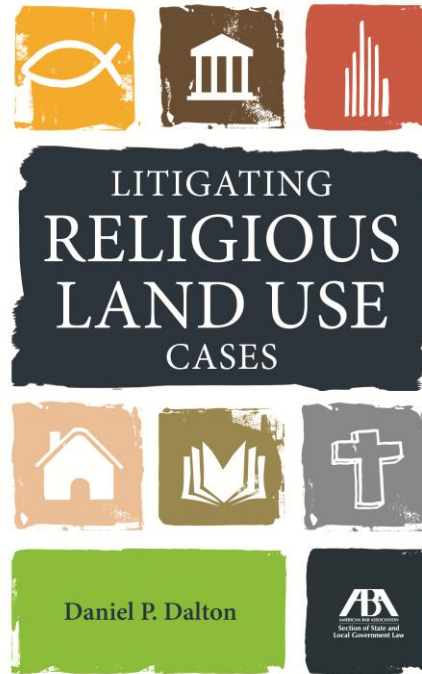


# *Religious Land Use Litigation Since 2000*



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# The First Amendment Religion Clauses

- First Amendment Establishment Clause:  
“Congress shall make no law respecting an establishment of religion....”
- First Amendment Free Exercise Clause:  
“Congress shall make no law ... prohibiting the free exercise” of religion

# Free Exercise Jurisprudence

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

- The Court must determine:
  - whether the person has a claim involving a sincere religious belief, and;
  - whether the government action is a substantial burden on the person's ability to act on that belief.
- If these two elements are established, the government must prove:
  - that it is acting in furtherance of a compelling state interest, and;
  - that it has pursued that interest in the manner least restrictive, or least burdensome, to religion.

## Change of Direction

In *Employment Division v. Smith*, 494 U.S. 872 (1990), the Court changed course and held that the “. . . . right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).”

## The Supreme Court Looks at Free Exercise Again

- In *Church of Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993), the Supreme Court held that an ordinance forbidding the "unnecessar[y]" killing of "an animal in a public or private ritual or ceremony not for the primary purpose of food consumption", is unconstitutional.
- The Supreme Court held that ordinances which target a religious exercise are subject to strict scrutiny, meaning the state action had to be justified by a compelling governmental interest, and be narrowly tailored to advance that interest.

## The Religious Freedom Restoration Act (RFRA)

- Congress passed RFRA in response to the United States Supreme Court's decision of *Employment Division v. Smith*
- RFRA applies the *Sherbert* test: substantial burden, compelling governmental interest and least restrictive means.



# The Supreme Court limits RFRA

- In *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Supreme Court limited the scope of Congress's enforcement power under the Fourteenth Amendment and struck down RFRA as it applies to the states as an unconstitutional use of Congress's enforcement powers.

# Congress unanimously enacts RLUIPA in 2000



# Constitutionality of the Act

- All Courts have ruled that RLUIPA is constitutional

# RLUIPA's Land Use Provisions

- Codified at 42 U.S.C. § 2000cc, RLUIPA contains four land use provisions:
  - Substantial Burden
  - Equal Terms
  - Nondiscrimination
  - Unreasonable Limitation/Exclusion

## RLUIPA's Substantial Burden Provision

No government shall impose or implement a land use regulation in a manner that imposes a *substantial burden on religious exercise*, unless the government demonstrates a *compelling governmental interest* that is the *least restrictive means* of furthering that interest

42 U.S.C. § 2000cc(a)

# Applicability of the Substantial Burden Provision

- RLUIPA's substantial burden provision applies only if:
  - the substantial burden is imposed under a program that receives **federal funding**, or;
  - the imposition or removal of the substantial burden affects **interstate commerce**; or,
  - the substantial burden is imposed as part of a regulatory system that makes **individualized assessments** of the proposed uses for the property involved.

# Interpreting RLUIPA

Congress provided that the entire statute should be “*construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution.*”

42 U.S.C. § 2000cc-3(g).

## What is an “Individualized Assessment”?

Not all courts agree that zoning and land use regulations are individualized assessments solely because they allow discretionary and possibly subjective decisions:

- *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643 (10th Cir. 2006).
- *Cambodian Buddhist Society v. Town of Newtown*, 285 Conn. 381 (2008).



# “Religious exercise” defined

*The “use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose.”*

42 U.S.C. § 2000cc-5(7)(B)

Temporary Land Use (?) – mobile clinic

# “Religious exercise” defined

Congress broadly defined “religious exercise” to “include **any** exercise of religion, whether or not compelled by, or central to, a system of religious belief.”

42 U.S.C. § 2000cc-5(7)(A)

## “Land Use regulation” defined

The term “‘land use regulation’ means a zoning or land-marking law, or the application of such a law, that limits or restricts a claimant’s use or development of land (including a structure affixed to land), if the claimant has an ownership, leasehold, easement, servitude, or other property interest in the regulated land or a contract or option to acquire such an interest.”

42 U.S.C. § 2000cc-5(5)

# Is Environmental Review a “Land Use Regulation”?

- **Maybe?** according to *Fortress Bible Church v. Feiner*, 734 F. Supp. 2d 409 (N.D.N.Y. 2010).

# Is Eminent Domain a “Land Use Regulation”?

- **Maybe.**

- The US District Court of New Jersey has said no, but, a religious institution could challenge the taking of its property pursuant to the municipality’s open space acquisition plan. *Albanian Associated Fund v. Twp. of Wayne*, 2007 WL 2904194 (D.N.J. 2007).
- The Seventh Circuit has held that some condemnations may be “land use regulations.” *St. John’s United Church of Christ v. Chicago*, 502 F.3d 616 (7th Cir. 2007).

# Is Eminent Domain a “Land Use Regulation”?

- **No.**

- The US District Courts in New York have said no. *Faith Temple Church v. Town of Brighton*, 405 F. Supp. 2d 250 (W.D.N.Y. 2005); *Congregation Adas Yerim v. City of New York*, 673 F. Supp. 2d 94 (E.D.N.Y. 2009).
- The Hawaii Supreme Court said no. *City and County of Honolulu v. Sherman*, 110 Haw. 39 (2006)

# Are Building and Health Codes “Land Use Regulations?”

- Depends on the state and circuit you are in:
  - Third Circuit: A sewer tap-in ordinance is not a “land use regulation.” *Second Baptist Church v. Gilpin Twp.*, 118 Fed. Appx. 615 (3d Cir. 2004).
  - Kentucky Court of Appeals: RLUIPA not violated by requiring religious schools to comply with school sanitation laws. *Liberty Road Christian School v. Todd County Health Dept.*, 2005 WL 2240482 (Ky. App. 2005).

## Other Actions that are Not “Land Use Regulations”

- ▶ The construction of a communications tower that obscured a synagogue’s scenic views. *Omnipoint Communications v. City of White Plains*, 202 F.R.D. 402 (S.D.N.Y. 2001).
- ▶ The refusal to sell property to a religious organization. *Taylor v. City of Gary*, 233 Fed. Appx. 561 (7th Cir. 2007).
- ▶ Involuntary annexation. *Vision Church v. Village of Long Grove*, 468 F.3d 975 (7th Cir. 2006).



# Does RLUIPA protect auxiliary/nontraditional religious uses?

- Common auxiliary uses include:
  - Schools
  - Community centers
  - Hospitals
  - Homeless shelters, halfway houses,
  - Food pantries and dining facilities
  - TV and Radio broadcasting
  - Credit unions and banks
  - Senior housing

# What constitutes a “substantial burden” on religious exercise?

Congress intentionally left the term “substantial burden” undefined in the Act.

The term ‘substantial burden’ as used in this Act is not intended to be given any broader definition than the Supreme Court’s articulation of the concept of substantial burden or religious exercise.

- Joint Statement, 146 Cong. Rec. 16,700 (2000)

## What constitutes a “substantial burden” on religious exercise?

- A substantial burden is a regulation that renders religious exercise “*effectively impracticable*” in the jurisdiction. *C.L.U.B. v. Chicago*, 342 F.3d 752 (7th Cir. 2003)
- A substantial burden may occur with the application of neutral and generally applicable standards. *Chabad Lubavitch v. Borough of Litchfield*, (2<sup>nd</sup> Cir., 2014)
- A substantial burden is akin to significant pressure that *coerces* adherents to forego religious precepts or *mandates* religious conduct. *Midrash Sephardi v. Surfside*, 366 F.3d 1214 (11<sup>th</sup> Cir. 2004)

## What constitutes a “substantial burden” on religious exercise?

- *Sts. Constantine & Helen v. New Berlin*, 396 F.3d 895 (7th Cir. 2005) – imposing *unjustified delay, uncertainty and expense* on a church can be a substantial burden
- *Vision Church v. Long Grove*, 468 F.3d 975 (7th Cir. 2006) & *Petra Presbyterian v. Northbrook*, 489 F.3d 846 (7th Cir. 2007) – *denial* of an approval is *not* a substantial burden where: (a) no “reasonable” expectation of approval and (b) other sites are available

## What constitutes a “substantial burden” on religious exercise?

- *Westchester Day School v. Mamaroneck*, 504 F.3d 338 (2d Cir. 2007)
  - Even where a denial is definitive, it may *not* be a substantial burden if the denial will have *only a minimal impact* on the institution’s religious exercise.
  - BUT, if the denial leaves the institution with *no real alternatives* ... OR, where alternatives would impose *substantial delay, uncertainty and expense*, then the denial is more likely to be a substantial burden.

# What constitutes a “substantial burden” on religious exercise?

- *Living Water Church of God v. Charter Twp. Of Meridian*, 258 Fed. Appx. 729, 2007 WL 4322157 (6<sup>th</sup> Cir.) (unpublished)
  - “We decline to set a bright line test by which to ‘measure’ a substantial burden and, instead, look for a framework to apply . . . .”
  - “Does the government action place substantial pressure on a religious institution to violate its religious beliefs or *effectively bar a religious institution from using its property in the exercise of religion?*”

## What constitutes a “substantial burden” on religious exercise?

- A denial of a church’s application for a conditional use permit when it forecloses a church from any *church* use of its property. (CA)
- A prohibition limiting the number of worshippers at prayer meetings when it requires “turning people away.” (CT)
- The denial of special use permit to finish the fourth floor of a building was, but denying an expansion of parking was not. (TX)

# A proposed definition of substantial burden

“[W]hether a given burden is substantial depends on its magnitude in relation to the needs and resources of the religious organization in question.” *Springfield*, 724 F.3d at 95 quoting verbatim from *World Outreach*, 591 F.3d at 537-538;

The manner in which the burden(s) were imposed. *Id.* citing *World Outreach*, 591 F.3d at 537-538; and

Whether as a whole the “different types of burdens ... *cumulate* to become substantial.” (emphasis added) *Springfield*, 724 F.3d at 95, citing *World Outreach*, 591 F.3d at 539.



# What constitutes a “substantial burden” on religious exercise?

## Very Likely Yes

- Nowhere to locate in the jurisdiction.
- Unable to use property for religious purposes.
- Imposing excessive and unjustified delay, uncertainty or expense.
- Religious animus expressed by City Officials

## Very Likely No

- Timely denial that leaves other sites available.
- Denial that has a minimum impact.
- Denial where no reasonable expectation of an approval.
- Personal Preference, Cost, Inconvenience

## If There is a “Substantial Burden” Has the Church Won?

- No, the burden shifts to the government to establish :
  - a *compelling government interest*
  - by the *least restrictive means*

## What are “compelling governmental interests” ?

- MERE SPECULATION, not compelling.
- Need specific evidence that religious practices jeopardize the city's stated interests.
- Does the religious conduct truly undermine any of the city's interests?

## What are “compelling governmental interests” ?

- Case by case analysis:
  - Ensuring the safety of residential neighborhoods through zoning - compelling interest. *Murphy v. Town of New Milford*, 289 F. Supp. 2d 87 (D. Conn. 2003), *vacated on other grounds*, 402 F.3d 342 (2d Cir. 2005).
  - Preservation of a municipalities rural and rustic single family residential character of the residential zone. *Westchester Day School v. Mamaroneck*, 417 F.Supp. 2d 477, 551 (S.D.N.Y. 2006), 504 F.3d 338 (2d Cir. 2007).

## Not Compelling Interests

- Concerns regarding traffic congestion and parking. *Lighthouse Cmty. Church of God v. City of Southfield*, 2007 U.S. Dist. LEXIS 28 (E.D. Mich. Jan. 3, 2007).
- Preserving property values. *Westchester Day Sch. v. Vill. of Mamaroneck*, 417 F. Supp. 2d 477, 553 (S.D.N.Y. 2006).
- Preserving property values. *Cambodian Buddhist Soc'y of Ct., Inc. v. Newtown Planning & Zoning Comm'n*, 2005 Conn. Super. LEXIS 3158, 42-44 (Nov. 18, 2005)
- Revenue generation. *Cottonwood Christian Ctr. v. City of Cypress*, 218 F. Supp. 2d 1203, 1228 (C.D. Cal. 2002).

# What is least restrictive means?

- To establish the least restrictive means, a government must show it could not achieve its interests by narrower state action that burdened the plaintiff to a lesser degree. *Elsinore Chr. Ctr. v. City of Lake Elsinore*, 270 F. Supp. 2d 1163, 1174-75 (C.D. Cal. 2003)
- Under strict scrutiny, if a less restrictive alternative is available, the government “**must** use that alternative.” *U.S. v. Playboy*, 529 U.S. 803, 813 (2000)
- “We do not doubt that cost may be an important factor in the least restrictive means analysis . . . Government may need to expend additional funds to accommodate a citizens religious beliefs.” *Hobby Lobby*, 134 S. Ct. 2751

## RLUIPA's Saving Provision for Substantial Burden Claims

- 42 U.S.C. 2000cc-3(e):

A government may avoid the preemptive force of any provision of this chapter by changing the policy or practice that results in a substantial burden on religious exercise, by retaining the policy or practice and exempting the substantially burdened religious exercise, by providing exemptions from the policy or practice for applications that substantially burden religious exercise, or by any other means that eliminates the substantial burden.

# The Economic Impact of Religious Organizations

- A recent study assigned monetary values to 49 categories, ranging from hosting weddings to building enhancement to teaching children social responsibility, which were then used by researchers to calculate the annual economic contributions 12 religious congregations in the Philadelphia area made on the communities they serve. The study determined the congregations provided an average of \$476,663.24 each year in economic contributions to the community.
- Ram A. Cnaan, Tuomi Forrest, Joseph Carlsmith & Kelsey Karsh (2013): *If you do not count it, it does not count: a pilot study of valuing urban congregations*, Journal of Management, Spirituality & Religion.



# Questions

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## Equal Terms Clause

Prohibits government from imposing or implementing 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

42 U.S.C.A. § 2000 cc(b)(1)

## Two Types of Equal Terms Claims

- As applied challenges
  - Individual zoning or land use decision
- Facial challenges
  - Overall zoning code provision

# The four Equal Terms Test

- The Court of Appeals has four separate Equal Terms test.
- Supreme Court was asked to look at the test most recently in 2014 and declined

## The Eleventh Circuit Equal Terms Test

A zoning ordinance that permits any "assembly," as defined by dictionaries, to locate in a district must permit a church to locate there as well, even if the only secular assemblies permitted are hospital operating theaters, bus terminals, air raid shelters, restaurants that have private dining rooms in which a book club or professional association might meet, and sports stadiums. Thus, private clubs are allowed, so must churches.

- *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1230-31 (11th Cir. 2004)

## The Third Circuit Equal Terms Test

A regulation will violate the Equal Terms provision if it treats religious assemblies or institutions worse than secular assemblies that are similarly situated as to the regulatory purpose. A secular comparator is needed to demonstrate the impact of the regulatory purpose in the same way that the religious assembly would. Once established, strict liability.

*Lighthouse Institute for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 266 (3d Cir. 2007).

## The Seventh and Ninth Circuit Equal Terms Test

The city violates the Equal Terms provision only when a church is treated on a less than equal basis with a secular comparator, similarly situated with respect to an accepted zoning criteria. While still somewhat restrictive in terms of available secular comparators, this test is theoretically more objective since criteria are typically less open to interpretation than an abstract purpose might be.

*River of Life Kingdom Ministries v. Vill. of Hazel Crest*, 611 F.3d 367, 371 (7th Cir. 2010); *Centro Familiar Cristiano Buenas Nuevas v. City of Yuma*, 651 F.3d 1163, 1173 (9th Cir. 2011),

## The Fifth Circuit Equal Terms Test

The 'less than equal terms' must be measured by the ordinance itself and the criteria by which it treats institutions differently. In accord with this instruction, and building on the similar approaches of our sister circuits, we must determine: (1) the regulatory purpose or zoning criterion behind the regulation at issue, as stated explicitly in the text of the ordinance or regulation; and (2) whether the religious assembly or institution is treated as well as every other nonreligious assembly or institution that is "similarly situated" with respect to the stated purpose or criterion. Where, as here, the religious assembly or institution establishes a prima facie case, the government must affirmatively satisfy this two-part test to bear its burden of persuasion on this element of the plaintiff's Equal Terms Clause claim

*Opulent Life Church v. City of Holly Springs Miss.*, 697 F.3d 279 (5th Cir. 2012)



# Equal Treatment

11<sup>th</sup> Circuit  
*Midrash Sephardi*

If the ordinance allows *any* secular assembly use, it must allow a religious assembly use

3<sup>rd</sup> Circuit  
*Lighthouse Institute*

Equal terms violated only if ordinance treats religious use less well than secular use that is *similarly situated as to the regulatory purpose*

# Mooting the Facial Equal Terms Claims

Trend is allowing communities to moot a facial challenge by changing the ordinance. Injunctive claims are mooted, but damages can be pursued.

- *Opulent Life Church v. City of Holly Springs Miss.*, 697 F.3d 279 (5th Cir. 2012)

# Nondiscrimination Claims

Prohibits government from imposing or implementing a land use regulation that *discriminates* against any religious assembly or institution on the basis of religion or religious denomination

42 U.S.C.A. § 2000 cc(b)(2)

# Exclusions and Unreasonable Limitations

Prohibits government from *totally excluding a religious assembly* from the jurisdiction

Prohibits government from *unreasonably limiting* a religious assembly, *institution or structure* in the jurisdiction

42 U.S.C.A. § 2000 cc(b)(3)]

# Addressing RLUIPA in the Planning Process

Examine your land use regulations affecting religious uses and how those regulations are applied.

- Do you have locations for different types and sizes of institutions?
- Are procedures administered fairly and in a non-discriminatory manner as applied to religious institutions?

# Ordinance Review

Establish an internal review process when enforcement actions target a religious use.

- Goal is not to exempt churches from enforcement of land use regulations.
- Goal is to ensure that neither churches generally, nor any particular church, are being singled-out for more frequent or severe enforcement, which could form the basis for a discriminatory treatment claim under RLUIPA.

# Strategies for avoiding/addressing RLUIPA claims

## Or ... How Not to Be Hit with a Multi-Million Dollar Damage Award

- City settled case for **\$2 million**  
*Hollywood Community Synagogue, Inc. v. City of Hollywood, Fla.*, 436 F. Supp. 2d 1325 (S.D. Fla. 2006)
- **\$3.7 million** award upheld  
*Reaching Hearts International, Inc. v. Prince George's County*, 584 F.Supp.2d 766 (D. Md. 2008), *aff'd* 368 Fed. Appx. 370 (4<sup>th</sup> Cir. 2010)

# Avoiding a RLUIPA Claim

- What these two decisions had in common:
  - government officials treating a religious use unfairly
  - in large part as a reaction to the negative opinions of neighbors
- *Hollywood*: Unfair treatment vs. both other religious uses and similar non-religious uses.
- *Prince George's*: Unfair treatment vs. non-religious uses that had greater environmental impacts.



# RESOURCES

## Litigating Religious Land Use Cases –ABA book

- Religion Clause Blog
- www.lawoftheland.com
- www.rluipa-defense.com
  - www.rc.com
- www.mauckbaker.com
- www.attorneysforlanduse.com
  - www.daltontomich.com

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