THE QUEST FOR CONGRUENCE: WHY THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT SHOULD APPLY TO EMINENT DOMAIN

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I. INTRODUCTION

Eminent domain and zoning authority are two important tools municipalities and states employ to control land use within their borders. When a state or municipality's right to control land use intersects with an individual's right to use his property as he sees fit, it is not uncommon for tensions to rise. For example, in *Kelo v. City of New London*[1] the Supreme Court of the United States held that an economic development plan constituted a public use under the Takings Clause of the Fifth Amendment of the United States Constitution,[2] thereby making it easier for municipalities to take property that is not generating tax revenue and local spending. State legislatures reacted to *Kelo* with a firestorm of legislation aimed at limiting local eminent domain powers.[3]

The issue of land use control through zoning and eminent domain becomes even more heated when state authority conflicts with an individual's First Amendment right to freely exercise his religious beliefs, as protected by the Constitution's Free Exercise Clause.[4] Seeking to balance the state's right to control land use with the individual's free exercise right, Congress passed the Religious Land Use

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[1] 545 U.S. 469 (2005).

[2] *Id.* at 483–89.

[3] Patricia H. Lee, *Eminent Domain: In the Aftermath of* Kelo v. New London, *a Resurrection in Norwood: One Public Interest Attorney's View*, 29 W. NEW ENG. L. REV. 121, 134 (2006) (noting that "[i]mmediately following the United States Supreme Court's 2005 *Kelo* decision, 'legislatures in 28 states have introduced more than 70 bills aimed at curbing local eminent domain powers'").

[4] U.S. CONST. amend. I ("Congress shall make no law . . . prohibiting the free exercise [of religion] . . . .").

and Institutionalized Persons Act (RLUIPA) in 2000.[5] RLUIPA provides that government regulations that substantially burden the free exercise of religion may be imposed only to further a compelling government interest and must be narrowly tailored to achieve that interest.[6] This standard is also known as the strict scrutiny test.[7] Adopting the individualized assessment distinction set forth in *Employment Division v. Smith*,[8] RLUIPA mandates strict scrutiny review of individualized applications of regulatory land use laws.[9] Surprisingly, RLUIPA is written to apply only to zoning and landmarking laws that substantially burden religious exercise. However, religious institutions are particularly vulnerable to takings in the post-*Kelo* environment, and several facing condemnation have used RLUIPA to challenge the exercise of eminent domain authority as well.[10] Whether land use regulation burdens free exercise through the application of a zoning law or through the exercise of eminent domain, both land use tools require an individualized assessment of their impact on the target property, and therefore under *Smith* both require a strict scrutiny analysis if their application burdens the free exercise of religion.[11] Applying RLUIPA to zoning and landmarking laws but not to exercises of eminent domain risks inconsistency and divergent case law. Alternatively, applying RLUIPA to both zoning laws and takings would develop precedent and consistency within the category of land use control of religious property.

This Comment argues that eminent domain, like zoning, should be subject to strict scrutiny review under RLUIPA. Part II discusses a pending case, *Albanian Associated Fund v. Township of Wayne*,[12] to illu-

[5] 42 U.S.C. §§ 2000cc to 2000cc-5 (2006). RLUIPA was Congress's second attempt to provide protection for free exercise following the invalidation of the Religious Freedom Restoration Act of 1993 in *City of Boerne v. Flores*. Religious Freedom Restoration Act (RFRA) of 1993, Pub. L. No. 103-141, 1993 U.S.C.C.A.N. (107 Stat.) 1488, *invalidated by* City of Boerne v. Flores, 521 U.S. 507 (1997) (codified as amended at 42 U.S.C. §§ 2000bb to 2000bb-4 (2006)).

[6] 42 U.S.C. § 2000cc(a)(1).

[7] *See, e.g.*, Tenafly Eruv Ass'n v. Borough of Tenafly, 309 F.3d 144, 165 n.24 (3d Cir. 2002) (stating that in order to meet the strict scrutiny standard, a law must be "narrowly tailored to advance a compelling government interest").

[8] 494 U.S. 872 (1990).

[9] *See infra* Part VII. *Smith* provides that where a generally applicable law has the incidental effect of burdening the free exercise of religion, the Free Exercise Clause is not frustrated. *Smith*, 494 U.S. at 893 (O'Connor, J., concurring). However, if the individualized application of a state law burdens free exercise, that law must pass strict scrutiny review. *Id.* at 894.

[10] *See infra* Part IV.

[11] *Smith*, 494 U.S. at 878 (majority opinion).

[12] No. 06-3217 (D.N.J. filed July 17, 2006).

strate how eminent domain may hamper free exercise. Part III outlines the history and discusses the relevant provisions of RLUIPA. Part IV describes the current debate over whether RLUIPA should apply to eminent domain actions through a discussion of current case law. Part V argues that eminent domain may be exercised in a manner that is analogous to the application of a zoning law, and therefore should be similarly subject to strict scrutiny review when it burdens free exercise. Part VI illustrates how zoning and eminent domain are used together to achieve the broader purpose of land use regulation, and thus both should be reviewed using a strict scrutiny analysis. Part VII discusses the need for strict scrutiny review of eminent domain condemnations of religious property post-*Kelo*. Ultimately, this Comment argues that since government frequently exercises both its zoning and eminent domain authority for the broader purpose of land use regulation, eminent domain challenges, like zoning challenges, should receive strict scrutiny review under RLUIPA.

II. EMINENT DOMAIN AND RLUIPA: AN ILLUSTRATION OF THE PROBLEM

On July 17, 2006, the Albanian Associated Fund (AAF) filed a complaint against the Township of Wayne ("township") alleging that the township improperly delayed the AAF's land development application to build a mosque on AAF property, despite the fact that religious worship was a permitted use within that zone.[13] The AAF, a religious non-profit organization, was created for the purpose of establishing a mosque to provide a public place of worship for the Albanian Muslim community in northeastern New Jersey.[14] The community, which numbered approximately two hundred at the time the complaint was filed, had been using a facility that was inadequate in terms of size and location.[15] To meet the needs of its congregation, the AAF purchased the disputed property in October 2001.[16] On October 17, 2002, the AAF submitted a land development application to the township stating its intention to develop the property as a religious facility.[17] In an attempt to address the township's concerns regarding a potential increase in automobile traffic and damage to

[13] Complaint at 2, Albanian Associated Fund v. Twp. of Wayne, No. 06-3217 (D.N.J. filed July 17, 2006).

[14] Plaintiff's Memorandum in Support of Preliminary Injunction at 5, Albanian Associated Fund v. Twp. of Wayne, No. 6-3217 (D.N.J. filed July 17, 2006).

[15] *Id.*

[16] Complaint, *supra* note 13, at 22.

[17] *Id.* at 29.

the environment, the AAF revised its site plan three times and appeared before the township planning board over twenty times from February 2003 through May 2006.[18] Finally, on April 5, 2006, the township passed a resolution in furtherance of its "Open Space and Recreation Plan" that sought to condemn the AAF's property, thus putting an end to the AAF's development application.[19] The township further stated that the mosque property "was identified . . . for preservation."[20]

The AAF challenged the condemnation as a violation of the Free Exercise Clause of both the United States Constitution[21] and the New Jersey Constitution,[22] the Equal Protection Clause of both the United States Constitution[23] and the New Jersey Constitution,[24] the "public use" requirement of the Takings Clause of the United States Constitution,[25] and the New Jersey Law Against Discrimination.[26] Further, the AAF argued that the condemnation imposed a substantial burden on the AAF's free exercise of religion in violation of RLUIPA.[27] The township's motion for summary judgment was denied on October 1, 2007.[28]

Albanian Associated Fund v. Township of Wayne[29] illustrates the targeted land use regulation Congress sought to address with RLUIPA. RLUIPA codified the individualized assessment exception to *Employment Division v. Smith*.[30] In *Smith*, the Supreme Court held that if a state has a system under which it may grant individualized exemptions from a generally applicable law, the state cannot decline to grant such an exemption without a compelling purpose in a situation

[18] *Id.* at 39–43.
[19] *Id.* at 55–60.
[20] *Id.* at 60.
[21] *Id.* at 75.
[22] Complaint, *supra* note 13, at 76.
[23] *Id.* at 81.
[24] *Id.* at 83.
[25] *Id.* at 85.
[26] *Id.* at 87.
[27] *Id.* at 77–79.
[28] *See* Albanian Associated Fund v. Twp. of Wayne, No. 06-3217, 2007 U.S. Dist. LEXIS 73176, at *1 (D.N.J. Oct. 1, 2007) (order denying motion for summary judgment). The U.S. Department of Justice intervened on behalf of the AAF and filed an amicus brief on July 19, 2007. Brief of the United States as Amicus Curiae in Opposition to Defendants' Motion for Summary Judgment, Albanian Associated Fund v. Twp. of Wayne, No. 06-3217 (D.N.J. filed July 19, 2007), *available at* http://www.becketfund.org/files/c1aad.pdf.
[29] 2007 U.S. Dist. LEXIS 73176 (D.N.J. Oct. 1, 2007).
[30] 42 U.S.C. § 2000cc(a)(2)(C) (2006).

where the law burdens the free exercise of religion.[31] As *Albanian Associated Fund* demonstrates, eminent domain may be used in an individualized manner; the township specifically identified the AAF property as one for preservation under its plan.[32] Because an individualized exercise of land use regulatory tools would be subject to strict scrutiny under *Smith*, the strict scrutiny standard should apply to any individualized land use control that burdens the free exercise of religion, whether it be achieved through zoning or eminent domain.

As this Comment will discuss, the exercise of eminent domain may require an individualized assessment of the taking, for example, through public hearings where the municipality or state evaluates the effect of the taking on a particular property.[33] Further, eminent domain and zoning are commonly used in conjunction for land use regulation.[34] Because eminent domain and zoning are two land use controls that are frequently used together to effect regulatory schemes, it is incongruous to apply strict scrutiny to one and not the other. RLUIPA was meant to be a comprehensive act addressing what Congress found to be the frequent burdening of free exercise within the land use context.[35] Applying strict scrutiny to one regulatory tool, zoning, and not to another, eminent domain, would lead to divergent case law, which would be an illogical result considering the frequency with which these two regulatory tools are used together and the similarities in their application.[36]

III. BACKGROUND

In 2000 Congress passed RLUIPA in an effort to address what it determined to be a frequent burdening of free exercise rights in the land use and institutional context.[37] The path leading to RLUIPA's passage began with the Supreme Court's landmark decision in *Employment Division v. Smith*.[38] Prior to *Smith*, the strict scrutiny standard

[31] Employment Div. v. Smith, 494 U.S. 872, 878 (1990).

[32] Complaint, *supra* note 13, at 60.

[33] *See infra* Part V.D.

[34] *See infra* Part VI.

[35] 146 CONG. REC. 16,698–99 (2000) (joint statement of Sens. Hatch and Kennedy).

[36] *See infra* Parts V, VI.

[37] 146 CONG. REC. 16,698 (2000) (joint statement of Sen. Hatch and Sen. Kennedy). In the institutionalized persons context, RLUIPA requires a strict scrutiny analysis of government action that substantially burdens the religious exercise of "a person residing in or confined to an institution." 42 U.S.C. § 2000cc-1(a). This Comment addresses RLUIPA in the land use context only.

[38] 494 U.S. 872 (1990).

was applied to all free exercise challenges.[39] *Smith* signaled a remarkable shift from this standard.[40]

In *Smith* the Court moved from its previous strict scrutiny examination of regulations that burdened the free exercise of religion and held that where a generally applicable law had the incidental effect of burdening free exercise, the Court would apply rational basis review.[41] The respondents in *Smith* challenged an Oregon criminal statute that prohibited the possession of controlled substances, including peyote.[42] The respondents were dismissed from employment because they had ingested peyote.[43] The Employment Division denied respondents' petition for unemployment benefits because respondents had been dismissed for "misconduct."[44] The respondents argued that the Oregon criminal statute hampered the free exercise of their religion because they had ingested the peyote as a sacrament at a ceremony of the Native American Church to which they belonged.[45] The issue before the Court was whether the Oregon statute, which did not contain an exception for the sacramental use of controlled substances, impermissibly burdened the free exercise of religion in violation of the First Amendment.[46] The Court upheld the Oregon law, stating that if hampering free exercise was "merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended."[47] However, the Court clarified that where the state had a system for granting exemptions from a generally applicable law on an individualized basis, the state could not decline such an exemption in cases where the law burdened religion without a compelling purpose.[48]

Congress reacted to *Smith* by enacting the Religious Freedom and Restoration Act (RFRA), which mandated strict scrutiny review of laws that substantially burden religious exercise, regardless of the

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[39] *See* Wisconsin v. Yoder, 406 U.S. 205, 215 (1972) (stating that "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion"); Sherbert v. Verner, 374 U.S. 398, 403 (1963) (holding that if state legislation had the incidental effect of burdening the free exercise of religion, it could be justified only by a compelling state interest).

[40] *Smith*, 494 U.S. at 891 (O'Connor, J., concurring) (stating that the Court's holding "dramatically departs from well-settled First Amendment jurisprudence").

[41] *Id.* at 878 (majority opinion).

[42] *Id.* at 875.

[43] *Id.* at 874.

[44] *Id.*

[45] *Id.*

[46] *Smith*, 494 U.S. at 874.

[47] *Id.* at 878.

[48] *Id.* at 884.

type of law.[49] Specifically, RFRA's purpose was 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 and to guarantee its application in all cases where free exercise of religion is substantially burdened."[50] However, Congress's attempt to restore strict scrutiny was short-lived; four years after its passage, the Supreme Court in *City of Boerne v. Flores* held that RFRA was unconstitutional as an impermissible exercise of Congress's remedial powers under the Fourteenth Amendment.[51]

In *City of Boerne v. Flores* the Supreme Court found that in passing RFRA Congress had overstepped its authority under the Enforcement Clause, which provides Congress with the power to remedy violations of the Fourteenth Amendment, but does not permit Congress to define the substance of Fourteenth Amendment rights.[52] Further, when Congress exercises its remedial powers, its response to a violation must be both proportional and congruent.[53] The Court held that RFRA was neither a proportional nor congruent response to a constitutional violation, but instead was a substantive change in constitutional law.[54] Because RFRA applied at the local, state, and federal levels, the Court found that its broad coverage "ensures its intrusion at every level of government."[55] Ultimately, the Court held RFRA unconstitutional because it was "broader than is appropriate if the goal is to prevent and remedy constitutional violations."[56] Today, RFRA is valid only as applied to federal government action.[57]

A. The Religious Land Use and Institutionalized Persons Act

Congress passed RLUIPA in 2000.[58] RLUIPA reinstates the strict scrutiny standard of RFRA but in a more limited manner.[59] RLUIPA mandates strict scrutiny review of government action that substantial-

[49] Religious Freedom Restoration Act (RFRA) of 1993, Pub. L. No. 103-141, 1993 U.S.C.C.A.N. (107 Stat.) 1488, *invalidated by* City of Boerne v. Flores, 521 U.S. 507 (1997) (codified as amended at 42 U.S.C. §§ 2000bb to 2000bb-4 (2006)).

[50] 42 U.S.C. § 2000bb(b)(1) (2006).

[51] City of Boerne v. Flores, 521 U.S. 507, 536 (1997).

[52] *Id.* at 519–20.

[53] *Id.* at 532.

[54] *Id.*

[55] *Id.*

[56] *Id.* at 535.

[57] *See, e.g.*, O Centro Espirita Beneficiente Uniao do Vegetal v. Ashcroft, 389 F.3d 973, 976 (10th Cir. 2004).

[58] 42 U.S.C. §§ 2000cc to 2000cc-5 (2006).

[59] 146 CONG. REC. 16,698 (2000) (joint statement of Sens. Hatch and Kennedy).

ly burdens the exercise of religion.[60] RLUIPA applies this analysis to land use regulations and government actions affecting people in state institutions, such as state penitentiaries.[61] Thus, Congress sought to restore the strict scrutiny standard of RFRA, but in a more limited manner so as to avoid colliding with the same constitutional issues that caused RFRA's demise.[62] The congressional hearing record demonstrates that the Free Exercise Clause was frequently violated in a land use context, and RLUIPA was specifically meant to address this issue.[63] Under RLUIPA:

> 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—
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> (A) is in furtherance of a compelling governmental interest; and
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> (B) is the least restrictive means of furthering that compelling governmental interest.[64]

Within the land use context, RLUIPA applies where:

> (A) the substantial burden is imposed in a program or activity that receives Federal financial assistance, even if the burden results from a rule of general applicability;
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> (B) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, even if the burden results from a rule of general applicability; or
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> (C) the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved.[65]

Lastly, under RLUIPA a land use regulation is defined 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."[66] In terms of its application, RLUIPA should be "construed in favor of a broad protection of

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[60] 42 U.S.C. § 2000cc(a)(1)(A)–(B).

[61] *Id.* §§ 2000cc to 2000cc-5.

[62] 146 CONG. REC. 16,698 (2000) (joint statement of Sens. Hatch and Kennedy).

[63] *Id.*

[64] 42 U.S.C. § 2000cc(a)(1).

[65] *Id.* § 2000cc(a)(2)(A)–(C).

[66] *Id.* § 2000cc-5(5) (emphasis added).

religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution."[67] When bringing a claim under RLUIPA, the claimant must first establish that the government action substantially burdens the free exercise of his religion.[68] Once a claimant has sufficiently demonstrated a substantial burden, the government has the burden of proving that its action is the least restrictive means of advancing a compelling government interest.[69]

B. Variations on the Definition of "Substantial Burden"

Courts have attempted to define "substantial burden" in various ways. In *Civil Liberties for Urban Believers v. City of Chicago*,[70] the United States Court of Appeals for the Seventh Circuit established a strict standard for what type of regulation would constitute a substantial burden. The appellants, an association of Chicago-area churches, claimed that both the lack of affordable housing and the costs of complying with the procedural requirements for obtaining a special use permit together imposed a substantial burden on the free exercise of their religion.[71] The court found that the steps an applicant would need to take to comply with the Chicago zoning ordinance did not amount to a substantial burden upon religion.[72] In defining substantial burden, the court stated that the burden would be one that "necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise . . . effectively impracticable."[73] Because appellants had failed to make a prima facie showing of this type of burden, they failed to establish that government action substantially burdened religion as required to bring a claim under RLUIPA.[74]

Not all courts have been so demanding. In *Guru Nanak Sikh Society v. County of Sutter*,[75] the United States District Court for the Eastern District of California criticized the "extremely high threshold" the United States Court of Appeals for the Seventh Circuit set for bringing a claim under RLUIPA.[76] In *Guru Nanak*, the plaintiff applied for a conditional use permit in order to build a Sikh temple within a res-

[67] *Id.* § 2000cc-3(g).
[68] *Id.* § 2000cc-2(b).
[69] *Id.*
[70] 342 F.3d 752 (7th Cir. 2003).
[71] *Id.* at 761.
[72] *Id.* at 762.
[73] *Id.* at 761.
[74] 42 U.S.C. § 2000cc–2(b).
[75] 326 F. Supp. 2d 1140 (E.D. Cal. 2003).
[76] *Id.* at 1153.

idential zone where churches and temples were conditionally permitted.[77] Churches and temples were not a permitted use in any of the districts within Sutter County, but instead were allowed within six districts only if accompanied by a conditional use permit.[78] The Sutter County Board denied the plaintiff's application, effectively shutting his temple out of the entire county.[79] The plaintiff claimed that both Sutter County's land use scheme and the board's denial of his conditional use permit violated the Free Exercise Clause and the Equal Protection Clause of the Federal Constitution, as well as RLUIPA.[80]

The court began its analysis by finding that the plaintiff's desire to build a religious temple was "religious exercise" as defined by RLUIPA, stating that the "requirement that there be a facility for religious assembly is common and fundamental to many of the world's religions."[81] In addressing whether the denial and land use scheme constituted a substantial burden, the court rejected the Seventh Circuit test articulated in *Civil Liberties* and instead defined a substantial burden as "one which actually inhibits religious practice by virtue of a land use decision."[82] Because the plaintiff had established a prima facie case of substantial burden, and because the county failed to counteract that claim with a compelling government interest, the court found that the denial of the permit was a violation of RLUIPA.[83] Thus, in order to bring a claim under RLUIPA, the claimant, at a minimum, must be able to establish that the land use regulation has the effect of inhibiting the free exercise of religion.

C. Defining "Compelling Government Interest"

Under RLUIPA, if a government-imposed land use regulation inflicts a substantial burden on free exercise, a strict scrutiny analysis is applied and the government must show that the burden is imposed in furtherance of a compelling government interest and that the land use restriction is the least restrictive means of furthering that interest.[84] RLUIPA itself does not define what qualifies as a compelling government interest. However, the legislative history reveals that

[77] *Id.* at 1142.
[78] *Id.* at 1146.
[79] *Id.* at 1145–46.
[80] *Id.* at 1146.
[81] *Guru Nanak Sikh Soc'y*, 326 F. Supp. 2d at 1146.
[82] *Id.* at 1154.
[83] *Id.*
[84] 42 U.S.C. § 2000cc(a)(1)(A)–(B) (2006).

"[t]he phrase . . . is taken directly from RFRA . . . and is intended to codify the traditional compelling interest test."[85]

The Supreme Court has articulated several definitions of what constitutes a compelling government interest. For example, in *Sherbert v. Verner*,[86] South Carolina defended the denial of unemployment benefits for the plaintiff under the South Carolina Unemployment Compensation Act as being necessary to avoid fraudulent claims which would diminish the unemployment compensation fund.[87] However, the Supreme Court found that the state's interest in preventing fraud did not constitute a compelling government interest.[88] Instead, the Court held that "[o]nly the gravest abuses endangering paramount interests give occasion for permissible limitation."[89]

Similarly, in *Wisconsin v. Yoder*,[90] the Supreme Court found that the state's interest in education was not a compelling government interest worthy of permissible infringement on the respondents' free exercise rights.[91] In *Yoder*, the respondents, members of the Conservative Mennonite Church, were charged with violating Wisconsin's compulsory school attendance law, which required attendance by members until the age of sixteen.[92] The respondents refused to comply with the law on the grounds that high school education was contrary to the Amish religion.[93] The Court found that the state's interest in high school attendance was not of adequate significance to justify infringing upon the respondents' right to free exercise of religion.[94] In so holding, the Court stated that "[o]nly those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."[95]

Although compelling government interest is not defined in RLUIPA, several courts addressing the issue have determined what does not qualify as a compelling interest. For example, in *Mintz v.*

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[85] 146 CONG. REC. 19,123 (2000) (statement of Rep. Canady).

[86] 374 U.S. 398 (1963).

[87] *Id.* at 407.

[88] *Id.* at 408–09.

[89] *Id.* at 406 (quoting Thomas v. Collins, 323 U.S. 516, 530 (1945)).

[90] 406 U.S. 205 (1972).

[91] *Id.* at 234–35.

[92] *Id.* at 207.

[93] *Id.*

[94] *Id.* at 234–35.

[95] *Id.* at 215; *see also* Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 546 (1993) (stating that "[a] law of restrictive religious practice must advance 'interests of the highest order' and must be narrowly tailored in pursuit of those interests").

Roman Catholic Bishop of Springfield,[96] the United States District Court for the District of Massachusetts concluded that maintaining the setback and coverage requirements listed in the town's zoning bylaw was not a compelling interest.[97] The diocese owned property in Lenox, Massachusetts, which housed both a church ("St. Ann's") and a rectory.[98] St. Ann's sought to construct a parish center whose building plans did not meet the coverage and setback requirements of the bylaw.[99] After St. Ann's applied for a building permit, the Lenox Special Town Counsel issued an opinion stating its belief that the section of the bylaw at issue violated RLUIPA, leading the Zoning Board of Appeals (ZBA) to grant the permit.[100] The plaintiffs, who owned property surrounding St. Ann's, sued both the diocese and the ZBA seeking a revocation of the permit.[101] The district court agreed with the ZBA and held that "setback and coverage requirements reveal no particularly compelling interest."[102] Further, discussing the other possible interests of limited parking and congestion, the court found that "[p]rior to RLUIPA . . . such concerns were not universally considered compelling."[103] The court ultimately found the setback and coverage requirements violated RLUIPA.[104]

In *Elsinore Christian Center v. City of Lake Elsinore*,[105] the United States District Court for the Central District of California held that the city's interest in generating tax revenue did not represent a compelling government interest, but suggested that the desire to combat urban blight may qualify as a compelling interest.[106] Faced with inadequate parking, the Elsinore Christian Center ("Church") purchased property in an economically depressed area of downtown Lake Elsinore.[107] Churches were permitted in the location subject to the grant of a conditional use permit ("CUP"), which the city's planning commission declined to issue based on factors including the

[96] 424 F. Supp. 2d 309 (D. Mass. 2006).
[97] *Id.* at 323.
[98] *Id.* at 311.
[99] *Id.* at 312–13.
[100] *Id.* at 313.
[101] *Id.* at 310.
[102] *Mintz*, 424 F. Supp. 2d at 323.
[103] *Id.* at 324 (citing Love Church v. City of Evanston, 671 F. Supp. 515, 519 (N.D. Ill. 1987)).
[104] *Id.* at 328.
[105] 291 F. Supp. 2d 1083 (C.D. Cal. 2003).
[106] *Id.* at 1093.
[107] *Id.* at 1086.

prevention of a loss of property tax revenue.[108] The Church sued, alleging that the zoning ordinance and denial of the CUP violated RLUIPA.[109] Rejecting the city's tax revenue justifications, the court held that "maintenance of property tax revenue is a potentially pretextual basis for decision-making that [was] a specific target of RLUIPA."[110] Addressing the city's interest in combating urban blight, the court stated that the interest in preserving the quality of urban life was of "[p]aramount importance in land use planning."[111] However, the court stopped short of defining the interest in curbing blight as compelling because it found that the city's denial of the CUP was not taken in furtherance of that interest as required by RLUIPA.[112]

At least one court has defined a city's interest in maintaining its zoning regulations as compelling. In *Konikov v. Orange County*,[113] the United States District Court for the Middle District of Florida held that even if the plaintiff had been capable of demonstrating a substantial burden on his right to free exercise, the county had established that it had a compelling interest in enforcing its zoning scheme, and it had done so in the least restrictive manner possible.[114] The plaintiff in *Konikov* was a rabbi who began conducting religious services on the property he owned in a residential neighborhood.[115] Surrounding property owners notified the Orange County Code Enforcement Division, which issued a code violation notice and gave the plaintiff seven days to come into compliance with the code.[116] Approximately one month later a hearing was held before the Code Enforcement Board.[117] The hearing included witness testimony and the introduction of evidence gathered from an eight-month investigation.[118] At the hearing's conclusion, the Board required the plaintiff to obtain special exception approval if he wished to continue offering the religious services.[119] The plaintiff declined and instead filed suit, arguing that the county's land use code violated both the United

[108] *Id.*
[109] *Id.* at 1087.
[110] *Id.* at 1093.
[111] *Elsinore*, 291 F. Supp. 2d at 1094.
[112] *Id.*
[113] 302 F. Supp. 2d 1328 (M.D. Fla. 2003).
[114] *Id.* at 1343.
[115] *Id.* at 1331.
[116] *Id.* at 1332.
[117] *Id.* at 1333.
[118] *Id.*
[119] *Konikov*, 302 F. Supp. 2d at 1336.

States and Florida Constitutions and RLUIPA.[120] The court found that the county's actions survived the application of the strict scrutiny standard, stating that a "[g]overnment's interest in zoning is indeed compelling."[121] Ultimately, the court found that the county's zoning code did not violate either the Free Exercise Clause or RLUIPA.[122]

Because there is no consensus, it is difficult to predict whether a court faced with an RLUIPA claim would find that the city or county's interest in enforcing its zoning code constitutes a compelling government interest, as required under strict scrutiny review.[123] It is clear that when challenging a land use regulation under RLUIPA, the claimant must first establish that the regulation imposes a substantial burden on the free exercise of religion before the regulation must be justified by a compelling government interest.[124] That compelling government interest must be something akin to those articulated in *Sherbert* and *Yoder*.[125]

IV. CURRENT SPLIT OVER WHETHER RLUIPA APPLIES TO EXERCISES OF EMINENT DOMAIN

As Part IV of this Comment will illustrate, because the public hearing element that accompanies an eminent domain condemnation is analogous to the individualized assessment that occurs in the granting or denial of a zoning variance, strict scrutiny is the appro-

[120] *Id.*

[121] *Id.* at 1343; *see also* First Baptist Church of Perrine v. Miami-Dade County, 768 So. 2d 1114, 1118 (Fla. Dist. Ct. App. 2000) (holding that the county "clearly has a compelling interest in enacting and enforcing fair and reasonable zoning regulations").

[122] *Konikov*, 302 F. Supp. 2d at 1343, 1345.

[123] *Id.* at 1333.

[124] *See* Guru Nanak Sikh Soc'y v. County of Sutter, 326 F. Supp. 2d 1140, 1154 (E.D. Cal. 2003).

[125] 146 CONG. REC. 19,123 (2000) (statement of Rep. Canady). RLUIPA has been challenged as an unconstitutional exercise of Congress's Section V remedial authority. However, as the hearing records for both RFRA and RLUIPA suggest, Congress felt a strict scrutiny standard was necessary to protect the right to the free exercise of religion from unnecessary governmental intrusion. 146 CONG. REC. 16,698 (2000) (joint statement of Sens. Hatch and Kennedy); 138 CONG. REC. 18,016–17 (1992) (statement of Sen. Kennedy). Specifically, Congress found that there was "massive evidence" in RLUIPA's hearing record that discrimination in the land use context was widespread. 146 CONG. REC. 16,698 (2000) (joint statement of Sens. Hatch and Kennedy). Further, when rejecting a challenge to RLUIPA's constitutionality in *Lighthouse Community Church of God v. City of Southfield*, the U.S. District Court for the Eastern District of Michigan stated that it aligned itself with "all circuit courts, and almost all district courts . . . [which] have found RLUIPA is a constitutional use of congressional power under Section V . . . ." Lighthouse Cmty. Church of God v. City of Southfield, No. 05-40220, 2007 WL 30280, at *10 (E.D. Mich. Jan. 3, 2007).

priate analysis for both land use regulatory tools. Under current Supreme Court jurisprudence that stems from *Employment Division v. Smith*[126] and *Sherbert v. Verner*,[127] where the government has in place a system of individualized assessment, the denial of an exemption in situations where free exercise is burdened must be justified by a compelling government purpose. RLUIPA sought to codify the individualized assessment exception to *Smith*.[128] Because eminent domain can be exercised in an individualized manner, strict scrutiny should apply where its use burdens the free exercise of religion.

District Courts are divided over whether the strict scrutiny standard applied to zoning provisions challenged under RLUIPA should be applied to eminent domain condemnations as well. Thus far, only the United States District Court for the Central District of California has applied a strict scrutiny analysis to an eminent domain condemnation.[129] However, the United States District Court for the Northern District of Illinois left open the possibility that there may be situations where eminent domain, specifically when used in conjunction with zoning regulations, should also receive a strict scrutiny analysis.[130] Because eminent domain and zoning provisions are frequently used together to effectuate a broader regulatory land use plan, it would be incongruous to apply a strict scrutiny analysis to one and not the other.

A. Cottonwood Christian Center v. Cypress Redevelopment Agency[131]

In *Cottonwood Christian Center v. Cypress Redevelopment Agency*, the United States District Court for the Central District of California used

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[126] 494 U.S. 872 (1990).

[127] 374 U.S. 398 (1963).

[128] *See* 146 CONG. REC. 16,699 (2000) (joint statement of Sens. Hatch and Kennedy):

> The General Rules in s2(a)(1), requiring that substantial burdens on religious exercise be justified by a compelling interest, applies only to cases within the spending power or the commerce power, or to cases where government has authority to make individualized assessments of the proposed uses to which the property will be put. Where government makes such individualized assessments, permitting some uses and excluding others, it cannot exclude religious uses without compelling justification.

[129] Cottonwood Christian Ctr. v. Cypress Redevelopment Agency, 218 F. Supp. 2d 1203, 1222 (C.D. Cal. 2002).

[130] St. John's United Church of Christ v. City of Chicago, 401 F. Supp. 2d 887, 900 (N.D. Ill. 2005).

[131] 218 F. Supp. 2d 1203 (C.D. Cal. 2002).

strict scrutiny to analyze the denial of the plaintiff's CUP and the city's subsequent exercise of eminent domain to the plaintiff's property.[132] In 1990, the City of Cypress adopted a redevelopment plan and classified several parcels within the area to be redeveloped—including the parcel the plaintiff would later purchase—as blighted.[133] Cottonwood Christian Center ("Cottonwood") had outgrown its site of worship and purchased two parcels within the redevelopment area in September 1999.[134] On October 6, 2000, Cottonwood submitted an application for a CUP.[135] On October 26, the City Planning Manager notified Cottonwood that its application was incomplete because it lacked design review studies.[136] Four days later, the city council imposed a moratorium on CUPs while it examined possibilities for redevelopment of the area.[137] By 2001, the city had neared completion of its plans for redevelopment of the area, which included the addition of a large Costco store.[138] In February 2002, the Cypress Center Redevelopment Agency made an offer to purchase the Cottonwood property, which was refused.[139] In May 2002, the city filed an action to condemn the land.[140] Cottonwood filed suit claiming that the condemnation violated RLUIPA.[141]

In analyzing Cottonwood's claims, the court found that strict scrutiny should apply for several reasons.[142] First, the court found that Cottonwood's plan to build a church on its new property and subsequent church activities would have a significant impact on interstate commerce,[143] thus bringing the claim within RLUIPA's jurisdiction.[144] Second, the court found that the city's denial of Cottonwood's CUP qualified as a land use regulation under the RLUIPA.[145] Most notably, the court stated that "[e]ven if the Court were only considering the condemnation proceedings, they would fall under RLUIPA's definition of 'land use regulation' . . . . The Redevelopment Agency's au-

[132] *Id.* at 1219–20.
[133] *Id.* at 1211.
[134] *Id.* at 1213.
[135] *Id.*
[136] *Id.*
[137] *Cottonwood*, 218 F. Supp. 2d at 1213.
[138] *Id.* at 1214.
[139] *Id.*
[140] *Id.* at 1214–15.
[141] *Id.* at 1218.
[142] *Id.* at 1221–24.
[143] *Cottonwood*, 218 F. Supp. 2d at 1221–22.
[144] 42 U.S.C. § 2000cc(a)(2)(B) (2006).
[145] *Cottonwood*, 218 F. Supp. 2d at 1222.

thority to exercise eminent domain . . . is based on a zoning system developed by the City."[146] The court interpreted RLUIPA's statutory language, which defines land use regulation as a "zoning or landmarking law, *or the application of such a law*,"[147] to apply to the city's use of eminent domain as based on the zoning system set forth in the redevelopment plan.[148] Because the city was using eminent domain as an instrument to enact a broader land use regulatory plan, the court found that the city's exercise of eminent domain should likewise be subject to a strict scrutiny analysis.[149] The court held that the city's interests in generating revenue and combating blight failed to meet the compelling interest standard required where strict scrutiny is applied to government action that burdens the free exercise of religion.[150] Finally, the court found the city had failed to demonstrate that there was no other way to generate revenue without taking the church property.[151]

B. Faith Temple Church v. Town of Brighton[152]

Unlike the *Cottonwood* court, in *Faith Temple Church v. Town of Brighton*, the United States District Court for the Western District of New York found RLUIPA did not apply to eminent domain condemnations.[153] In 2004, the Faith Temple congregation had grown too large for its site of worship and purchased a larger parcel of land.[154] However, unbeknownst to Faith Temple, in a 2000 update of its comprehensive plan, the Town of Brighton had recommended annexing that same parcel to facilitate the expansion of an adjacent park.[155] In 2004, the town initiated condemnation of the Faith Temple parcel.[156] Addressing Faith Temple's RLUIPA claim, the court found that RLUIPA did not apply because eminent domain is not a "zoning law" as defined under the RLUIPA.[157] Faith Temple argued that the condemnation was tied to the comprehensive plan and therefore

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146 *Id.* at 1222 n.9.
147 42 U.S.C. § 2000cc-5(5) (emphasis added).
148 *Cottonwood*, 218 F. Supp. 2d at 1222 n.9.
149 *Id.*
150 *Id.* at 1228.
151 *Id.* at 1228–29.
152 405 F. Supp. 2d 250 (W.D.N.Y. 2005).
153 *Id.* at 255.
154 *Id.* at 251.
155 *Id.*
156 *Id.* at 251–52.
157 *Id.* at 254.

amounted to the application of a zoning law.[158] However, the court rejected this argument because, unlike the *Cottonwood* court, it found the relationship between eminent domain and zoning too attenuated.[159]

C. City & County of Honolulu v. Sherman[160] *and* St. John's United Church of Christ v. City of Chicago[161]

In *City & County of Honolulu v. Sherman* and *St. John's United Church of Christ v. City of Chicago*, both the Supreme Court of Hawaii and the United States District Court for the Northern District of Illinois, respectively, left open the possibility that where eminent domain is used with other land use regulatory tools that require individualized assessments, strict scrutiny review of condemnations of religious property may be appropriate.[162] In *Sherman*, the Supreme Court of Hawaii held that the Revised Ordinances of Honolulu (ROH) challenged by the First United Methodist Church did not amount to a zoning or landmarking law, and therefore, the court found RLUIPA inapplicable.[163] The ROH authorized the City of Honolulu to obtain a fee simple interest in the land located underneath condominium developments from current landowners in order to convey fee simple title to the leasing occupants of the units.[164] The First United Methodist Church owned several units within a condominium building on the island.[165] The church challenged the condemnation, claiming it violated RLUIPA.[166] The Supreme Court of Hawaii held that the ROH could not be classified as either a landmarking or zoning law, and, therefore, RLUIPA did not apply.[167] However, the court also stated that the "condemnation right, standing alone, is not a 'zoning law.'"[168] This statement leaves open the

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[158] *Faith Temple*, 405 F. Supp. 2d at 256.

[159] *Id.* at 257.

[160] 129 P.3d 542 (Haw. 2006).

[161] 401 F. Supp. 2d 887 (N.D. Ill. 2005).

[162] *Id.* (holding that although strict scrutiny was not required where the city of Chicago condemned a religiously affiliated cemetery, not all condemnations were by definition outside of RLUIPA's strict scrutiny mandate); *Sherman*, 129 P.3d at 564 (holding that when the condemnation right is exercised alone without other regulatory land use controls, strict scrutiny is not required under RLUIPA).

[163] *Sherman*, 129 P.3d at 564.

[164] *Id.* at 545 n.1.

[165] *Id.* at 546.

[166] *Id.*

[167] *Id.* at 564.

[168] *Id.*

possibility that when an eminent domain condemnation is not "standing alone," but instead is used in conjunction with other land use regulatory tools, strict scrutiny may be appropriate.

In *St. John's United Church of Christ v. City of Chicago*, the United States District Court for the Northern District of Illinois analyzed a claim that the expansion of Chicago's O'Hare Airport onto church property violated RLUIPA.[169] In 2002, Chicago commenced its plan to build new runways as part of an expansion of the O'Hare International Airport.[170] The construction required the city to acquire several parcels of land, including a cemetery affiliated with St. John's.[171] The affected plaintiffs, including St. John's, succeeded in enjoining the condemnation in 2002.[172] In response to a request from the City of Chicago, the Illinois General Assembly passed the O'Hare Modernization Act (OMA),[173] which amended the Illinois Religious Freedom Restoration Act (IRFRA)[174] to specifically state that IRFRA did not limit the authority of Chicago to use its powers under the OMA to relocate cemeteries.[175] St. John's responded to the OMA by filing suit in 2003 under both the United States Constitution and RLUIPA, claiming the condemnation would substantially burden its religious beliefs.[176]

The court determined that the city's exercise of eminent domain did not stem from a zoning regulation or landmarking law and thus was not governed by RLUIPA.[177] St. John's argued that, according to *Cottonwood*, all exercises of eminent domain are governed by RLUIPA.[178] The court instead interpreted *Cottonwood* as standing for the proposition that, where eminent domain is used in conjunction with zoning regulations, RLUIPA would be applicable.[179] St. John's argued that Chicago's condemnation of the cemetery was related to land use regulation because the condemnation would impose a restriction on St. John's use of the property.[180] The court rejected this

[169] 401 F. Supp. 2d 887, 891–92 (N.D. Ill. 2005).
[170] *Id.* at 890.
[171] *Id.*
[172] *Id.* at 891.
[173] O'Hare Modernization Act, 620 ILL. COMP. STAT. 65/5 (2003).
[174] Illinois Religious Freedom Restoration Act, 775 ILL. COMP. STAT. 35/1-99 (1998).
[175] 775 ILL. COMP. STAT. 35/30 (1998).
[176] *St. John's United Church of Christ*, 401 F. Supp. 2d at 891–92.
[177] *Id.* at 899.
[178] *Id.* at 899–900.
[179] *Id.* at 900.
[180] *Id.*

argument and stated that, in condemning the property, Chicago was not acting pursuant to a zoning or landmarking law, but that the court's decision "should not be taken to mean that all condemnation proceedings necessarily are outside the scope of RLUIPA."[181] The court went on to hypothesize that "an act to acquire land (through eminent domain) and then to rezone it and transfer it might very well fall with [sic] the reach of RLUIPA."[182] As Part V of this Comment illustrates, eminent domain and zoning are often used in this manner to implement a broader regulatory land use scheme.[183]

Based on the interpretation of RLUIPA in *Sherman* and *St. John's*, where zoning and eminent domain are used together to implement a regulatory scheme, strict scrutiny should apply. In *Sherman*, the Supreme Court of Hawaii distinguished between the State's eminent domain power when used alone and when used in conjunction with a zoning law.[184] *Sherman* presented a unique situation: the purpose of the ROH was to facilitate the lease-to-fee conversion, not to rezone or change the nature of the property use permitted.[185] However, eminent domain may be used in conjunction with zoning to effectuate a broader regulatory scheme, as in *Cottonwood*.[186] Based on the statutory language of "or application of," where eminent domain is used to take religious property in order to implement a broader regulatory scheme, including zoning regulations, strict scrutiny should apply. Similarly, the *St. John's* court acknowledged that eminent domain may be used to take property that will subsequently be rezoned.[187] Under *St. John's*, where this type of condemnation and subsequent rezoning burdens free exercise, strict scrutiny under RLUIPA is appropriate.

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[181] *Id.*

[182] *St. John's United Church of Christ*, 401 F. Supp. 2d at 900 n.8.

[183] *See infra* Part V.

[184] City & County of Honolulu v. Sherman, 129 P.3d 542, 564 (Haw. 2006).

[185] *Id.* at 545.

[186] Cottonwood Christian Ctr. v. Cypress Redevelopment Agency, 218 F. Supp. 2d 1203, 1222 (C.D. Cal. 2002).

[187] *St. John's United Church of Christ*, 401 F. Supp. 2d at 900.

V. STRICT SCRUTINY REVIEW SHOULD APPLY WHERE THE EXERCISE OF EMINENT DOMAIN OR IMPLEMENTATION OF ZONING ORDINANCES BURDENS THE FREE EXERCISE OF RELIGION

A. The Individualized Assessment Exception to Smith

In *Employment Division v. Smith*,[188] the Supreme Court held that, where a generally applicable law has the incidental effect of burdening free exercise of religion, the Court would apply rational basis review.[189] However, an exception to this general rule applies when the state assesses, on an individual basis, whether the generally applicable law should apply to a specific person or entity.[190] In *Smith*, the Court distinguished its holdings in *Sherbert v. Verner* and *Bowen v. Roy*.[191] The Court noted that in *Sherbert*, within the context of unemployment compensation, there was individualized governmental assessment of whether the employee conduct at issue merited the denial of unemployment benefits.[192] A strict scrutiny test was appropriate in this context because the state weighed the employee's justification for terminating his employment on an individual basis.[193]

The distinction between generally applicable laws and those with an individualized assessment mechanism is clarified in *Bowen v. Roy*.[194] In *Bowen*, appellee challenged a requirement in the Aid to Families with Dependent Children Act[195] and the Food Stamp Act[196] that mandated that participants submit the social security numbers of the members of their households in order to receive benefits.[197] The appellee maintained that obtaining a Social Security number for his minor daughter would violate their Native American religious beliefs and claimed that the Free Exercise Clause entitled him to an exemption from the general requirement.[198] In upholding the requirement, the Court determined that it was neutral and uniform in application and, therefore, did not need to be justified as "the least restrictive

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[188] 494 U.S. 872 (1990).
[189] *Id.* at 883.
[190] *Id.* at 884.
[191] *Id.*
[192] *Id.*
[193] *Id.*
[194] 476 U.S. 693 (1986).
[195] 42 U.S.C. § 602(a)(25) (1994) (repealed 1996).
[196] 7 U.S.C. § 2025(e) (2000).
[197] *Bowen*, 476 U.S. at 695.
[198] *Id.*

means of accomplishing a compelling state interest."[199] Addressing *Sherbert*, the Court stated that in that case a strict scrutiny standard was appropriate because in determining if an employee should be denied unemployment benefits, the government agency would have to assess on an individual basis whether the employee had terminated his employment "without good cause."[200] Further, the court found "[t]he 'good cause' standard created a mechanism for individualized exemptions. If a state creates such a mechanism, its refusal to extend an exemption to an instance of religious hardship suggests a discriminatory intent."[201] Because the required submission of a Social Security number in *Bowen* applied to all applicants, there was no individualized assessment standard within the benefit programs, and therefore, a strict scrutiny standard did not apply.[202]

B. The Application of Zoning Ordinances as Individualized Assessment

RLUIPA sought to apply the individualized assessment exception of *Smith* to land use regulations that impermissibly burden the free exercise of religion.[203] Specifically, Congress found that religious organizations "are frequently discriminated against on the face of zoning codes and also in the highly individualized and discretionary processes of land use regulation."[204] As the United States District Court for the Eastern District of Pennsylvania stated in *Freedom Baptist Church v. Township of Middletown*,[205] zoning ordinances by their nature require individualized assessments to determine on a case-by-case basis if the proposed activity is suitable to the land in question.[206] In applying RLUIPA to zoning provisions, the *Freedom Baptist* court found that Congress codified "the individualized assessments jurisprudence in Free Exercise cases."[207] However, other courts have disagreed, finding instead that zoning regulations do not require individualized assessments.

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[199] *Id.* at 707–08.
[200] *Id.* at 708.
[201] *Id.*
[202] *Id.* at 708–09.
[203] 146 CONG. REC. 16,699 (2000) (joint statement of Sens. Hatch and Kennedy).
[204] *See id.*at 16,698.
[205] 204 F. Supp. 2d 857 (D. Pa. 2002).
[206] *Id.* at 868.
[207] *Id.*

In *Grace United Methodist Church v. City of Cheyenne*,[208] the United States Court of Appeals for the Tenth Circuit held that the application of the city's zoning code did not involve individualized assessments.[209] The Grace United Methodist Church ("Grace United") sought to operate a child daycare center in the residential zone where it owned property and applied for a variance.[210] After holding a public hearing, which included both witness testimony and evidence on how the proposed daycare center would operate, the city denied the variance.[211] Grace United challenged the city's denial of the variance as a violation of both RLUIPA and the Free Exercise Clause.[212] The city argued that the zoning ordinance was a generally applicable law, which should be subject only to rational basis review,[213] while Grace United argued that the zoning code's system of case-by-case exceptions provided an opportunity for individualized exemptions.[214] The United States Court of Appeals for the Tenth Circuit agreed with the city, stating that "[w]hile it is true that the Board held a hearing to evaluate the Church's daycare request . . . 'that kind of limited yes-or-no inquiry is qualitatively different from the kind of case-by-case system envisioned by the *Smith* Court.'"[215] Thus, the court held that the zoning code did not fall within the individualized assessment exception of *Smith*.[216] Applying rational basis review, the court found the denial of a variance did not offend either the Free Exercise Clause or RLUIPA.[217]

A brief examination of the application process for a variance or conditional use permit illustrates that it is more than a limited inquiry and suggests that the approach of the *Freedom Baptist* court is the more accurate one. In *Vietnamese Buddhism Study Temple in America v. City of Garden Grove*,[218] the temple applied for a CUP, which the

[208] 451 F.3d 643 (10th Cir. 2006).

[209] *Id.* at 653.

[210] *Id.* at 647.

[211] *Id.* at 648.

[212] *Id.* at 647.

[213] *Id.* at 650.

[214] *Grace United*, 451 F.3d at 650.

[215] *Id.* at 654 (quoting Axson-Flynn v. Johnson, 356 F.3d 1277, 1298 (10th Cir. 2004)).

[216] *Id.* at 653; *see also* Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch, 510 F.3d 253, 276 (3d Cir. 2007) (showing that the court declined "to hold that every zoning ordinance that includes a waiver or amendment provision is, solely by virtue of that fact, unconstitutional unless it can survive strict scrutiny").

[217] *Grace United*, 451 F.3d at 655.

[218] 460 F. Supp. 2d 1165 (C.D. Cal. 2006).

city planning commission denied twice.[219] Discussing the CUP application process, the United States District Court for the Central District of California found that, in fact, the temple was obligated to meet several conditions in order to obtain a CUP, including meeting requirements for minimum lot size, setback, parking, and access to public roads.[220] Further, once these conditions were met, the city was required to make additional findings before the CUP could be issued.[221] Similarly, in *Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward County*,[222] the United States Court of Appeals for the Eleventh Circuit listed six factors the Boca Raton Board of Adjustment would consider when deciding whether to grant a variance.[223] In fact, RLUIPA's congressional record suggests that Congress did not consider this type of application of a zoning code to be a generally applicable law.[224]

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[219] *Id.* at 1169–70.

[220] *Id.* at 1168.

[221] *Id.* Specifically, the proposed use:

> (1) must be consistent with the city's adopted general plan; (2) must not adversely affect the health, peace, comfort, or welfare of persons residing or working in the surrounding area; (3) must not unreasonably interfere with the use, enjoyment, or valuation of surrounding property; and (4) must not jeopardize or endanger the public health, safety, or general welfare.

Id.

[222] 450 F.3d 1295 (11th Cir. 2006).

[223] *Id.* at 1301. The criteria included:

> (1) That there are unique and special circumstances or conditions applying to the property in question, or to the intended use of the property, that do not apply generally to other properties in the same district; (2) That any alleged hardship is not self-created by any person having an interest in the property or is the result of mere disregard for, or ignorance of, the provisions of the Code; (3) That strict application of the provisions of the Code would deprive the petitioner of reasonable use of the property for which the variance is sought; (4) That the variance proposed is the minimum variance which makes possible the reasonable use of the property; (5) That the granting of the variance will be in harmony with the general intent and purpose of the Code and that such variance will not be injurious to the area involved or otherwise detrimental to the public welfare; (6) That there exists changed or changing circumstances which make approval of the variance appropriate.

Id. at 1301 n.2.

[224] 146 CONG. REC. 19,123 (2000) (statement of Rep. Canady).

> Section 2(a)(2)(C) applies the General Rule to cases in which the government has authority to make individualized assessments of the uses to which the property is put. Unlike the Commerce and Spending Clause sections, this section does not reach generally applicable laws. Laws that provide for individualized assessments of proposed uses are not generally applicable.

C. *Eminent Domain May Be Exercised in a Manner That Requires an Individualized Assessment, and Therefore Should Be Subject to the Same Strict Scrutiny as Zoning Regulations Where a Substantial Burden Is Imposed on the Free Exercise of Religion*

Assuming that zoning ordinances always or often implicate individual assessments, eminent domain may be applied in the same individualized manner. For example, a municipality may take a specific property instead of multiple properties over a larger area. Where eminent domain targets a specific property, its use should be subject to strict scrutiny review if its application substantially burdens the free exercise of religion.

Hawaii Housing Authority v. Midkiff[225] illustrates how eminent domain can be directed at particular properties. In *Midkiff*, the Hawaii Housing Authority (HHA) targeted specific properties which would advance the legislature's goal of breaking down concentrated land ownership.[226] The Hawaii Legislature passed the Land Reform Act of 1967 to address what the Supreme Court found was concentrated land ownership that had the negative effect of inflating land prices.[227] The Act authorized the HHA to condemn residential tracts and transfer ownership in fee simple to existing lessees.[228] The fee simple owner would be compensated with the fair market value of the fee interest.[229] Prior to condemning appellees' land, the "HHA made the statutorily required finding that acquisition of appellees' land would effectuate the public purposes of the Act . . . [and] directed appellees to negotiate . . . the sale of the *designated* properties."[230] The appellees challenged the Act as an unconstitutional exercise of the state's police power.[231] The United States Court of Appeals for the Ninth Circuit found the purpose of the Act did not conform to the public use requirement of the Fifth and Fourteenth Amendments.[232]

Reversing the court of appeals, the Supreme Court found the Act's purpose of normalizing the residential land use market by eradicating land oligopoly was a valid exercise of a state's police power.[233]

Id.

[225] 467 U.S. 229 (1984).

[226] *Id.* at 232–34.

[227] *Id.* at 232.

[228] *See id.* at 233.

[229] *See id.* at 234 n.2.

[230] *Id.* (emphasis added).

[231] *Midkiff*, 467 U.S. at 235.

[232] Midkiff v. Tom, 702 F.2d 788, 798 (9th Cir. 1983), *rev'd*, 467 U.S. 229 (1984).

[233] *Midkiff*, 467 U.S. at 242.

The Court applied a deferential review to the Hawaii Legislature's determination that the Act was necessary to achieve this purpose.[234] Quoting *Berman v. Parker*,[235] the Court found that "[o]nce the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear."[236] Furthermore, the Court found that this level of judicial deference was no less appropriate where a state legislature had made the conclusion that the Act served a public purpose.[237]

As *Midkiff* illustrates, eminent domain may be exercised in a manner that requires the specific targeting of individual properties. According to the Court's holding in *Employment Division v. Smith*,[238] where such targeting occurs and imposes a substantial burden on free exercise, strict scrutiny review is appropriate.[239] Distinguishing *Sherbert v. Verner*,[240] the *Smith* Court determined that the denial of unemployment benefits in *Sherbert* required a determination by the Employment Division as to whether the employee's reasons for terminating his employment were justifiable.[241] A strict scrutiny examination was appropriate where this denial burdened the free exercise of religion because the state agency would be weighing the justifications of the particular individual.[242] In other words, the agency would be assessing whether a generally applicable law should apply to a specific individual. Similarly, in *Midkiff* the HHA conducted an individualized assessment of particular properties to determine if their acquisition would further the purposes of the Land Reform Act of 1967.[243] The HHA therefore determined whether the generally applicable law, the Land Reform Act of 1967, should apply to specific property.[244] Moreover, if under RLUIPA Congress "codif[ied] the individualized assessments jurisprudence in Free Exercise cases" as the *Freedom Baptist* court found,[245] where eminent domain is exercised in an individua-

[234] *Id.* at 242–43.
[235] 348 U.S. 26, 33 (1954).
[236] *Midkiff*, 467 U.S. at 240.
[237] *Id.* at 244.
[238] 494 U.S. 872 (1990).
[239] *Id.* at 884.
[240] 374 U.S. 398 (1963).
[241] *Smith*, 494 U.S. at 884.
[242] *Id.*
[243] Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 234 (1984).
[244] *Id.*
[245] Freedom Baptist Church v. Twp. of Middletown, 204 F. Supp. 2d 857, 868 (D. Pa. 2002).

lized manner, a strict scrutiny standard should be applied if the action burdens the free exercise of religion.

D. The Identification of Parcels for Takings Through Eminent Domain and the Public Hearing Requirement in State Eminent Domain Statutes Are Analogous to the Individualized Assessment That Occurs in the Application of Zoning Regulations

As authorized by state constitutions, the state may take property for public use upon payment of just compensation.[246] Further, this authority may be delegated to counties and municipalities,[247] public transportation departments,[248] and conservation and recreation departments.[249] The identification of property for taking through eminent domain is necessarily an individualized process, as the state or municipality must designate which properties it intends to take.[250]

Where a state statute requires a public hearing prior to an eminent domain condemnation, the municipality or state individually assesses the application of eminent domain to a particular property. This hearing requirement is thus analogous to the individualized assessment that occurs in a zoning context, which under RLUIPA receives a strict scrutiny analysis if its application burdens the free exer-

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[246] *See, e.g.*, ILL. CONST. art. I, § 15 ("Right of Eminent Domain: Private property shall not be taken or damaged for public use without just compensation as provided by law.").

[247] *See, e.g.*, FLA. STAT. ANN. § 166.411 (West 2000) ("Eminent domain; uses or purposes" (authorizing municipalities to exercise the power of eminent domain for public improvement; public parks; use of sewerage or drainage; laying wires; for city buildings; and other municipal purposes)).

[248] *See, e.g.*, FLA. STAT. ANN. § 337.27 (West 2003) ("Exercise of power of eminent domain by department; procedure; title; cost: The power of eminent domain is vested in the department to condemn all necessary lands and property . . . for the purpose of securing and utilizing transportation rights-of-way . . . .").

[249] *See, e.g.*,VA. CODE ANN. § 10.1-201 (West 2006).

> The Director [of the Department of Conservation and Recreation] is authorized to acquire . . . by the exercise of the power of eminent domain, areas, properties, lands or any estate or interest therein, of scenic beauty, recreational utility, historical interest, biological significance or any other unusual features which in his judgment should be acquired, preserved and maintained for the use, observation, education, health and pleasure of the people of Virginia.

Id.

[250] *See, e.g.*, 53 PA. CONS. STAT. ANN. § 67201 (West 2009) ("Acquisition of lands and buildings: The board of supervisors may *designate* lands or buildings owned, leased or controlled by the township for use as parks, playgrounds . . . and acquire lands or buildings by lease, gift, devise, purchase or by the exercise of the right of eminent domain for recreational purposes." (emphasis added)).

cise of religion.[251] Because the application of eminent domain and a zoning law are analogous when applied in this individualized manner, both methods of land use control should receive strict scrutiny review when challenged under RLUIPA.

As part of formal eminent domain procedure, most states require some action by the condemnor prior to the condemnation.[252] For example, a state may require a resolution or finding by a condemnor stating that the condemnation is necessary, or the state may require the condemnor to begin compensation negotiations.[253] Procedurally, the condemnor may take the property through an administrative procedure after which the condemnee is notified that the land has been taken.[254] Or, the condemnor may take through a judicial proceeding where the court, without a jury, determines whether the right to take exists, followed by a compensation determination by an appraiser.[255] Alternatively, the court, again without a jury, determines if there is a right to take, and the court or jury then determines the amount of just compensation.[256]

To illustrate, in Illinois an eminent domain suit is commenced when the condemnor files a complaint in the county in which the property is located.[257] Questions about the right to condemn and any disputes regarding compensation must be determined by a court hearing before a jury.[258]

The *Cottonwood Christian Center v. Cypress Redevelopment Agency* court emphasized the individualized nature of eminent domain hearings.[259] Cottonwood Christian Center had challenged the Cypress Redevelopment Agency's denial of their CUP and subsequent condemnation of church property.[260] The court found that the Redevelopment Agency condemned Cottonwood's property as a necessary step in the implementation of their broad redevelopment scheme.[261] Further, both the denial of the CUP and the exercise of eminent

[251] 42 U.S.C. § 2000cc(a)(2)(C) (2006).

[252] 7 PATRICK J. ROHAN & MELVIN A. RESKIN, NICHOLS ON EMINENT DOMAIN § 2A.03 (Rev. 3d ed. 2006).

[253] *Id.*

[254] *Id.*

[255] *Id.*

[256] *Id.*

[257] 735 ILL. COMP. STAT. ANN. 5/7-101 (West 2003).

[258] *Id.*

[259] Cottonwood Christian Ctr. v. Cypress Redevelopment Agency, 218 F. Supp. 2d 1203, 1223 (C.D. Cal. 2002).

[260] *Id.* at 1215.

[261] *Id.* at 1223.

domain power occurred in an individualized manner.[262] The court emphasized that both actions were "quasi-judicial decisions wherein a municipal agency is required to hold public hearings, take testimony from the affected landowners, and make specific factual findings."[263] Indeed, California eminent domain law requires that prior to authorizing a condemnation, the public entity must adopt a resolution of necessity.[264] Such a resolution may only be adopted after each individual whose property will be affected has been given the opportunity to be heard[265] on the location, manner of implementation, and public use aspects of the regulatory plan.[266]

Hearings challenging the exercise of eminent domain require an individualized assessment of the taking as applied to a specific parcel of land. Therefore, under the individualized assessment exception to *Smith*, where the application of a resolution authorizing the acquisition of property is applied in an individualized manner—for example, where the municipality or state is required to assess the resolution's effect on a specific parcel—strict scrutiny should be applied.

In *Smith*, the Court approved the use of a strict scrutiny evaluation in *Sherbert* because there was individualized governmental assessment of whether the employee conduct at issue merited the denial of unemployment benefits.[267] Similarly, where the condemnation of religious property is challenged, the taking agency will be required to determine whether the possible infringement on the free exercise of religion merits an exception to the generally applicable resolution.

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[262] *Id.*

[263] *Id.*

[264] CAL. CIV. PROC. CODE § 1245.220 (West 2007).

[265] *See id.* § 1245.235.

> Notice and hearing; contents; conduct
> (a) The governing body of the public entity may adopt a resolution of necessity only after the governing body has given each person whose property is to be acquired by eminent domain . . . notice and a reasonable opportunity to appear and be heard on the matters referred to in Section 1240.030.

Id.

[266] *See id.* § 1240.030.

> The power of eminent domain may be exercised to acquire property for a proposed project only if all of the following are established:
> (a) The public interest and necessity require the project.
> (b) The project is planned or located in the manner that will be most compatible with the greatest public good and the least private injury.
> (c) The property sought to be acquired is necessary for the project.

Id.

[267] Employment Div. v. Smith, 494 U.S. 872, 884 (1990).

Therefore, following current Supreme Court jurisprudence, where a state or municipality considers the impact of a generally applicable land use resolution on specific properties, strict scrutiny should be applied if the state or municipality chooses to apply the resolution in a manner that substantially burdens the free exercise of religion. In fact, RLUIPA's legislative history illustrates that with the Act, Congress specifically sought to codify *Smith*'s individualized assessment exception.[268] The Act's legislative history indicates that its sponsors believed the Act to be necessary based on the "widespread pattern of discrimination against churches as compared to secular places of assembly . . . ."[269] Thus, although the Supreme Court had held ten years prior in *Smith* that strict scrutiny should apply in cases of individualized assessment,[270] RLUIPA's sponsors clearly felt that the codification of this standard was necessary. Further, in order to guarantee consistency of the application of strict scrutiny review to both exercises of eminent domain and the enforcement of zoning code provisions that substantially burden the free exercise of religion, RLUIPA's strict scrutiny mandate should apply to both tools of land use regulation.

VI. EMINENT DOMAIN CAN BE USED IN CONJUNCTION WITH A CHANGE IN ZONING TO EFFECTUATE A REGULATORY SCHEME; THEREFORE EMINENT DOMAIN SHOULD BE SUBJECT TO THE SAME STRICT SCRUTINY REVIEW AS ZONING

Where eminent domain condemnations proceed or are used in conjunction with changes in zoning codes as a method to effectuate a broader land use regulatory scheme, it is incongruous to apply strict scrutiny to challenges where zoning laws burden the free exercise of religion but not where the exercise of eminent domain burdens the free exercise of religion. Although eminent domain may not fall within the definition of land use regulation as RLUIPA currently stands,[271] where both regulatory tools are used together for the pur-

[268] 146 CONG. REC. 16,699 (2000).

[269] *Id.*

[270] *Smith*, 494 U.S. at 884.

[271] 42 U.S.C. § 2000cc-5(5) (2006).

> The term "land use regulation" means a zoning or landmarking law, or the application of such a law, that limits or restricts a claimant's use or development of land (including a structure affixed to land), if the claimant has an ownership, leasehold, easement, servitude, or other property interest in the regulated land or a contract or option to acquire such an interest.

Id.

pose of implementing a regulatory scheme, strict scrutiny review is appropriate if the condemnation substantially burdens the free exercise of religion.

A. Denver Urban Renewal Authority v. Pillar of Fire[272]

In the pre-*Smith* case *Denver Urban Renewal Authority v. Pillar of Fire*, the Supreme Court of Colorado applied strict scrutiny review to the Denver Urban Renewal Authority's condemnation of Pillar of Fire's church.[273] In 1967 Denver began its downtown Urban Renewal Project after determining the project area, which included the Pillar of Fire church, was blighted.[274] The Denver Urban Renewal Authority (DURA) was authorized to condemn property within the area, and "[u]pon acquisition, the property was to be rezoned and redeveloped."[275] The court found the city's interests in the renewal project outweighed Pillar of Fire's interests in maintaining ownership of the building.[276] Notably, for the prior thirty years the building had been used primarily as a commercial rooming house; it was used as a place of worship only once a month.[277] The court found that DURA had no alternative means for accomplishing its goals and that the condemnation was essential to the success of the renewal project.[278] *Pillar of Fire* illustrates how eminent domain and zoning are used together as tools to effectuate a broader regulatory plan. As the court found, the condemnation was a necessary step in a renewal process that included changes to the zoning code.[279]

B. Eminent Domain Followed by Zoning Changes in the Valuation Context

Under RLUIPA, if enforcement of a zoning law creates a substantial burden on free exercise, it is subject to strict scrutiny review.[280] Since eminent domain and zoning are frequently used together for the broader purpose of land use regulation, where the use of eminent domain burdens free exercise, it should also be subject to strict scrutiny review. Because changes to zoning codes frequently follow

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[272] 552 P.2d 23 (Colo. 1976).
[273] *Id.* at 25.
[274] *Id.* at 24.
[275] *Id.*
[276] *Id.* at 25.
[277] *Id.* at 24–25.
[278] *Pillar of Fire*, 552 P.2d at 25.
[279] *Id.*
[280] *See* 42 U.S.C. §§ 2000cc(a)(2)(A)–(C), 2000cc-5(5) (2006).

exercises of eminent domain authority, courts regularly confront the issue of how to value property for compensation where a change in the zoning code is imminent. When valuing property following a condemnation proceeding, the court must consider the highest and best use of the property.[281] Most states set the valuation date by statute.[282]

The Court of Appeals of Arizona confronted the issue of valuation in *Town of Paradise Valley v. Young Financial Services, Inc.*[283] When Paradise Valley was incorporated in 1961, all property was zoned as residential.[284] Any zoning variance had to be approved by the Town Council, which would grant a special use permit.[285] When the town condemned appellee's parcel, appellee Young Financial Services sought to introduce evidence that it was reasonably probable that it would be able to obtain a special use permit for the property, which was adjacent to a municipal complex.[286]

Addressing the town's motion to suppress evidence on nonresidential development, the court stated that, generally, the market value of condemned property is determined by taking account of only the permitted uses at the time of the condemnation.[287] However, an exception to this rule exists where there is "reasonable probability" that a change in the zoning ordinance will occur in the near future.[288] The "project influence doctrine" is an exception to this exception.[289] As the court explained, the doctrine excludes evidence of an imminent change in zoning that is the result of the proposed project for which the condemning authority is taking the property.[290] This pattern of condemnation immediately followed by a change in zoning occurs with such frequency that a doctrine has emerged to guide the

[281] 7 PATRICK J. ROHAN & MELVIN A. RESKIN, NICHOLS ON EMINENT DOMAIN § 2A.03 (Rev. 3d ed. 2006).

[282] Christopher A. Bauer, *Government Takings and Constitutional Guarantees: When Date of Valuation Statutes Deny Just Compensation*, 2003 BYU L. REV. 265, 278 (2003) (finding that twenty-one states and the District of Columbia have no valuation date statute).

[283] 868 P.2d 971 (Ariz. Ct. App. 1993).

[284] *Id.* at 973.

[285] *Id.*

[286] *Id.*

[287] *Id.* at 974.

[288] *Id.*

[289] *Town of Paradise Valley*, 868 P.2d at 974.

[290] *Id.*; *see also* Williams v. City and County of Denver, 363 P.2d 171, 175 (Colo. 1961) ("[W]here the change in zoning results from the taking of the subject property . . . it is not admissible . . . .").

courts in their quest to provide owners of the condemned property with just compensation.

The Missouri Court of Appeals further articulated the doctrine in *Kansas City Power & Light Co. v. Jenkins*,[291] where the court affirmed the trial court's decision to permit evidence regarding proposed zoning changes.[292] Describing the project influence doctrine, the court stated that "[t]he probability of rezoning (or even an actual change in zoning) which results from the fact that the project which is the basis for the taking was impending, cannot be taken into account in valuing the property in the condemnation proceeding."[293]

The project influence doctrine makes clear that an eminent domain condemnation is often followed by an immediate change in zoning regulations. If such a zoning change were in itself to substantially burden the free exercise of religion, it would be subject to strict scrutiny under RLUIPA.[294] Therefore, where the two regulatory tools of eminent domain and subsequent rezoning are used in conjunction for the purpose of implementing a land use scheme, should the use of eminent domain burden free exercise, it likewise should be subject to strict scrutiny review.

VII. THE NEED FOR STRICT SCRUTINY AFTER *KELO*

In its landmark decision in *Kelo v. City of New London*,[295] the Supreme Court held that taking property for economic purposes qualified as a public use within the meaning of the Fifth Amendment Takings Clause.[296] The city would not be permitted to take property solely for the benefit of a private party; however, where the taking was necessary to effectuate a comprehensive plan meant to provide economic benefits to the city, that exercise of eminent domain power was valid.[297] Fearing the impact of a holding equating public use with economic benefit, the Becket Fund for Religious Liberty, a public interest law firm focusing on religious land use and free exercise, submitted an amicus brief in support of the petitioners.[298] The fund

[291] 648 S.W.2d 555 (Mo. Ct. App. 1983).

[292] *Id.* at 568.

[293] *Id.* at 560 (citing 4 NICHOLS, EMINENT DOMAIN § 12.322 [1] at 12-655 (3d ed. 1981)) (court's emphasis omitted).

[294] 42 U.S.C. § 2000cc(a)(2)(C) (2006).

[295] 545 U.S. 469 (2005).

[296] *Id.* at 485.

[297] *Id.* at 486–87.

[298] Brief of Amicus Curiae the Becket Fund for Religious Liberty in Support of Petitioners, Kelo v. City of New London, 545 U.S. 469 (2005) (No. 04-108).

feared that "[r]eligious institutions will *always* be targets for eminent domain actions under a scheme that disfavors non-profit, tax-exempt property owners . . . ."[299] In fact, Shelley Ross Saxer, a professor at Pepperdine University School of Law, has echoed this fear.[300] Saxer suggests that the application of strict scrutiny to eminent domain actions against religious property is necessary to offset the ease with which cities may remove the substantial burden involved by paying the owner just compensation.[301]

Although the words "eminent domain" do not appear within the congressional record for RLUIPA,[302] it is conceivable that lawmakers were not focused on the impact eminent domain could have on religious property; the RLUIPA hearings took place in 2000, a full five years before the Supreme Court's watershed decision in *Kelo*. In light of *Kelo*'s new standard equating "public use" with "public purpose," there is even more reason to apply strict scrutiny to exercises of eminent domain which substantially burden the free exercise of religion. Further, as *Albanian Associated Fund v. Township of Wayne*[303] illustrates, religious institutions are particularly vulnerable to the ad hoc decisions of municipal planning boards. The AAF was required to revise its site plan three times and appeared before the planning board over twenty times, which undoubtedly entailed tremendous expense.[304] RLUIPA's supporters clearly intended that the Act function as a means of avoiding this type of burden where it is not justified by a compelling government interest.[305]

VIII. CONCLUSION

Eminent domain is a fundamental power exercised by the state, but its exercise must be balanced with the equally fundamental right of free exercise. In its current form RLUIPA mandates strict scrutiny review of zoning and landmarking laws; however, courts have debated whether this standard should be extended to eminent domain challenges. Eminent domain may be considered a generally applicable power, but it is frequently exercised in a manner that requires an in-

[299] *Id.* at 3.

[300] Shelley Ross Saxer, *Eminent Domain Actions Targeting First Amendment Land Uses*, 69 MO. L. REV. 653, 673 (2004).

[301] *Id.* at 674.

[302] 146 CONG. REC. 16,698–705 (2000).

[303] No. 06-cv-3217 (PGS), 2007 U.S. Dist. LEXIS 73176 (D.N.J. Oct. 1, 2007).

[304] Complaint, *supra* note 13, at 10.

[305] *See* 146 CONG. REC. 16,698 (2000) (joint statement of Sens. Hatch and Kennedy).

dividualized assessment of its potential impact. It is this individualized assessment that should bring eminent domain within the strict scrutiny purview of RLUIPA. Further, because eminent domain and zoning are frequently used together to enforce a land use regulatory scheme, it would be incongruous to demand strict scrutiny review of one regulatory tool and not the other. Eminent domain is an important and necessary power; however, free exercise is equally fundamental. Strict scrutiny review does not mean that the state is forbidden from condemning religious property; it simply means that condemnation must be justified by a compelling state interest and that the state action in question must be narrowly tailored to address that interest. Because free exercise is a fundamental right protected by the Constitution, it should be protected by strict scrutiny review.