2008

Preserving Sacred Places: Free Exercise and Historic Preservation in the Context of Third Church of Christ, Scientist, Washington, DC

Bryan Stockton
Georgetown University Law Center

Preserving Sacred Places:

Free Exercise and Historic Preservation in the Context of Third Church of Christ, Scientist, Washington, DC

Bryan Stockton

Historic Preservation Seminar

Georgetown University Law Center

Tersh Boasberg

May 2008

TABLE OF CONTENTS

INTRODUCTION - - - - - - - - - 1

I. CONTROVERSY SURROUNDING THE LANDMARKING OF THIRD CHURCH OF CHRIST, SCIENTIST - - - - - - 3

II. BACKGROUND ON FREE EXERCISE LAW - - - - - 4

A. Supreme Court free exercise jurisprudence - - - - 4

B. RFRA - - - - - - - - - 6

C. RLUIPA - - - - - - - - - 6

III. CONSIDERATIONS OF STANDING AND RIPENESS - - - 8

A. Standing - - - - - - - - - 8

B. Ripeness - - - - - - - - - 10

IV. ANALYSIS OF A POTENTIAL CHALLENGE BY THIRD CHURCH UNDER THE FREE EXERCISE CLAUSE - - - - - - 12

A. Historic preservation laws are neutral and generally applicable - - 12

B. Does regulation of religious property implicate freedom of speech? - 14

C. A denial of a demolition permit is not an individualized exemption under *Smith* - - - - - - - - - 17

D. The required maintenance of a landmarked church is not necessarily a substantial burden on the free exercise of religion - - - - 21

V. ANALYSIS OF A POTENTIAL SUIT UNDER RLUIPA - - - 26

A. Protections to religious exercise under RLUIPA - - - - 26

B. Individualized assessments and strict scrutiny - - - - 28

C. Historic preservation of a religious property does not create a substantial burden unless religious exercise is made effectively impractical - - 30

D. Role for accommodation - - - - - - - 40

CONCLUSION - - - - - - - - - 42

APPENDIX A - - - - - - - - - - 44

APPENDIX B - - - - - - - - - - 45

INTRODUCTION

Houses of worship are more than mere bricks and mortar. For congregants, they are sacred places of worship, contemplation, and fellowship. For the community-at-large, churches define neighborhood skylines and often provide valuable social services. For preservationists, churches represent some of the most ambitious (and controversial) architectural and design efforts of past generations. As surrounding shops and residences have deteriorated or been destroyed for redevelopment, churches often remain, as symbols of times past.

Historic preservation of churches can create unique tensions between congregations, which want to be able to alter or demolish their buildings to meet changing needs, and preservationists, who want to preserve their architectural integrity. Historic preservation imposes substantial financial constraints on congregations.[1] Landmarking may make maintenance more expensive and hinder the transferability of the property.[2] Religious groups, citing the free exercise clause of the First Amendment[3] and the Religious Land Use and Institutionalized Persons Act (RLUIPA),[4] claim that historic preservation laws do not apply to churches. Preservationists argue that religious groups should not receive special exemptions from neutral laws of general applicability.

This paper will analyze the tension between the historic preservation of sacred places and the free exercise of religion as seen through the recent controversy surrounding the landmarking of Third Church of Christ, Scientist, in Washington, D.C. Assuming Third Church would bring a

---

[1] *See* Melanie E. Homer, *Landmarking Religious Institutions: The Burden of Rehabiltation and the Loss of Religious Freedom*, 28 URB. LAWYER 327 (1996).
[2] *See* Stephen M. Watson, *First Amendment Challenges to Historic Preservation Statutes*, 11 FORDHAM URB. L. J. 115, 121 (1982); *see also* Evelyn B. Newell, *Model Free Exercise Challenges for Religious Landmarks*, 34 CASE W. RES. L. R. 144, 154-57 (1983) (describing in detail four hypothetical burdens on religious exercise).
[3] U.S. CONST. amend. I.
[4] 42 U.S.C. §2000cc (2000).

free exercise and RLUIPA challenge if the District denied a demolition permit, this paper will examine how such a suit would likely fail.

After describing the factual background, the paper will evaluate questions of standing and ripeness. The mere fact of landmarking does not create a cause of action recognized by District of Columbia courts, so any potential suit would have to be brought after administrative remedies are exhausted. The paper will then analyze the potential challenge under pre-RLUIPA free exercise jurisprudence and conclude that despite cases to the contrary in Kansas and Washington State, the denial of a demolition permit is not a violation of free exercise under the Supreme Court's analysis in *Employment Division v. Smith*.[5] The paper will then address the inherent contradictions within RLUIPA when religious entities try to invoke strict scrutiny to challenge historic preservation laws. While claiming to codify existing free exercise jurisprudence and not confer immunity from land use regulations to religious entities, RLUIPA contradictorily seems to expand free exercise protections by triggering strict scrutiny review upon a showing of an "individualized assessment" by a government body in land use decisions.

Although a District of Columbia court likely would not find the District's denial of a demolition permit to violate the free exercise clause, a court's determination of a RLUIPA violation is a much closer question and would depend on how it interprets "substantial burden." Circuit courts are split, but the more compelling precedent suggests that the District's insistence on preserving the landmarked church would not violate RLUIPA. The mere denial of a demolition permit to Third Church--absent a showing by the church of economic hardship triggering a taking--would not violate the expanded protections afforded religious groups through RLUIPA because the denial does not make religious exercise "effectively impracticable"

[5] 494 U.S. 872 (1990).

and increased costs on religious beliefs are not alone a substantial burden.

I. CONTROVERSY SURROUNDING THE LANDMARKING OF THIRD CHURCH OF CHRIST, SCIENTIST

Third Church of Christ, Scientist in Washington, D.C. does not look like a traditional church. Situated two blocks north of the White House, the church is an octagonal structure, with high concrete, windowless walls, that stands in an unadorned plaza on 16th St. NW. Araldo Cossutta, a principal architect in the renowned firm of I.M. Pei, designed the structure, which was finished in 1971. The church is considered an example of Brutalist architecture—a mid-twentieth century movement that emphasized the use of rough, poured-in-place concrete as the building medium.[6]

In late 2007, the Committee of 100 of the Federal City and the District of Columbia Preservation League nominated the church for landmark status. In December 2007, the District of Columbia Historic Preservation Review Board (HPRB), based on the testimony of multiple architects, architectural historians, and other knowledgeable experts regarding the building's architectural significance,[7] granted landmark status to the entire church complex: the octagonal

---

[6] Paul Schwartzman, *Church Gets Landmark Status over Congregation's Objections*, WASH. POST., Dec. 7, 2007, at B03.

[7] D.C HISTORIC PRESERVATION OFFICE, STAFF REPORT FOR THIRD CHURCH OF CHRIST, SCIENTIST (Nov. 1, 2007) (on file with author). The Historic Preservation Office's staff report noted that the church "was one of the best examples of Brutalism in the Washington area and one of the most important Modernist churches." *Id.* at 2. In addition, the design won the Washington Board of Trade's Award for Excellence in Architecture and a craftsmanship award for the concrete work from the Washington Building Congress. *Id.* at 4. Thus, the church complex satisfied the Historic Preservation Review Board's designation criterion F, for "notable works of craftsmen, artists, sculptors, architects, landscape architects, urban planners, engineers, builders, or developers whose works have influenced the evolution of their fields of endeavor, or are significant to the development of the District of Columbia or the nation." *Id.* at 10. Richard Longstreth, a George Washington University architectural history professor, testified before the board that the Third Church complex is "in a league of its own" as a "distinctive and original work." Mark Fisher, *State vs. Church: March of the Preservation Police*, WASH. POST., Dec. 7, 2007,

church itself, the rectangular office building that housed the offices of the *Christian Science Monitor*, and the triangular courtyard between the church and office building.[8] The congregation opposed the landmark designation at the December meeting. They claimed the structure, which holds 400 people, was too large for the congregation of forty to sixty weekly worshippers. The congregants expressed concern about the costs of maintaining the aging structure. They also stated that the building's fortress-like design impeded their worship and ability to attract new members.[9]

The landmarking has frustrated the plans of the congregation. The Mother Church of Christian Science had conveyed the property to a commercial real estate developer, ICG, who promised to construct a smaller sanctuary on the site. At the landmarking hearing, the church was represented by the Becket Fund for Religious Liberty, a public interest law firm that provides legal services to religious organizations.[10] Since the HPRB would have to issue a demolition permit for the developer to tear down the church, the church, through the Becket Fund, may choose to challenge a denial of that permit. "We have let HPRB know that it is treading on dangerous ground," said the church's counsel.[11]

II. BACKGROUND ON FREE EXERCISE LAW

A. Supreme Court Free Exercise Jurisprudence

The Supreme Court's free exercise jurisprudence has changed significantly over the past forty years and has been a source of much controversy. In *Sherbert v. Verner*, the Warren Court

---

http://blog.washingtonpost.com/rawfisher/2007/12/state_vs_church_march_of_the_p.html.
[8] Schwartzman, *supra* note 6.
[9] Darrow Kirkpatrick, a congregant who opposed the designation, testified: "We know of no way to adapt the building to meet our needs….It's not a welcoming building." Schwartzman, *supra* note 6.
[10] *Id.*
[11] *Id.*

held that burdens upon religious exercise were subject to strict scrutiny—that is, for the government action or law to survive judicial review the government had to assert both a compelling interest and that its action or law was narrowly tailored to achieve this objective.[12] Commentators saw this standard to be extremely favorable to religious groups. The *Sherbert* compelling interest test was the prevailing free exercise standard until the Court's 1990 decision in *Employment Division v. Smith*, which held that neutral, generally applicable laws were subject to rational basis review, not strict scrutiny.[13] The *Sherbert* compelling interest test still applied to government action that was not neutral toward religion or generally applicable.

There were however, two exceptions to the *Smith* rule imposing rational basis review. First, where the claim is "hybrid"—in that it combines free exercise with another constitutional right (like freedom of speech)—strict scrutiny is appropriate.[14] Second, "where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason."[15] The individualized exemption exception can be summarized as follows: as long as a law does not contain any exemptions, it is considered generally applicable and religious groups cannot claim a right to exemption; however, if a law has secular exemptions, then religious groups can challenge the law.[16] In the words of the Tenth Circuit, "the general applicability test gives religious groups something akin to a disparate treatment claim."[17] By requiring the government to merely show a rational basis for its actions in most cases, the Court immediately made it more difficult for individuals and religious entities to bring successful free exercise challenges.

---

[12] 374 U.S. 398 (1963).
[13] 494 U.S. 872, 876-77 (1990).
[14] *Id.* at 882.
[15] *Id.* at 884.
[16] *See* Grace United Methodist Church v. City of Cheyenne, 451 F.3d 643, 650 (10th Cir. 2006).
[17] *Id.*

B. RFRA

Unsurprisingly, the *Smith* decision was not popular with certain constituencies. Several years later Congress approved and President Clinton signed into law the Religious Freedom Restoration Act of 1993 (RFRA), which attempted to overturn *Smith* and "restore" the compelling interest test for federal and state actions that "substantially burdened" the free exercise of religion, even if such burdens derived from neutral rules of general applicability.[18] Four years later, in *City of Boerne v. Flores*,[19] the Supreme Court held RFRA to be unconstitutional, although subsequent courts have suggested that RFRA would still apply to federal governmental action.[20]

The Court in *City of Boerne* dismissed a church's RFRA challenge to a Texas town's denial of a demolition permit for a historic sanctuary building.[21] Although Congress may enforce constitutional rights pursuant to Section Five of the Fourteenth Amendment, the Court in *City of Boerne* held that Congress had not simply enforced First Amendment rights but had exceeded its constitutional authority by defining the boundaries of those rights.[22] The Court stressed that RFRA was out of proportion to its supposed remedial or preventative object, considering that Congress had presented no evidence in the legislative record of any widespread pattern of religious discrimination by states or the federal government.[23]

C. RLUIPA

Not dissuaded, Congress passed new legislation, the Religious Land Use and

---

[18] See 42 U.S.C. §2000bb-1 (2000).
[19] 521 U.S. 507 (1997).
[20] *See* Sutton v. Providence St. Joseph Med. Ctr., 192 F.3d 826, 832 (9th Cir. 1999) (collecting cases).
[21] City of Boerne, 521 U.S. at 507.
[22] *Id.* at 508-09.
[23] *Id.* at 509.

Institutionalized Persons Act of 2000 (RLUIPA), which President Clinton signed into law in September 2000. RLUIPA reinstated the same general rule of RFRA: state action that substantially burdens religious exercise can be justified only as the "least restrictive means" of further a "compelling governmental interest."[24] However, RLUIPA, unlike RFRA, did not apply to all government action but only to state or federal government action involving land use or institutionalized persons. Within the context of land use regulation, RLUIPA applies where the "burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes…individualized assessments of the proposed uses for the property involved."[25]

The purpose in passing RLUIPA's land use provisions was to eliminate covert discrimination against religious groups by zoning boards.[26] Despite its sweeping language, the statute was not intended to immunize religious institutions from local land use laws.[27]

The Supreme Court has upheld the constitutionality of RLUIPA only in regard to its application to institutionalized persons.[28] Lower courts have generally agreed that RLUIPA is constitutional in regard to land use regulations.[29] However, no court has addressed RLUIPA's constitutionality as applied to historic preservation laws, and the legislative record of RLUIPA

---

[24] *See* 42 U.S.C. §§ 2000cc(a)(1), 2000cc-1(a) (2000). The full text of § 2000cc is in Appendix A.
[25] § 2000cc(a)(2).
[26] *See* Daniel Lennington, *Thou Shalt Not Zone: the Overbroad Applications and Troubling Implications of RLUIPA's Land Use Provisions*, 29 SEATTLE U. L. REV. 805, 816 (2006).
[27] A joint statement issued by the sponsors of the legislation, Senators Hatch and Kennedy, explains, "This Act does not provide religious institutions with immunity form land use regulation, no does it relieve religious institutions from applying for variances, special permits or exceptions, hardship approval, or other relief provision in land use regulations, where available without discrimination or unfair delay." 146 CONG. REC. S7774-01, S7776 (daily ed. July 27, 2000).
[28] *See* Cutter v. Wilkinson, 544 U.S. 709 (2005).
[29] *See, e.g.*, United States v. Maui County, 298 F. Supp.2d 1010 (D. Haw. 2003) (upholding constitutionality of LUIPA against establishment clause, enforcement clause, commerce clause, and Tenth Amendment challenges); Guru Nanak Sikh Society of Yuba City v. County of Sutter, 456 F.3d 978 (9th Cir. 2006) (upholding RLUIPA as valid exercise of Congress's enforcement powers).

does not contain any examples of religious discrimination in the application of historic preservation ordinances.[30]

Considering that the Supreme Court struck down RFRA in *City of Boerne* because Congress had not provided any evidence of religious discrimination to justify its use of its enforcement powers, RLUIPA as applied to the historic preservation context may well be unconstitutional. Nevertheless, for this paper, the constitutionality of RLIUPA is assumed.

Thus, under the current constitutional and statutory framework, an individual or religious entity can bring a challenge to a burdensome government action both under the First Amendment and under RLUIPA. Part IV of his paper will analyze a potential challenge under the First Amendment and Part V will assess a claim under RLUIPA by Third Church.

III. CONSIDERATIONS OF STANDING AND RIPENESS

A. Standing

The first issue that must be addressed is whether the church has standing to bring a free exercise or RLUIPA claim when it no longer owns the land. The standing analysis is hindered by the uncertainty surrounding the terms of the church's lease with the developer. In all other cases where a religious organization has challenged historic preservation regulations, it has owned the property being regulated.[31] In contrast, while the Christian Science Mother Church, based in Boston, originally owned the land on which Third Church currently sits and leased the land to the congregation, a developer currently owns the property and continues to lease it back to Third Church.

---

[30] *See* Julia Miller, *Regulating Historic Religious Properties Under RLUIPA*, SL014 ALI-ABA 719, 731 (2005).
[31] *See, e.g.*, Soc'y of Jesus v. Boston Landmarks Comm'n, 409 Mass. 38 (1990).

Standing for a Free Exercise Claim

To have standing for a free exercise challenge, plaintiffs must prove that particular religious freedoms are or will be infringed.[32] Third Church can assert that the burdens imposed by the historic preservation regulations limit the space in which the congregation worships and impose financial costs that detract from religious and social initiatives. Moreover, the fact that no court has yet dismissed a challenge to a historic preservation law on standing grounds strongly suggests that even though Third Church does not own the property in question, it would still satisfy the standing requirements for a free exercise claim.[33]

Standing for a RLUIPA claim

The general rules of standing under Article III of the Constitution also governs standing for purposes of RLUIPA; so the standing analysis is identical for potential constitutional and statutory challenges.[34] But RLUIPA's protections only apply to two areas: institutionalized persons and land use regulations. As a consequence, Third Church's claim has to be related to a land use regulation in order for it to bring a suit.

Nevertheless, courts have recognized that plaintiffs who have a definite but non-possessory interest in the land—such as those who will receive the land as part of a contract or other agreement—do have standing to challenge zoning decisions.[35] In *Dilaura v. Ann Arbor Township*, a religious organization entered into an agreement with a land development company

[32] Sch. Dist. of Abington Tp. v. Schempp, 374 U.S. 203, 225 (1963).
[33] However, the lack of a concrete property interest would implicate standing if Third Church sought to also bring a Fifth Amendment takings challenge. This paper will not address a separate Fifth Amendment takings challenge, but Part VI analyzes how a "substantial burden" on religion resembles the burden of proving an unconstitutional taking.
[34] 42 U.S.C. 2000cc-2(a) (2000).
[35] Dilaura v. Ann Arbor Charter Tp., 30 Fed. Appx. 501, 506 (6th Cir. 2002).

to receive a residential home for free, if the home could be used for religious purposes. The court held that the contingency interest did not render the religious organization's interest unenforceable because a definite agreement existed.[36]

The court cited RLUIPA, which defined a "land use regulation" that could be challenged under RLUIPA as any "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."[37] Therefore, the religious group in *Dilaura* successfully met the standing requirement because it had an option to acquire a property interest in the property at issue.

Without more information about the structure of the contractual agreement between the developer and Third Church, it is difficult to completely analyze the standing question. Nevertheless, if the developer and Third Church have a similar arrangement that grants Third Church some type of property interest, even if nothing more than a lease, Third Church can likely satisfy the standing requirement, particularly because courts sometimes liberalize standing requirements with respect to the raising of First Amendment issues.[38]

B. Ripeness

Assuming that that Third Church would have standing to bring a suit under both the First Amendment and RLUIPA, the next issue becomes at what point the challenge becomes ripe for judicial review. The mere act of landmarking a historic church building does not present a

---

[36] *Id.*
[37] 42 U.S.C. § 2000cc-5(5).
[38] *See* Flast v. Cohen, 392 U.S. 83 (1968) (granting taxpayer-plaintiff standing to challenge funding scheme that allegedly violated the Establishment Clause of the First Amendment).

justiciable controversy under the First Amendment.[39]

In *Metropolitan Baptist v. Department of Consumer & Regulatory Affairs*, the D.C. Court of Appeals upheld the dismissal of the church's free exercise challenge to the inclusion of five church-owned rowhouses in the Greater 14th Street Historic District.[40] The court stated that historic designation did not impede the current use of the buildings and that because the church had not yet applied for a permit to alter or demolish the rowhouses, its claim was based solely on harm that might occur in the future.[41] The court stressed that one of the purposes of the ripeness doctrine was to protect "'agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties,'" and that allowing the church's challenge to go forward in the absence of a final administrative decision would needlessly entangle the courts in administrative policies.[42]

The *Metropolitan Baptist* court specifically declined to follow the precedent of the Washington State courts, which have found landmark designations, as applied, to be violations of free exercise under the federal and state constitutions.[43] The Court of Appeals distinguished the Washington case partly on the grounds that the Washington State Constitution provided broader

---

[39] Metro. Baptist Church v. D.C. Dep't of Consumer & Reg. Affairs, 918 A.2d 119 (D.C. 1998); *see also* Church of St. Paul & St. Andrew v. Barwick, 496 N.E.2d 183 (2d Cir. 1986), *cert. denied*, 479 US. 985 (1986) (rejecting church's free exercise challenge to landmark designation where church had not yet applied for a permit). *But see* First United Methodist Church v. Hearing Examiner for the Seattle Landmarks Preservation Board, 916 P.2d 374 (Wash. 1996) (holding that landmark designation violated church's free exercise under federal and state constitutions because the designation restricted the church's ability to sell its property to further its religious mission); Munns v. Martin, 930 P.2d 318 (Wash. 1997) (holding that landmark designation of religious school is a violation of the state constitution). The District Court of Connecticut held that in regard to a ripeness inquiry, it was not necessary to distinguish an RLUIPA claim from a First Amendment free exercise claim. Murphy v. New Milford Zoning Comm'n, 402 F.3d 342, 350 (2d Cir. 2005).

[40] *Id.* at 130.

[41] *Id.* at 130.

[42] *Id.* at 130 (quoting Abbot Lab. v. Gardner, 387 U.S. 136, 148 (1967)).

[43] *Id.* at 131-32 (distinguishing *First United Methodist*, 916 P.2d 374 (1996)).

protection for religious freedom than the federal constitution.[44]

Thus, Third Church's claim would not be ripe until the administrative decision was formalized; in other words, until the HPRB denied the demolition permit and the Mayor's Agent, through the normal appeals process, affirmed the HPRB's decision.

IV. ANALYSIS OF A POTENTIAL CHALLENGE BY THIRD CHURCH UNDER THE FREE EXERCISE CLAUSE

A. Historic preservation laws are neutral and generally applicable

The threshold question in a free exercise challenge under the First Amendment is whether the government action allegedly burdening the exercise of religion is neutral and generally applicable. If it is not, then strict scrutiny will apply. But if the historic preservation regulation is neutral and generally applicable and the regulations do not involve hybrid rights and do not have individualized exemptions, then rational basis will apply.

Historic preservation laws are neutral and of general applicability—and can thus burden free exercise—because they do not aim to infringe upon or restrict practices because of their religious motivation and do not in a selective manner impose burdens only on conduct motivated by religious belief.[45] The Supreme Court's decision in *Church of the Lukumi Babalu Aye v. City of Hialeah* strongly suggests that historic preservation laws may be viewed as generally

---

[44] *Id.* at 132. In a footnote, the court also distinguished *First United Methodist* on the grounds that the church in that case was suffering from deterioration, unlike the rowhouses of *Metropolitan Baptist*, and that repairs would only be affordable absent government regulations. This footnote suggests that if a court finds that Third Church is deteriorating and maintenance costs would be prohibitively expensive, the church may have a stronger case of distinguishing *Metropolitan Baptist*. Nevertheless, it is unlikely that even this would overcome the court's reluctance to intervene before a final administrative determination.

[45] Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 533 (1993); *see also* San Jose Christian Coll., 360 F.3d 1024, 1031 (9th Cir. 2004) (finding that city's denial of Christian college's petition for rezoning was not targeted on basis of religion and thus not a violation of free exercise.)

applicable, even if a demolition permit may be denied through an individualized hearing process. The Tenth Circuit Court of Appeals, in applying *Lukumi* to a zoning ordinance, explained that in order for a plaintiff to invoke strict scrutiny, the individual must present evidence "suggesting that the ordinance was passed due to religious animus"; evidence showing that "the city specifically targeted religious groups . . . in its enforcement of the ordinance"; or evidence that the municipality, through its ordinances, "ha[d] 'devalue[d] religious reasons . . . by judging them to be of lesser import than nonreligious reasons.'"[46]

The animosity toward religious practice addressed in *Lukumi* is not relevant here, because local historic preservation boards only decide to landmark buildings that meet specific threshold criteria, which are predetermined, explicit, and not religiously motivated.[47] The HPRB voted to landmark Third Church because of the church's architecture, not out of any religious motivation.[48] While the decision to landmark a particular building does involve discretion and subjective tastes about aesthetics, the majority of the Supreme Court in *Penn Central Transportation Co. v. City of New York* explicitly stated that subjective elements considered in the landmarking process do not make the final decision arbitrary.[49] Instead, historic

---

[46] Grace United, 451 F.3d 643, 650 (10th Cir. 2005) (citing Lukumi, 508 U.S. at 537).

[47] For the seven criteria that HPRB uses in determining whether to approve landmark status, see 10 DCMR § 200.1 (2002). Some confusion here. The first sentence correctly refers to the regs; but the second, is a non-sequitur ; and comes from the statute?? For example, subsection (e) provides: "No permit shall be issued unless the Mayor finds that issuance of the permit is necessary in the public interest, or that failure to issue a permit will result in unreasonable economic hardship to the owner." § 200.1(e).

[48] In contrast, the Supreme Court struck down a municipal ordinance that criminalized animal sacrifice within city limits because the Court found that the city council, in passing the ordinance, was motivated by animus toward Santerians and excluded many other activities that killed animals (medical research, butchers) from the ban. *See* Lukumi, 508 U.S. at 530.

[49] 438 U.S. 104, 132 (1978). "[C]ontrary to appellants' suggestions, landmark laws are not like discriminatory, or 'reverse spot,' zoning: that is, a land-use decision which arbitrarily singles out a particular parcel for different, less favorable treatment than the neighboring ones…. In contrast to discriminatory zoning, which is the antithesis of land-use control as part of some comprehensive plan, the New York City law embodies a comprehensive plan to preserve structures of historic or aesthetic interest

preservation, like zoning, is generally applicable because it treats similar property in a similar manner within a generally applicable scheme.[50] In *St. Bartholomew's Church v. City of New York*, the Second Circuit explicitly held that landmarks laws are "facially neutral regulations of general applicability within the meaning of Supreme Court decisions."[51] In addition, the Supreme Court in *City of Boerne v. Flores* assumed in dicta that the preservation ordinance at issue was a law of general application.[52] Therefore, historic preservation laws are likely both neutral and generally applicable.

B. Regulation of religious property does not implicate freedom of speech

Assuming historic preservation laws are neutral and generally applicable, plaintiffs may still attempt to invoke strict scrutiny under *Smith* by asserting a hybrid claim: that the historic preservation law infringes both free exercise and free speech.[53] Professor Angela Carmella argues that because architecture is closely intertwined with expression, religious architecture constitutes religious speech and is consequently protected not only by the Free Exercise Clause but also the Free Speech Clause.[54] "The semiotic nature of the house of worship," she writes,

---

wherever they might be found in the city…. Equally without merit is the related argument that the decision to designate a structure as a landmark "is inevitably arbitrary or at least subjective, because it is basically a matter of taste." *Id.*

[50] *Id.*

[51] St. Bartholomew's Church v. City of New York, 914 F.2d 348, 353 (2nd Cir. 1990).

[52] City of Boerne, 521 U.S. 507, 513-14 (1997).

[53] The hybrid rights claim is not without controversy. As the Tenth Circuit in *Grace United* stated, "The hybrid rights doctrine…. has been characterized as mere dicta not binding on lower courts, *Knight v. Conn. Dep't of Pub. Health*, 275 F.3d 156, 167 (2d Cir.2001); criticized as illogical, *Kissinger v. Bd. of Trs. of Ohio State Univ.*, 5 F.3d 177, 180 (6th Cir.1993); and dismissed as untenable." Grace United, 451 F.3d 643, 656 (D. Wyo. 2006). For simplicity, this paper assumes the validity of the hybrid rights exception in *Smith*.

[54] *See* Angela Carmella, *Landmark Preservation of Church Property*, 34 CATH. LAW. 41, 60 (1991); Russell S. Bonds, First Covenant Church v. City of Seattle: *The Washington Supreme Court Fortifies the Free Exercise Rights of Religious Landmarks Against Historic Preservation Restrictions*, Comment, 27 GA. L. REV. 589, 614 (1992)

"renders its 'religious' and 'aesthetic' aspects indistinguishable."[55] Therefore, when the government attempts to control ecclesiastical design for purely aesthetic reasons,[56] it "severely compromises the religious community's freedom to adapt its worship structure to its liturgical, theological, doctrinal, and missional goals" as well as the congregation's ability to protect its "expression and vitality."[57] The Washington State courts in *First Covenant Church v. City of Seattle* and *First United Methodist Church v. Hearing Examiner for Seattle Landmarks Preservation Board* embraced this idea that ecclesiastical architecture is an expression of religious ideas and that landmarking churches implicated both free speech and free exercise.[58]

In striking down Seattle's landmark designation of First Covenant Church, the court held that "regulation of the church's exterior impermissibly infringes on the religious organization's right to free exercise and free speech."[59] Moreover, in *Society of Jesus v. Boston Landmarks Commission*, the Supreme Court of Massachusetts, citing its *state* constitution, struck down the interior designation of a Jesuit church because the "configuration of the church interior is so freighted with religious meaning that it must be considered part and parcel of the Jesuits' religious worship."[60]

However, unlike *Society of Jesus*, the landmark designation for Third Church only applies to the exterior of the building, and Washington remains the only state to have made

---

[55] Angela Carmella, *Houses of Worship and Religious Liberty: Constitutional Limits to Landmark Preservation and Architectural Review*, 36 VILL. L. REV. 401, 405 (1991).
[56] Prof. Carmella does not dispute that health and safety regulations would trump this freedom of ecclesiastical architectural expression. *Id.*
[57] *Id.*
[58] First Covenant Church v. City of Seattle, 840 P.2d 174, 182 (1992) ("The relationship between theological doctrine and architectural design is well recognized."); First United Methodist Church v. Seattle Landmarks Preservation Bd., 916 P.2d 374 (1996) ("[T]he Landmarks Preservation Ordinance posed a potential threat to both the free exercise of religion and free speech….").
[59] First Covenant, 840 P.2d at 182.
[60] 564 N.E.2d 571, 573 (1990).

landmark designation subject to a hybrid claim. Although the issue of a hybrid claim was not before the D.C. Court of Appeals in *Metropolitan Baptist*, that court's distinguishing of *First United Methodist* and *First Covenant* make it likely that the Court of Appeals would also reject the hybrid claim argument.[61] Moreover, the Washington State cases conflicts with the Supreme Court's dicta in *Berman v. Parker*, which suggests that even municipal regulations solely based on aesthetics (and without any historic element) would be constitutionally permissible and not subject to First Amendment challenges.[62]

In addition, the California courts have rejected the idea that land use regulations always implicate the Free Speech Clause. In *San Jose Christian College v. City of Morgan Hill*, the Ninth Circuit Court of Appeals held that zoning ordinances that restrict religious entities from fully developing their properties do not implicate the Free Speech Clause unless the ordinances contain content-based discrimination or unless the city enacted or enforced the ordinances as a "pretext for suppressing expression."[63] In *San Jose Christian*, the city denied a religious group's petition to rezone a parcel to educational use. The religious college, the owner of the property, claimed that the building on the property was itself "speech."[64] Ignoring the idea that the property itself constituted symbolic speech, the court, in upholding the rezoning denial, instead looked to the effect and purpose behind the ordinance.[65] The court held that because the ordinance did not prohibit all religious uses within the city and was not a "pretext for suppressing expression,"[66] it was not a content-based restriction on religious speech.[67] The court

---

[61] See *Metro. Baptist Church v. D.C. Dep't of Consumer & Reg. Affairs*, 718 A.2d 119, 132 (D.C. 1998).
[62] 348 U.S. 26, 33 (1954).
[63] 360 F.3d 1024, 1033 (9th Cir. 2004).
[64] *Id.* at 1032.
[65] *Id.*
[66] *Id.* (quoting City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47 (1986)).
[67] *Id.* at 1032.

distinguished cases where land use laws were subject to free speech protections because those cases involved adult movie theaters that the city was attempting to zone out of existence.[68] Because Morgan Hill was not motivated by a disdain of the college's religious orientation, or by the message that would have been communicated by the property, "no viable impingement of speech claim has been asserted."[69]

Similarly, the District's landmarking of religious buildings does not prohibit all religious uses within the city and is not a pretext for suppressing expression. The landmark designation does not prevent religious uses within the landmarked building; it merely prevents a change in the status quo. While the preservation restrictions undoubtedly impose costs on religious exercise, courts generally have not considered the effects of freezing current uses sufficient to rise to the level of an economic taking or a substantial burden on free exercise.[70] In addition, the District's historic preservation regulations, like the zoning ordinance in Morgan Hill, is not a pretext for suppressing religious speech and was not motivated by disdain for religion. Therefore, absent a showing of discriminatory treatment, the District courts likely would dismiss Third Church's hybrid claim.

C. The denial of a demolition permit is not an individualized exemption under *Smith*

In a First Amendment challenge, the issue of whether the historic preservation laws contain individualized exemptions—and thus fall under *Sherbert*'s compelling interest test—is a much closer case. Courts have disagreed on whether preservation ordinances contain a system of

---

[68] *Id.* at 1032 (discussing *Renton v. Playtime Theaters*).
[69] *Id.* at 1032.
[70] *See* St. Bartholomew's Church v. City of New York, 914 F.2d 348 (2d Cir. 1990), *cert. denied*, 499 U.S. 905 (1991) (holding that no First Amendment violation occurs absent a showing of discriminatory motive, coercion in religious practice, or an inability to carry out its religious mission in its *existing* facilities).

individualized exemptions.[71] Nevertheless, the individualized exemption exception to the rational basis test articulated by the Supreme Court in *Smith* and applied in *Lukumi* should not be read to provide religious entities "special treatment," so long as the administrator has some criteria to narrow decision-making and there is no evidence of religious discrimination.

Five circuits refuse to apply strict scrutiny notwithstanding individualized exemptions

The Second, Sixth, Eighth, Tenth, and Eleventh Circuits have held that land use or historic preservation regulations do not trigger strict scrutiny notwithstanding the fact that they may have individualized procedures for obtaining special use permits or variances.[72] In *Grace United Methodist Church v. City of Cheyenne*, the Tenth Circuit declined to apply strict scrutiny to the town's denial of a license authorizing a religious day care center.[73] The court rejected a per se test that would subject any land use regulation to strict scrutiny and adopted a fact-specific inquiry to determine the existence of discriminatory animus or an application of the rule in "a discriminatory fashion that disadvantages religious groups or organizations."[74]

The Tenth Circuit distinguished the land use exemptions at issue in *Grace United* from *Axson-Flynn v. Johnson*. In *Axson-Flynn*, the court found that a system of individualized exemptions might exist where a Mormon student in an actor's training program had been

---

[71] *Compare id.* (holding landmark law to be generally applicable) *with* Mt. St. Scholastica v. City of Atchison, 482 F. Supp. 1281 (D. Kan. 2007) (holding historic preservation to be a system of individualized exemptions).
[72] *See* Grace United Methodist Church v. City of Cheyenne, 451 F.3d 643, 651 (10th Cir. 2006); First Assembly of God v. Collier County, 20 F.3d 419, 423 (11th Cir. 1994); Cornerstone Bible Church v. City of Hastings, 948 F.2d 464, 472 (8th Cir.1991); Mt. Elliott Cemetery Ass'n v. City of Troy, 171 F.3d 398, 405 (6th Cir.1999); St. Bartholomew's Church v. City of New York, 914 F.2d 348, 354 (2d Cir.1990); Civil Liberties for Urban Believers v. City of Chicago, 157 F. Supp. 2d 903, 914-15 (N.D. Ill. 2001), *aff'd*, 342 F.3d 752 (7th Cir. 2003).
[73] Grace United, 451 F.3d at 651.
[74] *Id.* at 651.

required, while reciting a script, to utter certain words offensive to her religious beliefs, but a Jewish student had received permission to miss certain class exercises for religious reasons without suffering adverse consequences.[75] In addition to the absence of any criteria for the university to exempt students from the academic program, the court also stressed the possibility of religious animus.[76] The court in *Grace United* thus reasoned that although special use permits or variances generally require individualized assessments about the property, the ordinances are motivated by secular purposes and equally impact all land owners within the city that seek a variance or special use permit.[77]

In *St. Bartholomew's*, the Second Circuit assumed without deciding that the demolition provision in the New York City landmarks law did not constitute an individualized exemption. Although the exemption exception was announced by the Supreme Court in *Smith* before the Second Circuit decided *St. Bartholomew's*, the Second Circuit ultimately decided it was worth only a brief mention. Acknowledging that the landmarks law "accords great discretion" to the city's Landmarks Commission, the court went on to state that "absent proof of the discriminatory exercise of discretion" such discretion was constitutionally irrelevant.[78] The court compared historic preservation to zoning, in which "the exercise of discretion is [hardly] constrained by scientific principles or unaffected by selfish or political interests," and which "passes

---

[75] *Id.*
[76] Axson-Flynn v. Johnson, 356 F.3d 1294, 1298-99 (10th Cir. 2004).
[77] Grace United, 451 F.3d at 651 ("[S]everal federal courts have held that land use regulations…are neutral and generally applicable notwithstanding that they may have individualized procedures for obtaining special use permits or variances….According to these courts…[zoning laws] are generally applicable if they are motivated by secular purposes and impact equally all land owners in the city seeking variances."); Collier County, 20 F.3d at 423-24; City of Troy, 171 F.3d at 405; Civil Liberties, 157 F.Supp.2d at 914-15.
[78] St. Bartholomew's Church v. City of New York, 914 F.2d 348, 354-55 (2nd Cir. 1990).

constitutional muster."[79]

Interestingly, on the very day the Supreme Court denied certiorari in *St. Bartholomew's*, it vacated and remanded the Washington State Supreme Court's decision in *First Covenant* for further consideration in light of *Smith*, thereby implying that Seattle's historic preservation law did not warrant strict scrutiny.[80] While the denial of certiorari is not binding precedent, the Supreme Court has effectively endorsed the Second Circuit's opinion in *St. Bartholomew's* by denying certiorari in that case and by vacating and remanding *First Covenant*.

A few courts have found individualized exemptions and have applied strict scrutiny

However, several courts have held otherwise and applied strict scrutiny. In *Keeler v. Mayor & City Council of Cumberland*, the District Court of Maryland held that the city's preservation ordinance had implemented a system of individualized exemptions that triggered strict scrutiny.[81] The court analyzed the circumstances under which the preservation board could allow an alteration or demolition of a protected property: when the retention of the landmark 1) would prevent a "major improvement program which will be of substantial benefit to the City," 2) "would cause undue financial hardship," or 3) "would not be to the best interest of a majority of persons in the community."[82]

The court thus concluded that the city's ordinance embodied a legislative judgment that the city's interest in historic preservation should, in some individual circumstances, give way to

---

[79] *Id.* at 355.
[80] Homer, *supra* note 1, at 341. While the denial of certiorari in *St. Bartholomew's* and the vacation and remand "appeared to make *First Covenant* an easy victory for preservationists," the Washington court surprisingly refused to change its opinion in light of *Smith* and grounded its second decision in the state constitution to isolate it from further review. *Id.* at 342.
[81] Keeler v. Mayor of Cumberland, 940 F. Supp. 879, 886 (D. Md. 1996).
[82] *Id.* at 886.

other interests, such as furthering major development and exempting property owners from financial hardship. The Cumberland ordinance regarding demolition of historic landmarks is similar to the District of Columbia's. Section 6-1104 of the District of Columbia Code states, "No permit shall be issued unless the Mayor finds that issuance of the permit is necessary in the public interest, or that failure to issue a permit will result in unreasonable economic hardship to the owner."[83] The statute lists detailed information required for a finding of economic hardship,[84] but the finding of "in the public interest" is a subjective determination. Although Maryland and Kansas would apply strict scrutiny, the Supreme Court's decision to deny cert in *St. Bartholomew's* and vacate *First Covenant* in the same term strongly suggests that the Court considers historic preservation laws as neutral, generally applicable laws not subject to strict scrutiny.

D. The required maintenance of a landmarked church is not necessarily a substantial burden on the free exercise of religion

The strict scrutiny inquiry asks whether the government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden.[85] It is a "basic precept" of First Amendment jurisprudence that not every governmental act that burdens religion violates the free exercise clause: "The First Amendment is only offended if there is a substantial burden on religious exercise."[86] Consequently, even if a court in the District of Columbia were to apply the individualized exemption of *Smith*, thereby triggering strict scrutiny, Third Church still must

[83] D.C. Code § 6-1104(e) (2000).
[84] *See* § 6-1104(g). The full text of this section is in Appendix B.
[85] Hernandez v. Comm'r of Internal Revenue, 490 U.S. 680, 699 (1989).
[86] Congregation Kol Ami v. Abington Tp., 2004 WL 1837037 at 5 (E.D. Pa. 2004)

show a substantial burden on its religious exercise for its free exercise claim to prevail. Because courts repeatedly have held that indirect financial or aesthetic burdens on religious groups are not substantial, the denial of a demolition permit likely would not rise to the level of a substantial burden on religion.

Substantial burdens arise when the government coerces a person to engage in an action that violates a fundamental tenet of his or her genuinely held religious beliefs.[87] Substantial burdens also occur when the government forces an individual to choose between following a basic tenet of his or her faith and forfeiting a government benefit.[88] However, states do not substantially burden religious exercise when laws indirectly make the practice of religion more expensive.[89] In *Brownfield v. Brown*, the Supreme Court upheld Pennsylvania's Sunday closing law, even though it imposed a serious financial burden on an Orthodox Jew, whose faith prevented him from also working on Saturday.[90] Although the state law increased financial hardship and made practicing one's religion more difficult, the Court held that the law did not interfere with or impede a religious observation.[91]

A refusal by a landmarking body to allow religious groups to alter or demolish historic structures has never been held to be a substantial burden upon free exercise.[92] In *St.*

---

[87] *See* Wisconsin v. Yoder, 406 U.S. 205 (1972) (holding that state law requiring Amish parents to send their children to high school a substantial burden on free exercise).
[88] Sherbert v. Verner, 374 U.S. 398, 404 (1963) (finding free exercise violation when Seventh Day Adventist was forced to choose between working on Saturday—which her faith prohibited—and receiving generally available unemployment benefits).
[89] *See* Braunfield v. Brown, 366 U.S. 599 (1961); *see also* Lakewood Cong. of Jehovah's Witnesses, Inc. v. City of Lakewood, 699 F.2d 303 (1983) (finding no substantial burden when city zoning ordinance required new religious groups to purchase land in the expensive commercial section of the city for religious structures).
[90] Braunfield, 366 U.S. at 605.
[91] *Id.*
[92] *See* St. Bartholomew's Church v. City of New York, 914 F.2d 348 (2nd Cir. 1990); First Church of Christ, Scientist v. Historic Dist. Com'n of Ridgefield, 738 A.2d 224 (Conn. Super. Ct. 1998), *aff'd*, 737 A.2d 989 (Conn. App. Ct. 1999), *cert. denied*, 742 A.2d 358 (1999) (holding that denial of alteration of

Bartholomew's, the Second Circuit rejected an Episcopal church's claim that the city's refusal to allow it to tear down an historic auxiliary building was a violation of free exercise.[93] The church sought permission to replace its community building with a forty-seven story office tower.[94]

The developer partnering with Third Church plans to replace the church with an office building as well. Citing its weak financial condition, the unsuitability of the building for its activities, and the cost of structural and mechanical repairs of its historic property, St. Bartholomew's—like Third Church—claimed the new office tower would provide better space for its activities and generate needed revenues.[95] While the preservation law "drastically restricted" the church's opportunity to raise funds and to expand its activities, the Second Circuit held that the denial of the demolition permit did not prevent the church from following its beliefs and was thus not a violation of the free exercise clause.[96]

Key to the court's holding in *St. Bartholomew's* was the church's inability to prove it could no longer continue its religious practice in its historic structure. Thus, for Third Church to escape from the weight of *St. Bartholomew's* precedent, it must assert that the current structure effectively prevents its religious practice. The fact that religious practice might be better served in a new facility is irrelevant. While Third Church can argue that the present structure is foreboding and unwelcoming, they will likely be unable to prove that the facility is unsuitable for religious exercise, especially because the church originally approved the architect's plans.

However, courts in Washington, Kansas, and Maryland have held that historic

---

historic church was not a substantial burden); Diocese of Toledo v. Toledo County-Lucas County Planning Comm'n, No. L-98-1150 (Ohio Ct. C.P. 1999), *rev'd on other grounds*, No. L.98-1150 (Ohio App. Ct. 1999), 1999 WL 128563 (Ohio App. 6 Dist.) (holding that denial of permission to tear down house for church parking lot was not an undue burden on the church's free exercise).

[93] St. Bartholomew's, 914 F.2d at 355.

[94] *Id.* at 352.

[95] *Id.* at 353-54.

[96] *Id.* at 355.

preservation laws impose unconstitutional burdens on religion. For example, in *First Covenant Church of Seattle v. City of Seattle*, the Washington State Supreme Court held that Seattle's historic preservation ordinances, as applied, burdened religious exercise "administratively," by requiring a religious entity to seek the approval before alteration or demolition, and "financially," by reducing the value of the landmarked property by fifty percent.[97] The court acknowledged that not all financial burdens upon religion violate free exercise but found that the fifty-percent reduction in value of the church property at issue was a "gross" financial burden.[98]

In *Keeler v. Mayor & City Council of Cumberland*, the United States District Court of Maryland held that a city's refusal to allow demolition of a monastery and chapel in a historic district violated the free exercise under federal and Maryland constitutions.[99] The Catholic Archdiocese of Baltimore wanted to demolish an historic structure and replace it with a newer building in order to improve accessibility, parking, and meeting space.[100] The *Keeler* court found that the city's historic preservation law contained a series of individualized exceptions and applied strict scrutiny.[101] However, the court accepted as true the archdiocese's claims that the denial of the demolition permit burdened its free exercise rights and applied strict scrutiny without determining whether those free exercise rights were *substantially burdened.*

Similarly, in *Mount St. Scholastica, Inc. v. City of Atchison*, the United States District Court in Kansas, applying strict scrutiny, held that a city's denial of a demolition permit for an historic monastic property violated the free exercise clause.[102] The city did not dispute that burdened religious practice, so the court, like the Maryland court in *Keeler*, accepted as true the

---

[97] First Covenant Church v. City of Seattle, 840 P.2d 174, 183 (1992).
[98] *Id.*
[99] Keeler v. Mayor of Cumberland, 940 F. Supp. 879, 887 (D. Md. 1996)
[100] *Id.* at 883.
[101] *Id.*
[102] 482 F. Supp. 2d 1281, 1295 (D. Kan. 2007).

plaintiff's alleged burden on religious exercise without once analyzing whether the alleged burden was substantial.[103]

Although *First Covenant*, *Keeler*, and *Mount St. Scholastica* directly conflict with the holding of St. Bartholomew's, these three cases are distinguishable. The courts in *Keeler* and *Mount St. Scholastica* did not analyze whether a substantial burden had occurred. Although *First Covenant* held a fifty-percent reduction in value to be a substantial burden, even if Third Church were to prove such a reduction, the Washington court's opinion would not be compelling precedent. The Washington State Supreme Court, acknowledging its dislike of the new *Smith* test,[104] also grounded its decision in the Washington State Constitution, which is "significantly different and stronger than the federal Constitution."[105] While the First Amendment limits government action that prohibits free exercise, the Washington Constitution "absolutely" protects freedom of worship and prohibits any conduct that merely "disturbs" religious conduct.[106] Therefore, in light of the unique provisions of the Washington Constitution, *First Covenant* would be inapplicable in the District of Columbia.

Moreover, the application of strict scrutiny without a finding of a substantial burden in *Keeler* and *Mount St. Scholastica* conflicts with Supreme Court dicta in *Smith*. Fearing the "anarchy" that would result from a liberal application of strict scrutiny to neutral laws, the majority in *Smith* cautioned: "[W]e cannot afford the luxury of deeming *presumptively invalid*, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order. The rule respondents favor would open the prospect of constitutionally

---

[103] *Id.* at 1292.
[104] The Washington State Supreme Court criticized the United States Supreme Court's analysis in *Smith* as "depart[ing] from a long history of established law and adopt[ing] a test that places free exercise in a subordinate, instead of preferred, position." *Id.* at 187.
[105] *Id.* at 186.
[106] *Id.* at 186.

required religious exemptions from civic obligations of almost every conceivable kind…."[107]

Even Justice O'Connor, who dissented in *Smith* and wanted to preserve the *Sherbert* compelling interest test, recognized that courts must first consider the scope of the alleged burden: the proper approach is "to determine whether the burden on the specific plaintiffs before us is *constitutionally significant* and whether the particular criminal interest asserted by the State before us is compelling."[108] Therefore, by applying strict scrutiny before determining whether a substantial burden on religious has occurred, the courts in *Keeler* and *Mount St. Scholastica* depart from the proper compelling interest test they purport to follow.

V. ANALYSIS OF A POTENTIAL SUIT UNDER RLUIPA

A. Protections to religious exercise under RLUIPA

As discussed above, RLUIPA prohibits the federal and state governments from imposing substantial burdens on religious exercise unless the government shows its action is the least restrictive means of achieving a compelling state interest.[109] RLUIPA does not define what constitutes a "substantial burden" of religious exercise, but it expands the scope of "religious exercise" to include not only "any exercise of religion, whether or not compelled by, or central to, a system of religious belief" but also "the use, building, or conversion of real property" for religious purposes.[110]

The substantial burden analysis under RLUIPA is supposed to be identical to that under the First Amendment, and yet different outcomes have resulted in a few courts.[111] Sen. Orrin

---

[107] *Employment Div. v. Smith*, 494 U.S. 872, 888-89 (1990).
[108] *Id.* at 899. (O'Connor, J., dissenting) (emphasis added).
[109] 42 U.S.C. § 2000cc(a)(1) (2000).
[110] § 2000cc-5(7)(A)-(B).
[111] *See* Congregation of Kol Ami v. Abington Township, 2004 WL 1837037 (E.D. Pa. 2004) (finding that

Hatch (R-UT), one of the sponsors of RLUIPA, explained to the Senate, "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."[112]

But not all courts have agreed with Sen. Hatch's interpretation. The United States District Court in the Eastern District of Pennsylvania commented, "Viewed in the light that the RLUIPA effectively changed the type of burdens that require judicial intervention, it appears that there are two types of burdens on the exercise of religion: those defined by free exercise case law both prior to and during the effectiveness of the RFRA, and those that have been recognized since the passage of the RLUIPA."[113] Thus, according to the Eastern District of Pennsylvania, a government action can be a violation of RLUIPA but not a violation of the free exercise clause.[114] This problem arises because the language of the statute conflicts with its legislative history.[115] RLUIPA was intended to remedy intentional discrimination against religion in zoning decisions, yet if interpreted broadly the statute can give religious organizations a per se exemption from historic preservation regulations even in the absence of discrimination.[116]

As discussed above, RLUIPA applies only in specific contexts; the most relevant of which in this case is when a substantial burden results from a regulation that allows the

---

denial of variance not a free exercise violation but a violation under RLUIPA).

[112] 146 CONG. REC. S7776 (daily ed. July 27, 2000) (statement of Sen. Hatch). Hatch continued: "Nothing in this Act, including the requirement in Section 5(g) that its terms be broadly construed, is intended to change that principle. 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." *Id.*

[113] Kol Ami, 2004 WL 1837037 at 8-9. However, it should be noted that Kol Ami is an unreported opinion and therefore lacks precedential weight.

[114] See *id.*; *see also* Dilaura v. Ann Arbor Charter Tp., No. 00-1846, 2002 U.S. App. LEXIS 3135, at *20 (6th Cir. 2002) (holding that denial of variance seeking to use a donated house for a religious retreat was a substantial burden under RLUIPA but not a violation of the Free Exercise Clause).

[115] *See* Lennington, *supra* note 26, at 834.

[116] *See id.* at 835.

government to make "individualized assessments of the proposed uses for the property involved."[117] There are two components in the analysis: whether the regulation makes individualized assessments and whether a substantial burden exists. If the regulation does not make individualized assessments, then even if the regulation substantially burdens free exercise, RLUIPA does not apply. Additionally, if the regulation does make individualized assessments, RLUIPA will not be relevant unless there is a substantial burden.

B. Individualized assessments and strict scrutiny

The "individualized assessments" language in RLUIPA purposefully mirrors and codifies the "individualized exemption" language in *Smith*. The general consensus of courts is that RLUIPA encompasses zoning and historic preservation laws that allow for individualized exemptions.[118]

For example, in *Episcopal Student Foundation v. City of Ann Arbor*, a federal district court found that a denial of a demolition permit for a contributing building in a historic district constituted an individualized assessment.[119] And in *Corp. of Presiding Bishop v. City of West Linn*, the Oregon Court of Appeals stated that even though zoning or preservation ordinances "are neutral laws of general applicability, their application to particular facts nevertheless can constitute an individualized assessment—particularly where…the application does to involve a mere numerical or mechanistic assessment, but on involving criteria that are at least partially

---

[117] 42 U.S.C. § 2000cc(a)(2)(C) (2000).
[118] *See* Freedom Baptist Church v. Tp. of Middleton, 204 F. Supp. 2d 857, 868-69 (E.D. Pa. 2002) (holding that zoning ordinances impose individual assessments involving case-by-case evaluation of the propriety of proposed activity against the ordinance); Shepherd Montessori Center Milan v. Ann Arbor Charter Tp., 675 N.W.2d 271 (Mich. App. Ct. 2003) (finding that denial of variance constituted "individualized assessment" under RLUIPA).
[119] 341 F. Supp. 2d 691, 698 (2004).

subjective in nature."[120]

Even though the HPRB applies criteria in its decision of whether or not to deny a demolition permit, the criteria are nevertheless subjective and require individualized assessments. For example, § 6-1104 of the D.C. Code prohibits any demolition permit for a landmark from being issued unless the Mayor finds the permit "is necessary in the public interest" or that a failure to issue the permit "will result in unreasonable economic hardship to the owner."[121]

The term "necessary in the special interest" is defined as being consistent with the purposes of the act or necessary to create a project "of special merit."[122] A project can be considered of special merit if it contains "exemplary architecture," "specific features of land planning," or "social or other benefits."[123] Each of these determinations requires an individual, fact specific assessment. In addition, while the Code standardizes the economic hardship review by listing specific financial information an owner must submit,[124] the determination of whether the hardship is unreasonable is nevertheless individualized.

Thus, even absent any evidence of discrimination, RLUIPA is triggered because the denial of a demolition permit would require an individualized assessment.

---

[120] Corp. of Presiding Bishop v. City of West Linn, 86 P.3d 1140, 1148 (Or. App. Ct. 2004) (finding that denial of variance to construct church was individualized assessment, although not a substantial burden on religious exercise).
[121] D.C. Code § 6-1104(e) (2000).
[122] § 6-1102(10).
[123] § 6-1102(11).
[124] § 6-1104(g).

C. Historic preservation of a religious property does not create a substantial burden unless religious exercise is effectively impracticable

It is important to note that strict scrutiny is not automatically invoked once an individualized assessment is found. Every zoning and historic preservation system has exemptions and requires individualized assessments, and to impose strict scrutiny without any other showing would effectively create immunity from any individualized assessment, whether a variance or permit. Such an interpretation of RLUIPA conflicts with the legislative intent of Congress when passing the Act. In describing the effects of RLUIPA, the Senate sponsors of the Act stated, "This Act does not provide religious institutions with immunity from land use regulation, nor does it relieve religious institutions from applying for variances, special permits or exceptions, hardship approval, or other relief provisions in land use regulations, where available without discrimination or unfair delay."[125]

Therefore, the fact that Congress intended religious groups to apply for variances and special permits shows that Congress intended many of these variances and permits to be upheld under RLUIPA unless something else was shown: a substantial burden on religious exercise.

Once it is determined that RLUIPA applies because an individualized assessment is made, the crucial question becomes whether a substantial burden exists. Once a substantial burden is found, local preservation ordinances will rarely survive strict scrutiny review, in part because historic preservation has never been held to constitute a compelling state interest.[126] While RLUIPA does not define substantial burden, the legislative history states that courts should "reference…Supreme Court jurisprudence" to establish what constitutes a substantial

---

[125] 146 CONG. REC. 7776 (daily ed. July 27, 2000) (statement of Sen. Kennedy).
[126] *See* Mt. St. Scholastica v. City of Atchison, 482 F. Supp. 2d 1281, 1294 (D. Kan. 2007) (citing Keeler v. Mayor of Cumberland, 940 F. Supp. 879, 886 (D. Md. 1996)).

burden.[127] Indeed, recent Supreme Court decisions show that the substantial burden test is a difficult standard to meet[128] and is rarely satisfied without a showing of coercion,[129] animus toward religion,[130] or the threat of criminal sanctions for religiously motivated activities.[131]

Five circuits narrowly interpret "substantial burden"

The Second, Third, Fifth, Ninth, and Eleventh Circuits have narrowly interpreted the term "substantial burden," holding that inconveniences or financial difficulties do not rise to the level of substantial burdens. The Second Circuit, suggesting in dicta that a town's denial of a special use permit for a religious day care center would not be a substantial burden, cautioned that if RLUIPA is construed too broadly, "a serious question arises whether it goes beyond the proper function of protecting the free exercise of religion into the constitutionally impermissible zone of entwining government with religion in a manner that prefers religion over irreligion and confers special benefits on it."[132] In other words, courts should narrowly interpret what constitutes a substantial burden on religion to avoid a potential Establishment Clause violation.

The Seventh Circuit, in one of the first cases addressing the question of what constituted a substantial burden under RLUIPA, recognized that although RLUIPA expanded the definition of religious exercise to include mere use of property for religious purposes, not every

---

[127] 146 CONG. REC. S7776 (daily ed. July 27, 2000).
[128] *See* Braunfield v. Brown, 366 U.S. 599, 605 (1961) (finding no substantial burden when Sunday closing law merely made practice of religion more expensive); Bowen v. Roy, 476 U.S. 693 (1986) (finding no substantial burden even though government's use of social security number would allegedly negatively affect plaintiff's soul); Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988) (finding no substantial burden when government built road through forest held sacred by Native Americans because action interfered with, but did not coerce, individual beliefs).
[129] *See* Sherbert v. Verner, 374 U.S. 398 (1963) (finding substantial burden when individual forced to choose "between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion…on the other").
[130] *See* Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 533 (1993).
[131] *Id.*
[132] Westchester Day Sch. v. Vill. of Mamaroneck, 386 F.3d 183, 189 (2d Cir. 2004).

infringement on use would be substantial. In upholding Chicago's requirement of a special use permit for any church that sought to operate in a business or commercial zone, the court reasoned that applying the substantial burden provision to any government action or regulation that constrained the use of property for religious purposes "would render meaningless the word 'substantial,' because the slightest obstacle to religious exercise incidental to the regulation of land use—however minor the burden it were to impose—could then constitute a burden sufficient to trigger" RLUPIA's strict scrutiny.[133] Thus, the Seventh Circuit defined a substantial burden for RLUIPA purposes as a government action that "necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise--including the use of real property for the purpose thereof within the regulated jurisdiction generally--effectively impracticable."[134] The court justified its holding by claiming that a broader interpretation would impermissibly create religious exemptions from land use and that "no such free pass for religious land uses masquerades among the legitimate protections RLUIPA affords."[135]

Other circuits have followed this approach. For example, the Third Circuit held that a city's denial of a variance to build a church in a commercial district did not constitute a substantial burden because the denial was not a "significantly great restriction" making religious

---

[133] Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752, 761 (7th Cir. 2003).
[134] *Id.* at 760-61. However, the Seventh Circuit's inclusion of a requirement that the challenged governmental action be the "direct" cause of an effective impracticability of using the real property for religious purposes appears to be inconsistent with the test under the Free Exercise Clause stated by the Supreme Court in *Sherbert*. *See* Sherbert v. Verner, 374 U.S. 399, 404 (1963) (explaining that, if the purpose or effect of a law is to impede religious practice, the law is constitutionally invalid even though it has such effect only indirectly). Thus, perhaps the more complete standard is one that either indirectly or directly makes religious exercise impracticable. The issue is of little importance because the Supreme Court has shifted away from examining the directness or indirectness of the burden to instead the substantiality of the burden. *Compare* Braunfield v. Brown, 366 U.S. 599 (1961) and Sherbert, 374 U.S. at 404 *with* Employment Div. v. Smith, 494 U.S. 872, 899 (O'Connor, J., concurring).
[135] Civil Liberties, 342 F.3d at 761.

exercise "effectively impracticable."[136] The Fifth Circuit, in the context of an institutionalized persons claim, held a "substantial burden" arises if government action "truly pressures the adherent to significantly modify his religious behavior and significantly violate his religious beliefs."[137] Echoing the element of coercion necessary for a substantial burden, the Ninth Circuit held that a "substantial burden" must be "oppressive" and "render religious exercise effectively impracticable."[138] Finally, the Eleventh Circuit, in holding that a city requirement limiting churches and synagogues to the central business district did not impose a significant burden to a synagogue who members did not live near by and had to walk farther to attend services.[139] The court defined a "substantial burden" as one that "directly coerces the religious adherent to conform his or her behavior accordingly."

Historic preservation laws, unless they make the practice of religion effectively impracticable, are not a substantial burden on religious exercise

Historic preservation laws, while they add financial expense and inconvenience, do not necessarily rise to the level of a substantial burden. In *Episcopal Student Foundation v. City of Ann Arbor*, the Eastern District of Michigan applied a narrow interpretation of substantial burden in the context of historic preservation. The City of Ann Arbor denied a demolition permit to an Episcopal organization near the University of Michigan that sought to demolish its two-story building in a historic district. The group alleged its ministry had outgrown the historic structure

[136] Lighthouse Inst. for Evangelism Inc. v. City of Long Branch, 100 F. Appx. 70, 77 (3d Cir. 2004) (not precedential).
[137] Adkins v. Kaspar, 393 F.3d 559 (5th Cir. 2004).
[138] San Jose Christian Coll. v. City of Morgan Hill, 360 F.3d 1024, 1035 (9th Cir. 2004).
[139] Midrash Sephardi v. Town of Surfside, 366 F.3d 1214, 1227 (11th Cir. 2004).

and it wanted to erect a "large and multi-faceted church."[140] The organization wanted to cater to students, but alternative sites near the university campus were impossible to obtain.

Nevertheless, the court found no substantial burden because the preservation ordinance's financial burden and inconvenience did not "prevent the group from pursuing its religious beliefs, coerce its members into abandoning or violating those beliefs, or dissuade members from practicing their faith."[141] It explicitly rejected the idea that the financial burdens on the religious organization constituted a substantial burden.[142] The court recommended a variety of alternatives, which included renting worship space in another facility or constructing an addition on the site.[143]

Thus, the holding of *Episcopal Student* strongly supports the constitutionality of not exempting religious groups from historic preservation regulations. In fact, the holding of *Episcopal Student* is in some regard even more compelling than *St. Bartholomew's* because the building at issue in *Episcopal Student*—like Third Church—is used for worship, not merely social services or offices, as was the case in *St. Bartholomew's*. Thus, even though the building was more closely tied to a central religious exercise, the burden in not being able to demolish the structure was insufficient to violate the free exercise clause.

Circuits retreat from narrow interpretation of substantial burden upon a colorable showing of religious discrimination

However, several recent decisions have retreated from the narrow interpretation of

---

[140] Episcopal Student Found. v. City of Ann Arbor, 341 F. Supp. 2d 691, 694 (E.D. Mich. 2004).
[141] *Id.* at 704.
[142] *Id.* at 706 ("Finally, although Canterbury House may incur additional financial burdens, such as rental expenses to accommodate its entire congregation on occasion, or if it seek additional growth, such financial burdens are not 'substantial' under RLUIPA.").
[143] *Id.*

substantial burden. The Seventh Circuit, in the year after its decision in *Civil Liberties*, significantly broadened the scope of a substantial burden. Distinguishing and not overruling *Civil Liberties*, the Seventh Circuit in *Saints Constantine & Helen Greek Orthodox Church v. City of New Berlin* held that "delay, uncertainty, and expense" resulting from the denial of a request to rezone for religious use constituted an impermissible substantial burden.[144] The burden need "not be insuperable" to be substantial.[145] However, in addition to the denial, the city had committed a series of legal errors, and the court found the mayor was "playing a delaying game," and all this created the inference of less than good faith on the part of the city.[146]

Similarly, in *Guru Nanak Sikh Society of Yuba City v. County of Sutter*, the Ninth Circuit, applying the reasoning of *San Jose Christian*, held that Sutter County's repeated denials of a conditional use permit to build a Sikh temple constituted a substantial burden.[147] The court implied the possibility of subtle discrimination in the county's denial, based upon the county's inconsistent application of zoning law, its law of explanation for denial despite the group's good faith efforts to satisfy every mitigation condition.[148]

A broad interpretation of substantial burden is not applicable to Third Church because no evidence of religious discrimination exists

New Berlin and *Garu Nanak* are distinguishable from *Episcopal Student* and the issue in Third Church because they raise issues of administrative incompetence or, at worst, discrete

---

[144] 396 F.3d 895, 901 (7th Cir. 2005); Lennington, *supra* note 26, at 821.
[145] New Berlin, 396 F.3d at 901.
[146] *Id.* at 899.
[147] Guru Nanak Sikh Society of Yuba City v. County of Sutter, 456 F.3d 978, 992 (9th Cir. 2006).
[148] *Id.* at 990-91.

discrimination. In contrast, the HPRB has signaled its willingness to work with Third Church in reaching a compromise.[149] Moreover, the administrative record shows that the church was landmarked because it was an example of Brutalist architecture, not because the HPRB wanted to restrict the religious practice of the Christian Scientists. *New Berlin* and *Garu Nanak* are also distinguishable in that they deal with the siting and creation of new houses of worship. By repeatedly denying the conditional use permit to the Sikhs, the County of Sutter was severely restricting their ability to locate. But the burden involved in not being able to establish a house of worship is far greater than the burden in not being able to alter an established church building. While the denials of siting approval do not directly coerce a religious adherent to alter his beliefs, it does make religious exercise, to adopt the term from the Seventh Circuit in *Civil Liberties*, "effectively impracticable."

<u>While preservation regulations impose financial costs on Third Church, they do not necessarily rise to the level of a substantial burden on free exercise</u>

In contrast, preventing the demolition of Third Church of Christ, Scientist, would not necessarily make religious exercise "effectively impracticable" because religious exercise would continue as it had since the building was completed in 1971. This makes Third Church different from other cases where courts have been willing to find a substantial burden when a church is denied a permit to construct a building for religious worship.[150] While congregants claim that the church is unwelcoming and that it costs $8,000 to erect scaffolding to change the

[149] Transcript of Dec. 6, 2007 HPRB hearing (on file with the Office of Historic Preservation).
[150] *See* Cottonwood Christian Ctr v. Cypress Redev. Agency, 218 F. Supp. 2d 1203, 1226 (C.D. Cal. 2002) ("Preventing a church from building a worship site fundamentally inhibits its ability to practice its religion….If Cottonwood could not build a church, it could not exist."); Elsinore Christian Ctr v. City of Lake Elsinore, 291 F. Supp. 2d 1083, 1090 (C.D. Cal. 2003) ("Denial of the [conditional use permit] bars the Church's use altogether, thereby imposing the ultimate burden on the use of that land.").

lightbulbs,[151] government actions that make the practice of religion more inconvenient or expensive—without making religious use impractical—have not been found to constitute a substantial burden upon religion.[152]

Of course, this is not to say that a financial burden on religious exercise could never rise to the level of a significant burden. Applying the test adopted by the Seventh Circuit and others, Third Church would have to show that its finances are in such poor shape that the maintenance costs made religious exercise "effectively impractical."[153] Considering that the congregation has declined from several hundred to approximately fifty or sixty weekly worshippers,[154] this is not unrealistic.

No court has decided what level of financial burden would amount to a substantial burden for either RLUIPA or First Amendment purposes,[155] but based upon *St. Bartholomew's* and *Episcopal Student*, the court's inquiry would be detailed and searching. To remain consistent with *St. Bartholomew's*, Third Church would have to provide "financial projections or cash flow analyses" to prove financing of repairs and maintenance were infeasible and would "prohibit" religious exercise, not merely make it more difficult.[156] In addition, the Second Circuit's opinion implies that a court would not run afoul of the constitution by requiring Third Church to mount a

---

[151] Charles Paul Freund, *A Brutalist Bargain*, THE AMERICAN SPECTATOR, Dec. 18, 2007, *available at* http://www.spectator.org/dsp_article.asp?art_id=12460.
[152] *See* Braunfield v. Brown, 366 U.S. 599 (1961).
[153] *See* Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752, 760-61 (7th Cir. 2003).
[154] *See* Schwartzman, *supra* note 6.
[155] The court in *First Covenant* held a substantial burden arose because the church's property was reduced in value by 50%, but this was largely based on the Washington State constitution. First Covenant Church v. City of Seattle, 840 P.2d 174, 182 (Wash. 1992).
[156] *See* St. Bartholomew's Church v. City of New York, 914 F.2d 348, 355 (2nd Cir. 1990) (quoting Lyng v. Northwest Cemetery Protective Ass'n, 485 U.S. 439 (1988)) ("The crucial word in the constitutional text is 'prohibit.'")

good faith fundraising drive.[157] While *St. Bartholomew's* is a pre-RLUIPA case, using the *St. Bartholomew's* analysis as a guide is appropriate because the legislative history of RLUIPA suggests that substantial burden should be interpreted in line with precedent.[158]

The District of Columbia Court of Appeals in *900 G Street Associates v. Department of Consumer and Regulatory Affairs* held that an owner had to undertake good faith efforts to rent or sell the building before the court would make a finding of economic hardship.[159] While *900 G Street* involved a takings claim of a commercial building and not free exercise claim, it nevertheless reinforces the fact that a plaintiff carries a significant burden in alleging economic hardship. The opinion in *900 G Street* thus implies that Third Church may have to undertake good faith efforts to rent out parts of the building (perhaps for conferences) before the court would be willing to find the financial burdens substantial.

Substantial burden determination resembles Fifth Amendment takings analysis

Third Church's showing that religious exercise was "effectively impractical" therefore would be similar to the analysis of a Fifth Amendment takings claim. This is not to say that Third Church must bring a successful takings claim first, but merely that the level of the burden is very similar.[160]

In *Society for Ethical Culture v. Spratt*, the Court of Appeals of New York rejected the claim that the landmark designation of a historic mansion used by a charitable organization

---

[157] *See id.* at 359.
[158] See 146 CONG. REC. S7776 (daily ed. July 27, 2000) (statement of Sen. Hatch).
[159] 430 A.2d 1387, 1391 (D.C. 1981).
[160] This paper does not fully explore a potential taking claim; this paragraph is included to illustrate how the showing of impracticability under RLUIPA is similar to a takings claim under the Fifth Amendment.

constituted an unconstitutional taking.[161] The court stated that the landmark designation of a non-profit organization would be constitutionally permissible so long as "it does not physically or financially prevent, or seriously interfere with the carrying out of the charitable purpose."[162] The Society for Ethical Culture had claimed its historic building was ill-suited for its needs. However, the court said the society had not proved its activities within the building were "wrongfully disrupted" by the landmark designation and that the society was not entitled to put the property to its most beneficial use.[163] The court in *Ethical Culture* distinguished an older case, *Lutheran Church in America v. City of New York*, which had found that landmark designation to a church-owned property constituted a "naked taking."[164]

In *Lutheran Church*, the landmark structure had become so "hopelessly inadequate to the church needs" that had the regulations been applied, the charitable activity would have had no alternative but to cease.[165] However, the Society for Ethical Culture—like Third Church—had not shown that the building was so "hopelessly inadequate" that the regulations would have had "no alternative" but to cause the charitable activity to cease.[166] While Third Church could argue that the historic preservation regulations "seriously interfere" with their religious activity, *Ethical Culture* says that only when charitable activity would cease does the regulation work a taking.[167]

Similarly, the Second Circuit stated in *St. Bartholomew's* that a preservation law does not cause a taking—even though the regulation interfered with the church's mission—because the

---

[161] Society for Ethical Culture v. Spratt, 415 N.E.2d 922, 926 (N.Y. 1980).
[162] *Id.*
[163] *Id.*
[164] *Id.*
[165] *Id.*
[166] *Id.*
[167] *See also* Sailors' Snug Harbor v. Platt, 29 A.D.2d 376 (N.Y. App. Div. 1968) (upholding landmark designation of historic building owned by charitable organization because the designation neither "physically or financially prevents" or "seriously interferes" with the organization's charitable purpose.).

religious entity could continue its existing activities in its current facilities.[168] In adapting the Supreme Court's *Penn Central* test to property used for religious or charitable purposes, the court stated that "so long as the Church can continue to use its property in the way that it has been using it, there is no unconstitutional taking."[169] In essence, then, the trigger for a takings claim in both *Ethical Culture* and *St. Bartholomew's*—the inability to continue use—is the same as for a free exercise claim: that religious exercise is "effectively impracticable."

D. Role for accommodation

Considering that the law in this area is uncertain, the District would be well-served by offering to accommodate Third Church. Accommodation does create a real problem in that a landmark is a landmark and each property is supposed to protected to the same extent as any other. However, the political realities involved here as well as the burden shifting that RLUIPA imposes encourage accommodation.

The statutory language of RLUIPA provides that the government can alleviate substantial burdens by proposing accommodations to religious entities.[170] The legislative history of RLUIPA states that a claimant has the burden of showing that any proposed accommodation by the government to relieve the burden on religion is either "unreasonable or ineffective" before the claimant can prevail under the statute.[171] As a consequence, assuming a substantial burden exists, the HPRB can propose a compromise—perhaps an alteration to the entrance to make it more welcoming—that addresses its preservation concerns as well as Third Church's concerns,

---

[168] *See* St. Bartholomew's, 914 F.2d at 357.
[169] *Id.*
[170] 42 U.S.C. § 2000cc-3(e) (2000).
[171] 146 CONG. REC. S7776 (daily ed. July 27, 2000). *See* Julia H. Miller, *Regulating Historic Religious Properties Under RLUIPA*, SM056 ALI-ABA 817, 829 (2007).

and Third Church would have to show the accommodation is "unreasonable or ineffective." Accommodation is preferable because it reduces litigation costs and removes the controversy from the uncertainty of the courts.

Accommodation is preferable for political reasons as well. Even if a potential Third Church challenge to the Mayor's Agent's denial of a demolition permit were rejected in the courts, the controversy could jeopardize the District's overall ability to protect churches. The initial landmarking decision has caused vocal outrage from some segments in the community, and District of Columbia Councilmember Jack Evans introduced a bill (which he withdrew a few days later) that would exempt houses of worship from historic preservation laws upon a statement of opposition from the religious entity.[172] While Evans' proposal presents its own constitutional challenges—it might present an unconstitutional establishment of religion to allow religious entities to opt-out of historic preservation laws[173]—a similar law was enacted and upheld as constitutional in California.[174]

The controversy from the case could jeopardize public support of including religious buildings within the overall historic preservation regime.[175] Preservationists should want to prevent a law like California's from being adopted in the District. Therefore, while the

---

[172] Bill on file with author.

[173] To avoid an Establishment clause violation under the Supreme Court's test in *Lemon v. Kurtzman*, a government action or law must "have a secular legislative purpose;" its "principal or primary effect" must "neither advance[] nor inhibit[] religion," and it must not foster "'excessive government entanglement with religion.'" 403 U.S. 601, 612-13 (1971) (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)). Exempting only religious properties arguably has neither a secular purpose nor a secular effect.

[174] *See* East Bay Asian Local Dev. Corp. v. California, 13 P.3d 1122 (Cal. 2000). The California law exempts all non-commercial properties from historic preservation laws if the organization objects to application of the regulations and makes a declaration in a public forum that it would suffer substantial hardship if the regulations were applied. *See* Felipe M. Nunez & Eric Seidman, *California's Statutory Exemption For Religious Properties From Preservation Ordinances: A Constitutional and Policy Analysis*, 12 J.L & RELIGION 271-322 (1995).

[175] Local media figures and property rights advocates have severely criticized the HPRB's decision to landmark Third Church. *See* Fisher, *supra* note 7.

preservation laws stand a good chance of surviving a free exercise and RLUIPA challenge by Third Church, the realities of preserving the integrity of preservation laws as applied to religious structures urge efforts to accommodate.

CONCLUSION

Historic preservation of religious properties poses numerous constitutional and policy questions. The legality of historic preservation in the context of religious properties is more uncertain because the religious entities have a constitutional protection to free exercise that ordinary landowners do not enjoy. The discrepancy in case law reflects the difficulty courts having in applying free exercise jurisprudence to this area. Despite the uncertainty and sometimes conflicting opinions, the Supreme Court's denial of certiorari in *St. Bartholomew's* and its vacation of *First Covenant* during the same term strongly suggest that the Court would not consider the preservation of a religious property to be a violation of the free exercise clause.

Similarly, the decision in *Episcopal Student*, which is factually similar to the situation involving Third Church, suggests that the denial of a demolition permit would not be a substantial burden on religious exercise under RLUIPA. These two decisions, particularly in light of the District of Columbia Court of Appeals' preservation-friendly opinions in *Metropolitan Baptist* and *Embassy Real Estate Holdings, LLC v. District of Columbia*,[176] greatly reduces the probability of a successful lawsuit by Third Church. In order to prevail, Third Church would have to show that the preservation regulations made its religious exercise "effectively impracticable."

But the tension between preservation of churches and religious exercise will only become

---

[176] *Embassy Real Estate Holdings, LLC v. District of Columbia*, No. 06-AA-1083 (D.C. Mar. 20, 2008).

more pronounced as congregations with historic churches suffer from shrinking congregations.[177] Faced with increased maintenance costs and decreased attendance and tithing, this may be the first of many such challenges.

[177] For example, the diocese of Pittsburgh closed over 40 churches from 1988-94. Megan McCloskey, *Historic Church Closes Its Doors Forever*, PITTSBURGH TRIB. REV., Dec. 7, 2004. In Boston, the Roman Catholic archdiocese recently closed 83 churches, many of them historic. Marilyn M. Fenollosa, *The Boston Archdiocese Parish Closing Process, in* QUEL AVENIR POUR QUELLES EGLISES? at 139 (2007).

APPENDIX A

42 U.S.C. §§ 2000cc (2000)
Protection of land use as religious exercise

(a) Substantial burdens

(1) General rule

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.

(2) Scope of application

This subsection applies in any case in which--

(A) the substantial burden is imposed in a program or activity that receives Federal financial assistance, even if the burden results from a rule of general applicability;

(B) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, even if the burden results from a rule of general applicability; or

(C) the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved.

(b) Discrimination and exclusion

(1) Equal terms

No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.

(2) Nondiscrimination

No government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination.

(3) Exclusions and limits

No government shall impose or implement a land use regulation that--

(A) totally excludes religious assemblies from a jurisdiction; or

(B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.

APPENDIX B
D.C. Code § 6-1104(e) (2000)

(1) In any instance where there is a claim of unreasonable economic hardship, the owner shall submit, by affidavit, to the Mayor at least 20 days prior to the public hearing, at least the following information:

(A) For all property:

(i) The amount paid for the property, the date of purchase and the party from whom purchased, including a description of the relationship, if any, between the owner and the person from whom the property was purchased;

(ii) The assessed value of the land and improvements thereon according to the two most recent assessments;

(iii) Real estate taxes for the previous two years;

(iv) Annual debt service, if any, for the previous two years;

(v) All appraisals obtained within the previous two years by the owner or applicant in connection with his purchase, financing or ownership of the property;

(vi) Any listing of the property for sale or rent, price asked, and offers received, if any; and

(vii) Any consideration by the owner as to profitable adaptive uses for the property; and

(B) For income-producing property:

(i) Annual gross income from the property for the previous two years;

(ii) Itemized operating and maintenance expenses for the previous two years;

(iii) Annual cash flow, if any, for the previous two years.