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RLUIPA and Mosques: Enforcing a Fundamental Right in Challenging Times

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INTRODUCTION

It is in the nature of legislation that Congress often cannot predict the precise factual scenarios where the principles set forth in a law will be applied. Sometimes problems that were barely on the radar screen of legislators may prove to be the key beneficiaries. If the operative principles of legislation are sound, the application to unanticipated situations will be seamless. Indeed that is generally how it should be—the Framers of the Constitution, in barring practices such as Bills of Attainder, sought to ensure that legislation would tend to serve broad rather than narrow ends.¹

One frequently sees this characteristic of legislation at work in civil rights statutes. Section 1983² was enacted as the Civil Rights Act of 1871 to try to help ensure that newly freed slaves in the South were protected by local officials from violence at the hands of the Ku Klux Klan and given the equal treatment protection of the law that the Constitution guaranteed them.³ However, its broad language providing a remedy for the “deprivation of any rights, privileges, or immunities”⁴ by states acting under color of law has resulted in its becoming a major vehicle for enforcement of constitutional protections generally.⁵

²See generally THE FEDERALIST PAPERS NO. 44 (James Madison).
⁵See CHEMERINSKY, supra note 3, § 8.1, at 377.
This has been true in recent years in the area of religious freedom legislation. The Church Arson Prevention Act\(^6\) was passed in 1996 in response to an upsurge of arson against churches, particularly African-American churches.\(^7\) Despite its popular name’s focus on churches, it makes it a crime to “intentionally deface[ ], damage[ ], or destroy[ ] any religious real property.”\(^8\) In the wake of 9/11, attacks on mosques, virtually unheard of prior to 9/11, rose sharply in the months afterward.\(^9\) The Church Arson Prevention Act, has proven to be an invaluable law enforcement tool in responding to the increased violence against mosques.\(^10\)

The same is true with the land use provisions of the Religious Land Use and Institutionalized Persons Act (“RLUIPA”), passed in 2000.\(^11\) RLUIPA was enacted, as will be discussed in detail in Section I below, to address the problem of local governments applying zoning and landmarking powers in a manner that either discriminated against places of worship and religious schools, or imposed substantial burdens on their religious exercise.\(^12\) While there are a few isolated references to mosques in the voluminous legislative history, and a number of general references to minority religions, the overwhelming focus in the legislative history is

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7. See, e.g., United States v. Grassie, 237 F.3d 1199, 1209 (10th Cir. 2001).  
12. See infra Section I.
on churches and, to a lesser extent, synagogues. The Joint Statement of Senate sponsors Hatch and Kennedy refers primarily to “churches” in describing the problem being addressed, and how the various provisions of the law would operate.

However, as with the Church Arson Prevention Act, RLUIPA is proving to be an important statute for protecting the civil rights of Muslims in America. As will be described below, Muslims have faced considerable opposition to efforts to build or expand mosques or religious schools. And this has intensified in the past two years. For example, the Department of Justice has opened twenty-seven RLUIPA matters involving mosques and Muslim schools since RLUIPA was passed. Of these, seventeen have been opened since May of 2010. Civil rights groups have likewise reported a significant increase in conflicts involving mosques recently.

This article will explore the problems faced by Muslim communities in the United States in land use issues since the passage of RLUIPA, and how RLUIPA can be a powerful tool for ensuring realization of the constitutional right to equal opportunities to build places of worship and religious schools. The provisions of RLUIPA are not uniquely helpful to Muslims. Indeed, the record of RLUIPA’s application in the first eleven years is one of broadly facilitating religious exercise of a wide range of religious groups. The majority of cases, as one would expect in a Christian-majority country, involve churches and Christian schools. But in light of the growing hostility toward construction and expansion of Muslim houses of worship, RLUIPA is an increasingly critical tool for protecting the civil rights of Muslim Americans.

Section I will describe the purposes behind passage of RLUIPA. While, as noted, the record focused on churches and synagogues, and mosques received barely a mention, Congress expressed particular concern with ensuring the ability of newer and smaller religious organizations to locate places of worship, whether small independent Bible churches operating in storefronts or minority religious

13. See infra Section I.
15. See infra Section II.
To protect the right of religious freedom in land use, Congress chose a broad remedial statute that protected against discrimination among religious groups. RLUIPA requires equal treatment between secular and religious use; it ensures that places of worship are not completely zoned out of jurisdictions or unreasonably limited in them; and it provides a mechanism to ensure that the constitutional right to be free from unjustifiably burdensome infringements on religious freedom is preserved. Section II describes the headwind of intolerance that mosques and Muslim religious schools currently face, and how that has been manifested in zoning disputes. Finally, Section III explores the various operational provisions of RLUIPA, describing developments in the law, how these issues have arisen in cases involving mosques, and how the various provisions of RLUIPA are likely to impact Muslim civil rights cases moving forward.

I. THE HISTORY AND PURPOSE OF RLUIPA

RLUIPA, fittingly for the present discussion of the protection of the right of Muslims to build mosques, has its origins in a landmark constitutional case involving a minority religion.

Prior to 1990, the Supreme Court had granted exemptions under the Free Exercise Clause to generally applicable laws that were facially neutral toward religion, but which nonetheless burdened those with religious practices or scruples conflicting with the law. Where the Court found the burden on an individual’s beliefs to outweigh the state’s interest, the individual received an exemption. Since those with religious practices that are different from the majority are more likely to see conflict between these practices and legal norms, this doctrine typically aided the religious practices of minority faiths. Thus in

16. See infra notes 64–69 and accompanying text.
17. See infra notes 75–93 and accompanying text.
18. See infra Section II.
19. See infra Section III.
21. See id.
22. See id.
Wisconsin v. Yoder\textsuperscript{23} the Court upheld a Free Exercise Clause challenge by Amish parents against the state of Wisconsin's compulsory education law, finding the Amish's longstanding practice of providing vocational training in community to their older children was rooted in their religious beliefs and outweighed the state's asserted interest in ensuring an educated citizenry.\textsuperscript{24} Similarly, in Sherbert v. Verner,\textsuperscript{25} the Court held that a Seventh-day Adventist who was fired by her employer for refusing to work on Saturdays could not be denied unemployment benefits.\textsuperscript{26} The state could not advance a compelling interest, narrowly tailored to achieve its objective, overriding her need to observe the Sabbath.\textsuperscript{27} This principle even applied to minorities within minorities, as in the case of a Jehovah's Witness fired for refusing to build tank turrets even though other Jehovah's Witnesses did not have a conscientious objection to this activity.\textsuperscript{28} In other cases, the state interest were found to override the religious claimant's interest in an exemption, such as an Orthodox Jewish Air Force psychologist who sought to wear a yarmulke with his uniform,\textsuperscript{29} Native American parents who objected on religious grounds to the use of a Social Security number for their child in order to obtain government welfare benefits,\textsuperscript{30} and Amish workers who objected to paying into the U.S. Social Security retirement system.\textsuperscript{31}

However, in 1990, the Supreme Court issued a decision, Employment Division v. Smith,\textsuperscript{32} that cut back on the ability of individuals to claim a right to exemptions under the Free Exercise Clause to "neutral law[s] of general applicability."\textsuperscript{33} The Court in Smith rejected the claim of Native Americans denied unemployment compensation after

\begin{itemize}
\item \textsuperscript{23} 406 U.S. 205 (1972).
\item \textsuperscript{24} \textit{Id.} at 234–35.
\item \textsuperscript{25} 374 U.S. 398 (1963).
\item \textsuperscript{26} \textit{Id.} at 406–07.
\item \textsuperscript{27} \textit{Id.} at 403–04, 406–07.
\item \textsuperscript{29} Goldman v. Weinberger, 475 U.S. 503, 504 (1986).
\item \textsuperscript{30} Bowen v. Roy, 476 U.S. 693, 712 (1986).
\item \textsuperscript{31} United States v. Lee, 455 U.S. 252, 254–61 (1982).
\item \textsuperscript{32} 494 U.S. 872, 879 (1990).
\item \textsuperscript{33} \textit{Id.} at 879 (quoting \textit{Lee}, 455 U.S. at 263 n.3 (Stevens, J., concurring)). See also Douglas Laycock, \textit{The Remnants of Free Exercise}, 1990 SUP. CT. REV. 1, 2–3;
\item Michael W. McConnell, \textit{supra} note 20.
\end{itemize}
being fired for using the sacramental drug Peyote in violation of the criminal laws. The Court held that claims for religious accommodations to general laws are, for the most part, not to be considered constitutional issues but rather must be sought from legislatures. The only cases in which a religious objector could seek a constitutional exemption to a neutral, generally applicable law, the Court held, were those that fell into one of two categories. First, cases involving a “hybrid situation” of religion joined with another fundamental right, such as religion plus parental rights or religion plus speech, could receive heightened scrutiny. Second, where laws involve “individualized governmental assessment of the reasons for the relevant conduct,” as in unemployment case like Sherbert v. Verner, such laws should not be deemed generally applicable, because they already permit citizens to be exempted from the law for secular reasons. The Smith majority acknowledged that leaving religious accommodation to the political process would “place at a relative disadvantage those religious practices that are not widely engaged in,” but this is an “unavoidable consequence of democratic government.”

The Smith decision was met with widespread criticism from religious communities, resulting in a broad, bipartisan and interfaith effort to enact legislation that fully protected individuals and religious organizations from unjustified and substantial burdens on their religious exercise. The resulting statute, the Religious Freedom Restoration Act ("RFRA"), provided very simply that no government may

34. See Smith, 494 U.S. at 890.
35. Id.
36. Id. at 881–82.
38. Smith, 494 U.S. at 884. See also Church of Lukumi Bablu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 542–45 (finding animal cruelty law to be not a law of general applicability due to numerous exceptions and applying heightened scrutiny to uphold Free Exercise claim of Santarians engaging in animal sacrifice).
"substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability" unless it is in furtherance of a compelling governmental interest pursued in the least restrictive means—essentially codifying the pre-Smith balancing test in all situations through legislation.

The Supreme Court overturned RFRA’s application to the states in City of Boerne v. Flores, holding that Congress had exceeded its power under Section 5 of the 14th Amendment to enforce due process and equal protection of law. The Court held that Congress had created a new rule of decision rather than enforcing existing constitutional protections, finding that RFRA lacked "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."

In response to the Boerne decision, Congress considered bills in 1998 and 1999, both styled “The Religious Liberty Protection Act” ("RLPA"), that attempted to apply the strict scrutiny standard of RFRA to as broad a group as possible of state laws that would meet the requirements of Boerne for Enforcement Clause legislation, or fall within Congress’s Commerce Clause or Spending Clause powers. RLPA was eventually narrowed to focus on two areas, laws involving zoning and landmarking, and the rights of persons confined to institutions, and was reintroduced as The Religious Land Use and Institutionalized Persons Act on July 13, 2000.

Congress gathered documentation of government infringement on religious exercise through application of land use laws in nine
hearings over three years. Over the course of those hearings, Congress amassed what the Senate sponsors termed “massive evidence” of a pattern of religious discrimination in state and local land use decisions. The House Report likewise described the situation as a “consistent, widespread pattern of political and governmental resistance to a core feature of religious exercise: the ability to assemble for worship.” In reaching these conclusions, RLUIPA’s sponsors relied on statistical evidence such as surveys of cases and studies of zoning codes, as well as anecdotal evidence from a broad range of local, regional, and national experts in religious land use matters who testified that these examples were representative of the unconstitutional discrimination that they had witnessed in their experiences. This statistical and anecdotal evidence was “cumulative and mutually reinforcing evidence” of discrimination, and amounted to a “substantial record of evidence indicating a widespread pattern of religious discrimination in land use regulation.”

Congress heard testimony that zoning processes lack consistent application of standards and are “often vague, discretionary, and subjective.” The evidence Congress amassed indicated that zoning regulations systems placed religious groups’ ability to assemble for worship “within the complete discretion of land use regulators.” The House Report further concluded that “[r]egulators typically have

54. 146 Cong. Rec. at S7775; see also H.R. Rep. 106-219, at 18–24.
56. Id. at 24; see also id. at 17 (“Local land use regulation, which lacks objective, generally applicable standards, and instead relies on discretionary, individualized determinations, presents a problem that Congress has closely scrutinized and found to warrant remedial measures under its Section 5 enforcement authority.”).
57. Id. at 19.
virtually unlimited discretion in granting or denying permits for land use and in other aspects of implementing zoning laws.\(^{58}\)

Congress heard evidence that religious institutions frequently faced both overt and subtle discrimination based on religion in denials of zoning approval and that "new, small, or unfamiliar churches" were more likely to face discrimination than larger, established churches.\(^{59}\) Congress also heard evidence of racial and religious animus in local land-use decisions, "especially in cases of black churches and Jewish shuls and synagogues."\(^{60}\) For example, Congress also heard evidence that faith groups constituting 9% of the population made up 50% of reported court cases involving zoning disputes.\(^{61}\) The discrimination, Congress found, was sometimes overt, but often more subtle.\(^{62}\) As the House Report notes, "the motive is not always easily discernible, but the result is a consistent, widespread pattern of political and governmental resistance to a core feature of religious exercise: the ability to assemble for worship."\(^{63}\)

The problem of mosque construction barely registered in the RLUIPA hearings and proceedings. In all of the hearing testimony, there are just two references to cases involving mosques.\(^{64}\) The House Report and the Senate Joint Statement address the problems facing churches and synagogues broadly, and do not once speak of mosques specifically in the document bodies, although there is a reference to a mosque case in a footnote to the House Report.\(^{65}\) This is not to say that the sponsors were indifferent to minority faiths. As noted above, both the House Report and the Senate Joint Statement highlighted the plight of minority faiths generally in obtaining zoning approval, and, in particular, cite to a

\(^{58}\) Id. at 20.

\(^{59}\) See 146 Cong. Rec. S7774.

\(^{60}\) Id.


\(^{62}\) See id. at 23.

\(^{63}\) Id. at 24; see also 146 Cong. Rec. S7774.


Brigham Young University study showing that minority faith groups are disproportionately represented in zoning disputes. But Islam was barely on the radar. Indeed, the record seems to indicate that Congress was simply reflecting the reality on the ground at the time. The BYU study found that only 1.6% of reported zoning cases raising free exercise issues involved Muslims. While this is greater than Muslims’ percentage of the population by a factor of 2 or 3, it contrasts dramatically with the experience of Jews, who make up approximately 2% of the population but accounted for more than 20% of the reported zoning decisions in the study, or the six-fold overrepresentation of minority religions generally.

In addition to evidence of arbitrariness and discrimination, Congress also reviewed evidence that, as a whole, religious institutions were treated worse than comparable secular institutions. As Senators Kennedy and Hatch noted:

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 . . . . Churches have been denied the right to meet in rented storefronts, in abandoned schools, in converted funeral homes,

66. See supra notes 49–65 and accompanying text.
68. The American Religious Identification Survey placed the number of Muslims in the U.S. in 2001 at 1,104,900, or just over .5% of the population. U.S. Census Bureau, Statistical Abstract of the United States 61 (2012). This survey, which looks at religious self-identification by adults, is used by the U.S. Census Bureau in its statistics. Other surveys of the Muslim population come in with higher numbers. For example, a Pew Research Center survey estimated a U.S. Muslim population of 2.5 million Muslims in 2008, Pew Research Center, Mapping the Global Muslim Population: A Report on the Size and Distribution of the World’s Muslim Population 24 (2009), while that same year the American Religious Identification Survey put the number at 1.3 million. Statistical Abstract of the United States at 61, http://pewforum.org/newassets/images/reports/Muslimpopulation/Muslimpopulation.pdf.
69. Von Keetch statement appendix, supra note 67 at 33.
theaters and skating rinks—in all sorts of buildings that were permitted when they generated traffic for secular purposes.\(^71\) Based on the evidence before it of a “pattern of abusive and discriminatory actions by land use authorities who have imposed substantial burdens on religious exercise,”\(^72\) Congress determined that there was a need to pass legislation, under its Commerce, Spending, and Enforcement Clause powers, to protect against the infringement of religious liberty in land use.\(^73\) As the Senate sponsors observed: “The right to assemble for worship is at the very core of the free exercise of religion. Churches and synagogues cannot function without a physical space adequate to their needs and consistent with their theological requirements.”\(^74\)

Congress passed RLUIPA in July of 2000 by unanimous consent.\(^75\) Its House and Senate sponsors were ideologically diverse,\(^76\) and RLUIPA was supported by more than seventy religious and civil rights groups representing a great diversity of religious and ideological viewpoints.\(^77\) As Representative Nadler noted in his remarks on the House floor, “Every religious group that I am aware of supports this bill. I am aware of no opposition from any religious or civil rights or civil

\(^{71}\) Id.; see also H.R. REP. NO. 106-219, at 19–20 (“[u]ses such as banquet halls, clubs, community centers, funeral parlors, fraternal organizations, health clubs, gyms, places of amusement, recreation centers, lodges, libraries, museums, municipal buildings, meeting halls, and theaters are often permitted as of right in zones where churches require a special use permit, or permitted on special use permit where churches are wholly excluded”).

\(^{72}\) H.R. REP. NO. 106-219, at 17.


\(^{74}\) 146 CONG. REC. at S7774.

\(^{75}\) Id. at S7774–01.

\(^{76}\) The sponsors included, in addition to Senators Hatch and Kennedy, Senators Charles Schumer, Mike Crapo, Joe Lieberman, and Robert Bennett, former Senators Gordon Smith, Tom Daschle and Tim Hutchinson, Representatives Jerrold Nadler, Barney Frank, Sanford Bishop, Lee Terry, Roy Blunt, Chet Edwards, and Robert Wexler, and former Representatives Charles Canady and Merrill Cook. See U.S. DEP’T OF JUSTICE, REPORT ON THE TENTH ANNIVERSARY OF RLUIPA, supra note 11, at 4 n.14 (Sept. 22, 2010).

liberties group." The Department of Justice gave its "strong support" to
the bill and worked closely with House and Senate Judiciary Committee
staffs on the drafting and refining the bill. RLUIPA was signed into law
by President Clinton on September 22, 2000.

RLUIPA's land use section codifies the constitutional
protections for religious freedom and against religious discrimination
provided under the Free Exercise Clause, the Free Speech Clause, and
the Equal Protection Clause, and provides mechanisms for enforcement
of these rights. The land use section contains five separate provisions,
which together provide comprehensive protection for individuals and
religious institutions from zoning and landmarking laws that discriminate
based on religion or unjustifiably infringe on religious freedom.

Section 2(a) prohibits land use regulations that impose a
"substantial burden" on the religious exercise of a person or institution,
unless the government can show that it has a "compelling interest" for
imposing the burden and that the regulations further that interest in the
least restrictive way. In recognition of the constitutional limits on
Congressional power articulated in the Boerne decision, this section
limits its reach to cases that impact interstate commerce, cases involving
federal funding, or cases in which the government's zoning or
landmarking decision involves "individualized assessment[]" of the
proposed use. This last jurisdictional basis enforces the free exercise
principle identified in the Smith decision that where the government had
in place a system of making individualized assessments, the government
cannot deny relief where doing so would impose a substantial burden on
religious exercise (absent meeting strict scrutiny).

Section 2(b)(1) provides that religious assemblies and
institutions must be treated at least as well as nonreligious assemblies
and institutions, and is based on the nondiscrimination principles of the

78. Id. at S7776.
79. Id. at S7776 (letter from Assistant Att'y Gen. Robert Raben).
80. See REPORT ON THE TENTH ANNIVERSARY OF RLUIPA, supra note 11, at 2.
83. Id. at § 2000cc(a)(1).
Free Exercise and Equal Protection Clauses, as well as the Free Speech clause’s requirement of neutrality toward religion.87 Where 2(b)(1) focuses on discrimination against religious compared to nonreligious land uses, Section 2(b)(2) is aimed at discrimination on the basis of religion or religious denomination, which is “the most invidious form of free exercise violation” and also violates the Equal Protection Clause.88

Finally, Sections 2(b)(3)(A) and (B) are directed at jurisdictions that either totally or unreasonably exclude religious assemblies from a jurisdiction.89 These two provisions are intended to track Supreme Court free speech precedents regarding attempts by local government to zone out particular speech categories.90 RLUIPA allows aggrieved persons to bring lawsuits and also authorizes the Attorney General to bring suit for injunctive relief.91

These provisions collectively prohibit local governments from discriminating against religious land uses, and protect individuals, religious institutions, and religious assemblies from “unnecessary government interference” with the free exercise of religion.92 As President Clinton said upon signing the Act into law, “Religious liberty is a constitutional value of the highest order, and the Framers of the Constitution included protection for the free exercise of religion in the very first Amendment. This Act recognizes the importance the free exercise of religion plays in our democratic society.”93

II. INCREASING DISPUTES, INCREASING ENFORCEMENT: THE IMPACT OF RLUIPA ON MOSQUE CONSTRUCTION CONTROVERSIES AFTER 9/11

RLUIPA has been successful in fulfilling the goals of its sponsors and supporters to reinvigorate the protection of religious exercise in land use and ensure that constitutional rights are enforced.94 As a Department of Justice report on the Tenth Anniversary of RLUIPA

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87. See, e.g., Storzer & Picarello, Jr., supra note 40 at 968.
88. Id. at 972.
89. 42 U.S.C. § 2000cc(b)(3).
94. Id. at 5–6.
concluded, "RLUIPA has had a dramatic impact in its first ten years on protecting the religious freedom of and preventing religious discrimination against and individuals and institutions seeking to exercise their religions through construction, expansion, and use of property." The report found that RLUIPA has been used to protect religious exercise in a wide range of settings, including places of worship, religious schools, prayer meetings in private homes, and faith-based social services such as homeless shelters, group homes, and soup kitchens. The report also found that cases under the land use provisions of RLUIPA had benefited a wide range of religious groups. Similarly, a Harvard Law Review Note in 2007, surveying the application of RLUIPA since in the first years since its enactment, concluded that "[s]ince the advent of RLUIPA, religious land use plaintiffs have been more successful in the federal courts than ever before.

RLUIPA came at a critical time for Muslim Americans. Less than one year after its passage, the 9/11 terrorist attacks occurred. It is often said, when talking about subjects ranging from our collective feelings of security to foreign policy, that "9/11 changed everything." This is demonstrably true with regard to the civil rights of Muslim Americans. Prior to 9/11, hate crimes against Muslims, while they did occur from time to time, barely registered in statistics. In 2000, for example, there were twenty-eight hate crime incidents against Muslims reported in the FBI Hate Crimes report, in contrast to 1,109 anti-Jewish hate crimes reported the same year. When I speak to veteran hate crime prosecutors, they tell me that before 9/11 Muslim cases were barely on the radar screen. In the wake of 9/11, there was a violent backlash

95. Id. at 5.
96. Id. (collecting cases).
97. Id.
100. This discussion of aggregate patterns should not understate the seriousness of individual crimes and their impact on victims and their families. For example, Alex Odeh, the regional director of the American Arab Anti-Discrimination Committee in California, was murdered by a letter bomb in 1985, a case that remains unsolved despite a $1 million FBI reward. See FBI, Seeking Information, http://www.fbi.gov/wantedSeeking-info/alexander-michel-odeh.
against Muslims and Arabs, and persons perceived to be Muslim or Arab, including Sikhs and South Asians. These included arsons and attempted arsons of mosques, a Sikh Gurdwara, and businesses, as well as threats, assaults, and even murder. Two days after 9/11, for example, Balbir Singh Sodhi, a Sikh gas station owner, was murdered in a drive by shooting while pumping gas. In Seattle, Washington, a man set fire to cars outside a mosque, then shot at congregants as they ran outside. The Department of Justice investigated more than 300 such incidents in the three months after 9/11. For 2001, the number of anti-Muslim hate crimes recorded in the FBI hate crime statistics jumped to 481 from 28 the prior year.

The backlash has not been limited to hate crimes. Charges of religion-based discrimination filed by Muslims with the Equal Employment Opportunity Commission ("EEOC") have jumped almost threefold from the eleven year period before 9/11 to the eleven year period after. Although Muslims make up from 1% to 2% of the population in the United States, they now make up one fourth of the religious discrimination claims filed with the EEOC.

Despite mosques barely registering in the legislative history of RLUIPA, as discussed in Section I above, land use disputes involving

101. See Treene, supra note 9, at 189.
102. Id. at 189–90.
103. Id. at 190.
105. Treene, supra note 9, at 189–90.
107. EEOC, Fact Sheet, Backlash Employment Discrimination Charges related to the events of 9/11/2001 against individuals who are, or are perceived to be, Muslim, Arab, Afghani, Middle Eastern or South Asian (Sept. 11, 2011). Part of that increase may be attributable to increased outreach by EEOC field offices and greater awareness among Muslims of their rights.
mosques became a prominent part of the RLUIPA enforcement story. While Muslims make up an estimated 1% to 2% of the population, 14% of RLUIPA investigations opened by the Civil Rights Division in RLUIPA’s first ten years involved mosques or Muslim schools. The ACLU has identified sixty disputes involving mosques in just the last five years, offering a sharp contrast to the two cases identified in RLUIPA’s legislative history. While certainly not a dominant feature of reported RLUIPA cases, there have been at least five reported court decisions involving mosques.

And while the rate of hate crimes has dropped sharply from the highs following 9/11, land use disputes appear to be on the rise. Of the twenty-seven RLUIPA matters involving mosques or Islamic schools that the Department of Justice has opened since 9/11, seventeen have

109. REPORT ON THE TENTH ANNIVERSARY OF RLUIPA, supra note 11, at 6.
110. Id. at 6.
112. See notes 65–70 and accompanying text.
114. The FBI hate crimes statistics show a sharp drop from the spike immediately after 9/11 to present levels, yielding a clear conclusion that the rate has gone down, but it is more difficult to discern the pattern for the years 2002 to the present. See Hate Crime Statistics, FBI, http://www.fbi.gov/about-us/cjis/ucr, follow “Hate Crime Statistics” portion and select year (last visited Feb. 2, 2012). The number of incidents dropped from 481 incidents in 2001—mostly in the last three and half months of that year—to 155 in 2002. See id. From 2002 to 2006, the number of incidents ranged from 128 to 156. See id. Then for 2007, 2008, and 2009 the number of incidents have been 115, 105, and 107, respectively. See id. In contrast to this trend, 2010 saw a 50% increase in incidents, up to 160, a figure near 2002 levels. See id. Pew Research Center polling data shows a steady number of Muslims reporting being physically attacked or threatened, with 4% reporting attacks or threats in 2007 and 6% in 2011. PEW RESEARCH CENTER, MUSLIM AMERICANS: NO SIGN OF GROWTH IN ALIENATION OR SUPPORT FOR EXTREMISM 46 (Aug. 2011), http://www.people-press.org/files/legacy-pdf/Muslim-American-Report.pdf.
been opened since May of 2010. Some of these cases involve allegations of overt bias. In two mosque cases settled by consent decree in September of 2011, for example, the United States alleged that local government officials directly involved in the zoning process had made hostile statements toward Muslims, and acted in furtherance of their own bias as well as the bias of constituents. The Pew Forum on Religion and Public life has identified thirty-seven mosque disputes in the last three years. Assistant Attorney General, Thomas E. Perez, testified before a Senate subcommittee in March of 2011 that the Civil Rights Division has seen an increase in RLUIPA cases and investigations involving mosques and that “[w]e believe this reflects a regrettable increase in anti-Muslim sentiment.” Farhana Khera, President of Muslim Advocates, the advocacy affiliate of the National Association of Muslim Lawyers, also testified at the same hearing of growing anti-Muslim sentiment being reflected in opposition to mosques. One study of land use issues involving mosques put it this way:

Resistance to mosque proposals over the last decade was tame by comparison to what we see today. Protest, even if bruising, at least took place


118. Id. at 11–13 (statement of Farhana Khera, President & Exec. Dir., Muslim Advocates), available at http://www.judiciary senate.gov/pdf/11-3-29%20Khera%20Testimony.pdf. See also id. at 2 (“There has been . . . a rampant increase in anti-Muslim harassment, discrimination, opposition to mosques, and hate crimes targeting Muslim, Arab, Sikh and South Asian Americans.”).
in the controlled environment of public sessions and within the framework of public debate—Muslim American applicants had the opportunity to respond to accusations and counter speculation with facts. Now, however, a vocal and organized opposition is in the streets with placards and bullhorns...  

This is consistent with the anecdotal evidence I hear from Muslim community leaders: while hate crimes are down from the immediate aftermath of 9/11, there is an uneasiness in Muslim communities that anti-Muslim sentiment has broadened, and that this is being reflected in mosque controversies. And while the general trend has been a sharp reduction in hate crimes since the months following 9/11, the number of hate crimes against Muslims reported by the FBI jumped 50% from 2009 to 2010, a development that merits watching.  

Survey data support the conclusion that there has been a rise in anti-Muslim sentiment. The Pew Research Center found that from 2007 to 2011, the number of Muslims who report being called offensive names in the most recent twelve months rose from 15% to 22%, and those reporting physical threats or attacks rose from 4% to 6%. Pew has on several occasions polled the general public’s favorable/unfavorable view of Muslims, and found that the favorable views of Muslims slipped from 47% in 2002 to 43% in 2007. A 2009 Gallup poll found that 43% of

121. PEW RESEARCH CENTER, supra note 114, at 108.
122. PEW FORUM ON RELIGION AND PUBLIC LIFE & THE PEW RESEARCH CENTER FOR THE PEOPLE AND THE PRESS, VIEWS OF RELIGIOUS SIMILARITIES AND DIFFERENCES, MUSLIMS WIDELY SEEN AS FACING DISCRIMINATION 22 (2009), available at http://pewresearch.org/pubs/1336/perceptions-of-islam-religious-similarities-differences. Indeed, the favorability rating in 2009 dropped to 37%, but the report indicates that due to an unusually large “no response” figure in the survey, that 37% figure is suspect. Id. The numbers improve when researchers ask about opinion of “Muslim Americans” rather than just Muslims. Id. While “Muslims” had
Americans report “a great deal,” “some,” or “a little” prejudice toward Muslims. Results in the same poll for prejudice toward Christians were 18%, toward Jews 13%, and toward Buddhists 14%.

Focusing on opinion regarding land use issues reveals similar results. A November of 2010 USA Networks poll found that 38% of respondents would oppose a mosque in their neighborhood, compared to the 34% who would oppose a Scientology center, 24% who would oppose a Mormon temple, 13% who would oppose a synagogue, and 8% who would oppose a church. Another survey found that 46% of respondents would be uncomfortable with a mosque being built near their home.

The anti-Muslim bias in cases we have handled is often overt. In one Civil Rights Division investigation involving a 2003 denial of a Muslim school’s application for a permit to expand to build a mosque, we reported that “[t]he proposal met with heated community opposition” some of which “was based on traffic and congestion concerns,” but there also were “incidents of vandalism at the school and expressions of anti-


124. Id.

125. United or Divided: Americans’ Attitude on Unity, Divisions, and Discrimination in the USA, PUBLIC OPINION STRATEGIES AND HART RESEARCH ASSOCIATES 3 (Nov. 2010) (on file with author). The opposition dropped with personal familiarity with Muslims: 44% of adults who did not know a Muslim personally opposed a mosque in the neighborhood, but only 26% of those who knew Muslim opposed a mosque in their neighborhood. Id. at 5.

Muslim sentiment.127 The case was resolved after DOJ mediation.128 In United States v. City of Lilburn, Georgia,129 settled by consent decree in September of 2011, the complaint alleged that: (1) the city raised its minimum acreage requirement for places of worship in commercial districts after a mosque discussed expansion plans with the city; (2) it did the same thing in residential districts in 2003 after becoming aware that another Muslim group wanted to build a mosque; that city residents expressed hostility to the mosque; (3) “City officials directly involved in the Islamic Center’s attempts to obtain [a permit] have made hostile remarks about Muslims and members of the Islamic Center”130; and (4) “[t]he City was motivated to deny the Islamic Center’s applications . . . to effectuate the desires expressed by City residents and City officials who were hostile to and had animus towards the Islamic Center and its members on the basis of religion or religious denomination.”131

Similarly, in United States v. County of Henrico, Virginia,132 also resolved by consent decree in September of 2011, the complaint alleged that “some County residents have communicated their hostility to the Mosque’s plan to obtain rezoning by making comments and sending communications to County officials expressing hostility to the Mosque on the basis of religion or religious denomination.”133 The complaint further alleged that “County officials directly involved in the Mosque’s attempts to obtain rezoning have discriminated against the Mosque on the basis of religion on religious denomination, including making derogatory and discriminatory statements, and/or treating the Mosque’s

128. Id.
131. Id. at 7. The defendants denied the allegations in the complaint. Id. at 4–7.
application less favorably than similar applications by non-Muslim houses of worship."  

A particularly vivid case of anti-Muslim bias is *Estes v. Rutherford County Regional Planning Commission*. There, a mosque in Murfreesboro sought to construct a larger mosque on land it had purchased in nearby Rutherford County. The county approved the mosque proposal, since places of worship were permitted as of right in the relevant zone. The mosque met with vociferous community opposition, including the spray-painting of "not welcome" on a construction sign, the destruction of a second sign, a firebombing of construction equipment at the site, and most recently, a bomb threat. Several county residents brought suit against the county, alleging violation of their Due Process rights in the approval of the mosque. One of their arguments was that the county should not have treated the mosque as it would have a church, because Islam is an ideology, rather than a religion, and thus a mosque is not a place of worship but a nonreligious assembly. The United States filed an amicus brief noting that the Congress, the courts, and the Executive Branch have all recognized Islam as a religion, and that Islam easily meets the tests courts have employed for determining whether something is a religion or not. The brief thus concluded that the county's "failing to treat mosques equally with churches as a category in application of its zoning

134. *Id.* at 4–5. The defendants denied the allegations in the complaint.


140. *Id.* at 2.

141. *Id.* at 5, 11.
laws would be a facial violation of Section 2(b)(2) of RLUIPA. The court agreed that there was no basis for treating the mosque differently, and dismissed the complaint. Moses disputes appear to be on the increase, and RLUIPA has proven to be an important tool in ensuring enforcement of Muslims’ constitutional rights. The sample of cases is too small to make any broad conclusions about RLUIPA’s impact on outcomes, however. The Department of Justice has brought two mosque investigations that resulted in favorable outcomes without filing lawsuits, filed two mosque lawsuits resulting in consent decrees, and filed amicus briefs in two mosque cases, both of which resulted in favorable rulings. While the sample is small, these cases suggest that RLUIPA can be an important statute for Muslim congregations seeking to protect their constitutional rights in land use disputes, just as RLUIPA has been shown to be for religious congregations generally in its first ten years. This application of RLUIPA is likely to increase as the number of mosque controversies increase. Section III below will explore how the individual substantive provisions of RLUIPA will apply in cases involving mosques going forward, examining cases with issues that raise similar issues to mosque cases. The experience of courts with these cases can offer a window into how these issues are likely to play out in mosque controversies.

142. Id. at 13.
145. See Consent Order, supra note 129; Consent Order supra note 132.
147. See REPORT ON THE TENTH ANNIVERSARY OF RLUIPA, supra note 11, at 2.
III. APPLICATION OF RLUIPA’S SUBSTANTIVE PROVISIONS IN ITS FIRST DECADE

RLUIPA, reflecting the complexity of the various constitutional provisions and doctrines protecting religious liberty in the land use context, has four separate operative provisions which protect against infringements on constitutional values in different ways.\(^{148}\) In the eleven years since RLUIPA’s enactment, courts have made determinations under each of these provisions, providing greater guidance regarding how they will apply in different factual settings. Some provisions, such as the Substantial Burden and Equal Terms provisions, have been the subjects of considerably more case law. There is very little case law specifically involving mosques. However, patterns of decision have emerged that give some understanding of how RLUIPA may be expected to protect the religious liberty of Muslims in land use matters in the years ahead.

1. Section 2(a): Substantial Burden

Section 2(a) of RLUIPA prevents government action that “substantially burdens” religious exercise without a compelling justification pursued through the least restrictive means.\(^{149}\) As discussed in the RLUIPA history section above,\(^{150}\) it enforces the free exercise balancing test of cases such as \textit{Sherbert v. Verner}.\(^{151}\)

The substantial burden section does not require any showing of discrimination or animus.\(^{152}\) However, it nonetheless has an important role in prohibiting religious discrimination. The U.S. Court of Appeals for the Seventh Circuit, for example, found in \textit{Sts. Constantine and Helen Greek Orthodox Church v. City of New Berlin},\(^{153}\) that a Greek Orthodox

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148. \textit{See supra} notes 81–93 and accompanying text.
150. \textit{See supra} Section I.
153. 396 F.3d 895 (7th Cir. 2005). The United States filed a brief and argued as amicus in the case. \textit{See} Brief for United States as Amicus Curiae, \textit{Helen Greek Orthodox Church}, 396 F.3d 895 (No. 04-2326), available at http://www.justice.gov/crt/spec_topics/religious
church's religious exercise was substantially burdened by zoning denials that created "delay, uncertainty and expense" for the congregation.\textsuperscript{154} There was no well-developed evidence of discrimination in the case, though the court noted that the target parcel was bordered on one side by a Protestant church and on the other by a piece of land for which another Protestant church had been granted a permit to build,\textsuperscript{155} and noted the "whiff of bad faith" in the City's actions.\textsuperscript{156} The court found there was a violation of the substantial burden provision. The court explained that:

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 . . . . If a land-use decision . . . imposes a substantial burden on religious exercise . . . , and the decision maker cannot justify it, the inference arises that hostility to religion, or more likely to a particular sect, influenced the decision.\textsuperscript{157}

The Ninth Circuit similarly, in \textit{Guru Nanak Sikh Society v. County of Sutter},\textsuperscript{158} found a county to have created a substantial burden on a Sikh congregation's religious exercise by denying successive permits for construction of a Sikh place of worship, called a Gurdwara.\textsuperscript{159} In that case, the congregation had applied first in the residential district, but was denied because its use was said to be incompatible with other uses.\textsuperscript{160} It then applied in the agricultural district, only to get the same answer, despite its willingness to modify its plans to address the county's

\textsuperscript{154} City of New Berlin, 396 F.3d at 901.
\textsuperscript{155} Id. at 898.
\textsuperscript{156} Id. at 901.
\textsuperscript{157} Id. at 900.
\textsuperscript{158} 456 F.3d 978 (9th Cir. 2006). The United States filed a brief and argued as amicus in the case. \textit{See Brief for United States as Intervenor and Amicus Curiae, Guru Nanak Sikh Soc'y, 456 F.3d 978 (No.03-17343), available at http://www.justice.gov/crt/about/app/briefs/gurunanak.pdf.}
\textsuperscript{159} \textit{See Guru Nanak Sikh Soc'y, 456 F.3d at 991–92.}
\textsuperscript{160} \textit{See id. at 989.}
stated concerns. The court held that the county’s repeated denials substantially burdened the congregation’s free exercise of religion.

Substantial burden similarly was at issue in a case involving a congregation’s efforts to build a mosque on an eleven-acre plot it owned in Wayne Township, New Jersey. As in the Seventh and Ninth Circuit cases, there was no overt evidence of discrimination. However, the Township, while the mosque’s zoning application was being processed, began eminent domain proceedings to take the congregation’s land to leave it as open space. Analyzing the burden on the congregation, the court noted the growth of the congregation from 100 individuals to over 200 families, and the current mosque’s inadequacy in terms of lack of space for religious education, insufficient worship space, and lack of facilities for ritual washing before prayers, and concluded that a fact finder “could reasonably determine that the Township’s actions have created a substantial burden on the mosque.” The court thus denied the Township’s motion for summary judgment.

The key threshold question in Section 2(a) cases is whether a burden on religion is in fact “substantial.” Although courts interpreting the section have looked to Supreme Court decisions under the Free Exercise Clause to determine when a burden is substantial, their precise formulations have varied. Generally, in order for a burden on religious exercise to be “substantial” under RLUIPA, it must create significant restriction or hardship on religious exercise, rather than just a mere inconvenience, minor cost, or incidental effect. For example, actions by a local government that effectively bar use of a particular property for

161. See id. at 990.
162. Id. at 992.
164. See id. at *11.
165. Id. at *3.
166. Id. at *10.
167. Id. at *44.
169. See, e.g., Guru Nanak Sikh Soc’y v. Cnty. of Sutter, 456 F.3d 978, 988 (9th Cir. 2006).
170. See Vision Church v. Vill. of Long Grove, 468 F.3d 975, 999 (7th Cir. 2006); Midrash Sephardi v. Town of Surfside, 366 F.3d 1214, 1227 (11th Cir. 2004).
religious activity, impose a significantly great restriction on religious use of a property, or that create significant delay, uncertainty, or expense in constructing or expanding a religious assembly or institution, can be substantial burdens. Some examples of things that have been found to be substantial burdens on religious exercise under RLUIPA have included denial of a Jewish religious school’s vitally needed expansion for arbitrary reasons, denial of a church construction permit due to unreasonable off-street parking requirements, and denial of approval of construction for a parish center.

As with other faith groups, growing Muslim congregations face burdens from lack of adequate worship space as well as lack of space for fellowship and educational activities. In the Henrico County case, the United States alleged that the current worship facilities lacked sufficient space for the congregation to worship at the same time, lacked facilities for ritual ablutions before prayer, and lacked a space for educating children. Similarly, in Lilburn, the United States identified burdens including lack of adequate space, lack of facilities for ablutions, lack of a nursery, and the inability to attract a full-time imam without a residence on site.

After a substantial burden is established, the burden shifts to the defendants to prove that the government action is supported by a compelling government interest pursued in the least restrictive means. “Compelling interest” means interests “of the highest order”: government

171. Living Water Church of God v. Charter Twp. of Meridian, 258 F. App’x 729, 737 (6th Cir. 2007); DiLaura v. Ann Arbor, 112 F. App’x 445, 446 (6th Cir. 2004).
172. Guru Nanak Sikh Soc’y, 456 F.3d at 988.
173. Westchester Day Sch. v. Vill. of Mamaroneck, 504 F.3d 338, 349 (2d Cir. 2007); Guru Nanak Sikh Soc’y, 456 F.3d at 992; Sts. Constantine and Helen Greek Orthodox Church, Inc. v. City of New Berlin, 396 F.3d 895, 901 (7th Cir. 2005).
174. Westchester Day Sch., 504 F.3d at 352–53.
177. Complaint, supra note 133 at 2–3.
178. Complaint, supra note 130 at 3–4.
interests that are merely reasonable or important are insufficient. For example, revenue generation and eliminating congestion, though they may be important, have been held not to be compelling interests.

2. Section 2(b)(1): “Equal Terms” Requirement

RLUIPA’s legislative history pointed to the problems of “[z]oning codes frequently exclud[ing] churches in places where they permit theaters, meeting halls, and other places where large groups of people assemble for secular purposes.” Section 2(b)(1) of RLUIPA, known as the “equal terms” provision, addresses this problem by providing 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.” This section applies to ordinances that treat religious assemblies or institutions on less than equal terms on their face, as well as ordinances that, although facially neutral, are applied in a non-neutral manner.

Determining if a religious assembly is treated on “less than equal terms” than a secular assembly or institution requires a comparison of how the two types of entities are treated in a zoning code and in its application. Courts have differed regarding precisely how such a comparison is made, and have incorporated different tests. Factual situations in which courts have found the equal terms section violated

180. See id.
185. See, e.g., Konikov v. Orange Cnty., 410 F.3d 1317, 1327 (11th Cir. 2005) (as applied); Midrash Sephardi v. Town of Surfside, 366 F.3d 1214, 1232–33 (11th Cir. 2004) (facially invalid).
186. See Third Church of Christ, Scientist v. City of New York, 626 F.3d 667, 669 (2d Cir. 2010).
187. See, e.g., Centro Familiar Cristiano Buenas Nuevas v. City of Yuma, 651 F.3d 1163 (9th Cir. 2011); River of Life Kingdom Ministries v. Vill. of Hazel Crest, 611 F.3d 367 (7th Cir. 2010); Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch, 510 F.3d 253 (3rd Cir. 2007); Midrash Sephardi, 366 F.3d 1214.
have included a city allowing "membership organizations (except religious organizations)"; a city forbidding places of worship but allowing private clubs; a city forbidding religious assemblies but allowing auditoriums, assembly halls, community centers, civic clubs, day care centers, and other assemblies; and a village forbidding places of worship but allowing community centers, fraternal associations, and political club.

The Equal Terms cases in the courts have tended to involve minority religious groups or newer, independent Christian churches seeking to move from temporary locations to more permanent spaces in rental spaces, offices, or other nontraditional spaces, rather than building freestanding structures. Muslim congregations seeking to build in urban and built-up suburban areas could likely fit this fact pattern. Since the Muslim population in the U.S. is growing, and a plurality of U.S. Muslims attend mosque weekly or more frequently, there likely will be

188. Centro Familiar, 651 F.3d at 1166.
190. Digrugilliers v. City of Indianapolis, 506 F.3d 612, 614–15 (7th Cir. 2007).
191. Petra Presbyterian Church v. Vill. of Northbrook, 489 F.3d 846, 847 (7th Cir. 2007).
192. See, e.g., Centro Familiar, 651 F.3d at 1165 (seeking to locate Hispanic church in former J.C. Penny store); Hazel Crest, 611 F.3d at 368 (describing church with sixty-seven members seeking to meet in building in commercial district); Digrugilliers, 506 F.3d at 614 (discussing church of thirty to fifty members leasing space in commercial zone); Petra Presbyterian Church, 489 F.3d at 847 (discussing Korean church seeking to locate in warehouse); Midrash Sephardi, 366 F.3d at 1220 (pertaining to small Jewish congregation leasing space above a bank); Congregation Etz Chaim v. City of L.A., No. CV10-1587 (C.D. Cal. July 11, 2011) (discussing small synagogue denied permit to locate in house), available at http://www.justice.gov/crt/spec_topics/religiousdiscrimination/rff47.2etzchaim_psj_ruling.pdf; Vietnamese Buddhism, 460 F. Supp. 2d at 1168 (seeking permit to use of former medical offices as temple, and eventually construct new facility).
194. 47% of Muslims in the United States attend mosque once a week or more, which is on a par with Christians in the United States. 34% of Muslims attend
increased situations where the Equal Terms section of RLUIPA becomes relevant for Muslim congregations in the coming years.

3. Section 2(b)(2): Discrimination

Section 2(b)(2) of RLUIPA makes it unlawful to discriminate based on religion or religious denomination. While numerous cases have been brought under RLUIPA alleging intentional discrimination, most courts in these cases have not had occasion to rule under 2(b)(2) because the courts provided relief to the plaintiffs under other sections of RLUIPA or the Equal Protection Clause of the Constitution, or because the cases were settled by consent decrees.

For example, in Fortress Bible Church v. Feiner, the district court found “overwhelming evidence of . . . intentional delay, hostility, and bias toward the Church’s application,” but determined that since it found that RLUIPA Section 2(a)(1) was violated, it did not need to rule on the church’s 2(b)(2) claim. Likewise, in Reaching Hearts International v. Prince George’s County, a jury found intentional discrimination in violation of the Equal Protection Clause and RLUIPA Section 2(a), and the court of appeals upheld the verdict, finding that “the evidence presented at trial of the County’s anti-church animus was very strong.”

A case that did interpret the meaning of 2(b)(2) explicitly is United States v. Village of Airmont, a case brought by the Justice Department alleging that a New York village had enacted a bar on boarding schools specifically to target Hasidic Jewish boarding

mosque monthly or yearly, and nineteen percent seldom or never. See Pew Research Center, supra note 114, at 26.

197. Id. at 503, 522–23.
198. 584 F. Supp. 2d 766 (D. Md. 2008), aff’d, 368 F. App’x 370, 372 (4th Cir. 2010).
199. Id. at 781.
200. Reaching Hearts, 368 F. App’x at 372.
schools. In denying the village’s motion to dismiss, the court held that Section 2(b)(2) would be violated if the village’s rule against boarding schools was enacted with the intent of disadvantaging a particular religious group. The case was resolved by consent decree in May of 2011.

I am not aware of any mosque case involving 2(b)(2) that has been decided by a court. As previously noted, the United States alleged violation of 2(b)(2) in Lilburn and Henrico, but these cases were resolved by consent decree concurrent with the filing of the complaints, so there was no occasion for the courts to rule on the issue. While there is very little guidance on how courts will interpret religious discrimination claims under RLUIPA, the large body of case law involving intentional racial discrimination in the Fair Housing Act context and other statutes is likely to provide guidance to courts. In Village of Arlington Heights v. Metropolitan Housing Development Corporation, for example, in order to determine if a zoning action was motivated by racially discriminatory intent, the Supreme Court looked to whether the action had a discriminatory or segregative effect, the historical background of the action, the sequence of events leading up to the challenged actions, and whether there were any departures from normal or substantive criteria.

4. Section 2(b)(3): Total Exclusion and Unreasonable Exclusion

This provision bars actions that totally or unreasonably limit religious assemblies in a particular jurisdiction. Section 2(b)(3) has only been applied in a small number of cases. One court described a violation of this section as a local zoning code or regulation that, “as applied or implemented, has the effect of depriving . . . religious

202. Id. at 18.
203. Id. at 18–19.
205. See supra notes 129–34 and accompanying text.
207. See id.
208. Id. at 265–68.
institutions or assemblies of reasonable opportunities to practice their religion, including the use and construction of structures." 209 Another court observed that what will be reasonable or unreasonable depends on a review of all of the facts in a particular jurisdiction, including the availability of land and the economics of religious organizations. 210 This provision is not likely to impact mosques more or less than any other religious institution, except for the fact previously noted that mosques, like small independent churches and the houses of worship of minority religious, are more likely to be in the position of attempting to move into new locations, compared to established churches that either have sufficient facilities or are merely seeking to expand existing facilities.

CONCLUSION

RLUIPA has proven to be an important tool for enforcing the constitutional rights of religious communities to engage in the basic and foundational religious activity of building structures in which to engage in worship and other religious activities. RLUIPA was enacted just before the outset of what has become a difficult time for Muslim Americans to exercise this right. RLUIPA has become a significant vehicle for protecting this right for Muslim Americans, as for all Americans, and promises to remain so going forward.

The Constitution unequivocally provides the right of mosques to build on the same basis as other religious institutions, and RLUIPA helps to enforce that right. A ban on minarets, as seen in Switzerland, 211 would be plainly unconstitutional in the United States, and RLUIPA helps ensure that such ban could never take place at any level of government.

However, significant numbers of Americans oppose equal treatment of mosques, with 25% of Americans saying that communities should be able to prohibit mosques, and 62% saying Muslims should

209. Rocky Mountain Christian Church v. Bd. of Cnty. Comm’rs of Boulder, 605 F.3d 1081, 1089–90 (10th Cir. 2010), amended and superseded by 613 F.3d 1229, 1238 (10th Cir. 2010).

210. Vision Church v. Vill. of Long Grove, 468 F.3d 975, 990 (7th Cir. 2006).

have the same right as other groups. As discouraging as such sentiments are for Americans concerned with upholding the principle of religious freedom that has been so important to our country throughout its history, and as palpably as Muslim communities facing community opposition to particular mosque projects are impacted by such sentiments, there is cause for optimism. First, those who know a Muslim personally are much more likely to have positive views of Muslims, and are much less likely to oppose the building of a mosque in their neighborhood. This suggests that perceptions are likely to improve moving forward as more people have personal interactions with Muslims. Second, while certainly negative sentiments toward Muslims are apparent from opinion polls, and the Pew Research Center found significant numbers of Muslims have had been called names or had negative statements made to them, a higher number of Muslims in the same poll report that someone expressed support for them in the past year.

Religious liberty is not merely a right in the Constitution, but is a principle that is part of our cultural and historical makeup, and departures from this principle should prove temporary. It is easy today to forget that throughout the 19th Century, Roman Catholics were subjected to arson of churches and convents, murder, and assaults because they were said to belong to an alien immigrant religion that was fundamentally incompatible with American democracy. Today Catholicism is so much a part of American culture that the concerns driving the nativists of the 19th century seem quaint.

212. See Benedict XVI Viewed Favorably, supra note 122, at 7.
213. See United or Divided, supra note 125, at 4.
215. Id.
So, there is good reason for hope for the future, but at the same time there is conflict on the ground. RLUIPA, unbeknownst to its sponsors, was perfectly timed to step into the gap to protect a critical element of religious liberty.