BRING OUT YOUR DEAD: AN EXAMINATION OF THE POSSIBILITIES FOR ZONING OUT CEMETERIES UNDER RLUIPA

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INTRODUCTION

In 1993, the Roman Catholic Diocese of Rockville Centre acquired ninety-seven acres of land in the Village of Old Westbury, New York, and sought a special permit to turn that land into a Catholic cemetery in order to replace the only Catholic cemetery located in the county.[1] A federal court will determine whether the Village tried to delay and prevent the construction needed to transform the ninety-seven-acre former farm into the proposed Queen of Peace Cemetery.[2] Critics have accused the Village of attempting to zone out the Queen of Peace Cemetery in order to preserve its "exclusive enclave of multimillion-dollar homes on Long Island's Gold Coast."[3] Old Westbury has both denied the Diocese's special permit applications and attempted to impose further requirements on the Cemetery, such as the completion of an environmental impact statement and "onerous set-back requirements," in addition to making zoning regulation changes that impact the cemetery plans.[4]

More than ten years of delays on construction of Queen of Peace Cemetery prompted the Diocese to sue the Village, in part under the Religious Land Use and Institutionalized Persons Act (RLUIPA).[5] RLUIPA sets forth a standard of strict scrutiny for local governments attempting to regulate the zoning of religious exercise, even if that regulation is done through facially neutral legislation.[6] RLUIPA's substantial burden provision, with regard to land use regulation, reads:

> No government shall impose or implement a land use regulation

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1 *See* Roman Catholic Diocese of Rockville Ctr. v. Vill. of Old Westbury, No. 09 CV 5195(DRH)(ETB), 2011 WL 666252, at *2 (E.D.N.Y. Feb. 14, 2011) [hereinafter Diocese I].

2 *See* Diocese I at *11; Roman Catholic Diocese of Rockville Ctr. v. Vill. of Old Westbury, No. 09 CV 5195(DRH)(ETB), 2012 WL 1392365, at *3 (E.D.N.Y. Apr. 23, 2012) [hereinafter Diocese II]; Roman Catholic Diocese of Rockville Ctr. v. Vill. of Old Westbury, 2015 WL 5178126, at *23 (E.D.N.Y. Sept. 3, 2015).

3 John Marzulli, *Diocese of Rockville Centre Suing Village of Old Westbury for Halting Plans to Build Cemetery,* N.Y. DAILY News (Dec. 3, 2009, 10:46 PM), http://www.nydailynews.com/new-york/diocese-rockville-centre-suing-village-old-westbury-halting-plans-build-cemetery-article-1.431944.

4 *See* Diocese II, 2012 WL 1392365, at *2; Diocese I, 2011 WL 666252, at *13–14.

5 *See generally* Diocese I, 2011 WL 666252; Diocese II, 2012 WL 1392365.

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

> 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 –
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> (A) is in furtherance of a compelling governmental interest; and
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> (B) is the least restrictive means of furthering that compelling governmental interest.[7]

RLUIPA seeks to preserve freedom of religious exercise through prohibitions regarding zoning regulations, but it is possible that cemeteries constitute a unique religious land use that municipalities may be able to justify regulating.

Cemeteries create concerns unique from more traditional religious uses, such as churches or parochial schools. Putting aside cemeteries' reputation in popular culture as haunted sites, cemeteries can create concerns with regard to the environment, aesthetics and traffic, and the availability of police resources. However, despite these possibly compelling government interests, this Note reveals that municipalities will have to craft land use regulations very carefully if they want to zone cemeteries out of their jurisdiction or contain cemeteries within certain portions of their jurisdiction. To avoid violating RLUIPA's substantial burden provision, these land use regulations will need to be facially neutral and applied with consistent reasoning.

Part I of this Note will analyze the scope of RLUIPA. Part II will compare different jurisdictions' definitions of "substantial burden" and apply these definitions to land use regulation of religious exercise under RLUIPA. Part III will discuss how zoning may be used to regulate cemeteries under RLUIPA's "compelling governmental interest" and "least restrictive means" standards. Finally, this Note will conclude by discussing how practical it would be for municipalities to zone out cemeteries, and how they may go about doing so.

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7 *Id.* RLUIPA contains other protections for religious land use—such as the equal protections provision in section 2000(b)(1)—but this Note will concentrate on the substantial burden provision in section 2000(a)(1).

I. THE SCOPE OF THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT

A. *History of the Free Exercise Clause and RLUIPA*

In 1990, the Supreme Court announced in its majority opinion in *Employment Division, Department of Human Resources of Oregon v. Smith* that facially neutral governmental restrictions may "burden a religious practice" without the support of a compelling governmental interest, unless another constitutional right is violated in conjunction with the right to free exercise.[8] The Court stated that to hold otherwise would be to allow religion "to become law unto" itself.[9] In *Smith*, respondents were denied unemployment compensation because they were dismissed from their employment for ingesting peyote as part of a religious practice.[10] Although *Smith* concerned unemployment compensation, the decision was seen by many observers as a "failure of the courts to create a legal climate conducive to religious worship."[11]

Congress responded to concerns over the *Smith* decision by passing the Religious Freedom Restoration Act (RFRA) in 1993.[12] With RFRA, Congress sought to restore the pre-*Smith* strict scrutiny standard of review to laws affecting the free exercise of religion.[13] The Act states that the "[g]overnment shall not

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8 *See* Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 883, 885, 890 (1990), *superseded by statute,* Religious Freedom Restoration Act of 1993, Pub. L. No. 101-141, 107 Stat. 1488, *as recognized in* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

9 *Smith*, 494 U.S. at 885.

10 *See id.* at 890.

11 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, 941 (2001); *see also* Stephen L. Carter, *The Separation of Church and Self*, 46 SMU L. REV. 585, 597 (1992) ("[T]he current Court's free exercise jurisprudence is heading . . . toward . . . a world in which citizens who adopt religious practices at variance with official state policy are properly made subject to the coercive authority of the state, which can pressure them to change those practices.").

12 Storzer, *supra* note 11, at 942.

13 *See* Colin L. Black, Comment, *The Free Exercise Clause and Historic Preservation Law: Suggestions for a More Coherent Free Exercise Analysis*, 72 TUL. L. REV. 1767, 1782 (1998); *see also* Sherbert v. Verner, 374 U.S. 398, 406 (1963) (establishing pre-*Smith* compelling interest test). The Supreme Court has recognized that RFRA was actually an expansion of the pre-*Smith* compelling interest test. *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2761 n.3

substantially burden a person's exercise of religion even if the burden results from a rule of general applicability" unless the burden "is in furtherance of a compelling governmental interest; and is the least restrictive means of furthering that compelling governmental interest."[14] RFRA effectively overruled the Supreme Court's decision in *Smith*.[15]

In 1997, however, the Supreme Court struck down RFRA—as applied to the states—as an unconstitutional exercise of congressional authority under the Fourteenth Amendment and separation of powers and federalism principles.[16] The Court declared the statute was overbroad because its "[s]weeping coverage ensures its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter."[17] With RFRA in part struck down, Congress initiated hearings that resulted in two new free exercise bills: the Religious Liberty Protection Act of 1998[18] and the Religious Liberty Protection Act of 1999,[19] which would have both applied to all state laws falling under Congress's Commerce and Spending Clause authority.[20] Both bills failed to pass for fear that they were, once again, overbroad.[21] In response, Congress transformed the two bills into more limited legislation that would only apply to state laws governing land use and institutionalized persons.[22] President Clinton signed the new legislation into law as the Religious Land Use and Institutionalized

(2014) ("RFRA did more than merely restore the balancing test used in the *Sherbert* line of cases; it provided even broader protection for religious liberty than was available under those decisions" because the "least restrictive means requirement was not used in the pre-*Smith* jurisprudence RFRA purported to codify" (quoting City of Boerne v. Flores, 521 U.S. 507, 509 (1997))).

14 42 U.S.C. § 2000bb-1 (2012).

15 *See* Black, *supra* note 13, at 1782.

16 *See* City of Boerne v. Flores, 521 U.S. 507, 532 (1997), *superseded by statute*, Religious
Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. §§ 2000cc–2000cc-5, *as stated in* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2761 (2014).

17 *Id.*

18 *See* S. 2148, 105th Cong. (1997); H.R. 4019, 105th Cong. (1997).

19 *See* H.R. 1691, 106th Cong. (1999).

20 *See* Storzer, *supra* note 11, at 943.

21 *See id.*; *see also* Marci A. Hamilton, *Federalism and the Public Good: The True Story Behind the Religious Land Use and Institutionalized Persons Act*, 78 IND. L.J. 311, 333–34 (2002).

22 *See* Storzer, *supra* note 11, at 943.

Persons Act of 2000 (RLUIPA).[23]

The substantial burden provision of RLUIPA states in part that "[n]o government shall impose or implement a land use regulation in a manner that imposes a substantial burden on . . . religious exercise . . . unless the government demonstrates" that the imposed burden "is in furtherance of a compelling governmental interest; and is the least restrictive means of furthering that compelling governmental interest."[24] This provision of RLUIPA applies only where there is a "land use regulation" of "religious exercise," and is therefore more constrained than the broad provisions of RFRA.[25] The term "religious exercise," as used in RLUIPA, is defined broadly and clearly "covers more than the use of a building for group worship."[26] "Religious exercise" does not include "purely secular functions" of religious groups, but courts do not always agree on what constitutes a "religious exercise" and what constitutes a "purely secular function."[27]

Religious institutions today encompass much more than simply places of worship.[28] Examples of religious "accessory uses" include an array of activities ranging from the more traditional operation of religious schools to the operation of a Subway restaurant franchise meant to provide jobs for community members.[29] While not all accessory uses have come before the courts via RLUIPA challenges yet, pre-RLUIPA decisions offer some additional guidance as to how RLUIPA may apply. Before RLUIPA, state courts had determined the following are covered as permitted religious "accessory uses" deserving of constitutional free exercise protection: "parochial schools, day care centers,

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23 *Id.* at 929–30.

24 42 U.S.C. § 2000cc(a)(1) (2012). This Note will not discuss the portion of RLUIPA dealing with institutionalized persons, or any land-use portions of the statute outside the substantial burden provision.

25 Roland F. Chase, *Zoning Regulation of Religious Activities: The Impact of Federal Law*, 54 R.I. B. J. 5, 5 (2005).

26 *Id.* at 7 (*citing* Guru Nanak Sikh Soc. of Yuba City v. County of Sutter, 326 F. Supp. 2d 1140, 1152 (E.D. Cal. 2003)).

27 *Id.* at 7 (*citing* Grace United Methodist Church v. City of Cheyenne, 235 F. Supp.2d 1186, 1197 (D. Wyo. 2002)).

28 Diane K. Hook, *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, 854 (2002).

29 *See id.*; Carolyn Thompson, *Pastor Says Church Subway Shop About Mission, Not Money*, PENINSULA CLARION (Nov. 19, 2004), http://peninsulaclarion.com/stories/111904/religion_20041119004.shtml.

playgrounds, baseball or softball fields, homeless shelters, administrative buildings, cemeteries, and coffee houses."[30] Pre-RLUIPA courts even stated that "[t]he term 'religious use' is defined, for zoning purposes, as 'broadly extended to conduct with a religious purpose.'"[31] This means that, in the context of zoning law, a "religious use" may include a gymnasium attached to a religious school or a room in a religious structure that is used for Boy Scout meetings.[32]

Prior to RLUIPA, regulation of these accessory uses—once they were viewed as religious uses—was analyzed under the precedent of *Sherbert v. Verner*.[33] The *Sherbert* test analyzes (1) whether a regulation "placed a burden on conduct which is motivated by a sincerely held religious belief" and, if so, (2) whether the regulation was backed by a compelling governmental interest.[34] RLUIPA, however, only concerns religious land use, as opposed to all religiously-motivated conduct.[35] Its initial analysis of accessory uses focuses on the standard of whether they are considered "religious exercise[s]," a term more broadly defined than the *Sherbert* standard of "conduct motivated by a sincerely held religious belief."[36] "Religious exercise," under RLUIPA, expressly includes activity both central to and incidental to religious exercise, thereby encompassing worship and non-worship activities.[37] An accessory use falls into the category of religious exercise if the average observer would objectively consider the use religious in nature.[38] Once the accessory use falls under the religious exercise definition, a court will begin its analysis of how a given land use regulation affects this exercise.[39]

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30 Hook, *supra* note 28, at 854 (internal citations omitted).

31 Slevin v. Long Island Jewish Med. Ctr., 319 N.Y.S.2d 937, 943 (1971), *citing In re* Cnty. Synagogue v. Bates, 1 N.Y.2d 445, 491 (1956).

32 *See id.* at 943–44.

33 374 U.S. 398 (1963); *see, e.g.*, Alpine Christian Fellowship v. Cnty. Comm'rs of Pitkin Cnty., 870 F. Supp. 991, 994 (D. Colo. 1994).

34 *See Alpine Christian Fellowship*, 870 F. Supp. at 994.

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

36 *Id.*; *Alpine Christian*, 870 F. Supp. at 994.

37 *See* 42 U.S.C. § 2000cc-5(7)(A); 42 U.S.C. § 2000cc(a)(1); Adam J. MacLeod, *A Non-Fatal Collision: Interpreting RLUIPA Where Religious Land Uses and Community Interest Meet*, 42 URB. LAW. 41, 49 (2010). A worship activity may be a religious service. A non-worship religious activity may be operation of a religious school. *See* MacLeod, *supra*, at 50, 53.

38 *See* MacLeod, *supra* note 37, at 51.

39 *See* 42 U.S.C. § 2000cc(a).

B. *RLUIPA's Scope Includes Cemetery Regulation*

1. *"Land Use Regulation" as Defined Under RLUIPA*

The substantial burden provision of RLUIPA only applies to land use regulations.[40] The term "land use regulation," however, is ambiguously defined within the text of the statute. To use the plain meaning of the term "land use regulation" would be to make RLUIPA's reach far too broad—almost any ordinance can affect or regulate how people use their land.[41] RLUIPA itself somewhat confines the meaning of "land use regulation," stating the term means "a zoning or landmarking law, or the application of such a law, that limits or restricts a claimant's use or development of land."[42] Courts have generally construed "land use regulation" narrowly when interpreting the term within the context of RLUIPA. Eminent domain and takings are usually seen to fall outside the scope of RLUIPA.[43] Additionally, RLUIPA only applies to land that a religious entity owns—not to land a religious entity would like to own.[44] Therefore, in the context of courts' interpretation of RLUIPA, any form of zoning used to keep cemeteries out of a municipality—or out of a certain area of a municipality—would fall under the scope of RLUIPA as long as the land the municipality seeks to regulate is owned by a private

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40 *Id.*

41 *See* MacLeod, *supra* note 37, at 43 ("It is reasonably clear that a municipal ordinance prohibiting the sale of alcohol on Sundays, for example, would not come within RLUIPA, even though that ordinance might impose a hardship on a procrastinating rector who neglected to purchase enough communion wine for Sunday's service.").

42 42 U.S.C. § 2000cc-5(5) (2012).

43 *See, e.g.*, St. John's United Church of Christ v. City of Chicago, 502 F.3d 616, 640 (7th Cir. 2007) (finding that use of eminent domain power to move cemetery in order to build new airport runway was not a land use regulation under RLUIPA); Prater v. City of Burnside, 289 F.3d 417, 434 (6th Cir. 2002) (finding that City's use of eminent domain power for roadway was "not based upon any zoning or landmarking law restricting development or use of the Church's own private property"). In *Cottonwood Christian Center v. Cypress Redevelopment Agency*, the Central District of California did hold a use of eminent domain to be a violation of RLUIPA, but the exercise of eminent domain was based on "a redevelopment plan, which constituted a zoning scheme." 218 F.Supp.2d 1203, 1222 n.9 (C.D. Cal. 2002), *noted in* MacLeod, *supra* note 37, at 48-49.

44 *See, e.g.*, Taylor v. City of Gary, 233 Fed. App'x 561, 562 (7th Cir. 2007) (dismissing RLUIPA claim because plaintiff did not "have any legally recognized property interest in the City Methodist Church," as the Church was owned by the City).

religious entity.[45]

2. *"Religious Exercise" as Defined Under RLUIPA*

A land use regulation must restrict "religious exercise" in order for a plaintiff to bring an RLUIPA claim against a municipality. RLUIPA defines "religious exercise" to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief."[46] Courts have inferred that this definition encompasses worship and non-worship religious activities.[47] When courts assess religious accessory uses to determine whether they are considered religious exercise, courts commonly look to whether the accessory use has "a purpose that objective observers generally take to be religious in nature."[48] Given that many cemeteries are openly religiously affiliated or feature religious grave markings, it is likely that religious cemeteries would pass this objective observer test.

It is unlikely that a municipality could successfully argue that its land use regulation of a religious cemetery does not create a substantial burden on religious exercise. Where a religious entity owns land and proposes to establish a cemetery on the site, any new land use regulation restricting construction of a cemetery can be viewed as a substantial burden on religious exercise.[49] The use of land as a religious cemetery would be considered religious exercise because the average observer would view the religious cemetery as objectively religious. Therefore, it would not be worthwhile for a municipality to argue its land use regulations that specifically apply to cemeteries do not place a substantial burden on religious exercise. A municipality may, however, be able to argue that a more general land use regulation that merely affects cemeteries does not place a substantial burden on religious exercise.

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45 *See* 42 U.S.C. § 2000cc-5(5).

46 42 U.S.C. § 2000cc-5(7)(A).

47 MacLeod, *supra* note 37, at 50.

48 *Id*. at 51.

49 *See* Diocese II, No. 09 CV 5195(DRH)(ETB), 2012 WL 1392365, at *13 (E.D.N.Y. Apr. 23, 2012) (finding that the Diocese had credibly alleged that the municipality enacted an ordinance, in the midst of conflict with the Diocese, that had "the express purpose of preventing the Diocese from developing its Property for religious use" as a cemetery; the Court took particular issue with the fact that the municipality enacted the ordinance three months after the Diocese received a favorable court verdict.).

II. COURTS' DEFINITIONS OF SUBSTANTIAL BURDEN AND APPLICATION TO POTENTIAL REGULATION OF CEMETERIES

Part I discussed the history of the Free Exercise Clause and the development of RLUIPA. The scope of RLUIPA covers land use regulations that place a "substantial burden" on religious exercise.[50] Religious exercise is to be defined broadly and includes accessory uses that the objective observer would view as religious in nature.[51] The next Section analyzes courts' definitions of "substantial burden" as used in RLUIPA and describes how municipalities may be able to use these definitions to their advantage in zoning out religious cemeteries.

A. *The General Definition of "Substantial Burden" Under RLUIPA*

If a land use regulation restricts religious exercise, the next question that must be addressed under RLUIPA is whether said regulation creates a "substantial burden" on the religious exercise.[52] RLUIPA does not define the term "substantial burden," and the Supreme Court has not defined the term as used in RLUIPA. Therefore, it has been left to the lower courts to define this key term. This Part reviews the possible definitions of substantial burden in the context of cemeteries.

Circuit Courts of Appeals that have addressed this issue base their RLUIPA definitions of "substantial burden" on the Supreme Court's definition of substantial burden as used in the Free Exercise context.[53] The Supreme Court showed how it evaluates a substantial burden on free exercise in *Sherbert v. Verner*, stating that a regulation created a substantial burden when it forced a person "to choose between following the precepts of her religion and forfeiting [governmental] benefits, on the one hand, and abandoning one of the precepts of her religion in order to [accept said benefits], on the other hand."[54] This test has been adapted to the land use context. In land use, an entity is generally not forced to *choose* between religion and governmental benefits. The test as applied to land use asks whether a land use regulation "directly

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50 *See supra* Part I.B.
51 *Id.*
52 42 U.S.C. § 2000cc(a)(1) (2012).
53 MacLeod, *supra* note 37, at 54.
54 Sherbert v. Verner, 374 U.S. 398, 404 (1963).

coerces the religious institution to change its behavior."[55] The real question, however, is how to differentiate between government regulation that inconveniences a religious exercise and government regulation that coerces a change in behavior and thereby creates a burden that is "substantial." It is this distinction that leads circuit courts to apply the substantial burden standard differently.

Although circuit courts begin their "substantial burden" analysis with the *Sherbert* definition, different circuit courts use different articulations of the term "substantial burden" in their RLUIPA analyses depending on their interpretation of *Sherbert*. The Seventh Circuit presents one definition of "substantial burden" under RLUIPA, finding that "the 'substantial burden' provision backstops the Act's explicit prohibition of religious discrimination if a land-use decision imposes a substantial burden on religious exercise and the decision maker cannot justify it, [giving rise to] the inference . . . that hostility to religion, or more likely to a particular sect, influenced the decision."[56] This definition is somewhat circular and almost makes the provision superfluous in the context of the equal terms provision of RLUIPA, given that RLUIPA already prohibits unequal treatment of religious and nonreligious institutions in a separate section of the statute.[57]

Despite this overlap, the Seventh Circuit has used this definition to resolve RLUIPA substantial burden claims. In *Civil Liberties for Urban Believers v. City of Chicago*, the Court used the idea of substantial-burden-as-backstop to conclude that "a land-use regulation that imposes a substantial burden on religious exercise is one that necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise—including the use of real property for the purpose thereof within the regulated jurisdiction generally—effectively impracticable."[58] There, the Court found that Chicago's zoning regulations were "incidental to any high-density urban land use" and therefore did

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55 Westchester Day Sch. v. Vill. of Mamaroneck, 504 F.3d 338, 349 (2d Cir. 2007) (emphasis in original).

56 Petra Presbyterian Church v. Vill. of Northbrook, 489 F.3d 846, 851 (7th Cir. 2007) (internal quotation marks omitted).

57 42 U.S.C. § 2000cc(b)(1) ("No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.").

58 342 F.3d 752, 761 (7th Cir. 2003). This case involved five churches wishing to relocate to zoning districts requiring special use permits for assembly activities.

not amount to a substantial burden on religious exercise.[59] The Court concluded that although it was difficult for religious entities to find suitable properties, the same problem existed for non-religious persons and entities and the regulations did not "render impracticable the use of real property in Chicago for religious exercise, much less discourage churches from locating or attempting to locate in Chicago."[60] In fact, even though the process of finding suitable properties was costly, all five plaintiff churches in *Urban Believers* were able to locate in Chicago.[61] Therefore, it was clearly not "effectively impracticable" for the plaintiffs to locate in Chicago. More recently, the Seventh Circuit held that a neutral land use regulation in the form of a zoning ordinance did not create a substantial burden on religious exercise where a proposed Bible camp insisted on locating on a certain property, without researching the availability of other properties in the county.[62] The Seventh Circuit's substantial burden test essentially protects well-reasoned, facially neutral ordinances that do not directly or indirectly make a religious exercise impracticable.[63]

The Eleventh Circuit rejects the Seventh Circuit's definition of "substantial burden," finding the definition superfluous in light of RLUIPA's equal terms provision.[64] The Eleventh Circuit instead defines substantial burden as "akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly. . . . [t]hus, a substantial burden can result from pressure that tends to force adherents to forego religious precepts or from pressure that mandates religious conduct."[65]

This standard harkens back to the free exercise definition of substantial burden announced in *Sherbert*. In practice, the Eleventh Circuit's definition is exercised to differentiate between a land use regulation that creates a mere inconvenience on religious practice and a land use regulation that would force an adherent to give up

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59 *Id.*

60 *Id.*

61 *See id.*

62 *See* Eagle Cove Camp & Conference Ctr., Inc. v. Town of Woodboro, 734 F.3d 673, 681 (7th Cir. 2013).

63 *See* Petra Presbyterian Church v. Vill. of Northbrook, 489 F.3d 846, 851 (7th Cir. 2007); Civil Liberties for Urban Believers, 342 F.3d at 761.

64 MacLeod, *supra* note 37, at 56 n.88.

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

the religious practice or at least "substantially burden" the religious practice.[66] Under this standard, it seems that a municipality looking to zone out cemeteries would have to ensure that the regulation did not preclude cemeteries from locating anywhere within the area, in order to prevent a religious entity from having to give up its plans to construct a cemetery usable by the community.

The Ninth Circuit's definition of "substantial burden," though articulated differently, is substantially the same as the Eleventh Circuit's definition. Under Ninth Circuit precedent, "for a land use regulation to impose a 'substantial burden,' it must be 'oppressive' to a 'significantly great' extent. . . . [t]hat is, a 'substantial burden' on 'religious exercise' must impose a significantly great restriction or onus upon such exercise.[67] A substantial burden, under the Ninth Circuit's definition, therefore exists where a government regulation "puts substantial pressure on an adherent to modify his behavior and to violate his beliefs."[68] This definition of substantial burden is illustrated in *Guru Nanak Sikh Society of Yuba City v. County of Sutter*.[69] There, a county denied two conditional use permit applications for a Sikh temple, even after the plaintiff complied with procedures that would minimize potential conflicts with nearby residential areas.[70] Additionally, the county's reasons for denying the conditional use permits were so broad as to "apply to all future applications by" the plaintiff.[71] The Court found that these permit denials, representative of the manner in which the county applied its zoning ordinance, constituted a substantial burden on the plaintiff's religious exercise because "the County's actions have to a significantly great extent lessened the prospect of Guru Nanak being able to construct a temple in the future."[72]

Finally, the Second Circuit has yet to issue a definition of "substantial burden" under RLUIPA, but has set out a number of standards that courts can look to in assessing whether a land use

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66 *Id.* at 1225, 1227–28 (finding that walking farther to get to a synagogue was an inconvenience, and not a substantial burden, on Jewish congregants).

67 San Jose Christian Coll. v. City of Morgan Hill, 360 F.3d 1024, 1034 (9th Cir. 2004).

68 Int'l Church of Foursquare Gospel v. City of San Leandro, 673 F.3d 1059, 1067 (9th Cir. 2011) (internal quotation marks omitted).

69 456 F.3d 978 (9th Cir. 2006).

70 *See id.* at 981–82.

71 *Id.* at 989.

72 *Id.* at 992.

regulation constitutes a substantial burden on religious exercise. The Court in *Westchester Day School v. Village of Mamaroneck* stated that "[t]here must exist a close nexus between the coerced or impeded conduct and the institution's religious exercise for such conduct to be a substantial burden on that religious exercise."[73] In determining whether this "close nexus" exists, courts and municipalities are to consider elements such as whether reasonable alternative locations for the proposed religious land use exist;[74] whether the land use regulation is facially neutral;[75] whether the land use regulation is applied to religious exercise "arbitrarily, capriciously, or unlawfully;"[76] and whether denial of a zoning permit was conditional.[77] The Second Circuit clarified in a later case that, especially in the context of property-specific permit requests, it is not true that "generally applicable land use regulations may only result in a substantial burden when arbitrarily and capriciously imposed."[78] A land use regulation may be a substantial burden on religious exercise even if a municipality can show the regulation serves the facially neutral purpose for which it was created and that the regulation is applied consistently.[79]

B. *Applying RLUIPA's "Substantial Burden" to Cemeteries*

In light of the varied definitions of substantial burden discussed in Section II.A, cemetery regulations may be treated differently in each of the circuits. It may be possible, though it is generally unlikely, for cemeteries to avoid a conflict with RLUIPA by not qualifying as a substantial burden. Municipalities will likely find they have the best opportunity to zone out cemeteries in the Seventh Circuit. In the Eleventh and Ninth Circuits, municipalities may only be able to restrict the area in which cemeteries are zoned.

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73 504 F.3d 338, 349 (2d Cir. 2007).

74 *See id.*

75 *See id.* at 350.

76 *Id.*

77 *See id.* at 352.

78 Chabad Lubavitch of Litchfield Cnty., Inc. v. Litchfield Historic Dist. Comm'n, 768 F.3d 183, 195 (2d Cir. 2014).

79 *See id.* For example, a municipality may consistently allow entities to reapply for special permits, but if that procedure is being applied to a religious institution in a disingenuous manner, such that the religious institution can never hope to have its special permit approved, the land use regulation may create a substantial burden. *See* Fortress Bible Church v. Feiner, 694 F.3d 208, 219 (2d Cir. 2012).

It is unlikely that a municipality could zone out cemeteries in the Second Circuit. This Section reviews the likely treatment of cemeteries in each circuit and recommends municipalities' best potential strategies for avoiding substantial burden qualification.

Under the Seventh Circuit definition, a municipality would likely be able to zone out cemeteries, from all or part of the municipality, if a zoning ordinance were carefully crafted and the product of a reasoned decision. The key would be to ensure that the ordinance did not display a hint or inference of religious discrimination or hostility.[80] The zoning ordinance would have to exist before the proposed religious use, in order to avoid creating an air of hostility toward a religious use,[81] and would have to be neutral on its face. It is also important that the land use regulation not completely frustrate religious entities' desire to locate a cemetery in a given area.[82]

For example, the Village of Old Westbury enacted its Places of Worship Law (POW Law) in the midst of a legal battle to keep Queen of Peace Cemetery out of the municipality.[83] The POW Law created special setback requirements for religious land uses, which would be found to be a substantial burden under the Seventh Circuit analysis because the regulation is not neutral, and both its name and its application create a clear air of religious hostility.[84] Had the Village enacted a neutral set-back law, prior to the Diocese's cemetery proposals, the Village would have stood a chance of keeping the cemetery out under a Seventh Circuit RLUIPA interpretation. For a municipality like Old Westbury, however, where Queen of Peace Cemetery was being developed to replace the only Catholic cemetery in the county, the Village may not have been able to zone out the cemetery unless other municipalities in the county were willing to allow the cemetery within their jurisdiction.

Unlike the Seventh Circuit "substantial burden" test, the Eleventh Circuit test does not leave room for a carefully drafted,

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80 *See* Petra Presbyterian Church v. Vill. of Northbrook, 489 F.3d 846, 851 (7th Cir. 2007).

81 *See* Diocese II, No. 09 CV 5195(DRH)(ETB), 2012 WL 1392365, at *13 (E.D.N.Y. Apr. 23, 2012).

82 As discussed in the Seventh Circuit's *Urban Believers* decision. *See supra* Part II.A.

83 *See* Diocese II, 2012 WL 1392365, at *2.

84 *See id.* at *2, *13.

facially neutral law to regulate religious land use if it would stand in the way of religious exercise, even if the regulation existed before the religious use was proposed.[85] This may mean that a municipality could not keep cemeteries out altogether, but may be able to require that cemeteries be located in another part of the municipality or away from residential areas.[86]

Under a Ninth Circuit interpretation of "substantial burden," a municipality seeking to zone out cemeteries would want its facially neutral land use regulation to be backed up with a record of specific reasoning for enacting the regulation in order to avoid doubts as to the regulation's neutrality.[87] Additionally, similar to treatment under the Eleventh Circuit's definition, a municipality would likely be better off requiring cemeteries to locate in certain parts of the municipality, as a kind of compromise between the religious institution and the municipality, rather than restricting cemeteries from the municipality altogether.

The Second Circuit's definition of substantial burden would likely be the most difficult of circuit court standards under which a municipality may try to zone out cemeteries, due to uncertainty surrounding the standard. First, the Second Circuit's definition is really just a list of factors,[88] making it difficult for a municipality to know what types of regulations may create a substantial burden on religious exercise. Second, even a facially neutral, well-reasoned land use regulation could be seen as a substantial burden on religious exercise if "quick, reliable, and financially feasible alternatives" to a desired property do not readily exist.[89] Any application of a land use regulation to cemeteries would have to be

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85 *See supra* Part II.A.

86 *See* Petra Presbyterian Church v. Vill. of Northbrook, 489 F.3d 846, 851 (7th Cir. 2007) ("When there is plenty of land on which religious organizations can build churches . . . in a community, the fact that they are not permitted to build everywhere does not create a substantial burden.").

87 Had the county in *Guru Nanak* provided specific reasoning as to the permit denials, the court may not have invalidated the permit denials. As described above in Part II.A, the court found the county's reasons for the permit denials were so general as to prevent any future approval of the religious institution's permits. *See* Guru Nanak Sikh Soc. of Yuba City v. County of Sutter, 456 F.3d 978, 992 (9th Cir. 2006).

88 *See supra* Part II.A.

89 Westchester Day Sch. v. Vill. of Mamaroneck, 504 F.3d 338, 352 (2d Cir. 2007) (finding "quick, reliable, and financially feasible alternatives" could have meant reallocating space within the school's existing buildings, but this was not possible).

considered on a case-by-case basis, depending on the availability of land in the area suitable for a proposed cemetery.

C. *Regulation of Cemeteries Based on Possible Compelling Government Interests*

Assuming a cemetery is considered a religious exercise under RLUIPA, and even if a given land use regulation is seen to create a substantial burden on religious exercise, a local government can still potentially zone out a cemetery, but only if the local government has a "compelling governmental interest" and the regulation promotes that interest using the "least restrictive means."[90] The question then becomes, "when does a city or town have a 'compelling interest' in using land use law in such a way that it restricts the religious exercise of some of its inhabitants?"[91] Under RLUIPA, a city or town may do so only rarely.[92] A compelling governmental interest cannot be made up simply to apply to a given case or regulation and must be genuine and more than simply "substantial."[93]

The compelling governmental interest standard is a very high burden for a municipality to meet. The compelling interest standard cannot be met with traditional concerns such as elimination of blight[94] or generation of tax revenues.[95] Courts so far have found that protecting aesthetics and promoting traffic safety in residential neighborhoods,[96] and avoidance of a necessary area rezoning in order to accommodate a religious use[97] could possibly constitute compelling governmental interests, but courts are reluctant to definitively create such new compelling interests in

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90 42 U.S.C. § 2000cc(a)(1) (2012).

91 Chase, *supra* note 25, at 7.

92 *See id.*

93 *See id.*

94 *See* Cottonwood Christian Ctr. v. Cypress Redevelopment Agency, 218 F. Supp. 2d 1203, 1228 (C.D. Cal. 2002).

95 *See* Elsinore Christian Ctr. v. City of Lake Elsinore, 291 F. Supp. 2d 1083, 1093 (C.D. Cal. 2003), *rev'd on other grounds*, 197 Fed. App'x 718 (9th Cir. 2005) ("[I]f a city's interest in maintaining property tax levels constituted a compelling governmental interest, the most significant provision of RLUIPA would be largely moot.").

96 *See* Murphy v. Zoning Comm'n of New Milford, 148 F. Supp. 2d 173, 189–90 (D. Conn. 2001).

97 *See* Greater Bible Way Temple of Jackson v. City of Jackson, 733 N.W.2d 734, 753 (Mich. 2007).

all circumstances.[98] Courts have left open the question of whether compliance with a state's environmental laws can constitute a compelling government interest[99] and have also stated that public safety could be used to make an argument of a "valid, if not compelling," governmental interest.[100] Additionally, there are governmental interests that have not yet come before a court, but that may be viewed as compelling, which are worth analyzing here.

If a local government can establish a compelling governmental interest for restricting religious exercise through its zoning regulations, the locality must then prove that the zoning regulation exists to further the professed compelling governmental interest and that the zoning regulation is the least restrictive means of furthering that interest.[101] The Supreme Court has stated that "to demonstrate a compelling interest and show that it has adopted the least restrictive means of achieving that interest is the most demanding test known to constitutional law."[102] It is apparent that a given municipality will bear an enormous burden in trying to zone out a cemetery.

III. HOW MUNICIPALITIES CAN DESIGN CEMETERY REGULATIONS TO ESTABLISH COMPELLING INTERESTS AND NARROW TAILORING UNDER RLUIPA

The proof that a zoning regulation was created for the purpose of furthering a compelling government interest and did so in the least restrictive means will be specific to a given case and regulation. Cemeteries, however, are vulnerable to three possible compelling governmental interest arguments: an interest in promoting environmental protection; an interest in promoting

98 *See id.* (stating that where a city demonstrated a general interest in zoning and a specific interest in the zoning of its single-family neighborhood, "the city has a compelling interest in maintaining single-family residential zoning and in not rezoning this area of the city."); *Murphy*, 148 F. Supp. 2d at 189-90 (finding a non-absolute compelling state interest in safety of residents in residential neighborhoods).

99 *See generally* Guru Nanak Sikh Soc. of Yuba City v. County of Sutter, 456 F.3d 978 (9th Cir. 2006).

100 *See* Davis v. Lockland Zoning Bd. of Appeals, 797 N.E.2d 548, 552 (Ohio Ct. App. 2003).

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

102 City of Boerne v. Flores, 521 U.S. 507, 534 (1997).

aesthetics and traffic safety in residential neighborhoods; and an interest in reducing the cost of patrolling cemeteries.

A. *Compelling Government Interest in Promoting Environmental Protection*

Where local governments have an established interest in promoting environmental protection, that goal can be used as a strong compelling government interest to combat a RLUIPA claim regarding the regulation of a cemetery. Courts, however, have left open whether environmental concerns can constitute a compelling government interest.[103] Given the special environmental concerns raised by traditional cemetery burials, it is clear that cemeteries pose some important environmental risks that are worthy of regulation.

The biggest threat cemeteries pose to the environment is groundwater contamination. Groundwater is the water trapped underground between soil, gravel, sand, and fractured rock.[104] It supplies 51 percent of U.S. drinking water, and 99 percent of drinking water in rural areas of the U.S.[105] Groundwater is also used for farm irrigation and industrial processes and flows into open waters and wetlands.[106] As bodies and coffins buried in cemeteries begin to decay, embalming fluid sometimes begins to seep into groundwater.[107] Typically, embalmers use formaldehyde to preserve dead bodies.[108] Formaldehyde is toxic, and "[t]he U.S. government has no established safety standards for the amount of formaldehyde in drinking water."[109] Ten acres of burial use—the size of the average cemetery—will typically contain "a volume of embalming fluid sufficient to fill a small backyard swimming pool

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103 *See generally Guru Nanak Sikh Soc. of Yuba City*, 456 F.3d 978.

104 *See The Basics,* THE GROUNDWATER FOUNDATION, http://www.groundwater.org/get-informed/basics/groundwater.html (last visited Nov. 10, 2015).

105 *See id.*

106 *See id.*

107 ENVIRONMENT AGENCY, ASSESSING THE GROUNDWATER POLLUTION POTENTIAL OF CEMETERY DEVELOPMENTS 6–7, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/290462/scho0404bgla-e-e.pdf (last visited Feb. 25, 2016). Pollution of groundwater may constitute a nuisance under states' tort laws. RESTATEMENT (SECOND) OF TORTS § 832 (1979).

108 *See Mark Harris, Arsenic Contamination in Graveyards: How the Dead Are Hurting the Environment,* UTNE READER (June 2013), http://www.utne.com/environment/arsenic-contamination-ze0z1306zpit.aspx.

109 *Id.*

and untold gallons of pesticide and weed killer to keep the graveyard preternaturally green."[110]

Observers have compared United States cemeteries to landfills[111] and toxic waste sites.[112] It is estimated that,

> Every year in the United States, the chemicals and materials buried along with bodies in a conventional burial include approximately 30 million board feet of hardwoods, 2,700 tons of copper and bronze, 104,272 tons of steel, and 1,636,000 tons of reinforced concrete. Also buried are approximately 827,060 gallons of embalming fluid . . .[113]

These materials release different chemicals that spread in soil and groundwater.[114] Decaying bodies alone release into the environment chemicals such as "ammonia, ammonium compounds, hydrogen sulphide, mercaptan, methane, carbon dioxide and phosphoric acid."[115] Such pollutants can cause cancer if they find their way into drinking water.[116] Furthermore, if large amounts of microorganisms associated with the decomposition of bodies seep into groundwater, and consequently into drinking water, they can cause "a variety of health effects like gastrointestinal, liver, neurological, lymphatic and endocrinological diseases."[117]

In addition to groundwater and soil concerns, individual cemeteries may raise site-specific concerns. The concerns range from impacts on endangered species[118] to the need for irrigation

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110 *Id.*

111 *See id.*

112 *See* Alexandra Harker, *Landscapes of the Dead: An Argument for Conservation Burial*, THE URBAN FRINGE (Sept. 19, 2012), http://ced.berkeley.edu/bpj/2012/09/landscapes-of-the-dead-an-argument-for-conservation-burial/.

113 *Id.* (internal citations omitted).

114 *See id.*

115 L. Rodrigues & A. Pacheco, *Groundwater Contamination from Cemeteries*, ENVIRONMENTAL 2010: SITUATION AND PERSPECTIVES FOR THE EUROPEAN UNION, MAY 2003, at 2, http://paginas.fe.up.pt/~mjneves/env2010_files/Sessions/Papers%20C/Rodrigues,L3.PDF.

116 *See* SABLE GUTTMAN, VALERIE MILLER & JADE WATSON, 'TIL DEATH DO WE POLLUTE, AND BEYOND: THE POTENTIAL POLLUTION OF CEMETERIES AND CREMATORIUMS 2 (Trent University, 2011), https://archive.org/stream/tilDeathDoWePolluteAndBeyondThePotentialPollutionOfCemeteriesAnd/TillDeathDoWePollute#page/n0/mode/2up.

117 *Id.*

118 *See* Contra Costa Cty. Dep't of Conservation & Dev., CREEKSIDE MEMORIAL PARK CEMETERY, DRAFT ENVIRONMENTAL IMPACT REPORT 1.0-10-11

and fertilizers used to keep cemetery lawns healthy.[119]

There are a number of reasons why a cemetery may have a negative influence on the environment, and a local government can likely show that environmental protection is a compelling governmental interest given the importance of the environment to citizens' health.[120] The problem that may arise by creating zoning regulations based on environmental concerns is that these regulations may not be the least restrictive means of achieving the compelling government interest. With respect to cemeteries in particular, regulations concerning the types of materials that may be buried in cemeteries and the means of burying materials and bodies may alleviate some environmental concerns that cemeteries raise.

Surface regulations that may apply to cemeteries, to deal with issues such as lawn care and endangered species, likely will not require that a cemetery locate elsewhere because such regulations will govern open land for an entire water conservation area or endangered species habitat. Such a regulation could require a municipality to preserve a certain percentage of a given species of tree or a portion of an endangered species' habitat. This regulation could limit the amount of land that can be cleared within the municipality's borders, which could possibly prevent a land use like a cemetery that would require a large clearing, but is only likely to do so in a municipality with little remaining undeveloped land.[121]

B. *Compelling Government Interest in Promoting Aesthetics and Traffic Safety in Residential Neighborhoods*

Depending on the specific zoning regulation, a local government may be able to claim a compelling interest in promoting aesthetics and traffic safety.[122] In *Murphy v. Zoning Commission of New Milford*, the District Court for the District of Connecticut found that a Zoning Commission decision that

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(2011), https://ebcnps.files.wordpress.com/2011/11/draft-environmental-impact-report.pdf (last visited Nov. 8, 2015).

119 *See* Harker, *supra* note 112 at 3.

120 *See infra* text accompanying note 127.

121 Of course, this may limit other land uses, such as golf courses and sports fields. Murphy v. Zoning Comm'n of New Milford, 148 F. Supp. 2d 173, 189–90 (D. Conn. 2001).

122 *Id.*

prohibited the Murphys from holding fifty- to sixty-person prayer circles at their home on Sunday afternoons might not be invalid.[123] The Murphys lived in an area zoned for single-family residential units.[124] Their prayer circles caused an increase in traffic in their neighborhood and led to a large number of cars being parked on the street.[125] The Murphys eventually converted their backyard into a parking lot to alleviate part of the parking issue.[126] The District Court found that the Zoning Commission regulation of the prayer circle was based on a compelling government interest, in that "[t]here appears to be no dispute that local governments have a compelling interest in protecting the health and safety of their communities through the enforcement of the local zoning regulations."[127] Under this compelling interest in health and safety, a municipality may announce an interest in or plan to promote aesthetics and traffic safety.[128] In *Murphy*, however, the local government failed to present evidence that its regulation was the least restrictive means of furthering the compelling interest concerning traffic and aesthetics.[129] The local government issued a cease and desist order "charging plaintiffs with violations of the single-family district regulations 'which [do] not permit use of said premises as a meeting place by a diverse group of people (25 to 40).'"[130] This was not the least restrictive means of regulation because they sought to control the number of people in the Murphy home, and not the actual problem of neighborhood traffic.[131]

If a local government sought to zone out a cemetery based on "protecting the health and safety" of its citizens "through the enforcement of the local zoning regulations" that promote aesthetics and regulate traffic[132] it may be possible for that municipality to base its zoning regulations on traffic or crowding concerns, similar to New Milford's reasoning in *Murphy*. A cemetery could possibly create an untenable parking situation in a

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123 *See id.* at 191 (ruling on plaintiff's motion for a preliminary injunction).
124 *See id.* at 176.
125 *See id.*
126 *See id.* at 177.
127 *Id*. at 190.
128 *See id.* (citing Knoeffler v. Town of Mamakating, 87 F. Supp. 2d 322, 330 (S.D.N.Y. 2000)).
129 *See id.*
130 *Id.* at 178 (alteration in original).
131 *See id.*
132 *Id*. at 190.

dense area, or a necessary route for a funeral procession may block the path of emergency vehicles. This compelling government interest may be the start of a municipality's defense to a RLUIPA claim, as long as the concern for enforcing local traffic-centric zoning ordinances existed prior to the proposal for the cemetery (because a compelling interest will not stand if it is simply derived in order to impede development of land by a religious entity).[133] The regulation may face problems, however, if it is not the least restrictive means of achieving its goals regarding traffic control. A regulation may be acceptable if the cemetery's construction were conditioned on creating parking lots that meet certain aesthetic standards, or only allowing the cemetery to hold burials at times in a given day when roads are less congested and funeral processions would be unlikely to cause traffic issues.

C. *Compelling Government Interest in the Cost of Patrolling Cemeteries*

Many states have enacted hate crime statutes that have provisions banning the desecration or vandalism of cemeteries and tombstones.[134] Applying these provisions specifically to cemeteries could mean that introduction of a new cemetery to a municipality will draw on that municipality's police resources to prevent the proscribed crimes. Particularly for poorly-funded or high-crime municipalities, patrolling cemeteries may be impracticable. In theory, a local government could potentially pass zoning regulations restricting cemeteries based on a compelling governmental interest in preserving police resources.

Of course, this justification for zoning regulation may fail. Police resources are a governmental expenditure necessarily funded by tax dollars, and courts have already held that generation of tax revenues is not a compelling government interest.[135] It may therefore be unlikely that a court would hold preservation and allocation of tax resources, in the form of police resources, to be a compelling governmental interest justifying the regulation of

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133 *See* Chase, *supra* note **Error! Bookmark not defined.**25, at 7.

134 *See* Staff of the Syracuse J. Legis. & Policy, *Crimes Motivated by Hatred: The Constitutionality and Impact of Hate Crime Legislation in the United States*, 1 SYRACUSE J. LEGIS. & POL'Y 29, 68–84 (1995).

135 *See* Elsinore Christian Ctr. v. City of Lake Elsinore, 291 F. Supp. 2d 1083, 1093 (C.D. Cal. 2003), *rev'd on other grounds*, 197 Fed. App'x 718 (9th Cir. 2005).

cemeteries. If, however, a court were to view the allocation of police resources as a municipality exercising its compelling interest in safety, the municipality may have a stronger argument for zoning out cemeteries.[136] A municipality could zone out cemeteries on the reasoning that the need to provide necessary police resources to patrol a cemetery would lead to a lack of police resources in other areas of the municipality, creating a serious safety issue. It is unlikely, however, that zoning out cemeteries is the least restrictive means of preserving police resources. It may simply be that a municipality would be able to only lightly patrol cemeteries, rather than require they locate in another jurisdiction.

CONCLUSION

There are a number of ways local governments could approach the regulation of cemeteries through zoning under RLUIPA. Each of these methods, however, has its weaknesses.

It is likely not worthwhile for a municipality to argue that a cemetery is not a form of "religious exercise" under RLUIPA, given the broad definition of "religious exercise" and the fact that RLUIPA covers worship and non-worship forms of religious exercise. Likewise, it is essentially set in stone that any zoning regulation a municipality proposes will be considered a "land use regulation" under RLUIPA.

A municipality could try to prove that its land use regulation affecting religious exercise does not constitute a "substantial burden" under RLUIPA, as defined by various circuit courts. A land use regulation of cemeteries would need to exist prior to any proposal for a cemetery within the municipality. The regulation would have to be facially neutral and well-reasoned at the time it is passed. Under the Seventh Circuit's standard for substantial burdens, taking these steps would likely ensure that the regulation can in no way be interpreted as hostile to religion and therefore in violation of the Seventh Circuit standard. Given that the Seventh Circuit's standard appears to give municipalities the most leeway in zoning out cemeteries, it is likely that municipalities falling within the jurisdiction of other circuits would need to meet this same standard, as a minimum. This means that zoning regulations

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136 As established in Part III.B. above, a municipality may assert a compelling government interest in health and safety. *See* Murphy v. Zoning Comm'n of New Milford, 148 F. Supp. 2d 173, 190 (D. Conn. 2001).

meant to regulate the location of a cemetery in any jurisdiction should be well-reasoned and should exist before the municipality receives a proposal for construction of a cemetery. Under the Eleventh and Ninth Circuits' standards, municipalities would be advised not to zone out cemeteries completely, but rather to restrict where within the municipality a cemetery can be located. This compromise will ensure that a religious entity is not completely frustrated in exercising its desired religious practices. Finally, taking these careful steps in crafting a zoning regulation to regulate cemeteries may still fail under the substantial burden standard set out by the Second Circuit, where analysis of any land use regulation of religious exercise could likely be assessed on a case-by-case basis, depending on whether reasonably feasible alternative properties exist within or near a given municipality.

If a municipality's regulation of cemeteries is found to be a substantial burden on religious exercise, the municipality could also try to meet RLUIPA's compelling government interest and least restrictive means standards. Some courts have already accepted that promoting aesthetics and controlling traffic at times constitute a compelling government interest. A local government may be able to impose zoning regulations on cemeteries based on potential traffic concerns, but must be wary that it must do so via the least restrictive means possible.

Environmental concerns constitute another potential compelling government interest upon which to base zoning regulation of cemeteries. Cemeteries are known to pollute groundwater and soil, and they can have impacts on endangered species. They have even been compared to landfills and toxic waste sites. Yet, even if a local government could establish that a zoning regulation was passed for the purpose of environmental protection, the local government would likely have difficulty proving that its regulation is the least restrictive means of achieving its environmental policy goals.

It is also possible that a municipality could argue that it has a compelling government interest in preserving police resources and therefore cannot afford to police a new cemetery for hate crimes. This argument is likely to fail, however, given that courts have already stated that tax revenue is not a compelling governmental interest, and police resources are closely tied to a town's tax revenues.

Finally, a local government may stand a chance of zoning out

a cemetery by bringing a claim that RLUIPA is unconstitutional, similar to the challenges brought against RFRA. This would be no easy feat, given that courts have attempted to construe RLUIPA narrowly in order to avoid questions of constitutionality.[137] There is debate over whether RLUIPA can exist under the Constitution, but lower federal courts have stated that RLUIPA is in fact constitutional.[138]

For now, it is likely that only a few, well-crafted zoning regulations could hope to avoid an RLUIPA challenge where a religious institution purchases land within a town for the purpose of constructing a religious cemetery.

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137 *See* Ariel Graff, *Calibrating the Balance of Free Exercise, Religious Establishment, and Land Use Regulation: Is RLUIPA an Unconstitutional Response to an Overstated Problem*, 53 UCLA L. REV. 485, 507 (2005).

138 *See, e.g.*, Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1236 (11th Cir. 2004); Westchester Day Sch. v. Vill. of Mamaroneck, 504 F.3d 338, 354 (2d Cir. 2007).