RLUIPA: What's the Use

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RLUIPA: WHAT'S THE USE?

Jason Z. Pesick*

After Congress passed the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), which protects religious land use, many observers feared that the legislation would allow religious organizations to flout land-use regulations. Because RLUIPA defines "religious exercise" broadly, these observers feared the law would protect an array of nonworship uses, including commercial ventures, as long as a religious entity owned the land. More than a decade after RLUIPA's passage, this Note concludes that courts have not interpreted religious exercise as broadly as those observers feared. Courts have not, however, settled on a clear or consistent way of interpreting religious exercise. This Note reviews the case law and extracts a coherent framework to interpret religious exercise.

INTRODUCTION .................................................. 360

I. CHANGES IN FREE EXERCISE DOCTRINE LEAD TO RLUIPA .... 363
   A. Free Exercise Background ........................................ 363
   B. The Mechanics of RLUIPA's Substantial Burden Provision ...... 365

II. DEBATE SURROUNDING THE DEFINITION OF RELIGIOUS EXERCISE ........................................... 368

III. THE IMPACT OF A COHERENT FRAMEWORK ......................... 371
    A. Threshold Inquiries ..................................... 372
    B. Consideration One: Courts Focus on the Type of Activity, Not the Type of Organization Engaging in the Activity ............................................. 373
    C. Consideration Two: Courts Inquire into the Primary Purpose of Multiple-Use Projects .................. 376
    D. Consideration Three: RLUIPA Does Not Protect Uses Just Because They Support Worship .............. 377
    E. Justifying an Aggressive Interpretation of Religious Exercise ............................................ 379

IV. SUBSTANTIAL BURDEN SECTION ........................................ 380
    A. Courts Have Interpreted "Substantial Burden" Narrowly .... 380
    B. The Definition of Substantial Burden Further Limits RLUIPA's Protection .......................... 383

CONCLUSION ...................................................... 385

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INTRODUCTION

In Philip Roth's short story *Eli the Fanatic*, assimilated Jews in the wealthy Protestant town of Woodenton, New York threatened to enforce zoning ordinances against a new yeshiva (an Orthodox Jewish school) that moved into town. Concerned that the conspicuous, religious Jews at the yeshiva would threaten the "amity" between the Jews and non-Jews of Woodenton, one of the leaders of the secular Jewish community said, "[T]his is a matter of zoning, isn't it? Isn't that what we discovered? You don't abide by the ordinance, you go. I mean I can't raise mountain goats, say, in my backyard . . . ."

Tensions between religious entities and their neighbors are not new. Justice Cardozo identified some of the standard complaints: disruption of neighbors' "peace and comfort" through "the parking of cars, the tooting of horns, and the invasions of privacy attendant upon crowds." But because one justification for zoning is to protect public morals, it may be reasonable to give religious organizations—which enhance public morals—immunity from "the full impact of zoning restrictions . . . ." On the other hand, while religious activity may contribute to public morals, it can also have the same negative impacts as other land uses.

This tension often raises the question of what is the appropriate balance between religious freedom and a community's ability to regulate land use. Congress attempted to answer this question by passing the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), which protects religious land use and institutionalized persons' religious observance. The substantial burden provision in RLUIPA's land-use section bars governments from implementing a land-use regulation that imposes a substantial burden on "religious exercise," unless the regulation meets strict-scrutiny review. The definition of religious exercise plays a large role in RLUIPA's impact because a use only receives RLUIPA's substantial burden protection if the use qualifies as religious exercise. This

2. Id. at 200.
Note discusses the definition of religious exercise in the substantial burden provision of RLUIPA's land-use section.

After more than a decade since the statute's passage, this Note reviews the way courts have interpreted religious exercise. Though courts have not followed a consistent framework in interpreting religious exercise, this Note concludes that—despite the predictions of numerous legal scholars—courts have defined the term narrowly. This Note aims to bring coherence to the body of court decisions interpreting religious exercise and gleans from the case law a framework to assist courts, attorneys, local governments, and religious organizations in determining whether a given use is likely to qualify as religious exercise.

After RLUIPA's passage, many critics feared the statute would provide religious entities with tremendous insulation from land-use regulation. These commentators wrote that the broad language RLUIPA uses to define religious exercise could provide its substantial burden protection to an array of uses largely unrelated to religion, save for the fact that a religious entity owns the land. For example, the provision could have protected uses that are often associated with religious entities but not central to religious worship, like hospitals, facilities for childcare or charity work, and administrative space. This fear was not unfounded. A New York Times story found that megachurches (churches with a weekly attendance of 2,000) now operate activities that include large athletic facilities, corporate storage facilities, housing developments, and shopping centers.

heightened standard of review is heavily dependent on the Act's definition of the term 'religious exercise' because if a religious institution cannot demonstrate that a particular land-use policy affects their exercise of religion, then the institution cannot establish a claim under RLUIPA."


10. See, e.g., Sara C. Galvan, Note, Beyond Worship: The Religious Land Use and Institutionalized Persons Act of 2000 and Religious Institutions' Auxiliary Uses, 24 YALE L. & POL'Y REV. 207, 222 (2006); see also 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, 223 (2008) ("Thus, a critical question not yet clearly answered is whether RLUIPA's protection of the exercise of religion is limited to obviously religious uses, or whether it extends to arguably secular activities carried out by religious institutions."); Welch supra note 7, at 275 (noting the array of uses in which religious organizations now engage).

Critics have identified a number of reasons why RLUIPA should not protect nonworship land uses. First, it is not consistent policy for a hospital or movie theater to receive protection from land-use regulations if a religious organization owns the facility, but not if a secular organization owns it.\textsuperscript{12} Some commentators also believe that drawing such a distinction violates the establishment clause.\textsuperscript{13} Furthermore, many of these nonworship uses cause the very concerns local land-use regulations exist to address, especially traffic.\textsuperscript{14} Finally, a definition of religious exercise that includes a number of nonworship uses does not appear to be consistent with the intent of the drafters.\textsuperscript{15} This Note, however, does not argue for a particular interpretation of religious exercise. Rather, it reviews how broadly courts have interpreted religious exercise and seeks to coherently restate the trends.

\textsuperscript{12} See Lennington, supra note 9, at 834.

\textsuperscript{13} See, e.g., City of Boerne v. Flores, 521 U.S. 507, 537 (1997) (Stevens, J., concurring) ("If the historic landmark on the hill in Boerne happened to be a museum or an art gallery owned by an atheist, it would not be eligible for an exemption from the city ordinances that forbid an enlargement of the structure.") (discussing RLUIPA predecessor RFRA); Marci A. Hamilton, The Constitutional Limitations on Congress's Power Over Local Land Use: Why the Religious Land Use and Institutionalized Persons Act is Unconstitutional, 2 ALB. Gov't L. REV. 366, 433 (2009); Galvan, supra note 10, at 232–34.


\textsuperscript{15} The legislative history reads: "This Act does not provide religious institutions with immunity from land use regulation, nor does it relieve religious institutions from applying for variances, special permits or exceptions, hardship approval, or other relief provisions in land-use regulations, where available without discrimination or unfair delay." 146 CONG. REC. S7774, S7776 (daily ed. July 27, 2000) Ex. 1 (Joint Statement of Sen. Hatch and Sen. Kennedy on the Religious Land Use and Institutionalized Persons Act of 2000).

The legislative history continues:

The definition of "religious exercise" under this Act includes the "use, building, or conversion" of real property for religious exercise. However, not every activity carried out by a religious entity or individual constitutes "religious exercise." In many cases, real property is used by religious institutions for purposes that are comparable to those carried out by other institutions. While recognizing that these activities or facilities may be owned, sponsored or operated by a religious institutions, or may permit a religious institution to obtain additional funds to further its religious activities, this alone does not automatically bring these activities or facilities within the bill's definition or [sic] "religious exercise." For example, a burden on a commercial building, which is connected to religious exercise primarily by the fact that proceeds from the building's operation would be used to support religious exercise, is not substantial burden on "religious exercise." Id.
Though the framework that this Note extracts will assist judges and litigators, it is not an attempt to develop bright-line rules or factors, or a test that courts must follow. Rather, this Note assists courts by identifying trends in court opinions. It develops a framework that describes three considerations courts have used when confronting the breadth of the term religious exercise.

Part I provides background on the Supreme Court's free exercise doctrine, which resulted in the enactment of RLUIPA, and then discusses the relevant provisions of RLUIPA in greater detail. Part II describes the discussion over how broadly the statute defines religious exercise and explains the current, often-conflicting interpretations of religious exercise. Part III provides a helpful framework drawn from the common approaches courts have taken. Part III also briefly explains how the courts' interpretation of "substantial burden" further limits protection of nonworship uses.

I. Changes in Free Exercise Doctrine Lead to RLUIPA

A. Free Exercise Background

The First Amendment states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof ..." Historically, the Court's free exercise doctrine distinguished between freedom of belief and freedom of conduct. For example, though Chief Justice Warren wrote that "freedom to hold religious beliefs and opinions is absolute," he rejected the challenge by Orthodox Jewish merchants to a criminal law prohibiting the sale of various merchandise on Sundays. The law affected the merchants' businesses because as Orthodox Jews, they were unable to work on Saturdays, and they wanted to remain open on Sundays to make up for the loss of Saturday business. The Court rejected their argument because the statute imposed only an indirect burden on religion; it did not directly bar a religious practice.

Sherbert v. Verner represents a high-water mark for the free exercise clause. In that case, the Court held that South Carolina's denial of unemployment benefits to a Seventh-Day Adventist who refused to work on

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16. U.S. Const. amend. I.
17. Cantwell v. Connecticut, 310 U.S. 296, 303–04 (1940); Reynolds v. United States, 98 U.S. 145, 166 (1879) ("Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.").
19. Id. at 609.
20. Id. at 601.
21. Id. at 606.
Saturdays violated her free exercise rights. Justice Brennan wrote that the
government forced the plaintiff to choose between her religion and re-
ceiving benefits—"the same kind of burden upon the free exercise of
religion as . . . a fine imposed against appellant for her Saturday worship." Justice Brennan applied strict-scrutiny review and invalidated the state
statute that disqualified the plaintiff from receiving benefits.

But in Employment Division v. Smith, the Court limited the free ex-
ercise doctrine. The Court held that Oregon could criminally bar the use
of peyote for religious purposes and deny unemployment benefits to indi-
viduals terminated for using the drug. The Court noted that it had only
applied Sherbert's strict-scrutiny test in unemployment compensation cas-
es, and then said that the test was not appropriate in the case of generally
applicable laws. Not wanting judges to inquire into the centrality of a
religious practice to an individual's beliefs, the Court also rejected an ap-
proach in which courts would apply a strict-scrutiny test when
government prohibited conduct central to an individual's religion. The
Court affirmed this holding in Church of Lukumi Babalu Aye v. City of Hia-
leah.

Congress responded to the Smith decision by passing the Religious
Freedom Restoration Act of 1993 (RFRA), an attempt to return free ex-
ercise jurisprudence to the Sherbert rule. RFRA concisely but boldly
stated, "Government shall not substantially burden a person's exercise of
religion even if the burden results from a rule of general applicability, ex-
cept" if the act passes strict-scrutiny review.

But the Court did not allow Congress to have the last say in the
matter and responded by striking down RFRA, at least as applied to state
and local governments. In City of Boerne v. Flores, members of a San An-
tonio-area Catholic church wanted to expand the church's building to

23. Id. at 401-02.
24. Id. at 404.
25. Id. at 406-07.
27. Id. at 890.
28. Id. at 883.
29. Id. at 885.
30. Id. at 886-87.
31. 508 U.S. 520, 531 (1993) ("[A] law that is neutral and of general applicability
need not be justified by a compelling governmental interest even if the law has the inci-
dental effect of burdening a particular religious practice.").
32. Religious Freedom Restoration Act (RFRA) of 1993, Pub. L. No. 103-141,
act was to restore the Sherbert test), invalidated by City of Boerne v. Flores, 521 U.S. 507
(1997).
34. See Cutter v. Wilkinson, 544 U.S. 709, 715 n.2 (2005) (noting that the Court has
not ruled on whether RFRA still applies to the federal government).
accommodate a growing group of regular worshippers. The city denied the San Antonio Archbishop’s application for a building permit, arguing that the church was part of a historic district. The Archbishop responded by filing suit in federal court. The question in the case was whether Congress exceeded its enforcement power under Section 5 of the Fourteenth Amendment by enacting RFRA. The Court answered in the affirmative, holding that the Amendment’s enforcement power is “remedial.” The Court said that the power to enforce the free exercise clause does not include the power to alter free exercise doctrine. The Court also found that there was not sufficient evidence to support Congress’s view that remedial measures to protect religious groups were necessary to combat religious bigotry carried out through generally applicable laws. RFRA applied to federal, state, and local officials, as well as to all federal and state law—the law’s breadth indicated it was not an enforcement measure, the Court reasoned. The Court called the legislation “a considerable congressional intrusion into the States’ traditional prerogatives and general authority to regulate the health and welfare of their citizens.” After the Court gutted RFRA, Congress made the next move.

B. The Mechanics of RLUIPA’s Substantial Burden Provision

Eventually, Congress responded with the Religious Land Use and Institutionalized Persons Act of 2000. RLUIPA is far more limited than RFRA. It protects only two forms of religious exercise: land use and

35. Boerne, 521 U.S. at 512.
36. Id.
37. Id.
38. This section reads: “The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.” U.S. Const. amend. XIV, § 5.
40. Id. at 519 (citing South Carolina v. Katzenbach, 383 U.S. 301, 326 (1966)).
41. Id. (“Congress does not enforce a constitutional right by changing what the right is.”).
42. Id. at 530 (distinguishing between laws that target religious groups and “laws of general applicability which place incidental burdens on religion”).
43. Id. at 532.
44. Id. at 534.
46. In addition to limiting RLUIPA’s scope, Congress also gave RLUIPA more secure footing than RFRA by giving it three jurisdictional bases. The land-use provisions apply in any cases in which 1) the substantial burden is imposed by a program that receives federal funding, even if the rule imposing the burden is of general applicability; 2) the
religious exercise by institutionalized persons. RLUIPA prevents government from implementing "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 burden furthers a compelling government interest and is the least restrictive means of "furthering that compelling governmental interest."\(^8\)

In response to Boerne, in which the Court admonished Congress that the Fourteenth Amendment's enforcement provisions are remedial,\(^9\) RLUIPA's legislative history includes evidence that the right to exercise religion "is frequently violated."\(^{50}\) According to the legislative history, such discrimination is frequent because of "the highly individualized and discretionary processes of land use regulation."\(^{51}\) Some observers have written that Congress did not thoroughly consider these allegations of discrimination or take into account the other side of the story: the views of homeowners and local governments.\(^{52}\) But proponents of the statute argue it protects religious minorities.\(^{53}\) During one hearing, a House subcommittee was told that religious groups that make up nine percent of

\[\text{burden or removal of the burden would affect interstate commerce, even if the burden is the result of a rule of general applicability; and 3) the burden is imposed through land-use regulation in which the government engages in procedures that allow it to make "individualized assessments of the proposed uses of the property involved." Id.; RLUIPA 42 U.S.C. § 2000cc(a)(2)(A)–(C). These jurisdictional hooks are based on the spending clause, the commerce clause, and the Fourteenth Amendment. 146 CONG. REC. at S7775–76. See Lennington, supra note 9, at 814 n.54 (arguing application of a general zoning law should not count as an "individualized assessment").}\]

\[\text{burden of removal of the burden would affect interstate commerce, even if the burden is the result of a rule of general applicability; and 3) the burden is imposed through land-use regulation in which the government engages in procedures that allow it to make "individualized assessments of the proposed uses of the property involved." Id.; RLUIPA 42 U.S.C. § 2000cc(a)(2)(A)–(C). These jurisdictional hooks are based on the spending clause, the commerce clause, and the Fourteenth Amendment. 146 CONG. REC. at S7775–76. See Lennington, supra note 9, at 814 n.54 (arguing application of a general zoning law should not count as an "individualized assessment").}\]

\[\text{47. 42 U.S.C. § 2000 at cc, cc-1. The institutionalized persons provision proscribes government from imposing a substantial burden on the exercise of religion by individuals confined to an institution, even if the burden is the result of a generally applicable rule, unless the burden is the least restrictive way to further a compelling interest. In other words, the burden must meet strict-scrutiny review. This provision is beyond the scope of this Note.}\]

\[\text{48. Id. at § 2000cc(a)(1)(A), (B). The land-use section of RLUIPA also contains provisions prohibiting government from imposing land-use regulations that treat religious assemblies or institutions on less than equal terms than nonreligious assemblies or institutions, as well as a provision prohibiting government imposition of a land-use regulation that discriminates against an assembly or institution on the basis of religion, and a provision prohibiting government from imposing a land-use regulation that "totally excludes religious assemblies from a jurisdiction" or "unreasonably limits" religious institutions in a jurisdiction. See Lennington, supra note 9, at 815 (noting these other land-use provisions have been "infrequently applied and seldom used by plaintiffs").}\]

\[\text{49. City of Boerne v. Flores, 521 U.S. 507, 517 (1997).}\]


\[\text{51. Id.}\]

\[\text{52. Salkin & Lavine, supra note 10, at 206–07.}\]

the population are involved in half the reported litigation over the location of churches.\(^5\)

Courts have interpreted various provisions of RLUIPA inconsistently because the statute’s language is unclear.\(^5\) In particular, a number of questions remain about RLUIPA’s substantial-burden land-use provisions.\(^5\) These include questions about the meanings of such terms as land-use regulation,\(^5\) religious exercise, substantial burden, compelling governmental interest, and individualized assessment.\(^5\) This Note focuses on only one of those questions: the definition of religious exercise. It examines the breadth of uses that receive protection under RLUIPA’s substantial burden provision.

RLUIPA’s definition of religious exercise is novel and cannot be traced to previous case law.\(^5\) The statute defines religious exercise broadly, to include “any exercise of religion, whether or not compelled by, or central to, a system of religious belief.”\(^5\) Therefore, as the Court did in Smith, RLUIPA eliminates a centrality-of-belief test that would have courts inquire into how central an activity is to a system of religious belief before deciding if the activity qualifies as religious exercise.\(^6\) In fact, provisions in the statute support a broad understanding of religious exercise. RLUIPA says, “The use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose.”\(^5\) The statute buttresses that definition with language instructing courts to provide maximal protection of religious exercise: “This chapter shall be

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55. Salkin & Lavine, supra note 10, at 219 (“If one argument in support of RLUIPA is the need for uniformity and clarity in the protection of the free exercise of religion, RLUIPA is failing miserably.”); see also Cambodian Buddhist Soc’y v. Planning & Zoning Comm’n, 941 A.2d 868, 890 (Conn. 2008).
57. See Shelley Ross Saxer, Assessing RLUIPA’s Application to Building Codes and Aesthetic Land Use Regulation, 2 Ala. Gov’t L. Rev. 623, 630–35 (2009); see also Alden, supra note 9, at 1795; Lennington, supra note 9, at 813 ("The key inquiry ... is whether the action concerns zoning or something else.") (citing Prater v. City of Burnside, 280 F.3d 417, 434 (6th Cir. 2000), which held that the law must limit the manner in which an individual can use or develop his property).
59. Galvan, supra note 10, at 222; see Salkin & Lavine, supra note 10, at 222–25 (noting free exercise jurisprudence has not considered land use to be religious exercise). For a brief discussion of the difference between the definition of religious exercise within free exercise jurisprudence as compared to RLUIPA, see Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752, 760 (7th Cir. 2003); Cambodian Buddhist Soc’y v. Planning & Zoning Comm’n, 941 A.2d 868, 888–89 (Conn. 2008).
construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution.\textsuperscript{63}

II. Debate Surrounding the Definition of Religious Exercise

The concern that RLUIPA's definition of religious exercise provides protection to religious institutions' auxiliary (nonworship) uses arose because the statute does not distinguish between worship and nonworship uses.\textsuperscript{64} "RLUIPA has significantly departed from prior law by expanding the class of protected religious uses to all auxiliary uses," one commentator wrote, "including those that are not substantially related to a religious institution's religious, educational or charitable mission."\textsuperscript{65} Citing policy and constitutional concerns, the commentator concluded that Congress should amend RLUIPA so that auxiliary uses which are not "substantially related to a religious, educational or charitable mission" do not receive protection under RLUIPA.\textsuperscript{66} Another commentator wrote that RLUIPA's definition of religious exercise means that "if a church wants to build a building, even if it is a school or a nursing home, then that building is actually a religious exercise."\textsuperscript{67} Other commentators have noted that RLUIPA compounded the impact of the proliferation of megachurches and the numerous auxiliary, nonworship uses they include because it took land-use regulatory authority away from local officials, with whom such authority has traditionally rested.\textsuperscript{68}

Other commentators have argued for a broader interpretation of religious exercise to protect religious entities' nonworship land uses, like charitable work and education.\textsuperscript{69} In a report marking RLUIPA's tenth anniversary, the Department of Justice compared the legislation to the

\begin{itemize}
\item \textsuperscript{63} Id. at cc-3(g).
\item \textsuperscript{64} See, e.g., Galvan, supra note 10, at 209.
\item \textsuperscript{65} Id. at 220.
\item \textsuperscript{66} Id. at 210.
\item \textsuperscript{67} Lennington, supra note 9, at 814; see also Welch, supra note 7, at 275–76 ("Taken to its logical extreme, the language of RLUIPA allows a religious institution to avoid having to comply with local zoning regulations that would otherwise apply to its activities or facilities that are unrelated to its beliefs or mission, or that would apply to a non-religious institution offering the same amenities.").
\item \textsuperscript{68} Welch, supra note 7, at 282–87 (noting "RLUIPA does not address, nor does it incorporate the critical differences in the land that it regulates."); Ariel Graff, Comment, 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, 519 (2005) (arguing land use should be regulated at the local level).
\end{itemize}
Civil Rights Act of 1964 and argued that the land use and institutionalized person provisions have "helped secure the ability of thousands of individuals and institutions to practice their faiths freely and without discrimination." The report also noted approvingly the "wide range of settings" in which courts have used the statute to protect religious exercise.

Courts have not settled on a test or manner to determine whether a given use falls under RLUIPA's definition of religious exercise. In Cutter, a prisoners' rights case, the Supreme Court used a much narrower definition of religious exercise that it drew from Smith: "[T]he 'exercise of religion' often involves not only belief and profession but the performance of . . . physical acts [such as] assembling with others for a worship service [or] participating in sacramental use of bread and wine . . . ." Though this definition suggests that the Court defines religious exercise narrowly, the Court has not yet addressed the definition of religious exercise in the statute's land-use provisions. If the Court used the Cutter definition in the land-use context, it would reduce RLUIPA's protection of nonworship uses.

One California court broadly interpreted RLUIPA as "definitionally equating land use with religious exercise." In that case, the court found that a city's denial of a permit to allow a church to relocate to another part of downtown with more parking imposed a substantial burden on religious exercise. Some courts assume that RLUIPA protects activities that financially support or promote worship activities. For example, a Maryland court held that a sign seeking to recruit freeway drivers to a church qualified as religious exercise, though the court ruled against the church in that case because it did not find a substantial burden on that religious exercise. Similarly, a federal district court in Michigan decided that concerts to raise money for and expand a church's membership were

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71. Id. at 5.
73. 42 U.S.C. § 2000cc-5(7)(B)'s inclusion of land use as a form of religious exercise militates against Cutter's narrow definition in the land-use context.
75. Id.
religious exercise: "The fact that many ... activities are not confined to worship does not mean ... that the acts themselves are not religious in nature. In fact, many religions offer services beyond traditional worship services as part of their religious offerings." In that case, however, the facility also hosted worship services; it is not clear how the court would have ruled if the facility in question did not host worship services.

Courts take for granted that building a religious temple qualifies as religious exercise. Though religious schools would also seem to fall under a broad definition of religious exercise, not all land uses by religious schools receive RLUIPA's protection. In *Westchester Day School v. Village of Mamaroneck*, the Second Circuit reasoned in dicta that an expansion project that included improvements to both secular and religious classrooms of a religious school did not necessarily receive protection under RLUIPA. In that case, in which an Orthodox Jewish day school submitted plans to expand both its religious and secular instruction space, Judge Leval rejected an interpretation of RLUIPA that would protect improvements to secular facilities at a religious school just because those improvements would enhance the overall quality of the religious school's education. He suggested that such a broad definition of religious exercise violates the establishment clause because if a religious school and a secular school both submitted applications to a zoning board to expand their gymnasiums, the board would be able to deny the secular school's application, but not the religious school's.

When the case returned to the Second Circuit after remand, a different panel reiterated that the denial of a proposal by a religious school to build office space, a gymnasium, or a headmaster's residence would not impose a substantial burden on religious exercise, and thus would not violate RLUIPA. The proper test, the court explained, was "whether the proposed facilities were for a religious purpose rather than simply whether the school was religiously affiliated." The court determined that the

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78. Id. at 693.

79. See, e.g., Guru Nanak Sikh Soc'y v. Cnty. of Sutter, 456 F.3d 978, 992 (9th Cir. 2006); Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1225–26 (11th Cir. 2004).

80. San Jose Christian Coll. v. City of Morgan Hill, 360 F.3d 1024, 1034 (9th Cir. 2004) ("Inasmuch as College intends to convert the Property from hospital use to a place for religious education, it appears that a 'religious exercise' is involved in this case.").

81. Westchester Day Sch. v. Vill. of Mamaroneck, 504 F.3d 338, 347–48 (2d Cir. 2007); 386 F.3d 183, 189 (2d Cir. 2004).

82. *Westchester*, 386 F.3d at 189–90.

83. Id. at 189.

84. Id.


86. Id. at 348.
expansion in question was religious exercise because the district court found that each room would be used “at least in part for religious education and practice.”\textsuperscript{87} It declined to decide exactly when a school expansion project is and is not religious exercise, but said the line “exists somewhere between this case, where every classroom being constructed will be used at some time for religious education, and a case ... where religious education will not occur in the proposed expansion.”\textsuperscript{88}

III. THE IMPACT OF A COHERENT FRAMEWORK

This Part will provide a method of analysis to determine whether a given use should be considered religious exercise under the statute. It will explain three limiting considerations distilled from the case law, and it will introduce two threshold inquiries that predate RLUIPA. The first consideration courts take into account is the type of activity in question, as opposed to the type of organization engaging in the activity. Second, for projects with more than one use, courts ask whether the primary purpose of the project is a use considered religious exercise under the first consideration. Third, activities that merely support religious exercise, like improvements to the quality of the secular education program at a religious school, or fundraising, do not qualify as religious exercise.

In some cases all three considerations will be relevant, and courts may consider them all. In other cases, not all of the considerations will be relevant. They are not bright-line rules or factors that must be weighed in every case. While the considerations identified in this Note represent an attempt to clarify the law so that courts can apply it more uniformly, bright-line rules proved too blunt a tool to define religious exercise under RLUIPA. Religious practice and the facts of individual cases vary so dramatically that courts need leeway to examine the facts and avoid unreasonable results.

These three considerations represent an attempt to bring coherence to the body of case law and can help clarify the law for litigators and courts. Even if a court determines that a given use is religious exercise, the land-use regulation still must impose a substantial burden on that religious exercise to trigger RLUIPA’s strict-scrutiny protection. This substantial burden hurdle explains why the predictions many commentators made about the breadth of activities RLUIPA would protect did not come to fruition.

\textsuperscript{87.} Id.
\textsuperscript{88.} Id.
A. Threshold Inquiries

Before turning to the three-factor analysis to determine if an activity is religious exercise, courts should consider two threshold inquiries that may make their job easier. First, though courts may not examine the centrality of a practice to "a system of religious belief," they may examine whether an activity is actually religious. Second, courts may also examine whether religious beliefs are sincere.

The first threshold inquiry is not simply another way of restating the question of what is religious exercise, but rather asks whether the plaintiff is even engaging in religious conduct at all. The courts consider "whether the belief exists and whether it is based on grounds other than religion." In *Beechy v. Central Michigan District Health Department*, Amish plaintiffs claimed that because of their religious lifestyle they did not need a septic tank as large as the law required. The court found that a tank of the required size would not negatively impact the plaintiffs' religion and that plaintiffs' concerns were based on practical concerns, like cost and convenience. Similarly, in *Glenside Center, Inc. v. Abington Township Zoning Hearing Board*, the court held that Alcoholics Anonymous meetings were not an exercise of religion because the purpose of the meetings was to treat addictions, not advance religion. Based on these cases, it seems easier for courts to find that an activity is not religious if the organization engaging in the activity is not a religious organization.

The second threshold inquiry simply asks whether the plaintiff sincerely views the given land use as a religious exercise. The court must make a factual determination to answer this question. If the plaintiff

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94. *Id.* Plaintiffs did not even claim that installation of the required tank "contravenes a tenet of their faith, or interferes with the practice of their religion." *Id.*
96. *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d at 663–64.
97. *Id.*
clears these two initial hurdles, a court should use the three factors explained below to evaluate whether the plaintiff’s activity qualifies as religious exercise under the statute.

B. Consideration One: Courts Focus on the Type of Activity, Not the Type of Organization Engaging in the Activity

The first and most important consideration courts take into account when determining whether an activity is religious exercise is the nature of the activity or use itself; in doing so, however, courts do not inquire into the nature or identity of the entity engaging in the activity. As Judge Leval noted, considering the identity of the organization engaging in the activity could lead to an establishment clause violation by providing a given use more protection if a religious entity owns it. Because courts examine the nature of the activity as opposed to the nature of the organization, RLUIPA does not protect secular activities merely because a religious organization performs them.

For example, the Michigan Supreme Court held that an apartment complex proposed by a religious organization did not constitute religious exercise under RLUIPA. The court held that the commercial activity of constructing an apartment complex does not become religious exercise merely because a religious organization constructs the apartments. Similarly, other courts have held that daycare centers operated by religious organizations do not qualify as religious exercise.

98. See, e.g., Greater Bible Way Temple of Jackson v. City of Jackson, 733 N.W.2d 734, 746 (Mich. 2007); see also 146 Cong. Rec. S7774, S7776 (daily ed. July 27, 2000) Ex. 1 (Joint Statement of Sen. Hatch and Sen. Kennedy) ("[N]ot every activity carried out by a religious entity or individual constitutes ‘religious exercise.’ In many cases, real property is used by religious institutions for purposes that are comparable to those carried out by other institutions. While recognizing that these activities or facilities may be owned, sponsored or operated by a religious institution, or may permit a religious institution to obtain additional funds to further its religious activities, this alone does not automatically bring these activities or facilities within the bill’s definition or ‘religious exercise.’").

99. See Westchester Day Sch. v. Vill. of Mamaroneck, 386 F.3d 183, 189-90 (2d Cir. 2004).

100. See, e.g., Greater Bible Way, 733 N.W.2d at 746 (explaining commercial activities that religious organizations engage in do not fall under RLUIPA’s definition of religious exercise).

101. Id. at 745 (Mich. 2007) (“A ‘religious exercise’ consists of a specific type of exercise, an exercise of religion, and this is not the equivalent of an exercise—any exercise—by a religious body.”).

102. Id. at 746. The court also pointed out that RLUIPA puts the burden on the plaintiff of proving an activity is religious exercise. Id. (citing 42 U.S.C. § 2000 cc-2(b)).

103. Ridley Park United Methodist Church v. Zoning Hearing Bd., 920 A.2d 953, 960 (Pa. Commw. Ct. 2007); see also Grace United Methodist Church v. City of Cheyenne, 451 F.3d 643, 663-64 (10th Cir. 2006) (upholding jury determination that daycare center was not a sincere exercise of religion).
Building worship facilities and religious schools, on the other hand, does qualify as religious exercise. A federal district court held that removal of religious artifacts to deconsecrate a church that is closing qualifies as religious exercise as well. At least some charitable work that religious organizations perform seems to fall within RLUIPA's definition of religious exercise. For example, a federal court in Florida found that a group home serving as a ministry and rehabilitation center for men with substance-abuse problems qualified as religious exercise under RLUIPA. There is still confusion, however, as to exactly what types of charitable activities courts consider religious exercise. Uses such as homeless shelters and soup kitchens are often associated with religious entities, but it is not clear if courts consider them religious exercise under RLUIPA.

Courts do not seem to consider the use of administrative space to be religious exercise. One court held that an expansion plan that included a sanctuary area, but was primarily an expansion of administrative offices, did not constitute religious exercise. Another court found that a parish center that would contain an office for religious education, meeting space for the parish council, and space for other church-related gatherings and functions did fall under RLUIPA's definition of religious exercise. The court found the parish center was intimately involved in the church's religious activity.

Courts also do not seem to consider recreational uses to be religious exercise. A Pennsylvania appellate court held that a denial of a church's application to use a campground and hiking trails as an accessory use to a church and worship center did not violate RLUIPA. A Rhode Island

105. Men of Destiny Ministries, Inc. v. Osceola Cnty., No. 6:06-cv-624-Orl-31DAB, 2006 WL 3219321, at *4 (M.D. Fla. Nov. 6, 2006). Though the court considered use of the religious rehabilitation center to be religious exercise, the court ultimately found against the ministry on its RLUIPA claims because, the court reasoned, relocating would not be a substantial burden. Id. at *5. See infra Part IV, Substantial Burden Section for a discussion of how the substantial burden requirement is further protection against land-use immunity for religious organizations.
106. But see Fifth Ave. Presbyterian Church v. City of New York, 293 F.3d 570, 574 (2d Cir. 2002) (suggesting caring for homeless can be religious exercise under the free exercise clause).
107. Cathedral Church of the Intercessor v. Vill. of Malverne, 353 F. Supp. 2d 375, 390–91 (E.D.N.Y. 2005) ("Simply because the Church is a religious institution does not mean it receives an unencumbered right to zoning approval for non-religious uses."). Factors 1 and 2 are related, as this court also looked at the primary purpose of the expansion.
109. Id.
110. See City of Hope v. Sadsbury Twp. Zoning Hearing Bd., 890 A.2d 1137, 1149 (Pa. Commw. Ct. 2006). Accessory use is defined as "a use which is dependent on or pertains to the principle or main use." RATHKOPF'S THE LAW OF ZONING AND PLANNING § 33:3
court determined that a fitness center and dance studio open to the public and in a high school building also did not count as religious exercise.\footnote{111}

Judge Posner seems to have endorsed a broader definition of religious exercise.\footnote{112} “Souls aren’t saved just in church buildings,” he declared.\footnote{113} He found a Christian organization’s community center that served the poor on Chicago’s South Side and that mainly consisted of “recreational and living facilities” to be “integral” to the organization’s religious mission.\footnote{114} While Judge Posner did not directly address the definition of religious exercise, what he perceived as the city of Chicago’s mistreatment of the small religious organization seems to have motivated his decision that the city imposed a substantial burden in violation of RLUIPA.\footnote{115}

The case highlights a complication in the way courts have interpreted religious exercise: Different religious organizations define what religious exercise means differently. For example, outreach, recreational, or charitable activities may be a core part of one religious organization’s practices but not another’s. And it seems odd for judges to establish rules to define religious exercise. Judge Posner’s approach of focusing on the way a government treated a religious organization and determining whether the government imposed a substantial burden on the religious organization therefore seems appealing.

But RLUIPA’s land-use provisions include other provisions that prohibit government from treating a religious organization “on less than equal terms with a nonreligious” organization and that prevent discrimination against a religious organization.\footnote{116} Furthermore, as discussed above, the statute defines religious exercise, and the legislative history discusses that definition, implying that the term has meaning that courts should consider. If the imposition of a substantial burden on any activity a religious organization defined as religious exercise violated RLUIPA, a broad range of activities could receive strict-scrutiny protection. This prospect raises a number of policy and legal concerns and did not appear to be the will of the statute’s drafters. In practice, courts tend to engage in a straightforward reading of the statute that asks whether a substantial

\footnote{112}{See World Outreach Conference Ctr. v. City of Chicago, 591 F.3d 531, 535 (7th Cir. 2009).}
\footnote{113}{Id.}
\footnote{114}{Id.}
\footnote{115}{Id. at 535–38.}
\footnote{116}{42 U.S.C. § 2000cc (b)(2006).}
burden was present and whether government imposed the substantial burden on an activity that qualifies as religious exercise.\textsuperscript{117}

While courts should further refine which types of uses they will consider religious exercise, Consideration One assists them by advising them to consider the nature of the use, not the identity of the organization engaging in the use. This approach helps avoid violations of the establishment clause, but it is not perfect because it puts courts in the awkward position of defining the scope of religious exercise.\textsuperscript{118} Despite this difficulty, courts have followed this approach of focusing on the type of activity in question, and it has led to a sensible interpretation of the statute.\textsuperscript{119}

C. Consideration Two: Courts Inquire into the Primary Purpose of Multiple-Use Projects

The second consideration courts take into account is the primary purpose of a multiple-use project.\textsuperscript{120} Often the projects at issue are complex, with both worship and nonworship components. When a project contains many components, courts have considered whether the primary purpose of the project is a use that courts consider religious exercise under Consideration One.\textsuperscript{121} For example, if a religious organization proposes to build a sanctuary with a gymnasium, the court would ask

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\item 117. See, e.g., Roman Catholic Bishop v. City of Springfield, 760 F. Supp. 2d 172, 185–86 (D. Mass. 2011) (asking first whether the case involves religious exercise and then whether the government imposed a substantial burden on that religious exercise).
\item 118. Adam J. MacLeod, Resurrecting the Bogeyman: The Curious Forms of the Substantial Burden Test in RLUIPA, 40 REAL ESTATE L.J. 115, 152–53 (2011) (raising concerns with the test because “the process of separating the truly religious from the nominally religious entails adjudicating the importance of various aspects of religious mission, and deciding which activities are central or fundamental to a religious land user’s mission and beliefs”). But, stating that the statute “simply cannot be meant to include within its protection every activity claimed to be religious, or alleged to serve a religious mission or purpose,” id. at 161, the article argues that RLUIPA’s substantial burden provision should focus on protecting religious land uses with no secular analogues. Id. at 169–70.
\item 119. Interestingly, Galvan, supra note 10, at 235, advocated amending RLUIPA to define religious exercise as activities that are “substantially related to the religious, educational, or charitable mission of a religious institution.” Her proposed definition may be broader than what the courts have defined as religious exercise. For example, a headmaster’s residence, classrooms solely dedicated for secular education in a religious school, and administrative offices may substantially relate to the educational mission of an institution. Furthermore her inclusion of charitable activities could provide space for health-care facilities, homeless shelters, soup kitchens, even warehouses that store food for needy families. These uses are all good things, but the courts have not yet definitively classified them as religious exercise under RLUIPA.
\item 120. See Westchester Day Sch. v. Vill. of Mamaroneck, 504 F.3d 338, 348 (2d. Cir. 2007).
\item 121. Id.
\end{itemize}
whether the primary purpose of the project is the sanctuary or the gymnasium because only the sanctuary qualifies as religious exercise under Consideration One. Courts might find this consideration attractive because it avoids the problem of religious organizations' bootstrapping a religious component onto a secular project to gain RLUIPA's protection.

As noted above, *Westchester Day School* is an example of how a court takes this consideration into account. In that case, the court examined the primary purpose of the expansion project and asked whether the primary purpose was religious or not; just because part of the project included construction of religious-school facilities did not make the entire expansion religious exercise.123

The *Westchester* court noted that the trial court carefully considered how each classroom in a school expansion project would be used and found that they would all be used at least in part for religious purposes.124 The court explained that it was not necessary that all the rooms be used for religious purposes for the project to receive protection from RLUIPA, but it declined to "demarcate the exact line at which a school expansion project comes to implicate RLUIPA."125 The court suggested that a district court should determine the overall purpose of the project.

Therefore, the construction of a church which included an administrative office would likely qualify as religious exercise, but if a church only wanted to build a basketball court, the project would not be religious exercise. Furthermore, if a church wanted to construct an expansion that included athletic facilities, a game room, and other recreational facilities, in addition to a classroom for religious instruction, the project would mostly likely not qualify as religious exercise. After engaging in fact finding to determine the primary purpose of the project—whether comparing the square feet of the various uses in the project or determining how much time people are likely to spend in the various portions of the project once it is complete—a court would find that the vast majority of the project was for recreational uses. The primary purpose of that project would therefore be recreational.

D. Consideration Three: RLUIPA Does Not Protect Uses Just Because They Support Worship

Finally, courts do not consider activities that merely support worship activities and religious education to be religious exercise. This limitation means that commercial activities that raise money for worship activities

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122. *Id.* at 347–48
123. *Id.* at 348.
124. *Id.*
125. *Id.*
126. *Id.* at 347–48.
and religious education, as well as activities that support worship activities and religious education in other ways, do not qualify either. RLUIPA's legislative history is explicit that activity that commercially supports worship activities does not qualify as religious exercise. Therefore, land use does not become religious exercise under RLUIPA merely because it advertises, promotes, recruits, fundraises, does administrative work for, generates profit for, or in other ways supports religious exercise.

The Westchester Day School court also reasoned consistently with Consideration Three. Though the project would benefit a religious school—and possibly attract more students—by enhancing the quality of the school's secular education, the Second Circuit rejected this justification for broadening the scope of uses RLUIPA protects. Judge Leval wrote that just because improved secular facilities "would enhance the overall experience of the students" does not make the entire expansion religious exercise. Other courts have also reasoned consistently with Consideration Three. For example, a California appellate court held that RLUIPA does not make commercial activity funding religious organizations and activities religious exercise.

127. See Scottish Rite Cathedral Ass'n v. City of Los Angeles, 67 Cal.Rptr.3d 207, 216 (Cal. Ct.App. 2007) ("Specifically, a burden on a commercial enterprise used to fund a religious organization does not constitute a substantial burden on 'religious exercise' within the meaning of RLUIPA."); see also New Life Worship Ctr. v. Town of Smithfield Zoning Bd. of Review, C.A. No. 09-0924, 2010 R.I. Super. LEXIS 101, at *40 (R.I. Super. Ct. July 7, 2010) ("[T]he fitness facility and dance studio within the high school building would be used to generate revenue for New Life. This Court is satisfied that this building is not automatically protected as falling within the definition of religious exercise.").

128. 146 Cong. Rec. S7774, S7776 (daily ed. July 27, 2000) Ex. 1 (Joint Statement of Sen. Hatch and Sen. Kennedy) ("In many cases, real property is used by religious institutions for purposes that are comparable to those carried out by other institutions. While recognizing that these activities or facilities may be owned, sponsored or operated by a religious institution, or may permit a religious institution to obtain additional funds to further its religious activities, this alone does not automatically bring these activities or facilities within the bill's definition or 'religious exercise.' For example, a burden on a commercial building, which is connected to religious exercise primarily by the fact that the proceeds from the building's operation would be used to support religious exercise, is not a substantial burden on 'religious exercise.'"))

129. See id.

130. Westchester Day Sch. v.Vill. of Mamaroneck, 386 F.3d 183, 189 (2d Cir. 2004) ("According to this logic, any improvement or enlargement proposed by a religious school to its secular educational and accessory facilities would be immune from regulation or rejection by a zoning board so long as the proposed improvement would enhance the overall experience of the students."); accord Westchester Day Sch. v.Vill. of Mamaroneck, 504 F.3d 338, 347–48 (2d. Cir. 2007).

131. Westchester Day Sch., 386 F.3d at 189. The later panel agreed with Judge Leval's reasoning. 504 F.3d at 347.

While these considerations and the threshold inquiries that precede them should be further developed as courts decide more cases concerning the definition of religious exercise in RLUIPA's substantial burden provision, they provide a straightforward method of analysis. This method can assist courts in adhering to the intent of the statute's drafters, as well as the Constitution. This method also brings coherence to precedent that, while moving in the direction of limiting the scope of religious exercise, has not done so in a consistent manner.

E. Justifying an Aggressive Interpretation of Religious Exercise

As this Note explains, many courts have aggressively interpreted RLUIPA to narrow the definition of religious exercise. While this Note focuses on restating the case law rather than advocating for a particular method of interpretation, there are three justifications for supporting an aggressive interpretation. These justifications are the doctrine of constitutional avoidance, language in RLUIPA's text, and RLUIPA's legislative history.

The doctrine of constitutional avoidance is well established. Justice Scalia has described the doctrine as "a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts." As Justice Scalia explained, "The canon is thus a means of giving effect to congressional intent, not of subverting it."

In a piece considering RLUIPA's actual impact, Brain Alden suggests courts have interpreted RLUIPA narrowly to avoid an unconstitutional outcome. Judge Leval noted that a broad definition of religious exercise would trigger constitutional problems because it would give preference to a religious entity over a secular one if both wanted to
build identical projects.\textsuperscript{137} The Seventh Circuit has also applied the
doctrine to RLUIPA in a prisoner suit.\textsuperscript{138}

Another justification for the method of interpretation in this Note
can be found in the statute itself. The statute contains a section titled “Est-
ablishment Clause unaffected,” which directs judges to interpret
RLUIPA in a way that does not make it unconstitutional. The text reads,
“Nothing in this chapter shall be construed to affect, interpret, or in any
way address that portion of the First Amendment to the Constitution
prohibiting laws respecting an establishment of religion (referred to in this
section as the ‘Establishment Clause’).”\textsuperscript{139} It was therefore not only the
intention of the legislators, but also enacted into law, that RLUIPA should
not be interpreted in a way that violates the establishment clause.

The legislative history further justifies an aggressive interpretation.
This Note does not intend to enter the debate among legal scholars as to
when or even whether courts should rely on legislative history,\textsuperscript{140} but as
noted above, RLUIPA’s legislative history indicates Congress did not in-
tend to grant religious entities total land-use immunity; rather, Congress
intended that there be limits on the definition of religious exercise.\textsuperscript{141}

IV. SUBSTANTIAL BURDEN SECTION

A. Courts Have Interpreted “Substantial Burden” Narrowly

As noted above, the way the courts interpret various terms in
RLUIPA aside from religious exercise—including such terms as “land-use
regulation,” “compelling governmental interest,” “substantial burden,” and
“individualized assessment”—affects the breadth of protection RLUIPA
provides to religious uses. The courts’ definition of “substantial burden”
has had a particularly significant impact. Because of this impact, even
though RLUIPA’s definition of religious exercise expanded the breadth
of uses that receive protection, the substantial burden provision does not

\textsuperscript{137} Westchester Day Sch. v.Vill. of Mamaroneck, 386 F.3d 183, 190 (2d Cir. 2004);
\textsuperscript{138} Nelson v. Miller, 570 F.3d 868, 889 (7th Cir. 2009); \textit{see also} Sossamon v. State of
Tex., 560 F.3d 316, 329 (5th Cir. 2009); Greater Bible Way Temple of Jackson v. City of
Jackson, 733 NW2d 734, 754 n.27 (Mich. 2007).
\textsuperscript{140} See, e.g., Conroy v. Aniskoff, 507 U.S. 511, 519 (1993) (“The greatest defect of
legislative history is its illegitimacy. We are governed by laws, not by the intentions of leg-
slators.”) (Scalia, J., concurring); Stephen Breyer, \textit{On the Uses of Legislative History in
\textsuperscript{141} 146 CONG. REC. S7774, S7776 (daily ed. July 27, 2000) Ex. 1 (Joint Statement of
result in the scope of protection some have feared. Courts use varying definitions of substantial burden, but the standard is always significant. Courts have interpreted the term consistently with the Smith framework: complying with general land-use laws usually does not amount to a substantial burden. This requirement prevents the statute from providing land-use immunity to nonworship uses.

RLUIPA itself does not define substantial burden. The legislative history explains that the Act does not change the courts’ definition of substantial burden and that even RLUIPA § cc-3(g) (which says RLUIPA should be interpreted to provide “broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution”) does not affect the definition of substantial burden. Not surprisingly, courts agree that the definition is up to the judiciary.

Generally, Salkin and Lavine, two of many scholars who have thoroughly studied and written on the definition of “substantial burden,” found that courts do not tend to view the following as substantial burdens: permit application requirements, preclusion from operating at a specific location when there are “reasonable alternatives” available, mere inconvenience, cost, delay, or denial of a request to expand when “reasonable alternatives” are available. Courts are more likely to find a substantial burden if there is some evidence of discriminatory treatment.

Though the Seventh Circuit has offered various definitions of “substantial burden,” the court recently said that a burden is substantial if it “necessarily bears direct, primary, and fundamental responsibility for

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142. As a reminder, 42 U.S.C. § 2000 cc(a) reads: “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 the least restrictive means of furthering that compelling governmental interest. See Welch, supra note 7, at 276–77 (“RLUIPA’s broadening of the definition of religious exercise all but guarantees that most religious institutions will proceed to the issue of whether a land use regulation imposes a substantial burden on its conduct.”).

143. See Salkin & Lavine, supra note 10, at 227–34.


145. 146 CONG. REC. S7774, S7774 (2000) (daily ed. July 27, 2000). Salkin and Lavine hint at an interesting quandary: If RLUIPA codifies Supreme Court jurisprudence on substantial burden, should that codification include Smith’s rule that a neutral, generally applicable policy does not violate the free exercise clause—the very rule RLUIPA sought to overturn? Salkin & Lavine, supra note 10, at 233.

146. See, e.g., Vision Church v. Vill. of Long Grove, 468 F.3d 975, 997 (7th Cir. 2006) (citing Guru Nanak Sikh Soc’y v. Cnty. of Sutter, 456 F.3d 978, 988 (9th Cir. 2006); Mid-rash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1226 (11th Cir. 2004)).

147. Salkin & Lavine, supra note 10, at 228–33.

148. Id. at 233.

149. See e.g., Sts. Constantine and Helene Catholic Church v. City of New Berlin, 396 F.3d 895, 901 (7th Cir. 2005) (holding a burden does not need to be “insuperable” for it to be substantial).
rendering religious exercise—including the use of real property for the purpose thereof within the regulated jurisdiction generally—effectively impracticable." It continued, "[T]he Supreme Court has found a 'substantial burden' to exist when the government put 'substantial pressure on an adherent to modify his behavior and to violate his beliefs.'" 

The Second Circuit considers a number of factors before finding a substantial burden: whether the action is arbitrary, capricious, or unlawful; "whether there are quick, reliable, and financially feasible alternatives;" and "whether the denial was conditional." In Westchester Day School, the court found the government imposed a substantial burden when it denied an application to expand the school, in large part because it found the denial to be "arbitrary and unlawful."]

The common ground among courts is that a regulation that indirectly makes the practice of religion more difficult does not create a substantial burden. After surveying the circuits, the Michigan Supreme Court articulated its test for a substantial burden: "[A] 'substantial burden' exists when one is forced to choose between violating a law (or forfeiting an important benefit) and violating one's religious tenets." The court went on to say that an "inconvenience," "irritation," and "something that simply makes it more difficult . . . to practice one's religion," do not qualify as a substantial burden. The court held that even if it assumed that building an apartment complex was a religious exercise, a government's decision to refuse to rezone property so the religious organization could build the apartments would not create a substantial burden. The court explained that the government was not prohibiting the religious organization from building an apartment complex, but regulating where such an

150. Vision Church, 468 F.3d at 997 (quoting Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752, 761 (7th Cir. 2003).
151. Id. at 997 (quoting Hobbie v. Unemp't Appeals Comm'n, 480 U.S. 136, 141 (1987)); see also World Outreach Conference Ctr. v. City of Chicago, 591 F.3d 531, 537 (7th Cir. 2009) (holding conduct amounting to malicious prosecution imposed a substantial burden).
152. Westchester Day Sch. v. Vill. of Mamaroneck, 504 F.3d 338, 352 (2d. Cir. 2007).
153. Id. at 352–53.
154. See also Grace United Methodist Church v. City of Cheyenne, 451 F.3d 643, 662 (10th Cir. 2006) (“The Supreme Court stated . . . that the incidental effects of otherwise lawful government programs ‘which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs’ do not constitute substantial burdens on the exercise of religion.”) (quoting Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 450–51 (1988)). Consistent with Smith, the courts generally hold that neutral, generally applicable policies that require religious organizations to follow the law do not impose a substantial burden.
156. Id.
157. Id.
apartment complex could be built. Thus, under this test, requiring a religious organization “to follow the law like everyone else” does not impose a substantial burden. This interpretation means that RLUIPA does not provide religious exercises with land-use immunity, rather protection from substantial burdens.

B. The Definition of Substantial Burden Further Limits RLUIPA's Protection

Because a religious land use only receives strict-scrutiny protection if a land-use regulation imposes a substantial burden on the land use, RLUIPA’s relatively broad definition of religious exercise does not have the extreme impact many observers predicted. For example, the Episcopal Student Foundation court, which decided that concerts to raise money for and expand a church’s membership were religious exercise, declined to find that denial of a permit to allow the religious organization to demolish its current facility and build a new one constituted a substantial burden. The court found that “the Defendants’ permit denial in no way precludes Canterbury House from exploring other options short of demolition. Nor is there any evidence that animus played a role in the Defendants’ conduct.”

Men of Destiny Ministries also illustrates that even if an activity qualifies as religious exercise, the definition of substantial burden restricts RLUIPA’s protection of religious entities’ land use. In Men of Destiny Ministries, the court found that a ministry geared toward rehabilitating men with substance-abuse problems qualified as religious exercise. Such a finding could frighten neighbors who might not want rehabilitation facilities to be immune from land-use regulation. But the court went on to hold that complying with local land-use law did not impose a substantial burden on the ministry: “MDM remains free to relocate its program to another location in the County where it can operate as of right, or to operate its ministry by other methods—such as a non-residential facility . . . .” In other words, it would not be a substantial burden for the

158. Id.
159. Id.
161. Id.
163. Id. at *4 (finding the ministry “clearly motivated by . . . religious beliefs” and “constitute[ing] a religious exercise for purposes of the RLUIPA. As such, use of the . . . property for that purpose would also constitute a religious exercise.”).
164. Id. at *5.
facility to relocate. Therefore, RLUIPA's definition of religious exercise does not result in the outcomes critics feared because even worship uses do not receive land-use immunity.

Another case, *Castle Hills First Baptist Church v. City of Castle Hills,* provides an example of how the substantial burden provision limits RLUIPA's impact for a use that may or may not qualify as religious exercise. In that case, a church asked for a special use permit to convert adjacent property into a 300-space parking lot. The church wanted to expand its parking facilities to accommodate future growth in membership, though its current parking availability was sufficient for its needs at the time. The city denied the request. As the court in *Castle Hills* pointed out, while a church is not entitled to as much parking as it wants, "physical access to a community of worship is crucial to a religious observer's ability to practice both faith and religious conduct within a community. A governmental regulation that precludes such access to the worshiping community presents a substantial burden to the religious exercise." Though the court said that access is essential to religious exercise, it found that the denial did not impose a substantial burden on religious exercise. A church, the court explained, is not entitled to unlimited parking facilities.

Consideration Three seems to counsel against classifying a parking lot expansion to support significant growth of a congregation (or a commercial parking lot) as religious exercise. But a city's refusal to allow construction of a church with adequate parking could prevent access to the church and therefore impose a substantial burden on the congrega-

165. See id. at *5 ("[S]o long as other locations ... are reasonably available, Osceola County has not imposed a substantial burden ... on religious exercise.").
166. Saxer, supra note 69, at 628 ("Although the phrase 'religious exercise' has been intentionally and explicitly given a broader meaning under RLUIPA, continuing to narrowly define what constitutes a 'substantial burden' will negate Congress's attempt to broaden religious land use protection.").
168. Id. at *5.
169. Id.
170. Id. at *6.
171. Id. at *12.
172. Id. at *11.
173. Id. ("By denying the parking SUP, the burden worked upon the Church is one of financial cost and inconvenience, as well as the frustration of not getting what one wants. None of these burdens, however, is substantial and none rises to the level necessary to trigger strict scrutiny under the free exercise clause of the First Amendment.").
174. Id. at *12 ("[T]his is a situation in which a successful church hopes to be more so, but the questions remain, just how much parking does a church need and how much parking must the City permit it. Surely, the answer is not whatever amount the church desires. The answer must be a reasonable amount, to be determined by the City or other governing body, in the absence of unacceptable religious discrimination.").
tion's religious exercise. The point is that both requirements must be met. A court needs to find both that a particular use is religious exercise and that a government's denial of the project imposed a substantial burden on that exercise for RLUIPA to provide strict-scrutiny protection.

CONCLUSION

In the years following RLUIPA’s passage, many legal observers called for revisions to the statute. One commentator called for a new provision to limit statutory protection for nonworship uses. Another called for new language as part of a significantly longer substantial burden provision that could only be triggered by intentional discrimination. These proposals to amend the statute are academic. Congress passed the statute unanimously, members of both political parties sponsored the legislation, and President Clinton signed it. Furthermore, as one of those observers noted, “Courts have not ... dealt with auxiliary uses with the same permissiveness as they have dealt with facilities used primarily for worship.”

After examining a decade of case law, this Note observes that courts have interpreted the statute's substantial burden protection narrowly and have not used the provision to protect an array of nonworship land uses. The outcomes actual courts have reached should ease the fears of those concerned that “Section 2(a) has created havoc in local land use governance related to religious entities, altered politics at the local level, and cost taxpayers millions.” Even though the substantial burden provision only protects a relatively narrow range of activities in which religious organizations engage, it is important to remember that the statute contains other provisions that protect religious organizations from discriminatory treatment in land-use decisions related to a broader range of uses.

177. Lennington, supra note 9, at 837–38.
179. Galvan, supra note 10, at 228.
180. For a smart commentary on RLUIPA, arguing its impact has been far more limited than critics suggest, see Alden, supra note 9. But see Note, Religious Land Use in the Federal Courts Under RLUIPA, 120 HARV. L. REV. 2178 2179 (2007) (arguing RLUIPA has aided plaintiffs, though not discussing nonworship uses).
181. Hamilton, supra note 13, at 412; see Alden, supra note 14, at 1805 (explaining many plaintiffs who have had success suing under RLUIPA would have had success with First Amendment challenges in RLUIPA’s absence).
182. MacLeod, supra note 118, at 172–73.
Though courts have interpreted religious exercise narrowly, this Note has sought to provide coherence to the case law by extracting major trends in the ways courts have interpreted the phrase. The three considerations explained in this Note are not bright-line rules, but they should assist courts trying to determine if a given use should receive protection from RLUIPA's substantial burden provision.