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Religious Land Use - Eleventh Circuit Broadly Interprets Religious Land Use and Institutionalized Persons Act of 2000 to Leave Local Governments Nearly Powerless to Zone Houses of Worship

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RELIGIOUS LAND USE—ELEVENTH CIRCUIT BROADLY INTERPRETS RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT OF 2000 TO LEAVE LOCAL GOVERNMENTS NEARLY POWERLESS TO ZONE HOUSES OF WORSHIP

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THE Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA") prohibits local governments from discriminating against houses of worship in land use decisions and the exercise of religious freedom by institutionalized persons.[1] The Eleventh Circuit broadly applied RLUIPA in *Midrash Sephardi, Inc. v. Town of Surfside*,[2] when it found that Surfside, Florida, could not prohibit two synagogues from locating in its downtown business district.[3] Congress passed RLUIPA in an effort to reverse the Supreme Court's decision in *City of Boerne v. Flores*,[4] which held that the earlier Religious Freedom Restoration Act of 1993 ("RFRA") was unconstitutional because Congress exceeded its enforcement power under section 5 of the Fourteenth Amendment.[5] RLUIPA focused only on prohibiting religious discrimination by state and local governments in land use zoning, as well as institutionalized persons' religious exercise, by providing a narrower standard for improper religious discrimination as compared to the language of RFRA. The Eleventh Circuit not only upheld RLUIPA's constitutionality, but the court also gave such a broad reading to the language of the

1. 42 U.S.C. § 2000cc (2000).

2. 366 F.3d 1214 (11th Cir. 2004), *cert. denied*, 125 S. Ct. 1295 (Feb. 22, 2005). The Supreme Court recently ruled that the institutionalized persons portion of RLUIPA in section 3(a) is constitutional under the Establishment Clause; however, it did not comment on the land use section of RLUIPA. Cutter v. Wilkinson, No. 03-9877, 2005 WL 1262549 (U.S. May 31, 2005).

3. *Midrash Sephardi, Inc.*, 366 F.3d at 1218-20, 1243.

4. 521 U.S. 507 (1997).

5. *Id.* at 536. RFRA prohibits any government entity from substantially burdening a person's exercise of religion unless the government could demonstrate the burden was in furtherance of a compelling governmental interest. 42 U.S.C. § 2000bb (1993).

statute that, as a practical manner, nearly all zoning regulations for any religious activity may now be forbidden.

The statutory tests for a violation of RLUIPA originated from a line of Free Exercise Clause cases beginning in 1990.[6] Before 1990, most courts applied the strict scrutiny test of *Sherbert v. Verner*,[7] a 1963 Supreme Court decision that asked whether the law substantially burdened a religious practice and, if it did, whether the burden was justified by a compelling interest. But, the Court's decision in 1990 in *Employment Division, Department of Human Resources v. Smith* eliminated the strict scrutiny test for government action in some cases because the Court held that "neutral law of general applicability" that only incidentally impacts the practice of religion does not have to be subjected to a strict scrutiny test.[8] Three years later, Congress passed RFRA to restore the *Sherbert* strict scrutiny test and "to provide a claim or defense to persons whose religious exercise is substantially burdened by government."[9] However, *City of Boerne v. Flores* held RFRA unconstitutional four years later.[10] In response, Congress passed RLUIPA in 2000 to require state and local government decisions to undergo a strict scrutiny test if they significantly burden religion in the areas of land use and institutionalized persons.[11]

In interpreting RLUIPA for the first time, the Eleventh Circuit considered the complaints of Surfside, a small beach town south of Miami Beach with 4,300 residents.[12] Surfside divided the city into eight zoning districts, with churches and synagogues zoned to the residential district and prohibited in the two-block business district.[13] Surfside's primary goals in writing the zoning ordinances were to create a strong tax base and to protect the character and location of future land uses.[14] The city also required churches and synagogues to obtain a conditional use permit.[15] Midrash Sephardi and Young Israel, two orthodox synagogues, had about 100 members who lived in or around Surfside.[16] Midrash leased the second floor of a bank in the business district to hold ser-

6. *See* 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, 323-24 (2003) (providing explanatory background of RLUIPA).

7. 374 U.S. 398, 406 (1963) (holding that denial of unemployment benefits to a member of the Seventh-day Adventist Church, who quit her job rather than work on Sabbath Day violated the Free Exercise Clause).

8. 494 U.S. 872, 879, 882-85 (1990).

9. City of Boerne v. Flores, 521 U.S. 507, 515-16 (1997) (quoting RFRA, 42 U.S.C. § 2000bb(b) (1993)).

10. *Id.* at 536.

11. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES 1217 (2d ed. 2002).

12. Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1219 (11th Cir. 2004).

13. SURFSIDE, FLA. CODE §§ 90-41(b)(1), 90-147(d), 90-152(a)-(e).

14. *Midrash Sephardi, Inc.*, 366 F.3d at 1221-22.

15. Surfside required conditional use permits when the use was public or semi-public in nature and when the nature of the land use might impact neighboring property. SURFSIDE, FLA. CODE § 90-41(d).

16. *Midrash Sephardi, Inc.*, 366 F.3d at 1219.

vices.[17] Surfside denied Midrash's applications for a special use permit and zoning variance because the congregation did not provide written permission from the bank.[18] Young Israel leased a space in a hotel in the tourist district, but it failed to apply for a conditional use permit or zoning variance.[19]

Because followers of Orthodox Judaism are not allowed to use any form of transportation on their Sabbath, they must walk to the synagogue to attend weekly services.[20] The synagogues claimed that the residential district is too far for many members to walk from their homes.[21] Surfside argued that the zoning requirements limiting churches and synagogues to the residential district would maintain city revenue by providing a strong tax base in the business district.[22] This disagreement led to the filing of the lawsuit.

Surfside initially sued Midrash and New Israel in state court in 1999 to end their use of the sites in the business district and to enforce penalties for alleged violations of the Surfside Code; however, the lawsuits were eventually removed to federal court and dismissed without prejudice.[23] Midrash and New Israel then filed suit in federal court for declaratory and injunctive relief from the ordinances under 42 U.S.C. § 1983, to which Surfside counterclaimed to enforce its zoning regulation.[24] To support its motion for summary judgment, Surfside presented evidence from land use experts that the presence of churches and synagogues in the business district would decrease Surfside's tax base, while the synagogues submitted evidence regarding their activities and the burden on their members in moving to the residential district.[25] The district court granted summary judgment for Surfside reasoning that under the *Smith* test the city code was neutral and of general applicability and therefore did not have to be justified by a compelling government interest.[26] Furthermore, the district court held that the statute inflicted at most a minimal burden on the plaintiffs, and there was no evidence of religious animus on the part of Surfside in passing the zoning ordinance.[27] The synagogues filed an amended complaint in November 2000, a month after RLUIPA went into effect, with a RLUIPA-based claim, and the district court again granted summary judgment in favor of Surfside.[28]

On appeal, the Eleventh Circuit reversed the district court and held in

17. *Id.* at 1220.
18. *Id.*
19. *Id.* at 1220-21.
20. *Id.* at 1221.
21. *Id.*
22. *Id.* at 1221-22.
23. *Id.* at 1222.
24. *Id.*
25. *Id.*
26. Midrash Sephardi et. al. v. Town of Surfside, No. 9901566-CIV, 2000 U.S. Dist. LEXIS 22629, at *21-22 (S.D. Fla. Jul. 13, 2000) (citing Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 879 (1990)); *see also supra* text accompanying note 6.
27. *Midrash Sephardi et al.*, 2000 U.S. Dist. LEXIS 22629, at *26.
28. *Midrash Sephardi, Inc.*, 366 F.3d at 1222.

favor of the synagogues.[29] In interpreting RLUIPA, the appeals court focused on two provisions: section (a)(1), the "substantial burden" provision, and section (b)(1), the "equal terms" provision.[30] The "substantial burden" provision provides:

> General Rule—No government shall impose or implement a *land use regulation* in a manner that imposes a *substantial burden* on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution—
> (A) is in furtherance of a *compelling government* interest; and
> (B) is the least restrictive means of furthering that compelling governmental interest.[31]

The Eleventh Circuit first recognized that the zoning regulations imposed no "substantial burden" on the synagogues.[32] The court explained that prior case law teaches that zoning regulations do not impose a substantial burden on religious exercise.[33] The court, however, distinguished these cases from RLUIPA by noting the difference in the definition of "religious exercise," which the prior case law defined as something "integral to a believer's faith."[34] In contrast, RLUIPA provides a broader definition of religious exercise that includes "use, building, or conversion of real property for the purpose of religious exercise."[35] Based on the RLUIPA definition, the court focused on whether the zoning regulations inflicted a substantial burden on the "congregations' use of real property for the purpose of religious exercise."[36] The Eleventh Circuit chose to define a substantial burden as that which "place[s] more than an inconvenience on religious exercise" and is "akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly."[37] Based on this definition, the court concluded that the

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29. *Id.* at 1219.

30. *Id.* at 1225.

31. 42 U.S.C. § 2000cc(a)(1) (2000) (emphasis added). RLUIPA defines "land use regulation" as a "zoning or landmarking law, or the application of such a law, that limits or restricts a claimant's use or development of land (including a structure affixed to land), if the claimant has . . . [a] leasehold . . . in the regulated land or a contract or option to acquire such an interest." 42 U.S.C. § 2000cc 5(5) (2000).

32. *Midrash Sephardi, Inc.*, 366 F.3d at 1228.

33. *Id.* at 1225-26 (citing Grosz v. City of Miami Beach, 721 F.2d 729, 739 (11th Cir. 1983) (holding that city's zoning law "[did] not prohibit religious conduct per se"); Christian Gospel Church, Inc. v. City of San Francisco, 896 F.2d 1221, 1224 (9th Cir. 1990) (holding that city's church permit requirement only created a burden of "convenience and expense"); Messiah Baptist Church v. County of Jefferson, 859 F.2d 820, 824-25 (10th Cir. 1988) (holding that there was no evidence that building a church on the particular site was "intimately related to the religious tenets of the church")).

34. *Midrash Sephardi, Inc.*, 366 F.3d at 1226.

35. 42 U.S.C. § 2000cc-5(7)(B) (2000).

36. *Midrash Sephardi, Inc.*, 366 F.3d at 1226.

37. *Id.* at 1227. The Eleventh Circuit declined to follow the Seventh Circuit's recent definition of "substantial burden" as "one that necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise . . . effectively impracticable." *Midrash Sephardi, Inc.*, 366 F.3d at 1227 (quoting Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752, 761 (7th Cir. 2003)).

synagogues suffered no significant religious burden. There was no indication that the location in the business district had specific religious significance, and while walking a greater distance may be burdensome, the court held it was not a substantial burden.[38]

The synagogues fared better on their challenge under the "equal terms" provision in section (b)(1), which provides that "[n]o government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than *equal terms* with a nonreligious assembly or institution."[39] Most importantly, the Eleventh Circuit treated the substantial burden provision as operating independently from the equal terms provision.[40] In other words, regardless of whether the zoning ordinance imposed a substantial burden on the religious assembly, the ordinance could still violate the equal terms provision of RLUIPA. Moreover, the court reasoned that although section (b)(1) "has the 'feel' of an equal protection law, it lacks the 'similarly situated' requirement usually found in equal protection analysis."[41] The district court applied similarly situated analysis and held that "private clubs and other secular institutions are not similarly situated to churches and synagogues because 'private clubs provide more of a social setting and provide more synergy for the shopping district.'"[42] In contrast, the Eleventh Circuit, compared the dictionary definitions for "assembly," "institution," "church," and "synagogue." Based on the definitions, the court concluded that churches, synagogues, and private clubs are all within the "natural perimeter" of an "assembly or institution."[43] By finding houses of worship within the "natural perimeter" of private clubs, the court then easily found that any difference in treatment among all the facilities in this expansive definition constituted discrimination and was a violation of section (b)(1).[44]

The Eleventh Circuit recognized, however, that an ordinance violating RLUIPA's equal terms provision must undergo a strict scrutiny test to determine whether the ordinance was narrowly tailored to advance a compelling interest of the local government.[45] In doing so, the court rejected Surfside's request to apply rational basis review, which would have

38. *Id.* at 1228. Deposition testimony in the record indicated that those who practice Orthodox Judaism usually move where synagogues are located and do not expect the synagogues to move closer to them. *Id.*

39. 42 U.S.C. § 2000cc(b)(1) (2000) (emphasis added).

40. *Midrash Sephardi, Inc.*, 366 F.3d at 1229.

41. *Id.* at 1229 (citing City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 447-50 (1985) (establishing similarly situated analysis of comparing land uses in an equal protection case and applying rational basis review)).

42. *Id.* at 1230 (citing Midrash Sephardi et al. v. Town of Surfside, No. 99-1566-CIV, 2000 U.S. Dist. LEXIS 22629, at *17 (S.D. Fla. Jul. 13, 2000)).

43. *Id.* at 1230-31 (citing Walz v. Tax Comm'n, 397 U.S. 664, 696 (1970) (Harlan, J., concurring) (explaining "[t]he critical question is whether the circumference of legislation encircles a class so broad that it can be fairly concluded that religious institutions could be thought to fall within the natural perimeter.")).

44. *Id.* at 1231.

45. *Id.* at 1232.

considered whether the law was rationally related to a legitimate purpose of Surfside's government.[46] In applying its interpretation of RLUIPA strict scrutiny review, the court explained that RLUIPA allows courts to decide whether classifications used by local government "subtly or covertly depart from requirements of neutrality and general applicability."[47] Upon review of the Surfside zoning law, the court concluded that the law violated the equal terms provision by not being neutral and generally applicable, therefore targeting religious groups and violating the free exercise requirement of "neutrality and general applicability."[48] The Eleventh Circuit noted that Surfside did not offer any evidence demonstrating that private clubs contribute to the business district any differently than religious institutions.[49]

Even assuming that the statute is constitutional, the Eleventh Circuit's reasoning is a warning to any city that it must carefully consider its zoning decisions to avoid a violation of the equal terms provision of RLUIPA. In *Midrash*, even without any evidence of religious animus or substantial burden on a religious group, Surfside was found in violation of RLUIPA.[50]

The Eleventh Circuit reached its conclusion through a strained interpretation of two provisions. First, the court incorrectly applied a "natural perimeter" standard in its equal terms provision analysis, which does not reflect traditional equal protection constitutional principles, and is not specified in RLUIPA. *City of Boerne* explained that when Congress codifies constitutional principles, it cannot substantively change them.[51] The traditional equal protection analysis for challenges to zoning laws is the *Cleburne* "similarly situated" analysis of comparing the land uses, and if they are treated differently, there must be a rational basis for the difference.[52] But the Eleventh Circuit applied "natural perimeter" analysis, instead of the *Cleburne* "similarly situated" analysis, by examining only whether the two land uses of houses of worship versus businesses and private clubs fell into the "natural perimeter" of each other.[53] This analysis presents problems because it allows courts to include land uses as being in the "natural perimeter" of each other that would not be considered "similarly situated" under *Cleburne*. Churches and synagogues under the court's analysis, for example, would be in the "natural perimeter" of theaters, stadiums, restaurants, and bars, which are all land uses where people can congregate. Thus, the Eleventh Circuit's application of its "natural perimeter" test makes it almost impossible for any city to zone houses of worship since people can gather almost anywhere. Furthermore, it at-

46. *Id.* at 1231.
47. *Id.* at 1232.
48. *Id.* at 1233.
49. *Id.* at 1234.
50. *See id.* at 1235.
51. City of Boerne v. Flores, 521 U.S. 507, 519 (1997).
52. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 447-50 (1985) (discussing the similarly situated standard).
53. *Midrash Sephardi, Inc.*, 366 F.3d at 1230.

taches to RLUIPA a test that rejects the established equal protection analysis of *Cleburne*, and creates, in essence, a new constitutional test for equal protection contrary to the reasoning of *City of Boerne*.[54]

Second, the court incorrectly interpreted RLUIPA by ignoring the need to prove a substantial burden before considering the equal terms provision. By interpreting the statute's section (a) "substantial burden" provision and section (b)(1) "equal terms" provision as separate causes of action, a plaintiff does not have to show a substantial burden on religious exercise to prove an "equal terms" violation under section (b)(1).[55] But Senators Hatch and Kennedy, co-authors of RLUIPA, explained during Senate hearings that sections (b)(1) and (2) "enforce the Free Exercise Clause rule against laws that burden religion and are not neutral and generally applicable" and that "the party asserting a violation of this Act shall in all cases bear the burden of proof that the governmental action in question constitutes a substantial burden on religious exercise."[56] Furthermore, as support for its position, the Eleventh Circuit cited dicta from *Civil Liberties for Urban Believers v. City of Chicago*,[57] that the section (a)(1) "substantial burden" provision and section (b)(2) "nondiscrimination" provision are independent of one another.[58] But the Seventh Circuit did not analyze the legislative history in drawing its conclusion. Most importantly, the language of the statute supports the application of the substantial burden test to the equal terms provision. In particular, the language of the government discretion provision in section 3(e) indicates that the statute's requirements must be read together by providing that "a government may avoid the preemptive force of *any provision* of [RLUIPA] by changing the policy or practice *that results in a substantial burden* on religious exercise . . . ."[59] This provision, which allows city governments to correct regulations that are a substantial burden and avoid "any provision" of RLUIPA, further indicates Congress's intent that a substantial burden must be found for an equal terms violation. In short, the Eleventh Circuit's interpretation conflicts with the statutory language and the legislative history and erroneously broadens the application of RLUIPA by allowing religious institutions that otherwise would not have a cause of action to bring suits under RLUIPA's "equal terms" provision.

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54. *See City of Boerne*, 521 U.S. at 519.

55. *See Midrash Sephardi, Inc.*, 366 F.3d at 1229.

56. 146 CONG. REC. S7774-76 (daily ed. Jul. 27, 2000) (joint statement of Sens. Hatch and Kennedy).

57. 342 F.3d 752, 762 (7th Cir. 2003) (holding in favor of the city and affirming the validity of a zoning ordinance under RLUIPA's governmental discretion provision, which allows a city to avoid a RLUIPA violation if it changes the provision causing the substantial burden). The section (b)(2) nondiscrimination provision referred to in *Civil Liberties* is not at issue in the *Midrash* case.

58. *Midrash Sephardi, Inc.*, 366 F.3d at 1227.

59. 42 U.S.C. § 2000cc3(e). The Seventh Circuit in *Civil Liberties*, the very case the Eleventh Circuit relied on to support its separate analysis of the provisions, acknowledged that the governmental discretion provision "appears not to reflect this distinction," which supports reading the two provisions together. 342 F.3d at 762.

Apart from whether RLUIPA meets the constitutional tests, cities are still faced with the interpretation of its statutory language. Based on the Eleventh Circuit's decision in *Midrash*, local governments must now consider whether it is even possible to zone to exclude houses of worship from any area of a city.