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## God's Green Earth? The Environmental Impacts of Religious Land Use

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# GOD’S GREEN EARTH? THE ENVIRONMENTAL IMPACTS OF RELIGIOUS LAND USE

*Kellen Zale*

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## GOD'S GREEN EARTH? THE ENVIRONMENTAL IMPACTS OF RELIGIOUS LAND USE

Kellen Zale\*

### I. INTRODUCTION

*"God 1, County 0"*<sup>1</sup>

Perched between the foothills of the Rockies and the edge of the Great Plains, Boulder County, Colorado has been at the forefront of the environmental movement for decades. Starting with its citizens' vote in 1967 to implement a tax specifically to preserve open space, the city has long been known for its progressive environmental policies, ranging from its early implementation of recycling programs to its "green" building code.<sup>2</sup> At the center of Boulder's environmental protection efforts is a comprehensive system of land use regulations<sup>3</sup> designed to mitigate the slow chokehold of ever-encroaching development on wetlands and open space, on groundwater and soils, and on wildlife and native species.<sup>4</sup> Numerous communities across the country have followed Boulder's much-praised model and enacted their own environmental zoning laws to protect unique ecosystems and natural resources from the negative effects of land users who seek to "develop their properties to the limits of the law and sometimes beyond."<sup>5</sup>

Last year, however, the Rocky Mountain Christian Church, a 2000-member megachurch located in a rural area of Boulder County, persuaded the Tenth Circuit Court of Appeals to undermine decades of environmental protection efforts by the County. In *Rocky Mountain Christian Church v. Board of Commissioners of*

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1. Wayne Laugensen, *God 1, County 0*, THE CHRISTIAN STANDARD (June 24, 2007), [http://christianstandard.com/2007/06/cs\\_article-608/](http://christianstandard.com/2007/06/cs_article-608/).

2. *Green Media Kit*, BOULDER COLORADO USA, <http://www.bouldercoloradousa.com/includes/content/images/media/docs/Page-Mock-Up---Smart-Growth--FINAL-WEB.pdf> (last visited Oct. 5, 2011).

3. See Brief For Petitioner-Appellant at 4-5, *Rocky Mountain Christian Church v. Bd. of County Comm'r of Boulder County*, 613 F.3d 1229 (10th Cir. 2010) (No. 09-1188) [hereinafter *Boulder Appellate Brief*] (describing how the County's comprehensive plan, which was adopted in the 1970s and which has been the model for communities throughout the country, seeks to preserve the unique character of Boulder County, particularly its open space, agricultural lands, and natural resources).

4. CHRISTOPHER DUERKSEN & CARA SNYDER, *NATURE-FRIENDLY COMMUNITIES, HABITAT PROTECTION AND LAND USE 2* (2005).

5. Diana B. Henriques, *Religion Trumps Regulation As Legal Exemptions Grow*, N.Y. TIMES, Oct. 8, 2006, at A1, available at <http://www.nytimes.com/2006/10/08/business/08religious.html?scp=3&sq=religion>. For examples of communities which have enacted environmental zoning laws to address a wide range of environmental issues, see DUERKSEN & SNYDER, *supra* note 4, at 210-13, 240-44 (discussing zoning regulations in Eugene, Oregon designed to protect wetlands and zoning regulations in Ft. Collins, Colorado designed to protect open space).

*Boulder County*,<sup>6</sup> the Tenth Circuit held that Boulder's zoning laws, limiting development in environmentally sensitive rural areas, violated the megachurch's right to religious exercise under a federal law.

The federal law, known as RLUIPA—the Religious Land Use and Institutionalized Persons Act of 2000—was passed with the intention of protecting religious land users from discrimination in the zoning process.<sup>7</sup> However, RLUIPA casts a far wider net: the Act allows churches<sup>8</sup> to sue local governments for requiring them to comply with generally applicable zoning laws if they can show that those laws impose a “substantial burden” on their religious exercise.<sup>9</sup> No evidence, or even allegation, of discrimination is required under RLUIPA.<sup>10</sup> As a result, churches are now exempt from numerous zoning laws, leaving local governments to struggle with a myriad of unintended consequences.<sup>11</sup>

RLUIPA has not gone without criticism. Local governments and scholars alike have argued that Congress exceeded its constitutional authority under the Spending Clause, the Commerce Clause and Section 5 of the Fourteenth Amendment in enacting the Act.<sup>12</sup> RLUIPA has also been criticized as a violation of the Establishment Clause, which requires that the government not prefer one religion over another, nor prefer religion over irreligion.<sup>13</sup> Still others have argued that RLUIPA is bad public policy because it distorts residential land users' expectations that their neighborhoods will not be subject to the impacts that non-

6. *Rocky Mountain Christian Church v. Bd. of Cnty. Comm'rs of Boulder Cnty.* (*Rocky Mountain II*), 613 F.3d 1229 (10th Cir. 2010), *aff'g*, (*Rocky Mountain I*), 612 F. Supp. 2d 1163 (D. Colo. 2009).

7. 42 U.S.C. § 2000cc (2006). RLUIPA also contains provisions protecting the religious exercise of incarcerated persons (i.e., prisoners). § 2000cc-1. This incongruous pairing of zoning laws and prisoners is the result of Congressional compromises narrowing the scope of RLUIPA from an earlier law, the Religious Freedom Restoration Act (RFRA), which was held unconstitutional in *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997). See 146 CONG. REC. S6678, 6687-88 (daily ed. July 13, 2000) (statements on introduced bills and joint resolutions) (summarizing the history of RLUIPA). See also *infra* note 49 for a brief discussion of the history of RLUIPA. This article focuses only on the land use provisions of the Act.

8. For brevity's sake, this article uses the term “church” to refer to religious entities of all denominations, as well as to the structures, including mosques, synagogues, and temples, that a religious entity uses as the physical place of worship.

9. § 2000cc(a)(1). Once a religious entity shows that a land use law imposes a substantial burden, the land use law violates RLUIPA unless the local government can show that the land use law is the least restrictive means of furthering a compelling governmental interest. *Id.* See *infra* Section III for a more detailed description of RLUIPA's provisions.

10. § 2000cc(a)(1).

11. For a discussion of RLUIPA's deleterious impact on non-environmental zoning laws, see MARCI A. HAMILTON, *GOD VERSUS THE GAVEL, RELIGION AND THE RULE OF LAW* 78-110 (Cambridge University Press ed., 2005).

12. Marci A. Hamilton, *The Constitutional Limitations on Congress's Power Over Local Land Use: Why the Religious Land Use and Institutionalized Persons Act is Unconstitutional*, 2 ALB. GOV'T L. REV. 366, 426-33 (2009). The prisoner provisions of RLUIPA were held constitutional by the Supreme Court in 2005; however, the Court specifically stated it was not expressing an opinion on the constitutionality of the land use provisions. *Cutter v. Wilkinson*, 544 U.S. 709, 715 n.3 (2005). See *infra* Section V and notes 137-38 for a more detailed discussion of arguments regarding RLUIPA's constitutionality.

13. See *Westchester Day Sch. v. Vill. of Mamaroneck*, 386 F.3d 183, 189-90 (2d. Cir. 2004). Critics have argued that by providing religious land users with rights available to no other land users, RLUIPA goes too far in protecting Free Exercise rights. See Hamilton, *supra* note 12, at 433-35.

residential uses such as churches create, such as excess traffic and noise.<sup>14</sup>

This article proposes an additional argument against RLUIPA: that by allowing religious entities to use their property in ways that no other land users can, the Act threatens to undermine local environmental protection efforts nationwide. If Boulder, with its impeccable record of environmental stewardship, could not survive an attack under RLUIPA,<sup>15</sup> the environmental zoning laws of other communities face an even greater threat. RLUIPA's message to churches is that they can expand without regard to the detrimental impact of their development. As a founding member of Rocky Mountain Christian Church explained when asked if there could be any limits on the church's expansion, "There's God's limit. When he says, 'You're at your limit,' that's when we will stop."<sup>16</sup>

"God's limit," however, may come too late for the ecosystems and natural resources that stand in the path of religious development. To those that would argue that churches should "not be treated the same as a Wal-Mart or a gas station,"<sup>17</sup> this article responds that the environmental impacts to the ecosystem are exactly the same whether a 200,000-square foot mega-church or a 200,000-square foot Wal-Mart is built on a parcel of rural open space. The identity of the land user is irrelevant when measuring negative environmental impacts.

Section II begins with an overview of how religious exercise in the United States has changed in recent years, bringing it into greater conflict with zoning laws, including environmental zoning laws. Section III provides a brief overview of RLUIPA and how courts have interpreted the Act's provisions. Section IV reviews the *Rocky Mountain* case in more detail, discussing both the Tenth Circuit and federal district court decisions. Section V considers several approaches to minimizing RLUIPA's threat to the environment. The article concludes by suggesting that protecting churches from discrimination should not require eviscerating environmental protection laws. While courts must take the lead in narrowly interpreting RLUIPA to avoid unintended consequences on the environment, the parties—religious entities and local governments—must recognize their common ground and seek solutions that respect both religion and the environment.

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14. See HAMILTON, *supra* note 11, at 106-07.

15. Despite a jury finding that Boulder's zoning laws had not been enacted or applied with any intent to discriminate against religious land users, the County was still found to have violated RLUIPA's other prongs. *Rocky Mountain II*, 613 F.3d at 1235.

16. Henriques, *supra* note 5.

17. Peter Applebome, *Where Religion Meets Real Estate, a Developer and Town Face Off*, N.Y. TIMES, Jan. 21, 2007, at 1.29, available at <http://select.nytimes.com/2007/01/21/nyregion/21towns.html?scp=4&sq=RLUIPA>. See also *Religious Liberty Protect Act of 1999: Hearing on H.R. 1691 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 106th Cong. 26 (1999) [hereinafter *RLPA Hearings*], available at [http://commdocs.house.gov/committees/judiciary/hju62491.000/hju62491\\_0f.htm](http://commdocs.house.gov/committees/judiciary/hju62491.000/hju62491_0f.htm) (testimony of Richard Land, President, Ethics and Religious Liberty Commission of the Southern Baptist Convention, arguing that "you can't treat a church or a mosque or a synagogue the same way you treat a bowling alley or a used car dealership").

## II. RELIGIOUS LAND USE AND THE ZONING PROCESS

*A. Religion's Place in the American Landscape*

Founded by people seeking a place to practice their religion openly and without fear of persecution, the United States has always been a religious nation.<sup>18</sup> Today, eighty-three percent of Americans describe themselves as members of an organized faith.<sup>19</sup> In addition to the First Amendment's guarantee of free exercise of religion, numerous other laws—ranging from tax-exempt status for religious organizations to exemptions from discrimination laws for religious employers<sup>20</sup>—give religious entities a preferential place in the legal system.<sup>21</sup>

While religion has always loomed large in the political landscape, how Americans exercise their religion has changed in recent years. Traditionally, churches were located in residential neighborhoods and catered to local residents with once-weekly services. However, in the 1980s, a “paradigm shift” occurred<sup>22</sup>: activities at churches were no longer limited to once-a-week, as churches became a “locus for social services, as well as a center for worship and entertainment.”<sup>23</sup> Use of existing facilities became more extensive and intensive, with church activities ranging from soup kitchens to singles' meetings to summer camps.<sup>24</sup>

At the same time that the frequency of activities at existing churches was expanding, megachurches—defined as Protestant churches with weekly worship attendance of over 2000 people—were becoming a growing presence in American suburbs and exurbs.<sup>25</sup> In 1970, there were ten megachurches in the United States;

18. C. WELTON GADDY & BARRY W. LYNN, *FIRST FREEDOM FIRST, A CITIZEN'S GUIDE TO PROTECTING RELIGIOUS LIBERTY AND THE SEPARATION OF CHURCH AND STATE* xxiii-xxiv (Beacon Press ed., 2008); Deborah M. Rosenthal, *Religion and the Constitution*, in *RLUIPA READER* 7, 9-14 (Michael S. Giaimo & Lora A. Lucero eds., 2009).

19. *U.S. Religious Landscape Survey Report 1: Religious Affiliation*, THE PEW FORUM ON RELIGION & PUBLIC LIFE [hereinafter PEW FORUM], <http://religions.pewforum.org/reports> (last visited Oct. 5, 2011). The United States is the most religiously diverse nation in the world. GADDY & LYNN, *supra* note 18, at xvii.

20. Henriques, *supra* note 5.

21. *See Zorach v. Clauson*, 343 U.S. 306, 313-14 (1952) (“We are a religious people whose institutions presuppose a Supreme Being. . . . When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs.”) Thus, the U.S. legal system has given churches special benefits because religion is generally considered a social good. *See* Angela C. Carmella, *RLUIPA: Linking Religion, Land Use, Ownership and the Common Good*, 2 ALB. GOV'T L. REV. 485, 489-90 (2009) (explaining that courts may look favorably on religious land use because they “deem[] houses of worship to be in furtherance of the general welfare.”). *See also* Shelley Ross Saxer, *When Religion Becomes a Nuisance: Balancing Land Use and Religious Freedom When Activities of Religious Institutions Bring Outsiders into the Neighborhood*, 84 KY. L.J. 507, 511 (1996) (arguing that “religious uses [should] be given great deference when zoning regulations are applied to such uses because of their contribution to the general welfare of our country.”).

22. HAMILTON, *supra* note 11, at 79-80.

23. *Id.*

24. *Id.*

25. SCOTT THUMA & WARREN BIRD, HARTFORD INSTITUTE FOR RELIGION RESEARCH, *CHANGES IN AMERICAN MEGACHURCHES: TRACING EIGHT YEARS OF GROWTH AND INNOVATION IN THE NATION'S LARGEST-ATTENDANCE CONGREGATIONS* 1 (Sept. 12, 2008), *available at*

today, there are over 1200.<sup>26</sup> Megachurches draw their membership from the larger region, not the local community, and they need massive amounts of space to house their parishioners and their vehicles.<sup>27</sup> Like corporate campuses, megachurches may have multiple buildings spread out over fifty to eighty acres, and their facilities may include everything from movie theaters to baseball fields to hotels.<sup>28</sup>

As churches' land uses expanded, they necessarily found themselves more frequently dealing with local zoning regulations. The next section discusses the function of zoning laws and how such laws have evolved to encompass the type of environmental regulations that were struck down in *Rocky Mountain I* and *II*.

### B. Zoning and the Environment

Zoning laws, first upheld almost a century ago in *Euclid v. Ambler Realty Company* as a valid exercise of the police power to protect the public welfare, are an outgrowth of nuisance law.<sup>29</sup> While nuisance law addresses conflicting land uses after the conflict arises, zoning provides regulations in advance to balance conflicting interests and minimize the harm any single property owner's use causes others.<sup>30</sup> Zoning initially accomplished this goal by separating incompatible uses into stand-alone zones, such as residential, industrial, and commercial.<sup>31</sup> Modern zoning has evolved from its Euclidean origins to encompass wide-ranging planning objects and address complex land use demands.<sup>32</sup> Today, zoning not only regulates

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<http://hrr.hartsem.edu/megachurch/Changes%20in%20American%20Megachurches%20Sept%2012%202008.pdf>.

26. Jennifer S. Evans-Cowley & Kenneth Pearlman, *Six Flags Over Jesus: RLUIPA, Megachurches, and Zoning*, 21 TUL. ENVTL. L.J. 203, 205 (2008). See also THUMA & BIRD, *supra* note 25, at 1.

27. See Jonathan D. Weiss & Randy Lowell, *Supersizing Religion: Megachurches, Sprawl and Smart Growth*, 21 ST. LOUIS U. PUB. L. REV. 313, 317-18 (2002).

28. Evans-Cowley & Pearlman, *supra* note 26, at 207-08.

29. See *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (upholding a zoning code that established separate zones for residential, agricultural, industrial, and commercial uses against constitutional challenge under the Due Process clause of the Fourteenth Amendment). Local governments derive their zoning powers from the police power, which is delegated to them by state enabling acts. See John R. Nolon & Mary C. Stockel, *Expanding Traditional Land Use Authority Through Environmental Legislation: The Regulation of Affordable Housing*, 2 HOFSTRA PROP. L.J. 1, 4-5 (1988). Courts have construed the power of localities to enact zoning laws broadly and deferred to local governments' decisions by applying rational basis review to most challenges to zoning laws. See *Young v. Am. Mini Theaters, Inc.*, 427 U.S. 50, 71 (1976) (holding that a "city's interest in attempting to preserve the quality of urban life is one that must be accorded high respect."); *Kelo v. City of New London*, 545 U.S. 469, 481 (2005) (rejecting a takings challenge to a zoning redevelopment scheme: "The concept of the public welfare is broad and inclusive . . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.") (quoting *Berman v. Parker*, 348 U.S. 26, 33 (1954)).

30. Hamilton, *supra* note 12, at 375-78.

31. *Id.*

32. In *Euclid*, the Supreme Court recognized that land use laws, by definition, must evolve as conditions change: "[r]egulations, the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive." 272 U.S. at 387. Thus, local governments developed more sophisticated zoning tools, such as variances and conditional use permits, which provide flexibility in the zoning process. Hamilton, *supra* note 12, at 377.

the structural and architectural components of buildings, but also addresses parking and traffic issues, affordable housing requirements, and a wide swath of environmental concerns.<sup>33</sup> Echoing the Supreme Court's *Euclid* decision,<sup>34</sup> a local government official involved in the *Rocky Mountain* case explained that Boulder's zoning laws are designed to balance conflicting interests: "It's not that some development is good and some is bad. What Boulder County has done is to make sure that the right development is in the right place."<sup>35</sup>

Initially, zoning laws that protected the environment did so incidentally. For example, open space zoning requirements intended to protect property values and private views also preserved habitat.<sup>36</sup> By the 1980s, however, the link between land use law and environmental law became firmly established,<sup>37</sup> and some zoning laws were implemented with the sole, not incidental, goal of protecting environmental interests.<sup>38</sup> Guided by local concerns, environmental zoning laws have been "flexibly tailored to local contexts,"<sup>39</sup> and have filled in the regulatory gaps left by federal and state environmental laws to ensure that land users control use of their property and limit damage to natural resources and ecosystems.<sup>40</sup>

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33. DANIEL J. CURTIN, JR., CURTIN'S CALIFORNIA LAND USE AND PLANNING LAW 27-46 (17th ed. 1997). As with Euclidean zoning laws, courts typically apply rational basis review to "non-traditional" zoning laws. Prior to RLUIPA, numerous environmental zoning laws were upheld against challenges by both religious and non-religious users, on grounds that environmental protection is a legitimate goal of local government and is permissible under its police power. John R. Nolon, *The Law of Sustainable Development: Keeping Pace*, 30 PACE L. REV. 1246, 1281-84 (2010) (describing cases where such challenges were dismissed by courts applying rational basis review). *But see* Nolon & Stockel, *supra* note 29, at 6 (noting that the Supreme Court's increasingly active stance regarding takings has had the effect of limiting local government's ability to enact a wide variety of zoning laws).

34. *See Euclid*, 272 U.S. at 388 ("A nuisance may be merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard.").

35. Dwight H. Merriam, *RLUIPA: Two Sides of the Story*, SN005 ALI-ABA 1149 (2007).

36. John R. Nolon, *In Praise of Parochialism: The Advent of Local Environmental Law*, 26 HARV. ENVTL. L. REV. 365, 374 (2002).

37. Some states have explicitly incorporated the requirements of their state environmental laws into the local zoning process. *See* Kathryn C. Plunkett, Comment, *Local Environmental Impact Review: Integrating Land Use and Environmental Planning Through Local Environmental Impact Reviews*, 20 PACE ENVTL. L. REV. 211, 215 (2003) (noting that New York, California, and Washington encourage local governments to implement their state environmental law requirements into the local planning process). For example, in California, the California Environmental Quality Act ("CEQA") requires that any governmental action involving the approval of a project identify significant environmental effects and mitigate those effects. CAL. PUB. RES. CODE § 21002 (West 2010). Rather than require a land use applicant to go through two approval processes—first to satisfy a local zoning code and second to satisfy CEQA—California law requires that municipalities incorporate CEQA into their land use approval process. *Id.* § 21003(a). *See also* MICHAEL H. REMY ET AL., GUIDE TO CALIFORNIA ENVIRONMENTAL QUALITY ACT (11th ed. 2006).

38. *See, e.g.*, Nolon, *supra* note 33, at 1280; Nolon, *supra* note 36, at 372-77.

39. Nolon, *supra* note 36, at 411.

40. While a multitude of federal laws protect the air and water, protection of the land has been called the "weakest link in modern environmental law." A. Dan Tarlock, *Land Use Regulation: The Weak Link in Environmental Protection*, 82 WASH. L. REV. 651, 652 (2007). There is no equivalent to the Clean Water Act or Clean Air Act for land, and federal regulations have proven inadequate at addressing the incremental threat of sprawl and development to "non-wild" lands. *Id.* at 657-58. One reason federal regulation has failed to protect the land is because "too many species' and places' appeal are not special enough to our national political" agencies. Jamison E. Colburn, *Localism's Ecology: Protecting and Restoring Habitat in the Suburban Nation*, 33 ECOLOGY L.Q. 945, 949 (2006). Land use



The types of local environmental laws that exist today are as diverse as the types of landscapes in the United States.<sup>41</sup> Regulations range from erosion control measures and riparian setbacks to storm water management protocols and tree mitigation requirements.<sup>42</sup> In recognition of the ecological value of undeveloped or minimally developed land, many communities have also established open space or rural zoning designations limiting the scale of development on such land.<sup>43</sup> These types of zoning laws and others play a key role in protecting the environment and resisting the “death by a thousand cuts” threatened by ever-expanding development.<sup>44</sup>

### III. RLUIPA’S LAND USE PROVISIONS

While all land users must comply with zoning regulations, environmental or otherwise, as religious entities faced increasingly complicated land use regulatory regimes, they began to perceive zoning laws as interfering with their “higher purpose.”<sup>45</sup> In addition, in rare cases, zoning laws were inappropriately used to covertly discriminate against religious entities.<sup>46</sup> Thus, in the 1990s, churches lobbied Congress for a law to insulate them from the zoning process.<sup>47</sup> A testament to the perseverance of the religious lobby,<sup>48</sup> RLUIPA emerged after a decade-long contest between Congress and the Supreme Court about the scope of constitutional protection for religious exercise.<sup>49</sup>

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law, however, is uniquely suited to protecting the places that may not register as “special” on the national level. In addition, because of resistance to federal, or even state or regional, management of local matters, local zoning laws are often the only legal protection for much of the land in the United States. See DUERKSEN & SNYDER, *supra* note 4, at 4-6.

41. See DUERKSEN & SNYDER, *supra* note 4 (providing several in-depth case studies of local communities’ uses of environmental zoning laws); Nolon, *supra* note 33, at 1280 (describing in detail several types of environmental zoning laws).

42. Nolon, *supra* note 36, at 376.

43. Similarly, numerous communities have recognized the value of agricultural land, and zoning laws have been used to preserve and protect such lands from non-farm land uses. See DUERKSEN & SNYDER, *supra* note 4, at 174-78 (describing such efforts in Dane County, Wisconsin).

44. Henriques, *supra* note 5.

45. See HAMILTON, *supra* note 11, at 91.

46. See *Islamic Cntr. of Miss. v. City of Starkville*, 840 F.2d 293, 302-03 (5th Cir. 1988) (holding that the city had discriminated against a mosque when the mosque was denied a building permit, while every other religious institution that had ever applied for such a permit had been granted one; therefore, even under rational basis review, the city’s zoning laws were an unconstitutional violation of equal protection and due process).

47. See Bradley P. Jacob, *Free Exercise in the “Lobbying Nineties,”* 84 NEB. L. REV. 795, 816-17 (2006) (describing the coalition of religious groups that joined together to seek legislative protection for expansive free exercise rights).

48. See *id.* RLUIPA was one of several laws protective of religion that emerged in the 1990s; these laws have been referred to as “a sort of religious affirmative action program.” See Henriques, *supra* note 5.

49. A complete history of RLUIPA is beyond the scope of this article, but the topic has been extensively analyzed by other commentators. See, e.g., Patricia E. Salkin & Amy Lavine, *The Genesis of RLUIPA and Federalism: Evaluating the Creation of a Federal Statutory Right and its Impact on Local Government*, 40 URB. LAW. 195 (2008); Marci A. Hamilton, *The History of RLUIPA*, in RLUIPA READER 31, 31-40 (Michael S. Giaimo & Lora A. Lucero eds., 2009); Daniel P. Lennington, *Thou Shall Not Zone: The Overboard Applications and Troublesome Implications of RLUIPA’s Land Use*

RLUIPA upends the traditional deference given to zoning laws as a valid exercise of the police power to protect the public welfare.<sup>50</sup> Because Congress believed religious discrimination could be masked behind pretextual reasons such as traffic or noise,<sup>51</sup> RLUIPA requires courts to apply a strict scrutiny or strict liability standard to any land use regulation affecting a church.<sup>52</sup> RLUIPA provides religious land users with three distinct ways to challenge generally applicable zoning laws. First, a land use regulation violates RLUIPA if it substantially burdens religious exercise and it is not the least restricting means of furthering a compelling interest.<sup>53</sup> Second, a land use regulation cannot be imposed in a manner that treats a religious assembly “on less than equal terms than a nonreligious assembly or institution.”<sup>54</sup> Third, a land use regulation violates RLUIPA if it unreasonably limits, completely excludes, or discriminates against religious assemblies.<sup>55</sup>

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*Provisions*, 29 SEATTLE U. L. REV. 805 (2005-2006); Caroline R. Adams, *The Constitutional Validity of the Religious Land Use & Institutionalized Persons Act of 2000: Will RLUIPA's Strict Scrutiny Survive the Supreme Court's Strict Scrutiny?*, 70 FORDHAM L. REV. 2361 (2002). The road to RLUIPA began with the Supreme Court's 1990 decision in *Employment Division v. Smith*, which held that rational basis review applied to generally applicable laws that did not single out individuals because of their religious beliefs, even if the law incidentally burdened some religious exercise. *Emp't Div. Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990). Viewing *Smith* as eviscerating protection for religious exercise, Congress passed the Religious Freedom Restoration Act (“RFRA”) in 1993, a sweeping law that applied strict scrutiny to all laws that burdened religious exercise. Religious Freedom Restoration Act (RFRA), Pub. L. No. 103-141, § 2, 107 Stat. 1488 (codified at 42 U.S.C. § 2000bb (1994)). In 1997, the Supreme Court held that RFRA was unconstitutional as applied to the states: “RFRA is so out of proportion to a supposed remedial or preventative object that . . . [i]t appears . . . to attempt a substantive change in constitutional protections.” *City of Boerne v. Flores*, 521 U.S. 507, 532 (1997). After several other revisions of RFRA died in Congressional committees, RLUIPA, with its odd pairing of land use and prisoners, was passed in the Senate by unanimous roll call vote and signed into law by President Clinton in 2000. HAMILTON, *supra* note 11, at 39.

50. Prior to RLUIPA, zoning challenges by churches were reviewed under deferential rational basis review; most zoning laws were not considered a violation of religious freedom, even where they prevented a church from worshipping at a “preferred” location. *See, e.g.*, *Am. Comm’n Ass’n, C.I.O. v. Douds*, 339 U.S. 382, 397-98 (1950) (citing *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Porterville*, 338 U.S. 805 (1949) (describing how the Supreme Court “dismissed for want of substantiality an appeal in which a church group contended that its First Amendment rights were violated by a municipal zoning ordinance preventing the building of churches in residential areas.”)).

51. *See* 146 CONG. REC. S7774-75 (daily ed. July 27, 2000) [hereinafter Joint Statement], (joint statement of Sen. Orrin G. Hatch and Sen. Edward M. Kennedy, explaining that the Act was intended to address the “nationwide problem” of discrimination against churches in the zoning process).

52. 42 U.S.C. § 2000cc(a)(1) (2006).

53. *Id.* The substantial burden prong is only applicable if (i) the burden is “imposed in a program or activity that receives Federal financial assistance,” (ii) the burden affects interstate commerce, or (iii) in the implementation of a land use system involving “individualized assessments of the proposed uses for the property involved.” § 2000cc(a)(2). These three “jurisdictional hooks” correspond to the three Constitutional bases for Congress’s enactment of RLUIPA: the Spending Clause, the Commerce Clause, and Section 5 of the 14th Amendment.

54. § 2000cc(b)(1).

55. § 2000cc(b)(2-3). RLUIPA lawsuits often include a claim under the non-discrimination prong, but courts typically decide RLUIPA cases under either the substantial burden or equal terms prongs. Evidence of religious antipathy may figure in decisions finding a violation under these other prongs, but few cases have been decided solely under the non-discrimination prong. *See, e.g.*, *Guru Nanak Sikh*

“Land use regulation” is defined broadly 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.”<sup>56</sup> Standing under RLUIPA is restricted to parties who have traditional property interests in the land: claimants must have an “ownership, leasehold, easement, servitude, or other property interest in the regulated land or a contract or option to acquire such an interest.”<sup>57</sup>

RLUIPA has proven to be a significant challenge to local governments not because they are trying to covertly discriminate against religious entities, but because RLUIPA makes unlawful a wide array of government actions where there is no evidence, or even allegation, of discrimination.<sup>58</sup> Two separate but related factors have further complicated matters for local governments. First, RLUIPA allows churches to claim virtually anything as part of its “religious exercise,” and courts cannot question the claimed belief.<sup>59</sup> Second, courts have applied inconsistent standards to the substantial burden and equal terms prongs of RLUIPA, providing no clear rule as to what will be considered a violation of RLUIPA.<sup>60</sup>

#### A. Religious Exercise under RLUIPA

“Religious exercise” is defined broadly under RLUIPA as “any exercise of religion, whether or not compelled by, or central to, a system of religious belief,” including the “use, building, or conversion of real property for the purpose of religious exercise.”<sup>61</sup> When read in conjunction with First Amendment jurisprudence prohibiting courts from questioning the validity or centrality of alleged religious beliefs,<sup>62</sup> this expansive definition allows churches to claim

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Soc’y. of Yuba City v. Cnty. of Sutter, 456 F.3d 978, 991-92 (9th Cir. 2006) (describing evidence of discriminatory behavior by a local government against a Hindu Temple, but finding that the substantial burden prong, not the discrimination prong, of RLUIPA had been violated by the local government).

56. § 2000cc-5(5).

57. *Id.* Thus, a synagogue was found to not have standing under RLUIPA when it claimed that its religious exercise had been detrimentally affected by a land use regulation requiring a cellular tower to be built on neighboring property because the synagogue had no property interest in the neighboring property. *Omnipoint Commc’ns, Inc. v. City of White Plains*, 202 F.R.D. 402, 403-04 (S.D.N.Y. 2001), *rev’d on other grounds*, 430 F.3d 529 (2d Cir. 2005).

58. When Congress acts under its Fourteenth Amendment Section 5 remedial power, as it did in enacting RLUIPA, it “may prohibit ‘a somewhat broader swath of conduct, including that which is not itself forbidden by the [Constitution].’” *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 737 (2003) (citations omitted). However, there must be “a significant likelihood” of the prohibited conduct being unconstitutional as well as congruence between the means used and the ends to be achieved.” *City of Boerne v. Flores*, 521 U.S. 507, 530, 532 (1997). Generally applicable zoning laws prohibited by RLUIPA are rarely found to be unconstitutional. *See, e.g., Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253 (3d Cir. 2007) (holding that a zoning ordinance violated the equal terms prong of RLUIPA, but did not violate the First Amendment); *Rocky Mountain I*, 612 F. Supp. 2d 1163, 1167 (D. Colo. 2009) (noting that while the jury found that Boulder’s zoning law was prohibited under RLUIPA, it found that the zoning law was not a constitutional violation). Thus, the question of whether RLUIPA’s land use provisions are unconstitutional remains an open question.

59. *See infra* Section III(A) and notes 63-67.

60. *See infra* Section III(B)(1) and notes 68-78.

61. 42 U.S.C. § 2000cc-5(7) (2006).

62. *See, e.g., Hernandez v. Comm’r*, 490 U.S. 680, 699 (1989) (“It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants’

virtually anything as part of its “religious exercise.”<sup>63</sup> Thus, churches have an incentive to define their religious belief as precisely the thing they are prevented from doing by a zoning law. For example, a church in Maryland alleged that erecting an oversized electronic billboard to advertise its services was part of its religious exercise and that a zoning regulation limiting the size of such billboards was a violation of RLUIPA.<sup>64</sup>

Even where courts may be dubious about the “religious” nature of a particular belief, they must accept the belief as part of the claimant’s religious exercise as long as it is sincerely held.<sup>65</sup> For example, the Church of Universal Love and Music in Pennsylvania alleged that holding outdoor rock concerts was part of its religious exercise and a zoning law prohibiting such activity in a residential neighborhood was a violation of RLUIPA.<sup>66</sup> Because the court could not question

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interpretations of those creeds.”) (citations omitted). However, courts have not been hesitant to question a faith’s “religious belief” when the religion in question is a Native American religion. *See, e.g., Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058 (2008) (rejecting a RFRA claim by a Navajo religious group against the federal government for allowing a ski resort on federally-owned land considered sacred in the Navajo religion and questioning whether the church’s belief that the mountain was sacred was a “core belief”). A key underlying distinction between *Navajo Nation* and most RLUIPA cases is that the religious entity in *Navajo Nation* had no property interest in the subject land. *See id.* at 1064. As noted above, RLUPA requires that a religious entity must have a property interest in the land at issue. § 2000cc-5(5). It is ironic that RFRA failed to protect Native American religious beliefs, considering that it was enacted in response to the Supreme Court’s decision in *Employment Division v. Smith*, which centered on Native American religious beliefs. *See Flores*, 521 U.S. at 512-17 (describing how the *Smith* decision led to the enactment of RFRA).

63. Congress conceded that “not every activity carried out by a religious entity or individual constitutes ‘religious exercise.’” Joint Statement, *supra* note 51, at 7776. For example, if a church owns a commercial office building and rents from the building provide the funding for the church’s religious activities, the commercial office building is not automatically considered religious exercises (but it also is not automatically not considered religious exercise). *Id.* *See also* Greater Bible Way Temple v. City of Jackson, 733 N.W.2d 734, 745-46 (Mich. 2007) (holding that a church’s operation of an apartment building was not a religious exercise, and thus RLUIPA was not applicable). However, churches have claimed a wide variety of activities other than worship activities as religious exercise protected under RLUIPA, including schools, hospitals, and day care centers. Hamilton, *supra* note 12, at 412-14.

64. *Trinity Assembly of God v. People’s Counsel*, 962 A.2d 404, 427 (Md. 2008) (“[A]ssum[ing], without deciding, that Trinity’s use of the sign it proposed would constitute religious exercise as defined by RLUIPA.”). The court in *Trinity Assembly* ultimately rejected the church’s argument that a substantial burden had been imposed:

Trinity argues that the sign it wants constitutes religious exercise; that the Board will not let it have the sign it wants; and, thus, the Board’s refusal substantially burdens Trinity’s religious exercise. This rote application of the RLUIPA does not persuade us because it renders the “substantial burden” element largely nugatory; it suggests that a restriction on land use qualifies as a “substantial burden,” even if it actually poses only a slight impediment to religious exercise.

*Id.* at 429.

65. *See Gillette v. United States*, 401 U.S. 437, 457 (1971) (citations and quotations omitted) (“The ‘truth’ of a belief is not open to question”; rather the question is whether the objector’s beliefs are truly held.”). *See also* Salkin & Lavine, *supra* note 49, at 222.

66. *Church of Universal Love & Music v. Fayette Cnty.*, No. 06-872, 2008 U.S. Dist. LEXIS 65564, at \*17 (W.D. Penn. August, 26, 2008) (making “no determination whether or not Plaintiffs’ belief or practice in question (*i.e.*, holding music events) is compelled by, or central to, their system of religious beliefs” but only considering the “sincerity” of the beliefs).

whether holding rock concerts is a religious belief, the church was found to have stated a claim under RLUIPA sufficient to survive a summary judgment motion by the local government.<sup>67</sup>

*B. Inconsistent Standards under RLUIPA's Substantial Burden and Equal Terms Prongs*

*1. Substantial Burden*

RLUIPA's substantial burden prong is based on the constitutional strict scrutiny test, the most stringent standard in constitutional law.<sup>68</sup> Any land use regulation that creates a substantial burden on religious exercise is unlawful unless it is the least restrictive means of furthering a compelling government interest.<sup>69</sup> The burden is on a religious claimant to establish that a substantial burden has been imposed; once a claimant does so, the burden shifts to the government to prove that the burden is the least restrictive means of furthering a compelling interest.<sup>70</sup>

RLUIPA does not define "substantial burden," and in the decade since the Act's passage, the precise meaning of the term remains unclear. The issue has yet to reach the Supreme Court, and appellate court definitions vary widely.<sup>71</sup> Even definitions from the same circuit court are inconsistent. For example, the Seventh Circuit has held that to be a substantial burden, a land use law must bear "direct, primary, and fundamental responsibility for rendering religious exercise . . . effectively impracticable."<sup>72</sup> Yet, in another case, the Seventh Circuit found a substantial burden where a zoning law would have done nothing more than subject the church to "unreasonable delay" or having to "find a suitable alternative parcel."<sup>73</sup>

While courts generally agree that the imposition of fees applicable to all zoning applicants is not a substantial burden, there is little agreement beyond that

67. *Id.* at \*16, \*20.

68. See Joint Statement, *supra* note 51, at 7776 ("[I]t 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.").

69. 42 U.S.C. § 2000cc(a)(1) (2006).

70. *Id.* Some states have passed religious land use laws that constrain local governments even more than RLUIPA does. For example, in 2010, Arizona passed the "Free Exercise of Religion Law," which provides that the government cannot impose a land use regulation in a manner that imposes a substantial burden *regardless* of whether there is a compelling interest. ARIZ. REV. STAT. ANN. § 41-1493.03 (2007).

71. See Salkin & Lavine, *supra* note 49, at 259-67 (describing the various definitions of substantial burden in all of the federal appellate courts and selected state courts).

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

73. *Sts. Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 895, 900-01 (7th Cir. 2005). The Seventh Circuit subsequently seemed to return to its *CLUB* definition in later cases and explained that its holding in *New Berlin* was based on the fact that the zoning denial in that case was "so utterly groundless as to create an inference of religious discrimination," and therefore could have been decided under the unequal terms prong rather than the substantial burden prong. *Petra Presbyterian Church v. Vill. of Northbrook*, 489 F.3d 846, 851 (7th Cir. 2007). See also *Vision Church v. Vill. of Long Grove*, 468 F.3d 975, 997 (7th Cir. 2006) (citing *CLUB*, not *New Berlin*, for the definition of "substantial burden").

baseline.<sup>74</sup> Some courts have held that zoning laws limiting a church's expansion are a substantial burden, even if the church can still conduct religious activity at its current location.<sup>75</sup> In contrast, other courts have held that even if a zoning law has the effect of completely prohibiting a church's worship activities on a particular parcel of land, no substantial burden exists.<sup>76</sup> While several courts have held that a zoning regulation that causes logistical difficulties or impositions on non-worship activities can be a substantial burden,<sup>77</sup> other courts have held that inconveniences resulting from a zoning regulation's application are not a substantial burden under RLUIPA as long as they do not force worshippers "to forego the tenets of" their religion.<sup>78</sup>

The "least restrictive means" of furthering a "compelling government interest" provision of the substantial burden prong have not been analyzed extensively in the case law, in part because when a claimant fails to establish a substantial burden, courts can end their inquiry under RLUIPA.<sup>79</sup> Under the constitutional strict scrutiny test RLUIPA is based on, few interests qualify as compelling; even

74. Congress specifically provided that RLUIPA does not "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." Joint Statement, *supra* note 51, at 7776. Courts have therefore held that application costs or fees, even if expensive, are not a substantial burden. See, e.g., *San Jose Christian Coll. v. City of Morgan Hill*, 360 F.3d 1024, 1035-36 (9th Cir. 2004) (holding that the requirement to submit a complete application, including environmental impact studies costing several thousand dollars, applies to all applicants and therefore is not a substantial burden). The *San Jose* court explained that application requirements cannot impose "a significantly great restriction" on religious exercise, only a denial of a complete application could do so.) *Id.* at 1035. See also *CLUB*, 342 F.3d at 762 ("[N]o . . . free pass for religious land uses masquerades among the legitimate protections RLUIPA affords to religious exercise.").

75. *Cottonwood Christian Ctr. v. Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203, 1226-27 (C.D. Cal. 2002); *Rocky Mountain I*, 612 F. Supp. 2d 1163, 1170 (D. Colo. 2009). See *infra* Section IV for a detailed discussion of the district court decision in *Rocky Mountain* and *infra* Section V for a detailed discussion of how decisions like *Cottonwood Christian* and *Rocky Mountain I* create a slippery slope by holding that zoning laws limiting expansion are substantial burdens.

76. See, e.g., *Timberline Baptist Church v. Washington Cnty.*, 154 P.3d 759, 774 (Or. Ct. App. 2007). See *infra* Section V for a detailed discussion of *Timberline*.

77. See, e.g., *Mintz v. Roman Catholic Bishop*, 424 F. Supp. 2d 309, 311, 312, 322 (D. Mass. 2006) (summarily concluding that the lack of meeting space for church committees and crowding in the rectory building—not the church itself—constituted a substantial burden).

78. See, e.g., *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 406 F. Supp. 2d 507, 515 (D. N.J. 2005) (quoting *Braunfeld v. Brown*, 366 U.S. 599, 605 (1961)) (holding that a "mere inconvenience is not enough to meet the 'substantial burden' requirement, nor is it a substantial burden when a law merely 'operates so as to make the practice of religious beliefs more expensive'" ) *aff'd in part and rev'd in part* by 510 F.3d 253 (3d Cir. 2007). See also *Williams Island Synagogue, Inc. v. City of Aventura*, 358 F. Supp. 2d 1207, 1215-16 (S.D. Fla. 2005) (holding that the inconveniences faced by a synagogue in its current location—late-arriving women having to walk to the male prayer area, congregants having to rotate their bodies to face the proper direction for prayer, and meals being prepared in the back of the prayer area because there was no kitchen—were not actionable under RLUIPA).

79. See, e.g., *Trinity Assembly of God v. People's Counsel*, 962 A.2d 404, 432 (Md. Ct. Spec. App. 2008) (concluding that the zoning ordinance did not impose a substantial burden and therefore determining that the court "need not decide whether the Sign Law and the Board's denial of the variances are the least restrictive means of advancing a compelling government interest.").

significant or important government interests will not suffice.<sup>80</sup> Thus, courts considering RLUIPA challenges have held that government interests in traffic safety,<sup>81</sup> aesthetics,<sup>82</sup> blight avoidance,<sup>83</sup> and tax revenues<sup>84</sup> are not compelling, even if they are significant. However, some courts have framed the government interest more broadly—as an interest in enforcing land use laws to preserve public health, welfare, and safety—and have found such an interest to be compelling.<sup>85</sup>

The determination of whether a government regulation is the least restrictive means of achieving a compelling interest is fact-specific and no general trends emerge from the case law. The few courts that have reached the question have usually done so unnecessarily, in dicta, after they have already held that there is no substantial burden or no compelling interest.<sup>86</sup>

## 2. Equal Terms

RLUIPA's equal terms provision provides that "[n]o 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."<sup>87</sup> The plain language of the statute does not require that the religious assembly be similar to the non-religious assembly in any way. Thus, as written, RLUIPA implies that local governments are strictly liable if a RLUIPA plaintiff can "identify *any* nonreligious assembly or institution that enjoys better terms under the land-use regulation."<sup>88</sup> Since this interpretation would produce absurd<sup>89</sup> and

80. See *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972) ("[O]nly those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.").

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

82. See *id.* at 553-54 (holding that regulating visual impact of land uses was not a compelling governmental interest and citing other decisions reaching the same conclusion as to aesthetics).

83. See *Cottonwood Christian Ctr.*, 218 F. Supp. 2d at 1228. But see *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253 (3d Cir. 2007) (finding, in dicta, that redevelopment and economic revitalization are compelling interests).

84. *Cottonwood Christian Ctr.* 218 F. Supp. 2d at 1228.

85. See *Greater Bible Way of Jackson v. City of Jackson*, 733 N.W.2d 734, 751-52 (Mich. 2007) (holding that a government's interest in enacting and enforcing zoning regulations is a compelling interest and describing several other cases that have also held so). But see *Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F.3d 338, 353(2d Cir. 2007) (holding that a general interest in enforcing zoning regulations is not compelling; rather a local government "must show a compelling interest in imposing the burden on religious exercise in the particular case at hand").

86. See, e.g., *Greater Bible Way of Jackson*, 733 N.W.2d at 750-54 (holding that no substantial burden was imposed by the challenged zoning regulation, but then going on to find that even if a substantial burden had been imposed, it was the least restrictive means of furthering a compelling government interest).

87. 42 U.S.C. § 2000cc(b)(1) (2006).

88. *Lighthouse Inst. for Evangelism, Inc.*, 510 F.3d at 264. For example, if a local government granted the variance application of a small private school to provide a few less parking spots than required by the zoning code, it must also grant a variance application of a megachurch to provide hundreds of fewer parking spots than required by the zoning code. See *id.*

89. See *id.* at 268 (explaining that a provision that makes the government strictly liable if there is any nonreligious assembly, no matter how dissimilarly situated, treated better than a religious entity would "force local governments to give any and all religious entities a free pass to locate wherever any secular institution or assembly is allowed.").

arguably unconstitutional<sup>90</sup> results, four of the five appellate courts addressing the issue have held that the equal terms provisions require that churches not be treated on less than equal terms than a *similarly situated* nonreligious assembly or institution.<sup>91</sup>

Courts differ in how they determine whether religious and non-religious assemblies are similarly situated. For example, the Third Circuit considers whether the religious and non-religious assemblies are similarly situated with regard to the purpose of a challenged regulation,<sup>92</sup> while the Seventh Circuit considers whether the two entities are similarly situated with regard to a challenged regulation's stated criteria.<sup>93</sup> Other circuits have not specifically articulated what it means to be "similarly situated," but consider whether there is a non-religious entity that is similar in some physical respects to the religious entity and that has been treated differently under the challenged zoning law.<sup>94</sup> For example, in *Third Church of Christ v. City of New York*, the Second Circuit compared a church on Park Avenue in New York City to a nearby hotel and held that the church had been treated on less than equal terms;<sup>95</sup> the court reasoned that both the church and the hotel were located in the same zone and both were being used for catering events in violation of the zoning code, but only the church had been served with a cease and desist order.<sup>96</sup>

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90. The Supreme Court Free Exercise and Equal Protection jurisprudence, on which the equal terms prong is based, compares how a challenged regulation treats religious conduct versus how it treats "analogous secular conduct that *has a similar impact on the regulation's aims*." *Id.* at 266. Thus, in reading a similarly situated requirement onto RLUIPA, courts have followed the canon of construction that permits narrowing the interpretation of a statute to preserve its constitutionality; without such a requirement, RLUIPA would be an unconstitutional application of strict liability. *Id.* at 266-67 & n.11. But see Sarah Keeton Campbell, Note, *Restoring RLUIPA's Equal Terms Provision*, 58 DUKE L.J. 1071, 1094 (2009) (arguing that courts' interpretation of the equal terms prong and imposition of the similarly situated requirement "contradict[s] . . . Congress's intent to expand protections for religious liberty").

91. See *Third Church of Christ, Scientist v. City of New York*, 626 F.3d 667, 670 (2d Cir. 2010); *Rocky Mountain II*, 613 F.3d 1229, 1236-37 (10th Cir. 2010); *River of Life Kingdom Ministries v. Vill. of Hazel Crest*, 611 F.3d 367, 371 (7th Cir. 2010); *Lighthouse Inst. for Evangelism, Inc.*, 510 F.3d at 266. The Eleventh Circuit has not read a similarly situated requirement into RLUIPA's equal terms prong. See *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1230-31 (11th Cir. 2004) (holding that any "differential treatment" between a religious assembly and a secular assembly violates the equal terms provision, unless the challenged regulation satisfied strict scrutiny); *Konikov v. Orange Cnty.*, 410 F.3d 1317, 1324 (11th Cir. 2005) ("For purposes of a RLUIPA equal terms challenge, the standard for determining whether it is proper to compare a religious group to a nonreligious group is not whether one is 'similarly situated' to the other, as in our familiar equal protection jurisprudence.").

92. *Lighthouse Inst. for Evangelism, Inc.*, 510 F.3d at 266-67.

93. *River of Life Kingdom Ministries*, 611 F.3d at 371. The Seventh Circuit reasoned that focusing on the regulation's stated criteria is preferable to focusing on its purpose because it provides a court with objective factors to determine if the two entities are similarly situated. *Id.* The Seventh Circuit expressed concern that focusing on the regulations purpose might allow local governments to develop a justification after the fact to cover up improper unequal treatment. See *id.*

94. See *infra* Section IV for discussion of the Tenth Circuit's decision in *Rocky Mountain II* regarding the equal terms prong of RLUIPA.

95. *Third Church of Christ, Scientist*, 626 F.3d at 671-72.

96. *Id.* at 672.



## IV. RLUIPA'S THREAT TO ENVIRONMENTAL ZONING LAWS

A. *RLUIPA and Environmental Zoning Laws*

RLUIPA allows churches to do what no other land users are permitted to do: develop their property in ways that land use laws forbid. When the land use law at issue is an environmental zoning law, the threat is particularly severe. The negative environmental impacts of any one particular land use can threaten an entire ecosystem. The efficacy of environmental zoning regulations often depends on the area as a whole being protected from the effects of development; just one overly-intensive development, such as a shopping center or a school or a church, in an otherwise undeveloped or agricultural area, starts the inevitable buildup that follows. No matter that other land users are prohibited from building in wetlands by a zoning restriction, if a church can successfully argue that the zoning restriction violates RLUIPA, the damage to the environment is done.

Until recently, laws enacted for the protection of the environment largely escaped challenge under RLUIPA. In part, this is because environmental protection has traditionally been accomplished through federal and state laws;<sup>97</sup> RLUIPA only applies to "zoning or landmarking" laws, which are typically local laws.<sup>98</sup> However, as discussed above in Section II, local land use laws are increasingly being used to accomplish a wide range of environmental objectives. When RLUIPA is used to invalidate these laws, incremental environmental destruction follows.<sup>99</sup>

The *Rocky Mountain* decisions foreshadow how RLUIPA could lead to a "death by a thousand cuts" for environmental protection efforts across the nation. *Rocky Mountain* is one of only a handful of cases challenging environmental zoning laws to have made its way through the court system. Yet considering how effective RLUIPA has been in allowing religious entities to challenge other types of land use laws,<sup>100</sup> the threat to environmental zoning laws is real. Churches

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97. Nolon, *supra* note 36, at 365.

98. 42 U.S.C. § 2000cc-5(5) (2006). However, at least one RLUIPA lawsuit has been filed by a church alleging that a state environmental law violated its rights under RLUIPA. See Complaint for Declaratory and Injunctive Relief, Pompton Plains Reform Bible Church v. Jackson, No. 07-cv-02702, 2007 WL 2605323 (D.N.J. June 11, 2007), (filing suit against the New Jersey Department of Environmental Protection, and alleging that New Jersey's state-wide water protection law violated RLUIPA). The case did not go to trial and the settlement documents are not public.

99. See *supra* Section II.B.

100. See *supra* Section III. See also Note, *Religious Land Use in the Federal Courts under RLUIPA*, 120 HARV. L. REV. 2178, 2179 (2007) (reviewing religious land use cases in the federal appellate courts since 1980 and concluding the RLUIPA has succeeded in "not only restor[ing] the right to religious exemptions from land use laws to its pre-Smith status, but also broaden[ing] this right considerably."). The author's own research confirms this finding, and she disagrees with other commentators who argue that RLUIPA is an ineffective tool or that it has not given churches any advantages in the zoning process. See Tyler F. Mark, *Rocky Mountain Shootout: Free Exercise & Preserving the Open Range*, 98 GEO. L.J. 1859, 1887 (2010) (arguing that "concerns about RLUIPA's effect on local land use conservation are overhyped."); Bram Alden, Comment, *Reconsidering RLUIPA: Do Religious Land Use Protections Really Benefit Religious Land Users?*, 57 UCLA L. REV. 1779, 1779 (2010) (arguing that RLUIPA has "failed to benefit religious groups and has, in many cases, actually worked a detriment to these groups."). A review of RLUIPA land use cases that resulted in a decision on the merits at the federal appellate level reveals that, as of February 2011, churches prevailed in 11 of the 26 cases, an

typically occupy between 1-3% of land in U.S. cities,<sup>101</sup> and as the highly religious U.S. population—83% of Americans are affiliated with an organized faith<sup>102</sup>—grows from its current total of 310 million to over 390 million by 2050, the amount of land used by religious entities will only continue to increase.<sup>103</sup>

### B. The Rocky Mountain Case

The plaintiff in *Rocky Mountain*, Rocky Mountain Christian Church (“RMCC”), operated a megachurch with an average weekly attendance of 2300 worshippers on a rural property in Boulder County, Colorado.<sup>104</sup> The property was located in an Agricultural District, a zone where all facilities with occupancy loads over 100 persons are required to apply for special use permits for any changes in use.<sup>105</sup>

As RMCC’s membership expanded, its facilities became overcrowded. In 2004, it applied for a special use permit to more than double the size of its facilities, from 116,000 to 240,000 square feet.<sup>106</sup> The County denied RMCC’s application on the ground that the church’s proposal conflicted with special use criteria limiting the scope of development in the zone where the church was located.<sup>107</sup> Specifically, RMCC’s proposed expansion would be incompatible with the surrounding agricultural area and would be an over-intensive use of land, resulting in depletion of natural resources.<sup>108</sup>

RMCC sued the County under RLUIPA, alleging that the denial violated the substantial burden, unequal treatment, unreasonable limitations, and discrimination prongs of the Act.<sup>109</sup> The case first went to a jury, which found that the church had not been discriminated against by Boulder.<sup>110</sup> Nonetheless, the jury found for the

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almost fifty percent success rate. Churches have also succeeded under RLUIPA at higher rates at the trial court level, and have achieved an unknown level of success in reaching favorable settlements by simply threatening a RLUIPA suit. HAMILTON, *supra* note 11, at 96-98.

101. No nationwide study exists on how much land is occupied by religious land uses; the 1-3% figure is based on the Author’s research of individual city records categorizing land use. Many cities do track what percentage of land is used by institutional or semi-public uses, which typically includes churches. See, e.g., CITY OF NEWARK, LAND USE ELEMENT OF THE MASTER PLAN FOR THE CITY OF NEWARK 56 (2004), available at [http://www.ci.newark.nj.us/government/city\\_departments/economic\\_housing\\_development/newarks\\_master\\_plan.php](http://www.ci.newark.nj.us/government/city_departments/economic_housing_development/newarks_master_plan.php) (indicating that 2% of parcels in Newark, New Jersey are occupied by charitable/non-profit uses, not including religious schools). Some communities track religious land use specifically. See, e.g., *Existing Land Use*, CITY OF PITTSBURG, KANSAS, <http://www3.pittks.org/index.php?pageid=303> (last visited Dec. 21, 2011) (indicating that 2% of downtown buildings in Pittsburg, Kansas are occupied by churches). In addition, megachurch campuses are typically between 50 and 80 acres, and these churches are a growing presence in American suburbs. See *supra* Section II.

102. PEW FORUM, *supra* note 19.

103. *National Population Projections*, U.S. CENSUS BUREAU, <http://www.census.gov/population/www/pop-profile/natproj.html> (last visited Oct. 5, 2011).

104. *Rocky Mountain I*, 612 F. Supp. 2d 1163, 1168 (D. Colo. 2009).

105. *Rocky Mountain II*, 613 F.3d 1229, 1233 (10th Cir. 2010).

106. *Id.* at 1234.

107. *Rocky Mountain I*, 612 F. Supp. 2d at 1168-69.

108. *Id.*

109. *Id.* at 1167.

110. *Id.*

church on the other three claims under RLUIPA, finding that the zoning law was an unreasonable limitation and a substantial burden, and that the County had treated the church on less than equal terms.<sup>111</sup>

On Boulder's post-trial motion to vacate the verdict, the district court held that there was sufficient evidence to support the jury's findings on all three prongs.<sup>112</sup> First, the district court held that Boulder's zoning laws substantially burdened RMCC's religious exercise because the regulations limited the megachurch's ability to expand.<sup>113</sup> Holding that "the denial of a church's expansion proposal can constitute a substantial burden even if religious activity continues at the site," the district court did not consider the alternatives available to RMCC to accommodate its growing membership, such as purchasing property in an area where zoning laws would not prohibit its desired expansion.<sup>114</sup> Instead, the district court focused on the difficulties that RMCC would face in its current location if Boulder's zoning regulation were applied.<sup>115</sup> Such difficulties included the fact that parishioners at some services could not witness baptisms; enrollment in some adult Sunday school classes would be capped; weekly sermons would be shortened from 35 to 25 minutes; and some children's Sunday school classes would be held in the hallway.<sup>116</sup> Without articulating a specific definition of substantial burden, the district court held that these and other logistical difficulties were sufficient to show a substantial burden.<sup>117</sup>

After finding that a substantial burden had been imposed, the district court went on to reject Boulder's environmental protection goals as a compelling state interest.<sup>118</sup> Specifically, the court concluded that the County's reasons for denying the church's permit—over-intensive use of rural land and excessive depletion of natural resources—were not compelling interests.<sup>119</sup> The court offered as an additional justification for this holding the fact that nine years earlier the County had allowed a private school located in the same zone as RMCC to expand.<sup>120</sup> The court reasoned that if Boulder were truly concerned about over-intensive use of rural land and excessive depletion of natural resources, it should have also denied the private school's permit a decade earlier.<sup>121</sup>

The district court also found that RMCC had been treated on less than equal terms than the private school, which it found to be a similarly situated non-religious

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111. *Id.*

112. *Id.* at 1177.

113. *Id.* at 1170-72.

114. *Id.*

115. *Id.* at 1172.

116. *Id.*

117. *Id.* at 1172-73.

118. *Id.* at 1173-76.

119. *Id.* at 1175.

120. *Id.*

121. *Id.* The court then concluded, without discussion, that Boulder had also failed to implement the least restrictive means of serving its asserted interests. *Id.* at 1176. The court disregarded evidence that Boulder had approved of every expansion permit lodged by RMCC between 1986 and 2004 (when the permit subject of the lawsuit was denied), and the fact that Boulder had approved selected portions of the 2004 permit application. *Id.* Boulder Appellate Brief, *supra* note 3, at 11-14.

assembly.<sup>122</sup> The court found that the church and school were similarly situated because they were located in the same agricultural zone and thus subject to the same zoning restrictions, and because the school had sought a similarly large expansion of its facilities.<sup>123</sup> The court found that differences between the church and the school—the fact that the church applied for a permit nine years after the school had, as well as the fact that the church would generate ten times more traffic than the school—were immaterial for purposes of determining whether the two entities were similarly situated.<sup>124</sup>

Finally, the district court concluded that there was sufficient evidence for the jury's finding that Boulder's zoning laws were an unreasonable limitation on religious exercise.<sup>125</sup> The court cited the trial testimony of one witness, a land use consultant for Colorado churches, who opined that churches of "any size" in Boulder County were required to undergo special use review, which had become "more difficult over the years."<sup>126</sup> The district court held that this witness's opinion was sufficient evidence of an unreasonable limitation on religious exercise, despite the same witness's admission that special use review had become "more difficult" for all land users, religious or secular.<sup>127</sup> The court also disregarded evidence that Boulder had conditionally approved the applications of every one of the forty-five other religious institutions that had applied for zoning permits under the special use review process.<sup>128</sup>

The Tenth Circuit affirmed the district court's decision in favor of RMCC on the basis of the unreasonable limitation and equal terms prongs of RLUIPA.<sup>129</sup> On the unreasonable limitation claim, the Tenth Circuit acknowledged the evidence of Boulder approving other churches' permit applications, but held that the "jury could choose to weigh evidence of the County's land use regulation effectively excluding churches more heavily than the County's record of approving special use applications."<sup>130</sup> On the equal terms claim, the Tenth Circuit held that "[a]lthough the two proposed expansions were not identical, the many substantial similarities allow for a reasonable jury to conclude" that the church and school were similarly situated.<sup>131</sup> The court declined to review the sufficiency of the evidence on the church's substantial burden claim, and thus expressed no opinion on the District Court's analysis of substantial burden or its rejection of environmental interests as compelling interests.<sup>132</sup>

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122. *Rocky Mountain I*, 612 F. Supp. at 1168-70.

123. The school had sought a permit to expand from 136,000 square feet to 196,000 square feet, which the court held was comparable to the church's proposed increase from 116,000 to 240,800 square feet. *Id.* at 1164; *Rocky Mountain II*, 613 F.3d 1229, 1236 (10th Cir. 2010).

124. *Rocky Mountain I*, 612 F. Supp. at 1169-70.

125. *Id.* at 1177.

126. *Id.* at 1176-77.

127. *Id.* at 1177.

128. Boulder Appellate Brief, *supra* note 3, at 11.

129. *Rocky Mountain II*, 613 F.3d 1229, 1237-39 (10th Cir. 2010).

130. *Id.* at 1239.

131. *Id.* at 1236-37.

132. *Id.* at 1239. In January 2011, the Supreme Court denied the certiorari petition of Boulder County. *Bd. of Cnty. Comm'r of Boulder Cnty. v. Rocky Mountain Christian Church*, 131 S. Ct. 978 (2011).

## V. PROTECTING THE ENVIRONMENT UNDER THE SHADOW OF RLUIPA

By holding that Boulder's neutral and long-standing environmental zoning laws violated RLUIPA, *Rocky Mountain I* and *II* have troubling implications for any local government seeking to protect the environment through land use laws. This section considers several approaches for reducing the threat RLUIPA poses to the environment, starting with a potential repeal or amendment of RLUIPA. If RLUIPA cannot be repealed or amended, the question then becomes how local governments can apply zoning laws to protect the environment without running afoul of the Act. The article suggests that courts should not follow the precedent set by the *Rocky Mountain* decisions, and instead should more narrowly interpret the equal terms and substantial burden prongs of RLUIPA. The article concludes by suggesting that RLUIPA creates a false conflict between religion and the environment, when what is needed is recognition of the parties' common interests in protecting the planet for future generations.

## A. Repealing RLUIPA

RLUIPA's supporters argue that in the land use context, a municipality can always point to a non-discriminatory reason for denying a zoning request, such as traffic or noise;<sup>133</sup> thus, the Act is a necessary and constitutional response to protect religious land users from discrimination.<sup>134</sup> Opponents contend that while preventing discrimination is an appropriate legislative goal, RLUIPA gives churches rights that are beyond what is constitutionally permissible.<sup>135</sup> While RLUIPA's prisoner provisions were upheld by the Supreme Court in *Cutter v. Wilkinson*,<sup>136</sup> the constitutionality of the land use provisions remains an open question. No lower courts have found the provisions to be unconstitutional since *Cutter*, but numerous local governments and scholars argue that RLUIPA's land use provisions are an unconstitutional violation of federalism principles, as well as a violation of the Establishment and Equal Protection Clauses.<sup>137</sup>

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133. Joint Statement, *supra* note 51, at 7774-75.

134. *See id.* The need for RLUIPA has been colorfully described by some of its supporters. *See, e.g.,* Kevin M. Powers, Note, *The Sword and the Shield: RLUIPA and the New Battle Ground of Religious Freedom*, 22 BUFF. PUB. INT. L.J. 145, 156 (2004) ("By utilizing RLUIPA in a claim, a religious institution can wield the Sword of Damocles over an authority.").

135. *See, e.g.,* HAMILTON, *supra* note 11, at 78-110.

136. 544 U.S. 709, 719-20 (2005) (holding that RLUIPA's prisoner provisions fall into the "joint" between the Free Exercise Clause and the Establishment Clause and are thus a permissible accommodation of religion, even if they provide more protections for religious exercise than the constitution requires).

137. For a detailed analysis of the federalism arguments against RLUIPA, see Adams, *supra* note 49 (arguing that Congress exceeded its powers in enacting RLUIPA since it is not valid under any of the jurisdictional bases it was enacted under—i.e., the Spending and Commerce Clauses and Section 5 of the 14th Amendment). *See also* Hamilton, *supra* note 12; *Cutter*, 544 U.S. at 727 n.2 (Thomas, J., concurring) ("RLUIPA . . . may well exceed Congress' authority under either the Spending Clause or the Commerce Clause . . . . The Court, however, properly declines to reach those issues, since they are outside of the question presented . . . ."). While lower courts have repeatedly upheld the substantial burden prong of RLUIPA as within Congress's remedial powers under Section 5 of the Fourteenth Amendment because of the evidence of "widespread discrimination" against religious entities alleged during Congressional hearings, the quality of the statistical evidence for that claim is questionable. *See*

A larger debate about the meaning of Free Exercise and Establishment Clause principles lies behind the question of the constitutionality of RLUIPA's land use provisions.<sup>138</sup> While a detailed analysis of this debate is beyond the scope of this article, if RLUIPA is found unconstitutional and repealed in its entirety, the threat it poses to environmental laws would be eliminated. However, if RLUIPA were repealed, churches would be left without a statutory means to challenge zoning laws used to discriminate against them.<sup>139</sup> Yet RLUIPA's efficacy in allowing churches to obtain redress for the rare cases of religious discrimination must be balanced against the myriad of unintended consequences that RLUIPA in its present form creates. Even if RLUIPA's land use provisions are ultimately held constitutional, the Act can still be criticized as bad public policy. Thus, several amendments to RLUIPA have been proposed to address its most egregious

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Adams, *supra* note 49, at 2397-400. Subsequent studies have indicated that religious land users receive equal, or even more favorable, treatment than other land users. See Stephen Clowney, Comment, *An Empirical Look at Churches in the Zoning Process*, 116 YALE L.J. 859, 863-64 (2007); Mark Chaves & William Tsitsos, *Are Congregations Constrained by Government? Empirical Results from the National Congregations Study*, 42 J. CHURCH & ST. 335 (2000). If there is in fact no pervasive discrimination against religious entities, RLUIPA's land use provisions would be unconstitutionally "out of proportion to a supposed remedial or preventive object" and not "responsive to, or designed to prevent, unconstitutional behavior." See *City of Boerne v. Flores*, 521 U.S. 507, 532 (1997) (finding RFRA unconstitutional because it exceeded Congress's power under Section 5 of the Fourteenth Amendment).

138. See Robert W. Tuttle, *How Firm a Foundation? Protecting Religious Land Uses After Boerne*, 68 GEO. WASH. L. REV. 861, 913-14 (2000) ("The debate since *Smith* reflects two distinct answers to that question. The first, which is shared by most proponents of the RLUIPA, holds that the Free Exercise Clause promotes the full flourishing of religious conviction . . . only limit[ed] where necessary to safeguard public concerns of the highest level, such as health and safety. Justice Scalia's opinion in *Smith* represents the second answer. The Free Exercise Clause prohibits the government from placing burdens on individuals because of their religious beliefs, but does not require the government to promote religious flourishing by refraining from acting simply because it might burden religion.") (citations omitted). Thus, RLUIPA provides inconsistent protections to the same land use, depending on whether it is operated by a religious entity or not. Adam J. MacLeod, *A Non-Fatal Collision: Interpreting RLUIPA Where Religious Land Uses and Community Interests Meet*, 42 URB. LAW. 41, 73 (2010). For example, the Act would extend protection to a religious homeless shelter built in violation of a zoning code, but not to a secular homeless shelter. *Id.* Yet, "[i]t is not immediately obvious why a religious homeless shelter should enjoy an exemption from land use regulations that a comparable shelter, operated by a secular organization, does not enjoy." *Id.* RLUIPA supporters contend that RLUIPA's elevation of religious land users is permissible because "certain rights are deliberately intended to give leverage that no one else has. These are enshrined in the Bill of Rights." Powers, *supra* note 134, at 195. However, it is difficult to understand why only some rights in the Bill of Rights are given special attention and not others; for example, both free speech and religion are protected under the First Amendment, but only a church, not a bookstore, can take advantage of the potential exemption provided by RLUIPA from generally applicable zoning laws. See MacLeod, *supra*, at 90.

139. See Angela C. Carmella, *RLUIPA: Linking Religion, Land Use, Ownership and the Common Good*, 2 ALB. GOV'T L. REV. 485, 487-88 (2009) (explaining that RLUIPA provides a statutory cause of action in religious land use cases and augments pre-existing constitutional causes of action). Even one of RLUIPA's most vocal detractors, Marci Hamilton, has acknowledged that RLUIPA could, in rare instances—in particular, in the case of the Ground Zero mosque—protect a religious land user from zoning regulations being used as a pretext for underlying discrimination against the religious group. See Marci Hamilton, *The Wrong-Headed Furor Over the Planned Mosque at Ground Zero: Mistaking a War on Radical Islamism for a War on all Muslims*, FINDLAW (August 5, 2010), <http://writ.news.findlaw.com/hamilton/20100805.html>. However, religious land users would not be left without a remedy even if RLUIPA were repealed or found unconstitutional: Free Exercise or Equal Protection challenges could still be raised against allegedly discriminatory zoning laws.

unintended consequences but still allow for it to be used by churches that face actual discrimination, rather than mere inconvenience.

### B. Amending RLUIPA

By giving churches advantages that no other land users enjoy, as well as providing them with economic and legal incentives to intimidate local governments, RLUIPA has given churches a sword where a shield was intended.<sup>140</sup> Even RLUIPA supporters acknowledge that the Act is a “big stick”<sup>141</sup> that allows churches to “bully” local governments.<sup>142</sup>

Municipalities face significant pressure to settle when confronted by a RLUIPA lawsuit, regardless of actual liability, because of the unbalanced financial incentives inherent in RLUIPA. A religious claimant is entitled to attorneys’ fees if it prevails on its claim under RLUIPA; however, there is no corresponding provision entitling a local government to attorneys’ fees if it prevails.<sup>143</sup> Attorneys’ fees are available to a church even if it only has partial success on the merits<sup>144</sup> and even if it is not awarded damages. Thus, although the jury refused to award RMCC the \$8 million it sought in damages from Boulder, Boulder was ultimately forced to pay RMCC over \$1.5 million in attorneys’ fees.<sup>145</sup>

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140. The sword/shield analogy is not original to the author. See, e.g., Peter Applebome, *Our Towns; Court Elbows Village in Favor of Religious Rights*, N.Y. TIMES, Oct. 21, 2007, available at <http://query.nytimes.com/gst/fullpage.html?res=9800E6DB143BF932A15753C1A9619C8B63>; Powers, *supra* note 134, at 156 (praising RLUIPA as a “Sword of Damocles”).

141. Wendie L. Kellington, *RLUIPA Practice Pointers—Representing the Religious Claimant*, SN005 ALI-ABA 1141, 1148 (2007).

142. Elizabeth Reilly, *Empathy and Pragmatism in the Choice of Constitutional Norms for Religious Land Use Disputes*, 2 ALB. GOV’T L. REV. 555, 560 (2009).

143. 42 U.S.C. § 1988(b) (2006) (“[i]n any action or proceeding to enforce a provision of . . . the Religious Land Use and Institutionalized Persons Act of 2000 . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney’s fee as part of the costs . . .”). RLUIPA’s language and legislative history indicate only prevailing *plaintiffs* are intended the benefit of potential attorneys fees. See 42 U.S.C. § 2000cc-2(a) (2006) (“A person may assert a violation of this Act as a claim or defense in a judicial proceeding and obtain appropriate relief against a government.”); 146 CONG. REC. E1563 (daily ed. September 22, 2000) (explaining that section 4(b) of Senate Bill 2869 (the senate bill which became 42 U.S.C. § 2000cc) “provides that a successful plaintiff may recover attorneys’ fees.”). Thus, if a religious entity succeeds on a RLUIPA claim, the government defendant must pay both its legal fees and the religious entity’s fees; if the local government succeeds, it still must pay its own legal fees. In addition, because churches are often represented in RLUIPA lawsuits by public interest law firms such as The Becket Fund or the Pacific Justice Institute, churches may not have to pay their own attorneys’ fees even if they lose.

144. See *DiLaura v. Twp. Of Ann Arbor*, 471 F.3d 666, 670 (6th Cir. 2006) (explaining that a plaintiff is a prevailing party for purposes of RLUIPA if it has “succeeded on ‘any significant issue in litigation which achieve[d] some of the benefit the parties sought in bringing suit’”) (quoting *Tex. State Teachers Ass’n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 789 (1989)).

145. Boulder Appellate Brief, *supra* note 3, at 15 (noting that no damages were awarded by the jury at the trial); *Rocky Mountain Christian Church v. Bd. of Cnty. Comm’r of Boulder Cnty.*, No. 06-cv-00554, 2010 U.S. Dist. LEXIS 8273, at \*21 (D. Colo. Jan. 27, 2010) (awarding RMCC approximately \$1.35 million in attorneys’ fees and expenses for costs incurred in its lawsuit against Boulder); *Rocky Mountain Christian Church v. Bd. of Cnty. Comm’r of Boulder Cnty.*, No. 06-cv-00554, 2010 U.S. Dist. LEXIS 102081, at \* 21 (D. Colo. Sept. 13, 2010) (awarding RMCC an additional \$217,000 in attorney fees and expenses for costs incurred in the Tenth Circuit appeal). Attorneys’ fees in RLUIPA lawsuits can be exorbitant because churches may employ the services of nationally-known First Amendment

Furthermore, RLUIPA authorizes the Department of Justice ("DOJ") to bring suit against local governments, either on its own initiative or as an amicus to a church's lawsuit.<sup>146</sup> The DOJ has created the "First Freedom Project" to promote and publicize its efforts; as of September 2010, the DOJ has opened fifty-one RLUIPA investigations, filed seven independent RLUIPA lawsuits and ten amicus briefs in churches' lawsuits, and intervened in thirty additional lawsuits to defend RLUIPA's constitutionality.<sup>147</sup> Thus, local governments must contend not only with the costs associated with a church's underlying lawsuit, but also with the costs of responding to a potential DOJ lawsuit. As a result, local governments often choose to settle, even where ultimate liability under RLUIPA is unclear.<sup>148</sup>

Amending RLUIPA would potentially refocus the Act on its intended purpose of eliminating religious discrimination. One possible amendment would be to narrow the definition of "religious exercise." As discussed above in Section III, when a RLUIPA plaintiff characterizes something that it wants and that it is prevented from doing by zoning laws as part of its religious exercise, courts must accept the church's definition of its religious beliefs.<sup>149</sup> As a result, almost any church activity falls under the jurisdiction of RLUIPA. Yet, while RLUIPA's definition of religious exercise may be overly-expansive, it is the lesser of two evils: adopting any other definition would put courts in the business of determining what is and is not "religion."<sup>150</sup>

Another potential amendment to RLUIPA would be a blanket exemption for environmental zoning laws. However, seemingly neutral, generally applicable environmental zoning laws—like any other law—can serve as a cloak for discrimination.<sup>151</sup> Simply exempting environmental zoning laws from RLUIPA on

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litigators whose rates exceed average rates in the local community; for example, Williams & Connolly partner Kevin Baine represented RMCC on its appeal to the Tenth Circuit. *Id.* at \*8-9.

146. 42 U.S.C. § 2000cc-2(f) (2006).

147. U.S. DEP'T OF JUSTICE, REPORT ON THE TENTH ANNIVERSARY OF THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSON ACT (September 2010), [http://www.justice.gov/crt/rliupa\\_report\\_092210.pdf](http://www.justice.gov/crt/rliupa_report_092210.pdf).

148. See Adam Liptak, *Justice Dept. Takes up a Little Church's Zoning Fight*, N.Y. TIMES, July 4, 2004, at A14, available at <http://www.nytimes.com/2003/07/04/us/justice-dept-takes-up-a-little-church-s-zoning-fight.html?scp=18&sq=> (describing how "the Justice Department's civil rights division . . . weighed in, accusing Maui County of religious discrimination and threatening a lawsuit of its own," after Maui, Hawaii determined that under applicable zoning regulations, a small church was not permitted to build in a rural area because it would create traffic and safety issues). Maui initially perceived the DOJ's action "as a betrayal of the Bush administration's usual deference to local governments . . . [and was] in no mood to capitulate" because it believed it had not violated RLUIPA by routinely applying its zoning regulations to the church. *Id.* Maui capitulated a year later under the dual threat of the church's RLUIPA lawsuit and the DOJ suit, and settled with the church for a "substantial" sum. Christie Wilson, *Maui Pays Church to Settle Land Use Case*, HONOLULU ADVERTISER, Nov. 19, 2004, available at <http://the.honoluluadvertiser.com/article/2004/Nov/19/ln22p.html>.

149. See *supra* Section III.

150. See, e.g., *Emp't Div. Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 887 (1990) ("Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim.").

151. See *Albanian Associated Fund v. Twp. of Wayne*, No. 06-cv-3217 (PGS), 2007 U.S. Dist. LEXIS 73176 (D. N.J. Oct. 1, 2007). In *Township of Wayne*, a mosque purchased property shortly before 9/11 that was zoned as environmentally sensitive. *Id.* at \*2. The township attempted to purchase the property from the mosque under an open space regulation authorizing the use of eminent domain to



the assumption that the application of such laws is always motivated by “green” goals would fail to acknowledge that just like other laws, environmental zoning laws have the potential to be applied in a discriminatory manner.

RLUIPA could also be amended to reverse the order in which courts analyze claims under the three prongs and change the standard of review applied at each level.<sup>152</sup> By requiring courts to focus on the most harmful government behavior first—discrimination or total exclusion—the Act could refocus RLUIPA on the wrongs it was intended to address.<sup>153</sup> Only if no evidence is found to support that prong would a court then consider whether the church has been treated on less than equal terms than non-religious assemblies.<sup>154</sup> Finally, only if no evidence under either of the first two prongs is found would a court consider whether a substantial burden has been imposed.<sup>155</sup>

However, any amendment to RLUIPA is unlikely in the current political climate. RLUIPA is an easy law for Congress to stand behind: as a 30-second sound bite, the Act is anti-discrimination, pro-religion. Any amendment would be labeled as anti-religion, a charge no member of Congress wants to face, considering RLUIPA’s wide base of support, from Evangelicals in Texas suburbs to Hasidic communities in New York City.<sup>156</sup> Since an amendment to RLUIPA is unlikely, courts are left with the task of interpreting RLUIPA in a way that does not undermine environmental protection.

### *C. Treating Religious Assemblies on Less than Equal Terms*

Unlike even the most stringent test under constitutional equal protection analysis, RLUIPA’s equal terms provision imposes strict liability: once two entities are determined to be “similarly situated,” a local government is not permitted to offer any justifications for differing treatment.<sup>157</sup> To ensure that the Act’s equal terms prong does not eviscerate environmental protection laws, courts should not only continue to read a similarly situated requirement into the Act, but should also take into account changed circumstances that may justify a local government

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purchase environmentally sensitive properties. *Id.* at \*4-6. The mosque alleged that the township’s actions violated RLUIPA, and a district court held that it was at least a question for a jury and rejected the township’s motion for summary judgment, citing evidence that the mosque was the only one out of 100 environmentally sensitive properties in the community that the township attempted to purchase. *Id.* at \*10-11, \*18. The case never went to trial and was settled out of court. See TOWN OF WAYNE 2009 STATE OF THE TOWNSHIP ADDRESS, available at <http://www.waynetownship.com/flyers/2009stateofthetown.pdf> (last visited on Oct. 5, 2011).

152. See Reilly, *supra* note 142, at 584-87 (suggesting that such a reversal “would address and protect the most invidious harms first.”). Reilly also suggests that strict scrutiny be imposed to the discrimination prong, intermediate scrutiny to the equal terms prong, and rational basis/*Smith* standard to the substantial burden prong. *Id.* at 589-92.

153. *Id.* at 590.

154. *Id.*

155. *Id.* at 590-91.

156. See *RLPA Hearings*, *supra* note 17 (collecting testimony in favor of RLPA from religious leaders of the Seventh Day Adventist Church, the Church of Jesus Christ of Latter-Day Saints, the First Baptist Church of Georgetown, the Religious Action Center of Reform Judaism, the Baptist Joint Committee on Public Affairs, the Christian Legal Society, and the National Council of Churches).

157. *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 269 (3d Cir. 2007).

treating a religious entity differently than a non-religious assembly.

The greatest threat to the environment today is the slow encroachment on habitat and degradation of natural resources caused by seemingly limitless human development.<sup>158</sup> In *Rocky Mountain*, nine years had passed between when Boulder had granted an expansion permit to a private school and when it denied a permit to RMCC.<sup>159</sup> While the school and the church were similar to the extent that they were located in the same rural zone and sought comparably large expansions, the two entities may have differed significantly in how their expansions would affect the environment.<sup>160</sup> Development that might have been appropriate a decade earlier may have no longer been appropriate in light of new environmental considerations, such as diminished available habitat or incremental impacts on groundwater. As Boulder argued in its brief to the Tenth Circuit, “[l]ocal governments cannot secure open space if they can never draw a reasonable line regarding intense and large expansions of pre-existing uses.”<sup>161</sup> Once local governments draw such a line, no land user—religious or secular—should be permitted to cross it.<sup>162</sup>

#### D. Limiting Limitless Expansion

Churches “ideally would have an unlimited and ever-expanding place of worship with open doors and a parking space for all who would enter.”<sup>163</sup> Indeed, for many churches, a growing congregation is part of their religious beliefs; some congregations also believe that they must worship together as one body.<sup>164</sup> As discussed in Section II, when a church claims that its expansion or need to worship as one body is “part of God’s plan,”<sup>165</sup> courts must accept the church’s definition of its religious belief.<sup>166</sup>

Yet few would argue that RLUIPA protects an “absolute right to assemble for worship wherever, and under whatever circumstances, a religious group happens to

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158. DUERKSEN & SNYDER, *supra* note 4, at 2.

159. *Rocky Mountain II*, 613 F.3d 1229, 1236 (10th Cir. 2010).

160. The record does not indicate if there were such changed circumstances that put increased pressure on the local ecosystems. Boulder offered a general argument that approving RMCC’s expansion would be inconsistent with its policy of protecting rural lands that have “significant environmental, scenic or cultural value” and conserving agricultural lands. *See* Boulder Appellate Brief, *supra* note 3, at 9-11.

161. *Id.* at 29.

162. Under the 10th Circuit’s interpretation of the equal terms prong, if a local government anticipates needing to draw such a line, it must do so *before* a religious entity attempts to cross it, i.e., the first applicant required to comply with an environmental zoning law cannot be a religious entity.

163. *Castle Hills First Baptist Church v. City of Castle Hills*, No. SA-01-CA-1149-RF, 2004 WL 546792, at \*11 (W.D. Tex. Mar. 17, 2004).

164. *See, e.g., Cottonwood Christian Ctr. v. Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203, 1212 (C.D. Cal. 2002) (“Because the church is one body, it is essential to our faith that the whole church body regularly assemble together as a body to worship God . . .”).

165. Weiss & Lowell, *supra* note 27, at 324.

166. *See supra* Section III (discussing First Amendment jurisprudence limiting courts’ ability to question claimed religious beliefs).

prefer.”<sup>167</sup> The results of such an expansive right of religious exercise on the environment, as well as on other safety, health, and welfare concerns, would be unjustifiable. As the Supreme Court explained in *Employment Division v. Smith*: “[T]o make an individual’s obligation to obey . . . a law contingent upon the law’s coincidence with his religious beliefs, except where the State’s interest is ‘compelling’ - permitting him, by virtue of his beliefs, ‘to become a law unto himself,’ - contradicts both constitutional tradition and common sense.”<sup>168</sup>

Yet, because of the low threshold that some courts have set for what suffices as a “substantial” burden, RLUIPA comes dangerously close to allowing religious entities to become a “law unto [themselves].”<sup>169</sup> The court in *Rocky Mountain I* failed to recognize the slippery slope created if a substantial burden is defined as any zoning regulation that limits expansion. While the conditions RMCC has faced in its current facility may not have been ideal, it is difficult to understand how they could be characterized as “rendering religious exercise . . . effectively impracticable.”<sup>170</sup> By holding that Boulder’s rural zoning restriction imposed a substantial burden,<sup>171</sup> the court in *Rocky Mountain I* essentially gave RMCC a “blank check” to expand as it sees fit.<sup>172</sup>

167. MacLeod, *supra* note 138, at 77 (“[RLUIPA] does not create an absolute right to assemble. However, it does make it difficult for local governing authorities to require religious landowners to internalize many of the negative externalities that they generate.”).

168. 494 U.S. 872, 885 (1990) (internal citations omitted).

169. As discussed *infra* Section V.E. few interests are considered compelling, and environmental protection has not been definitely accepted as one. See also *Petra Presbyterian Church v. Vill. of Northbrook*, 489 F.3d 846, 851 (7th Cir. 2007) (“Unless the requirement of a substantial burden is taken seriously, the difficulty of proving a compelling governmental interest will free religious organizations from zoning restrictions of any kind.”).

170. *CLUB*, 342 F.3d 752, 761 (7th Cir. 2003). The Tenth Circuit has not articulated a specific definition of substantial burden, holding only that RLUIPA “is not intended to be given any broader interpretation than the Supreme Court’s articulation of the concept of substantial burden.” *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 661 (10th Cir. 2006) (citing *CLUB*, 342 F.3d at 760-61). The cited portion of *CLUB* defines substantial burden as a land use regulation that “necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise . . . effectively impracticable.” *CLUB*, 342 F.3d at 761. However, the Tenth Circuit has also approved, in part, a lower court’s broader definition of substantial burden:

A government regulation “substantially burdens” the exercise of religion if the regulation: (1) significantly inhibits or constrains conduct or expression that manifests some tenet of the institutions belief; (2) meaningfully curtails an institution’s ability to express adherence to its faith; or (3) denies an institution reasonable opportunities to engage in those activities that are *fundamental* to the institution’s religion.

*Grace United Methodist Church*, 451 F.3d at 660 n.4, 663 (holding that the above jury instruction on the meaning of substantial burden was acceptable except that it erroneously required that the activity burdened be one that is “fundamental” to the religion).

171. *Rocky Mountain I*, 612 F. Supp. 2d 1163, 1176 (D.Colo. 2009). See also *Cottonwood Christian Ctr. v. Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203, 1226-27 (C.D. Cal. 2002) (holding that a zoning law that prevented a 4000-member megachurch from building a facility large enough for its expanding membership substantially burdened the church’s religious exercise and that the church could expand in its chosen location without regard to the zoning law). Megachurches are not the only type of religious entities who have claimed that zoning laws limiting their expansion are a substantial burden. See, e.g., *Mintz v. Roman Catholic Bishop*, 424 F. Supp. 2d 309, 319-22 (D. Mass. 2006) (holding that where a church did not have space for offices for religious education or parish council meetings and was denied a permit to expand because the applicable code capped the size of buildings in the residential zone the church was located in, a substantial burden had been imposed). However, because of their size,

Giving churches such a near-absolute right to expand can undermine a wide range of environmental protection goals, ranging from water quality to habitat protection to erosion control. Unlike the district court in *Rocky Mountain*, several other courts require that a substantial burden be something more than a church “not [getting] everything that it wants.”<sup>173</sup> For example, several courts have held that as long as reasonable alternative properties are available within the jurisdiction for a church’s use, zoning restrictions that limit growth on its current property are not a substantial burden.<sup>174</sup> While “these alternatives may be less appealing or more costly, neither the RLUIPA nor the Constitution requires [the local government] to subsidize the real estate market.”<sup>175</sup> The Seventh Circuit has gone further, holding that even if there are no alternative properties available in a jurisdiction, a zoning law that limits the church’s growth may still not be substantial;<sup>176</sup> the court explained that RLUIPA does not require that churches be shielded from “[t]he harsh reality of the marketplace [that] sometimes dictates that certain facilities are not available to those who desire them.”<sup>177</sup>

Other courts have defined substantial burden in a temporal manner, rejecting claims based on hypothetical future growth. For example, in *Living Water Church of God v. Township of Meridian*, the Sixth Circuit held that a zoning law setting a maximum square footage for buildings in the zone a church was located in was not

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megachurches provide the starkest example of how environmental protection efforts are threatened when religious entities claim that zoning laws limiting their ability to expand are a substantial burden.

172. *But see* *Trinity Assembly of God v. People’s Counsel*, 962 A.2d 404, 430 (Md. 2008) (rejecting the church members argument that they should be allowed practice their religion “as they see fit.”).

173. *Timberline Baptist Church v. Washington Cnty.*, 154 P.3d. 759, 774 (Or. Ct. App. 2007).

174. *See, e.g., San Jose Christian Coll. v. City of Morgan Hill*, 360 F.3d 1024, 1035 (9th Cir. 2004). In *San Jose*, a Christian college owned property in a planned unit development, in which no non-hospital uses (secular or religious) were permitted. *Id.* at 1027. It sought rezoning but the city denied the application, on the grounds that the city needed a hospital on the property. *Id.* at 1029. The court reasoned that the college could sell its property and purchase another property in which school use was allowed, and that this was not a substantial burden, even if it was inconvenient, time-consuming, and more expensive than building on its current property. *See also Timberline Baptist Church*, 154 P.3d. at 774-5 (holding that since there were several available properties without the development restrictions of the zone where the church had purchased its property, the burden imposed on the church by the zoning restrictions was not substantial).

175. *Episcopal Student Found. v. City of Ann Arbor*, 341 F. Supp. 2d 691, 705 (E.D. Mich. 2004) (internal quotations omitted). *See also* *Calvary Temple Assembly of God v. City of Marinette*, No. 06-c-1148, 2008 US Dist LEXIS 55500, \*3-5, \*24, \*27-30, \*30 (E.D. Wis. Jul. 18, 2008) (holding that where there were alternate sites in the city for a church’s expansion, zoning code restrictions that limited parking and building square footage on the church’s current site were not a substantial burden, even though acquiring the alternate sites might be expensive and less convenient than expanding at the desired site); *Hillcrest Christian Sch. v. City of Los Angeles*, No. 05-08788 RGK(RCx), 2007 U.S. Dist. LEXIS 95925, at \*15 (C.D. Cal. July 12, 2007) (holding that the city “has not denied Hillcrest the opportunity to expand, nor to continue its religious exercise. Rather the City has denied Hillcrest’s ability to expand its school in a single location. Hillcrest’s land use travails demonstrate unfortunate but familiar pitfalls of this county’s localized land use planning system. . . . but . . . do not amount to a violation of law.”).

176. *CLUB*, 342 F.3d, 752, 761 (7th Cir. 2003).

177. *Id.* (quoting *Love Church v. City of Evanston*, 896 F.2d 1082, 1086 (7th Cir. 1990). *See also* *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 n.11 (11th Cir. 2004) (holding that there was no substantial burden, but finding that the city was liable for violation of the equal terms provision of RLUIPA).

a substantial burden.<sup>178</sup> The court rejected the church's arguments that if its congregation continued to expand, there would come a point in the next decade when the church's facility would need to exceed the maximum square footage.<sup>179</sup> The court explained that "[t]he question before us here is whether the Township's denial substantially burdens Living Water's religious exercise *now*—not five, ten or twenty years from now."<sup>180</sup>

Finally, some courts have considered whether a church's own actions and decisions—such as not efficiently using their current property<sup>181</sup> or choosing to purchase a property located in an area with zoning restrictions because it was cheaper than property in areas without zoning restrictions<sup>182</sup>—have put the church in the position of using RLUIPA to seek an exemption from generally applicable zoning laws. For example, in *Timberline Baptist Church v. Washington County*, an Oregon church challenged a rural zoning regulation that limited the scale of development on its property, a law similar to the challenged zoning regulation in *Rocky Mountain*.<sup>183</sup> Unlike the court in *Rocky Mountain I*, the *Timberline* court rejected the church's substantial burden claim.<sup>184</sup> Rather than focusing on the overcrowded conditions at the church's current location and the difficulties that would result if the zoning code were applied to prevent it from building a larger facility, the court focused on the alternatives available to the church to accommodate its growing membership, such as selling its rural property and purchasing available property in an area where the type of development it sought was permitted.<sup>185</sup>

The *Timberline* court also noted that the church had put itself in the position it was in: as a rational buyer in the marketplace, the church had chosen to purchase the agricultural property, fully aware of the applicable zoning limitations, rather than purchase other available properties with no such limitations, because those properties were more expensive.<sup>186</sup> The *Timberline* decision thus implicitly recognized that development limitations on rural properties are often intended to protect environmentally sensitive land, and churches should not be permitted to use RLUIPA to obtain the benefit of such land—cheaper property—without the burden—zoning restrictions.

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178. 258 F.Appx. 729, 738-39 (6th Cir. 2007).

179. *Id.*

180. *Id.* at 738.

181. *See, e.g.*, *Episcopal Student Found. v. City of Ann Arbor*, 341 F. Supp. 2d 691, 708 (E.D. Mich. 2004) (holding that overcrowding at a religious entity's existing facility was insufficient to establish a substantial burden because the religious entity was not entitled to expand at will at its current location in violation of the zoning code when the evidence indicated it could use its own facility more efficiently).

182. *See, e.g.*, *Centro Familiar Cristiano Buenas Nuevas v. City of Yuma*, 615 F. Supp. 2d 980, 991 (D. Ariz. 2009); *Greater Bible Way of Jackson v. City of Jackson*, 733 N.W.2d 734, 750 (Mich. 2007); *Timberline Baptist Church v. Washington Cnty.*, 154 P.3d. 759, 771 (Or. Ct. App. 2007).

183. *Timberline Baptist Church*, 154 P.3d at 760-61.

184. *Id.* at 771.

185. *Id.*

186. *Id.* at 760. Because less development is permitted on open space rural and agricultural land, it is often priced lower than comparable urban or suburban property. But there is a tradeoff: the larger, cheaper, rural property is typically located away from population centers and accompanied by restrictions on development so as to protect environmentally sensitive rural land.

*E. Environmental Protection as a Compelling Interest*

As long as courts continue to expansively define substantial burden, as the court in *Rocky Mountain I* did, it is imperative that environmental protection be recognized as a compelling government interest. Despite the court's opinion in *Rocky Mountain I* to the contrary, few interests can be considered more compelling than the protection of the environment. While individual environmental zoning laws may have a relatively limited impact—preventing erosion to a few miles of hillside, or limiting pollution in one river or stream—without such specific, targeted laws to protect the environment, overall protection would be impossible.<sup>187</sup>

Environmental protection has been found to be a legitimate or important interest in a myriad of non-RLUIPA cases challenging environmental zoning laws, but no court—other than the court in *Rocky Mountain I*<sup>188</sup>—has definitively addressed whether environmental protection would be considered a compelling interest under RLUIPA.<sup>189</sup> However, in a decision analyzing religious interests and governmental environmental protection goals under another federal statute dealing with religious freedom, the Eighth Circuit held that preserving environmental resources is a compelling government interest.<sup>190</sup> In *Crow v. Gullet*, a group of Native Americans sued the state of South Dakota, alleging that regulations limiting the use of a state park that was also a sacred prayer area in the Native American religion were a violation of the group's religious freedom under the First Amendment and the American Indian Religious Freedoms Act.<sup>191</sup> One of the justifications offered by the state for the regulations was the need to limit the number of visitors to the park so as to preserve the natural resources and habitat from decay and erosion.<sup>192</sup> The Eighth Circuit held that the government's interest in protecting the environment was a compelling state interest and, therefore, there was no violation of the Native American group's free exercise rights.<sup>193</sup> While the *Crow* decision may be questionable in terms of its protection for Native American religious rights,<sup>194</sup> its recognition of environmental protection as a compelling interest is precedent that courts addressing RLUIPA claims should look to.

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187. Tarlock, *supra* note 40, at 661 (explaining that local environmental zoning laws are often the "only realistic choice" for environmental protection).

188. See discussion *supra* Section IV. The Tenth Circuit affirmed the decision on other grounds and did not express any opinion on this part of the district court's opinion. See *supra* Section IV.

189. The court in *Albanian Associated. Fund v. Twp. of Wayne* recognized the potential question of whether environmental protection is a compelling interest, but declined to address the question until the matter went to trial. No. 06-cv-3217(PGS), 2007 U.S. Dist. LEXIS 73176, at \*43-44 (D. N.J. Oct. 1, 2007). The case was settled before trial, so the question was never definitively addressed. See *supra* note 151 and accompanying text.

190. *Crow v. Gullet*, 706 F.2d 856, 858 (8th Cir. 1983).

191. *Id.* at 857-58.

192. *Id.* at 858.

193. Although *Crow* was a pre-RLUIPA case, it is unlikely that the plaintiffs in that case would have any more success under RLUIPA, because a RLUIPA plaintiff must have a property interest in land. *Id.*

194. See *supra* note 62 (noting RLUIPA's and RFRA's ironic lack of protection for Native American religious rights).

### F. Conclusion

“Religion is like a knife: you can either use it to cut bread, or stick in someone’s back.” ~ Desmond Tutu

The conflict created by RLUIPA between religion and the environment stems in part from a difference in perceived values.<sup>195</sup> As a leader of RMCC explained while discussing the church’s lawsuit, “[Boulder] define[s] the greater good in a far different way than we do.”<sup>196</sup> For religious entities, using their land in a manner they see as mandated by God trumps any environmental considerations. For local governments, charged with protecting the public welfare, preserving natural resources and ecosystems for future generations trumps any physical building requirements that a religious group may have.

Despite statements from Congress that RLUIPA was intended to prevent discrimination and not provide “a free pass” elevating religious land use above everything else,<sup>197</sup> overly-expansive interpretations of RLUIPA, like those in *Rocky Mountain I* and *II*, lead to the conclusion that “that is exactly what the law set forth to do.”<sup>198</sup> This elevation of religion above all values is congruent with the belief of RLUIPA supporters that “[the United States] was founded as a country in which belief in deity trumps secular government interests.”<sup>199</sup> Yet this point of view is not only constitutionally untenable—it was rejected by the Supreme Court in *Smith* and again in *City of Boerne*—it also fails to take into account that while religion is undoubtedly an important value in American society, it is not the only important value.<sup>200</sup>

One of the most compelling values that must also be considered is the preservation of the planet for future generations. As a means of furthering this value,<sup>201</sup> environmental zoning laws are not actually in conflict with the values of many religious groups. Thus, numerous religious groups have “added a moral voice to debates” on environmental policy issues and “linked projects for social justice, health and ecological well-being” to tenets of their faith.<sup>202</sup> While a

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195. See Andrew M. Englander, Note, *God and Land in the Garden State: The Impact of the Religious Land Use and Institutionalized Persons Act in New Jersey*, 61 RUTGERS L. REV. 753, 789-90 (2009) (noting that opinions on whether legislation as “sweeping” as RLUIPA is really needed to address the potential problem of discrimination against religious land users “may ultimately be a value judgment, not a legal judgment.”).

196. Laura Snider, *Boulder County will ask U.S. Supreme Court to consider Rocky Mountain Christian Church case*, BOULDER DAILY CAMERA, Sept. 30, 2010, available at [http://www.dailycamera.com/news/ci\\_16212241](http://www.dailycamera.com/news/ci_16212241).

197. Joint Statement, *supra* note 51, at 7776.

198. Laugensen, *supra* note 1.

199. *Id.*

200. See Henriques, *supra* note 5 (“Precious as protecting religious freedom is, however, there are cases where . . . [it] collide[s] with other values important in this country—like extending the protections of government to all citizens and sharing the responsibilities of society fairly.”).

201. When local governments enact environmental zoning laws pursuant to the police power, the goal is to protect the public, which “includes all citizens including generations not yet born.” Merriam, *supra* note 35.

202. *Statements and Activities*, NATIONAL RELIGIOUS PARTNERSHIP FOR THE ENVIRONMENT, <http://www.nrpe.org/statements-activities> (last visited Jan. 1, 2012). The National Religious Partnership for the Environment (“NRPE”) is a lobbying organization formed in the 1990’s made up of leaders of

discussion of the theological arguments in support of environmental protection is beyond the scope of this article, there is a growing recognition among religious groups that environmentalism is compatible or even required by their faith.<sup>203</sup>

Allowing one category of land users to systematically undermine environmental laws is not an appropriate way to address concerns about religious discrimination. In the vast majority of cases, churches face difficulties in the zoning process not because of discrimination, but for the same reason as any other land user: the “increasing pressures on society’s remaining undeveloped lands.”<sup>204</sup> Environmental zoning laws are one of the most effective tools available for managing those pressures and ensuring that natural resources and ecosystems are not incrementally destroyed. While the courts need to take the primary role by narrowing the application of RLUIPA, religious entities and local governments need to seek compromise on mutually acceptable solutions that recognize that their ultimate goal is the same: to preserve and protect God’s green earth.

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several faiths. *History of the Partnership*, NATIONAL RELIGIOUS PARTNERSHIP FOR THE ENVIRONMENT, <http://www.nrpe.org/what-is-national-religious-partnership-environment> (last visited Jan. 1, 2012).

203. See, e.g., ROGER S. GOTTLIEB, A GREENER FAITH, RELIGIOUS ENVIRONMENTALISM AND OUR PLANET’S FUTURE 9 (2006) (discussing religious environmentalism and how religion is becoming a leading voice in the environmental movement). See also Stephen M. Johnson, *Is Religion the Environment’s Last Best Hope? Targeting Change in Individual Behavior Through Personal Norm Activation*, 24 J. ENVTL. L. & LITIG. 119, 122 (2009) (discussing how religion can play an effective role in influencing individual behavior to achieve environmental protection); Staff Author, “Greens” and Churches Join Hands in Environmental Mission, WALL ST. J., March 26, 2002, at A24 (discussing how religious lobbying was a key in Senate votes against drilling in the Alaska National Wildlife Refuge).

204. Julie M. Osborn, Note, *RLUIPA’s Land Use Provisions: Congress’ Unconstitutional Response to City of Boerne*, 28 ENVIRONS ENVTL. L. & POL’Y J. 155, 165 (2004). By pitting religious groups against the environment, RLUIPA also fosters a hostile atmosphere and can perversely cause the very religious animosity it was intended to remedy when others in the community perceive churches being permitted to do what no other land users can do. Englander, *supra* note 195, at 755. See also HAMILTON, *supra* note 11, at 84-85, 103 (discussing several RLUIPA cases “injecting interdenominational hatred into a context where it otherwise did not exist”).



