delay, uncertainty, and expense.").

[198] *Id.* at 434.

[199] *Id.*

[200] *Id.* (citing Holt v. Hobbs, 135 S. Ct. 853, 862 (2015) (finding that "the availability of alternative means of practicing religion" irrelevant under the RLUIPA)).

[201] *Tartikov*, 138 F. Supp. 3d at 433 (quoting *Holt*, 135 S. Ct. at 863 (determining that protection under the RLUIPA was "not limited to beliefs which are shared by all of the members of a religious sect.")).

to build wherever they like,"[202] the core of Tartikov's substantial burden claim had two parts:

(a) "is the proposed rabbinical college, *exactly as proposed* with libraries, mikvahs, student housing, etc., essential to their religious exercise, and
(b) If not, can Plaintiffs build a rabbinical college that is sufficient to meet their needs within the confines of the Challenged Laws?"[203]

Under part (a), there were three other rabbinical colleges in the general area: Kollel Belz, Mechon L'Horoya, and Kollel Beth Yechiel Mechil of Tartikov.[204] Tartikov contended that there were several differences between those rabbinical colleges and its proposed education.[205] Not only did Tartikov believe that it would offer a higher quality of education, it also asserted "that a rabbinical college *as proposed by Plaintiffs* is essential to the exercise of their religious beliefs."[206] In response, Pomona argued that Tartikov had not articulated any religious belief that required a traditional Torah Community.[207] In assessing the arguments, the district court recognized that Tartikov's proposed plan for education was unclear and not finalized. Thus, it was difficult for the district court to find that the proposed rabbinical college was essential to Tartikov's religious exercise.[208]

Under part (b), the district court noted that if no rabbinical college of any kind was compatible with the Laws, then Pomona may have unlawfully imposed a substantial burden.[209] While Tartikov could not operate without violating the Laws, the other three rabbinical colleges could operate since it educated students without on-campus housing.[210] Thus, the district court found that the "Dormitory Law arguably is not a substantial burden on the operation of *a* rabbinical college."[211] However, the district court was hesitant about such a finding so it held that it might raise an issue

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[202] *Id.* (quoting *Fortress Bible*, 694 F.3d at 221).
[203] *Id.* at 435.
[204] *Id.* at 434
[205] *Id.*
[206] *Id.*
[207] *Tartikov*, 138 F. Supp. 3d at 434.
[208] *Id.*
[209] *Id.* at 436.
[210] *Id.*
[211] *Id.*

of material fact.[212] Therefore, Tartikov was not entitled to summary judgment on its substantial burden claim.[213]

United States Court of Appeals for the Second Circuit

The Second Circuit granted review of this case.[214] The first issue of the appeal was whether Tartikov had standing to bring a substantial burden claim under the RLUIPA.[215] The Second Circuit began its analysis by noting that standing "turns on whether the alleged injury is an injury in fact for Article III purposes."[216] The Second Circuit held that there was no standing because Tartikov never submitted a proposal for the rabbinical college, applied for a permit, or engaged in any other conduct that would violate the Laws.[217] Since whatever harm may have arisen from the enactment of the Laws was merely conjectural at the time of review, the Second Circuit found that it lacked jurisdiction over Tartikov's substantial burden claim.[218] Consequently, the Second Circuit did not rule on Tartikov's substantial burden claim since it did not have standing.[219]

COVID-19 IMPACT ON RELIGIOUS INSTITUTIONS

Since it is unlikely that the Court will review a RLUIPA case with underlying facts during ordinary times, it is critical to identify the circumstances that would persuade the Court to grant certiorari on a RLUIPA case. Facts associated with the COVID-19 pandemic are likely those circumstances.

On March 13, 2020, then-President Trump declared a national emergency due to COVID-19, which marked the beginning of a long, difficult road ahead for religious institutions in the United States.[220] State governments issued executive orders which intended to stop the spread of COVID-19.[221] For example,

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[212] *Id.*
[213] *Id.*
[214] *Tartikov*, 945 F.3d at 109.
[215] *Id.*
[216] *Id.* at 109-10 ("Whether Tartikov has standing to pursue each group of claims turns on whether the alleged injury is an injury in fact for Article III purposes.").
[217] *Id.* at 110.
[218] *Id.*
[219] *Id.*
[220] Kevin Liptak, *Trump declares national emergency – and denies responsibility for coronavirus testing failures*, CNN Politics (Mar. 13, 2020, 10:58 PM), https://www.cnn.com/2020/03/13/politics/donald-trump-emergency/index.html.
[221] Davia Cox Downey & William M. Myers, *Federalism, Intergovernmental Relationships, and Emergency Response: A Comparison of Australia and the United*

Government Murphy of New Jersey signed Executive Order No. 156, which limited the number of persons at indoor gatherings, including religious services, to 25% capacity of the room.[222] The combination of executive orders and public concern about COVID-19 has caused religious institutions to struggle.

Since the COVID-19 pandemic began, religious institutions have incurred financial hardships. Donations given to religious institutions have plummeted due to the lack of members attending indoor services.[223] This trend was analyzed by the COVID-19 Congregational Study conducted by the Lake Institute.[224] Of the 555 participating faith communities, it was reported that donations were down about 4.4% between February and June of 2020 as compared to the prior year.[225] It was also reported that 38% of participants cut costs by reducing nonpersonnel administrative expenses, 11% of participants delayed capital campaigns, and 12% of participants pulled back on giving to religious associations.[226] Although only 14% of the participants reported salary reductions, layoffs, or furloughs, 30% of the participants said they also financially aided other congregations in need.[227] As to the future, a majority of participants (52%) planned to keep their budgets the same, while the rest intended to make cuts of 5% to 10%.[228]

In order to minimize losses, religious institutions have remained innovative by offering electronic donation features for its members to use. According to the 2018-2019 National Congregations Study, only 20% of participants streamed their services and 48% were able to accept donations electronically.[229] The COVID-19 Congregational Study also tracked the effectiveness of

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States, 50 A. Rev. Pub. Admin. 526, 529 (2020) ("Direction provided to governors in states with evidence of community spread was limited to recommendations to close schools, bars, restaurants, and other indoor and outdoor venues.").

[222] NJ Exec. Order No. 156 2020-1 (June 22, 2020), https://www.nj.gov/infobank/eo/056murphy/pdf/EO-156.pdf.

[223] *See* Lake Institute on Faith & Giving, National Study of Congregations' Economic Practices 14 (2019) (finding that 81% of giving comes from individuals and 78% of these individuals' donations are given during a worship service).

[224] Lake Institute on Faith & Giving, COVID-19 Congregational Study September 2020 2 (2020), https://scholarworks.iupui.edu/bitstream/handle/1805/23791/lake-covid-report2020-2.pdf.

[225] *Id.*

[226] *Id.* at 5.

[227] *Id.*

[228] *Id.* at 6.

[229] Lake Institute on Faith & Giving, *supra* note 8.

electronic donations.[230] The results showed how technologically deficient the smaller religious institutions were to adopt an electronic donation feature compared to the bigger religious institutions.[231] This logically concludes that many small religious institutions have taken the biggest hit financially during the COVID-19 pandemic.

Another option utilized by religious institutions to stay afloat financially was to receive funding as part of the federal stimulus package. On March 27, 2020, then-President Trump signed the CARES Act which authorized the Small Business Administration ("SBA") to modify existing loan programs and establish a new loan program to assist small businesses nationwide impacted by COVID-19.[232] The CARES Act explicitly states that "nonprofit entities' are eligible and the SBA reaffirmed that by publishing a memorandum stating that "faith-based organizations are eligible to receive SBA loans regardless of whether they provide secular social services."[233] It was reported that religious institutions received a total of approximately $7.3 billion.[234] Even though all religious institutions were eligible for relief, there was much disparity in the distribution of the funds. For example, televangelist Joel Osteen's megachurch received $4.4 million from the loan, whereas smaller religious institutions received much less. [235]

Nevertheless, religious institutions still have not overcome such uncertainty and financial hardships. For example, the Florence Seventh-Day Adventist Church in Northampton, Massachusetts fell victim to these hardships earlier in 2020.[236]

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[230] Lake Institute on Faith & Giving, *supra* note 9.
[231] *Id.*
[232] Business Loan Program Temporary Changes; Paycheck Protection Program, 85 Fed. Reg. 20811, 20816 (Apr. 15, 2020) (to be codified at 44 U.S.C. 1510); *see also* Coronavirus Aid, Relief, and Economic Security Act
[233] *Id.*; *see* U.S. Small Business Administration, Faith-Based Organizations (2020).
[234] Benjamin Fearnow, *Religious Organizations Receive $7.3 Billion in PPP Loans, Megachurches Amass Millions*, Newsweek (July 7, 2020, 11:05 AM), https://www.newsweek.com/religious-organizations-receive-73-billion-ppp-loans-megachurches-amass-millions-1515963.
[235] Kaelan Deese, *Joel Osteen's Texas megachurch received $4.4M COVID-19 stimulus loan*, The Hill, Dec. 15, 2020, https://thehill.com/homenews/state-watch/530322-joel-osteens-texas-megachurch-received-44-million-covid-19-stimulus-loan.
[236] Jim Kinney, *Seventh-Day Adventist Church buys former Blessed Sacrament in Northhampton*, MASS LIVE, Jan. 14, 2021, https://www.masslive.com/news/2021/01/seventh-day-adventist-church-buys-former-blessed-sacrament-in-northampton.html.

Before having to conduct online services due to COVID-19 restrictions, the church had as many as 80 members worshipping together each week.[237] Realizing that 80 members was too many to hold in its original building, the church decided to find a new location.[238] While searching for a new site to relocate, the COVID-19 pandemic struck.[239] The current state of the law will likely subject it to certain land-use ordinances, making compliance longer and more expensive. This is just one of the many religious institutions whose futures may be in question due to the combination of COVID-19 and these types of restrictions.

LOWER COURT DECISIONS CONCERNING RELIGIOUS FREEDOM DURING THE COVID-19 PANDEMIC

As discussed above, the underlying facts of RLUIPA cases during the COVID-19 pandemic will be the determining factor as to why the Court may review the circuit splits involving the standing provision and the substantial burden provision. There have only been a few lower court decisions which have addressed the general protection of religious freedom during the COVID-19 pandemic.

A district court for the Eastern District of California addressed whether Governor Newsom's executive order to limit indoor gatherings violated the RLUIPA.[240] In *Cross Culture Christian Ctr.*, the Cross Culture Christian Center ("Cross Culture") held Wednesday and Sunday services in a building it rented from Bethel Open Bible Church ("Bethel").[241] In March of 2020, Government Newsom and San Joaquin County issued "stay-at-home" orders to slow the spread of COVID-19.[242] The local police department required Cross Culture to stop holding in-person services.[243] In early March, Governor Newsom enacted a statewide "stay-at-home" order.[244] On March 21, San Joaquin County then issued its own "stay-at-home" order.[245] Throughout the month of

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[237] *Id.*
[238] *Id.*
[239] *Id.*
[240] Cross Culture Christian Ctr. V. Newsom, 445 F. Supp. 3d 758, 763 (E.D. Cal. 2020).
[241] *Id.*
[242] *Id.*
[243] *Id.*
[244] The order directed California residents to "stay home or at their place of residence except as needed to maintain continuity of operations of the federal critical infrastructure services." *Id.*
[245] *Id.*

March, Cross Culture continued to hold in-person services.[246] In response, the local police department posted a notice on the building, stating that its non-essential use of the facility was a public nuisance.[247] On April 3, a County Public Health Officer issued an Order Prohibiting Public Assembly to Bethel.[248] The order stated that, "[a]ny person who refuses or willfully neglects to comply with this emergency order is guilty of a misdemeanor, punishable by fine and/or imprisonment."[249] One week later, Bethel changed the locks of its building so that Cross Culture could not conduct in-person services.[250]

Subsequently, Cross Culture sought to enjoin Governor Newsom, the Attorney General of California, the California Public Health Officer, and San Joaquin County from enforcing the "stay-at-home" orders.[251] The district court emphasized that the RLUIPA protects religious institutions from burdensome *land-use* regulations.[252] Here, however, the "stay-at-home" orders regulated religious institutions' *conduct*.[253] Since Cross Culture could not cite to any authority where a court had upheld a challenge under the RLUIPA to a conduct-regulating statute, the district court dismissed its request to enjoin.[254]

Although this argument focuses on the RLUIPA, recent decisions suggest that federal courts have and will continue to consider the COVID-19 pandemic in the context of infringing the constitutional rights of religious institutions. For example, a district court for the District of Maine considered whether "stay-at-home" executive orders violated the Free Exercise Clause.[255] In *Calvary Chapel*, Governor Mills of Maine declared a "state of emergency" on March 15 to notify its residents that COVID-19 "poses an imminent threat of substantial harm to our citizens."[256] Additionally, Governor Mills issued five executive orders which aimed to restrict

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[246] *Id.* at 764.
[247] *Id.*
[248] *Id.*
[249] Although Cross Culture's religious services were prohibited in the building, Bethel Open Bible Church could continue to operate its childcare facility "consistent with the order of the State Public health Officer." *Id.*
[250] *Id.*
[251] *Id.* at 765.
[252] *Id.* at 771.
[253] *Id.*
[254] *Id.*
[255] Calvary Chapel v. Mills, 459 F. Supp. 3d 273, 287 (D. Me. 2020).
[256] *Id.* at 278.

indoor gatherings.[257] In April, Maine sought to roll out its "Restarting Maine's Economy" plan.[258] Pursuant to the plan, there was a "General Checklist" that all businesses were required to comply with to reopen.[259] The plan provided specific guidelines for "Places of Worship."[260] Calvary Chapel was prohibited from holding in-person services with more than 10 people present.[261] Calvary Chapel brought suit against Governor Mills for injunctive relief, alleging that such restrictions violated the Free Exercise Clause.[262]

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[257] On March 18, Governor Mills issued Executive Order 14 stating that "[g]atherings of more than 10 people are prohibited throughout the State," which included gatherings that were "faith-based." *Id.* 278-79; ME Exec. Order No. 14 (March 18, 2020), https://www.maine.gov/governor/mills/sites/maine.gov.governor.mills/files/inline-files/EO%2014%20An%20Order%20to%20Protect%20Public%20Health.pdf. On March 24, Governor Mills issued Executive Order 19 which continued the prohibition of all gatherings of more than 10 people but carved out an exemption for businesses deemed "essential." *Id.* at 279; ME Exec. Order No. 19 (March 24, 2020), https://www.maine.gov/governor/mills/sites/maine.gov.governor.mills/files/inline-files/An%20Order%20Regarding%20Essential%20Businesses%20and%20Operations%20_0.pdf. On March 31, Governor Mills issued Executive Order 28, which stated that "[a]ll persons living in the State of Maine are hereby ordered, effective as of 12:01 AM on April 2, 2020 to stay at their homes or places of residence." *Id.*; ME Exec. Order No. 28 (March 31, 2020), https://www.maine.gov/governor/mills/sites/maine.gov.governor.mills/files/inline-files/Corrected%202_%20An%20Order%20Regarding%20Further%20Restrictions%20on%20Public%20Contact%20and%20Movement%2C%20Schools%2C%20Vehicle%20Travel%20and%20Retail%20Business%20Operations_0.pdf.

[258] The "Restarting Maine's Economy" plan set forth a four-phased approach to reopening businesses and activities. *Id.* at 280-81.

[259] *Id.* at 281; *see* DECD, COVID-19 Prevention Checklists, https://maine.gov/decd/covid-19-prevention-checklists (last visited March 8, 2021).

[260] The following guidance was offered to "Places of Worship" to reopen properly: "A. In-person gatherings remain prohibited; B. Streaming and recording of services encouraged; and (C) Drive-in services not encouraged by permitted provided: 1. Participants stay in their vehicles; 2. Leaders of services and signage provide notice about staying in vehicles; 3. Only immediate household members in each vehicle; 4. Vehicles shall be parked in manner that provides six feet of space between the occupants of adjacent vehicles; 5. Windows are kept at least ½ way up; 6. Any collection is executed with a drop-off receptacle that requires no contact and participants remaining in their vehicles; and 7. Religious leaders are responsible for communicating and enforcing these restrictions. DECD, Guidance on Governor's Exec. Order 19 Regarding Places of Worship, https://www.maine.gov/decd/checklists/religious-gatherings.

[261] *Calvary Chapel*, 459 F. Supp. 3d at 282-83.

[262] *Id.*

At the outset of its Free Exercise Clause analysis, the district court stated that it "should only overturn state action when it lacks a 'real or substantial relation to the protection of the public health,' or represents 'a plain, palpable invasion of rights secured by the fundamental law.'"[263] In recognizing that other courts have repeatedly upheld similar executive orders during the COVID-19 pandemic, the district court found that Governor Mills' executive orders also were not likely to violate the Free Exercise Clause: "Given what we know about how COVID-19 spreads, the nature of the orders – in permitting drive-in services, online services, and small gatherings, while restricting large assemblies of people – demonstrates a substantial relation to the interest of protecting public health."[264]

In further support, the district court confirmed its finding by conducting a traditional Free Exercise Clause analysis.[265] Calvary Chapel argued that the executive orders were not neutral because religious institutions had been restricted in ways that secular institutions were not, including the exemption from the 10-person limit for "liquor stores, warehouse clubs, supercenter stores, [and] marijuana dispensaries." The district court rejected Calvary Chapel's argument because to be comparable the secular conduct must inhibit interests in a similar degree as the religious conduct.[266] The district court found that the executive orders were neutral because they were generally applicable.[267] There was no evidence to support that Calvary Chapel was comparable to secular businesses.[268] Thus, Calvary Chapel failed to meet its burden for injunctive relief against Governor Mills's executive orders.[269]

Next, Calvary Chapel argued that the executive orders violated the Establishment Clause.[270] The district court found that the executive orders were likely to pass the test set forth in *Lemon*: "[T]he order have the secular purpose of slowing the spread of

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[263] *Id.* at 284 (quoting Jacobson v. Commonwealth of Mass., 197 U.S. 11, 27 (1905)).
[264] *Id.*
[265] *Id.* at 284-85 ("Under traditional analysis of the Free Exercise Clause, 'neutral, generally applicable laws' are subject to rational basis review, even where they are applied to religious practice." (citing Burwell v. Hobby Lobby Stores, Inc. 573 U.S. 682, 694 (2014)).
[266] *Id.* at 286 (citing Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 543 (1993)).
[267] *Id.*
[268] *Id.*
[269] *Id.* at 286-87.
[270] *Id.* at 287; *see also* U.S. Const. amend. I.

COVID-19; they have the primary effect of limited gatherings – both secular and religious – which has been shown to slow the spread of COVID-19; and the Plaintiff develops no argument that the orders foster government entanglement with religion."[271]

Lastly, Calvary Chapel asserted that the executive orders infringed on its First Amendment rights to free speech and assembly.[272] Because it had already found that the executive orders did not restrict Calvary Chapel's free exercise of religion, the district court also found that it would not likely succeed on these claims.[273]

THE COURT WILL LIKELY REVIEW RLUIPA CLAIMS WITH CERTAIN UNDERLYING FACTS DURING THE COVID-19 PANDEMIC

The lower court decisions above contribute to the uncertainty which religious institutions face during the COVID-19 pandemic. There were two events involving the Court which could lead to some clarity for religious institutions as to their rights under the RLUIPA: (1) the Court's recent denial of an application for injunctive relief in *South Bay United Pentecostal Church* and (2) the recent shift in ideological majority on the bench.[274]

In *South Bay United Pentecostal Church*, the South Bay United Pentecostal Church ("South Bay") alleged that its religious freedoms were affected due to COVID-19 executive orders.[275] Specifically, South Bay brought suit against Governor Newsom, alleging that the orders violated the Free Exercise Clause.[276] The Ninth Circuit affirmed a district court's denial of South Bay's motions for preliminary injunctive relief and a temporary restraining order.[277] South Bay then applied to the Court for injunctive relief.[278]

South Bay presented the following question to the Court for review: "Do Governor Newsom's lockdown orders and reopening

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[271] *Calvary Chapel*, 459 F. Supp. 3d at 287 (citing Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971)).

[272] Calvary Chapel referenced the fact that the executive orders discriminated against its free speech and assembly rights on the basis of content. *Id.*

[273] *Id.*

[274] S. Bay United Pentecostal Church v. Newsom, No. 20-CV-00865-BAS-AHG, 2020 WL 6081733 (S.D. Cal. Oct. 15, 2020), *vacated and remanded*, 981 F.3d 765 (9th Cir. 2020).

[275] *Id.*

[276] *Id.*

[277] *Id.*

[278] S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613 (2020).

restrictions under the 'Blueprint' framework, placing strict limitations, including closures, on all Places of Worship in California, violate South Bay's First Amendment right to Free Exercise of Religion?"[279] In raising this question, South Bay found it necessary for the Court to examine whether the "stay-at-home" orders were neutral and generally applicable.[280] South Bay offered two reasons why the "stay-at-home" orders were not neutral.[281] First, Governor Newsom singled out religious institutions by treating them differently from other essential business in the area.[282] Second, the "the prohibitions and limitations that [we]re applied to Places of Worship have been specifically created by the State for Places of Worship, based on the State's own assessment of risk/reward for the particular activities that are exclusively conducted by Places of Worship."[283] Furthermore, South Bay argued that the "stay-at-home" orders were "not generally applicable because a host of secular activities are still allowed to be conducted indoors as they follow minimal guidelines for mask wearing, sanitizing and social distancing, while indoor church services are not allowed to take place even if they follow the same guidelines for mask wearing, sanitizing and social distancing."[284]

On May 29, 2020, the Court denied South Bay's application for injunctive relief in a 5-4 decision.[285] While history shows that justices rarely write concurring or dissenting opinions in such orders, the Court did so here.[286] The following five justices were in the majority for denial: Chief Justice Roberts, Justice Ginsburg, Justice Breyer, Justice Sotomayor, and Justice Kagan.[287] Chief Justice Roberts noted the threat of COVID-19 in his concurring opinion:

> "The Governor of California's Executive Order aims to limit the spread of COVID-19, a novel severe acute respiratory illness that has killed thousands of people in California and

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[279] Petition for Writ of Certiorari, *S. Bay United Pentecostal Church*, 140 S. Ct. 1613 (No. 20-746).
[280] Petition for Writ of Certiorari, *supra* note 279, at 31.
[281] Petition for Writ of Certiorari, *supra* note 279, at 31-32.
[282] South Bay supported this position by citing that 17 out of the 18 categories of workforce in the area were not subject to working remotely because it was deemed impractical for them to do so. Petition for Writ of Certiorari, *supra* note 279, at 31.
[283] Petition for Writ of Certiorari, *supra* note 279, at 32.
[284] Petition for Writ of Certiorari, *supra* note 279, at 31-33.
[285] *S. Bay United Pentecostal Church*, 140 S. Ct. at 1613.
[286] *Id.*
[287] *Id.*

> more than 100,000 nationwide. At this time, there is no known cure, no effective treatment, and no vaccine. Because people may be infected but asymptomatic, they may unwittingly infect others. The Order places temporary numerical restrictions on public gatherings to address this extraordinary health emergency. State guidelines currently limit attendance at places of worship to 25% of building capacity or a maximum of 100 attendees."[288]

In assessing the Free Exercise Clause claim, Chief Justice Roberts acknowledged that there were similar or more severe "stay-at-home" orders applied to comparable secular gatherings where large groups of people gather in close proximity for extended periods of time.[289] He emphasized that the orders exempted or treated more leniently only dissimilar activities, like grocery stores, banks, and laundromats.[290]

The following four justices dissented from the majority: Justice Thomas, Justice Alito, Justice Gorsuch, and Justice Kavanaugh.[291] Justice Kavanaugh issued a dissenting opinion joined by Justice Thomas and Justice Gorsuch. Justice Kavanaugh stated that he "would grant the Church's requested temporary injunction because California's latest safety guidelines discriminate against places of worship and in favor of comparable secular businesses."[292] The "stay-at-home" orders violated the First Amendment because the "basic constitutional problem is that comparable secular businesses are not subject to a 25% occupancy cap, including factories, offices, supermarkets, restaurants, retail stores, pharmacies, shopping malls, pet grooming shops, bookstores, florists, hair salons, and cannabis dispensaries."[293] Although California had a compelling interest in slowing the spread of COVID-19, Justice Kavanaugh stated that the orders were not narrowly tailored to achieve the interest since South Bay had offered to comply with the same rules regarding social distancing

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[288] *Id.*
[289] *Id.*
[290] *Id.*
[291] *Id.* at 1614.
[292] *Id.* (noting that such discrimination violated the Free Exercise Clause of the First Amendment).
[293] *Id.*

and hygiene as the other business uses.[294] Justice Kavanaugh concluded by posing the following rhetorical question:

> "Assuming all of the same precautions are taken, why can someone safely walk down a grocery store aisle but not a pew? And why can someone safely interact with a brave deliverywoman but not with a stoic minister?"[295]

As reflected by the vote, almost half of the bench was troubled by this decision. While this case dealt with the Free Exercise Clause, the concerns of the dissenting justices would likely be relevant to case involving the review of government restrictions against RLUIPA claims in a COVID-19 setting. Thus, this decision indicates that the issues arising from the free exercise of religion during the COVID-19 pandemic are not fully resolved.

In addition to the concerns expressed by the dissent in *South Bay United Pentecostal Church*, the recent shift in ideological majority on the bench will likely lead the Court to review a RLUIPA case with appropriate facts during the COVID-19 pandemic.

At the time the petition in *South Bay United Pentecostal Church* was denied, the majority of the bench leaned in favor of liberal ideology.[296] Specifically, the more-liberal justices on the bench were Justice Ginsburg, Justice Breyer, Justice Sotomayor, Justice Kagan, and the more-center Chief Justice Roberts. This liberal majority on the bench shifted after the *S. Bay United Pentecostal Church* denial when Justice Ginsburg passed away on September 18, 2020 and Justice Amy Coney Barrett was appointed to the Court on October 27, 2020.

There is a preconceived belief that Justice Barrett will have a more-conservative ideology on the bench since she was nominated by then-President Trump, a member of the Republican Party. This belief is supported by Justice Barrett's history as a federal judge of the United States Court of Appeals for the Seventh Circuit and as a published legal author. For example, then-Seventh Circuit Judge Barrett wrote the majority opinion in *Grussgott* which involved the Free Exercise Clause of the First Amendment.[297] In *Grussgott*, plaintiff sued her former employer, Milwaukee Jewish Day School ("School"), for terminating her employment in violation of the

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[294] *Id.* at 1615.
[295] *Id.*
[296] *S. Bay United Pentecostal Church*, 140 S. Ct. at 1613.
[297] Grussgott v. Milwaukee Jewish Day Sch., Inc., 882 F.3d 655, 657 (7th Cir. 2018).

Americans with Disabilities Act.[298] School moved for summary judgment, arguing that the First Amendment's ministerial exception to employment-discrimination laws barred the plaintiff's lawsuit.[299] The district court granted summary judgment for School, concluding that plaintiff's role as a teacher was "ministerial" since School was a religious institution.[300]

On appeal, the question presented to the Seventh Circuit was whether plaintiff was a ministerial employee.[301] Then-Seventh Circuit Judge Barrett wrote that "whether Grussgott's role as a Hebrew teacher can properly be considered ministerial is subject to a fact-intensive analysis."[302] This excerpt from her opinion in *Grussgott* suggests that Justice Barrett will likely focus upon the specific facts at issue in cases involving the religious exercise of religious institutions.[303]

Additionally, Justice Barrett's periodical article for Marquette Law Review also indicates a more conservative ideology being brought to the Court in religious freedom issues.[304] In Catholic Judges in Capital Cases, then-professor Barrett identified the two "tracks" for judging government actions that infringe upon the First Amendment's freedom of speech.[305] The first track involves cases where a government acts intentionally in restricting speech.[306] Justice Barrett noted that these types of actions are almost always deemed unconstitutional.[307] The second track involves cases where a government restricts speech unintentionally through its actions.[308] Justice Barrett acknowledged that these types of cases are harder to decide since sometimes such governmental actions are constitutional and some are not.[309]

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[298] *Id.* at 656.
[299] *Id.*
[300] *Id.* at 657.
[301] *Id.*
[302] *Id.*
[303] *See also* Fulton v. City of Phila., 141 S. Ct. 1868, 1883 (2021) (Barrett, J., concurring) (agreeing with the Majority that the City of Philadelphia's elimination of a religious institution as an approved foster care service violated the Free Exercise Clause based upon the fact that the relevant government contract failed to meet the strict scrutiny standard).
[304] John H. Garvey & Amy V. Coney, Catholic Judges in Capital Cases, 81 Marq. L. Rev. 303, 320 (1998).
[305] *Id.*
[306] *Id.*
[307] *Id.*
[308] *Id.*
[309] *Id.*

Based upon Justice Barrett's history as a Seventh Circuit Judge and as a published legal author, one could reasonably conclude that her views will likely be more consistent with the conservative-minded justices on the bench. If Justice Barrett was on the bench at the time of the *S. Bay United Pentecostal Church* denial, it is reasonable to believe that she would have joined Justice Kavanaugh's dissenting opinion.

LOOKING AHEAD: A LIKELY SCENARIO TO BE REVIEWED

In this continuing COVID-19 world, it is anticipated that numerous petitions have been and will be filed by religious institutions in light of the ongoing hardships that they are still experiencing. Based upon the existing circuit split and recent holdings of lower courts during the pandemic, the Court will likely grant a petition arising under certain facts which allegedly violate the RLUIPA. Based upon the discussion above, a case with a certain fact-pattern would be a likely candidate for the Court to accept a petition and settle the RLUIPA circuit split.

The optimal fact-pattern would involve a government issuing an order with restrictions in order to slow the spread of COVID-19, including any of its variants. Specifically, the order would limit indoor gatherings of entities, including religious institutions, based upon which land district they are located. The order would also allow an entity to apply for a special-use permit for the purpose of continuing its indoor services. After an application is filed, the government would be required to make a final decision on it within a short time, such as two weeks, from when it was received. The government's final decision would be based on whether the entity posed a reasonable justification for allowing to continue its services indoors. If the government denies such an application, it would provide the entity with its reasoning behind its decision.

The Court will likely review a RLUIPA claim arising from this fact-pattern only or a similar one, if the government denies a religious institution's application for a special-use permit without providing its reasoning. In such a scenario, the Court would likely begin its analysis by determining whether the RLUIPA claim had standing. Due to the current composition of the bench, the Court would likely approach the standing issue similar to the way in which the First, Fifth, Seventh, and Eleventh Circuits did[310]. Specifically, the Court would likely conclude that standing of a

[310] *See supra* text accompanying notes 301-313.

RLUIPA claim turns on whether the mere issuance of the order confronted the religious institution with a direct and immediate dilemma.[311] Based upon prior decisions, the Court will likely find that the order presented the religious institution with a direct and immediate dilemma because disallowing it from conducting indoor services placed considerable hardships on it, especially due to a lack of receiving in-person donations.

Although unlikely, if the Court does apply the approach taken by the Third, Sixth, and Ninth Circuits, then a different analysis is required.[312] Generally, standing is sufficient if the religious institution can point to something additional it suffered beyond the issuance of the order.[313] Even under this approach, the Court would likely find that the religious institution had standing as to its RLUIPA claim at the moment the government denied the application for a special-use permit. If such a scenario occurred and the Court granted a petition, it will also set forth the proper test for determining whether a RLUIPA claim has standing.

After finding that the RLUIPA claim had standing, the Court would need to determine whether the order imposed a substantial burden on the religious institution's operations. As emphasized in Justice Barrett's periodical article, disputes involving the free exercise of religion are based on a very fact-specific, case-by-case analysis.[314] Thus, the Court will likely consider the specific hardships suffered by the religious institution after the government denied its application for a special-use permit. General statements about hardships without specific facts as to that religious institution would not be sufficient.

An important hardship which would need to be suffered is that the religious institution was disallowed from conducting its in-person services. The Court would likely view this as being at the core of the Functionality Factor of whether a substantial burden was imposed.[315] Similar to the government disregarding Guru Nanak's accepted conditions of operation provided in its permit application, the Court as currently configured will likely recognize that indoor services of the religious institution were rendered impracticable.[316]

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[311] *See Roman Catholic Bishop*, 724 F.3d at 92-93.
[312] *See supra* text accompanying notes 63-91.
[313] *Id.*
[314] *See supra* text accompanying notes 308-313.
[315] *See supra* text accompanying notes 99-113.
[316] *See Guru Nanak Sikh Society of Yuba City*, 456 F.3d at 991-992.

Another important hardship likely needed to be suffered by the religious institution is the great expenses incurred, including from having to prepare for the possibility of opening back up for indoor services. As central to the Financial Impact Factor, the Court will likely place emphasis on the fact that the religious institution has spent a considerable amount of money on the necessary personal protective equipment, such as masks, hand sanitizer, and other items used for social distancing.[317] The fact pattern would likely need to involve the religious institution's plans for reopening safely being provided in its application, yet the government denied it without offering any substantive reason. This denial would then impose a substantial financial impact, and place the religious institution in a state of delay and uncertainty.

Another hardship to be considered is the reduction in the regular donations it receives during its in-person services. The Court will not likely be persuaded by the Other Viable Options Factor because the religious institution could have utilized an online donation feature as done by others.[318] Although the Other Viable Options Factor does not support the religious institution's position, it is not determinative of the case's outcome.

In considering whether to accept a petition by a religious institution for the alleged violation of the RLUIPA by a government through a COVID-19 executive order or requirement, the Court will place great emphasis on the specific facts alleged and assess all of the factors. As the Court is currently configured, there is a greater likelihood than before that it would find that the government imposed a substantial burden upon the religious institution if the right set of facts accompanies the petition. A decision to accept a petition by the Court does not mean that the Court would rule in favor of the religious institution on its RLUIPA claim. Regardless of the decision on the merits by the Court, however, if the Court accepts such a petition, religious institutions will receive clarity as to the lawful or unlawful impacts of government acts on their operations. This is important to religious institutions as COVID-19 and its variants continue to exist and affect regular activities in this country.

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[317] *See supra* text accompanying notes 114-130.
[318] *See supra* text accompanying notes 131-163.