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Zoning On Holy Ground: Developing A Coherent Factor-Based Analysis For RLUIPA's Substantial Burden Provision

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ZONING ON HOLY GROUND: DEVELOPING A COHERENT FACTOR-BASED ANALYSIS FOR RLUIPA'S SUBSTANTIAL BURDEN PROVISION

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INTRODUCTION

In 2015, Pastor Fred Fields bought a small, abandoned bait-and-tackle shop in the city of Markham, located on the south side of Chicago.[2] The pastor intended to convert the building into a church for his thirty-person, African-American congregation.[3] Upon seeking an occupancy permit from the city, a city official told Pastor Fields that Markham did not "need another church" and that the city preferred that the property be used by a business in order to generate tax revenue.[4] When the church applied for a conditional use permit, the city denied the application and told the church to revise the plan with blueprints and architectural plans.[5] When a revised application was submitted, the city denied the application again, presenting new concerns and more requirements to gain approval.[6] The process cost the small congregation $13,000 in legal and architectural fees and still left them without a permit.[7] After the second denial of its application, the church filed a lawsuit against the city seeking injunctive relief.[8]

Stories like these prompted Congress to pass the Religious Land Use and Institutionalized Persons Act ("RLUIPA") in 2000.[9] Religious organizations can be unpopular occupants in zoning schemes. If a house of worship is located in a residential zone, the surrounding residents may

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2. Mike Nolan, *Parishioners* '*still standing*' *after legal fight; Markham church celebrates opening*, DAILY SOUTHTOWN (May 20, 2018), https://www.chicagotribune.com/suburbs/daily-southtown/news/ct-sta-markham-church-reopen-st-0521-story.html [https://perma.cc/JTB3-XUZN].

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. 42 U.S.C. § 2000cc (2012).

complain of the accompanying traffic, noise, and decrease in property values.[10] If a religious organization tries to locate in a commercial or business zone, land regulators have problems with the lack of tax revenue and commercial attraction.[11]

Municipalities have been found to be hostile and discriminatory to religious organizations in whether they grant or deny the zoning applications and variances, particularly to those of minority religions.[12] For example, in a three-year timespan, the Pew Research Center documented fifty-three proposed mosques and Islamic centers that encountered community resistance.[13] In many cases, the opposition centered on the usual concerns of neighbors: traffic, noise, and potential decreases in property values.[14] In other communities, however, the controversies have centered on fears about Islam, Sharia law, and terrorism.[15]

Congress intended RLUIPA to solve the tension between the right to exercise religious beliefs and the interests behind zoning codes. RLUIPA prohibits land-use restrictions that impose a substantial burden on religious exercise, unless the government can satisfy a strict scrutiny test by demonstrating that such a burden furthers a compelling government interest and is the least restrictive means of furthering that interest.[16] Strict scrutiny is the most demanding test in constitutional jurisprudence and usually a fatal blow for the government's position.[17] If a religious organization can successfully litigate under RLUIPA, it is exempt from the land-use restriction, even if the restriction is otherwise generally applicable.[18]

Roughly three-quarters of Americans claim to be affiliated with a religion,[19] and an estimated 350,000 religious congregations exist in the Unit-

10. Emma Green, *The Quiet Religious-Freedom Fight That Is Remaking America*, THE ATLANTIC (Nov. 5, 2017), https://www.theatlantic.com/politics/archive/2017/11/rluipa/543504/ [https://perma.cc/6T28-XMLE].

11. *See* River of Life Kingdom Ministries v. Vill. of Hazel Crest, 611 F.3d 367, 373 (7th Cir. 2010).

12. *See* Fortress Bible Church v. Feiner, 694 F.3d 208, 220 (2d Cir. 2012).

13. *See Controversies Over Mosques and Islamic Centers Across the U.S.*, PEW RES. CTR. (Sep. 27, 2012), http://www.pewforum.org/2012/09/27/controversies-over-mosques-and-islamic-centers-across-the-u-s-2/ [https://perma.cc/N6DD-YD8L].

14. *Id.*

15. *Id.*

16. 42 U.S.C. § 2000cc (2012).

17. *See* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 795 (2006).

18. 42 U.S.C. § 2000 (2012).

19. *Religious Landscape Study*, PEW RES. CTR. (Nov. 17, 2018), http://www.pewforum.org/religious-landscape-study/ [https://perma.cc/N6DD-YD8L].

ed States.[20] RLUIPA claims can range from regulations on sewerage, to protecting historical buildings, to enforcing building capacity limits. If every land-use restriction were subject to strict scrutiny then thousands of real estate properties nationwide would escape zoning ordinances, environmental protection rules, and urban planning schemes. To prevent this zoning Armageddon from taking place, RLUIPA requires that before strict scrutiny is satisfied, a religious organization must first show that the land-use restriction constitutes a substantial burden on its religious exercise.[21]

What constitutes a substantial burden in religious land use? Despite being a common subject of litigation, the Supreme Court has yet to answer this question.[22] The circuit courts, however, have developed a wide range of answers. Courts have struggled to uphold RLUIPA's clear purpose—to relieve religious institutions of any land-use regulation that is unnecessarily restrictive—while at the same time ensuring that the substantial burden requirement is taken seriously so that religious organizations are not completely free from zoning restrictions.[23]

This Note's purpose is to develop a clear yet flexible test to determine whether a land-use restriction constitutes a substantial burden on religious exercise. Part I will give a background to RLUIPA and the relevant Supreme Court cases used in defining a substantial burden, as well as introduce the land-use provisions of RLUIPA itself. This part will also give a brief note on RLUIPA's definition of free exercise and on the Act's tension with the Establishment Clause. Part II will outline the different approaches the circuits have taken to define a substantial burden in the land-use context. Part III will take the position that a factor-based approach offers the most certain, practical, and functional standard to define a substantial burden. The Note will conclude with a list of factors courts should consider in their analysis and suggest ways to apply them in a land-use case.

20. *Fast Facts About American Religion*, HARTFORD INST. (Nov. 27, 2018) http://hirr.hartsem.edu/research/fastfacts/fast_facts.html [https://perma.cc/PX9D-CZTQ].

21. *See* 42 U.S.C. § 2000cc(a)(1).

22. In 2019, the U.S. Supreme Court refused to address a circuit split surrounding the test for RLUIPA's equal terms provision. Tree of Life Christian Sch. v. City of Upper Arlington, Ohio, 139 S. Ct. 2011, 2012 (2019).

23. Petra Presbyterian Church v. Vill. of Northbrook, 489 F.3d 846, 851 (7th Cir. 2007), *cert. denied*, 128 S. Ct. 914 (2008).

I. THE HISTORY AND PROVISIONS OF RLUIPA

A. Background of Substantial Burden Analysis and the Rise of RLUIPA

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[24] The First Amendment's two religious clauses that came into existence in 1791. However, the first century of the Free Exercise Clause's existence saw few notable Supreme Court cases except for *Reynolds v. United States*, which involved a criminal indictment against a leader of the Church of Jesus Christ of Latter-day Saints for practicing polygamy.[25] The Court found that prohibiting the man's religious duty to practice polygamy did not constitute a constitutional violation, drawing the distinction that his religious beliefs may be protected but not his religious conduct.[26]

It was not until the Warren Court in the 1960s that the Court concluded that the conduct and belief dichotomy imposed an unreasonable burden on religious conduct. In *Sherbert v. Verner*, Justice Brennan, writing for the Court, held that refusing to give state-sponsored unemployment benefits to a Seventh-day Adventist because of his refusal to work on his Saturday Sabbath constituted "a substantial infringement on religious liberties."[27] Forcing someone to choose between unemployment benefits and his religious beliefs imposes "the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship."[28] The Court then conducted a strict scrutiny analysis and found that the government did not have a compelling interest in denying unemployment benefits to the religious dissident.[29]

In *Wisconsin v. Yoder*, the Court held that a compulsory attendance law that required Amish students to attend public high school until age sixteen violated the Free Exercise Clause and the parental right to direct the upbringing of one's children.[30] The Amish litigants successfully demonstrated the intricate role their beliefs play in their daily lives and the need

24. U.S. CONST. amend. I.

25. Reynolds v. United States, 98 U.S. 145 (1878); *see also* Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940) ([T]he [First] Amendment embraces two concepts—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be.").

26. *Id.* at 164 (stating that "[c]ongress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order").

27. Sherbert v. Verner, 374 U.S. 398, 407 (1963).

28. *Id.* at 404.

29. *Id.* at 409.

30. Wisconsin v. Yoder, 406 U.S. 205 (1972).

for adolescents to spend their formative years in the Amish environment.[31] The Court found that forcing the children to attend high school "unduly burdens" the Amish people's religious beliefs.[32] The Court again used strict scrutiny and found that the state had to "show with more particularity" how accommodating the Amish would adversely affect their strong state interest in education.[33] Thus, the Court ruled in favor of the Amish.[34] With *Sherbert* and *Yoder*, strong precedent was in place to apply strict scrutiny to cases whenever the government imposed a substantial burden on religious exercise.

But this precedent collapsed in 1990 upon the U.S. Supreme Court's ruling in *Employment Division, Department of Human Resources of Oregon v. Smith*.[35] In *Smith,* members of a Native American Church violated a criminal prohibition on hallucinogenic drugs by ingesting peyote as required by their religious beliefs.[36] In contrast to *Sherbert* and *Yoder*, the Court did not apply strict scrutiny to the criminal prohibition, despite the burden on the litigants' religious beliefs. Instead, the Court ruled that strict scrutiny analysis should not be applied in Free Exercise challenges to laws that were "generally applicable."[37] For laws that were neutral in effect, the Court would now look at Free Exercise challenges under a rational basis review. The Court said that holding otherwise "would be courting anarchy."[38] The *Smith* case radically altered the Free Exercise landscape, taking away the necessity for accommodating religious beliefs as long as the government could demonstrate that the law in question was generally applicable.

This decision was not well received by elected officials in the other two federal branches. In response, Congress attempted to reverse *Smith* and revive strict scrutiny protection against substantial burdens on religious exercise through the Religious Freedom Restoration Act of 1993 ("RFRA").[39] The attempted reversal of *Smith* was quickly squelched by the Supreme Court. In *City of Boerne v. Flores*, the Court held that RFRA exceeded congressional authority to enforce substantive free exercise rights

31. *Id.* at 235-36.
32. *Id.* at 220.
33. *Id.* at 236.
34. *Id.*
35. Emp't Div., Dep't of Human Res. of Oregon v. Smith, 494 U.S. 872 (1990).
36. *Id.* at 874.
37. *Id.* at 882-83.
38. *Id.* at 888.
39. 42 U.S.C. § 2000bb-2 (2012).

against the states.[40] The Court reasoned under the Fourteenth Amendment that Congress only has the authority to remedy constitutional violations, "not the power to determine what constitutes a constitutional violation."[41] RFRA was not struck down entirely, however; as it still applies to federal laws.[42]

In response, Congress passed a narrower solution to *Smith*. RLUIPA reinstated strict scrutiny analysis for state and local laws that substantially burden religious conduct, but only in the context of institutionalized facilities and land use. Congress found the need for the land-use legislation after compiling "massive evidence"—both statistical and anecdotal—that zoning codes frequently discriminated against religious groups seeking physical space to worship.[43] In the course of nine hearings, Congress found that discrimination most often occurred toward new and small religious groups, particularly those of racial and religious minorities.[44] RLUIPA passed with overwhelming, bipartisan support and President Clinton signed it into law on September 22, 2000. Surprisingly, since RLUIPA's passage, the Supreme Court has never reviewed a case in the land-use context, although the Court has reviewed cases in the institutionalized-persons context.[45]

B. The Provisions of RLUIPA

RLUIPA has two core provisions for land use. One provision prohibits civil authorities from treating religious institutions on less than equal terms than secular institutions in land-use regulation.[46] Although this provision is not the focus of this Note, as will be shown in Part II, some courts have used the Equal Terms provision to interpret its sister provision: the substan-

40. City of Boerne v. Flores, 521 U.S. 507, 513 (1997).

41. *Id.* at 519.

42. Gonzales v. O Centro Espirita Beneficiente Uniao Do Vegetal, 546 U.S. 418 (2006).

43. 146 CONG. REC. S7774-01 (daily ed. July 27, 2000) (statement of Sen. Hatch).

44. *See* H.R. REP. NO. 106-219, at 18-24 (1999) (These hearings concerned a broader bill, the proposed Religious Liberty Protection Act, that never passed. RLUIPA was selected from this proposed piece of legislation and presented as its own individual bill.).

45. *See* Holt v. Hobbs, 135 S. Ct. 853, 857 (2015) (holding that a substantial burden existed when a prison forbade a Muslim prisoner from growing a beard of a certain length, which the prisoner sincerely believed was required by his religion. However, the Court did not define a substantial burden).

46. *See* 42 U.S.C. § 2000cc (2012). Interestingly, the statutory language only applies strict scrutiny to generally applicable laws that come into the reach of the tax and power and commerce clause prongs. The effect of the Fourteenth Amendment prong is only to "individualized assessments." 42 U.S.C. § 2000cc. This has caused some commentators to argue that RLUIPA's substantial burden provision should not apply to generally applicable laws. Instead, a substantial burden should only be considered at all when applying to individualized assessments that indicate an element of arbitrary and capricious decision making by government officials. *See* Adam J. MacLeod, *Resurrecting the Bogeyman: The Curious Forms of the Substantial Burden Test in RLUIPA*, 40 REAL EST. L.J. 115, 175 (2011).

tial burden provision. This second part of RLUIPA, the subject of this Note, states,

> No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution—
>
> > (A) is in furtherance of a compelling governmental interest; and
> >
> > (B) is the least restrictive means of furthering that compelling governmental interest.[47]

RLUIPA intentionally does not define "substantial burden." In a congressional joint statement in enacting RLUIPA, the bill's co-sponsors stated,

> The Act does not include a definition of the term 'substantial burden' because it is not the intent of this Act to create a new standard for the definition of 'substantial burden' on religious exercise. Instead, that term as used in the Act should be interpreted by reference to Supreme Court jurisprudence.[48]

The co-sponsors further stated, "The term 'substantial burden' as used in this Act is not intended to be given any broader interpretation than the Supreme Court's articulation of the concept of substantial burden or religious exercise."[49]

The Act specifies that the other terms of RLUIPA are to be construed broadly to the maximum extent as allowed by its terms and the Constitution.[50] For its constitutional basis, Congress rests its authority for passing RLIUPA in three constitutional provisions: the tax and spending power, the commerce clause, and the Fourteenth Amendment's Due Process provision. Thus, RLUIPA specifies that its substantial burden analysis applies only when (1) the land-use regulation is in connection with activity that receives federal funds; (2) the land-use regulation affects interstate commerce or Indian tribes; or (3) the burden occurs in the context of applying a land-use regulation where the government makes "individualized assessments" regarding the property involved.[51] Similar to RFRA in *City of Boerne*, there

47. 42 U.S.C. § 2000cc(a)(1).
48. 146 CONG. REC. S7776 (daily ed. July 27, 2000) (statement of Sen. Hatch).
49. *Id.*
50. 42 U.S.C. § 2000cc-3(g) (2012).
51. 42 U.S.C. § 2000cc(a)(2).

was originally skepticism about whether this provision exceeds Congress's authority under Section 5 of the Fourteenth Amendment, but so far the courts have rejected this argument.[52]

C. A Digression on Religious Exercise

Any discussion of what constitutes a substantial burden would not be complete without a brief reference to another RLUIPA term, "religious exercise."[53] Even if a substantial burden can be shown, RLUIPA protections do not apply to merely any religious activity. Many religious institutions operate places of commerce out of their buildings, like coffee shops or bookstores, both of which may be considered part of their religious activity.

Unlike the term "substantial burden," RLUIPA does not use Supreme Court jurisprudence in defining religious exercise.[54] Congress specified that only certain types of religious activity are within the scope of the Act. The Act itself defines religious exercise in general as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief."[55] Furthermore, the rule in RLUIPA is that "[t]he use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose."[56] To offer clarity behind the term, a joint congressional statement discussing RLUIPA states that "not every activity carried out by a religious entity or individual constitutes 'religious exercise.'"[57] 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.'"[58]

This is illustrated by a financially struggling Christian Science church in New York that leased its building to a catering business in order to cover its bills.[59] The lease gave the catering business almost complete control of the building except the church retained the right to utilize certain rooms of the building for services on Sundays, Wednesday evenings, and certain

52. Guru Nanak Sikh Soc. of Yuba City v. Cty. of Sutter, 456 F.3d 978 (9th Cir. 2006).
53. *See generally* Jason Z. Pesick, *RLUIPA: What's the Use*, 17 MICH. J. RACE & L. 359 (2012).
54. 42 U.S.C. § 2000cc–5(7) (2000).
55. *Id.*
56. *Id.*
57. 146 CONG. REC. 16,700 (2000).
58. *Id.*
59. Third Church of Christ, Scientist, of N.Y.C v. City of N.Y., 617 F. Supp. 2d 201, 202-04 (S.D.N.Y. 2008).

holidays.[60] The city said that the lease could not be added to its original zoning permit and denied the business' use of the facility, which led the church to sue under RLUIPA.[61] The District Court noted that a burden on catering within a church building is not a burden on religious exercise within the meaning of RLUIPA, even if the church benefits financially from the catering business.[62]

D. A Violation of the Establishment Clause?

RLUIPA is rooted in Free Exercise Clause jurisprudence and is therefore aimed at protecting religious practice from intrusive state interference. Precautions must be taken, however, to ensure the other religion clause of the First Amendment is not encroached upon. The Establishment Clause is aimed at protecting the government's decision-making from religion.[63] As a legislative accommodation of religion, RLUIPA occupies a tense area between the Free Exercise Clause, which assures that the government does not interfere with religious exercise, and the Establishment Clause, which prohibits the government from becoming too entangled with religion in a way that favors a certain religion over other religions or non-religion.[64] Thus, one precaution that courts evaluating a RLUIPA claim must consider is whether the government is treating religious institutions too favorably in their zoning laws, especially in relation to other land-users.[65]

RLUIPA has been criticized as a wholesale religious exemption for land-use regulations—a tool for religious institutions to escape land-use regulations that every other landowner must comply with.[66] The law has also been seen as unduly hampering the careful planning efforts of local governments.[67] However, so far, an Establishment Clause attack on RLUIPA has not gained much traction. The Seventh Circuit has not expressed concern with RLUIPA being too favorable to religious entities. In response to Establishment Clause concerns, *Petra Presbyterian Church v. Village of Northbrook* emphasized religious plaintiffs' vulnerability to dis-

60. *Id.*

61. *Id.* at 207.

62. *Id.* at 209.

63. *See* JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS (1785).

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

65. *See* Sts. Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin, 396 F.3d 895, 900 (7th Cir. 2005).

66. Adam J. MacLeod, *Resurrecting the Bogeyman: The Curious Forms of the Substantial Burden Test in RLUIPA*, REAL EST. L.J. 115, 127 (2011).

67. *See* Petra Presbyterian Church v. Vill. of Northbrook, 489 F.3d 846, 851 (7th Cir. 2007).

crimination by zoning boards, especially congregations who are not affiliated with large, mainstream denominations like the Roman Catholic Church.[68]

The Second Circuit found the statute's land-use provision complied with the three-pronged *Lemon* test.[69] The Second Circuit in *Westchester Day School v. Village of Mamaroneck* found that the first prong of the *Lemon* test is satisfied since RLUIPA has a secular purpose—"to lift government-created burdens on private religious exercise."[70] Under the second *Lemon* prong, the court found that the principal or primary effect of RLUIPA's land-use provisions neither advances nor inhibits religion; it only permits the practice of religious beliefs without an unnecessary government burden. "RLUIPA cannot be said to advance religion simply by requiring that states not discriminate against or among religious institutions."[71] Finally, when examining the third *Lemon* prong the court found that RLUIPA's land-use provisions did not foster excessive government entanglement with religion.[72] The Second Circuit did note that the Establishment Clause limits RLUIPA from being so broadly construed that it would grant a religious institution immunity from land-use regulation.[73] Such immunity would put a religious institution in too favorable of a position over non-religious and other religious entities.[74]

II. ADAPTING SUBSTANTIAL BURDEN ANALYSIS TO RELIGIOUS LAND-USE

When Congress passed RLUIPA in 2000, commentators criticized the Act as being overbroad and ripe for abuse, fearing that religious institutions would use the law as a means to get around land-use regulations.[75] However, those fears have largely not come to fruition. The courts have been careful to interpret RLUIPA's provisions narrowly. With RLUIPA leaving its definition of "substantial burden" to Supreme Court precedent and the Supreme Court offering no specific guidance in the land-use context,[76] the

68. *Id.*

69. *See* Westchester Day Sch. v. Vill. of Mamaroneck, 504 F.3d 338, 355 (2d Cir. 2007).

70. *Id.* (citing Cutter v. Wilkinson, 544 U.S. 709, 720 (2005) (RLUIPA prisoner Supreme Court case)).

71. *Id.* at 355-56.

72. *Id.* at 355.

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

74. *Id.*

75. *See generally* Daniel P. Lennington, *Thou Shalt Not Zone: The Overbroad Applications and Troubling Implications of RLUIPA's Land Use Provisions*, 29 SEATTLE U. L. REV. 805 (2006).

76. *See Westchester Day Sch.*, 504 F.3d at 348-49 (2d Cir. 2007).

circuit courts have been left to their own devices to determine what constitutes a substantial burden. Courts have uniformly agreed that not just any imposition on religious exercise constitutes a RLUIPA violation, but they have taken varying positions as to what conduct violates the Act.[77] The result has been a plethora of tests, definitions, and factors in defining a substantial burden, with differing results. This section outlines the three approaches taken by the circuits: the "effectively impracticable" approach, the direct coercion approach, and the factor-based approach.

A. Ninth and Seventh Circuits' "Effectively Impracticable" Standard

The Seventh Circuit was one of the first to offer a definition of "substantial burden," coming up with a high standard for plaintiffs to overcome. In *C.L.U.B. v. City of Chicago*, a group of churches and a church association argued that the city of Chicago's requirement that the churches obtain a "Special Use" approval to move into business and certain commercial zoning districts constituted a substantial burden under RLUIPA.[78] The churches had continually applied for and were denied approval by the city, and costs ran up to $5,000 per application.[79]

The court rejected the argument that these barriers constituted a substantial burden, opting to define the term narrowly: "[A] substantial burden on religious exercise is one that necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise-including the use of real property for the purpose thereof . . . effectively impracticable."[80] The court stated that factors like the scarcity of affordable land, procedural requirements, and the inherently political aspects of obtaining zoning variances are merely "incidental" and do not constitute a substantial burden.[81]

Subsequently, the Ninth Circuit defined "substantial burden" in a way that was "entirely consistent" with the Seventh Circuit's standard.[82] The court held in *San Jose Christian College v. City of Morgan Hill*, that for a land-use regulation to impose a "substantial burden," it must be "oppressive" to a "significantly great" extent.[83] Since a municipality's environmental regulations and application requirements on a private Christian college

77. *See* Livingston Christian Sch. v. Genoa Charter Twp., 858 F.3d 996, 1003 (6th Cir. 2017), *cert. denied*, 138 S. Ct. 1696 (2018) ("One principle that clearly emerges from . . . our sister circuits' decisions is that not just any imposition on religious exercise will constitute a violation of RLUIPA.").

78. Civil Liberties for Urban Believers v. City of Chi., 342 F.3d 752, 755-58 (7th Cir. 2003).

79. *See id.* at 755-57.

80. *Id.* at 761.

81. *Id.*

82. San Jose Christian Coll. v. City of Morgan Hill, 360 F.3d 1024, 1035 (9th Cir. 2004).

83. *Id.* at 1034.

did not "render religious exercise effectively impracticable," only more expensive and inconvenient, no substantial burden existed.[84]

In some ways, this "effectively impracticable" approach only adds an extra level to the substantial burden analysis; now the question becomes, what does "effectively impracticable" look like*?* Seventh Circuit cases have since offered clarity and in some ways retreated from its initially narrow definition. First, the Seventh Circuit made it clear that a substantial burden must "mean something different from greater burden than imposed on secular institutions."[85] Unequal burdens are explicitly prohibited in RLUIPA's Equal Terms provision.

A second point that has been cleared up is that "effectively impracticable" does not necessarily mean that religious institutions do not have alternative locations to carry out their religious practices. However, lacking an alternative location for a house of worship is a strong indicator of a substantial burden. In *Saints Constantine & Helen Greek Orthodox Church v. City of New Berlin*, the Seventh Circuit found that a substantial burden existed for a church that had acquired land to build a church and sought the appropriate rezoning measure.[86] The municipality denied the church's application for fear that the church would eventually sell the property for something other than religious use, despite the church agreeing to condition the rezoning only for its stated purpose.[87] Judge Posner found that the city's actions constituted a substantial burden on the church's religious exercise, saying that the church's conditional rezoning agreement should alleviate the city's fear.[88] Posner agreed that the church could have found an alternative property or continued applying for a permit, but doing so would cause "delay, uncertainty, and expense."[89]

Finally, the Seventh Circuit has made it clear that a religious organization must have a reasonable expectation that its requested land-use will be accepted. In *Saints Constantine & Helen Greek Orthodox Church*, the church bought the land with every indication by the governing authority that its request would be granted.[90] However, in *Petra Presbyterian Church v. Village of Northbrook*, a church bought a property in an industrial zone

84. *Id.* at 1035.

85. Sts. Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin, 396 F.3d 895, 900 (7th Cir. 2005).

86. *See id.* at 901.

87. *Id.* at 898.

88. *Id.* at 901.

89. *Id.*

90. *See id.*

and had advance warning that their permit would not be granted.[91] When the church proceeded to purchase the property anyway, it did not have a substantial burden claim because the church did not have any reasonable expectation that its application would be approved.[92]

B. The Second, Fourth, and Eleventh Circuits' "Direct Coercion" Approach

The Second and Eleventh Circuits have opted to define "substantial burden" as a government regulation that "directly coerces" a religious organization to change its religious behavior.[93] This approach focuses on whether a plaintiff's behavior in their religious exercise must be modified to comply with a land-use restriction. This comes in contrast to the Seventh and Ninth Circuit's "effectively impracticable" approach, which focuses on the likely possibility that the religious institution can function at all on the property.

In *Midrash Sephardi, Inc. v. Town of Surfside*, Jewish synagogues were denied a zoning variance and special-use permit to locate in the Florida town's business district.[94] The town zoning code allowed religious organizations to locate in only one of eight zoning districts.[95] The congregation of Orthodox Jews did not use cars or other types of motorized transportation on the Sabbath.[96] The congregation argued that the zoning restrictions, which took the synagogue out of walking distance, imposed a substantial burden on their religious exercise.[97]

The Eleventh Circuit declined to implement the "effectively impracticable" standard of the Seventh and Ninth Circuits.[98] Instead, the court reasoned that "the relevant inquiry is whether and to what extent this particular requirement burdens the congregations' religious exercise."[99] The court found a substantial burden as being "akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly."[100] Thus, the court looked at whether the pressure from the land regulation "tends to force adherents to forego religious precepts or

91. *See* Petra Presbyterian Church v. Vill. of Northbrook, 489 F.3d 846, 847–48 (7th Cir. 2007).
92. *Id.* at 851.
93. *See* Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1227 (11th Cir. 2004).
94. *Id.* at 1220.
95. *Id.* at 1219.
96. *Id.* at 1221.
97. *Id.* at 1227.
98. *Id.*
99. *Id.* at 1228.
100. *Id.* at 1227.

from pressure that mandates religious conduct."[101] For the Jewish congregation, the court said that while walking a few extra blocks to the synagogue in the Floridian heat may be more difficult, particularly for older congregants, this did not make their burden "substantial."[102]

The Fourth Circuit also adopted a similar approach. The court reasoned that land-use regulations do not compel plaintiffs to "violate their beliefs" in the same way prison rules may require an inmate to violate his or her religious tenets.[103] The government does not have "absolute control" over religious institutions in the land-use context and will "rarely" force a religious institution to violate its beliefs.[104] However, a land-use restriction may prohibit a plaintiff from acting in accordance with their religious beliefs. Thus, "in the land use context, a plaintiff can succeed on a substantial burden claim by establishing that a government regulation puts substantial pressure on it to modify its behavior."[105]

The Second Circuit also adopted the directly coercive approach but attempted to be more pragmatic by spelling out several factors of what direct coercion on religious exercise looks like.[106] Neutral application of a land-use restriction is likely not a substantial burden, especially if it is related to "reasonable 'run of the mill' zoning considerations."[107] In contrast, where the law is imposed in an arbitrary, capricious, or unlawful manner, there is strong indication of a substantial burden.[108] The court noted two other indicators: "(1) whether there are quick, reliable, and financially feasible alternatives [the plaintiff] may utilize to meet [their] religious needs absent [their] obtaining the construction permit; and (2) whether the denial [of the application] was conditional."[109] If there are alternatives and the denial is not absolute, it is less likely a substantial burden exists.

C. The Dawn of the Factor-Based Analysis

In recent years, the circuit courts that had not previously defined "substantial burden" have decided against the "effectively impracticable" or "directly coercive" standards. These approaches were criticized as being

101. *Id.*
102. *Id.* at 1228.
103. Bethel World Outreach Ministries v. Montgomery Cty. Council, 706 F.3d 548, 555 (4th Cir. 2013).
104. *Id.*
105. *Id.* at 556.
106. Westchester Day Sch. v. Vill. of Mamaroneck, 504 F.3d 338, 349 (2d Cir. 2007).
107. *Id.* at 350 (quoting Midrash Sephardi, 366 F.3d at 1227-28 & n.11).
108. *Id.*
109. *Id.* at 352.

"abstract formulations" that have produced inconsistent results.[110] Instead, these circuits have opted for a "functional approach," specifying certain verifiable factors that indicate a substantial burden.[111]

The First Circuit was the first to use a factor-based test, choosing to focus on the land-use regulators' bias against religious institutions. In *Roman Catholic Bishop of Springfield v. City of Springfield*, the court considered three factors in evaluating a substantial burden claim: (1) whether the land restriction "appears to target a religion, religious practice, or members of a religious organization because of hostility to that religion itself"; (2) "whether local regulators have subjected the religious organization to a process that may appear neutral on its face but in practice is designed to reach a predetermined outcome contrary to the group's request"; and (3) "whether the land use restriction was imposed on the religious institution arbitrarily, capriciously or unlawfully."[112] The case involved a building that was designated a historical landmark *after* the church had bought it to demolish the building and construct a new facility. Despite such signs that the landmark designation was motivated by bias against the church, the court ultimately rejected the substantial burden claim. The court found that the possible religious bias in the decision-making process was not outcome determinative.[113]

The Sixth Circuit has also sought to identify factors in considering what constitutes a substantial burden; however, it has focused on the outcome of the land-use regulation as opposed to the decision-making process. In *Livingston Christian School v. Genoa Charter Township,* a Michigan nondenominational Christian school attempted to relocate from a neighboring municipality to Genoa Township.[114] The school had entered into a lease agreement with a church in Genoa Township so that the school could operate on the church's property.[115] However, after the lease was signed, the township informed the school that an amended special-use permit would be required before it could use the church's property.[116] When the church applied for a permit on behalf of the school, it was denied by the township.[117]

110. Roman Catholic Bishop of Springfield v. City of Springfield, 724 F.3d 78, 95 (1st Cir. 2013).
111. *Id.*
112. *Id.* at 96-97 (internal quotations omitted).
113. *Id.* at 99.
114. Livingston Christian Sch. v. Genoa Charter Twp., 858 F.3d 996, 998 (6th Cir. 2017), *cert. denied*, 138 S. Ct. 1696 (2018).
115. *Id.* at 999.
116. *Id.*
117. *Id.* at 999-1000.

The school then filed a complaint alleging that denying the special-use permit violated RLUIPA.[118]

The court considered three factors: (1) "whether the religious institution has a feasible alternative location from which it can carry on its mission"; (2) "whether the religious institution will suffer substantial 'delay, uncertainty, and expense' due to the imposition of the regulation"; and (3) whether "a plaintiff has imposed a burden upon itself," such as when "an institutional plaintiff has obtained an interest in land without a reasonable expectation of being able to use that land for religious purposes."[119] The court found that under these factors the religious school did not suffer a substantial burden, largely because another facility suited the school's needs in a nearby township.[120]

III. CREATING A COHERENT FACTOR-BASED SUBSTANTIAL BURDEN TEST

This Note takes the position that a factor-based analysis should be the mainstay in substantial burden analysis. By considering a variety of concrete verifiable facts that are common to substantial burdens on religious exercise, this approach offers the most clarity, flexibility, and certainty of the three tests so far suggested. It also allows the courts to tailor its approach to the facts of the particular case. The other two approaches put forth by the courts, the "effectively impracticable" and "directly coercive" standards, are problematic because they are too abstract and narrow the meaning of "substantial burden."

The effectively impracticable approach is flawed for placing too much emphasis on the term "substantial." To meet this standard, religious plaintiffs must show that land restrictions are the direct and primary cause for rendering their religious exercise "effectively impracticable."[121] This approach forces plaintiffs to prove that the land-use restriction is not just substantially burdensome but debilitating as well. The interpretation gives little relief to organizations that may face discrimination yet still have some possible means to carry out their religious exercise. As the First Circuit points out, "substantial" describes something of significant weight or force, but not necessarily to the point that the weight is disabling.[122] The approach also goes against the clear language of RLUIPA, which intentionally con-

118. *Id.*
119. *Id.* at 1004.
120. *Id.* at 1011.
121. Civil Liberties for Urban Believers v. City of Chi., 342 F.3d 752, 761 (7th Cir. 2003).
122. Roman Catholic Bishop of Springfield v. City of Springfield, 724 F.3d 78, 96 (1st Cir. 2013).

strues its terms as broadly as the terms and the Constitution allow.[123] Limiting the substantial burden provision only to cases where religious exercise is effectively impracticable narrows RLUIPA's reach dramatically.

This unwieldy approach may also present unfair challenges to regulators. As the Sixth Circuit points out, the standard "would mean that, any time a land-use regulation completely barred the religious use of a property, a substantial burden would automatically exist."[124] An automatic substantial burden would leave a zoning authority without an opportunity to demonstrate the reasons behind its plan.

The directly coercive approach is not as narrow as the effectively impracticable standard but still has similar problems. First, the approach is singular in focus, centering only on the impact of the government decision on religious exercise. It does not allow the courts to consider the reasonable expectations of a certain religious organization when it bought a property. A congregation could buy a property with every indication from the governing authority that its use would be approved but then be denied later due to an arbitrary government decision. Under the directly coercive approach, if an alternative location is available, a substantial burden does not exist since their religious exercise is not being coerced. A second problem is that the approach does not take into account the possibility of unseen discrimination that will be discussed below in the section titled "Improper Decision Making."

In comparison to the other two approaches, a factor-based analysis offers the most clarity, flexibility, and certainty to district courts, litigants, municipalities, and religious institutions in determining whether ligation is necessary. Parties are more likely to disagree over abstract formulations than over concrete factors, and hence produce more lawsuits. Instead of litigating over vague questions of what is effectively impracticable or directly coercive, a factor-based analysis allows parties to consider the factual circumstances, like the availability of alternative locations, to determine whether a substantial burden exists.

The following are factors courts can use in considering whether a substantial burden exists on religious exercise from a land-use restriction. This list is not comprehensive and should be left open for other factors to be developed by the courts as the needs of religious organizations change or become more cognizant. No factor discussed below should be considered

123. 42 U.S.C. § 2000cc-3 (2012).
124. *Livingston Christian Sch.*, 858 F.3d at 1003.

dispositive by itself, and the weight given to a particular factor may vary depending on the situation.

A. The Availability of Alternative Means or Locations

One widely cited factor is whether there are other available locations or means the religious plaintiffs can use to practice their faith. If there are no alternative means or locations available to a plaintiff to practice their faith, then there is a strong likelihood that a substantial burden exists.[125] This may mean that a religious congregation can be completely prohibited from building on their own land but that other ways to carry out their worship are still available.[126] The principle seems straightforward on its face, but the jurisprudence surrounding this factor has shown the need for more specificity and nuance.

One point of contention is whether there should be a hardline rule that a governing body must have locations available in its jurisdiction for a religious institution to meet. Free Exercise jurisprudence has generally established that if a municipality refuses to allow a religious institution to establish a place that meets its needs and there is no other available location in its jurisdiction that does not suffer from similar regulation issues, religious exercise is substantially burdened.[127] This principle is backed by the Equal Terms provision of RLUIPA, which explicitly prohibits a government from imposing a regulation that "totally excludes religious assemblies from a jurisdiction" or "unreasonably limits religious assemblies, institutions, or structures within a jurisdiction."[128]

However, the practicality of enforcing such a hardline rule, particularly in small jurisdictions, has caused courts to take a factual and functional approach, as a factor-based approach provides. For example, in *Livingston*,

125. The U.S. Supreme Court previously ruled on the importance of a zoning scheme leaving available alternative locations in the First Amendment context. In *Schad v. Borough of Mount Ephraim*, owners of a live entertainment venue with nude dancers were subject to criminal penalties under an ordinance that prohibited all live entertainment in the entire Borough of Mount Ephraim. The Supreme Court held that free expression protections require that the zoning scheme's time, place, and manner restrictions must leave open adequate alternative means, and reversed the appellate court's ruling against the venue owners. Schad v. Borough of Mount Ephraim, 452 U.S. 61, 75-76 (1981).

126. Westchester Day Sch. v. Vill. of Mamaroneck, 504 F.3d 338, 350 (2d Cir. 2007).

127. *See* Fifth Ave. Presbyterian Church v. City of N.Y., 293 F.3d 570, 575 (2d Cir. 2002) (although RLUIPA was not argued, the court still found a substantial burden on First Amendment rights when the municipality refused to allow outdoor sanctuary for the homeless to sleep when no other options were available); Westchester Day Sch. v. Vill. of Mamaroneck, 504 F.3d at 349 ("[w]hen the [religious] school has no ready alternatives, or where the alternatives require substantial 'delay, uncertainty, and expense,' a complete denial of the school's application might be indicative of a substantial burden.").

128. 42 U.S.C. § 2000cc(b)(3) (2012).

the religious school only had one available location in the township, and the closest alternative was twelve miles away in a different jurisdiction.[129] The court noted the township's relatively small size (roughly thirty square miles) and that local government jurisdictions are often arbitrarily drawn.[130] "Holding that a religious institution is substantially burdened any time that it cannot locate within such a small area . . . would be tantamount to giving religious institutions a free pass from zoning laws."[131] The court found that there could not be a substantial burden simply because there were no locations available in the township. Requiring the school children to drive an extra twelve miles to get to the alternative location would not be substantially burdensome, only "a mere inconvenience."[132] The flexibility of the factor-based analysis allowed the court to come to such a reasonable conclusion. If a jurisdiction is large, a stricter rule may be appropriate. But in the case of small townships, considering alternatives in other townships can be allowed.

Note that the availability of other locations does not allow a governing body to prohibit a house of worship if the religious institution purchased the property with a reasonable expectation that religious use would be permitted. Courts have looked at the availability of alternative locations both when disputed properties were originally purchased as well as when their applications were denied by regulating authorities.[133] In a case involving a property in a historic preservation district, the Second Circuit remanded the case back to the district court to determine whether a Jewish congregation had alternative locations available at the time of purchase, and whether the congregation reasonably believed they would be permitted to undertake the proposed modifications to the property at the time of purchase.[134] In addition, courts are more likely to disregard the availability of alternative locations if the religious organization in question has to go undergo the "delay, uncertainty, and expense of selling the plaintiff's property and finding an alternate location."[135]

The "available alternatives" factor is not limited to a lack of alternative properties. It can also mean that in the application process, there is a

129. *Livingston Christian Sch.*, 858 F.3d at 1005.

130. *Id.* at 1011.

131. *Id.* at 1010-11.

132. *Id.* at 1009.

133. Westchester Day Sch. v. Vill. of Mamaroneck, 504 F.3d 338, 352 (2d Cir. 2007).

134. Chabad Lubavitch of Litchfield Cty., Inc. v. Litchfield Historic Dist. Comm'n, 768 F.3d 183, 196 (2d Cir. 2014).

135. Bethel World Outreach Ministries v. Montgomery Cty. Council, 706 F.3d 548, 557-58 (4th Cir. 2013).

lack of alternative means to meet the government's requirements. This is often an issue when a religious organization already owns and uses a property but is seeking a modification to their permit. However, to argue that an application process leaves a religious organization with no alternatives, the plaintiff may have to show that they attempted to use the alternative means available but failed. For example, a Missouri religious homeless shelter complained that it had no alternative means when the municipality required it to collect signatures from neighboring residents, who previously signed a petition asking that the shelter's permit be revoked, in order to approve the zoning permit.[136] The court found that alternatives means did exist because the shelter did not attempt to collect the signatures for the petition, and the neighbors' attitudes toward the shelter may have changed.[137]

A lack of alternative locations or means is a compelling factor in substantial burden analysis, but its weight will vary depending on the facts of the case. In summary, here are some considerations courts can use in weighing the lack of available alternatives for the plaintiffs: whether the religious organization has ready alternatives within the jurisdiction or reasonably close surrounding areas; whether the alternatives require substantial delay, uncertainty, or expense; whether the alternative locations could be reasonably expected to meet the land regulation's requirements; and, in the case of a conditional denial of an application, whether the religious organization has sought out alternative means to fulfill the authority's requirements without compromising their own faith tenets.[138]

B. Improper Decision Making

One factor that has been the strongest point of dispute among the circuit courts is considering evidence of wrongful decision making on the part of the civil authority. The argument goes that when a municipality's actions are arbitrary, capricious, unlawful, or taken in bad faith, a substantial burden may exist, because it appears that the applicant may have been discriminated against on the basis of their status as a religious institution.[139] For example, in *Fortress Bible Church v. Feiner*, the court found that in denying the church's application, the town attempted to extort a payment in lieu of taxes from the church, ignored and then replaced their planning commissioner when he advocated on the church's behalf, and intentionally de-

136. New Life Evangelistic Ctr. v. City of St. Louis, 564 S.W.3d 665, 683 (Mo. Ct. App. Sept. 25, 2018), *transfer denied* (Nov. 5, 2018).

137. *Id.* at 684.

138. *Westchester Day Sch.*, 504 F.3d at 349.

139. Fortress Bible Church v. Feiner, 694 F.3d 208, 219 (2d Cir. 2012).

stroyed relevant evidence.[140] The court also found the municipality's reasons for forcing the church to reapply to be disingenuous.[141] This evidence indicated hostility toward the church, and the court found that there was a substantial burden.[142]

Yet this factor has been rejected by several circuits. In *Livingston*, the Sixth Circuit rejected evidence of improper decision making for two reasons.[143] First, the court argued that evidence of arbitrary, capricious, or discriminatory application of the law should only be considered in applying strict scrutiny, which occurs after a substantial burden is found,[144] and pointed out that several sister courts have confused and intermixed the two doctrines.[145] The court did not give a reason why improper decision making cannot be considered in both substantial burden analysis and strict scrutiny. It is true that some courts have confused strict scrutiny with substantial burden analysis. For example, in *Fortress Bible Church*, the court found the "compelling governmental interests" put forth by the town to be disingenuous and used this finding to conclude that a substantial burden exists.[146] This is a backwards RLUIPA analysis—the application of strict scrutiny is conditioned on finding a substantial burden. However, other courts' misapplication of RLUIPA is hardly reason for excluding improper decision making from one's own analysis, particularly in light of the discrimination concerns that will be discussed next.

The second and more compelling reason the *Livingston* court gave for excluding improper decision making was that RLUIPA already contained a prohibition on discrimination, spelled out in subsection (b)—the Equal Terms provision.[147] The court argued that allowing evidence of discrimination in substantial burden analysis would render the Equal Terms provision "superfluous."[148]

It first should be pointed out that inclusion of improper decision making in considering equal treatment does not necessarily exclude it from being considered in substantial burden analysis. But the stronger reason for

140. *Id.*
141. *Id.*
142. *Id.*
143. Livingston Christian Sch. v. Genoa Charter Twp., 858 F.3d 996, 1004-05 (6th Cir. 2017).
144. *Id.*
145. *Id.*
146. Fortress Bible Church v. Feiner, 694 F.3d 208, 219 (2d Cir. 2012).
147. 42 U.S.C. § 2000cc(b)(1)(2) (2012).
148. *Livingston Christian Sch*., 858 F.3d at 1005; Bethel World Outreach Ministries v. Montgomery Cty. Council, 706 F.3d 548, 557 (4th Cir. 2013) ("Requiring a religious institution to show that it has been targeted on the basis of religion in order to succeed on a substantial burden claim would render the nondiscrimination provision superfluous.").

including improper decision making as a factor is to bolster RLUIPA's main policy concern of prohibiting religious bias in land-use regulation. As the Seventh Circuit pointed out, considering arbitrary, capricious, or discriminatory decision-making "backstops the explicit prohibition of religious discrimination in" RLUIPA's Equal Terms provision.[149] A strong policy reason for the substantial burden test is to protect religious institutions from "subtle forms of discrimination."[150]

Subtle forms of discrimination may be especially prevalent in zoning decisions because they are often based on individualized assessments. As the Seventh Circuit points out, the task of granting or denying a zoning application is often left "to nonprofessionals operating without procedural safeguards" and acting with "standardless discretion."[151] Here the court is referring to elected officials or appointed zoning board members making mostly arbitrary assessments of the applicants, such as in deciding whether or not to grant zoning variances. This leaves more room for subtle forms of discrimination. In contrast, if the government is simply applying a generally applicable law that does not leave room for discretion, it is less likely discrimination played a role in the decision. It follows that if a land regulation is imposed based on an individualized assessment of a governing authority, as opposed to a generally applicable law, there is a stronger inference that a substantial burden exists.[152]

Unexpressed discrimination is a particularly relevant concern for small religious groups. The Seventh Circuit has pointed out the "vulnerability of religious institutions . . . to subtle forms of discrimination" in going before zoning boards, especially those that are not affiliated with mainstream denominations, like the Roman Catholic Church.[153] Such congregations do not have the political clout or large enough budgets to defend themselves in court. The Supreme Court itself expressed concern that religious minorities may be prone to religious hostility even under the guise of neutral laws in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*.[154]

The Seventh Circuit analogizes the relationship between the Substantial Burden and Equal Terms provisions as acting in the same way as "the

149. Sts. Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin, 396 F.3d 895, 900 (7th Cir. 2005).

150. *Id.*

151. *Id.*; *see also* Am. Jewish Cong. v. City of Beverly Hills, 90 F.3d 379, 386 (9th Cir. 1996).

152. Chabad Lubavitch of Litchfield Cty., Inc. v. Litchfield Historic Dist. Comm'n, 768 F.3d 183, 196 (2d Cir. 2014).

153. *Id.*

154. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 532–33 (1993).

disparate-impact theory of employment discrimination backstops the prohibition of intentional discrimination."[155] "Disparate impact theory" refers to the concept in employment law in which explicit discrimination does not need to be shown as long as it is proven that the actions disproportionately affect a protected trait. This allows a plaintiff to prevail by establishing a policy or practice that affects members of the protected group so disproportionately that courts can infer discrimination from the impact.[156] An employee can present a strong likelihood of discrimination without explicit evidence. In the same way, the substantial burden provision allows courts to consider all the factual circumstances in determining whether there is religious discrimination, even without expressed intent to discriminate. This allows the courts to sniff out subtle discrimination that would otherwise escape the analysis of the explicit prohibition of discrimination in the Equal Terms clause. The Seventh Circuit argued that if a land-use decision, such as denying a zoning variance, imposes a substantial burden on religious exercise and the decision maker cannot justify it, there is an inference that the decision was influenced by hostility to religion.[157]

Squelching discrimination and bias against religious property owners was one of the original policy purposes behind RLUIPA. The Congressional Record in passing RLUIPA shows a strong motivation for expelling religious hostility from land-use authorities.[158] Removing improper discrimination from substantial burden analysis hinders this purpose. Such evidence acts as a signal that a religious organization is experiencing unwarranted difficulty, giving notice to a court of a probable substantial burden on religious exercise. Take the example of Pastor Fred Fields (from this Note's introductory paragraph), who was told by city officials that his church was not wanted on the property he had bought. By including the city official's statements in its arguments for proving a substantial burden, Pastor Fields could demonstrate that its trouble in gaining a permit was not due to normal administrative costs and delays. Establishing a substantial burden is a necessary step in order to reach strict scrutiny. If the city's expressions of discrimination were excluded from the substantial burden analysis, it is probable that Pastor Fields would never have been able to introduce the evidence to the court under the substantial burden provision.

155. *Sts. Constantine & Helen Greek Orthodox Church, Inc.*, 396 F.3d at 900.

156. *See generally* Griggs v. Duke Power Co., 401 U.S. 424 (1971). This is usually established statistically by showing the alleged discrimination happens 80% of the time. 29 C.F.R. § 1607.4(D) (1978).

157. *Sts. Constantine & Helen Greek Orthodox Church, Inc.*, 396 F.3d at 900.

158. 146 CONG. REC. 16,698 (2000).

An overview of the caselaw on this point has indicated common facts that demonstrate signs of subtle forms of discrimination. The following are suggested factors for substantial burden analysis that indicate improper decision making on the part of the regulator: whether the land regulation appears to target a religion, religious practice, or members of a religious organization because of hostility to that religion itself;[159] whether local regulators have subjected the religious organization to a process that may appear neutral on its face but in practice is designed to reach a predetermined outcome contrary to the group's request;[160] whether the authority has demonstrated an unwillingness to deliberate over the religious organization's application;[161] and whether the regulators have repeatedly denied permits despite the plaintiff's willingness to cooperate and compromise.[162]

C. Substantial Delay, Uncertainty, and Expense

Religious organizations often have small budgets, and also cannot be expected to delay their religious practice for long periods of time. Factoring the financial impact, delay, and uncertainty involved in the land-use regulation allows the court to ensure the religious organization is not subjected to unreasonable costs. The issue lies in striking the right balance between a substantial delay or expense and what is only "incidental" or a "mere inconvenience."[163]

Surprisingly, so far in RLUIPA jurisprudence, courts have largely excluded the financial impact that land-use regulations have on religious organizations in their substantial burden analysis. The Seventh Circuit has held that the scarcity of affordable land is only an incidental burden on religious exercise.[164] According to the Fourth Circuit, "[t]he absence of affordable and available properties within a geographic area will not by itself support a substantial burden claim under RLUIPA."[165] Several courts have considered whether enforcing a restriction on land use would cause a religious institution to suffer substantial "delay, uncertainty, and expense," but this consideration only takes place after the religious organization purchases the property and faces the prospect of moving to a different loca-

159. *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 532–33.

160. Roman Catholic Bishop of Springfield v. City of Springfield, 724 F.3d 78, 95 (1st Cir. 2013).

161. Irshad Learning Center v. Cty. of DuPage, 804 F. Supp. 2d 697, 699 (N.D. Ill. 2011).

162. Sts. Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin, 396 F.3d 895, 901 (7th Cir. 2005); Guru Nanak Sikh Soc. of Yuba City v. Cty. of Sutter, 456 F.3d 978, 979 (9th Cir. 2006); Westchester Day Sch. v. Vill. of Mamaroneck, 504 F.3d 338, 349 (2d Cir. 2007).

163. *Guru Nanak*, 456 F.3d at 984-85.

164. Civil Liberties for Urban Believers v. City of Chi., 342 F.3d 752, 761 (7th Cir. 2003).

165. Andon, LLC v. City of Newport News, Va., 813 F.3d 510, 516 (4th Cir. 2016).

tion.[166] Courts have generally not considered the impact that the government's actions have on the religious organizations' budgets.[167]

The lack of consideration for the financial impact on religious organizations has produced unjust results. In *Roman Catholic Bishop of Springfield,* a church bought a building intending to demolish it and build a new facility.[168] City residents were not pleased upon learning of the plan, and officials designated the building as a historical landmark, protecting it from destruction.[169] The church could no longer use the property, and it would be difficult to sell under the new historic landmark designation. Utilizing the direct coercion approach, the court barely considered the costs of purchasing, maintaining, or selling the building, nor did it consider the church's financial viability after the government's actions.[170] The court found that no substantial burden existed, noting that "the mere existence of some expenses does not put substantial pressure on [the church] to modify its behavior."[171]

The Supreme Court itself has shown that the financial impact of a government regulation should be considered in a substantial burden analysis, as seen in the famed *Hobby Lobby v. Burwell* case, which was litigated under RFRA.[172] The Supreme Court noted the enormity of the fines imposed on Hobby Lobby if its leaders chose to adhere to their deeply held religious beliefs by not providing certain contraceptives to their employees.[173] The fines for their refusal to comply with the government mandate amounted to $1.3 million per day, or $475 million per year.[174] By compelling the decision between staying faithful to religious beliefs or facing fines, the government had substantially burdened the company's religious beliefs. The Court pointed out that if "these consequences do not amount to a substantial burden, it is hard to see what would."[175]

In the same way, when a religious organization faces a substantial financial impact by failing to comply with a land-use restriction, this should

166. *Sts. Constantine & Helen Greek Orthodox Church, Inc.*, 396 F.3d at 896; Livingston Christian Sch. v. Genoa Charter Twp., 858 F.3d 996, 1004 (6th Cir. 2017).

167. *See* Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood, Ohio, 699 F.2d 303, 307 (6th Cir. 1983); Episcopal Student Found. v. City of Ann Arbor, 341 F. Supp. 2d 691, 709 (E.D. Mich. 2004).

168. Roman Catholic Bishop of Springfield v. City of Springfield, 724 F.3d 78, 84 (1st Cir. 2013).

169. *Id.* at 98-99.

170. *Id.* at 99.

171. *Id.*

172. Hobby Lobby v. Burwell, 134 S. Ct. 2751, 2759 (2014).

173. *Id.*

174. *Id.*

175. *Id.*

be factored into the court's substantial burden analysis. However, this is not to say that a substantial burden is established merely because a law or policy makes the free exercise of religion more expensive,[176] nor do the multi-million-dollar fines in *Hobby Lobby* offer much guidance to the typical religious land-use case. However, factoring in the financial impact allows the court to consider all the circumstances of the given case.

One problem with considering financial costs is that the severity of the impact is likely to be much greater for a nonprofit religious institution than other establishments. This is particularly true for small religious minorities in poorer communities. If the financial impact on an institution is given too much weight, the Establishment Clause concerns expressed in Part I become an issue.[177] In response, a court can fall back to whether cost goes beyond what the religious organization could reasonably expect.[178] Typical costs and delays imposed on to every general land user would not be exempted. However, if the costs go well beyond what can be expected as was the case in *Roman Catholic Bishop of Springfield*, it is a strong indicator that a substantial burden exists. Thus, a proposed factor courts can use may be worded as whether the religious institution would suffer substantial delay, uncertainty, and expense beyond what could be reasonably expected.

D. Self-Imposed Burdens

If a claimed substantial burden is self-imposed by the plaintiff's organization, then this is a strong indicator that no substantial burden exists.[179] A self-imposed burden can occur if an organization purchases a property without any reasonable expectation that its use will be permitted.[180] For example, in *Andon, LLC v. City of Newport News*, a Virginia town's zoning code required that "community centers"—such as churches—be located more than 100 feet away from residential zones.[181] Despite knowledge of this zoning requirement, one church bought a property that did not comply with the code.[182] The zoning authority refused the church's zoning variance application, and the church sued under RLUIPA. The Fourth Circuit was not sympathetic to the substantial burden claim. Since the church bought the property with knowledge of the zoning issue, the

176. Civil Liberties for Urban Believers v. City of Chi., 342 F.3d 752, 762 (7th Cir. 2003).
177. *See supra* Part I.D (discussing RLUIPA's relationship with the Establishment Clause).
178. *See* Petra Presbyterian Church v. Vill. of Northbrook, 489 F.3d 846, 851 (7th Cir. 2007).
179. Andon, LLC v. City of Newport News, Va., 813 F.3d 510, 515 (4th Cir. 2016).
180. *Id.*
181. *Id.* at 512.
182. *Id.*

hardship was not imposed by governmental action, nor did the government alter a legitimate, pre-existing expectation.[183] The court held that the plaintiffs lacked a reasonable expectation to use the property as a church and that any burden on their religious exercise was self-imposed.[184]

E. Conditional Denial of an Application

Whether the denial of an application is absolute without the possibility of modification and resubmission is also an indicator that a substantial burden exists.[185] A conditional denial of a building application is likely not a substantial burden, since it leaves open the possibility of modification and resubmission.[186] To determine whether a denial is conditional or absolute, a court can look at whether the authority has classified the denial as complete, whether any required modification would itself constitute a burden on religious exercise, whether curing the problems specified by the authority would impose so great an economic burden as to make the change unworkable, and whether the board's stated willingness to consider a modified proposal is disingenuous.[187]

CONCLUSION

At the enactment of RLUIPA, a joint bipartisan statement stated that "[t]he right to assemble for worship is at the very core of the free exercise of religion. Churches and synagogues cannot function without a physical space adequate to their needs and consistent with their theological requirements. The right to build, buy, or rent such a space is an indispensable adjunct of the core First Amendment right to assemble for religious purposes."[188]

The substantial burden provision of RLUIPA was aimed to protect this right and has done so with moderate success. Of the differing approaches the courts have put forward, a flexible factor-based analysis has best served RLUIPA's original purpose without being too cumbersome on local governments. It allows courts to consider whether religious organizations had reasonable expectations when they bought their property, whether they had other alternatives, and whether there are signs of discrimination in the land

183. *Id.* at 515.

184. *Id.*

185. Chabad Lubavitch of Litchfield Cty., Inc. v. Litchfield Historic Dist. Comm'n, 768 F.3d 183, 195 (2d Cir. 2014).

186. Fortress Bible Church v. Feiner, 694 F.3d 208, 219 (2d Cir. 2012).

187. Westchester Day Sch. v. Vill. of Mamaroneck, 504 F.3d 338, 352 (2d Cir. 2007).

188. 146 CONG. REC. S7774-01 (2000).

regulators' decision making. The factors proposed by this Note do not constitute an exhaustive list, and there remains an open possibility for new factors to be proposed.[189] However, by adopting a factor-based analysis, courts have the flexibility and certainty to determine what constitutes a substantial burden in a given circumstance.

189. *See* Roman Catholic Bishop of Springfield v. City of Springfield, 724 F.3d 78, 95 (1st Cir. 2013).