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# COMMENT

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## FREEDOM FROM RELIGION: RLUIPA, RELIGIOUS FREEDOM, AND REPRESENTATIVE DEMOCRACY ON TRIAL

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ANTHONY LAZZARO MINERVINI<sup>†</sup>

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<sup>†</sup> J.D. Candidate, 2010, University of Pennsylvania Law School; B.A., 2007, Loyola College in Maryland. I would like to thank Professor Sarah Barringer Gordon for her invaluable feedback on earlier drafts of this Comment. I would also like to thank Jason Levine, Michelle Banker, Jessica Urban, and the entire staff of the *University of Pennsylvania Law Review* for their diligent efforts and thoughtful suggestions in preparing this piece for publication. Finally, I would like to express my sincere gratitude to my family and to Taylor Calderone for their selfless sacrifices and support. All remaining errors are my own.

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INTRODUCTION

Religious liberty is a bedrock principle of our national heritage.<sup>1</sup> The Supreme Court has recognized that the Founders saw the separation of church and state as necessary to guarantee individuals the freedom to openly practice the religion of their choosing without fear of governmental persecution.<sup>2</sup> James Madison, for example, was a strong supporter of the federal protection of religious freedom.<sup>3</sup> The

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<sup>1</sup> The Supreme Court has explained that

[w]e are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma.

Zorach v. Clauson, 343 U.S. 306, 313 (1952).

<sup>2</sup> See, e.g., Everson v. Bd. of Educ., 330 U.S. 1, 8-9 (1947) (“A large proportion of the early settlers of this country came here from Europe to escape the bondage of laws which compelled them to support and attend government-favored churches.”).

<sup>3</sup> During the debates over the Constitution in the Virginia Ratifying Convention, Madison opined that religious freedom was better guarded by the Federal Congress than by the legislature of any one state.

There is not a shadow of right in the General Government to intermeddle with religion.—Its least interference with it would be a most flagrant usurpation.—I can appeal to my uniform conduct on this subject, that I have warmly supported religious freedom.—It is better that this security should be depended upon from the General Legislature, than from one particular State.

Patrick Henry & James Madison, Remarks at the Virginia Ratifying Convention (June 12, 1788), reprinted in 2 THE DEBATE ON THE CONSTITUTION 673, 690 (Bernard Bailyn ed., 1993).

In fact, Madison would have preferred broader protection than was politically palatable at the time. Madison’s initial draft of the Federal Bill of Rights sought to protect “full and equal rights of *conscience*,” not simply free exercise of *religion*, from infringement “in any manner, or on any pretext.” 1 ANNALS OF CONG. 451 (Joseph Gales ed., 1834) (emphasis added). *But cf.* Letter from Thomas Jefferson to the Danbury Baptist Ass’n (Jan. 1, 1802) (“Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legitimate powers of government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should ‘make no law respecting an establishment of religion, or prohibiting the free exercise thereof,’ thus building a wall of separation between church and State.”), in THOMAS JEFFERSON, WRITINGS 510, 510

Bill of Rights thus enshrines religious liberty as a fundamental right and places it prominently at the beginning of the First Amendment.<sup>4</sup>

Over time, however, the protections guaranteed by the First Amendment have been qualified by judicial decisionmaking. In 1990, the Supreme Court held in *Employment Division v. Smith* that a neutral, generally applicable law is entitled to deferential rational basis review, even if the law prohibits conduct central to an individual's religion.<sup>5</sup> The Supreme Court's decision in *Smith* dramatically limited prior Supreme Court precedent that had required strict scrutiny of any law substantially infringing upon the right to free exercise of religion.<sup>6</sup> The widespread perception that principles of stare decisis had been violated by the *Smith* Court provoked a powerful congressional response. At least two bills signed into law sought to restore the religious freedom thought to have been lost after *Smith*.<sup>7</sup>

The latest congressional attempt to restore the religious liberty promised by the Constitution is the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA).<sup>8</sup> RLUIPA contains an Equal Terms provision, which states that "[n]o government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution."<sup>9</sup> As this Comment will show, however, some federal courts have interpreted RLUIPA in such a way as to render it toothless.

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(Merrill D. Peterson ed., 1984). The fact that Madison's preferred language was not adopted further indicates that the Free Exercise Clause was specifically meant to protect religion as opposed to philosophy or other nonreligious belief systems. See Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1491 (1990) (arguing that the choice of the term "free exercise of religion" "singles out religion for special treatment").

<sup>4</sup> See U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .").

<sup>5</sup> See 494 U.S. 872, 885-87 (1990), *superseded by statute*, Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803, *as recognized in* *Cutter v. Wilkinson*, 544 U.S. 709 (2005); ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 12.3.2.3, at 1259 (3d ed. 2006) (explaining that, post-*Smith*, rational basis review applies to neutral and generally applicable laws that burden religion).

<sup>6</sup> See *Sherbert v. Verner*, 374 U.S. 398, 406 (1963) (requiring a compelling state interest in order to justify substantial infringement of the First Amendment right to free exercise of religion).

<sup>7</sup> One of these bills, the Religious Land Use and Institutionalized Persons Act of 2000, is the focus of this Comment. The second is the Act's ill-fated predecessor, the Religious Freedom Restoration Act of 1993, discussed *infra* Section I.C.

<sup>8</sup> 42 U.S.C. §§ 2000cc to 2000cc-5 (2006).

<sup>9</sup> *Id.* § 2000cc(b)(1).

The federal circuit courts are split as to the proper interpretation of the Equal Terms provision. The Eleventh Circuit noted in *Midrash Sephardi, Inc. v. Town of Surfside* that while the provision “has the ‘feel’ of an equal protection law, it lacks the ‘similarly situated’ requirement usually found in equal protection analysis.”<sup>10</sup> Therefore, a land-use regulation violates RLUIPA if a secular assembly or institution, in the ordinary sense of those terms, can locate where a religious assembly or institution cannot.<sup>11</sup> The Seventh Circuit agreed, stating in *Vision Church v. Village of Long Grove* that “a plaintiff need not demonstrate disparate treatment between two institutions *similarly situated in all relevant respects*.”<sup>12</sup> The Third Circuit disagreed with both the Seventh and Eleventh Circuits, holding in *Lighthouse Institute for Evangelism, Inc. v. City of Long Branch* that “a regulation will violate the Equal Terms provision only if it treats religious assemblies or institutions less well than secular assemblies or institutions that are similarly situated *as to the regulatory purpose*.”<sup>13</sup>

The Third Circuit also disagreed with the Eleventh Circuit regarding the standard of review that should apply to a regulation upon a finding of unequal treatment.<sup>14</sup> While the Eleventh Circuit held that the challenged regulation should receive strict scrutiny upon a finding of unequal treatment,<sup>15</sup> the Third Circuit held that the government should be held strictly liable for a violation of the Equal Terms provision. Thus, under the Third Circuit’s test, the challenged regulation is automatically invalidated upon a finding of unequal treatment.<sup>16</sup>

The Third Circuit’s interpretation of RLUIPA’s Equal Terms provision responds to a valid concern that the provision should not

<sup>10</sup> 366 F.3d 1214, 1229 (11th Cir. 2004).

<sup>11</sup> See *id.* at 1230-31 (construing the terms “assembly” and “institution” “in accordance with their ordinary or natural meanings” and concluding that because “private clubs, churches and synagogues fall under the umbrella of ‘assembly or institution[,]’ . . . differential treatment constitutes a violation of § (b)(1) of RLUIPA”).

<sup>12</sup> 468 F.3d 975, 1003 (7th Cir. 2006) (emphasis added).

<sup>13</sup> 510 F.3d 253, 266 (3d Cir. 2007).

<sup>14</sup> The Seventh Circuit has not yet addressed these standard of review issues. See Sarah Keeton Campbell, Note, *Restoring RLUIPA’s Equal Terms Provision*, 58 DUKE L.J. 1071, 1074 & n.14 (2009) (“The Seventh Circuit has addressed the first issue, but not the second.”).

<sup>15</sup> See *Midrash*, 366 F.3d at 1232 (“[A] violation of § (b)’s equal treatment provision, consistent with the analysis employed in [*Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993)], must undergo strict scrutiny.”).

<sup>16</sup> See *Lighthouse*, 510 F.3d at 269 (“[I]f a land-use regulation treats religious assemblies or institutions on less than equal terms with nonreligious assemblies or institutions that are no less harmful to the governmental objectives in enacting the regulation, that regulation—without more—fails under RLUIPA.”).

be interpreted to grant religious entities greater rights than secular entities. In light of the text and legislative history of RLUIPA, however, the imposition of a “similarly situated” requirement and a strict-liability standard of review ignores the plain language of the statute as well as Congress’s express purpose in enacting it. The Eleventh Circuit’s interpretation in *Midrash* is more consistent with the text of the statute, Congress’s express findings of religious discrimination, and RLUIPA’s purpose.

In her insightful Note, recently published in the *Duke Law Journal*, Sarah Keeton Campbell argues that a strict textual interpretation of the Equal Terms provision would be within Congress’s powers under Section 5 of the Fourteenth Amendment.<sup>17</sup> While Campbell contends that imposing a similarly situated requirement on the Equal Terms provision is inappropriate, she does not believe that the appropriate standard of review is strict scrutiny of the challenged regulation upon a finding of unequal treatment.<sup>18</sup> This Comment, in contrast, argues that the strict-liability standard of review advocated by Campbell might exceed the boundaries set by the Supreme Court’s holding in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*.<sup>19</sup> The text of RLUIPA expressly provides that the Act should be construed to protect religious exercise to the broadest extent *constitutionally permissible*,<sup>20</sup> which, under *Lukumi*, means strict scrutiny of the challenged regulation.

In Part I of this Comment, I review the history of federal protection of religious exercise from the ratification of the Constitution to the enactment of RLUIPA. In Part II, I summarize the judicial interpretations of RLUIPA’s Equal Terms provision. Finally, in Part III, I argue that the Eleventh Circuit’s interpretation in *Midrash* is preferable because it recognizes legislative supremacy and effectuates the will of the American people as expressed in the text of the statute enacted by their elected representatives.

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<sup>17</sup> Campbell, *supra* note 14, at 1075-76. Section 5 empowers Congress “to enforce, by appropriate legislation, the provisions of [the Fourteenth Amendment].” U.S. CONST. amend. XIV, § 5.

<sup>18</sup> See Campbell, *supra* note 14, at 1104.

<sup>19</sup> See 508 U.S. 520, 546 (1993) (“A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny. To satisfy the commands of the First Amendment, a law restrictive of religious practice must advance interests of the highest order and must be narrowly tailored in pursuit of those interests.” (citations omitted) (internal quotation marks omitted)).

<sup>20</sup> 42 U.S.C. § 2000cc-3(g) (2006).

## I. A BRIEF HISTORY OF FEDERAL PROTECTION OF RELIGIOUS EXERCISE

Our nation has enjoyed a long and distinguished history of upholding every American's right to freely profess and practice the religious beliefs of her choice. This Part provides a brief overview of the federal protection of religious exercise.

### A. *The Constitution*

The Constitution is the starting point for any analysis of religious-liberty rights. The First Amendment provides two forms of protection for religion: the Establishment Clause and the Free Exercise Clause.<sup>21</sup> This Comment is primarily concerned with the protections conferred by the Free Exercise Clause, which prevents the states and the federal government from passing any law prohibiting the free exercise of religion.<sup>22</sup>

The Bill of Rights was enacted as a result of popular concern that the federal government would not be accountable to the people in the absence of express restrictions on the exercise of governmental authority.<sup>23</sup> The Religion Clauses of the First Amendment were largely designed to assuage fears that the federal government might attempt to establish religion or prohibit religious exercise in the states,<sup>24</sup> as well as to guarantee that the religious preferences of one state would not be imposed on the country as a whole. The Founders' use of the term "free exercise" implies that the Clause was meant to protect not only religious belief but also religious conduct.<sup>25</sup> Indeed, the Supreme Court itself has stated that "[t]he Free Exercise Clause . . . withdraws from legislative power, state and federal, the exertion of any restraint on

<sup>21</sup> See *supra* note 4.

<sup>22</sup> *Id.*; see also *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (incorporating the Free Exercise Clause against the states).

<sup>23</sup> See, e.g., Kenneth R. Bowling, "A Tub to the Whale": *The Founding Fathers and Adoption of the Federal Bill of Rights*, 8 J. EARLY REPUBLIC 223, 251 (1988) ("The constitutional role as well as the consecrated status of the federal Bill of Rights today is due less to the foresight of the Founding Fathers than to the vigilance of a concerned citizenry . . ."); Samuel Bryan, "*Centinel*" I, INDEP. GAZETTEER (Phila.), Oct. 5, 1787 (arguing that a federal government without a Bill of Rights similar to that found in most free Constitutions "would be in practice a permanent aristocracy" (emphasis omitted)), reprinted in 1 THE DEBATE ON THE CONSTITUTION, *supra* note 3, at 52, 61.

<sup>24</sup> See McConnell, *supra* note 3, at 1477-79 (examining the shortcomings of the Federalist argument against a Bill of Rights, including that powers such as those enumerated in the Necessary and Proper Clause have the potential to be used oppressively).

<sup>25</sup> *Id.* at 1488. McConnell goes on to note that the Supreme Court puzzlingly rejected this reading of the term "free exercise" in *Reynolds v. United States*, 98 U.S. 145, 164 (1879), and did not acknowledge the protection of religiously motivated conduct afforded by the Free Exercise Clause until 1940. *Id.* at 1488-89.

the free exercise of religion. Its purpose is to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority.”<sup>26</sup>

The next constitutional provision relevant to recent congressional attempts to protect religious liberty is the Fourteenth Amendment. The Due Process Clause of the Fourteenth Amendment provides that no state shall “deprive any person of life, liberty, or property, without due process of law.”<sup>27</sup> “Liberty” includes the religious liberty conferred by the First Amendment.<sup>28</sup> Section 5 of the Fourteenth Amendment further provides that “Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”<sup>29</sup> Thus, when Congress has found the states to be remiss in their duty, Section 5 of the Fourteenth Amendment enables Congress to use its remedial power to enact laws enforcing the guarantees of religious liberty found in the First Amendment. RLUIPA is one such law.

### B. Case Law Interpreting the Free Exercise Clause

The first case to interpret the Free Exercise Clause came down in 1879.<sup>30</sup> In *Reynolds v. United States*, the Supreme Court held that a Mormon who had contracted plural marriages could not obtain a religious exemption from the federal antipolygamy statute.<sup>31</sup> The Court, deciding not to protect religiously motivated conduct in the face of a generally applicable criminal law,<sup>32</sup> thus interpreted the Free Exercise Clause countertextually. This interpretation remained unchanged until the 1940 case of *Cantwell v. Connecticut*, in which the Court upheld the right

<sup>26</sup> *Sch. Dist. v. Schempp*, 374 U.S. 203, 222-23 (1963).

<sup>27</sup> U.S. CONST. amend. XIV, § 1.

<sup>28</sup> In *Cantwell v. Connecticut*, the Supreme Court held that

[t]he fundamental concept of liberty embodied in [the Fourteenth] Amendment embraces the liberties guaranteed by the First Amendment. The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws.

310 U.S. 296, 303 (1940).

<sup>29</sup> U.S. CONST. amend. XIV, § 5.

<sup>30</sup> See CHEMERINSKY, *supra* note 5, § 12.3.1, at 1246.

<sup>31</sup> See 98 U.S. 145, 166-67 (1879) (explaining that a religious exemption for Mormons would subordinate the law to religious belief).

<sup>32</sup> See *id.* at 166 (“Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.”).

of Jehovah's Witnesses to proselytize without prior governmental restraint, even in ways considered aggressive and offensive to Catholics.<sup>33</sup>

In the 1963 case of *Sherbert v. Verner*, the Court adopted a more expansive reading of the Free Exercise Clause, one that embraced not only protection for religiously motivated conduct but also religious exemption from generally applicable laws.<sup>34</sup> *Sherbert* involved a member of the Seventh-day Adventist Church who was discharged by her employer because she refused to work on Saturday, the Sabbath for Seventh-day Adventists.<sup>35</sup> The South Carolina Unemployment Compensation Act required that a claimant be able to work and be available for work in order to be eligible for unemployment benefits.<sup>36</sup> The Supreme Court applied strict scrutiny to the South Carolina law, requiring a compelling state interest in order to justify substantial infringement of the First Amendment right to free exercise of religion.<sup>37</sup> The compelling state interest asserted by South Carolina was the unproven possibility of "unscrupulous" workers filing fraudulent claims for unemployment compensation using the pretext of religious observance.<sup>38</sup> The Court held that South Carolina could not constitutionally deny one of its citizens unemployment compensation simply because she refused to compromise her religious beliefs in order to come within the statute's prescription.<sup>39</sup> The statute thus failed strict scrutiny. This was the law of the land until 1988.

In 1988, the Supreme Court decided *Lyng v. Northwest Indian Cemetery Protective Ass'n*.<sup>40</sup> The case posed the question whether the Free Exercise Clause prohibited the government from building a road through part of a national forest traditionally used by Native Americans for religious purposes.<sup>41</sup> The Native Americans argued that the road construction could not be upheld without a compelling state interest because it would impose a substantial burden on their religious exercise.<sup>42</sup> The Supreme Court disagreed, reasoning that the government's decision did not "penalize religious activity by denying any

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<sup>33</sup> See 310 U.S. 296, 308 (1940) ("[A] state may not unduly suppress free communication of views, religious or other, under the guise of conserving desirable conditions.").

<sup>34</sup> 374 U.S. 398 (1963).

<sup>35</sup> *Id.* at 399.

<sup>36</sup> *Id.* at 400.

<sup>37</sup> *Id.* at 406.

<sup>38</sup> *Id.* at 407.

<sup>39</sup> *Id.* at 410.

<sup>40</sup> 485 U.S. 439 (1988).

<sup>41</sup> *Id.* at 441-42.

<sup>42</sup> *Id.* at 447.



person an equal share of the rights, benefits, and privileges enjoyed by other citizens.”<sup>43</sup> The Court further reasoned that the government had a right to decide what to do with its land and that, while accommodation of religious practices was to be encouraged, the Constitution “does not . . . offer to reconcile [religious organizations’] various competing demands on government.”<sup>44</sup>

In 1990, the Supreme Court decided the landmark case of *Employment Division v. Smith*.<sup>45</sup> *Smith* effectively overturned *Sherbert* by holding that the compelling interest test would no longer apply to a neutral, generally applicable law, even if the law prohibits conduct central to an individual’s religion.<sup>46</sup> *Smith* involved two Native Americans who were fired from their jobs and then denied unemployment compensation because they had ingested peyote, a controlled substance under federal and Oregon state law, “for sacramental purposes at a ceremony of the Native American Church.”<sup>47</sup> The Court held that rational basis review applied to the state unemployment-compensation statute and that Oregon could constitutionally deny the ex-employees unemployment benefits because the criminal drug laws were neutral and generally applicable.<sup>48</sup> The Court retained the compelling interest test, however, for situations where the government has a system of individualized exemptions in place.<sup>49</sup>

Just such a system of individualized exemptions was presented to the Court in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*.<sup>50</sup> In that case, members of the Santeria religion, which practices ritual animal sacrifice, were found to have been discriminated against by facially neutral city ordinances prohibiting all ritual animal sacrifice.<sup>51</sup> The ordinances were riddled with exceptions for animals raised for food purposes (including an exception for kosher slaughter), clearly evincing that the state’s interests in protecting the public health and preventing cruelty to animals were being pursued only against Santeria practitioners.<sup>52</sup> There was also evidence that the ordinances were

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<sup>43</sup> *Id.* at 449.

<sup>44</sup> *Id.* at 452, 454.

<sup>45</sup> 494 U.S. 872 (1990).

<sup>46</sup> *Id.* at 883-85.

<sup>47</sup> *Id.* at 874.

<sup>48</sup> *Id.* at 890.

<sup>49</sup> *Id.* at 884.

<sup>50</sup> 508 U.S. 520 (1993).

<sup>51</sup> *Id.* at 525-29, 532.

<sup>52</sup> *See id.* at 543 (“[The ordinances] fail to prohibit nonreligious conduct that endangers these interests in a similar or greater degree than Santeria sacrifice does.”).

enacted in response to the Santeria church's announcement of its plans to open in Hialeah.<sup>53</sup> The Court found that the ordinances were neither neutral nor generally applicable.<sup>54</sup> The Court then held that "[a] law burdening religious practice that is not neutral or not of general application . . . must advance interests of the highest order and must be narrowly tailored in pursuit of those interests."<sup>55</sup> In other words, where a law that burdens religion is either not neutral or not generally applicable, the compelling interest test still controls.

Despite the exception for a system of individualized exemptions, *Smith* did away with the compelling interest test for neutral, generally applicable laws. Some, like Marci Hamilton in her book *God vs. the Gavel*,<sup>56</sup> have argued that *Smith* was not a departure from settled precedent at all. Hamilton writes that *Smith* "cast the preceding cases that had seemed to rest on a principle at odds with the dominant approach[] in a different light to show that they were not inconsistent with the long-established principles the Court was reaffirming."<sup>57</sup> On the other hand, the Court may simply have been searching for a way out of creating religious exemptions to generally applicable criminal laws. Regardless, many argued after *Smith* that "the Court had overturned a long-settled doctrine that required strict scrutiny of any law, no matter how neutral, that substantially burdened religious conduct."<sup>58</sup> Congress, as it turned out, agreed with this latter point of view.

### C. RFRA and *City of Boerne v. Flores*

In the wake of *Smith*, Congress responded by enacting the Religious Freedom Restoration Act of 1993 (RFRA).<sup>59</sup> Finding that *Smith* had "virtually eliminated" the compelling interest test previously applicable to burdens on religious exercise imposed by neutral laws,<sup>60</sup> Congress reinstated that test, mandating that even rules of general applicability could only substantially burden religious exercise if they were

<sup>53</sup> *Id.* at 540-41 (opinion of Kennedy, J.).

<sup>54</sup> *See id.* at 542, 545-46 (majority opinion) (holding that the ordinances were not neutral because their object was to suppress religion and that they were not generally applicable because the government's interests were pursued only against religiously motivated conduct).

<sup>55</sup> *Id.* at 546 (internal quotation marks omitted).

<sup>56</sup> MARCI A. HAMILTON, *GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW* (2005).

<sup>57</sup> *Id.* at 221. *But see* CHEMERINSKY, *supra* note 5, § 12.3.2.3, at 1258 ("In *Employment Division v. Smith*, the Court expressly changed the law of the free exercise clause.").

<sup>58</sup> HAMILTON, *supra* note 56, at 223.

<sup>59</sup> 42 U.S.C. §§ 2000bb to 2000bb-4 (2006).

<sup>60</sup> *Id.* § 2000bb(a)(4).

both “in furtherance of a compelling governmental interest” and “the least restrictive means of furthering that compelling governmental interest.”<sup>61</sup> Exercising its Section 5 power to enact legislation enforcing the Free Exercise Clause, Congress attempted to reverse the Supreme Court’s decision in *Smith*.<sup>62</sup> The Supreme Court, however, was less than pleased with Congress’s enactment.

In *City of Boerne v. Flores*, the Court reviewed a decision by local zoning authorities in Texas that had denied a Catholic church a building permit that would have allowed the church to expand.<sup>63</sup> The church was built in the mission style and was too small to accommodate its parishioners at some Masses.<sup>64</sup> Boerne authorities relied on a recently enacted historic-preservation ordinance requiring the Historic Landmark Commission to preapprove any construction affecting historic landmarks.<sup>65</sup> Flores, the Catholic archbishop of San Antonio, challenged the decision under RFRA, arguing that it imposed a substantial burden on the religious exercise of San Antonio Catholics without a compelling state justification.<sup>66</sup> The Court held that Congress had exceeded its remedial power under Section 5 of the Fourteenth Amendment in enacting RFRA and further held RFRA unconstitutional as applied against the states.<sup>67</sup> RFRA still applies, however, to the federal government.<sup>68</sup> The major fault the Court found with RFRA was that the law was too broad to be properly considered remedial legislation and thus constituted an impermissible attempt to alter substantive constitutional rights.<sup>69</sup> After the Court struck down

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<sup>61</sup> *Id.* § 2000bb-1.

<sup>62</sup> See S. REP. NO. 103-111, at 14 (1993), as reprinted in 1993 U.S.C.C.A.N. 1892, 1903 (“Because the Religious Freedom Restoration Act is clearly designed to implement the free exercise clause . . . it falls squarely within Congress’ section 5 enforcement power.”).

<sup>63</sup> 521 U.S. 507, 512 (1997).

<sup>64</sup> *Id.* at 511-12.

<sup>65</sup> *Id.* at 512.

<sup>66</sup> *Id.* at 512, 529.

<sup>67</sup> See *id.* at 536 (“[A]s the provisions of the federal statute here invoked are beyond congressional authority, it is this Court’s precedent, not RFRA, which must control.”).

<sup>68</sup> See 146 CONG. REC. 19,124 (2000) (statement of Rep. Canady) (“Sections 7(a)(1) and (2) and (7)(b) [of RLUIPA] collectively conform RFRA to the Supreme Court’s decision in *City of Boerne v. Flores* . . . leaving RFRA applicable only to the federal government.” (citation omitted)).

<sup>69</sup> The Court reasoned that

[r]emedial legislation under § 5 “should be adapted to the mischief and wrong which the [Fourteenth] [A]mendment was intended to provide against.”

RFRA as overbroad, Congress responded by enacting RLUIPA to target discrimination against religious entities by state and local governments.

#### D. RLUIPA

In response to the Supreme Court's criticism in *Boerne*, Congress drafted a narrower religious-freedom bill. RLUIPA is the end product of Congress's effort. As opposed to RFRA, which was indiscriminate in its zeal to protect religious liberty, RLUIPA specifically targets two areas in which governmental entities regularly make individualized assessments that may impact a person's religious freedom: religious land use and the religious exercise of institutionalized persons.<sup>70</sup> By retaining the compelling interest test only for these areas, RLUIPA fits into the exception that the Court left open in *Smith*.<sup>71</sup> The chief sponsors of RLUIPA in the Senate, Edward Kennedy of Massachusetts and Orrin Hatch of Utah, spearheaded congressional hearings that found that the right to assemble for worship is frequently violated by state and local governments.<sup>72</sup> The Senators noted that discrimination often "lurks behind such vague and universally applicable reasons as traffic, aesthetics, or 'not consistent with the city's land use plan.'"<sup>73</sup>

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RFRA is not so confined. Sweeping coverage ensures its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter.

*Boerne*, 521 U.S. at 532 (citation omitted).

<sup>70</sup> See 146 CONG. REC. 16,622 (2000) (statement of Rep. Canady) (asserting that RLUIPA uses Congress's authority to protect the right to gather and worship and the religious exercise of institutionalized persons).

<sup>71</sup> See *Employment Div. v. Smith*, 494 U.S. 872, 884 (1990) ("As the plurality pointed out in [*Bowen v. Roy*, 476 U.S. 693 (1986)], our decisions in the unemployment cases stand for the proposition that where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason."). The Supreme Court has upheld RLUIPA's institutionalized-persons provisions against Establishment Clause challenge. See *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005). In addition, the Second Circuit has validated the constitutionality of RLUIPA's land-use provisions under the Commerce Clause, the Tenth Amendment, and the Establishment Clause. See *Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F.3d 338, 353-56 (2d Cir. 2007). The Supreme Court has not yet passed judgment on the constitutionality of RLUIPA's land-use provisions.

<sup>72</sup> See 146 CONG. REC. 16,698 (2000) (joint statement of Sen. Hatch and Sen. Kennedy on RLUIPA) ("Churches in general, and new, small, or unfamiliar churches in particular, are frequently discriminated against on the face of zoning codes and also in the highly individualized and discretionary processes of land use regulation.").

<sup>73</sup> *Id.*

As a result, the Senators concluded that “discrimination against religious uses is a nationwide problem” requiring a federal solution.<sup>74</sup>

RLUIPA defines “religious exercise” to include the “use, building, or conversion of real property for the purpose of religious exercise.”<sup>75</sup> The statute reinstates the compelling interest test for land-use regulations that impose a substantial burden on an individual’s religious exercise, unless imposition of the burden is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest.<sup>76</sup> Additionally, RLUIPA provides that the Act “shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this [Act] and the Constitution.”<sup>77</sup>

RLUIPA also seeks to remedy discrimination and exclusion in religious land use.<sup>78</sup> The Equal Terms provision is one example of Congress’s remedial purpose. It is important to note at the outset that the Discrimination and Exclusion provisions of RLUIPA operate independently of the Substantial Burden provision—that is, a plaintiff does not have to prove a substantial burden on religious exercise to state a claim under the Discrimination and Exclusion provisions.<sup>79</sup>

RLUIPA’s Equal Terms provision, the focal point of this Comment, provides that “[n]o government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.”<sup>80</sup> The statute’s command is clear: a land-use regulation cannot on its face or by its application treat a religious assembly or institution worse than a nonreligious assembly or institution. The legislative history explains that the Equal Terms provision “more squarely addresses the case in which the unequal treatment of different land

<sup>74</sup> *Id.* at 16,699.

<sup>75</sup> 42 U.S.C. § 2000cc-5(7)(B) (2006).

<sup>76</sup> *Id.* §§ 2000cc(a)(1), 2000cc-1(a).

<sup>77</sup> *Id.* § 2000cc-3(g).

<sup>78</sup> *Id.* § 2000cc(b).

<sup>79</sup> *See* Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752, 762 (7th Cir. 2003) (“[T]he substantial burden and nondiscrimination provisions are operatively independent of one another . . .”); *see also* Patricia E. Salkin & Amy Lavine, *The Genesis of RLUIPA and Federalism: Evaluating the Creation of a Federal Statutory Right and Its Impact on Local Government*, 40 URB. LAW. 195, 246 (2008) (“The equal terms provision, the courts have made clear, is conceptually distinct from RLUIPA’s substantial burden section.”).

<sup>80</sup> 42 U.S.C. § 2000cc(b)(1).

uses does not fall into any apparent pattern.”<sup>81</sup> The legislative history further states that the Discrimination and Exclusion provisions codify parts, but not all, of the Supreme Court’s constitutional jurisprudence as applied to land-use regulation.<sup>82</sup>

RLUIPA provides religious entities neither land-use immunity nor a blanket exemption from application for variances, special permits, or other relief provisions.<sup>83</sup> The Equal Terms provision simply mandates equal treatment of religious and nonreligious assemblies and institutions with respect to land-use regulation.

## II. THE JUDICIAL INTERPRETATION OF RLUIPA’S EQUAL TERMS PROVISION

Understanding the background and history behind RLUIPA, we may now proceed to examine how courts have interpreted the statute’s Equal Terms provision. Despite its apparent simplicity, RLUIPA’s Equal Terms provision has raised genuine problems of interpretation for federal courts. Judges have struggled to discern exactly what Congress meant when it proclaimed that religious assemblies and institutions must not be treated on less than equal terms with nonreligious assemblies and institutions. In particular, federal courts have sent mixed messages as to what a religious plaintiff must demonstrate in order to establish an Equal Terms violation. Must religious plaintiffs simply produce a nonreligious assembly or institution that is permitted where the plaintiffs are not? Must they produce a nonreligious assembly or institution that is *similarly situated* as to the regulatory purpose of the challenged land-use regulation? If so, what does it mean to be similarly situated? What counts as a nonreligious assembly or institution in the first place? Do different standards apply if the challenge to the regulation is facial or as applied? Should the standard of review applied to a challenged regulation upon a finding of unequal treatment be strict scrutiny or strict liability? Questions such as these abound in the case law.

While the Substantial Burden provision has generated a sizeable body of case law, there are far fewer circuit court opinions analyzing

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<sup>81</sup> 146 CONG. REC. 19,123 (2000) (statement of Rep. Canady).

<sup>82</sup> *See id.*

<sup>83</sup> *See id.* at 16,700 (joint statement of Sen. Hatch and Sen. Kennedy on RLUIPA) (“This Act does not provide religious institutions with immunity from land use regulation . . .”).

the Equal Terms provision.<sup>84</sup> Nonetheless, the Equal Terms provision has been examined by three federal appellate courts: the Eleventh, Seventh, and Third Circuits. The Eleventh Circuit has dealt with the provision most extensively, and the Seventh and Third Circuits have drawn upon the Eleventh Circuit's reasoning in deciding their own cases. A circuit split has emerged between the Seventh and Eleventh Circuits on the one hand and the Third Circuit on the other.

### A. *The Eleventh Circuit*

Beginning in 2004, the Eleventh Circuit decided several cases interpreting the Equal Terms provision of RLUIPA. Before this Section lays out the Eleventh Circuit's doctrinal tests, it is helpful to note the three kinds of potential Equal Terms statutory violations, as defined by the Eleventh Circuit. A land-use regulation will violate RLUIPA if it is

- (1) a statute that facially differentiates between religious and nonreligious assemblies or institutions; (2) a facially neutral statute that is nevertheless "gerrymandered" to place a burden solely on religious, as opposed to nonreligious, assemblies or institutions; or (3) a truly neutral statute that is selectively enforced against religious, as opposed to nonreligious[,] assemblies or institutions.<sup>85</sup>

These classifications parallel the standard types of governmental action that cause a violation of the Free Exercise Clause. *Midrash Sephardi, Inc. v. Town of Surfside* addresses the first type of violation,<sup>86</sup> while *Konikov v. Orange County*<sup>87</sup> and *Primera Iglesia Bautista of Boca Raton, Inc. v. Broward County*<sup>88</sup> address the third type. The second type of

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<sup>84</sup> See Daniel P. Lennington, *Thou Shalt Not Zone: The Overbroad Applications and Troubling Implications of RLUIPA's Land Use Provisions*, 29 SEATTLE U. L. REV. 805, 815 (2006) ("This second part [RLUIPA's Discrimination and Exclusion provisions] has been infrequently applied and seldom used by plaintiffs. Moreover, it has generally not been attacked in the courts as either overbroad or unconstitutional." (footnote omitted)).

<sup>85</sup> *Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward County*, 450 F.3d 1295, 1308 (11th Cir. 2006).

<sup>86</sup> See 366 F.3d 1214, 1220 & n.3 (11th Cir. 2004) (noting that churches and synagogues were expressly prohibited in the business district); see also *Primera*, 450 F.3d at 1311 n.11 (stating that *Midrash* involved a facial Equal Terms challenge).

<sup>87</sup> See 410 F.3d 1317, 1329 (11th Cir. 2005) (per curiam) (holding that the Orange County zoning code as implemented by the county violated RLUIPA); see also *Primera*, 450 F.3d at 1311 n.11 (stating that *Konikov* decided an as-applied Equal Terms challenge).

<sup>88</sup> See 450 F.3d at 1310 (stating that *Primera* "essentially claim[ed]" the third type of Equal Terms violation).

violation contemplates cases similar to the situation brought to the Supreme Court in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*.<sup>89</sup>

The first, and perhaps the most influential, Eleventh Circuit case interpreting the Equal Terms provision, *Midrash*, involved a zoning ordinance promulgated by the town of Surfside, Florida.<sup>90</sup> The ordinance contained a provision excluding churches and synagogues from Surfside's business district, while private clubs and lodges were permitted above the first floor.<sup>91</sup> Two synagogues wishing to locate in the business district challenged the zoning ordinance as facially discriminatory under the Equal Terms provision of RLUIPA.<sup>92</sup> Churches and synagogues were prohibited in seven of the eight zoning districts in Surfside; indeed, they were only permitted in the "RD-1 two-family residential district," and even then only with a conditional-use permit.<sup>93</sup> The synagogues argued that it would be burdensome to locate in the RD-1 district because Orthodox Judaism requires its practitioners to walk to religious services.<sup>94</sup> Surfside, however, argued that the ordinance was necessary "to invigorate the business district and to create a strong tax base";<sup>95</sup> a synagogue ostensibly would be tax exempt. The Eleventh Circuit invalidated the zoning ordinance, holding that "churches and synagogues, as well as private clubs and lodges, fall within the natural perimeter of 'assembly or institution.'"<sup>96</sup> Since Surfside's goal of "retail synergy" was pursued against religious assemblies but not other noncommercial assemblies, the court found that the town had impermissibly preferred secular motivations to religious ones.<sup>97</sup>

According to the *Midrash* court, while the Equal Terms provision "has the 'feel' of an equal protection law, it lacks the 'similarly situated' requirement usually found in equal protection analysis."<sup>98</sup> Looking to the ordinary meanings of "assembly" and "institution," the court reasoned that a proper inquiry must first determine whether the church or synagogue "qualifies as an 'assembly or institution,'" then determine "whether the governmental authority treats [it] differently

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<sup>89</sup> See 508 U.S. 520, 535 (1993) ("It becomes evident that these ordinances target Santeria sacrifice when the ordinances' operation is considered.").

<sup>90</sup> 366 F.3d at 1219.

<sup>91</sup> *Id.* at 1220.

<sup>92</sup> *Id.* at 1218-19.

<sup>93</sup> *Id.* at 1219.

<sup>94</sup> *Id.* at 1221.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 1231.

<sup>97</sup> *Id.* at 1235.

<sup>98</sup> *Id.* at 1229.



than a nonreligious assembly or institution.”<sup>99</sup> Quoting *Webster’s Dictionary*, the court defined “assembly” as “a company of persons collected together in one place [usually] and usually for some common purpose (as deliberation and legislation, worship, or social entertainment).”<sup>100</sup> “Institution” was defined to mean “an established society or corporation: an establishment or foundation esp[ecially] of a public character,” or “[a]n established organization, esp[ecially] one of a public character.”<sup>101</sup>

Under the *Midrash* rule, upon a finding of unequal treatment of religious and nonreligious assemblies or institutions, the court will automatically find a violation of the Equal Terms provision, regardless of any justification supplied by the zoning authority.<sup>102</sup> Once a violation of the Equal Terms provision is found, the regulation in question is by definition deemed not neutral or not generally applicable “because such unequal treatment indicates the ordinance improperly targets the religious character of an assembly.”<sup>103</sup> Because it is relatively easy to prove a violation of the Equal Terms provision under the *Midrash* approach, however, a finding that the challenged regulation is either not neutral or not generally applicable does not translate into automatic invalidation of the regulation. Rather, upon the finding of a violation, the regulation must pass the test of strict scrutiny.<sup>104</sup> In order for the law to survive, the governmental entity must demonstrate a compelling justification for the classification and that the classification is narrowly tailored to the government’s interest.<sup>105</sup>

The Eleventh Circuit next visited RLUIPA’s Equal Terms provision in 2005. In *Konikov v. Orange County*, the court confronted a *Chabad* rabbi holding services and Torah study meetings out of his home.<sup>106</sup> His home was located in an R-1A residential district, in which a landowner was required to submit a \$912 application to the zoning board for a special exception if she wished to operate a religious organ-

<sup>99</sup> *Id.* at 1230.

<sup>100</sup> *Id.* (alteration in original) (internal quotation marks omitted).

<sup>101</sup> *Id.* at 1230-31 (internal quotation marks omitted).

<sup>102</sup> *See id.* at 1231 (“Because we have concluded that private clubs, churches and synagogues fall under the umbrella of ‘assembly or institution’ as those terms are used in RLUIPA, this differential treatment constitutes a violation of § (b)(1) of RLUIPA.”).

<sup>103</sup> *Id.* at 1232.

<sup>104</sup> *Id.* It should be noted that the strict scrutiny that the Eleventh Circuit applies to the classification determines whether the challenged regulation should be invalidated, not whether there was a violation of the Equal Terms provision in the first place.

<sup>105</sup> *Id.*

<sup>106</sup> 410 F.3d 1317, 1319-20 (11th Cir. 2005) (per curiam).

ization.<sup>107</sup> Konikov never applied for a special exception.<sup>108</sup> When Orange County cited him for violation of the zoning code, Konikov sued, raising facial and as-applied challenges to the zoning code under RLUIPA's Equal Terms provision.<sup>109</sup>

In assessing the distinctions made by the Orange County zoning code (i.e., the facial challenge), the court applied the *Midrash* test and found that the only permitted secular use in the R-1A zone that *might* qualify as an assembly or institution was family day-care centers.<sup>110</sup> Nonetheless, the court held that even if family day-care centers could qualify as assemblies or institutions, the state had a compelling justification for treating family day-care centers differently from other groups because of the "fundamental right to freedom of personal choice in marriage and family life."<sup>111</sup> The court also found that because the classification was narrowly tailored to that interest, it could survive strict scrutiny.<sup>112</sup>

In assessing the implementation of the Orange County zoning code (i.e., the as-applied challenge), however, the Eleventh Circuit held that the county had violated the Equal Terms provision of RLUIPA and that its classification could not survive strict scrutiny.<sup>113</sup> The court was deeply troubled by the fact that "a group meeting with the same frequency as Konikov's would not violate the Code, *so long as religion is not discussed*."<sup>114</sup> As a result, it found that Orange County's enforcement of the zoning code impermissibly targeted religious assemblies without a compelling justification.<sup>115</sup>

The last stop on our tour of Eleventh Circuit jurisprudence is the case of *Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward County*.<sup>116</sup> Primera, a Hispanic Baptist congregation, purchased land in the A-1 Agricultural Estate district, on which it planned to build a

<sup>107</sup> *Id.* at 1320.

<sup>108</sup> *Id.* at 1321.

<sup>109</sup> *Id.* at 1321, 1324.

<sup>110</sup> *Id.* at 1325-26.

<sup>111</sup> *Id.* at 1326; *see also* Moore v. City of East Cleveland, 431 U.S. 494, 499 (1977) (plurality opinion) ("This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." (quoting Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639-40 (1974))).

<sup>112</sup> *Konikov*, 410 F.3d at 1327.

<sup>113</sup> *Id.* at 1329.

<sup>114</sup> *Id.* at 1328.

<sup>115</sup> *Id.* at 1329.

<sup>116</sup> 450 F.3d 1295 (11th Cir. 2006).

church.<sup>117</sup> The land, however, was situated within 1000 feet of other nonresidential, nonagricultural uses, in violation of a separation requirement applicable to the A-1 district.<sup>118</sup> The “stated purpose” of this requirement was “to protect, preserve and enhance the rural character and lifestyle of the existing low density areas.”<sup>119</sup> On the advice of counsel, Primera applied for a zoning variance, which was denied by the Board of Adjustment twice, but continued to hold services in violation of the separation requirement.<sup>120</sup> Primera then brought suit under the Equal Terms provision of RLUIPA, claiming that the Broward County Preparatory School, a secular institution located in the same A-1 district, had been granted rezoning.<sup>121</sup> The Eleventh Circuit held that Primera had not demonstrated a violation of the Equal Terms provision because it had failed to present a similarly situated secular comparator.<sup>122</sup> The court found that the school was not similarly situated to Primera because “they sought markedly different forms of zoning relief, from different decision-making bodies, under sharply different provisions of local law.”<sup>123</sup>

In its reasoning, the court revisited its holding in *Konikov*. Noting that *Konikov* involved an as-applied challenge to a land-use regulation, the court stated that *Konikov* “stands for the proposition that a neutral statute’s *application* may violate the Equal Terms provision if it differentially treats *similarly situated* religious and nonreligious assemblies.”<sup>124</sup> This is a more stringent standard than the *Midrash* rule, which requires only that the religious assembly or institution present a better-treated secular entity that falls into the “natural perimeter” of “assembly or institution.”<sup>125</sup> The Eleventh Circuit found that in an as-applied challenge, the *Konikov* court had engaged in a similarly situated analysis; it thus ruled that *Konikov* controlled in the as-applied context.<sup>126</sup> The court’s primary concern in *Primera* was that religious

<sup>117</sup> *Id.* at 1300.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* (internal quotation marks omitted).

<sup>120</sup> *Id.* at 1301-02.

<sup>121</sup> *Id.* Note that Primera had applied to the Board of Adjustment for a zoning variance. The Broward County Preparatory School, on the other hand, had applied to the county for rezoning, a different remedy administered by a different board. *Id.* at 1300-02.

<sup>122</sup> *Id.* at 1313.

<sup>123</sup> *Id.* at 1311.

<sup>124</sup> *Id.*

<sup>125</sup> See *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1230 & n.12 (11th Cir. 2004) (describing Justice Harlan’s “natural perimeter” test).

<sup>126</sup> *Primera*, 450 F.3d at 1311 n.11.

entities be given “equal treatment, not special treatment,” under RLUIPA’s Equal Terms provision.<sup>127</sup>

The Eleventh Circuit’s construction of RLUIPA’s Equal Terms provision is the most comprehensive we have. The Seventh and Third Circuit opinions in this area largely respond to the precedent set by the Eleventh Circuit.

### B. *The Seventh Circuit*

The Seventh Circuit has heard two major cases construing the Equal Terms provision of RLUIPA. In the first of those cases, *Vision Church v. Village of Long Grove*, a Korean congregation owned land in unincorporated Lake County, Illinois, on which it planned to build a church.<sup>128</sup> The congregation, however, wanted the church to be within the boundaries of the Village of Long Grove proper, not in unincorporated Lake County, so it applied for voluntary annexation into the Village of Long Grove.<sup>129</sup> Church use was permitted on the property under Lake County’s Zoning Code but not under the Village’s without a special-use permit; therefore, the church made its application for annexation conditional on the grant of a special-use permit.<sup>130</sup> Citing concerns about the size of the church and Vision’s refusal to assent to other conditions desired by the Village, the Village denied Vision’s application for annexation.<sup>131</sup>

At the same time, a local real estate developer whose property surrounded Vision’s property on all sides applied for voluntary annexation.<sup>132</sup> After denying Vision’s application, the Village quickly approved the developer’s and then took advantage of a provision of Illinois law allowing a municipality to *involuntarily* annex property surrounded on all sides by property within the Village’s boundaries.<sup>133</sup> The Village zoned Vision’s property “R2 Residential,” as requested by Vision, but the involuntary annexation terminated Vision’s application for the requisite special-use permit to operate as a church.<sup>134</sup> Shortly thereafter, the Village amended its Assembly Ordinance to re-

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<sup>127</sup> *Id.* at 1313.

<sup>128</sup> 468 F.3d 975, 981 (7th Cir. 2006).

<sup>129</sup> *Id.* at 981-82.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 982.

<sup>132</sup> *Id.* at 983.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 983 & n.5.

strict the size of buildings used for public assembly.<sup>135</sup> Vision later reapplied for a special-use permit, but the permit was denied because the size of the proposed facility exceeded the permissible square footage under the Assembly Ordinance.<sup>136</sup> Although the Seventh Circuit cited *Konikov* for the proposition that a religious group and a nonreligious group need not be similarly situated in all relevant respects for purposes of the Equal Terms provision comparison, it did not hold for Vision.<sup>137</sup> Arguing that elementary schools were exempt from the requirement, Vision apparently had challenged only the special-use permit requirement, not the questionable Assembly Ordinance.<sup>138</sup> As a result, the court found Vision's comparison to elementary schools unpersuasive under the rules of *Konikov* and *Primera*.<sup>139</sup> The court held that Vision had not demonstrated an Equal Terms statutory violation as defined in *Primera*.<sup>140</sup>

The next case to examine the Equal Terms provision in the Seventh Circuit was *Digrugilliers v. Consolidated City of Indianapolis*.<sup>141</sup> In that case, the Baptist Church of the West Side had been conducting church services out of a building zoned "C-1."<sup>142</sup> Under Indianapolis's zoning code, the church's building was considered a "religious use," which was not permitted in a C-1 district without a zoning variance.<sup>143</sup> Various secular assemblies and institutions, along with their corresponding commercial accessory uses, were allowed in the C-1 district without a variance.<sup>144</sup> The Pastor did not apply for a zoning variance; instead, he brought suit alleging that "the requirement of obtaining a variance in order to make a religious use of land" violated the Equal Terms provision of RLUIPA.<sup>145</sup> The district court held for the city, reasoning that because the zoning code permitted religious land users to enjoy certain *residential* uses (e.g., use of a rectory for the minister), allowing religious use in the C-1 district without a variance would give

<sup>135</sup> *Id.* at 983-84.

<sup>136</sup> *Id.* at 984.

<sup>137</sup> *Id.* at 1002-03.

<sup>138</sup> *Id.* at 1003.

<sup>139</sup> *Id.*

<sup>140</sup> *See id.* ("[T]he fact that Vision and the elementary schools were subject to different standards because of the year in which their special use applications were considered compels the conclusion that there was no unequal treatment.")

<sup>141</sup> 506 F.3d 612 (7th Cir. 2007).

<sup>142</sup> *Id.* at 614.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 614-15.

<sup>145</sup> *Id.* at 614.

religious entities “rights greater than rather than equal to” those of secular entities.<sup>146</sup> In an opinion by Judge Posner, however, the Seventh Circuit vindicated the church. The court held that

the City may not, by defining religious use so expansively as to bestow on churches in districts in which it allows them to operate more rights than identical secular users of land have, justify excluding churches from districts in which, were it not for those superadded rights, the exclusion would be discriminatory.<sup>147</sup>

To hold otherwise, reasoned Judge Posner, would be to allow local governments to zone out religious entities simply by *defining* religious use to permit an activity forbidden for secular use in the same zone.<sup>148</sup> *Vision and Digrugilliers* thus exemplify the Seventh Circuit’s willingness to follow the Eleventh Circuit’s lead in construing the Equal Terms provision of RLUIPA.<sup>149</sup>

### C. *The Third Circuit*

The Third Circuit has explicitly repudiated the Seventh and Eleventh Circuits in its leading case interpreting the Equal Terms provision, *Lighthouse Institute for Evangelism, Inc. v. City of Long Branch*.<sup>150</sup> In *Lighthouse*, “a Christian church . . . seek[ing] to minister to the poor and disadvantaged in downtown Long Branch, New Jersey,” purchased property in the C-1 Central Commercial District.<sup>151</sup> Assembly halls and theaters were permitted in the C-1 district, but churches were not.<sup>152</sup> *Lighthouse* sought permission to use its property for religious purposes but was only allowed to use it as an office.<sup>153</sup> *Lighthouse* sued for a preliminary injunction, attacking the ordinance both facially and as

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<sup>146</sup> *Id.* at 615.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> Indeed, although the Seventh Circuit has not issued an opinion interpreting the Equal Terms provision since the circuit split emerged, the U.S. District Court for the Northern District of Illinois has opined that the Eleventh Circuit’s approach is more consistent with *Digrugilliers* than it is with the Third Circuit’s approach, in terms of the appropriateness of considering protective zones in Equal Terms provision analysis. See *River of Life Kingdom Ministries v. Vill. of Hazel Crest*, No. 08-0950, 2008 WL 4865568, at \*7 (N.D. Ill. July 14, 2008) (noting that the Seventh Circuit cited approvingly to the reasoning of the Eleventh Circuit in at least two prior cases). The Seventh Circuit also has not examined the standard of review applicable to a challenged regulation upon a finding of unequal treatment.

<sup>150</sup> 510 F.3d 253 (3d Cir. 2007).

<sup>151</sup> *Id.* at 256-57 (internal quotation marks omitted).

<sup>152</sup> *Id.* at 257.

<sup>153</sup> *Id.*

applied.<sup>154</sup> All claims were dismissed as either unexhausted or unripe, and the Third Circuit affirmed the district court's denial of a preliminary injunction.<sup>155</sup>

While this litigation was pending, Long Branch adopted a redevelopment plan that "strictly limited the use of properties within the 'Broadway Corridor' area," where the church's property was located.<sup>156</sup> The plan superseded the ordinance and was adopted in order to increase retail revenues for business owners and tax revenues for the city.<sup>157</sup> Churches were not permitted in the Broadway Corridor.<sup>158</sup> Lighthouse tried to qualify as a developer so as to retain the ability to make use of its property, but this request was denied by the City Council because "a church would 'destroy the ability of the block to be used as a high end entertainment and recreation area' due to a New Jersey statute which prohibits the issuance of liquor licenses within two hundred feet of a house of worship."<sup>159</sup> Lighthouse then challenged the plan as violative of the Equal Terms provision of RLUIPA.<sup>160</sup>

The Third Circuit held that "a religious plaintiff under the Equal Terms Provision must identify a better-treated secular comparator that is similarly situated in regard to the objectives of the challenged regulation"—something Lighthouse had not, and perhaps could not have, done.<sup>161</sup> The court further held that when a violation of the Equal Terms provision is found, the standard should be strict liability, not strict scrutiny.<sup>162</sup> As a result, the court upheld summary judgment for Long Branch with respect to the plan, finding that the plan did not

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*; see also *Lighthouse Inst. for Evangelism Inc. v. City of Long Branch*, 100 F. App'x 70, 77 (3d Cir. 2004) (holding that Lighthouse's Equal Terms claim had failed because Lighthouse did not present a similarly situated secular comparator and because it was unclear whether its property would have been approved for church use had it applied as an "assembly hall").

<sup>156</sup> *Lighthouse*, 510 F.3d at 258.

<sup>157</sup> *Id.*

<sup>158</sup> See *id.* ("Churches were not listed as a permitted use . . . [and] the Plan provided that '[a]ny uses not specifically listed' were prohibited.").

<sup>159</sup> *Id.* at 259.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at 268, 277 (emphasis omitted).

<sup>162</sup> *Id.* at 269. This standard differs from the Eleventh Circuit test laid out in *Mi-drash*. Under the Third Circuit's test, the religious plaintiff must first produce a better-treated secular assembly or institution that is similarly situated as to the purpose of the regulation at issue. If the court decides that the secular group is both similarly situated *and* better treated than the religious group, the government will be held strictly liable for violation of the Equal Terms provision. Note that this approach entirely bypasses the compelling interest (or strict scrutiny) test that RLUIPA seeks to revive.

violate the Equal Terms provision.<sup>163</sup> The court found that although the plan permitted nonreligious assemblies such as theaters in the Broadway Corridor, it did not permit any secular “assemblies or institutions whose presence would cause no lesser harm to the redevelopment and revitalization of the Corridor” than the church.<sup>164</sup> The court stressed the difficulty of creating a vibrant downtown if “sizeable areas of the Broadway Corridor were not available for the issuance of liquor licenses.”<sup>165</sup> The Third Circuit, however, reversed the grant of summary judgment for Long Branch on the ordinance issue and then ordered summary judgment for Lighthouse; it found that the ordinance violated RLUIPA’s Equal Terms provision because, during discovery, the term “assembly hall” was determined *not* to encompass religious use.<sup>166</sup>

The court reasoned that the Equal Terms provision requires something more than just the “identif[ication] [of] *any* nonreligious assembly or institution that enjoys better terms”: one must consider the objectives of the regulation as well as the characteristics of the secular and religious comparators.<sup>167</sup> The court asserted that Congress had intended to codify existing Free Exercise Clause jurisprudence, which—as the court described in painstaking detail—required comparing how a regulation treated secular entities or behaviors that had the same effect on the regulation’s objectives.<sup>168</sup> The Third Circuit expressly declined to adopt the Eleventh Circuit’s “expansive” reading of the statute because, according to the court, such a reading would assume “that Congress intended to force local governments to give any and all religious entities a free pass to locate wherever any secular assembly or institution is allowed.”<sup>169</sup>

<sup>163</sup> *Id.* at 272.

<sup>164</sup> *Id.* at 270.

<sup>165</sup> *Id.* at 270-71. Under a state statute, liquor licenses could not be issued “in the vicinity of houses of worship.” *Id.*

<sup>166</sup> *Id.* at 272-73.

<sup>167</sup> *Id.* at 264.

<sup>168</sup> *Id.* at 264-65.

<sup>169</sup> *Id.* at 268, 269 n.14. Since the Third Circuit’s opinion in *Lighthouse* was handed down, two relevant district court opinions have discussed it in detail. In *Third Church of Christ v. City of New York*, the U.S. District Court for the Southern District of New York analyzed the plaintiff’s claim under the Eleventh Circuit, Seventh Circuit, and Third Circuit tests and decided that the Equal Terms provision was violated under all three. 617 F. Supp. 2d 201, 209-11 (S.D.N.Y. 2008). The court thus refused to express an opinion as to which test would prevail in the Second Circuit. *Id.* In *Centro Familiar Cristiano Buenas Nuevas v. City of Yuma*, the U.S. District Court for the District of Arizona did not apply the similarly situated secular comparator test of *Lighthouse*; rather, it focused on the Eleventh Circuit’s and the Third Circuit’s invocations of principles of neutrality and general applicability to deny the religious institution’s Equal Terms



In fashioning its doctrinal test, the majority opinion focused more heavily on Third Circuit Free Exercise Clause jurisprudence than on the statutory text. Judge Jordan, in his dissent, capitalized on precisely this point. As Judge Jordan succinctly put it, “In less legalistic language, we are asked whether religion can be made to take a back seat to a City’s economic development goals.”<sup>170</sup> The dissent took notice of the majority’s fear that the Eleventh Circuit’s interpretation would “make rational zoning impossible whenever a church was in the mix,” but it responded by arguing that RLUIPA does no more than prevent a religious assembly or institution from being excluded when a secular assembly or institution is allowed.<sup>171</sup>

Judge Jordan also took issue with the majority’s analysis because, although Congress intended to codify *parts* of Free Exercise Clause jurisprudence when it enacted RLUIPA, it did not necessarily mean to replicate that analysis completely.<sup>172</sup> For Judge Jordan, the starting point of the majority’s analysis should have been the text of the statute that Congress chose to enact.<sup>173</sup> The dissent also correctly pointed out that RLUIPA was enacted using Congress’s Section 5 power, under the Fourteenth Amendment, to enforce the Free Exercise Clause and that importing a similarly situated secular comparator requirement would in fact frustrate that intent by making the Act harder to enforce.<sup>174</sup> In sum, the dissent concluded that there was no legitimate basis for the majority’s grafting of additional requirements onto the statute.

### III. WHY THE *MIDRASH* APPROACH PROVIDES THE BEST INTERPRETIVE FRAMEWORK FOR THE ANALYSIS OF EQUAL TERMS CHALLENGES

Undoubtedly, religious entities’ land uses create thorny and controversial issues. For example, a common argument against RLUIPA’s land-use provisions is that they permit religious groups to wantonly

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challenge. See 615 F. Supp. 2d 980, 996-1000 (D. Ariz. 2009) (holding that the city had shown that a neutral and generally applicable principle justified its conditional-use permit requirement for religious and similar secular groups, thus qualifying the city’s regulation for rational basis review).

<sup>170</sup> *Lighthouse*, 510 F.3d at 278 (Jordan, J., concurring in part and dissenting in part).

<sup>171</sup> *Id.* at 286.

<sup>172</sup> See *id.* at 287-88 (“Viewing a RLUIPA claim as the precise equivalent of a Free Exercise Claim renders the statute superfluous.”).

<sup>173</sup> *Id.* at 288.

<sup>174</sup> *Id.* at 293-94.

flout generally applicable land-use regulations.<sup>175</sup> Indeed, some courts seem to find the Equal Terms provision itself objectionable. Their arguments imply that RLUIPA does not seek to treat religious entities on equal terms with nonreligious entities but rather to treat religious assemblies and institutions *better* than their secular counterparts.<sup>176</sup> Given these concerns, the *Midrash* approach best reconciles the competing interests of religious and secular groups. Furthermore, of all the interpretive approaches to Equal Terms challenges detailed above, the interpretation of the *Midrash* court is most consistent with the text and purpose of RLUIPA.

To prevent what it perceived to be a potential constitutional problem,<sup>177</sup> the Third Circuit imposed more stringent requirements on religious plaintiffs than those found in the text of RLUIPA. The Third Circuit's approach is two-pronged: First, it prevents religious plaintiffs from stating a claim under the Equal Terms provision unless they can demonstrate that there exists a secular assembly or institution *similarly situated* to the religious entity as to the purpose of the challenged regulation. Second, if unequal treatment is established, the government is held strictly liable for violating the statute. Likewise, in *Primera*, the Eleventh Circuit read a similarly situated requirement into *Konikov*.<sup>178</sup> The question remains, however, whether the best interpretive approach to remedy a perceived injustice is to rewrite the text of a statute constitutionally passed by both houses of Congress and signed into law by the President.

The Third Circuit is not alone in its concern that statutes like RLUIPA in fact confer more rights on religious entities than on their secular counterparts. Hamilton argues in *God vs. the Gavel* that home-

<sup>175</sup> See, e.g., Ashira Pelman Ostrow, *Judicial Review of Local Land Use Decisions: Lessons from RLUIPA*, 31 HARV. J.L. & PUB. POL'Y 717, 738 (2008) ("To others, RLUIPA unnecessarily interferes with local governments' ability to enforce generally applicable land use regulation and creates an overly broad exemption that allows religious institutions to avoid a community's reasonable land-use concerns.").

<sup>176</sup> See *supra* text accompanying note 169 (noting the Third Circuit's concern that such an interpretation could "force local governments to give any and all religious entities a free pass" in location decisions).

<sup>177</sup> See *Lighthouse*, 510 F.3d at 267 n.11 (declining to reach the question of RLUIPA's constitutionality under Section 5 of the Fourteenth Amendment); see also Campbell, *supra* note 14, at 1089 ("Even though Long Branch failed to argue that the equal terms provision would be unconstitutional under the interpretation advanced by Lighthouse . . . , the court nevertheless included a lengthy footnote explaining that its limiting construction avoided concerns about the constitutionality of the provision.").

<sup>178</sup> See *Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward County*, 450 F.3d 1295, 1311 n.11 (11th Cir. 2006) ("*Konikov*[,] decided an *as-applied* Equal Terms challenge by engaging in a similarly situated analysis.").

owners have reason to fear that they will “go to sleep in a quiet residential enclave and wake up next door to a proposed 150-car parking lot” without meaningful recourse to the courts.<sup>179</sup> Similar statements abound in the literature examining RLUIPA.<sup>180</sup> Fortunately, however, such fears are unfounded. The *Midrash* test, which does not add a similarly situated requirement and relies on strict scrutiny of the challenged regulation upon a finding of unequal treatment, is more than adequate to the task.

#### A. *The Circuit Split*

The federal appellate court decisions construing the Equal Terms provision essentially create a two-pronged doctrinal framework.<sup>181</sup> The Eleventh Circuit and the Third Circuit apply different standards under each prong of the analysis. In order to state a claim under the Equal Terms provision, the religious plaintiff must show that there is (1) a land-use regulation, (2) a religious assembly or institution, (3) a nonreligious assembly or institution, and (4) some evidence that the nonreligious entity is better treated. The standard applicable to each prong has an enormous effect on the outcome in a given case.

The first prong involves determining whether the case includes the requisite entities and whether the secular entity is treated better than the religious one. The Eleventh Circuit maintains that, at least in a facial challenge, the plaintiff need only produce one religious and one secular assembly or institution, as defined by Webster; if the secular one is treated better than the religious one, unequal treatment is established.<sup>182</sup> The Third Circuit, on the other hand, maintains that Congress could not possibly have meant to include all secular assemblies or institutions in the comparison; only those assemblies or institutions that are similarly situated to the religious plaintiff with respect

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<sup>179</sup> HAMILTON, *supra* note 56, at 79; *see also id.* at 78-82 (cataloguing the problems of parking, traffic, lights, and noise that the modern religious congregation imposes on suburbs).

<sup>180</sup> *See, e.g.,* Lennington, *supra* note 84, at 805 (creating a hypothetical in which a pastor purchases a home next door to the reader’s with plans to raze it in order to build his dream church).

<sup>181</sup> *See* Campbell, *supra* note 14, at 1085-86. For simplicity, I compare the Eleventh Circuit’s approach with the Third Circuit’s, because the Seventh Circuit followed the Eleventh Circuit on the first prong and has not yet addressed the second prong.

<sup>182</sup> *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1230-31 (11th Cir. 2004).

to the purpose of the challenged regulation are relevant.<sup>183</sup> To take the *Lighthouse* example, if a liquor license cannot be issued within 500 feet of a church or school, and a zoning regulation excludes only churches from a zone for this reason, the religious plaintiff cannot produce the Rotary Club as an example of a better-treated secular entity. The Rotary Club does not affect liquor licensing in the zone. Instead, the church must produce a better-treated school because a school would also interrupt liquor licensing. A school is the only secular entity that is similarly situated to the church as to the purpose of the challenged regulation, which is to avoid liquor-licensing interruptions and create a vibrant downtown. The standard employed at this stage matters because it determines which plaintiffs will be able to state a claim. In the Eleventh Circuit, more plaintiffs get through the door; in the Third Circuit, very few can pass.

The second prong involves the standard of review applied to the challenged land-use regulation. The Eleventh Circuit applies strict scrutiny.<sup>184</sup> The court examines the government's justifications for the regulation in great detail because more plaintiffs cross the threshold under the first prong. If the regulation fails strict scrutiny, it is invalidated; if the government demonstrates a narrowly tailored compelling interest, it stands. The Third Circuit, on the other hand, does not apply strict scrutiny. Because it is so difficult to get through the door under the first prong, if a plaintiff can prove unequal treatment under the similarly situated test, the challenged regulation is automatically invalidated.<sup>185</sup>

It appears that the second prong of the Equal Terms test is the operative one in the Eleventh Circuit, while the first prong is instrumental in the Third Circuit. In the Eleventh Circuit, it is easy for the religious plaintiff to get through the door under the first prong (at least in a facial challenge), but the government gets a chance to prove that it has a compelling interest under the second prong. In the Third Circuit, it is very difficult for the religious plaintiff to get through the door under the first prong, but if it does, it wins under the second prong.

*Lighthouse* deals a significant blow to religious entities seeking to exercise their statutory rights under RLUIPA by creating the requirement that a religious assembly or institution produce not only a bet-

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<sup>183</sup> *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 266 (3d Cir. 2007).

<sup>184</sup> *Midrash*, 366 F.3d at 1232.

<sup>185</sup> See *Lighthouse*, 510 F.3d at 269.

ter-treated secular assembly or institution but also one that is similarly situated as to the purpose of the challenged regulation. The eventual resolution of this circuit split by the Supreme Court would ultimately clear up this doctrinal confusion by determining which interpretation of RLUIPA's Equal Terms provision should prevail.

### B. *The Similarly Situated Secular Comparator Requirement*

The Third Circuit argued that without the similarly situated secular comparator requirement, religious entities will be immune from land-use regulation. A textual interpretation of RLUIPA's Equal Terms provision, however, does not allow religious assemblies and institutions to locate wherever they please. It does not absolve religious entities from compliance with *neutral and generally applicable*<sup>186</sup> special-permit and variance requirements.<sup>187</sup> It simply prevents local governments from discriminating against religious assemblies and institutions by excluding or hampering them when secular assemblies and institutions are not so burdened.<sup>188</sup> Therefore, the fearful homeowner in Hamilton's hypothetical need worry that a strange new church and its 150-space parking lot could one day set up shop next door only if the local Rotary Club<sup>189</sup> would be permitted to do the same. So long as the Rotary Club is excluded, the church may be excluded as well. Contrary to the opinion of RLUIPA's detractors, the church will not be permitted to flout applicable land-use regulations and locate wherever it pleases.

#### 1. The Third Circuit's Fears

The Third Circuit was reluctant to give the Equal Terms provision a broad construction in *Lighthouse* because it believed that such a "reading of the statute would lead to the conclusion that Congress in-

<sup>186</sup> The challenged requirement in *Digrugilliers* was not generally applicable; rather, only religious land users had to apply for a zoning variance in order to make use of their land. See *Digrugilliers v. Consol. City of Indianapolis*, 506 F.3d 612, 614 (7th Cir. 2007) ("A religious use is forbidden in C-1 districts without a zoning variance.").

<sup>187</sup> Neutral and generally applicable laws do not admit of religious exemption. See *supra* text accompanying note 48.

<sup>188</sup> See *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1242 (11th Cir. 2004) ("While RLUIPA may preempt laws that discriminate against or exclude religious institutions entirely, it leaves individual states free to eliminate the discrimination in any way they choose, so long as the discrimination is actually eliminated.").

<sup>189</sup> The Rotary Club is an international community service organization. Rotary Int'l, History of Rotary International, <http://www.rotary.org/en/AboutUs/History/RIHistory/Pages/ridefault.aspx> (last visited Nov. 15, 2009).

tended to force local governments to give any and all religious entities a free pass to locate wherever any secular institution or assembly is allowed."<sup>190</sup> Recent trends in religious land use have some courts and commentators worried that special treatment for religion will become the rule. In Hamilton's view, for example, religious land use has undergone a "paradigm shift" in recent years. Hamilton argues that

[u]nfortunately for their neighbors, although favorable for the recipients of their services, contemporary houses of worship . . . are now a locus for social services, as well as a center for worship and entertainment. The thriving religious entities have sizeable buildings, with seating for hundreds—maybe thousands, along with heavy traffic, intense parking needs, and even bus transportation into the neighborhood from off site.<sup>191</sup>

This statement is undoubtedly true. Houses of worship have certainly expanded in recent years, thus creating all of the benefits and drawbacks associated with large groups of people congregating in one place. What is puzzling, however, is why problems of building size, parking, and traffic are bemoaned as though they apply only to religious land use and not to the land use of secular assemblies or institutions. The peculiar problems associated with religious land use are in fact issues confronted wherever land is used by a sizeable assembly or institution.<sup>192</sup> Secular assemblies and institutions require buildings, a physical plant, and parking. If secular assemblies and institutions are thus permitted while religious ones are excluded, then the problems such exclusion seeks to address will remain unsolved.

As a result, the Third Circuit's fear that an Equal Terms provision without a similarly situated secular comparator requirement will make rational zoning impossible is also unfounded. A municipality wishing entirely to prevent a church from locating in a particular district need only ban all other secular assemblies and institutions.<sup>193</sup>

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<sup>190</sup> *Lighthouse*, 510 F.3d at 268.

<sup>191</sup> HAMILTON, *supra* note 5657, at 79.

<sup>192</sup> See 146 CONG. REC. 16,698 (2000) (joint statement of Sen. Hatch and Sen. Kennedy on RLUIPA) ("Churches have been denied the right to meet in rented storefronts, in abandoned schools, in converted funeral homes, theaters, and skating rinks—in all sorts of buildings that were permitted when they generated traffic for secular purposes.").

<sup>193</sup> A related concern is that an Equal Terms provision without a similarly situated requirement would be unconstitutionally overbroad under *Boerne*. For a discussion of why a textual interpretation of the Equal Terms provision would be constitutional under *Boerne*, see Campbell, *supra* note 14, at 1094-99.

The *Lighthouse* court, however, remained troubled by what it saw as a slippery slope, arguing that according to the Eleventh Circuit,

if a town allows a local, ten-member book club to meet in the senior center, it must also permit a large church with a thousand members—or . . . a religious assembly with rituals involving sacrificial killings of animals or the participation of wild bears—to locate in the same neighborhood regardless of the impact such a religious entity might have on the envisioned character of the area.<sup>194</sup>

This comparison seems inapposite. If a thousand-member book club would not be allowed in a particular zone, a thousand-member church could not credibly claim that it is being treated on less than equal terms, even if the ten-member book club would be allowed.<sup>195</sup> On the other hand, if a thousand-member book club would be allowed in the zone, the church should not be penalized for the fact that the book club currently has only ten members. The similarly situated requirement strives to make explicit the fact that a thousand-member church should not necessarily be treated the same way as a ten-member book club, at least in an as-applied Equal Terms challenge. The *Midrash* test, however, achieves the same result while doing less damage to the statutory text.

*Lighthouse* makes it harder for plaintiffs to assert their rights under a statute enacted to protect them but easier for judges to achieve their own desired policy results. In *Lighthouse*, Long Branch argued that “churches are by their nature not likely to foster the kind of extended-hours traffic and synergetic spending it wishes to foster in the Broadway Corridor”<sup>196</sup> and that the New Jersey liquor laws “would hinder the development of the kind of modern entertainment-oriented district that Long Branch envisages.”<sup>197</sup> *Lighthouse* offered to waive its right to enforce the liquor laws in perpetuity, but because each new license would require a new waiver, the court rejected this as giving the church “unacceptable control over the development of the downtown area.”<sup>198</sup> As a result, while secular assemblies and institutions such as

<sup>194</sup> *Lighthouse*, 510 F.3d at 268 (citations omitted).

<sup>195</sup> Some might argue that a judge would feel constrained to apply the text of this statute to sanction such an absurd result, but even the “plain meaning” rule of statutory construction provides an exception for absurd results. See *infra* subsection III.A.2.

<sup>196</sup> 510 F.3d at 270.

<sup>197</sup> *Id.*

<sup>198</sup> *Id.* at 271. It would of course be unconstitutional for Long Branch to pass a law giving religious authorities veto power over the issuance of liquor licenses, but a church’s voluntary waiver of its own rights under a statute seems like a different issue. See generally *Larkin v. Grendel’s Den*, 459 U.S. 116, 117, 127 (1982) (holding that a

theaters, performance venues, restaurants, bars, clubs, culinary schools, and dance studios were all permitted in the Broadway Corridor, the church was not.<sup>199</sup> By finding that the secular groups and the religious group were not similarly situated as to the regulatory purpose, the court essentially found that the teaching of cooking skills or the worship of artists and musicians would cause less harm to Long Branch's redevelopment goals than the teaching of life skills to the poor or the worship of God. It would be difficult to argue, however, that Lighthouse was treated on equal terms with the array of secular groups permitted in the Broadway Corridor.<sup>200</sup>

The Third Circuit's test practically guaranteed Long Branch's success because only a religious entity or a school could cause the liquor-licensing interruptions at issue in *Lighthouse*. A secular assembly or institution other than a private school could never be similarly situated to Lighthouse in this respect. The similarly situated requirement allowed the Third Circuit to shut the door on Lighthouse's claim without passing on the justifications for Long Branch's regulation.<sup>201</sup> The *Midrash* test, however, likely would have found unequal treatment, leading to a violation of the Equal Terms provision, after which the burden would have shifted to the government to demonstrate a compelling state interest and to prove that the classification was narrowly tailored to that interest. Long Branch would have been less likely to succeed under this test, but it would have had a fair opportunity to show a compelling state interest. More importantly, after application of the *Midrash* test, the text of the statute would remain a reliable guide for those who must obey Congress's command.

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Massachusetts law giving churches and schools veto power over the issuance of liquor licenses to venues located within 500 feet of a church or school violates the Establishment Clause).

<sup>199</sup> *Lighthouse*, 510 F.3d at 270.

<sup>200</sup> Recall Judge Posner's point in *Digrugilliers*:

Government cannot, by granting churches special privileges (the right of a church official to reside in a building in a nonresidential district, or the right of the church to be free from offensive land uses in its vicinity), furnish the premise for excluding churches from otherwise suitable districts.

*Digrugilliers v. Consol. City of Indianapolis*, 506 F.3d 612, 616 (7th Cir. 2007).

<sup>201</sup> See *Lighthouse*, 510 F.3d at 270 ("We do not need to reach the question whether a church by its very nature is unlikely to contribute to the development of a vibrant and vital downtown . . . ." (internal quotation marks omitted)); see also Campbell, *supra* note 14, at 1101 ("[The Third Circuit's interpretation] removed the government's regulatory objectives from judicial scrutiny.").



## 2. Principles of Statutory Construction

The *Midrash* test is also more consistent with the text and purpose of RLUIPA and further accords with accepted principles of statutory construction. As Campbell notes, “courts may give a statute a narrowing interpretation to preserve its constitutionality,”<sup>202</sup> but Campbell argues that the use of this avoidance canon in *Lighthouse* was inappropriate in part because the Third Circuit’s interpretation contradicted congressional intent.<sup>203</sup> The Third Circuit, as well as the Eleventh Circuit in *Primera*, departed from the statutory text in fashioning their doctrinal tests. Although the issue is hotly contested in the academic literature, the Supreme Court has historically disfavored resort to legislative history and other indicia of congressional intent when the text of a statute is clear.<sup>204</sup> With the exception of the period between 1940 and 1986, the Court has either criticized the use of legislative history in statutory interpretation or subscribed to what has become known as the “plain meaning” rule.<sup>205</sup> The plain-meaning rule states that “where the language of an enactment is clear and construction according to its terms does not lead to absurd or impracticable consequences, the words employed are to be taken as the final expression of the meaning intended.”<sup>206</sup> Under the plain-meaning rule, resort to traditional indicia of legislative intent may be appropriate where the text of a statute is ambiguous, but not otherwise.

The term “legislative intent,” however, may be something of a misnomer. It is unclear whether it is possible to discern the “intent”

<sup>202</sup> Campbell, *supra* note 14, at 1094.

<sup>203</sup> *Id.* at 1094. For Campbell’s full explanation of why the Third Circuit’s use of the avoidance canon was inappropriate, see *id.* at 1093-1105.

<sup>204</sup> See JOSEPH L. GERKEN, WHAT GOOD IS LEGISLATIVE HISTORY? 39-40 (2007) (describing the historical evolution of the Supreme Court’s treatment of legislative history in statutory interpretation).

<sup>205</sup> *Id.* Between 1940 and 1986, the Court rejected the plain-meaning rule, holding in *United States v. American Trucking Ass’ns* that “[w]hen aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no rule of law which forbids its use, however clear the words may appear on superficial examination.” 310 U.S. 534, 543-44 (1940) (internal quotation marks omitted) (footnote omitted). Since then, the Supreme Court, spearheaded by the advocacy of Justice Scalia, has indicated its intent to return to the plain-meaning rule. See, e.g., *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (stating the plain-meaning rule as a legitimate approach to statutory interpretation). *But cf.* WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 13 (1994) (arguing that “all originalist theories fail” in part because “none of them adequately describes what American agencies and courts do when they interpret statutes”).

<sup>206</sup> *United States v. Mo. Pac. R.R. Co.*, 278 U.S. 269, 278 (1929).

of a multimember body.<sup>207</sup> What can be discerned, however, is the meaning of the statutory text that Congress voted to enact and that the President signed. Indeed, the text may be the best indication of legislative intent. While legislative history can be useful in parsing the language of unclear statutory text, such sources should be an aid to understanding the statute, not primary authority of equal weight. Where legislative history and clear statutory text conflict, the statutory text should always control.<sup>208</sup>

The overriding problem with the Third Circuit's test is that it liberates courts from the text of the Equal Terms provision. This is apparent from the *Lighthouse* opinion itself. When discussing the standard of review to be applied to the challenged land-use regulation, the Third Circuit stated that "[s]ince the Substantial Burden section includes a strict scrutiny provision and the Discrimination and Exclusion section does not, we conclude this 'disparate exclusion' was part of the intent of Congress and not an oversight."<sup>209</sup> The court was not correspondingly troubled, however, by the lack of a similarly situated requirement in the text of the Equal Terms provision. There, the court concluded, based on the intent of Congress and its own Free Exercise opinions, that a similarly situated requirement was mandated by the statute.<sup>210</sup>

The text of RLUIPA's Equal Terms provision does not contain a similarly situated requirement.<sup>211</sup> Furthermore, the statute clearly states that it should be construed to the maximum breadth permissi-

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<sup>207</sup> The argument that "legislative intention is either undiscoverable or unpalatably selfish," CHRISTIAN E. MAMMEN, USING LEGISLATIVE HISTORY IN AMERICAN STATUTORY INTERPRETATION 182 (2002), has been difficult to overcome. See *id.* at 183 (arguing that even Justice Breyer has been unable to explain sufficiently why and how legislative purpose or intent should control statutory interpretation).

<sup>208</sup> See, e.g., *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 448 (7th Cir. 2005) ("When a law sensibly could be read in multiple ways, legislative history may help a court understand which of these received the political branches' imprimatur. But when the legislative history stands by itself, as a naked expression of 'intent' unconnected to any enacted text, it has no more force than an opinion poll of legislators—less, really, as it speaks for fewer.").

<sup>209</sup> *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 269 (3d Cir. 2007).

<sup>210</sup> *Id.* at 264-68.

<sup>211</sup> See 42 U.S.C. § 2000cc(b)(1) (2006) ("No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.").

ble to protect religious exercise,<sup>212</sup> which RLUIPA defines to include religious land use.<sup>213</sup> In this case, the statutory command is clear: “No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.”<sup>214</sup> The Third Circuit, however, focused on the “intent” of Congress to codify Third Circuit Free Exercise Clause jurisprudence.<sup>215</sup>

The Seventh and Eleventh Circuits duly noted that the statute clearly demands a comparison. Otherwise, it would be impossible to know whether a religious assembly or institution was being treated on less than equal terms with a nonreligious assembly or institution. But that is as far as the statute goes. The Eleventh Circuit in *Midrash* understood the text to mean that a religious entity need only show that there exists a secular assembly or institution, similarly situated to the religious entity by virtue of its status as an assembly or institution, that is better treated on the face of a land-use regulation or by its application. In contrast, the Third Circuit ignored the statutory text, preferring to interpret Congress’s intent as codification of those Free Exercise Clause cases cited by the court. Consequently, the Third Circuit, as well as the Eleventh Circuit in *Primera*, imported into RLUIPA with little textual support the similarly situated secular comparator requirement from judicial opinions construing the Equal Protection Clause.<sup>216</sup>

Even if we were to rely on the legislative history of RLUIPA as our primary guide to statutory construction, the *Midrash* test is superior. The legislative history states that Congress intended to codify *aspects*, not all, of the existing Free Exercise Clause jurisprudence, and, as duly noted in the *Lighthouse* dissent, Congress’s stated goal in enacting

<sup>212</sup> See *id.* § 2000cc-3(g) (“This chapter shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution.”).

<sup>213</sup> See *id.* § 2000cc-5(7)(B) (“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.”).

<sup>214</sup> *Id.* § 2000cc(b)(1).

<sup>215</sup> See *Lighthouse*, 510 F.3d at 266 (“We see that the Free Exercise jurisprudence of the Supreme Court and of this Court teaches that the relevant comparison for purposes of a Free Exercise challenge to a regulation is between its treatment of certain religious conduct and the analogous secular conduct that *has a similar impact on the regulation’s aims.*”).

<sup>216</sup> See *id.* at 293 (Jordan, J., concurring in part and dissenting in part) (“[I]ncorporating into RLUIPA the type of ‘similarly situated’ analysis embedded in equal protection cases would frustrate Congress’s intention of enforcing the Free Exercise Clause, because it would make it very difficult for religious assemblies to qualify for relief . . .”).

the bill was to restore the compelling interest test and maintain the protection for religious liberty guaranteed by the Constitution. In its attempt to give life to Congress's intent, the Third Circuit ignored the reason why RLUIPA was brought to the floor of Congress in the first place: to take advantage of the space that the *Smith* opinion left open for the protection of religious exercise.

### C. *Strict Liability Versus Strict Scrutiny*

The second prong of the *Midrash* test is also preferable to that of the Third Circuit's test. Under *Lighthouse*, a court imposes a strict-liability standard on the government upon a finding of unequal treatment under the first prong. The *Midrash* test, on the other hand, requires judges to apply strict scrutiny to the challenged regulation upon a finding of unequal treatment. Although the text of the Equal Terms provision provides a strong argument against applying strict scrutiny, the text and purpose of RLUIPA taken as a whole support a strict scrutiny approach.

The Third Circuit expressed concern over applying strict scrutiny to a challenged regulation because the text of the Equal Terms provision, unlike that of the Substantial Burden provision, does not expressly provide for such searching judicial review. Campbell agrees,<sup>217</sup> as she advocates a strictly textual interpretation of the statute, one that disavows both a "similarly situated" requirement and strict scrutiny.<sup>218</sup> She argues that the *Midrash* approach is flawed because it provides "an escape hatch to governments capable of showing that their unequal treatment of religious assemblies is the least restrictive means of furthering a compelling government interest."<sup>219</sup> As a result, for Campbell, only a purely textual interpretation of the Equal Terms provision would prevent contradiction of the statute's text, frustration of congressional intent, and weakening of protections for religious liberty.<sup>220</sup>

While Campbell's concerns are valid and worth considering, there are several compelling reasons for keeping the *Midrash* court's strict

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<sup>217</sup> Campbell, *supra* note 14, at 1100.

<sup>218</sup> See *id.* at 1093 ("[T]his Note argues that courts should interpret the statute according to its express terms, which do not include a similarly situated requirement or a compelling interest test.")

<sup>219</sup> *Id.* at 1103. Campbell does admit, however, that because the *Midrash* approach addresses the criticism that the Equal Terms provision impermissibly interferes with local government, it is "at least marginally better than using the Third Circuit's similarly situated requirement." *Id.* at 1104.

<sup>220</sup> *Id.* at 1093-1104.

scrutiny prong. RLUIPA was enacted in the wake of *Smith* and was narrowly drawn to fit into the exception for individualized assessments left open by the Court in that case. Under *Smith* and *Lukumi*, the compelling interest test governs cases in which the government has in place a system of individualized assessments that is either not neutral or not generally applicable and that burdens religious exercise. That is why RLUIPA is addressed specifically to religious land use and the religious exercise of institutionalized persons: both activities involve individualized governmental assessments that may determine whether an individual may freely exercise her religion. As a result, in the context of land-use regulation, the compelling interest test should control.

The text and legislative history of RLUIPA support this conclusion. RLUIPA provides that it “shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this [Act] and the Constitution.”<sup>221</sup> The legislative history further states that the Discrimination and Exclusion provisions “codif[y] parts of the Supreme Court’s constitutional tests as applied to land use regulation.”<sup>222</sup> It appears, therefore, that the Equal Terms provision would, at a minimum, codify the basic rules of *Smith* and *Lukumi*.<sup>223</sup> If this is so, the statute thus expressly provides that because land-use regulation that differentiates between religious and secular assemblies or institutions is either not neutral or not generally applicable,<sup>224</sup> the maximum permissible constitutional protection for a violation of the Equal Terms provision is strict scrutiny of the challenged regulation. The Court’s decisions in *Smith* and *Lukumi* limited the availability of searching judicial review for religious plaintiffs; they did not expand constitutional protection for religious liberty to encompass strict liability.<sup>225</sup> Further, *Lukumi* mandates that the strict scrutiny applied to a regulation be rigorous, and perhaps “fatal in fact,” assuaging fears that courts will be less than rigorous in reviewing

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<sup>221</sup> 42 U.S.C. § 2000cc-3(g) (2006).

<sup>222</sup> 146 CONG. REC. 19,123 (2000) (statement of Rep. Canady).

<sup>223</sup> Cf. *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1232 (11th Cir. 2004).

<sup>224</sup> See *id.* at 1235 (“[A] violation of § (b)’s equal treatment provision indicates that the offending law also violates the *Smith* rule . . .”). But see *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 265 (3d Cir. 2007) (“A regulation does not automatically cease being neutral and generally applicable, however, simply because it allows certain secular behaviors but not certain religious behaviors.”).

<sup>225</sup> Campbell admits that “a textual interpretation of the equal terms provision might prohibit some government regulations that would be constitutional if analyzed under free exercise or equal protection jurisprudence.” Campbell, *supra* note 14, at 1098.

laws that burden religious exercise.<sup>226</sup> As a result, and despite the fact that Congress may have made the “implicit judgment that no permissible reason justifies treating religious assemblies and institutions less favorably than secular assemblies and institutions,”<sup>227</sup> the *Midrash* court’s approach to the Equal Terms provision is the most sound.

#### CONCLUSION

The Third Circuit’s test construes RLUIPA so as to render it practically ineffective. It would be difficult, if not impossible, to name a secular assembly or institution that could have the same effect on the regulatory purpose of a land-use law as a religious assembly or institution, particularly where other, unrelated laws treat religious groups differently. It is true that if a religious plaintiff could clear this high hurdle, the government would not have a chance to demonstrate a compelling interest under *Lighthouse*. The first prong of the Third Circuit’s test, however, functions to limit the number of plaintiffs who can state a claim of unequal treatment such that courts will not reach the second prong in many, if not most, cases. As a result, future courts considering this issue should adopt *Midrash*’s textually sensitive approach.

When a court interprets a statute and its decision becomes final, the court removes that issue from the political process. If the American people believe that RLUIPA unjustly favors religious entities over secular ones, the political process is perfectly capable of facilitating the election of representatives who will amend the statute or repeal it altogether. Hopefully, in time, the Supreme Court will step in to restore to the American people the democratic rights and religious freedom that they were promised by the Constitution and RLUIPA.

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<sup>226</sup> See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993) (“The compelling interest standard that we apply once a law fails to meet the *Smith* requirements is not ‘water[ed] . . . down’ but ‘really means what it says.’” (citation omitted)); see also *Campbell*, *supra* note 14, at 1103 (“[T]here is a risk that courts will apply a less-than-rigorous form of strict scrutiny in these religious land-use cases, consequently weakening the protections intended by Congress.”).

<sup>227</sup> *Campbell*, *supra* note 14, at 1104.