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Andrew Glover

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Comments

The Pit and the Pendulum: How Far Can RLUIPA Go in Protecting the Amish?

Andrew Glover*

I. INTRODUCTION

The relationship between government and religion is in a constant state of tension and flux. In addition to the guarantees of the United States Constitution, both the federal and state governments have enacted statutes intended to preserve the separation of church and state while ensuring that religious freedoms will not be impinged. This comment will focus on one area affected by this tension: the efficacy of the Religious Land Use and Institutionalized Persons Act[1] (hereinafter "RLUIPA" or "the Act") in efforts to fight the effects of land use controls and similar ordinances on the Amish.[2]

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* J.D. Candidate, The Dickinson School of Law of the Pennsylvania State University, 2011.

1. 42 U.S.C. §§ 2000cc - 2000cc-5 (2006).

2. While some of the concerns of the Amish discussed in this comment may be germane to concerns of an incarcerated person, covered under 42 U.S.C. § 2000cc of RLUIPA, that is not the focus of this paper, and it will be not be discussed herein. Further, though arguments have been advanced in favor of interpreting or amending RLUIPA to include the concept of eminent domain, most commentators agree that, at least as currently formulated, RLUIPA, which deals with land use regulations, simply does not cover eminent domain. *Compare* The Rev'd Canon Kenneth G. Leonczyk, Jr.,

To better illustrate the process of a RLUIPA claim, I will be referencing a hypothetical throughout this comment. The protagonist of the story will be Amos, a potential client who walks into the law office of Danny Jones, Esq. Amos is an Amish farmer from Lancaster, Pennsylvania, who has been notified by his municipality that he must install a septic tank on his property. Due to the layout of his property, the septic tank will need to contain components which require electricity to work. Amos does not wish to comply because his faith prohibits him from using electricity. Further, he considers the septic system to be wasteful given his austere way of life. Can Attorney Jones successfully advocate for Amos? If not, what repercussions will there be for Amos? Whether or not Attorney Jones is successful, will there be effects on the local environment?

II. BACKGROUND

The Old Order Amish live in a manner that is far removed from the normal, everyday American life. Due to their religion, the Amish eschew many of the conveniences of modern living. This includes grid power, the ownership of automobiles, and accoutrements such as watches, jewelry, and makeup.[3] Although their lifestyle is far removed from contemporary society, the Amish themselves are not.

The Amish live within the bounds of municipalities and are subject to regulations set forth to govern all people, regardless of their religion. Among these regulations are land use controls, such as zoning ordinances. The municipal laws and regulations occasionally conflict with the Amish lifestyle. In order to resolve these differences between religion and government, legislatures and courts have created and interpreted laws that attempt to balance the competing interests in a way that is fair both to the Amish and to society at large.[4]

RLUIPA and Eminent Domain: How a Plain Reading of a Flawed Statute Creates an Absurd Result, 13 TEX. REV. L. & POL. 311 (2009) (RLUIPA should be understood to cover eminent domain), *with* Daniel N. Lerman, *Taking the Temple: Eminent Domain and the Limits of RLUIPA*, 96 GEO. L.J. 2057 (2008) (RLUIPA does not cover eminent domain); Cristina Finetti, *Limiting the Scope of The Religious Land Use and Institutionalized Persons Act: Why RLUIPA Should Not Be Amended to Regulate Eminent Domain Actions Against Religious Property*, 38 SETON HALL L. REV. 667 (2008) (RLUIPA does not cover eminent domain). This latter interpretation is textually supported by the statute, and as such RLUIPA will not, for purposes of this comment, be addressed to eminent domain. *See* 42 U.S.C. § 2000cc-5(5) (2006) ("The term 'land use regulation' means a zoning or landmark law, or the application of such a law.").

3. *See* Donald B. Kraybill, *Negotiating with Caesar*, *in* THE AMISH AND THE STATE 3, 8-12 (Donald B. Kraybill ed., 2nd ed. 2003).

4. For a discussion of the anteceding evolution of case and statutory law, see Barr v. City of Sinton, 52 TEX. SUP. CT. J. 871, *4-5 (2009).

A good place to begin the analysis of this balancing act is with the legal standard that RLUIPA was designed to emulate, the compelling interest, or strict scrutiny, test laid out by the United States Supreme Court in the 1972 case of *Wisconsin v. Yoder*.[5] This test recognizes that religious freedom is a preferred liberty and that courts will not permit encroachment on it unless the government has a compelling interest of the highest order.[6] The test also requires that a means narrowly tailored to achieve the government's ends is employed.[7]

In *Yoder*, the Court held that an Amish family could not be compelled to enroll their children in high school, as this violated Amish religious convictions.[8] In coming to this conclusion, the Court emphasized that the protections of the Free Exercise Clause only apply to liberties or beliefs that are religious in nature; secular beliefs, no matter how virtuous or dearly held, will not be protected by the clause.[9] The Court went on to find that the Amish were protected, stating: "the way of life of the Amish is not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living."[10]

This concept of a sincere religious belief is further elaborated on in other Supreme Court cases, including *Thomas v. Review Board of Indiana Employment Security Division*,[11] and *United States v. Lee*.[12] Two critical points that emerge from these cases are of particular importance in considering Amos's case. First, once an Amish person has objected to an ordinance based on religious grounds, the sincerity of that objection is beyond the Court's ken.[13] Second, it is not necessary for all

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

6. Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 895 (O'Connor, J. concurring) (1990).

7. *Id.* Another characterization of this test comes from Lee J. Zook in his article *Slow-moving Vehicles*. He characterizes this test as asking four questions: "[1] Is there a genuine, sincere religious belief? [2] Does the law infringe on the practice of religion? [3] Is the infringement justified by a compelling state-society interest? [4] Does a less-restrictive, alternative means satisfy the compelling interest?" Lee J. Zook, *Slow-moving Vehicles*, *in* THE AMISH AND THE STATE 145, 149 (Donald B. Kraybill ed., 2nd ed. 2003).

8. *See Yoder*, 406 U.S. at 234.

9. *See id.* at 215.

10. *Id.* at 216.

11. *See* Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707, 716 (1981).

12. United States v. Lee, 455 U.S. 252, 257 (1982).

13. *See* Beechy v. Cent. Mich. Dist. Health Dept., 475 F. Supp. 2d 671, 683 (E.D. Mich. 2007), *aff'd*, No. 07-1376, 2008 WL 1820816 (6th Cir. Apr. 23, 2008) ("*Lee* stands for the proposition that *once established*, the sincerity of one's religious belief cannot be questioned."). *See also Lee*, 455 U.S. at 257.

members of a religion to agree on a belief for that belief to be protected.[14]

These points are important because not all members of the Amish faith share the same beliefs.[15] As the *Yoder* Court recognized, Amish life is "regulated in great detail by the Ordnung."[16] An Ordnung is the blueprint for the expected behavior of an Amish sect.[17] It defines their ways and regulates public, private, and ceremonial behavior.[18] It is usually passed on by oral tradition and includes taboos such as filing a lawsuit, owning a television, and wearing jewelry.[19] An Ordnung's composition varies by sect and degree of restrictiveness.[20] It is for this reason that the *Thomas* and *Lee* decisions are so important. If a court tried to determine whether one Amish person's beliefs were sincere by examining whether some or all other Amish follow that belief, the Amish claimant would find the burden nearly impossible to carry.[21]

An important departure from precedent as to how Free Exercise Claims would be reviewed was made by the Supreme Court in *Employment Division, Department of Human Resources of Oregon v. Smith*.[22] In *Smith*, the Supreme Court deviated from the *Yoder* standard for Free Exercise claims, making it far more difficult for a claimant to receive strict scrutiny review.[23] Following *Smith*, the standard was that "a neutral law of general applicability that burdens religious exercise will receive deferential review unless the law lends itself to individualized government assessments, allows for a system of individualized exemptions, or implicates hybrid rights."[24] Thus, after *Smith*, the

14. *See Thomas*, 450 U.S. at 715-16 ("[T]he guarantee of free exercise is not limited to beliefs which are shared by all members of a religious sect. Particularly in this sensitive area, it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation.").

15. *See* Kraybill, *supra* note 3, at 10.

16. Wisconsin v. Yoder, 406 U.S. 210 (1972).

17. *See* Kraybill, *supra* note 3, at 10.

18. *Id.*

19. *Id.*

20. *Id.*

21. RLUIPA recognizes that a similar question which may arise is how central to a faith the belief that a claimant says was burdened is. The question may be asked: If the belief is only incidental to faith, and not central thereto, is there really an objection to be made that the claimant's faith has been burdened? In answer, RLUIPA defines a religious exercise as including "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A) (2006). *See also* Daniel N. Lerman, *Taking the Temple: Eminent Domain and the Limits of RLUIPA*, 96 GEO. L.J. 2057 (2008).

22. *See* Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872 (1990).

23. *Id.*

24. Lerman, *supra* note 2, at 2091.

government would be relieved of the burdens of the strict scrutiny test: proving that they had a compelling interest, and that the means they employed of achieving this interest were the least restrictive. This is a clear departure from *Yoder* and is far more deferential to the government.

In response to the new test delineated by *Smith*, Congress passed the Religious Freedom Restoration Act[25] (hereinafter "RFRA"), a bill intended by Congress to return the court's standard of review for Free Exercise issues to a strict scrutiny test.[26] However, in *City of Boerne v. Flores*, the United States Supreme Court found that RFRA was overly broad and not suitably adapted to the wrongs that it sought to address.[27] The Court therefore held that RFRA was invalid legislation as applied to the states.[28] As a result, the test laid out in *Smith* remained the standard with regard to state actions. RFRA was not, however, held unconstitutional as applied to the federal government and so survives as a limit on federal actions.[29]

In the latest salvo in the battle, Congress enacted RLUIPA, another bill intended to return judicial review of Free Exercise issues to the strict scrutiny test of *Yoder*. This Act has thus far survived constitutional challenges.[30] There are several ways in which RLUIPA is more narrowly tailored than RFRA.[31] Unlike RFRA, RLUIPA is not a law of broad applicability; instead, it applies only to the specific issues of religious land use[32] and institutionalized persons.[33] When dealing with religious land use, there are two separate subsections under which a claim may be brought: the Substantial Burden clause,[34] and the Discrimination and Exclusion clause.[35]

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25. 42 U.S.C. §§ 2000bb(a)(4)-(5) (2006).

26. *Id.* § 2000bb(b)(1) ("The purposes of this chapter are (1) to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened. . . .").

27. *See* City of Boerne v. Flores, 521 U.S. 507, 529-36 (1997).

28. *See id.* at 532 (Remedial legislation under § 5 "should be adapted to the mischief and wrong which the [Fourteenth] [A]mendment was intended to provide against." RFRA is not so confined (quoting *Civil Rights Cases,* 103 U.S. 3, 13 (1883))).

29. Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 424, n.1 (2006).

30. In *Cutter v. Wilkinson*, 349 F.3d 257 (6th Cir. 2003), *rev'd*, 544 U.S. 709 (2005), the Court of Appeals for the Sixth Circuit found that 42 U.S.C. § 2000cc-1 (2000) of RLUIPA violated the Establishment Clause. However, the United States Supreme Court in *Cutter v. Wilkinson*, 544 U.S. 709 (2005), reversed the appellate court, holding that RLUIPA was constitutional.

31. *Compare* 42 U.S.C. §§ 2000cc-2000cc-5 (2006) *with* 42 U.S.C. §§ 2000bb-2000bb-4 (2006).

32. 42 U.S.C. § 2000cc.

33. *Id.* § 2000cc-1.

34. *Id.* § 2000cc(a).

35. *Id.* § 2000cc(b).

A. RLUIPA's Substantial Burden Clause

The Substantial Burden clause, at subsection (a), is generally a better vehicle for individuals seeking RLUIPA's protections than subsection (b)'s Discrimination and Exclusion clause. This is largely because, while both subsections expressly consider assemblies and institutions, subsection (a) considers individual persons as well.[36] Under subsection (a), RLUIPA is only applicable if federal funding is being used,[37] interstate commerce is affected,[38] or individualized determinations are being made.[39] When these conditions are met and RLUIPA's protections are triggered, the Act requires that the government show two things in order to impose a land use regulation in spite of the substantial burden on religious exercise:[40] 1) that the regulation furthers a compelling government interest;[41] and 2) that the least restrictive means was used to further that interest.[42]

1. Substantial Burden

The term "substantial burden" is not explicitly defined in the statute and, as such, has engendered much debate both in and among the Circuits.[43] In Amos's jurisdiction, the Third Circuit, the case of *Washington v. Klem* provides a good working definition of this term.[44] The *Klem* court examined precedent, legislative intent, and statutory construction, adopting a combination of the definitions put forth in two former United States Supreme Court cases.[45] The *Klem* court held that:

> For the purposes of RLUIPA, a substantial burden exists where: 1) a follower is forced to choose between following the precepts of his religion and forfeiting benefits otherwise generally available to other [people] versus abandoning one of the precepts of his religion in order to receive a benefit; OR 2)

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36. *Id.* § 2000cc(a)(1).
37. *See id.* § 2000cc(a)(2)(A).
38. *See* 42 U.S.C. § 2000cc(a)(2)(B).
39. *See id.* § 2000cc(a)(2)(C).
40. *See id.* § 2000cc(a)(1).
41. *See id.* § 2000cc(a)(1)(A).
42. *See id.* § 2000cc(a)(1)(B).
43. *See* Patricia E. Salkin, *The Genesis of RLUIPA and Federalism: Evaluating the Creation of a Federal Statutory Right and Its Impact on Local Government*, 40 URB. LAW. 195, 225-34, Appendix (2008); Edward M. McClenathan, *Swinging the Big Stick: How the Circuits Have Interpreted RLUIPA and What Practitioners Need to Know*, 36 REAL ESTATE L.J. 405 (2008).
44. Washington v. Klem, 497 F.3d 272 (Pa. 2007).
45. *Id.* at 278-281.

> the government puts substantial pressure on an adherent to substantially modify his behavior and to violate his beliefs.[46]

Under this notion of substantial burden, Amos and his fellow Amish are particularly well situated to benefit from RLUIPA. This is because the courts have recognized that, for the Amish, faith and life are difficult to separate.[47] One Amish man puts the point very succinctly: "[o]ur religion is inseparable from a day's work, a night's rest, a meal, or any other practice."[48] The courts have on several occasions taken notice of how deeply ingrained the precepts of the Amish religion are in the daily lives and actions of its adherents.[49]

Due to this interdependency, RLUIPA applies to the Amish in a somewhat unique way: acts by the government that would not affect the belief system of most religions almost inherently affect the religious belief system of the Amish. When an Amish claimant is subject to land use regulations that predicate the granting of a zoning variance or building permit upon accession to trappings of the modern world, he is placed squarely within the *Klem* definition of substantial burden.

As an example: for most people, installing a septic system on a rural plot of land on which they intend to build a home is not only necessary, but desirable. Modern conveniences such as indoor plumbing, dishwashers, and washing machines are a part of everyday life. These commodities are seen as ranging between desirable amenities and bare necessities. For the Amish, they are neither. Adherents to any particular religion could claim that the regulation regarding a septic system was a financial burden, but few religions are in the position that the Amish are. For the Amish, the burden can have little to do with money, and instead have everything to do with the modes of modernity required to live up to the regulation.

2. Individualized Assessment

Another hurdle Attorney Jones may have to navigate is the imprecision of the term "individualized assessments" included in

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46. *Id.* at 280.

47. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 216 (1972); Commonwealth v. Miller, No. 0624-2002, 2002 WL 31426193, at *5-6 (Pa. Commw. Ct. June 6, 2002).

48. Kraybill, *supra* note 3, at 16-17.

49. *See Yoder*, 406 U.S. at 216 ("[T]he record in this case abundantly supports the claim that the traditional way of life of the Amish is not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living."); *Miller*, 2002 WL 31426193, at *5-6 ("The court admires the lifestyles of this community and accepts that the sincere religious beliefs of these individuals have caused them to follow a life that would be much too difficult for many outside that community to adopt.").

subsection (a).[50] Just as with the term "substantial burden," "individualized assessments" are not defined in RLUIPA[51] and different interpretations of the term exist among the Circuits.[52] One such interpretation is exemplified in the Supreme Court of Connecticut case *Cambodian Buddhist Society of Connecticut, Inc. v. Planning & Zoning Commission*.[53]

Previously, in *Freedom Baptist Church of Delaware County v. Township of Middletown*, a Pennsylvania federal district court had held that "[n]o one contests that zoning ordinances must by their nature impose individual assessment regimes. That is to say, land use regulations through zoning codes necessarily involve case-by-case evaluations of the propriety of proposed activity against extant land use regulations."[54] Despite this holding, the Supreme Court of Connecticut found in *Cambodian Buddhist Society* that a zoning regulation, as long as it applies to all property owners in a jurisdiction, is not an individualized assessment for purposes of RLUIPA.[55]

The *Cambodian Buddhist Society* court, in fact, went so far as to say that the individualized assessment category for jurisdiction under RLUIPA could only be met "when the government has the discretion to apply a land use regulation in a manner that discriminates against religious institutions in general or against a particular religion or denomination."[56] Under this interpretation, only land use regulations that permit discrimination based on religion would count as individualized assessments for purposes of RLUIPA, and only laws that are facially discriminatory against religion would trigger RLUIPA's protections.

The view taken by the court in *Cambodian Buddhist Society* is detrimental to those seeking to make use of the protections that RLUIPA offers because an individualized assessment is one of the three triggers which make the Substantial Burden prong of RLUIPA applicable.[57] It may, in fact, be the trigger most easily recognized by those who would seek to use RLUIPA because it may be difficult for an individual landowner to know if federal funding is involved, or if the burden would

50. 42 U.S.C. § 2000cc(a)(2)(C) (2006).

51. *Id.*

52. *See* Patricia E. Salkin, *The Genesis of RLUIPA and Federalism: Evaluating the Creation of a Federal Statutory Right and Its Impact on Local Government*, 40 URB. LAW. 195, 238-46 (2008).

53. Cambodian Buddhist Soc'y of Conn., Inc. v. Planning & Zoning Comm'n, 941 A.2d 868 (Conn. 2008).

54. Freedom Baptist Church of Del. County v. Twp. of Middletown, 204 F. Supp. 2d 857, 868 (E.D. Pa. 2002).

55. *See Cambodian Buddhist Soc'y*, 941 A.2d at 892.

56. *Id.*

57. *See* 42 U.S.C. § 2000cc(a)(2) (2006).

affect commerce among the states. People in Amos's situation would, however, likely know that an individualized assessment had been made in their particular circumstance if a zoning board had ruled against them. While *Cambodian Buddhist Society* has not been overruled, there has been negative treatment of the decision and an election not to follow its logic in another jurisdiction.[58]

In *Trinity Assembly of God of Baltimore City, Inc. v. People's Counsel for Baltimore County*, the court found the reasoning of the *Cambodian Buddhist Society* court to be incorrect because separate provisions in RLUIPA prevent a zoning authority from treating religious and non-religious groups differently.[59] In fact, a separate clause under the Discrimination and Exclusion subsection of RLUIPA makes it clear that a municipality never has the discretion to discriminate against religion by stating that "[n]o government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination."[60]

This language is a match to the *Cambodian Buddhist Society* court's reading of the RLUIPA provision on individual assessment: both would construe a provision of the statute to say that it is impermissible for a municipality to discriminate based upon religion.[61] If the *Cambodian Buddhist Society* court's interpretation was correct, one of the two provisions would be rendered mere surplusage. Such a result would not fit with a court's duty "to give effect, if possible, to every clause and word of a statute."[62] Thus, the *Cambodian Buddhist Society* court's reading of the statute should be disfavored and courts should, instead, recognize land use regulations as examples of individual assessment, as the court did in *Freedom Baptist Church*.[63] Attorney Jones should look to make use of this argument, particularly since the *Freedom Baptist Church* case would be more authoritative in his Third Circuit court than would *Cambodian Buddhist Society*.

B. RLUIPA's Discrimination and Exclusion Clause

Unlike subsection (a), RLUIPA's Discrimination and Exclusion subsection, subsection (b), applies solely to religious assemblies and

58. *See* Trinity Assembly of God of Balt. City, Inc. v. People's Counsel for Balt. County, 962 A.2d 404 (Md. 2008).

59. *See id.* at 426.

60. 42 U.S.C. § 2000cc(b)(2).

61. *See Cambodian Buddhist Soc'y*, 941 A.2d at 892.

62. Ali v. Fed. Bureau of Prisons, 552 U.S. 214, 237 (2008) (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)).

63. Freedom Baptist Church of Del. County v. Twp. of Middletown, 204 F. Supp. 2d 857 (E.D. Pa. 2002).

institutions.[64] Subsection (b) mandates that no government shall implement a land use regulation that: 1) treats a religious assembly or institution on less than equal terms with a non-religious counterpart;[65] 2) discriminates against an assembly or institution on the basis of religion;[66] or 3) totally excludes[67] or 4) unreasonably limits[68] a religious assembly, institution, or structure within its jurisdiction.

There is a disagreement among the Circuits as to which standard should be applied to the Discrimination and Exclusion subsection.[69] One central point of this interpretive problem is whether this subsection is governed by the strict scrutiny test, as the Substantial Burden section is, or by strict liability.[70]

The Eleventh Circuit has held that strict scrutiny is the proper test, whether the action is brought under the Substantial Burden subsection or the Discrimination and Exclusion subsection.[71] As applied in the Third Circuit, however, the Discrimination and Exclusion subsection is viewed as different and separate from the substantial burden test.[72] Since the Discrimination and Exclusion subsection does not contain any language about substantial burden, the Third Circuit interpretation is that this standard does not apply to actions brought thereunder.[73] Instead, the court believes that the analysis should be performed under a strict liability test.[74]

Under this strict liability analysis, a plaintiff claiming under the RLUIPA Discrimination and Exclusion clause must prove:

> (1) it is a religious assembly or institution, (2) subject to a land use regulation, which regulation (3) treats the religious

64. *See* 42 U.S.C. § 2000cc(b)(1).
65. *See id.* § 2000cc(b)(1).
66. *See id.* § 2000cc(b)(2).
67. *See id.* § 2000cc(b)(3)(A).
68. *See id.* § 2000cc(b)(3)(B).
69. *See* Patricia E. Salkin, *The Genesis of RLUIPA and Federalism: Evaluating the Creation of a Federal Statutory Right and Its Impact on Local Government*, 40 URB. LAW. 195, 246-51 (2008).
70. *See* Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch, 510 F.3d 253, 269 (3d Cir. 2007), *cert. denied*, 128 S. Ct. 2503 (2008).
71. *See* Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1232 (11th Cir. 2004).
72. *See Lighthouse*, 510 F.3d at 269 ("The land-use provisions of RLUIPA are structured to create a clear divide between claims under section 2(a) (the Substantial Burdens section) and section 2(b) (the Discrimination and Exclusion section, of which the Equal Terms provision is a part).").
73. *See id.* ("Since the Substantial Burden section includes a strict scrutiny provision and the Discrimination and Exclusion section does not, we conclude this 'disparate exclusion' was part of the intent of Congress and not an oversight.").
74. *See id.* ("We hold that RLUIPA's Equal Terms provision operates on a strict liability standard; strict scrutiny does not come into play.")

> assembly on less than equal terms with (4) a nonreligious assembly or institution (5) that causes no lesser harm to the interests the regulation seeks to advance.[75]

Application of this standard under the Discrimination and Exclusion subsection may prove favorable to the Amish in the Third Circuit in a situation similar to the one in *State v Bontrager*,[76] which will be discussed further, below.

Thus, the strict scrutiny test survives in the areas of 1) federal action, under RFRA; 2) the Substantial Burden category, and perhaps the Discrimination and Exclusion category, of religious land use and institutionalized persons, under RLUIPA;[77] and 3) individualized assessments and hybrid rights, under *Smith*. For other Free Exercise claims, the more deferential *Smith* neutral burden standard applies.

III. AMOS'S CLAIM

A. Can Amos Claim the Protections of RLUIPA?

Returning to Amos and his Lancaster farm, one of the first and most important questions that Attorney Jones will consider is whether Amos will be able to proceed under the strict scrutiny test, as embodied by RLUIPA, or whether he will be forced to qualify for protection under the more difficult *Smith* test. To qualify under RLUIPA, Amos will have to first show prima facie evidence that an individualized assessment[78] has been performed and he has thereby been burdened. Then, Amos would bear the burden of persuasion as to whether or not a substantial burden has been placed upon him.[79] The burden of persuasion of all other elements of the claim would fall on the government.[80] In addition to the definitional hurdles that Amos will have to overcome, as laid out above, case law suggests further impediments of which Attorney Jones will have to be wary.

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75. *Id.* at 270.

76. *See* State v. Bontrager, 897 N.E.2d 244 (Ohio Mun. 2008).

77. Alternately, the strict liability test may apply to the Discrimination and Exclusion section, as discussed above.

78. Or, in the alternative, he must prove 1) that the burden was placed on him by a program receiving government funding, or 2) that the burden affected interstate commerce. *See* 42 U.S.C. §§ 2000cc(a)(2)(A)-(a)(2)(B) (2006).

79. *See id.* § 2000cc-2(b).

80. *See id.* ("If a plaintiff produces prima facie evidence to support a claim alleging a violation of the Free Exercise Clause or a violation of section 2000cc of this title, the government shall bear the burden of persuasion on any element of the claim, except that the plaintiff shall bear the burden of persuasion on whether the law (including a regulation) or government practice that is challenged by the claim substantially burdens the plaintiff's exercise of religion.").

There have been a few cases[81] where the Amish have brought a challenge based on just the problem that Amos has presented: how to deal with a municipality's septic system demands.[82] The courts have dealt with this issue in different ways. In *Liberty Road Christian School v. Todd County Health Department*, the court examined a private Mennonite[83] school that was being sued in civil court by the health department.[84] The health department complained that, among other things, the school lacked an appropriate septic system.[85] The health department was therefore seeking a temporary restraining order and a permanent injunction to force the school to comply with certain provisions of the health code.[86] The school tried to use RLUIPA to shield itself from the health department's attack, but the court was not swayed. Under the facts of this case, the court found that RLUIPA was inapplicable because a "school sanitation law is not a land use regulation."[87]

Beechy v. Central Michigan District Health Department is another case which is centered on septic tanks and the Amish.[88] In *Beechy*, the Amish plaintiffs objected to having to install a septic tank of the size

81. Due to the concept of *Gelassenheit*, the Amish rarely bring lawsuits. Septic tanks are one of the few subjects that have a body of land use law which involves the Amish. *Gelassenheit* is a core principal of Amish faith, and is centered on submission. As Dr. Kraybill explains "the German word means submission, or yielding to a higher authority. It entails self-surrender, resignation to God's will, yielding to others, self-denial, contentment, and a quiet spirit. . . . The meek spirit of Gelassenheit[] [is] modeled after the suffering Jesus who refused to resist his adversaries. Embracing the stance of Gelassenhiet, the Amish avoid using the law to protect their rights or to force others to comply with their contractual obligations." Kraybill, *supra* note 3, at 3, 10-11.

82. *See* Beechy v. Cent. Mich. Dist. Health Dept., 475 F. Supp. 2d 671 (E.D. Mich. 2007), *aff'd*, No. 07-1376, 2008 WL 1820816 (6th Cir. Apr. 23, 2008); Liberty Road Christian School v. Todd County Health Dept., No. 2004-CA-001583-MR, 2005 WL 2240482 (Ky. Ct. App. Sept. 16, 2005); State v. Bontrager, 897 N.E.2d 244 (Ohio Mun. 2008); Elizabeth Place, *Land Use*, *in* THE AMISH AND THE STATE 191, 203-5 (Donald B. Kraybill ed., 2nd ed. 2003).

83. The Amish and the Mennonites both arose from the Swiss Anabaptists. They share many beliefs and practices, and are similar in their devotion to religious ideals which separate them from the modern world. Professor Kraybill characterizes the Amish and Mennonites as religious cousins and points out that they often cooperate in the construction and administration of their private schools. *See* Kraybill, *supra* note 3, at 6. In accordance with Professor Kraybill's statements, the school at issue in this case is referred to alternately as a Mennonite and an Amish school. *Liberty Road*, 2005 WL 2240482, at * 1, * 2. As such, this case is germane to a discussion which focuses on the Amish.

84. *See Liberty Road*, 2005 WL 2240482.

85. *See id.* at * 1.

86. *See id.*

87. *Id.* at * 5.

88. Beechy v. Cent. Mich. Dist. Health Dept., 475 F. Supp. 2d 671 (E.D. Mich. 2007), *aff'd*, No. 07-1376, 2008 WL 1820816 (6th Cir. Apr. 23, 2008).

required by the applicable ordinance.[89] Similar to the *Liberty Road* court, the *Beechy* court found that RLUIPA was inapplicable.[90] The important distinction between the two cases is *why* RLUIPA was held inapplicable. Unlike in *Liberty Road*, it was not argued in *Beechy* that the ordinance was outside the scope of RLUIPA. Instead, the court found the Act inapplicable because the plaintiffs had not argued against the installation of the septic system based on religious grounds, but rather on financial ones.[91]

The *Beechy* court acknowledged that the plaintiffs had made mention of their religion, but found that this was only in support of why the septic tank was not necessary.[92] Critically, the plaintiffs never claimed that the installation of the tank, in and of itself, would burden their religion.[93] As such, the complaint failed because, as the *Yoder* court stated and the *Beechy* court acknowledged:

> [I]f the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself at Walden Pond, their claims would not rest on a religious basis. Thoreau's choice was philosophical and personal rather than religious, and such a belief does not rise to the demands of the Religion Clauses.[94]

The court found that the plaintiffs' reference to religion, a concept of "temptation to the world," was offered as an explanation for why the plaintiffs did not need a larger tank, and nothing more.[95] In other words, the concern was secular. Without a specific statement, there was no argument presented that the septic tank requirement burdened the plaintiffs' religious practice. Thus, RLUIPA was held inapplicable.[96]

B. If Amos Can Claim RLUIPA's Protection, Will it be Enough?

In the previous two examples, the courts found RLUIPA inapplicable; however, not all courts have come to that conclusion. In *State v Bontrager*, the Amish defendant's objection to putting in a septic system was different than in the above cases.[97] Under the applicable

89. *See id.* at 672.
90. *See id.* at 683-4.
91. *See id.*
92. *See id.* at 684.
93. *See id.*
94. *Id.* at 682 (quoting Wisconsin v. Yoder, 406 U.S. 205, 215-16(1972)).
95. *See Beechy*, 475 F. Supp. 2d at 684.
96. *See id.*
97. The court in this case did not analyze under RLUIPA, but instead under the Ohio Constitution, which had adopted the Free Exercise Clause compelling interest test that

statue, the defendant would have been forced to install, as a portion of his septic system, a device that required electricity.[98] The defendant's particular sect did not allow for the use of electricity, and if he installed this device he would have been expelled from the church.[99]

The *Bontrager* court not only found that there was a genuine religious belief that was seriously burdened by the ordinance at issue, but also that the government did have a compelling interest: preventing untreated sewage from working its way into the groundwater.[100] The remaining question, then, was whether or not the regulation was the least-restrictive means necessary.[101] The court found that there was no less-restrictive means by which the state could accomplish its compelling interest because all the devices that satisfied the state's requirements needed electricity.[102] In this case, the government carried its burden and the defendant was found liable.[103] As *Bontrager* illustrates, it is not enough for Amos to have a case that is properly considered under RLUIPA. The strict scrutiny test is a balancing act that must weigh the burden on the claimant against the burden on society.

Liberty Road, *Beechy*, and especially *Bontrager* illustrate that there are some relatively fixed and determinable end points for how far the protections of the Substantial Burdens clause of RLUIPA are likely to be extended by the courts. To summarize these three cases, subsection (a) of RLUIPA will not apply if: 1) the court characterizes the land use issue in question as being more properly subject to some area of law other than land use regulations,[104] or 2) the party seeking to invoke RLUIPA does not specifically claim that the land use in question violates

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RFRA and RLUIPA were meant to put back in force. As such, the court's decision is germane to a discussion of RLUIPA. *See* State v. Bontrager, 897 N.E.2d 244, 246 (Ohio Mun. 2008).

98. *See id.*

99. *See id.* at 247.

100. *See id.* ("The state's interest in enforcing the septic-system regulations is illustrated by the testimony that the defendant's present septic-system does not have enough land available for an 'on-lot' leach line system and that it discharges into a ravine/stream. This court finds that the state's interest in preventing the discharge of untreated septic/sewage from being washed downstream in the surface waters and into the groundwater is compelling.").

101. *See id.*

102. *See id.* ("Finally, there appears to be no less restrictive means of complying with the regulation. The state's witness testified that all of the off-lot systems with aerators currently available require electric service.").

103. *See id.* at 248.

104. *See* Liberty Road Christian School v. Todd County Health Dept., No. 2004-CA-001583-MR, 2005 WL 2240482(Ky. Ct. App. Sept. 16, 2005).

their religion.[105] Further, if RLUIPA does apply, the government's burden may be substantial, but it is not insurmountable.[106]

C. *Results of a Decision Adverse to Amos's Interests*

If RLUIPA is determined to be either satisfied or inapplicable and a court decision goes against Amos's interests, he will be faced with a difficult choice. He must choose between violating the law, violating his faith, or leaving the jurisdiction. Each is problematic and carries with it several negative implications. Violating the law is an untenable choice, as the government is likely to continue to prosecute him for his violations of the law and court orders. Therefore, Amos will likely have to exercise one of his other two choices.

If Amos chooses to violate his faith, two serious consequences are readily shown. First, Amos will have been forced to do this at the behest of the government. As the *Klem* court stated, this is indeed a serious burden.[107] On a more personal level, Amos also faces very real consequences in his own community. Were the decision to go against him, one possible result is that Amos's sect would meet and modify their Ordnung to conform with the government's requirement.[108] However, if this does not happen, then Amos would be in violation of the fundamental tenets of his society and subject to discipline therein.[109] The punishment may only be a public confession of the violation, but can extend from there to include excommunication, or even shunning.[110] A community member who is shunned is cast out by his society. Members in good standing are expected to restrict all communications and transactions with the shunned individual.[111]

The last option is for the claimant to move to an area which is more tolerant of his beliefs and practices.[112] This outcome is problematic in several ways. First, there are the practical difficulties associated with moving that everyone faces. For the Amish, this is compounded by the individuals' inter-reliance on the community of which they are a part.[113]

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105. *See* Beechy v. Cent. Mich. Dist. Health Dept., 475 F. Supp. 2d 671 (E.D. Mich. 2007), *aff'd*, No. 07-1376, 2008 WL 1820816 (6th Cir. Apr. 23, 2008).

106. *See Bontrager*, 897 N.E.2d 244.

107. *See* Washington v. Klem, 497 F.3d 272, 280 (Pa. 2007).

108. *See* Kraybill, *supra* note 3, at 10-11.

109. *See id.*

110. *See id.*

111. *See id.* at 11.

112. The Amish have said that enforcement of an ordinance would force them to vacate an area and have in fact moved out of the area. *See* Place, *supra* note 82, at 205; Commonwealth v. Miller, No. 0624-2002, 2002 WL 31426193, at *19-20 (Pa. Commw. Ct. June 6, 2002); Zook, *supra* note 7, at 152.

113. *See* Kraybill, *supra* note 3, at 8-9.

Further, the Ordnung will vary between communities,[114] so an Amish family looking to relocate would either have to find an Ordnung that closely matched their own beliefs, or again modify their beliefs to fit into the new community.

The option of moving highlights not only the personal problems that a claimant may face, but also two other very important issues. The first issue returns to the Discrimination and Exclusion clause of RLUIPA, discussed above.[115] The second issue is the other side of the environmental problem: what happens to the land if the Amish choose to leave repressive municipalities?

1. Moving and the Discrimination and Exclusion Subsection

> [T]he danger to the continued existence of an ancient religious faith cannot be ignored simply because of the assumption that its adherents will continue to be able, at considerable sacrifice, to relocate in some more tolerant State or country or work out accommodations under threat of criminal prosecution. Forced migration of religious minorities was an evil that lay at the heart of the Religion Clauses.[116]

Consider the facts of *Bontrager*. In that case, the sect of Amish involved specifically forbade the use of electricity in their Ordnung.[117] The court found that the belief was religious in nature.[118] By analyzing under the strict scrutiny test, the court found that there was a substantial burden,[119] the state did have a compelling interest,[120] and the means used were the least restrictive possible.[121] Analyzed under strict scrutiny, as subsection (a) of RLUIPA's land use provisions is, and as the Eleventh Circuit analyzed subsection (b), the case is over. The state has carried its burden, high though it may be, and the Amish will be forced to comply with the regulation or leave.

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114. *See id.* at 10-11.

115. *See* 42 U.S.C. § 2000cc(b)(3)(B) (2006). This same inquiry can also be fruitfully pursued under the Free Exercise Clause, U.S. CONST. amend. I; however, such an inquiry goes beyond the scope of this comment.

116. Wisconsin v. Yoder, 406 U.S. 205, 218 n.9 (1972).

117. *See* State v. Bontrager, 897 N.E.2d 244, 246 (Ohio Mun. 2008).

118. *See id.* at 247 ("The court notes that the defendant joined this particular church two years ago when he married and moved onto this particular piece of property. Nevertheless, he was willing to subject himself to this prosecution rather than violate that particular tenant of his church. Thus, the court finds that the defendant's religious beliefs in this instance are sincerely held.").

119. *See id.*

120. *See id.*

121. *See id.*

Under the Discrimination and Exclusion subsection as interpreted in the Third Circuit, however, the Amish have a different avenue of argument. If a particular action is forbidden to the Amish, as in *Bontrager*, or to Amos by his Ordnung, it is also forbidden to every other member of that sect of the Amish. As such, a decision faced by any member of that sect is a decision that is ultimately faced by many within the sect, as any member may be subject to violating the ordinance in the same manner. Certainly, a land use regulation that would force the majority of an Amish community to either change a fundamental tenet of their religion or move from the area unreasonably limits a religious assembly.[122] Such an unreasonable limit is expressly prohibited by RLUIPA's Discrimination and Exclusion clause.[123]

To determine whether those circumstances, and Amos's, would trigger RLUIPA's subsection (b) protections, the court would examine whether the group:

> (1) . . . is a religious assembly or institution, (2) subject to a land use regulation, which regulation (3) treats the religious assembly on less than equal terms with (4) a nonreligious assembly or institution (5) that causes no lesser harm to the interests the regulation seeks to advance.[124]

Certainly, element (1) of the above test is met as the Supreme Court has expressly noted that the Amish are a deeply religious group.[125] Element (2) is also almost certainly met as the septic tank regulation is what engendered the case.[126] Elements (3), (4), and (5) may present a problem, but may be met, as long as two important facts are remembered and argued to the court.

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122. This language is drawn from 42 U.S.C. § 2000cc(b)(3)(B), and it is on this section that I have chosen to concentrate my argument. However, 42 U.S.C. § 2000cc(b)(3)(A) may also be applicable, especially in a factual scenario such as this because causing an entire sect to move is to totally exclude them from a jurisdiction. I have chosen to concentrate on § 2000cc(b)(3)(B) because the "totally excludes" language of § 2000cc(b)(3)(A) may be open to arguments that a group is not totally excluded if they can, for instance, move to some small corner of the jurisdiction which is totally unsuited for their purposes, or is alternately not realistically available. *See, e.g.* City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986).

123. *See* 42 U.S.C. § 2000cc(b)(3)(B).

124. Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch, 510 F.3d 253, 270 (3d Cir. 2007), *cert. denied*, 128 S. Ct. 2503 (2008).

125. Wisconsin v. Yoder, 406 U.S. 205, 216 (1972).

126. I say almost certainly to allow for any potential Circuit split as to the definition of what is and is not a land use regulation.

First, discrimination, and its attendant unequal treatment, is often hidden behind the guise of a perfectly legitimate purpose.[127] Second, where the effect of even a facially neutral law is felt more significantly by any one group than all other groups, the terms can still be less than equal, even if no intentional discrimination is present.[128] As such, the result of *Bontrager* may well have been different and the Amish there, as well as Amos here, may have been able to avoid putting in the septic systems required by the municipality.[129]

This potential difference in results based on the *Bontrager* facts highlights the balancing act being performed between the state's interest and individual rights. Surely, controlling the waste in a municipality is an important concern. Reducing effluent pollution in the waterways or unpleasant odors is a benefit. However, forcing the Amish to choose between their beliefs and their homes is a significant harm, which cannot be lightly brushed aside. Further, the balancing act may impact not only the rights of the parties to the action, but may also have unintended consequences for the municipality.

2. Moving and the Effects on the Environment

To highlight the problems that a municipality may face, again consider Amos's situation. In Lancaster, Amos's hometown, the Amish are vitally involved in the life of the city. Not only do they own, operate, and otherwise contribute to farmer's markets, but they also own furniture stores, quilt stores, and other businesses, large and small. Moreover, the area refers to itself as "Amish Country."

The local hotels are named to draw attention to the Amish presence; for instance, the "AmishView Inn & Suites," the "Amish Lanterns Motel," and "Comfort Suites Amish Country." All of these establishments boast of their proximity to Amish farms and some even offer buggy rides.[130] If Lancaster were to create a land use ordinance that

127. *See* Patricia E. Salkin, *The Genesis of RLUIPA and Federalism: Evaluating the Creation of a Federal Statutory Right and Its Impact on Local Government*, 40 URB. LAW. 195, 244 (2008).

128. *See* River of Life Kingdom Ministries v. Village of Hazel Crest, 611 F.3d 367, 387 (7th Cir., 2010); Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993).

129. As with many such proceedings, *Beechy* did not involve only one Amish party. This case was brought with five named Amish plaintiffs as well as a general unnamed class of similarly situated Amish persons. *See* Beechy v. Cent. Mich. Dist. Health Dept., 475 F. Supp. 2d 671 (E.D. Mich. 2007), *aff'd*, No. 07-1376, 2008 WL 1820816 (6th Cir. Apr. 23, 2008).

130. *See* AmishView Inn & Suites, http://www.amishviewinn.com/ (last visited Dec. 4, 2010); Amish Lanterns Motel, http://www.amishmotel.com/ (last visited Dec. 4, 2010);

forced the Amish to choose between faith and home, and the Amish chose faith, as they have in the past,[131] then the municipality would lose a substantial amount of its revenue. This would happen not only directly by losing the contributions of the Amish themselves through their farms and the businesses they run, but through the other business which rely on the tourism that "Amish Country" attracts.

Further, when the Amish are forced from an area by land use regulations, the environment itself is likely to feel the effects.[132] As the population spreads, land prices rise, and the Amish can often make more by selling their farms than by staying on and farming them.[133] When the Amish sell, the void is not necessarily filled by other farmers, but can be filled instead by developments, commercial establishments, or industry. This new land use pattern would further disrupt the area's view of itself as Amish Country, getting rid of not only the Amish part of their self-chosen title, but the "country" part as well. Urban sprawl and industrialization of Amish Country would forever change the natural landscape the Amish have diligently preserved.

D. How Should Attorney Jones Proceed?

In considering Amos's case, Attorney Jones should first examine what type of law the government is charging Amos with violating. As illustrated by *Liberty Road*, the government can bring charges which, while related to land use laws, are also covered by other areas of the law. In such a case, the practitioner must evaluate if he has an argument that this is, in actuality, a land use regulation being masqueraded as some other form of law. If he is unable to convince the court that this is truly a land use issue, then RLUIPA will be inapplicable.[134]

Second, Attorney Jones must be sure to deal with not only the content of what Amos has to say, but also the manner in which it is said. *Beechy* suggests that Amos must phrase his complaint so that the

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Comfort Suites Amish Country, http://www.comfortsuites.com/hotel-lancaster-pennsylvania-PA577 (last visited Dec. 4, 2010).

131. *See* Place, *supra* note 82, at 205.

132. *See id.* at 205-08.

133. *See id.* at 205-06. (citing the tempting prices in 1990 of an 83 acre farm, sold for $1,400,000 and a 68 acre farm, sold for $2,100,000); Realtor.com, http://www.realtor.com/ (last visited Feb. 4, 2010) (a search of Lancaster, PA farms and land suggest the trend continues, yielding a 22 acre farm for $1,999,000, and a 38 acre farm $1,350,000).

134. RLUIPA defines a land use regulation as: "[A] zoning or landmarking law, or the application of such a law, that limits or restricts a claimant's use or development of land (including a structure affixed to land), if the claimant has an ownership, leasehold, easement, servitude, or other property interest in the regulated land or a contract or option to acquire such an interest." 42 U.S.C. § 2000c-5(5) (2006).

governmental action falls into a category that "violates [his] Ordnung, contravenes a tenet of [his] faith, or interferes with the practice of [his] religion."[135] If the governmental action at issue directly contravenes Amos's sect's Ordnung, then this hurdle can be passed by Attorney Jones simply asking Amos if this is the case, and Amos responding that it is. If, however, the action is not specifically objectionable, but rather Amos feels that his faith is violated or interfered with, then Attorney Jones must figure out not only what the court will need to hear to convince them that RLUIPA is proper, but also how to elicit this information from Amos.[136]

Third, Attorney Jones must weigh the burden on Amos against the interest of the municipality. In this comparison, he should look into the other means that may be available to accomplish the government's goal while minimizing the burden to Amish individuals like Amos. If a suitable alternative exists, the parties may be able to negotiate their way to a compromise and avoid having to go through a trial. This method has worked before in Pennsylvania, where the Amish and the state were able to compromise by using generator power rather than grid power.[137] If no such compromise can be reached, then Attorney Jones will still be served well by this research, as he can present it at trial to show that other, less restrictive means were available but not used. The government would therefore not have complied with the least restrictive means test of the Substantial Burden subsection of RLUIPA, and would thus fail to carry their burden.[138]

If the government is deemed to have met its burden, Attorney Jones may have yet another route under RLUIPA because he is within the Third Circuit. He may present an argument under the Discrimination and Exclusion clause of RLIUPA that forcing the Amish to use electricity is something unacceptable to this sect's interpretation of their faith. As such, the sect will be forced to relocate if the government prevails. Attorney Jones's argument would be that this constitutes an unreasonable limit on the sect and as such the government should be held strictly liable under § 2000cc(b)(3)(B) of RLUIPA.

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135. Beechy v. Cent. Mich. Dist. Health Dept., 475 F. Supp. 2d 671, 684 (E.D. Mich. 2007), *aff'd*, No. 07-1376, 2008 WL 1820816 (6th Cir. Apr. 23, 2008).

136. *See, e.g.* Richard C. Wydick, *The Ethics of Witness Coaching*, 17 CARDOZO L. REV. 1 (1995).

137. When the state sought to require the Amish to hook into the power grid due to concerns about the pasteurization of milk that was being produced by the Amish, the parties sought a workable middle ground. The compromise reached was that the Amish would install the equipment, but rely on battery and generator power instead of the grid. *See* Place, *supra* note 82, at 193.

138. 42 U.S.C. § 2000cc(a)(1)(B).

If this case were to take place in a jurisdiction which has not yet decided whether to use the strict liability test of the Third Circuit or the substantial burden test of the Eleventh Circuit in the application of the Discrimination and Exclusion clause, Attorney Jones should advocate for the use of the former as more favorable based both on policy and structural grounds.[139] If this case were to take place in a Circuit that has adopted the substantial burden test, then Attorney Jones should also consider making the argument for the Third Circuit's interpretation, as this is a Circuit split on which the United States Supreme Court has not yet ruled.

Finally, Attorney Jones should put forward the policy arguments against driving the Amish out of the area, especially in an area like Lancaster which is so dependant on tourism concentrating on the Amish. This argument may be useful in convincing a judge that court-ordered mediation is not only viable, but a desirable option. Even if earlier rounds of negotiations failed, Attorney Jones may find the municipality more willing to compromise pursuant to a judge's order.

IV. CONCLUSION

When the Amish bring RLUIPA claims to attorneys, it is because the Amish way of life infuses faith into everyday activities. This consummate fusion dictates modes of dress, belief, and behavior. When the Amish claim a substantial burden has been placed on their religion, they usually present a very compelling case. However, it must be remembered that the municipality's concerns are often justified as well.

These conflicting interests must be weighed in an attempt to come to the right decision. The result may be a victory for one party, but will often be a compromise. The long-term effects of any decision must be considered in this process. If, for instance, an Amish family is washing effluence into the groundwater, the environment and the other residents must be considered should the courts allow the Amish to continue their practices unabated. Perhaps the courts will decide that in such a case, the environmental and sanitary concerns override the burden placed on the Amish. However, the possibility of completely driving the Amish population away from an area must also be considered.

If the burden placed on the Amish is too onerous to their faith, such as forcing them to use electricity in order to power a septic system, they may choose to leave the area rather than comply. The effects on the environment from this decision can be deleterious as well since farmland and open space may be lost to development. With such considerations in

139. *See* Lighthouse Institute for Evangelism, Inc. v. City of Long Branch, 510 F.3d 253, 269 (3d Cir. 2007), *cert. denied*, 128 S. Ct. 2503 (2008).

mind, a litigator should push for his client's position, but all parties should remember that they are dealing with issues which are larger than a single septic tank.