

**NEW YORK
CITY BAR**

**FIFTY-NINTH ANNUAL
NATIONAL MOOT COURT COMPETITION**

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

October Term 2008

—————
Docket No. 2008-315

—————
Your Love Children's Academy, Petitioner

v.

Town of San Teresa, State of Old York, Respondent

—————
Cormac T., Petitioner

v.

Town of San Teresa, State of Old York, Respondent

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THE RECORD

Background

George T. is a child with a learning disability. He lives in San Teresa, Old York with his parents, Cormac and June T. He was born August 12, 2000. Early on, George's parents noticed behavior consistent with a learning disability. Medical tests and evaluations later confirmed that George suffered from Attention Deficit Hyperactivity Disorder ("ADHD") and other learning disabilities affecting his math and language abilities.

In September 2003, his parents enrolled him in a private pre-school, Little Learners Academy. The ratio of teachers to students at Little Learners was four to one. George received individualized attention in a class with non-disabled students. He did not receive any structured academic instruction, although he was exposed daily to math and language concepts.

Children's Academy

In September 2005, George's parents considered enrolling him in Faraway Point's public kindergarten class. They worried about the quality of Faraway Point's public schools because they were among the lowest-performing schools in Old York. George's parents decided to enroll him in the elementary school counterpart to Little Learners, Old York Children's Academy ("Children's Academy"). That elementary school offered a program specializing in the education of children with learning disabilities.

At Children's Academy, a host of certified experts evaluated George's academic abilities, among them the school's program administrator, a certified special education teacher, a speech and language pathologist, an occupational therapist, and a psychologist. These evaluations confirmed George's previously-diagnosed learning disabilities. School officials then put George in a class of eight students with one teacher and one teacher's assistant.

Like George, the other students were between five and six years old with varying degrees of learning disabilities. Academically, George was at the middle of his class. He received one-on-one instruction for one hour twice a week in both math and language skills. George also participated in additional daily math laboratories. He received one hour of private counseling every week to address emotional issues. George's teacher held a masters degree in special education, and was certified as an Old York special education teacher. Only in physical education activities did George interact with non-disabled students.

San Teresa Board of Education

Before George turned six, his parents decided to move to a town with a better public school system. They chose San Teresa. San Teresa is a suburban town of about 15,000 people. It has a bustling commercial area with shops, houses of worship, and restaurants near commuter train service into Old York City. Outside the shopping area, however, the town was mainly residential.

Cormac and June entered into a contract to purchase a house in San Teresa. They then approached the public school system about enrolling George and issuing an

Individualized Educational Program ("Program") for George for the 2006-2007 school year, as required by the Individuals with Disabilities Education Act.

Cormac was told that the Board of Education of the San Teresa School System ("Board") could not evaluate non-resident students. And, since George was not yet a resident of San Teresa, the Board would evaluate him only after his parents actually became San Teresa residents.

Based on that information, and the fact that George would not reside in San Teresa until six weeks before the school year began, Cormac decided to keep George at the Children's Academy for another year.

Individualized Educational Program

In February 2007, Cormac again asked the Board to evaluate George for a Program to address George's specific educational needs for the upcoming school year. During the Spring of 2007, the Board's experts fully evaluated George, among them the Board's psychologist, speech and language pathologists, occupational therapists, educational evaluators and special education teachers, and the Board's Committee on Special Education ("Committee").

The evaluations indicated that despite his disabilities, George's speech and language skills were comparable to those of four year olds. And George's mathematical abilities were in the range of five year olds. In light of George's learning disabilities, the academic progress that he had made at the Children's Academy was remarkable.

Cormac participated in a meeting with the Committee to prepare a Program for George. The Board scheduled the Program review for May 25, 2007 with Cormac, a member of the Committee, George's current special education teacher, the special education teacher responsible for George's learning under the Program, and a school psychologist from the Board, as required by Old York State law. The Program provided for George's placement in the smaller of San Teresa's two public elementary schools, Ironia Elementary School ("Ironia"). That school had about 200 students in grades K-6. Ironia had a group of 15 learning-disabled students when the Program review occurred, and expected that group to grow to 18 disabled students for the upcoming school year.

The learning-disabled students were broken up into two classrooms, grouped largely by age and abilities of the students. Each classroom had one teacher and a part-time teacher's assistant. George's Program placed him in a classroom composed primarily of nine younger students with academic abilities in the three to four year old range (a few students were in the four to five year old range). Students in the second classroom were aged 9 to 12 functioning at second to fourth grade academic levels. George would have been at the higher end academically of his assigned classroom placement.

The Program also provided for individualized instruction for one hour every week. Specifically, George would receive one hour of small group instruction every week for language and math skills. And George's only contact with mainstreamed students would be limited to physical education.

During the Program review, Cormac questioned the Committee's proposed Program. He asked that it be revised to include additional one-on-one instruction for George in math and language. Individualized instruction was key in helping George keep academic pace with his peers. Cormac also objected that the placement would limit George academically because he would be more advanced than other students in his class.

On June 22, 2007, however, the Board notified Cormac that it would not modify the Program. Cormac requested an impartial review to determine the appropriateness of the placement.

Meanwhile, Cormac started considering other schooling options for George. Along the way, Cormac learned that George's teacher – with whom Cormac and George had developed an excellent relationship – would be leaving the Children's Academy. She was going to teach special education at a private school, the Your Love Children's Academy ("YLC Academy"), in a program specially designed for the education of students with ADHD and other learning disabilities. Cormac learned about an opening in the classroom with George's former teacher.

While Cormac was aware of controversy surrounding YLC Academy and Your Love Church, after speaking with the YLC Academy administrators, he was confident that the controversy would not affect the quality of George's education. Cormac then enrolled George at YLC Academy, and sought reimbursement from the Board for George's tuition of \$24,000 for the 2007-2008 school year.

YLC Academy

YLC Academy is located near the central business district of San Teresa. The school's mission is to educate the young YLC members consistent with the basic tenets of the church. The school also accepts non-member students, but all students are educated consistent with the Church's tenets. The school is widely recognized for its expertise in educating students with learning and other disabilities.

YLC Academy first opened in 1995. At that point, its facilities consisted of a two-story building housing ten rooms for classroom instruction, and a main office for the Academy's principal. Between 1995 and 1999, the Academy's enrollment doubled from 100 to 200 students, leading to extreme space constraints. In early 2000, the school sought a special permit from the San Teresa Zoning Board ("Zoning Board") to build an additional two floors on the existing building. After the Zoning Board granted the special permit, construction ended in time for the following school year. Today, YLC Academy consists of a four-story building with 20 rooms for classroom instruction, a library, a teachers' lounge, and offices for administrative staff.

The additional space from the year 2000 construction project, combined with recent studies ranking YLC Academy in the top five rated private schools in the area for students with learning challenges, made YLC Academy even more attractive to parents seeking a quality education for their children. As a result, in 2005, YLC Academy made plans for another expansion project. Dick Belding, YLC Academy's principal and the church's spiritual leader, hired the famous architect, Jarren Weffs, to design an annex that would be connected to the main building by a glass walkway. The

annex would house a new state-of-the-art gymnasium to accommodate the physical education component of YLC Academy curriculum, as well as small classrooms that would be used for tutoring, individualized instruction (particularly for students with learning disabilities) and Sunday school classes for church members.

YLC Academy, through its principal, petitioned the Zoning Board to obtain a special permit to begin construction on the expansion. The Academy's goal was to have the new annex completed in time for the 2007-2008 school year. At first, Belding's efforts to obtain the special permit progressed smoothly. On June 1, 2005, a subcommittee of the Zoning Board that was charged with scrutinizing the building plans, engineering, and feasibility of the new construction, recommended to issue the special permit. That recommendation was scheduled to be reviewed by the full Zoning Board at the Board's June 15, 2005 meeting.

YLC Academy Principal's Arrest

On June 5, 2005, however, the State of Old York authorities raided Belding's residence in the far corner of the YLC grounds. The raid occurred days after a 12-year-old female student at YLC Academy informed a family crisis hotline that Belding sexually abused her and other YLC Academy students at his residence. The residence and surrounding grounds had been used by YLC Academy for physical education classes because the school did not have a gymnasium. Authorities removed 15 youths who were both members of YLC and students at YLC Academy from Belding's residence.

The raid caused a public outcry in San Teresa. For three days, members of the community protested in front of YLC Academy to shut down both the church and the school. There were media reports that polygamist religious sects were linked to a higher frequency of sexual assaults on young females than non-polygamist religious sects. Although YLC condoned polygamy when the church was founded in 1955, it claimed to have abandoned those beliefs in the mid-1970s. Nonetheless, those reports fueled rumors throughout San Teresa.

Although the constant news coverage abated after the protests ended, the raid of Mr. Belding's residence and his subsequent arrest left the San Teresa community with a sour image of YLC. On June 13, 2005, the local news ran a story about YLC Academy's planned expansion project. It included details about the Zoning Board subcommittee's recommendation that the Academy be granted a special permit, and the scheduled meeting of the full Zoning Board to consider the subcommittee's recommendation.

Over 500 people attended the June 15, 2005 Zoning Board meeting — more than any other Zoning Board meeting in the history of Old York — and 75 of them voiced grave concerns to the Board about the expansion project. At the end of the Zoning Board meeting, the Chair announced that the Zoning Board would take the community's comments into consideration.

Zoning Board Special Permit Denial

On June 20, 2005, the Zoning Board unanimously denied YLC's special permit application. In its faxed letter to Jack Skinner, the newly-appointed YLC Academy principal

and spiritual leader, the Board explained that the planned expansion would increase the existing traffic problems. The new annex would also likely create emissions that would burden and adversely impact the local farming environment. Finally, the letter indicated that YLC Academy could re-apply for a special permit so long as the new construction plan addressed these concerns.

After receiving the Zoning Board's denial letter, Skinner asked Jarren Weffs to revise his design plan for the annex. The new plan included a larger rear entrance to the facility and a bigger parking lot on Old York Street. It also included a "green" design that would not impact the air or water quality of San Teresa and the surrounding communities.

YLC Academy re-submitted its special permit application on August 5, 2005. Again, the Zoning Board denied the application. In an August 10, 2005 decision, the Board cited the same concerns. At this point, any further changes to the design of the annex would have been prohibitively expensive for YLC Academy.

Two Lawsuits Challenged San Teresa's Action

Two lawsuits challenged San Teresa's decisions in the Southern District of Old York.

In one case, Cormac appealed the Board's refusal to amend its Program or reimburse him for YLC Academy tuition costs. Specifically, in September 2007, after Cormac requested an impartial review of the appropriateness of the Board's recommended placement and for reimbursement of the YLC Academy's tuition, an impartial hearing officer

("Hearing Officer") held a two-day hearing concerning Cormac's challenge to the Board's Program. The Hearing Officer heard testimony from six witnesses, including an educational evaluator and a school psychologist from the Board, the special education teacher responsible for George's learning under the Program, a Committee on Special Education member, George's current special education teacher, and Cormac. The Hearing Officer granted Cormac's request for tuition reimbursement, reasoning that the proposed placement at Ironia Elementary School was an inappropriate placement to meet George's needs.

The Board then appealed the Hearing Officer's decision to a State Review Officer ("Review Officer"). The Review Officer disagreed with the Hearing Officer, finding that the proposed placement was appropriate to meet George's needs and would provide him with a free and appropriate public education. The Review Officer further found that YLC Academy was an inappropriate placement to meet George's educational needs. Accordingly, on November 19, 2007, the Review Officer denied Cormac's reimbursement request for the cost of George's tuition at YLC Academy.

Cormac, on behalf of his son George, appealed the Review Officer's decision to the District Court for the Southern District of Old York.

The other case involved YLC Academy's federal action appealing the San Teresa's Zoning Board decision to deny its special permit application.

Both parties sought injunctive and declaratory relief.

District Court Opinion

Although these actions were originally filed separately, the district court consolidated them. Because the Town of San Teresa is a party to the actions brought by Cormac T. and YLC Academy, all parties consented to consolidation of both actions to expedite review of the parties' summary judgment motions.

In its decision, the district court held that Section 2 of the Religious Land Use and Institutionalized Persons Act ("RLUIPA") was constitutional and the Zoning Board's denial of YLC Academy's application was arbitrary and unlawful. The district court also denied summary judgment on Cormac's claim for tuition reimbursement holding that the Individuals with Disabilities Education Act ("IDEA") did not require a student to use the public school system to trigger the statute's reimbursement remedy.

Fourteenth Circuit Court of Appeals Opinion

San Teresa appealed on both grounds. The Fourteenth Circuit Court of Appeals reversed the district court's decision, and held that Section 2 of RLUIPA was unconstitutional. Therefore, the Court did not address the Zoning Board's findings. The Fourteenth Circuit Court of Appeals also held that IDEA required students to enroll and attempt to use the public school options afforded to trigger the statute's reimbursement remedy.

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OLD YORK**

Consolidated Under Case No. 06-1836

06-1836

Your Love Children's Academy

Plaintiff,

v.

Town of San Teresa, State of Old York

Defendant.

07-13877

Cormac T.

Plaintiff,

v.

Town of San Teresa, State of Old York

Defendant.

January 7, 2008

Opinion and Order

A. Volery, District Judge.

Currently before this Court are two separate actions brought against the Town of San Teresa in the State of Old York. Both cases raise novel legal questions of great

significance to Old York. These cases have been consolidated under Rule 42(a) of the Federal Rules of Civil Procedure.

In *Your Love Children's Academy v. Town of San Teresa, State of Old York* (Case No. 06-Civ-1836), Defendant, Town of San Teresa asks this Court to grant summary judgment on its claim that Section 2 of the Religious Land Use and Institutionalized Persons Act ("RLUIPA") is unconstitutional. The Town argues that RLUIPA exceeds Congress' Fourteenth Amendment powers, and violates the Establishment Clause. Your Love Children's ("YLC") Academy, however, argues that RLUIPA is constitutional, and the Zoning Board's denial of YLC Academy's application for a special permit violated RLUIPA.

In *Cormac T. v. Town of San Teresa, State of Old York* (Case No. 07-Civ-13877), Defendant, Town of San Teresa seeks summary judgment on Cormac T.'s appeal to this Court of the decision of the State Review Officer ("SRO") denying him tuition reimbursement. Although Cormac T. and the Board continue to disagree about the appropriateness of the educational placement for George T., the Board moved for summary judgment on a narrower reimbursement issue: do the 1997 Amendments to the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. 1412(a)(10)(C)(ii), allow tuition reimbursement where a child has not "previously received special education and related services under the authority of a public agency."

The Town of San Teresa moves for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. After reviewing all of the litigants' submissions, for the reasons more fully explained below, this Court:

Denies Old York’s motion for summary judgment and holds that RLUIPA is constitutional, and the Zoning Board’s denial of YLC Academy’s application was arbitrary and unlawful.

Denies Old York’s motion for summary judgment, finding that IDEA does not impose a mandatory bar to tuition reimbursement where a child has not previously attended public school. This Court also finds that a disputed issue of material fact exists concerning the appropriateness of George T.’s Individualized Educational Program (“Program”).

Background

YLC Academy

YLC Academy is a private school, affiliated with the Your Love Church located in San Teresa, Old York. The school’s mission is to educate the members of YLC consistent with the church’s teachings. YLC Academy developed an expertise in educating students with learning and other disabilities. Over the last several years, the increase in YLC Academy’s enrollment caused space constraints. While the school expanded in 2000, another expansion has become necessary. YLC Academy developed a design for an annex to house a new gymnasium, and small classrooms for tutoring, individualized instruction, and Sunday school classes for YLC members.

YLC’s Zoning Board Application

YLC Academy submitted an application to the San Teresa Zoning Board (“Zoning Board”) for permission to carry out its plans for the annex. A subcommittee of the

Zoning Board recommended that a special permit be issued to YLC Academy. That recommendation was scheduled for review by the full Zoning Board at its June 2005 meeting. Before the meeting, however, YLC Academy administrators fell victim to a widely-publicized incident involving its principal. This resulted in public outcry over the expansion project.

On June 20, 2005, the Zoning Board informed YLC Academy that it unanimously denied the application for a special permit because the planned expansion would increase the existing traffic problems and would create environmental problems. The Zoning Board indicated that YLC Academy could re-apply for a special permit so long as the new construction plan addressed these concerns.

YLC Academy re-submitted its special permit application on August 5, 2005 with a new plan to address the traffic and environmental concerns. On August 10, 2005, however, the Zoning Board again denied the application, citing the same concerns.

Cormac T.

Petitioner Cormac T. is the father of George T. Both are residents of the town of San Teresa in the State of Old York. George suffers from Attention Deficit Hyperactivity Disorder ("ADHD"), and other learning disabilities affecting his math and reading abilities. When George's parents were moving to San Teresa, they asked the Board to develop an Individualized Educational Program ("Program") for George so that he could attend public school and receive special education services within the public school system. The Board refused, citing policy against evaluating non-resident

students. Based on that policy, Cormac decided to continue his son's enrollment in a private educational setting.

For the upcoming 2007-2008 school year, Cormac again approached the Board about developing a Program for George. This time, however, the Board developed a Program that Cormac believed to be inappropriate. Cormac notified the Board of his belief that the placement was inappropriate. On the last day of the Board's academic year, the Board notified Cormac that it would not modify the Program. Cormac enrolled George in a private school setting at YLC Academy, and sought reimbursement from the Board for George's tuition. Cormac exhausted all administrative remedies and appealed to this Court.

Standard of Review

Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Fed.R.Civ.P. 56(c). Under Rule 56 of the Federal Rules of Civil Procedure, this Court "must view the facts in the light most favorable to the nonmoving party and draw all inferences in that party's favor." *Id.*

Discussion

1. RLUIPA is a constitutional exercise of Congress' power

Section 2 of the Religious Land Use and Institutionalized Persons Act¹ provides that:

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 ...

(A) is in furtherance of a compelling governmental interest; and

(B) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000cc(a)(1). There is no doubt that Congress intended courts to interpret RLUIPA broadly, stating that the Act's aim of protecting religious exercise is to be construed "to the maximum extent permitted by the terms of this chapter and the Constitution." 42 U.S.C. § 2000cc-3(g).

¹ Because Section 2 of RLUIPA is the only section at issue, references to RLUIPA throughout this decision refer only to Section 2 of the Act.

Congress enacted RLUIPA in response to the Supreme Court's partial invalidation in 1997 of the Religious Freedom Restoration Act of 1993 ("RFRA"), 107 Stat. 1488, 42 U.S.C. §§ 2000bb-2000bb-4, in *City of Boerne v. Flores*, 521 U.S. 507 (1997). The "general rule" of RLUIPA is the same as that provided by RFRA in that state action that "substantially burden[s]" religious exercise must be justified as the "least restrictive means" of furthering a "compelling governmental interest." See 42 U.S.C. §§ 2000cc(a)(1), 2000cc-1(a). RLUIPA's provisions, however, are more narrowly directed than those of RFRA.

San Teresa challenges RLUIPA on the grounds that it exceeds Congress' authority under the Fourteenth Amendment (§ 5) and is unconstitutional under the Establishment Clause.

Congress has the power to enforce the "free exercise" clause under the Fourteenth Amendment

Section 1 of the Fourteenth Amendment prohibits the States from "depriv[ing] any person of life, liberty, or property without due process of law," and from "deny [ing] to any person within its jurisdiction the equal protection of the laws." U.S. CONST. AMEND. XIV, § 1.

Section 5 of that Amendment provides Congress with the "power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. AMEND. XIV, § 5.

Congress' Section 5 power allows it to pass "corrective legislation ... such as may be necessary and proper for counteracting ... such acts and proceedings as the States may commit or take, and which, by the amendment, they are prohibited from committing or taking."

The Civil Rights Cases, 109 U.S. 3,13-14 (1883); *U.S. v. Georgia*, 126 S. Ct. 877, 881 (2006) (holding that Congress has the power to remedy violations of the Fourteenth Amendment through corrective legislation); *Nevada Dep't of Human Resources v. Hibbs*, 538 U.S. 721 (2003) (same).

RLUIPA applies in those cases where the government makes "*individualized assessments* of the proposed uses for the property involved." 42 U.S.C. §§ 2000cc(a)(2)(c) (emphasis added). Congress's enactment of subsection (a)(2)(C) of RLUIPA did nothing more than codify existing Supreme Court jurisprudence.

In *Sherbert v. Verner*, 374 U.S. 398 (1963), the Supreme Court held that a government-imposed choice between engaging in religious conduct and receiving a benefit was a substantial burden on the free exercise of religion, and that the government must justify such conduct with a compelling state interest to pass constitutional muster. Later, in *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), the Court held that the *Sherbert* strict scrutiny standard did not apply to generally applicable government action that substantially burdens religious exercise. However, the *Sherbert* standard for applying strict scrutiny in free exercise cases that challenge laws imposing *individualized assessments* survived the Supreme Court's decision in *Smith*. The Court's more recent case, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), does nothing to deter this conclusion. In *Lukumi*, the Court struck down several city ordinances prohibiting the ritual slaughter of animals as violating the Free Exercise Clause, reasoning that the ordinances at issue were not neutral with respect to religion and lacked a compelling governmental interest. *Id.*

at 546 (“[a] law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny”). Here, the Zoning Board’s decision constitutes an individualized assessment within the meaning of *Smith* and, therefore, strict scrutiny applies.

Through RLUIPA, Congress did not blur the line between creating a remedy to unconstitutional laws and defining constitutional rights. RLUIPA conforms with the Supreme Court’s decision in *City of Boerne*, satisfying both the requirements for congruence and proportionality. Thus, RLUIPA’s land use provisions are constitutional on their face as applied to states and municipalities.

RLUIPA does not violate the Establishment Clause

San Teresa claims that RLUIPA violates the Establishment Clause. The Establishment Clause of the United States Constitution provides that “Congress shall make no law respecting an establishment of religion....” U.S. CONST. AMEND. I. In the seminal case, *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the Supreme Court established a three-prong test to determine if there is a violation of the Establishment Clause (the “Lemon Test”). The Lemon Test provides that:

1. the statute must have a secular legislative purpose;
2. the statute’s principal or primary effect must be one that neither advances nor inhibits religion; and
3. the statute must not foster an excessive government entanglement with religion.

Id. at 612-13.

San Teresa argues that RLUIPA fails under the Lemon Test. This Court disagrees. The Lemon Test and the Establishment Clause call for neutrality. *Gillette v. United States*, 401 U.S. 437, 450 (1971). RLUIPA is neutral. It does not favor one religion over any other but applies equally to all religions. See *Jimmy Swaggart Ministries v. Bd. of Equalization*, 493 U.S. 378 (1990) (holding that a rule that applies equally to all religions offends neither the Free Exercise Clause nor the Establishment Clause). RLUIPA serves the secular purpose of alleviating governmental interference with religious exercise. See *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1240-41 (11th Cir. 2004) (alleviation of discrimination is proper secular purpose).

RLUIPA also complies with the second and third prongs of the Lemon Test because it neither “advances nor inhibits religion,” nor fosters an “excessive government entanglement with religion.” *Lemon*, 403 U.S. at 612-13 (citing *Walz v. Tax Commission*, 397 U.S. 664, 674 (1970)). RLUIPA § 2(a)(1), as applied through § 2(a)(2)(C), merely codifies existing Free Exercise jurisprudence. RLUIPA does not promote or subsidize a religious belief or message, but merely frees religious groups and individuals to practice as they otherwise would in the absence of certain state-imposed regulations. See *Midrash Sephardi*, 366 F.3d at 1241 (“RLUIPA, by mandating *equal* as opposed to *special* treatment for religious institutions, does not advance religion by making it easier for religious organizations themselves to advance religion.”) (emphasis in original).

Finally, RLUIPA does not require the government to supervise or oversee religion, but rather to avoid

discrimination against religious institutions. This does not constitute entanglement with religion sufficient to violate the third prong of the Lemon Test.

Accordingly, RLUIPA satisfies the Lemon Test and is constitutional under the Establishment Clause.

2. Denying YLC Academy’s special permit application violated RLUIPA

To establish a RLUIPA violation, YLC Academy must demonstrate that the town’s conduct imposes a “substantial burden” on YLC Academy’s “religious exercise.” 42 U.S.C. §§ 2000cc(a)(1), (2).

This case involves a “Religious Exercise”

Religious exercise under RLUIPA is defined as “any exercise of religion, whether or not compelled by, or central to, a system of religious belief.” 42 U.S.C. § 2000cc-5(7)(A). Using, building, or converting real property for religious exercise purposes is considered a religious exercise under the statute. 42 U.S.C. § 2000cc-5(7)(B). This Court concludes that YLC’s intent to construct an annex to the Academy property falls within RLUIPA’s definition of religious exercise. See *San Jose Christian College v. City of Morgan Hill*, 360 F.3d 1024, 1034 (9th Cir. 2004) (“Inasmuch as [the plaintiff] intends to convert the [p]roperty from hospital use to a place for religious education, it appears that a ‘religious exercise’ is involved in this case”).

The application’s denial imposes a “substantial burden”

The U.S. Supreme Court has not yet defined “substantial burden” as it applies to RLUIPA. Neither does the statute itself contain any definition of the term. But, RLUIPA’s legislative history indicates that Congress intended the term “substantial burden” to be interpreted “by reference to Supreme Court jurisprudence.” 146 Cong. Rec. S7774, S7776 (2000).

Up to now, the Supreme Court has generally found that a government’s action imposes a substantial burden on an individual’s free exercise of religion when that action forced an individual to choose between “following the precepts of her religion and forfeiting benefits,” *Sherbert*, 374 U.S. at 404, or when the action in question placed “substantial pressure on an adherent to modify his behavior and to violate his beliefs,” *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 717-18 (1981). But it has found no substantial burden when, although the action encumbered the practice of religion, it did not pressure the individual to violate his or her religious beliefs. See *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 449 (1988); *Braunfeld v. Brown*, 366 U.S. 599, 605-06 (1961).

In the RLUIPA context, “a land-use regulation that imposes a substantial burden on religious exercise is one that necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise — including the use of real property for the purpose thereof within the regulated jurisdiction generally — *effectively impracticable*.” *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 761 (7th Cir. 2003) (“*CLUB*”) (emphasis added). Compare *Midrash Sephardi v. Town of Surfside*, 366 F.3d

1214, 1227 (11th Cir. 2004) (defining a “substantial burden” as something “akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly”) (emphasis added).

Here, the Zoning Board’s denial of YLC Academy’s application could well be found to be arbitrary and unlawful. The cited traffic problems and environmental impact issues appear to be mere pretexts for discrimination against a controversial religious group. YLC Academy did not have a quick, reliable, and financially feasible alternative to meet its religious needs absent its obtaining the special permit. Therefore, this Court finds that a jury could reasonably conclude that the Zoning Board’s decision imposed a “substantial burden” on YLC Academy by rendering its expansion effectively impractical.

Accordingly, Defendant’s motion for summary judgment is **DENIED** as to the RLUIPA claims.

3. IDEA does not impose a mandatory bar to tuition reimbursement where a child has not previously attended public school

The 1997 Amendments to IDEA did not alter the fundamental framework of IDEA, as outlined by the United States Supreme Court in *School Comm. of the Town of Burlington v. Department of Education*, 471 U.S. 359 (1985), and *Florence County School District v. Carter*, 510 U.S. 7 (1993).

In *Burlington* and *Carter*, the Supreme Court held that children with disabilities need not continue in inappropriate public school placements while their parents challenge the school district’s failure to provide a free appropriate public

education ("FAPE"). 471 U.S. at 374; 510 U.S. at 16. The 1997 Amendments did not effect a change in the law. Rather, they codified existing case law concerning parents' obligations to give notice that special education is at issue, and to cooperate with a school district's efforts to provide FAPE to a child.

The plain language of the statute does not require public school enrollment before a student is eligible for tuition reimbursement.

Section 1412(a)(10)(C)(ii) ("Section (C)(ii)") does not require that a special education student try out an inappropriate public school placement before he or she is eligible to seek reimbursement from the public school system for the cost of a private placement. The 1997 amendment to Section (C)(ii) states as follows:

If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private elementary or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment.

Contrary to the Board's position, the plain language of Section (C)(ii) does not say that tuition reimbursement is

only available to parents of a child who previously received special education and related services from a public agency. Nor does Section (C)(ii) say that tuition reimbursement is unavailable to parents of a child who has not previously received such services. Instead, the Board urges this Court, by implication, to read this language into the statute. And this Court declines to do so.

As the Supreme Court cautioned in *Winkelman v. Parma City School District*, 127 S. Ct. 1994 (2007), courts asked to find that IDEA provisions implicitly limit parental rights must carefully consider whether such an interpretation “would be inconsistent with the statutory scheme.” The Board’s plain language argument is inconsistent with IDEA’s statutory scheme and goals, which include “ensur[ing] that all children with disabilities have available to them a free appropriate public education” and “that the rights of children with disabilities and parents of such children are protected.” 20 U.S.C. §§ 1400(d)(1)(A)-(B).

Supreme Court precedent allows parent tuition reimbursement where the public agency has failed to provide free appropriate public education to a disabled child.

In *Burlington*, the Court held that courts have the power to order school authorities to reimburse parents for their expenditures for private special education for a child if the court ultimately determines that private placement, rather than the proposed Individualized Educational Program (“IEP”), is proper under the Act. 471 U.S. at 370. Children with disabilities are not required to continue in inadequate public school placements while their parents challenge the school boards’ Individualized Educational Programs and

failure to provide FAPE. Instead, parents can place their children in an appropriate private school placement without the risk of forgoing tuition reimbursement. *Id.* at 372-373 (“The Act was intended to give handicapped children both an appropriate education and a free one; it should not be interpreted to defeat one or the other of those objectives.”).

The Court in *Burlington* refused to force parents of disabled children into this “Hobson’s choice” of accepting an inappropriate placement with the public school or paying for what the parents consider to be an appropriate placement in a private setting. *Id.* at 370. The Court recognized that most parents, if they were able, would choose the latter course. In those circumstances, however, “the child’s right to a free appropriate public education, the parents’ right to participate fully in developing a proper IEP, and all of the procedural safeguards would be less than complete.” *Id.* The Court held that Congress “undoubtedly did not intend this result.” *Id.*

Burlington interpreted IDEA as authorizing tuition reimbursement where:

1. an Individualized Education Program is inappropriate;
2. the private school placement is appropriate; and
3. equitable considerations favor granting relief.

Id. at 370, 374.

The Board’s argument goes against the Court’s precedent and wrongly attempts to add a fourth part to the *Burlington* test. This Court sees no reason to disturb our highest Court’s interpretation of what IDEA requires to afford parents of disabled children a tuition reimbursement remedy.

Rules of statutory construction compel the conclusion that the 1997 Amendments to IDEA did not disturb courts' equitable powers to grant tuition reimbursement in appropriate circumstances

In drafting Section 1412 in the 1997 Amendments, Congress made no mention of any disapproval or intended restriction of the scope of a court's equitable powers under Section 1415. Without such express disapproval of the statute in existence at the time of the Amendments, it would be improper for this Court now to conclude that Congress intended the upheaval of the body of law developed under the prior statute. See *Cottage Savings Assoc. v. Comm'r of Internal Revenue*, 499 U.S. 554, 561-562 (1991) (Where prior court decisions "were part of the 'contemporary legal context' in which Congress enacted" a particular statutory provision and Congress left the principles "undisturbed" in subsequent amendments to the statute as a whole, the Court would "presume that Congress intended to codify these principles" in the statute.).

Moreover, when Section 1415 and IDEA are read together as a whole, it is beyond cavil that Section 1412 was not intended to limit the remedies afforded by Section 1415. Instead, by codifying the Supreme Court's precedent in *Burlington* and *Carter*, Congress clearly sought to clarify the obligations of parents and to guide courts in exercising their broad equitable powers.

All that Section 1412 requires is that parents notify the school board that special education is at issue, and allow the school board the opportunity to provide a disabled child with FAPE. Neither principles of statutory construction, nor

legislative history regarding Section (C)(ii),² reveals any intent on the part of Congress to impose a mandatory public school tryout to trigger the parent of a disabled child's tuition reimbursement remedy.

For all these reasons, Defendant's motion is **DENIED** as to the IDEA claims.

² The legislative history regarding Section (C)(ii) is limited. The Second Circuit in *Frank G. v. Board of Education of Hyde Park*, however, recognized that the "legislative history of the 1997 Amendments . . . is as significant for what it does not say as for what it does say." 459 F.3d 356, 374 (2d Cir. 2006). The most pertinent legislative history does little more than restate the statutory language. See H.R. Rep. No. 105-95 at 92 (1997); S. Rep. No. 105-17 at 13 (1997).

**UNITED STATES COURT OF APPEALS
FOR THE FOURTEENTH CIRCUIT**

Consolidated Under Appellate No. 06-1836

Docket No. 06-1836

**Your Love Children's Academy,
Plaintiff-Appellant,**

v.

**Town of San Teresa, State of Old York,
Defendant-Respondent.**

Docket No. 07-13877

**Cormac T.,
Plaintiff-Respondent,**

v.

**Town of San Teresa, State of Old York,
Defendant-Appellant.**

May 22, 2008
(Argued April 1, 2008)

Before Cleary, Ondell and Angelo, Circuit Judges

Cleary, Circuit Judge.

The district court below administratively consolidated two actions with consent of all the parties. We consented to

this interlocutory appeal, and Defendant-Appellant Town of San Teresa, State of Old York, now raises two questions of first impression for us to consider:

1. Does Section 2 of the Religious Land Use and Institutionalized Persons Act (“RLUIPA”)³ exceed Congress’ power under the Fourteenth Amendment and violate the Establishment Clause?
2. Does the Individuals with Disabilities Education Act (“IDEA”) restrict tuition reimbursement where a child has not previously received publicly-authorized special education and related services?

The district court answered “no” to both questions. We disagree on both. For reasons fully explained below, we reverse the district court’s decision, and remand for further proceedings consistent with this decision.

Background

Because the factual background and procedural history of this case are adequately presented in the district court’s opinion, and those facts are not in dispute, we adopt those facts and findings on appeal.

³ As the district court did in its opinion, because Section 2 of RLUIPA is the only section at issue, all references to RLUIPA herein refer to Section 2 of the Act.

Discussion

Our standard of review over the district court's grant of summary judgment is plenary, and we apply the same standard that the district court applied. *In re Color Tile Inc.*, 475 F.3d 508, 512 (3d Cir. 2007). "Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Andreoli v. Gates*, 482 F.3d 641, 647 (3d Cir. 2007) (quoting Fed.R.Civ.P. 56(c)). Under Rule 56, we "must view the facts in the light most favorable to the nonmoving party and draw all inferences in that party's favor." *Id.*

1. Section 2 of RLUIPA is unconstitutional

The traditional recourse for a landowner whose zoning variance or special permit is denied is a special proceeding pursuant to Article 78 of the State of Old York Procedural Rules challenging the actions of the local zoning board. With the enactment of RLUIPA, however, all applicants seeking land use approvals are no longer similarly situated: religious institutions may turn to the district court to override a local zoning board's decision under RLUIPA.

As set forth more fully below, such advantage, given by Congress to a religious institution over any other property owner, exceeds Congress' powers under the Fourteenth Amendment and makes the statute unconstitutional under the Establishment Clause of the First Amendment.

RLUIPA exceeds Congress' power under the Fourteenth Amendment

As the district court recognized, RLUIPA was enacted in response to the Supreme Court's partial invalidation of the Religious Freedom Restoration Act ("RFRA") in *City of Boerne v. Flores*. In *City of Boerne*, the Court held that RFRA was "so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." 521 U.S. 507, 532 (1997). In determining whether RLUIPA suffers from the same defect, we must determine whether the statute exhibits a congruence and proportionality between an injury and the means adopted to remedy it. *Id.* at 530.

Congress' power under Section 5 of the Fourteenth Amendment extends only to enforcing the provisions of the amendment. Congress may not pass a law pursuant to the Fourteenth Amendment that regulates the states and gives any person or group additional protection under the law, unless there is proof that the states have engaged in:

1. widespread and persistent constitutional violations aimed at a group which the law passed is protecting; and
2. the congressional action is congruent with and proportional to those violations.

City of Boerne, 521 U.S. at 530-533. As the Supreme Court has recognized, "Congress does not enforce a constitutional right by changing what the right is." *Id.* at 519. Without congruence and proportionality, the touchstones of any Fourteenth Amendment inquiry, legislation may become substantive in operation and effect. *Id.* at 520.

As with RFRA, the aim of RLUIPA is to protect religious free exercise. See 42 U.S.C. § 2000cc-3(g). To determine the appropriateness of RLUIPA as a remedial measure, we must consider the evil presented. See *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966). RLUIPA's legislative history makes no reference to any widespread, persisting constitutional violations against religious groups or religious institutions requiring a law to remedy the wrong. Because there is no widespread constitutional violation aimed at religious organizations, RLUIPA would have to have minimal impact, at best, to satisfy the congruence requirement set forth in *City of Boerne*. Not only does RLUIPA have much more than a minimal impact, it has no "termination date[], geographic restriction[], or egregious predicate[]." *City of Boerne*, 521 U.S. at 533. While such restrictions are not required, these limitations "tend to ensure Congress' means are proportionate to ends legitimate under §5." *Id.* With no widespread constitutional violation for the statute to counteract, this lack of limitation is fatal.

RLUIPA compels application of the strict scrutiny test to governmental action with respect to land use decisions, where there is a substantial burden imposed on the owner in the implementation of a land use regulatory system under which the government makes "individualized assessments" of the proposed uses of the property involved. 42 U.S.C. § 2000cc(a)(2)(C). This is similar to the provisions of RFRA: if an objector could show a substantial burden on its free exercise, the state was required to demonstrate that the law is the least restrictive means of furthering its compelling governmental interest. 42 U.S.C. § 2000bb.

Contrary to the district court's holding, limiting the application of strict scrutiny to land use decisions that substantially burden free religious exercise to only where the government makes individualized assessments of the proposed *uses* of the property involved is not a codification of the existing constitutional scope of the strict scrutiny test. As the Supreme Court observed in *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), strict scrutiny never applied to challenges outside the employment compensation field. 494 U.S. at 883. Even without such a narrow reading, several circuits have held that strict scrutiny does not apply to discretionary decisions made pursuant to land-use laws.

In *St. Bartholomew's Church v. City of New York*, 914 F.2d 348 (2d Cir. 1990), the Second Circuit held that the landmark law at issue was "a facially neutral regulation of general applicability within the meaning of Supreme Court decisions," and, therefore, declined to subject the City's decision to strict scrutiny. *Id.* at 354-55. Similarly in *Mount Elliott Cemetery Ass'n v. City of Troy*, 171 F.3d 398 (6th Cir. 1999), the Sixth Circuit found the city's land use ordinance governing residential and community facilities were "neutral laws of general applicability" and therefore, strict scrutiny did not apply. *Id.* at 405. *See also Cornerstone Bible Church v. City of Hastings*, 948 F.2d 464 (8th Cir. 1991) (holding that zoning ordinance was "properly viewed as a neutral law of general applicability" and therefore, was not subject to strict scrutiny). Unless the enactment of the land use law is intended to regulate against religious worship, strict scrutiny is not warranted. Congress' establishment of a strict scrutiny test for land use decisions under RLUIPA effects a substantive change in constitutional protections, creating

new rights and thus exceeding Congress' remedial power under the Fourteenth Amendment.

RLUIPA, like RFRA, imposes a substantial burden that far outweighs any pattern or practice of unconstitutional conduct. RLUIPA is not designed to counteract a state or municipal law likely to be unconstitutional because of its treatment of religion. Rather, it addresses the incidental burdening of a religious institution by a zoning law of general application. The Supreme Court has already recognized, however, that "[w]hen the exercise of religion has been burdened in an incidental way by a law of general application, it does not follow that the persons affected have been burdened any more than other citizens, let alone burdened because of their religious beliefs." *City of Boerne*, 521 U.S. at 535. Awarding religious organizations greater rights than all others in the regulation of land use development is not proportional to any alleged constitutional violation. In passing RLUIPA, therefore, Congress has exceeded its power and improperly created substantive rights only for religious groups.

RLUIPA is unconstitutional under the Establishment Clause

RLUIPA also violates the First Amendment's Establishment Clause. The Establishment Clause provides that "Congress shall make no law respecting an establishment of religion . . ." U.S. CONST. AMEND. I. The Supreme Court has consistently disapproved of unequal treatment that elevates religion over secular interests. See, e.g., *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989). This bar to unequal treatment is also the fundamental point of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), which held that

the Establishment Clause requires that the “principal or primary effect [of governmental action] must be one that neither advances nor inhibits religion.” *Id.* at 612. The *Lemon* court established a three-part test to determine violations of the Establishment Clause:

1. the statute must have a secular legislative purpose;
2. the statute’s principal effect must be one that neither advances nor inhibits religion; and
3. the statute must not foster an excessive government entanglement with religion.

Id. at 612-613. To be permissible under *Lemon*, the statute must pass all three parts of the test; RLUIPA cannot.⁴

RLUIPA was enacted to provide unique protection to religious organizations faced with compliance with generally applicable, neutral land use laws. Only religious groups aggrieved by a land use decision have this unique access to the federal courts. See *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 709 (1985).

Furthermore, RLUIPA creates friction between local land use laws and religious groups’ desire to build. As Justice Stevens stated in concurring in *City of Boerne*, the statute at issue, RFRA, “provided the Church with a potent legal weapon that no atheist or agnostic can obtain.” *City of Boerne*, 521 U.S. at 537. RLUIPA, enacted in response to

⁴ It should be noted that while in *Cutter v. Wilkinson*, 544 U.S. 709 (2005), the Supreme Court held that § 3 of RLUIPA (addressing institutionalized persons) did not violate the Establishment Clause, the Court specifically noted that it was not expressing a view on the validity of § 2 of the statute addressing land use. *Id.* at 716.

the Supreme Court's partial invalidation of RFRA, fails for the same reason. Because RLUIPA does not satisfy the *Lemon* test, it is unconstitutional under the Establishment Clause.

Accordingly, we believe that the district court erred in holding that RLUIPA is constitutional. We believe that Section 2 of the Act exceeds Congress' power under the Fourteenth Amendment and is unconstitutional under the Establishment Clause of the First Amendment. We, therefore, reverse and remand to the district court for a judgment consistent with this opinion.

2. To qualify for tuition reimbursement under IDEA, a student must have received special education from a public agency

IDEA ensures that all children with disabilities are given access to a free and appropriate public education, authorizes federal financial assistance to states and local school systems to ensure that disabled students have access to the public schools, and requires school systems to make free appropriate public education available to all children with disabilities in their jurisdiction. See 20 U.S.C. § 1412(a)(1).

Free appropriate public education is defined to include special education and related services that:

1. are provided at public expense, under public supervision and direction, and without charge;
2. meet the standards of the state education agency;
3. include preschool, elementary school, or secondary school education in the state; and

4. are provided in conformity with an individualized education program (“IEP”) that meets the requirements of the statute.

Id.

The 1997 Amendments to IDEA establish a prerequisite that the disabled child try out a public school placement before qualifying for tuition reimbursement for a private school placement

As part of the 1997 Amendments to IDEA, Congress added 20 U.S.C. § 1412(a)(10)(C)(ii), authorizing tuition reimbursement to the parents of a disabled child “who previously received special education and related services under the authority of a public agency.” 20 U.S.C. § 1412(a)(10)(C)(ii). That language establishes a prerequisite for parents to receive tuition reimbursement when enrolling their child in a private school without the consent of the school district. The district court’s reading of the language “previously received special education and related services” renders it a nullity and should be rejected.

Both the plain language of IDEA and the statute’s legislative history demonstrate Congress’ intent that:

1. children with disabilities be educated with non-disabled students whenever possible; and
2. the availability of reimbursement for private school tuition should be restricted.

Such unambiguous language should be strictly construed.

The Supreme Court has recognized that when statutory language is plain “the sole function of the courts – at least where the disposition required by the text is not absurd – is to enforce it according to its terms.” *Hartford*

Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1, 6 (2000). The meaning of the language of 20 U.S.C. § 1412(a)(10)(C)(ii) is that where a child has not previously received special education from a public agency, there is no authority to reimburse tuition expenses arising from a unilateral placement in private school.

This statutory threshold must be met before the parent becomes eligible for tuition reimbursement. While this circuit has not previously addressed the issue, we are persuaded by the First Circuit's reasoning in *Greenland School District v. Amy N.*, 358 F.3d 150, 159-60 (1st Cir. 2004), holding that the plain language of the statute creates a threshold requirement that tuition reimbursement is only available for children who have previously received special education and related services while in the public school system. Contrary to the reading of other courts, we hold that the "previously received" language is unambiguous, and must be enforced. *Compare Frank G. v. Board of Education of Hyde Park*, 459 F.3d 356, 368 (2d Cir. 2006).

Section 1412(a)(10)(C)(ii) must also be read in conjunction with the plain language of the prior section of the act, §1412(a)(10)(C)(i), limiting the obligation of the local educational agency to pay for the cost of private school tuition. Read together, the sections demonstrate Congress' intent to define and limit the circumstances under which tuition reimbursement is available. This reading is supported by the fact that the language of statutes derived from Congress' Spending Power, like IDEA, must be strictly construed according to the plain meaning of their terms in order to avoid burdening the states with unforeseen obligations.

Participating in an Individualized Education Program is not sufficient to trigger the tuition reimbursement under IDEA

We also reject Cormac’s argument that participation in an IEP constitutes receipt of “special education and related services under the authority of a public agency” sufficient to trigger the reimbursement remedy of IDEA. There is no authority within the statute or legislative history to support this interpretation. The testing and evaluative services provided with the IEP, while necessary to formulate the IEP, do not constitute special education and related services for IDEA purposes.

For these reasons, we believe that the district court erred in holding that IDEA did not preclude tuition reimbursement where a child has not previously received special education and related services under the authority of a public agency. Accordingly, we reverse and remand to the district court for a judgment consistent with this opinion.

**FIFTY-NINTH ANNUAL
NATIONAL MOOT COURT COMPETITION**

SUPREME COURT OF THE UNITED STATES

October Term 2008

—————
Docket No. 2008-315

—————
Your Love Children's Academy, Petitioner

v.

Town of San Teresa, State of Old York, Respondent

—————
Cormac T., Petitioner

v.

Town of San Teresa, State of Old York, Respondent

Petition for certiorari is granted. The Court certifies the following questions:

1. Does Section 2 of the Religious Land Use and Institutionalized Persons Act exceed Congress' power under the Fourteenth Amendment and violate the Establishment Clause? and
2. Does the Individuals with Disabilities Education Act limit tuition reimbursement only to children who have received public special education and related services through attendance at a public school?

RULES OF THE FIFTY-NINTH ANNUAL NATIONAL MOOT COURT COMPETITION

2008 – 2009

Rule 1 – Competition’s Mission

The purpose of this Competition is to benefit our profession by helping law students develop the art of appellate advocacy. It is about promoting a sense of integrity, advocacy, and esteem in our noble profession. Accordingly, everyone is expected to follow the letter – as well as the spirit – of these Rules, and maintain the highest levels of professionalism throughout the Competition.

Rule 2 – Teams

- 2.1 **Teams Generally.** The Committee (or Regional Sponsor) determines how many teams may enter the regional rounds. Each team may have up to 3 full-time (day or evening) law students. Competitors graduating after the regional rounds may still participate in the National Finals.
- 2.2 **Team Substitution.** Teams may not substitute competitors after certification and service of the briefs, except with the Committee’s written consent. The Committee will not grant competitor substitution requests **after** oral argument in the regional rounds begins. The only exception is when number of competitors falls below two.

- 2.3 **Team Selection.** Law schools may not use this year's Problem to select that law school's competitors for the Annual National Moot Court Competition. But law schools may use old copies of our materials by first obtaining the Committee's express written consent.

Rule 3 – Briefs

- 3.1 **General.** A team may submit a brief on behalf of either petitioner or respondent. Teams from the same law school must brief opposite sides of the issues. Teams entering the National Finals must use the same brief submitted for the regional rounds.
- 3.2 **Format.** Brief format generally follows the one used by the United States Supreme Court, unless otherwise directed by these Rules. No formal statement of jurisdiction is needed. Briefs must use citations as prescribed by the current edition of Harvard Law Review Association, *A Uniform System of Citation*. All briefs must:
- 3.2.1 Be printed on 8½ x11 inch paper.
 - 3.2.2 Use uniform style and 12-point Arial font for all brief contents, including footnotes.
 - 3.2.3 Have at least one-inch margins on all sides. Page numbers, however, may be put outside these parameters.
 - 3.2.4 Use only double-spaced text. Footnotes, however, may be single-spaced.

- 3.2.5 Be firmly bound at left margin (e.g., spiral, stapled, perfect binding).
- 3.2.6 Be 35 pages or less in length. Any partially-filled page will count as a full page. This limit does not include the questions presented, subject index, table of authorities, or appendix. Appendices may only be used to recite relevant statutory text (e.g., constitutional provisions, regulations) or other material not generally available.
- 3.3 **Copies.** All brief copies submitted must be identical. Briefs may be copied using any process producing a clear black image on white paper. Briefs may be duplicated on one or both sides of a page. The copying process, however, may not reduce the character size.
- 3.4 **Identification.** Competitor and law school names only appear once: in the lower right corner of the brief's cover. For electronic brief submissions, however, only a team's officially-designated number may appear in the lower right corner of the brief's cover, **not** the law school name. Briefs must **not** be signed or in any other way identify a team or its members.
- 3.5 **Certification.** Competitors must certify that they prepared their brief in accordance with these Rules, and that it represents the work product solely of those Competitors. The certification must accompany the brief, but not bound or otherwise inserted to violate Rule 3.4. The certification states:

We certify that York University School of Law's brief is solely our work product, and that we have not received any assistance in writing it.

Tom Sawyer

Huckleberry Finn

- 3.6 **No Revisions.** Once a team submits its brief, it may not revise it.
- 3.7 **Regional Brief Grading.** Regional Sponsors blind-grade all properly submitted briefs, and select the "best" overall brief in that region. Regional sponsors remove identifying information before submitting briefs for scoring, and assess appropriate penalties.
- 3.8 **National Finals Brief Grading.** The Committee blind-grades all properly submitted briefs, and selects the "best" brief in the Competition. The Committee removes identifying information before submitting briefs for scoring, and assesses appropriate penalties.

Rule 4 – Service and Certifications

- 4.1 **Service on the Regional Sponsor.** Teams must serve briefs on the Regional Sponsor by October 17, 2008. Number of brief copies (hard or electronic) should comply with the Regional Sponsor's specific instructions. If the Regional Sponsor does not have specific instructions, teams must serve 10 hard copies of its brief consistent with Rule 4.4 below.
- 4.2 **Service on Committee.** Committee service procedures vary depending on 3 situations.
- 4.2.1 **Regional Rounds.** Teams competing outside Region 2 must only serve the Committee with 1

hard copy of brief (with original Rule 3.5 certificate) in a single package on the Committee by **October 17, 2008**.

- 4.2.2 **Region 2 Competitors.** Teams competing in Region 2 must serve the Committee with 10 hard copies (with original Rule 3.5 certificate) plus 1 electronic copy of brief to:

Young Lawyers Committee
Attn.: National Moot Court Competition
New York City Bar
42 West 44th Street
New York, New York 10036-6689

- 4.2.3 **National Finals.** Teams competing in the National Finals must follow Rule 4.2.2 Committee service procedures, and serve briefs by close of business on 10th day after regional rounds ends.

- 4.2.4 **Electronic Copy Described.** Send electronic briefs to the Committee at: ylcbrief@nycbar.org. Use only PDF format. E-mail subject line must state: “[Your School Name and Team Number] Brief.” E-mail body must only contain your school name, competitor names, and team representative’s complete contact information. Attach brief only as a single document.

- 4.3 **Service on Opposing Teams.** Teams may serve opposing teams by hard or electronic copy using PDF format:

- 4.3.1 By **October 17, 2008** – at the regional rounds. Unless regional sponsors have other specific instructions, teams will serve 1 copy of their brief on each team competing in that region.
- 4.3.2 By **December 15, 2008** – at the National Finals. Teams at this round must serve 1 copy of their brief on all other National Finals teams.

4.4 **Method and Timing of Service.** Service under these Rules occurs by depositing materials by the deadline in the U.S. mail first-class postage prepaid. The postmark date operates as the official date of mailing for briefs served by U.S. mail. Service may also occur by an overnight delivery service with delivery charges paid by the sender. Materials must be sent to the proper Regional Sponsor (or Committee), and any authorized representative of opposing teams. Coaches act as official team representatives, unless specifically stated otherwise.

Rule 5 – Proof of Service

Teams entering the National Finals must serve on the Committee a Certificate of Compliance by **December 19, 2008**. The Certificate of Compliance must be sent under separate cover from briefs. The form of the Certificate will state:

I certify that on [Insert Date], my team caused 1 copy of our brief to be served in accordance with Rule 4 of the New York City Bar's National Moot Court Competition. My team served the following schools:

York University School of Law
42 West 44th Street
New York, NY 10036

Horatio Hornblower

Rule 6 – Law Clerks

- 6.1 **General.** Each team (or law school) is ultimately responsible for supplying their own law clerk for oral argument. As a courtesy, however, Regional Sponsors may elect to provide law clerks. During argument, law clerks track time and visibly display time cards showing remaining time to judges and competitors.
- 6.2 **Eligibility.** Anyone may serve as law clerk, except a competitor arguing in that round.
- 6.3 **Duties.** Law clerks are responsible for ensuring arguments proceed consistent with these rules. Specifically:
- 6.3.1 Petitioner's clerk escorts judges to the courtroom.
 - 6.3.2 Petitioner's clerk calls the Court to order with the Supreme Court's traditional "call for silence."
 - 6.3.3 Petitioner's clerk tracks petitioner's time.
 - 6.3.4 Respondent's clerk tracks respondent's time.

- 6.3.5 Respondent's clerk instructs everyone (including clerks) to exit while judges deliberate.
- 6.3.6 A panel of judges decides the oral argument's winner and assigns a score. Then, **both** clerks deliver the score to Competition officials to calculate the total score. Only that round's clerks may enter the official Competition grading room.
- 6.3.7 After Competition officials determine the winner, clerks carry scoring results to judges. Judges then announce the winner.

Rule 7 – Regional and National Final Rounds

- 7.1 **Number of Participants.** Two competitors represent each team in every argument.
- 7.2 **Time Allowed for Argument.** Each team receives up to **30** minutes for oral argument. Judges may grant additional time. Petitioner may reserve up to 5 minutes in advance for rebuttal. Only one competitor may argue rebuttal.
- 7.3. **Oral Argument Scoring.** A panel of judges determines oral argument score. Judges are **never** informed of the team's brief grade before oral argument. Overall score is computed by weighing the oral arguments 60 percent, and the brief 40 percent (*Oral Argument* x .60 + *Brief Score* x .40 = *Final Score*). Scores are computed to the nearest hundredth decimal (e.g., 92.75).

7.4 **Ties.** Occasionally, a draw (or tie) may occur after computing scores. In those instances, the criteria used to determine the winner depend on the circumstances.

7.4.1 **Argument Ties.** If a tie results *after* combining the oral argument and brief scores, then the team with the higher oral argument score prevails.

7.4.2 **Ranking Ties.** If 2 teams are equally ranked because both have the same win-loss record, then tie is broken in favor of the team with the higher aggregate point differential. If those teams have identical win-loss record *and* aggregate point differentials, then tie is broken in favor of the team with higher brief score.

7.4.3 **Miscellaneous.** Ultimately, if an unanticipated draw scenario results, the Regional Sponsor (or Committee during the National Finals) will be the final authority on how to determine the winner.

7.5 **Recordkeeping.** Regional Sponsors maintain records of the oral and brief scores throughout each round of the competition.

7.6 **Judicial Conflicts.** Conflicts arise when judges teach or coach at a particular law school. If a conflict occurs, the judge is reassigned, unless judge and members of both teams unanimously agree to waive conflict.

Rule 8 – Regional Rounds

The goal of the Regional Rounds is to determine the first and second place team from each region. Eligible teams then advance to the National Finals in New York City. Only a total of 28 teams may compete in the National Finals.

- 8.1 **Time and Place.** Regional Sponsors determine time and place for each argument. Teams receive at least 30 days advanced notice of the oral argument's time and place. All regional rounds must end by December 5, 2008.
- 8.2 **Team Pairings.** Regional sponsors must notify teams of pairings for the first 2 preliminary rounds at the same time as the Rule 8.1 notice.
 - 8.2.1 **Preliminary Rounds.** Pairings for first 2 preliminary rounds are randomly scheduled. In making that schedule, no team argues the same side of the case in the first 2 preliminary rounds. (In regions allowing 2 teams from each school, no 2 teams from the same school may argue against each other.) Also, the same 2 teams are not paired together twice during the preliminary rounds.
 - 8.2.2 **Semi-Final Rounds.** Semi-final argument pairing is determined by seeding. This means that the top seeded team argues against the last place team, the second place team argues against the second-to-last team. (See Rule 8.7).

- 8.3 **Byes.** A bye round may be necessary if an odd number of teams compete in a regional competition. In that case, the Regional Sponsor may randomly select 2 teams to receive “byes” in each of the 2 preliminary rounds. These teams will then be paired against each other, and will argue at a time decided by the Regional Sponsor.
- 8.4 **Preliminary Rounds.** Teams argue at least twice before being eliminated (preliminary rounds). All teams still undefeated after the preliminary rounds advance to either the Semi-Final or “tie-breaker” rounds. If 4 or fewer teams are undefeated after the preliminary rounds, those undefeated teams advance to the Semi-Final round. If fewer than 4 teams are undefeated, the necessary number of teams with the next highest win-loss record, ranked in order of highest point differential, also advance. The goal is to narrow the group of teams to 4 for the Semi-Final round.
- 8.5 **Tie-Breaker Rounds.** “Tie-breaker” rounds occur only if more than 4 teams are undefeated during the preliminary rounds. In that case, a “tie-breaker” round is held among all undefeated teams, and any additional teams necessary to evenly complete the bracket. For example, if 5 undefeated teams initially result, then 6 must compete at the tie-breaker. In that case, the sixth team is the next highest seeded team (see Rule 8.7). After this round, all teams still undefeated advance to the Semi-Final round – along with the necessary number of extra teams with the highest point differential. Again, the goal of the “tie-breaker” round is

to narrow the group of teams to 4 for the Semi-Final round.

- 8.6 **Final Round.** The 2 prevailing teams of the Semi-Final round advance to the Final Round. The winner here wins the Regional Competition.
- 8.7 **Seeding Explained.** Once preliminary rounds end, teams are paired by seeding. Seeding is established according to a team's win-loss record during the preliminary rounds. If any teams have the same win-loss record, the team with the highest point differential ranks higher. (See also Rule 7.4).
- 8.8 **Aggregate Point Differential.** Aggregate point differential plays a key role in determining who advances during the preliminary round. For example, if *Team A* defeated its first round opponent by a score of 80 to 75, and lost its second argument with a 78 to 80 score, its aggregate point difference for the 2 rounds is +3 points (i.e., the net of the +5 point difference in its first argument and the -2 point difference in its second argument). Ties in win-loss record are broken in favor of the team with the highest aggregate point differences over its opponents during the preliminary rounds.
- 8.9 **Double Coin Toss.** During Semi-Final and Final rounds, Competition officials assign case side by a double coin toss. This means that a Competition official tosses a coin and asks one team representative to call the result. The winner of the first coin toss earns the right to call the outcome of a second coin toss. The winner of the second coin toss may choose the side it will represent in the next argument.

- 8.10 **Objections.** Regional Sponsors must include in their Rule 8.1 notice other procedures to be used in that contest. Any objections must be promptly forwarded to the Regional Sponsor and the Committee within 10 days after Rule 8.1 notice is sent.
- 8.11 **Committee Notice.** Regional Sponsors must notify the Committee of prevailing teams and competitors eligible to enter the National Finals within 7 days after the end of the regional rounds.
- 8.12 **Local Rules.** Regional Sponsors may modify Rule 8 procedures for conducting regional rounds (e.g., adding a quarter-final round before advancing to the semi-finals) with the Committee’s express written consent. To do so, however, Regional Sponsors must seek Committee approval annually by submitting proposed revisions (i.e., local rules) in writing at least 60 days before oral arguments begin. Local rules must always use a plain-English format, and be made available to competitors 30 days before arguments begin (See Rule 8.1).

Rule 9 – National Final Rounds

- 9.1 **General.** The National Finals are at the New York City Bar in late January or early February. Once the Committee knows all the teams entering the National Final rounds, it will announce program details.
- 9.2. **Eligibility.** The first and second place teams from each region are eligible to enter the National Finals. But only one team from each school may compete. So if both the first and second place team are from the same

school, then the third place regional team will replace the second place team as eligible to enter the National Finals.

9.3 **Teams Pairings.** The Committee randomly schedules the first 2 preliminary rounds.

9.3.1 **Preliminary Rounds.** In making the schedule, no team argues the same side of the case in the first 2 preliminary rounds. Also, no team from the same region may be paired against each other. Finally, the same 2 teams are not paired together twice during the preliminary rounds.

9.3.2 **Top 16 Teams.** After every team argues twice, the goal is to narrow the pool to 16 teams. Pairing for this “Octo-Final” Round is determined by seeding. The top seeded team argues against the 16th seeded team, the 2nd seeded team arguing against the 15th seeded, and so on. Teams that have argued against each other in the preliminary rounds may be paired against one another in later rounds.

9.4 **Seeding Explained.** Again, seeding is based on a team’s win-loss record during the preliminary rounds. If any teams have the same win-loss record, the team with the highest aggregate point differential ranks higher. If any teams have identical win-loss records and point differentials, brief score determines ranking. Teams will not be re-seeded after the “Octo-Final” Round. Instead, all subsequent pairings follow an elimination ladder.

- 9.5 **Argument Procedures.** After preliminary rounds end, only 16 teams advance to the Octo-Final round. Subsequent arguments proceed on a winner-advances basis. All teams undefeated after preliminary rounds advance to the Octo-Finals – along with the necessary number of teams with the highest aggregate point differential.
- 9.6 **Double Coin Toss.** During these elimination rounds, a double coin toss determines the side competitors will represent. (Double-coin toss process is fully described in Rule 8.9.)
- 9.7 **Objections.** Any objections must be promptly forwarded to the Committee within 10 days after the Rule 9.1 notice is sent.

Rule 10 – Assistance Throughout Competition

- 10.1 **No Faculty Assistance.** Teams may not receive any help in writing briefs. Teams within the same school may not share or compare work product. Teams may, however, generally discuss case issues with other students, and use any widely available research tools.
- 10.2 **Preparing For Oral Argument.** Once a brief is filed, competitors may receive help in preparing for oral argument. Schools entering 2 teams may hold up to 3 practice arguments between those 2 teams **after** filing briefs.
- 10.3 **Counsel’s Table.** Up to 3 competitors may sit at counsel’s table. Once a round begins, competitors

sitting at counsel's table may not communicate with non-competitors.

Rule 11 – No Scouting

Scouting rival teams is strictly prohibited. No competitor or coach still participating may attend oral arguments of rival teams or otherwise obtain information about other competitors. Regional Sponsors may waive this prohibition, however, to accommodate administrative concerns.

Rule 12 – Penalties

- 12.1 The Committee or Regional Sponsors may impose **any** penalty deemed reasonable and appropriate for failure to comply with these Rules.
- 12.2 All briefs within a single region will receive uniform penalties for each type of violation. Penalties may be levied in whole or fractional points.
- 12.3 Regional Sponsors keep records of any penalty imposed under these Rules for at least 6 months. The Committee may obtain copies of those records.

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