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ARTICLE

RELIGION AND HOUSING FOR THE HOMELESS: USING THE FIRST AMENDMENT AND THE RELIGIOUS LAND USE ACT TO CONVERT RELIGIOUS FAITH INTO SAFE, AFFORDABLE HOUSING

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"And homeless near a thousand homes I stood,
And near a thousand tables pined and wanted food."
William Wordsworth (1770-1850)[1]

The homeless[2] in America lead terribly hard lives. Our prosperous nation has, for most of its existence, failed to provide decent housing for

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1. WILLIAM WORDSWORTH, *Guilt and Sorrow or Incidents upon Salisbury Plain, reprinted in* THE WORKS OF WILLIAM WORDSWORTH 31, 43 (Black's Readers Serv. Co. ed., Random House, Inc. 1951) (1794).

2. *See* 42 U.S.C. § 11302(a) (2000).

many of its people.[3] Because the homeless often lack reliable transportation to stores, medical care, work, schools, government aid, and training programs, worthwhile housing must be located near work, medical facilities, schools, shopping, and government offices.[4] It is precisely those areas, however, that are often zoned for business, industrial, commercial, single-family, suburban, or other uses barring residential housing facilities that could provide the homeless with safe, affordable and decent housing.[5] In other words, the homeless need safe, affordable housing precisely where local governments often ban such housing. It is an absurd Catch 22.[6]

Federal and local governments have consistently ignored the need to provide adequate housing for the homeless.[7] It is obvious that private, for-profit organizations are rarely interested in providing safe, decent and affordable housing for the homeless, who cannot afford to pay standard commercial rates for housing.[8] If there is a solution for the homeless problem, it rests with non-profit entities and corporations, which *can* afford to provide such housing for free or for rates so low they would promptly bankrupt for-profit corporations. After all, taxes impose a burden on any profit-based organization. The ability of non-profit organizations to operate tax-free is a tremendous benefit in providing such housing for free, or for very reasonable and affordable rates – if the non-profit must charge tenants at all.

The term "homeless" in this article includes persons who have no place to live, as well as people who are living in structures, motor vehicles, or other places that are unfit for safe, decent, long-term human habitation. This approach is analogous to the federal government's definition of "homeless" or "homeless individual or homeless person." *Id.*

3. *See generally* TED GOTTFRIED, HOMELESSNESS: WHOSE PROBLEM IS IT? (1999); HOMELESSNESS: A GUIDE TO THE LITERATURE (B. G. Kutais & Tatiana Shohov eds., 1999); KENNETH L. KUSMER, DOWN AND OUT, ON THE ROAD: THE HOMELESS IN AMERICAN HISTORY (2002); PETER H. ROSSI, DOWN AND OUT IN AMERICA: THE ORIGINS OF HOMELESSNESS (1989).

4. *See* GOTTFRIED, *supra* note 3, at 65-66.

5. *See generally* GOTTFRIED, *supra* note 3; HOMELESSNESS: A GUIDE TO THE LITERATURE, *supra* note 3; KUSMER, *supra* note 3; ROSSI, *supra* note 3.

6. Stuard v. Steward, 401 F.3d 1064, 1067 n.8 (9th Cir. 2005) ("In Joseph Heller's World War II novel, Yossarian tries to avoid having to fly any more dangerous combat missions by claiming that he is crazy. The doctor explains to him that only a crazy person would willingly fly combat missions after a lot of close calls, but rational concern for his own safety proves that a person is not crazy. So, anyone who asks to be relieved from flying more combat missions because he is crazy can't be relieved, since his rational request proves he isn't crazy. 'That's some catch, that Catch-22,' acknowledges Yossarian. Joseph Heller, Catch-22 at 46-47 (Dell ed., 1962) (1955).").

7. *See generally* GOTTFRIED, *supra* note 3; HOMELESSNESS: A GUIDE TO THE LITERATURE, *supra* note 3; KUSMER, *supra* note 3; ROSSI, *supra* note 3.

8. *See* GOTTFRIED, *supra* note 3, at 89-90 (discussing the obstacles faced by developers who do wish to provide affordable housing to the homeless).

Among non-profit groups, religious organizations have a potentially priceless advantage. If providing housing for the homeless is an exercise of religion, such religious organizations can assert the applicability of constitutional doctrines and statutes that may enable them to provide housing for large numbers of the homeless, in locations where such housing can do the most good.[9]

Religious organizations that want to provide safe and affordable housing for the homeless, as a concrete expression and exercise of religious faith, have two very powerful tools they can use to place such housing and services in places where they will be most effective, despite contrary local zoning and land use laws. The first tool is the First Amendment to the United States Constitution, which is a general prohibition against making laws prohibiting the free exercise of religion.[10] The second tool is the Religious Land Use and Institutionalized Persons Act of 2000.[11] For ease of reference, this law will generally be referred to as the "Religious Land Use Act" or as "RLUIPA."

I. THE FIRST AMENDMENT

In relevant part, the First Amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[12] This provides the starting point for any challenge to land use or zoning laws banning a religious organization from using property to house the homeless. While federal laws come and go at congressional whim, and are occasionally declared unconstitutional, the First Amendment is an integral part of the United States Constitution, and is the foundation for establishing the limits of the free exercise of religion in the United States.

American courts have repeatedly recognized that providing housing and other essential services for the homeless and disadvantaged are forms of religious activity and worship.[13] In order to claim the First Amend-

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9. *See* Fifth Ave. Presbyterian Church v. City of New York, 293 F.3d 570, 574 (2d Cir. 2002) (suggesting how to provide housing).

10. U.S. CONST. amend. I.

11. Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §§ 2000cc-2000cc-5 (2000).

12. U.S. CONST. amend. I.

13. *See, e.g.*, Capital City Rescue Mission v. City of Albany Bd. of Zoning Appeals, 652 N.Y.S.2d 388, 390 (N.Y. App. Div. 1997). ("Here, it is not disputed that petitioner's functions are not for profit. Its mission statement also reflects its religious status. The proposed uses of the facility include providing food, clothing, shelter, counseling, medical care, educational training and spiritual guidance to disadvantaged individuals. Even if we accepted respondent's conclusion that these activities did not fall within the definition of a house of worship, we fail to see how they do not comport with the definition of a religious or charitable institution."); Henley v. City of Youngstown Bd. of Zoning Appeals, 735

ment as a solid basis for providing housing for the homeless, a religious organization must establish that such conduct is an act of religious faith and worship.[14] Evidence to that effect can appear in many forms, including speeches, resolutions, papers, documents, pronouncements, mission statements and minutes of the religious organization's meetings. Such evidence should be sufficent to rebut any speculation that the religious justification was fabricated *post factum.*[15] Then, as soon as practicable, a permit, permission or variance should be sought from the local government, in order to determine if legal action will be needed at all. It may be that a compromise can be reached in order to avoid any lawsuit.

If legal action is needed to enforce the right to provide housing and similar services for the homeless, an important consideration is the standard of review the case will receive in the judicial system. The question of whether a zoning rule or ordinance allows a proposed use of land is generally regarded as a question of law rather than one of fact, since it involves judicial interpretation of the zoning ordinance as a legal document.[16] Thus, because the judge decides the matter at a summary judgment proceeding or after a bench trial, the case may never be presented to a jury.

A religious organization that ministers to the homeless as part of its exercise of religion would be denied its protected right under the First Amendment's free exercise clause if it were prohibited from conducting that religious ministry.[17] That is important because, "the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."[18] Thus, in *Stuart Circle Parish v. Board of Zoning Appeals*,[19] the United States District Court for the Eastern District of Virginia held that a zoning ordinance, which limited the feeding

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N.E.2d 433 (Ohio 2000) (holding that providing transitional apartments for homeless women and their children in former convent on church property was a religious use of the property permitted by the zoning regulations, although the court did not decide the case on constitutional grounds); Solid Rock Ministries Int'l v. Monroe Bd. of Zoning Appeals, 740 N.E.2d 320, 328 (Ohio Ct. App. 2000) (holding that the church facility to house unwed pregnant teenagers was "an integral part of [the church's] Christian and missionary purposes. . ."), *appeal dismissed*, 736 N.E.2d 901 (Ohio 2000).

14. *See Capital City Rescue Mission*, 652 N.Y.S.2d at 390.

15. Grace United Methodist Church v. City of Cheyenne, 235 F. Supp. 2d 1186, 1196-97 (D. Wyo. 2002) (holding that such evidence existed as to create issues of material fact as to the religious purposes of a proposed day care center).

16. Cmty. Synagogue v. Bates, 136 N.E.2d 488, 492 (N.Y. 1956).

17. *See Fifth Ave. Presbyterian Church,* 293 F.3d at 574 ("[T]he city concedes that the Church's provision of services to the homeless falls within the ambit of protected activity under the Free Exercise Clause. . .").

18. Elrod v. Burns, 427 U.S. 347, 373 (1976).

19. Stuart Circle Parish v. Bd. of Zoning Appeals, 946 F. Supp. 1225 (E.D. Va. 1996).

and housing of the homeless within churches for no more than seven days between October and April, violated the congregation's First Amendment right to engage in its ministry to the homeless.[20] Likewise, in *Western Presbyterian Church v. Board of Zoning Adjustment*,[21] the United States District Court for the District of Columbia concluded that a church's program for feeding the poor was religious conduct, and thus enjoined the application of zoning regulations that purported to bar the church from feeding homeless persons on its premises.[22]

In *St. John's Evangelical Lutheran Church v. City of Hoboken*,[23] a church sought, and obtained, an injunction restraining a municipality from using its zoning laws to prohibit the operation of a shelter for the homeless on church premises.[24] The superior court granting the injunction observed that regardless of how the zoning ordinance was construed, "a municipality may not exercise its zoning power in violation of the fundamental tenets of the First Amendment."[25] The court further explained that:

> Under the First Amendment, government must be neutral toward religion. Government may breach that neutrality if it denies or unreasonably limits the religious use of land. It is indeed late in the day for government to interfere with religion. Pilgrims and others who fled to this country in order to pursue their religious beliefs where and how they wished, undoubtedly thought they had ended government intrusion on religious liberty.[26]

The court concluded: "[i]n view of the centuries old church tradition of sanctuary for those in need of shelter and aid, St. John's and its parishioners in sheltering the homeless are engaging in the free exercise of religion. [The City of] Hoboken cannot constitutionally use its zoning authority to prohibit that free exercise."[27]

In *Fifth Avenue Presbyterian Church v. City of New York*,[28] a church sued New York City seeking "injunctive relief preventing the City from entering onto Church property and dispersing the homeless."[29] The

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20. *Id.* at 1239.

21. W. Presbyterian Church v. Bd. of Zoning Adjustment, 862 F. Supp. 538 (D.D.C. 1994).

22. *Id.* at 547.

23. St. John's Evangelical Lutheran Church v. City of Hoboken, 479 A.2d 935 (N.J. Super. Ct. Law Div. 1983).

24. *Id.* at 939.

25. *Id.* at 938.

26. *See id.*

27. *See id.*

28. *See Fifth Ave. Presbyterian Church*, 293 F.3d 570.

29. *Id.* at 573.

church alleged a number of theories to support its request for an injunction, but the central point was that providing the homeless with even such an attenuated form of shelter was a type of religious worship protected by the First Amendment.[30] The Court of Appeals for the Second Circuit accepted that premise and held that "the City has not sufficiently shown the existence of a relevant law or policy that is neutral and of general applicability, and that would therefore justify its actions in dispersing the homeless from the Church's landings and steps."[31] As a result, the church's First Amendment right to the free exercise of religion prevailed.[32]

The difficulty is that there are factually similar cases with contrary holdings. For instance, in *First Assembly of God v. Collier County Florida*,[33] a church and the residents of a homeless shelter on the church premises sued a county, challenging enforcement of zoning regulations that had closed the shelter.[34] The trial court granted summary judgment for the county,[35] which the Court of Appeals for the Eleventh Circuit affirmed. The Eleventh Circuit held that the county's enforcement of neutral ordinances of general applicability[36] did not violate the free exercise clause of the First Amendment,[37] despite the plain fact that such a ruling necessarily prevented members of this church from freely practicing their religion through this form of ministry.[38] It is hard to reconcile a governmental prohibition on worship in certain, common geographical areas with the constitutional right to free exercise of religion.

II. Laws of Neutral and General Applicability

While it was not a religious housing case, the Supreme Court's decision in *Church of the Lukumi Babalu Aye v. City of Hialeah*[39] still set a challenging standard for avoiding the impact of land use statutes and regulations on religious institutions attempting to provide housing for the homeless.[40] The Court's analysis in *Lukumi Babalu Aye* may be used to impose severe restrictions on the use of the First Amendment to prevent

30. *See id.*
31. *Id.* at 576.
32. *See id.*
33. First Assembly of God v. Collier County, 20 F.3d 419 (11th Cir. 1994).
34. *Id.* at 420-21.
35. *Id.* at 421.
36. *Id.* at 423.
37. *Id.* at 424.
38. *First Assembly of God*, 20 F.3d at 424.
39. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993).
40. *Id.* at 531-32 (holding that city ordinances that are not neutral and of general applicability are unconstitutional).

government regulation of religiously based housing for the homeless. In *Lukumi Babalu Aye*, the Supreme Court held that a local law targeting and barring the use of animal sacrifice for religious purposes violated the Free Exercise Clause.[41] In so holding, the Court reversed an Eleventh Circuit opinion that had affirmed the district court's upholding of the local ordinance.[42]

However, the *Lukumi Babalu Aye* Court also held that "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice."[43] A law that does not meet these requirements, however, "must be justified by a compelling governmental interest, and must be narrowly tailored to advance that interest."[44] Thus, the Supreme Court made it clear that the two important threshold questions for a law challenged under the Free Exercise Clause are: (1) Is the law neutral; and (2) Is the law of general applicability?[45]

The Court addressed these questions in *Lukumi Babalu Aye*, and determined the ordinances were enacted only when government officials belatedly realized that "Santerians" – believers in certain forms of animal sacrifice[46] – were planning to build a church in their community.[47] The ordinances explicitly targeted the religious conduct of animal sacrifice, and so were not neutral.[48] In addition, the Court found that the laws were not of general applicability, but rather applied "only against conduct motivated by religious belief."[49] Thus, the zoning ordinance in *Lukumi Babalu* had to withstand strict judicial scrutiny – a stringent analysis that it could not survive.[50] Likewise, in *Daytona Rescue Mission, Inc. v. City of Daytona Beach*,[51] a church attempted to obtain a permit to operate a food bank and homeless shelter under a city zoning code.[52] The permit was denied and the church filed suit alleging that members of the church had been denied the right to the free exercise of religion.[53] The district

41. *Id.* at 547.

42. Church of the Lukumi Babalu Aye v. City of Hialeah, 723 F. Supp. 1467 (S.D. Fla. 1989), *aff'd*, 936 F.2d 586 (11th Cir. 1991), *rev'd*, 508 U.S. 520 (1993).

43. *See Church of the Lukumi Babalu Aye*, 508 U.S. at 531.

44. *Id.* at 531-32.

45. *Id.* at 531.

46. *Id.* at 524.

47. *Id.* at 526.

48. *See Church of Lukumi Babalu Aye*, 508 U.S. at 545.

49. *Id.* at 542.

50. *Id.* at 546.

51. Daytona Rescue Mission, Inc. v. City of Daytona Beach, 885 F. Supp. 1554 (M.D. Fla. 1995).

52. *Id.* at 1556.

53. *Id.*

court disagreed, holding: (1) the city's zoning code regulated conduct and not belief;[54] (2) the zoning code was not aimed at impeding religion;[55] (3) the government's interest in regulating zoning outweighed housing the homeless and feeding the poor, even if that was a religious practice;[56] and (4) the city had a compelling interest in regulating homeless shelters and food banks, which were being furthered by the least restrictive means possible.[57]

III. The Religious Land Use Act

The Religious Land Use Act was Congress's solution to the highly-restrictive view that some courts had taken of the First Amendment, especially when there was a conflict between religious practices involving the use of land and supposedly neutral laws of general applicability. President Bill Clinton signed the Religious Land Use and Institutionalized Persons Act into law on September 22, 2000.[58] Congress enacted this law after the United States Supreme Court invalidated parts of the Religious Freedom Restoration Act of 1993.[59] Congress passed the Religious Land Use Act to "remedy the well documented discriminatory and abusive treatment suffered by religious individuals and organizations in the land use context."[60] Congressional action was controlling because Article VI, Clause 2 of the United States Constitution makes federal law the supreme law of the land.[61] As a consequence of the Supremacy Clause, Congress could sidestep local government disapproval of religious use of land in a number of contexts, including providing services and housing for the homeless.[62]

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54. *Id.* at 1558.

55. *Id.*

56. *See Daytona Rescue Mission, Inc.*, 885 F. Supp at 1560.

57. *Id.*

58. *See generally* John J. Dvorske, Annotation, *Validity, Construction, and Operation of Religious Land Use and Institutionalized Persons Act of 2000*, 181 A.L.R. Fed. 247 (2002); Shawn Jensvold, Article, *The Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA): A Valid Exercise of Congressional Power?*, 16 BYU J. Pub. L. 1 (2001); Frank T. Santoro, *Section Five of the Fourteenth Amendment and the Religious Land Use and Institutionalized Persons Act*, 24 Whittier L. Rev. 493 (2002); Roman P. Storzer & Anthony R. Picarello, Jr., *The Religious Land Use and Institutionalized Persons Act of 2000: A Constitutional Response to Unconstitutional Zoning Practices*, 9 Geo. Mason L. Rev. 929 (2001).

59. City of Boerne v. Flores, 521 U.S. 507, 536 (1997).

60. 146 Cong Rec. E 1234, 1235 (daily ed. July 13, 2000) (statement of Rep. Charles T. Canady).

61. U.S. Const. art. VI, Cl.2.

62. Derek L. Gaubatz, *RLUIPA at Four: Evaluating the Success and Constitutionality of RLUIPA's Prisoner Provisions*, 28 Harv. J.L. & Pub. Pol'y 501, 598 (2005).

As a result, if the Religious Land Use Act is constitutional, local land use and zoning regulations not conforming with its terms would necessarily be invalid and of no force or effect. The Supremacy Clause of the United States Constitution thus makes the Religious Land Use Act a potentially powerful law that could provide religious organizations a real opportunity to place shelters, short-term housing, and long-term residential structures for the homeless in locations where such facilities do the most good, which is often where local land use planners and zoning officials do not want to see them located.[63]

IV. THE CONSTITUTIONALITY OF RLUIPA

Several local governments have already challenged the constitutionality of the Religious Land Use Act, contending that its enactment was beyond the scope of congressional authority.[64] The influential United States Court of Appeals for the Ninth Circuit has upheld its constitutionality.[65] Indeed, the majority of courts that have considered the matter have concluded that the Religious Land Use Act is on its face constitutional.[66]

Still, many commentators are convinced that prohibiting the government from having the ability to force religious institutions to use their land in ways that conflict with their religious beliefs actually promotes religion, violates the separation of church and state, exceeds congressional authority, contravenes the United States Constitution, or is simply an unworkable and unwise piece of legislation.[67] If the Religious Land

63. Diane K. Hook, Comment, *The Religious Land Use and Institutionalized Persons Act of 2000: Congress's New Twist on "Speak Softly and Carry a Big Stick,"* 34 URB. LAW. 829, 835 (2002) ("[T]he act may provide religious institutions and individuals engaged in religious activities with a powerful weapon to challenge land-use impediments, and perhaps, at the same time, the Act has taken away any meaningful power of local communities to regulate land use within their borders.").

64. Benning v. Georgia, 391 F.3d 1299, 1309 (11th Cir. 2004); Charles v. Verhagen, 348 F.3d 601, 610 (7th Cir. 2003); Mayweathers v. Newland, 314 F.3d 1062, 1070 (9th Cir. 2002).

65. *See Mayweathers*, 314 F.3d at 1070 ("We hold that Congress did not exceed its Spending Clause power in enacting RLUIPA.").

66. *See, e.g.*, *Benning*, 391 F.3d at 1309; *Charles*, 348 F.3d at 610. *But see* Elsinore Christian Ctr. v. City of Lake Elsinore, 270 F. Supp. 2d 1163, 1182 (C.D. Cal. 2003) (finding the Religious Land Use Act exceeded congressional power).

67. *See, e.g.*, Joshua R. Geller, *The Religious Land Use and Institutionalized Persons Act of 2000: An Unconstitutional Exercise of Congress's Power Under Section Five of the Fourteenth Amendment*, 6 N.Y.U. J. LEGIS. & PUB. POL'Y. 561 (2002-2003); Marci A. Hamilton, *Federalism and the Public Good: The True Story Behind the Religious Land Use and Institutionalized Persons Act*, 78 IND. L.J. 311 (2003); Ada-Marie Walsh, *Religious Land Use and Institutionalized Persons Act of 2000: Unconstitutional and Unnecessary*, 10 WM. & MARY BILL RTS. J. 189 (2001).

Use Act can continue to withstand such attacks, it will be a powerful mechanism for securing viable housing for the homeless.

V. RLUIPA's "Substantial Burden" Clause

The heart of the Religious Land Use Act is a ban on land use laws and regulations that place a substantial burden on the free exercise of religion:

> 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 governmental interest; and
>
> (B) is the least restrictive means of furthering that compelling governmental interest.[68]

It is clear that RLUIPA's placement of the "substantial burden" on the government is intended to negate the reasoning of such cases as *Lukumi Babalu Aye*, where the Supreme Court held that "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice."[69] Now, under RLUIPA, it is the government – and not the religious institution – that must establish that land use regulations imposing substantial burdens on religious exercise further a compelling governmental interest *and* are the least restrictive means of furthering that interest.[70]

The "substantial burden" language has been the focal point of many cases construing the Religious Land Use Act.[71] However, the Seventh Circuit has concluded that, as used in RLUIPA, a "substantial burden on

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68. 42 U.S.C. § 2000cc(a)(1) (2000) (emphasis added).

The mandated strict scrutiny part of this law has met with some opposition from legal commentators, although not from the courts. *See* Caroline R. Adams, *The Constitutional Validity of the Religious Land Use and Institutionalized Persons Act of 2000: Will RLUIPA's Strict Scrutiny Survive the Supreme Court's Strict Scrutiny?*, 70 Fordham L. Rev. 2361 (2002); Kris Banvard, *Exercise in Frustration? A New Attempt by Congress to Restore Strict Scrutiny to Governmental Burdens on Religious Practice*, 31 Cap. U.L. Rev. 279 (2003).

69. *See Church of the Lukumi Babali Aye v. City of Hialeah, 508* U.S. 520, 531 (1993).

70. 42 U.S.C. § 2000cc(a)(1).

71. Hernandez v. Comm'r, 490 U.S. 680, 699 (1989); Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch, 100 Fed. Appx. 70, 77 (3rd Cir. 2004), *cert. denied*, 125 S. Ct. 1061 (2005); Adkins v. Kaspar, 393 F.3d 559, 568 (5th Cir. 2004), *cert. denied*, 125 S. Ct. 2549 (2005); San Jose Christian College v. City of Morgan Hill, 360 F.3d 1024, 1035 (9th Cir. 2004); Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1227 (11th Cir. 2004),

religious exercise is one that necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise. . . effectively impracticable."[72] In order to show that state regulation of land has created a substantial burden on the exercise of religion, the religious institution is not required to demonstrate that there is no other land available that might fulfill its purposes.[73] A substantial burden exists if the religious institution would have to endure additional delay, uncertainty and expense in order to find suitable substitute property for its religious purposes, or have to restart the permit process to satisfy the zoning authorities.[74] The important point is that a religious institution need not prove that it has nowhere else to practice its religious tenets, just that the government has improperly imposed a substantial burden on the religious institution's choice of a location to perform its worship.[75]

Land use regulations that would otherwise prevent religious organizations from providing housing facilities and services to the homeless should be subjected to the substantial burden test because such regulations cripple the free exercise of religion. After all, when providing housing for the homeless, there are few ideal places to house such persons, in a location that is reasonably safe, well-maintained, affordable, and close to those educational, governmental and private resources that such persons need to live and improve their existence.[76]

Moreover, the "substantial burden" language must be read in conjunction with another provision of the Religious Land Use Act stating that "no government shall impose or implement a land use regulation that. . . unreasonably limits religious assemblies, institutions, or structures within a jurisdiction."[77] Religious housing facilities for the homeless clearly qualify as "religious institutions, or structures." Indeed, Congress has specified that the Religious Land Use Act is to be interpreted and construed *strongly* in favor of the religious entity: "This [Act] shall be construed in favor of a broad protection of religious exercise, to the

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cert. denied, 125 S. Ct. 1295 (2005); Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752, 761 (7th Cir. 2003), *cert. denied*, 541 U.S. 1096 (2004).

72. *See Civil Liberties for Urban Believers*, 342 F.3d at 761.

73. Sts. Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin, 396 F.3d 895, 901 (7th Cir. 2005).

74. *Id.*

75. *Id.*

76. *See* GOTTFRIED, *supra* note 3; HOMELESSNESS: A GUIDE TO THE LITERATURE, *supra* note 3; KUSMER, *supra* note 3; ROSSI, *supra* note 3.

77. 42 U.S.C. § 2000cc(b)(3)(B) (2000).

maximum extent permitted by the terms of this [Act] and the Constitution."[78]

Of even greater importance, the Religious Land Use Act specifically envisions the application of the Act to advance claims against the government or to defend against the government:

"A person may assert a violation of this [Act] as a claim or defense in a judicial proceeding and obtain appropriate relief against a government."[79]

This clause provides a religious institution with solid standing for filing suitable actions, and for defending against actions brought by the government.

VI. Housing as an Act of Religious Faith under RLUIPA

As noted earlier, courts have repeatedly recognized that providing housing and services for the homeless constitutes a form of religious activity protected to a certain extent by the First Amendment.[80] For its part, the Religious Land Use Act defines the term "religious exercise" in a broad, highly inclusive fashion:

> Religious exercise. –
>
> (A)In general. – The term "religious exercise" includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.
>
> (B)Rule. – The use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose.[81]

This broad definition of religious exercise fully harmonizes with federal and state common law and constitutional law. As the United States Supreme Court has similarly remarked, "it is no business of courts to say that what is a religious practice or activity for one group is not religion under the protection of the First Amendment."[82] As a rule, courts will accept claims of religious belief unless they are "so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the

78. 42 U.S.C. § 2000cc-3(g) (2000); *see also* Kang v. U. Lim Am., Inc., 296 F.3d 810, 816 (9th Cir. 2002) ("We broadly interpret ambiguous language in civil rights statutes to effectuate the remedial purpose of the legislation.").

79. 42 U.S.C. § 2000cc-2(a) (2000).

80. *See* Fifth Ave. Presbyterian Church v. City of New York, 293 F.3d 570, 575 (2d Cir. 2002); Stuart Circle Parish v. Bd. of Zoning Appeals, 946 F. Supp. 1225, 1236 (E.D. Va. 1996); Henley v. Youngstown Bd. of Zoning Appeals, 735 N.E.2d 433, 439 (Ohio 2000).

81. 42 U.S.C. § 2000cc-5(7) (2000).

82. Fowler v. Rhode Island, 345 U.S. 67, 70 (1953).

Free Exercise Clause."[83] After all, religion "is what the individual human being perceives to be the requirement of the transhuman [sic] Spirit to whom he or she gives allegiance."[84] It is "not within the judicial ken to question the centrality of particular beliefs or practices to a faith or the validity of particular litigants' interpretations of those creeds."[85] In fact, even the very architecture of a building can constitute a form of religious exercise.[86]

The legislative history of the Religious Land Use Act exhibits an intention to include a wide array of religious exercises and activities that involve the use of land.[87] The drafters of this law intended to ensure that religious entities could operate "homeless shelters in suburbs" and similar facilities providing food, housing and other services for the poor.[88] Providing housing for the homeless, as a religious exercise, fits squarely within RLUIPA.

VII. Religious Housing Upheld Under RLUIPA

Since its enactment, the majority of courts have been sympathetic toward the Religious Land Use Act in cases involving temporary shelter and other forms of housing for the homeless.[89] In these courts' opinions, the Religious Land Use Act has emerged as a powerful tool for establishing religious use to create such housing in property that could otherwise not be used for such purposes.[90] For instance, in 2002, the U.S. Court of Appeals for the Second Circuit upheld an injunction prohibiting the City of New York from dispersing homeless persons that a church had allowed to sleep on the church's outdoor property, in part based on RLUIPA.[91] The Second Circuit accepted the church's position that this assistance for

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83. Scott v. Rosenberg, 702 F.2d 1263, 1273 (9th Cir. 1983) (quoting Thomas v. Review Bd. of the Indiana Employment Sec. Div., 450 U.S. 707, 715 (1981)).

84. Peterson v. Minidoka County Sch. Dist. No. 331, 118 F.3d 1351, 1357 (9th Cir. 1997), *amended by*, 1997 US. App LEXIS 36357, 13 (9th Cir. 1997).

85. *See* Hernandez v. Comm'r, 490 U.S. 680, 699 (1989).

86. Martin v. Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter Day Saints, 747 N.E.2d 131, 137-38 (Mass. 2001).

87. *See* James L. Noles, Jr., *Can Historic Preservation Coexist with Protections for Religious Land Uses?*, 17 Nat. Resources & Env't 89 (2002) (arguing the Religious Land Use Act is so broad and strong that it may override zoning ordinances meant to preserve historic structures and districts).

88. *See* 146 Cong. Rec. E 1564, 1564 (daily ed. Sept. 21, 2000) (statement of Rep. Henry J. Hyde).

89. *See generally*, Fifth Ave. Presbyterian Church v. City of New York, 293 F.3d 570 (2d Cir. 2002); First Assembly of God v. Collier County, 20 F.3d 419 (11th Cir. 1994).

90. *See generally*, *Fifth Ave. Presbyterian Church*, 293 F.3d 570; *First Assembly of God*, 20 F.3d 419.

91. *See Fifth Ave. Presbyterian Church*, 293 F.3d at 572.

the homeless was "an integral part of its religious mission"[92] and that the church was "commanded by scripture to care for the least, the lost, and the lonely of this world, and, in ministering to the homeless, the Church [was] giving the love of God. There is perhaps no higher act of worship for a Christian."[93]

The holding in *Grace United Methodist Church v. City of Cheyenne*,[94] may stand for the argument that a church might establish a claim under the Religious Land Use Act to require a city to permit operation of a religious day care facility in a low-density residential neighborhood where such a facility would otherwise have been banned.[95] In *Dilaura v. Ann Arbor Charter Township*,[96] the United States Court of Appeals for the Sixth Circuit held that a religious organization was entitled to allege that the Religious Land Use Act permitted it to use its property as a religious retreat, despite a contrary zoning ordinance.[97]

In *Shepherd Montessori Center Milan v. Ann Arbor Charter Township*,[98] the Michigan Court of Appeals held that the Religious Land Use Act might provide a basis for relief for people who wanted to open and operate a religious primary school for children, despite a local ordinance that the only proper use for the land was as an office park.[99] In *Konikov v. Orange County, Florida*,[100] the Eleventh Circuit Court of Appeals held that the county was not entitled to summary judgment against a rabbi who was conducting religious meetings and services at his home, in defiance of county ordinances, because the lack of rational, even-handed enforcement standards had created a risk of arbitrary and discriminatory enforcement.[101] While some cases indicate otherwise, the majority trend favors enforcing the RLUIPA's plain terms, thereby affording greater protection to religious organizations seeking to use land for religious purposes in areas restricted by adverse regulations and laws.

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92. *Id.* at 574.

93. *Id.* at 574-75 (internal quotes and ellipses omitted).

94. Grace United Methodist Church v. City of Cheyenne, 235 F. Supp. 2d 1186 (D. Wyo. 2002).

95. *Id.* at 1196-98.

96. Dilaura v. Ann Arbor Charter Twp., 30 Fed. Appx. 501 (6th Cir. 2002).

97. *Id.* at 507, 510.

98. Shepard Montessori Ctr. Milan v. Ann Arbor Charter Twp., 675 N.W. 2d 271 (Mich. Ct. App. 2003).

99. *Id.* at 289-90.

100. Konikov v. Orange County, 410 F.3d 1317 (11th Cir. 2005).

101. *Id.* at 1330-31.

VIII. CONCLUSION

The First Amendment and the Religious Land Use and Institutionalized Persons Act provide powerful tools for protecting the rights of religious institutions to supply housing for the homeless as a part of the exercise of their religious beliefs. This benefits both the persons who can freely exercise their ministry of care as well as those less fortunate and the homeless who receive lodging and other essential services at locations that are convenient. Indeed, since religious non-profit organizations have the desire and potential to provide substantial services to the homeless in an era where government lacks the will and resources to do so, the nation as a whole will clearly benefit from their charitable housing activities, initiated under the aegis of the First Amendment and the Religious Land Use and Institutionalized Persons Act.