RLUIPA'S HIDDEN THIRD-PARTY HARMS ON LANDOWNERS AND LOCAL GOVERNMENTS

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INTRODUCTION

The Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA)[1] governs two broad areas of local and state government regulation: religious land-use regulation and religious regulations governing institutionalized persons.[2] This Note focuses on the land-use regulation portion of the law. In particular, the purpose of this Note is to examine the negative external impacts the law creates. When a law benefiting one group negatively impacts another group, the negatively impacted group is called a third party. In the RLUIPA context, granting a zoning accommodation to a religious institution can harm third-party landowners who are otherwise bound by the zoning laws. A discussion of the issues related to third-party harms arising from RLUIPA has been absent from court opinions and academic literature.[3]

When religious institutions exercise their statutory right under RLUIPA, third parties can be forced to bear the cost. There is a long-standing principle that religious accommodations should not unduly burden non-beneficiary third parties.[4] The Supreme Court has acknowledged there is room for some limited accommodation within the parameters of the First Amendment's religious clauses.[5] Even assuming RLUIPA is an allowable accommodation, when it creates significant third-party harms it should garner closer attention than it has. Some scholars have even gone so far as to impugn any accommodation that negatively impacts others.[6] At least a few of the Founders shared this view. Madison noted in his writings the importance of both the freedom to practice and freedom to *not* practice religion, bemoaning the power of the clergy to negatively impact

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1 Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §§ 2000cc–2000cc-5.

2 42 U.S.C. § 2000cc-1 restricts governments from burdening religious practices of a person "in or confined to an institution, as defined in [the Civil Rights of Institutionalized Persons Act (42 U.S.C. § 1997)]."

3 The author found no academic literature discussing the issue in several searches. Only one judicial opinion mentioned third-party harms, but the issue related to a *beneficiary's* harm arising from a RLUIPA accommodation denial. *See* Cambodian Buddhist Soc'y of Conn., Inc. v. Plan. & Zoning Comm'n, 941 A.2d 868, 879 (Conn. 2008) (a monk whose monastery was denied an exemption alleged injury as a third-party *adherent*; the court denied standing).

4 Judge Learned Hand wrote, "The First Amendment . . . gives no one the right to insist that in the pursuit of their own interests others must conform their conduct to his own religious necessities." Otten v. Balt. & O. R. Co., 205 F.2d 58, 61 (2d Cir. 1953).

5 *See, e.g.*, Cutter v. Wilkinson, 544 U.S. 709, 713 (2005) (a common phrase used by the Court is "room for play in the joints" of the religious clauses).

6 *See, e.g.*, Zechariah Chafee, Jr., *Freedom of Speech in War Time*, 32 HARV. L. REV. 932, 957 (1919) ("Your right to swing your arms ends just where the other man's nose begins.").

others;[7] Jefferson seemingly agreed.[8] Although RLUIPA can create third-party harms, the law need not be invalidated on these grounds alone. Instead, guided by the principles of the third-party harm doctrine, courts should recognize third-party harms and seek to mitigate them, while upholding the text and intent of the law. To cure a third-party harm, courts must determine who should be allowed to bring a third-party claim, what standard of review should be applied, and what the remedy for successful claims should be.

This Note suggests splitting claimants into two distinct groups to analyze third-party harms arising from RLUIPA. Group one encompasses public entities responsible for making and enforcing land-use laws, such as local governments and zoning boards. Group two covers private entities such as local residents and private landowners. There are fewer options for group one claimants since RLUIPA directly addresses this group.[9] RLUIPA establishes the standard of review to be applied to public entities, as well as when accommodations can be denied.[10] Group two, however, is not addressed anywhere in the statute.[11] For this reason, more options should be available to group two claimants seeking to mitigate third-party harms. This Note argues that group two disputes should be resolved using well-established nuisance doctrine—available in other land-use disputes.[12] Applying the nuisance doctrine to RLUIPA-created third-party harms can provide a reasonable middle ground for resolving many RLUIPA disputes.

In Part I, this Note begins by outlining the history of RLUIPA, starting with its predecessor statute, RFRA, and explains the need for religious protection in land use. This Part ends with an analysis of RLUIPA's statutory text. Part II looks at how RLUIPA has been applied since its passage. Part III introduces the third-party harm doctrine. This section provides an overview of how third-party harms arise from

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7 "Whilst we assert for ourselves a freedom to embrace, to profess and to observe the Religion which we believe to be of divine origin, we cannot deny an equal freedom to those whose minds have not yet yielded to the evidence which has convinced us." 2 JAMES MADISON, THE WRITINGS OF JAMES MADISON: COMPRISING HIS PUBLIC PAPERS AND HIS PRIVATE CORRESPONDENCE, INCLUDING HIS NUMEROUS LETTERS AND DOCUMENTS NOW FOR THE FIRST TIME PRINTED 186 (Gaillard Hunt ed., 1901).

8 THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 166 (1832) ("[I]t does me no injury for my neighbour to say there are twenty gods, or no God. It neither picks my pocket nor breaks my leg.").

9 *See, e.g.*, 42 U.S.C. § 2000cc (the word "government" appears nine times; no reference is made to private entities).

10 *See id.* (instructing courts to apply strict scrutiny to public entities seeking denial of an accommodation).

11 *See* 42 U.S.C. §§ 2000cc–2000cc-5 (the statute offers no guidance on what standard should apply to private parties).

12 *See infra* Sections IV.B, D.

religious accommodations and how courts have historically handled the issue. With a firm background of RLUIPA's goals and the issues of third-party harms, Part IV turns to the issue of third-party harms arising from RLUIPA accommodations. This Note seeks to distinguish between different third-party harms by looking at *who* is impacted, distinguishing public and private entities. Part IV then discusses why courts should apply a lower standard of review to public entities and why the nuisance doctrine should be used for private entities.

I. BACKGROUND

A. *Codifying Strict Scrutiny—Passing RFRA and RLUIPA—Background and Context*

President Clinton signed RLUIPA into law on September 22, 2000.[13] The law received broad bipartisan support, passing both houses of Congress without objection.[14] The impetus for the succession of laws leading to RLUIPA began with the Supreme Court's decision in *Employment Division v. Smith*.[15] The issue in *Smith* was whether Oregon violated the Free Exercise Clause by denying Native American church members unemployment benefits based on peyote usage taken as part of a religious practice.[16] Relying in part on the Supreme Court's *Sherbert v. Verner* decision,[17] the Oregon Supreme Court held the Oregon law violated the First Amendment.[18] The U.S. Supreme Court granted certiorari to determine whether the First Amendment's Free Exercise Clause protects employees' unemployment benefits when the work-related misconduct leading to discharge arises from an activity

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13 Statement on Signing the Religious Land Use and Institutionalized Persons Act of 2000, Administration of William J. Clinton (Sept. 22, 2000), https://www.govinfo.gov/content/pkg/WCPD-2000-09-25/pdf/WCPD-2000-09-25-Pg2168.pdf [https://perma.cc/Z8NS-DMUB].

14 U.S. DEP'T OF JUST., REPORT ON THE TENTH ANNIVERSARY OF THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT 2, 4 (Sept. 22, 2010) [hereinafter TENTH ANNIVERSARY REPORT], http://www.justice.gov/crt/rluipa_report_092210.pdf [https://perma.cc/CCN4-HHXQ].

15 Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872 (1990).

16 *Id.* at 874. Non-medical use of a Schedules I–V drug are illegal under Oregon law. *Id.* The State denied Church members unemployment because their peyote use was considered "work-related 'misconduct.'" *Id.*

17 Sherbert v. Verner, 374 U.S. 398 (1963).

18 Smith v. Emp. Div., Dep't of Hum. Res., 721 P.2d 445, 450–51 (Or. 1986) (finding Oregon had not used the least restrictive means as required by *Sherbert*). In addition to *Sherbert*, the Oregon Supreme Court also cited *Thomas v. Review Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707 (1981), finding Oregon's financial interest in the unemployment fund was not a "compelling" interest. *Id.*

outside the workplace and is part of a genuine religious practice that is illegal under state law.[19] The Supreme Court reversed, holding that state laws of general applicability that created incidental burdens on religious practices did not need to be justified by a compelling governmental interest.[20] Many, including Justice O'Connor, have argued *Smith*'s holding departed from long-standing First Amendment jurisprudence.[21] Effectively, *Smith* held that no law, regardless of its impact on any religion, would be invalidated so long as it was broadly and neutrally applied.[22] Before *Smith*, *Sherbert v. Verner* reigned as the established view on religious rights under the First Amendment.[23] The *Sherbert* Court held unconstitutional a policy requiring religious adherents to choose between working on their Sabbath or foregoing unemployment benefits.[24] *Sherbert* applied a strict scrutiny standard to a state's action that impeded religious practice. South Carolina's policy in *Sherbert* failed to meet the strict scrutiny standard because the unemployment policy impeded Sabbath observers by forcing them to choose between their religion and unemployment benefits, and the law lacked a compelling state interest.[25] The strict scrutiny standard used in *Sherbert*, and its progeny,[26] was the standard pre–*Smith* approach to religious challenges under the First Amendment.[27]

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19 *Smith*, 494 U.S. at 875–76.

20 *Id.* at 888–90.

21 *Id.* at 891 (O'Connor, J., concurring); *see also* Milner S. Ball, *The Unfree Exercise of Religion*, 20 CAP. U. L. REV. 39, 49 (1991) (predicting *Smith* would have a widely felt impact on Free Exercise cases). *But see* Marci A. Hamilton, Employment Division v. Smith *at the Supreme Court: The Justices, the Litigants, and the Doctrinal Discourse*, 32 CARDOZO L. REV. 1671 (2011) (arguing the *Smith* decision was in line with prior case law and therefore was not a departure at all).

22 *See infra* note 35.

23 Sherbert v. Verner, 374 U.S. 398 (1963).

24 *Id.*

25 *Id.* at 406–10 (the Court made clear that "(o)nly the gravest abuses, endangering paramount interests, give occasion for permissible [religious] limitation") (quoting Thomas v. Collins, 323 U.S. 516, 530 (1945)). South Carolina claimed that granting Sabbath observers unemployment would increase the risk of fraudulent claims in the system and hinder employers who needed Saturday workers. *Id.* at 407. Although the State failed to raise this claim in the lower courts, the Court found that even if it had, "there is no proof whatever to warrant such fears . . . ." *Id.*

26 *See* Frazee v. Ill. Dep't of Emp. Sec., 489 U.S. 829, 832 (1989); Hobbie v. Unemp. Appeals Comm'n, 480 U.S. 136, 144 (1987); Thomas v. Rev. Bd. Of Ind. Emp. Sec. Div., 450 U.S. 707, 717–18 (1981).

27 Another commonly cited pre-*Smith* case is Wisconsin v. Yoder, 406 U.S. 205 (1972). The *Yoder* Court held Amish parents could not be held criminally liable for not sending their children to school past the age of fourteen in violation of their religious beliefs. *Id.* at 234–36. But as Justice Douglas pointed out in dissent, the Court failed to account for the third-party harms to Amish children resulting from their parent's beliefs. *Id.* at 241–46 (Douglas, J., dissenting).

Many see *Smith* as an inflection point, ending the Supreme Court's shift toward favoring religion that began with *Sherbert*.[28] Although strict scrutiny is a difficult burden to meet, it at least provided litigants a chance to show that a burdensome law lacked any compelling state interest. Under *Smith*, strict scrutiny was no longer standard practice. The *Smith* Court found that applying *Sherbert*'s strict scrutiny standard in *Smith* would create a "constitutional anomaly."[29] In cases before *Smith*, applying strict scrutiny led to the equality of treatment between the religious and non-religious, without creating an exclusion for religious adherents only.[30] Applying strict scrutiny in *Smith* would have exempted practitioners from generally applicable laws that would otherwise continue to bind non-practitioners.[31] *Smith* held that Free Exercise claims could not prevail over laws of general applicability.[32] The standard established in *Smith* and the departure from a strict scrutiny test spurred legislative action.[33] Issues related to "centrality of a belief," "compelling state interest," and "generally applicable laws" were all factors in RLUIPA's final wording.[34]

Following *Smith*, strong bipartisan backlash ensued.[35] In an effort to roll back *Smith*, Congress passed a new law, the Religious Freedom Restoration Act (RFRA),[36] with overwhelming bipartisan support in both houses of Congress.[37] RFRA's goal was to restore the prior legal standard, established in *Sherbert* and *Wisconsin v. Yoder*, as the

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28 Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 137–40 (1992).

29 Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 886 (1990).

30 *Id*. at 886–87.

31 *Id*. The Court saw no option for a limited application of strict scrutiny for beliefs "central" to religious practice based on the longstanding view that it is not the judiciary's role to determine beliefs central to a religious belief.

32 *Id*. at 885.

33 *See infra* notes 35–39.

34 *See generally* 42 U.S.C. § 2000cc(a)(1) ("substantial burden"); § 2000cc (a)(1)(A) ("compelling governmental interest"); § 2000cc (a)(2)(A) ("even if the burden results from a rule of general applicability"); § 2000cc-5(7)(A) ("whether or not compelled by, or central to, a system of religious belief").

35 *See, e.g.*, James E. Ryan, Smith *and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1409–10 (1992) (describing the mostly negative reaction from academics and the public media); Linda Greenhouse, *Court Is Urged to Rehear Case on Ritual Drugs*, N.Y. TIMES (May 11, 1990), https://www.nytimes.com/1990/05/11/us/court-is-urged-to-rehear-case-on-ritual-drugs.html [https://perma.cc/M3E2-3MDV] (listing groups from across the religious and ideological spectrum who came together to petition for rehearing).

36 42 U.S.C. § 2000bb (2019).

37 RFRA passed unanimously in the House and with a 97–3 margin in the Senate. H.R. 1308, 103rd Cong. (1993) (enacted).

governing standard for free exercise cases.[38] RFRA states that federal and state laws are invalid as applied when they impose a substantial burden on religion in the absence of a compelling governmental interest served by the least restrictive means.[39] Following the federal government's example, many states passed RFRA-like statutes as well.[40]

In *City of Boerne v. Flores*, the Supreme Court partially struck down RFRA as unconstitutional, holding its application to state governments exceeded Congress's legislative authority.[41] *City of Boerne* followed a now-familiar RLUIPA-type fact pattern.[42] In that case, an archbishop, in response to increased membership, applied for a building permit to enlarge a church.[43] The City denied the application because of the church's location in a designated historic district.[44] On appeal, the church argued the permit denial violated RFRA.[45] A strongly worded Supreme Court opinion found Congress exceeded its enforcement power under § 5 of the Fourteenth Amendment. [46] Although RFRA is no longer applicable to the states, RFRA remains enforceable for all federal laws.[47]

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38 Wisconsin v. Yoder, 406 U.S. 205, 220 (1972). *See also* discussion *infra* Section III.B discussing *Yoder*.

39 42 U.S.C. § 2000bb(b)(1) ("The purposes of this Act are . . . to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) . . . ."); Religious Freedom Restoration Act (RFRA) of 1993, Pub. L. No. 103–141, 42 U.S.C. § 2000bb-3(a) (1993) (prior to 2000 amendment) ("This Act applies to all Federal and State law, . . . whether adopted before or after [enactment of this Act].").

40 *State Religious Freedom Restoration Acts*, WIKIPEDIA (last edited Jan. 22, 2021), https://wikipedia.org/wiki/State_Religious_Freedom_Restoration_Acts [https://perma.cc/4UNM-XD6Q] (twenty-one states have enacted versions of RFRA and an additional ten states have similar provisions instituted by their state courts).

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

42 *See, e.g.*, Living Water Church of God v. Charter Twp. Meridian, 258 F. App'x 729, 741–42 (6th Cir. 2007) (in a dispute over increasing the size of a church building, the court denied the church's request, finding the town's permit denial did not create a "substantial burden" on the church); Westchester Day Sch. v. Vill. of Mamaroneck, 504 F.3d 338, 350–53 (2d Cir. 2007) (in a dispute over increasing the size of religious day school building, the court held in favor of the school because the permit denial created a "substantial burden").

43 521 U.S. at 511–12.

44 *Id.*

45 *Id.*

46 *Id.* at 529–37. For example, the Court stated that "RFRA is *so out of proportion* to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." *Id.* at 532 (emphasis added). The Court also found Congress encroached on the Court's role as interpreter of the Constitution, creating separation of powers issues. *Id.* at 523–24. Finally, the Court also found RFRA circumvented Article V requirements for constitutional amendments. *Id.* at 529.

47 *See, e.g.*, Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014) (holding the U.S. Department of Health and Human Services violated RFRA by requiring that contraception be included in health insurance coverage).

B. *The Need for Religious Protection*

A determined effort to find a *City of Boerne* workaround ensued.[48] Three years after *City of Boerne*, Congress passed RLUIPA.[49] Based on nine hearings over three years, Congress identified two areas where religious discrimination protections were most needed—land-use regulation and incarceration.[50] Remarks on the Senate floor described some shocking committee findings.[51] The findings included examples of explicit use of race or religion as reasons for excluding proposed churches from an area, with small and unfamiliar churches facing the most frequent discrimination.[52] Commonly given reasons for permit denial—such as increased traffic or inconsistency with the city's land-use plan—were easily identified as pretextual.[53]

Congressional and academic findings in the period following the *City of Boerne* decision uncovered many instances of racial and religious discrimination by towns in their land-use decisions that motivated Congress to find a RFRA replacement.[54] For example, towns seeking to exclude a racial minority from an area found that controlling where a church was allowed to go often dictated where people of that faith chose to live.[55] Professor Douglas Laycock relayed one particularly poignant anecdote of a town using land-use control to exclude racial minorities.[56] In a conversation between Laycock and a Texas legislator regarding the then-proposed Texas RFRA statute, the legislator predicted that any statute removing a town's ability to keep Black churches from white neighborhoods would not pass.[57] Another example of religious land-use discrimination was told by representatives of a Hispanic church who

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48 *See, e.g.*, *Protecting Religious Freedom After Boerne v. Flores*: *Hearing Before the Subcomm. on Const. of the H. Comm. on the Judiciary*, 105th Cong. (1998) (discussing how to achieve the broad religious protections envisioned by RFRA following *City of Boerne*).

49 42 U.S.C. § 2000cc (2019).

50 146 CONG. REC. S7774–81 (daily ed. July 27, 2000) (joint statement of Sens. Hatch and Kennedy) [hereinafter Hatch-Kennedy Statement] (discussing the findings resulting in the determination that land use and incarceration warranted additional religious protections).

51 *Id.*

52 *Id.* at S7774.

53 *Id.* at S7774–75.

54 *See infra* notes 55–69.

55 *See* Hatch-Kennedy Statement, *supra* note 50, at S7775.

56 Douglas Laycock, *State RFRAs and Land Use Regulation*, 32 U.C. DAVIS L. REV. 755 (1999). Professor Laycock's article was also cited during the congressional hearings as supporting a need for RLUIPA. *See* Hatch-Kennedy Statement, *supra* note 50, at S7775.

57 Laycock, *supra* note 56, at 758.

were unable to get a permit in a Chicago suburb.[58] When the church representatives complained, the city mayor told the city manager to deny the permit because "[w]e don't want S[****] in this town."[59] Conversations like these demonstrate elected officials' awareness that controlling religious institutions' land use means indirectly controlling the residents choosing to move to an area.

Following *Smith*, neutral laws of general applicability were to be upheld, even if no compelling governmental interest was progressed by denying an accommodation.[60] The *Smith* standard, highly deferential to governments, stacked the cards against religious institutions. A rare example of a religious institution prevailing pre-RLUIPA is *LeBlanc-Sternberg v. Fletcher*.[61] In *Fletcher*, a Hasidic Jewish community faced discrimination over where synagogues could locate.[62] Given the Jewish religious practice forbidding driving on the Sabbath—a particularly important day for religious worship—Orthodox Jews must live within walking distance of a synagogue.[63] Using this prohibition, local legislatures in *Fletcher* sought to control where Orthodox Jews would move by restricting where synagogues were allowed.[64] In *Fletcher*, the Second Circuit found the Village of Airmont—previously an unincorporated town—incorporated itself with the express purpose of keeping out the Hasidic Jewish population.[65] Once incorporated, the town enacted zoning policies restricting religious worship in private homes.[66] The town also required that all new houses of worship be built on at least two acres of land, an extremely expensive endeavor in that community.[67] Testimony by a property developer at trial confirmed statements by the original community president that keeping Hasidic

58 *Religious Liberty Protection Act of 1998: Hearings Before the Subcomm. on the Const. of the Comm. on the Judiciary H.R.*, 105th Cong. Second Session H.R. 4019, 91 (1998) [hereinafter RLPA Hearing of 1998].

59 *Id.* (the city manager who came forward with the story was fired the following week).

60 *See* Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872 (1990) (setting out the general test generally upholding regulations impinging religious practices).

61 LeBlanc-Sternberg v. Fletcher, 67 F.3d 412 (2d Cir. 1995).

62 *Id.*

63 *Driving on Shabbat*, WIKIPEDIA (last visited Apr. 25, 2019), https://wikipedia.org/wiki/Driving_on_Shabbat [https://perma.cc/MY2U-HP9D] (discussing the prohibition against driving on the Sabbath).

64 *LeBlanc-Sternberg*, 67 F.3d at 420.

65 *Id.* at 418 ("Throughout the period prior to [the town of] Airmont's incorporation, [Airmont's Civic Association] emphasized the need for control over zoning in connection with the desire to keep Orthodox and Hasidic Jews out of the Airmont community.").

66 *Id.* at 416.

67 *Id.* at 417–18 (the estimated cost of a two-acre plot was "as much as $750,000").

Jews out of the community was a central reason for incorporation.[68] *Fletcher* demonstrated how efficiently town officials used zoning restrictions on houses of worship to control minorities from moving to a community.

In the period before RLUIPA's passage, evidence suggests there was discrimination against religious institutions in the zoning codes themselves. A survey of Chicago commercial districts found *no place* where a church could exist without a special use permit, while arenas with seating up to 2,000 people required no permit.[69] While the city envisioned suburbs as the place churches should be, only about a third of residential neighborhood zoning laws permitted churches.[70] Even where zoning laws did not exclude them, churches often faced other zoning challenges. For instance, the lack of parking in many suburbs often meant that gatherings could not occur without violating a separate set of zoning laws.[71] Churches that found suburb lots often paid significantly more than similarly sized lots in commercial areas.[72]

Congress's goal with RLUIPA was to tackle both the overt and subtle discrimination present in land use.[73] Pre-RLUIPA cases were generally limited to determining if zoning decisions were illegal or an abuse of discretion.[74] To protect religious land use, Congress sought to reestablish the pre-*Smith* standard of review via statute.[75] Under RLUIPA, zoning laws that create a substantial burden on religious practice are subject to strict scrutiny—the most demanding form of judicial review.[76] Holding municipalities to the exceedingly high strict-scrutiny standard creates a strong presumption in favor of religious institutions.

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68 *Id.* at 418–19 ("[T]he reason of forming this village is to keep people like you out of this neighborhood.").

69 RLPA Hearing of 1998, *supra* note 58, at 126–30.

70 *Id.*

71 *Id.*

72 *Id.*

73 *See generally* Hatch-Kennedy Statement, *supra* note 50.

74 Laycock, *supra* note 56, at 765.

75 42 U.S.C. § 2000bb(a)(4)–(5) (stating the goal of RLUIPA is to reestablish the compelling interest test set out in pre-*Smith* case law).

76 42 U.S.C. § 2000cc(a)(1) (stating that imposing a rule that interferes with religious land use must further a compelling governmental interest, and utilize the least restrictive means).

C. *RLUIPA—Breaking Down the Text*

Congress's goal with RLUIPA was to codify the strict-scrutiny standard that was in place pre-*Smith*.[77] As its third attempt to pass a law of this nature, Congress was determined to pass a law within the legal parameters of the Supreme Court's prior rulings.[78] To address the shortcomings of its prior attempts, Congress designed a much more limited law, focusing on areas where it believed it had jurisdiction and where it perceived the greatest need for protection.[79] For ease of analysis, the statute can be broken into three parts.

The first part of the statute, 42 U.S.C. § 2000cc(a)(1), provides that zoning restrictions on a religious entity's land use must meet the strict scrutiny standard.[80] Section (a) is labeled "[s]ubstantial burdens"; RLUIPA applies only to burdens on religious practice that are "substantial." The term "substantial burden" is used six times in a barely 200-word-long section, but critically, no definition is provided for this critical term on which the statute's application turns.[81] What "substantial burden" encompasses has been the subject of much litigation—currently, there is no one test for determining what constitutes a substantial burden.[82]

Part two, § 2000cc(a)(2), outlines the statute's scope and is where Congress most drastically departs from the sweeping coverage of its prior attempts.[83] Section (a)(2) limits the application of the statute to three areas: (A) programs receiving federal funds; (B) where a substantial burden affects interstate commerce; and (C) where governments make individualized property assessments.[84] Part two also

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77 42 U.S.C. § 2000bb.

78 RFRA, discussed *supra* Section I.A, was the first attempt. The Religious Liberty Protection Act of 1998 (RLPA) was the second attempt. Concerns RLPA might have unintended harmful effects on other civil rights laws caused the bill to languish in the Senate. For more on the concerns RLPA raised, see Hatch-Kennedy Statement, *supra* note 50, at S7777–78.

79 *See* Hatch-Kennedy Statement, *supra* note 50, at S7777–78.

80 The strict-scrutiny standard is outlined in subsection (a)(1)(A) (compelling governmental interest) and (a)(1)(B) (least restrictive means).

81 Leaving "substantial burden" undefined was not an oversight. The Congressional record states, "The Act does not include a definition of the term 'substantial burden' because it is not the intent of this Act to create a new standard for the definition of 'substantial burden' on religious exercise. Instead, that term . . . should be interpreted by reference to Supreme Court jurisprudence." Hatch-Kennedy Statement, *supra* note 50, at S7776.

82 The courts' struggle with what constitutes a substantial burden is not a new one. RFRA used the same "substantial burden" term and courts faced similar struggles under RFRA as they do today under RLUIPA. *See, e.g.*, Hicks v. Garner, 69 F.3d 22, 26 (5th Cir. 1995) (collecting cases interpreting "substantial burden" under RFRA).

83 *See supra* note 78.

84 42 U.S.C. § 2000cc(a)(2).

addresses the Court's *Smith* decision by applying RLUIPA to rules of general applicability only for parts (A) and (B), which stem from Congress's spending and commerce clause powers, respectively. [85] Section (C) uses Congress's remedial power under the Fourteenth Amendment and does not extend to laws of general applicability, [86] resolving the overreach issue with RFRA articulated in the Court's *City of Boerne* decision.[87]

Part three, § 2000cc(b), defines discriminatory action.[88] Part three is divided into three sections. First, (b)(1) provides an "equal terms" provision requiring religious and nonreligious land uses be given no "less than equal treatment."[89] Provision (b)(2) addresses discrimination directly, making it illegal to impose a land-use regulation on the basis of religion.[90] Section (b)(3) addresses exclusions and prohibits governments from either (A) excluding religious assemblies from their jurisdiction, or (B) placing unreasonable limitations on religious institutions.[91]

II. APPLYING RLUIPA

Since its passage, every circuit court has heard at least one RLUIPA land-use case, providing a robust and mature body of law for analysis.[92]

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85 U.S. CONST. art. I, § 8.

86 U.S. CONST. amend. XIV, § 5.

87 *See supra* Section I.A0 (discussing RFRA and the *City of Boerne*, 521 U.S. 507 (1997), decision).

88 42 U.S.C. § 2000cc(b).

89 The circuit courts are currently split on the definition of "equal terms," which remains a hotly litigated subject. *See* Tree of Life Christian Sch. v. City of Upper Arlington, 905 F.3d 357, 367–70 (6th Cir. 2018) (outlining the different approaches circuit courts have taken and adopting the Third, Seventh, and Ninth Circuit's approach); *see also* Brian K. Mosley, *Zoning Religion out of the Public Square: Constitutional Avoidance and Conflicting Interpretations of RLUIPA's Equal Terms Provision*, 55 ARIZ. L. REV. 465, 476–88 (2013) (discussing the circuit split over the meaning of RLUIPA's "equal terms" provision).

90 § 2000cc(b) ("No government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination.").

91 *Id.*

92 *See, e.g.*, *Tree of Life Christian Sch.*, 905 F.3d at 387 (Thapar, C.J., dissenting) ("There comes a time with every law when the Supreme Court must revisit what the circuits are doing. That time has come." Suggesting RLUIPA's maturity warrants Supreme Court review in order to resolve the circuit split on RLUIPA's Equal Terms provision.). The following is a list of prominent cases from each circuit addressing issues related to RLUIPA's land-use provision: Roman Cath. Bishop v. City of Springfield, 724 F.3d 78 (1st Cir. 2013); Westchester Day Sch. v. Vill. of Mamaroneck, 504 F.3d 338 (2d Cir. 2007); Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch, 510

Justice Department data from the first sixteen years show RLUIPA has been heavily used by religious institutions.[93] The Department of Justice has itself opened ninety-six investigations concerning religious land-use discrimination.[94] RLUIPA's intensive use suggests, at the very least, that the law is producing favorable outcomes for religious institutions.

The first land use RLUIPA case in federal court was *Murphy v. Zoning Commission of New Milford*.[95] *Murphy* in many ways encapsulates a typical RLUIPA case and highlights the third-party harm issue present in land-use disputes. In *Murphy*, New Milford residents Robert and Mary Murphy began holding group prayer at their home, often with fifty to sixty guests.[96] Soon after they started their prayer groups, the Murphys began using their backyard as a parking lot to accommodate guests who were unable to find street parking.[97] New Milford's zoning regulations at that time were permissive, meaning a land use is *prohibited* unless specifically permitted.[98] It did not take long for neighbors to complain to the zoning commission (Commission) about the increased traffic and street and backyard parking.[99] Residents also expressed concern for the safety of their children who were accustomed to playing on what had until then been a quiet and safe street.[100] Following an investigation, the Commission found the Murphy's prayer service had increased the neighborhood's car volume, created more traffic, and raised safety concerns.[101] Based on its findings

F.3d 253 (3d Cir. 2007); Jesus Christ is the Answer Ministries, Inc. v. Balt. Cnty., 915 F.3d 256 (4th Cir. 2019); Opulent Life Church v. City of Holly Springs, 697 F.3d 279 (5th Cir. 2012); *Tree of Life Christian Sch.*, 905 F.3d 357; St. John's United Church of Christ v. City of Chi., 502 F.3d 616 (7th Cir. 2007); Marianist Province v. City of Kirkwood, 944 F.3d 996 (8th Cir. 2019); Guru Nanak Sikh Soc'y v. Cnty. of Sutter, 456 F.3d 978 (9th Cir. 2006); Grace United Methodist Church v. City of Cheyenne, 451 F.3d 643 (10th Cir. 2006); Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214 (11th Cir. 2004); Standing Rock Sioux Tribe v. United States Army Corps of Eng'rs, 239 F. Supp. 3d 77 (D.D.C. 2017); Vill. of Bensenville v. FAA, 457 F.3d 52 (D.C. Cir. 2006) (both RFRA and RLUIPA are binding on the federal government).

93 *See* TENTH ANNIVERSARY REPORT, *supra* note 14, at 5.

94 *See* TENTH ANNIVERSARY REPORT, *supra* note 14, at 5 (providing data covering RLUIPA's first ten years, from 2000–2010); U.S. DEP'T OF JUSTICE, UPDATE ON THE JUSTICE DEPARTMENT'S ENFORCEMENT OF THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT: 2010–2016 4 (2016), https://www.justice.gov/crt/file/877931/download [https://perma.cc/VP5Z-9ME4] (providing data covering RLUIPA's subsequent six years, from 2010–2016).

95 Murphy v. Zoning Commission of New Milford, 148 F. Supp. 2d 173 (D. Conn. 2001).

96 *Id.* at 176.

97 *Id.*

98 *Id.* at 179.

99 *Id.* at 177.

100 *Id.*

101 *Id.* at 179 (explaining that the Commission's findings did not substantiate the safety concerns, rather it found a "potential for safety concerns").

and the neighborhood complaints, the Commission passed a new rule restricting in-home gatherings to twenty-five people.[102]

In its ruling for the Murphy's, the district court specifically noted that no evidence was submitted suggesting religious animus played any role in the Commission's decision or the neighbors' complaints.[103] Despite the Murphy's admitted religious requirement of just two or more people for prayers, the court found the Commission's twenty-five person gathering limit was substantially burdensome.[104] Interestingly, the court found the town's interest—ensuring safety and maintaining aesthetics—were legitimate compelling interests.[105] However, the court found the town failed to utilize the least restrictive means to progress its goal.[106] Because of the religious nature of their activity, the Murphy's received a RLUIPA accommodation from the twenty-five person gathering rule, despite the undisputed harm to the community, which would have been avoided had the rule been enforced.[107] And, since the court's ruling was an as-applied accommodation, the rest of the neighborhood remained bound by the twenty-five person gathering limit. Neighbors who had purchased homes on a quiet and safe street with ample parking were forced to accept that their homes now neighbored a bustling religious institution. This dramatic neighborhood change came about without any opportunity for community input.[108]

The first RLUIPA case to reach a circuit court was *DiLaura v. Ann Arbor Charter Township*.[109] The Sixth Circuit held that application of the town's bed-and-breakfast regulations required a RLUIPA accommodation as applied to the DiLaura's religious retreat.[110] The bed- and-breakfast regulation at issue would have required DiLaura to charge his religious retreat visitors and would have forbade serving meals other than breakfast and periodic snacks; serving wine for communion was also banned under the town's alcohol service rules.[111]

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102 *Id.* at 177, 179 (explaining that the twenty-five-person limit was based on what the zoning commission considered regular use for a single-family home).

103 *Id.* at 179 ("There is no evidence of religious animus on the part of plaintiffs' neighbors, [or] the Commission . . . .").

104 *Id.* at 188.

105 *Id.* at 190–91.

106 *Id.*

107 *Id.*

108 On appeal three years after the district court's ruling, the Second Circuit vacated and remanded on ripeness grounds. *See* Murphy v. New Milford Zoning Comm'n, 402 F.3d 342 (2d Cir. 2005).

109 DiLaura v. Ann Arbor Charter Twp., 30 F. App'x 501 (6th Cir. 2002) (*DiLaura I*).

110 *Id.* at 503.

111 DiLaura v. Twp. of Ann Arbor, 471 F.3d 666, 669 (6th Cir. 2006) (*DiLaura II*).

As in *Murphy*, the *DiLaura* court found the zoning laws were facially neutral, devoid of religious animus.[112] However, since the *DiLaura* court found the bed-and-breakfast rules substantially burdened the DiLaura's *religion*, the court ordered the town to issue a religious accommodation from a law that was otherwise legitimate.[113]

In many ways, these two early cases are representative of a typical RLUIPA suit. RLUIPA suits seem to take far longer to resolve than the average federal court case. For example, *DiLaura* was not fully resolved until nearly eight years after its initial filing in January 2000[114] and took three trips to the circuit court.[115] Compared to other cases in its district, *DiLaura* took nearly four times longer to resolve.[116] The two cases are also typical of the kind of land-use regulation and religious land-use conflicts that arise. In both cases, the court acknowledged the township was not acting out of religious animus.[117] Both cases involved land-use restrictions that the town deemed necessary for achieving its desired outcome. In *Murphy*, the town did not want excessive traffic and parking congestion—interests the court accepted were legitimate.[118] In *DiLaura*, the town sought to enforce bed-and-breakfast regulations, and here too the court agreed the goal was legitimate.[119] As in other RLUIPA cases, the parties sought accommodations from zoning regulations that were in place before the religious organization's intended use.[120] Finally,

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112 *Dilaura I*, 30 F. App'x at 508.

113 *Id.* at 508–10; *see also DiLaura II*, 471 F.3d 666 (on the parties' third trip to the Sixth Circuit, the court affirmed the district court's ruling, forbidding the town from ever enforcing the bed and breakfast provisions).

114 Notice by Defendants of Removal from Washtenaw County Circuit Court at 2, DiLaura v. Twp. of Ann Arbor, No. 2:00-cv-70570 (E.D. Mich. Jan. 31, 2000) (initially filed in state court, removed to federal court in January of 2000).

115 *See* Satisfaction of Judgment at 2, DiLaura v. Twp. of Ann Arbor, No. 2:00-cv-70570 (E.D. Mich. Dec. 20, 2007).

116 *See U.S. District Courts—Median Time Intervals from Filing to Disposition of Civil Cases Terminated, by District and Method of Disposition, During the 12-Month Period Ending March 31, 2001*, U.S. CTS., https://www.uscourts.gov/sites/default/files/statistics_import_dir/c05mar01.pdf [https://perma.cc/DC5S-FRHB] (compare the nearly eighty-five-month period to resolve *DiLaura* with the median twenty-month period for Sixth Circuit case from the Eastern District of Michigan).

117 *DiLaura*, 30 F. App'x at 508 ("[T]here is no evidence offered of any animus against religion involved in either the passage or interpretation of the law."); Murphy v. Zoning Commission of New Milford, 148 F. Supp. 2d 173, 179–80 (D. Conn. 2001) ("no evidence of religious animus on the part of the plaintiff's neighbors").

118 *Murphy*, 148 F. Supp. 2d at 179–80.

119 30 F. App'x at 508.

120 There are however plenty of cases where zoning regulations specifically target religious uses and were only passed *after* the intended religious use was established. *See, e.g.*, Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch, 510 F.3d 253, 257–58 (3d Cir. 2007) (the city prohibited churches in a Redevelopment Plan passed while litigation was pending).

these two cases are also illustrative of how RLUIPA impacts third parties.[121] In *Murphy*, the religious accommodation impacted neighbors by allowing more intensive land use that increased noise, reduced parking, and created new risks for their children's safety; in *DiLaura*, the religious accommodation impacted the town's ability to raise revenue through regulation of bed and breakfasts and the service of alcohol.[122]

III. ISSUES WITH THIRD-PARTY HARMS

A. *What Are Third-Party Harms?*

The First Amendment enshrines religious liberty into the Constitution. The "religion clause" of the First Amendment states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[123] The religion clause is generally broken into two parts: the first part is called the "Establishment Clause"; the second part is called the "Free Exercise Clause."[124] Broadly, the Establishment Clause prohibits laws that establish or favor religion, while the Free Exercise Clause prohibits laws that interfere with religion.[125] Taken together, the clauses can be seen as being at odds with each other. Strictly construed, the Establishment Clause seemingly requires strictly secular legislation that ardently avoids establishing or favoring any religion. On the other hand, free exercise demands legislation that accounts for the needs of religion and for laws to avoid religious interference.[126]

Acknowledging this tension, the Court has repeatedly emphasized that the religion clause need not be strictly construed and that there is

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121 *See generally* Part IV (discussing how RLUIPA accommodations create third-party harms).

122 Third-party harms arising from RLUIPA accommodations are discussed more in Part IV.

123 U.S. CONST. amend. I (freedom of religion).

124 *See generally* Cnty. of Allegheny v. ACLU, 492 U.S. 573, 589–98 (1989) (discussing the Court's freedom of religion jurisprudence).

125 *See generally* Walz v. Tax Com. of N.Y., 397 U.S. 664, 669 (1970) (discussing the interplay between the Religion Clauses). The religion clause definitions employed in this Note are left purposefully broad; the rich debate over the Religion Clause's meanings exceeds this Note's scope.

126 This is a common theme repeated in the Supreme Court's freedom of religion jurisprudence. *See, e.g.*, McCreary Cnty. v. ACLU of Ky., 545 U.S. 844, 875 (2005) ("[D]ifficult interpretative issues generally, arise from the tension of [the clause's] competing values, each constitutionally respectable, but none open to realization to the logical limit.").

room for accommodative interpretation between the two clauses.[127] Laws like RLUIPA seize on the idea that some accommodation can be granted under the Free Exercise Clause without violating the Establishment Clause.[128] Accommodations may even exceed the constitutional minima free exercise requires without offending the Establishment Clause.[129]

Religious accommodations date back to before the country's founding.[130] The earliest examples of religious accommodations covered activities related to oath-taking and military service.[131] Perhaps the longest standing accommodation has to do with the military draft exemption.[132] Draft exemptions, accommodating religious adherents whose beliefs forbid fighting, falls within the permissible boundaries of the Establishment Clause.[133] However, courts curtail accommodations that create substantial burdens on third parties.[134]

In the country's founding era, exemptions frequently required some alternative or offsetting measure. For example, parties who objected to oath-taking on religious grounds were required to make

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127 To explain how the two clauses can be read in unison, the Court repeatedly uses the phrase, "room for play in the joints," between the two religion clauses. *See, e.g.*, Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2031, 2036 (2017) (Sotomayor, J., dissenting); Cutter v. Wilkinson, 544 U.S. 709, 713 (2005); Locke v. Davey, 540 U.S. 712, 718 (2004); *Cnty. of Allegheny*, 492 U.S. at 661–62; Sloan v. Lemon, 413 U.S. 825, 835 (1973); *Walz*, 397 U.S. at 669.

128 *See, e.g.*, *Cutter*, 544 U.S. at 713 ("[T]he government [can] accommodate religion beyond free exercise requirements, without offense to the Establishment Clause.").

129 *Locke*, 540 U.S. at 718–19 ("In other words, there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause.").

130 Douglas Laycock, *Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause*, 81 NOTRE DAME L. REV. 1793, 1809–25 (2006) (discussing pacifist draft exemption debates during the founding era).

131 *Id.* at 1804 (tracing the first oath-taking-exemption to 1669) (citing Fundamental Constitutions of Carolina § 100 (1669), *reprinted in* 5 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 2772, 2784 (Francis Newton Thorpe ed., 1909); R.R. Russell, *Development of Conscientious Objector Recognition in the United States,* 20 GEO. WASH. L. REV. 409, 412–13 (1952) (stating that in 1673, Rhode Island exempted "conscientious objectors," i.e., people whose conscience forbade bearing arms, from partaking in the draft).

132 *See, e.g.*, Welsh v. United States, 398 U.S. 333 (1970) (extending draft exemptions for religious adherents to individuals with secular conscious claims); *see also* Laycock, *supra* note 130, at 1809–25.

133 *Welsh*, 398 U.S. at 356–59 (Harlan, J., concurring) (arguing that Congress may create a draft exemption to accommodate an individual's free exercise claim, but the Establishment Clause requires that the accommodation extends to theistic and nontheistic beliefs).

134 *See, e.g.*, Thornton v. Caldor, Inc., 472 U.S. 703 (1985) (State law accommodating Sabbath observers impermissibly burdened third parties). *Thornton* is discussed in greater length in Section III.B.

statements of affirmation instead.[135] Military service exemptions required paying an extra tax or performing an alternate service.[136] Today, religious accommodations are commonplace. An older—but comprehensive—study from 1992 found over 2,000 religious accommodations spread throughout federal and state laws and in practically every part of the U.S. economy.[137] Religious accommodations remain prevalent in the statutory text of both old and new laws. For example, the relatively recent Affordable Care Act accommodates religious employers, while the less recent but still highly important Fair Housing Act exempts religious organizations from discrimination laws, despite the exemption's potential to harm practitioners of disfavored religions.[138] When an accommodations burden falls on a non-beneficiary, it creates a third-party harm.[139]

B. *Generally: Third-Party Harms Caused by Religion*

Not all third-party harms are the same and not all are equally bad, and even among the bad ones, not all are impermissible. But some third-party harms are clearly impermissible. Courts consider several factors to determine which third-party harms are considered impermissible. The likelihood of a court finding an accommodation impermissible due to its burden on third parties increases when an accommodation's burden becomes more certain to occur, the anticipated harm is of increased severity, and the impacted party

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135 Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1467 (1990) (noting that strict adherence to oath-taking would have effectively prevented religious adherents from accessing the justice system or taking public office). *See also* Laycock, *supra* note 130, at 1822.

136 *See* McConnell, *supra* note 135, at 1468; Laycock, *supra* note 130, at 1808 (pointing out that military service exemptions were highly controversial since it allowed avoidance of dangerous duties, while shifting the burden to others); *see also* R.R. Russell, *supra* note 131, at 413 (documenting alternative forms of service which included firefighting, removing women and children from danger, and "any other Duty consistent with their Religious Principles").

137 James E. Ryan, *supra* note 35, at 1445–46.

138 *See generally* 26 U.S.C. § 5000A(d)(2) (2019) (Affordable Care Act individual mandate requirements); *infra* Section III.B (discussing the Affordable Care Act's religious accommodation). *See* 42 U.S.C. § 3607(a) (2019) (Fair Housing Act) ("Nothing in this subchapter shall prohibit a religious organization . . . from limiting the sale . . . to persons of the same religion . . . .").

139 There is an ongoing academic debate whether any kind religious accommodations, regardless of third-party impact, should be considered a third-party harm. While the merits of this debate fall outside the scope of this Note, for thoughtful analysis of these arguments, see Kathleen A. Brady, *Religious Accommodations and Third-Party Harms: Constitutional Values and Limits*, 106 KY. L.J. 717 (2017) (arguing religious accommodations can create third-party harms).

becomes more traceable or specific and less diffuse across the population.

Third-party harms are easily recognized at the extremes. For example, in *Reynolds v. United States*, an early Supreme Court case addressing religious exemptions derived from the First Amendment, the Court posed a rhetorical hypothetical of a religious observer compelled to perform human sacrifices on unwilling victims.[140] Of course, there can be no argument that a religious belief compelling unwilling human sacrifices could ever be legal. Governments have a compelling interest in preserving life, and the harm to a third party in this hypothetical is beyond question.[141] The state interest at issue in closer cases is often less obvious than the *Reynolds* hypothetical. Third-party harms in close cases can also be less obvious and more easily explained away.[142] Although many RLUIPA cases fit this borderline area,[143] some clearly create third-party harms.[144] Examples of cases involving third-party harms are discussed below.[145]

The easiest accommodations to justify are those with little or no discernable third-party impact. Early religious accommodations for oath-taking and military service are helpful examples.[146] Accommodating religious restrictions against oath-taking by allowing a substitute affirmative statement is a perfect example of an accommodation with no third-party impact.[147] Accommodating oath restrictions created no more burden on third parties than already existed. Few accommodations fit this easiest-to-justify category.

Military draft exemptions are slightly harder to justify. Draft exemptions impact third parties—*vis-à-vis* the increased probability of being drafted—and for this reason, they have historically been more controversial.[148] But, burdens from a draft exemption are not easily

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140 Reynolds v. United States, 98 U.S. 145, 166 (1878).

141 Washington v. Glucksberg, 521 U.S. 702, 728 (1997) (preserving life is a legitimate state interest).

142 *See generally* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 739 (2014) (Ginsburg, J., dissenting).

143 *See, e.g.*, Guru Nanak Sikh Soc'y v. Cnty. of Sutter, 456 F.3d 978, 983–91 (9th Cir. 2006) (concerns that a church's relocation to a rural area may contribute to "leapfrog development" over time does not create a concrete harm attributable to any identifiable group).

144 *See infra* Part IV (discussing RLUIPA created third-party harms).

145 *See infra* Part IV.

146 *See generally supra* Section III.A.

147 *See* Laycock, *supra* note 130, at 1805 (detailing the early oath accommodations).

148 *See generally* Ellis M. West, *The Right to Religion-Based Exemptions in Early America: The Case of Conscientious Objectors to Conscription*, 10 J.L. & RELIGION 367, 375, 395 (1993) (reviewing the debate over religious exemptions for military service).

traced to a specific third party.[149] The Supreme Court has consistently upheld draft exceptions, despite the substantial third-party impact, while caveating that the First Amendment does *not* mandate such accommodations.[150] Draft exemptions demonstrate that even potentially severe third-party harms, such as risks arising from active military service, can be allowable.

If high personal costs from accommodation are allowable when spread across the population, it follows that high monetary costs spread across the population should also be allowed. *Sherbert v. Verner* supports this proposition.[151] In *Sherbert*, the Court held that governments could not withhold unemployment benefits when the only available jobs conflicted with sincere religious beliefs.[152] Despite the Court's division over whether the Free Exercise Clause *required* the state to provide an accommodation, the justices agreed that the state *could* provide an accommodation.[153] Accommodations like the one in *Sherbert* seem no more objectionable than draft exemptions. In *Sherbert*, the dollar benefit accruing to each religious observant was high, but the per-person cost to non-beneficiaries was low since the cost of unemployment benefits are spread across an entire state's population.[154] And, when the religious adherents found jobs, they shared in the cost—like everyone else—by contributing to the unemployment fund.[155] *Sherbert* teaches that the costliness of an accommodation, on its own, is not enough to disqualify a religious accommodation.

When no third party comes forward personally claiming harm, even when the matter of the exception directly concerns the third party, the Court has shown a hesitancy to recognize any harm. This was

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149 *See* William P. Marshall, *Third-Party Burdens and Conscientious Objection to War*, 106 KY. L.J. 685 (2017) (arguing that the Court has only denied draft exemptions, such as in Gillette v. United States, 401 U.S. 437 (1971), when the resulting third-party harm would have been directly traceable to subsequent draftees).

150 *See* Johnson v. Robison, 415 U.S. 361, 375, n.14 (1974); Gillette v. United States, 401 U.S. 437 (1971); Dickinson v. United States, 346 U.S. 389 (1953); *In re* Summers, 325 U.S. 561 (1945); Hamilton v. Regents of Univ. of Cal., 293 U.S. 245 (1934); United States v. Macintosh, 283 U.S. 605, 623–25 (1931); Arver v. United States, 245 U.S. 366 (1918); Jacobson v. Massachusetts, 197 U.S. 11, 29 (1905).

151 Sherbert v. Verner, 374 U.S. 398 (1963); *see also supra* Section I.A (discussing *Sherbert*).

152 374 U.S. at 399 (appellant was a Seventh-day Adventist whose beliefs forbade Saturday work).

153 *Id.* at 422 (Harlan, J., dissenting) ("[I]t would be a permissible accommodation of religion for the State, if it *chose* to do so, to create an exception to its eligibility requirements . . . .") (emphasis added).

154 U.S. Dep't of Labor, UNEMPLOYMENT INSURANCE, https://oui.doleta.gov/unemploy/docs/factsheet/UI_Program_FactSheet.pdf [https://perma.cc/3596-HNCF].

155 *Id.*

demonstrated in *Wisconsin v. Yoder*.[156] In *Yoder*, Amish parents faced a criminal conviction for violating Wisconsin's compulsory school-attendance laws requiring parents to enroll their children in school until they were sixteen.[157] In defense, the parents claimed that schooling beyond the age of thirteen violated their religious beliefs.[158] Here, the injured third-party harm would have been the children, whom the State claimed would benefit from the additional educational requirements.[159] As noted in Justice Douglas's dissent, the children were never given an opportunity to testify as to *their* preference for continuing their education, noting that such failures are often deemed a reversible error.[160] Absent any showing by the children, the Court found no evidence of any third-party harm, despite the State's asserted interest on behalf of the children.[161] Acknowledging the weakness of their opinion, and in a nod to the dissent, the Court left open the possibility for the children to sue on their own behalf.[162] *Yoder* remains a controversial ruling, drawing diverging views on how its holding should be interpreted.[163] The Court's acknowledgment of the child's right to sue suggests the existence of a concrete and particularized harm needed for standing.[164] Despite the State's general interest in childhood education, it was unable to vindicate these rights on the child's behalf. *Yoder* suggests that states are not in the best position to vindicate a third-party's harm, even when they are seemingly relied upon to do so. When it comes to third-party harms arising from a RLUIPA

156 Wisconsin v. Yoder, 406 U.S. 205 (1972).

157 *Id.* at 207–08.

158 *Id.* at 209–10.

159 *Id.* (however, the State admitted that education until the age of thirteen was generally sufficient).

160 *Id.* at 245 n.3 (Douglas, J., dissenting).

161 *Id.* at 230 ("This case, of course, is not one in which any harm to the physical or mental health of the child or to the public safety, peace, order, or welfare has been demonstrated or may be properly inferred.").

162 *Id.* at 230–32, 242 (Douglas, J. dissenting) (stating that it is essential for the Court to reach the question of third-party harm "because no analysis of religious-liberty claims can take place in a vacuum"); *Yoder* also drew two concurring opinions, each expressing their concern for third-party harms, but satisfied that none existed in this case. *See id.* at 237–38 (Stewart, J., concurring) (noting the lack of evidence in the record that the children wanted anything different); *see also id.* at 237–38 (White, J., concurring) (stating the difference between Wisconsin's educational requirement and what the parent's belief allowed was not large enough to cause significant educational harm).

163 *Yoder* continues to draw academic attention for its third-party harm impact. *See, e.g.*, Gage Raley, Yoder *Revisited: Why the Landmark Amish Schooling Case Could—and Should—Be Overturned*, 97 VA. L. REV. 681, 693–702 (2011).

164 Lujan v. Defs. of Wildlife, 504 U.S. 555, 555 (1992).

accommodation, *Yoder* seemingly instructs individually injured landowners to bring their claim directly.

In addition to requesting an accommodation, statutes whose primary function is religious accommodation can also create third-party harms. The Court overturned such a statute in *Thornton v. Caldor, Inc.*[165] The Connecticut statute at issue in *Caldor* granted all employees an absolute right *not* to work on any day of the week their Sabbath was celebrated.[166] Had the law been allowed to stand, the Court found, it would have created substantial burdens on employers and other employees who would be forced to accommodate their coworkers' religious practices.[167] In addition to the third-party harm created by the law, the statute was completely unqualified, taking no account whatsoever of religious accommodations offered by an employer.[168] It is easy to see the parallels between the law at issue in *Caldor* and RLUIPA: for both, the cost of accommodation primarily burdens private parties, and neither law accounted for accommodations already made.

In a unanimous opinion, the Court in *Cutter v. Wilkinson*, after finding no evidence of any third-party harm, upheld RLUIPA's institutionalized-persons provision.[169] Prisoners in *Cutter* sued the prison alleging RLUIPA violations for the prison's refusal to accommodate the prisoners' non-mainstream religious beliefs.[170] Requests, similar to those made by the prisoners in *Cutter*, were granted to mainstream religious adherents.[171] In its defense, the prison argued, inter alia, that accommodating prisoners' religious beliefs would harm third parties by requiring the prison to abandon security measures it deemed necessary.[172] The prison also alleged that accommodating the prisoners would create an upsurge in religious claims, create administrative burdens, and overburden the already busy chaplain,

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165 Thornton v. Caldor, Inc., 472 U.S. 703 (1985); *see also infra* note 2 citing the text of RLUIPA's Institutionalized Persons provision.

166 *Thornton*, 472 U.S. at 703 (holding that regardless of an employer's work schedule, such as being a Monday through Friday employer, employees were given a statutory right to celebrate their Sabbath any day of the week they chose).

167 *Id.* at 709–10.

168 *Id.* at 710 ("[T]he statute allows for no consideration as to whether the employer has made reasonable accommodation proposals.").

169 Cutter v. Wilkinson, 544 U.S. 709 (2005).

170 *Id.* at 712 (prisoners belonged to several nonmainstream religions including Satanism, Wicca, and Asatru).

171 *Id.* at 713.

172 *Id.*

thereby reducing services to others.[173] Critically, all of the prison's alleged third-party harms were hypothetical.[174] The prison raised only a facial challenge to RLUIPA's constitutionality.[175] Because proper application of RLUIPA allowed courts to account for third-party harms, the Court held that the law was facially valid.[176] Easily distinguishing the absolute right granted in *Caldor*, the Court found RLUIPA could be applied in a balanced manner, accounting for third-party harms.[177] In its holding, the Court made clear that religious accommodations must be applied carefully, with sensitivity to the concerns of non-beneficiary third parties.[178] *Cutter* provided a path forward for third-party claimants under RLUIPA's land-use provision. Litigants working under facially valid statutes—like RLUIPA's institutionalized-persons provision—can still claim an impermissible third-party harm as applied.

In *Burwell v. Hobby Lobby Stores, Inc.*, a decision addressing third-party harms tied to contraceptive health insurance coverage, the Court strained to explain away any potential third-party harm. [179] A sharply divided 5–4 decision held that closely-held for-profit corporations were entitled to the same religious accommodations under RFRA as individuals.[180] The *Hobby Lobby* dispute involved the minimum coverage requirements of the Patient Protection and Affordable Care Act (ACA), requiring employers to provide certain minimum levels of health insurance coverage or pay a non-compliance penalty.[181] To meet the minimum coverage requirements, all FDA approved forms of contraception had to be covered by the health insurance plan.[182]

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173 Brief for Respondents at 17–20, Cutter v. Wilkinson, 544 U.S. 709 (2005) (No. 03-9877), 2005 WL 363713.

174 544 U.S. at 725.

175 544 U.S. at 725 ("In upholding RLUIPA's institutionalized-persons provision, we emphasize that respondents 'have raised a facial challenge to [the Act's] constitutionality . . . .'") (alteration in original) (quoting Gerhardt v. Lazaroff, 221 F. Supp. 2d 827, 831 (S.D. Ohio 2002)).

176 *Id.* at 720 ("Properly applying RLUIPA, courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries.").

177 *Id.* at 720, 722.

178 *Id.* at 722–23 ("Our decisions indicate that an accommodation must be measured so that it does not override other significant interests.").

179 Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014).

180 *Id.* at 688. Although *City of Boerne v. Flores*, 521 U.S. 507 (1997), found RFRA unconstitutional as applied to state governments, RFRA continues to apply the federal government and its laws *and* regulations. The contraception regulations at issue in *Hobby Lobby* were promulgated by a U.S. agency (U.S. Department of Health and Human Services (HHS)) pursuant to a U.S. statute (Patient Protection and Affordable Care Act), making RFRA applicable. *See Hobby Lobby*, 573 U.S. at 696.

181 26 U.S.C. § 5000A(f)(2) (2019).

182 *Hobby Lobby*, 573 U.S. at 698.

Congress created a carve-out for religious non-profits who objected to some forms of contraception. The terms of the carve-out allowed non-profits to subtract the portion of costs allocated to contraception from their health-insurance premiums and required insurance companies to cover all contraception costs.[183] The majority opinion reiterated that any religious accommodation that harms others cannot be allowed, citing *Cutter* as a recent precedent.[184] Finding that extending the insurance accommodation to closely-held for-profits would leave women covered by their religious employers' health plans unaffected, no third-party harm was found.[185] Key to the majority's opinion—and central to the dissent's argument—was that female employees and insurance providers would face *no* negative consequences from an extension of the non-profit accommodation to closely-held for-profit entities.[186] A determined majority, set on extending the non-profit accommodation to for-profit entities, recognized that the presence of third-party harms would prevent it from doing so.[187] The Court labored to cast any impact on third parties as non-consequential.[188] An acknowledgment of the third-party harms in *Hobby Lobby* would have required the Court to deny the accommodation. Recognizing the pains the Court took to portray the third-party impact as marginal reinforces the idea that, where undeniable third-party harms exist, courts should not grant an accommodation.

From this overview of the Supreme Court's third-party harms doctrine, some guidance can be gleaned for when religious accommodations should be limited. First, when religious accommodation creates no discernable harm to anyone, the accommodation is generally granted.[189] For example, accommodating religious practices banning oath-taking by offering an alternative affirmative statement creates no discernable third-party harm.[190] Religious accommodations, however, are valid even when they create

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183 *Id.* The Court also noted that while this accommodation "requires the issuer to bear the cost of the services, HHS has determined that this obligation *will not* impose any net expense on issuers because its cost will be less than or equal to the cost savings resulting from services." *Id.* (citing 78 Fed. Reg. 39877) (emphasis added).

184 *Id.* at 764 ("No tradition, and no prior decision under RFRA, allows a religion-based exemption when the accommodation would be harmful to others . . . .").

185 *Id.* at 693.

186 *Id.* (finding the effect of the accommodation on the female employees "would be precisely zero").

187 *Id.* at 693–94.

188 *Id.*

189 Accommodations may still run afoul of the Establishment Clause if one religion is favored over another.

190 *See* McConnell, *supra* note 135; *see also* Laycock, *supra* note 130, at 1822.

some third-party costs.[191] For accommodations with high costs to be valid, the per-person cost generally needs to drop. Spreading a high cost, such as unemployment benefits, over a large population, such as the entire tax base, results in a low per-person cost. This was the case in *Sherbert*, with its high absolute cost, but minimal per-person cost.[192] Draft cases provide a similar example—accommodations were approved because the impact to other eligible draftees is marginal. Both *Yoder* and *Hobby Lobby* drew dissenting opinions, in part due to their third-party impact. However, when a third-party claim is only theoretical, as was the case in the Court's unanimous *Cutter* decision, the Court has little trouble dismissing third-party harms.[193] What is clear from the outcome of these cases is that religious accommodations placing significant burdens on identifiable third parties are not allowed.

IV. IMPERMISSIBLE THIRD-PARTY HARMS ARISING FROM RLUIPA'S LAND-USE CLAUSE?

Third-party harms under RLUIPA's land-use provision have been entirely ignored by both courts and academics. The research for this Note found only one case discussing third-party harms, but the case was referencing alleged harms to a religious observer *seeking* an accommodation.[194] Congress knew of the risks RLUIPA posed to third parties—the ACLU had even proposed a RLUIPA carve-out for when exemptions implicate civil rights, while religious groups countered by arguing courts should be the deciders of when a religious exemption impermissibly burdens third parties.[195] In its final form, RLUIPA was given no third-party exemption.

Several factors explain the judicial and academic silence on the issue of third-party harms under RLUIPA's land-use provision. For one, the Supreme Court—despite circuit splits over several of RLUIPA's clauses—has yet to take up any case dealing with RLUIPA's land-use

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191 *See, e.g.*, the draft cases, *supra* notes 148–50 and accompanying text.

192 *See supra* Section I.A and accompanying notes (discussing *Sherbert*); *supra* notes 151–55 and accompanying text for additional discussion on *Sherbert*.

193 *See supra* notes 169–78 and accompanying text.

194 Cambodian Buddhist Soc'y of Conn., Inc. v. Planning & Zoning Comm'n, 941 A.2d 868, 879 (Conn. 2008).

195 *Religious Liberty: Hearing Before the Comm. on the Judiciary*, 106th Cong. 5, 13 (1999), https://www.govinfo.gov/content/pkg/CHRG-106shrg67066/pdf/CHRG-106shrg67066.pdf [https://perma.cc/23FZ-TMKJ]; *see also* RLPA Hearing of 1998, *supra* note 58, at 209, 213 (statements of Steven K. Green, Legal Director, Americans United for Separation of Church and State, cautioning against sweeping legislation because of the risk to third parties).

provision.[196] Another issue is determining who should be considered an aggrieved third party. Harms and remedies vary based on who the aggrieved party is. For this reason, to understand when RLUIPA accommodations create third-party harms, it is helpful to categorize cases by who the aggrieved party is. Categorizing aggrieved third parties and analyzing how remedies should vary based on category has not been explored by courts or scholars. This Note fills that gap by providing a commonsense approach that separates harms to local governments from harms to landowners. Because cases often impact both governments and residents, a third "blended" group is added to address issues arising under this common scenario. The plain text of RLUIPA deals directly with claims involving *governments* and provides the legal standard for addressing these claims.[197] When a claim involves third-party landowners, RLUIPA is silent as to the rule or legal standard.[198] Furthermore, RLUIPA's text specifically defines the term "government," making it perfectly clear that the statute was never intended to address landowner claims.[199] As the *Cutter* Court indicated, RLUIPA was designed to prevent exceptional government-created burdens,[200] and therefore should not be considered together with private third-party claims. Finally, separating claimants also makes sense based on the differences in the remedies sought by each group. Government entities generally will seek an injunction, while landowners may seek either damages or an injunction. For these reasons, government and private claimants should be analyzed separately to best account for each party's concerns.

Category One will cover instances where only a governmental interest is impacted. In these cases, the government entity is the injured third party. Among the many and varied roles frequently left to local governments, land-use decision-making is perhaps the most important.[201] RLUIPA exemptions can wreak havoc on carefully

196 *See* Tree of Life Christian Sch. v. City of Upper Arlington, 139 S. Ct. 2011 (2019), *cert. denied* (circuit split over the meaning of RLUIPA's equal terms provision); *see also supra* note 92 (discussing *Tree of Life* and the circuit split). *See also infra* note 220 (discussing the circuit split on whether tax revenue considerations should be considered a compelling governmental interest).

197 42 U.S.C. § 2000cc(a)(1) ("General rule—No *government* shall impose . . . land use regulation . . . .") (emphasis added). The statute provides the strict scrutiny standard—compelling governmental interest using least restrictive means. *Id.* at (A)–(B).

198 *See generally id.*

199 *See* 42 U.S.C. § 2000cc-5(4)(A)(i)–(iii) (defining state government broadly).

200 Cutter v. Wilkinson, 544 U.S. 709, 720 (2005).

201 *See* Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 3 (1990) ("Land use control is the most important local regulatory power."); Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as Problem of Local Legitimacy*, 71 CALIF. L. REV. 837, 910 (1983).

planned local land-use decisions. The reduced regulatory authority may harm an entire community and encroach on the unique role of local government. RLUIPA accommodations also raise federalism concerns when the accommodation usurps the power of state or local governments.[202] Harms in this category only marginally impact any individual's property interests.

Category Two addresses RLUIPA cases where accommodations create direct and measurable harms to landowners. Third-party harms in this category are highly individualized, making local governments' arguments of direct harm difficult to make. Furthermore, local governments will likely face political constraints from unimpacted constituents, uninterested in engaging in an expensive lawsuit with no clear benefit to them. Category Two, therefore, addresses just those harms that fall primarily on local landowners with little impact on the broader community or local government.

Category Three addresses hybrid cases. In this section, RLUIPA accommodations negatively impact both a local government's interests and landowners' interests. Remedying harms in this category is more complex than Category One or Category Two alone since one exemption harms two discrete types of entities whose remedial claims can be exclusive of each other.

A. *Category One: Local Government*

Land-use regulation has traditionally, and wisely, been regarded as a function for local government.[203] A locality's on-the-ground knowledge of their community's needs allows them to serve their communities efficiently and responsively, while their small operational scale allows for highly tailored solutions to local issues.[204] In passing RLUIPA, Congress imposed a rule that discards all concern for local interests except in those rare cases when governments can show a compelling interest achieved by the least restrictive means. Many scholars have reacted with alarm to what is easily recognized as a

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202 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 (2003).

203 Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30, 44 (1994) (stating land-use regulation is a "function traditionally performed by local governments").

204 Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as Problem of Local Legitimacy*, 71 CALIF. L. REV. 837, 887 (1983) (suggesting local decision-making legitimacy derives from "decisionmaker who know the issues directly"); Richard C. Schragger, *The Role of the Local in the Doctrine and Discourse of Religious Liberty*, 117 HARV. L. REV. 1810, 1871 (2004) (pointing out that local governments are better able to "balance competing communal values" because they are made up of local politicians more likely to be aware of what the local issues are).

congressional power grab in an area historically belonging to local government and trampling all federalism concerns.[205] There is good reason to believe that local governments are better suited to balance local and religious land-use needs than any national solution ever could be. For example, before RLUIPA's passage, Illinois's RFRA statute provided broad religious accommodations, but carved-out the area around Chicago's O'Hare airport to facilitate its modernization.[206] It is likely impossible to write any land-use law at the national level that would account for every local level concern.[207]

Cases in this category do not have directly traceable impacts on readily recognizable third parties. Here, the primary cause of harm arises from federalism concerns due to RLUIPA's straitjacket approach to local land-use decision-making. An inevitable outcome of setting land-use policy at the national level is reduced responsiveness of local governments and lower engagement by residents. Local governments are beholden to residents, who themselves are interested in shaping their communities.[208] Contextually appropriate regulations are more likely when local communities are engaged with local land-use decisions.[209] RLUIPA displaces land-use decisions from the local decision-making process, disenfranchising local communities. When decisions are made locally, voters can galvanize their neighbors to oppose, or eject, local politicians; RLUIPA's nationalistic approach provides no such option. There is at least some evidence that RLUIPA has had these negative effects in communities where RLUIPA has been heavily utilized.[210] Furthermore, residents who feel they have been stripped of their right to be heard are more likely to ignore land-use regulations that apply to their property.[211] For example, recall *DiLaura I*,[212] where a town sought to enforce regulations governing bed and

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205 *See, e.g.*, Hamilton, *supra* note 202; Patricia E. Salkin & Amy Lavine, *The Genesis of RLUIPA and Federalism: Evaluating the Creation of a Federal Statutory Right and Its Impact on Local Government*, 40 URB. L. 195 (2008).

206 775 Ill. Comp. Stat. Ann. 35/30 ("Nothing in this Act limits the authority of the City of Chicago to exercise its powers under the O'Hare Modernization Act.").

207 Jerold S. Kayden, *National Land-Use Planning in America: Something Whose Time Has Never Come*, 3 WASH. U. J.L. & POL'Y 445 (2000); Michael C. Pollack, *Land Use Federalism's False Choice*, 68 ALA. L. REV. 707, 718–19 (2017).

208 *See* Eric T. Freyfogle, *The Particulars of Owning*, 25 ECOLOGY L.Q. 574, 580–81 (1999) (discussing how land-use planners understand the need for residents to have a say in shaping the place they live).

209 Pollack, *supra* note 207, at 718.

210 *See* Arthur H. Gunther III, *Community View: RLUIPA Ripe for Challenge*, LOHUD (May 22, 2014, 2:23 PM), https://www.lohud.com/story/opinion/contributors/2014/05/22/rluipa-rockland-land-use-environment/9458553 [https://perma.cc/sAGH8-WUEY].

211 *See* Pollack, *supra* note 207, at 740.

212 *See supra* Part II.

breakfasts as well as alcohol service.[213] Following the court order to grant the DiLauras an accommodation, the town would likely have a difficult time explaining to other landowners why they must abide by the very rule the DiLauras were excused from. Courts should recognize RLUIPA's disenfranchisement effect and related downstream impacts as third-party harms.

Another example of RLUIPA's adverse impact on local governments is the potential interference with local initiatives designed to enhance a community.[214] For example, in *Centro Familiar Cristiano Buenas Nuevas v. City of Yuma*, a town sought to revive its downtown area and considered attracting nightlife venues to be the best method of doing so.[215] In place at the time was a state law banning liquor-selling establishments within 300-feet of a church.[216] To comply with the state law and achieve its desired rejuvenation outcome, the town banned churches from locating to the downtown area.[217] The court found that the town's policy violated RLUIPA.[218] Applying a national law to a local land-use problem would have forced the town to allow churches into the downtown area, foregoing the best chance at neighborhood rejuvenation.[219] Forgoing its plans would have resulted in significant tax revenue loss and the rejuvenation of a small local economy, too small to ever be part of a national solution.[220]

RLUIPA's creation of a national solution to resolve local problems creates high negative external costs for towns otherwise treating religious institutions fairly. The impact of a RLUIPA accommodation leads to less responsive local government and disenfranchised residents. Furthermore, threats of an expensive and drawn-out trial likely means localities will settle, even if they may ultimately prevail on the merits. A

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213 DiLaura v. Ann Arbor Charter Twp., No. 00–1846, 2002 WL 273774 (6th Cir. Feb. 25, 2002).

214 Although all government decisions can be said to be related to the voter, the suggested solutions to voter disenfranchisement, and town planning, are different. *See infra* Section IV.D.

215 Centro Familiar Cristiano Buenas Nuevas v. City of Yuma, 651 F.3d 1163 (9th Cir. 2011).

216 *Id.* at 1166.

217 *Id.*

218 *Id.* at 1175.

219 By the time this case reached the Ninth Circuit, Arizona had overturned the liquor license law at issue in this case. The case was not moot because the church still had a viable damage claim. *See id.* at 1167–76.

220 The circuit courts have been split on the issue of whether revenue maximization can be a valid basis for denying a RLUIPA accommodation. *See, e.g.*, Tree of Life Christian Sch. v. City of Upper Arlington, 905 F.3d 357, 371 (6th Cir. 2018) (revenue maximization is a valid reason to deny an accommodation); Int'l Church of Foursquare Gospel v. City of San Leandro, 673 F.3d 1059, 1071 (9th Cir. 2011) (revenue maximization is not a valid reason to deny an accommodation).

balanced solution should recognize these costs as the third-party harms that they are.[221]

B. *Category Two: Landowners*

Towns cannot always be relied upon to serve the needs of their residents. Here, third-party harms arising from an accommodation fall entirely on neighboring landowners.[222] When only a few landowners are impacted by a RLUIPA accommodation, they may find that their local officials are more interested in avoiding an expensive lawsuit that may, in the best-case scenario, benefit only a few residents. This outcome seems even more likely given the multi-million-dollar verdicts that have occasionally been awarded to prevailing religious institutions.[223] Politicians, interested in gaining the most votes, cannot be relied upon to prevent third-party harms against a small group of injured property owners—even when their injury is great. However, high costs falling on a discrete group of people precisely describes the kind of third-party harms the Court deems impermissible.[224]

An opinion from a Texas appellate court provides a superb example of a town's unwillingness to enforce its own zoning code when faced with the threat of a RLUIPA suit, despite the third-party harm leveled on neighboring landowners.[225] In *Schmitz v. Denton Cnty. Cowboy Church*, the Cowboy Church purchased land in a residential neighborhood and soon thereafter began construction on a 61,000 square foot arena in which the Church planned to conduct weekly rodeo events.[226] After construction began and neighbors raised complaints with the town, the Church applied for a specific-use commercial-building permit, and to have their land rezoned as agricultural.[227] The town convened a special meeting to discuss the proposed changes, but the decision seemed to have already been made.[228] The agenda for the meeting stated that the arena "is considered to be part of the [C]hurch

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221 *See infra* Section IV.D.

222 This Note makes no distinction between landowners and renters, under the assumption that harms to renters will flow through to the property owner. However, there may be instances where what is bad for tenants is good for landlords.

223 The cost of losing an RLUIPA suit can run into the millions of dollars. *See, e.g.*, Reaching Hearts Int'l, Inc. v. Prince George's Cnty., 584 F. Supp. 2d 766, 780 (D. Md. 2008) ($3.7 million jury verdict).

224 *See generally supra* Part III (discussing the Court's jurisprudence on third-party harms).

225 Schmitz v. Denton Cnty. Cowboy Church, 550 S.W.3d 342 (Tex. App. 2018).

226 *Id.* at 347–49.

227 *Id.*

228 *Id.*

and should be allowed under [RLUIPA]."[229] Unsurprisingly, and over the dissent of seven out of the eight notified residents, the town approved the zoning change and the requested special-use permit.[230] The trial court affirmed the changes, finding that any other decision would have constituted a substantial burden in violation of RLUIPA.[231] Although the appellate court disagreed with the trial court's reading of RLUIPA, it nevertheless upheld the town's decision, without questioning at all the impact on the third parties.[232]

After losing at the zoning commission, Schmitz, a resident opposed to the rezoning, raised several ways in which the new 61,000-foot arena, sitting eighty feet from his property line, would directly harm his property interest.[233] Schmitz claimed, inter alia, that the quiet enjoyment of his property would be compromised by the "noise, dust, light, and odor" emanating from the arena and also noted the impact on his property value.[234] In the end, the court allowed Schmitz to go forward with a private nuisance suit, but found Schmitz lacked standing to enforce the zoning laws.[235] The *Schmitz* case highlights the difficulties residents can face when going up against a religious institution armed with RLUIPA. The zoning board's near-unanimous decision, granting the Church permission to engage in rodeos in the middle of a residential neighborhood, demonstrates the lengths politicians go to avoid becoming embroiled in a RLUIPA suit. In cases like *Schmitz*, harm arising from a religious accommodation fall entirely on neighboring residents.

C. *Category Three: The Hybrid Cases*

A hybrid case injures both Category One and Category Two groups from the same RLUIPA accommodation. In this group of cases, harms are suffered by both the locality, as well as by property owners in their personal capacities.[236] It seems clear that residents will not remedy the kinds of third-party harms felt by localities—even if private parties were interested in taking on such a suit, it is unlikely they will meet the

229 *Id.*

230 *Id.* at 350.

231 *Id.* at 351.

232 *Id.* at 359.

233 *Id.* at 363.

234 *Id.* at 357, 363.

235 *Id.* at 360–62.

236 *See supra* Sections IV.A–B (discussing third-party harms to governments and individuals, respectively).

standing requirements.[237] Similarly, towns cannot be expected to avenge harms suffered by landowners in their individual capacity, even if they have standing do so. It is unclear if an injury to a private party's property interest can constitute a compelling governmental interest on its own. Even if a town could bring a case on behalf of its resident landowners, the landowners would likely be better off bringing the case themselves if courts determine an easier legal standard applies. Therefore, it seems likely that when cases present third-party harms to both individuals and towns, towns will not pursue damage actions on a landowner's behalf. A holistic view accounting for third-party harms to both groups of interested parties can help synthesize solutions in hybrid cases, accounting party types, and their unique harms.

D. *Potential Solutions*

This Note argues that third-party harms can arise from RLUIPA accommodations.[238] Furthermore, harms vary based on who the injured party is. It should follow that remedies should account for the kinds of harms suffered by each party. The primary harms towns suffer are based on federalism principles. On the other hand, the primary concern for residents is tied to their property interest, presented in the form of reduced property values, reduced enjoyment from their property, and denial of their bargain. While denying a religious institution an accommodation may prevent third-party harms for both groups, courts need not resort to a total accommodation denial just to prevent third-party harms. There may be strong mitigating factors that justify granting an accommodation. Instead, courts should take a holistic view of all potential third-party harms that may arise from a RLUIPA accommodation. Accommodations that may otherwise give rise to impermissible third-party harms can be mitigated using one of the methods specified in this Section.

1. Local Government

A broad reading of local and state governments' roles is the first step to mitigating third-party harms arising from RLUIPA accommodations. Courts should be highly deferential to local

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237 *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 555–56 (1992) (articulating standing requirements); *see also Schmitz*, 550 S.W.3d at 359–60 (finding private resident lacked standing to enforce the towns zoning laws).

238 *See supra* Sections IV.A–C.

government and acknowledge the unique land-use role local governments are tasked with. Within the statutory framework of RLUIPA, courts should avoid a cabined view of what constitutes a compelling governmental interest. Even if some compelling governmental interests can be addressed only by denying an accommodation, many, if viewed as a third-party harm, can be mitigated, thereby allowing the accommodation without the accompanying injury. For example, circuit courts are split on whether a loss of tax revenue should constitute a compelling governmental interest.[239] The main argument against recognizing revenue as a compelling interest is a concern that doing so will result in RLUIPA accommodations always being avoided.[240] Essentially, courts hesitate to recognize legitimate interests when doing so will result in curtailing accommodations. But courts should not decide what constitutes a compelling interest based on its impact on religious institutions. Rather, compelling interests should be considered in the context of its impact on the town. Viewed through the lens of the third-party harm doctrine, broadly recognizing compelling interests need not interfere with RLUIPA accommodations. Rather, when accommodations interfere with governmental interests, offsetting measures, such as payment for lost revenue, can be used to mitigate external costs. Sometimes, third-party costs are less measurable—but equally present—as in cases involving the reduced impact of local democratic processes, or increased lawlessness.[241] In these cases, courts should readily recognize potential harms arising from a RLUIPA accommodation and take steps to mitigate these harms. Courts can mitigate these third-party harms by making accommodations contingent on greater community involvement in the accommodation process.

2. Landowners

Landowners should not be burdened by third-party harms arising from RLUIPA accommodations. Forcing accommodation costs on landowners runs afoul of Supreme Court jurisprudence and risks falling outside the legitimate bounds of the First Amendment's religion

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239 *See* Tree of Life Christian Sch. v. City of Upper Arlington, 905 F.3d 357, 371 (6th Cir. 2018) ("Revenue maximization is a legitimate regulatory purpose."). *But see* River of Life Kingdom Ministries v. Vill. of Hazel Crest, 611 F.3d 367, 392 (7th Cir. 2010) (finding loss of tax revenue on its own is not a compelling governmental interest).

240 *River of Life Kingdom Ministries*, 611 F.3d at 392 ("[T]he marginal loss of tax revenue attributable to the establishment of a tax-exempt religious use in the district cannot be considered irreparable harm; if it were, then no injunction under RLUIPA would ever be possible.").

241 *See supra* Section IV.A.

clauses.[242] Furthermore, residents should not be held to the exacting legal strict scrutiny standard RLUIPA places on governments. RLUIPA's statutory text explicitly states that it applies to government actions, making no mention of private landowners.[243] As with third-party harms to governments, RLUIPA accommodations need not be denied solely based on impermissible third-party harms to residents. Rather, RLUIPA accommodations should be conditioned upon third-party harms to landowners being mitigated.

The best method for resolving third-party harms on residents is using the well-established nuisance doctrine. Traditionally, the nuisance doctrine armed landowners with a legal right to enjoin a neighboring landowner's land use that interfered with their reasonable enjoyment.[244] Old nuisance law made no distinction between when a nuisance activity began, and when a nuisance asserting party arrived.[245] Today's nuisance law, with roots in the law and economics movement, is more nuanced.[246] The modern approach maintains a neighbor's nuisance claim but asks courts to weigh the cost of enjoining the nuisance.[247] Courts compare the harm to a landowner with the cost of an injunction.[248] When an injunction's costs exceed the benefits landowners would gain, rather than issue an injunction, courts will order nuisance causing parties to pay for the right to continue their nuisance behavior.[249]

Applying nuisance law to instances where RLUIPA accommodations create third-party harms provides an equitable solution for landowners and religious institutions. Although a nuisance remedy—in extreme cases—can still result is an injunction, generally, a cash remedy will suffice to make landowners whole. In those instances where an injunction is warranted, and a town either chooses not to

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242 *See supra* Part III (discussing the limits on religious accommodation based on the Supreme Court's First Amendment interpretation).

243 42 U.S.C. § 2000cc-1(a)(1) ("No *government* shall impose . . . .") (emphasis added); *see also supra* Section I.C.

244 *See, e.g.*, Sturges v. Bridgman, 11 Ch. D. 852 (C.A. 1879).

245 *Id.* (a confectioner was forced to move his mortars inside, despite years of use in the outdoor space, after a new neighbor complained about the noise).

246 *See, e.g.*, Guido Calabresi and A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1106–07 (1972).

247 *Id.*

248 *See, e.g.*, Boomer v. Atlantic Cement Co., 257 N.E.2d 870 (N.Y. 1970) (finding a cement factory created a nuisance for local landowners, the court, weighing the harm on landowners against the cost of issuing an injunction and the likely shuttering of the cement factory, chose to grant the landowners damages rather than an injunction).

249 Calabresi and Melamed, *supra* note 246, at 1105–09. (High transaction costs, such as holdouts, may frustrate any potential settlement, which, absent court mediation, will result in an injunction, barring an otherwise desirable activity).

defend a RLUIPA claim or does not meet the legal standard, landowners would have a private right they can assert to prevent the injury-causing land use. It is essential that courts recognize landowners' private right to sue because, as noted, landowners are unlikely to have standing to litigate a RLUIPA suit on a town's behalf. Denying landowners a private right of action would make them entirely reliant on their town; nothing in RLUIPA's text or statutory history supports this conclusion.[250] Furthermore, the use of nuisance law allows courts to separate baseless claims by residents, stemming from religious animosity, from those claimants alleging legitimate property-related concerns. In cases like *Schmitz* where a court finds residents' complaints based on legitimate property-related concerns, requiring religious institutions to buy out their neighbor's injunction is a fair and equitable outcome. Using nuisance law to craft solutions to land-use disputes between religious institutions and residents is far more flexible than the binary outcome RLUIPA mandates.

3. Hybrid Cases

In hybrid cases, a combination of remedies must be used. Courts should utilize a lower compelling interest bar to local governments and apply a different legal standard based on nuisance law to landowners' third-party harms. Courts should acknowledge when third-party harms exist against one plaintiff category and not the other. Thinking of third-party harms based on who is impacted allows courts to tailor narrow remedies instead of being restricted to a binary decision of whether a RLUIPA accommodation should be granted. Furthermore, courts should readily acknowledge a government's standing to litigate personal harms on behalf of its residents and be willing to grant residents relief.

CONCLUSION

Courts must inquire into third-party harms that will arise from a RLUIPA accommodation. In so doing, courts should take a wide view of what constitutes a third-party harm, realizing that in RLUIPA suits not all parties are harmed in the same way. By acknowledging the presence or third-party harms, courts should move away from binary decision-making on whether a RLUIPA accommodation should be granted. Any RLUIPA accommodation giving rise to third-party harms

250 *See supra* Section IV.B.

must be accompanied by contingent mitigating conditions. Third-party harms have long been the upper limit on religious accommodations, and RLUIPA land-use accommodations should be treated the same.