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CHRISTIAN PARKING, HINDU PARKING: APPLYING ESTABLISHED CIVIL RIGHTS PRINCIPLES TO RLUIPA'S NONDISCRIMINATION PROVISION

*Roman P. Storzer and Blair Lazarus Storzer****

I. INTRODUCTION

“The right to equal protection of the laws, in the exercise of those freedoms of speech and religion protected by the First and Fourteenth Amendments, has a firmer foundation than the whims or personal opinions of a local governing body.”¹

Twelve years after the passage of the Religious Land Use and Institutionalized Persons Act of 2000 (“RLUIPA” or the “Act”), there is little clarity available for practitioners or courts in applying the “nondiscrimination” provision set forth in the Act:

NONDISCRIMINATION - 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.²

While there is ample evidence of discrimination—both overt and surreptitious—violative of RLUIPA, some commentators continue to argue that religious groups simply do not face discrimination during the land use regulation process and that stakeholders in such regulation are only concerned with legitimate land use issues.³ They are plainly wrong. While there is no

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¹ *Niemotko v. Maryland*, 340 U.S. 268, 272 (1951).

² The Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc(b)(2) (2006).

³ See, e.g., Stephen Clowney, Comment, *An Empirical Look at Churches in the Zoning Process*, 116 *YALE L.J.* 859, 863 (2007) (“[T]his Comment questions the prevailing belief that zoning ‘has become the most widespread obstacle to the free exercise of religion.’”); Diane K. Hook, Comment, *The Religious Land Use and Institutionalized Persons Act of 2000: Congress’ New Twist on “Speak Softly and Carry a Big Stick,”* 34 *URB. LAW.* 829, 851 (2002) (“[I]t is difficult to accept that there is a pervasive

question that local zoning boards and other regulatory bodies are often motivated by sincere concerns about matters such as traffic, environmental protection, and adherence to building codes, it is also true that such reasons are often used as a façade for invidious discrimination.⁴ Also, it is far more frequent that minority faiths and those that are unfamiliar to local residents suffer from such intolerance.⁵

Land use regulation is a “highly individualized and discretionary process.”⁶ Zoning laws “often restrict...religious assemblies to designated districts and frequently require...that religious assemblies complete a conditional use application procedure.”⁷ In such cases, a religious organization seeking to construct a house of worship must meet with the approval of government actors weighing very subjective⁸ criteria, such as whether a “proposed use or structure is in harmony with the general purpose and intent of [zoning] regulations” given the consideration of a list of factors, after which a necessary permit *may* be granted.⁹ Similarly, procedures for

and widespread discrimination against religious entities attempting to build, buy, or rent adequate space in which to exercise their faith.”); Jess Bravin, *Church Turns to Higher Authority in Zoning Battle*, WALL ST. J., Nov. 16, 2011 (quoting Marci Hamilton) (“In cases like Boerne and San Leandro, ‘there’s no discrimination—it’s just a fight over zoning.’”), available at <http://online.wsj.com/article/SB10001424052970204450804576623053812974230.html>; Marci Hamilton, *The Federal Government’s Intervention on Behalf of Religious Entities in Local Land Use Disputes: Why It’s a Terrible Idea*, FINDLAW’S WRIT (Nov. 6, 2003), <http://writ.news.findlaw.com/hamilton/20031106.html>. But see Matthew Baker, Comment, *RLUIPA and Eminent Domain: Probing the Boundaries of Religious Land Use Protection*, 2008 BYU L. REV. 1213, 1240 (2008) (“[m]ost of the criticism strikes at the fringes, and not at the heart, of the claims made during the congressional hearings.”).

⁴ See, e.g., *Bikur Cholim, Inc. v. Vill. of Suffern*, 664 F. Supp. 2d 267, 282–84 (S.D.N.Y. 2009) (member of the Zoning Board, which had unanimously denied a variance application, testified that “certain explanations for the denial of the application included in the [explanation] were not the actual reasons for the Zoning Board’s decision.”).

⁵ 146 CONG. REC. S7774-01 (daily ed. July 27, 2000) (joint statement of Sen. Hatch and Sen. Kennedy).

⁶ *Third Church of Christ v. City of New York*, 617 F. Supp. 2d 201, 214 (S.D.N.Y. 2008), *aff’d* 626 F.3d 667 (2d Cir. 2010).

⁷ *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004).

⁸ Although outside the scope of this article, such criteria have been held to be unconstitutional prior restraints as they “invest excessive discretion in the hands of the land use board.” See *St. Benedict Ctr. v. Town of Richmond*, No 07-010, slip op. at 18, 2009 WL 8635926, at 7 (N.H. Super. Oct. 23, 2009) (on file with authors); see also *Hollywood Cmty. Synagogue, Inc. v. City of Hollywood*, 436 F. Supp. 2d 1325, 1336 (S.D. Fla. 2006) (holding that the city’s requirement that places of worship obtain a special exception permit constituted a prior restraint because it lacked narrow, precise, and objective standards to guide officials).

⁹ The zoning regulations at issue in *Hollywood Community Synagogue, Inc. v. City of Hollywood*, 436 F. Supp. 2d 1325 (S.D. Fla. 2006) are illustrative. The statute provided that the zoning board may grant a special permit “if it makes all of the following findings: (a) That the use is compatible with the existing natural environment and other properties within the vicinity; (b) That there will be adequate provision for safe traffic movement, both vehicular and pedestrian, both internal to the use and in the area which will serve the use; (c) That there are adequate setbacks, buffering, and general amenities in order to control any adverse effects of noise, light, dust and other potential nuisances; and (d) That the land area is

special permits,¹⁰ variances,¹¹ rezoning¹² or text amendments are also discretionary.¹³ Municipalities may also pass ordinances targeted at pending applications to ensure that disfavored worship facilities cannot be built.¹⁴

RLUIPA was designed not only to protect individuals and faith groups that are targeted directly for their beliefs, but also as a shield for religious groups suffering from crafty regulators and community opponents who have learned to couch their opposition in more subtle terms.¹⁵ It is “the latest of long-running congressional efforts to accord religious exercise heightened protection from government-imposed burdens.”¹⁶ Congress implemented RLUIPA as a response to the Supreme Court’s decisions in *Employment Division, Department of Human Resources of Oregon v. Smith*¹⁷ and *City of Boerne v. Flores*, in which the Court held that Congress had overstepped its authority when it enacted the Religious Freedom Restora-

sufficient, appropriate and adequate for the use as proposed.” *Id.* at 1334. Even if an applicant was able to obtain favorable findings for each of these broad categories, the zoning board could still impose conditions that “are necessary to further the purpose of the zoning district or compatibility with other property within the vicinity, or deny the special exception.” *Id.* at 1334.

¹⁰ See *Vision Church v. Vill. of Long Grove*, 468 F.3d 975, 990 (7th Cir. 2006) (discussing effect of officials’ discretion in issuing special use permits on zoning regulations).

¹¹ See *Shelton v. City of College Station*, 754 F.2d 1251, 1258 (5th Cir. 1985) (discussing disputed factual issue of whether zoning officials were shielded from individual liability for discretionary function of administering the city’s zoning-variance policy).

¹² See *Jacobs, Visconsi & Jacobs, Co. v. City of Lawrence*, 927 F.2d 1111, 1117 (10th Cir. 1991) (“The classification of the rezoning application process as quasi-judicial by the Kansas Supreme Court, however, does not further appellants’ expectation of a property interest or otherwise place substantive limitations on official discretion.”).

¹³ See *Richardson v. Twp. of Brady*, 218 F.3d 508, 517 (6th Cir. 2000) (“If [Plaintiff’s] claim is that he was deprived of a text amendment or “interpretation” without due process, he cannot show that he has a protected property interest in such an amendment. Simply put, [Plaintiff] can have no legitimate claim of entitlement to a discretionary decision.”).

¹⁴ See, e.g., *Reaching Hearts Int’l, Inc. v. Prince George’s Cnty.*, 584 F. Supp. 2d 766, 783 (D. Md. 2008), *aff’d*, 68 Fed. App’x 370 (4th Cir. 2010) (City Council passed new legislation less than two months after denying group’s application, which rendered it impossible for the group to construct a church or school on its own property); *Moxley v. Town of Walkersville*, 601 F. Supp. 2d 648, 656 (D. Md. 2009) (after a Muslim group announced plans to purchase land in an agricultural zone, the county commissioners passed an ordinance excluding all houses of worship from the agricultural zone, even by way of a special exception).

¹⁵ See 146 CONG. REC. S7774-01 (daily ed. July 27, 2000) (joint statement of Sen. Hatch and Sen. Kennedy) (“Churches in general, and new, small, or unfamiliar churches in particular, are frequently discriminated against on the face of zoning codes and also in the highly individualized and discretionary processes of land use regulation.”); Shelley Ross Saxer, *Zoning Away First Amendment Rights*, 53 WASH. U. J. URB. & CONTEMP. L. 1, 8 n. 34 (1998) (noting that “[c]lashes between zoning authorities and religious groups commonly have involved Jehovah’s Witnesses, Orthodox Jews, and Hari Krishnas”).

¹⁶ *Cutter v. Wilkinson*, 544 U.S. 709, 714 (2005). For a thorough history of the RLUIPA, see Roman P. Storzer & Anthony R. Picarello, Jr., *The Religious Land Use and Institutionalized Persons Act of 2000: A Constitutional Response to Unconstitutional Zoning Practices*, 9 GEO. MASON L. REV. 929, 931-44 (2001).

¹⁷ *Employment Div. v. Smith*, 494 U.S. 872, 890 (1990).

tion Act of 1993 (“RFRA”).¹⁸ RLUIPA has weathered judicial scrutiny more successfully than RFRA; the Supreme Court held that the “institutionalized persons” provisions of RLUIPA¹⁹ were a constitutional exercise of congressional power,²⁰ and the lower courts have unanimously upheld the land use provisions.²¹

This article is divided into three parts. First, it explores certain issues inherent in a Nondiscrimination claim, including how the Nondiscrimination provision has been mistakenly conflated with other RLUIPA land use provisions, whether a showing of direct hostility toward a particular faith by governmental actors is required, and what might qualify as adequate comparators in a case where a claimant asserts that it was treated differently and worse than similarly situated applicants. Second, the article proposes application of the reasoning in *McDonnell Douglas Corp. v. Green*²² to some Nondiscrimination claims. This would be achieved by burden shifting; after the plaintiff establishes a prima facie case of dissimilar treatment, triggering a presumption of discrimination, the burden would shift to the defendant to show a nondiscriminatory motive for its actions. Finally, the article provides different real-world examples and applies the suggested solution to the various contexts in which a Nondiscrimination claim arises.

II. BACKGROUND AND APPLICATION OF RLUIPA’S NONDISCRIMINATION PROVISION

RLUIPA’s land use provisions²³ set forth five grounds upon which a cause of action may be based: a land use regulation that (1) substantially burdens religious exercise without being the least restrictive means of achieving a compelling governmental interest (the “Substantial Burdens” provision);²⁴ (2) treats a religious assembly or institution on less than equal

¹⁸ *City of Boerne v. Flores*, 521 U.S. 507, 534–36 (1997).

¹⁹ 42 U.S.C. § 2000cc et seq. (2006).

²⁰ *Cutter*, 544 U.S. at 720.

²¹ See, e.g., *World Outreach Conf. Ctr. v. City of Chi.*, 591 F.3d 531, 534 (7th Cir. 2009) (expressly finding “substantial burden” provision constitutional); *Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F.3d 338, 354–56 (2d Cir. 2007) (holding that RLUIPA does not violate either the Tenth Amendment or the Establishment Clause); *Guru Nanak Sikh Soc’y of Yuba City v. Cnty. of Sutter*, 456 F.3d 978, 981 (9th Cir. 2006) (“[W]e find the relevant portion of RLUIPA is a permissible exercise of Congress’s remedial power under Section Five of the Fourteenth Amendment.”).

²² *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

²³ 42 U.S.C. § 2000cc (2006).

²⁴ *Id.* § 2000cc(a)(1). The Substantial Burdens provision is limited in application to circumstances in which the substantial burden “is imposed in a program or activity that receives Federal financial assistance,” where the substantial burden (or its removal) affects “commerce with foreign nations, among the several States, or with Indian tribes,” or where the substantial burden is “imposed in the implementation

terms than a nonreligious assembly or institution (the “Equal Terms” provision);²⁵ (3) “discriminates against any assembly or institution on the basis of religion or religious denomination” (the “Nondiscrimination” provision);²⁶ (4) totally excludes religious assemblies from a jurisdiction (the “Total Exclusion” provision);²⁷ or, (5) unreasonably limits religious assemblies within a jurisdiction (the “Unreasonable Limitations” provision).²⁸ Significantly, one of RLUIPA’s rules of construction provides that the statute “shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of the [Act] and the Constitution.”²⁹

“Land use regulation” can mean either the zoning or landmarking laws to which a plaintiff may be subject if using the property for religious exercise.³⁰ RLUIPA applies to both the “impos[ition]” and “implement[ation]” of a land use regulation.³¹ In practical terms, this provides a plaintiff with the opportunity to challenge, for example, a burdensome law (*e.g.*, a zoning provision that requires a five acre minimum lot size to construct a place of worship) or a burdensome application of a law (*e.g.*, denial of a special use permit to construct a place of worship because of a standardless determination by a zoning board that the lot was “too small” to house a place of worship).

While there is a developing standard of law for claims brought under other provisions of RLUIPA, no prevailing standard has yet been adopted for the Nondiscrimination provision. Furthermore, while RLUIPA was passed in great part to overcome discrimination against minority faiths in the zoning process, there are very few decisions regarding this provision. No prevailing standards for pleading or proving a Nondiscrimination claim have emerged, to the detriment of both religious groups who face discrimination in the same forms that have long been recognized in other civil rights cases, and to local governments facing unknown liability for their unequal treatment of religious land use applicants. Without a guiding standard, courts and practitioners have treated this provision inconsistently.

of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved.” *Id.* § 2000cc(a)(2).

²⁵ *Id.* § 2000cc(b)(1).

²⁶ *Id.* § 2000cc(b)(2).

²⁷ *Id.* § 2000cc(b)(3)(A).

²⁸ *Id.* § 2000cc(b)(3)(B).

²⁹ *Id.* § 2000cc-3(g).

³⁰ *See id.* § 2000cc-5(7)(B) (“The use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose.”)

³¹ *Id.* § 2000cc(a)(1).

A. Legislative History and Current Examples of Discrimination

The Department of Justice has recently reported that, since September 11, 2001, its Civil Rights Division has “opened more than 28 matters involving efforts to interfere with the construction of mosques and Islamic centers.”³² One example of a story that is distressingly familiar to RLUIPA practitioners is that of an Islamic group in Minnesota who sought approval to construct a religious center.³³ Reportedly, the group worked with city officials for months and received approval from the city’s Planning Commission, only to have the City Council reject their plans.³⁴ Along the way, the group attended public hearings on its proposal, during which it had to hear its religion called “evil” by members of the community.³⁵

Congress considered evidence of such overt discrimination, as well as more subtle forms, when it enacted RLUIPA.³⁶ The Subcommittee on the Constitution of the House Committee on the Judiciary conducted nine separate hearings, during which lawyers involved in these types of cases, researchers, and religious leaders provided testimony on the discrimination faced by religious groups.³⁷ In its report, the Committee on the Judiciary quoted one practitioner who testified that “[t]he 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.”³⁸ The Committee also cited one case where “a Mormon church was denied a permit to use property which had formerly been used as a church.”³⁹ The location was near three other large churches.⁴⁰ After the Mormon church purchased the property and applied to use it, “[t]he city denied the permit on the basis that a temple would not be ‘in the best interests of and promote the public health, safety, morals, convenience, order, prosperity, and general welfare of the City’ and cit[ed] its desire to have no more churches in the community.”⁴¹

³² U.S. DEP’T OF JUSTICE, CONFRONTING DISCRIMINATION IN THE POST-9/11 ERA: CHALLENGES AND OPPORTUNITIES TEN YEARS LATER 3 (2011), *available at* http://www.justice.gov/crt/publications/post911/post911summit_report_2012-04.pdf.

³³ See Rose French, *St. Anthony City Council Rejects Islamic Center Plan*, MINN. STAR TRIBUNE, June 13, 2012, *available at* <http://www.startribune.com/local/north/158785005.html>

³⁴ *Id.*

³⁵ *Id.*

³⁶ H.R. REP. NO. 106-219, at 17 (1999).

³⁷ H.R. REP. NO. 106-219, at 17.

³⁸ H.R. REP. NO. 106-219, at 19.

³⁹ H.R. REP. NO. 106-219, at 22.

⁴⁰ H.R. REP. NO. 106-219, at 22.

⁴¹ H.R. REP. NO. 106-219, at 22.

RLUIPA was enacted against this backdrop, with broad, bi-partisan support. In the “Need for Legislation” section of the Joint Statement in support of the bill, Senators Hatch and Kennedy cited “frequent discrimination” faced by religious groups.⁴² They noted that “[s]ometimes, zoning board members or neighborhood residents explicitly offer race or religion as the reason to exclude a proposed church, especially in cases of black churches and Jewish shuls and synagogues.”⁴³ Further, “the codes permit churches only with individualized permission from the zoning board, and zoning boards use that authority in discriminatory ways.”⁴⁴

Courts have also recognized the “vulnerability of religious institutions—especially those that are not affiliated with the mainstream Protestant sects or the Roman Catholic Church—to subtle forms of discrimination when, as in the case of the grant or denial of zoning variances, a state delegates essentially standardless discretion to nonprofessionals operating without procedural safeguards.”⁴⁵ One court reviewing the legislative history of RLUIPA’s land use provisions noted: “Congress compiled what it considered to be ‘massive evidence’ of widespread discrimination against religious institutions by state and local officials regarding land-use decisions, and concluded that often these decisions frustrated a core aspect of religious exercise – the ability to worship.”⁴⁶ In this context, there can be no doubt about the existence of the discrimination that RLUIPA was intended to help remedy.

In its report on the draft version of RLUIPA in the House of Representatives, the House Committee on the Judiciary discussed testimony regarding a study “finding that Jews, small Christian denominations, and nondenominational churches are vastly over represented in reported church zoning cases.”⁴⁷ According to the study, “[r]eligious groups accounting for only 9% of the population account for 50% of the reported litigation involving location of churches, and 34% of the reported litigation involving accessory uses at existing churches.”⁴⁸ Once unaffiliated and nondenominational

⁴² 146 CONG. REC. S7774 (Jul. 27, 2000) (joint statement of Sens. Hatch and Kennedy).

⁴³ 146 CONG. REC. S7774.

⁴⁴ 146 CONG. REC. S7774.

⁴⁵ *Sts. Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 895, 900 (7th Cir. 2005).

⁴⁶ *Rocky Mtn. Christian Church v. Bd. of Cnty. Comm’rs of Boulder Cnty.*, 612 F. Supp. 2d 1163, 1185 (D. Colo. 2009), *aff’d*, 613 F.3d 1229 (10th Cir. 2010), *cert denied*, 131 S. Ct. 978 (2011).

⁴⁷ H.R. REP. NO. 106-219, at 20 (1999); *see also* Von G. Keetch & Matthew K. Richards, *The Need for Legislation to Enshrine Free Exercise in the Land Use Context*, 32 U.C. DAVIS L. REV. 725 (1999) (further discussing the study referenced by the House Committee on the Judiciary).

⁴⁸ H.R. REP. NO. 106-219, at 21.

churches are added, the figure swells to “69% of the reported location cases, and 51% of the reported accessory use cases.”⁴⁹ After reviewing the statistical and anecdotal data, the study’s authors concluded that in the pre-RLUIPA world, “the current status of the law leaves no balance at all, vesting full decision-making power as to these land use matters in the hands of locally elected officials and demoting the constitutionally protected right to freely exercise religion.”⁵⁰

Muslims have suffered disproportionately from bias in zoning proceedings nationwide.⁵¹ In *Albanian Associated Fund v. Township of Wayne*, the Township initiated condemnation proceedings against a Muslim group’s property purportedly based on environmental concerns, but made a deal to accommodate a Catholic hospital situated on environmentally sensitive land.⁵² In *Moxley v. Town of Walkersville*, a town commissioner was alleged to have conspired with local residents, advising them on how to best oppose a Muslim group’s zoning petition at public hearings, “including refraining from using ‘terms like Muslim, those individuals, religion etc.,’ and how many people should testify.”⁵³ The Islamic Center of Murfreesboro was sued by neighbors seeking to block mosque construction and also had to endure vandalism, arson, and bomb threats during the construction of the mosque.⁵⁴ Orthodox Jews, Hindus, and other minority religions continue to raise claims under RLUIPA at a disproportionate rate.⁵⁵

⁴⁹ *Id.*

⁵⁰ Keetch, *supra* note 47, at 734–35.

⁵¹ Eric Treene, *RLUIPA and Mosques, Enforcing a Fundamental Right in Challenging Times*, 10 FIRST AMENDMENT L. REV. 330, 347-48 (2011) (Describing incidents of anti-Muslim hate crimes and noting, “[t]he anti-Muslim bias in cases [the Department of Justice] ha[s] handled is often overt.”).

⁵² *Albanian Associated Fund v. Twp. of Wayne Planning Bd.*, No. 06-cv-3217, 2007 WL 2904194, at *11 (D.N.J. Oct. 1, 2007).

⁵³ *Moxley v. Town of Walkersville*, 601 F. Supp. 2d 648, 654 (D. Md. 2009).

⁵⁴ Robbie Brown & Christine Hauser, *After a Struggle, Mosque Opens in Tennessee*, N.Y. TIMES, Aug. 10, 2012, at A9; Press Release, Becket Fund for Religious Liberty, Mosque Free to Open, a Win for all Religious Houses of Worship (Aug. 10, 2012), available at <http://www.becketfund.org/tennessee-mosque-opens-in-time-for-ramadan>; see also *Al Salaam Mosque Found. v. City of Palos Heights*, No. 00-C-4596, 2001 WL 204772, at *2 (N.D. Ill. Mar. 1, 2001) (The city frustrated a Muslim group seeking to purchase existing church property by subjecting the group to worse treatment than others. Further, the Zoning Committee “indicated to [the plaintiff’s representative] that it was their opinion that a mosque was not the same as a church and therefore, even if the special use ran with the land, it was possible that using the property as a mosque was not permitted.”).

⁵⁵ See *LeBlanc-Sternberg v. Fletcher*, 67 F.3d 412, 434-35 (2d Cir. 1995) (village’s zoning code limiting the use of Orthodox rabbis’ homes for prayer services was motivated by anti-Semitism); *United States v. Vill. of Airmont*, No. 05-5520, slip op. at 2-4 (S.D.N.Y. Nov. 12, 2008) (Orthodox Jewish group seeking to build a yeshiva challenged a village’s complete ban on boarding schools); *Reaching Hearts Int’l Inc. v. Prince George’s Cnty.*, 584 F. Supp. 2d 766, 772 (D. Md. 2008), *aff’d*, 68 Fed. Appx. 370 (4th Cir. 2010) (Seventh-Day Adventist group sought to build church); *Adhi Parasakthi Charitable, Med., Educ., & Cultural Soc’y of N. Am. v. Twp of W. Pikeland*, 721 F. Supp. 2d 361, 869 (E.D. Pa.

While successful challenges to targeted zoning actions tend to be litigated under the Substantial Burdens provision of RLUIPA, the decisions themselves clearly indicate that the treatment of these religious applicants was so poor that the applications could have established prima facie Nondiscrimination claims. For example, in *Westchester Day School*, an Orthodox Jewish day school was forced to commence two separate RLUIPA lawsuits to obtain the permit to build a gymnasium.⁵⁶ The Second Circuit noted that “[t]he arbitrary application of laws to religious organizations may reflect bias or discrimination against religion.”⁵⁷ Similarly, in *Guru Nanak Society of Yuba City v. County of Sutter*, the Ninth Circuit reviewed the religious group’s two denied applications and conditions imposed by the zoning board, concluding “the history behind Guru Nanak’s two CUP application processes, and the reasons given for ultimately denying these applications, to a significantly great extent lessened the possibility that future CUP applications would be successful.”⁵⁸ In *Saints Constantine and Helen Greek Orthodox Church, Inc. v. City of New Berlin*, the Seventh Circuit found that “repeated legal errors made by the City’s officials cast doubt on their good faith.”⁵⁹ In *Fortress Bible Church v. Feiner*, “[g]iven the overwhelming evidence of Defendants’ intentional delay, hostility, and bias toward the Church’s application, the Court finds that . . . the Church’s religious exercise was substantially burdened by the Town’s arbitrary and unlawful denial of its application.”⁶⁰

B. Problems with the Application of the Nondiscrimination Provision

Inconsistency of application and lack of concrete standards contribute to the dearth of Nondiscrimination RLUIPA claims.⁶¹ Problems in its applica-

2010) (Hindu group sought to construct worship facility); *Int’l Church of the Foursquare Gospel v. City of San Leandro*, 673 F.3d 1059 (9th Cir. 2011) (Pentecostal church sought to construct worship facility); *Church of Scientology of Ga., Inc. v. City of Sandy Springs, Ga.*, 843 F. Supp. 2d 1328, 1335 (N.D. Ga. 2012) (Scientologists sought to build worship and education center); *Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F.3d 338, 354 (2d Cir. 2007) (Orthodox Jewish school sought to build expansion); *Guru Nanak Sikh Soc’y of Yuba City v. Cnty. of Sutter*, 456 F.3d 978, 981-82 (9th Cir. 2006) (Sikh group sought to build worship facility); *E. End Eruv Ass’n, Inc. v. Vill. of Westhampton Beach*, 828 F. Supp. 2d 526, 530 (E.D.N.Y. 2011) (Orthodox Jewish group sought to construct *eruv* within Village).

⁵⁶ *Westchester Day Sch.*, 504 F.3d at 346.

⁵⁷ *Id.* at 350.

⁵⁸ *Guru Nanak Sikh Soc’y of Yuba City*, 456 F.3d at 989.

⁵⁹ *Sts. Constantine & Helen Greek Orthodox Church v. City of New Berlin*, 396 F.3d 895, 899 (7th Cir. 2005).

⁶⁰ *Fortress Bible Church v. Feiner*, 734 F. Supp. 2d 409, 503 (S.D.N.Y. 2010).

⁶¹ *See Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 406 F. Supp. 2d 507, 516 (D.N.J. 2005), *rev’d in part*, 510 F.3d 253 (3d Cir. 2007).

tion include both issues of statutory interpretation and more systemic problems with respect to the assumptions and standards used in applying the statute. The Nondiscrimination provision “is even less clear than the meaning of the ‘substantial burden’ provision.”⁶² Sometimes, the provision is inexplicably ignored outright.⁶³

1. Conflating the Nondiscrimination and Equal Terms Provisions

RLUIPA contains two different provisions relating specifically to discriminatory laws or conduct: the Nondiscrimination and the Equal Terms provisions. While the former addresses discrimination on the basis of religion or religious denomination,⁶⁴ the latter speaks to unequal treatment between religious and nonreligious land uses.⁶⁵ Yet, the two provisions are sometimes conflated. In one early case, the Seventh Circuit analyzed whether church uses were treated differently from nonreligious uses under the auspices of a Nondiscrimination claim.⁶⁶ These types of claims are now widely understood to fall under the Equal Terms provision.⁶⁷ More recently, in *Church of Scientology of Georgia v. City of Sandy Springs*, the court noted that “[t]he parties treat RLUIPA’s Nondiscrimination provision as a subset of the Equal Terms provision”⁶⁸ Likewise, in *Roman Catholic Bishop of Springfield v. City of Springfield*, the court observed that the “[p]laintiff lumps this violation into the same count . . . as its Equal Terms argument and makes no attempt to distinguish these provisions.”⁶⁹ Treating the two sections as one violates the basic principles of statutory construction: the Equal Terms provision and Nondiscrimination provision are listed separately.⁷⁰ The Seventh Circuit has recognized that “each of RLUIPA’s

⁶² *Guru Nanak Sikh Soc’y of Yuba City v. Cnty. of Sutter*, 326 F. Supp. 2d 1140, 1154 (E.D. Cal. 2003), *aff’d*, 456 F.3d 978 (9th Cir. 2006).

⁶³ *See, e.g., Great Lakes Soc’y v. Georgetown Charter Twp.*, 761 N.W. 2d 371, 389 n. 22 (Mich. Ct. App. 2008) (“In response, GLS goes to great lengths to describe the religious hostility, animus, and discriminatory intent of various township officials. All of that argument applies to the decision that GLS is not a church, however, so it is inapposite to this Court’s review of GLS’s claims that its constitutional rights were violated with respect to the variance decision.”).

⁶⁴ 42 U.S.C. § 2000cc(b)(2) (2006).

⁶⁵ *Id.* § 2000cc(b)(1) (2006).

⁶⁶ *Civil Liberties for Urban Believers v. City of Chi.*, 342 F.3d 752, 762 (7th Cir. 2003).

⁶⁷ *See* 42 U.S.C. § 2000cc(b)(1).

⁶⁸ *Church of Scientology of Ga., Inc. v. City of Sandy Springs*, 843 F. Supp. 2d 1328, 1360 (N.D. Ga. 2012).

⁶⁹ *Roman Catholic Bishop of Springfield v. City of Springfield*, 760 F. Supp. 2d 172, 191 (D. Mass. 2011).

⁷⁰ *See Williams v. Taylor*, 529 U.S. 362, 364 (2000) (“In light of the cardinal principle of statutory construction that courts must give effect, if possible, to every clause and word of a statute, this Court must

land-use subsections captures a distinct kind of free-exercise harm and must be given its own force and effect.”⁷¹ Clarity as to the type of claims alleged in a RLUIPA suit is necessary.

2. Conflating the Nondiscrimination and Substantial Burdens Provisions

Section 2000cc(a) of RLUIPA states:

(a) SUBSTANTIAL BURDENS-

(1) GENERAL RULE- No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution--

- (A) is in furtherance of a compelling governmental interest; and
- (B) is the least restrictive means of furthering that compelling governmental interest.⁷²

Although the application of the Substantial Burdens provision has its own set of pitfalls,⁷³ it is beyond the scope of this article. One court has recognized that “[c]ourts disagree over whether section 2000cc(b) is dependent on section 2000cc(a).”⁷⁴

However, the structure of the statute clearly indicates that a Substantial Burdens violation may occur even where a zoning law or its application is neutral with respect to the religious entity, and a Nondiscrimination violation is subject to neither the “substantial burden” nor strict scrutiny analysis.⁷⁵ For example, a zoning law that charged Christian churches \$100 for a

give independent meaning to both [clauses of the statute at issue].”); *United States v. Menasche*, 348 U.S. 528, 538–39 (1955) (“It is our duty ‘to give effect, if possible, to every clause and word of a statute, rather than to emasculate an entire section.’”).

⁷¹ *River of Life Kingdom Ministries v. Vill. of Hazel Crest, Ill.*, 611 F.3d 367, 382 (7th Cir. 2010) (en banc).

⁷² 42 U.S.C. § 2000cc(a)(1) (2006). Significantly, here interstate commerce is affected by the burden or removal of the burden, the Substantial Burdens provision applies “even if the burden results from a rule of general applicability; . . .” § 2000cc(a)(2)(B).

⁷³ See generally Jason Z. Pesick, *RLUIPA: What's the Use?*, 17 MICH. J. RACE & L. 359 (2012); Noelle V. Crisalli, Note, *Civil Liberties for Urban Believers v. City of Chicago: A Defining Case for the Substantial Burden Test Under the Religious Land Use and Institutionalized Persons Act*, 23 PACE ENVTL. L. REV. 263 (2006).

⁷⁴ *United States v. Vill. of Airmont*, No. 05-5520, slip opinion at 16 n. 11 (S.D.N.Y. Nov. 12, 2008) (on file with authors) (finding it unnecessary to resolve the issue “because the Government had pled sufficient facts for this Court to allow its substantial burden claim to go forward”).

⁷⁵ Cf. *Tenafly Eruv Ass’n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 165 (3d Cir. 2002) (“[I]f the law is not neutral (i.e., if it discriminates against religiously motivated conduct) . . . strict scrutiny applies and the burden on religious conduct violates the Free Exercise Clause unless it is narrowly tailored to ad-

permit application but Jewish synagogues \$150 would clearly violate Section 2000cc(b)(2) by discriminating on the basis of religion even though Section 2000cc(a) may not be violated because the payment of an additional fifty dollars could be said not to substantially burden religious exercise. Similarly, a zoning law that prohibited any place of worship from exceeding 10,000 square feet in floor space could substantially burden religious exercise, even if it applied neutrally to all religions and thus it would not violate the Nondiscrimination provision.

Therefore, although the principles underpinning both sections are intertwined,⁷⁶ they are distinct concepts requiring separate analyses. However, some courts have required plaintiffs to show that their worship has been substantially burdened in order to reach Subsection (b) claims. In *Lighthouse Institute for Evangelism v. City of Long Branch*, the district court's erroneously narrow reading of RLUIPA led it to require that RLUIPA plaintiffs show a substantial burden in order to reach the merits of a claim brought under Subsection (b).⁷⁷ The Third Circuit explicitly reversed the lower court on this point, noting that "[s]ince Congress evidently knew how to require a showing of a substantial burden, it must have intended not to do so in the Equal Terms provision."⁷⁸

Other courts have applied the strict scrutiny analysis to a Subsection (b) claim.⁷⁹ The Ninth Circuit recently rejected this approach:

Both because the language of the Equal Terms provision does not allow for it, and because it would violate the "broad construction" provision, we cannot accept the notion that a "compelling governmental interest" is an exception to the

vance a compelling government interest.").

⁷⁶ See *Sts. Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 895, 900 (7th Cir. 2005) ("On this construal, the 'substantial burden' provision backstops the explicit prohibition of religious discrimination in the later section of the Act, much as the disparate-impact theory of employment discrimination backstops the prohibition of intentional discrimination.").

⁷⁷ *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 406 F. Supp. 2d 507, 519 (D.N.J. 2005) ("As such, plaintiffs' failure to demonstrate a substantial burden under Section (a) is fatal to his claims under Section (b)."); *rev'd*, *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 213, 262-64 (3d Cir. 2007); see also *Vineyard Christian Fellowship of Evanston, Inc. v. City of Evanston*, 250 F. Supp. 2d 961, 992-93 (N.D. Ill. 2003) (explaining that Section 2000cc(b) should be read as a subset of Section 2000cc(a)).

⁷⁸ See *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 262-63 (3d Cir. 2007), *cert denied*, 553 U.S. 1065 (2008); cf. *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 165 (3d Cir. 2002) ("[I]f the law is not neutral (*i.e.*, if it discriminates against religiously motivated conduct) . . . strict scrutiny applies and the burden on religious conduct violates the Free Exercise Clause unless it is narrowly tailored to advance a compelling government interest.").

⁷⁹ See *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1232 (11th Cir. 2004) (holding that a § 2000cc(b) violation "must undergo strict scrutiny"); see also *Rocky Mountain Christian Church v. Bd. of Cnty. Comm'rs*, 613 F.3d 1229, 1237 (10th Cir. 2010) ("Other circuits disagree whether RLUIPA implicitly includes an affirmative defense.").

Equal Terms provision, or that the church has the burden of proving a “substantial burden” under the Equal Terms provision.⁸⁰

Similarly, in *Adhi Parasakthi Charitable, Medical, Educational, and Cultural Society of North America v. Township of West Pikeland*, the plaintiff asserted claims under each of RLUIPA’s five land use provisions.⁸¹ The Eastern District of Pennsylvania held that, “[i]mportantly, there is no ‘substantial burden’ requirement under the discrimination path; any government discrimination against religion will implicate the Free Exercise clause’s protection.”⁸² As the Nondiscrimination provision is located directly after the Equal Terms provision in the same section of the statute, it should likewise not be subject to the substantial burden or strict scrutiny analyses. It “is operatively independent of the jurisdictional prerequisites of [2000cc(a)] . . . Plaintiffs need not allege a substantial burden to state claims under RLUIPA §§ (b)(1) and (b)(2).”⁸³

Conversely, a Substantial Burdens claim should not be dismissed for failure to demonstrate that a zoning law, or the application of such a law, discriminates against a religious entity. Courts often improperly read a “discrimination” or “neutrality” requirement in a Subsection (a) claim. For example, the Maryland federal district court granted summary judgment against a church that brought suit against a county for changing its zoning laws to prohibit places of worship after the church had already applied to do so; the court held that there was no substantial burden on its religious exercise because “[t]here’s no way in which the court can find that they have been targeted,”⁸⁴ As the United States argued in its brief *amicus curiae* in the appeal of that decision,

Bethel need not show that it was a “target” of a land use regulation to establish that the regulation substantially burdens its religious exercise in violation of 42 U.S.C. 2000cc(a)(1). . . . Congress enacted RLUIPA in response to the Supreme Court’s decision in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990). *Smith* held that laws of general applicability that incidentally burden religious conduct do not violate the

⁸⁰ *Centro Familiar Cristiano Buenas Nuevas v. City of Yuma*, 651 F.3d 1163, 1171-72 (9th Cir. 2011) (“The Constitutional phrases, ‘substantial burden,’ ‘compelling governmental interest,’ and ‘least restrictive means,’ are all included in the ‘substantial burden’ provision, not the ‘Equal Terms’ provision.” (footnote omitted)).

⁸¹ *Adhi Parasakthi Charitable, Med., Educ., & Cultural Soc’y of N. Am. v. Twp. of W. Pikeland*, 721 F. Supp. 2d 361, 371-72 (E.D. Pa. 2010).

⁸² *Id.* at 377.

⁸³ *Hollywood Cmty. Synagogue, Inc. v. City of Hollywood*, 430 F. Supp. 2d 1296, 1320 (S.D. Fla. 2006).

⁸⁴ Transcript of Record at 146, *Bethel World Outreach Ministries v. Montgomery Cnty. Council*, No. 18-1195 (D. Md. Sept. 26, 2011), *appeal filed*, No. 11-2176 (4th Cir. Oct. 24, 2011).

Free Exercise Clause of the First Amendment and are not subject to strict scrutiny. *Id.* at 878-882. The effect of *Smith*, then, is that plaintiffs who raise claims under the Free Exercise Clause must now show some form of government action that is aimed at, or targets, religion. Congress enacted RLUIPA specifically for the purpose of changing that rule – and restoring the substantial burden test that had existed prior to *Smith*, under which a plaintiff did not have to show that the government’s action is aimed at religion . . . Thus, the fact that the Council did not “target” Bethel when passing ZTA 07-07 is irrelevant; whether Bethel was a “target” of ZTA 07-07 has absolutely no bearing on whether ZTA 07-07 constituted a substantial burden on Bethel’s religious exercise under 42 U.S.C. 2000cc(a)(1).⁸⁵

Sections (a) and (b) of RLUIPA’s land-use provisions are conceptually distinct, are separated within the statute itself, and principles of statutory construction require that they not be conflated in their application.

3. Dismissing Nondiscrimination Claims for Failure to Provide Direct Evidence of Discriminatory Animus

Local governments often argue that their conduct should not be considered discriminatory in the absence of a facially discriminatory law⁸⁶ or a showing by the plaintiff of some animus or hostility on the part of all governmental actors that motivated the challenged action. In *Roman Catholic Bishop of Springfield*, the District of Massachusetts noted that “the Nondiscrimination provision sets a higher bar for plaintiffs by requiring evidence that the government action was motivated by (‘on the basis of’) religion.”⁸⁷ That court required the plaintiff to show some “discriminatory animus” in order to make its prima facie case of discrimination.⁸⁸ Similarly, a Michigan trial court dismissed a Nondiscrimination claim merely because the administrative zoning record did not demonstrate “religious animus,”⁸⁹ regardless of the large amount of evidence that the church had been treated

⁸⁵ Brief for the United States as Amicus Curiae Supporting Plaintiff-Appellant at 19-20, *Bethel World Outreach Ministries v. Montgomery Cnty. Council*, (4th Cir. 2012) (No. 11-2716) (footnote omitted) (on file with authors).

⁸⁶ *United States v. Vill. of Airmont*, No. 05-5520, slip op. at 16 (S.D.N.Y. Nov. 12, 2008) (“The Defendants argue that only laws that facially discriminate against religion or against a particular religious group will violate section 2000cc(b)(2). Thus, the Defendants assert, the Code does not violate the Nondiscrimination provision because the Code is facially neutral towards religion generally and towards particular religious groups.”) (on file with authors).

⁸⁷ *Roman Catholic Bishop of Springfield v. City of Springfield*, 760 F. Supp. 2d 172, 191 (D. Mass. 2011).

⁸⁸ *Id.*

⁸⁹ *Great Lakes Soc’y v. Georgetown Twp.*, No. 03-45966, slip op. at 9 (Ottawa Cnty. Cir. Ct. July 20, 2007) (on file with authors); *Great Lakes Soc’y v. Georgetown Twp.*, No. 03-45966, slip op. at 10 n.4 (Ottawa Cnty. Cir. Ct. Apr. 12, 2006) (on file with authors).

differently and worse than every other religious institution within the jurisdiction.⁹⁰

There is no language, however, in RLUIPA that requires a showing of direct evidence of “animus.”⁹¹ Judge Posner of the Seventh Circuit acknowledged in *Saints Constantine and Helen Greek Orthodox Church*, the “vulnerability” of religious groups that are not of the mainstream “to subtle forms of discrimination when, as in the case of the grant or denial of zoning variances, a state delegates essentially standardless discretion to nonprofessionals operating without procedural safeguards.”⁹² Thus, “[o]n this construal, the ‘substantial burden’ provision backstops the explicit prohibition of religious discrimination in the later section of [RLUIPA], much as the disparate-impact theory of employment discrimination backstops the prohibition of intentional discrimination.”⁹³

Courts should not confuse the equal protection requirement that a plaintiff must establish discriminatory intent⁹⁴with an obligation to present specific anti-religious statements demonstrating personal animus on the part of the government decision-makers in a RLUIPA claim. The latter requirement leads to a more stringent application than is required by equal protection jurisprudence or warranted by the express language of the statute. The ferreting out of invidious discrimination as a purpose behind the application of facially neutral laws is well within the established judicial framework for equal protection cases and other federal civil rights statutes protecting against disparate treatment.⁹⁵

The recent case of *Church of Scientology of Georgia, Inc. v. City of Sandy Springs* is the first to confront these discriminatory intent issues head-on, describing the various methods of demonstrating discriminatory intent or disparate impact without limiting its analysis to direct statements of personal animus.⁹⁶ The court held that “to make out a prima facie case of discrimination under Section (b) of RLUIPA, Plaintiff must present evidence of intentional or purposeful discrimination by the City because of Plaintiff’s religious denomination.”⁹⁷ The court then explained that such

⁹⁰ *Great Lakes Soc’y v. Georgetown Twp*, 761 N.W.2d. 371 (Mich. App. 2008).

⁹¹ *Vill. of Airmont*, slip op. at 16 (“A party may bring a facial or as-applied challenge under the Nondiscrimination provision.”).

⁹² *Sts. Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 895, 900 (7th Cir. 2005).

⁹³ *Id.*

⁹⁴ *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266–67 (1977).

⁹⁵ *Id.*

⁹⁶ *Church of Scientology of Ga. v. City of Sandy Springs*, 843 F. Supp. 2d 1328, 1370 (N.D. Ga. 2012).

⁹⁷ *Id.*

evidence can include:

(1) historical background of the decision, particularly if it reveals a series of official actions taken for invidious purposes, (2) the specific sequence of events leading up to the challenged decision, (3) departures from the normal procedural sequence, as well as substantive departures, (4) legislative or administrative history, especially where there are contemporary statements by members of the decision-making body, minutes of its meetings, or reports, (5) foreseeability of discriminatory impact, (6) knowledge of discriminatory impact, and (7) the availability of less discriminatory alternatives.⁹⁸

These factors provide a basis for ascertaining the existence of a discriminatory purpose behind an otherwise “facially neutral” application of zoning laws that is not limited to direct evidence of invidious intent. Furthermore claims for disparate impact do not require the showing of a discriminatory intent.⁹⁹ The analysis provided below in Section IV suggests an approach for prosecuting and reviewing Nondiscrimination claims in line with established jurisprudence regarding the Equal Protection Clause and other federal civil rights statutes.

4. Requirement to Show Similarly Situated Comparators

Other courts have dismissed Section (b) claims—either under the Equal Terms¹⁰⁰ or Nondiscrimination provisions—because plaintiffs failed to allege that they were treated differently and worse than a similarly situated entity.¹⁰¹ Again, such a position is not faithful to the text or history of RLUIPA. If an application for a land use permit is denied because the applicant belongs to a minority faith disfavored in the community, the government has “implement[ed] a land use regulation that discriminates against any assembly or institution on the basis of religion,” regardless of whether

⁹⁸ *Id.* at 1371.

⁹⁹ *Lewis v. City of Chi.*, 130 S. Ct. 2191, 2199 (2010).

¹⁰⁰ 42 U.S.C. § 2000cc(b)(1) (2006); *see* 146 CONG. REC. S7774 (daily ed. Jul. 27, 2000) (joint statement of Senator Hatch and Senator Kennedy on the Religious Land Use and Institutionalized Persons Act of 2000).

¹⁰¹ *See, e.g., Roman Catholic Bishop of Springfield v. City of Springfield*, 760 F. Supp. 2d 172, 189 (D. Mass. 2011) (“Plaintiff presents no evidence of unequal treatment as compared to any secular comparator, whether similarly situated or not.”); *First Korean Church of New York, Inc. v. Cheltenham Twp. Zoning Hearing Bd.*, No. 05-6389, 2012 WL 645986, slip op at *15 (E.D. Pa. Feb. 29, 2012) (“Because [Plaintiff] has failed to identify a similarly situated better-treated nonreligious comparator, its as-applied attack under RLUIPA’s equal-terms provision fails.”); *Chabad Lubavitch of Litchfield Cnty., Inc. v. Borough of Litchfield*, No. 09-1419, 2012 WL 527851, slip op at *7–11 (D. Conn. Feb. 17, 2012) (dismissing the Equal Terms claim because Plaintiff did not demonstrate similarly situated secular comparators and dismissing the Nondiscrimination claim because Plaintiff did not demonstrate similarly situated religious comparators).

it has treated any comparable entity more favorably.¹⁰² While evidence of such comparable land use applicants is relevant to a claim of discrimination, it is not necessary to establish a Nondiscrimination violation.

Where comparisons are relevant—for instance, in a “selective enforcement” case where a jurisdiction has approved the applications of all places of worship and then denied one for a mosque or synagogue—the question arises as to how similarly situated the comparators must be to the claimant. While a church with 100 parishioners may be comparable to one of 200, a “mega-church” with 10,000 members might not be comparable in the same location. The courts have yet to provide guidance on this issue with respect to a Nondiscrimination claim; however the issue has been ruled upon by a number of federal circuits with respect to Equal Terms claims. The plain language of Section (b)(1) provides that “[n]o government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.”¹⁰³ On its face, the statute appears to create a strict liability standard permitting religious institutions or assembly uses wherever any nonreligious institution or assembly use is permitted. This was a tough pill to swallow for the courts of appeals.¹⁰⁴

In an early case to address the subject, the Eleventh Circuit observed, “while § (b)(1) has the ‘feel’ of an equal protection law, it lacks the ‘similarly situated’ requirement usually found in equal protection analysis.”¹⁰⁵ In that case, the court found that the challenged ordinance was targeted at the synagogue, which caused an impermissible “religious gerrymander” in addition to being facially discriminatory.¹⁰⁶ The Eleventh Circuit has since recognized a third kind of Equal Terms violation—the discriminatory application of a facially neutral regulation.¹⁰⁷ This final type of violation does

¹⁰² 42 U.S.C. § 2000cc(b)(2).

¹⁰³ 42 U.S.C. § 2000cc(b)(1).

¹⁰⁴ See, e.g., *River of Life Kingdom Ministries v. Vill. of Hazel Crest*, 611 F.3d 367, 369 (7th Cir. 2010) (en banc) (discussing *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1230–31 (11th Cir. 2004)) (“Pressed too hard, this approach would give religious land uses favored treatment—imagine a zoning ordinance that permits private clubs but not meeting halls used by political advocacy groups.”); *Lighthouse Inst. for Evangelism v. City of Long Branch*, 510 F.3d 253, 268 (3d Cir. 2007) (discussing *Midrash Sephardi*, 366 F.3d at 1214) (“[U]nder the Eleventh Circuit’s interpretation, if a town allows a local, ten-member book club to meet in the senior center, it must also permit a large church with a thousand members . . .”).

¹⁰⁵ *Midrash Sephardi*, 366 F.3d at 1229.

¹⁰⁶ *Id.* at 1232–33. This factual pattern—where a new ordinance is passed (especially soon after a religious organization purchased property or applied for a land use permit) to preclude the development of land for religious purposes by a disfavored faith group—is common and should be viewed as giving rise to a potential Nondiscrimination claim. See *infra* Section IV(B).

¹⁰⁷ A “selective enforcement” claim. See *Primera Iglesia Bautista Hispana of Boca Raton, Inc. v.*

require a similarly situated comparator, one that has a “comparable community impact.”¹⁰⁸

The Third Circuit used a more specific test in *Lighthouse Institute for Evangelism, Inc. v. City of Long Branch*,¹⁰⁹ holding that the Equal Terms provision “require[s] a secular comparator that is similarly situated as to the regulatory purpose of the regulation.”¹¹⁰ The Seventh Circuit considered and rejected the Third Circuit’s test before setting forth its own requirement that a sufficient comparator must be similarly situated as to “accepted zoning criteria.”¹¹¹ The Second Circuit refused to adopt either of these tests, holding that the religious and secular entities’ “activities were similarly situated with regard to their legality under New York City law.”¹¹² The Fifth Circuit held that “[t]he ‘less than equal terms’ must be measured by the ordinance itself and the criteria by which it treats institutions differently.”¹¹³

Against this tableau, determining whether a Nondiscrimination plaintiff must demonstrate that it has been treated differently than a similarly situated comparator, and which comparators might qualify, is a daunting task. Unlike the Equal Terms provision, the plain language of the Nondiscrimination provision does not require a comparator, and thus such evidence is not necessary to establish a Nondiscrimination claim. Yet, in discrimination cases based on selective enforcement or disparate impact, a comparator may be identified.¹¹⁴ The approach of the Second, Fifth, and Seventh Circuits favors the religious institution by using objective criteria to judge whether one entity is similarly situated enough to another rather than using the criteria selected by the local government itself as in the “regulatory purpose” standard of the Third Circuit.

Broward Cnty., 450 F.3d 1295, 1310–11 (11th Cir. 2006) (discussing *Konikov v. Orange Cnty.*, 410 F.3d 1317 (11th Cir. 2005)). See generally *infra* Section IV(C) (discussing selective enforcement).

¹⁰⁸ *Konikov*, 410 F.3d at 1327.

¹⁰⁹ *Lighthouse*, 510 F.3d 253.

¹¹⁰ *Id.* at 264.

¹¹¹ See *River of Life Kingdom Ministries v. Vill. of Hazel Crest*, 611 F.3d 367, 371 (7th Cir. 2010) (en banc) (emphasis added.)

¹¹² See *Third Church of Christ, Scientist v. City of New York*, 626 F.3d 667, 670 (2nd Cir. 2010).

¹¹³ See *Elijah Grp., Inc. v. City of Leon Valley*, 643 F.3d 419, 424 (5th Cir. 2011). That court specifically noted that its “analysis should not be interpreted as necessarily adopting any of the tests heretofore adopted by the other circuits.” *Id.* at n.19.

¹¹⁴ In one of the few cases analyzing a Nondiscrimination claim, a federal court incorporated a “similarly situated” standard. *Albanian Associated Fund v. Twp. of Wayne*, No. 06-3217, 2007 WL 2904194, at *10 (D.N.J. Oct. 1, 2007). There, a Muslim group alleged discriminatory treatment under the guise of a municipality’s purported concern for protecting open space. *Id.* at *11. The District of New Jersey acknowledged that a Catholic hospital could be a valid comparator, even though the desired use of the development was dissimilar. *Id.*

III. A BURDEN-SHIFTING PROPOSAL FOR THE APPLICATION OF RLUIPA'S NONDISCRIMINATION PROVISION

The legislative history behind RLUIPA makes clear that it was meant to codify existing equal protection analysis, preserving it in light of what many saw as an encroachment on fundamental rights. As one court observed:

RLUIPA is designed to protect the non-discrimination principles of the Free Exercise and Establishment Clauses of the First Amendment, as well as the Equal Protection Clause of the Fourteenth Amendment. In short, the scope of the rights at issue is the rights protected by the Free Exercise Clause of the First Amendment, made applicable to the states under the Due Process Clause of the Fourteenth Amendment and the Equal Protection Clause of the Fourteenth Amendment, as those rights implicate land use decisions affecting religious assemblies or institutions.¹¹⁵

The Nondiscrimination provision, which seeks to protect a fundamental right and prohibit discrimination “on the basis of religion” is thus within the purview of a diverse and well-developed body of federal civil rights law that seeks to redress the harms of invidious discrimination based on certain classifications that Congress deemed worthy of protection.¹¹⁶

The case law setting forth a burden-shifting framework and the elements of a prima facie case for discrimination claims should be applied to RLUIPA Nondiscrimination claims. In light of the confusion surrounding how to plead and analyze such claims, and the analogues between discrimination based on religion and discrimination based on age, sex, race, or disability, precedents in these types of cases should serve as guideposts. Like racial discrimination cases, there is not a single “silver bullet” answer. Courts and practitioners will benefit from considering the various recognized contexts in which discrimination may occur, which are set forth below and explained in greater detail in Section IV.

A. The Extension of *McDonnell Douglas* Burden-Shifting

First, regarding the respective burdens of proof in RLUIPA Nondiscrimination cases, the authors propose the extension of the burden-shifting framework first developed by the Supreme Court in *McDonnell Douglas*

¹¹⁵ *Rocky Mountain Christian Church v. Bd. of Cnty. Comm'rs*, 612 F. Supp. 2d 1163, 1184 (D. Colo. 2009) (citing *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1238 (11th Cir. 2004)).

¹¹⁶ *See Vision Church v. Vill. of Long Grove*, 468 F.3d 975, 1000 (7th Cir. 2006).

Corporation v. Green.¹¹⁷ *McDonnell Douglas* was an early case interpreting provisions of Title VII of the Civil Rights Act of 1964¹¹⁸ (“Title VII”), in which the Supreme Court was called upon to illuminate “the order and allocation of proof in a private, non-class action challenging employment discrimination.”¹¹⁹ The plaintiff was an African-American mechanic and laboratory technician whose employment was terminated pursuant to a general layoff.¹²⁰ He argued that African-American employees had been targeted during the layoff and that the defendant manufacturing company’s hiring policies were also discriminatory.¹²¹ After he was terminated, the plaintiff participated in an illegal demonstration that resulted in employees missing part of a morning shift at the company’s plant.¹²² The company thereafter began hiring new mechanics and the plaintiff applied for re-employment.¹²³ The company refused to re-hire him based on his participation in the demonstration.¹²⁴ The plaintiff challenged the company’s decision under two provisions of Title VII that prohibit racial discrimination: the first prohibiting discrimination in employment decisions generally, and the second prohibiting retribution against an applicant or employee who demonstrates against discriminatory conditions.¹²⁵

The Court began with its interpretation of the congressional purpose behind Title VII: “to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens.”¹²⁶ It then quoted itself from *Griggs v. Duke Power Company*: “[d]iscriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.”¹²⁷

Title VII places the initial burden on the plaintiff to make a prima facie

¹¹⁷ 411 U.S. 792, 802 (1973).

¹¹⁸ 42 U.S.C. § 2000e-4 (2012); *McDonnell Douglas*, 411 U.S. at 792.

¹¹⁹ *McDonnell Douglas*, 411 U.S. at 800.

¹²⁰ *Id.* at 794.

¹²¹ *Id.*

¹²² *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 796 (1973).

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.* at 800.

¹²⁷ *Id.* at 800-01 (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 430-31 (1971)).

case of discrimination.¹²⁸ In *McDonnell Douglas*, the prima facie case of employment discrimination requires four elements:

(i) that [the plaintiff] belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of [the plaintiff's] qualifications.¹²⁹

In *McDonnell Douglas*, it was undisputed that the plaintiff made a prima facie case.¹³⁰ The Court then noted that “[t]he burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee’s rejection.”¹³¹ Finding that the company had articulated such a reason, namely that the plaintiff had engaged in “deliberate, unlawful activity against it,”¹³² the Court held that “the inquiry must not end here.”¹³³ The Court was concerned with an employer’s use of a facially nondiscriminatory reason that was actually pretext for some underlying discrimination.¹³⁴ The Court went on to find that a Title VII plaintiff must “be afforded a fair opportunity to show that [the employer’s] stated reason for [his] rejection was in fact pretext.”¹³⁵ The Court then described evidence that a plaintiff might use show pretext: (1) the use of Caucasian comparators who had engaged in similar acts but who had been rehired; (2) “facts as to the [company’s] treatment of [the plaintiff] during his prior term of employment”; (3) the company’s past reaction, if any, to the plaintiff’s involvement in the civil rights movement; and, (4) evidence, such as statistics, that show the company’s practices with regard to minority employment.¹³⁶ The plaintiff “must be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for his rejection were in fact a cover-up for a racially discriminatory decision.”¹³⁷

The *McDonnell Douglas* burden-shifting framework has been extended to cases brought under the Age Discrimination in Employment Act (the “ADEA”),¹³⁸ the Rehabilitation Act of 1973 (the “Rehabilitation Act”),¹³⁹

¹²⁸ 42 U.S.C. § 2000cc-2(b) (2006); *MacKenzie v. City & Cnty. of Denver*, 414 F.3d 1266, 1274 (10th Cir. 2005); *McDonnell Douglas*, 411 U.S. at 802.

¹²⁹ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.* at 803.

¹³³ *Id.* at 804.

¹³⁴ *Id.*

¹³⁵ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804 (1973).

¹³⁶ *Id.* at 804–05.

¹³⁷ *Id.* at 805.

¹³⁸ *See, e.g., Loeb v. Textron, Inc.*, 600 F.2d 1003, 1010 (1st Cir. 1979).

and certain cases brought under the Americans with Disabilities Act (the “ADA”)¹⁴⁰ and the Family Medical Leave Act (the “FMLA”).¹⁴¹ The Fourth Circuit applied the burden-shifting test to the ADA in *Kaylor v. Fannin Regional Hospital* because the Second Circuit had previously applied it to a case brought under the Rehabilitation Act in which an employer’s actions were allegedly unrelated to the employee or applicant’s disability.¹⁴² These decisions are indicative of prevailing trends related to the application of such civil rights laws.¹⁴³

At least one court has extended the framework to retaliation claims under the FMLA:¹⁴⁴

The language of the FMLA makes plain the purpose of Congress to assure equality of employment opportunities for those individuals who assert their rights under the FMLA. The burden shifting approach best effectuates the intent of the FMLA to prohibit discrimination against employees using FMLA leave because it can most accurately balance providing employees a broader basis for proving an employer violated the FMLA while also protecting the interests of employers. See *McDonnell Douglas*, 411 U.S. at 792, 93 S. Ct. at 1817 (“The broad, overriding interest, shared by employer, employee, and consumer, is efficient and trustworthy workmanship assured through fair and racially neutral employment and personnel decisions.”). The burden shifting approach also places claims of FMLA discrimination under the well-settled rubric of law governing discrimination claims under Title VII, the ADEA, etc., and thus ensures uniformity in analyzing discrimination in the workplace.¹⁴⁵

Although other courts have rejected this approach because “claims under the FMLA do not depend on discrimination,” the *Kaylor* court applied *McDonnell Douglas* to a statute intended to ensure equality in the broadest

¹³⁹ See Kevin W. Williams, Note, *The Reasonable Accommodation Difference: The Effect of Applying the Burden Shifting Frameworks Developed Under Title VII in Disparate Treatment Cases to Claims Brought Under Title I of the Americans with Disabilities Act*, 18 BERKELEY J. EMP. & LAB. L. 98, 113 (1997).

¹⁴⁰ See, e.g., *Raytheon Co. v. Hernandez*, 540 U.S. 44, 50 n. 3 (2003) (noting with approval that “the Court of Appeals proceeded under the familiar burden-shifting approach adopted by this Court in *McDonnell Douglas Corp. v. Green*”); see also 42 U.S.C. §§ 12101-12103 (2009). Specifically, courts have applied the burden-shifting test to ADA cases in which the plaintiff cannot offer direct proof of discrimination, resulting in disparate-treatment or disparate-impact claims. See *Butler v. City of Prairie Vill., Kan.*, 172 F.3d 736, 747-48 (10th Cir. 1999). The Fifth Circuit first applied the test based on its belief that “[t]he Title VII jurisprudence is, we believe, for the most applicable to intentional to social-bias discrimination against handicapped persons.” *Prewitt v. U.S. Postal Service*, 662 F.2d 292, 305 n. 19 (5th Cir. 1981).

¹⁴¹ See, e.g., *Kaylor v. Fannin Reg’l Hosp. Inc.*, 946 F. Supp. 988, 1000 (N.D. Ga. 1996); see also 29 U.S.C. § 2601 (2006).

¹⁴² See *Ennis v. Nat’l Ass’n of Bus & Educ. Radio, Inc.*, 53 F.3d 55, 58 (4th Cir. 1995).

¹⁴³ See, e.g., *Williams v. Widnall*, 79 F.3d 1003, 1005 n. 3 (10th Cir. 1996).

¹⁴⁴ *Id.*

¹⁴⁵ *Kaylor*, 946 F. Supp. at 1000.

terms, as does RLUIPA.¹⁴⁶

B. The Congressional Intent Behind RLUIPA's Nondiscrimination Provision Supports Burden-Shifting

Religion, like race, is a suspect classification under Title VII¹⁴⁷ as well as a fundamental right guaranteed to equal protection.¹⁴⁸ In the House of Representatives report on the Religious Liberty Protection Act of 1999, RLUIPA's predecessor bill, the Committee on the Judiciary noted that "H.R. 1691's purpose is to protect religious liberty, one of the most fundamental of 'civil rights.'"¹⁴⁹ RLUIPA's final form does not contain a statement of congressional findings and purposes. When enacting RFRA, Congress specified that the purposes of the law were:

- (1) to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and
- (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.¹⁵⁰

After an examination of the legislative record behind RFRA, the Supreme Court noted that, "Congress' concern was with the incidental burdens imposed, not the object or purpose of the legislation."¹⁵¹ RFRA contained only a substantial burden test, with no analogue to RLUIPA's Nondiscrimination provision.¹⁵²

In the "Summary and Purpose" section of the Joint Statement regarding RLUIPA, Senators Hatch and Kennedy reference RFRA, providing that, within the scope of Congress's power to enact RLUIPA,

[T]he bill applies the standard of the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1 (1994): if government substantially burdens the exercise of religion, it must demonstrate that imposing that burden on the claimant serves a compelling interest by the least restrictive means. *In addition, with respect to land use regulation, the bill specifically prohibits various forms of religious*

¹⁴⁶ *Diaz v. Fort Wayne Foundry Corp.*, 131 F.3d 711, 712 (7th Cir. 1997).

¹⁴⁷ 42 U.S.C. § 2000e-2(a)(b) (2006).

¹⁴⁸ *See Niemotko v. Maryland*, 340 U.S. 268, 273 (1951).

¹⁴⁹ H. REP. NO. 106-219, at 13 (1999).

¹⁵⁰ 42 U.S.C. § 2000bb(B)(1-2) (2006).

¹⁵¹ *City of Boerne v. Flores*, 521 U.S. 507, 531 (1997).

¹⁵² *See id.* at 515-16.

*discrimination and exclusion.*¹⁵³

The Joint Statement “Need for Legislation” section makes plain that Congress was primarily interested in using its power to alleviate the widespread discrimination¹⁵⁴ in land use regulation:

The hearing record compiled massive evidence that this right is frequently violated. Churches in general, and new, small, or unfamiliar churches in particular, are frequently discriminated against on the face of zoning codes and also in the highly individualized and discretionary processes of land use regulation. Zoning codes frequently exclude churches in places where they permit theaters, meeting halls, and other places where large groups of people assemble for secular purposes. Or the codes permit churches only with individualized permission from the zoning board, and zoning boards use that authority in discriminatory ways.

Sometimes, zoning board members or neighborhood residents explicitly offer race or religion as the reason to exclude a proposed church, especially in cases of black churches and Jewish shuls and synagogues. More often, discrimination lurks behind such vague and universally applicable reasons as traffic, aesthetics, or “not consistent with the city’s land use plan.” Churches have been excluded from residential zones because they generate too much traffic, and from commercial zones because they don’t generate enough traffic. Churches have been denied the right to meet in rented storefronts, in abandoned schools, in converted funeral homes, theaters, and skating rinks-in all sorts of buildings that were permitted when they generated traffic for secular purposes.¹⁵⁵

The Senators noted that the Nondiscrimination section was meant to prohibit “various forms of discrimination against or among land uses.”¹⁵⁶ This statement demonstrates that RLUIPA was intended to be remedial. The plain language of the statute sets forth that RLUIPA “shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of [the Act] and the Constitution.”¹⁵⁷ Thus, although Congress observed that discrimination may take many forms, the congressional intent behind RLUIPA is for courts to afford the broadest protection possible to religious groups alleging discriminatory treatment from local governing boards.¹⁵⁸ Presumably, Congress had this “broad protection” in

¹⁵³ 146 CONG. REC. S7774-01 (daily ed. July 27, 2000) (joint statement of Sens. Hatch and Kennedy) (emphasis added).

¹⁵⁴ See *id.* at S7774-S7775 (“The hearing record contains much evidence that these forms of discrimination are very widespread. Some of this evidence is statistical—from national surveys of cases, churches, zoning codes, and public attitudes. Some of it is anecdotal, with examples from all over the country. Some of it is testimony by witnesses with wide experience who say that the anecdotes are representative.”).

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at S7775.

¹⁵⁷ 42 U.S.C. § 2000cc-3(g).

¹⁵⁸ See *Protecting Religious Liberty: Hearings on H.R. 1691 Before the Subcomm. on the Constitution*

mind when it placed the burden of persuasion on the local government in Nondiscrimination claims:

BURDEN OF PERSUASION- If a plaintiff produces prima facie evidence to support a claim alleging a violation of the Free Exercise Clause or a violation of section 2, the government shall bear the burden of persuasion on any element of the claim, except that the plaintiff shall bear the burden of persuasion on whether the law (including a regulation) or government practice that is challenged by the claim substantially burdens the plaintiff's exercise of religion.¹⁵⁹

Therefore, the text of RLUIPA itself supports the burden-shifting approach. A plaintiff's prima facie case will depend on the land use provision pleaded and in which federal circuit the case is heard.¹⁶⁰ A claimant under Section (a) must demonstrate that the land use regulation substantially burdens its religious exercise;¹⁶¹ if so, the strict scrutiny standard must be met and the regulation must "[employ] a narrowly tailored means of achieving a compelling government interest."¹⁶² Under the Equal Terms provision, the plaintiff may be required to "present evidence that a similarly situated non-religious comparator received differential treatment under the challenged regulation."¹⁶³ Once the plaintiff has met its burden, the statute calls for the burden of persuasion to shift to the local government.¹⁶⁴

The extension of the *McDonnell Douglas* burden-shifting framework to Nondiscrimination claims would allow plaintiffs the opportunity to show that the proffered justification of a facially neutral imposition or application of a land use law is pretextual. This is an approach consistent with RLUIPA's text and legislative history as well as a well-developed civil rights jurisprudence. Such an opportunity would fit the analysis of these types of claims within the general discrimination framework that is familiar to courts and practitioners. Furthermore, without such a standard, ferreting

of the H. Comm. on the Judiciary, 106th Cong. 211 (1999) (testimony of Prof. Douglas Laycock, University of Texas Law School) ("Section 3(a) provides that if a claimant demonstrates a prima facie violation of the Free Exercise Clause, the burden of persuasion then shifts to the government on all issues except burden on religious exercise. No element of the Court's definition of a free exercise violation is changed, but in cases where a court is unsure of the facts, the risk of nonpersuasion is placed on government instead of on the claim of religious liberty. This provision facilitates enforcement of the constitutional right as the Supreme Court has defined it.").

¹⁵⁹ 42 U.S.C. § 2000cc-2(b) (2006); *see also* *Church of Scientology of Georgia, Inc. v. City of Sandy Springs, Ga.*, 843 F. Supp. 2d 1328, 1360 (N.D. Ga. 2012) (citing *Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward Cnty.*, 450 F.3d 1295, 1308 (11th Cir. 2006)).

¹⁶⁰ There is little guidance, and no consensus, on how to establish a prima facie case for a Nondiscrimination challenge; the authors' suggestion follows.

¹⁶¹ 42 U.S.C. § 2000cc(a)(1) (2000).

¹⁶² *Primera Iglesia Bautista*, 450 F.3d 1308.

¹⁶³ *See Primera Iglesia*, 450 F.3d at 1311.

¹⁶⁴ 42 U.S.C. § 2000cc-2(b).

out discrimination in these types of cases amounts to little more than guesswork and inconsistent application of the statute.

IV. APPLICATION OF THE STANDARD

Courts confronting Nondiscrimination claims have noted the dearth of reported cases concerning this provision.¹⁶⁵ In *Adhi Parasakthi Charitable, Medical, Educational, and Cultural Society of North America v. Township of West Pikeland*, the plaintiff escaped summary judgment on its Nondiscrimination claim based on the court's analysis of its Free Exercise claim.¹⁶⁶ The court found that the law imposed was facially neutral, but held that "[a] jury, therefore, must determine the factual issue of discriminatory application."¹⁶⁷ What standards might guide that jury were not defined.

In perhaps the most detailed analysis of the Nondiscrimination provision, *Church of Scientology of Georgia, Inc. v. City of Sandy Springs* involved a motion to reconsider the court's earlier grant of summary judgment to the defendants.¹⁶⁸ The court reviewed the three forms of discrimination that are recognized in the Eleventh Circuit in claims brought under the Equal Protection Clause: "(1) a statute that facially differentiates between religious assemblies or institutions; (2) a facially neutral statute that is nevertheless 'gerrymandered' to place a burden solely on a particular religious assembly or institution; or (3) a truly neutral statute that is selectively enforced against one religious denomination as opposed to another."¹⁶⁹ The court treated that case as a "selective enforcement" action, ultimately holding that there was sufficient evidence to create a jury question on the Nondiscrimination claim, but insufficient evidence to determine whether the plaintiff had met its burden of establishing a prima facie case for discrimination.¹⁷⁰

In *Church of the Hills of the Township of Bedminster v. the Township of Bedminster*,¹⁷¹ the court denied the defendants' motion to dismiss

¹⁶⁵ *Church of Scientology of Georgia, Inc. v. City of Sandy Springs, Ga.*, No. 10-0082, 2012 WL 500263, at *23 (N.D. Ga. Feb. 10, 2012); *Covenant Christian Ministries, Inc. v. City of Marietta, Ga.*, No. 2008 WL 8866408, at *15 (N.D. Ga.).

¹⁶⁶ *Adhi Parasakthi Charitable Med., Educ., & Cultural Soc'y of N. Am. v. Twp of W. Pikeland*, 721 F. Supp. 2d 361, 379 (E.D. Pa. 2010).

¹⁶⁷ *Id.*

¹⁶⁸ *Church of Scientology of Ga, Inc. v. City of Sandy Springs*, 843 F. Supp. 2d 1328, 1349-50 (N.D. Ga. 2012).

¹⁶⁹ *Id.* at 1361 (citing *Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward Cnty.*, 450 F.3d 1295, 1308 (11th Cir. 2006)).

¹⁷⁰ *Id.* at 1361-62.

¹⁷¹ *Church of the Hills of Bedminster v. Twp. Of Bedminster*, No. 05-3332, 2006 WL 462674 at *12

and examined the plaintiffs' equal protection claim under a "disparate treatment"-type analysis.¹⁷² The court held that, in order "[t]o establish an equal protection claim, the Plaintiffs must establish that they were treated differently from other similarly situated persons who were granted similar variances in a similarly zoned parcel of land."¹⁷³ The equal protection claim survived because "[t]he Plaintiffs' Complaint allege[d] that the Township has granted zoning variances to other churches located in R-10 zones within the town. . . . Accordingly, the Court finds that the Plaintiffs have sufficiently alleged that other similarly situated uses within the Township's R-10 zones were granted variances similar to the ones sought by the Church in the present case."¹⁷⁴ Importantly, the court then shifted the burden to the Township to demonstrate that the differential treatment was not based on discriminatory motivations, albeit under a less rigorous rational basis standard: "This places the burden on the Township to either refute the allegation or to demonstrate why the denial of the Church's variances, as opposed to any given to similarly situated churches, were rationally related to a legitimate state interest."¹⁷⁵

Invidious discrimination may take many forms. In order to fully effectuate the purposes of the Nondiscrimination provision, practitioners should be able to identify the various fact patterns demonstrating discrimination against a religious entity. These include, but are not limited to: (1) direct evidence of discrimination; (2) "gerrymandering" laws that may be facially neutral but were designed to prevent a particular applicant from building a religious facility; (3) disparate treatment, whereby one religious organization is disfavored in the discretionary application of zoning laws; and (4) laws that may be facially neutral but have a disparate impact on certain religious groups.

Direct evidence of discriminatory intent—what the authors describe as "Torches and Pitchforks" discrimination¹⁷⁶—will be the easiest of these to

(D.N.J. Feb. 24, 2006).

¹⁷² *Id.* at * 12. Although the plaintiff had advanced a RLUIPA Nondiscrimination claim, the court did not include any mention of it in the opinion. Complaint at 157-58, *Church of the Hills of Bedminster v. Twp. Of Bedminster*, No. 05-3332, 2006 WL 462674 (D.N.J. July 7, 2005) (on file with authors).

¹⁷³ *Church of the Hills of Bedminster*, 2006 WL 462674, at *8.

¹⁷⁴ *Id.* at *10.

¹⁷⁵ *Id.*

¹⁷⁶ See YOUNG FRANKENSTEIN (Gruskoff/Venture Films 1974), available at <http://www.moviescriptsources.com/movie-script.php?id=286> ("VILLAGERS, with torches and DOGS, stand on the street, in front of the Burgomeister's steps. FIRST VILLAGER: The monster, sir. The Monster is loose. BURGOMEISTER: Do you realize it's after eight o'clock??? SECOND VILLAGER: Yes, sir, but the monster. He's escaped! THIRD VILLAGER: He's running through the countryside, terrorizing the villagers. No one is safe. . . . ASSORTEDVILLAGERS: Yes! The monster! Kill the monster!

recognize, and calls to mind the integration of Alabama high schools.¹⁷⁷ Yet, such religious discrimination is not an anachronism.¹⁷⁸ One example of such a fact pattern is described in a 2009 federal decision that recounted the trials faced by the Ahmadiyya Muslim Community in attempting to locate in a small Maryland town, where the Town's Burgess was alleged to have made statements such as:

Muslims are a whole different culture from us. . . The situation with the Muslims is a touchy worldwide situation, so people are antsy over that. . . But for the most part people, I don't know if they're dramatically upset, but they are definitely concerned, I-like me, I am concerned myself . . . I understand the world climate, I understand what's going on. I do remember . . . 9/11 very vividly so it's only that thing sticks in your mind . . . There's a lot of animosity. Not, that's not a good word. There's a lot of, shall we say, "apprehension" about the AMC's application . . . It's a different culture moving into town, a culture we're not used to . . . This town is not very diversified. You know what I mean? We're sitting back here off the radar scope and living in our little piece of heaven . . . Let me be sure I understand, if this is done [*i.e.* denying the special exception] the Muslims are gone, right?¹⁷⁹

Such attitudes are not uncommon: "An Airmont, [New York,] mayor described Orthodox Jews as 'foreigners and interlopers,' who were 'ignorant and uneducated' and 'an insult to' the community."¹⁸⁰ A trustee of that village "stated that 'the only reason we formed this village is to keep those Jews from Williamsburg out of here.'"¹⁸¹ The FBI is offering a \$20,000 reward for information leading to the arrest in the arson of construction equipment in Murfreesboro, Tennessee, where a religious community has faced astonishing opposition to its new mosque and community center before it ultimately prevailed in court.¹⁸² Asian Americans recently faced

The monster must be destroyed!").

¹⁷⁷ See generally Note, *Integration of Higher Education in the South*, 69 COLUM. L. REV. 112 (1969).

¹⁷⁸ H. Rep. No. 106-219, at 23 (1999) (recounting testimony before the House Judiciary Committee including anecdotes that neighbors to proposed worship facilities have made such facially discriminatory statements as "Hitler should have killed more of you" and "Let's keep these God damned Pentecostals out of here.").

¹⁷⁹ *Moxley v. Town of Walkersville*, 601 F. Supp. 2d 648, 655 (D. Md. 2009); see also Phillip Rucker, *Uneasy Feelings Moving In*, WASH. POST, Oct. 23, 2007, at B01 ("I'm not in favor of that group being this close," said David 'Reds' Main, standing behind the counter at the duckpin bowling alley he has run since the 1970s. "They have a right to their religion like anybody else," he said. "But it goes back to 9/11 to get the trust back and convince yourself that not all Muslims are terrorists.").

¹⁸⁰ *United States v. Vill. of Airmont*, No. 05-5520, slip op. at 5 (S.D.N.Y. Nov. 12, 2008) (quoting *Leblanc-Sternberg v. Fletcher*, No. 96-6149, 1996 WL 699648, at *1 (2d Cir. Dec. 6, 1996)) (on file with authors).

¹⁸¹ *Id.*

¹⁸² See *ATF Lab Confirms Accelerants Used at Future Site of the Islamic Center of Murfreesboro*, FBI.GOV (Sep. 3, 2010), <http://www.fbi.gov/memphis/press-releases/2010/me090310.htm>; see also *Texas Man Indicted for Threatening to Bomb Islamic Center in Murfreesboro*, FBI.GOV (June 21, 2012),

community opposition, such as:

In New Jersey right now there's 240,000 Asian Americans in New Jersey. In Middlesex County, there's more than any other county right in Middlesex County. That's just 2000, the census from 2000. From 1990 to – there was 114,000. 2000, which is 10 years later, it's doubled to 224,000. Now they're going to do another census in 2010. What's it going to be then? If there's only a limited amount of churches, where do these people park when they come to this church? There's a lot of Asian Americans, where do they park?¹⁸³

Neither are lesser-known Christian groups immune from such targeting. The Michigan-based Great Lakes Society was denied a special use permit to build a place of worship in a jurisdiction where a township official was quoted as stating: “It's not a church. The issue is that they're just not a church.”¹⁸⁴

Not all evidence of discrimination is as blatant, however. Indirect evidence of discrimination is often necessary to demonstrate what the Supreme Court has described as “practices that are fair in form but discriminatory in practice.”¹⁸⁵ This includes, for instance, the preferential treatment of some religious groups over others through the selective enforcement of certain laws that vest great discretion among nonprofessional land-use officials. A local government may enact a law specifically designed to prevent a certain religious group from locating within its jurisdiction and later claim that it was merely tidying up its zoning code.¹⁸⁶ Similarly, zoning regulations that have a disparate impact will also require courts and practitioners to carefully examine all of the facts surrounding not only the immediate application, but years of past applications.¹⁸⁷

The small number of successful Nondiscrimination claims is indicative of the difficulty inherent in pleading and proving them. Certainly the lack of positive case law begets disuse, as practitioners may not wish to plead a cause of action for which there are almost no discernible standards. The

<http://www.fbi.gov/memphis/press-releases/2012/texas-man-indicted-for-threatening-to-bomb-islamic-center-in-murfreesboro>); *United States v. Rutherford Cnty.*, No. 3:12-0737, 2012 WL 2930076 at *2 (M.D. Tenn. July 18, 2012) (ordering the county to process and issue certificate of occupancy for mosque) (on file with authors).

¹⁸³ *Dayalbagh Radhasoami Satsang Ass'n*, Hearing on Application No. 18-07Z Before the Board of Adjustment for the Township of Old Bridge, New Jersey 69 (2008) (transcript on file with authors).

¹⁸⁴ Barton Deiters, *Church Sues, Claims Bias in Building Ban*, GRAND RAPIDS PRESS, Apr. 2, 2003, at C4.

¹⁸⁵ *See Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

¹⁸⁶ *See, e.g., Reaching Hearts Int'l v. Prince George's Cnty.*, 584 F. Supp. 2d 766, 783 (D. Md. 2008), *aff'd*, 368 Fed. App'x 370 (4th Cir. 2010) (explaining the stated purposed of achieving consistency was merely superficial).

¹⁸⁷ *See, e.g., Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977).

current landscape, in which litigants often simply appeal to a judge's intuition without overriding standards, cannot be maintained. However, there is extensive case law examining how each of these types of cases might be proven in the employment discrimination context. This body of law, employing the *McDonnell Douglas* burden-shifting set forth above, should be adapted to serve as the basis for RLUIPA Nondiscrimination claims. Applying this framework to each of the four fact patterns demonstrating discrimination set forth above provides plaintiffs with an opportunity to demonstrate that they are being discriminated against on the basis of religion or religious denomination, whether by evidence of direct or indirect discriminatory motivation.

The *McDonnell Douglas* test merely acts "to help the plaintiff overcome the formidable evidentiary difficulties of proving discrimination":¹⁸⁸

Even an employer who knowingly discriminates on the basis of age may leave no written records revealing the forbidden motive and may communicate it orally to no one. When evidence is in existence, it is likely to be under the control of the employer, and the plaintiff may not succeed in turning it up. The indirect method compensates for these evidentiary difficulties by permitting the plaintiff to prove his case by eliminating all lawful motivations, instead of proving directly an unlawful motivation.¹⁸⁹

Similarly, "Title VII law recognizes that discrimination is widespread in our society and very difficult to prove."¹⁹⁰ Often, however, the same claims that would not survive under one Title VII theory will remain colorable under others.¹⁹¹

A. "Torches and Pitchforks" Discrimination

Any adequate application of the Nondiscrimination provision must include a review of the decisions of zoning boards in the context of the community's response to the zoning treatments sought. "To allow expression of religious views by some and deny the same privilege to others merely because they or their views are unpopular, even deeply so, is a denial of equal protection of the law forbidden by the Fourteenth Amendment."¹⁹² Permitting the sentiment of the community to influence zoning decisions amounts

¹⁸⁸ *Oxman v. WLS-TV*, 609 F. Supp. 1384, 1391 n.6 (N.D. Ill. 1985) (citing *La Montagne v. Am. Convenience Products, Inc.*, 750 F.2d 1405, 1410 (7th Cir. 1984)).

¹⁸⁹ *Id.*

¹⁹⁰ *Valdez v. Church's Fried Chicken, Inc.*, 683 F. Supp. 596, 624 (W.D. Tex. 1988).

¹⁹¹ See *Lewis v. City of Chi., Ill.*, 130 S. Ct. 2191, 2199 (2010).

¹⁹² *Niemotko v. State of Md.*, 340 U.S. 268, 284 (1951) (Frankfurter, J., concurring).

to a “modified heckler’s veto” abridging the exercise of a fundamental right.¹⁹³ Zoning boards are made up of elected or appointed political actors. Where these governmental actors make their decision within the context of significant, discriminatory community opposition, or where zoning board members themselves improperly attack or question the applicants’ religious beliefs,¹⁹⁴ discriminatory intent may be demonstrated.

It is well established that an application’s denial, reached contrary to evidence or other factors that suggest approval, may give rise to an inference of intentional discrimination.¹⁹⁵ Similarly, “[r]arely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the ‘dominant’ or ‘primary’ one.”¹⁹⁶ Still, some courts construing RLUIPA have taken an improperly narrow view. For example, one Michigan court summarily concluded that “if there was a valid basis for the township’s action the fact that there may also have been invalid reasons does not give rise to a cause of action for any additionally stated invalid reasoning.”¹⁹⁷ While the evidence of some “invalid reason” should not automatically invalidate a zoning board’s reasoning, neither should it be permitted to automatically save a discriminatory decision by reference to some valid reason for denial. RLUIPA Nondiscrimination claimants should enjoy the same opportunity to show that the valid reasons stated were actually pretextual (and that the discriminatory reason was a significant or dominant concern) as for other types of discrimination claims.

The *McDonnell Douglas* test is inapplicable where a plaintiff presents direct evidence of discrimination, such as discriminatory statements made by government officials themselves.¹⁹⁸ However, statements by members of the public should also be available as indirect evidence of the motives of a municipality. In *United States v. Yonkers Board of Education*,¹⁹⁹ for example, the Second Circuit affirmed a district court finding that the City of

¹⁹³ See *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 119 (2001).

¹⁹⁴ See *Bass v. Bd. of Cnty. Comm’rs.*, 256 F.3d 1095, 1105 (11th Cir. 2001) (“Direct evidence of discrimination is evidence which, if believed, would prove the existence of a fact in issue without inference or presumption. Only the most blatant remarks, whose intent could be nothing other than to discriminate on the basis of [the protected characteristic] . . . constitute direct evidence of discrimination.” (quotations and citations omitted)), *abrogation on other grounds, recognized by Crawford v. Carroll*, 529 F.3d 961, 971 (11th Cir. 2008).

¹⁹⁵ See *City of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 267 (1977).

¹⁹⁶ See *id.* at 265.

¹⁹⁷ *Great Lakes Soc’y v. Georgetown Charter Twp.*, No. 03-45966, slip op. at 3 (Mich. Cir. Ct. Jan. 15, 2010) (on file with authors).

¹⁹⁸ See *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985).

¹⁹⁹ *United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181 (2d Cir. 1997).

Yonkers and two of its agencies had “intentionally enhanced racial segregation”²⁰⁰ in the city in violation of the Fair Housing Act (the “FHA”) and of the Equal Protection Clause of the Fourteenth Amendment where the record reflected a tremendous amount of racial animus present in the city. For example, attendees at the public meetings surrounding public housing proposals “made specific racial slurs inside and outside the hearing room,” including, “we don’t want those children” and worse.²⁰¹ Further, “[o]fficials describing public meetings said racial motivations were ‘definitely a consideration’ and were ‘thick in the air.’”²⁰²

In a manner familiar to RLUIPA practitioners, the city’s defense to the FHA claim was that “its housing decisions only responded to the concerns of its citizens, and race was not found to be the citizens’ ‘dominant’ concern.”²⁰³ These officials, it argued, “were *entirely* well-meaning public servants acting in accordance with their perception of what was feasible in the political and socio-economic circumstances of Yonkers and *in the best interests of that community.*”²⁰⁴ The court rejected the city’s contention for several reasons, including: (1) the active involvement of officials in the promulgating of the negative community sentiment; (2) that racial animus need only constitute a significant, not a dominant, factor in the community’s motivation; and (3) that official action responsive to community opposition where race is a “significant” factor still violates the Equal Protection Clause.²⁰⁵ Thus,

Given the district court’s finding, which is unimpeachable on the basis of the present record, that racial animus was a significant factor motivating those white residents who opposed the location of low-income housing in their predominantly white neighborhoods, the City may properly be held liable for the segregative effects of a decision to cater to this “will of the people.”²⁰⁶

The Tenth Circuit has extended this reasoning to an FHA and Equal Protection case, in which “the race issue was not discussed at any of the public meetings and . . . there was no evidence of racial prejudice on the part of any city official.”²⁰⁷ In *Dailey v. City of Lawton*, a Catholic church sought to convert an unused school into an integrated low-income housing project,

²⁰⁰ *Id.* at 1184.

²⁰¹ *Id.* at 1207.

²⁰² *Id.* at 1221.

²⁰³ *Id.* at 1222.

²⁰⁴ *Id.* at 1223 (emphasis in original).

²⁰⁵ *United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181, 1223–24 (2d Cir. 1997).

²⁰⁶ *Id.* at 1226.

²⁰⁷ *Dailey v. City of Lawton*, 425 F.2d 1037, 1039 (10th Cir. 1970).

where it would have brought diversity to an otherwise segregated area.²⁰⁸ Citing *Shelley v. Kraemer*, the court held “[i]n our opinion it is enough for the complaining parties to show that the local officials are effectuating the discriminatory designs of private individuals.”²⁰⁹

Although the Supreme Court has not explicitly included hostile statements of members of the community in its list of nonexclusive factors for inferring discriminatory intent (which will be discussed in greater detail), it has signaled a willingness to consider such statements.²¹⁰ In reviewing the context of the ordinances at issue in *Church of the Lukumi Babalu Aye*, the Supreme Court noted that “relevant evidence” of an unconstitutionally gerrymandered law included statements by members of the decision-making body.²¹¹ Yet, the Court also noted the actions of members of the public at hearings, including “significant hostility exhibited by residents” and that “[t]he public crowd that attended the June 9 meetings interrupted statements by council members critical of Santeria with cheers and the brief comments of [the church’s priest] with taunts.”²¹²

Such evidence of community hostility to minority and unfamiliar faiths were of central importance to RLUIPA’s drafters.²¹³ The Congressional Report includes specific instances of vicious bigotry in community meetings, including one in which “an objector turned to the people in the audience wearing skull caps and said ‘Hitler should have killed more of you.’”²¹⁴ The Congressional Report also notes that when dealing with community opposition, “[r]acial or ethnic discrimination may also play a part” since differential treatment between denominations is also differential treatment between black churches and white churches.²¹⁵

In *Moxley v. Town of Walkersville*, the plaintiffs brought claims against a community group that was allegedly formed for the sole purpose of preventing a Muslim group from using farmland for the construction of a mosque.²¹⁶ The complaint alleged that the group secretly met with town

²⁰⁸ *Id.* at 1038.

²⁰⁹ *Id.* at 1030 (citing *Shelley v. Kraemer*, 334 U.S. 1 (1948)).

²¹⁰ Compare *City of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 267–68 (1977) (providing factors for inferring discriminatory intent), with *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 540–41 (1993) (noting hostile statements of members of community).

²¹¹ *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 540.

²¹² *Id.* at 541.

²¹³ See H.R. REP. NO. 106-219, at 23 (1999).

²¹⁴ H. REP. NO. 106-219, at 23.

²¹⁵ H. REP. NO. 106-219, at n. 111.

²¹⁶ *Moxley v. Town of Walkersville*, 601 F. Supp. 2d 648, 653 (D. Md. 2009).

commissioners to formulate strategies for preventing the mosque's construction.²¹⁷ One commissioner was alleged to have provided "'talking points' to use against the [mosque] and told the Private Defendants that following the points would avoid violations of [RLUIPA]" and advised "the Private Defendants about how to approach the public hearings on the [mosque's] petition, including refraining from using 'terms like Muslim, those individuals, religion etc.,' and how many people should testify."²¹⁸

Between that meeting and the vote on the mosque's request for a special exception, the community group actively spoke out against the mosque, with members allegedly making statements such as, "I'm trying to keep Frederick free of people who don't belong" and spreading rumors that the mosque would "be used to spread radical Islamic ideology."²¹⁹ The District Court held that the plaintiff could maintain counts for civil conspiracy against certain members of the community who acted in concert with government officials.²²⁰ Although the fact pattern in *Moxley* provides an extreme example of collusion with government officials, it is not the only case containing examples of community opposition to the "new or unfamiliar" churches that RLUIPA was intended to protect.²²¹

To deny plaintiffs the opportunity to infer intentional discrimination through the context in which decisions are made denies the realities of local government. For example, in *Westchester Day School v. Village of Mamaroneck*, the court reviewed the relationships between members of one zoning board, noting that many were members of a local social club, were long-time friends, socialized on a regular basis, or were business partners.²²² Zoning boards do not spring fully formed from county or village codes; they are elected or appointed, and often politically answerable.²²³ They may also be savvy enough to appeal to members of the community to further a discriminatory agenda. Evidence of community opposition alone may not be enough to constitute a prima facie case for a Nondiscrimination claim, but it should, however, be recognized by the courts as a factor to be used in conjunction with the other nonexclusive factors used to evaluate equal protection claims, such as deviations from the normal legislative patterns or statements by lawmakers on the record.

²¹⁷ *Id.* at 654.

²¹⁸ *Id.*

²¹⁹ *Id.* at 654-655.

²²⁰ *Id.* at 668.

²²¹ See, e.g., *Westchester Day Sch. v. Vill. of Mamaroneck*, 417 F. Supp. 2d 477, 507-08 (S.D.N.Y. 2006).

²²² *Westchester Day Sch. v. Vill. of Mamaroneck*, 417 F. Supp. 2d 477, 507-08 (S.D.N.Y. 2006).

²²³ *Id.* at 507.

B. “Gerrymandered” or Targeted Laws

Where a zoning code permits religious land use by right, or where there is not even a fig leaf justification to deny a use completely, another common tactic is to enact a new ordinance that prohibits such use. Often, such code amendments do not prohibit the use entirely, but are crafted in such a manner as to limit only a subset of locations or activity—a subset that the religious applicant invariably finds itself included within.²²⁴ The specific timing, language of the amendment, and particularized effects will be relevant evidence in determining whether discrimination exists. Furthermore, while the existence of comparators *may* play a role, they should not be essential to a claim that a law was passed to target one specific entity.

Zoning code amendments that are adopted soon after a minority religious group purchases property and files for an application, which would prohibit the group’s desired use are unfortunately common. A complaint was filed against the Village of Pomona, New York,²²⁵ for adopting various zoning code provisions regulating “dormitory” uses in a manner that would prohibit a planned ultra-Orthodox Jewish rabbinical college from locating anywhere within its jurisdiction by forbidding “separate cooking, dining or housekeeping facilities,”²²⁶ requiring any educational uses to be “accredited,” and creating other limitations rendering it impracticable to build the college. If the very specific regulation of a use that thus far *had not existed anywhere within the village*²²⁷ was insufficient evidence of a targeted law, comments by the village’s mayor at a public meeting were equally damning:

²²⁴ “Religious gerrymanders” are also potentially viable claims under the Equal Terms provision. See *Elijah Grp., Inc. v. City of Leon Valley*, 643 F.3d 419, 422–23 (5th Cir. 2011) (“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.’” (quoting *Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward Cnty.*, 450 F.3d 1295, 1309 (11th Cir. 2006))); *Church of Scientology of Ga., Inc. v. City of Sandy Springs*, 843 F. Supp. 2d 1328, 1361 (N.D. Ga. 2012).

²²⁵ Second Amended Complaint, *Congregation Rabbinical Coll. of Tartikov, Inc. v. Vill. of Pomona*, No. 07-6304 (S.D.N.Y. Nov. 14, 2007) (on file with authors). See *Congregation Rabbinical College of Tartikov, Inc. v. Village of Pomona*, No. 07-6304, 2013 WL 66473, at *30, *47 (S.D.N.Y. Jan. 4, 2013) (denying motion to dismiss facial Nondiscrimination challenge to newly enacted ordinances where “Plaintiffs pled that the timing of the enactment of one of the challenged ordinances demonstrates Defendants’ discriminatory animus [and] Plaintiffs’ allegations of racially charged public comments preceding the enactment . . . suggests the existence of discriminatory motivation.”).

²²⁶ Most students at the rabbinical college would be married and many would have children, necessitating that the dorms have kitchens. *Id.* at ¶ 59.

²²⁷ *Id.* at ¶ 172.

Ladies and gentlemen, let me say something. We sitting at this table have limitations that are placed on us as to what we can say, and what we can't say, because our attorney tells us what we can say and what we can't say. I can't say what I feel – I can't – if I agree with you, I don't agree with you, I don't have that luxury of being able to say that here. All that I can say is that every member of this board works very, very hard to do what is best for this community. You have your issues. Don't assume because no one has gotten up and said, wow, I agree with you, oh boy; don't assume that because we didn't do that that we don't agree.²²⁸

Similarly, when Bethel World Outreach Ministries, a church that served mostly African immigrants in Montgomery County, Maryland, purchased property in the county's "RDT" zoning district—property that permitted a church use by right—the county adopted a series of new regulations that limited and finally prohibited the church's proposed use completely.²²⁹ Unsurprisingly, the final amendment limited the ban to properties encumbered with a certain type of property easement (which, of course, existed on Bethel's property).²³⁰ In *Moxley v. Town of Walkersville*, two days after a Muslim group publicly disclosed that it sought to purchase land located within the agricultural zoning district for use as a mosque, a County Commissioner introduced an amendment to the zoning ordinance to prohibit places of worship in the agricultural zone even by special exception.²³¹ In another recent example, the Township of Old Bridge, New Jersey adopted a new ordinance defining what constitutes permissible accessory uses of a house of worship.²³² The timing of the ordinance resulted in the denial of a pending application by the Dayalbagh Radhasoami Satsang Association of North America.²³³ The circumstances and effect of such gerrymandered laws at

²²⁸ Transcript at 58–59, In re Public Hearings on Local Law Amendment: Dormitories (Continued), Local Law Amendment: Wetlands Before Vill. of Pomona Bd. of Trs. (Jan. 22, 2007) (on file with authors).

²²⁹ See Brief for the United States as Amicus Curiae Supporting Plaintiff-Appellant at 5–6, *Bethel World Outreach Ministries v. Montgomery Cnty. Council*, No. 11-2176 (4th Cir. Apr. 12, 2012), available at <http://www.justice.gov/crt/about/app/briefs/bethelbrief.pdf>; First Amended Complaint at 7–13, *Bethel World Outreach Ministries v. Montgomery Cnty. Council*, No. 08-1195 (D. Md. Jan. 28, 2010) (on file with authors).

²³⁰ First Amended Complaint at 10-11, *Bethel World Outreach Ministries v. Montgomery Cnty. Council*, No. 08-1195 (D. Md. Jan. 28, 2010) (on file with authors).

²³¹ *Moxley v. Town of Walkersville*, 601 F. Supp. 2d 648, 653 (D. Md. 2009).

²³² Lauren Ciraulo, *O.B. Looking to Change House of Worship Zoning, Changes Will Impact Pending Plans by Religious Groups*, SUBURBAN (Sept. 29, 2010), available at http://sub.gmnews.com/news/2010-09-23/Front_Page/0B_looking_to_change_house_of_worship_zoning.html (“Recent applications for houses of worship have brought to our attention that certain sections of the LDO may be interpreted by applications in ways other than what was intended. Several sections have been called into question, [Township Planner Sam] Rizzo said in an August report on the issue.”) (on file with authors).

²³³ Sam Slaughter, *Religious Group's Plan Denied in Old Bridge*, SUBURBAN (May 12, 2011), available at http://sub.gmnews.com/news/2011-05-12/Religious_Groups_Plan_Denied_in_Old_Bridge.html.

least establish a prima facie case of discrimination.²³⁴

It was well established in pre-RLUIPA Free Exercise jurisprudence that laws specifically targeting religious conduct have an “impermissible object” and are not constitutional.²³⁵ In *Church of Lukumi Babalu Aye, Inc.*, the Supreme Court reviewed the principle that, “the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons.”²³⁶ Further, “[a] law targeting religious beliefs as such is never permissible.”²³⁷ The equal application of the law is paramount, and when disposing of applications made by unpopular groups, “[t]hose in office must be resolute in resisting importunate demands and must ensure that the sole reasons for imposing the burdens of law and regulation are secular. Legislators may not devise mechanisms, overt or disguised, designed to persecute or oppress a religion or its practices.”²³⁸ The Nondiscrimination provision encompasses these existing Free Exercise principles.

The Court first contemplated the concept of a “religious gerrymander” that might target religious activity in Justice Harlan’s concurrence in *Walz v. Tax Commissioners of New York*.²³⁹ There, a plaintiff challenged certain tax exemptions for worship facilities on establishment clause grounds.²⁴⁰ The Court held that the history of “the Religion Clauses” made clear that such exemptions did not lead to unconstitutional entanglement.²⁴¹ Justice Harlan highlighted the “mutually reinforcing” concepts of neutrality and voluntarism that defend against government over-involvement in religious matters.²⁴² He further explained that

[n]eutrality in its application requires an equal protection mode of analysis. The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders. In any particular case the critical question is whether the circumference of legislation encircles a class so broad that it can be fairly concluded that religious institutions could be thought

12/Front_Page/Religious_groups_plan_denied_in_Old_Bridge.html.

²³⁴ Compare *St. John’s United Church of Christ v. City of Chi.*, 401 F. Supp. 2d 887, 898 (N.D. Ill. 2005) (“Plaintiffs do not allege that Chicago wanted the legislature to pass § 30 so that it could satisfy a goal of impeding the St. John’s Plaintiffs religious practice by building runways over St. Johannes Cemetery.”), with *Ciraulo*, *supra*, note 232.

²³⁵ See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 524 (1993).

²³⁶ *Id.* at 532.

²³⁷ *Id.* at 533.

²³⁸ *Id.* at 547.

²³⁹ *Walz v. Tax Comm’rs of N.Y.*, 397 U.S. 664, 696 (1970) (Harlan, J., concurring).

²⁴⁰ *Id.* at 667.

²⁴¹ *Id.* at 680.

²⁴² *Id.* at 694.

to fall within the natural perimeter.²⁴³

This “zone of effect” of challenged legislation has thus become one of the primary inquiries in cases alleging religious gerrymanders. While Justice Harlan was concerned with avoiding Establishment Clause violations by considering the natural scope of legislation, the inquiry has also been applied in the reverse to ensure that legislation does not single out particular sects or particular religious entities.²⁴⁴

The Supreme Court applied that inquiry in *City of Hialeah*, where a Santeria group leased property with the intent to construct a worship facility.²⁴⁵ The practice of the Santeria faith includes animal sacrifice.²⁴⁶ After learning of the group’s plans, the city council passed four ordinances and two hortatory statements intended to prevent the group from conducting its worship or animal sacrifices within the city.²⁴⁷ All of these were framed as general animal welfare laws, although curiously they were either limited to ritual sacrifice or else contained specific exemptions for commercial slaughterhouses.²⁴⁸

After a bench trial, the District Court held that, although the ordinances were prompted by the group’s arrival in the city and were not religiously neutral, “the purpose of the ordinances was not to exclude the Church from the city but to end the practice of animal sacrifice, for whatever reason practiced.”²⁴⁹ Further, because the ordinances did not facially target religious conduct, and were ostensibly to preserve the public health and welfare, any burden on the group’s religious exercise was incidental.²⁵⁰ The court balanced the church’s interests against four interests proffered by the government to determine whether those governmental interests were sufficiently compelling.²⁵¹ Relying in part on the government’s stated interest in “emotional injury to children who witness the sacrifice of animals,” the district court found that the ordinances passed strict scrutiny review.²⁵²

The Supreme Court disagreed, applying free exercise jurisprudence to determine that, despite their facial neutrality, the ordinances targeted the

²⁴³ *Id.* at 696.

²⁴⁴ *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 525 (1993).

²⁴⁵ *Id.* at 525-26.

²⁴⁶ *Id.* at 525.

²⁴⁷ *Id.* at 527-28.

²⁴⁸ *Id.*

²⁴⁹ *Id.* at 529.

²⁵⁰ *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 529 (1993).

²⁵¹ *Id.* at 529-30.

²⁵² *Id.* at 530.

Santeria faith.²⁵³ Citing *Walz*, the Court held that “[o]fficial action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality.”²⁵⁴ Importantly, “[a]part from the text, the effect of a law in its real operation is strong evidence of its object.”²⁵⁵ Although the government identified legitimate interests protected by the ordinances, “the ordinances when considered together disclose an object remote from these legitimate concerns.”²⁵⁶ Because the ordinances targeted religious conduct, they amounted to a religious gerrymander.²⁵⁷ Essential to the Court’s conclusion was the context and effect of the ordinances: “It is a necessary conclusion that almost the only conduct subject to [the ordinances] is the religious exercise of Santeria church members.”²⁵⁸

Referring to its equal protection analysis in *City of Arlington Heights v. Metropolitan Housing Development Corporation*,²⁵⁹ the Court noted that the context considered should include, “among other things, the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body.”²⁶⁰ The Court specifically reviewed transcripts of public hearings, as discussed *supra*.²⁶¹ Because the context and effect of the ordinances evidenced a religious gerrymander, the ordinances were deemed not to be neutral.²⁶² Further, by permitting conduct that conflicted with the stated governmental interests, the ordinances were not of general applicability, and subsequently did not survive strict scrutiny review.²⁶³

The only RLUIPA Nondiscrimination case to explicitly allege religious gerrymandering involved a Hasidic Jewish group seeking to construct a boys’ boarding school.²⁶⁴ In *United States v. Village of Airmont*, the Department of Justice filed a facial challenge and an as-applied challenge to

²⁵³ *Id.* at 535.

²⁵⁴ *Id.* at 534.

²⁵⁵ *Id.* at 535.

²⁵⁶ *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 535 (1993).

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *City of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 426 U.S. 252 (1977).

²⁶⁰ *Church of Lukumi Babalu Aye, Inc.*, 508 U.S. at 535 (1992).

²⁶¹ *Id.* at 540-541.

²⁶² *Id.* at 542.

²⁶³ *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 542, 546 (1993).

²⁶⁴ *United States v. Vill. of Airmont*, No. 05-5520, at 3 (S.D.N.Y. Nov. 12, 2008).

the Village's zoning code, which had totally prohibited boarding schools.²⁶⁵ It was alleged that living on campus was an important part of the pedagogical structure of the school.²⁶⁶ The area constituting the Village had previously been part of the Town of Ramapo, New York, which allowed for the construction of these schools, but its residents had seceded.²⁶⁷ Additionally, in a prior case, the Second Circuit had held that there was sufficient evidence to find that the Village's zoning code was motivated by anti-Semitism.²⁶⁸ Although the prohibition on boarding schools predated the Hasidic Jewish group's application, the court found that "the language [of the zoning code] suggests that the Code's drafters were seeking to prohibit religious schools, and perhaps yeshivas in particular, when they wrote this provision."²⁶⁹ Thus, in this case, the intent of the drafters, as inferred through the history of the zoning code, was so strong as to nullify the temporal requirement usually found in such cases.²⁷⁰

In 2010, the Fourth Circuit affirmed a jury finding of religious discrimination in *Reaching Hearts International, Inc. v. Prince George's County*, a RLUIPA challenge to, *inter alia*, a zoning amendment that allegedly restricted religious land use.²⁷¹ The plaintiff was a Seventh Day Adventist group that sought to construct a worship facility and school on land it had purchased.²⁷² The County denied its application for a water and sewer category change—the only denial out of twenty-eight applications considered at that particular meeting.²⁷³ The group had previously faced community opposition at a meeting it held to introduce neighbors to its project.²⁷⁴ Additionally, the circumstances surrounding the denial of the application were suspect: the County Council initially voted for the approval of the application, but after Councilman Dernoga "was observed to have said something to the other council members, who then reversed themselves and voted against [the church's] application."²⁷⁵

After reworking its application for resubmission, the church learned

²⁶⁵ *Id.* at 3-4.

²⁶⁶ *Id.* at 3.

²⁶⁷ *Id.* at 4 n.1.

²⁶⁸ *Id.* at 4 (citing *Leblanc-Sternberg v. Fletcher*, 67 F.3d 412, 416 (2d Cir. 1995)).

²⁶⁹ *Id.* at 18.

²⁷⁰ *United States v. Vill. of Airmont*, No. 05-5520, slip op. at 18 (S.D.N.Y. Nov. 12, 2008).

²⁷¹ *Reaching Hearts Int'l, Inc. v. Prince George's Cnty.*, 368 Fed. Appx. 370, 373 (4th Cir. 2010).

²⁷² *Reaching Hearts Int'l, Inc. v. Prince George's Cnty.*, 584 F. Supp. 2d 766, 772 (D. Md. 2008), *aff'd*, 368 Fed. Appx. 370 (4th Cir. 2010).

²⁷³ *Id.* at 775.

²⁷⁴ *Id.* at 773.

²⁷⁵ *Id.* at 775.

of an ordinance sponsored by Councilman Dernoga and passed by the County Council four months after the denial of the church's application.²⁷⁶ That ordinance "dramatically reduced the allowable net lot coverage for certain non-residential use properties in residential zones that were within 2,500 feet of a drinking water reservoir from 50% and 60% to 10% and 20%."²⁷⁷ The only non-residential uses in that zone were church and elementary schools.²⁷⁸ Further, the drafter of the ordinance "testified that he was unaware of any other property in Councilman Dernoga's district that would have been affected by the terms of [the ordinance]."²⁷⁹ The effect of the ordinance was to make construction of the Reaching Hearts church impossible,²⁸⁰ and the church continued its futile attempt to file application after application to develop the property.²⁸¹

After filing suit, the church prevailed in a jury trial against the County.²⁸² The district court found that there was sufficient evidence to support the jury's finding of intentional discrimination.²⁸³ Specifically, "the historical background, the specific sequence of events leading up to the Defendant's actions (including numerous departures from normal procedures), and the contemporary statements of decision-makers all amply supported the jury's reasonable finding of intentional discrimination."²⁸⁴ Among the evidence adduced at trial that related to these factors were statements made by members of the County Council to the press at the same time that the application was pending.²⁸⁵ Importantly, the district court also found that the sequence of events leading to the passage of the ordinance, "which effectively foreclosed [Reaching Heart's] ability to build a church on its property," was introduced just two months after the denial of the first water and sewer permit, and contained a restriction "just large enough to encompass all of [the church's] property" but did not affect any other properties, all supported an inference of targeting.²⁸⁶ As in *City of Hialeah*, "[t]he inference that Reach-

²⁷⁶ *Id.* at 776.

²⁷⁷ *Id.* at 772.

²⁷⁸ *Reaching Hearts Int'l, Inc. v. Prince George's Cnty.*, 584 F. Supp. 2d 766, 772 (D. Md. 2008), *aff'd*, 368 Fed. Appx. 370 (4th Cir. 2010).

²⁷⁹ *Id.*

²⁸⁰ *Id.*

²⁸¹ *Id.* at 778-79.

²⁸² *Id.* at 782.

²⁸³ *Id.* at 781-82.

²⁸⁴ *Reaching Hearts Int'l, Inc. v. Prince George's Cnty.*, 584 F. Supp. 2d 766, 781-82 (D. Md. 2008), *aff'd*, 368 Fed. Appx. 370 (4th Cir. 2010).

²⁸⁵ *Id.* at 782. The district court rejected the County's position that these statements should not factor into the analysis because they were not strictly "on the record or in minutes of their meetings," as considered in *Arlington Heights*. *Id.* at 783.

²⁸⁶ *Id.* at 779.

ing Hearts was uniquely targeted by this bill is buttressed by the inconsistency in the purported motivation for the bill and the reality of its drafting” which contained serious flaws.²⁸⁷

Plaintiff Reaching Hearts had advanced an equal protection claim under 42 U.S.C. § 1983 and a substantial burden claim under RLUIPA.²⁸⁸ The district court reviewed the factors for discerning intentional discrimination derived by the Fourth Circuit in its own interpretation of the *City of Arlington Heights* factors:

(1) evidence of a ‘consistent pattern’ of actions by the decision-making body disparately impacting members of a particular class of persons; (2) historical background of the decision, which may take into account any history of discrimination by the decision-making body or the jurisdiction it represents; (3) the specific sequence of events leading up to the particular decision being challenged, including any significant departures from normal procedures; and (4) contemporary statements by decision-makers on the record or in minutes of their meetings.²⁸⁹

The lower court further reviewed each party’s burden of proof, noting that the initial burden was on the plaintiff to show “intentional or purposeful discrimination.”²⁹⁰ Once it did so, the burden shifted to the defendant in the equal protection analysis “to articulate a compelling governmental interest and that its actions taken were narrowly tailored to further that compelling governmental interest.”²⁹¹ The court next highlighted the main advantage that the Nondiscrimination provision provides: “Because CB–83–2003 is a facially neutral ordinance, RHI bears the burden of demonstrating an intent on the part of the Defendant to purposefully discriminate against it.”²⁹² To the contrary, under RLUIPA, the municipality bears the burden of persuasion to demonstrate that its targeted ordinance does not discriminate against the plaintiff.²⁹³ Nonetheless, in *Reaching Hearts* the church met its burden. On appeal, the Fourth Circuit agreed with the district court, citing a Title VII case and noting that, when “[v]iewed in the light most favorable to Reaching Hearts, the evidence presented at trial of the County’s anti-church

²⁸⁶ *Id.* at 783.

²⁸⁷ *Id.*

²⁸⁸ *Id.* at 780-81 (although a showing of intentional discrimination was necessary for the church to maintain its equal protection claim, it did not assert a RLUIPA Nondiscrimination claim).

²⁸⁹ *Id.* at 781.

²⁹⁰ *Reaching Hearts Int’l, Inc. v. Prince George’s Cnty.*, 584 F. Supp. 2d 766, 781 (D. Md. 2008), *aff’d*, 368 Fed. Appx. 370 (4th Cir. 2010).

²⁹¹ *Id.*

²⁹² *Id.*

²⁹³ 42 U.S.C. § 2000cc-2(b) (2006).

animus was very strong.”²⁹⁴

Against this background, a prima facie Nondiscrimination claim can be made by demonstrating that a plaintiff’s religious land use was the object of a particular zoning or landmarking ordinance or that the particularized effect of the law is such that the only or almost the only affected landowner is the religious group at issue. Once the plaintiff meets that threshold, the burden must shift to the defendant municipality to show that the law is not only facially neutral but also was not intended to target a specific religious group or denomination.²⁹⁵

C. Selective Enforcement

The unequal application of an otherwise facially neutral statute is one of the most commonly understood types of discrimination.²⁹⁶ In the context of racial discrimination, the Supreme Court has held that “[a] statute, otherwise neutral on its face, must not be applied so as invidiously to discriminate”²⁹⁷ The identification of comparators is critical for a claim that a local government has treated a religious entity differently and worse than other religious entities.²⁹⁸ The Supreme Court has described the *McDonnell Douglas* test simply as the “burden-shifting scheme for discriminatory-treatment cases.”²⁹⁹ Elsewhere, it has noted that “[t]he burden of establishing a prima facie case of disparate treatment is not onerous. The plaintiff must prove by a preponderance of the evidence that she applied for an available position for which she was qualified, but was rejected under circumstances which give rise to an inference of unlawful discrimination.”³⁰⁰ The *McDonnell Douglas* burden-shifting test should be applied to these types of claims, particularly since a municipality will likely be able to identify some criteria differing between the aggrieved applicant and the identified comparator, as no two applicants will be identical.

²⁹⁴ *Reaching Hearts Int’l, Inc. v. Prince George’s Cnty.*, 368 Fed. Appx. 370, 372 (4th Cir. 2010).

²⁹⁵ See 42 U.S.C. § 2000cc-2(b) (2006).

²⁹⁶ See, e.g., *Church of Scientology of Ga., Inc. v. City of Sandy Springs*, 843 F. Supp. 2d 1328, 1361 (N.D. Ga. 2012).

²⁹⁷ *Washington v. Davis*, 426 U.S. 229, 241 (1976) (citing *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)).

²⁹⁸ The Equal Terms provision is implicated if a religious entity is treated differently and worse than other *nonreligious* entities. Also, it should be noted that the authors have yet to observe a circumstance where a traditional mainstream church alleged mistreatment as compared to a nontraditional place of worship.

²⁹⁹ *Raytheon Co. v. Hernandez*, 540 U.S. 44, 50 n.3 (2003).

³⁰⁰ *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

In one case predating RLUIPA, the plaintiff group needed only to look next door to find a religious group receiving better treatment.³⁰¹ In *Islamic Center of Mississippi, Inc. v. City of Starkville*, a Muslim group searched for more than a year to locate an appropriate site for a worship center within walking distance of the University of Mississippi, since many of the students did not own cars.³⁰² Pursuant to the city's zoning code, any location near the university would require a special exception from the City Board of Aldermen (the "Board").³⁰³ The Center entered into a dialogue with the Board, who rejected several of the group's informal choices for houses of worship, presented before the group purchased them.³⁰⁴ Finally, the Center located a suitable property and was told by a member of the Board that it was an "excellent location" for the proposed use.³⁰⁵ Later, after the group had purchased the property and expended significant funds in construction, the Board unanimously rejected the exception without explanation.³⁰⁶

The group filed suit, alleging violation of the Free Exercise Clause.³⁰⁷ On appeal, the Fifth Circuit carefully examined the context of the denial of the exception for the group.³⁰⁸ It noted that since the inception of the zoning provisions requiring groups to obtain special exceptions, all nine previous applicants had been approved.³⁰⁹ Each of those applicants (along with the other sixteen churches that existed in the neighborhood prior to the enactment of the zoning code) were Christian churches.³¹⁰ One of them was located next door to the space sought by the Muslim group.³¹¹ Although the city cited "parking" concerns as a reason for denying the Muslim center, the appeals court noted that the neighboring church attracted "more than twice as many persons" as the services at the Muslim center, and that the Muslim center planned to provide ten more parking spaces than its neighbor.³¹² The Fifth Circuit held that "[t]he City's approval of applications for zoning exceptions by other churches suggests that it did not treat all applicants alike. This undermines the City's contention that the Board denied a zoning exception to the Muslims solely for the purposes of traffic

³⁰¹ *Islamic Ctr. of Miss., Inc. v. City of Starkville*, 840 F.2d 293, 295 (5th Cir. 1988).

³⁰² *Id.*

³⁰³ *Id.* at 294.

³⁰⁴ *Id.* at 295.

³⁰⁵ *Id.*

³⁰⁶ *Id.* at 296.

³⁰⁷ *Islamic Ctr. of Miss., Inc. v. City of Starkville*, 840 F.2d 293, 298 (5th Cir. 1988).

³⁰⁸ *Id.*

³⁰⁹ *Id.* at 297.

³¹⁰ *Id.*

³¹¹ *Id.*

³¹² *Id.* at 297.

control and public safety.”³¹³ The court then found the zoning ordinance unconstitutional as applied to the Center.³¹⁴

Had the case been brought after the passage of RLUIPA, the plaintiff would have established a prima facie Nondiscrimination claim by demonstrating that its use had been rejected while other places of worship had been permitted to locate in the same zoning district under the same statutory scheme. The burden of persuasion would then have fallen on the defendant to demonstrate that the reasons for its disparate treatment were not pretextual, a burden it likely would not have been able to meet in this case. Therefore, the extension of the *McDonnell Douglas* analysis generally would not pose a fundamental change to the analysis; it would merely make cases more manageable and predictable for litigants and courts.

In *Adhi Parasakthi Charitable, Medical, Educational, and Cultural Society of North America*,³¹⁵ the plaintiff Hindu organization sought “conditional use” approval to expand its facilities.³¹⁶ The zoning board held eight public hearings on the proposal,³¹⁷ and then purported to approve the application but included conditions that completely frustrated the purposes of the application, leading the district court to find that, “[i]n effect, therefore, the Board denied Plaintiff’s application.”³¹⁸ The group thereafter filed suit, including a Nondiscrimination claim that the defendant municipality’s zoning ordinance was arbitrarily enforced against it.³¹⁹ The Eastern District of Pennsylvania found that the plaintiff had provided evidence that “other, non-Hindu groups that did not require such an extensive [zoning] process,” and that the group asserted “that there was an undue focus on ‘small technical issues,’ and that Defendant repeatedly added new reasons to the list of why the application could not be approved after engineering changes had been made. These obstacles, according to Plaintiff, were not faced by other applicants.”³²⁰ In the face of Defendant’s facts, Plaintiff’s arguments created a genuine issue of fact and thus summary judgment was inappropriate on Plaintiffs’ Free Exercise and Nondiscrimination claims.³²¹ The court found

³¹³ *Islamic Ctr. of Miss., Inc. v. City of Starkville*, 840 F.2d 293, 302 (5th Cir. 1988).

³¹⁴ *Id.* at 303.

³¹⁵ *Adhi Parasakthi Charitable, Med., Educ., & Cultural Soc’y of N. Am. v. Twp. of W. Pikeland*, 721 F. Supp. 2d 361, 370-71 (E.D. Pa. 2010).

³¹⁶ *Id.* at 371.

³¹⁷ *Id.*

³¹⁸ *Id.*

³¹⁹ *Id.* at 378.

³²⁰ *Id.*

³²¹ *Adhi Parasakthi Charitable, Med., Educ., & Cultural Soc’y of N. Am. v. Twp. of W. Pikeland*, 721 F. Supp. 2d 361, 378, 386 (E.D. Pa. 2010).

that the ordinance was not facially discriminatory, but that it was “possible, however, that this Ordinance was applied to target religiously motivated conduct.”³²² The identification of sufficient comparators contributed to the existence of a fact-question of pretext.³²³

Similarly, in *Hollywood Community Synagogue, Inc. v. City of Hollywood*, the court applied a selective enforcement theory to deny the defendant’s motion to dismiss the plaintiff’s Nondiscrimination claim.³²⁴ The plaintiff group had purchased two adjacent single-family homes, which were zoned such that a Worship Special Exception permit was required in order to operate a worship facility out of one of the homes.³²⁵ Despite assurances from city officials that the permit would be granted, the group was granted temporary permits, but its application was ultimately denied after one of the city commissioners filed an appeal challenging the permit.³²⁶ The reviewing body “determined that the Synagogue was ‘too controversial,’ despite the fact that ‘controversiality’ was not an enumerated factor in the City Code to be evaluated when considering a Special Exception.”³²⁷ The court reviewed evidence of three types of comparators submitted by the plaintiff.³²⁸ Specifically, there were nineteen houses of worship in the area, including two other synagogues that had obtained the necessary Special Exception permit.³²⁹ There was also a shrine located only a few blocks away from the proposed synagogue site, which had been operating for more than a decade without obtaining the Special Exception permit.³³⁰ There was yet another non-Jewish house of worship that had operated without a Special Exception permit without incident “until after the Synagogue inquired about unequal treatment[;] this house of worship applied for and was immediately granted a Special Exception.”³³¹ Additionally, the plaintiff asserted that of the ten other applications for such permits submitted in the last twenty years, only the plaintiff’s application had been denied.³³² This was suffi-

³²² *Id.* at 378.

³²³ See also *Bikur Cholim, Inc. v. Vill. of Suffern*, 664 F. Supp. 2d 267, 292 (S.D.N.Y. 2009) (noting that the plaintiff’s evidence of comparators in its consideration of whether the facially neutral zoning, if unequally applied as evidenced by the treatment comparators, gave rise to a RLUIPA claim).

³²⁴ *Hollywood Cmty. Synagogue, Inc. v. City of Hollywood*, 430 F. Supp. 2d 1296, 1320-21 (S.D. Fla. 2006).

³²⁵ *Id.* at 1300.

³²⁶ *Id.* at 1300-1301.

³²⁷ *Id.* at 1301.

³²⁸ *Id.* at 1301-02.

³²⁹ *Id.* at 1302.

³³⁰ *Hollywood Cmty. Synagogue, Inc. v. City of Hollywood*, 430 F. Supp. 2d 1296, 1302-03 (S.D. Fla. 2006).

³³¹ *Id.* at 1303.

³³² *Id.*

cient to maintain the Nondiscrimination claim:

[I]t adequately connected the alleged discrimination with HCS's religious affiliation by identifying HCS as a religious institution, describing how the City of Hollywood denied it a Special Exception and sought to prevent religious worship there, and identifying the City's implementation of a time limit on HCS's Special Exception and the City's ultimate denial of a permanent Special Exception as the first such measures ever imposed on a religious institution by the City.³³³

The denial of the permit application and "the selective enforcement against the Synagogue" were the most significant facts influencing the court's decision.³³⁴ Again, the court applied an abbreviated test in which the court treated the prima facie case, the defendant's reason for denying the permit, and the showing of pretext through comparators at the same time.³³⁵

In *Church of Scientology of Georgia, Inc. v. City of Sandy Springs*, the Northern District of Georgia made a thorough and instructive investigation of adequate comparators before finding that a fact question existed as to the selective enforcement of parking regulations.³³⁶ The plaintiff church argued that

The City has discriminated against the Church, not only by refusing to apply its own parking ordinance to the Church, but also by applying a different parking standard than it has applied to every other church or place of worship in its jurisdictional boundaries. The City approved parking variances to reduce the required parking required for other places of worship in the City, while imposing a parking requirement on the Church of Scientology that amounts to almost three (3) times the parking required by the City's Zoning Ordinance.³³⁷

In support of its allegations, the plaintiff alleged that there were eleven comparators that had been treated more favorably by the City with respect to the relevant land use regulations.³³⁸ Although the group had been assured by city officials that the site contained sufficient parking, the City later decided that the parking was not sufficient based on applying different standards to the church.³³⁹

To define its prima facie case for a selective enforcement claim, the court

³³³ *Id.* at 1320-21.

³³⁴ *Id.* at 1321.

³³⁵ *Id.* at 1323, 1327.

³³⁶ *Church of Scientology of Ga., Inc. v. City of Sandy Springs*, 843 F. Supp. 2d 1328, 1376 (N.D. Ga. 2012).

³³⁷ *Id.* at 1362.

³³⁸ *Id.*

³³⁹ *Id.* at 1342-43.

borrowed from an Eleventh Circuit equal protection case that did not involve the exercise of fundamental rights.³⁴⁰ It held that the “Plaintiff must show: (1) that it was treated differently from other similarly situated religious assemblies or institutions, and (2) that the City unequally applied a facially neutral ordinance for the purpose of discriminating against Plaintiff.”³⁴¹ The court examined the comparators identified by the plaintiff based on whether they would have similar uses in addition to the congregational worship; that is, “they must have sought rezoning approval for a primary use in addition to their ‘church’ use (defined by the Zoning Ordinance as an ‘assembly-type use’), that would necessitate application of the [different parking standards].”³⁴² The plaintiff was able to show at least one comparator who operated a school and was permitted to meet its parking requirements through an off-site shared parking arrangement without a variance, as was required of the plaintiff.³⁴³

The court also reviewed the factors that might be used to show circumstantial evidence of intentional discrimination, including the

(1) historical background of the decision, particularly if it reveals a series of official actions taken for invidious purposes, (2) the specific sequence of events leading up to the challenged decision, (3) departures from the normal procedural sequence, as well as substantive departures, (4) legislative or administrative history, especially where there are contemporary statements by members of the decision-making body, minutes of its meetings, or reports, (5) foreseeability of discriminatory impact, (6) knowledge of discriminatory impact, and (7) the availability of less discriminatory alternatives.³⁴⁴

Framing these within the general equal protection context, the court noted that the plaintiff argued that it was subjected to a lengthier approval process than other churches.³⁴⁵ After reviewing all of the evidence, the court found that the plaintiff had made its prima facie case, and that the defendant had presented evidence that any departures were related to legitimate non-discriminatory objectives.³⁴⁶ The court reasoned that summary judgment

³⁴⁰ *Id.* at 1370–71 (citing *Jean v. Nelson*, 711 F.2d 1455, 1485–86 (11th Cir. 1983)).

³⁴¹ *Id.* at 1361; *see also* *Campbell v. Rainbow City*, 434 F.3d 1306, 1314 (11th Cir. 2006) (citing *Strickland v. Alderman*, 74 F.3d 260, 264 (11th Cir. 1996)).

³⁴² The plaintiff also intended to locate classrooms and offices at the site. *Id.* at 1364.

³⁴³ *Id.* at 1365–66, 1369.

³⁴⁴ *Id.* at 1371 (citing *Vill. of Arlington Heights v. Metro Hous. Dev. Corp.*, 429 U.S. 252, 266–68 (1977); *Jean v. Nelson*, 711 F.2d 1455, 1486 (11th Cir. 1983); *see also* *Reaching Hearts Int’l, Inc. v. Prince George’s Cnty.*, 584 F. Supp. 2d 766, 781 (D. Md. 2008) (recognizing several factors the Fourth Circuit used to determine whether a decision-making entity acted based on discriminatory intent).

³⁴⁵ *Church of Scientology of Ga., Inc. v. City of Sandy Springs*, 843 F. Supp. 2d 1328, 1372–73 (N.D. Ga. 2012).

³⁴⁶ *Id.* at 1375–76.

was inappropriate because a reasonable fact-finder could determine that any discrimination was unintentional.³⁴⁷

The *Church of Scientology* framework suggests an effective method for analyzing a Nondiscrimination claim based on selective enforcement. Meeting the first prong by showing a more favorably treated comparator,³⁴⁸ should constitute a sufficient prima facie case. Applying the *McDonnell Douglas* analysis to this method, the burden would then shift to the defendant to show a nondiscriminatory explanation for the differential treatment. These explanations should be made in terms of the neutral regulatory purposes for which the ordinances were originally implemented. Finally, the plaintiff should have the opportunity to show that these reasons were pretextual. It will be particularly important that courts not equate “intentional” discrimination with direct evidence of discrimination, as some courts have done.

D. Disparate Impact

The disparate impact of facially neutral laws or practices may also demonstrate discrimination on the basis of religion or religious denomination. Even as it found RFRA to be unconstitutional, the Supreme Court allowed for the possibility of appropriate disparate impact claims in the area of religious discrimination, noting that “[i]f a state law disproportionately burdened a particular class of religious observers, this circumstance might be evidence of an impermissible legislative motive.”³⁴⁹

The Supreme Court in *Griggs v. Duke Power Company*, one of its earliest cases interpreting Title VII, announced the theory of discrimination shown through disparate impact.³⁵⁰ In *Griggs*, the defendant power compa-

³⁴⁷ *Id.* at 1376.

³⁴⁸ How a valid comparator is determined is a separate question. The objective standards employed in the Equal Terms context by the Fifth and Seventh Circuits in *River of Life Kingdom Ministries v. Vill. of Hazel Crest*, 611 F.3d 376, 371 (7th Cir. 2010) (“accepted zoning criteria.”) and *Elijah Grp., Inc. v. City of Leon Valley*, 643 F.3d 419, 424 (5th Cir. 2011) (“measured by the ordinance itself and the criteria by which it treats institutions differently.”) are preferable for the reasons described above. See *River of Life Kingdom Ministries*, 611 F.3d at 371 (“The problems that we have identified with the Third Circuit’s test can be solved by a shift of focus from regulatory purpose to accepted zoning criteria. The shift is not merely semantic. ‘Purpose’ is subjective and manipulable, so asking about ‘regulatory purpose’ might result in giving local officials a free hand in answering the question ‘equal with respect to what?’ ‘Regulatory criteria’ are objective—and it is federal judges who will apply the criteria to resolve the issue.”).

³⁴⁹ *City of Boerne v. Flores*, 521 U.S. 507, 535 (1971).

³⁵⁰ See generally *Griggs v. Duke Power, Co.*, 401 U.S. 424 (1974).

ny had engaged in overtly discriminatory policies prior to the enactment of the Civil Rights Act of 1964.³⁵¹ African American employees had been hired only for the power plant's Labor Department, which provided the least desirable work of the plant's five departments.³⁵² After the passage of the Civil Rights Act, the plant began permitting African American employees to transfer to the more desirable departments, provided that they were high-school graduates or if they obtained satisfactory scores on two intelligence tests.³⁵³ Significantly, the fact that the company's implementation of these requirements was not motivated by any intent to discriminate was undisputed.³⁵⁴ Yet, the Court found decisively that the implementation of the requirements was not related to job performance since it was not disputed that employees hired prior to the implementation of the requirements were able to perform their jobs satisfactorily.³⁵⁵ The Court cited statistics that demonstrated that a significantly lower percentage of African American men in North Carolina, the state in which the plant was located, had graduated from high school, and that a significantly lower percentage of African-American employees taking the intelligence tests achieved a satisfactory score.³⁵⁶

The Court noted that after the passage of the Civil Rights Act, "practices, procedure, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practice."³⁵⁷ It held that "if an employment practice which operates to exclude [African Americans] cannot be shown to be related to job performance, the practice is prohibited[:]"³⁵⁸ any tests used must measure the person for the job and not the person in the abstract."³⁵⁹

Later versions of Title VII codified the *Griggs* holding.³⁶⁰ The current version of the law sets forth the burden of proof in employment discrimination cases based on disparate impact:

(I)(A) An unlawful employment practice based on disparate impact is established under this subchapter only if--

³⁵¹ *Id.* at 426-27.

³⁵² *Id.* at 427.

³⁵³ *Id.* at 428.

³⁵⁴ *Id.* at 432.

³⁵⁵ *Id.* at 431.

³⁵⁶ *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 n. 6. (1947).

³⁵⁷ *Id.* at 430.

³⁵⁸ *Id.* at 431.

³⁵⁹ *Id.* at 436.

³⁶⁰ See Civil Rights Act of 1991, Pub. L. No. 102-166, § 105(a), 105 Stat. 1071, 1074-75 (adding 42 U.S.C. § 2000e-2(k)).

- (i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or
- (ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.³⁶¹

In *Smith v. City of Jackson*, the Supreme Court held that disparate impact claims could be brought under the ADEA.³⁶² The congressional purpose behind the ADEA is “to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.”³⁶³ The Court reviewed its holding in *Griggs* and focused on the identical language in Title VII and the ADEA prohibiting conduct that would ““deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individuals’ race or age. . . .”³⁶⁴ Thus, the text focuses on the *effects* of the action on the employee rather than the motivation for the action of the employer.”³⁶⁵ The textual differences between the post-1991 Civil Rights Act and the ADEA led the Court to define the scope of an ADEA disparate impact case narrowly: “it is not enough to simply allege that there is a disparate impact on workers, or point to a generalized policy that leads to such an impact. Rather, the employee is ‘responsible for isolating and identifying the *specific* employment practices that are allegedly responsible for any observed statistical disparities.”³⁶⁶

Disparate impact claims are particularly useful in the RLUIPA Nondiscrimination context because, like the tests at issue in *Griggs*, zoning laws are often designed to maintain the status quo, the effect of which is to keep out the very faith groups—unfamiliar and disfavored religious organiza-

³⁶¹ 42 U.S.C. § 2000e-2(k) (2006). This section was created by Congress in the 1991 amendments to the Civil Rights Act, and the demonstration referenced in the second half of the quoted portion is a reference to an earlier version of the Civil Rights Act. See 42 U.S.C. § 2000e-3 (2006). A leading expert in labor law explains that Section (1)(A)(ii) refers to a plaintiff proving the availability of an alternative employment practice which the employer refuses to adopt. Rosemary Alito, “*Disparate Impact Discrimination Under the 1991 Civil Rights Act*,” 45 RUT. L. R. 1011, 1017 (1993).

³⁶² *Smith v. City of Jackson*, 544 U.S. 228, 240 (2005) (holding that ADEA and Title VII “both . . . authorize recovery on a disparate-impact theory . . .”).

³⁶³ 29 U.S.C. § 621(b) (2006).

³⁶⁴ 42 U.S.C. § 2000e-2 (2006).

³⁶⁵ See *City of Jackson*, 544 U.S. at 235.

³⁶⁶ *Id.* at 241 (quoting *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 656 (1989)) (quoting *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 991 (1988)) (emphasis in original).

tions—that RLUIPA was designed to protect. For example, in *Cambodian Buddhist Society of Connecticut, Inc. v. Planning and Zoning Commission of the Town of Newtown*, the defendant planning and zoning commission denied the plaintiff’s application for a special exception to build a Buddhist temple on property it had purchased.³⁶⁷ The property was located in a farming and residential zone which permitted places of religious worship by special exception.³⁶⁸ The proposed structure was to be a traditional Buddhist design.³⁶⁹ Among other reasons, the defendant commission found that the traditional Buddhist design of the temple would impair property values and was not in harmony with the design of other buildings in the neighborhood.³⁷⁰ Clearly, while the code provisions may not have been adopted with discriminatory intent, even if they were applied in a neutral manner (*i.e.*, if the architectural design of the Buddhist temple was in fact not in harmony with surrounding buildings), such application would discriminate “on the basis of religion.” Church architecture is imbued with religious significance,³⁷¹ and to permit simple Christian churches that are deemed to fit within a New England community while prohibiting an unfamiliar Buddhist design is to engage in religious discrimination.

In accordance with Senators Hatch and Kennedy’s statement that RLUIPA should serve as a shield in situations where “discrimination lurks behind such vague and universally applicable reasons as traffic [or] aesthetics,” RLUIPA’s definition of religious exercise provides that “[t]he use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose.”³⁷² In short, RLUIPA pro-

³⁶⁷ *Cambodian Buddhist Soc’y of Conn., Inc. v. Planning & Zoning Comm’n of Newtown*, 285 Conn. 381, 384 (2008).

³⁶⁸ *Id.* at 386.

³⁶⁹ *Id.* at 387.

³⁷⁰ *Id.* at 387-88 (in order to qualify for a special exception the use “shall not substantially impair property values in the neighborhood” and any “architectural design of the proposed buildings shall be in harmony with the design of other buildings in the neighborhood.”).

³⁷¹ See, e.g., *First Covenant Church of Seattle v. City of Seattle*, 120 Wash. 2d 203, 217 (1992) (“First Covenant claims, and no one disputes, that its church building itself ‘is an expression of Christian belief and message’ and that conveying religious beliefs is part of the building’s function.”); Angela C. Carmella, *Houses of Worship and Religious Liberty: Constitutional Limits to Landmark Preservation and Architectural Review*, 36 VILL. L. REV. 401, 450 (1991) (“Ecclesiastical structures reify particular theological, moral and social assertions. They express, among other things, the religious community’s purpose, theology, identity, hope, unity and reverence for the divine and its identification with or separation from certain aspects of the culture.” (footnotes omitted)); Thomas Pak, *Free Exercise, Free Expression, and Landmarks Preservation*, 91 COLUM. L. REV. 1813, 1840-41 (1991) (“Religious architecture, through its shapes, symbols, decorations, ornamentations, and monumentality, represents a strong intention to communicate a particularized message about a group’s religious beliefs.” (footnotes omitted)).

³⁷² 42 U.S.C. § 2000cc-5(7)(B) (2006); 146 CONG. REC. S7774-01 (daily ed. July 27, 2000) (joint

vides for the commonsense understanding that Buddhist religious practice may include worshipping in a building with traditional Buddhist features. By stating that such a building is inappropriate for the neighborhood and further deciding that a Buddhist worship center would impair property values, the zoning commission effectively finds that Buddhism is incompatible with the neighborhood.

Despite this, the Connecticut Supreme Court appeared to reject RLUIPA's rule of construction: RLUIPA "shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this Act and the Constitution."³⁷³ It accepted the zoning commission's lip service that "[d]iversity of religion should be encouraged in Newtown," and . . . "[the Commission hoped] that the [society] could find property more suitable to [the temple's] needs,"³⁷⁴ presumably where Buddhist architecture would be "in harmony" with the surrounding neighborhood, if any such place exists.

A disparate impact theory could have resolved this issue, even where that court was "satisfied that the commission's concerns were motivated not by religious bigotry but by neutral considerations that it would apply equally to any proposed use of the property," and "[n]othing in the record establishes that . . . the reasons that the commission gave for denying the society's application were pretextual or otherwise designed to conceal an unlawful discriminatory intent."³⁷⁵ Many "facially neutral" land use restrictions on the location and construction of places of worship may discriminate against certain religions or forms of religious exercise. For example, a minimum or maximum lot size requirement of several acres could effectively ban either small churches or "megachurches" from a jurisdiction because the acreage requirement would render construction of an appropriate place of worship impossible.³⁷⁶ Prohibiting churches from downtown retail or commercial zoning districts eliminates the possibility of a church that seeks to minister to the homeless or other at-risk populations in such areas and thus favors those religious groups that do not undertake such ministry.³⁷⁷ While such

statement of Sen. Hatch and Sen. Kennedy).

³⁷³ 42 U.S.C. § 2000cc-3(g) (2006).

³⁷⁴ *Cambodian Buddhist Soc'y of Conn., Inc. v. Planning & Zoning Comm'n of Newtown*, 285 Conn. 381, 388 (2008).

³⁷⁵ *Id.* at 421-22.

³⁷⁶ *See, e.g., Covenant Christian Ministries v. City of Marietta*, 654 F.3d 1231, 1236 (11th Cir. 2011) (City prohibited houses of worship in zoning district rather than eliminating 5-acre minimum lot size requirement for houses of worship); *Freedom Baptist Church v. Twp. of Middletown*, 204 F. Supp. 2d 857, 859 (E.D. Pa. 2002) (challenging zoning requirement that houses of worship locate on lots of at least five acres).

³⁷⁷ *Christian Assembly Rios de Agua Viva v. City of Burbank*, 948 N.E.2d 251, 254 (Ill. App. 2011)

laws may also violate the Equal Terms provision if nonreligious institutional or assembly uses remain unregulated in the same manner, they could also violate the Nondiscrimination provision if their effect is to favor certain religions or religious denominations over others.

The parallels between such cases and *Griggs* are obvious. The company owner in *Griggs* maintained that he had instituted the high-school diploma requirement and intelligence tests based “on the Company’s judgment that they generally would improve the quality of the work force.”³⁷⁸ That only 12% of African American men in North Carolina (compared to 34% of Caucasian men) had graduated high school in 1960, and only 6% passed the intelligence tests (compared to 58% of the whites), due to the inferior educational opportunities, was incidental to the company.³⁷⁹ Similarly, local governments may have certain views on how places of worship should look and where they should be located. In both cases, such “facially neutral” requirements have the necessary effect of keeping out the affected populations that Title VII or RLUIPA were intended to aid.³⁸⁰

V. CONCLUSION

Religious groups, especially new and minority faiths, continue to face discrimination in the context of land use regulation across the United States. Without specific standards to guide practitioners and courts, RLUIPA’s Nondiscrimination provision has been underutilized as a tool to ensure equal opportunities for religious worship. Groups that have chosen to bring these claims have been unable to ascertain what evidence or process is necessary to achieve favorable outcomes, and, unsurprisingly, such outcomes have been rare. By looking to other areas of the law, with established statutory constructions for discrimination claims, practitioners and courts can gain the predictability and structure necessary to proper adjudication of RLUIPA Nondiscrimination claims.

(indicating that zoning ordinance restricted uses in the commercial zone to those that would generate tax revenue); *Digrugilliers v. Consol. City of Indianapolis*, 506 F.3d 612, 614-17 (7th Cir. 2007) (explaining that neither existence of alternative rural locations nor possibility that churches locating in downtown areas might circumscribe those wishing to sell alcohol or pornography justified the exclusion of small church from the downtown zoning district).

³⁷⁸ *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

³⁷⁹ *Id.* at 430-431, n. 6.

³⁸⁰ *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977).