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R.I.P. to RLUIPA: The Ongoing Debate of RLUIPA as Applied to Local Cemetery Ordinances is Finally Laid to Rest

Alexandra C. Rawson*

“Religion & Govt. will both exist in greater purity, the less they are mixed together.”-James Madison¹

There is a small farm-town in Massachusetts named “Dudley” that is known for its open fields, blossoming trees, and dairy farms. In 2016, however, this town that was once known for its natural serenity and quaint charm became riddled with heated confrontations and allegations. The dispute began in February 2016, when the Islamic Society of Greater Worcester proposed to buy fifty-five acres of farmland for a Muslim cemetery, intended to accommodate an estimated 16,000 gravesites.² The town of

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1. Letter from James Madison to Edward Livingston, 10 July 1822, FOUNDERS ONLINE, <https://founders.archives.gov/documents/Madison/04-02-02-0471> (last updated June 29, 2017).

2. Brian MacQuarrie, *Muslims face backlash over proposed cemetery in Dudley*, BOS. GLOBE (Mar. 28, 2016), <https://www.bostonglobe.com/metro/2016/03/28/muslims-face-backlash-over-proposed-cemetery-dudley/awhGJrYq60mZGoDEbFWDJP/story.html>; see also Kim Ring, *Islamic cemetery plan meets opposition at Dudley hearing*, WORCESTER TELEGRAM & GAZETTE (Feb. 6, 2016), <http://www.telegram.com/article/20160204/NEWS/160209543>.

Dudley originally rejected the proposal citing well-water contamination, zoning issues, and increased traffic concerns.³ Nevertheless, this was not the end of the struggle. In just a few months, Dudley was sued by the Islamic Society and was under federal investigation by the United States Attorney's Office based on allegations that Dudley's actions were discriminatory and violated the Religious Land Use and Institutionalized Persons Act (RLUIPA).⁴ In December 2016, after many months of heated contention, Dudley succumbed to the pressure and approved the cemetery permit.⁵

Interestingly, Dudley, Massachusetts, has not been the only town confronted with a RLUIPA challenge due to a religious institution's request for a cemetery permit. Other municipalities have similarly experienced intense disputes concerning this very topic. For example, in Farmington, Minnesota, the Castle Rock Township originally denied a cemetery permit to the Al Maghfirah Cemetery Association based on the township's concern that the cemetery would decrease property tax revenue and require additional maintenance expenses.⁶ After the township's planning commission amended the zoning ordinances to exclude cemeteries within that area, the Al Maghfirah Cemetery Association filed a

3. Brian MacQuarrie, *Islamic group accuses Dudley of blocking Muslim cemetery*, BOS. GLOBE (July 5, 2016), <https://www.bostonglobe.com/metro/2016/07/05/islamic-group-files-suit-accusing-dudley-illegally-blocking-muslim-cemetery-plans/9TpLhOUWs8S3z2QoGmHPbM/story.html>.

4. *U.S. Attorney Ortiz to Probe Islamic Cemetery Proposal in Dudley*, U.S. DEP'T OF JUST., U.S. ATT'YS OFF., DIST. OF MASS., <https://www.justice.gov/usao-ma/pr/us-attorney-ortiz-probe-islamic-cemetery-proposal-dudley> (last updated Aug. 18, 2016).

5. Mark Arsenault, *Town of Dudley reaches settlement over proposed Muslim cemetery*, BOS. GLOBE (Dec. 23, 2016), <https://www.bostonglobe.com/2016/12/23/dudley/FwDOBlw8MzsgNtoTWa9O/story.html>. Nevertheless, in just a few months of gaining approval for the cemetery, the Association decided that it no longer wanted to use Dudley, Massachusetts, as the location for its cemetery after all. Brian MacQuarrie, *After bitter fight for approval, Islamic Society abruptly drops plan for cemetery in town of Dudley*, BOS. GLOBE (Apr. 13, 2017), <https://www.bostonglobe.com/metro/2017/04/13/after-bitter-fight-for-approval-islamic-society-abruptly-drops-plan-for-cemetery-town-dudley/JZ7H61XR2fxMc88AcZp6ZN/story.html>.

6. Tory Cooney, *Judge OKs Muslim cemetery in Castle Rock Township*, FARMINGTON INDEP. (Feb. 11, 2016, 6:14 AM), <http://www.farmingtonindependent.com/life/religion/3945067-judge-oks-muslim-cemetery-castle-rock-township>.

lawsuit in the County District Court.⁷ The Association also allegedly requested that the Department of Justice investigate whether the allegedly discriminatory ordinances violated RLUIPA.⁸ The district judge found that the permit denial was “arbitrary and capricious” and quickly overturned it.⁹ Pursuant to court orders, the Township granted the permit.¹⁰ Carlisle, Pennsylvania, fell into a similar controversy when the West Pennsboro Township Board rejected the Bosniak Islamic Cultural Center of Carlisle’s cemetery proposal, based on its concerns about water contamination and decreased property values.¹¹ However, a judge quickly overturned the town’s ruling and granted the cemetery’s proposal.¹²

Similarly, in Nassau County, New York, there has been a longstanding dispute between The Roman Catholic Diocese of Rockville Centre, New York, and the governing and legislative figures in the community regarding the Diocese’s application to develop a cemetery, the “Queen of Peace Cemetery,” on approximately ninety-seven acres of land.¹³ After the Village denied the cemetery proposal, the Diocese brought an action against the Village, alleging, among other things, that the zoning laws violated RLUIPA.¹⁴ On the summary judgment motion, the United States District Court for the Eastern District of New York

7. Mukhtar Ibrahim, *Castle Rock Township must allow Islamic cemetery, judge rules*, MPRNEWS (Feb. 1, 2016), <http://www.mprnews.org/story/2016/02/01/dakota-county-ruling-islamic-cemetery-muslim-religious-discrimination>.

8. Cooney, *supra* note 6.

9. Ibrahim, *supra* note 7.

10. *Id.* Although Minnesota already had two Islamic cemeteries, they neared capacity; thus, the Association planned to use the 20-acre site for an estimated 35,000 burials, thereby accommodating its needs for the next 200 years.

11. Daniel Walmer, *West Pennsboro Township officials vote down Bosniak cemetery*, THE SENTINEL (Mar. 23, 2015), http://cumberlink.com/news/local/west-pennsboro-township-officials-vote-down-bosniak-cemetery/article_c8586d8b-3f64-50ad-bd1a-420fb804a275.html; Elise Amendola, *Plans for Muslim cemeteries face backlash across the U.S.*, CBS NEWS (Apr. 25, 2016, 9:13 PM), <https://www.cbsnews.com/news/plans-for-muslim-cemeteries-face-backlash-across-the-us/>.

12. Amendola, *supra* note 11.

13. Roman Cath. Diocese of Rockville Ctr., N.Y. v. Inc. Vill. of Old Westbury, 128 F. Supp. 3d 566, 571, 573 (E.D.N.Y. 2015).

14. *Id.* at 571, 573.

held that although the zoning law was neutral with respect to religion and was generally applicable, a “genuine issue of material facts existed as to whether [the] zoning law created substantial burden on the exercise of [the] religious corporation’s religious beliefs” and as to whether the Village used the “least restrictive means” to protect its interests in maintaining the aesthetic qualities of the Village.¹⁵

In 2012, the construction of an *ohel*, which is a “stand-alone structure customarily built over the graves of righteous scholars and leaders of the Hassidic Jewish community,” raised debates in Hempstead, New York.¹⁶ Here, the town subsequently rejected the building permit application for the *ohel* because the applicants never obtained the Cemetery’s signature for the application as was required under the town building code.¹⁷ In response, the applicants brought suit against the town, alleging that the denial violated their rights under the First Amendment and RLUIPA.¹⁸ The court, however, dismissed the case based on its finding that the claims were not ripe, and should have first been appealed to the zoning board of appeals.¹⁹

News reports covering these stories often highlighted some form of bigotry or prejudice imposed by the municipalities.²⁰ Although in some instances evidence of bias manifested,²¹ this did not depict the entire story. Rather, the reports often forgot to mention two big features: the municipality’s perspective,²² and

15. *Id.* at 567, 583–84, 586–87.

16. *Twersky v. Town of Hempstead*, No. 10 CV 4573 MKB, slip op. at 2 (E.D.N.Y. Oct. 16, 2012).

17. *Id.* at 3.

18. *Id.* at 4.

19. *Id.* at 7.

20. *Plans for Muslim cemeteries across US met with worry, disappointment*, FOX NEWS (Apr. 27, 2016), <http://www.foxnews.com/us/2016/04/27/plans-for-muslim-cemeteries-across-us-met-with-worry-disappointment.html>.

21. In another municipality, perhaps met with the greatest backlash, including threats, an estimated 3,000 residents spoke out against a proposed Muslim cemetery. *Collin County Residents Condemn Proposal For Muslim Cemetery*, CBS DFW (July 14, 2015, 8:27 PM), <http://dfw.cbslocal.com/2015/07/14/collin-county-residents-condemn-proposal-for-muslim-cemetery/>.

22. *Boston Globe Forgot To Mention That Dudley Doesn’t Want A Muslim Cemetery Because It Will Affect The Water, And Now SJW’s Are Calling The Entire Town Islamophobic And Bigoted*, TURTLEBOY, <http://turtleboysports.com/boston-globe-forgot-to-mention-that-dudley-doesnt-want-a-muslim-cemetery->

most importantly, the role that RLUIPA, a congressional act designed to eliminate governmental regulations from restricting the exercise of religion, played in these recent debates.²³ Today, many Americans remain unaware of RLUIPA's expansive nature, despite the harrowing implications that the wide-ranging Act imposes upon American society.²⁴

In 2000, Congress enacted RLUIPA to protect individuals, as well as religious assemblies and institutions, from land use regulations that substantially burdened the exercise of religious practices.²⁵ In doing so, Congress provided special protections to individuals, religious institutions, and other religious assemblies' religious exercises that were not made available to ordinary citizens. As RLUIPA stands, if a local government imposes a burden upon the religious exercise of individuals, religious assemblies, or institutions, the government must prove that its action was in the furtherance of a "compelling governmental interest" and that its interest cannot be achieved through less restrictive means.²⁶

Although this Comment highlights the challenges that local governments experience as a result of RLUIPA's regulation over cemeteries, cemeteries are just one example of this recent phenomenon. RLUIPA broadly protects individuals, houses of worship, and other religious institutions from substantially burdensome zoning and landmark laws.²⁷ Nevertheless, as the

because-it-will-affect-the-water-and-now-sjws-are-calling-the-entire-town-islamophobic-and-bigoted/ (last updated Jan. 8, 2017).

23. 42 U.S.C. § 2000cc (2012).

24. Letter from Vanita Gupta, Principal Deputy Assistant Att'y Gen. C.R. Div., to State, County, and Municipal Officials, Dec. 15, 2016, U.S. DEPT OF JUST., <https://www.justice.gov/crt/page/file/918596/> [hereinafter Letter from Vanita Gupta] (stating that "sixteen years after RLUIPA's enactment, far too many people and communities remain unaware of the law, or do not fully understand the scope of its provisions").

25. See 42 U.S.C. § 2000cc. Also note, RLUIPA includes provisions to protect institutionalized persons from prison protocols that place a substantial burden on the exercise of religion. See *id.* § 2000cc-1.

26. See *id.* § 2000cc(a)(1)(A)–(B).

27. U.S. DEPT OF JUST. C.R. DIV., *Religious Land Use and Institutionalized Persons Act*, <https://www.justice.gov/crt/religious-land-use-and-institutionalized-persons-act> (last updated Jan. 11, 2017); see also *Lubavitch v. Litchfield Historic Dist. Comm'n*, 768 F.3d 183, 189 (2d Cir. 2014) (Defendant, a religious corporation, alleged that the Historic District Commission's denial of its proposed modifications, which included: "a 17,000-

nation continues to diversify and expand, this raises the question as to how far this Act can stretch.²⁸ There is only so much land and there are many competing desires for it.²⁹ As such, a town's perspective deserves due consideration and discussion.

Part I of this Comment begins with the backdrop of RLUIPA by briefly presenting the contentions surrounding the varying levels of scrutiny that have been applied to religious exercise, which eventually led to the enactment of RLUIPA. Part II argues that RLUIPA is unconstitutional as applied to local ordinances regulating cemeteries. Conversely, Part III argues that even if RLUIPA is not unconstitutional, cemetery regulations satisfy RLUIPA in that: (A) cemeteries are not a religious land use; and (B) cemetery regulations are justified by compelling interests. Lastly, Part IV provides recommendations and alternatives that could be adopted to strike a fairer balance between the Act and local governments.

I. THE TURN OF EVENTS LEADING TO RLUIPA'S ENACTMENT

The First Amendment provides, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof"³⁰ While the government is normally prohibited from regulating religion, the Supreme Court has held that freedom of religion does not mean that all religious practices are unrestricted.³¹ Rather, in some circumstances, legislative

square-foot addition to be built . . . administrative offices, classrooms, a nearly 5,000-square-foot residence for [the Rabbi] and his family, an indoor swimming pool, guest accommodations, kitchens, and a ritual bath," violated RLUIPA and state law.)

28. See *Emp't. Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 888–89 (1990), *superseded by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (noting that, "because 'we are a cosmopolitan nation made up of people of almost every conceivable religious preference,' and . . . because we value and protect that religious divergence, we cannot afford the luxury of deeming *presumptively invalid* . . . every regulation of conduct that does not protect an interest of the highest order" (emphasis in original) (citation omitted)).

29. See *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 452 (1988) (explaining that "[t]he Constitution does not, and courts cannot, offer to reconcile the various competing demands on government, many of them rooted in sincere religious belief, that inevitably arise in so diverse a society as ours").

30. U.S. CONST. amend. I.

31. See *Reynolds v. United States*, 98 U.S. 145, 166 (1878) (noting that

action is required to maintain an organized and peaceful society.³² As such, the circumstances in which legislative action can restrict religious exercise has sparked a contentious debate between the judicial and legislative branches. This contention is depicted by the fluctuating levels of scrutiny that have been applied by the courts in the context of religious exercise, which eventually led to the enactment of RLUIPA.

For example, in *Sherbert v. Verner*, a claimant asserted that disqualifying her from unemployment benefits because she refused to work on Saturdays, her Sabbath day, violated her First Amendment right.³³ The Court, ruling in her favor, held that the state's benefit provision unconstitutionally forced recipients to reject their religious beliefs to obtain public benefits.³⁴ Most important, however, was the level of scrutiny that the Court applied when determining whether to uphold the state's restrictive provisions. The Court held that "any incidental burden" on the exercise of religion is warranted only when the government can show that the regulation is "justified by a 'compelling state interest.'"³⁵ Subsequent cases affirmed this standard.

However, although *Sherbert* applied strict scrutiny, subsequent case law was somewhat unclear in determining whether this standard should apply to incidental burdens. For example, in 1990, the Supreme Court's decision in *Employment Division v. Smith*, unlike the prior cases, rejected strict scrutiny for laws that impose incidental burdens.³⁶ In that case, claimants asserted that Oregon unconstitutionally denied them unemployment benefits because they ingested peyote, an illegal substance, during a Native American religious ceremony.³⁷ The Court held that because it was against state law to ingest peyote, it did not matter whether the claimants ingested the peyote for

"[l]aws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices").

32. *See id.* at 166–67.

33. *Sherbert v. Verner*, 374 U.S. 398, 403 (1963).

34. *Id.* at 410.

35. *Id.* at 403 (emphasis added).

36. *See Emp't. Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 879 (1990), *superseded by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488.

37. *Id.* at 872.

religious purposes; thus, the State was perfectly warranted to deny the claimants unemployment benefits.³⁸ Notably, the Court refused to apply the heightened standard of scrutiny that previous courts, such as *Sherbert*, had relied upon. Instead, the Court applied a lower level of scrutiny based on its reasoning that “the right of free exercise does not relieve an individual of the obligation to comply with a ‘*valid and neutral law of general applicability*.’”³⁹

In 1993, dismayed by the *Smith* decision and its application of “neutral laws of general applicability” in this context, Congress reacted by passing the “Religious Freedom Restoration Act” (RFRA).⁴⁰ Under RFRA, Congress attempted to bring back strict scrutiny by requiring States to establish a “compelling interest” to justify an infringement upon religious exercise.⁴¹ However, in 1997, the Supreme Court struck back in *City of Boerne v. Flores*, by holding RFRA unconstitutional as applied to the states for its “considerable congressional intrusion into the States’ traditional prerogatives and general authority to regulate for the health and welfare of their citizens.”⁴² However, it did not take Congress long to devise a new plan.

In 1998, Congress introduced the Religious Liberty Protection Act (RLPA), which again imposed the strict scrutiny test, but, unlike RFRA, included a congressional power hook through the Commerce Clause.⁴³ However, RLPA failed due to the strong opposition that civil rights activists, child advocates, and federalist organizations presented during Congressional hearings.

38. *Id.* at 890; *see also id.* at 878–79 (“We have never held that an individual’s religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate.”).

39. *Id.* at 879 (emphasis added) (citation omitted).

40. *Id.* *See* 42 U.S.C. § 2000bb (2012).

41. 42 U.S.C. § 2000bb.

42. *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997).

43. *See* Marci A. Hamilton, *Federalism and the Public Good: The True Story Behind the Religious Land Use and Institutionalized Persons Act*, 78 IND. L.J. 311, 334 (2003) [hereinafter *Federalism and the Public Good*] (“To Congress’s credit, it remembered with RLPA the warning in *United States v. Lopez* to analyze the constitutional bases of its actions.”); *see also Religious Liberty Protection Act of 1998: Hearing on H.R. 4019 In House*, 105th Cong. 27 (1998); *Issues Relating to Religious Liberty Protection, and Focusing on the Constitutionality of a Religious Protection Measure: S. Hrg. 106–689 Before the S. Comm. on the Judiciary*, 106th Cong. (1999) [hereinafter *S. Hrg. 106–689*].

Nevertheless, a coalition of religious and civil liberties groups continued to support a limited version of the RLPA bill that would provide these same protections to religious practices. However, the bill's application would be limited to two contexts: (1) land use regulations and (2) prison protocols. So, without holding any additional hearings,⁴⁴ Congress transformed RLPA into the "Religious Land Use and Institutionalized Persons Act" (RLUIPA).⁴⁵ Thus, although RLUIPA, like RLPA, is focused on "protect[ing] religious liberty from unnecessary governmental interference," RLUIPA is essentially the "narrowly focused" version of RLPA.⁴⁶

As such, RLUIPA's protections are limited to two contexts: (1) "where State and local governments seek to impose or implement a zoning or landmark law in a manner that imposes a substantial burden on religious exercise" and (2) "where State and local governments seek to impose a substantial burden on the religious exercise of persons residing or confined to certain institutions."⁴⁷ In short, RLUIPA's land use provision is understood to "provide protection for houses of worship and other religious assemblies from restrictive land use regulation that often prevents the practice of faith."⁴⁸ For this reason, RLUIPA applies a strict scrutiny standard in cases where land is regulated, receives federal funds, or affects commerce. As such, "if a zoning or landmarking law substantially burdens a person's free exercise of

44. See Hamilton, *supra* note 43, at 334 (noting that no hearings were held on RLUIPA; instead, the RLPA hearings that generally addressed land use law stood in as hearings in support of RLUIPA).

45. See *id.* at 334–35; see also 42 U.S.C. § 2000cc.

46. See 146 CONG. REC. S6678-02 (daily ed. July 13, 2000) (statement of Rep. Hatch). RLUIPA states in relevant parts that:

No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution—(A) is in furtherance of a compelling governmental interest; and (B) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000cc(a)(1).

47. Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803, 662 (2000).

48. 146 CONG. REC. S6678-02 (daily ed. July 13, 2000) (statement of Rep. Hatch).

religion, the government involved must demonstrate that the particular law is the least restrictive means of furthering a compelling governmental interest.”⁴⁹

II. RLUIPA IS UNCONSTITUTIONAL AS APPLIED TO LOCAL ORDINANCES REGULATING CEMETERIES BECAUSE IT OVER EXTENDS CONGRESS’S ENUMERATED POWER UNDER THE COMMERCE CLAUSE⁵⁰

Despite Congress’s intentions, RLUIPA is unconstitutional as applied to local ordinances regulating cemeteries because it goes well beyond Congress’s enumerated powers through the Commerce Clause.⁵¹ Thus, in this limited context, the Act is arguably unconstitutional.

To maintain an equilibrium of power among the three branches, the framers imposed inherent restrictions upon the authority of each branch. As such, the legislative branch, entrusted with the power to enact law, may only do so when it has express or implied constitutional power.⁵² One of those powers is Congress’s power to regulate interstate commerce.⁵³ This includes the power to regulate channels, instrumentalities, and *economic activities* that have a *substantial effect on interstate commerce*.⁵⁴

49. *Id.* (statement of Rep. Enzi).

50. This Comment will not discuss the possibility of the Act as applied to the Spending Clause. However, the Author does acknowledge that this is a potential argument to be made.

51. *Religious Liberty Protection Act of 1999: Hearing on H.R.1691 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 106th Cong. 1 (2000) [hereinafter *H.R. 1691 Hearing*] (testimony and prepared statement of Lawrence G. Sager, Robert B. McKay, Prof. of L., N.Y.U. School of Law) (“RLPA . . . extends liberty selectively and makes recognizable religious motivation a talisman of advantage. That is a flat contradiction of religious liberty at its essence, and the Supreme Court would say so pursuant to the Establishment Clause of the first amendment.”).

52. *See* *Marbury v. Madison*, 5 U.S. 137, 176 (1803) (stating that “[t]he powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written”); *see also* *United States v. Morrison*, 529 U.S. 598, 607 (2000) (noting, “[e]very law enacted by Congress must be based on one or more of its powers enumerated in the Constitution”).

53. *Gibbons v. Ogden*, 22 U.S. 1, 189–90 (1824) (“Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse.”).

54. *United States v. Lopez*, 514 U.S. 549, 559 (1995).

It was through this clause that Congress enacted RLUIPA.⁵⁵ However, the Commerce Clause is inapplicable to RLUIPA when applied to ordinances regulating cemeteries because the clause was designed to promote a national market by terminating hostile trade regulations and protective tariffs that restricted free-flowing trade among the States.⁵⁶ Cemeteries are a far cry from economic activities of interstate trade to warrant regulation under the Commerce Clause.

First and foremost, the use of land for a cemetery does not constitute an economic activity. In *Gonzalez v. Raich*, which concerned the possession of homegrown marijuana for medical purposes, the Supreme Court concluded that because the medical marijuana was for personal consumption, and thus, was not sold, the possession alone did not constitute an economic activity.⁵⁷ Thus, although homegrown marijuana presumably relied on essential economic transactions, such as planting materials and heating devices, the actual possession of marijuana, which is what Congress sought to regulate, was not an economic activity.⁵⁸

In accordance with *Raich*, Congress's regulation of cemeteries under RLUIPA should be deemed unconstitutional. Under RLUIPA, Congress attempts to regulate religious land use, whereas in *Raich*, Congress sought to regulate medical marijuana; however, the actual marijuana was not intended for sale, and thus, was not considered an economic activity.⁵⁹ Similarly, with cemeteries, Congress cannot rely on the Commerce Clause to regulate the use of land for cemeteries because, like the marijuana in *Raich*, the cemetery land is not going to be sold.⁶⁰ Rather, the very point of a cemetery is to keep the land so that the bodies laid

55. See 146 CONG. REC. S7774-01 (daily ed. July 27, 2000) (“[T]he bill applies only to the extent that Congress has power to regulate under the Commerce Clause, the Spending Clause, or Section 5 of the Fourteenth Amendment. . . . The jurisdictional element in this bill is that, in each case, the burden on religious exercise, or removal of that burden, will affect interstate commerce.”).

56. See *Reeves, Inc. v. Stake*, 447 U.S. 429, 436–37 (1980) (noting that “the Commerce Clause responds principally to state taxes and regulatory measures impeding free private trade in the national marketplace”).

57. 545 U.S. 1, 27–28 (2005).

58. *Id.*

59. *Id.*

60. See *id.*

to rest are not disturbed. Thus, the possession of land for a cemetery, like medical marijuana possession for personal consumption, is not a commodity that is sold or part of an ongoing market.⁶¹ For this reason, the onetime purchase of the land is the extent to which economic transactions are involved in cemeteries. So, although Congress could regulate the initial sale of the land as interstate commerce, Congress cannot regulate whether the land is used as a cemetery because the actual use of the land for a cemetery does not constitute an economic activity.⁶² Thus, to the extent that Congress would argue that RLUIPA applies to cemeteries, this argument fails because, given that use of land for a cemetery is not an economic activity, Congress could not rely upon the Commerce Clause to regulate such use.⁶³

Nevertheless, *Raich* carved out an exception for such “non-economic” activities.⁶⁴ The Court reasoned that the possession of marijuana, although intended for home consumption, fell within the commerce power because the regulation of marijuana possession was necessary to fulfill a larger regulatory scheme: the federal Controlled Substance Act (CSA).⁶⁵ This is where RLUIPA departs from the situation presented in *Raich*.

In order to effectuate the CSA, a comprehensive Act that regulates the complicated realm of controlled substances, Congress necessarily had to regulate homegrown marijuana as well. As the Court explained, “[g]iven the enforcement difficulties that attend distinguishing between marijuana cultivated locally and marijuana grown elsewhere, . . . and concerns about diversion into illicit channels, we have no difficulty concluding that Congress had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the CSA.”⁶⁶ As such, given that demands for marijuana have a strong likelihood of drawing homegrown medical marijuana into interstate markets, “Congress acted rationally in determining that . . . the subdivided class of activities . . . was an essential part of the larger regulatory

61. *See id.*

62. *See id.*

63. *See id.*

64. *Id.*

65. *Id.*

66. *Id.* at 22.

scheme.”⁶⁷

Similarly, the Ninth Circuit in *United States v. McCalla* held that the application of a federal statute that criminalized the production and possession of child pornography was not unconstitutional because the statute, as a part of a national effort to eliminate the child pornography industry, was a valid exercise of Congressional authority under the Commerce Clause.⁶⁸ Relying on similar arguments raised in *Raich*, the court reasoned that the statute “[wa]s comprehensive in that it [sought] to regulate (more accurately, exterminate) the entire child pornography market (similar to at least one category of the CSA—marijuana).”⁶⁹ Drawing another comparison to the CSA’s complexity, the court also noted that child pornography “[has] become [a] highly organized, multimillion dollar industr[y] that operate[s] on a nationwide scale.”⁷⁰ Furthermore, quoting the Fourth Circuit, the court emphasized that “[j]ust as Congress rationally concluded that demand might draw homegrown marijuana into interstate markets, thereby frustrating the federal interest in eliminating commercial transactions in the interstate market in their entirety, so too might Congress rationally fear that homemade child pornography would find its way into interstate commerce.”⁷¹

RLUIPA is highly distinguishable from both *Raich* and *McCalla*, and thus, cannot be deemed a compressive regulatory scheme that warrants congressional regulation under the Commerce Clause. To begin, RLUIPA cannot be deemed a “comprehensive regulatory scheme” because RLUIPA, which aims to protect religious organizations in their religious land uses, is not as complex or expansive as the CSA or the federal child pornography statute. Rather, unlike the statutes in *Raich* and *McCalla*, which aim to eliminate multifaceted criminal schemes, RLUIPA does not have to eliminate any and all land use regulations to achieve its purpose. Thus, unlike the above-mentioned statutes, under RLUIPA, exceptions for certain land

67. *Id.* at 26–27.

68. 545 F.3d 750, 756 (9th Cir. 2008).

69. *Id.* at 755.

70. *Id.* (alteration in original) (citation omitted).

71. *Id.* (citation omitted) (quoting *United States v. Forrest*, 429 F.3d 73, 78 (4th Cir. 2005)).

uses could exist, and the statute would still maintain its effectiveness.

Nonetheless, even if RLUIPA were deemed a large regulatory scheme, the use of land for cemeteries, is not a class of activities that is essential to the Act's success. In *Gonzalez*, the Court reasoned that for Congress to effectively control marijuana consumption, it necessarily had to regulate medical marijuana consumption as well. Similarly, in *McCalla*, the Ninth Circuit reasoned that, for Congress to eliminate child pornography, it unavoidably had to eliminate homegrown child pornography. However, for RLUIPA to effectively regulate land use ordinances, Congress does not necessarily have to regulate local cemetery ordinances for RLUIPA to function successfully. Considering the unique circumstances posed by cemeteries, local cemetery ordinances could receive exemption from RLUIPA, and yet, Congress could continue to regulate restrictive land use regulations in other contexts. Thus, Congress's conclusion that, even if the use of land for a cemetery is deemed a non-economic activity, failure to regulate cemeteries would leave a "gaping hole" in RLUIPA is ungrounded because the success of RLUIPA is not contingent upon whether cemetery ordinances are a part of the regulatory scheme.⁷²

Moreover, cemetery ordinances cannot be deemed as having a "substantial effect" on interstate commerce. In 1995, *United States v. Lopez* clarified what it meant for an economic activity to have a "substantial effect" on interstate commerce to warrant Congressional regulation.⁷³ The Court held that, although guns in a school zone may adversely affect the economy, the mere possession of a gun was "in no sense an economic activity."⁷⁴ As the Court noted, the gun possession statute "by its terms ha[d] nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might [have] define[d] those terms."⁷⁵ For this reason, the Court held that, despite valid concerns that gun

72. *Gonzales v. Raich*, 545 U.S. 1, 22 (2005); *see also* *United States v. Lopez*, 514 U.S. 549, 561 (1995) (noting that the gun possession in a school zone statute "[wa]s not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated").

73. *Lopez*, 514 U.S. at 559–60.

74. *Id.* at 561.

75. *Id.*

possession in school zones could promote violence, and thus, negatively impact the surrounding economy, the criminal statute itself had nothing to do with the regulation of commerce.⁷⁶ Thus, the statute could not be “sustained under [its] cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce.”⁷⁷ With this holding, the Court articulated a bright-line standard that, aside from channels or instrumentalities: Congress can only regulate *economic activities* that have a *substantial effect* on interstate commerce.⁷⁸

RLUIPA, applied to cemetery ordinances, does not pass the standard set forth by *Lopez*, because, in this context, Congress is not regulating an economic activity. As such, the cumulative effect of restrictive cemetery ordinances cannot be used to transform this non-economic activity into an economic one for purposes of obtaining Commerce Clause authority. Just as the statute regarding gun possession in a school zone did not constitute an economic activity, as previously discussed, the use of land for cemeteries does not constitute an economic activity. Moreover, just as the adverse effects of gun possession in school zones could not be relied upon to constitute a substantial effect on interstate commerce, the adverse effects of cemetery ordinances cannot be relied upon to constitute a substantial effect on interstate commerce. Under RLUIPA, Congress asserts that religious land use falls within the Commerce Clause power because “the burden on religious exercise, or removal of that burden, will affect interstate commerce.”⁷⁹ Congress argued that restrictive land use regulations limit “economic transactions in commerce, such as a construction project, purchase or rental of a building, or an interstate shipment of religious goods,” the aggregate effect of which, “is obviously substantial.”⁸⁰ However,

76. *See id.* at 563–64, 567.

77. *Id.* at 561.

78. *Id.* at 559 (“We conclude, consistent with the great weight of our case law, that the proper test requires an analysis of whether the regulated activity ‘substantially affects’ interstate commerce.”).

79. 146 CONG. REC. S7775 (daily ed. July 27, 2000).

80. *Id.*; *see also* *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 573, 595 (1997) (holding that the aggregate effect of restricting the religious practice equated to a substantial burden on interstate

Congress's argument is unsubstantiated because, in failing to establish that religious land use is an actual economic activity, Congress points only to the cumulative effects that restrictive land use regulations could potentially have on commerce.⁸¹ Recall, this is the very reason *Lopez* fell outside of the Commerce Clause, because, although possession of guns in school zones could threaten the learning environment or lead to increased crime, the actual act of possessing a gun was not an economic activity.⁸² That is the same exact situation at play here.⁸³ Although cemetery ordinances may decrease construction project demands, the actual act of religious land use is not economic in nature; rather, it is the *effects* alone that portray its economic characteristic.⁸⁴ Thus, given that Congress can only regulate *economic activities* that have a *substantial effect* on interstate commerce, any aggregate effects that cemetery ordinances pose are erroneous because cumulative effects can only constitute substantial activity if the underlying activity Congress seeks to regulate is an economic activity, and here, that is not the case.

Similarly, in *United States v. Morrison*, the Court held that

commerce).

81. See 146 CONG. REC. S7775 (daily ed. July 27, 2000); see also *H.R. 1691 Hearing*, *supra* note 51, at 14 (statement of Lawrence G. Sager & Robert B. McKay) ("No one believes that RLPA is addressed to increasing interstate commerce, to the control of interstate commerce, or to the benefit of the economy generally. RLPA seizes on the entirely coincidental fact that some laws which regulate religiously motivated conduct will thereby have some effect on interstate commerce in order to find a commerce clause rationale for the blanket exemption from the force of such laws that it grants religiously-motivated persons. This flies in the face of the Supreme Court's decision in *United States v. Lopez*, 115 S. Ct. 1624 (1995).").

82. *Lopez*, 514 U.S. at 564.

83. See *Jones v. United States*, 529 U.S. 848, 850–51 (2000) (holding that "an owner-occupied residence not used for any commercial purpose does not qualify as property 'used in' commerce or commerce-affecting activity").

84. *H.R. 1691 Hearing*, *supra* note 51, at 19 (statement of Lawrence G. Sager & Robert B. McKay) ("RLPA is a far more extreme example of what worried the Court in *Lopez*. RLPA does not emerge from or reflect any honest concern with interstate commerce. Congress' purpose is not, for example, to encourage churches and religious persons to participate more extensively in interstate commerce. . . . The connection between religious activity and commerce is being used as a constitutional excuse for a regulatory program which Congress wishes to enact for reasons having nothing at all to do with commerce. The nexus between RLPA and legitimate Commerce Clause goals is thus weaker than the nexus between the Gun Free School Zones Act and legitimate Commerce Clause goals.").

Congress lacked power under the Commerce Clause to regulate gender motivated crimes of violence because, as the Court reasoned, such acts “are not, in any sense of the phrase, economic activity.”⁸⁵ Congress tried to argue that gender-motivated violence affects interstate commerce “by deterring potential victims from traveling interstate, from engaging in employment in interstate business, and from transacting with business, and in places involved in interstate commerce; . . . by diminishing national productivity, increasing medical and other costs, and decreasing the supply of and the demand for interstate products.”⁸⁶ Nevertheless, the Court explained that Congress could not rely on “but for” causation “from the initial occurrence of violent crime . . . to every attenuated effect upon interstate commerce,”⁸⁷ because, if accepted, this would “allow Congress to regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption.”⁸⁸ Accordingly, the Court “reject[ed] the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct’s aggregate effect on interstate commerce.”⁸⁹

Thus, although it is conceded that cemeteries require underlying economic transactions to effectuate their means, as explained in *Morrison*, Congress cannot aggregate the effects of a non-economic activity to obtain Commerce Clause authority. In *Morrison*, the Court explicitly rejected the argument that gender-motivated crimes fell within Congress’s Commerce Clause power because the aggregate effect, which included the impact on employment and the supply and demand for interstate products, effected interstate commerce. Similarly, although cemeteries would necessarily require building materials, as well as construction and maintenance contracts, Congress cannot rely on a “but for” causation chain of events from every cemetery permit rejection to every attenuated effect on interstate commerce. As such, Congress’s attempts to merely aggregate the effects of cemetery ordinances, which are non-economic activities, should

85. 529 U.S. 598, 613 (2000).

86. *Id.* at 615 (citation omitted).

87. *Id.*

88. *Id.*

89. *Id.* at 617.

not suffice as a mechanism for Congress to gain regulatory power under the Commerce Clause.

Nevertheless, Congress cleverly found a way to circumvent the above-mentioned challenges. To bypass the Commerce Clause's inherently limited application, Congress evaded the challenges raised in *Lopez* and *Morrison* by including a jurisdictional hook in the Act's language. This hook states that the "scope" of the Act covers regulations where "the substantial burden affects, or the removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes," "even if the burden result[ed] from a rule of general applicability."⁹⁰

Regardless, there is still hope for cemetery ordinances. Recently, in *National Federation of Independent Business v. Sebelius*, the Supreme Court held that the individual health insurance mandate of the Affordable Care Act was not within Congress's Commerce power because, as set forth by *Lopez* and *Gonzalez*, absent an economic activity, there is nothing for Congress to regulate.⁹¹ The Court stated that holding otherwise would "erode [Congress's] limits, permitting Congress to reach beyond the natural extent of its authority, 'everywhere extending the sphere of its activity and drawing all power into its impetuous vortex.'"⁹² *Sebelius* is pertinent here because of the message it sent. Through this decision, the Court reinforced the fundamental concept that the Commerce Clause has limits.⁹³ Given the Supreme Court's recent curtailment of Congress's assumedly omnipotent Commerce Clause power, this presents the perfect opportunity for courts interpreting RLUIPA's land use provision to similarly adopt a strict interpretation of the Commerce Clause power and find that it does not extend to cemeteries.

Thus, the Commerce Clause is inapplicable to RLUIPA when applied to local ordinances regulating cemeteries because using land for burials is not economic in nature. For this reason, the courts should take a more stringent look at the Framer's intent, and not condone overarching regulations that obliterate the true

90. 42 U.S.C. § 2000cc-1(a), (b)(2) (2012).

91. See 132 S. Ct. 2566, 2589 (2012).

92. *Id.* (citations omitted).

93. *Id.*

intent of the Commerce Clause.⁹⁴

III. EVEN IF RLUIPA IS NOT UNCONSTITUTIONAL AS APPLIED TO LOCAL ORDINANCES REGULATING CEMETERIES, CEMETERY REGULATIONS DO NOT SATISFY RLUIPA IN THAT CEMETERIES ARE NOT A RELIGIOUS LAND USE AND CEMETERY REGULATIONS ARE JUSTIFIED BY COMPELLING LOCAL GOVERNMENTAL INTERESTS

As a practical matter, the actual application of RLUIPA has raised many issues within local governments and communities, which has, in effect, led to hostility and confrontation between local officials and religious institutions. Ultimately, the problems surrounding RLUIPA stem from Congress's attempt to cast such a broad shield over all "religious exercise" combined with Congress's failure to account for the intricacies that certain property uses encompass.⁹⁵ In doing so, Congress failed to give sufficient consideration to the adverse effects that RLUIPA's broad and overreaching restrictions would pose for local communities, and instead, placed tight restraints upon local government to abide by this heightened scrutiny. Given the expansive application of RLUIPA's religious exercise definition, religious land use has come to incorporate a wide range of institutions, including: churches, mosques, temples, schools, community centers, cemeteries, hospitals, etc. As such, cemeteries are just one example to illustrate how misguided RLUIPA's application has proven to be as a result of Congress's inadvertence. In the context of cemeteries alone, this has raised the questions: What should constitute "religious" land use? And in this particular context, what should be considered compelling interests?

94. See *H.R. 1691 Hearing*, *supra* note 51 at 20 (statement of Lawrence G. Sager & Robert B. McKay) (warning that "[i]t would be a mistake to think that boilerplate references to commerce give Congress a free hand to regulate can save an otherwise unconstitutional statute").

95. See 42 U.S.C. § 2000cc-5(7). This section provides:

(A) In general. The term "religious exercise" includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.

(B) Rule. 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.

Id.

A. *Cemeteries should NOT constitute “religious” land use*⁹⁶

In accordance with RLUIPA, “religious exercise’ includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief,” which also includes “[t]he use, building, or conversion of real property for the purpose of religious exercise.”⁹⁷ In response to the expansiveness of RLUIPA’s reach, the courts have “caution[ed] that RLUIPA cannot be so broad as to protect any construction plan merely because an institution pursues a religious mission.”⁹⁸ As the Supreme Court of Connecticut duly noted, these land use provisions “are in contrast to existing first amendment jurisprudence, which holds that ‘building and owning a church is a desirable accessory of worship, not a fundamental tenet of the [c]ongregation’s religious beliefs’ and, therefore, do not constitute the exercise of religion within the meaning of the free exercise clause.”⁹⁹ In furtherance of this principle, despite RLUIPA’s broad definition and inherent attempt to cover any activity affiliated with a religious entity, cemeteries should not be deemed a “religious exercise” because merely owning or using a plot of land by itself should not constitute a religious exercise.

In 1959, the Supreme Court of Pennsylvania, faced with the question of whether or not a religious society was entitled to use a particular plot of land for a cemetery, began its analysis by pointing out that the area for the cemetery was “zoned primarily for agricultural and residential uses.”¹⁰⁰ The court hypothesized, “[i]f a business corporation had purchased the eighty-eight acres in question for use as a cemetery and as a business venture for profit, there would be no question but that it was not a religious

96. Although I am taking the position that cemeteries should not constitute religious land use, another law review article came to the opposite conclusion. See Rachel Scall, Note, *Bring Out Your Dead: An Examination of the Possibilities for Zoning Out Cemeteries Under RLUIPA*, 24 N.Y.U. ENVTL. L.J. 111, 119 (2016).

97. 42 U.S.C. § 2000cc-5(7)(A)–(B).

98. *Westchester Day Sch. v. Vill. of Mamaroneck*, 417 F. Supp. 2d 477, 543 (S.D.N.Y. 2006), *aff’d*, 504 F.3d 338 (2d Cir. 2007).

99. *Cambodian Buddhist Soc’y of Conn., Inc. v. Planning & Zoning Comm’n of Newtown*, 285 Conn. 381, 411 (2008) (citation omitted).

100. *Appeal of Russian Orthodox Church of the Holy Ghost, of Ambridge*, 152 A.2d 489, 490 (1959).

use”¹⁰¹ However, the appellant in that case contended that a different outcome was appropriate when the owner of the land was not a corporation, but instead a religious group, thus making the land’s use religious.¹⁰² Nevertheless, the court was not convinced by this explanation, holding that such an argument “goes too far” because the reasoning was based, “not [on] the actual use to be made of the land but [on] an extraneous aspect taken on by the land depending on the nature of the land’s owner.”¹⁰³ As such, the court held that “a cemetery is basically a secular use of land,” and thus, “the fact that the land will be owned by a religious institution” does not “alter[] the basic secular use to be made thereof.”¹⁰⁴

Similarly, in *Mount Elliot Cemetery Ass’n v. City of Troy*, a cemetery owner brought an action against the city as a result of the city’s refusal to rezone the property for use as a Catholic cemetery.¹⁰⁵ The Sixth Circuit held that the construction of a cemetery was secular, and thus “[wa]s not an exercise of religion and, therefore, [the owner] [could] not maintain a claim for violation of the right to free exercise.”¹⁰⁶ In reaching this determination, the court relied on the parties’ expert witnesses, who had testified that the Church does not consider a Catholic cemetery “a fundamental or essential tenet of the religion”¹⁰⁷ because “Catholics can freely exercise their religion whether or not they have a Catholic cemetery near them.”¹⁰⁸ In finding that the “construction and operation of a cemetery [wa]s not an exercise of

101. *Id.* at 491; *see also* Roman Catholic Diocese of Rockville Ctr., N.Y. v. Inc. Vill. of Old Westbury, No. 09 CV 5195 DRH ETB, 2012 WL 1392365, at *1 (E.D.N.Y. Apr. 23, 2012) (finding that a legislative and governing body of the Village denied the Roman Catholic Diocese’s cemetery application based on its conclusion that the cemetery “was not a religious use of real property, but would be a ‘huge commercial operation outside the Village’s framework’”).

102. *Appeal of Russian Orthodox Church of the Holy Ghost, of Ambridge*, 152 A.2d at 491.

103. *Id.*

104. *Id.*

105. 171 F.3d 398, 400 (6th Cir. 1999).

106. *Id.* at 404; *see also* Calvary Christian Ctr. v. City of Fredericksburg, 800 F. Supp. 2d 760, 772 (E.D. Va. 2011) (“[C]ourts in several districts have held that structures used by religious organizations for secular purposes or non-religious activities are not automatically protected as an expression of religion.”).

107. *Mount Elliot Cemetery Ass’n*, 171 F.3d at 404.

108. *Id.*

religion,” and that the city’s zoning ordinance was a “neutral law of general applicability,” the court upheld the city’s denial of the cemetery permit.¹⁰⁹

Recently, in *St. John’s United Church of Christ v. City of Chicago*, the Seventh Circuit adjudicated a dispute regarding the condemnation of two cemeteries in response to the city’s airport expansion proposal.¹¹⁰ The court similarly concluded that “there [wa]s nothing inherently religious about cemeteries or graves, and the act of relocating them thus [did] not on its face infringe upon a religious practice.”¹¹¹ The court noted that “[s]ome cemeteries are affiliated with religious sects, others are not,” and it was understandable that out of “natural necessity, for public health concerns, after a hurricane or flood, or for many other private or public reasons” the town may have to rely on its own discretion in making decisions regarding cemeteries.¹¹²

Taking a slightly different path to the same conclusion, the court in *Stumpf v. Jefferson Parish Council* upheld a town’s denial of a cemetery permit.¹¹³ In reaching its decision, the court considered the residents’ perspectives regarding the proposed cemetery.¹¹⁴ For instance, the court noted that several residents “did not wish to live next to a cemetery and be constantly reminded of death each time they went out to get the paper or had a backyard barbeque.”¹¹⁵ The court also noted that approximately 550 residents had signed a petition in opposition of the cemetery.¹¹⁶ Lastly, the court voiced its agreement with the town councilman’s reasoning that the cemetery would “alter the essential character of the area in a manner that was objectionable to a large number of people directly affected by the change,” which was why the town councilman “had to side with those of his

109. *Id.* at 405.

110. 502 F.3d 616, 632 (7th Cir. 2007).

111. *Id.*

112. *See id.* at 632. *But see* Roman Catholic Diocese of Rockville Ctr., N.Y. v. Inc. Vill. of Old Westbury, 128 F. Supp. 3d 566, 586 (E.D.N.Y. 2015) (holding that the cemetery denial constituted a *prima facie* claim for substantial burden within the meaning of RLUIPA).

113. 663 So. 2d 871, 872 (La. Ct. App. 1995).

114. *Id.*

115. *Id.*

116. *Id.*

constituents who would be most immediately impacted by it.”¹¹⁷ As such, in an effort to honor the local town’s wishes, the court upheld the cemetery permit denial.¹¹⁸

Although, in this instance the court allotted significant weight to the constituents’ objections and beliefs, if the cemeteries were deemed a religious land use, the disposition would likely have come out very differently. As set forth in *Church of the Lumumi Babalu Aye v. City of Hialeah*, if such opposition is just a facade to discriminate against a religious exercise, the court would apply strict scrutiny.¹¹⁹ However, the court elucidated that “adverse impact will not always lead to a finding of impermissible targeting.”¹²⁰ Rather, “a social harm may have been a legitimate concern of government for reasons quite apart from discrimination.”¹²¹ Thus, it is important to distinguish whether the activity is classified as a religious activity because this will inevitably affect the weight that local opposition would have.

A recent law review note concluded that a court would likely find that a cemetery would constitute a religious land use under RLUIPA.¹²² This conclusion was based on the assumption that when courts determine whether a religious accessory is considered a religious exercise, “courts commonly look to whether the accessory use has ‘a purpose that objective observers generally take to be religious in nature.’”¹²³ Based on this presupposition, the Note reasoned that because “many cemeteries are openly religiously affiliated or feature religious grave markings, it is likely that religious cemeteries would pass this objective observer test.”¹²⁴ As such, the Note concluded that “[t]he use of land as a religious cemetery would be considered religious exercise because the average observer would view the religious cemetery as

117. *Id.*

118. *Id.*

119. *See* 508 U.S. 520, 533 (1993) (“Although a law targeting religious beliefs as such is never permissible, . . . if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral, . . . and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest.”).

120. *Id.* at 535.

121. *Id.* (citing *McGowan v. Maryland*, 366 U.S. 420, 442 (1961)).

122. Scall, *supra* note 96, at 119.

123. *Id.* (citation omitted).

124. *Id.*

objectively religious.”¹²⁵ And so, for this reason, “it would not be worthwhile for a municipality to argue its land use regulations that specifically apply to cemeteries do not place a substantial burden on religious exercise.”¹²⁶

Conversely, in light of how the courts have decided this issue, there are compelling arguments that support a municipality’s position against RLUIPA’s application to cemeteries.¹²⁷ For instance, rather than to rely on the “average observer” test, the stronger argument lies in how the courts have viewed cemeteries. As discussed above, courts have regarded cemeteries as a secular use.¹²⁸ To base such an important determination on whether an average observer might infer that a cemetery is religiously affiliated is misguided and arbitrary because it fails to account for the intent and purpose of the Act. The entire point of RLUIPA was to ensure that religious practices were protected. Thus, in deciding whether a cemetery is an actual religious exercise for which protection is warranted, the test should not be whether the average observer thinks the lot of land is for religious exercise. Instead, the test should be focused on whether the religious entity relies on the land as a fundamental tenet of its ability to practice religion.

United States v. Seeger provides helpful guidance on how the courts have subjectively made these types of determinations.¹²⁹ In *Seeger*, the court examined the contours of the Universal Military Training and Service Act, which exempted individuals from the armed services who, by reason of their religious beliefs, were conscientiously opposed to participation in the war.¹³⁰ In this case, an individual was denied exemption from the armed forces because his beliefs were not in a Supreme Being, but instead, were purely ethical.¹³¹ Nevertheless, the Supreme Court rejected this narrow exemption and clarified that an individual does not need to hold beliefs in relation to a “Supreme Being” to

125. *Id.*

126. *Id.*

127. *See supra*, Section III.A.

128. *See, e.g.*, *Cambodian Buddhist Soc’y of Conn., Inc. v. Planning & Zoning Comm’n of Newtown*, 285 Conn. 381, 411 (2008).

129. *See* 380 U.S. 163 (1965).

130. *Id.* at 164–65.

131. *Id.* at 166.

receive the exemption.¹³² Rather, the court explained that the test should instead focus on “[a] sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption.”¹³³ In making exemptions contingent upon an individual’s sincerely held beliefs, this raises the issue as to how we determine the validity of such declarations. Nevertheless, *United States v. Ballard* has clarified that a jury cannot determine whether a particular religious belief is true.¹³⁴ Rather, a jury can only look at the facts to determine whether the viewpoints sincerely occupy a place in the plaintiff’s religious beliefs.¹³⁵

Nevertheless, making exemptions contingent upon an individual’s sincerely held beliefs, rather than the primary pillars of a sect as a whole, creates a slippery slope, making it difficult to draw a line. The strictly held belief test, however, is more favorable than a mere “objective observer test” because the former requires an actual showing that a particular practice is a sincerely held religious belief, and if need be, provides a jury the opportunity to consider additional evidence to ensure that such assertions are true.

Nevertheless, this raises a question as to whether a religious group should receive exemptions from local ordinances to construct a cemetery for its members, under the presumption that a proper burial is a necessary tenet of its members’ religious beliefs. The courts emphasized the significance of determining whether a belief occupies a meaningful and sincere place in the *individual*.¹³⁶ Thus, it appears misplaced for a religious group to determine that having a cemetery is a central belief held by *all* members. Rather, individual members individually should corroborate that a cemetery burial is a sincerely held religious belief that he or she holds. This position is presented in reference to the courts’ decision to grant religious exceptions on an individual, subjective basis. To reach a fair balance, this begs the

132. *Id.* at 187.

133. *Id.* at 176.

134. 322 U.S. 78, 88 (1944) (concluding that the District Court correctly “withheld from the jury all questions concerning the truth or falsity of the religious beliefs or doctrines of respondents”).

135. *Id.* at 81–82.

136. *See Seeger*, 380 U.S. at 176.

question: Is there a mechanism by which exemptions can be sought on a more individualistic basis? Answering this question may better decipher whether land is being used as a fundamental tenet of one's religious beliefs.

Nonetheless, not all courts are convinced that just because a religious entity uses a plot of land, this use is automatically deemed a religious exercise. Rather, there must be some showing that the land will be used for religious exercise, and that such exercise is a fundamental tenet of the faith. In accordance with this standard, the plaintiffs themselves are in a better position to attest to their sincerity, rather than an average observer. For this reason, the courts should focus on whether cemeteries constitute a sincerely held religious belief.¹³⁷ Lastly, given the case law and precedent, a municipality need not simply surrender in the face of RLUIPA's overarching definition. A municipality should instead challenge the assumption that a cemetery automatically constitutes a religious exercise.

B. Cemetery Regulations are Justified by Compelling Interests

A cemetery is defined as an area of ground in which dead bodies are buried.¹³⁸ The term cemetery traces its roots from the Greek word *koimeterion*, which means, "sleeping place [or] dormitory."¹³⁹ Given that cemeteries serve as places to house the dead, they present unique challenges that other land uses do not. For instance, the negative connotations and critical health concerns that cemeteries raise warrant greater consideration than other land uses might typically require. In light of these unique characteristics, depending on a cemetery's placement, it may be so injurious to the public health that it is rendered a public nuisance.¹⁴⁰ Alternatively, the cemetery may "be so located and arranged, so planted with trees and flowering shrubs, intersected

137. See *id.* at 165–66 ("We believe that under this construction, the test of belief 'in a relation to a Supreme Being' is whether a given belief that is sincere and meaningful occupies a place in the life of its possessor . . .").

138. *Cemetery*, CAMBRIDGE ADVANCED LEARNER'S DICTIONARY & THESAURUS, CAMBRIDGE UNIVERSITY PRESS, <http://dictionary.cambridge.org/dictionary/english/cemetery> (last visited Oct. 21, 2017).

139. *Cemetery*, ONLINE ETYMOLOGY DICTIONARY, http://etymonline.com/index.php?allowed_in_frame=0&search=cemetery (last visited Oct. 21, 2017).

140. R.P. Davis, Annotation, *Cemetery or burial ground as nuisance*, 50 A.L.R.2d 1324, § 3 (1956).

with drives and walks, and decorated with monumental marbles, as to be not less beautiful than a public landscaped garden, and free from all reasonable objection.”¹⁴¹

In light of the special circumstances posed by cemeteries, courts tend to tread lightly in this context. Courts have upheld a municipality’s prohibition of a cemetery, so long as the decision was not “arbitrary and capricious, unreasonable, discriminatory, or otherwise unconstitutional.”¹⁴² Nevertheless, it is evident that, contrary to RLUIPA’s broadly sweeping regulation, there are many unique factors involved in the decision to permit a cemetery. Therefore, rather than apply a stringent rule, it is more appropriate to leave this decision to the discretion of local governments.¹⁴³

1. *Unique Challenges Posed by Cemeteries*

Unlike playgrounds or schools, which are commonly associated with youthfulness and laughter, cemeteries are commonly associated with death and mourning. As such, although cemeteries may be essential, “they are hardly an unqualified benefit to a neighborhood.”¹⁴⁴ Rather, “the ceremonies of burial tend to cast gloom over an otherwise cheerful and attractive neighborhood.”¹⁴⁵ For this reason, the Supreme Court of Florida held that it was unfair to enable the defendant to use the land at issue for a cemetery because the presence of the cemetery would serve as a constant reminder of death and would lead to “the depression of the mind.”¹⁴⁶ The court reasoned that “[the plaintiffs] did not buy [their homes] with the expectation of

141. *Id.* § 2.

142. 3 PATRICIA E. SALKIN, *CEMETERIES, IN AMERICAN LAW OF ZONING* § 18:19 (5th ed. 2008) (last updated May 2017). *See, e.g.*, *Shumaker v. Borough of Dalton*, 51 F.2d 793 (M.D. Pa. 1931) (upholding an ordinance that prohibited burials within certain areas of the borough against claims that it violated due process, equal protection, and the Contract Clause); *Picha v. County of McLeod*, 634 N.W.2d 739 (Minn. Ct. App. 2001) (overturning the county’s denial of cemetery permit because the record contained no evidence supporting the county’s decision).

143. *Davis*, *supra* note 140, § 2 (“[A] cemetery is not a nuisance per se, the question of whether or not it is a nuisance being one of fact to be determined by the circumstances of each case.”).

144. SALKIN, *supra* note 142.

145. *Id.*

146. *Jones v. Trawick*, 75 So. 2d 785, 788 (Fla. 1954).

living forever in the gloomy shadow of death, and with the disquieting interruptions of their normal pastimes and peaceful pursuits occasioned by constantly recurring funeral services.”¹⁴⁷

Furthermore, unlike a park or a building, cemeteries serve as places for bodies to decompose. This necessarily presents inherent health concerns. For this reason, “[c]lear proof that a cemetery is so situated that burial of the dead, there will endanger health and life by corrupting the surrounding atmosphere or water, wells or springs establishes that it is a nuisance in fact.”¹⁴⁸ For instance, the United States Supreme Court upheld the Supreme Court of California’s holding that it was not unconstitutional to deny a cemetery permit due to concerns about contaminated groundwater, because “the burial of the dead within the City and County of San Francisco [wa]s dangerous to life and detrimental to the public health.”¹⁴⁹ Similarly, in *McCaw v. Harrison*, the Court of Appeals of Kentucky held that “if the location or maintenance of a cemetery endangers the public health, either by corrupting the surrounding atmosphere, or water of wells or springs, it constitutes a nuisance.”¹⁵⁰

In light of these holdings, it is important to consider that not all religions and cultures perform the same burial practices. Traditionally, the funeral industry in America has used a burial method that consists of embalming the body and then placing it in a casket and a concrete vault beneath the ground.¹⁵¹ However, recently, there has been a substantial interest in “green burials.”¹⁵² A green burial is a natural burial method that is aimed towards creating a more natural disposal of the body with fewer impacts on the environment.¹⁵³ Thus, a green burial means

147. *Id.*

148. 7 MCQUILLIN, *Cemetery as nuisance*, The Law of Municipal Corporations § 24:270 (3d ed.) (last updated July 2017).

149. *Laurel Hill Cemetery v. City & Cty. of San Francisco*, 216 U.S. 358, 363 (1910).

150. 259 S.W.2d 457, 458 (Ky. 1953).

151. Tasnim Shamma, *Options for Green Burials on the Rise*, *NEWSWEEK* (Aug. 26, 2010, 7:00 AM), <http://www.newsweek.com/options-green-burials-rise-71717>.

152. *Id.*

153. *Issues to Consider in Preparing for Disposition of Decedents*, MASS.GOV HEALTH AND HUMAN SERVICES, <http://www.mass.gov/eohhs/gov/departments/dph/programs/environmental-health/comm-sanitation/burial-and-cremation.html> (last visited Oct. 21, 2017).

that there is no embalming, no metal, no hard wood for a casket, and no vault.¹⁵⁴ Although green burials have experienced a recent uptick in the United States, certain religions have traditionally required green burials, which has been a main source of the opposition surrounding cemetery proposals.¹⁵⁵ Nonetheless, green burial practices, although accepted by some members of society, have not received unanimous support. Rather, many communities have raised concerns that depending on the water level or presence of wetlands, green burials may cause hazardous materials to enter into the water.¹⁵⁶

2. *Given cemeteries' unique characteristics, additional factors should be deemed "compelling interests"*

Recall RLUIPA's requirement that for a government to implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, assembly, or institution, the government must demonstrate that the imposition of the burden is in the furtherance of a compelling governmental interest.¹⁵⁷ Thus, it is imperative to determine what exactly constitutes a "compelling interest" in light of this Act. In the only Supreme Court decision that has addressed the constitutionality of RLUIPA, the Supreme Court in *Cutter v. Wilkinson*, analyzing the prisoner provision, emphasized that, in regards to the compelling governmental interest standard, courts must consider the "context" of the regulation.¹⁵⁸ As such, within the context of cemeteries, as discussed above, a number of unique governmental interests arise. Thus, when considering cemetery proposals, the courts should grant local governments greater deference and find that these governmental interests constitute "compelling interests."

To begin, the decomposition of bodies in the ground has the potential to release hazardous materials into the ground and

¹⁵⁴ *Id.*

¹⁵⁵ Johanna Seltz, *Walpole aquifer complicates bid for Muslim cemetery*, BOS. GLOBE (Sept. 04, 2014), <https://www.bostonglobe.com/metro/regionals/south/2014/09/03/islamic-burial-service-proposes-build-muslim-cemetery-walpole/HMJc51bElc4fvYwRhAPM/story.html>.

¹⁵⁶ *See id.*

¹⁵⁷ 42 U.S.C. § 2000cc (2012).

¹⁵⁸ 544 U.S. 709, 710 (2005).

water, which presents the risk that water sources and wells may become contaminated. For this reason, public health and safety interests should constitute a compelling interest under RLUIPA. Moreover, such a notion is supported by the United States Supreme Court's decision in *Wisconsin v. Yoder*, where the Court similarly reasoned that "activities of individuals, even when religiously based, are often subject to regulation by the States in the exercise of their undoubted power to promote the health, safety, and general welfare, or the Federal Government in the exercise of its delegated powers."¹⁵⁹ Because cemeteries pose a potential danger to the health and safety of nearby residents, the prohibition on their existence by local towns should be a compelling government interest that satisfies RLUIPA.

Further, the presence of a cemetery will presumably lead to increased traffic and a greater demand for parking, and noise pollution, all of which should constitute a compelling interest. New York courts have agreed, stating that "easing traffic congestion on an important city avenue . . . is a compelling government interest."¹⁶⁰ Moreover, as the Court of Appeals of New York noted, a zoning ordinance "may be conditioned on the effect the use would have on traffic congestion, property values, municipal services, the general plan for development of the community, etc."¹⁶¹ In light of the affects that particular land uses might pose, the court reasoned that "[a] community . . . should not be obliged to stand helpless in the face of proposed uses that are dangerous to the surrounding area."¹⁶² Rather, increased "traffic and similar problems . . . are unquestionably within the municipality's police power to exclude altogether."¹⁶³ Importantly, "the fact that the case reports do not reveal any case in which a court has found traffic concerns compelling does not

159. 406 U.S. 205, 220 (1972).

160. *Int'l Action Ctr. v. City of New York*, 2006 U.S. Dist. LEXIS 93387, at *10 (S.D.N.Y. Dec. 26, 2006); *see also* *Krafchow v. Town of Woodstock*, 62 F. Supp. 2d 698, 710 (N.D.N.Y. 1999) (holding that "the Town's interest in controlling traffic while ensuring the convenience of Town residents is a sufficiently compelling interest"); *Cole v. Roadway Express, Inc.*, 218 F. Supp. 2d 350, 356 (W.D.N.Y. 2002) (noting that "the public has a compelling interest in maintaining safe roadways").

161. *Cornell Univ. v. Bagnardi*, 68 N.Y.2d 583, 596 (1986).

162. *Id.* at 595.

163. *Id.*

support the proposition that traffic concerns by nature cannot be compelling.”¹⁶⁴

Additionally, given the impact that a cemetery will have in terms of its melancholy presence, increased traffic, and noise pollution, zoning regulations should be deemed compelling interests. The sudden presence of a cemetery in a town has the potential to pose significant changes within the community, which is why historical or cultural preservation ordinances, as well as the rustic, rural, or residential character of a neighborhood should be considered. Accordingly, the cases above touched upon constituents’ perspectives regarding the sudden presence of a cemetery near their homes, as did most of the news stories reporting on the opposition to cemeteries. Reading these stories, it is evident that often, the townspeople simply do not want the atmosphere of their home to change.¹⁶⁵ As a property owner in Dudley, Massachusetts, explained: “I grew up here. It’s farmland, and I’d like to see it stay that way A lot of people moved here because it’s peaceful and quiet. I just don’t want a cemetery here, period. Any kind of cemetery. It doesn’t matter what kind.”¹⁶⁶ However, despite the concerns that are often raised by homeowners, the courts consistently refused to regard purely aesthetic preferences as compelling interests.¹⁶⁷ Yet, that is changing. Recently, in light of a RLUIPA challenge, the Seventh Circuit held that “[t]he [c]ounty had a compelling interest in preserving the rural and rustic character of the Town as well as the single-family development around [the] [l]ake.”¹⁶⁸ Thus, onerous aesthetic effects caused by cemeteries should constitute

164. *Westchester Day Sch. v. Vill. of Mamaroneck*, 386 F.3d 183, 191 (2d Cir. 2004).

165. *Plans for Muslim cemeteries across US met with worry, disappointment*, *supra* note 20.

166. *Id.*

167. *Westchester Day Sch. v. Vill. of Mamaroneck*, 417 F. Supp. 2d 477, 554 (S.D.N.Y. 2006).

168. *Eagle Cove Camp & Conf. Ctr., Inc. v. Town of Woodboro*, 734 F.3d 673, 682 (7th Cir. 2013); *see also* *Roman Catholic Diocese of Rockville Ctr. v. Inc. Vill. of Old Westbury*, 128 F. Supp. 3d 566, 584 (E.D.N.Y. 2015) (“Defendants ha[d] a legitimate governmental purpose in maintaining the integrity of its zoning scheme and the residential character of the Village. It [wa]s well-established that States and cities may enact land-use restrictions or controls to enhance the quality of life by preserving the character and desirable aesthetic features of a city.”).

compelling interests.

Nevertheless, it is apparent that RLUIPA's broad definition of religious exercise failed to account for the inherent intricacies posed by particular land uses, such as cemeteries.¹⁶⁹ Thus, in failing to enable local government to exercise their discretion over such matters, RLUIPA instead has given broad protections to religious entities in land use matters.¹⁷⁰ This is concerning because, as exemplified by cemeteries, particular land uses may pose unique challenges and concerns. These unique concerns are why religious organizations should not have priority over such important land use decisions. Moreover, given that RLUIPA requires local government to prove a compelling interest, and that such regulations be enforced according to the least restrictive means, such a stringent stronghold over the local government prevents local officials from exercising their discretion over these decisions. The implications that RLUIPA poses are alarming; the broad definition of "religious exercise" when put into action has proven deficient, and the misbalance of power between religious organizations and local governments is distressingly misguided.

Lastly, it is important to recognize the large divide that continues to exist over the matters raised herein. Recall the examples provided at the beginning of this Comment, which discussed recent cemetery disputes throughout the country.¹⁷¹ Thus, although the case law and precedent relied upon in this Comment strongly supports a finding that cemeteries are not religious land uses and are justified by compelling interests, these issues have not been laid to rest. Rather, as highlighted above, while some courts have rendered more favorable decisions over these claims, others, presumably due to RLUIPA, have not. To the extent that cemetery proposals remain contested, claimants

169. Furthermore, it is worth noting that cemeteries will necessarily lead to increased costs for the town due to the need to finance increased police presence and other security measures, as well as, maintenance costs.

170. See *S. Hrg. 106-689*, *supra* note 43, at 109 (prepared statement of Chai R. Feldblum Professor of Law at Georgetown University Law Center) (noting that, "one might expect amicus curia briefs from . . . environmental groups challenging the notion that it is in the 'general welfare,' to pass a broad-based rule requiring that any governmental action taken to protect [its] interests . . . when any religious belief is burdened by that governmental action").

171. See *supra*, Introduction Section.

continue to bring their grievances to court, which resultantly, largely consumes an opposing communities' resources and time. As such, despite a town's ability to present a strong defense, to even reach this point, the town must expend its limited time and resources defending itself. Nonetheless, as matters regarding cemetery ordinances remain largely unsettled, it is evident that a fair ground needs to be reached.

IV. THE PROPER RESOLUTION

Although RLUIPA in its current application poses significant shortcomings, there are other alternatives that if adopted, would preserve the Act's goal of preventing discriminatory land use regulations while still honoring the states' power and maintaining a fair balance amongst society.

First, RLUIPA should be repealed. Rather than the federal government, the state and local governments should single-handedly regulate religious land use. Looking to state statutes, it is clear that there already are mechanisms in place to prevent against discriminatory land use regulations.¹⁷² For example, according to Massachusetts General Laws chapter 40A section 3, “[n]o zoning ordinance or by-law shall regulate or restrict . . . the use of land or structures for religious purposes or for educational purposes on land owned or leased by the commonwealth or any of its agencies, subdivisions or bodies politic or by a religious sect or denomination.”¹⁷³ Similar statutes exist in other states as well.¹⁷⁴

Moreover, within the states, both the local governments and courts should rely on *Smith* for guidance and similarly adopt the stance that, so long as a law is neutrally applied and of “general applicability,” the state does not need to establish a “compelling governmental interest” if the regulation imposes a restriction on

172. See *Federalism and the Public Good*, *supra* note 43, at 337–38 (“Every state applies at least some elements of its land use law to religious landowners, whether it is zoning or use restrictions, or both. Some states are more accommodationist than others, for example, Massachusetts gives churches the right to choose their zoning and location.”).

173. MASS. GEN. LAWS ANN. ch. 40A, § 3 (West, Westlaw through Ch. 74 of the 2017 1st Annual Sess.).

174. See *Federalism and the Public Good*, *supra* note 43, at 338; see also U.S. CONST. amend. I (by incorporation, all the states must adhere to the First Amendment).

the intended land use.¹⁷⁵ By adopting this approach, land use regulations would be applied and investigated neutrally through the same lenses, rather than providing stronger lenses for religious uses individually. Thus, there would not be any special protections afforded to religious organizations, rather, all individuals would be required to equally abide by the same neutral laws of general applicability.

If Congress and the judiciary refuse to release the stronghold that the federal government currently has over the states regarding land use, RLUIPA should be amended to require states to create administrative bodies to decide these questions. A local state agency could then evaluate every claim on a case-by-case basis and would be more in touch with the nature of the communities and governmental interests.¹⁷⁶ Given that “religious land use” has transformed into a wide range of uses, such as churches, synagogues, mosques, temples, meditation centers, religious centers, religious schools, religious programming, among others, the creation of an agency in each state would improve the efficiency and validity of resolving these cases. Furthermore, given the compelling needs of local governments, religious entities, and the complexities and sensitivities regarding religious land matters, the implementation of local administrative bodies, ideally, would lead to impartial resolutions.

Emulating the Massachusetts medical tribunals, a last suggestion would be to require any religious land use claims, just like medical malpractice claims in Massachusetts, to go before a tribunal to determine whether there is sufficient evidence to process the claim.¹⁷⁷ In Massachusetts, non-patient medical malpractice claims must first go before the Massachusetts medical

175. *Emp't Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 879 (1990), *superseded by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488.

176. *See Cambodian Buddhist Soc'y of Conn., Inc. v. Planning & Zoning Comm'n of Newtown*, 285 Conn. 381, 416 (2008) (citation omitted) (stating, “in the land use context, the Sixth, Seventh, Eighth, and Eleventh Circuits have rejected a per se approach and instead apply a fact-specific inquiry to determine whether the regulation at issue was motivated by discriminatory animus”).

177. MASS. GEN. LAWS ANN. ch. 231, § 60B (West, Westlaw through Ch. 74 of the 2017 1st Annual Sess.); *see also Medical Malpractice Tribunal*, MASS. MED. SOC'Y, <http://www.massmed.org/tribunal/#.WJzgoHREbww> (last visited Oct. 21, 2017).

malpractice tribunal.¹⁷⁸ The role of the medical tribunal is to review the claim to determine whether medical malpractice potentially caused the injury or if the injury was merely the result of an unfortunate medical result.¹⁷⁹ With religious land use cases, the tribunal would ideally consist of a judge, a land use attorney, a zoning specialist, a town official not from the town at issue, and a religious affiliate not involved in the case. After reviewing all the evidence and conducting a hearing, if the plaintiff is unable to show a likelihood of success on the merits, the plaintiff will have to post bond for the case to be litigated.¹⁸⁰ As such, it is imperative that a hearing before a tribunal is held, so that the tribunal can fairly balance the equities of both party's interests.¹⁸¹ Tribunals are suggested because they provide an opportunity for both the towns and religious entities to have their cases fully heard while also saving the parties time and money. Given that local governments and religious institutions do not have abundant resources nor an everlasting monetary supply for such land use debates, tribunals would be ideal because they would alleviate long, arduous trials, thus allowing the parties to spend their limited time and resources on their communities.

CONCLUSION

The issues that RLUIPA poses need to be publicized in order to shed light on the harrowing implications that RLUIPA has, not only upon our legal foundations, but also, upon all our local communities. Nationwide, there has been an influx of cases in which local municipalities have been pressed to grant requests for various places of worship ranging from churches, synagogues, mosques, temples, religious schools, religious community centers, and even cemeteries. Nevertheless, with this sudden increase in

178. Breakstone, White & Gluck, *Massachusetts Court Requires Medical Malpractice Tribunal in Third Party Claims*, MASS. INJURY LAW. BLOG (Mar. 10, 2010), <https://www.massachusettsinjurylawyerblog.com/2010/03/massachusetts-court-requires-m.html>.

179. *Id.*

180. *See Medical Malpractice Tribunal*, *supra* note 177.

181. *H.R. 1691 Hearing*, *supra* note 51, at 147 (statement of Marci Hamilton, Professor of Law, Benjamin N. Cardozo School of Law) (stating, “[i]f there are significant meaningful burdens on religion, you should have hearings about those burdens and consider whether or not an exemption is in the interest of the public good”).

demand this has also led to an increase in investigations conducted by the Federal Justice Department against the local municipalities. As a result, this Act has in effect completely discarded a municipality's power to have any input in the land use proposals for their community.

Nonetheless, this Comment is not intended to condone local biases or discrimination, which is simply unconstitutional. Rather, this Comment is intended to call into question the need for RLUIPA's regulation, which has ultimately decided that religious entities deserve greater power and protection than do local government and nonreligious individuals. Our nation prides itself on its diversification and acceptance, but with our continuous diversification comes with it the competing interests and demands of different cultural and religious institutions. Alternatively, what this Act disregards is that our available land is not increasing, but is in fact, limited. For this reason, local communities still need to have an input in decisions regarding land use so that the needs of all individuals are met. Due consideration needs to be given to the fact that for some individuals, what they cherish most is not religion, but rather, their towns historical charm or fruitful farmland. Most importantly, as highlighted above, the application of RLUIPA's wide-reaching land use provision has proven problematic, as showcased by the cemetery example. Nevertheless, there are other alternatives that the federal and local governments could adopt, thus fulfilling the needs of both the municipalities and religious entities in a fair and balanced way.