RLUIPA: CALMING THE INTERPRETIVE SEAS

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INTRODUCTION

Religious organizations often spend thousands of dollars to create planning documents, meet with planning commissions, address the local community's concern, and receive zoning approval to only later have a permit application denied for a plethora of seemingly neutral reasons.[1] For example, in 1994, Living Water Church of God applied for a Special Use Permit (SUP) to build a sanctuary and a daycare center in Meridian Charter Township, Michigan.[2] In the application for the SUP, Living Water explained that the 10,925 square-foot building for which the SUP would be used was the first phase in a multiphase plan for the use of the property.[3] The Township granted Living Water's application, and the church constructed and began to occupy that building.[4] Then, in 2000, the church received another SUP to expand its use of the property to include a 28,500 square-foot elementary school.[5] Living Water voluntarily agreed to limit its enrollment to 280 students and to delay the start time of its school so as not to interfere with traffic.[6] After the Township granted the second SUP, the church began advertising the school to raise money for its construction.[7] Later, the Township informed Living Water that its SUP would expire unless the church undertook construction on the property or the Township granted an extension for the SUP.[8] The Township had a policy of granting these extensions.[9] Therefore, Living Water applied for an extension without a second thought.[10]

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[1] *See* Karla L. Chaffee & Dwight H. Merriam, *Six Fact Patterns of Substantial Burden in RLUIPA: Lessons for Potential Litigants*, 2 ALB. GOV'T L. REV. 437, 441 (2009) ("Despite the possible financial consequences for local governments, some contend that religious discrimination in the zoning context is rampant . . . .").

[2] Living Water Church of God v. Charter Twp. Meridian, 258 F. Appx. 729, 730 (6th Cir. 2007).

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.*

However, the Township had obtained new legal counsel who, at this point, had already issued a legal opinion denying a SUP extension to another applicant.[11] The basis for this denial was that the Code of Ordinances did not provide for extensions of SUPs.[12] The Township's denial of the SUP extension resulted in the passage of a resolution that treated SUP extension applications as applications for new permits.[13]

As such, Living Water was forced to apply for a new SUP.[14] Before doing so, however, it met with the Township to address more of its concerns regarding the property.[15] After negotiation and numerous expenditures on planning documents, the Township ultimately denied Living Water's application for a new SUP in 2003.[16] Therefore, Living Water brought suit alleging multiple violations of federal and state law, namely violations of the Religious Land Use and Institutionalized Person's Act.[17]

RLUIPA is a statute that is designed to protect religious land users' exercise of faith from infringement by governments in land use decisions. The substantial burden provision of the statute provides in pertinent part,

> 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 is in furtherance of a compelling governmental interest; and is the least restrictive means of furthering that compelling governmental interest.[18]

Applying this statute, the district court ruled in favor of Living Water, holding that the denial of the 2003 SUP constituted a substantial burden on Living Water's religious exercise.[19] On appeal, the Sixth Circuit reversed the district court's holding and ruled in favor of the Township.[20] In doing so, the Sixth Circuit encountered a problem that federal courts have dealt with for

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[11] *Id.*
[12] *Id.* at 730–31.
[13] *Id.* at 731.
[14] *Id.*
[15] *Id.*
[16] *Id.* at 732.
[17] *Id;* 42 U.S.C. §§ 2000cc(1)(A)(B).
[18] 42 U.S.C. §§ 2000cc(1)(A)(B).
[19] *Living Water Church of God*, 258 F. Appx., at 732.
[20] *Id.* at 741.

two decades.[21]

This problem is the failure of federal courts to craft any coherent standard for applying the substantial burden provision to the complex and burdensome fact patterns presented in typical RLUIPA claims.[22] The root of this problem is the Supreme Court's failure to provide the lower courts any guidance regarding RLUIPA's interpretation and application.[23] The *Living Water* court articulates this by stating, "[b]ecause this circuit has not yet spoken on [what constitutes a substantial burden], the parties direct us to several opinions of our sister circuits, which have defined substantial burden in a *variety* of ways."[24]

This problem merits consideration for three reasons. First, even as recently as 2020, circuit courts are attempting to clarify their RLUIPA jurisprudence because district courts' consistently struggle to apply the substantial burden standards of each circuit.[25] Second, the differences between RLUIPA claims and traditional First Amendment free exercise claims have not been properly addressed by the relevant literature as they relate to courts' struggle to properly define substantial burden in the land-use context. Third, if free exercise jurisprudence is to be instructive for RLUIPA's application, a broad interpretation of this provision is necessarily compelled.

This Note offers a relaxed behavioral standard for RLUIPA's substantial burden provision that is in keeping with the Constitution and the Supreme Court's pertinent free exercise jurisprudence while effectuating the broad interpretation that the statute necessarily compels. The statutory construction for which this Note argues seeks to allow courts to determine more accurately when the government has violated RLUIPA by (1) lowering the threshold for what type of modified behavior is required to make an RLUIPA claim successful and (2) re-examining the numerous factors courts have considered in making this determination. A relaxed behavioral standard not only has its roots in the Supreme Court's free exercise jurisprudence and more appropriately accomplishes RLUIPA's statutory goals, but it promulgates a subtle and workable, yet vitally important, shift in the current case law.

This Note continues in two main parts. Part I briefly examines the history of RLUIPA, its relationship to the Religious Freedom Restoration Act

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[21] *Id.*

[22] *See* Chaffee & Merriam, *supra* note 1, at 452 ("Since the courts have failed to reach a consensus on the definition of 'substantial burden,' it is not surprising that courts differ on the factors considered . . . . Substantial burden determinations are fact-driven.").

[23] *See, e.g.*, Cutter v. Wilkinson, 544 U.S. 709 (2005) (overturning the Sixth Circuit's ruling that RLUIPA was unconstitutional). Though, this was in the institutionalized persons context, not the land use context. *Id.*

[24] *Living Water Church of God*, 258 F. Appx., at 735 (internal quotation marks omitted) (emphasis added).

[25] *See e.g.*, Thai Meditation Association of Alabama, Inc. v. City of Mobile, Ala., 980 F.3d 821 (11th Cir. 2020).

of 1993 (RFRA) and the current substantial burden standards of appellate courts. Part II analyzes the various jurisprudences employed by courts in the crafting of these standards, how those jurisprudences are connected to the Supreme Court's free exercise case law, what parts of the relevant case law the modern standards have neglected, and what parts the modern standards have gotten right. Finally, Part II introduces the relaxed behavioral standard and defends its constitutionality.

I. RLUPIA"S ORIGINS

A. The History of RLUIPA

Congress enacted RLUIPA in response to the Supreme Court's decision in *City of Boerne v. Flores*.[26] The *City of Boerne* Court held RFRA unconstitutional under the Fourteenth Amendment as applied to state actions because it allowed for significant intrusions into states' "traditional prerogatives and general authority to regulate for the health and welfare of their citizens."[27] The reason for that holding, the Court explained, was that RFRA redefined the Free Exercise Clause in a manner that was inconsistent with the Supreme Court's free exercise jurisprudence and would be applied in an overbroad manner.[28]

The fatal issue with RFRA resided in its "Purposes" chapter, which stated, "[t]he purposes of this chapter are . . . to restore the compelling interest test as set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder, . . .* and *to guarantee its application in all cases where free exercise of religion is substantially burdened . . . .*"[29] *Sherbert* and *Yoder* asked two questions: 1) whether a regulation substantially infringed on or unduly burdened[30] the free exercise of religion; and, if so, 2) whether the government had a compelling interest in doing so.[31]

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[26] 521 U.S. 507 (1997).

[27] *Id.* at 534; *see also* 42 U.S.C. § 2000bb.

[28] *City of Boerne*, 521 U.S. at 532–34 (explaining that, unlike 1960's voting rights legislation, which was held constitutional under the same provision invoked by RFRA, RFRA demanded a test that did not meet the Court's congruence and proportionality test).

[29] 42 U.S.C. § 2000bb; 347 U.S. 398 (1963); 406 U.S. 205, 215 (1972).

[30] *Sherbert* asked whether free exercise was "substantially infringed." Sherbert v. Verner, 374 U.S. 398, 406 (1963). *Yoder* asked whether the regulation "unduly burdened" free exercise. Wis. v. Yoder, 406 U.S. 205, 220-21 (1972).

[31] *See Yoder*, 406 U.S. at 220-21 (holding that a Wisconsin law compelling school attendance for children beyond the eighth grade violated the free exercise rights of Amish children because it "unduly burden[ed]" the practice of their religion, and Wisconsin had no compelling interest in applying the law to them) (citing *Sherbert*, 374 U.S. at 406 (holding that the disqualification of an employee who was fired for refusing to work on Saturdays from eligibility for unemployment benefits violated the First Amendment because the state had no "compelling interest . . . [that] justifi[ed] the substantial infringement of appellant's [sic] First Amendment right" to the free exercise of religion)).

The problem was that Congress attempted to reinstate a framework that the Supreme Court had declined to apply in cases preceding RFRA.[32] In *Employment Division, Department of Human Resources of Oregon v. Smith*, Justice Scalia authored the majority opinion and held, "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes . . . conduct that his religion prescribes . . . .'"[33] Justice Scalia's opinion shifted the Court's free exercise jurisprudence away from the compelling interest test of *Sherbert* and *Yoder*. Nonetheless, RFRA attempted to enshrine in statutory form the compelling interest test of *Sherbert* and *Yoder* that the court declined to apply in *Smith*.[34]

The *City of Boerne* Court swiftly resolved this conflict by explaining that it is outside of Congress' purview to "decree the substance of the [Fourteenth] Amendment's restrictions on the states."[35] Specifically, "[l]egislation which alters the Free Exercise Clause's meaning cannot be said to be enforcing the Clause."[36] The Court placed the final nail in RFRA's proverbial coffin by stating that the distinction between "measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern . . .[, but] the distinction exists and must be observed."[37] RFRA, the Court held, effectuated a substantive change in the Court's free exercise jurisprudence and therefore was unconstitutional, as applied to state action, under the Fourteenth Amendment.[38] As a result, Congress responded to the Court's ruling with RLUIPA.

B. RLUIPA v. RFRA

There are few differences between RFRA and RLUIPA, but the differences are noteworthy. First, RLUIPA applies only in two circumstances—discrimination against land use as free exercise and discrimination against the free exercise of institutionalized persons.[39] RFRA, on the other hand, applied to *all* federal, state, and local governmental actions.[40] Second, RFRA defined free exercise as the "portion of the first amendment [sic] to the Constitution that proscribes laws prohibiting the free

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[32] *City of Boerne*, 521 U.S. at 532-34.
[33] 494 U.S. 872, 879 (1990).
[34] *Id*; 42 U.S.C. § 2000bb; 347 U.S. 398 (1963); 406 U.S. 205, 215 (1972).
[35] 521 U.S. at 519.
[36] *Id.*
[37] *Id.*
[38] *Id.* at 532.
[39] 42 U.S.C. § 2000cc.
[40] 42 U.S.C. § 2000bb.

exercise of religion."[41] This definition inevitably tied RFRA to the Court's free exercise jurisprudence and, as previously explained, was responsible for its downfall.[42] As a result, "in an obvious effort to effect a complete separation from First Amendment case law, Congress deleted [RFRA's] reference to the First Amendment" when it passed RLUIPA.[43] However, what Congress did not delete was the compelling interest test of RFRA, which is derived from the *Sherbert* and *Yoder* decisions.[44]

Because RLUIPA maintained the compelling interest test, despite Congress's deletion of the reference to the First Amendment, legislators were concerned with RLUIPA's constitutionality from the outset.[45] This concern prompted Senators Orrin Hatch and Edward Kennedy, sponsors of the bill, to state, "'substantial burden' as used in this Act is not intended to be given any broader interpretation than the Supreme Court's articulation of the concept of substantial burden or religious exercise."[46] The Senators' statement created confusion because the entire purpose of RFRA was to effectuate a broader protection for free exercise than the Supreme Court offered in *Smith*.[47] However, the reason that the Court held RFRA unconstitutional was due to RFRA's attempt to redefine the First Amendment's free exercise right in an overly broad context, which failed to meet the Court's congruence and proportionality test.[48]

RLUIPA, on the other hand, maintained many of RFRA's provisions but applied them in more narrow contexts so as to pass constitutional muster, which it has done successfully.[49] Though, RLUIPA's conception of free exercise *must* be different *and* broader than the Supreme Court's current understanding. RLUIPA uses the substantial burden test for determining whether free exercise has been infringed under the meaning of RLUIPA. The Supreme Court uses *Smith*'s valid and neutral law of general applicability standard in First Amendment free exercise cases, which is inherently less protective of free exercise than the substantial burden test.[50] This is why Congress deleted reference to the First Amendment in RLUIPA.[51] As a result,

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[41] 42 U.S.C. § 2000cc-5.

[42] *See City of Boerne*, 521 U.S. at 531–32.

[43] Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 696 (2014) ("In RLUIPA, in an obvious effort to effect a complete separation from First Amendment case law, Congress deleted [RFRA's] reference to the First Amendment.").

[44] 42 U.S.C. § 2000cc(a)(1)(A)(B).

[45] *Id; See* 146 CONG. REC. S7774-01, 7776 (daily ed. July 27, 2000) (joint statement of Sens. Hatch and Kennedy).

[46] 146 CONG. REC. S7774-01, 7776.

[47] 42 U.S.C. § 2000bb(b)(1)–(2).

[48] *See* City of Boerne v. Flores, 521 U.S. 507, 531–32 (1997).

[49] *See, e.g.*, Cutter v. Wilkinson, 544 U.S. 709 (2005); 42 U.S.C. § 2000bb; 42 U.S.C. § 2000cc(a)(1)(A)(B).

[50] *See generally* 42 U.S.C. § 2000cc(a)(1)(A)(B); *see also* Emp't Div. v. Smith, 494 U.S. 872, 879 (1990).

[51] Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 696 (2014).

circuit courts have had an extraordinarily difficult time determining the meaning of RLUIPA's substantial burden provision.[52]

C. The Variations of Circuit Courts' Substantial Burden Jurisprudence

The following subsections examine the language used by courts in their individual substantial burden standards. This will illustrate the vast differences in the language utilized by the courts, how unclear the standards are, and, in some instances, courts' hesitancy to adopt any standard—instead, opting to adopt a set of factors. Often, the factors that courts consider are not dispositive in determining whether a substantial burden exists. Finally, the jurisprudential inclinations of these courts are categorized as follows: the Seventh and Fourth Circuits, Eleventh and Eighth Circuits, Fifth and Third Circuits, Ninth Circuit, and courts that only use factors as opposed to a working definition.

1. The Seventh and Fourth Circuits

The first articulation of a standard for RLUIPA's substantial burden provision in the land use context was the Seventh Circuit's decision in *Civil Liberties for Urban Believers v. City of Chicago*.[53] The standard promulgated by the court, when compared to the subsequent standards mentioned in this section, requires a formidable threshold for claimants to establish a substantial burden on their free exercise.[54] The court begins with explaining that "RLUIPA's legislative history indicates that it is to be interpreted by reference to RFRA and First Amendment jurisprudence."[55] Then, after perusing the Supreme Court's jurisprudence for substantial burden standards and other relevant First Amendment jurisprudence, the court gives its definition:"[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 . . . effectively impracticable."[56] In other words, in order for there to be a substantial burden, religious exercise must be operatively impossible. This reads more like a requirement for an effective bar on free exercise rather than a substantial burden on religious exercise. Nonetheless, this standard is the most stringent one given by circuit courts for the provision. Other circuits have subscribed

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[52] *See generally id.* at 714.
[53] 342 F.3d 752, 760 (7th Cir. 2003).
[54] *See generally infra* §§ I(C)(2)-(5).
[55] *Civil Liberties for Urban Believers*, 342 F.3d at 760.
[56] *Id.* at 761.

to this standard as well.[57]

In *Bethel World Outreach Ministries v. Montgomery City Council*, the Fourth Circuit aligned itself with the Seventh Circuit by holding that a substantial burden can only be imposed by a regulation that bears direct responsibility for rendering a plaintiff's religious exercise effectively impracticable.[58] Shortly after the *Urban Believers* decision, the Eleventh Circuit was called upon to craft a definition for substantial burden and explicitly declined to adopt the Seventh Circuit's harsh definition.[59]

2. The Eleventh and Eighth Circuits

The Eleventh Circuit provides a more sympathetic standard to religious organizations, which better comports with the statute than does the Seventh Circuit's articulation. In *Midrash Sephardi, Inc. v. Town of Surfside*, the Eleventh Circuit declined to adopt the Seventh Circuit's standard and held that "a 'substantial burden' is akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly."[60] To provide more guidance to the lower courts, the court also stated, "[A] substantial burden can result from pressure that tends to force adherents to forego religious precepts."[61] Of course, in reality, this standard provides little practical guidance as to what constitutes a substantial burden, and the district courts, as a result, struggled to apply this standard.[62] Accordingly, the district courts' difficulty applying the standard prompted the Eleventh Circuit to issue a clarification in 2020.[63]

In *Thai Meditation Association of Alabama, Inc. v. City of Mobile, Ala.*, the court, in reversing a district court's misinterpretation of *Midrash*, stated, "the district court . . . just latched onto the wrong language . . . . The 'completely prevents' and 'force . . . to forego' passages [of *Midrash*] simply describe conduct that would suffice . . . to demonstrate a substantial burden."[64] However, to avoid any hard and fast conclusion, the court divined conduct that *can* result in a substantial burden.[65] "[I]t isn't necessary for a plaintiff to prove—as the district court here seemed to assume—that the government required her to completely surrender her religious beliefs;

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[57] Bethel World Outreach Ministries v. Montgomery Cty. Council, 706 F.3d 548, 556 (4th Cir. 2013).
[58] *Id.* at 557.
[59] *See generally* Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1227 (11th Cir. 2004). .
[60] *Id.* at 1227.
[61] *Id.*
[62] *Id.* at 1230.
[63] *See generally* Thai Meditation Association of Alabama, Inc. v. City of Mobile, Ala., 980 F.3d 821 (11th Cir. 2020).
[64] *Id.* at 831 (citing *Midrash*, 366 F.3d at 1227).
[65] *Id.*

modified behavior, if the result of government coercion or pressure, can be enough."[66] Other courts have crafted similar language in their controlling opinions as well.[67]

The Eighth Circuit does not have a controlling opinion for RLUIPA's substantial burden provision. However, this circuit has seemingly adopted an offshoot of the Eleventh Circuit's standard. In *First Lutheran Church v. City of St. Paul*, the court held that "a government regulation substantially burdens an exercise of religion when the regulation's effects go beyond being an inconvenience to a religious institution, and instead put substantial pressure on the institution to change that exercise."[68] While this is not an explicit adoption of the Eleventh Circuit's standard, the district court here drew from the language of *Midrash*.[69]

The Seventh and Eleventh Circuits' standard for substantial burden represent opposite ends of the spectrum. The Seventh Circuit requires religious exercise to be rendered impracticable, while the Eleventh Circuit may find a substantial burden where conduct of a religious organization has simply been modified.[70] The rest of the circuits fall somewhere in between the impracticability and modified behavior standards of the Seventh and Eleventh Circuits, resepctively.

3. The Fifth and Third Circuits

The Fifth Circuit's definition of substantial burden, while similar to the Eleventh Circuit's, merits its own consideration. In divining a definition, the Fifth Circuit held that a governmental regulation imposes a substantial burden when it "influences the adherent to act in a way that violates his religious beliefs, or . . . forces the adherent to choose between . . . enjoying some generally available, non-trivial benefit, and, on the other hand, following his religious beliefs."[71] The Fifth Circuit also opined on the type of regulation that does not constitute a substantial burden.[72] A burden imposed by a regulation, according to the court, is not substantial if it prevents the adherent from "enjoying some benefit that is not otherwise generally available or acting in a way that is not otherwise generally allowed."[73] Presumably, the court adopted this definition so as not to

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[66] *Id.*
[67] *Id.*
[68] 326 F. Supp. 3d 745, 761 (D. Minn. 2018).
[69] *Id.*; *see also Midrash*, 366 F.3d at 1227.
[70] *See* Civil Liberties for Urb. Believers v. City of Chi., 342 F.3d 752 (7th Cir. 2003); *see also Thai Mediation Ass'n of Ala.*, 980 F.3d at 831.
[71] Adkins v. Kaspar, 393 F.3d 559, 567 (5th Cir. 2004).
[72] *Id.* at 571.
[73] *Id.* at 570. This is also a callback to the language in the *Smith* decision. *See* Emp't Div., Dep't of Hum. Res.

privilege religious land users over non-religious land users. The Third Circuit has aligned itself with the Fifth Circuit in this regard.[74]

Providing what seems to be the most encompassing definition of RLUIPA's substantial burden provision, the Third Circuit determined that "a substantial burden exists where . . . a follower is forced to choose between following the precepts of his religion and forfeiting benefits otherwise generally available . . . [or] . . . the government puts substantial pressure on an adherent to substantially modify his behavior and to violate his beliefs."[75] "[I]t recognizes that Congress intended to create a broad definition of substantial burden."[76] This definition takes into account all of the relevant inquiries that must be considered when defining "substantial burden" under the meaning of RLUIPA.[77]

4. The Ninth Circuit

The next major jurisprudential category resides with the Ninth Circuit. In *San Jose Christian College v. City of Morgan Hill*, the court established its substantial burden standard.[78] This standard drastically departs from the already-confusing language of the other circuits. The court states, "for a land use regulation to impose a substantial burden, it must be oppressive to a significantly great extent . . . a substantial burden must impose a significantly great restriction or onus upon such exercise."[79] This threshold established by the court falls between the standards used in the Seventh and Eleventh Circuits. Its language, while not as harsh as the Seventh Circuit's, is certainly a higher bar for establishing a substantial burden than what the Eleventh Circuit has required.[80]

5. Courts Without a Standard

The First and Second Circuits have declined to adopt any standard to apply to RLUIPA substantial burden claims and have instead elected to apply a vague set of factors.[81] In *Roman Catholic Bishop v. City of Springfield*, the

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of Or. v. Smith, 494 U.S. 872 (1990).

[74] Washington v. Klem, 497 F.3d 272 (3d Cir. 2007).

[75] *Id.* at 280.

[76] *Id.*

[77] *See generally id.*

[78] 360 F.3d 1024, 1034 (9th Cir. 2004).

[79] *Id.*

[80] *Id*; *see generally* Civil Liberties for Urb. Believers v. City of Chi., 342 F.3d 752 (7th Cir. 2003); *see also* Thai Meditation Ass'n of Ala. v. City of Mobile, Ala., 980 F.3d 821, 831 (11th Cir. 2020).

[81] *See* Roman Catholic Bishop v. City of Springfield, 724 F.3d 78 (1st Cir. 2013); *see also* Westchester Day Sch. v. Vill. Of Mamaroneck, 504 F.3d 338 (2d Cir. 2007).

First Circuit opined on factors that it would consider in determining the substantiality of a burden such as whether the regulation targets a religion or "whether local regulators have subjected the religious organization to a process that may appear neutral on its face but in practice is designed to reach a predetermined outcome contrary to the group's requests."[82] Similarly, the Second Circuit also declined to adopt any standard and held that,

> Two . . . factors . . . must be considered in reaching such a burden determination: (1) whether there are quick, reliable, and financially feasible alternatives [the organization] may utilize to meet its religious needs absent its obtaining the construction permit; and (2) whether the denial was conditional.[83]

Finally, the Sixth Circuit, which has similarly declined to adopt a bright-line standard, simply asks a question: "[D]oes the government action place substantial pressure on a religious institution to violate its religious beliefs or effectively bar a religious institution from using its property in the exercise of its religion?"[84] These factors are the closest that the Sixth Circuit has come to adopting a definition for substantial burden, even though it had on a previous occasion held a burden to be substantial in *DiLaura v. Ann Arbor Charter Township* based on a similar set of factors.[85]

D. The Literature's Stance on RLUIPA's Application

The literature regarding RLUIPA, its interpretation, and its subsequent application, is cumbersome. As such, only the most relevant articles are considered to illustrate some of the controversy regarding RLUIPA as it relates to its various iterations in the courts. The first point of controversy is RLUIPA's constitutionality under the Fourteenth Amendment.

Professor Adam MacLeod eloquently articulates both sides of the argument regarding RLUIPA's constitutionality.[86] At issue is whether RLUIPA can permissibly be interpreted to go beyond the scope of the First Amendment's protection of free exercise.[87] On one side, opponents of this

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[82] 724 F.3d at 96.
[83] *Westchester Day Sch.*, 504 F.3d at 352.
[84] Living Water Church of God v. Charter Twp. Meridian, 258 F. Appx. 729, 737 (6th Cir. 2007).
[85] *Id.*; *see* DiLaura v. Ann Arbor Charter Twp., 30 F. Appx. 501, 510 (6th Cir. 2002).
[86] Adam J. MacLeod, *A Non-Fatal Collision: Interpreting RLUIPA Where Religious and Community Interests Meet*, 42 URB. LAW. 41, 42 (2010).
[87] *Id.*

interpretation argue that a broad construction of RLUIPA's terms would privilege religious land-uses over non-religious land uses, thus exceeding the constitutional bounds within which RLUIPA can exist.[88] However, proponents of this broad construction "point to a history of discrimination against religious land users, which tends to hide behind facially neutral justifications in individualized land-use decisions."[89] Professor MacLeod also correctly identifies that, for the most part, courts have adopted neither an overly broad nor an overly narrow interpretation of RLUIPA's terms.[90] He posits that courts have avoided any "constitutional or jurisprudential infirmities in the statute."[91]

While RLUIPA does compel a broad construction of its terms, some scholars argue that its subsequent application by courts has resulted in the terms of RLUIPA actually being contracted.[92] For example, Bram Alden points out that the majority of courts have narrowly defined "land use regulation" so as not to include the exercise of a local government's eminent domain power.[93] Moreover, Alden also points out that, in many cases, RLUIPA simply achieves the same outcome as the Free Exercise and Equal Protection clauses of the Constitution, which renders RLUIPA "redundant and unnecessary."[94] The reason for this is that some courts have explained that, if RLUIPA is violated, then the Free Exercise Clause is necessarily violated as well.[95] Alden's proposition that the First Amendment and RLUIPA are essentially the same, however, is misguided. RLUIPA *would* be redundant if it provided the same protections as the First Amendment, but it does not. It provides more.[96] As a result, Courts have a serious split as to what constitutes a substantial burden.[97] Many early RLUIPA scholars spent a significant amount of time debating the constitutionality of RLUIPA's land use provisions for this reason.[98]

The early scholars' debate specifically regarded whether RLUIPA, like RFRA, violates the Fourteenth Amendment.[99] One scholar, Ariel Graff, argues that RLUIPA's finding of a widespread practice of religious

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[88] *Id.*
[89] *Id.*
[90] *Id.*
[91] *Id.*
[92] Bram Alden, *Reconsidering RLUIPA: Do Religious Land Use Protections Really Benefit Religious Land Users?*, 57 UCLA L. REV. 1779, 1796 (2010).
[93] *Id.* at 1795–96.
[94] *Id.* at 1805.
[95] *Id.* at 1805–06.
[96] *See* Dorman v. Chaplains Office BSO, 36 F.4th 1306, 1313 (11th Cir. 2022) ("The RLUIPA provides greater religious protection than the First Amendment.").
[97] Chaffee & Merriam, *supra* note 1, at 450–51.
[98] Ariel Graff, *Calibrating the Balance of Free Exercise Religious Establishment, and Land Use Regulation: Is RLUIPA an Unconstitutional Response to an Overstated Problem?*, 53 UCLA L. REV. 485, 487 (2005).
[99] *Id.* at 485.

discrimination is simply incorrect.[100] Graff bases this conclusion on the fact that the congressional findings were merely anecdotal.[101] However, another scholar argues that one way through which RLUIPA could find its constitutional home under the Fourteenth Amendment rests on the way that the events of September 11, 2001, upended the landscape of religious discrimination, particularly in zoning regulation against the Muslim community.[102] This angle merits further consideration as many critics of RLUIPA argue that it is only a protection of corporate religion against local community zoning needs.[103] Though, as Rashid points out, this has not been true through RLUIPA's application.[104] Either way, only one court has ruled that RLUIPA was unconstitutional, and the Supreme Court reversed that decision in *Cutter v. Wilkinson*.[105] However, the *Cutter* decision did not resolve any of the ambiguity regarding RLUIPA's land use provisions.[106] As a result, other RLUIPA scholars predicted that the Supreme Court would eventually put the substantive meaning of the provisions to bed.[107] However, like a child on Christmas Eve, RLUIPA's substantive meaning is still wide awake.

Ashira Ostrow also predicted that the Supreme Court would once and for all resolve the debate as to the meaning of RLUIPA.[108] "It seems likely that as RLUIPA's land use cases continue to make their way through federal courts, the Supreme Court will be called upon to resolve the debate."[109] The Supreme Court has been called upon on many occasions to resolve the debate, and it has declined to do so in the land use context.[110] Lawyers who regularly represent plaintiffs challenging land use regulations on RLUIPA grounds have noted that this has left federal courts to their own devices as to RLUIPA's application, resulting in a lack of clarity.[111] The law firm of Dalton and Tomich recently opined, "until the Supreme Court takes a [sic] RLUIPA

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[100] *Id.* at 499.

[101] *Id.*

[102] *See* Qasim Rashid, *The Right to Enforce: Why RLUIPA's Land Use Provision is a Constitutional Federal Enforcement Power*, 16 RICH. J. L. & PUB. INT. 267, 269 (2013).

[103] *Id.* at 271; *see also* MacLeod, *supra* note 86, at 42.

[104] Rashid, *supra* note 102, at 271.

[105] *See generally* Cutter v. Wilkinson, 544 U.S. 709 (2005).

[106] *Id.*

[107] Ashira P. Ostrow, *Judicial Review of Local Land Use Decisions*, 31 HARV. J. L. & PUB. POL'Y. 717, 723 (2008).

[108] *Id.*

[109] *Id.*

[110] *See* Tree of Life Christian Sch. v. City of Upper Arlington, 905 F.3d 357, 378 (6th Cir. 2018) (Thapar, J., dissenting) ("[The] fault lies . . . with the courts, which have added requirements into RLUIPA that prevent many religious groups from seeking the shelter that Congress sought to provide. There comes a time with every law when the Supreme Court must revisit what the circuits are doing. That time has come.").

[111] Noel Sterett, *Supreme Court Unified on Strength of the Religious Land Use & Institutionalized Persons Act*, DALTON & TOMICH (Mar. 30, 2022), https://www.daltontomich.com/supreme-court-unified-on-strength-of-the-religious-land-use-institutionalized-persons-act/ [https://perma.cc/G7XM-MDMY].

land use case to resolve these disagreements, the strength of RLUIPA's land use provisions will vary based on where the religious institution or assembly is located."[112] This is the problem this Note seeks to resolve.

II. COURTS' JURISPRUDENTIAL FLAWS AND HOW TO CORRECT THEM

A. Calming the Interpretative Waters

This section will analyze the manner in which courts have crafted a definition, standard, or set of factors for determining the best way to apply RLUIPA. Generally, some courts begin with *Sherbert* and *Yoder*, while others resort to the plain meaning of the statute.[113] Whatever the case may be, the following section will seek to provide an interpretative framework that comports with the statute and effectuates the broad interpretation of the substantial burden provision that RLUIPA requires.

1. Courts' Interpretive Process

First, one subset of courts began interpreting RLUIPA's substantial burden provision by giving at least some credence to the *Sherbert* and *Yoder* decisions and their subsequent application because this was the original goal of RFRA—to restore the tests set out in these cases.[114] RFRA re-implemented *Sherbert*'s and *Yoder*'s compelling interest test, which is much more favorable to religious groups than *Smith*.[115] However, RFRA's application to all state and federal actions caused it to fail the Court's congruence and proportionality test under the Fourteenth Amendment.[116] RLUIPA's constitutional reformation of RFRA, which has proven to be successful, did not delete *Sherbert*'s and *Yoder*'s language from its text.[117] Rather, it modified the governmental actions to which the compelling interest test applied.[118] As such, the interpretation of the test itself should maintain, in a constitutionally permissible manner, the meaning as it was understood in the *Sherbert* and *Yoder* decisions.[119]

The Fifth, Seventh, and Eleventh Circuits begin their substantial

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[112] *Id.*

[113] *See, e.g.* Civil Liberties for Urb. Believers v. City of Chi., 342 F.3d 752, 760 (7th Cir. 2003); *see also, e.g.*, San Jose Christian Coll. v. City of Morgan Hill, 360 F.3d 1024, 1034 (9th Cir. 2004).

[114] 42 U.S.C. § 2000bb.

[115] *Id;* Sherbert v. Verner, 374 U.S. 398 (1963); Wis. v. Yoder, 406 U.S. 205 (1972); Emp't Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872 (1990).

[116] *See City of Boerne*, 521 U.S. at 531–32.

[117] 42 U.S.C. § 2000cc; *Sherbert*, 374 U.S. at 398; *Yoder*, 406 U.S. at 205.

[118] *See* 42 U.S.C. § 2000cc.

[119] *See generally Sherbert*, 374 U.S. at 398; *Yoder*, 406 U.S. at 205.

burden analyses by looking at *Sherbert* and *Yoder*.[120] However, this has not resulted in the same conclusion regarding the intricacies of RLUIPA's application. For example, the Eleventh Circuit, in addition to its modified behavior standard, has offered six factors to help guide lower courts' substantial burden determinations.[121] These factors are:

> [W]hether the plaintiffs have demonstrated a genuine need for new or more space . . .; the extent to which the City's decision, and the application of its zoning policy more generally, effectively deprives the plaintiffs of any viable means by which to engage in protected religious exercise; whether there is a meaningful "nexus" between the allegedly coerced or impeded conduct and the plaintiffs' religious exercise; whether the City's decisionmaking [sic] process concerning the plaintiffs' applications reflects any arbitrariness of the sort that might evince animus or otherwise suggests that the plaintiffs have been, are being, or will be (to use a technical term of art) jerked around; whether the City's denial of the plaintiffs' zoning applications was final or whether, instead, the plaintiffs had (or have) an opportunity to submit modified applications that might satisfy the City's objections; and whether the alleged burden is properly attributable to the government (as where, for instance, a plaintiff had a reasonable expectation of using its property for religious exercise) or whether the burden is instead self-imposed (as where the plaintiff had no such expectation or demonstrated an unwillingness to modify its proposal in order to comply applicable zoning requirements).[122]

Conversely, both the Fifth and Seventh Circuits have declined to adopt any set of factors.[123] Instead, these courts have maintained only vague standards with little additional guidance.[124]

The Ninth Circuit, on the other hand, does not begin with *Sherbert* and *Yoder*. Rather, it refers to the definition of "burden" in the dictionary to

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[120] *See, e.g.*, Adkins v. Kaspar, 393 F.3d 559, 567 (5th Cir. 2004); *see also* Civil Liberties for Urban Believers v. City of Chi., 342 F.3d 752 (7th Cir. 2003); *see* Thai Meditation Ass'n of Ala. v. City of Mobile, Ala., 980 F.3d 821 (11th Cir. 2020).

[121] *See Thai Meditation Ass'n of Ala*., 980 F.3d at 832.

[122] *Id.*

[123] *See Adkins*, 393 F.3d at 567; *see also Civil Liberties for Urban Believers*, 342 F.3d. at 760.

[124] *Id.*

craft its standard, which requires "great restriction or onus on [free] exercise."[125] For this reason, the Ninth Circuit's definition departs significantly from RLUIPA's drafters' understanding of what the term should mean, given that the drafters of RLUIPA's ancestral statute—RFRA—refer specifically to *Sherbert* and *Yoder*.[126]

Using the plain meaning rule—a canon of construction using words' ordinary meaning to construe statutes—the Ninth Circuit first looked to the dictionary definition for "substantial" and "burden" to create a hodgepodge of words that make little legal sense.[127] The Court states, "[A] 'substantial burden' on 'religious exercise' must impose a significantly great restriction or onus upon such exercise."[128] There are multiple problems with this interpretation. First, while referencing the dictionary is "permissible," it should not always be the first resort when the text of a statute provides at least some guidance for its interpretation.[129] RFRA's text references *Sherbert* and *Yoder* as its source for the substantial burden and compelling interest tests, which RLUIPA adopts word-for-word while omitting the specific reference to these cases.[130] *San Jose Christian College*, however, does not cite to either of these cases.[131] Of course, the inquiry does not begin and end with these decisions, but they should be looked to as sources for guidance.

Some courts, unlike the Eleventh Circuit, provide a set of factors with no standard at all.[132] The reason some courts have offered for using factors is that, while "[a] number of other circuits have announced tests in terms of such abstract formulations . . .[,] the standards . . . have not been consistent."[133] Accordingly, the First Circuit simply provides a range of potentially permissible standards.[134] First, it states, "A burden does not need to be disabling to be substantial."[135] However, "RLUIPA does not mean that any land use restriction on a religious organization imposes a substantial burden . . . ."[136] In an attempt to provide some guidance in making this

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[125] *See* San Jose Christian Coll. v. City of Morgan Hill, 360 F.3d 1024, 1034 (9th Cir. 2004) ("To determine 'the plain meaning' of a term undefined by a statute, resort to a dictionary is permissible.") (internal citations omitted).

[126] *See id*; *see also* 42 U.S.C. § 2000bb.

[127] *San Jose Christian Coll.*, 360 F.3d at 1034.

[128] *Id.*

[129] *See* Kevin P. Tobia, *Testing Ordinary Meaning*, 134 HARV. L. REV. 726, 744–46 (2020) (highlighting problems that can occur from the use of dictionaries in determining plain meaning).

[130] 42 U.S.C. § 2000bb; 42 U.S.C. § 2000cc; Sherbert v. Verner, 374 U.S. 398 (1963); Wis. v. Yoder, 406 U.S. 205 (1972).

[131] *See* 360 F.3d at 1024.

[132] *See, e.g.*, Thai Meditation Ass'n of Ala. v. City of Mobile, Ala., 980 F.3d 821, 832 (11th Cir. 2020); *see e.g.*, Roman Catholic Bishop v. City of Springfield, 724 F.3d 78, 95 (1st Cir. 2013).

[133] *Roman Catholic Bishop*, 724 F.3d at 95.

[134] *See id.*

[135] *Id.* at 96.

[136] *Id.*

determination, the court offers two factors.[137] The first factor is "whether the regulation at issue appears to target a religious organization because of hostility to that religion itself."[138] The second factor is "whether local regulators have subjected the religious organization to a process that may appear neutral on its face but in practice is designed to reach a predetermined outcome contrary to the group's request."[139] While using factors is certainly beneficial in parsing out these types of standards that have been historically difficult to apply, without tying them to at least some sort of standard, courts are simply adding to the confusion surrounding the provision.

There are, however, notable jurisprudential similarities. For example, scholars examining the factors that courts have not considered a substantial burden have provided insight into the commonalities of courts' RLUIPA frameworks.[140] Patricia Salkin and Amy Lavine found that generally courts do not consider things like permit application requirements, costs, inconveniences, delays, or the availability of reasonable alternatives to be a substantial burden.[141] Moreover, courts also generally agree that there are regulations that can affect religious exercise without imposing a burden that is substantial.[142] Congress did not intend RLUIPA to protect against all burdens that may be imposed on a religious organization because the Supreme Court has traditionally provided a high level of deference to local governmental bodies in making land use decisions.[143] RLUIPA did not drastically alter that landscape. Congress did intend, however, for RLUIPA to guard against land use regulations that may appear neutral on their face but that have an underlying discriminatory animus towards a particular religion, given that zoning regulations almost always have a plausible neutral justification.[144] Courts agree on this general principle of RLUIPA.[145] Yet, there tends to be little agreement between the courts regarding the substantial burden provision's application.

Perusing these vastly different frameworks make it clear that courts should be more absolute in their crafting of substantial burden standards. Often, courts opine on things that *can* be a substantial burden. For example,

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[137] *Id.*
[138] *Id.*
[139] *Id.*
[140] *See generally*, Patricia E. Salkin & Amy Lavine, *The Genesis of RLUIPA and Federalism: Evaluating the Creation of a Federal Statutory Right and Its Impact on Local Government*, 40 URB. LAW 195 (2008).
[141] *Id*. at 227.
[142] *Roman Catholic Bishop*, 724 F.3d at 95.
[143] *See* Village of Euclid v. Amber Realty Co., 272 U.S. 365, 387 (1926) (finding that as long as zoning decisions are not arbitrary or unreasonable, they fall under local government's police powers).
[144] *See* Thomas E. Raccuia, *RLUIPA and Exclusionary Zoning: Government Defendants Should Have the Burden of Persuasion in Equal Terms Cases,* 80 FORD. L. REV. 1853, 1860 (2012).
[145] *Id.* at 1861.

the Eleventh Circuit uses this language.[146] The court states in *Thai Meditation*, "modified behavior, if the result of government coercion, *can* be enough."[147] Surely, there must be modified behavior that *is* enough to constitute a substantial burden. Courts are in desperate need of guidance that will allow the ailments that have long plagued their RLUIPA jurisprudence to be cured. Therefore, a better framework for diagnosing RLUIPA violations is necessary. Though, it is imperative to first articulate the jurisprudential underpinnings of current substantial burden case law and the necessary considerations courts commonly overlook.

2. *In the Beginning*

RLUIPA's use of the substantial burden provision can be traced up its family tree to the *Sherbert* decision.[148] The Supreme Court, in this case, set out a test for determining whether a constitutionally impermissible burden had been placed on an individual's free exercise.[149] The Court employed the standard that any "incidental burden" placed on free exercise without a compelling state interest fails to pass constitutional muster.[150] Then, in a later footnote, the court provided numerous examples of conditions placed on free exercise for governmental benefits that the Court found unconstitutional because of the conditions' "tendency to inhibit constitutionally protected activity."[151] This footnote, however, has never been explicitly adopted or vindicated by any later Supreme Court ruling.[152] Nonetheless, there has been one court to consider this footnote in its initial contemplation of the substantial burden provision.[153]

In *Washington v. Klem*, the Third Circuit became the only court to address *Sherbert*'s sixth footnote.[154] "In [the] footnote. . . the Supreme Court seemed to imply that a substantial burden exists whenever a government action has 'the tendency to inhibit constitutionally protected activity.'"[155] Then, the court explained that, in a subsequent case where the Court purported to follow *Sherbert*, the Supreme Court reframed the substantial burden definition:

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[146] *See, e.g.*, Thai Meditation Ass'n of Ala., Inc. v. City of Mobile, Ala., 980 F.3d 821, 831 (11th Cir. 2020).
[147] *Id.*
[148] *See generally*, Sherbert v. Verner, 374 U.S. 398 (1963).
[149] *Id.* at 406.
[150] *Id.* at 403.
[151] *Id.* at 423 n.6.
[152] *Id.*
[153] Washington v. Klem, 497 F.3d 272, 280 (3d Cir. 2007).
[154] *Id.*
[155] *Id.* at 279.

> Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.[156]

This test certainly provides a higher bar than the incidental effects standard suggested by the *Sherbert* footnote, but the inquiry does not end there.

In *Lyng v. Northwest Indian Cemetery Protective Association*, another case in the *Sherbert* line, the Court rejected the position that *Sherbert* could be read to mean that any incidental burden on religious exercise requires a compelling justification from the government.[157] However, the *Lyng* court's holding did not alter the holdings of *Sherbert* or *Thomas*, thus creating a dichotomy for courts.[158] First, based on this case law, courts could have implemented a standard that leans more towards *Sherbert*'s hint at an incidental effects standard, or courts could have implemented a standard that requires a certain level of impracticability or foregoing of religious precepts.[159] The Third Circuit, like many other courts, adopted a combination of the two standards. In doing so, the court held:

> For the purposes of RLUIPA, a substantial burden exists where: 1) a follower is forced to choose between following the precepts of his religion and forfeiting benefits otherwise generally available . . . or abandoning one of the precepts of his religion in order to receive a benefit; *or* 2) the government puts substantial pressure on an adherent to substantially modify his behavior and to violate his beliefs.[160]

The Third Circuit's standard is a noticeable departure from any sort of incidental effects test. The court gives a couple of reasons for its decision to not implement this test.[161]

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[156] Thomas v. Review Bd. of Ind. Emp. Sec. Div., 450 U.S. 707, 717–18 (1981).
[157] Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 450–51 (1988).
[158] *See generally id.*
[159] *See id;* Sherbert v. Verner, 374 U.S. 398 (1963); Civil Liberties for Urb. Believers v. City of Chi., 342 F.3d 752, 761 (7th Cir. 2003).
[160] *Washington*, 497 F.3d at 280.
[161] *Id.*

"First, post-*Sherbert*, the Supreme Court has not squarely adopted its dictum in footnote six of *Sherbert* as a holding in a Free Exercise or RLUIPA case."[162] Second, "there is reason to question whether *Lyng* can be read to hold that any *incidental* effect of a government program which may have *some* tendency to coerce individuals into acting contrary to their religious beliefs satisfies the substantial burden standard."[163] The court felt that the "'any incidental effect/some tendency' standard" would conflict with *Lyng*'s assertion that there are circumstances under which a burden is not substantial despite "[the grave] threat to the efficacy of at least some religious practices."[164] As such, most circuits, like the Third Circuit, to use a term of art, "split the baby," and fell into a middle ground that sought to maintain the efficacy of RLUIPA. The Third Circuit "recognize[s] that this definition is narrower than the dictum in footnote six . . . and the negative implication of *Lyng*, but is still broad enough to accurately reflect the statute's plain text and to effect its purpose."[165] It is useful to illustrate here that the *Washington* court utilized, in part, the plain meaning rule.[166] Though, the Ninth Circuit also used the plain meaning rule and landed on a significantly harsher standard—requiring "significantly great restriction[s] or onus."[167] On one hand, the Third Circuit sought to maintain the Supreme Court's substantial burden jurisprudence while the Ninth Circuit paid it no attention. For these reasons, a common interpretive framework is necessary to resolve the dilemma that courts have been facing for the last two decades.

3. Requirements of a Correct Standard

Examination of the jurisprudence courts have utilized in their RLUIPA substantial burden determinations makes apparent that the courts that begin with *Sherbert* and its subsequent line of cases have more accurate definitions of substantial burden than the courts that have either declined to adopt a standard or avoided the Supreme Court's jurisprudence altogether. While there is no binding Supreme Court precedent regarding this provision specifically, *Sherbert* and cases in its precedential sphere are instructive in the analysis that courts should conduct. As such, the best way to resolve this split is to adopt a uniform definition for substantial burden and to give a uniform set of factors that will, in some ways, constrain the latitude that judges, under modern case law, currently have in the RLUIPA landscape.

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[162] *Id.*
[163] *Id.* at 280–81.
[164] *Id.* at 281; Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 451 (1988).
[165] *Washington*, 497 F.3d at 280.
[166] *See id.*
[167] San Jose Christian Coll. v. City of Morgan Hill, 360 F.3d 1024, 1034 (9th Cir. 2004).

Correctly, the Third Circuit's standard appropriately considers *Sherbert*. In declining to adopt the incidental effect test, the court reiterates concern that the Supreme Court had for this standard.[168] In *Lyng*, the Court states, "however much we might wish that it were otherwise, government simply could not operate if it were required to satisfy every citizen's religious needs and desires."[169] *Lyng* operates as a modification of *Sherbert's* standard. Because of this, adopting the footnote would be constitutionally impermissible. However, there is still room within the joints because the only other boundary that the Supreme Court has given for interpreting substantial burden is that it does not require the practice of religion to be impossible for substantiality to be present, unlike standards such as the Seventh Circuit's suggest.[170] The Third Circuit's standard, therefore, falls somewhere in the middle. The Court in *Thomas* employed language from which lower courts have drawn, requiring that "substantial pressure on an adherent to modify his behavior" be present.[171] Though, the Court goes further and states, "While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial."[172]

The *Thomas* decision leads to multiple inferences regarding the substantial burden test. First, courts that use language such as "significantly great restriction or onus," or "effectively impracticable," when referring to the effect a regulation must have on free exercise when defining "substantial burden" have gone too far.[173] Second, the burden can be substantial even if the compulsion is indirect.[174] As a result, the Supreme Court's definition of substantial burden requires a significantly lower demonstration of substantiality than many federal courts' definitions today. Of course, the Supreme Court developed its definition based on what can be considered "outdated" First Amendment case law.[175] RLUIPA, however, does not reference the First Amendment, which was an obvious attempt to separate itself from the Court's current (*Smith*) jurisprudence.[176] Because RLUIPA seems to satisfy the Fourteenth Amendment's congruence and proportionality test, it is constitutionally permissible for Congress, under Section Five of the Fourteenth Amendment, to provide greater protection to

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[168] *Washington*, 497 F.3d at 281 (quoting *Lyng*, 485 U.S. at 452).

[169] *Lyng*, 485 U.S. at 452.

[170] *Id*; *see also* Civil Liberties for Urb. Believers v. City of Chi., 342 F.3d 752, 761 (7th Cir. 2003) (holding that the substantial burden exists when a regulation bears direct responsibility for rendering religious exercise "effectively impracticable.").

[171] Thomas v. Review Bd. of Ind. Emp., 450 U.S. 707, 717–18 (1981).

[172] *Id.*

[173] *Civil Liberties for Urb. Believers*, 342 F.3d at 761; San Jose Christian Coll. v. City of Morgan Hill, 360 F.3d 1024, 1034–35 (9th Cir. 2004).

[174] *Thomas*, 450 U.S. at 717–18.

[175] *See id.*

[176] *See* 42 U.S.C. § 2000cc; *see* Emp't Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872 (1990).

religious land users than those afforded by the Constitution.[177]

Therefore, *Thomas*'s use of the "modified behavior language," which has been adopted by the Third, Fifth, Seventh, and Eleventh Circuits, should be controlling for any RLUIPA determination.[178] The Court does not require impossibility. Because it does not require any impossibility, it is far easier to tell whether behavior has been modified at all than whether it has been modified to an acceptable degree. The next requirement should be that there is some level of coercion. Most courts look to whether or not the modified behavior is caused by the conditioning of some benefit on the changed behavior.[179] Courts should, pursuant to the *Sherbert* decision, inquire as to whether someone is forced with choosing between exercising their religion or receiving a government benefit.

4. The Model Standard

To strike a balance between an incidental effects standard and an impracticability standard, while implementing the aforementioned necessities of any definition of substantial burden, a model standard should read: "A substantial burden exists where the government puts pressure on an adherent to modify his behavior in a way that would render free exercise, under the meaning of RLUIPA, sufficiently more difficult or impossible."

This standard does two things. First, it places the focus of any court's inquiry on the content of the government action (i.e., whether the government places pressure on the adherent) rather than on whether adherents have substantially modified their behavior to a sufficient degree. Second, it makes the determination of whether an adherent's behavior has been sufficiently modified easier. There are situations in which a religious adherent's behavior could be modified in a way that would not necessarily make free exercise more difficult. This also allows the standard to avoid constitutional infirmity by requiring a higher bar than an incidental effects standard, because this standard inherently requires that religious exercise be made more difficult—but not *substantially* more difficult or impossible. Though, this standard does not solve many of the other problems present with the interpretation of RLUIPA's substantial burden provision. For this reason, courts should also adopt a set of factors in conjunction with the aforementioned standard to make its application easier.

It is not a new idea that courts should consider factors when making determinations about the substantiality of a burden. The First Circuit

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[177] *See* Dorman v. Chaplains Office BSO, 36 F.4th 1306, 1313 (11th Cir. 2022) ("The RLUIPA provides greater religious protection than the First Amendment."); s*ee also* U.S. CONST. amend. XIV, § 5.

[178] *See Thomas*, 450 U.S. at 717–18.

[179] *See generally* Sherbert v. Verner, 374 U.S. 398, 403–04.

considers whether hostility towards religions is present and whether the regulation is designed to be neutral but contains some sort of mystical underlying animus towards religion.[180] The Eleventh Circuit considers six other factors for practicality.[181] As such, any court adopting a set of factors should mirror the Eleventh Circuit by adopting a more functional approach, which tailors its factors to common themes within RLUIPA fact patterns. Though, there are a few other factors that should be considered in addition to and deleted from the Eleventh Circuit's framework.

For example, courts should first consider whether a religious organization obtained prior approval from a zoning body before that approval was later revoked. Second, courts should not suggest that the availability of alternative locations implies that a burden is insubstantial. Certainly, the existence of alternative locations implies that a burden *might* be less substantial. However, once a religious organization purchases a property for the purpose of conducting a particular religious activity, the religious organization engages in the particular religious activity, and the local government then decides to revoke a permit, courts should not consider the availability of alternative locations. Having to move locations would certainly constitute a substantial burden under this framework. Third, courts should consider cost in complying with the regulation in relation to the size of the church. In some instances, churches spend tens of thousands of dollars to comply with certain regulations on top of an already lengthy approval process. For a small congregation, such a series of events could prevent them from being able to maintain the property at all, while the same expenses might be insignificant to a large congregation.

In conclusion, the Third Circuit has conducted the most accurate substantial burden inquiry because it gives credence to Supreme Court substantial burden jurisprudence and identifies that RLUIPA requires broad protections for religious liberty. As the court points out, *Sherbert*, *Lyng*, and *Thomas* should be instructive in parsing out the provision. Because these cases are the proper authorities to look to, a relaxed behavioral standard, as opposed to an impracticability standard, in conjunction with a set of factors, will result in a more proper application of the substantial burden provision, which will effectuate the protection of religious liberty that RLUIPA intended.

B. The Constitutionality of This Broad Interpretation

Scholars have debated the constitutionality of RLUIPA for nearly

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[180] *See, e.g.*, Roman Catholic Bishop v. City of Springfield, 724 F.3d 78, 95 (1st Cir. 2013).
[181] *See, e.g.*, Thai Meditation Ass'n of Ala., Inc. v. City of Mobile, Ala., 980 F.3d 821, 832 (11th Cir. 2020).

two decades.[182] For this reason, scholars such as Ashira Ostrow have stated, "[i]t seems likely that as RLUIPA's land use cases continue to make their way through federal courts, the Supreme Court will be called upon to resolve the debate."[183] This case has not come to fruition. However, the Supreme Court, albeit in the prison context, has explicitly held those provisions to be constitutional.[184] As a result, under its current application post-*Cutter*, no court has seriously questioned RLUIPA's constitutionality. Some scholars, on the other hand, have argued that any broad construction of RLUIPA's terms would place it in constitutional danger.[185] Those in this camp argue that this broad construction would, similarly to RFRA, wade too far into states' traditional waters—that is, that RLUIPA would exceed Congress' enforcement powers under the Fourteenth Amendment.[186] Though, the broad construction of RLUIPA that this Note argues for satisfies constitutional scrutiny because it meets the Court's congruence and proportionality test and is justified by the prevalence of religious discrimination in zoning decisions.

Under the Fourteenth Amendment, Congress is authorized to pass legislation designed to enforce substantive guarantees of the Constitution.[187] However, under the provision, Congress may not necessarily provide more protection than the Constitution provides unless it does so in a way that passes the "congruence and proportionality" test.[188] For example, the Court upheld the Voting Rights Act of 1965 on the grounds that its legislation was congruent and proportional to the widespread racism throughout many of the southern states.[189] While RLUIPA does not go nearly as far in its reach as the Voting Rights Act, it does provide greater protections than the First Amendment.[190] As Rashid argues, however, this statutory protection for free exercise is justified by widespread discrimination against religious organizations, which has risen since 9/11.[191] While RLUIPA's protections have been disputed by other scholars, the truth remains that RLUIPA does serve the purpose of guarding against religious discrimination and has not proven to be the corporate religion protector that many people anticipated it

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[182] *See, e.g.*, Ariel Graff, *Calibrating the Balance of Free Exercise Religious Establishment, and Land Use Regulation: Is RLUIPA an Unconstitutional Response to an Overstated Problem?*, 53 UCLA L. REV. 485, 487 (2005).

[183] Ostrow, *supra* note 107.

[184] *See e.g.,* Mayweathers v. Newland, 314 F.3d 1062 (9th Cir. 2002) (holding RLUIPA constitutional in the prison context and demonstrating a significant deference given by courts to congressional findings of religious discrimination).

[185] Ostrow, *supra* note 107.

[186] *See id.*

[187] U.S. CONST. amend. XIV, § 5.

[188] City of Boerne v. Flores, 521 U.S. 507, 520 (1997).

[189] *Id.* at 525.

[190] *See* Dorman v. Chaplains Office BSO, 36 F.4th 1306, 1313 (11th Cir. 2022) ("The RLUIPA provides greater religious protection than the First Amendment.").

[191] *See* Rashid, *supra* note 102, at 280.

would be.[192] Because of this, the relaxed behavioral standard is not only necessary for RLUIPA's intended purpose, but also for the broad construction of its terms that this Note has articulated, which would certainly pass constitutional muster.

First, the standard goes beyond merely requiring an incidental effect on religion.[193] It requires a higher bar than that. The Supreme Court has instructed that not every burden on religion is substantial.[194] As such, there must be a gradient because impracticability is more restrictive than *Sherbert*. Therefore, the standard must allow for some modified behavior so that courts may find a substantial burden when appropriate and avoid having to cater to every religious organization that may have their free exercise affected by trivial zoning regulations.

Second, as the Third Circuit makes clear, it is the purpose of RLUIPA to re-implement the standards applied in the *Sherbert* line.[195] *Sherbert* requires a standard that extends broad protections for religious liberty.[196] While the Court has acknowledged that not every burden is substantial, Congress intended the provision to be favorable to religious land users.[197] This is why when the Court abrogated *Sherbert* in *Employment Division v. Smith*, Congress felt the need to enact RFRA in the first place, which went further in protecting religious liberties than *Smith*.[198] RLUIPA provides precisely the same protections as RFRA, but only in the land use and institutionalized persons context.[199] By requiring a standard that establishes a formidable bar to establishing a substantial burden, such as "significantly great restriction" or "impracticability," courts have ignored the fundamental protections of RLUIPA, which provide recourse for numerous land users against discriminatory local land use decisions.[200]

It is true that the relaxed behavioral standard, along with the other proposed factors, goes further, in terms of protecting religious liberty, than does the First Amendment. Though, the standard does so in a constitutionally permissible manner because it would fail to extend Congress' power in a way that is incongruent or disproportional with RLUIPA's purpose. Rather, RLUIPA applies in specific areas—land use and institutionalized persons, and this is not broad, sweeping legislation. RLUIPA merely seeks to regulate

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[192] MacLeod, *supra* note 86, at 42.
[193] *See* Sherbert v. Verner, 374 U.S. 398, 423 n.6 (1963).
[194] *See, e.g.*, Adkins v. Kaspar, 393 F.3d 559, 567 (5th Cir. 2004).
[195] 42 U.S.C. § 2000bb; Washington v. Klem, 497 F.3d 272, 280 (3d Cir. 2007).
[196] *See generally Sherbert*, 374 U.S. at 423 n.6.
[197] *See Adkins*, 393 F.3d at 567.
[198] *See* 42 U.S.C. § 2000bb(b)(1)(2); *See generally* Emp't Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872 (1990).
[199] *See* 42 U.S.C. § 2000cc.
[200] San Jose Christian Coll. v. City of Morgan Hill, 360 F.3d 1024, 1034 (9th Cir. 2004).

subsets of human society that have experienced high levels of discrimination. Applying the relaxed behavioral standard is in keeping with this idea.

The inquiry also does not end with whether the litigant established a substantial burden. This lower bar would simply allow courts to reach the question of whether the government has offered a compelling interest in more cases than it has in the past. Some scholars have debated this portion of the test, which seems to imply strict scrutiny.[201] Courts in other portions of RLUIPA—the equal terms provision—have implemented strict scrutiny as to a government's intent and purpose.[202] Moreover, the statute itself uses strict scrutiny language—that is, requiring a "compelling interest" once a substantial burden has been demonstrated.[203] Therefore, lowering the bar for what constitutes "substantially modified" by deleting "substantially," allows courts to focus more on the type of pressure the government placed on the adherents rather than whether the adherents have modified their behavior to an appropriate degree.

In conclusion, the relaxed behavioral standard contemplated in this Note is constitutionally permissible because it satisfies the congruence and proportionality test. Additionally, this standard allows RLUIPA's intent and purpose to be effectuated, which includes being more skeptical over government action that affects religion. For these reasons, courts should adopt the relaxed behavioral standard proposed in this Note because it will bring to a halt some of the confusion surrounding the substantial burden provision of RLUIPA.

III. CONCLUSION

RLUIPA's statutory framework, like many other statutes relating to free exercise, is complicated and difficult to apply. Although there is no obvious answer to the question that this Note addresses, two things are clear: (1) the current application of RLUIPA's substantial burden provision is unworkable and in need of modification; and (2) the Supreme Court should grant certiorari in a future case to resolve this debate once and for all. The relaxed behavioral standard offered in this Note, along with its subsequent factors, should be instructive in any analysis the Supreme Court may undertake. While the proposed standard will not bring total clarity to RLUIPA's land use provisions, it does provide a much clearer framework for

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[201] *See* Ostrow, *supra* note 107, at 724 ("The strict scrutiny review mandated by RLUIPA is clearly inappropriate for as-applied land use decisions that impact neither fundamental rights nor suspect classes.").

[202] *See* Terry M. Crist III, Comment, *Equally Confused: Construing RLUIPA's Equal Terms Provision*, 41 ARIZ. St. L.J. 1139, 1155 (2009) (endorsing the Eleventh Circuit's strict scrutiny standard based on RLUIPA's intent and purpose).

[203] 42 U.S.C. § 2000cc(a)(1)(A).

courts to apply to the cumbersome fact patterns presented in the RLUIPA line of cases examined in this Note. The relaxed behavioral standard is a workable standard that will give substantive meaning to RLUIPA's land use provisions and effectuate the broad interpretation that the statute requires. The time for a jurisprudential course correction has come, and that time is now. It is impossible to know how this problem will be solved, either by the Supreme Court or by the lower courts, but one thing is certain—courts must finally place RLUIPA in its proper light and grant the protections to religious land users that the statute requires.