"Zoning" Matters: RLUIPA and the New Normal of Religious Discrimination

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ABSTRACT

The protection of religious freedom under federal law waxes and wanes, depending on two unpredictable factors: judicial activism and congressional action. A review of dozens of cases involving alleged violations of the Religious Land Use and Institutionalized Persons Act (RLUIPA), including two recent cases heard by the Supreme Court and the Fourth Circuit, reveals for the first time that many litigants and judges have ignored the congressional injunction to limit the reach of RLUIPA to two (and only two) forms of land-use regulation: zoning and landmarking. Plaintiffs have instead used RLUIPA to challenge water and sewer, septic, fire prevention, building, water pollution, environmental review, and other local and state regulations, as well as the use of eminent domain—all in the name of religious freedom. Central to the resolution of these disputes is the definition of the word "zoning." Rather than ignoring the issue or taking a holistic approach to the meaning of zoning (and thereby submitting all forms of land use regulation to the most exacting scrutiny should they place a substantial burden on the free exercise of religion or otherwise fall under the proscriptions of the Act), courts and counsel need to consult the rich body of case law that describes the discrete substance and structure of American zoning. Adhering to the meaning of zoning as derived from the diverse laboratory of state courts meets the expectation of the bill's champions in Congress, addresses the problem situations identified by experts who testified on the proposed legislation, and prevents the possibility of using RLUIPA as a strategy for neutralizing effective state and local environmental controls in a time when sustainability, safe structures, and the protection of water supplies rank high on the list of public health and safety needs. If, as a result of the findings in this Article, there should be a strong desire to expand the reach of the Act by amending the definitional section of RLUIPA, there is little likelihood that the near-unanimous support for RLUIPA and its predecessor Religious Freedom Restoration Act (RFRA) would be replicated. A

contemporary effort to widen the reach of RLUIPA would very likely fall victim to lawmakers' (and their constituents') concerns that certain religious minorities (especially Muslims) are no longer worthy of special legislative protection, that many religious groups and individual believers have been using federal and state statutes designed to protect against *religious discrimination as a means* for *discriminating on the basis of gender and sexual orientation, and that the environmental harms posed by lax enforcement of building codes, clean water, and other regulations outweigh the benefits of expanding RLUIPA's protections.*

I. INTRODUCTION

For more than two decades, counsel representing churches, mosques, synagogues, and other religious entities have attempted to broaden the reach of the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA),[1] a narrowly crafted federal statute designed in part[2] to protect property owners from zoning and landmarking regulations that place a substantial burden on the free exercise of religion or otherwise disfavor religious owners.[3] Several courts have given their blessing to these efforts to apply the Act beyond the two kinds of regulation identified in the text, often (but not always) explaining the motives for their extra-textualism.[4] This Article for the first time explores this phenomenon, contrasting the unique substantive and procedural components of American zoning with the regulations—chiefly (but not solely) environmental in nature—challenged by many religious plaintiffs.[5]

1. 42 U.S.C. §§ 2000cc–2000cc-5.

2. As the name of the statute implies, its protections are also applied to "institutionalized persons," that is, someone "residing in or confined to an institution, as defined in section 2 of the Civil Rights of Institutionalized Persons Act." *Id.* § 2000cc-1(a).

3. *See id.* § 2000cc-5(5) ("The term 'land use regulation' means a zoning or landmarking law, or the application of such a law, that limits or restricts a claimant's use or development of land (including a structure affixed to land), if the claimant has an ownership, leasehold, easement, servitude, or other property interest in the regulated land or a contract or option to acquire such an interest.").

4. *See, e.g.*, Mast v. Fillmore County, 141 S. Ct. 2430 (2021); Redeemed Christian Church of God (Victory Temple) v. Prince George's County, 17 F.4th 497 (4th Cir. 2021).

5. In 2009, before many of the key cases discussed in the Article were decided, Professor Saxer made a strong case for why building codes and aesthetic regulations

Part II of this Article analyzes two recent RLUIPA cases involving alleged religious discrimination by local regulators: *Mast v. Fillmore County*, a dispute over water treatment requirements imposed on an Amish community that warranted comment by two U.S. Supreme Court Justices,[6] and *Redeemed Christian Church of God (Victory Temple) Bowie v. Prince George's County*, a Fourth Circuit decision involving water and sewer regulations, in which the court purposefully blurred the line between zoning and other forms of local land regulation.[7]

In Part III, this Article explores the question of whether, as suggested by the federal and district courts' written opinions in *Redeemed Christian Church*, there is a federal law of zoning that Congress invoked when crafting RLUIPA.[8] Examination of federal statutes and regulations, and of the legislative history of RLUIPA leads to the conclusion that the answer is no.

Part IV situates *Mast* and *Redeemed Christian Church* in the decisional stream of dozens of RLUIPA cases in which courts have been asked to expand the reach of the statute to cover non-zoning regulations that arguably place a substantial burden on religion or otherwise discriminate against religious landowners. The better-reasoned opinions are those in which courts adhered to the words and apparent intent of the drafters. While judges' sympathy for the victims of apparent religious discrimination is both palpable and understandable, the text does and should matter. Prevailing in RLUIPA cases has been far from a slam dunk for plaintiffs' counsel, owing to ripeness requirements and statutory demands that landowners demonstrate either that regulations have placed a "substantial burden" on religious exercise,[9] or that unequal treatment,[10] religious discrimination,[11]

"*should* be categorized as 'zoning or landmarking law[s], or the application of such law[s]' which would place these regulations within the reach of RLUIPA's protection." Shelley Ross Saxer, *Assessing RLUIPA's Application to Building Codes and Aesthetic Land Use Regulation*, 2 ALB. GOV'T L. REV. 623, 650 (2009) (emphasis added). This Article demonstrates why such regulations are, in fact, neither zoning nor the application of zoning.

6. 141 S. Ct. at 2430.

7. 17 F.4th at 497; *see* discussion *infra* Section II.B.

8. *See infra* Part III.

9. 42 U.S.C. § 2000cc(a)(1) ("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 . . . .").

10. *Id.* § 2000cc(b)(1) ("No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.").

11. *Id.* § 2000cc(b)(2) ("No government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination.").

total exclusion,[12] or unreasonable limitation[13] has occurred. This should provide some solace for those fearful that RLUIPA would lead to widespread noncompliance with important land-use regulations designed to protect public health and safety. Still, departures from the statutory text and legislative record are problematic.

In Part V, this Article explores the rich body of state court decisions that have provided workable definitions of zoning. It becomes apparent when engaging with this state laboratory that there are meaningful distinctions between zoning and the alternative forms of land-use regulation that many RLUIPA plaintiffs have inappropriately targeted.

Part VI considers the bleak prospects for enacting a legislative fix to address the findings of this Article. While RLUIPA and its predecessor, the Religious Freedom Restoration Act of 1993,[14] received nearly unanimous support in Congress,[15] today, the political landscape has shifted.[16] A contemporary effort to widen the reach of RLUIPA would very likely fall victim to lawmakers' (and their constituents') concerns that certain religious minorities (especially Muslims) are no longer worthy of special legislative protection, that many religious groups and individual believers have been using federal and state statutes designed to protect *against* religious discrimination as a means *for* discriminating on the basis of gender and sexual orientation, and that the environmental harms posed by lax enforcement of building codes, clean water, and other regulations outweigh the benefits of expanding RLUIPA's protections.[17]

12. *Id.* § 2000cc(b)(3)(A) ("No government shall impose or implement a land use regulation that . . . totally excludes religious assemblies from a jurisdiction.").

13. *Id.* § 2000cc(b)(3)(B) ("No government shall impose or implement a land use regulation that . . . unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.").

14. 42 U.S. Code § 2000bb.

15. *See infra* notes 263–64 and accompanying text.

16. *See* Drew DeSilver, *The Polarization in Today's Congress Has Roots that Go Back Decades*, PEW RSCH. CTR. (Mar. 10, 2022), https://www.pewresearch.org/short-reads/2022/03/10/the-polarization-in-todays-congress-has-roots-that-go-back-decades/ [https://perma.cc/PA66-DM8K] (explaining that Democrats and Republicans are farther apart ideologically than they have been in the last fifty years).

17. *See infra* Part VI.

II. OVEREXTENDING RLUIPA IN THE 2020S: *MAST* AND *REDEEMED CHRISTIAN CHURCH*

During the opening years of the 2020s, high-level federal judges issued pro-plaintiff opinions in two RLUIPA cases in which the definition of "land use regulation" was (or should have been) at the heart of the dispute.[18] In fact, had the courts considering these RLUIPA challenges adhered to the text of the Act,[19] neither challenge would have survived a motion to dismiss.

A. Mast v. Fillmore County*: Murky Waters and Murkier Jurisprudence*

On July 2, 2021, the U.S. Supreme Court granted a petition for a writ of certiorari in *Mast v. Fillmore County*,[20] thereby vacating a decision of the Court of Appeals of Minnesota that ruled against members of an Amish Community who refused, on religious grounds, to comply with a county order to install a modern water-treatment system.[21] The Court then remanded the case back to state court "for further consideration in light of *Fulton v. Philadelphia*,"[22] the Court's decision a few weeks earlier holding that the city had violated the First Amendment's Free Exercise Clause when it "stopped referring children to CSS [Catholic Social Services] upon discovering that the agency would not certify same-sex couples to be foster parents due to its religious beliefs about marriage" and decided that it would "renew its foster care contract with CSS only if the agency agrees to certify same-sex couples."[23]

Justices Alito and Gorsuch submitted opinions concurring with the Court's decision. Justice Alito's opinion is but two sentences long: "I agree that we should vacate the judgment below and remand for further consideration. The lower court plainly misinterpreted and misapplied the Religious Land Use and Institutionalized Persons Act [RLUIPA]."[24] Justice Gorsuch's opinion, in which he provided details about the Amish community's plight, is a few pages long, but the gist is the same: the state court misapplied the federal statute designed to protect free exercise rights.[25]

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18. *See* discussion *infra* Sections II.A–B.

19. *See generally* Mast v. Fillmore County, 141 S. Ct. 2430, 2430 (2021) (Alito, J., concurring); Redeemed Christian Church of God (Victory Temple) v. Prince George's County, 17 F.4th 497 (4th Cir. 2021).

20. 141 S. Ct. at 2430.

21. Mast v. County of Fillmore, No. A19-1375, 2020 Minn. App. LEXIS 465, at *1–2 (Minn. Ct. App. June 8, 2020), *vacated*, 141 S. Ct. 2430 (2021).

22. *Mast*, 141 S. Ct. at 2430 (citing Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021)).

23. *Fulton*, 141 S. Ct. at 1882, 1874.

24. *Mast*, 141 S. Ct. at 2430 (Alito, J., concurring).

25. *See id.* at 2432 (Gorsuch, J., concurring).

First, Justice Gorsuch asserted, "*Fulton* makes clear that the County and courts below misapprehended RLUIPA's demands. That statute requires the application of 'strict scrutiny.'"[26] Second, he wrote that county officials "have displayed precisely the sort of bureaucratic inflexibility RLUIPA was designed to prevent."[27] There is just one problem with these two concurrences: a careful reading of the relevant language from the statute reveals that RLUIPA simply does not apply to the county's state-mandated water-treatment requirements.[28]

This is not to say that the plaintiffs—Amos Mast, Menno Mast, Ammon Swartzentruber, and Sam Mille, all members of the Swartzentruber Amish community located in Fillmore County, Minnesota[29]—are unsympathetic claimants. According to the certiorari petition, the trouble began when the county "began mandating that the Swartzentruber Amish install a septic system to dispose of the water byproducts associated with laundry, bathing, and cooking, which is collectively referred to as 'gray water.'"[30] The county adopted the mandate in December 2013, two months after the Minnesota Pollution Control Agency (MPCA) "passed sewage treatment rules mandating that all counties create local ordinances rather than simply adopting the state septic code by reference."[31] Efforts by members of the Swartzentruber Amish community to explain to the MPCA the conflict between the new rules and their religious beliefs failed, and after the agency "sought compliance through threats of criminal penalty, weekly community service requirements, and fines" many Amish either complied or left Minnesota.[32]

The four plaintiffs filed an action in state court in April 2017, originally "alleging that the septic system requirement, as applied to the Swartzentruber Amish, infringed upon and substantially burdened their free exercise of religion as protected by the United States Constitution, the Religious Land

26. *Id.*
27. *Id.* at 2434.
28. *See* 42 U.S.C. § 2000cc-5(5) (describing RLUIPA as applicable to land use regulations which only include a zoning or landmarking law).
29. Mast v. County of Fillmore, No. A19-1375, 2020 Minn. App. LEXIS 465, at *1 (Minn. Ct. App. June 8, 2020), *vacated*, 141 S. Ct. 2430 (2021).
30. Petition for Writ of Certiorari at 4, *Mast*, 141 S. Ct. 2430 (No. 20-7028).
31. *Id.* at 9. The MPCA acted in accordance with Minnesota Law. MINN. STAT. ANN. § 115.55(3)(a) (West 2023) ("The agency shall adopt rules containing minimum standards and criteria for the design, location, installation, use, maintenance, and closure of subsurface sewage treatment systems.").
32. Petition for Writ of Certiorari, *supra* note 30, at 9–10.

Use and Institutionalized Persons Act of 2000 . . . and the Minnesota Constitution, art. I, § 16";[33] they later dropped the First Amendment claim.[34] In considering the RLUIPA and state constitutional claims, Judge Joseph F. Chase of the Fillmore County District Court did acknowledge that "[r]equiring these religious people to build, own, and use on their properties an item of technology unused and unknown to prior Amish generations, to which they sincerely object as a way of the world prohibited in their lives by scripture, is a significant burden on their faith."[35] Nevertheless, the trial court ruled against the plaintiffs, finding "that untreated or inadequately treated gray water presents substantial and serious danger to public health and risk to the environment, and that the Government has a compelling interest in protecting against those dangers,"[36] and "that the Government's public health and environmental safety interests cannot be accomplished by a less religiously intrusive alternative means."[37] After Judge Chase denied their motions to amend his findings and to grant a new trial,[38] the plaintiffs sought review by the Court of Appeals of Minnesota.[39]

The state appellate court affirmed the trial court, concluding that, since "the district court's findings of fact are supported by the record, and thus are not clearly erroneous," the court below "appropriately concluded that respondents met their burden of demonstrating that appellants' mulch-basin system does not provide a less-restrictive means of accomplishing the government's compelling interests of protecting public health and the environment."[40] When the Supreme Court of Minnesota chose not to review

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33. *Id.* at 10–11.

34. *Id.* at 11.

35. Mast v. Minn. Pollution Control Agency, No. 23-CV-17-351, 2019 Minn. Dist. LEXIS 256, at *62 (Fillmore Cnty. Dist. Ct. Apr. 22, 2019).

36. *Id.* at *65–66.

37. *Id.* at *97. The plaintiffs had unsuccessfully proffered "mulch basin gray water systems . . . [as] an equally effective and feasible alternative means of achieving the Government's public health and environmental objectives." *Id.* at *71.

38. Mast v. County of Fillmore, No. 23-CV-17-351, 2019 Minn. Dist. LEXIS 260, at *1–2 (Fillmore Cnty. Dist. Ct. July 9, 2019).

39. Mast v. County of Fillmore, No. A19-1375, 2020 Minn. App. LEXIS 465, at *1 (Minn. Ct. App. June 8, 2020), *vacated*, 141 S. Ct. 2430 (2021).

40. *Id.* at *14–15; *see also* Petition for Writ of Certiorari, *supra* note 30 ("In keeping with their religious convictions, the Swartzentruber Amish proposed a religiously compliant method which is based on the reuse of gray water for irrigation purposes and utilizes mulch basins. This type of system is favored by many across the country who wish to conserve natural resources or reduce their utility bills. Twenty different U.S. States and the Uniform Plumbing Code permit gray water reuse systems, but Fillmore County does not.").

this decision,[41] the plaintiffs decided to play the U.S. Supreme Court certiorari lottery.[42]

The mixed news came for the Amish plaintiffs on July 2, 2021, when the Court granted the writ of certiorari and vacated the ruling below.[43] However, instead of deciding the RLUIPA issue itself, the Justices remanded the case back to the state appellate court so that it could consider the effects, if any, of the Court's recent ruling in *Fulton v. Philadelphia*.[44] Yet, as noted above, Justices Alito and Gorsuch penned short concurring opinions in which they criticized the Minnesota Court of Appeals' RLUIPA analysis.[45] Justice Alito stated simply that "[t]he lower court plainly misinterpreted and misapplied" the Act.[46] Justice Gorsuch provided more support for his assertion that "*Fulton* makes clear that the County and courts below misapprehended RLUIPA's demands."[47] He asserted and provided support from the record that the most important mistake made by county officials and state judges was that they "erred by treating the County's *general* interest in sanitation regulations as 'compelling' without reference to the *specific* application of those rules to *this* community."[48]

With the judges in mind to whom the Court gave a second chance to resolve the dispute, Justice Gorsuch then offered these closing thoughts:

> RLUIPA prohibits governments from infringing sincerely held religious beliefs and practices except as a last resort. Despite that clear command, this dispute has staggered on in various forms for over six years. County officials have subjected the Amish to threats of reprisals and inspections of their homes and farms. They have attacked the sincerity of the Amish's faith. *And they have displayed precisely the sort of bureaucratic inflexibility RLUIPA was designed to prevent*. Now that this Court has vacated the decision below, I hope the lower courts and local authorities will take advantage of this "opportunity for further consideration," . . . and

41. Mast v. County of Fillmore, No. A19-1375, 2020 Minn. LEXIS 437, at *1 (Minn. Aug. 25, 2020).

42. Petition for Writ of Certiorari, *supra* note 30.

43. Mast v. Fillmore County, 141 S. Ct. 2430 (2021).

44. *Id. See generally* Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1882 (2021) ("The refusal of Philadelphia to contract with [Catholic Social Services] for the provision of foster care services unless it agrees to certify same-sex couples as foster parents cannot survive strict scrutiny, and violates the [Free Exercise Clause of the] First Amendment.").

45. *Mast*, 141 S. Ct. at 2430 (Alito, J., concurring), 2430–32 (Gorsuch, J., concurring).

46. *Id.* at 2430 (Alito, J., concurring).

47. *Id.* at 2432 (Gorsuch, J., concurring).

48. *Id.*

> bring this matter to a swift conclusion. In this country, neither the Amish nor anyone else should have to choose between their farms and their faith.[49]

Unfortunately, for Justice Gorsuch, Justice Alito, and indeed all of the judges involved in the *Mast* litigation, the language and legislative history of RLUIPA make abundantly clear that, contrary to the italicized sentence in the quotation above, the Act does not even apply in the context of state and county septic requirements.

In his opinion for the Court in *Sossamon v. Texas*,[50] Justice Thomas traced the back-and-forth between the Supreme Court and Congress that preceded the enactment of RLUIPA:

> RLUIPA is Congress' second attempt to accord heightened statutory protection to religious exercise in the wake of this Court's decision in *Employment Div., Dept. of Human Resources of Ore. v. Smith*.[51] Congress first enacted the Religious Freedom Restoration Act of 1993 (RFRA), with which it intended to "restore the compelling interest test as set forth in *Sherbert v. Verner*[52] and *Wisconsin v. Yoder*[53] . . . in all cases where free exercise of religion is substantially burdened." We held RFRA unconstitutional as applied to state and local governments because it exceeded Congress' power under § 5 of the Fourteenth Amendment.
>
> Congress responded by enacting RLUIPA pursuant to its Spending Clause and Commerce Clause authority. RLUIPA borrows important elements from RFRA—which continues to apply to the Federal Government—but RLUIPA is less sweeping in scope. It targets two areas of state and local action: land-use regulation, and restrictions on the religious exercise of institutionalized persons.[54]

Because, as expressed by the name of the statute itself, the regulation of land-use regulation is one of only two areas within the reach of RLUIPA, lawyers and judges involved in RLUIPA litigation should be intimately familiar with how the statute itself defines key terms.

The phrase "land use regulation" appears six times in RLUIPA.[55] In 42 U.S.C. § 2000cc, which sets out the regulatory activities that trigger a violation, Congress provided:

> 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

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49. *Id.* at 2433–34 (emphasis added) (quoting Lawrence v. Chater, 516 U.S. 163, 167 (1996)).

50. 563 U.S. 277 (2011).

51. 494 U.S. 872 (1990), *superseded by* Religious Freedom Restoration Act (RFRA) of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended at 42 U.S.C. §§ 2000bb to 2000bb-4), *as recognized in* Ramirez v. Collier, 595 U.S. 411 (2022).

52. 374 U.S. 398 (1963), *abrogated by Smith*, 494 U.S. at 872.

53. 406 U.S. 205 (1972), *abrogated by Smith*, 494 U.S. at 872.

54. *Sossamon*, 563 U.S. at 281. The opinion in which the Court confined RFRA to actions by the federal government is *City of Boerne v. Flores*, 521 U.S. 507 (1997).

55. *See* 42 U.S.C. § 2000cc.

> religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution—
>
> (A) is in furtherance of a compelling governmental interest; and
> (B) is the least restrictive means of furthering that compelling governmental interest.[56]
>
> . . . .
>
> [T]he 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.[57]
>
> . . . .
>
> No government shall impose or implement a *land use regulation* in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.[58]
>
> . . . .
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> No government shall impose or implement a *land use regulation* that discriminates against any assembly or institution on the basis of religion or religious denomination.[59]
>
> . . . .
>
> No government shall impose or implement a *land use regulation* that—
>
> (A) totally excludes religious assemblies from a jurisdiction; or
> (B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.[60]

The sixth usage appears in the definitional section of the Act, 42 U.S.C. § 2000cc-5:

> The term "land use regulation" means a *zoning or landmarking law*, or the application of such a law, that limits or restricts a claimant's use or development of land (including a structure affixed to land), if the claimant has an ownership, leasehold, easement, servitude, or other property interest in the regulated land or a contract or option to acquire such an interest.[61]

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56. *Id.* § 2000cc(a)(1) (emphasis added).
57. *Id.* § 2000cc(a)(2)(C) (emphasis added).
58. *Id.* § 2000cc(b)(1) (emphasis added).
59. *Id.* § 2000cc(b)(2) (emphasis added).
60. *Id.* § 2000cc(b)(3) (emphasis added).
61. *Id.* § 2000cc-5(5) (emphasis added).

Because septic regulations for gray water are neither zoning nor landmarking laws, it should be apparent that any discussion in the state court opinions in the *Mast* litigation of RLUIPA's requirements is irrelevant and inappropriate.[62] Justices Alito and Gorsuch were correct that the Minnesota courts misunderstood and misapprehended RLUIPA; that misunderstanding was not in the way in which those courts applied strict scrutiny, but in the relevance of the statute altogether.

The foundational problem with the Swartzentruber Amish RLUIPA claim was only exacerbated after the Supreme Court remanded the case back to the state courts. The Court of Appeals of Minnesota, which noted the (misdirected) criticisms of their handiwork made by Justices Alito and Gorsuch,[63] returned the case for trial in the district court, which "concluded that the government met its burden to prove the septic-tank requirement was narrowly tailored to further a compelling state interest."[64] Given a second bite of the appeal, and following the Supreme Court's admonition to follow the example of *Fulton*, the appellate court reversed: "Because the evidence the government presents does not support the district court's conclusion that the septic-tank requirement furthers a compelling state interest *specific to appellants*, RLUIPA precludes the government from enforcing the challenged regulations against appellants."[65] Once again, there was no evidence that the court or counsel even considered the possibility that, because septic regulations are a far cry from zoning and landmarking, RLUIPA was irrelevant, not controlling.

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62. This is not to suggest that, under Minnesota *state* constitutional law, it was inappropriate for the court to discuss compelling state interests and least restrictive means. Although the *Smith* Court would not have elevated scrutiny when faced with allegations of a substantial burden on free exercise effected by a "neutral, generally applicable law," such as Fillmore County's gray water septic requirements, state courts are free to provide greater protection for free exercise rights when interpreting their own constitutions. *See* Emp. Div. v. Smith, 494 U.S. 872, 881 (1990) ("The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections."), *superseded by* Religious Freedom Restoration Act (RFRA) of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended at 42 U.S.C. §§ 2000bb to 2000bb-4), *as recognized in* Ramirez v. Collier, 595 U.S. 411 (2022).

63. Mast v. County of Fillmore, 993 N.W.2d 895, 899, 900 n.3 (Minn. Ct. App. 2023).

64. *Id.* at 899.

65. *Id.* (emphasis added). The specific problem with the trial court's analysis was that it "relied on generalized evidence about the content of gray water, conjecture based on visual observations of appellants' gray water, and speculation about the quantity of water used and discharged by appellants, including the number of households objecting to the septic-tank requirement." *Id.* at 910.

B. Redeemed Christian Church of God (Victory Temple) Bowie v. Prince George's County*: Conscious Departure from the Statutory Text*

The Swartzentruber Amish litigation would not be the only time high-ranking federal jurists ignored or stumbled over RLUIPA's straightforward definition of "land use regulation," in fact, not even the only time in 2021. For example, only four months after the Supreme Court remanded *Mast*, the U.S. Court of Appeals for the Fourth Circuit also applied RLUIPA outside of the area of "zoning or landmarking law," but this time the departure from the textual definition was intentional.[66] In *Redeemed Church of God (Victory Temple) v. Prince George's County*, the three-judge panel affirmed a district court's decision "that the County's denial of Victory Temple's application for a legislative amendment to the County's Water and Sewer Plan contravened RLUIPA."[67]

In 2018, the Victory Temple, an evangelical congregation with roots in Nigeria, purchased property in Bowie, Maryland, for a new church to serve its membership, which grew from 500 to more than two thousand members since the church's founding in 2002.[68] While churches and other houses of worship are permitted as-of-right in Prince George's County's Residential Estates classification,[69] "Victory Temple knew that the Property would require an upgrade from water and sewer Category 5 to Category 4 in order to be developed. Victory Temple purchased the Property reasonably expecting that it would be able to build its new church there."[70]

That expectation seemed unreasonable when, on May 7, 2019, the County Council, following a public hearing and a recommendation by its

66. *See* Redeemed Christian Church of God (Victory Temple) v. Prince George's County, 17 F.4th 497 (4th Cir. 2021).
67. 17 F. 4th 497, 500 (4th Cir. 2021).
68. *Id.* at 500–01.
69. *Id.* at 501.
70. *Id.* The court explained the water and sewer category delineations as follows:

> The Water and Sewer Plan describes Category 5 as "land inside the Sewer Envelope that should not be developed until water and sewer lines are available to serve the proposed development." Further, Category 5 properties "require a redesignation to Category 4 prior to the development review process," by way of a legislative amendment to the Water and Sewer Plan. The Water and Sewer Plan describes Category 4 as "all properties inside the Sewer Envelope for which the subdivision process is required."

Id. at 502 (internal citations omitted).

Transportation, Infrastructure, Energy and Environment (TIEE) Committee,[71] denied Victory Temple's application to change the water and sewer category from 5 to 4.[72] Victory Temple responded by filing an RLUIPA-based challenge in federal district court, alleging that the denial of the water and sewer amendment amounted, in the words of the statute, to a "substantial burden [that the county] imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes . . . individualized assessments of the proposed uses for the property involved."[73] One potential barrier to a win for the plaintiff was the county's insistence that the water and sewer regulations were not zoning and thus did not qualify as a land use regulation under the terms of RLUIPA.

Unlike in *Mast*, in which the state trial and appellate court opinions did not address this question, U.S. District Court Judge Deborah Chasanow considered and then rejected the county's argument. In the Memorandum Opinion in which she denied the county's motion to dismiss,[74] Judge Chasanow rejected the county's reliance on a Court of Appeals of Maryland ruling that a water and sewer amendment was not a zoning action.[75] "Although it is obvious that state law is involved in the analysis," she wrote, "definition of the term 'zoning' is a matter of *federal* law."[76] As authority for this proposition, she cited a Fourth Circuit case (regarding not RLUIPA but the possession of a firearm by someone who was committed to a hospital for restoration to competency),[77] and an Alabama federal district court RLUIPA case that concluded that a state statute "provid[ing] that multiple unrelated adult sex offenders may not establish residency in the same home" would "qualif[y] as a zoning law" because

71. According to the county's website, the council's Planning, Housing and Economic Development (PHED) Committee has jurisdiction over issues such as zoning and subdivision, the TIEE does not. *See Planning, Housing and Economic Development (PHED)*, PRINCE GEORGE'S CNTY. COUNCIL, https://pgccouncil.us/438/Planning-Housing-and-Economic-Developmen [https://perma.cc/4NCT-5VKG] (outlining review responsibilities of Prince George's PHED council).

72. *Redeemed Christian Church of God*, 17 F.4th at 503–04.

73. 42 U.S.C. § 2000cc(a)(2)(C).

74. Redeemed Christian Church of God (Victory Temple) v. Prince George's County, No. DKC 19-3367, 2020 U.S. Dist. LEXIS 20413, at *15 (D. Md. Feb. 6, 2020).

75. *Id.* at *7; *see also* Appleton Reg'l Cmty. All. v. Cnty. Comm'rs of Cecil Cnty., 945 A.2d 648, 651 (Md. 2008) (holding that a water and sewer amendment was not a zoning action under Maryland law).

76. *Redeemed Christian Church of God*, 2020 U.S. Dist. LEXIS 20413, at *7–8 (emphasis added).

77. *Id.* at *8 (quoting United States v. Midgett, 198 F.3d 143, 145 (4th Cir. 1999)).

it "makes territorial divisions in the same way" as zoning.[78] Not surprisingly, in her subsequent Memorandum Opinion finding that Prince George's County had indeed violated RLUIPA, Judge Chasanow found unpersuasive the argument that "'the general rule that terms in federal statutes are defined with reference to federal law' . . . is inapplicable because '[z]oning equally is a quintessential matter of local concern.'"[79]

The Fourth Circuit panel seconded Judge Chasanow's position: "The County contends that we should interpret 'zoning' under Maryland state law. It asserts that, under state law, an amendment to a water and sewer plan is a comprehensive planning action, and neither a zoning law nor its application. We reject that contention."[80] The appellate court did acknowledge that the Supreme Court had:

> recognized that certain instances may exist "in which the application of certain federal statutes may depend on state law," but held that "[i]n the absence of a plain indication to the contrary . . . it is to be assumed when Congress enacts a statute that it does not intend to make its application dependent on state law."[81]

To the appellate panel, "[b]ecause RLUIPA does not contain a 'plain indication' that state law should govern its interpretation, we are satisfied that federal law applies here."[82] This position is not tenable, however, as in traditional terms there is no special "federal law of zoning." Even more significant is the fact that RLUIPA would not even exist at all but for the fact that the Supreme Court held that RFRA was not applicable to *state and local* law because Congress lacked the power under § 5 of the Fourteenth Amendment.[83]

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78. Martin v. Houston, 196 F. Supp. 3d 1258, 1261, 1264 (M.D. Ala. 2016); *Redeemed Christian Church of God*, 2020 U.S. Dist. LEXIS 20413, at *8 (quoting *Martin*, 196 F. Supp. 3d at 1264).

79. Redeemed Christian Church of God (Victory Temple) v. Prince George's County, 485 F. Supp. 3d 594, 603 (D. Md. 2020) (quoting Defendant's Pretrial Memorandum at 29, *Redeemed Christian Church of God*, 485 F. Supp. 3d 594 (No. 8:19-cv-03367-DKC)), *aff'd*, 17 F.4th 497 (4th Cir. 2021).

80. *Redeemed Christian Church of God*, 17 F.4th at 507.

81. *Id.* (quoting NLRB v. Nat'l Gas Util. Dist. of Hawkins Cnty., 402 U.S. 600, 603 (1971)).

82. *Id.* at 508.

83. *See* Sossamon v. Texas, 563 U.S. 277, 281 (2011) (explaining how the RLUIPA was created after the RFRA was struck down as unconstitutional under § 5 of the Fourteenth Amendment as applied to state and local governments).

III. THE ELUSIVE "FEDERAL LAW OF ZONING"

If there were a federal law of zoning, where would we find it? The two most obvious possibilities would be federal statutes and federal regulations interpreting and applying those statutes. Unfortunately for Judge Chasanow, the Fourth Circuit panel, and others similarly inclined to expand the reach of RLUIPA, each of these paths is a dead end.

Although the U.S. Code refers to zoning in several provisions, it is apparent that the drafters were alluding to local government regulation. For example, in legislation creating the New River Gorge National River, Congress provided:

> The Secretary shall on his own initiative, or at the request of any local government having jurisdiction over land located in or adjacent to the Gorge area, *assist and consult with the appropriate officials and employees of such local government in establishing zoning laws or ordinances* which will assist in achieving the purposes of this subchapter. In providing assistance pursuant to this section, the Secretary shall endeavor to obtain provisions in such zoning laws or ordinances which—
>
> (1) have the effect of restricting incompatible commercial and industrial use of all real property in or adjacent to the Gorge area;
> (2) aid in preserving the character of the Gorge area by appropriate restrictions on the use of real property in the vicinity, including, but not limited to, restrictions upon building and construction of all types; signs and billboards; the burning of cover; cutting of timber; removal of topsoil, sand, or gravel; dumping, storage, or piling of refuse; or any other use which would detract from the esthetic character of the Gorge area; and
> (3) have the effect of providing that the Secretary shall receive advance notice of any hearing for the purpose of granting a variance and any variance granted under, and of any exception made to, the application of such law or ordinance.[84]

Many other federal statutes similarly indicate that Congress views zoning as firmly ensconced in local government law.[85]

A search through the Code of Federal Regulations results in the same conclusion—the concept of zoning refers to (and derives from) traditional state and local regulation, not federal law. For example, regulations

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84. 16 U.S.C. § 410eeee–4(1)–(3) (2020) (emphasis added).

85. *See, e.g.*, 10 U.S.C. § 2869(b)(2) (2021) ("[V]oluntary zoning actions taken by such political subdivision to limit encroachment on a military installation. . . ."); 12 U.S.C. § 1701z(a) ("[T]o evaluate the effect of local housing codes and zoning regulations on the large-scale use of new housing technologies in the provision of such housing . . . ."); 15 U.S.C. § 3722a(e)(4)(v) (2022) ("[I]dentification or implementation of planning and local zoning and other code changes necessary to implement a comprehensive regional technology strategy."); 42 U.S.C. § 4104c(h)(1)(A)(i) (2012) ("[A] political subdivision that . . . has zoning and building code jurisdiction.").

accompanying a federal statute regarding outdoor advertising[86] read, in pertinent part, "State and local zoning actions must be taken pursuant to the State's zoning enabling statute or constitutional authority and in accordance therewith."[87] Many other federal regulations employ the same familiar usage.[88] While a handful of provisions in the Code of Federal Regulations use the term "zoning" to describe regulatory schemes having nothing to do with comprehensive height, use, and area land-use restrictions, it would be a stretch to categorize those as examples of a "federal law of zoning."[89]

This is not to say that federal law broadly understood does not inform the meaning of the word zoning as it appears in dozens of federal statutes and regulations. A common term to describe the most prevalent form of American height, area, and use regulation is "Euclidean zoning."[90] The word "Euclidean" refers to the U.S. Supreme Court's first zoning case, in which the majority in 1926 rejected a facial challenge to the zoning ordinance of Euclid, Ohio, a suburb of Cleveland.[91] Joining the adjective (derived from a Supreme Court case) to the noun zoning, reminds us of the importance

86. 23 U.S.C. § 131(d) ("In order to promote the reasonable, orderly and effective display of outdoor advertising while remaining consistent with the purposes of this section, signs, displays, and devices whose size, lighting and spacing, consistent with customary use is to be determined by agreement between the several States and the Secretary, may be erected and maintained within six hundred and sixty feet of the nearest edge of the right-of-way within areas adjacent to the Interstate and primary systems which are zoned industrial or commercial under authority of State law, or in unzoned commercial or industrial areas as may be determined by agreement between the several States and the Secretary.").

87. 24 C.F.R. § 750.708(b) (1974).

88. *See, e.g.*, 24 C.F.R. § 201.21(e)(4)(i) (1985) ("The site complies with local zoning ordinances and regulations, if any . . . ."); 47 C.F.R. § 1.4000(a)(1) (2023) ("Any restriction, including but not limited to any state or local law or regulation, including zoning, land-use, or building regulations.").

89. *See, e.g.*, 33 C.F.R. § 222.4(e)(1) (1995) ("Furthermore, earthquakes have occurred in several parts of the country where significant seismic activity had not been predicted by some seismic zoning maps."); 46 C.F.R. § 76.35–5(a) (2016) ("The zoning of the manual alarm system must meet the same requirements as those for the fire detection system set forth in § 76.27–15(d)."). These are the exceptions that prove the rule.

90. *See, e.g.*, Christopher Serkin, *A Case for Zoning*, 96 NOTRE DAME L. REV. 749, 756 (2020) ("This kind of regime, still colloquially called Euclidean zoning, was entirely conventional and precisely what the SZEA had envisioned: separating incompatible uses from each other.").

91. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). *See generally* MICHAEL ALLAN WOLF, THE ZONING OF AMERICA: *EUCLID V. AMBLER* (2008).

of *federal constitutional* law to the validity of this concept, but not to how that concept is defined.

Although it makes sense to approach legislative history with a bit of Scalian (or is it Kaganian?) skepticism,[92] the record of RLUIPA's framing and adoption leaves little room for any notion of a federal concept of zoning distinct from traditional state and local zoning. A careful review of the relevant documents demonstrates that members of Congress and the expert witnesses they consulted had traditional zoning in mind as the main culprit in the fight against religious discrimination by state and local government officials.[93]

The earliest iteration of the legislation that became RLUIPA was H.R. 4019, the Religious Liberty Protection Act of 1998, which was introduced June 9, 1998.[94] The bill would have been generally applicable to any state or local "program or activity" that either received federal funding or affected interstate and other forms of commerce.[95] Section 3(b) referred specifically to "land use regulation" that may violate the Free Exercise Clause, but the drafters provided no definition of that term.[96] The lead sponsor of the bill, Representative Charles Canady (Republican from Florida) followed up that effort on May 5, 1999, by introducing the H.R. 1691, the Religious Liberty Protection Act of 1999, § 3(b) of which discussed restrictions on discriminatory "land use regulation."[97] The word

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92. *See* Stuart M. Benjamin & Kristen M. Renberg, *The Paradoxical Impact of Scalia's Campaign Against Legislative History*, 105 CORNELL L. REV. 1023, 1024 (2020) (citing *The 2015 Scalia Lecture: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YOUTUBE at 7:58 (Nov. 18, 2015), https://www.youtube.com/watch?v=dpEtszFT0Tg [https://perma.cc/J3EP-M7Y5]) ("Justice Scalia has taught everybody how to do statutory interpretation differently, and I really do mean pretty much taught everybody. . . . I think we're all textualists now in a way that just was not remotely true when Justice Scalia joined the bench.").

93. For links to the relevant documents, see *Religious Land Use and Institutionalized Persons Act of 2000 (P.L. 106-274)*, U.S. DEP'T OF JUST., https://www.justice.gov/jmd/ls/religious-land-use-and-institutionalized-persons-act-2000-pl-106-274 [https://perma.cc/QNC4-L74Z].

94. H.R. 4019, 105th Cong. § 1 (1998).

95. *Id.* § 2(a).

96. *Id.* § 3(b)(1). The pertinent language read:

> No government shall impose a land use regulation that—
>
> (A) substantially burdens religious exercise, unless the burden is the least restrictive means to prevent substantial and tangible harm to neighboring properties or to the public health or safety;
>
> (B) denies religious assemblies a reasonable location in the jurisdiction; or
>
> (C) excludes religious assemblies from areas in which nonreligious assemblies are permitted.

Id.

97. H.R. 1691, 106th Cong. § 3(b) (1999).

"zoning" made a brief appearance in this bill, but not in the definitional section.[98]

An amended version of H.R. 1691 dated July 1, 1999, included the same reference to "zoning," along with this definition:

> [T]he term "land use regulation" means a law or decision by a government that limits or restricts a private person's uses or development of land, or of structures affixed to land, where the law or decision applies to one or more particular parcels of land or to land within one or more designated geographical zones, and where the private person has an ownership, leasehold, easement, servitude, or other property interest in the regulated land, or a contract or option to acquire such an interest . . . .[99]

With its references to "uses or development," "structures affixed to land," and "geographical zones," this appeared to be a functional definition of traditional local zoning.

A little more than a year later, on July 13, 2000, Representative Canady introduced H.R. 4862, which featured the name Religious Land Use and Institutionalized Persons Act of 2000. Section 8(5) contained the exact definition of land use regulation found in the enacted version of the legislation, currently codified at 42 U.S.C. § 2000cc-5, referring specifically to "a zoning or landmarking law."[100] The Senate version of RLUIPA containing the identical definition,[101] was introduced by Senator Orrin Hatch (Republican from Utah) and became the enrolled version of the Act that was passed by both chambers on July 27, 2000, and signed into law by President Bill Clinton on September 22, 2000.[102]

In its summary of the hearing testimony regarding the proposed Religious Liberty Protection Act of 1999, the House Judicial Committee cited numerous examples involving local zoning, such as:

- "One attorney specializing in land use litigation testified that it is not uncommon for ordinances to establish standards for houses of worship differing from those applicable to other places of assembly, such as where they are conditional uses or not permitted

98. *Id.* § 3(b)(1)(D) ("No government with zoning authority shall unreasonably exclude from the jurisdiction over which it has authority, or unreasonably limit within that jurisdiction, assemblies or institutions principally devoted to religious exercise.").

99. *Id.* § 8(3).

100. H.R. 4862, 106th Cong. § 8(5) (2000).

101. S. 2869, 106th Cong. § 8(5) (2000).

102. Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, § 8(5), 114 Stat. 803, 807.

in any zone. 'The result of these zoning patterns is to foreclose or limit new religious groups from moving into a municipality. Established houses of worship are protected and new houses of worship and their worshipers are kept out.'"[103]

- "Another zoning expert testified about a survey of twenty-nine zoning codes from suburban Chicago. In twelve of these codes, there was no place where a church could locate without the grant of a special use permit. In ten codes, churches could locate as of right only in residential neighborhoods . . . ."[104]
- "Regulators typically have virtually unlimited discretion in granting or denying permits for land use and in other aspects of implementing zoning laws."[105]
- "The Subcommittee heard testimony regarding a study conducted at Brigham Young University finding that Jews, small Christian denominations, and nondenominational churches are vastly over represented in reported church zoning cases."[106]
- "The Subcommittee also received testimony of overt religious bigotry in zoning hearings."[107]

This is just a small selection from the committee report. In the hearings themselves, references to local zoning abuses are legion.[108]

Mentions of traditional, local zoning are prominent, too, in accounts of the debate over the bills leading up to RLUIPA found in the Congressional Record. Here is a sampling:

- "In America, the ability of citizens to hold private Bible studies in their own homes or the freedom of synagogues and churches to locate near their members should not be left to the whims of local zoning boards."[109]

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103. H.R. REP. NO. 106-219, at 19 (1999) (quoting *Religious Liberty Protection Act of 1998: Hearing on H.R. 4019 Before the Subcomm. on the Const. of the H. Comm. on the Judiciary*, 105th Cong. 199 (1998) [hereinafter *H.R. 4019 Hearing*] (statement of Bruce D. Shoulson, Attorney)).

104. *Id.* (citing *H.R. 4019 Hearing*, *supra* note 103, at 91 (statement of John Mauck, Attorney, Mauck, Bellande & Cheely)).

105. *Id.* at 20.

106. *Id.*

107. *Id.* at 23.

108. *See, e.g.*, *Religious Liberty Protection Act of 1999: Hearing on H.R. 1691 Before the Subcomm. on the Const. of the H. Comm. on the Judiciary*, 106th Cong. 7–8 (1999) (statement of Richard Land, President, Ethics and Religious Liberty Commission of the Southern Baptist Convention); *id.* at 12 (statement of Lawrence G. Sager, Robert B. McKay Professor of Law, New York University School of Law).

109. 144 CONG. REC. S5791 (daily ed. June 9, 1998) (statement of Sen. Orrin Hatch).

- "There are legitimate health and safety reasons for local governments to make zoning decisions, but religious discrimination is not one of them."[110]
- "The third reason that I have concerns about this bill is that it will give the Federal Government substantially more control and involvement in local zoning and land use decisions. This is something that we have historically reserved to local and State governments."[111]
- "In other words, state and local zoning boards would be required to use the least restrictive means possible to advance a compelling state interest."[112]

There is no indication here or in the other documents that comprise RLUIPA's legislative history that the word zoning in the Act refers to anything other than the substance and procedures of zoning as found in the codes and ordinances of thousands of American municipalities.[113]

Equal in importance to the ubiquity of references to zoning discrimination is the absence from these same records of any concern among witnesses or members of Congress about abuses and discrimination in state and local environmental controls, or in water, sewer, and septic regulation. There is, however, one (and only one) mention of building codes.[114] Judicial efforts to extend RLUIPA's reach beyond the zoning envelope, therefore, run contrary to the Act's legislative history.[115]

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110. 145 CONG. REC. H5581 (daily ed. July 15, 1999) (statement of Rep. Sue Myrick).

111. *Id.* at H5592 (statement of Rep. Melvin Watt).

112. 146 CONG. REC. S7778 (daily ed. July 27, 2000) (statement of Sen. Harry Reid).

113. *See* DEP'T OF JUST., STATEMENT OF THE DEPARTMENT OF JUSTICE ON THE LAND USE PROVISIONS OF THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT (RLUIPA) 6 (2018), https://www.justice.gov/d9/pages/attachments/2018/06/12/rluipa_qas_footnoted_version_508.pdf [https://perma.cc/AEA8-6YPH].

114. In response to a question from Senator Patrick Leahy about a situation in California involving a minister who hoped to run a homeless shelter in a building that was structurally unsafe, University of Texas law professor Douglas Laycock opined: "[N]ot every rule in a building code is connected to safety, and I can readily imagine a city using or creating technical rules to close the minister's shelter even if it were perfectly safe." *Religious Liberty: Hearing Before the Sen. Comm. on the Judiciary*, 106th Cong. 152 (1999). The Author thanks Nantiya Ruan for information on how RLUIPA was related to her students' advocacy on behalf of safe parking lots for the unhoused.

115. The following exchange that took place after RLUIPA's enactment is also enlightening. Senator Mike DeWine (Republican from Ohio) explained that he "had some serious concerns about this bill as originally introduced." 146 CONG. REC. S10992 (daily ed. Oct. 25, 2000) (statement of Sen. Mike DeWine). His concern was that the legislation

There is a federal aspect of zoning—of sorts. That is because the enabling legislation passed by states throughout the nation to authorize local governments to engage in zoning was based on a model nurtured and championed by the federal government. The Standard State Zoning Enabling Act (SZEA), "drafted and circulated under the auspices of the U.S. Department of Commerce, provided a general framework for zoning on the local government level."[116] Because the predominant form of American zoning still tracks very closely with the SZEA model,[117] if a court insisted that the word zoning as it appears in RLUIPA must be defined according to federal and not state law, it could legitimately be said that zoning means what the SZEA says it means.

While, unfortunately, the SZEA did not feature a discrete definitional section (an omission often shared by the state enabling statutes for which it served as the template), the framers did include an ample description of this new regulatory tool in the first section:

> For the purpose of promoting health, safety, morals, or the general welfare of the community, the legislative body of cities and incorporated villages is hereby empowered to regulate and restrict the height, number of stories, and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards courts, and other open spaces, the density of population, and the location and use of buildings, structures, and land for trade, industry, residence, or other purposes.[118]

If Judge Chasanow and the Fourth Circuit panel who followed her lead had been familiar with the SZEA, perhaps they would have been satisfied that they were following "federal law," or, more accurately, federally inspired state and local law, unless what was really happening was that these judges, sympathetic with the plight of a church that may have been

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would "have unintentionally impeded the ability of states and localities to protect the health and safety of children in a variety of ways." *Id.* He then asked Senator Ted Kennedy (Democrat from Massachusetts), one of the sponsors of the Senate bill, to confirm "that this legislation will not affect the ability of states and localities to enforce *fire codes, building codes, and other measures to protect the health and safety* of people using the land or buildings, such as children in childcare centers, schools, or camps run by religious organizations[.]" *Id.* (emphasis added). Senator Kennedy assured his colleague from across the aisle that this understanding was correct. *Id.*

116. Michael Allan Wolf, *A Common Law of Zoning*, 61 ARIZ. L. REV. 771, 773 (2019) (citing DEP'T OF COMMERCE ADVISORY COMM. ON ZONING, A STANDARD STATE ZONING ENABLING ACT UNDER WHICH MUNICIPALITIES MAY ADOPT ZONING REGULATIONS (1924) [hereinafter SZEA 1924]).

117. *See id.* at 787–88 ("By the middle of the twentieth century, every state had enacted state legislation that tracked very closely with the SZEA, incorporating, often with only minor variations, components found in each of the nine sections of the model act."); *see also* Serkin, *supra* note 90, at 758 ("Most states quickly adopted the SZEA and zoning became a ubiquitous part of the land development process.").

118. SZEA 1924, *supra* note 116, § 1, at 4–5.

treated unfairly by county officials, decided not to confine RLUIPA's strictures to its text.

IV. COLORING OUTSIDE THE LINES: EXTENDING RLUIPA'S REACH

The judges who wrote opinions in the *Mast* and *Redeemed Christian Church*, cases involving regulations that did not track with the definition of "land use regulation" found in RLUIPA, were in good company. As illustrated in the Appendix, a survey of reported opinions in federal and state courts reveals 44 separate cases between 2002 and 2023 in which the asserted RLUIPA violation involved, in whole or in part, regulatory or other government activity that was neither zoning nor landmarking.[119] This is a significant percentage of all reported RLUIPA land-use cases. For example, one quantitative analysis identified 38 state and 150 federal court RLUIPA land-use cases between 2002 and 2019.[120] Using those numbers (plus twelve additional cases that appear in the Appendix to this Article), the 39 cases from that period identified in this Article would account for nearly 20% of all reported RLUIPA land-use cases.[121] In some cases, the plaintiff complained about zoning or landmarking abuse along with other forms of regulations (not all of them directly related to land). In several other cases, the government was targeted for activities that could be labeled neither zoning nor landmarking.

As noted in the Appendix, the regulatory and other government activity targeted by RLUIPA claimants included:

- Decision to develop public roadway;
- Use of eminent domain;
- Requirement for landowner to "tap-in" to sewage system;
- Application of state environmental policy act (CEQA and SEQRA);
- Moratorium on new hospital construction;
- Compliance with septic and other sanitation standards;
- Compliance with building codes and regulations;

119. In many cases there were more than one reported opinion, sometimes many more than one. The Appendix only includes one citation from each separate federal or state court case. *See* cases cited *infra* app.

120. Lucien J. Dhooge, *RLUIPA at 20: A Quantitative Study of its Impact on Land Use and Religious Minorities*, 46 J. LEGIS. 207, 209 (2020).

121. *See id.*; cases cited *infra* app. The Author thanks Professor Lucien Dhooge for sharing his database of RLUIPA decisions.

- Application of annexation laws;
- Stop Work Orders and other delays caused by building department officials;
- Denial of change in water and sewer category;
- Application of state "conceal and carry law" (firearms);
- Application of fire sprinkler requirements;
- Requirement of building permit for cemetery monument;
- Limiting development of property subject to transferable development right (TDR) easements;
- Delay in issuing demolition permit;
- Revocation of hotel permit for housing homeless persons;
- State law mandating separation of sex offenders' homes;
- Application of code banning private religious meetings;
- Imposition of storm water remediation fee;
- Denial of pump-and-haul permit;
- Requirement to obtain "flow determination" from state water pollution agency;
- Plat-and-petition requirement for securing permit and license to operate homeless shelter;
- Enforcement of restrictive covenant;
- Ban on portable signs;
- Eviction for lease violation;
- Revocation of building permit;
- Sewer connection ordinance;
- Notice and Order to Abate Nuisance because of building, electrical, and plumbing code violations.[122]

Reading the court's summary of the religious entity's plight in most of these cases certainly evokes sympathy, especially when the facts strongly indicate bias against people who simply want to worship, serve the needy, or educate their children. This may explain why so many judges have missed or overlooked the clear definition of "land use regulation" included in RLUIPA.

A. No Harm, No Foul?

In several of these cases, the court concluded that the RLUIPA claim could not proceed because of ripeness concerns, factual issues, or the claimant's failure to demonstrate a "substantial burden," unequal treatment, or another substantive element. For example, in *San Jose Christian College v. City of Morgan Hill*, a Ninth Circuit panel wrote,

122. *See* cases cited *infra* app.

> College maintains that the City's enforcement of the requirements of the California Environmental Quality Act ("CEQA") is a "land use regulation" within the meaning of RLUIPA. We need not decide whether, in the circumstances of this case, CEQA is a "land use regulation" within the meaning of RLUIPA. . . . Assuming, without deciding, that CEQA is such a land use regulation, the strict scrutiny requirements of RLUIPA are not triggered because the CEQA requirements in this case did not impose a "substantial burden" on College's free exercise of religion.[123]

A similar approach can be found in the opinion of a Maryland intermediate appellate court in *Bethel World Outreach Church v. Montgomery County*, in which the court explained:

> The County argues . . . that RLUIPA does not apply to a water and sewer plan amendment because it is not a "zoning or landmarking law." . . . The County additionally argues that the circuit court's statement, in context, included the substantial burden claim, and that Bethel never produced any evidence in support of such a claim. We agree with the County's second argument and have no need to address the first argument.[124]

In those and other instances,[125] one might say there was no harm because, after all, the courts dismissed the RLUIPA claims. However, the fact that a court chooses not to state that the challenged regulation is neither zoning nor landmarking may be overlooked by a future court faced with a similar claim.

B. Zoning + Non-Zoning

In other cases, courts have allowed an RLUIPA claim to proceed when a challenge to zoning or landmarking was coupled with a challenge to another form of regulation. Perhaps the best example is *Cottonwood Christian Ctr. v. Cypress Redevelopment Agency*, an early (2002) federal

123. 360 F.3d 1024, 1036 (9th Cir. 2004).
124. 967 A.2d 232, 250 (Md. Ct. Spec. App. 2009).
125. *See, e.g.*, St. Paul's Found. v. Ives, 29 F.4th 32, 39 (1st Cir. 2022) ("Because we agree with the District Court's latter holding (if not all of the reasoning underlying it), we do not address whether the Town implemented 'a land use regulation.'"); Affordable Recovery Hous. v. City of Blue Island, 860 F.3d 580, 582 (7th Cir. 2017) ("Even if Blue Island's fire-safety code could be considered a zoning law because of its potential to exclude a building or other land use from a particular area, we know that Affordable is not being excluded from Blue Island or even required to install a sprinkler system."); Sisters of St. Francis Health Servs., Inc. v. Morgan County, 397 F. Supp. 2d 1032, 1051 (S.D. Ind. 2005) ("St. Francis has not proved its facial challenge to the Ordinance under RLUIPA. The court does not reach the question whether the [hospital construction moratorium] Ordinance is a land use regulation or whether St. Francis's expansion amounts to a 'religious exercise' under RLUIPA.").

district court RLUIPA case in which a Christian congregation in Southern California seeking to relocate its facilities was told in October 2000, that its application for a conditional use permit (CUP), a familiar zoning tool, "was incomplete because it did not contain design review studies that the City staff desired."[126] More than a year later, in February 2002, the congregation received good and bad news. First, the city explained that the design review studies were not, in fact, needed.[127] Second, the city made an offer to purchase the congregation's property so that a retail project, anchored by a Costco store, could be built on the parcel.[128] On May 29, 2002, the city began eminent domain proceedings to acquire the parcel.[129]

The congregation, which had already filed a federal claim against the city in January 2002, for the zoning irregularities, then filed an amended complaint in which it sought a preliminary injunction to enjoin the city's condemnation effort.[130] The congregation asserted that "the City's refusal to grant its application for a CUP, its exercising eminent domain over the Cottonwood Property, and its various other zoning actions" violated not only RLUIPA but also free exercise, free speech, assembly, due process, and equal protection rights.[131] Coupling RLUIPA claims with other federal and state constitutional claims is par for the course.

The city and other defendants "argue[d] that RLUIPA does not apply because the exercise of eminent domain is not a 'land use regulation' under RLUIPA."[132] The court responded forcefully (and problematically):

> *Even if the Court were only considering the condemnation proceedings*, they would fall under RLUIPA's definition of "land use regulation" which is defined as "a zoning or landmarking law, or the application of such a law, that limits or restricts the claimant's use or development of land . . . ." The Redevelopment Agency's authority to exercise eminent domain to contravene blight, as set forth in the Resolution of Necessity, is based on a zoning system developed by the City (the LART [Los Alamitos Race Track and Golf Course Redevelopment Project] Plan). It would unquestionably "limit[] or restrict[]" Cottonwood's "use or development of land."[133]

Finding that the congregation had presented a case of substantial burden on its exercise of religion and rejecting the notion that the city had used

126. 218 F. Supp. 2d 1203, 1213 (C.D. Cal. 2002).
127. *Id.* at 1214.
128. *Id.*
129. *Id.* at 1215.
130. *Id.*
131. *Id.* at 1218.
132. *Id.* at 1222 n.9.
133. *Id.* (emphasis added) (quoting 42 U.S.C. § 2000cc–5(5)).

the least restrictive means to achieve the required compelling interest, the court granted the preliminary injunction.[134]

C. The Problematic Legacy of Eminent Domain Dicta

Not surprisingly, the dicta in *Cottonwood* gave hope to succeeding RLUIPA plaintiffs. Several subsequent reported RLUIPA decisions have considered and rejected the notion that eminent domain is encompassed in the statute's definitional section. For example, in *St. John's United Church of Christ v. City of Chicago*, in which a church opposed the use of eminent domain to take a cemetery for airport expansion, a Seventh Circuit panel was "not persuaded by the district court's brief dicta in *Cottonwood* that eminent domain is always and inevitably a land use regulation under RLUIPA," noting that "we think that if Congress had wanted to include eminent domain within RLUIPA, it would have said something."[135] While other courts,[136] along with several commentators,[137]

134. *Id.* at 1232. The Cypress Costco store opened on July 14, 2005. *See Cypress CA Warehouse*, COSTCO WHOLESALE, https://www.costco.com/warehouse-locations/cypress-ca-748.html [https://perma.cc/V4D2-JLYS].

135. 502 F.3d 616, 641 (7th Cir. 2007).

136. *See, e.g.*, Faith Temple Church v. Town of Brighton, 405 F. Supp. 2d 250, 254 (W.D.N.Y. 2005) ("The eminent domain proceedings here also do not amount to a 'zoning law' or 'the application of such a law.'"); Congregation Adas Yereim v. City of New York, 673 F. Supp. 2d 94, 106 (E.D.N.Y. 2009) ("In the absence of statutory direction, the Court declines to extend RLUIPA to include eminent domain proceedings, and thus, to reach the taking of the Warsoff property at issue in this case."); City & County of Honolulu v. Sherman, 129 P.3d 542, 564 (Haw. 2006) ("A condemnation right, standing alone, is not a 'zoning law,' and the self-evident fact that ROH [Revised Ordinances of Honolulu] ch. 38 applies to buildings that happen to be situated on land zoned to permit residences does not alter that reality.").

137. *See, e.g.*, Kenneth G. Leonczyk, Jr., *RLUIPA and Eminent Domain: How a Plain Reading of a Flawed Statute Creates an Absurd Result*, 13 TEX. REV. L. & POL. 311, 314–15 (2009) ("Congress intended eminent domain to be covered under RLUIPA, sound public policy dictates that sacred property ought to be afforded special protection from burdensome government action, and Congress must cover eminent domain under RLUIPA in order to adequately protect religious liberty in the land use context."); Cristina Finetti, Comment, *Limiting the Scope of the Religious Land Use and Institutionalized Persons Act: Why RLUIPA Should Not Be Amended to Regulate Eminent Domain Actions Against Religious Property*, 38 SETON HALL L. REV. 667, 669 (2008) ("This Comment will argue that RLUIPA does not cover eminent domain actions and should not be amended to subject eminent domain actions against religious property to strict scrutiny review."); Daniel N. Lerman, Note, *Taking the Temple: Eminent Domain and the Limits of RLUIPA*, 96 GEO. L.J. 2057, 2059 (2008) ("RLUIPA does not apply to eminent domain actions but that religious assemblies can nevertheless challenge condemnations under the Free

have expressed the same skepticism about the *Cottonwood* court's position on eminent domain claims under the Act, there are dissenting voices.[138] Professors Serkin and Tebbe have done the best job of setting out the opposing positions; the burden should be on those who challenge their astute analysis:

> [RLUIPA] provides a powerful legal tool to congregations that wish to, say, build a parking lot or expand their buildings in defiance of municipal restrictions. But does it also confer the power to resist condemnation? If so, then churches, mosques, and synagogues would gain a legal weapon that would threaten the development of municipal infrastructure, economic redevelopment, and even general regulatory power. If not, RLUIPA's core zoning provisions would be defanged because localities that found themselves unable to zone could simply condemn church property and avoid RLUIPA's substantive zoning provisions. In this Article, we side with the latter position and argue that RLUIPA should not apply to eminent domain. . . . RLUIPA should not be extended to outright takings despite the fact that—or indeed because—allowing unfettered condemnation would effectively take some of the bite out of the Act's core zoning provisions.[139]

Exercise Clause. . . . Part II demonstrates, through an analysis of the Act's statutory text, legislative history, and policy goals, that RLUIPA does not apply to eminent domain actions.").

138. *See, e.g.*, Shelley R. Saxer, *Eminent Domain Actions Targeting First Amendment Land Uses*, 69 MO. L. REV. 653, 670 (2004) (quoting 42 U.S.C. § 2000cc-3(g) (2000)) ("[E]xpress statutory language requires that the Act be construed 'in favor of a broad protection of religious exercise.' Such a broad construction would certainly encompass government eminent domain actions within the definition of a 'land use regulation' that substantially burdens religious exercise."); Matthew Baker, Comment, *RLUIPA and Eminent Domain: Probing the Boundaries of Religious Land Use Protection*, 2008 B.Y.U. L. REV. 1213, 1216 ("[T]his Comment will argue that application of RLUIPA to eminent domain proceedings is appropriate and reasonable given the close causal nexus between zoning laws and eminent domain, the broad construction of RLUIPA, and the substance of its congressional record."); G. David Mathues, Note, *Shadow of a Bulldozer?: RLUIPA and Eminent Domain After* Kelo, 81 NOTRE DAME L. REV. 1653, 1668 (2006) ("No reason exists why eminent domain should be uniquely excluded from RLUIPA's orbit. Without a reason to exclude eminent domain from RLUIPA's definition of 'land use regulation,' the statute's legislative history, self-contained canon of broad construction, and federal case law indicate that condemnations of church property should be governed by RLUIPA."); Vikki Bollettino, Comment, *The Quest for Congruence: Why the Religious Land Use and Institutionalized Persons Act Should Apply to Eminent Domain*, 39 SETON HALL L. REV. 1263, 1265 (2009) ("[T]his Comment argues that since government frequently exercises both its zoning and eminent domain authority for the broader purpose of land use regulation, eminent domain challenges, like zoning challenges, should receive strict scrutiny review under RLUIPA."); Allison Scaduto, Comment, *RLUIPA as a Possible Shield from the Government Taking of Religious Property*, 38 SETON HALL L. REV. 823, 824 (2008) ("This Comment contends that eminent domain proceedings are not per se land use regulations within the scope of RLUIPA, but that an eminent domain proceeding might fall under RLUIPA's umbrella if undertaken as part of a plan to ultimately execute a land use regulation.").

139. Christopher Serkin & Nelson Tebbe, *Condemning Religion: RLUIPA and the Politics of Eminent Domain*, 85 NOTRE DAME L. REV. 1, 2–3 (2009). RLUIPA's sharpest critic reported in 2006 that Senator Ted Kennedy was

In the absence of a definitive ruling from the Supreme Court, we can expect to see future religious plaintiffs raise the same objections to eminent domain.

In several other cases not involving eminent domain, judges have directly addressed the question of whether the alleged government misconduct fits within the definition of "land use regulation" under RLUIPA. Taking seriously the definition's limits to "zoning and landmarking," courts have considered the following outside RLUIPA's reach: an ordinance requiring a church to "tap-in" to a township's sewage system,[140] a school sanitation law,[141] an annexation statute,[142] building codes,[143] and alleged bad-faith enforcement of the city code.[144]

> circulating a "Dear Colleague" letter suggesting that churches should be protected from the government's power of eminent domain. In particular, Kennedy favor[ed] amending [RLUIPA] to bring eminent domain within the definition of "land use regulations" - and thus to apply RLUIPA's demanding standards to any use of the eminent domain power that affects a religious landowner.

Marci Hamilton, *Churches and Eminent Domain: A Move in Congress to Once Again Make Churches Privileged Landowners*, FIND L. (Aug. 10, 2006), https://supreme.findlaw.com/legal-commentary/churches-and-eminent-domain-a-move-in-congress-to-once-again-make-churches-privileged-landowners.html. [https://perma.cc/ZHC5-3ZCZ].

140. Second Baptist Church v. Gilpin Township, 118 F. App'x 615, 617 (3d Cir. 2004) ("[T]he District Court correctly held that the Ordinance does not fall within the RLUIPA definition of a 'land use regulation' because the mandatory sewer tap was not enacted pursuant to a zoning or landmarking law.").

141. Liberty Rd. Christian Sch. v. Todd Cnty. Health Dep't, No. 2004-CA-001583-MR, 2005 Ky. App. LEXIS 681, at *14 (Ky. Ct. App. Sept. 16, 2005) ("The school board has not persuaded us that requiring it to comply with school sanitation laws is a land use regulation that imposes a substantial burden on the free exercise of religion. . . . A school sanitation law is not a land use regulation.").

142. Vision Church v. Village of Long Grove, 468 F.3d 975, 998 (7th Cir. 2006) ("The process of annexation . . . may indeed make possible the subsequent zoning or marking of the land; however, an annexation statute is not itself a 'zoning' or 'landmarking' regulation and its application therefore does not constitute government action covered by RLUIPA.").

143. Temple of 1001 Buddhas v. City of Fremont, 588 F. Supp. 3d 1010, 1027 (N.D. Cal. 2022) (citing Anselmo v. City of Shasta, 873 F. Supp. 2d 1247, 1257 (E.D. Cal. 2012) ("Safety laws such as building or construction code provisions do not qualify as 'land use regulations' under RLUIPA, at least where they do not explicitly reference zoning laws."); Lighthouse Cmty. Church of God v. City of Southfield, No. 05-40220, 2007 U.S. Dist. LEXIS 15973, at *10 (E.D. Mich. Mar. 7, 2007) ("It should be noted that Plaintiff is currently unable to use the Rutland Drive building, not because of the RLUIPA violation, but because of certain outstanding building code violations.").

144. Congregation 3401 Prairie Bais Yeshaya D'Kerestir, Inc. v. City of Miami, No. 22-21213-CIV-ALTONAGA/Torres, 2022 U.S. Dist. LEXIS 184119, at *45 (S.D. Fla. Oct. 6, 2022) ("That Defendant allegedly pursued an enforcement action *contrary* to the City Code is a problem for Defendant, but not because the City Code is infirm in some

Like Judge Chasonow in *Redeemed Christian Church*,[145] other courts have addressed and purposefully broadened the reach of the statute. The best such argument came in *Fortress Bible Church v. Feiner*,[146] in which a Second Circuit panel affirmed a district court's ruling that the town of Greenburgh, New York, had violated RLUIPA by "a series of contentious administrative proceedings effectively preventing the Church's project from going forward."[147] In order to build a new worship facility, the church would have to clear zoning-related hurdles such as site plan approval and an area variance.[148] However, those were not the regulatory problems targeted by the lawsuit: "Because the Church's proposal required discretionary government approval, it triggered New York's State Environmental Quality Review Act ('SEQRA')."[149] The process of preparing a draft environmental impact statement (EIS), consultations, hearings, and a proposed final EIS took years.[150] In the end, the town took over the EIS process; the result of the delays was a lawsuit alleging RLUIPA, First Amendment, and Fourteenth Amendment violations.[151]

After agreeing with the town "that SEQRA itself is not a zoning or landmarking law for purposes of RLUIPA," the court nevertheless ruled that "when a government uses a statutory environmental review process as the primary vehicle for making zoning decisions, those decisions constitute the *application* of a zoning law and are within the purview of RLUIPA."[152] The appellate court made a valid attempt to fit the state-mandated environmental review process into the RLUIPA envelope. After explaining the origins of state environmental quality laws and then noting that, "[a]lthough the purview of 'zoning' is hard to delineate precisely, at its core it involves the division of a community into zones based on like land use," the panel conceded that it had "little difficulty concluding that SEQRA itself is not a zoning law within the meaning of RLUIPA. SEQRA is not concerned with the division of land into zones based on use."[153] Nevertheless, because the SEQRA process was "triggered" by the zoning process and because the environmental review in this case focused on traffic and other traditional zoning (as opposed to environmental) concerns, the court

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way. . . . Section 2000cc concerns land use regulations, not miscellaneous government misconduct.").

145. *See supra* notes 74–79 and accompanying text.
146. 694 F.3d 208 (2d Cir. 2012).
147. 694 F.3d 208, 212 (2d Cir. 2012).
148. *Id.* at 213.
149. *Id.* (citing N.Y. COMP. R. & REGS. tit. 6, §§ 617.2(b), 617.3(a) (2019)).
150. *Id.* at 213–14.
151. *Id.* at 214.
152. *Id.* at 216 (emphasis added).
153. *Id.* at 216–17.

"decline[d] to insulate the Town from liability with regard to its decisions on zoning issues simply because it decided them under the rubric of an environmental quality review process."[154]

In stark contrast with the *Fortress Bible Church* court's measured approach stands the fast-and-loose approach of the federal district court in *Martin v. Houston*.[155] Pastor Ricky Martin housed registered sex offenders in mobile homes situated next to his church for several years until the Alabama legislature passed an act mandating physical separation of sex offenders' homes by at least 300 feet.[156] The legislation only applied to the county in which Martin conducted his ministry, and the pastor asserted "that the bill's sponsors supported its passage with the intent of forcing him to dismantle his ministry. In his answer, Houston[, the county's district attorney,] admit[ted] that Martin is the only person on whom he served a notice of enforcement of the Act."[157] These facts certainly suggested that the state and county officials were targeting Martin's special ministry, especially when the pastor was notified that his property was deemed a public nuisance.[158] Unfortunately there was a potentially fatal flaw in the plaintiff's RLUIPA claim—this act was neither traditional zoning nor landmarking.

Undaunted by such technicalities, Judge W. Keith Watkins consulted his trusty legal dictionary, which defined zoning as "legislative division of a region, esp[ecially] a municipality, into separate districts with different regulations within the districts for land use, building size, and the like."[159] Even though the challenged statute did not create districts within the targeted county and had nothing to do with the use of land (as in agricultural, residential, commercial, or industrial) or the size of buildings, the court still believed the state law referred to zoning:

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154. *Id.* at 217, 218.
155. 196 F. Supp. 3d 1258 (M.D. Ala. 2016).
156. *Id.* at 1261 (citing ALA. CODE § 45-11-82 (2014) (repealed 2016)).
157. *Id.*
158. *See id.* at 1265–66.
159. *Id.* at 1264 (quoting *Zoning*, BLACK'S LAW DICTIONARY (10th ed. 2014)). The court also relied on Alabama law. *Id.* (citing ALA. CODE § 11-52-70 (2011) ("Each municipal corporation in the State of Alabama may divide the territory within its corporate limits into business, industrial and residential zones or districts and may provide the kind, character and use of structures and improvements that may be erected or made within the several zones or districts established and may, from time to time, rearrange or alter the boundaries of such zones or districts and may also adopt such ordinances as necessary to carry into effect and make effective the provisions of this article.")).

> The Act makes territorial divisions in the same way. It divides the state of Alabama into two districts: one where adult sex offenders may not live within 300 feet of each other, and one where they may. The former includes the entirety of Chilton County, and the latter comprises all other counties within the state. Rather than imposing *in personam* restrictions on adult sex offenders themselves, the legislature opted to limit the acceptable uses of property within the Chilton County zone. In this sense, for purposes of applying the individualized assessments prerequisite, the Act qualifies as a zoning law, and thus constitutes a land use regulation.[160]

Satisfied that what he was looking at was zoning (or at something close enough) and giving short shrift to Houston's invocation of legislative history indicating otherwise,[161] Judge Watkins denied the defendant's motion to dismiss.[162] A little more than a month after this ruling, Alabama's governor signed a law repealing the offending statute,[163] thereby preventing the Eleventh Circuit from reviewing Judge Watkins' much-too-generous reading of zoning.[164]

D. Conscious Coupling: Broadening the Definition of "Zoning"

Another extra-textual application of RLUIPA, this time in favor of an Islamic center seeking to build a mosque in Culpeper County, Virginia, arose in *United States v. County of Culpeper*.[165] The parcel targeted by the center was "zoned for residential use and allows religious uses as of right."[166] However, the regulatory requirement that frustrated the religious organization was the requirement to secure a pump-and-haul permit, which "is used when municipal sewers cannot service a property and the local soil cannot effectively support a septic system."[167] Until the effort to

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160. *Id.*
161. *See id.* at 1265.
162. *Id.* at 1268.
163. Martin v. Houston, 226 F. Supp. 3d 1283, 1287 (M.D. Ala. 2016) (citing S.B. 10, 2016 Leg., 1st Spec. Sess. (Ala. 2016)).
164. *See id.* at 1288 ("It takes no great feat of logic to find that this case no longer presents a live controversy. With th[e] [anti-clustering] law orphaned, there remains no 'effectual relief' that Martin may be granted.").
165. 245 F. Supp. 3d 758 (W.D. Va. 2017).
166. *Id.* at 762.
167. *Id.* The court explained:

> [S]ewage is held in a tank on-site, then periodically pumped out and hauled away by truck to a treatment plant. Pump-and-haul permits are a creature of state law and issued by the Virginia Department of Health. But any "permanent" pump-and-haul operation—meaning one lasting longer than a year—must be done under supervision of a local governmental entity rather than a private actor. The Culpeper County government is the only holder of a permanent pump-and-haul permit in Culpeper County, so one must receive the Board's approval to be added to its permit.

Id. (internal citations omitted).

secure a permit for the mosque, commercial and religious applicants had always received approval from the County Board of Supervisors.[168] But this time, there were delays and anti-Muslim phone calls and email messages to the county.[169] When a motion to deny the permit finally came up for a vote, it passed by a 4–3 vote.[170] The result was an RLUIPA suit filed by the Department of Justice.[171]

The county pointed out that the permit was a "public health law," not zoning.[172] Judge Norman K. Moon demurred, asserting that "the County's process regarding approval of pump-and-haul permits is best understood as a zoning law" and that to reject that position "would disregard RLUIPA's rule of broad construction, elevate form over function, and cut against case law indicating that laws applied in a manner akin to zoning laws should be understood as such."[173] That case law included *Bethel World Outreach Ministries v. Montgomery County Council*, in which the Fourth Circuit considered an RLUIPA challenge to an amendment to the zoning ordinance along with "the 'deferral' of its application for a well and septic system."[174] Judge Moon pointed out that the *Bethel* Court "saw no reason to distinguish between [the two claims] for purposes of its RLUIPA analysis."[175] However, nowhere in its opinion did the Fourth Circuit panel ever address the specific question of whether the well and septic issue concerned either zoning or landmarking.

A second case cited by the *Culpeper* court was *Reaching Hearts Int'l, Inc. v. Prince George's County*, in which the Fourth Circuit found that the county's denial of a change in the property's water and sewer classification "effectively prohibited the church's planned development of a worship center,"[176] affirming the district court finding that RLUIPA had been violated and assessing more than three million dollars in damages.[177] In *Culpeper*, Judge Moon made sure to quote the *Reaching Hearts* court's statement that "the County imposed or implemented a land use regulation in a manner

168. *Id.* at 763.
169. *Id.*
170. *Id.* at 764.
171. *Id.* at 758, 760.
172. *Id.* at 766.
173. *Id.*
174. 706 F.3d 548, 554 (4th Cir. 2013). For a discussion of a previous ruling in this dispute by a state court, see *supra* notes 124–25 and accompanying text.
175. *County of Culpeper*, 245 F. Supp. 3d at 767.
176. 368 F. App'x 370, 371 (4th Cir. 2010).
177. *Id.* at 373, 372.

that imposed a substantial burden on Reaching Heart's religious exercise, without satisfying the standard of strict scrutiny,"[178] italicizing "land use regulation" for emphasis and drawing from that quotation the conclusion that "the Fourth Circuit *squarely held* that the sewer petition fell within RLUIPA's ambit."[179] In reality, that was the *Reaching Hearts* court's only use of the phrase land use regulation.[180] That court did not characterize the regulation as zoning and, unlike other cases in which the definition of land use regulation was an issue, did not cite the pertinent section of the Act. In other words, the Fourth Circuit had not "squarely held" anything of relevance to this issue.

Judge Moon sensibly cited the *Feiner* decision,[181] noting that in that Second Circuit ruling the court found that "RLUIPA applied to environmental law in part because it was 'intertwined' with locality's zoning regulation."[182] However, he then attempted a bit of syllogistic reasoning to get from Culpeper's septic requirements (health measures based on soil and other factors) to good old-fashioned zoning:

> [T]he zoning laws require a building permit, which in turn is preconditioned on obtaining a septic permit—in this case, a pump-and-haul permit. Because Culpeper County's zoning laws make it impossible to receive permission from the County to build a structure without first obtaining the necessary sewage permit (which the County here refused to grant), its permitting process is considered a "zoning law" under RLUIPA.[183]

Under this reasoning, any number of water, sewer, building, electrical, environmental, and other permits tied technically but tangentially to a zoning ordinance would likewise have to be considered "zoning laws."

Judge Moon's fourth precedent—*Anselmo v. County of Shasta*[184]—was equally unpersuasive. While he was correct that the federal district court held "that [a] building code making 'explicit reference to the county's zoning laws' and that in practice 'makes obtaining a permit contingent upon compliance with zoning laws' fell within RLUIPA,"[185] that was only part of the story. First, Judge Moon left out the next, crucial sentence: "However, the section also makes obtaining a permit contingent upon a finding that there are no ongoing violations of other portions of the county code *that*

178. *County of Culpeper*, 245 F. Supp. 3d at 767 (emphasis omitted) (quoting *Reaching Hearts Int'l*, 368 F. App'x at 372).
179. *Id.* (emphasis added).
180. *Reaching Hearts Int'l*, 368 F. App'x at 372.
181. *See supra* notes 146–54 and accompanying text.
182. *County of Culpeper*, 245 F. Supp. 3d at 767.
183. *Id.* at 768 (citations omitted).
184. 873 F. Supp. 2d 1247 (E.D. Cal. 2012).
185. *County of Culpeper*, 245 F. Supp. 3d at 768 (quoting *Anselmo*, 873 F. Supp. 2d at 1257).

have nothing to do with zoning regulations."[186] Indeed, because the court was considering a motion to dismiss the plaintiff's merely colorable[187] (and ultimately unsuccessful)[188] claims, *Anselmo* did not provide a firm foundation for the ruling in *Culpeper*. What we are left with is a sympathetic client who attracted virulent prejudice bringing an RLUIPA claim for its failure to secure, not zoning or landmarking permission, but a public health permit.[189]

In 2018, one year after the ruling in *Culpeper*, a federal court in New Jersey, in *Garden State Islamic Center v. City of Vineland*, denied the city's motion to dismiss an RLUIPA claim brought by the center whose plans to operate its newly constructed mosque were frustrated by the county's "withholding permit approvals and a final certificate of occupancy in addition to assessing tax liens against GSIC, despite its exemption as a religious institution."[190] The "[c]ity's continued denial of the Certificate of Occupancy [wa]s allegedly related to GSIC exceeding the output contemplated by the septic system permit."[191] The court explained that "because of the allegedly altered design [of the mosque] and the City's determination that the re-design increased the output of the septic-system, the City declared that it

186. *Anselmo*, 873 F. Supp. 2d at 1257 (emphasis added).

187. *See id.* ("While plaintiffs included several examples of violations elsewhere on the parcel that defendants allegedly relied on to deny plaintiffs a permit, *it is not clear whether these violations were violations of the county's zoning code* or of other sections of the county's codes. However, drawing all inferences in favor of plaintiffs as the court must on a motion to dismiss, plaintiffs have adequately alleged that defendants' enforcement of Shasta County Code section 16.04.160.C was enforcement of a land use regulation." (emphasis added)).

188. Anselmo v. County of Shasta, No. CIV. 2:12-00361 WBS EFB, 2013 U.S. Dist. LEXIS 66575, at *1–2 (E.D. Cal. May 9, 2013) ("The court finds that plaintiffs' claim under [RLUIPA] is not ripe for review. Plaintiffs do not identify any immediate injury in connection with the implementation of a land use regulation." (first citing Second Baptist Church of Leechburg v. Gilpin Township, 118 F. App'x 615, 616 (3d Cir. 2004) ("[M]andatory tap-in ordinance" was not a "land use regulation" under RLUIPA"); and then citing Lighthouse Cmty. Church of God v. City of Southfield, Civ. No. 05-40220, 2007 U.S. Dist. LEXIS 15973, at *4 (E.D. Mich. Mar. 7, 2007) ("It should be noted that Plaintiff is currently unable to use [the building], not because of the RLUIPA violation [of denial of a parking variance], but because of certain outstanding building code violations."))).

189. The Islamic Center later sued and settled with the county, receiving the necessary permit and $10,000. The county also "took added remedial steps of its own volition: It posted nondiscrimination notices, created a complaint process, and trained employees about religious discrimination." United States v. County of Culpeper, No. 3:16-cv-00083, 2017 U.S. Dist. LEXIS 142125, at *2 (W.D. Va. Sept. 1, 2017).

190. 358 F. Supp. 3d 377, 379 (D.N.J. 2018).

191. *Id.*

could not issue a Certificate of Occupancy until GSIC could secure a 'flow determination' from the NJDEP's Bureau of Non-Point Pollution Control."[192] In other words, a state water pollution agency was the entity causing the delay.

With *Culpeper* as his guidepost, Judge Joseph H. Rodriguez did not see RLUIPA's definition of land use regulation as a significant barrier to relief. After noting the center's efforts to convince county officials that their use of the mosque would not trigger review by the state agency, Judge Rodriguez turned to what he deemed a convincing precedent:

> Construing the language of RLUIPA broadly, because the sewage regulation at issue is incorporated by reference into the City's Land Use Ordinance, it qualifies as a zoning law. To hold otherwise would put form over function. As in *Cnty. of Culpeper, VA*., the permit here is granted as a matter of course and was previously approved for a building of greater capacity and function. The County of Culpeper's denial of a routine permit left the district court with the impression that the denial was based on religious hostility. In reaching its conclusion that the permit in *Culpeper* fits within the ambit of RLUIPA as a zoning law, the district court highlighted "the text of RLUIPA, precedent from the Fourth Circuit and other courts, the structure of the County's own laws, and how the permit process was (allegedly) used here to restrict property that otherwise allowed religious uses as of right."[193]

In denying the county a motion to dismiss,[194] the seeds planted in *Feiner* and *Culpeper* thus yielded another problematic ruling.

Two more recent decisions wrestled with the legacy of *Culpeper* in the context of building and other non-zoning codes. In *Layman Lessons Church v. Metropolitan Government*, a church providing assistance to the unhoused and needy in Nashville "alleged misuse of both zoning and non-zoning regulations by Defendant to prevent Plaintiff's use of the property."[195] In denying the defendant's motion to dismiss substantial burden and equal terms claims under RLUIPA,[196] the federal district court invoked *Culpeper* for the notion that "[w]here the record supports the inference that a locality disingenuously used its procedures to obstruct and ultimately deny a plaintiff's religious building, courts decline to insulate the municipality from liability with regard to its decisions on zoning issues simply because it decided them under the rubric of an ostensibly non-zoning process."[197]

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192. *Id.*

193. *Id.* at 387 (quoting United States v. County of Culpeper, 245 F. Supp. 3d 758, 760 (W.D. Va. 2017)).

194. *Id.* at 379.

195. No. 3:18-cv-0107, 2019 U.S. Dist. LEXIS 66301, at *9 (M.D. Tenn. Apr. 18, 2019). *Id.* at *9.

196. *Id.* at *16.

197. *Id.* at *10 (citing *County of Culpeper*, 245 F. Supp. 3d at 768).

In 2021, in *St. Paul's Foundation v. Baldacci*, a federal district court granted a motion to dismiss filed by the town of Marblehead and its building commissioner.[198] The plaintiffs included an "Orthodox Christian monastic organization" that planned to renovate a building in Marblehead, Massachusetts, to be used for religious services and communal meals featuring beer brewed by its leader, Father Andrew Bushell.[199] The source of the dispute was the commissioner's warning to St. Paul's that its renovation work did not comply with the state building code, followed by the issuance of a building code violation that St. Paul's unsuccessfully appealed to the state Building Code Appeals Board.[200] When the commissioner learned that St. Paul's no longer had a registered architect working on the project, he suspended the building permit and ordered that the renovation work must stop.[201] The back-and-forth between the two parties continued even after St. Paul's secured another architect.[202] Even though the town ultimately restored the permit, the plaintiffs continued to pursue their RLUIPA claim for the alleged abuse they had already suffered at the hands of public officials.[203]

The district court considered the question of whether this was a challenge to a "land use regulation," ruling that none of the three cases cited by St. Paul's—*Feiner*, *Culpeper*, and *Layman Lessons Church*—"warrants a result in its favor here."[204] The court explained:

> Here, the Town's conditional revocation of the Permit was not pursuant to a zoning or landmarking law, but rather the state building code. Unlike the cases cited by St. Paul's, the Town issued the Permit, construction under the Permit had gone forward and even the revocation of same (prompted by the termination of its original architect) was temporary pending certain conditions: full inspection and either agreement to original plans' use designation or variance for other use designation. Even though Baldacci's conditions for reinstatement centered on proper use designation and occupancy, the conditions were not imposed to prohibit or limit St. Paul's from using the space as they intended, but rather about what the proper scope of the renovation — and therefore the Permit — would be.[205]

198. 540 F. Supp. 3d 147, 157 (D. Mass. 2021), *aff'd sub nom.* St. Paul's Found. v. Ives, 29 F.4th 32 (1st Cir. 2022).
199. *Id.* at 149.
200. *Id.* at 150.
201. *Id.* at 151.
202. *Id.*
203. *Id.* at 152.
204. *Id.* at 153.
205. *Id.* (internal citations omitted).

The court then identified a second justification for granting the motion to dismiss: "Even assuming *arguendo* that the Town's revocation of the Permit falls under RLUIPA, St. Paul's has also failed to show that such action placed a substantial burden on its exercise of religion."[206] When a First Circuit panel affirmed the ruling in favor of the town, it avoided the "land use regulation" issue.[207]

The legacy of cases such as *Cottonwood* and *Culpeper* is a line of confusing and conflicting decisions in which courts have considered, and too often accepted, an expansive reading of the key term zoning as it appears in RLUIPA. Luckily, there is a reliable source for the meaning of zoning—a century's worth of state law decisions.

V. LAB REPORT: "ZONING" MATTERS IN STATE COURTS

As established in Part IV of this Article, a large and expanding number of courts have considered RLUIPA challenges to a wide range of local and state land (and other) regulations that do not carry the labels "zoning" or "landmarking."[208] In some instances, judges offered reasons for expanding the statute's reach,[209] while in many others, the opinions do not reveal if the court even considered the issue. Allowing judges to define zoning to address the plight of individual plaintiffs defeats the purpose of a definitional provision in a statute. Luckily for those courts, counsel, commentators, and litigants who have struggled with this issue, there is a robust body of case law that directly addresses the meaning of American zoning.

An exploration of recent state court decisions that define zoning and distinguish this familiar scheme from other forms of land-use regulation demonstrates that many of the judges whose opinions are reviewed in Parts II and IV of this Article were off base when they asserted that RLUIPA applies outside of the two forms of regulation specified in the definitional sections of the Act: zoning and landmarking. To practitioners, judges, and commentators, zoning is like hard-core pornography was to Justice Potter Stewart in *Jacobellis v. Ohio*[210]—we think we know it when we see it.

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206. *Id.* at 154.

207. St. Paul's Found. v. Ives, 29 F.4th 32, 39 (1st Cir. 2022) ("Because we agree with the District Court's latter [substantial burden] holding (if not all of the reasoning underlying it), we do not address whether the Town implemented 'a land use regulation.'").

208. *See* discussion *supra* Part IV.

209. *See* discussion *supra* Part IV.D.

210. 378 U.S. 184, 197 (1964) (Stewart, J., concurring) ("I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description ['hard-core pornography']; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.").

But over the 100-plus-year life of American zoning, courts have wrestled with the definition of this familiar concept.

A. Texas Two-Step: Powell v. City of Houston

Our expedition to uncover the meaning of the term "zoning" begins, ironically enough, in the only major American city that is not, and has never been, zoned: Houston.[211] The city's charter requires approval through a public referendum before zoning can be implemented in the nation's fourth largest city.[212] Three efforts to put zoning to a vote failed between 1948 and 1993.[213] This does not mean that Houston has no planning or no public controls over land use—just no zoning.

In 1995, just two years after voters gave a thumbs-down to zoning, the city council adopted another important form of public land-use regulation: the Historic Preservation Ordinance.[214] Fifteen years later, the council amended the ordinance and implemented a procedure whereby a neighborhood could ask for its designation as a historic district to be reconsidered.[215] An effort to reconsider the Heights East District was attempted, but it failed. Two Heights East residents—Kathleen Powell and Paul Luccia—sued the city, asserting, in part "that the Ordinance is void and unenforceable because it violates the City Charter's limits on zoning."[216] In 2021, the Supreme Court of Texas affirmed a trial court's judgment favoring Houston, which had been approved by the state court of appeals.[217]

The issue of the legitimacy of the ordinance boiled down to this: "Because the City held no referendum, the Ordinance is invalid if it constitutes zoning under the Charter."[218] In other words, the meaning of the word zoning mattered more than any other factor to the outcome of this case. In order

211. Bradley C. Karkkainen, *Zoning: A Reply to the Critics*, 10 J. LAND USE & ENV'T L. 45, 45 (1994).
212. Powell v. City of Houston, 628 S.W.3d 838, 841 (Tex. 2021).
213. Karkkainen, *supra* note 211.
214. *Powell*, 628 S.W.3d at 841.
215. *Id.*
216. *Id.*
217. *Id.* at 841–42, 859.
218. *Id.* at 843.

to determine the "common, ordinary meaning" of the word zoning,[219] the supreme court majority relied on two sources: dictionaries and case law.[220]

Black's Law Dictionary, as we have already seen,[221] provides this definition: "legislative division of a region, esp[ecially] a municipality, into separate districts with different regulations within the districts for land use, building size, and the like."[222] The *Powell* court also relied on a non-legal dictionary: "zoning" refers to "the act or process of partitioning a city, town, or borough into zones reserved for different purposes (such as residence or business)," or "municipal or county regulation of land use effected through the creation and enforcement of zones under local law."[223] The majority gleaned three characteristics from this first pair of sources: use regulation, restrictions on building height and bulk, and applicability to the entire municipality.[224]

The chief benefit of the *Powell* court's analysis to this Article is its survey of state court decisions offering definitions of zoning. This review was wide-ranging—not confined to Lone Star State courts. From a group of decisions (each featuring its own definition) from Wyoming, Maryland, Louisiana (two), North Carolina, Missouri, Iowa, Michigan, Connecticut, Pennsylvania, and New Jersey, decided between 1957 and 2018,[225] the majority summarized that "[m]any courts define the term by emphasizing regulation of land use, while others identify both use and site regulations as key features of zoning."[226] Then, after reviewing federal and state court decisions interpreting Houston's unique set of land-use controls, the *Powell* court offered this workable and sensible list of "several features common to zoning ordinances: implementation of a *comprehensive plan* of city-wide development, division of the city into *geographic districts*, and *specification of the uses* to which land can be put within each district."[227] The court then took a stab at defining zoning:

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219. *Id.*

220. *Id.* at 844. The *Powell* majority also relied on treatises for the purpose of distinguishing historic preservation from zoning. *Id.* at 848.

221. *See supra* note 159 and accompanying text.

222. *Powell*, 628 S.W.3d at 844 (quoting *Zoning*, BLACK'S LAW DICTIONARY (11th ed. 2019)).

223. *Id.* (quoting *Zoning*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/zoning [https://perma.cc/3VSQ-BHL9]).

224. *See id.*

225. *Id.* at 844–45 n.5. Each of the citations to state court decisions featured a parenthetical quoting the court's definition. *Id.* The reason why a court in Texas could rely with confidence on the definition of a feature of *state law* from such a wide variety of jurisdictions is that state zoning enabling acts were all based on the same model—the Standard State Zoning Enabling Act. *See supra* note 116 and accompanying text; *see also* Wolf, *supra* note 116, at 785–88.

226. *Powell*, 628 S.W.3d at 844.

227. *Id.* at 846 (emphasis added).

> [T]he ordinary meaning of zoning is the district-based regulation of the uses to which land can be put and of the height, bulk, and placement of buildings on land, with the regulations being uniform within each district and implementing a comprehensive plan. Zoning regulations also tend to be comprehensive geographically by dividing an entire city into districts, though this need not always be the case.[228]

Not one of the tools identified in the cases discussed in Part IV of this Article or featured in the Appendix—including, but certainly not limited to, building codes, septic regulation, water and sewer classification, environmental quality, and eminent domain—fits comfortably within this accurate and highly serviceable definition of zoning.

B. What's Up, Dock? Unique Procedural Protections

We can distinguish zoning from alternative forms of land-use regulation not only by reviewing a list of its substantive features but also by exploring the unique set of procedural protections for landowners and neighbors provided by local zoning ordinances, as mandated by state enabling legislation.[229] This was the central message of a 2021 ruling from the Supreme Court of Minnesota, *City of Waconia v. Dock*, in which the court explained: "Zoning laws interfere with the property rights of owners, and because of this concern, a variety of protective doctrines apply, including the nonconforming-use doctrine, vested-rights doctrine, and discretionary variances."[230]

The dispute pitted city officials against Jayson and Christine Dock, who asserted "that the City's ordinance [Ordinance 707], which prohibits them from building a permanent dock on their lakeshore property, is void because the City did not follow the procedures required for adopting a zoning or surface-use regulation."[231] If the ordinance amounted to zoning, then, under Minnesota Statute § 462.357, "public notice, a public hearing, and referral to a planning agency when amending" would be required.[232] The trial court granted the city's request for a permanent injunction, and the intermediate appellate court ruled that "that the City had sufficient authority to adopt the ordinance under a separate statute that does not

228. *Id.* at 849.
229. *See* City of Waconia v. Dock, 961 N.W.2d 220, 236 (Minn. 2021).
230. *Id.*
231. *Id.* at 223. Yes, the challenge to the dock ordinance was brought by a couple named Dock.
232. *Id.* (citing MINN. STAT. ANN. § 462.357, subdiv. 3 (West 2023)).

contain those procedural requirements and holding that the zoning and surface-use statutes did not apply."[233]

Once again, the definition of zoning mattered; indeed, it was outcome-determinative. The supreme court started its analysis by carefully parsing § 462.357, a comprehensive statute that established a city's authority to pass a zoning ordinance, identified the substantive and procedural elements of such an ordinance, discussed amendments to the ordinance, variance requests to the board of appeals and adjustments, and more.[234] The court explained that it would use a "functional analysis" in order to establish whether an ordinance constitutes a zoning regulation under the statute.[235] The justices then articulated their Minnesota two-step: (1) "determining whether an ordinance . . . governs the subjects identified by section 462.357," and (2) "determin[ing] whether an ordinance serves a zoning purpose."[236] In support of its election to use a "functional analysis," the *Dock* court, like the *Powell* court, quoted a wide range of cases from numerous states (including *Powell* itself).[237]

The court first noted that under § 462.357, cities may regulate "the location, type of foundation, and uses of structures,"[238] all *substantive* aspects governed by Ordinance 707.[239] In step two, the court asked "whether the City was required to follow the *procedural requirements* for adopting or amending a zoning ordinance."[240] Once again, there was a match, even though there was a separate Minnesota statute that specifically authorized municipalities to regulate docks.[241] While that special-purpose statute "does not identify any external limitations on the power of a statutory city to regulate docks," the supreme court explained "that silence does not negate the Legislature's clearly expressed intent . . . that a city follow zoning procedural requirements when exercising its zoning authority."[242]

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233. *Id.* That statute reads:

> The [city] council shall have power to establish harbor and dock limits and by ordinance regulate the location, construction and use of piers, docks, wharves, and boat houses on navigable waters and fix rates of wharfage. The council may construct and maintain public docks and warehouses and by ordinance regulate their use.

MINN. STAT. ANN. § 412.221, subdiv. 12 (West 2016).

234. *See Dock*, 961 N.W.2d at 223, 230.

235. *Id.* at 230.

236. *Id.* at 230 (citing MINN. STAT. ANN. § 462.357, subdiv. 1 (West 2023)).

237. *See id.* at 232.

238. *Id.* (citing MINN. STAT. ANN. § 462.357, subdiv. 1).

239. *See id.* at 232–35.

240. *Id.* at 235 (emphasis added).

241. *See id.* (citing MINN. STAT. ANN. § 412.221, subdiv. 12 (2016)). For the text of the statute, see *supra* note 233.

242. *Dock*, 961 N.W.2d at 236 (citing MINN. STAT. ANN. § 462.351 (West 1980)).

Citing examples from state cases, the *Dock* court instructed its readers that "[z]oning laws interfere with the property rights of owners, and because of this concern, a variety of protective doctrines apply, including the nonconforming-use doctrine, vested-rights doctrine, and discretionary variances."[243] Those and other "protective doctrines" that have been essential features of zoning since the 1920s do not typically accompany the non-regulatory devices found in the problematic RLUIPA cases identified in this Article, especially those tools that are closely tied to the protection of public health and safety, such as electrical and building codes, fire sprinkler requirements, septic systems, and water and sewer classifications. That is yet another reason why those regulations do not qualify as zoning under RLUIPA's definition of land use regulation.

C. Zoning Versus Police Power

Another set of cases that provide guidance as to the meaning of zoning addresses the differences between zoning and other "police power" regulations. This contrast can be confusing because, after all, zoning is traditionally subsumed under the state's police power, as delegated to local governments through enabling legislation.[244] Beginning with *Village of Euclid v. Ambler Realty Co.*, courts have stressed that zoning will withstand constitutional challenges so long as disgruntled landowners cannot demonstrate that zoning does not advance the legitimate goals of the state's police power, that is, the protection of public health, safety, morals, and general welfare.[245]

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243. *Id.*

244. *See* Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 387 (1926) ("The ordinance now under review, and all similar laws and regulations, must find their justification in some aspect of the police power, asserted for the public welfare.").

245. *Id.* at 395 ("If these reasons, thus summarized, do not demonstrate the wisdom or sound policy in all respects of those restrictions which we have indicated as pertinent to the inquiry, at least, the reasons are sufficiently cogent to preclude us from saying, as it must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."). For a more recent articulation of this standard, see Metal Green Inc. v. City of Philadelphia, 266 A.3d 495, 506 (Pa. 2021) ("[Z]oning classifications and the fixing of lines of demarcation are largely within the judgment of the controlling legislative body, and the exercise of that judgment will not be interfered with by the courts except in cases where it is obvious that the classification has no relation to public health, safety, morals, or general welfare." (citing Di Santo v. Zoning Bd. of Adjustment of Lower Merion Twp., 189 A.2d 135, 136–37 (Pa. 1963))).

One of the most useful opinions explorations of this dichotomy came in a 2012 decision of the Supreme Court of Wisconsin. In *Zwiefelhofer v. Town of Cooks Valley*, Cooks Valley residents sought a judicial determination that a Nonmetallic Mining Ordinance enacted by the town "is a zoning ordinance that is invalid because it does not have county board approval. If the Ordinance is not a zoning ordinance, county board approval is not required."[246] Once again, the meaning of zoning would determine whether the challenge would be successful or not.

The *Zwiefelhofer* court acknowledged that zoning and police power are closely intertwined:

> Zoning ordinances are enacted pursuant to a local government's police power. "Although zoning ordinances are enacted under a municipality's police power, all ordinances enacted under the police power are not zoning ordinances." Zoning ordinances and non-zoning ordinances that are enacted pursuant to a local government's police power thus inhabit closely related spheres. The court has declared that a zoning ordinance and a building code enacted pursuant to the police power "are two closely related facets of police power regulation. Both are designed to promote public safety, health and welfare."[247]

Many of the RLUIPA cases discussed in this Article reflect these close connections.

Despite these similarities, because "the legislature imposes different procedural requirements on these two forms of ordinances"[248] (in this instance, county approval of the town ordinance), the *Zwiefelhofer* court tasked itself with determining meaningful distinctions between zoning particularly and police power generally. The court therefore identified six "characteristics that are traditionally present in a zoning ordinance":

> First, zoning ordinances typically divide a geographic area into multiple zones or districts . . . .
>
> Second, within the established districts or zones, certain uses are typically allowed as of right and certain uses are prohibited by virtue of not being included in the list of permissive uses for a district. . . .
>
> Third, and closely related, zoning ordinances are traditionally aimed at directly controlling *where* a use takes place, as opposed to *how* it takes place. . . .
>
> Fourth, zoning ordinances traditionally classify uses in general terms and attempt to comprehensively address all possible uses in the geographic area. . . .
>
> Fifth, traditionally, though not always, zoning ordinances make a fixed, forward-looking determination about what uses will be permitted, as opposed to case-by-case, ad hoc determinations of what individual landowners will be allowed to do. It has become increasingly common for zoning ordinances to

246. 809 N.W.2d 362, 365 (Wis. 2012).

247. *Id.* (first quoting Heitman v. City of Mauston Common Council, 595 N.W.2d 450, 458 (Wis. Ct. App. 1999) (Dykman, P.J., dissenting); and then quoting Village of Wind Point v. Halverson, 155 N.W.2d 654, 657 (Wis. 1968)).

248. *Id.*

> allow for uses that are conditionally permitted, which gives local officials the power to make decisions on an individual, ad hoc basis. . . .
>
> Sixth, traditional zoning ordinances allow certain landowners whose land use was legal prior to the adoption of the zoning ordinance to maintain their land use despite its failure to conform to the zoning ordinance. . . .[249]

After surveying the purposes of zoning as articulated in cases and treatises, the court then applied its findings to the Nonmetallic Mining Ordinance.[250]

While the ordinance shared several things in common with zoning,[251] numerous differences outweighed the similarities:

> The Ordinance does not create multiple districts; it applies with equal force to any location in the Town. The Ordinance does not confine nonmetallic mining to any particular area in the Town; no parts of the Town are foreclosed to nonmetallic mining. The Ordinance does not directly affect where an activity may take place; it governs how an activity must be conducted and incidentally limits where it may be conducted. The Ordinance does not automatically permit or prohibit any land use; it operates entirely on a case-by-case basis. The Ordinance does not comprehensively address a wide range of potential classes of land use; it speaks only to a single, specific land use.[252]

The regulations and use of eminent domain featured in the dozens of RLUIPA cases discussed in this article share many of these same non-zoning characteristics.

Zoning has been under attack dating back to its origins in the opening decades of the twentieth century,[253] and sometimes for good reason. But

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249. *Id.* at 371–72.

250. *Id.* at 374.

251. *Id.* at 377–78 ("Conditional allowance of a land use and exemption of preexisting land uses are features associated with zoning ordinances. The Ordinance clearly regulates the use of land in a potentially dramatic way. It regulates nonmetallic mining in many respects and in great detail. A landowner might be barred from engaging in nonmetallic mining in a certain location or in the entire Town because of the terms of the Ordinance.").

252. *Id.* at 377. The court drew a similar conclusion regarding the purposes of the ordinance. Though there was some overlap, when it came to the separation of incompatible land uses, "the Ordinance does not seem even loosely similar to zoning. The Ordinance does not explicitly separate different land uses, nor does it explicitly declare any land uses incompatible with any others. The Town's 'intent' appears to be to regulate in detail nonmetallic mines." *Id.* at 378.

253. Perhaps the best critique was offered by Judge David Westenhaver in his lower court opinion in the first federal challenge to zoning that was reversed by the Supreme Court. *See* Ambler Realty Co. v. Village of Euclid, 297 F. 307, 316 (N.D. Ohio 1924) ("The plain truth is that the true object of the ordinance in question is to place all the property in an undeveloped area of 16 square miles in a strait-jacket. The purpose to be accomplished is really to regulate the mode of living of persons who may hereafter inhabit

somehow, the seed planted in Manhattan in the 1910s[254] that spread like wildflowers over the next few decades,[255] is still alive and going strong, from the times of Model T and Lipton Tea, to Mr. T., to Ice-T, to T Mobile, and to ChatGPT. Yes, modern zoning often excludes outsiders who, because of class or race, are perceived to be not enough like insiders;[256] it can create monotonous, cookie-cutter communities,[257] and regulators administering it can be vulnerable to development pressures.[258] Nevertheless, what we learn from this body of case law is that zoning is different from run-of-the-mill police power regulations and codes, and the exercise of eminent domain, not just because zoning *comprehensively* regulates the *use* (as opposed to the ownership, condition, and harms posed by) of *structures and land*,[259] but, more importantly, because zoning ordinances must provide substantive and procedural protections to landowners, neighbors, and the community that are not necessarily features of public nuisance laws, building codes, septic, water and sewer, and other regulations of land.

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it. In the last analysis, the result to be accomplished is to classify the population and segregate them according to their income or situation in life."), *rev'd*, 272 U.S. 365 (1926).

254. *See, e.g.*, David W. Dunlap, *Zoning Arrived 100 Years Ago. It Changed New York City Forever.*, N.Y. TIMES (July 25, 2016), https://www.nytimes.com/2016/07/26/nyregion/new-yorks-first-zoning-resolution-which-brought-order-to-a-chaotic-building-boom-turns-100.html [https://perma.cc/JNU8-9ZNR] ("Urban lore says that the massive Equitable Building at 120 Broadway in Lower Manhattan—a 40-story extrusion of a whole city block, unrelieved by setbacks and capable of housing 16,000 workers at once—was responsible for the enactment 100 years ago, on July 25, 1916, of New York City's first Zoning Resolution.").

255. *See* Wolf, *supra* note 116, at 787–88 ("By the middle of the twentieth century, every state had enacted state legislation that tracked very closely with the SZEA, incorporating, often with only minor variations, components found in each of the nine s of the model act.").

256. *See* DANIEL R. MANDELKER & MICHAEL ALLAN WOLF, LAND USE LAW § 7.01 (6th ed. 2022) ("Many zoning regulations, such as large-lot zoning and the exclusion of multifamily development, can exclude lower-income and racial minorities.").

257. *Id.* § 9.25 ("The zoning ordinance also provides a 'cookie cutter' pattern of minimum lot sizes and setbacks because its site regulations apply to individual lots. They do not allow the variety in design that a planned unit development can provide if it is planned as an entity.").

258. *See, e.g.*, Fasano v. Bd. of Cnty. Comm'rs, 507 P.2d 23, 30 (Or. 1973) ("[H]aving weighed the dangers of making desirable change more difficult against the dangers of the almost irresistible pressures that can be asserted by private economic interests on local government, we believe that the latter dangers are more to be feared."), *overruled on other grounds*, Neuberger v. Portland, 607 P.2d 722 (Or. 1980).

259. *See* Wolf, *supra* note 116, at 805 ("American zoning features another maxim—that zoning concerns use, not ownership—which serves as a kind of leitmotif for the entire field.").

VI. A SIMPLE (AND UNREALISTIC) SOLUTION: AMENDING RLUIPA

This Article has demonstrated that dozens of courts over the last twenty years have misinterpreted or misapplied RLUIPA's straightforward definition of land use regulation. Many religious groups and their supporters had high hopes for the new law—the congressional response to the Supreme Court's partial invalidation of RFRA, which itself was federal lawmakers' reaction against the Court's apparent dilution of religious rights in *Employment Division v. Smith*.[260] The findings of this Article—that judges in a high percentage of reported RLUIPA cases are purposefully or otherwise applying the statute to too broad an array of land-use regulations[261]—will be disappointing news. This adds insult to the injury that it has proved very difficult for the great majority of RLUIPA plaintiffs to overcome the "substantial burden," "equal terms," and discrimination requirements embedded in the statute.[262]

There appears to be a very simple solution to RLUIPA's zoning problem: Congress can amend the statute and broaden the definition of "land use regulation" to include eminent domain and various public and health safety measures such as septic requirements, water and sewer regulations, building codes, fire sprinkler requirements, and the like. It *should* be an easy sell based on past experience. After all, RFRA passed the House unanimously in 1993, and the vote in the Senate was 97-3,[263] while RLUIPA sailed through both chambers by unanimous consent via voice vote in 2000.[264] But, alas, appearances, especially political ones, can be deceiving.

260. *See* John Infranca, *Institutional Free Exercise and Religious Land Use*, 34 CARDOZO L. REV. 1693, 1700–02 (2013) (arguing *Employment Division v. Smith* is the origin of RLUIPA and describing RLUIPA as Congress's tug of war with the Supreme Court).

261. *See* discussion *supra* Sections IV.C–D.

262. *See* Dhooge, *supra* note 120, at 228, 233 (noting that the success rates for land-use RLUIPA claims were 15.8% in state courts and 24.7% in federal courts).

263. 139 CONG. REC. 9673, 9680–87 (1993) (passing bill in House by voice vote with no objection); 139 CONG. REC. 26407–16 (1993) (passing bill in Senate by roll–call vote with 97 yeas and 3 nays).

264. 146 CONG. REC. H7190–92 (daily ed. July 27, 2000) (passing bill in House via voice vote without objection); 146 CONG. REC. S7774–81 (daily ed. July 27, 2000) (passing bill in Senate via unanimous consent).

A. 9/11 Reverberations

The social, legal, and political landscape has shifted significantly since 2000 regarding religious freedom and lax enforcement of environmental and public health controls, owing to three post-2000 developments. The first development was September 11, 2001, and the anti-Muslim sentiment that followed in the wake of the unprecedented terrorist attacks on United States soil that day.[265] Those attacks did not create American prejudice against Muslims. One need only study the rhetoric directed at the Barbary States in the early years of the Republic to see how red-white-and-blue such bias can be.[266] It is undeniable, however, that September 11 accelerated and (apparently) made more socially acceptable anti-Muslim comments and movements. For example, in *United States v. County of Culpeper*, the 2017 decision discussed in Part IV of this Article, the judge reported that "the County received many emails and phone calls from citizens about the ICC's application [to build a mosque], and allegedly '[m]uch of the opposition' contained disparaging anti-Muslim comments, such as references to terrorism and the September 11, 2001 terrorist attacks."[267] Because a significant number of RLUIPA cases involve the religious practices of Muslims, there is a strong possibility that a large chunk of Republican lawmakers in Congress still share the sentiments expressed by President Trump in support of his so-called "Muslim Ban."[268] Those lawmakers might be hesitant to fortify the protections afforded certain religious minorities via RLUIPA.

B. Religious Freedom to Discriminate?

The second development militating against a quick legislative fix for RLUIPA is the Supreme Court's opinion in *Burwell v. Hobby Lobby Stores,*

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265. *See generally* Farah Pandith, *The U.S., Muslims, and a Turbulent Post-9/11 World*, COUNCIL ON FOREIGN RELS. (Sept. 1, 2021, 3:36 PM), https://www.cfr.org/article/us-muslims-and-turbulent-post-911-world [https://perma.cc/CAS9-72E9] (Since the attacks, divisions in American society have deepened amid changes wrought by the technology and media revolution, the weaponization of misinformation, and foreign policy choices. Muslims, like other minorities, have become caught up in the sometimes-bitter national conversation about history, race, religion, ethnicity, and heritage.").

266. *See generally* ADRIAN TINNISWOOD, PIRATES OF BARBARY: CORSAIRS, CONQUESTS, AND CAPTIVITY IN THE SEVENTEENTH CENTURY MEDITERRANEAN (2010).

267. 245 F. Supp. 3d 758, 763 (W.D. Va. 2017); *see also* OT, LLC v. Harford City, No. SAG-17-02812, 2019 U.S. Dist. LEXIS 184706, at *18–19 (D. Md. Oct. 24, 2019) ("Dr. Younus testified about an interaction with Impallaria at a town hall, in which Impallaria personally bullied him, and made a reference to the September 11, 2001 terrorist attacks.").

268. For relevant quotations from Trump in his candidate and President capacity, see Trump v. Hawaii, 138 S. Ct. 2392, 2435–38 (2018) (Sotomayor, J., dissenting).

Inc.[269] and the shifts in the perception and reality of religious protection statutes in the wake of the majority's holding.[270] In *Hobby Lobby*, Justice Alito began his opinion by explaining that the issue facing the Court was "whether the Religious Freedom Restoration Act of 1993 (RFRA or Act), permits the United States Department of Health and Human Services (HHS) to demand that three closely held corporations provide health-insurance coverage for methods of contraception that violate the sincerely held religious beliefs of the companies' owners."[271] The majority concluded that "[t]he contraceptive mandate, as applied to closely held corporations, violates RFRA."[272]

The majority's laser focus on the religious rights of the corporation prompted a strong dissent from Justice Ginsberg, an icon in the fight against sex discrimination. This opinion exposed the new normal of the struggle for religious rights in America by focusing on the women who were negatively affected by employers who were protected by RFRA:

> In the Court's view, RFRA demands accommodation of a for-profit corporation's religious beliefs no matter *the impact that accommodation may have on third parties* who do not share the corporation owners' religious faith—in these cases, thousands of women employed by Hobby Lobby and Conestoga or dependents of persons those corporations employ.[273]

Justice Ginsberg's dissent raised important questions concerning the potential of a statute designed to protect religious individuals and entities *from* discrimination being used *to discriminate* against others: "Working for Hobby Lobby or Conestoga, in other words, should not deprive employees of the preventive care available to workers at the shop next door, at least in the absence of directions from the Legislature or Administration to do so."[274] The dissent's assertion that "Hobby Lobby and Conestoga surely do not stand alone as commercial enterprises seeking exemptions from generally applicable laws on the basis of their religious beliefs" was followed by citations to cases in which a restaurant chain owner refused

269. 573 U.S. 682 (2014).
270. *See* Xiao Wang, *Religion as Disobedience*, 76 VAND. L. REV. 999, 1007 (2023) (noting free exercise of religion claims, like those protected under RFRA and RLUIPA, have emerged in criminal law, employment law, and immigration law in the wake of *Burwell v. Hobby Lobby*).
271. 573 U.S. at 688–90.
272. *Id.* at 736.
273. *Id.* at 740 (Ginsberg, J., dissenting) (emphasis added).
274. *Id.* at 769.

to serve African-American patrons based on anti-integration religious beliefs, health club owners who followed Biblical proscriptions against hiring certain women based on their marital status and living arrangements, and owners of a photography business that refused on religious grounds to offer their services for a lesbian couple's commitment ceremony.[275]

In the years following the Court's announcement of its ruling in *Hobby Lobby*, the pattern identified by Justice Ginsberg has intensified.[276] Connecticut, like Congress, passed a religious freedom statute in 1993; no fewer than ten states enacted RFRAs in the two years following *Boerne*.[277] Five more states followed suit between 2002 and 2009.[278] A few years later, emboldened by Justice Alito and his colleagues in the majority in *Hobby Lobby*,[279] legislators in several states introduced a new batch of RFRA legislation in hopes of protecting religious individuals and entities (including businesses) who choose not to offer their services to gays and lesbians.[280] One Midwestern politician—Indiana governor Mike Pence—twice gained national notoriety in connection with such efforts: first, when he signed a state RFRA "during a closed-door ceremony while surround[ed]

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275. *Id.* at 770 (first citing Newman v. Piggie Park Enters., Inc., 256 F. Supp. 941, 945 (D.S.C. 1966), *aff'd in relevant part and rev'd in part on other grounds*, 377 F.2d 433 (4th Cir. 1967), *aff'd and modified on other grounds*, 390 U.S. 400 (1968); then citing State *ex rel.* McClure v. Sports & Health Club, Inc., 370 N.W.2d 844, 847 (Minn. 1985), *appeal dismissed*, 478 U.S. 1015 (1986); and then citing Elane Photography, LLC v. Willock, 309 P.3d 53 (N.M. 2013)).

276. *See, e.g.*, EMILY LONDON & MAGGIE SIDDIQI, CTR. FOR AM. PROGRESS, RELIGIOUS LIBERTY SHOULD DO NO HARM 1 (2019), https://www.americanprogress.org/wp-content/uploads/sites/2/2019/03/ReligiousLiberty-report-6.pdf [https://perma.cc/3UEX-SVAK] ("In 2014, however, the U.S. Supreme Court decision in *Burwell v. Hobby Lobby* marked a major shift in the interpretation of religious exemptions from religiously neutral laws. Rather than simply protecting the rights of religious people, RFRA was expanded and misused to discriminate. . . . The legacy of the *Hobby Lobby* decision has continued under the Trump administration as religious liberty is misused to discriminate against vulnerable communities, such as religious minorities, nonreligious people, people of color, women, and the LGBTQ community.").

277. Christopher C. Lund, *Religious Liberty After* Gonzales*: A Look at State RFRAs*, 55 S.D. L. REV. 466, 477 & n.67 (2010).

278. *Id.*

279. *See, e.g.*, Monica Davey & Laurie Goodstein, *Religion Laws Quickly Fall into Retreat in Indiana and Arkansas*, N.Y. TIMES (Apr. 2, 2015), https://www.nytimes.com/2015/04/03/us/rights-laws-quickly-fall-into-retreat.html [perma.cc/E56D-27XH] ("The Supreme Court's decision in the Hobby Lobby case in 2014, which relied on the federal Religious Freedom Restoration Act to find that a Christian-owned company can refuse to cover birth control in its employees' insurance plans, reinforced the conservative movements' enthusiasm for state laws.").

280. *See, e.g.*, LONDON & SIDDIQI, *supra* note 276, at 7 (citing CATHRYN OAKLEY, HUM. RTS. CAMPAIGN, DISREGARDING THE BEST INTEREST OF THE CHILD: LICENSES TO DISCRIMINATE IN CHILD WELFARE SERVICES 1 (2017), https://assets2.hrc.org/files/assets/resources/licenses-to-discriminate-child-welfare-2017.pdf [https://perma.cc/5VFE-LRZA]).

by religious leaders and members of the Christian right,"[281] and second, when a few days later (after vehement protests within and outside the state) he signed a quickly revised version of the act that would "specify that it will not authorize discrimination because of sexual orientation or gender identity."[282]

Meanwhile, in the Supreme Court, conservative majorities have protected the rights of religious individuals and businesses who expressed discomfort with activities engaged in by the LGBTQ+ community. Justice Sotomayor noted the shift in her dissent in *303 Creative LLC v. Elenis*:

> Around the country, there has been a backlash to the movement for liberty and equality for gender and sexual minorities. New forms of inclusion have been met with reactionary exclusion. This is heartbreaking. Sadly, it is also familiar. When the civil rights and women's rights movements sought equality in public life, some public establishments refused. Some even claimed, based on sincere religious beliefs, constitutional rights to discriminate. The brave Justices who once sat on this Court decisively rejected those claims.[283]

Contrast the "brave Justices" referred to by Justice Sotomayor with Lori Smith, who brought the challenge in *303 Creative* because she "worries that, if she enters the wedding website business, the State will force her to convey messages inconsistent with her belief that marriage should be reserved to unions between one man and one woman."[284]

Although RLUIPA passed without objection, such voice votes can be deceiving. RLUIPA was not the first iteration of a congressional response to *Boerne*. As noted previously, H.R. 4019, introduced in 1998, provided widespread protections against state and local programs and activities generally, with a special section on "land use regulation."[285] Senator Hatch,

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281. Dwight Adams, *RFRA: Why the 'Religious Freedom Law' Signed by Mike Pence Was So Controversial*, INDYSTAR (May 3, 2018, 3:23 PM), https://www.indystar.com/story/news/2018/04/25/rfra-indiana-why-law-signed-mike-pence-so-controversial/546411002/ [https://perma.cc/495B-GPPT].

282. Davey & Goodstein, *supra* note 279. This time, "a far different cast stood behind them, including a prominent gay businessman and corporate leaders from Eli Lilly, the Indiana Pacers and the Indiana Chamber of Commerce." *Id.* The second (and current) version of the legislation clarifies that the act does not "authorize a provider to refuse to offer or provide services, facilities, use of public accommodations, goods, employment, or housing to any member or members of the general public on the basis of race, color, religion, ancestry, age, national origin, disability, sex, sexual orientation, gender identity, or United States military service." IND. CODE ANN. § 34-13-9-0.7(1) (West 2015).

283. 143 S. Ct. 2298, 2322 (2023) (Sotomayor, J., dissenting).

284. *Id.* at 2308 (majority opinion).

285. *See supra* notes 94–95 and accompanying text.

after noting the RLUIPA's limitations to "just two areas where religious freedom has been threatened," stated: "It is no secret that I would have preferred a broader bill than the one before us today."[286] One reason for taking the scissors to the original bill, according to Senator Harry Reid (Democrat from Nevada), was concern that the predecessor bill—The Religious Freedom Protection Act—"would supersede certain civil rights, particularly in areas relating to employment and housing."[287] Senator Reid explained:

> These concerns were most troubling to the gay and lesbian community. Discrimination based upon race, national origin, and to lesser certainty, gender, would have been protected, regardless of RLPA, because the courts have recognized that preventing such discrimination is a sufficient enough compelling government interest to overcome the strict scrutiny standard that RLPA would apply to religious exercise. Sexual orientation and disability discrimination, however, have not been afforded this high level of protection.[288]

When it comes to protections for LGBTQ+ citizens, they are still not afforded special constitutional status.[289]

Now that the fears expressed by some RLUIPA skeptics more than twenty years ago are being realized, there is little likelihood that, particularly in a closely divided Congress in which partisan lines are rarely crossed, the necessary majorities in both chambers would coalesce in favor of a quick fix for a statute whose political appeal has diminished since its enthusiastic enactment.[290]

C. A New Political Climate

Congress has never been a hotbed (please excuse the pun) of legislation designed to respond to climate change. While discussions by politicians worldwide over the implications of greenhouse gas emissions occurred before 2000, it was not until the Biden Administration that rhetoric culminated

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286. 146 CONG. REC. S7774 (daily ed. July 27, 2000) (statement of Sen. Orrin Hatch).
287. *Id.* at S7778 (statement of Sen. Harry Reid).
288. *Id.*
289. *See 303 Creative LLC*, 143 S. Ct. at 2341 (Sotomayor, J., dissenting) ("By issuing this new license to discriminate in a case brought by a company that seeks to deny same-sex couples the full and equal enjoyment of its services, the immediate, symbolic effect of the decision is to mark gays and lesbians for second-class status.").
290. In 2019, then-Senator Kamala Harris (Democrat from California) was the lead sponsor of S. 593, the Do No Harm Act. Section 3 of the bill would have exempted from RFRA's reach federal laws providing "protection against discrimination or the promotion of equal opportunity." S. 593, 116th Cong. § 3 (2019). Similar bills have been introduced more recently. *See, e.g.*, Do No Harm Act, H.R. 2725, 118th Cong. (2023) (as introduced by Representative Bobby Scott (Democrat from Virginia) on April 19, 2023); *see also* Bram Alden, *Reconsidering RLUIPA: Do Religious Land Use Protections Really Benefit Religious Land Users?*, 57 UCLA L. REV. 1779, 1786–88 (2010).

in significant action, with the passage of the Inflation Reduction Act of 2022.[291] The president of the Environmental Defense Fund exclaimed: "It's a new day in the fight against climate change, thanks to the Inflation Reduction Act. With its $369 billion in climate and clean energy investments, the new law is the largest, most ambitious climate legislation Congress has ever passed."[292]

This is not to imply that there have not been climate-change warriors and environmental-protection hawks in the House and Senate before the 2020s, doing their best against forces such as the energy lobby to enact legislation designed, for example, to wean Americans from their reliance on fossil fuels and to make our air and water cleaner.[293] It would be a tough sell to convince those lawmakers to make it harder for state and local governments to enforce regulations designed to protect clean water sources, to apply state laws mandating environmental impact statements, and to protect the structural integrity of houses converted into places of worship and schools or of mega-churches seating hundreds and thousands of worshipers.

In recent years, Americans have experienced and witnessed disturbing examples of polluted drinking water supplies,[294] building collapses,[295] and

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291. Inflation Reduction Act of 2022, Pub. L. No. 117–69, 136 Stat. 1818.

292. Fred Krupp, *The Biggest Thing Congress Has Ever Done to Address Climate Change*, ENV'T DEF. FUND (Aug. 12, 2022), https://www.edf.org/blog/2022/08/12/biggest-thing-congress-has-ever-done-address-climate-change [https://perma.cc/BV9Z-Z359].

293. *See generally Congress Climate History*, CTR. FOR CLIMATE & ENERGY SOLS., https://www.c2es.org/content/congress-climate-history/ [https://perma.cc/VJ94-R8PA] (outlining the history of congressional legislation related to climate change).

294. *See, e.g.*, Robert Glennon, *America's Water Supply: The Corrosion of a Proud Tradition*, SCI. AM. (Aug. 29, 2016), https://blogs.scientificamerican.com/guest-blog/america-s-water-supply-the-corrosion-of-a-proud-tradition/ [https://perma.cc/YY8G-4CUY] ("The debacle in Flint, Michigan was a betrayal of the public trust at every level of government. The horror of people drinking poisoned water is a microcosm of the sad deterioration of one of America's greatest accomplishments: the creation of infrastructure to provide virtually universal access to clean water and wastewater treatment."); *see also* John Yang & Claire Mufson, *Why American Cities Are Struggling to Supply Safe Drinking Water*, PBS (Feb. 5, 2023, 5:40 PM), https://www.pbs.org/newshour/show/why-american-cities-are-struggling-to-supply-safe-drinking-water (last visited Jan. 14, 2024) ("Last year, drinking water was found to be tainted in parts of New York City, Baltimore and the state of Hawaii. Of course, Flint, Michigan is still coping with the effects of its lead contamination.").

295. *See, e.g.*, John Peragine, Mitch Smith & Amanda Holpuch, *Demolition of Collapsed Building Is Put on Hold as People Remain Missing*, N.Y. TIMES (May 30, 2023), https://www.nytimes.com/2023/05/30/us/iowa-building-collapse.html [https://perma.cc/KJX7-F6AV] ("Like in New York City, where the collapse of a parking garage with unresolved safety violations killed one person earlier this year, and in Surfside, Fla., where

deadly building fires.[296] The negative environmental externalities associated with violations of many of the non-zoning regulations discussed in the RLUIPA cases identified in this Article are certainly greater than those associated with run-of-the-mill decisions to grant a rezoning, conditional use permit, or variance, or to allow the continuation of a nonconforming use. When asked to weigh the harms posed by lax enforcement of building codes and water and sewer, septic, fire safety, and environmental policy regulations against the benefits of expanding RLUIPA's protections, there is little likelihood that "green" lawmakers (and many of their colleagues) will overlook the former to achieve the latter.

VII. CONCLUSION

One enduring feature of the American story has been prejudice against people and groups whose religious beliefs and practices are not shared by government officials and their often-vocal constituents.[297] When in 1990, a slim Supreme Court majority appeared to water down protections for religious freedom—in the name of enforcing neutral laws of general applicability[298]—the responses of national politicians were swift (RFRA) and, after a second setback in the Court,[299] targeted (RLUIPA). In one of

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the 2021 collapse of a condo building killed 98 people, there had been warnings about problems at 324 Main Street in Davenport, a city of 100,000 residents situated about halfway between Des Moines and Chicago.").

296. *See, e.g.*, John Bacon & Christal Hayes, *Fatal Trump Tower Fire: No Sprinkler System in Apartments*, USA TODAY (Apr. 8, 2018, 7:44 PM), https://www.usatoday.com/story/news/nation/2018/04/08/fatal-trump-tower-fire-no-sprinkler-system-apartments/497058002/ [https://perma.cc/7ADT-BBUN] ("The building was completed in 1983, several years before sprinkler systems were mandated. Owners of older, residential high-rises are required to add the systems when major renovations take place.").

297. *See* David Masci, *Many Americans See Religious Discrimination in U.S. – Especially Against Muslims*, PEW RSCH. CTR. (May 17, 2019), https://www.pewresearch.org/short-reads/2019/05/17/many-americans-see-religious-discrimination-in-u-s-especially-against-muslims/ [https://perma.cc/Z8R6-4MGB].

298. *See* Emp. Div. v. Smith, 494 U.S. 872, 874, 878–79 (1990) ("This case requires us to decide whether the Free Exercise Clause of the First Amendment permits the State of Oregon to include religiously inspired peyote use within the reach of its general criminal prohibition on use of that drug, and thus permits the State to deny unemployment benefits to persons dismissed from their jobs because of such religiously inspired use. . . . We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."), *superseded by* Religious Freedom Restoration Act (RFRA) of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended at 42 U.S.C. §§ 2000bb to 2000bb-4), *as recognized in* Ramirez v. Collier, 595 U.S. 411 (2022).

299. *See* City of Boerne v. Flores, 521 U.S. 507, 536 (1997) ("Broad as the power of Congress is under the Enforcement Clause of the Fourteenth Amendment, RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance."), *superseded by* Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No.

the two areas specifically covered by the latter statute—the regulation of land use by state and local governments—the case law has revealed that prejudice against Muslims, Haredi Jews, fundamentalist Christians, and others comes in many forms and from multiple directions.[300] In a significant percentage of RLUIPA cases, however, courts have entertained claims directed against regulations that cannot be characterized as either zoning or landmarking, in the face of express limitations contained in the definition section of the statute.[301]

The judicial indulgence of these extra-textual claims is understandable, given the ample evidence of religious bias offered by the plaintiffs. Still, expanding the reach of RLUIPA in this way runs counter to the specific problems identified in the legislative record of the Act, to the decision to take a targeted approach in response to the Supreme Court's partial dismantling of RFRA, and to a longstanding body of case law defining zoning.[302]

While it would appear that there is a simple fix for judicial overreaching in interpreting RLUIPA—amending the definition of "land use regulation" —the social, legal, and political landscape has shifted in dramatic ways since the passage of the statute in 2000, with a rise in anti-Muslim sentiment and justifiable concerns about the problem posed by efforts to protect the religious freedom of some that amount to discrimination against others. Until such time as equilibrium is restored on these two fronts, courts and counsel should adhere to the text of RLUIPA by recognizing that, in many ways, the definition of the term "zoning" truly matters.

106-274, 114 Stat. 803 (codified at 42 U.S.C. §§ 2000cc to 2000cc-5), *as recognized in* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014).

300. *See, e.g.*, United States v. County of Culpeper, 245 F. Supp. 3d 758, 761 (W.D. Va. 2017); *see also* Redeemed Christian Church of God (Victory Temple) v. Prince George's County, 17 F.4th 497 (4th Cir. 2021).

301. *See* Saxer, *supra* note 5, at 630–35.

302. *See, e.g.*, Powell v. City of Houston, 628 S.W.3d 838 (Tex. 2021); *Flores*, 521 U.S. at 536; *see also* 146 CONG. REC. S7774 (daily ed. July 27, 2000).

YEAR	CASE NAME	CITATION	FACTS	OUTCOME
2002	*Prater v. City of Burnside*	289 F.3d 417 (6th Cir. 2002).	City decided to **develop roadway** between two lots owned by church.	District court dismissal of RFRA claim affirmed.
2002	*Cottonwood Christian Ctr. v. Cypress Redevelopment Agency*	218 F. Supp. 2d 1203 (C.D. Cal. 2002).	City refused to grant church a CUP and pursued plans to use **eminent domain** to take property for commercial development.	Court granted preliminary injunction to church on RLUIPA claims.
2004	*Second Baptist Church v. Gilpin Township*	No. 04-1434, 2004 WL 2958291 (3d Cir. Dec. 22, 2004).	Ordinance required church to **"tap-in" to township's sewage system**.	Township won motion to dismiss RLUIPA claim—affirmed.
2004	*San Jose Christian Coll. v. City of Morgan Hill*	360 F.3d 1024 (9th Cir. 2004).	City denied college's rezoning application in part because it did not comply with **CEQA-based rezoning requirements.**	Court affirmed trial court's summary judgment in favor of city on RLUIPA claims.
2005	*Faith Temple Church v. Town of Brighton*	405 F. Supp. 2d 250 (W.D.N.Y. 2005).	Town commenced **condemnation proceedings** for parcel church had contracted to purchase.	Court granted summary judgment to town on RLUIPA claims.
2005	*Sisters of St. Francis Health Servs. v. Morgan County*	397 F. Supp. 2d 1032 (S.D. Ind. 2005).	Hospital company challenged county **moratorium on new hospital construction**.	Court held that the ordinance did not violate RLUIPA, but was preempted by state home rule act.
2005	*Liberty Rd. Christian Sch. v. Todd Cnty. Health Dep't*	No. 2004-CA-001583-MR, 2005 WL 2240482 (Ky. Ct. App. Sept. 16, 2005).	County school board attempted to get court to lift the trial court's injunction closing an Amish school because of noncompliance with **septic and other sanitation standards**.	Appeals court refused to lift injunction even though state authorities had granted variances from health regulations to the school.

2005	*County of Santa Clara v. Victory Outreach San Jose, Inc.*	No. H027497, 2005 WL 2046219 (Cal. Ct. App. Aug. 25, 2005).	Church conducted religious services in violation of zoning ordinance and **building codes**.	Court affirmed trial court's grant of summary judgment to county on RLUIPA claims because they were not ripe.
2006	*City & County of Honolulu v. Sherman*	129 P.3d 542 (Haw. 2006).	Church challenged use of **eminent domain** to condemn underlying fee for condo complex in part on RLUIPA grounds.	Court affirmed lower court ruling that RLUIPA was not applicable (taking upheld on other grounds).
2006	*Vision Church v. Village of Long Grove*	468 F.3d 975 (7th Cir. 2006).	Village denied Church's application for voluntary **annexation** and involuntary annexed its property.	Court affirmed district court's grant of summary judgment to village on RLUIPA claims.
2006	*Cathedral Church of the Intercessor v. Incorporated Village of Malverne*	353 F. Supp. 2d 375 (E.D.N.Y.).	Church ran into roadblocks in seeking a 5,700-square-foot expansion. After they secured a variance from the BZA and a building permit, they experienced **harrassment from Building Department officials and delays from Stop Work Orders** and other tactics.	Court allowed RLUIPA claims to proceed.
2007	*Lighthouse Cmty. Church of God v. City of Southfield*	No. 05-40220, 2007 WL 756647 (E.D. Mich. Mar. 7, 2007).	Church could not use building for worship services because of parking restrictions and **building code violations.**	Court granted summary judgment on RLUIPA claim for denial of parking variance, not for building code.
2007	*St. John's United Church of Christ v. City of Chicago*	502 F.3d 616 (7th Cir. 2007).	City opposed city's use of **eminent domain** to take cemetery for airport expansion.	Affirming grant of motion to dismiss RLUIPA claims.

2007	*Bethel World Outreach Church v. Montgomery County*	967 A.2d 232 (Md. Ct. Spec. App. 2007).	Church was denied change in **water and sewer** categorization to construct church and other facilities.	Court affirmed trial court finding that RLUIPA claims lacked evidentiary support.
2007	*Albanian Associated Fund v. Township of Wayne*	No. 06-cv-3217 (PGS), 2007 WL 2904194 (D. N.J.).	Mosque sought to stop township from using **eminent domain** to condemn its property for Open Space and Recreation Plan, a decision made while the mosque's CUP application was pending.	Court denied both parties' motions for summary judgment.
2008	*Edina Cmty. Lutheran Church v. State*	745 N.W.2d 194 (Minn. Ct. App. 2008).	State challenged district court's permanent injunction supporting church's challenge to **"conceal and carry law."**	Court reversed district court's finding that statute violated RLUIPA (upholding challenge on other grounds).
2009	*Congregation Adas Yereim v. City of New York*	673 F. Supp. 2d 94 (E.D.N.Y. 2009).	Congregation challenged "effective" denial of special use permit because of city's acquisition of property by **eminent domain**.	Court granted city's motion to dismiss RLUIPA claim (SUP challenge was time-barred).
2009	*Shenkel United Church of Christ v. North Coventry Township*	No. 09-1823, 2009 2009 WL 3806769 (E.D. Pa. Nov. 13, 2009).	Church insisted that using its facilities as a temporary homeless shelter would not require a variance. Also the Fire Marshal informed the church that without **sprinklers** they would only be able to accommodate up to 16 individuals.	Court granted township motion to dismiss RLUIPA claims, which were not ripe.
2010	*Fortress Bible Church v. Feiner*	694 F.3d 208 (2d Cir. 2010).	Town failed to complete **SEQRA review process** for church's site plan application.	Church won on RLUIPA and other grounds.

2010	*Reaching Hearts Int'l, Inc. v. Prince George's County*	368 F. App'x 370 (4th Cir. 2010).	Church was unable to get change in **sewer and water** classifications for its property.	Court affirmed trial court's award of $3 mill+ in damages for RLUIPA and Equal Protection claims.
2012	*Anselmo v. County of Shasta*	873 F. Supp. 2d 1247 (E.D. Cal. 2012)	Rancher wanted to build private chapel on his property but ran into **building code** problems.	Court allowed RLUIPA claim based on violation of building codes to survive motion to dismiss.
2012	*Twerksy v. Town of Hempstead*	No. 10 CV 4573 (MKB), 2012 WL 4928901 (E.D.N.Y. Oct. 16, 2012).	The town defendants refused to grant **building permit for cemetery monument** without the signature of a cemetery official.	Court found that RLUIPA claims were not ripe.
2013	*Bethel World Outreach Ministries v. Montgomery Cnty. Council*	706 F.3d 548 (4th Cir. 2013).	County amended zoning ordinance to prohibiting private institutional facilities on property subject to TDR easements and **deferred church's well and septic application.**	Court reversed grant of summary judgment to county on RLUIPA claims.
2014	*Cal.-Nev. Annual Conference of the Methodist Church v. City of San Francisco*	74 F. Supp. 3d 1144 (N.D. Cal. 2014).	Methodist Conference alleged that city's ten-year **delay in issuing a demolition permit** for a church on property it was selling to a developer constituted an RLUIPA violation.	Court granted city's motion to dismiss, finding that the sale of property to the developer of market-rate condos did not constitute a "religious exercise" that was protected by RLUIPA.

2015	*New Life Evangelistic Ctr., Inc. v. City of St. Louis*	No. 4:15-cv-00395-JAR, 2015 WL 6509338 (E.D. Mo. Oct. 27, 2015).	Board of Public Service voted to **revoke church's hotel permit**, which allowed homeless housing for 32 beds. Church was housing hundreds of people per night.	Court found that RLUIPA claims were not ripe.
2016	*Martin v. Houston*	196 F. Supp. 3d 1258 (M.D. Ala. 2016).	Minister offering transitional housing to convicted sex offenders challenged **state law requiring separation of sex offenders' homes**.	Court denied defendant's motion to dismiss RLUIPA claims.
2016	*Salman v. Phoenix*	No. CV-12-01219-PHX-JAT, 2016 WL 319532 (D. Ariz. Jan. 27, 2016).	Plaintiffs who were punished for holding weekly bible study meetings out of their home sought to enjoin city from enforcing a **"Code" against holding private religious meetings**. They sought leave to file Third Amended Complaint (TAC).	Court denied Motion for Leave to File Third Amendment Complaint after RLUIPA claims were dismissed.
2016	*Shaarei Tfiloh Congregation v. Mayor of Baltimore*	183 A.3d 845 (Md. Ct. Spec. App. 2016).	City objected to imposition of **storm water remediation fee**.	Court affirmed trial court's ruling that RLUIPA was inapplicable because fee was not a land-use regulation.
2017	*United States v. County of Culpeper*	245 F. Supp. 3d 758 (W.D. Va. 2017).	County denied **pump-and-haul permit** for mosque because site would not support septic system.	Court denied county's motion to dismiss RLUIPA claim brought by U.S. government.

2017	*Affordable Recovery Hous. v. City of Blue Island*	860 F.3d 580 (7th Cir. 2017).	Faith-based group operating recovery home successfully sued city for **requiring fire sprinklers** because that requirement was preempted by state law.	Court affirmed dismissal of RLUIPA claims.
2017	*Vision for Children, Inc., v. City of Kingston*	No. 1:15-CV-0164 (BKS/DJS), 2017 WL 9249665 (N.D.N.Y. June 7, 2017).	City **demolished building** that plaintiff owned and planned to repair to use as a ministry for orphan children.	Plaintiff was denied summary judgment on RLUIPA claims.
2018	*Garden State Islamic Ctr. v. City of Vineland*	358 F. Supp. 3d 377 (D. N.J. 2018).	City declared it could not issue Certificate of Occupancy for mosque until plaintiff could secure a "flow determination" from **state Bureau of Non-Point Pollution Control**.	District court denied city's motion to dismiss.
2018	*New Life Evangelistic Ctr., Inc. v. City of St. Louis*	564 S.W.3d 665 (Mo. Ct. App. 2018).	City's Board of Building Appeals (which does not have jurisdiction over zoning code violations) affirmed the denial of the church's request for an exemption to the **plat-and-petition requirement** for securing a **permit and license** to operate a homeless shelter.	Court rejected RLUIPA claims because it found no substantial burden.
2019	*Friends of Lubavitch v. Baltimore County*	421 F.Supp.3d 146 (D. Md. 2019).	Plaintiffs sought to expand Chabad House located in residential neighborhood but were denied special exception and violated **restrictive covenant**; court ordered new construction be razed.	Court granted summary judgment on RLUIPA claims.

2019	*Cities4Life Inc. v. City of Charlotte*	No. 3:17-cv-670-KDB-DSC, 2019 WL 4127295 (W.D.N.C. July 26, 2019).	Opponents of abortion challenged zoning ordinance **ban on portable signs.**	Court dismissed RLUIPA claim (no substantial burden).
2019	*Layman Lessons Church & Welcome Baptist Church, Inc. v. Metro. Gov't*	No. 3:18-cv-0107, 2019 WL 1746512 (M.D. Tenn. Apr. 18, 2019).	Church wanted to use property to store and distribute donated goods to the needy, running afoul of **building regulations**.	Court allowed RLUIPA substantial burden claim to survive motion to dismiss.
2021	*Redeemed Christian Church of God v. Prince George's County*	17 F.4th 497 (4th Cir. 2021).	Church was denied **water and sewer** category amendment to build structure on acquired parcel.	Court affirmed trial court's finding of RLUIPA violation.
2021	*Schworck v. City of Madison*	No. 19-cv-312-wmc, 2021 WL 1820779 (W.D. Wis. May 6, 2021).	Operators of Rastafari church evicted because their possession and distribution of marijuana **violated lease**; they were also unsuccessful in having property classified as "place of worship" under zoning ordinance.	Court granted summary judgment to city on RLUIPA claims.
2022	*Canaan Christian Church v. Montgomery County*	29 F.4th 182 (4th Cir. 2022).	Church was denied **water and sewer** category changes when it sought to purchase five parcels.	Court affirmed trial court's grant of summary judgment to county.
2022	*St. Paul's Found. v. Ives*	29 F.4th 32 (1st Cir. 2022).	City revoked **building permit** for facility owned by Orthodox Christian Monk.	Court affirmed summary judgment granted to city for RLUIPA claim on substantial burden grounds.

2022	*Yoder v. Sugar Grove Area Sewer Auth.*	No. 1:21-cv-288, 2022 WL 4104277 (W.D. Pa. Sept. 8, 2022).	Amish community sought to enjoin sewer authority's enforcement of **sewer connection ordinance.**	District court granted motion to dismiss all claims including RLUIPA because of issue preclusion.
2022	*Temple of 1001 Buddhas v. City of Fremont*	588 F. Supp. 3d 1010 (N.D. Cal. 2022).	Plaintiff made several changes to religious buildings on property and city issued **Notice and Order to Abate Nuisance** because of building, electrical, and plumbing code violations.	City was granted motion to dismiss RLUIPA claims with leave to amend.
2022	*Congregation 3401 Prairie Bais Yeshaya D'Kerestir, Inc. v. City of Miami*	No. 22-21213-CIV-ALTONAGA/Torres, 2022 U.S. Dist. LEXIS 184119 (S.D. Fla. Oct. 6, 2022).	City officials allegedly **harassed congregation** because it held daily minyans in the house in a residential neighborhood.	Court granted city's motion to dismiss RLUIPA claims.
2023	*Mast v. County of Fillmore*	No. A22-1534, 2023 WL 4411613 (Minn. Ct. App. July 10, 2023).	Amish community objected to state and county **septic requirements** for disposal of gray water.	Court reversed holding by trial court that county had used least restrictive means to further compelling governmental interest.