HOBBY LOBBY AND *HOBBS* TO THE RESCUE: CLARIFYING RLUIPA'S CONFUSING SUBSTANTIAL BURDEN TEST FOR LAND-USE CASES

Lisa Mathews[*]

INTRODUCTION

In 2013, Church of Our Savior attracted enough weekly attendees that its rented building could no longer accommodate congregants comfortably with only one meeting per week.[1] But the size of the building was not the only problem; the rental terms of the Church's contract included no automatic renewal provision, which meant that the Church had to reapply every three months to continue to worship there.[2] And the Church had to get permission from the building's owners to use the facilities outside of pre-determined meeting times, such as four hours on Sunday and major religious holidays.[3] Facing these constraints, the Church decided it was time to construct its own building.

Even with a limited budget, the Church was able to locate one parcel of land that met its specifications.[4] The property was zoned for single-family residences, which meant that the Church would need to obtain a conditional use permit ("CUP") from the local zoning board before it could start construction.[5] After hiring an architect to prepare a site plan, the Church submitted a CUP application to the city.[6] The city planner reviewed and approved the application.[7] But the Commission voted unanimously to deny the application after a public hearing in which five residents and one commissioner expressed opposition to the plan due to its potential impact on neighborhood.[8] Church of Our Savior then re-designed its plans in response to the concerns, again received a recommendation from the city's planning department, again

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[*] Articles Editor, GEORGE MASON LAW REVIEW 2016–2017; J.D., 2017, Antonin Scalia Law School, George Mason University.; MBA, 2014, Indiana University; B.A. Political Science, 2002, Brigham Young University. Special thanks to the Law Review staff, Professor Alvarè, and Rebecca Mathews and family for their help in publishing the article.

1 Church of Our Savior v. City of Jacksonville Beach, 69 F. Supp. 3d 1299, 1304 (M.D. Fla. 2014).

2 *Id.*

3 *Id.*

4 *Id.* at 1305.

5 *Id.* at 1306–07.

6 *Id*. at 1307–08.

7 *Church of Our Savior*, 69 F. Supp. 3d at 1308.

8 *Id.* at 1309.

presented its plans in a public hearing, and again was denied by the Commission.[9] The Church then filed suit, asserting among other things that the city violated the Religious Land Use and Institutionalized Person Act ("RLUIPA") by imposing a substantial burden on the Church.[10] The court found that the city's two permit denials did not substantially burden the Church, even though the Church had spent substantial funds to purchase the parcel of land, no other land was available within an acceptable price range, the Church was unable to function adequately in its current rented building, and the Church had altered its design plans to accommodate its neighbor's concerns.[11]

When an overwhelming majority in both houses of Congress passed RLUIPA, one of its purposes was to counteract pervasive discrimination against churches in land-use decisions made at the local level.[12] The law was supposed to provide a framework for courts to balance the needs of the church against the needs of the town.[13] To accomplish this goal, the law forbids the government from implementing a regulation "in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that" its actions further a "compelling government interest" and that the burden represents the "least restrictive means" of accomplishing that government interest.[14] The law applies to situations where the government makes "individualized assessments of the proposed uses for the property involved," such as in zoning conditional use or variance permit applications.[15]

Unfortunately, the legislation provides no definition of the term "substantial burden." When Congress authored RLUIPA, it chose not to define the term because it wanted courts to use their existing legal definition.[16] However, though the Supreme Court has applied the substantial burden test to individuals, it has never heard a land-use case in which the substantial burden test was at issue.[17] Absent a clear precedent, lower courts have been forced to extrapolate a substantial burden test for land use from cases where the test focused on burdens to people instead of to churches. This has created incon-

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9 *Id.* at 1309–10.

10 *Id.* at 1312–13.

11 *Id.* at 1316. The Court found for the Church on other grounds, however. *Id.* at 1324, 1326.

12 Douglas Laycock & Luke W. Goodrich, *RLUIPA: Necessary, Modest, and Under-Enforced*, 39 FORDHAM URB. L.J. 1021, 1031–32 (2012) (noting the extensive Congressional record which discovered widespread arbitrary zoning for churches).

13 *See id.* at 1022–23.

14 42 U.S.C. § 2000cc(a)(1) (2012).

15 *Id.* § 2000cc(a)(2)(C).

16 *See* 146 CONG. REC. S7776 (daily ed. July 27, 2000) (joint statement of Sen. Hatch & Sen. Kennedy).

17 *E.g.*, Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 717–18 (1981); Sherbert v. Verner, 374 U.S. 398, 399–402 (1963).

sistency throughout the country, because determining whether a burden exists as applied to an individual's religious practice is not easily analogous to determining whether a burden exists as applied to the religious practice of a church and its use of land.[18] The vague substantial burden test is one reason why many commentators have concluded that RLUIPA has not entirely resolved the problem it sought to alleviate: relieving the burdens local zoning boards place on churches.[19]

However, since RLUIPA's enactment, the Supreme Court has applied the substantial burden test in some significant cases, namely *Burwell v. Hobby Lobby Stores, Inc.*[20] and *Holt v. Hobbs*.[21] While neither of these were land-use cases, they offer lower courts the Supreme Court's most recent application of the substantial burden test.

This comment suggests that courts should look to the Supreme Court's recent cases for guidance in applying the substantial burden test in land-use cases, specifically *Hobby Lobby* and *Hobbs*. This comment proceeds in three parts: Section I presents a history of the factors leading to RLUIPA by outlining how religious land-use cases faired prior to RLUIPA's passage, charting the increase in authority of zoning boards, and examining how the increased use of land-use permits as a city planning tool has led to discrimination. Section II describes the history of the substantial burden test, starting with religious exercise cases that established the rule prior to RLUIPA. This section provides an overview of how the various circuits interpret the rule in land-use cases. Section II analyzes recent Supreme Court cases considering the substantial burden test. Section III provides specific recommendations for courts to consider based on recent Supreme Court cases in order to improve consistency across the country and ensure that RLUIPA is applied as intended given its purpose as a civil rights law.[22]

I. HISTORY

During the twentieth century, courts decreasingly deferred to churches in local land-use cases, while zoning boards rose as a source of local power.[23]

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18 *See infra* Section II.C. for a thorough analysis of how various circuits apply the test.

19 Adam J. MacLeod, *Resurrecting the Bogeyman: The Curious Forms of the Substantial Burden Test in RLUIPA*, 40 REAL EST. L.J. 115, 118–19 (2011). *See also* Laycock & Goodrich, *supra* note 12, at 1048 ("RLUIPA has, if anything, been under enforced. This under-enforcement has surfaced with respect to both the substantial-burden provision and the equal-terms provision, and it has resulted in lengthy litigation, and sometimes losses, in cases that churches should have easily won.").

20 134 S. Ct. 2751 (2014).

21 135 S. Ct. 853 (2015).

22 *See* 146 CONG. REC. E1564 (daily ed. Sept. 22, 2000) (statement of Rep. Canady) (identifying the act as a civil rights act).

23 *See, e.g.*, Richard C. Schragger, *The Role of the Local in the Doctrine and Discourse of Religious Liberty*, 117 HARV. L. REV. 1811, 1812–13 (2004).

After years of tension between churches and zoning boards, RLUIPA restored religious land use as a protected religious practice.[24] Section A discusses the history of religious land-use cases, and Section B describes the rise of zoning boards. Finally, Section C describes the events that led to RLUIPA's passage.

A. *Religious Land-Use Cases Before RLUIPA*

Prior to RLUIPA, courts did not apply the substantial burden test to religious land-use cases. Originally, courts only applied the test to religious freedom cases involving individuals.[25] Even so, for most of the twentieth century, state courts gave churches broad exemptions from zoning exclusions in residential zones; courts "acknowledged the connection between religious exercise and land use."[26] Even in the event that neighbors complained of increased noise or traffic, courts still supported the church's right to build, reasoning that the church's constitutionally protected status disallowed extensive governmental regulation.[27] Many courts ruled that churches should be allowed to build in residential areas due to "freedom of worship and assembly" and because they "promoted the general welfare and morals of the community," which outweighed any negative impact they might have.[28]

While state courts generally supported churches' rights in land-use cases, the first federal court decision on the matter—which did not occur until 1983—took the opposite view.[29] In *Lakewood, Ohio Congregation of Jehovah's Witnesses v. City of Lakewood*,[30] the Sixth Circuit rejected any connection between religious exercise and land use, stating that the Jehovah's Witness' inability to construct a building was of no religious significance.[31] The court asserted that "the act of construction was neither a ritual, a fundamental tenet of the faith, nor a cardinal principle of the faith."[32] This ruling established a precedent, and by the end of the twentieth century, the trend was looking grim for churches in land-use cases.[33]

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24 *See* 146 CONG. REC. S7774 (daily ed. July 27, 2000) (joint statement of Sen. Hatch & Sen. Kennedy).

25 *E.g.*, Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 717–18 (1981); Sherbert v. Verner, 374 U.S. 398, 399–402 (1963).

26 Angela C. Carmella, *RLUIPA: Linking Religion Land Use, Ownership and the Common Good*, 2 ALB. GOV'T L. REV. 485, 491–92 (2009).

27 *Id.*

28 *Id.* at 492 (footnote omitted).

29 *Id.* at 491–93.

30 699 F.2d 303 (6th Cir. 1983).

31 *Id.* at 306–07.

32 Carmella, *supra* note 26, at 492 (quoting *Lakewood, Ohio Congregation of Jehovah's Witnesses v. City of Lakewood*, 699 F.2d 303, 306–07 (6th Cir. 1983)).

33 *See id.* at 493.

B. *Zoning Boards in the Twentieth Century*

The eventual confrontation between local zoning decisions and religious land use was inevitable with the growing prominence of zoning boards. Zonings boards are a product of the twentieth century. Prior to that, the zoning laws that did exist were typically much more limited in scope than they are today and focused primarily on "fire prevention and building standards, or on restricting noxious uses in or near residential neighborhoods."[34] Towards the end of the nineteenth century, local governments came to appreciate the benefits of city planning to separate different types of activity, and in 1916, New York City passed a landmark zoning ordinance that drew the interest of Herbert Hoover, then Secretary of Commerce.[35] Secretary Hoover helped implement similar local zoning across the country by supporting the passage of the Standard State Zone Enabling Act ("SZEA"), which encouraged states to defer part of their police power to municipalities to engage in local zoning.[36] As a result, local zoning spread across the country, eventually becoming the "primary means of land use regulation in the United States."[37]

Originally, local zoning boards designed master plans for their towns, which pre-determined each zoning designation.[38] As time went on, zoning practice shifted to a case-by-case review, assigning much of the land to low-density, residential zones, and then rezoning individual parcels on an ad-hoc basis.[39] This method of planning requires landowners to request a use permit to build in these large residential zones when the building's purpose is not residential in nature. In some cities, zoning boards will set aside certain zones for religious buildings, but in cities that do not set aside such zones, a church must request a permit for any religious land use.[40] Due to the ubiquity of zoning by such use permits, many church building decisions must be approved ad-hoc by the town's zoning board before the church can carry out whatever plans it has for its property. Because each decision is individualized, there is no objective standard by which zoning boards engage in decision-making, making each decision highly discretionary.[41] As a result, before

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34 Ashira Pelman Ostrow, *Judicial Review of Local Land Use Decisions: Lessons From RLUIPA*, 31 HARV. J.L. & PUB. POL'Y 717, 727–28 (2008) (footnotes omitted).

35 *Id.* at 728.

36 *Id.*

37 *Id.* at 729.

38 *Id.* at 733.

39 *Id.* at 734.

40 *See, e.g.*, Hope Rising Cmty. Church v. Municipality of Penn Hills, No. 15-1165, 2015 WL 7720380, at *2–3 (W.D. Pa. Oct. 28, 2015).

41 *See, e.g.*, Ostrow, *supra* note 34, at 735.

enacting RLUIPA, Congress compiled extensive evidence demonstrating ongoing discrimination against religious organizations by zoning boards.[42] The highly subjective, ad-hoc permit approval process made it "susceptible to authorities or local constituencies' latent discriminatory attitudes."[43]

Of course, it would be unfair to assert that zoning boards always vote against churches because of religious discrimination.[44] Commentators identify numerous reasons a zoning board may deny a church's permit request, including, among others: churches' tax-free status, which can cause a church to be less desirable to a city's finances than a taxable entity; the traffic on weekends; the size of the building compared to the smaller residential homes nearby; the impact a church building has on the aesthetics of a neighborhood; and even not-in-my-backyard ("NIMBY") attitudes where residents simply do not want to live next to a church.[45] However, the fact that zoning boards put forward such reasons for denying a permit does not eliminate the possibility that the true reason for a permit's denial may be discrimination against the church. Even if the reasons offered are not a pretext for discrimination, zoning boards may easily forget that when denying a permit for a church, First Amendment rights are at issue in a way that they are not at issue in other zoning decisions.[46]

Whatever the specific reasons for individual permit denials, the rise of zoning boards in general and the broad use of special-use permits in particular created a new structural obstacle for churches that had previously been able to freely choose where to purchase land and how to use it.

C. *Background of RLUIPA*

The history of RLUIPA reveals multiple hurdles that Congress overcame to protect, among other things, religious land use.[47] RLUIPA is a culmination of years of effort by Congress to overturn *Employment Division*,

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42 *See* 146 CONG. REC. S7774 (daily ed. July 27, 2000) (joint statement of Sen. Hatch & Sen. Kennedy); Alex R. Whitted, Note, *Park51 as a Case Study: Testing the Religious Land Usage and Institutionalized Persons Act*, 45 IND. L. REV. 249, 254 (2011).

43 Tokufumi Noda, Note, *The Role of Economics in the Discourse of RLUIPA and Nondiscrimination in Religious Land Use*, 53 B.C. L. REV. 1089, 1100 (2012).

44 *See* Laycock & Goodrich, *supra* note 12, at 1021.

45 *See id.* at 1021–22; MacLeod, *supra* note 19, at 136 ("[L]ocal authorities often act rationally, for nondiscriminatory reasons, when they attempt to deflect the negative externalities that churches generate, even when they cannot articulate *compelling* reasons for doing so.").

46 Roman P. Storzer & Anthony R. Picarello, Jr., *The Religious Land Use and Institutionalized Persons Act of 2000: A Constitutional Response to Unconstitutional Zoning Practices*, 9 GEO. MASON L. REV. 929, 951 (2001).

47 *See* 42 U.S.C. § 2000cc(a)(1) (2012). RLUIPA also protects prisoners from religious discrimination. *Id.* at § 2000cc-1(a).

Department of Human Resources of Oregon v. Smith.[48] In *Smith*, the Supreme Court overrode the precedent it established in *Sherbert v. Verner*,[49] which required strict scrutiny analysis when a law created a substantial burden on religion.[50] In *Smith*, the Supreme Court refused to apply the strict scrutiny analysis if the law was "facially neutral," of general applicability, and did not specifically target religion.[51] The Court ruled that Oregon did not substantially burden religion when it denied unemployment compensation to members of the Native American Church who were fired after using peyote.[52]

Congress strongly opposed the *Smith* ruling[53] and in 1993 enacted the Religious Freedom Restoration Act ("RFRA"), re-instating the rule that any government action that imposes a substantial burden on religious free exercise is subject to strict scrutiny analysis requiring the government to demonstrate a compelling interest.[54] However, a few years later, in *City of Boerne v. Flores*,[55] the Supreme Court declared RFRA unconstitutional as applied to state law on the grounds that it exceeded Congress's power under Article V of the Fourteenth Amendment.[56] In response, Congress passed RLUIPA in 2000, aiming to protect prisoners' religious freedom and religious land use.[57] This more narrow law could be defended on Constitutional grounds.[58] For the law's land-use provision, Congress justified the law by holding multiple hearings over three years, which revealed that ad-hoc zoning decisions made at the city and town level were an area of "rampant" religious discrimination.[59]

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48 494 U.S. 872 (1990).

49 374 U.S. 398 (1963).

50 Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 884 (1990) (ruling that the *Sherbert* applied to individual assessments and does not compel religious exemptions from generally-applicable laws); Stephen A. Haller, Comment, *On Sacred Ground: Exploring Congress's Attempts to Rein in Discriminatory State Zoning Practices*, 33 SW. U. L. REV. 285, 286–87 (2004).

51 *Smith*, 494 U.S. at 879.

52 *Id.* at 890.

53 Robert M. Bernstein, *Abandoning the Use of Abstract Formulations in Interpreting RLUIPA's Substantial Burden Provision in Religious Land Use Cases*, 36 COLUM. J.L. & ARTS 283, 288 (2013).

54 42 U.S.C. §§ 2000bb–2000bb-4 (2012).

55 521 U.S. 507 (1997).

56 *Id.* at 530, 536 (ruling that while Congress can take remedial measures to correct a denial of privileges and immunities, it must do so "in light of the evil presented." Congress's response must be proportionate and based on research and findings that the law serves to correct discrimination, findings which here were not part of the Congressional record).

57 MacLeod, *supra* note 19, at 118–19.

58 Congress based RLUIPA on the Commerce Clause, the Spending Clause, and Section 5 of the Fourteenth Amendment. 146 CONG. REC. S7777, S7779 (daily ed. July 27, 2000) (joint statement of Sen. Hatch & Sen. Kennedy). It is also supported by evidence gathered over three years of hearings before the Judiciary Committee in the Senate and the Subcommittee on the Constitution in the House. *Id.* at S7777; Bernstein, *supra* note 53, at 288.

59 146 CONG. REC. S7777 (daily ed. July 27, 2000) (joint statement of Sen. Hatch & Sen. Kennedy); Bernstein, *supra* note 53, at 288.

Examples of such discrimination pepper the Congressional record.[60] They also give some insight into what the sponsors of the bill considered to be a substantial burden. In one example, the City of Jacksonville granted a permit to the First Presbyterian Church for a sanctuary and education building.[61] But the city granted the permit only after the church agreed to several restrictions, such as closing the building every Saturday and certain hours during the week, not holding weddings or funerals on Saturdays, and not serving alcohol on the premises.[62] When the city council realized that the wedding and funeral ban were probably unconstitutional, it chose to deny the permit altogether.[63]

In a second example, The Church of Jesus Christ of Latter-day Saints built a temple in Belmont, Massachusetts near an upscale neighborhood of single-family homes.[64] Some of the nearby residents wanted the temple demolished.[65] The temple was built while some of the lawsuits were still pending, though they were later resolved.[66] At one point, one court found that the 139-foot steeple for the temple was not essential: "While a spire might have inspirational value and may embody the Mormon value of ascendancy towards heaven, that is not a matter of religious doctrine and is not in any way related to the religious use of the temple."[67]

Congress included these and many other scenarios in the Congressional record as examples of zoning decisions that created a substantial burden on religious practice. In passing RLUIPA and specifically applying it to land use, Congress established a connection between religious worship and a church's ability to construct or rent buildings to exercise its faith. RLUIPA was intended to protect churches to the full extent allowed without violating the Establishment Clause.[68] Further, the law itself states that it is to be interpreted broadly.[69] The Department of Justice has stated that "[w]hen there is a conflict between RLUIPA and the zoning code or how it is applied, RLUIPA, as a federal civil rights law, takes precedence and the zoning law must give way."[70] After Congress passed RLUIPA, a joint statement by Senator Ted

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60 *See, e.g.*, 146 CONG. REC. E1564–67 (daily ed. Sept 22, 2000) (statement of Rep. Hyde).

61 *Id.* at E1566

62 *Id.*

63 *Id.*

64 *Id.* at E1565.

65 *Id.*

66 146 CONG. REC. E1,565 (daily ed. Sept 22, 2000) (statement of Rep. Hyde).

67 *Id.* (quoting Martin v. Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints, 747 N.E.2d 131, 148–49 (Mass. 2001)).

68 *See* Holt v. Hobbs, 135 S. Ct. 853, 859 (2015); *Hobby Lobby*, 134 S. Ct. 2751, 2761–62 (2014).

69 42 U.S.C. § 2000cc-3(g) (2012).

70 Dep't of Justice, Civil Rights Div., Statement of the Department of Justice on the Land-Use Provisions of the Religious Land Use and Institutionalized Persons Act (RLUIPA) (Sept. 22, 2010), http://www.justice.gov/sites/default/files/crt/legacy/2010/12/15/rluipa_q_a_9-22-10_0.pdf.

Kennedy and Senator Orrin Hatch declared: "The right to assemble for worship is at the very core of the free exercise of religion."[71] This declaration expressed the law's intent to restore the connection between church practice and land use that many state courts had recognized for much of the twentieth century before federal courts got involved with the issue.[72]

II. THE SUBSTANTIAL BURDEN TEST

Congress defined the substantial burden test in RLUIPA as requiring the following:

> No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution—
>
> (A) is in furtherance of a compelling governmental interest; and
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> (B) is the least restrictive means of furthering that compelling government interest.[73]

This provision applies to cases in which, among other scenarios,[74] "the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make individualized assessments of the proposed uses for the property involved."[75]

Section A below describes the difficulties courts have defining a substantial burden. Section B discusses the expanded definition of "religious exercise" in RLUIPA which may contribute to some of the inconsistent court rulings defining substantial burden. Section C examines how various circuit courts have applied the substantial burden test, and section D introduces two post-RLUIPA Supreme Court cases that apply the substantial burden test.

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71 146 CONG. REC. S7774 (daily ed. July 27, 2000) (joint statement of Sen. Hatch & Sen. Kennedy).

72 *See* discussion *supra* Section I.A.

73 42 U.S.C. § 2000cc(a)(1) (2012).

74 While this comment focuses on 42 U.S.C. § 2000cc(a)(2)(C), the law applies to the following three scenarios for zoning and land use:

> (2) Scope of Application. This subsection applies in any case in which—
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> (A) the substantial burden is imposed in a program or activity that receives Federal financial assistance, even if the burden results from a rule of general applicability; or
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> (B) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, even if the burden results from a rule of general applicability; or
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> (C) the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved.

Id. § 2000cc(a)(2).

75 *Id.* § 2000cc(a)(2)(C).

A. *The Substantial Burden Test's Lack of Statutory Definition*

The substantial burden test for RFRA and RLUIPA was not defined within the legislation itself.[76] Senators Hatch and Kennedy submitted a joint statement into the Congressional Record explaining the lack of a statutory definition:

> The Act does not include a definition of the term "substantial burden" because it is not the intent of the 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. Nothing in this Act . . . is intended to change that principle. The term "substantial burden" as used in this Act is not intended to be given any broader interpretation than the Supreme Court's articulation of the concept of substantial burden on religious exercise.[77]

"Substantial burden" is a term of art, the meaning of which courts attempt to derive from legal precedent.[78] In *Sherbert*, the Court defined the term as a condition requiring an individual to choose "between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand."[79] The Court further articulated the test in *Thomas*, another religious unemployment case, stating that when a state "conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of the conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists."[80]

Another well-known case where the Court weighed a state law against religious practice is *Wisconsin v. Yoder*,[81] in which the Court ruled that a Wisconsin law requiring Amish children to attend school until the age of sixteen placed an undue burden on their religious practice.[82] While the Court did not use the term "substantial burden", it stated that for Wisconsin to require school attendance past the eighth grade over an allegation that the law violates religious belief, the state must either demonstrate that it is not actually denying free exercise of religion with this law or that "there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause."[83] The Court found that the record supported the Amish's claim that their way of life is one of "deep religious conviction"

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76 146 CONG. REC. S7776 (daily ed. July 27, 2000) (joint statement of Sen. Hatch & Sen. Kennedy).

77 *Id.*

78 Bernstein, *supra* note 53, at 288.

79 Sherbert v. Verner, 374 U.S. 398, 404 (1962).

80 Thomas v. Review Bd. of the Ind. Emp't Sec. Div, 450 U.S. 707, 717–18 (1981).

81 406 U.S. 205 (1972).

82 *Id.* at 235.

83 *Id.* at 214.

stemming from their interpretation of the Bible.[84] Finding that the Wisconsin law would be "inescapable," would compel a threat of criminal sanction, and would even undermine the Amish community, the Court found for the Amish, after also determining that Wisconsin's law did not serve a compelling interest as it applied to children who will grow up and live in an Amish society.[85]

While *Sherbert* and *Thomas* provide some direction for evaluating whether a burden is substantial, they are woefully inadequate in offering a test that courts can use in land-use cases. *Sherbert*'s test, which asks if a party is being forced to choose between following the precepts of its religion or forfeiting benefits, does not readily apply to land use. That a church cannot build on a particular piece of land does not necessarily violate the "precepts" of its religion, and the requirement that it look for other parcels does not easily equate to a forfeiture of benefits akin to the compensation lost in *Sherbert*.[86] And, though RLUIPA expanded the definition of religious use to include nearly any activity carried out by a religious organization, it does not necessarily follow that the organization's inability to perform every aspect of each activity creates a substantial burden.

As demonstrated in Section B below, many courts have attempted to use the *Thomas* test to evaluate the assertion of a substantial burden in the land-use context, but though this test is more helpful than the one articulated in *Sherbert*, it has still confounded courts. In land use, the city is not typically conditioning receipt of an important benefit on conduct. And while it arguably is denying a benefit because of conduct mandated by religious belief, the courts often fail to understand how denying a church the desired use of one particular piece of land equates to limiting conduct "mandated" by religious belief, especially since other options are often available.[87]

B. *Religious Exercise*

RLUIPA defines "religious exercise" as any exercise of religion "whether or not compelled by, or central to, a system of religious belief."[88] As described by the Civil Rights Division of the Department of Justice after

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84 *Id.* at 216–17.

85 *Id.* at 218–21.

86 Sherbert v. Verner, 374 U.S. 398, 404 (1962). *See also* Westchester Day Sch. v. Vill. of Mamaroneck, 504 F.3d 338, 349 (2d Cir. 2007) ("When a municipality denies a religious institution the right to expand its facilities, it is more difficult to speak of substantial pressure to change religious behavior, because in light of the denial the renovation simply cannot proceed.").

87 *See, e.g.*, Greater Bible Way Temple of Jackson v. City of Jackson, 733 N.W.2d 734, 747–48 (Mich. 2007) ("[F]or land use regulation to impose a 'substantial burden,' it must . . . impose a significantly great restriction or onus upon [religious] exercise . . . . [T]here is no evidence [showing the plaintiff] was precluded from using other sites within the city.").

88 42 U.S.C. § 2000cc-5(7)(A) (2012).

RLUIPA became law, the term is defined this way so a municipality "cannot avoid the force of RLUIPA by asserting that a particular religious activity is something that a religious group merely wants to do rather than something that it must do."[89] Thus, RLUIPA applies to more than just constructing church buildings. The Department of Justice has interpreted religious exercise to cover various activities including, among others, the "operation of homeless shelters [and] soup kitchens . . . religious education . . . religious gatherings in homes; and construction or expansion of schools . . . ."[90] The Senators' joint statement did articulate a limit on the definition of religious practice, stating that land use that mimics use by non-religious institutions, such as commercial sales whose proceeds support religious activity, is not "religious exercise."[91]

This expansive definition of religious practice, while arguably a desirable one for churches, does not resolve the confusion around defining a substantial burden on religion. If a church asserts that its ability to practice religion has been substantially burdened due to a permit denial to run a soup kitchen in a rented building, for instance, while the intent of RLUIPA is that the judge should evaluate the burden as though the soup kitchen were part of the church's core exercises of religion, it may not always be intuitive to the judge that the considerations are the same. Further, even with the expanded definition of religious practice, a church may make a request that seems to exceed that definition. The Supreme Court of Michigan dealt with such a request in *Greater Bible Way Temple v. City of Jackson*,[92] where a church applied for a variance to build an apartment building across the street from its church building.[93] The court determined that maintaining an apartment building was not part of the church's religious exercise as defined by RLUIPA.[94]

So, while RLUIPA's broad definition of religious exercise may not clarify the substantial burden test, it does help define the type of activity that must be impacted in order for a burden to exist. This clarification provides relevant insight into Congress's intent to protect religious behavior through an expansive application of RLUIPA.

C. *How Courts Define the Substantial Burden Test*

Courts universally find a substantial burden where discrimination plays a perceptible role in a permit denial, a determination that stems from the

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89 Dep't of Justice, *supra* note 70.

90 *Id.*

91 146 CONG. REC. S7776 (daily ed. July 27, 2000) (joint statement of Sen. Hatch & Sen. Kennedy).

92 733 N.W.2d 734 (Mich. 2007).

93 *Id.* at 737.

94 *Id.* at 745–46.

court's finding that the denial was arbitrary or capricious. For instance, in *Sts. Constantine and Helen Greek Orthodox Church, Inc. v. City of New Berlin*,[95] the city's permit denial was found to create a substantial burden not only because of the resulting expense it created for the church but also because the city officials' multiple legal errors "cast doubt on their good faith."[96] Similarly, in *Grace Church of North County v. City of San Diego*,[97] the court found that a church's short-term permit approval created a substantial burden because the city would only approve the permit with a provision that the church not reapply in the future, and because, according to the court, the church faced "outright hostility" to its application throughout the process and decision-making that was "seemingly arbitrary or pretextual."[98] These cases represent an obvious application of RLUIPA because the law was intended to quash discrimination.[99]

Many circuits also find a substantial burden if a church is completely or nearly completely unable to carry out its function in a particular city or county, though, surprisingly, not all courts have come to this conclusion.[100] In circuits that have adopted this rule, it is nearly impossible for churches to prevail because they almost always can find a way to continue to function despite a permit denial, though sometimes with great difficulty.[101] The Eleventh Circuit has stated that "a 'substantial burden' must place more than an inconvenience on religious exercise; a 'substantial burden' is akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly."[102] Under this formulation of the test, a city's restriction is not a substantial burden if it does not prohibit the religious organization from practicing.[103] But "a substantial burden can result from pressure that tends to force adherents to forego religious precepts or from pressure that mandates religious conduct."[104] Similarly, the Seventh Circuit has stated "a land-use regulation that imposes a substantial burden on religious exercise is one that necessarily bears direct, primary, and fundamental responsibility for

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95 396 F.3d 895 (7th Cir. 2005).

96 *Id.* at 899–901.

97 555 F. Supp. 2d 1126 (S.D. Cal. 2008).

98 *Id.* at 1136.

99 *See, e.g.*, Dep't of Justice, *supra* note 70.

100 *See e.g.*, Corp. of the Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. City of W. Linn, 86 P.3d 1140, 1156 (Or. Ct. App. 2004) (where plaintiff could not meet the burden), *aff'd*, 111 P.3d 1123 (Or. 2005).

101 Courts sometimes provide little analysis as to why the religious organization failed to establish a substantial burden exists, but simply imply that the continued existence of the religious group demonstrates that the permit denial did not create an insurmountable burden. *See, e.g.*, Thai Meditation Ass'n of Ala., Inc. v. City of Mobile, No. 16-0395-CG-M, 2016 U.S. Dist. LEXIS 142651, *18–19 (S.D. Ala. Oct. 12, 2016) (Finding that the city's permit denial did not create a substantial burden even though it kept the religious group from using its own land for meditation as planned).

102 Midrash Sephardi, Inc., v. Town of Surfside, 366 F.3d 1214, 1227 (11th Cir. 2004).

103 *Thai Meditation Ass'n of Ala., Inc.*, 2016 U.S. Dist. LEXIS 142651, at *17.

104 *Midrash Sephardi, Inc.*, 366 F.3d at 1227.

rendering religious exercise—including the use of real property for the purpose thereof within the regulated jurisdiction generally—effectively impracticable."[105]

An example of this rule can be found in *Guru Nanak Sikh Society of Yuba City v. County of Sutter*,[106] in which the county twice denied permits for two different parcels of land on which the claimant sought to build a temple.[107] The Ninth Circuit overruled the district court, finding that the two denials indicated that the claimant would likely never be allowed to build the temple.[108] However, in *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. City of West Linn*,[109] the Court of Appeals of Oregon found that a permit denial did not create a substantial burden even though the church members of the City of West Linn were forced to attend congregations in surrounding towns because the permit denial did not extinguish the members' ability to attend any of the church's worship services.[110] Also, the court pontificated, the denial of a larger building on the current parcel in question did not preclude a potential future approval of a smaller building in a different parcel of land.[111]

Circuits are split on how to factor a permit denial's financial impact into the analysis. "[C]ourts have been . . . reluctant to find a violation where compliance with the challenged regulation makes the practice of one's religion more difficult or expensive."[112] In *Roman Catholic Bishop of Springfield v. City of Springfield*,[113] the First Circuit brushed over the expenses that would fall on the church to maintain a building that the church had planned to demolish after deciding it could not afford to maintain a separate parish.[114] After learning of the church's plans to demolish the building, the town quickly chose to designate the building as a historic site.[115] The court found that maintaining the building was not a substantial burden on the church because the "mere existence of some expenses does not put 'substantial pressure on [the church] to modify its behavior.'"[116] This is ironic because the church was forced to modify its behavior to maintain the church building it had originally wished to sell.[117] In *Church of Our Savior*, discussed in the introduction, the

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

106 456 F.3d 978 (9th Cir. 2006).

107 *Id.* at 991–92.

108 *Id.*

109 86 P.3d 1140 (Or. Ct. App. 2004), *aff'd*, 111 P.3d 1123 (Or. 2005).

110 *Id.* at 1156.

111 *Id.*

112 Episcopal Student Found. v. City of Ann Arbor, 341 F. Supp. 2d 691, 702 (E.D. Mich. 2004).

113 724 F.3d 78 (1st Cir. 2013).

114 *Id.* at 99.

115 *Id.* at 98.

116 *Id.* at 99 (quoting Bethel World Outreach Ministries v. Montgomery Cty. Council, 706 F.3d 548, 556 (4th Cir. 2013)).

117 *See id.* at 86, 99.

fact that the only other available land was out of the church's price-range was not a consideration in the substantial burden analysis.[118] However, in *Sts. Constantine and Helen Greek Orthodox Church*, the Seventh Circuit found that even the act of searching for new property and selling existing property would create "delay, uncertainty, and expense," which amounted to a substantial burden.[119]

The circuits are also split in their application of the substantial burden test when other viable options are available to the church. In the Seventh Circuit case of *Eagle Cove Camp & Conference Center, Inc. v. Town of Woodboro*,[120] the court found that one of the reasons the city's denial of a permit for the church to run a year-round Bible camp did not violate RLUIPA was due to the fact that the appellant had not even attempted to locate other suitable locations for its Bible camp.[121] This suggests that the lack of such alternatives would have weighed in favor of the appellant's assertion that a substantial burden was created when the city denied its permit. In *International Church of the Foursquare Gospel v. City of San Leandro*,[122] the Ninth Circuit admonished the district court for dismissing the church's assertions that no other suitable parcels existed and failing to take this into account when evaluating the substantial burden test.[123] The Ninth Circuit also admonished the district court for accepting the city's claim that no substantial burden existed because the church could simply continue to function as it had, holding multiple meetings each Sunday at various smaller properties throughout the city despite the Church's stated beliefs that it should hold Sunday School at the same time as its general church service.[124]

Contrast this with the factually similar case described in the introduction, *Church of Our Savior*, where the court was unmoved by the fact that no other land was available that was affordable to the church.[125] Further, the court did not find it compelling that the church was forced to hold multiple services because the rented building was not large enough to hold the entire congregation or that the building required a lease renewal every three months.[126] Courts have reasoned that the absence of other options is simply a

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118 Church of Our Savior v. City of Jacksonville Beach, 69 F. Supp. 3d 1299, at 1314–16 (M.D. Fla. 2014).

119 Sts. Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin, 396 F.3d 895, 901 (7th Cir. 2005).

120 734 F.3d 673 (7th Cir. 2013).

121 *Id.* at 681 (noting also that the city was able to suggest multiple other options that would have not offended the city's zoning ordinances).

122 673 F.3d 1059 (9th Cir. 2011).

123 *Id.* at 1068.

124 *Id.* at 1069.

125 Church of Our Savior v. City of Jacksonville Beach, 69 F. Supp. 3d 1299, 1314–16 (M.D. Fla. 2014).

126 *Id.* at 1304, 1316.

function of the realities of land ownership.[127] In *Civil Liberties for Urban Believers v. City of Chicago*,[128] the Seventh Circuit found that the fact that other properties are not available does not necessarily create a substantial burden, stating that: "'The harsh realit[ies] of the marketplace sometimes dictate that certain facilities are not available to those who desire them.'"[129] As noted in the discussion of *Eagle Cove Camp & Conference Center* above, the Seventh Circuit has not been consistent on this issue.[130] The Eleventh Circuit, however, has plainly declared that the absence of other available land does not create a substantial burden.[131]

Courts also struggle to define when a church is substantially burdened when the burden is evident, but the impact to the church's religious practice is unclear. For instance, in *Congregation Rabbinical College of Tartikov, Inc. v. Village of Pomona*,[132] an Orthodox Jewish Community that included various sects of the Hasidic Community wanted to construct a rabbinical college on property that it owned.[133] In considering the potential substantial burden, the district court explained that it needed to understand exactly which parts of the proposed building features were required for religious exercise.[134] Further, even though the plaintiffs explained that the type of college they sought to build was for a particular type of education that was different than surrounding colleges, the court stated that the existence of other Rabbinical colleges with fewer features led the court to believe that the inability to attain all of the planned features would not create a substantial burden.[135] In *Midrash Sephardi, Inc., v. Town of Surfside*,[136] the Eleventh Circuit found that requiring an Orthodox Jewish synagogue to move to another zone was not a substantial burden even though it would require the congregants, whose religious beliefs require them to walk to church, to walk further.[137] The court reasoned that the claimants did not assert that the more convenient location had any religious significance and that the new location was only a few blocks away from the current one, and though it would be more difficult for

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127 *See, e.g.*, Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752, 761 (7th Cir. 2003).

128 342 F.3d 752 (7th Cir. 2003).

129 *Id.* at 761 (quoting Love Church v. City of Evanston, 896 F.2d 1082, 1086 (7th Cir. 1990)).

130 *Compare* Eagle Cove Camp & Conference Ctr., Inc. v. Town of Woodboro, 734 F.3d 673, 681 (7th Cir. 2013) (finding no substantial burden by the land use regulation because other viable land options were available) *with* Sts. Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin, 396 F.3d 895, 901 (7th Cir. 2005) (finding that the city's denial of a rezoning application was a substantial burden even though the church could have sought other land options).

131 Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1228 (11th Cir. 2004).

132 138 F. Supp. 3d 352 (S.D.N.Y. 2015).

133 *Id.* at 370.

134 *Id.* at 435–36.

135 *Id.*

136 366 F.3d 1214 (11th Cir. 2004).

137 *Id.* at 1228.

the young and elderly to attend the synagogue in the Florida heat, extra walking did not create a substantial burden on religion.[138]

Most circuits find that being required to apply for a permit is not a substantial burden.[139] Most also agree that being forced to reapply after submitting an incomplete or otherwise faulty application is not a substantial burden, but is part of the cost "incidental to any high-density urban land use."[140] The Eleventh Circuit, for instance, has found that "run of the mill" zoning considerations like "requiring churches and synagogues to apply for [Conditional Use Permits]" do not amount to a substantial burden.[141]

In sum, while most courts will find that a substantial burden exists if the permit denial is prejudicial or if it would prevent the church from practicing its religion, there is broad disagreement on how to evaluate particular details such as cost, availability of other land, and the necessity of detail to a building design. Courts in some of these cases appear wary of finding that a substantial burden exists even when the city's permit denial creates obvious added expense and effort for the church.[142] While RLUIPA has succeeded in improving access to land for religious organizations compared to the dominant federal jurisprudence of the 1980's, RLUIPA's application is still arguably not as broad as Congress intended.[143]

The reluctance of courts to find a substantial burden even in circumstances where such a finding may be compelling leaves RLUIPA's secondary inquiry—whether the zoning decision constituted the least restrictive means to accomplish a narrow government interest—underdeveloped in case law and limits RLUIPA's intended impact.[144] Any concern that lowering the bar for the substantial burden test would favor religion and violate the Establishment Clause undermines the emphasis that should be given to this second prong–requiring the city to justify its decision.

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138 *Id.*

139 *See* Laycock & Goodrich, *supra* note 12, at 1042.

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

141 *Midrash Sephardi, Inc.*, 366 F.3d at 1227–28 n.11 (citing Lady J. Lingerie, Inc. v. Jacksonville, 176 F.3d 1358, 1362 (11th Cir. 1999)).

142 MacLeod, *supra* note 19, at 134 ("[S]ome courts appear to share the fear of RLUIPA's critics that a broad exemption for religious land users would unduly hamper the regulatory efforts of local governments, threatening federalism and privileging religious land users to flout important land use regulations." (footnote omitted)); George P. Smith, II & Philip M. Donoho, *RLUIPA: Re-Aligning Burdens of Proof, Clarifying Freedoms, and Re-Defining Responsibilities*, 18 N.Y.U. J. LEGIS. & PUB. POL'Y 67, 72 (2015) ("RLUIPA's new civil right has mired its putative enforcer—the federal judiciary—in an analytical and ideological conflict over the appropriate construction and application of RLUIPA's provisions.").

143 *See* Laycock & Goodrich, *supra* note 12, at 1054 ("One area of under-enforcement is RLUIPA's substantial-burden provision, which requires the government to satisfy strict scrutiny whenever a land-use regulation imposes a substantial burden on religious exercise.").

144 *See id.* at 1048–54 (discussing judicial reluctance and its effect on the under-enforcement of RLUIPA).

D. *Recent Supreme Court Cases Can Provide Guidance to Lower Courts in Land-Use Cases*

Since RLUIPA's enactment, the Supreme Court has continued to apply the substantial burden test to new scenarios, though the Court still has not decided a land-use case where the substantial burden was at issue. But because Congress intended the courts to utilize their own jurisprudence for defining the meaning of "substantial burden" for RLUIPA cases, it follows that as the Supreme Court's definition of substantial burden evolves, so should the test as applied to land use.[145] Section 1 below introduces two significant cases, *Hobby Lobby* and *Hobbs*, and Section 2 discusses their similarities and the Supreme Court's systematic approach to the substantial burden test, which may be useful in land-use cases.

1. Two Key Post-RLUIPA Supreme Court Cases: *Burwell v. Hobby Lobby Stores* and *Holt v. Hobbs*

In *Hobby Lobby*, the Court considered whether a federal regulation requiring companies to include certain contraceptives as a part of their insurance plan violated RFRA for a company whose owners believed that some of those contraceptives cause abortions.[146] The plaintiffs, two closely-held family businesses, claimed that the government's requirement that they carry insurance for certain contraception created a substantial burden on their religious beliefs because it required the owners to facilitate what they believed to be an immoral act.[147] After first disposing of the government's assertion that RFRA was not meant to protect companies by ruling that Congress intended to protect the rights of companies as well as individuals,[148] the Court turned to the substantial burden test.[149] The Court approached the test by first considering the sincerity of the owner's beliefs.[150] Because the government stipulated that the plaintiff's belief was sincere, the Court could quickly move to the question of whether the burden was substantial.[151]

Denying that the claimants faced a substantial burden, the government asserted that the "connection between what the objecting parties must do . . . and the end they find to be morally wrong . . . is simply too attenuated."[152] In

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145 *See* 146 CONG. REC. S7776 (daily ed. July 27, 2000) (joint statement of Sen. Hatch & Sen. Kennedy).

146 Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2762–63 (2014).

147 *Id.* at 2764–66.

148 *Id.* at 2768–69.

149 *Id.* at 2775.

150 *Id.* at 2774.

151 *Id.* at 2774–75.

152 Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2777 (2014).

response, Justice Alito stated that the question is whether the mandate imposes a substantial burden on their beliefs and not whether those beliefs are reasonable.[153] Justice Alito confirmed, "it is not for us to say that their religious beliefs are mistaken or insubstantial."[154] Instead, he said that the courts role is to determine whether the view reflects an "'honest conviction,'" which in this case it did.[155] The Court noted that violation of the regulation would lead to a fine of $100 per day for each employee, which would add up to $475 million per year for Hobby Lobby and $15 million per year for Mardel, the other company in the suit.[156] Given the amount of money involved, the Court found that the burden was indeed substantial.[157]

In *Hobbs*, a Muslim inmate challenged a prison's policy against inmates growing beards, [158] and the Court found that this policy did impose a substantial burden on his religion.[159] The inmate asserted that wearing a beard was an exercise of religion, and that the prison substantially burdened his ability to practice his religion by disallowing him to wear a beard.[160] In assessing RLUIPA's general intent, the Court noted:

> Several provisions of RLUIPA underscore its expansive protection for religious liberty. Congress defined "religious exercise" capaciously to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." Congress mandated that this concept "shall 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." And Congress stated that RLUIPA "may require a government to incur expenses in its own operations to avoid imposing a substantial burden on religious exercise."[161]

The Court, as in *Hobby Lobby*, began its analysis by considering the sincerity of the inmate's belief.[162] Because the government did not dispute the prisoner's sincerity, the Court moved to the substantial burden analysis.[163] The Court noted that because the choice facing the prisoner was to either violate his religion or face disciplinary action, he had easily established that the prison's policy created a substantial burden on his religion.[164] The Court also ruled that the lower court erred in finding that because the inmate had been given other accommodations, such as a prayer rug, not providing this

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153 *Id.* at 2778.
154 *Id.* at 2779.
155 *Id.* (quoting Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 716 (1981)).
156 *Id.* at 2775–76.
157 *Id.* at 2779.
158 Holt v. Hobbs, 135 S. Ct. 853, 859 (2015).
159 *Id.*
160 *Id.* at 860–61.
161 *Id.* at 860 (statutory citations omitted).
162 *Id.*at 862.
163 *Id.*
164 Holt v. Hobbs, 135 S. Ct. 853, 862 (2015).

accommodation did not create a substantial burden.[165] Speaking for the Court, Justice Alito stated, "RLUIPA's 'substantial burden' inquiry asks whether the government has substantially burdened religious exercise . . . not whether the RLUIPA claimant is able to engage in other forms of religious exercise."[166] The Court also confirmed its finding in *Thomas* that not all members of a religious sect must follow the same religious practice for it to be protected.[167] One's beliefs may be idiosyncratic; the issue is not conformity but rather whether the belief is sincerely held.[168]

As illustrated and discussed further in Section 2 below, both *Hobby Lobby* and *Hobbs* demonstrate recent, straightforward applications of the substantial burden test.

2. The Supreme Court's Simple Application of the Substantial Burden Test

Both *Hobby Lobby* and *Hobbs* offer an example of the Supreme Court's rather simple evaluation of the substantial burden test under RLUIPA (and RFRA). The Court acknowledged the religious behavior at issue—either wearing a beard or not carrying certain contraceptives in a health insurance plan—and then recognized the consequence attached to each action (or inaction).[169] For the inmate, wearing the beard would result in punishment from the prison.[170] For Hobby Lobby, not carrying health insurance that covers contraceptives would result in large fines.[171] In both cases, the result of their desired religious expression incurred a significant negative consequence.[172] Indeed, the consequence was such that it may have had the effect of coercing the plaintiffs to not follow their religious beliefs.[173]

In acknowledging this fact, the Court rejected the error made by lower courts that the plaintiff's ability to practice his or her religion in a different setting precluded the plaintiff's claim in the case at hand.[174] Indeed, the court in *Hobbs* confirmed that the prisoner's ability to practice his religion in other ways within the prison did not justify disallowing him to grow a beard.[175] The rule to be garnered from this is that even when the prisoner, as in this situa-

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165 *Id.*
166 *Id.*
167 *Id.* at 862–63.
168 *Id.*
169 *Id.* at 859; Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2759 (2014).
170 *Hobbs*, 135 S. Ct. at 862.
171 *Hobby Lobby*, 134 S. Ct. at 2759.
172 *Hobbs*, 135 S. Ct. at 862; *Hobby Lobby*, 134 S. Ct. at 2759.
173 *See Holt*, 135 S. Ct. at 862; *Hobby Lobby*, 134 S. Ct. at 2759.
174 *Hobbs*, 135 S. Ct. at 862.
175 *Id.*

tion, is able to practice his religion in every other aspect—by attending religious meetings, praying, eating only religiously-approved foods, etc.—the Court will not take those other activities into account when evaluating if he is experiencing a substantial burden.[176] Courts should only evaluate whether the activity in question, in this case the ability to grow a beard, is thwarted. If it is, a substantial burden has been created. Viewed through this lens, the court in *Hobbs* easily ruled that the prisoner faced a substantial burden.[177]

In finding that the plaintiffs in both cases had established that a substantial burden had been placed on them, the Court also chose to recognize only the consequences of the government action and not other outside factors. For instance, in *Hobbs*, the Court could have attributed the inability of the inmate to practice his religion to his own conduct that resulted in his incarceration. The Court could have asserted that such limitations are placed on prisoners as a matter of course when they are incarcerated, and that such limitations are therefore a common issue that prisoners must face. However, instead, the Court limited its review to the conflict before it: the prison's rule that the prisoner could not grow a beard. The Court refrained from indulging in broad justifications for the situation the prisoner was facing, and simply looked at the prison's rule and its impact on the prisoner.

In sum, the Court applied the substantial burden test in a simple manner in both cases by comparing the plaintiff's desired behavior to the consequences of practicing that behavior. In land-use cases, courts could simplify their analysis by following the Supreme Court's pattern and not complicating the substantial burden analysis with extraneous considerations.[178]

III. RECOMMENDATIONS

The inconsistent application of the substantial burden test in land-use cases limits RLUIPA's reach.[179] Congress was clear that the law was to be interpreted broadly.[180] That Congress could clarify the substantial burden test is obvious, but absent Congressional action, courts should look to the Supreme Court's recent interpretation of the substantial burden test for insight. Many of the inconsistencies across the circuits could be reduced if lower courts would apply the Supreme Court's reasoning in *Hobby Lobby* and *Hobbs* in their analysis.

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176 *See id.*

177 *Id.* at 867. *See also Hobby Lobby*, 134 S. Ct. at 2779 (holding that once the court finds a "substantial burden on the exercise of religion, we must move on" to analyze the government's interest).

178 *See* discussion *infra* Section III.A.

179 Laycock & Goodrich, *supra* note 12, at 1048 ("RLUIPA has, if anything, been under enforced. This under-enforcement has surfaced with respect to both the substantial-burden provision and the equal-terms provision, and it has resulted in lengthy litigation, and sometimes losses, in cases that churches should have easily won.").

180 *See, e.g.*, Dep't of Justice, *supra* note 70.

Section A below suggests four principles derived from both Supreme Court cases that lower courts should consider as they work through the substantial burden analysis. Section B describes limits to the suggestions in Section A and responds to any concern that by following the suggestions in Section A, churches would be overly favored.

A. *Four Principles That Improve the Substantial Burden Analysis*

When the Supreme Court worked through its substantial burden analysis in *Hobby Lobby* and *Hobbs*, it offered principles for judges to consider while determining if a burden is substantial in land-use cases. First, courts should recognize and consider the financial impact to the church as part of the substantial burden analysis. Second, courts should focus on the conflict before it and not attribute the cause of the church's burden to other factors. Third, courts should be willing to find that a burden is substantial even if a church has found another way to worship despite the city's actions. And fourth, since RLUIPA was meant to provide broad protections for religious freedom,[181] courts should not forget RLUIPA's definition of "religious practice" and engage in attempts to determine whether the church's desired activity is based on religious precepts.[182] All four assertions are discussed below in turn.

1. Courts Should Consider Financial Impact as a Part of the Substantial Burden Analysis

The *Hobby Lobby* case confirms that the Supreme Court considers the financial impact a party faces to be a relevant factor in the substantial burden analysis.[183] The Court was persuaded by the enormity of the fine Hobby Lobby confronted if it chose to follow its religious beliefs.[184] By forcing the company to choose between its religious beliefs—not providing contraceptive coverage—and paying the fine, the government's mandate indeed substantially burdened Hobby Lobby's practice of religion.[185] The Court stated that if "these consequences do not amount to a substantial burden, it is hard to see what would."[186] Similarly, in land-use cases, courts should allow churches to present the financial consequences of the city's action in denying a use permit as part of its case. Currently, some courts recognize the financial

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181 *Hobbs*, 135 S. Ct. at 859–60.

182 *Id.* at 860 ("Congress defined 'religious exercise' capaciously to include 'any exercise of religion, whether or not compelled by, or central to, a system of religious belief.'" (statutory citation omitted)).

183 *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2779 (2014).

184 *Id.*

185 *Id.*

186 *Id.* at 2759.

realities that face churches when a permit is denied, but most courts do not.[187] The courts that ignore the real consequences churches face after a use permit is denied fail to apply the substantial burden test as *Hobby Lobby* directs.

Considering the financial impact as part of the analysis does not require that *any* cost render the burden substantial. One could speculate that the Supreme Court may not have found a much smaller fine substantial in *Hobby Lobby*. Perhaps a fine in the thousands instead of the millions would not have been substantial. In land-use cases, if a church incurs greater costs as a result of a city's permit denial or requirements—such as paying an architect or paying to reapply for the permit—such costs may or may not be deemed substantial. However, the city should allow the church to submit these costs as proof that a substantial burden exists. Courts must then decide if the financial impact rises to the level of a "substantial" impact. Costs associated with hiring an architect would likely not be found to be substantial; but costs associated with selling property and locating new property may be found to be substantial, depending on their severity.

Also, by incorporating the financial impact as a more central feature of the substantial burden analysis, courts will create a more stable test for churches to navigate. Of course, looking at evidence of financial impact will not decide every case,[188] but it would correct some mistaken precedent in cases where the church had established a substantial burden and the court's inattention to the financial impact muddled its analysis.[189] For instance, in *Roman Catholic Bishop of Springfield*, the court barely considered the costs of maintaining a building that was designated a historical landmark *after* the church decided to demolish the building because city residents did not want the building demolished.[190] As a historical landmark, the building would be very difficult to sell in the future, and the entire reason the church decided to demolish the building and consolidate its parish with another one in the first place was cost.[191] Had the court incorporated the financial impact more centrally into its analysis, it most likely would have found that a substantial burden was created when the city thwarted the church's efforts to remain financially viable. Similarly, in *Church of Our Savior*, discussed in the introduction, the court did not consider that the only land within the church's price

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187 *See supra* text accompanying notes 114–118.

188 For instance, it will not resolve *Midrash Sephardi*, where the issue surrounds the distance between the congregants and the building and not the cost of a new building. Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1228 (11th Cir. 2004).

189 Commentators have stated that *Hobby Lobby* was legally boring and offered little change in legal precedent, which highlights the need for courts in land-use cases to consider the financial impact since the financial impact element is obvious in other applications of the substantial burden test. *See, e.g.*, Eric Rassbach, *Is* Hobby Lobby *Really a Brave New World? Litigation Truths About Religious Exercise by For-Profit Organizations*, 42 HASTINGS CONST. L.Q. 625, 630 (2015).

190 Roman Catholic Bishop of Springfield v. City of Springfield, 724 F.3d 78, 98– 99 (1st Cir. 2013).

191 *Id.* at 84.

range was the parcel in question.[192] Any other option was quite costly in comparison to the cost associated with using the land it already had.[193] The court erred when it ignored this consideration.

To assuage concerns that such a rule would unfairly benefit churches, one must remember that churches still have the initial burden of establishing that the financial impact is indeed *substantial*.[194] Courts should not make this assumption themselves. In *Calvary Temple Assembly of God v. City of Marinette*,[195] for instance, the church did not offer sufficient evidence that the financial impact of the city's permit denial was substantial.[196] The city produced evidence of secondary options the church could utilize, which negated the church's unsupported assertion that other sites were unavailable.[197]

In sum, the exclusion of a financial impact analysis frustrates the Supreme Court's substantial burden test as applied in *Hobby Lobby*.[198] While some courts already take this factor into account, some do not, which highlights the inconsistencies between circuits.[199] Courts may be reluctant to consider the financial impact as part of the substantial burden test because the city is not directly fining the church. So, judges may perceive that the burden is not imposed by the city and financial consideration therefore belongs outside of the analysis. This fallacy is addressed in Section 2 below.

2. The Court Should Not Minimize the City's Role in Creating a Substantial Burden by Attributing the Lack of Alternatives or Costs Imposed to Market Factors

Some courts have reasoned that a permit denial is not a substantial burden when other parcels of land or buildings are not available because, they assert, the city is not responsible for the "harsh reality of the marketplace."[200] In making this claim, courts are misconstruing the role the city plays in creating a substantial burden. Again, a recent Supreme Court case provides direction.[201] In *Hobbs*, the plaintiff was an inmate who was in prison because of his own behavior.[202] Given his status as a prisoner, it is self-evident that

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192 Church of Our Savior v. City of Jacksonville Beach, 69 F. Supp. 3d 1299, 1315–16 (M.D. Fla. 2014).

193 *Id.*

194 *See* 42 U.S.C. § 2000cc-2(b) (2012).

195 No. 06-C-1148, 2008 WL 2837774 (E.D. Wis. July 21, 2008)

196 *Id.* at *8–9.

197 *Id.*

198 Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2775–76, 2777–78 (2014).

199 *See* discussion *supra* Section I.C.

200 *See, e.g.*, Church of Our Savior v. City of Jacksonville Beach, 69 F. Supp. 3d 1299, 1314 (M.D. Fla. 2014) (citations omitted).

201 *See* Holt v. Hobbs, 135 S. Ct. 853, 859–63 (2015).

202 *Hobbs*, 135 S. Ct. at 860.

the prison's beard policy was not the only reason he could not practice his religion freely. The prison may have argued that the prison rules were not responsible for restricting the plaintiff's religious activity; the blame fell on the prisoner for behaving in a way that resulted in his incarceration. The rules, they could assert, are simply part of the harsh reality of prison. However, in *Hobbs*, the Court did not concern itself with other factors leading to the dispute in question. Instead, the Court focused only on the impact the prison's rule had on the prisoner's desired religious expression, not the prisoner's prior behavior and its potential contribution to the prisoner's inability to practice his religion as freely as he wanted.[203] Similarly, in land-use cases, courts should only look at the city's permit denial and the resulting impact to the church. Other factors, such as market factors and their contribution to the church's woes, are irrelevant.

Indeed, the Court's approach in *Hobbs* showcases the simple analysis that seems to evade courts in RLUIPA cases.[204] This process of analysis is congruent with the way the law itself states it must be applied.[205] The law first assigns the burden to the claimant to establish that he faces a substantial burden, and only if the burden is met, the court is to look to the city to see if it can justify its behavior.[206] At no point does RLUIPA ask the court to discover other hardships the claimant faces or opine about other causes that may have led to the substantial burden.[207]

For land-use cases, Congress knew when it passed RLUIPA that the city itself was not entirely responsible for market conditions or land costs. But, Congress still chose to write the law so that judges would only consider the impact of the city's action when determining if a substantial burden had been created.[208] This strong posture regarding the city's role is reinforced by the text of the law, which states that RLUIPA "may require a government to incur expenses in its own operations to avoid imposing a substantial burden on religious exercise."[209] Therefore, in land-use cases, courts should not concern themselves with factors unrelated to the city's action and the impact that action has on the religious organization. Nor should courts fault the lack of reasonable alternatives on market forces or look to other causes for the church's woe, such as the realities of urban life.[210]

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203 *See id.* at 862–63.

204 *See* discussion *supra* Section II.D.

205 *See* 42 U.S.C. § 2000cc-2(b) (2012) (stating the plaintiff's burden).

206 *Id.*

207 *See id.* §§ 2000cc-1, 2000cc-2.

208 *See id.* § 2000cc-2.

209 *Id.* § 2000cc–3(c).

210 *See* Civil Liberties for Urban Believers v. City of Chi., 342 F.3d 752, 761–62 (7th Cir. 2003) (finding that a lack of reasonable alternatives due to urban life was insufficient to support a claim of a substantial burden).

3. Courts Should Find a Substantial Burden Even When the Congregation Remains Functional

Courts err when they fail to find that a church's burden is substantial because the church is functioning in some other location. Courts should instead evaluate only if the desired activity—such as constructing a building or running a soup kitchen—is thwarted by the city's permit denial, not if the entire religion is in peril. When courts fail to acknowledge a substantial burden just because a congregation has found a resourceful way to continue to function, the court undermines the premise of the law and punishes congregations who work creatively to solve their problems. For instance, the court erred in *Corporation of the Presiding Bishop* when it ruled that the church did not face a substantial burden in part because even though the city denied the church a permit to build on its land within the city, congregants were currently travelling to other cities to attend church.[211] The court reasoned that since members were able to find a way to worship, the burden associated with not being able to use a certain parcel for worship was not substantial.[212]

RLUIPA's Congressional Record is full of examples of churches that were trying to utilize their land in some way and upon applying for a use permit, were given restrictions that frustrated their goals.[213] Since these examples were included in the Congressional Record and formed a basis upon which Congress justified passing RLUIPA into law, they highlight just the types of issues RLUIPA was supposed to resolve. For instance, in one case, the Haven Shores Community Church sought to operate from a storefront to more closely serve its community.[214] However, the city denied its permit even though the district allowed businesses, private schools, and fraternal organizations to operate in the same area.[215] In another example, the City of Jacksonville authorized the First Presbyterian Church to build a sanctuary and education building only if the church closed these buildings on Saturdays and certain hours during the week, never held weddings or funerals on Saturdays, and never served alcohol.[216] The city eventually denied the permit altogether, after learning that some of the specific provisions may have been unconstitutional.[217] In yet one more example, a zoning code in Evanston, IL allowed the Vineyard Christian Fellowship's building to be used for non-religious events, but forbade the building's use for religious gatherings.[218]

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211 Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. City of W. Linn, 86 P.3d 1140, 1156–57 (Or. App. Ct. 2004) *aff'd*, 111 P.3d 1123 (Or. 2005).

212 *Id.* at 1156.

213 146 CONG. REC. E1564–67 (daily ed. Sept. 22, 2000) (statement of Rep. Hyde).

214 *Id.* at E1565.

215 *Id.*

216 *Id.* at E1566.

217 *Id.*

218 *Id.*

These illustrations are relevant because in each one, the church members were arguably still able to practice their religion in some capacity even after their cities denied their permits—albeit in a different location or manner than they would have liked. For instance, First Presbyterian Church members could still practice their religion in the absence of a sanctuary, and the Vineyard Christian Fellowship was still functioning by using other facilities to hold its religious services.[219] However, what these cases all have in common is that they each demonstrate a scenario where a church owned or rented property on which it wanted to practice its religion in some way, and the city forbade or severely limited its ability to do so. This is the quintessential definition of a substantial burden. These and other examples in the Congressional Record serve as flagship examples of the problem RLUIPA was meant to solve and should provide ample justification for courts to focus their attention on the church's ability to use its land as it wishes. Courts, therefore, err when they ignore the specific issue before it—the church's ability to use its own land—and instead search for other ways that the church continues to function.

4. Courts Should Not Ask Religious Organizations to Justify That Their Desired Activity is Central to Their Faith

As stated above, Congress intended to expand the rights for religious organizations to the fullest amount allowed under the First Amendment.[220] Indeed, in *Hobbs*, the Court acknowledged that Congress intended RLIUPA to be construed broadly, to the "maximum extent permitted."[221] Congress even stated that RLUIPA "may require a government to incur expenses in its own operations to avoid imposing a substantial burden on religious exercise."[222] Congress was also crystal clear when it defined "religious practice;" the law defines the term as including any exercise of religion, "whether or not compelled by, or central to, a system of religious belief."[223] The intent of this provision was to ensure "a county or municipality cannot avoid the force of RLUIPA by asserting that a particular religious activity is something that a religious group merely wants to do rather than something that it must do."[224]

However, as case law demonstrates, some courts choose to investigate the centrality of an activity to a religious organization's belief-system before

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219 *See* 146 CONG. REC. E1566 (daily ed. Sept. 2000) (statement of Rep. Hyde).

220 *See* discussion *supra* Section I.D.2.

221 Holt v. Hobbs, 135 S. Ct. 853, 860 (2015).

222 42 U.S.C. § 2000cc–3(c) (2012).

223 *Id.* § 2000cc–5(7)(A).

224 *See* Dep't of Justice, *supra* note 70.

the court inquires if a substantial burden exists.[225] For instance, in *Congregation Rabbinical College of Tartikov*, described above, an Orthodox Jewish Community wanted to construct a rabbinical college on property that it owned.[226] After being denied a permit to build, the court explained that it needed to understand exactly which parts of the proposed building features were required for religious exercise.[227] It also stated that if other colleges had been constructed with any variation from the design of this one, this would serve as proof that the inability to attain each desired feature would not create a substantial burden.[228] Such an inquiry undermines Congress's intent and the Supreme Court's direction.

Indeed, in *Smith*, Justice Scalia rebutted the idea that courts must determine the centrality of belief, which demonstrates that this principle pre-dates RLUIPA:

> What principle of law or logic can be brought to bear to contradict a believer's assertion that a particular act is "central" to his personal faith? Judging the centrality of different religious practices is akin to the unacceptable "business of evaluating the relative merits of differing religious claims." . . . [I]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds. 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.[229]

RLUIPA does not require that churches prove that their specific building plans are central to their beliefs, only that they constitute religious exercise.[230] By defining religious exercise broadly, Congress made it clear that most church activities—and their related building needs—are protected under the statute, resulting in the requirement that permit denials that frustrate these needs must pass strict scrutiny analysis.[231] Therefore, courts should not ask for "proof" that a certain building design or other detail is central to a church's faith. Churches simply need to show that their intended activity is substantially frustrated by the city's decision to deny their permit.[232]

When courts require churches to prove that a particular design is central to its religion, the burden placed on the church is too high. For example, most churches cannot produce a scripture or religious canon that indicates a particular building size is required by core religious beliefs. Indeed, in *Hobbs*

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225 *See, e.g.*, Congregation Rabbinical Coll. of Tartikov, Inc. v. Vill. of Pomona, 138 F. Supp. 3d 352, 424–25 (S.D.N.Y. 2015).

226 *Id.* at 370.

227 *Id.* at 424.

228 *Id.* at 435–36.

229 Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 887 (1990) (citations omitted).

230 *See id.*

231 *See* Dep't of Justice, *supra* note 70.

232 *See* 42 U.S.C. § 2000cc-2(b) (2012) (stating that the Plaintiff's burden is to show a substantial burden on their religious exercise).

the court reinforced its statement in *Thomas* that not all parties' religious practices must be identical for those practices to be protected.[233] Not all building designs are the same, but that does not negate their importance to the congregation that wishes to build them. An idiosyncratic belief may not be expressed in a religion's scriptures, but this belief still receives the court's protection. Similarly, a church may not be able to demonstrate how its religion demands a particular building design or geographic location, and yet the church's desire to construct that building as it wishes is still protected religious exercise under RLUIPA.[234]

Courts should remember that their examination does not stop with the substantial burden analysis, and the city may still triumph if the court finds a substantial burden. After a court finds a substantial burden exists, a city still has the opportunity to defend its decision, which the court may very well find legitimate in spite of the substantial burden.[235]

B. *Finding Goldilocks – Looking for the Interpretation That is "Just Right"*

Since RLUIPA's under-enforcement is at least partly due to the unclear definition of the substantial burden test, it is appropriate to ask if the suggestions in Section A above overcorrects the issue. Some assert that judges apply such an onerous substantial burden test in the first place because they fear that a truer application of the test may favor churches.[236] However, while implementing these suggestions does improve churches' chances in court, it does so with Congress's blessing and the Supreme Court's acknowledgement that this law was intended to expand religious protections beyond those required by the First Amendment.[237] Judges should not attempt to "correct" the safeguard for churches that an overwhelming majority in Congress and the President were attempting to bring to pass when they created the law.

The suggestions above have the added benefit of simplifying the substantial burden test, which currently is inconsistently applied in courts across the country.[238] The Supreme Court provided a prime example of simplicity and focus when it applied this test in *Hobby Lobby* and *Hobbs*. Lower courts could greatly reduce uncertainty for both churches and cities by adopting the Supreme Court's example.[239]

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233 Holt v. Hobbs, 135 S. Ct. 853, 862–63 (2015).

234 *See supra* text accompanying notes 167–168.

235 *See* 42 U.S.C. § 2000cc(a)(1) (2012).

236 *See, e.g.*, MacLeod, *supra* note 19, at 134; Smith & Donoho, *supra* note 142, at 72.

237 *Hobbs*, 135 S. Ct. at 859–60.

238 *See* discussion of inconsistency *supra* Section II.C.

239 *See* discussion *supra* Section II.D.

Also, while implementing the four suggestions above would improve churches' ability to establish that a substantial burden exists, many scenarios remain where churches will be unable to do so. For instance, churches would still have to apply for use permits as they do now.[240] Churches whose permits are not fully denied, but conditionally accepted would likely find it difficult to prove a substantial burden exists unless the conditions are extreme. Churches that are forced to make changes to their architectural plans would still have to prove that those changes created costs that were substantially burdensome. Indeed, there are still many scenarios where churches would not prevail.

And courts should remember that ruling a substantial burden exists only has the effect of requiring the city to justify its permit denial.[241] A city may put forth evidence that its choice to deny a permit was in furtherance of a compelling government interest, and that the denial constituted the least restrictive means of accomplishing this interest.[242] In many cases, the city may very well be able to show that no other means was available to accomplish its compelling interest.

Therefore, concerns about over-protecting churches are unwarranted—and even misplaced—considering Congress's intent it enacted RLUIPA. Courts should remember the extensive findings of discrimination that preceded RLUIPA's passage.[243] Courts that do not require cities to defend their decision-making avoid discovering the very discriminatory scenarios Congress was looking to eliminate when it passed RLUIPA.[244]

CONCLUSION

RLUIPA is a landmark law that has aided churches since its inception. The law repudiates prior case law that found no connection between church land use and protected religious activity, and it provides churches with a remedy for unfair zoning decisions.[245] Congress intended the law to be broadly interpreted, and while it has provided a remedy in some cases, it has not had its intended effect due, at least partly, to the absence of a clear substantial burden test.[246]

Prior cases such as *Sherbert* and *Thomas* provide some groundwork from which a test may be derived, but *Hobby Lobby* and *Hobbs* offer the

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240 *See supra* text accompanying notes 139–141.

241 *See* 42 U.S.C. § 2000cc(a)(1) (2012).

242 *Id.*

243 *See* H.R. REP. NO. 106-219, at 18–24 (1999).

244 *See* 146 CONG. REC. S7774–75 (daily ed. July 27, 2000) (joint statement of Sen. Hatch & Sen. Kennedy).

245 *See* discussion *supra* Section I.D.

246 *See* discussion *supra* Sections II.A, C.

Supreme Court's most recent examples of the test.[247] These cases are significant not only because they are consistent in their method of evaluating the substantial burden test, but also because they provide a workable example for lower courts to apply.[248] By applying the Supreme Court's example, courts can more effectively fulfill Congress's intent by improving the reach of RLUIPA and giving churches the full protection Congress sought for them when it passed this law.

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247 *See* discussion *supra* Section II.D.2.

248 Holt v. Hobbs, 135 S. Ct. 853, 862–63 (2015); Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2775–79 (2014).