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THE RIGHT TO ENFORCE: WHY RLUIPA'S LAND USE
PROVISION IS A CONSTITUTIONAL FEDERAL
ENFORCEMENT POWER

Qasim Rashid^{•••}

ABSTRACT

The Religious Land Use and Institutionalized Persons Act (“RLUIPA”) superseded the Religious Freedom Restoration Act (“RFRA”), which the Supreme Court held unconstitutional in its application to states in 1997. A two-pronged law, RLUIPA protects prisoners from unjust impositions to their freedom of worship and also ensures religious institutions may use their property for legitimate worship purposes without burdensome zoning law restrictions. This paper focuses specifically on the latter prong and analyzes RLUIPA in light of the growing Islamophobia in America during the previous twenty-four months. For example, the United States Department of Justice reports “of the eighteen RLUIPA matters involving possible discrimination against Muslims that the Department has monitored since September 11, 2001, eight have been opened since May of 2010.” Additionally, this paper repudiates the assertion that RLUIPA is an unconstitutional exercise of Congressional power, and argues instead RLUIPA ensures effective and legal protection from religious discrimination for all Americans.

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• This paper is dedicated to my wonderful wife, Ayesha, and beautiful son, Hassan.

• U.S. Dep't of Justice, REPORT OF THE TENTH ANNIVERSARY OF THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT 13 (Sept. 22, 2010), available at http://www.justice.gov/crt/rluipa_report_092210.pdf.

“In reviewing the history of the times through which we have passed, no portion of it gives greater satisfaction, on reflection, than that which presents the efforts of the friends of religious freedom, and the success with which they are crowned.”

I. INTRODUCTION

President Bill Clinton signed The Religious Land Use and Institutionalized Persons Act (“RLUIPA”) into law on September 22, 2000, after it passed unanimously through both the House and the Senate.¹ Congress recognized that a gap existed between the First Amendment’s freedom of religion protection and a tangible enforcement measure to ensure religious organizations did not suffer under the guise of what appeared to be a local or state government’s legitimate economic reasons.² In the decade since RLUIPA was enacted, Americans of diverse religious backgrounds have filed and won suits using the RLUIPA defense, demonstrating both the need for RLUIPA and its effectiveness. For example, the New York Times reported that RLUIPA challenges

...have been filed by a Sikh society that wants to build a temple in a low-density residential area of Yuba City, Calif.[,] a Hindu congregation seeking permission to expand its temple and cultural center on a busy highway in Bridgewater, N.J.[,] and a Muslim organization that has been trying for years to build a mosque on land that the local government in Wayne Township, N.J., now wants to buy for open space.³

But critics assert that RLUIPA is unconstitutional because it allegedly requires the government to support a religion over a secular local or state government interest, in essence violating the Establishment Clause.⁴ Likewise, critics contend that RLUIPA is not an authorized federal power under the Enumerated Powers of Congress.⁵

This paper responds to these misunderstandings about RLUIPA. Part II

· Letter from Thomas Jefferson to the General Meeting of Correspondence of the Sixth Baptist Associations (Nov. 21, 1808).

¹ 146 CONG. REC. H11947-01, 2000 WL 1777680 (daily ed. Dec. 4, 2000); *see* 146 Cong. Rec. E1563-01, 2000 WL 1369378 (daily ed. Sept. 22, 2000).

² Statements on Introduced Bills and Joint Resolutions, 146 Cong. Rec. S6678-02 (2000), at 21.

³ Diana B. Henriques, *Religion Trumps Regulation As Legal Exemptions Grow*, N.Y. TIMES, Oct. 8, 2006, at A1.

⁴ *See* Marci Hamilton, *Struggling With Churches as Neighbors: Land Use Conflicts Between Religious Institutions and Those Who Reside Nearby*, FINDLAW.COM (Jan. 17, 2002), <http://writ.news.findlaw.com/hamilton/20020117.html>.

⁵ *See id.*

of this paper describes the motivations behind developing RLUIPA and how it protects religious institutions in particular. It also describes the responsibilities RLUIPA imposes upon local and state governments. Part III responds to multiple criticisms of RLUIPA, particularly that it is an overreach of the federal government's powers, that it is an impermissible use of power outside the scope of Section 5 of the Fourteenth Amendment, and that it violates the Establishment Clause. Further, this section delves specifically into the increased anti-Muslim sentiment in America, sometimes colloquially dubbed "Islamophobia," and demonstrates how this reality further legitimizes RLUIPA's necessity. Finally, to demonstrate RLUIPA's limits of application and appropriate functionality, this section analyzes several notable case studies in which the RLUIPA defense was employed. Part IV concludes this paper, reaffirming that RLUIPA is, in fact, a necessary and proper use of federal power and serves a substantive constitutional purpose to support religious freedom in America.

II. THE HISTORY AND PURPOSE OF RLUIPA

A. What is RLUIPA?

The Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA")⁶ developed from the failed Religious Freedom and Restoration Act of 1993 ("RFRA").⁷ In 1997, the Supreme Court struck down RFRA in its application to states in *Boerne v. Flores*, holding that it was an unconstitutional use of Congress's enforcement power.⁸ The Court held that while Congress has the right to enact "remedial or preventative legislation," that legislation must show "congruence and proportionality" between the violations it wanted to rectify and the means chosen to rectify those violations.⁹ In other words, RFRA was held unconstitutional because Congress assumed a power reserved exclusively to the Court: the power to define the substantive rights that the Fourteenth Amendment guarantees. In his opinion, Justice Kennedy wrote:

Congress' power under § 5, however, extends only to "enforc[ing]" the provisions of the Fourteenth Amendment. The Court has described this power as "remedial." The design of the Amendment and the text of § 5 are

⁶ Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc – cc5 (2000). For the text of the statute relating specifically to land use, see 42 U.S.C. § 2000cc.

⁷ 42 U.S.C. § 2000bb-1 (1993), *invalidated by* City of Boerne v. Flores, 521 U.S. 507 (1997).

⁸ City of Boerne v. Flores, 521 U.S. 507, 536 (1997).

⁹ *Id.* at 517, 520.

inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States. Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is. It has been given the power "to enforce," not the power to determine what constitutes a constitutional violation. Were it not so, what Congress would be enforcing would no longer be, in any meaningful sense, the "provisions of [the Fourteenth Amendment]." ¹⁰

While the RFRA was held unconstitutional as it applied to local and state governments, it still currently applies to the federal government. This fact was reaffirmed in the 2006 case of *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*.¹¹ Once the Supreme Court ruled RFRA unconstitutional as it applied to states, several states created their own statutes modeled after RFRA to achieve a similar purpose.¹² But the demand for a federal law to address what RFRA could not address on a state level still existed. Thus, the *Boerne* ruling ultimately led to the development, passage, and enactment of RLUIPA. Unlike RFRA, Congress developed RLUIPA under the Taxing and Spending Clause,¹³ arguing that it was constitutional to require local and state governments that receive federal funding to modify their land use laws to accommodate religious freedom.¹⁴

B. How Does RLUIPA Apply?

RLUIPA was thus designed specifically to avoid the pitfalls that led to the RFRA's inapplicability to local and state zoning ordinances.¹⁵ RLUIPA

¹⁰ *Id.* at 519.

¹¹ *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 423 (2006) (ruling unanimously against the federal government, stating that the Government must show a compelling state interest in restricting religious freedom, including restriction on the use of an otherwise illegal substance in a religious ceremony).

¹² See generally Christopher C. Lund, *Religious Liberty After Gonzales: A Look at State RFRAs*, 55 S.D. L. REV. 466, 474–77 (2010).

¹³ U.S. CONST. art. I, § 8, cl. 1 ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.").

¹⁴ 146 CONG. REC. S7775 (daily ed. July 27, 2000) (statement of Sen. Hatch) ("The Spending Clause provisions are modeled directly on similar provisions in other civil rights laws. Congressional power to attach germane conditions to federal spending has long been upheld.")

¹⁵ 146 CONG. REC. S7777 (daily ed. July 27, 2000) (statement of Sen. Kennedy) ("The Religious Land Use and Institutionalized Persons Act of 2000 reflects our commitment to protect religious freedom and our belief that Congress still has power to enhance that freedom, even after the Supreme Court's decision in 1997 that struck down the broader Religious Freedom Restoration Act that 97 Senators joined in passing in 1993.")

requires local and state governments to avoid implementing zoning restrictions on religious institutions that would substantially burden their freedom of worship,¹⁶ however, RLUIPA is not an exception to all zoning restrictions on religious institutions. Local and state governments may still implement zoning restrictions if they demonstrate that the burden on the religious assembly or institution is both in furtherance of a compelling government interest and also the least restrictive means to further that compelling interest.¹⁷ Any local or state government receiving federal funds, even for general purposes, is held liable to this RLUIPA standard.¹⁸ Under an equality principle, RLUIPA ultimately strives to ensure that “[n]o government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.”¹⁹ As such, RLUIPA ensures that no government shall implement a land use regulation that discriminates against a religious organization, categorically excludes a religious organization from any jurisdiction, or unreasonably limits them within a jurisdiction.²⁰

When a religious organization files a RLUIPA complaint against the government, the court first determines whether RLUIPA even applies. RLUIPA applies if the plaintiff religious organization can demonstrate that the government’s land use regulation places a substantial burden on the organization’s religious practice.²¹ To date, five federal circuits have heard RLUIPA-related cases, and regardless of whether they have held for or against the plaintiff religious organization, each has applied a different test to determine whether a RLUIPA violation occurred.²²

The most common complaint is a violation of RLUIPA’s Equal Terms clause.²³ Religious organizations alleging an Equal Terms violation are simply claiming that the local or state government is applying a different standard to them than is applied to a secular organization.²⁴ To determine if this claim is valid, courts directly compare the rights afforded to the restricted religious institution filing the complaint to that of non-religious in-

¹⁶ See 42 U.S.C. §2000cc(a)(1).

¹⁷ See 42 U.S.C. § 2000cc(a)(1)(A) – (B).

¹⁸ *Id.*

¹⁹ 42 U.S.C. § 2000cc(a)(1)(A) – (B).

²⁰ *Id.*

²¹ *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1229 (11th Cir. 2004) (citing 42 U.S.C. § 2000cc-2(b) (2010)).

²² See generally *Elijah Grp., Inc. v. City of Leon Valley*, 643 F.3d 419, 422–23 (5th Cir. 2011) (discussing the various tests used by the Eleventh Circuit, Seventh Circuit, Third Circuit, and Second Circuit to determine RLUIPA violations, before ultimately applying a hybrid test to hold for the church plaintiff).

²³ 42 U.S.C § 2000cc(b)(1) (2000).

²⁴ See § 2000cc(b)(1).

stitutions that have been permitted to function under the zoning ordinances, also known as the comparators.²⁵

The Eleventh Circuit held that determining whether an entity is a comparator is based on whether the challenged zoning ordinance is facially neutral or facially discriminatory.²⁶ If the ordinance is determined to be facially discriminatory, the entity is determined to be a comparator; this renders virtually every non-religious institution as a comparator, but the Eleventh Circuit does not deem this alone as a *prima facie* case of a RLUIPA violation.²⁷ Instead, it applies an additional strict scrutiny review to make that determination.²⁸ Commenting on the Eleventh Circuit's ruling on facially neutral zoning ordinances, however, the Fifth Circuit states:

When alleging "religious gerrymander," a religious plaintiff must show that "the challenged zoning regulation separates permissible from impermissible assemblies or institutions in a way that burdens almost only religious uses"—thus assessing the treatment of the religious plaintiff relative to all other nonreligious occupants. When alleging discriminatory application, however, a religious plaintiff must show that "a similarly situated non-religious comparator received differential treatment under the challenged regulation."²⁹

This test essentially looks at both the religious and non-religious organizations to determine if the non-religious organization received different treatment under the same zoning ordinance.

The Third and Seventh Circuits apply a less complex test—one that does not ask whether the zoning ordinance is facially discriminatory or facially neutral.³⁰ The Third Circuit held in *Lighthouse Institute for Evangelism v. City of Long Branch*, "a regulation will violate the Equal Terms provision only if it treats religious assemblies or institutions less well than secular assemblies or institutions that are similarly situated as to *the regulatory pur-*

²⁵ See *Elijah Grp.*, 643 F.3d at 422 (holding that "[i]n prohibiting the government from treating a religious institution 'on less than equal terms with a nonreligious assembly or institution,' the Clause by its nature requires that the religious institution in question be compared to a nonreligious counterpart, or 'comparator.'").

²⁶ *Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward Cnty.*, 450 F.3d 1295, 1308 (11th Cir. 2006).

²⁷ See *id.* at 1308–09, 1311.

²⁸ See *id.* at 1309.

²⁹ *Elijah Grp., Inc. v. City of Leon Valley*, 643 F.3d 419, 423 (5th Cir. 2011) (citing *Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward Cnty.*, 450 F.3d 1295, 1308 (11th Cir. 2006)).

³⁰ *Lighthouse Inst. for Evangelism v. City of Long Branch*, 510 F.3d 253, 266 (3d Cir. 2007); *River of Life Kingdom Ministries v. Vill. of Hazel Crest, Ill.*, 611 F.3d 367, 371 (7th Cir. 2010).

pose.”³¹ Likewise, the Seventh Circuit held in an *en banc* ruling that a government’s zoning ordinance is in violation of the Equal Terms Clause if it treats a religious organization on less than equal terms than a nonreligious organization that is situated similarly in regards to “accepted zoning criteria.”³²

The Second Circuit applies a hybrid test of sorts. It first determines if a religious organization and nonreligious comparator are engaging in activities that are legal under the relevant zoning ordinance in question.³³ Next and finally, it determines if both the religious organization and the nonreligious comparator receive equal treatment for their legal activities.³⁴ If so, then no RLUIPA violation has occurred; if the religious organizations have not received equal treatment, then the plaintiff has succeeded in establishing a *prime facie* case of a RLUIPA violation.

The Fifth Circuit also applies a generally straightforward test, holding in *Elijah Group, Inc. v. City of Leon Valley* that an “ordinance violates RLUIPA’s Equal Terms Clause” if it “treats the [religious organization] on terms that are less than equal to the terms on which it treats similarly situated nonreligious institutions.”³⁵

Despite the varying tests that different federal circuits apply, a consistent theme is that courts determine each RLUIPA claim on a case-by-case basis.³⁶ The Department of Justice is optimistic that courts will establish a more uniform test in the coming years, acknowledging that “different courts currently use different tests to determine when a religious assembly is treated on less than equal terms than a nonreligious assembly or institution under RLUIPA Section 2(b)(1).”³⁷

Once the plaintiff religious organization has proven that a government’s zoning ordinance applies unequally, then it may invoke RLUIPA. To shift the burden of defense to the government, the plaintiff religious organization must then also prove that the unequal treatment resulted in a substantial

³¹ *Lighthouse Inst. for Evangelism*, 510 F.3d at 266 (emphasis in original).

³² *River of Life*, 611 F. 3d at 371.

³³ *Third Church of Christ, Scientist, of N.Y.C. v. City of New York*, 626 F.3d 667, 670–71 (2d Cir. 2010).

³⁴ *Id.* at 671.

³⁵ *Elijah Grp., Inc. v. City of Leon Valley*, 643 F.3d 419, 424 (5th Cir. 2011).

³⁶ See *San Jose Christian Coll. v City of Morgan Hill*, 360 F.3d 1024, 1036 (9th Cir. 2004); *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 761 (7th Cir. 2003) *reh’g en banc denied*, 2003 U.S. App. LEXIS 24176; *DiLaura v. Ann Arbor Charter Twp.*, 471 F.3d 666, 669 (6th Cir. 2006).

³⁷ U.S. Dep’t of Justice, REPORT OF THE TENTH ANNIVERSARY OF THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT 13 (Sept. 22, 2010), available at http://www.justice.gov/crt/rluipa_report_092210.pdf.

burden upon its religious practice.³⁸ A mere inconvenience does not become a substantial burden unless “the restriction ‘prevents adherents from conducting or expressing their religious beliefs or causes them to forgo religious precepts.’”³⁹ Proving this substantial burden establishes a *prima facie* case of a RLUIPA violation, but is still not fatal to the government’s zoning ordinance. Instead, once the plaintiff shifts the burden to the government, the government may choose to rebut.⁴⁰

Should the government choose to rebut the presumption that their zoning ordinance has caused a RLUIPA violation, it must meet two criteria: demonstrate that the zoning ordinance fulfills a compelling government interest *and* demonstrate that the zoning ordinance was the least restrictive means by which to fulfill that compelling interest.⁴¹ If the government is able to meet both these burdens, then the court will uphold the government’s zoning ordinance.⁴² If, however, the government fails to demonstrate either of these requirements, the plaintiff religious organization stands successful in its claim, and stands to receive appropriate judgment.⁴³

With this brief background of RLUIPA’s application, we move to the crux of this paper. In 2005, the Supreme Court unanimously upheld the “institutionalized persons” provision of RLUIPA⁴⁴ and numerous Circuit Courts have upheld the “land use” provision.⁴⁵ Still, critics assert that RLUIPA is unconstitutional because it is an overreach of the federal government’s powers, that it is an impermissible use of power outside the scope of Section 5 of the Fourteenth Amendment, and that it violates the Establishment Clause. The next section responds to these arguments in detail.

³⁸ See, e.g., *Trinity Assembly of God of Baltimore City, Inc. v. People’s Counsel for Baltimore Cnty.*, 962 A.2d 404, 426–27 (Md. 2008) (determining that a land use regulation and religious exercise exist before considering whether the regulation is a “substantial burden” on the religious exercise).

³⁹ See *id.* at 429 (citing *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 406 F. Supp. 2d 507, 515 (D.N.J. 2005) (holding that a zoning restriction that forbade excessively large signs is not a RLUIPA violation because the church had other ways of advertising and could have placed the sign on another street).

⁴⁰ See 42 U.S.C. § 2000cc(a)(1)(A)–(B) (2000).

⁴¹ See 42 U.S.C. § 2000cc(a)(1)(A)–(B).

⁴² See *Midrash*, 366 F.3d at 1225.

⁴³ *Id.*

⁴⁴ *Cutter v. Wilkinson*, 544 U.S. 709, 720–21 (2005).

⁴⁵ See *Guru Nanak Sikh Soc’y v. Cnty. of Sutter*, 456 F.3d 978, 994–95 (9th Cir. 2005); *Sts. Constantine & Helen Greek Orthodox Church v. City of New Berlin*, 396 F.3d 895, 898 (7th Cir. 2005); *Midrash*, 366 F.3d at 1239–40; *United States v. Maui Cnty.*, 298 F. Supp. 2d 1010, 1016 (D. Haw. 2003); *Freedom Baptist Church v. Twp. of Middletown*, 204 F. Supp. 2d 857, 874 (E.D. Pa. 2002).

III. RLUIPA IS CONSTITUTIONAL AND NECESSARY DUE TO THE RISE OF ISLAMOPHOBIA

Professor Marci A. Hamilton, author of *God vs. the Gavel: Religion and the Rule of Law*, is one of RLUIPA's leading critics.⁴⁶ Prior to RLUIPA's enactment, Professor Hamilton successfully represented the City of Boerne, Texas, in *City of Boerne v. Flores*,⁴⁷ the case in which the Supreme Court ruled RFRA unconstitutional as it applied to local and state governments.⁴⁸

Professor Hamilton's objections to RLUIPA can be summarized in the following two points. First, Professor Hamilton contends that RLUIPA's "federal takeover of local land use control constitutes an obvious violation of the Constitution's federalism."⁴⁹ She argues, "[i]f land use is not an inherently local concern, then virtually nothing is."⁵⁰ Next, Professor Hamilton argues that, "RLUIPA...constitutes an establishment of religion on the part of Congress, for it systematically favors religious organizations over their secular neighbors."⁵¹ These arguments are certainly not exclusively Professor Hamilton's arguments, nor are they comprehensive of all arguments against RLUIPA. But, they represent the general objections that RLUIPA critics propagate.⁵²

A. RLUIPA Is Valid Under Section 5 of the Fourteenth Amendment

Section 5 of the Fourteenth Amendment reads, "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article."⁵³ RFRA was largely ruled unconstitutional as it applied to state and local governments because the Court felt that Congress took too much liberty in its understanding of Section 5 authority.⁵⁴ While Justice Kennedy

⁴⁶ *Profile: Marci A. Hamilton*, CARDOZO LAW (Nov. 12, 2007), <http://www.cardozo.yu.edu/MemberContentDisplay.aspx?ccmd=ContentDisplay&ucmd=UserDisplay&userid=10510>.

⁴⁷ *City of Boerne v. Flores*, 521 U.S. 507, 509 (1997).

⁴⁸ *Id.* at 536.

⁴⁹ Hamilton, *supra* note 4.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² See, e.g., Adam McLeod, *Whither the Constitution?*, LAND USE PROF BLOG (Oct. 12, 2011), http://lawprofessors.typepad.com/land_use/2011/10/whither-the-constitution.html (discussing critics' arguments that RLUIPA violates the principles of federalism); *Freedom Baptist Church of Delaware Cnty. v. Twp. of Middletown*, 204 F. Supp. 2d 857, 863 (E.D. Pa. 2002) (Plaintiff alleging that RLUIPA violates the Establishment Clause).

⁵³ U.S. CONST. amend. XIV, § 5.

⁵⁴ *City of Boerne v. Flores*, 521 U.S. 507, 532 (1997).

opined on the leeway afforded to Congress under Section 5 as ensuring Congress had “wide latitude in determining” whether its actions are remedial or substantive in nature,⁵⁵ this wide latitude was not enough to apply RFRA to local and state governments. In *Boerne*, the Court held:

It is difficult to maintain that [the anecdotes in the record] are examples of legislation enacted or enforced due to animus or hostility to the burdened religious practices or that they indicate some widespread pattern of religious discrimination in this country. Congress' concern was with the incidental burdens imposed, not the object or the purpose of legislation.⁵⁶

Thus, in *Boerne*, the Court sought more than mere anecdotes of potential discrimination to justify the legislation. Although it endorsed the general purpose of the legislation itself, the Court determined that Congress had not shown the necessity for such a sweeping law.⁵⁷ While the Court's position may have been accurate in 1997, when RFRA was held unconstitutional as applied to state and local governments, this position is not accurate today, as evidenced by the growth of the “Islamophobia Industry” (discussed in the next section).

Section 5 of the Fourteenth Amendment affords the federal government the right to enforce RLUIPA to ensure American-Muslims are protected from the growing widespread pattern of religious discrimination in America. Contrary to critical assertions that Section 5 of the Fourteenth Amendment does not afford the federal government the right to enforce RLUIPA, “[a]ll circuit courts and almost all district courts which have considered this issue have found that RLUIPA is a constitutional use of congressional power under Section 5 of the Fourteenth Amendment.”⁵⁸ In *Lighthouse Community Church of God v. City of Southfield*, the court held that:

...under Section V of the Fourteenth Amendment, Congress has the power to enforce the provisions of the Fourteenth Amendment, and that as such, Congress has the power to determine legislation necessary to secure the guarantees of the Free Exercise Clause of the First Amendment. Conse-

⁵⁵ *Id.* at 519.

⁵⁶ *Id.* at 531.

⁵⁷ *Id.* at 532, 534–35 (“Simply put, RFRA is not designed to identify and counteract state laws likely to be unconstitutional because of their treatment of religion. In most cases, the state laws to which RFRA applies are not ones which will have been motivated by religious bigotry.”).

⁴⁸ *Lighthouse Cmty. Church of God v. City of Southfield*, No. 05-40220, 2007 WL 30280, at *10 (E.D. Mich. 2007); see *Guru Nanak Sikh Soc’y v. Cnty. of Sutter*, 456 F.3d 978, 995 (9th Cir. 2006); *Sts. Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 895, 898 (7th Cir. 2005); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F. 3d 1214, 1239-40 (11th Cir. 2004); *United States v. Maui County*, 298 F. Supp. 2d 1010, 1016 (D. Haw. 2003); *Freedom Baptist Church v. Twp. of Middletown*, 204 F. Supp. 2d 857, 874 (E.D. Pa. 2002).

quently, Congress had the authority to enact RLUIPA.⁵⁹

The court further established RLUIPA's legitimacy by stating: "Since the Court finds that RLUIPA is a constitutional exercise of congressional power under the Fourteenth Amendment, it need not consider whether RLUIPA is also a constitutional exercise of congressional power under the Commerce Clause."⁶⁰ In addition, courts have conceded that while

RLUIPA intrudes to some degree on local land use decisions, RLUIPA does not violate principles of federalism if it is otherwise grounded in the Constitution. *See New York v. United States*, 505 U.S. 144, 156 (1992). Because RLUIPA is a proper exercise of Congress's power under § 5 of the Fourteenth Amendment, there is no violation of the Tenth Amendment. Moreover, RLUIPA must not "compel the States to enact or enforce a federal regulatory program." *Printz v. United States*, 521 U.S. 898, 935 (1997); *New York*, 505 U.S. at 175-77, 188. While RLUIPA may preempt laws that discriminate against or exclude religious institutions entirely, it leaves individual states free to eliminate the discrimination in any way they choose, so long as the discrimination is actually eliminated. *See Fed. Energy Regulatory Comm'n v. Mississippi*, 456 U.S. 742, 759 (1982) ("[T]he Federal government may displace state regulation even though this serves to 'curtail or prohibit the States' prerogatives to make legislative choices respecting subjects the States may consider important.") (citation omitted); *City of Rome v. United States*, 446 U.S. 156, 179 (1980) (contemplating Fourteenth Amendment interference with state rights); *Gregory v. Ashcroft*, 501 U.S. 452, 468 (1991) (same).⁶¹

Critics might continue to assert that the reason why RLUIPA's land use provision has not been ruled unconstitutional is because the question of its authority under Section 5 of the Fourteenth Amendment has not yet reached the Supreme Court. The fact is, however, that the reason why the question has not reached the Supreme Court is because all circuit courts and virtually all district courts have consistently ruled RLUIPA constitutional.⁶² Thus, as far as our judiciary is concerned, no debate exists for the Supreme Court to

⁴⁹ *Lighthouse Cmty. Church of God*, No. 05-40220, 2007 WL 30280 at *10.

⁵⁰ *Id.*

⁵¹ *Midrash*, 366 F.3d at 1242.

⁶² *See, e.g., Lighthouse Cmty. Church of God*, No. 05-40220, 2007 WL 30280, at *10 (applying *Cutter v. Wilkinson* to RLUIPA, thus holding the RLUIPA does not violate the Establishment Clause); *Westchester Day Sch. v. Vill. Of Mamaroneck*, 504 F.3d 338, 355 (2d Cir. 2007) (applying the *Lemon* Test to hold that RLUIPA does not violate the Establishment Clause); *Lighthouse Inst. for Evangelism v. City of Long Branch*, 510 F.3d 253, 266 (3d Cir. 2007) (holding RLUIPA does not violate the Tenth Amendment); *Midrash Sephardi, Inc. v. Town of Surfside*, 336 F.3d 1214, 1239 (11th Cir. 2004) (holding that RLUIPA does not violate the Tenth Amendment).

finalize; RLUIPA is a constitutional power under Section 5 of the Fourteenth Amendment.

B. RLUIPA Is Necessary to Combat the Growing Islamophobia Industry

RLUIPA plays a substantial role in protecting the legitimate land use rights of religious minorities, often because of the growing systemic discrimination against, for example, the American-Muslim community—discrimination that goes far beyond “mere anecdotes.” The reality is that Islamophobia is a growing phenomenon in the United States, warranting legislation as assertive as RLUIPA. For example, the Southern Poverty Law Center (“SPLC”) reports that “Anti-Muslim hate groups are a relatively new phenomenon in the United States, most of them appearing in the aftermath of the World Trade Center terrorist attacks on Sept. 11, 2001.”⁶³ Recall that RFRA was held unconstitutional as it applied to local and state governments in 1997—four years prior.⁶⁴ SPLC adds that:

The number of anti-Muslim groups tripled in 2011, jumping from 10 groups in 2010 to 30 last year. That rapid growth in Islamophobia, marked by the vilification of Muslims by opportunistic politicians and anti-Muslim activists, *began in August 2010, when controversy over a planned Islamic cultural center in lower Manhattan reached a fever pitch.*⁶⁵

The infamous “Ground Zero” mosque opposition was led by anti-Islam bloggers Pamela Geller⁶⁶ and Robert Spencer.⁶⁷ The Anti-Defamation League (“ADL”) reports that in 2010, Geller and Spencer united to lead “Stop Islamization of America” (“SIOA”).⁶⁸ The ADL describes SIOA as follows:

Stop Islamization of America (SIOA), created in 2009, promotes a con-

⁵² *Intelligence Files: Anti-Muslim*, SOUTHERN POVERTY LAW CENTER, <http://www.splcenter.org/get-informed/intelligence-files/ideology/anti-muslim> (last visited Sept. 7, 2012).

⁶⁴ See *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997).

⁶⁵ Mark Potok, *The Patriot Movement Explodes*, 145 INTELLIGENCE REPORT (2012), available at <http://www.splcenter.org/get-informed/intelligence-report/browse-all-issues/2012/spring/the-year-in-hate-and-extremism> (last visited Sept. 7, 2012) (emphasis added).

⁶⁶ *Intelligence Files: Pamela Geller*, SOUTHERN POVERTY LAW CENTER, <http://www.splcenter.org/get-informed/intelligence-files/profiles/pamela-geller> (last visited Sept. 11, 2012).

⁶⁷ Robert Steinback, *The Anti-Muslim Inner Circle*, 142 INTELLIGENCE REPORT (2012) available at <http://www.splcenter.org/get-informed/intelligence-report/browse-all-issues/2011/summer/the-anti-muslim-inner-circle>.

⁶⁸ *Backgrounder: Stop Islamization of America (SIOA)*, ANTI-DEFAMATION LEAGUE (March 25, 2011), <http://www.adl.org/NR/exeres/E8F94C42-4C47-43D3-9957-7EB92CD1015A,8C8C250F-DA79-405F-B716-D4409CAB5396,frameless.htm>.

spiratorial anti-Muslim agenda under the guise of fighting radical Islam. The group seeks to rouse public fears by consistently vilifying the Islamic faith and asserting the existence of an Islamic conspiracy to destroy “American” values. The organization warns of the encroachment of shari’a, or Islamic law, and encourages Muslims to leave what it describes as the “falsity of Islam”...Geller and Spencer work closely with David Yerushalmi, an Arizona attorney with a record of anti-Muslim, anti-immigrant and anti-black bigotry. Yerushalmi is one of the driving forces behind Shari’a-related conspiracy theories and growing efforts to ban or restrict the use of Shari’a law in American courts... *A main focus of SIOA activity has been the proposed Islamic center near Ground Zero.*⁶⁹

In 2010, SPLC recognized Geller and Spencer’s SIOA organization as an official hate group, a title reserved for the most incendiary of groups such as the KKK or neo-Nazi organizations.⁷⁰ Still, Geller and Spencer’s efforts to promote intolerance have been remarkably successful; with the assistance of David Yerushalmi, they have helped push several “anti-Shariah” bills through state legislations.⁷¹ The ADL Reports:

One of the driving forces behind Shari’a-related conspiracy theories and growing efforts to ban or restrict the use of Shari’a law in American courts is David Yerushalmi...[whose] latest weapon is model anti-Shari’a legislation he has titled “American Laws for American Courts,” developed for a group called the American Public Policy Alliance (APPA). The group claims that “one of the greatest threats to American values and liberties today” comes from “foreign laws and foreign legal doctrines,” including “Islamic Shari’ah law,” that have been “infiltrating our court system.” *Yerushalmi is General Counsel to the Washington, D.C.-based Center for Security Policy, founded by Frank J. Gaffney. Gaffney has been active in opposing mosque construction and has made several statements about Islam that raise concerns. For example, in a 2009 article in the Washington Times, Gaffney claimed that “there is mounting evidence that the president not only identifies with Muslims, but actually may still be one himself.”*⁷²

During the past twenty-four months, over two dozen states have proposed or succeeded in passing state statutes to ban Shariah law (or to ban foreign law and therefore include Shariah law), which would in effect prevent Muslims from building mosques, attending worship services, or even

⁶⁹ *Id.* (emphasis added).

⁷⁰ Intelligence Files: Pamela Geller, *supra* note 54.

⁷¹ *See id.*; *David Yerushalmi: A Driving Force Behind Anti-Sharia Efforts in U.S.*, ANTI-DEFAMATION LEAGUE, (Jan. 13, 2012), http://www.adl.org/main_Interfaith/david_yerushalmi.htm.

⁷² *David Yerushalmi, supra* note 70 (emphasis added).

marrying, writing wills, or writing personal contracts based on Islamic guidance.⁷³

Known hate mongers like Geller and Spencer have thus directly influenced numerous state governments. But, a similar story emerges in the federal government. For example, several members of Congress have openly promoted a conspiratorial and baseless campaign to demonize Islam.⁷⁴ Representative Michele Bachmann (R-MN) sent an open letter to the State Department's inspector general, making meritless accusations against Huma Abedin—a high level Clinton aide—of having terrorist ties with the Muslim Brotherhood.⁷⁵ Likewise, Representative Allen West (R-FL) has made a platform out of demonizing Islam and Muslims, stating that Islam is “not [even] a religion, but a ‘theocratic political ideology’ that’s a threat to America.”⁷⁶ More recently, Representative Joe Walsh (R-IL) publicly announced at a town hall meeting,

One thing I’m sure of is that there are people in this country – there is a radical strain of Islam in this country – it’s not just over there – trying to kill Americans every week. It is a real threat, and it is a threat that is much more at home now than it was after 9/11. It’s here. It’s in Elk Grove. It’s in Addison. It’s in Elgin. It’s here.⁷⁷

Within one week of Walsh’s comments, a local mosque had gunshots fired upon it⁷⁸ and another local Muslim school suffered an acid bomb attack.⁷⁹ He has since not recanted his comments, but rather reaffirmed them.⁸⁰

That anti-Muslim hate groups tripled in 2011 as compared to 2010

⁷³ See *infra* Table A.

⁷⁴ See, e.g., *Michele Bachmann’s Baseless Attack on Huma Abedin*, WASH. POST, http://www.washingtonpost.com/opinions/michele-bachmanns-baseless-attack-on-huma-abedin/2012/07/19/gJQAFhkiwW_story.html (last visited Sept. 10, 2012).

⁷⁵ *Id.*

⁷⁶ Greg Allen, *Muslim Activist Challenges Fla. Republican’s Views*, NPR (Oct. 27, 2011), <http://www.npr.org/2011/10/27/141359282/muslim-activist-challenges-fla-republicans-views>.

⁷⁷ *Rep. Walsh’s Comments Infuriate Muslims*, CBS CHI. (Aug. 10, 2012, 8:04 AM), <http://chicago.cbslocal.com/2012/08/10/rep-walshs-comments-infuriate-muslims/>.

⁷⁸ *Man Charged After Pellets Fired at Morton Grove Mosque*, ABC CHI., <http://abclocal.go.com/wls/story?section=news/local&id=8770572> (last visited Aug. 29, 2012).

⁷⁹ *Islamic School Hit With Acid-Filled Bottle in Lombard*, CBS CHI. (Aug. 13, 2012), <http://chicago.cbslocal.com/2012/08/13/islamic-school-hit-with-acid-filled-bottle-in-lombard>.

⁸⁰ See *Joe Walsh: Muslims in America, Radical Islam ‘A Threat’ More Now Than After 9/11*, HUFFINTON POST CHI. (Aug. 10, 2012), http://www.huffingtonpost.com/2012/08/10/joe-walsh-muslims-in-amer_n_1764034.html (after these town hall comments, Walsh’s office released a statement: “We cannot let political correctness blind us to reality.”).

should be a major concern for federal and state government.⁸¹ Instead, anti-Muslim sentiment is also prevalent in federal enforcement agencies and the New York Police Department (“NYPD”), both of which have come under scrutiny for severely incorrect agent training material about Muslims,⁸² or for spying on Muslim students, mosques, and American-Muslim citizens without a warrant or even probable cause.⁸³ In fact, after a six-year illegal spy ring on American Muslims in New York, the NYPD finally admitted that the exercise resulted in zero leads, arrests, charges, or cases of terrorism.⁸⁴

The stark xenophobia against American Muslims is just as clear as it relates to land use equality. For example, Assistant Attorney General Thomas E. Perez stated in his 2011 testimony before Congress:

Over the last year, we have seen an increase in our RLUIPA cases and investigations involving mosques. Of the 24 RLUIPA matters involving mosques that the Department has opened since the law was passed, 14 have been opened since May 2010. We believe this reflects a regrettable increase in anti-Muslim sentiment.⁸⁵

This trend coincides with the SPLC’s report of growing anti-Muslim animus, particularly as a result of the efforts of several anti-Muslim hate groups working against the Park51 Islamic center in Manhattan, New York.⁸⁶ This rising bigotry has, in some cases, advanced beyond individual discrimination and into open opposition to Muslim communities.⁸⁷ Since 2010, another notable mosque in Murfreesboro, Tennessee, faced lawsuits,

⁸¹ Potok, *supra* note 53.

⁸² Michael S. Schmidt & Charlie Savage, *Language Deemed Offensive is Removed from F.B.I. Training Materials*, N.Y. TIMES, Mar. 29, 2012, at A20, available at <http://www.nytimes.com/2012/03/29/us/politics/language-deemed-offensive-is-removed-from-fbi-training-materials.html>.

⁸³ Matt Apuzzo, *NYPD Muslim Spying: The Legal and Policy Issues Raised by Widespread Surveillance (Q&A)*, HUFFINGTON POST (Mar. 12, 2012, 2:28 PM), http://www.huffingtonpost.com/2012/03/12/nypd-muslim-spying-the-legal-and-policy-issues-raised-by-surveillance-qa_n_1338765.html.

⁸⁴ Adam Goldman & Matt Apuzzo, *NYPD Secret Police Spying on Muslims Led to No Terrorism Leads or Cases*, GUARDIAN, (Aug. 21, 2012, 9:48AM), <http://www.guardian.co.uk/world/2012/aug/21/nypd-secret-muslim-spying-no-leads>.

⁸⁵ *Protecting the Civil Rights of Muslim Americans: Hearing Before the S. Subcomm. on the Constitution, Civil Rights, and Human Rights, S. Comm. on the Judiciary*, 112th Cong. 5 (2011) (statement of Thomas E. Perez, Assistant Att’y Gen. of the United States), available at <http://www.justice.gov/ola/testimony/112-1/03-29-11-crt-perez-testimony-re-protecting-the-civil-rights-of-muslim-americans.pdf>.

⁸⁶ Robert Steinback, *Jihad Against Islam*, 142 INTELLIGENCE REPORT (2011), available at <http://www.splcenter.org/get-informed/intelligence-report/browse-all-issues/2011/summer/jihad-against-islam>.

⁸⁷ See, e.g., Elisabeth Kauffman, *In Murfreesboro, Tenn.: Church ‘Yes,’ Mosque ‘No’*, TIME.COM (Aug. 19, 2010), <http://www.time.com/time/nation/article/0,8599,2011847,00.html>.

threats, vandalism, destruction of property, and attempted arson for wanting to expand their facility, even though the local board approved the measure.⁸⁸ In 2006, before the Park51 incident, the Ahmadiyya Muslim Community cancelled their plans to build a mosque in Walkersville, Maryland, after local outrage.⁸⁹ Though the Ahmadiyya Muslim Community decided not to challenge the zoning ordinances, the general anti-Muslim fervor was clear among the Walkersville community.⁹⁰ Clark Millison, a Walkersville resident, stated, “I don’t know that much about Muslims, but I understand they want to take over the world and want us all dead.”⁹¹ Perhaps best describing why RLUIPA is needed, Mary Mowen, also a Walkersville resident stated, “We don’t begrudge the right [of Ahmadi Muslims to practice their religion]...but we don’t feel that Walkersville is the best place [for them to do it].”⁹²

In addition, Chairman of the House Homeland Committee, Representative Peter King (R-NY), claims “80-85 percent of mosques in this country are controlled by Islamic fundamentalists...This is an enemy living amongst us.”⁹³ In a September 2007 interview, King added that “[t]here are too many mosques in this country...There are too many people sympathetic to radical Islam. We should be looking at them more carefully and finding out how we can infiltrate them.”⁹⁴ These comments may influence American citizens who are personally unfamiliar with American Muslims.⁹⁵ While American Muslims comprised only 0.8% of the American population in 2010, 13.7% of all RLUIPA investigations filed from the inception of RLUIPA through September 2010 were classified as “Muslim.”⁹⁶

⁸⁸ *See id.*

⁸⁹ Jacqueline L. Salmon, *Rejected Muslim Sect Keeps Faith; Ahmadi Thiving in Silver Spring Despite Disdain, Fear*, WASH. POST, Aug. 30, 2008, at B1, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/08/29/AR2008082902302.html>.

⁹⁰ *See, e.g.*, Andrea Stone, *Muslim Sect Resisted in Md.; Group Wants to Buy Land for Worship Center*, USA TODAY, Oct. 1, 2007, at 3A, available at http://www.usatoday.com/news/religion/2007-09-30-muslims_N.htm.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Congressman: ‘Muslims Enemy Amongst Us’*, WORLD NET DAILY (Feb. 13, 2004), <http://www.wnd.com/2004/02/23257/>.

⁹⁴ *Rep. Peter King: There Are “Too Many Mosques in This Country”*, POLITICO (Sept. 19, 2007), http://www.politico.com/blogs/thecrypt/0907/Rep_King_There_are_too_many_mosques_in_this_country.html.

⁹⁵ *See* ARAB AM. INST., *THE AM. DIVIDE: HOW WE VIEW ARABS AND MUSLIMS* pt. IV (2012), available at <http://www.aaiusa.org/reports/the-american-divide-how-we-view-arabs-and-muslims> (follow “Download the poll”) (“Most Americans say they do not know any Arabs or Muslims; but the 30% who do have significantly more favorable attitudes toward Arabs, Muslims, Arab Americans, and American Muslims”).

⁹⁶ U.S. Dep’t of Justice, *supra* note 36, at 6 (citing BARRY A. KOSMIN & ARIELA KEYSAR, AM.

Far more than mere anecdotes, these contemporary realities more than meet the “widespread pattern of religious discrimination in [America]” the Court referred to in *Boerne*.⁹⁷ Based on these facts alone, RLUIPA is necessary to ensure federal protection of American Muslims’ First Amendment right to freedom of worship and Fourteenth Amendment right to equality from state and local governments. While anti-pluralism activists such as Geller and Spencer will likely continue their efforts to usurp constitutionally guaranteed freedoms for American citizens who happen to be Muslim, it is necessary to appreciate the reality of Islamophobia and the effectiveness of RLUIPA to combat against this form of domestic extremism.

C. RLUIPA Is Valid Under the Enumerated Powers of Congress

Critics also argue that RLUIPA is unconstitutional because it is not a valid exercise of any of the Enumerated Powers of Congress.⁹⁸ This position is also inaccurate based on fundamental Supreme Court precedent.⁹⁹

The Constitution affords the federal government the right to determine how its funds are used under the Commerce Clause and the Taxing and Spending Clause.¹⁰⁰ In *South Dakota v. Dole*, the state of South Dakota challenged the constitutionality of a federal statute under the Commerce Clause.¹⁰¹ In *South Dakota*, nineteen-year-old adults were permitted to purchase beer with up to 3.2% alcohol.¹⁰² The conflict arose because 23 U.S.C. § 158 directs the Secretary of Transportation to withhold a certain percentage of federal highway funds if a state makes it legal for individuals under the age of twenty-one to purchase alcoholic drinks.¹⁰³ South Dakota sued, stating § 158 was unconstitutional because Congress exceeded its spending powers and the Twenty-First Amendment by passing legislation that made receipt of federal highway funds contingent upon the states’ adoption of a uniform minimum drinking age.¹⁰⁴

RELIGIOUS IDENTIFICATION SURVEY SUMMARY REPORT 5 (Trinity Coll. 2009), available at http://commons.trincoll.edu/aris/files/2011/08/ARIS_Report_2008.pdf (of the fifty-one RLUIPA investigations, seven were categorized as “Muslim”); PEW RESEARCH CTR., THE GLOBAL MUSLIM POPULATION 15 (2011) (citing that Muslim comprised 0.8% of the United States population in 2010).

⁹⁷ *City of Boerne v. Flores*, 521 U.S. 507, 531 (1997).

⁹⁸ Hamilton, *supra* note 4.

⁹⁹ See *South Dakota v. Dole*, 483 U.S. 203, 206–07, 210–11 (1987).

¹⁰⁰ See U.S. CONST., art. 1, § 8 cl. 1; U.S. CONST., art. 1, § 8, cl. 3.

¹⁰¹ *South Dakota*, 483 U.S. at 205.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

In holding § 158 constitutional, the *South Dakota* Court reasoned that Congress acted indirectly under its spending power to encourage uniformity in states' drinking ages, which is within constitutional bounds even if Congress cannot regulate a minimum drinking age directly.¹⁰⁵ The Court reaffirmed that Congress has the right to attach conditions on receipt of federal funds, specifically holding that

[t]he Constitution empowers Congress to “lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States.” Art. I, § 8, cl. 1. Incident to this power, Congress may attach conditions on the receipt of federal funds, and has repeatedly employed the power “to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives.” The breadth of this power was made clear in *United States v. Butler*, 297 U.S. 1, 56 S.Ct. 312, 319, 80 L. Ed 477 (1936), where the Court, resolving a longstanding debate over the scope of the Spending Clause, determined that “the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution.”¹⁰⁶

The Court cited to *Butler* to reiterate that “objectives not thought to be within Article I’s ‘enumerated legislative fields’ may nevertheless be attained through use of the spending power and the conditional grant of federal funds.”¹⁰⁷ RLUIPA applies the same constitutional principles to local and state governments: those local and state governments that use federal funds must uniformly adhere to the federal government’s legitimate policy objectives to provide for the “General Welfare” by promoting religious freedom.¹⁰⁸

But, the Court in *South Dakota* did not afford the federal government a *carte blanche* to regulate local and state governments as they deemed fit. Instead, the Court also identified four requirements for Congress’s use of conditional spending to regulate state and local activities.¹⁰⁹ RLUIPA meets each of these requirements.¹¹⁰

First, the Court cited the Constitution, reminding, “the exercise of the

¹⁰⁵ *Id.* at 206.

¹⁰⁶ *South Dakota v. Dole*, 483 U.S. 203, 206–207 (1987) (some citations omitted).

¹⁰⁷ *Id.* at 207 (citing *United States v. Butler*, 297 U.S. 1, 65 (1936)).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 207–08.

¹¹⁰ *Id.*

spending power must be in pursuit of the ‘general welfare.’”¹¹¹ Likewise, “in considering whether a particular expenditure is intended to serve general public purposes, courts should defer substantially to judgment of Congress.”¹¹² To be sure, even critics of RLUIPA have not asserted that the federal government’s policy to ensure religious freedom is not a legitimate general welfare purpose for American citizens. Likewise, to ensure uniform religious freedom across the states, it makes perfect sense to “defer substantially to the judgment of Congress.”¹¹³

Next, the Court required that, if Congress desires to place conditions on States’ receipt of federal funds, it “must do so unambiguously, enabling States to exercise their choice knowingly, cognizant of consequences of their participation.”¹¹⁴ Again, local and state governments have the right to reject federal funding if they wish to be exempt from RLUIPA. Should they choose not to participate in the federal government’s public policy initiatives, used to promote general welfare through uniform religious freedom, they may do so by simply rejecting federal funds. No enforcement mechanism exists to require state and local governments to accept federal funding.

Third, the *South Dakota* Court held that conditions on federal funding might be illegitimate if they are unrelated to the “federal interest in particular national projects or programs.”¹¹⁵ The Court cited to *Ivanhoe Irrigation District v. McCracken*: “[T]he Federal Government may establish and impose reasonable conditions relevant to federal interest in the project and to the over-all objectives thereof.”¹¹⁶ The federal government has long had a legitimate interest in ensuring equal religious freedom throughout the country,¹¹⁷ and thus utilizing federal monies in the form of RLUIPA is clearly related to that federal interest.

Fourth, the Court held that the conditions cannot violate other provisions, and finally, the provisions cannot amount to coercion, only inducement.¹¹⁸ RLUIPA critics argue that RLUIPA violates the Establishment Clause, and that RLUIPA amounts to coercion because it automatically pre-

¹¹¹ *Id.* at 207 (citing *Helvering v. Davis*, 301 U.S. 619, 640, 645 (1937); *United States v. Butler*, 297 U.S. 1, 65 (1936)).

¹¹² *South Dakota v. Dole*, 483 U.S. 203, 207 n.2 (1987) (citing *Helvering v. Davis*, 301 U.S. 619, 640, 645 (1937)).

¹¹³ *Id.*

¹¹⁴ *Id.* (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)).

¹¹⁵ *Id.* (citing *Massachusetts v. U.S.*, 435 U.S. 444, 461 (1978)).

¹¹⁶ *South Dakota*, 483 U.S. at 208 (citing *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275, 295 (1958)).

¹¹⁷ See U.S. CONST., amend. I., amend. XIV, § 1.

¹¹⁸ *Id.* at 210–211.

fers religious organizations to secular organizations.¹¹⁹ The next section demonstrates why both of these assertions are incorrect.

D. RLUIPA Does Not Violate The Establishment Clause

Contrary to assertions that RLUIPA violates other constitutional provisions, the Supreme Court held in *Cutter v. Wilkinson* that RLUIPA does not violate the Establishment Clause.¹²⁰ In *Cutter*, inmates filed suit alleging that prison officials violated RLUIPA by failing to accommodate their exercise of “non-mainstream” religions.¹²¹ To be sure, *Cutter* focused only on the institutionalized-person prong of RLUIPA, with no discussion of the land use provision. Still, *Cutter* is significant to the land use provision for two reasons.

First, in *Cutter*, the Supreme Court not only overturned the Sixth Circuit’s ruling that the portion of RLUIPA relating to incarcerated persons improperly advanced religion and thus violated the Establishment Clause, but the Court also did so unanimously.¹²² Second, although the argument that RLUIPA violates the Establishment Clause was also offered in *Lighthouse Community Church of God v. City of Southfield*—a case that challenged the constitutionality of RLUIPA’s land use provision—this argument was rejected, due in part to the precedent established in *Cutter*.¹²³ The *Lighthouse* court held:

...RLUIPA does not establish religion in violation of the First Amendment. RLUIPA does not favor or promote a certain specific religious message. Instead, RLUIPA frees groups and individuals to practice religion in whatever manner they choose. In *Cutter v. Wilkinson*, the Supreme Court found that RLUIPA’s provisions involving institutionalized persons do not establish religion in violation of the First Amendment. *Cutter v. Wilkinson*, 544 U.S. 709 (2005). *The Supreme Court’s reasoning in Cutter can be equally applied to those provisions of RLUIPA involving land use regulations. See also* Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1242 (11th Cir. 2004); United States v. Maui County, 298 F. Supp. 2d 1010, 1014 (D. Haw. 2003) (finding that RLUIPA’s provisions related to land use regulations do not violate the Establishment Clause).¹²⁴

¹¹⁹ See Marci A. Hamilton, *God vs. The Gavel: Religion and the Rule of Law* 78–110 (2005).

¹²⁰ *Cutter v. Wilkinson*, 544 U.S. 709, 713 (2005).

¹²¹ *Id.* at 712.

¹²² *Id.* at 711, 713.

¹²³ See *Lighthouse Cmty. Church of God v. City of Southfield*, No. 05-40220, 2007 WL 30280, at *10 (E.D. Mich. Jan. 3, 2007).

¹²⁴ *Id.* (emphasis added).

The Michigan court concluded that the Supreme Court's reasoning in the *Cutter* case “*can be equally applied to those provisions of RLUIPA involving land use regulations.*”¹²⁵ Incidentally, the court further held that Section 5 of the Fourteenth Amendment gives Congress the power to enact legislation necessary to enforce the First Amendment's religious freedom guarantees—and that RLUIPA is therefore a constitutional enforcement mechanism.¹²⁶ As mentioned earlier, the *Lighthouse* court also noted that “[a]ll circuit courts and almost all district courts which have considered this issue have found that RLUIPA is a constitutional use of congressional power under Section V of the Fourteenth Amendment.”¹²⁷

In 2007, *Westchester Day School v. Village of Mamaroneck* applied the *Lemon* Test, which analyzes the interaction of government and religion, to address the issue of whether RLUIPA violates the Establishment Clause.¹²⁸ In *Westchester*, Defendant Mamaroneck appealed a lower court ruling that permitted Westchester to expand their daycare facility, arguing that the ruling violated the Establishment Clause.¹²⁹ In affirming the lower court's ruling, the court held:

RLUIPA's land use provisions plainly have a secular purpose, that is, the same secular purpose that RLUIPA's institutionalized persons provisions have: to lift government-created burdens on private religious exercise. See *Cutter v. Wilkinson*. Similarly, the principal or primary effect of RLUIPA's land use provisions neither advances nor inhibits religion. As the Supreme Court has explained, a law produces forbidden effects under *Lemon* if “the government itself has advanced religion through its own activities and influence.” *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 337, 107 S. Ct. 2862, 97 L. Ed. 2d 273 (1987). Under RLUIPA, the government itself does not advance religion; all RLUIPA does is permit religious practitioners the free exercise of their religious beliefs without being bur-

¹²⁵ *Id.* (emphasis added).

¹²⁶ *Id.*

¹²⁷ *Id.* at *10; see *Guru Nanak Sikh Soc’y of Yuba City v. Cnty. of Sutter*, 456 F.3d 978, 994–95 (9th Cir. 2006); *Sts. Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 895, 897 (7th Cir. 2005); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1239–40 (11th Cir. 2004); *United States v. Maui Cnty.*, 298 F. Supp. 2d 1010, 1016 (D. Haw. 2003); *Freedom Baptist Church v. Twp. of Middletown*, 204 F. Supp. 2d 857, 874 (E.D. Pa. 2002).

¹²⁸ *Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F.3d 338, 355 (2d Cir. 2007) (“In determining whether a particular law violates the Establishment Clause, which provides in the First Amendment that ‘Congress shall make no law respecting an establishment of religion,’ U.S. CONST. amend. I, we examine the government conduct at issue under the three-prong analysis articulated by the Supreme Court in *Lemon v. Kurtzman*. . . . Under *Lemon*, government action that interacts with religion must: (1) have a secular purpose, (2) have a principal effect that neither advances nor inhibits religion, and (3) not bring about an excessive government entanglement with religion.”) (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971)).

¹²⁹ *Id.* at 343–44, 353.

dened unnecessarily by the government.¹³⁰

This distinction is crucial to understanding RLUIPA's proper application. RLUIPA serves a secular purpose of ensuring discrimination does not occur against religious organizations; it does not by any means promote religion itself.

E. RLUIPA Does Not Violate Federalism

RLUIPA does not violate the principles of federalism, a fact numerous circuit courts have consistently reaffirmed.¹³¹ For example, in *Lighthouse Institute for Evangelism v. City of Long Branch*, the court held that

RLUIPA does not violate the Tenth Amendment. The Tenth Amendment reserves to the States those powers not enumerated in the Constitution. Since Congress enacted RLUIPA pursuant to its power enumerated in the Fourteenth Amendment, by necessity RLUIPA does not violate the Tenth Amendment ... In conclusion, the Court finds that RLUIPA is not unconstitutional."¹³²

The *Lighthouse Institute* court cited numerous other circuit courts that arrived at the same conclusion.¹³³ For example, in *Midrash Sephardi, Inc. v. Town of Surfside*, two synagogues filed a RLUIPA suit against the Town of Surfside for passing a zoning ordinance that forbade churches and synagogues from areas where private clubs and lodges were permitted.¹³⁴ The Town of Surfside alleged that RLUIPA violated the principles of federalism and was not a valid congressional exercise afforded under Section 5 of the Fourteenth Amendment.¹³⁵ In ruling for the synagogue plaintiffs, the court held:

RLUIPA's core policy is not to regulate the states or compel the enforcement of a federal regulatory program, but to protect the exercise of religion, a valid exercise of Congress's § 5 power under the Fourteenth Amendment, which does not run afoul of the Tenth Amendment's protection of the principles of federalism.¹³⁶

¹³⁰ *Id.* at 355 (citation omitted).

¹³¹ See *Lighthouse Cmty. Church of God*, 2007 WL 30280, at *10; *Westchester Day*, 504 F.3d at 355; *Midrash*, 366 F.3d at 1242.

¹³² *Lighthouse Inst. for Evangelism v. City of Long Branch*, 510 F.3d 253, 266 (3d Cir. 2007).

¹³³ *Id.*; see *Midrash*, 366 F.3d at 1242; *Westchester Day*, 280 F. Supp. 2d at 239.

¹³⁴ *Midrash*, 366 F.3d at 1218–19.

¹³⁵ *Midrash*, 366 F.3d at 1242–1243; *Westchester Day*, 280 F. Supp. 2d at 239.

¹³⁶ *Midrash*, 366 F.3d at 1243.

In short, the court held that under RLUIPA, the federal government is not compelling a federal regulatory program, but instead protecting a legitimate federal interest, ensuring uniform religious freedom. Therefore, RLUIPA does not violate the principles of federalism.

F. RLUIPA Is Not a Universal Trump Card for Religious Organizations

As it becomes increasingly clear that RLUIPA is permitted under Section 5 of the Fourteenth Amendment, does not violate the principles of federalism, and does not violate the Establishment Clause, it is also important to note that RLUIPA is not a universal trump card for religious organizations to demand unreasonable zoning exceptions. In fact, courts have consistently applied RLUIPA in a measured form to ensure the precise aforementioned criticisms do not become realities.¹³⁷

For example, in 2008, Maryland's highest court ruled for Baltimore County against a church in a RLUIPA case.¹³⁸ The church, Trinity Assembly of God of Baltimore City, filed suit against Baltimore County after zoning officials rejected Trinity's request to erect a sign substantially larger than the size zoning ordinances permitted.¹³⁹ In ruling for Baltimore County, the court echoed the Board's argument that "[t]o meet the 'substantial burden' standard, the government conduct being challenged must actually inhibit religious activity in a concrete way and cause more than a mere inconvenience."¹⁴⁰ In holding that the government's alleged RLUIPA violation was, in fact, a legal government act, the court held:

In the present case, we hold that the Board correctly assessed the law regarding what constitutes a substantial burden on religious exercise under the RLUIPA. We also hold that the Board properly found that the impediment to Trinity in this case does not rise to the level of a substantial burden....First, Trinity has not been substantially burdened "when the solution to a majority of [its] myriad constraints appears to lie within [its] control"....Second, "[t]he burden on religious practice is not great when the

¹³⁷ See, e.g., *Trinity Assembly of God of Baltimore City, Inc. v. People's Counsel For Baltimore Cnty.*, 962 A.2d 404, 432 (Md. 2008); *San Jose Christian Coll. v City of Morgan Hill*, 360 F.3d 1024, 1036 (9th Cir. 2004); *Civil Liberties for Urban Believers v. City of Chi.*, 342 F.3d 752, 761 (7th Cir. 2003), *reh'g en banc denied*, 2003 U.S. App. LEXIS 24176; *DiLaura v. Ann Arbor Charter Twp.*, 471 F.3d 666, 669 (6th Cir. 2006).

¹³⁸ *Trinity Assembly of God of Baltimore City, Inc. v. People's Counsel For Baltimore Cnty.*, 962 A.2d 404, 432 (Md. 2008).

¹³⁹ *Id.* at 404.

¹⁴⁰ *Id.* at 430-431 n.24.

government action . . . does not restrict current religious practice but rather prevents a change in religious practice”....Moreover, the Board noted also that there was no “evidence to show that church attendance was falling as a result of the fact that there was no large sign to advertise church functions.” Accordingly, substantial evidence supports the Board’s decision that denial of a variance for Trinity’s proposed sign does not impose a substantial burden on Trinity.¹⁴¹

The *Trinity* case is certainly not the exception; it is one of several examples in which the court rejected a RLUIPA claim because the local or state government did nothing more than to enforce a neutral, non-discriminatory zoning provision.¹⁴² In fact, the Sixth, Seventh, and Ninth Circuits have each held RLUIPA inapplicable for the same reason as the *Trinity* court: the challenged land use regulation did not impose a substantial burden on the religious organization in question.¹⁴³

These cases are of particular importance for several reasons. First, they demonstrate that it is possible to enforce local and state government zoning regulations without violating the Free Exercise Clause.¹⁴⁴ Likewise, these cases demonstrate that RLUIPA does not invalidate state and local zoning regulations that are general laws with neutral applicability.¹⁴⁵ Thus, these examples are perhaps the most convincing arguments against assertions that RLUIPA violates the Establishment Clause, because they demonstrate that courts do not blindly validate RLUIPA claims, but do so on a case-by-case basis and only if the claim has objective merit.

IV. CONCLUSION

RLUIPA is a two-pronged act, signed into law in 2000, to ensure local and state governments do not infringe on the religious freedoms of institutionalized persons or religious organizations. Since then, the “institutionalized persons” prong debate has been put to rest, as the Supreme Court unanimously ruled in *Cutter v. Wilkinson* that RLUIPA does not violate the

¹⁴¹ *Id.* at 430 (citing *Christian Gospel Church, Inc. v. City and Cnty. of S.F.*, 896 F.2d 1221, 1224 (9th Cir. 1990), *superseded on other grounds by* 42 U.S.C. § 2000e (applying the Free Exercise Clause)).

¹⁴² *See, e.g.*, *San Jose Christian Coll. v. City of Morgan Hill*, 360 F.3d 1024, 1036 (9th Cir. 2004); *Civil Liberties for Urban Believers v. City of Chi.*, 342 F.3d 752, 761 (7th Cir. 2003), *reh'g en banc denied*, 2003 U.S. App. LEXIS 24176; *DiLaura v. Ann Arbor Charter Twp.*, 471 F.3d 666, 669 (6th Cir. 2006).

¹⁴³ *See San Jose Christian Coll.*, 360 F.3d at 1036; *Civil Liberties*, 342 F.3d at 761; *DiLaura*, 471 F.3d at 669.

¹⁴⁴ *San Jose Christian Coll.*, 360 F.3d at 1036; *Civil Liberties*, 342 F.3d at 761; *DiLaura*, 471 F.3d at 669.

¹⁴⁵ *San Jose Christian Coll.*, 360 F.3d at 1036; *Civil Liberties*, 342 F.3d at 76; *DiLaura*, 471 F.3d at 669.

Establishment Clause. Still, critics assert that at least the land use provision of RLUIPA is an impermissible use of power outside the scope of Section 5 of the Fourteenth Amendment, that it is not permitted among the Enumerated Powers of Congress, that it violates the Establishment Clause, and that it violates the principles of federalism. On the contrary, federal courts have repeatedly and uniformly held that Congress has the power under Section 5 of the Fourteenth Amendment to enforce RLUIPA, that RLUIPA is legitimate under Congress's Enumerated Powers, that RLUIPA does not violate the Establishment Clause, and that RLUIPA does not violate the principles of federalism. Even the most active RLUIPA critics are appreciating these holdings, as the Department of Justice reports that "since June 2006, [it is] aware of only one land-use case and one institutionalized persons case that have even raised RLUIPA's constitutionality as an issue."¹⁴⁶

While critics continue to debate RLUIPA's constitutionality, countless minority religious organizations, particularly American Muslims, serve as living examples of RLUIPA's crucial role in ensuring equal treatment and religious freedom. As anti-Muslim campaigns gain strength, the number of anti-Islam hate groups continue to increase, and open opposition to mosque projects continue, RLUIPA's need and service as a vanguard of religious freedom in America becomes even more apparent. As states continue to consider and pass anti-Shariah laws and elected officials continue to hold anti-Muslim views, RLUIPA only gains more relevance in protecting land use rights.

In short, not only is RLUIPA constitutional, it is also absolutely necessary to counter the "widespread pattern of religious discrimination in [America]" against American Muslims.¹⁴⁷ RLUIPA ensures that the religious freedom principles that our Founding Fathers established in the eighteenth century continue to remain unmolested and at the forefront of American public policy as our nation grows into the twenty-first century.

¹⁴⁶ U.S. Dep't of Justice, *supra* note 36.

¹⁴⁷ *City of Boerne v. Flores*, 117 S.Ct. 2157, 2169 (1997).

Appendix A: State Anti-Shariah/Foreign/Religious Law Statutes

State	Law	Legislative Status*	Banning What?
Alabama	SB 62	Active	Shariah Law
Alaska	HB 88	Active	Foreign Law
Arizona	HB 2582	Active	All Religious Law
Arkansas	SB 97	Dead	Foreign Law
Florida	SB 1294	Dead	Foreign Law
Georgia	HB 45	Active	Foreign Law
Indiana	HB 1078	Active	Foreign Law
Indiana	SB 530	Active	Foreign Law
Kansas	HB 2087	Enacted	Foreign Law
Louisiana	Act 714	Enacted	Foreign Law
Michigan	HB 4769	Active	Foreign Law
Mississippi	HB 301	Dead	Shariah Law
Missouri	HB 708	Active	Foreign Law
Nebraska	LB 647	Active	Foreign Law
North Carolina	HB 640	Active	Foreign Law
Oklahoma	SQ 755	Enacted / Suspended	Shariah Law
Pennsylvania	HB 2029	Active	Foreign Law
South Carolina	S 444	Active	Foreign Law
South Dakota	HRJ 1004	Active	Religious Law

Tennessee	SB 1028	Enacted	Shariah Law
Texas	HJR 57	Dead	Religious Law
Utah	N/A	Withdrawn	Shariah Law
Virginia	HB 631	Active	Foreign Law
Wyoming	HJR 8	Active	Shariah Law

*Dead = Proposal did not become law and is not active in the legislative process;

Active = Proposal is progressing through the legislature but not a law yet (may mean stagnant);

Enacted = Proposal passed both state legislatures, was signed by the governor, and is current state law