A CIRCUIT SPLIT: INTERPRETATION OF THE EQUAL TERMS PROVISION OF THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT

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I. INTRODUCTION

Grand Haven, Michigan.[1] Middletown Township, Pennsylvania.[2]

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[1] RLUIPA.com, Haven Shores Community Church v. City of Grand Haven, Michigan, http://www.rluipa.com/index.php/case/58.html (last visited Feb. 15, 2009). The Haven Shores Community Church entered into a lease agreement whereby it would finally be able to move from its temporary location at a local high school to a small storefront property in a shopping center. When Rev. David Bailey attempted to apply for the appropriate building

Forest Park, Georgia.[3] These cities are just a few examples of the silencing of religion faced by religious institutions and organizations all across the country. Evidence of this phenomenon is everywhere; just drive down the street in any thriving metropolis and you will see office complexes and high-rises that stretch nearly into the clouds and residential developments that occupy hundreds, if not thousands, of acres. But where do you go to church? Do you walk down the street with your neighbors to the church at the end of the block, or do you have to drive 25 minutes to the outskirts of town? Can you stop in for brunch after Sunday service at the local café, or do you have to make reservations at the nearest restaurant, which happens to be across town? Will you make it to church on a blustery winter day, or will the stretch of highway you have to take be too dangerous? Somewhere in our push for community growth, a vital component of our society has disappeared.

Religious institutions and assemblies of all faiths, while historically at the center of society, are being forced from "Main Street" and quarantined into silent corners of our cities, areas where they will

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permits, "he was told by city officials that, [under city zoning law] religious meetings and worship were not permitted at that location." *Id.* This result was puzzling, considering the City's Zoning Code did specifically allow "private clubs, fraternal organizations, lodge halls, funeral homes, theaters and assembly halls, [and] concerts halls." *Id.*

[2] RLUIPA.com, Freedom Baptist Church v. Township of Middletown, http://www.rluipa.com/index.php/case/51.html (last visited Feb. 15, 2009). The Freedom Baptist Church engaged in a search to find an appropriate location for its small congregation to gather and worship. The church entered into a lease of an office building. Nearly a year and a half later, a Township Zoning Officer contacted the owner of the building and notified him that the church's use of the space violated the Township's zoning ordinance, which specifically prohibited religious worship in any area zoned O-1. In fact, of the seventeen zoning districts within Middletown Township, religious use was prohibited in every single one. However, acceptable uses in an O-1 zone included schools of all sorts, including nursery, kindergarten, elementary, junior and senior high schools. Each of these uses accommodated, at any given time, more people than the Freedom Baptist Church. The district court upheld the constitutionality of the zoning ordinance.

[3] RLUIPA.com, Refuge Temple Ministries of Atlanta v. City of Forest Park, http://www.rluipa.com/index.php/case/71.html (last visited Feb. 15, 2009). Since its inception in 1997, the fifty members of the Refuge Temple Ministries Church had been meeting in temporary locations, including the home of its pastor. In 2000, the church signed a lease agreement for a property in Forest Park, a southern suburb of Atlanta, located in the city's C-2 (central commercial) district. Although the church originally received zoning verification with ease, the congregation was soon notified that the city, only four days earlier, had adopted a new zoning ordinance that required churches to obtain a special land use permit before locating in a C-2 district. Other similar uses, including "private clubs, lodges, theaters, auditoriums and [various] other places of assembly" were allowed to locate in the district without a special permit. *Id.*

have the least chance of affecting metropolitan growth. Political leaders offer endless hollow reasons for this excommunication, however, the notion that religious institutions do not mesh with retail, commercial, and industrial growth in our cities is often repeated.[4] But is this separation what is best for our society? For our children? For tomorrow's generation? Congress has decidedly said no, and has codified its response in the Religious Land Use and Institutionalized Persons Act (RLUIPA).

In the eight years since its enactment, RLUIPA has aided dozens of individuals and religious organizations in their fight for free exercise. This Comment will specifically deal with one component of RLUIPA, the Equal Terms provision, a clause designed to ensure equal treatment between secular and non-secular assemblies. Sections II and III will highlight pertinent history, beginning with the first attempt at reform under the Religious Freedom Restoration Act, and will detail the constant tug-of-war between Congress and the Supreme Court on the issue of religious land use. Section IV will describe the current circuit split concerning the interpretation of the Equal Terms provision through a detailed analysis of three prominent cases: *Midrash Sephardi, Inc. v. Town of Surfside*,[5] *Digrugilliers v. Consolidated City of Indianapolis*,[6] and *Lighthouse Institute for Evangelism, Inc. v. City of Long Branch*.[7] Section V will argue for the adoption of the approach used in *Midrash* and *Digrugilliers*, and discuss how the court in *Lighthouse* misinterpreted RLUIPA. It will also advocate an Equal Protection analysis to determine the validity of a challenged regulation under RLUIPA. Section VI will conclude and offer solutions for the future.

II. THE HISTORY OF FREE EXERCISE CHALLENGES PRECEDING RLUIPA

The fight for equal terms and protection of religious land use proved to be a contentious process, at times pitting Congress against the Supreme Court.[8] These two entities, each searching for the appropriate

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[4] *See* 146 CONG. REC. S7774 (daily ed. July 27, 2000). Congress noted that, although zoning discrimination can be overt, it has a tendency to lurk "behind such vague and universally applicable reasons such as traffic, aesthetics, or 'not consistent with the city's land use plan.'" *Id.*

[5] 366 F.3d 1214 (11th Cir. 2004).

[6] 506 F.3d 612 (7th Cir. 2007).

[7] 510 F.3d 253 (3d Cir. 2007).

[8] *See* Daniel P. Lennington, *Thou Shalt Not Zone: The Overbroad Applications and*

land use balance, began their tug-of-war in 1990 with the Court's landmark decision in *Employment Div., Dept. of Human Resources of Oregon v. Smith*.[9] Prior to this ruling, religious organizations and individuals enjoyed significant protections under the Free Exercise Clause, as enforced by the Court's 1963 holding in *Sherbert v. Verner*[10]; government actions burdening religion would only be upheld if they passed muster under strict scrutiny, meaning they were "necessary to achieve a compelling government purpose."[11] However, in *Smith*, the Court turned the Free Exercise precedent on its head, holding that a

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Troubling Implications of RLUIPA's Land Use Provisions, 29 SEATTLE U. L. REV. 805, 806-07 (2006). Lennington states, "RLUIPA is the latest skirmish in a tug of war between Congress and the Supreme Court over the meaning and application of the Free Exercise Clause of the United States Constitution." *Id.*

[9] 494 U.S. 872 (1990). Respondents, members of the Native American Church, were terminated from their employment with a private drug company after their employer discovered that the respondents had ingested peyote, a hallucinogenic drug, during a religious ceremony. *Id.* at 874. The Oregon Employment Division denied the respondents' request for unemployment compensation on the ground that their termination was due to work-related misconduct. *Id.* Upholding the decision of the Oregon Court of Appeals, the Oregon Supreme Court reversed the decision of the Employment Division, finding that the denial of unemployment benefits violated the respondents' First Amendment rights of free exercise and failed to meet of strict scrutiny. *Id.* at 874-75. *See also* Lennington, *supra* note 8, at 807 (noting that the "skirmishes between Congress and the Supreme Court started in 1990," when the *Smith* decision was handed down).

[10] 374 U.S. 398 (1963). *Sherbert* involved a claim of a member of the Seventh-Day Adventist Church who was terminated from her employer because she would not work on Saturday, the Sabbath Day for her faith. *Id.* at 399. Appellant's refusal to work on Saturdays prevented her from obtaining other employment and she eventually filed a claim for unemployment compensation benefits. *Id.* at 399-400. The State Commission denied appellant's application, stating that she would not accept suitable work when it was offered. *Id.* at 401. The Supreme Court held that the South Carolina statute abridged appellant's right to free exercise of religion. The Court reasoned that denying an employee unemployment benefits simply because she refused to take a job that required her to go against her faith imposed an unconstitutional burden on free exercise. *Id.* at 403. Furthermore, the Court found that there was no compelling state interest that adequately justified the infringement of appellant's right to religious freedom. *Id.* at 406-07.

[11] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 3.6.2 (3d ed. 2006) (citing Sherbert v. Verner, 374 U.S. 398 (1963)). *See also id.* , at § 6.5. In general, the Supreme Court has identified three tiers of scrutiny: rational, intermediate, and strict, each progressively more rigorous than the last. Rational basis scrutiny is the most basic form of scrutiny; every law must at least meet this level. Under this test, "a law will be upheld if it is *rationally related to a legitimate government purpose*." *Id.* Taking the analysis one step further is the intermediate level of scrutiny. Laws that fall into this category will only be upheld if they are "*substantially related to an important government purpose*." *Id.* Finally, the most difficult test that a law may undergo is that of strict scrutiny. At this level, "a law will [only] be upheld if '*it is necessary to achieve a compelling government purpose*.'" *Id.*

generally applicable government prohibition on a particular form of conduct did not violate an individual's right to free exercise of religion.[12]

Appalled at the Court's rejection of prior precedent, Congress launched a direct attack against the *Smith* decision, seeking to restore the strict scrutiny precedent established in *Sherbert*. In 1993, President Bill Clinton signed the Religious Freedom Restoration Act (RFRA) into law.[13] RFRA required courts considering free exercise challenges, even those regarding neutral laws of general applicability, to uphold the government's action only if it satisfied strict scrutiny —that is, if it was the least restrictive means to achieve a compelling purpose.[14]

At the same time Congress was adopting RFRA, the Supreme Court was busy hearing another free exercise case, *Church of the Lukumi Babalu Aye v. City of Hialeah*.[15] *Lukumi* involved a general prohibition on the practice of animal sacrifice and, according to the City of Hialeah, was done to protect the "public health, safety, welfare and morals of the community."[16] Following the *Smith* precedent, the district court concluded that, although the ordinance was not neutral, the goal of preventing animal sacrifice in the city was a legitimate and rational government purpose and subsequently upheld the ordinance.[17] The Supreme Court reversed that decision, finding the prohibition to be

[12] *Smith*, 494 U.S. at 879. The Court stated, "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" *Id.* (citation omitted). As Oregon's ban on peyote was not an attempt by the state to regulate religious beliefs, the law was constitutional. *Id.* at 890.

[13] *See* 42 U.S.C. §§ 2000bb(1)-(4) (2003). In enacting RFRA, Congress sought to restore the compelling interest test set forth in *Sherbert*, and also to provide a claim or defense for individuals whose religious exercise was substantially burdened by government.

[14] *See* CHEMERINSKY, *supra* note 11, at § 3.6. RFRA specifically "prohibited government from substantially burdening a person's free exercise of religion, even if the burden resulted from a rule of general applicability, unless the government [could] demonstrate [that] the burden[:]" (1) furthered a compelling governmental interest; and (2) was the least restrictive means of achieving that interest. *Id.* (citation omitted). *See also* 42 U.S.C. § 2000bb-(a)3.

[15] 508 U.S. 520 (1993).

[16] *Id.* at 527-28 (citation omitted). In 1987, the Church of the Lukumi Babalu Aye announced plans to locate its house of worship, "as well as a school, cultural center, and museum" in Hialeah, Florida. *Id.* at 525-26. Members of the church practiced the Santeria religion, which often involved ritualistic animal sacrifice. *Id.* at 524-25. The city council held an emergency meeting during which it passed an ordinance prohibiting animal sacrifice. *Id.* at 526-27. But rather than prohibiting all animal slaughter, the city only restricted ritualistic animal sacrifice, providing certain exemptions for those who slaughtered animals for food and other business reasons. *Id.* at 527-28.

[17] *Id.* at 528-29.

neither neutral nor generally applicable.[18] Although not facially invalid,[19] the Court found that the ordinance created a type of religious gerrymander, in effect existing solely to prevent Santeria worship.[20]

Refusing to allow its *Smith* precedent to be destroyed through actions taken by Congress, the Supreme Court declared RFRA to be an unconstitutional exercise of Congress' power as applied to the states.[21] In *Boerne*, the Archbishop of St. Peter's Catholic Church in San Antonio, Texas, filed suit claiming a RFRA violation after the city prevented the church from constructing a new facility because its building was a historic landmark.[22] Rather than ruling solely on the validity of the claim, the Court held that Congress had overstepped its bounds by enacting RFRA and thereby violated section 5 of the Fourteenth Amendment.[23] Acknowledging that Congress had the authority to enforce provisions of the Constitution, a power the Court described as "remedial," the Court reinforced the idea that Congress did not have the power to determine, alter, or expand the substantive content and scope of constitutional rights.[24] The Court noted that Congress could only create laws that would prevent or remedy violations already recognized by the Supreme Court, and that even then those remedies must be narrowly tailored to the violation.[25] Otherwise, the Court feared, many laws would fail to satisfy strict scrutiny, thus opening "the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind."[26]

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[18] *Id.* at 531-32.

[19] *Id.* at 534.

[20] *Lukumi*, 508 U.S. at 535.

[21] *See* City of Boerne v. Flores, 521 U.S. 507 (1997).

[22] *Id.* at 512.

[23] *See id.* at 536.

[24] *See id.* at 519. The Court stated that the design of the Fourteenth Amendment and the text of Section 5 were:

> inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restriction on the States. Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is.

Id.

[25] *See id.* at 519-20. The Court noted, "there must be a *congruence* and *proportionality* between the injury to be prevented or remedied and the means adopted to that end." *Id.* at 520 (emphasis added).

[26] *Boerne*, 521 U.S. at 534.

III. THE ADOPTION OF RLUIPA

A. Legislative History

Given the intensity and duration of the battle between Congress and the Supreme Court regarding the boundaries of religious exercise, Congress was more careful in its next attempt to return to the doctrine specified in *Sherbert*. Based on evidence compiled from various sources, including statistical studies, national surveys of litigation and zoning codes, and personal stories from individuals affected by religious land use discrimination, Congress recognized discriminatory religious land use practices as a pervasive problem.[27] It noted that this epidemic spread from coast-to-coast, and across all denominations, with religious institutions being discriminated against through the use of restrictive zoning codes and selective land use processes.[28] Armed with a firm understanding of its role in constitutional enforcement and interpretation, Congress made a "commitment to protect religious freedom" and embarked on the development of RLUIPA.[29]

Desiring to link RLUIPA to free exercise, Congress drew additional support for the Act from the Commerce and Free Speech Clauses of the Constitution.[30] The aggregate effect of multiple churches facing land use discrimination, Congress argued, bore heavily on interstate commerce.[31] Furthermore, using the standard set forth in *Boerne*, that Congress "may act to enforce the Constitution when it has 'reason to believe that many of the laws affected by the congressional enactment have a significant likelihood of being unconstitutional,'"[32] Congress justified RLUIPA as a measure that simply enforced the Free

[27] *See* 146 CONG. REC. S7775 (daily ed. July 27, 2000).

[28] *See* 146 CONG. REC. S7774 (daily ed. July 27, 2000). "Zoning codes frequently exclude churches in places where they permit theaters, meeting halls, and other places where large groups of people assemble for secular purposes. Or the codes permit churches only with individualized permission from the zoning board, and zoning boards use that authority in discriminatory ways." *Id.*

[29] *See* 146 CONG. REC. S7774, 7777 (daily ed. July 27, 2000) (statement of Sen. Kennedy).

[30] *See* 146 CONG. REC. S7774, 7775 (daily ed. July 27, 2000) (joint statement of Sen. Hatch and Sen. Kennedy).

[31] *Id.* at 7775-77. Congress argued that this effect would most commonly be demonstrated by "showing that the burden prevents a specific economic transaction in commerce, such as a construction project, purchase or rental of a building, or an interstate shipment of religious goods." *Id.* at 7775.

[32] *Id.* (quoting City of Boerne v. Flores, 521 U.S. 507, 532 (1997)).

Exercise and Free Speech Clauses of the Constitution.[33] RLUIPA, Congress argued, satisfied the *Boerne* standard in two independent ways. First, Congress had collected evidence demonstrating that individualized discrimination against religious institutions was a widespread problem that required "prophylactic rules."[34] Second, codification of various Supreme Court holdings in RLUIPA would allow "greater visibility and easier enforceability."[35]

Despite its strong desire to protect religious land use, Congress did not intend RLUIPA to be a free pass for religious institutions to assemble wherever and however they please.[36] In other words, the Act was not designed to be a type of land use immunity, but was rather instituted to prevent discrimination and prohibit unequal treatment.[37] RLUIPA was officially signed into law on September 22, 2000.[38]

B. *The Text*

RLUIPA has two main goals: preventing burdens on religious exercise and prohibiting discrimination against religious exercise in land use decisions.[39] Echoing the *Sherbert* test, RLUIPA provides:

> (a)(1) *Substantial Burdens*: No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly or institution—
>
> (A) is in furtherance of a compelling governmental interest; and

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[33] *Id.* at 7775-77.

[34] *Id.* at 7775.

[35] *See* 146 CONG. REC. S7774, 7775 (daily ed. July 27, 2000) (joint statement of Sen. Hatch and Sen. Kennedy).

[36] *See* 146 CONG. REC. S6678 (daily ed. July 13, 2000) (statement of Sen. Hatch).

[37] *See* 146 CONG. REC. S7774, 7776 (daily ed. July 27, 2000) (joint statement of Sen. Hatch and Sen. Kennedy). In a section of the Congressional Record, Senators Orrin Hatch and Edward Kennedy, primary sponsors of RLUIPA, discussed the potential for religious institutions to misinterpret RLUIPA as a form of land use immunity. The record clearly states that RLUIPA "does not provide religious institutions with immunity from land use regulation, nor does it relieve religious institutions from applying for variances, special permits or exceptions, hardship approval, or other relief provisions in land use regulations, where available without discrimination or unfair delay." *Id.*

[38] *See* RLUIPA, www.rluipa.com (last visited Nov. 4, 2009).

[39] *See generally* 42 U.S.C. § 2000cc (2008). Note that RLUIPA also discusses the religious rights of prisoners. This Comment focuses specifically on the land use provision of RLUIPA.

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

Pressing beyond the boundaries of RFRA, Congress also included a provision addressing discrimination against religious institutions. In its second prong, RLUIPA states:

> (b)(1) *Equal terms*: 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.
>
> (b)(2) *Nondiscrimination*: No government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination.
>
> (b)(3) *Exclusions and Limits*: No government shall impose or implement a land use regulation that—
>
> (A) totally excludes religious assemblies from a jurisdiction; or
>
> (B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.

C. *Equal Terms*

Although most commonly thought of in terms of eradicating substantial burdens on religious land use, RLUIPA contains a provision concerning equal terms that is as important as the substantial burden provision. Designed to be completely independent of the substantial burden provision,[40] the equal terms provision guarantees that religious institutions and assemblies will not be treated on less equal terms than any secular institution or assembly. Furthermore, courts have identified basic differences between the two provisions of RLUIPA: (1) the equal terms provision does not require a plaintiff to meet a specific threshold jurisdiction test; (2) the equal terms provision lacks a "similarly

[40] 146 CONG. REC. S7774 (daily ed. July 27, 2000) (joint statement of Sen. Hatch and Sen. Kennedy). Legislative history suggests that the two provisions were designed to operate independent of one another. In a presentation to the Senate in 2000, RLUIPA supporters Utah Senator Orrin Hatch and Massachusetts Senator Edward Kennedy stated, "if government substantially burdens the exercise of religion, it must demonstrate that imposing that burden on the claimant serves a compelling interest by the least restrictive means. *In addition* . . . the bill specifically prohibits various forms of religious discrimination and exclusion." *Id.* (emphasis added).

situated" requirement; and (3) the equal terms provision renders a municipality strictly liable for a violation.[41]

Despite its strong congressional support, RLUIPA's equal terms provision has been surprisingly controversial. Although early cases tended toward the protection and preservation of religion, a recent decision from the Third Circuit Court of Appeals created a startling circuit split. This dramatic departure has created uncertainty for equal terms cases on the immediate horizon and called into question the future of the provision's effectiveness as a whole.

IV. DIFFERENCE OF OPINION

A. Midrash Sephardi, Inc. v. Town of Surfside (2004)

One of the most prominent RLUIPA cases to date, *Midrash Sephardi, Inc. v. Town of Surfside,*[42] sent a clear message to local municipalities that unequal treatment between secular and religious institutions, with regard to land use, would not be tolerated. *Midrash* established a line of interpretation that has resulted in favorable decisions for multiple religious institutions.[43]

A small tourist area along the Florida coastline, Surfside was home to several religious institutions, including two Orthodox Jewish synagogues, Young Israel of Bal Harbour (Young Israel) and Midrash Sephardi (Midrash).[44] One of the basic tenets of Orthodox Judaism prohibits followers from using any form of transportation on the

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[41] *See* Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1229 (11th Cir. 2004).

[42] *Id.*

[43] *See, e.g.*, Westchester Day Sch. v.Vill. of Mamaroneck, 504 F.3d 338 (2d Cir. 2007); Adkins v. Kaspar, 393 F.3d 559 (5th Cir. 2004); River of Life Kingdom Ministries v. Hazel Crest, No. 08-0251 2008 U.S. Dist. LEXIS 54391 (W.D. Ill. 2008); Coleman v. Granholm, No. 06-26335, 2008 U.S. Dist. LEXIS 26335 (E.D. Mich. 2008); Lighthouse Cmty. Church of God v. Southfield, No. 05-40220, 2007 U.S. Dist. LEXIS 28 (E.D. Mich. 2007); Mintz v. Roman Catholic Bishop, 424 F. Supp. 2d 309 (Mass. Dist. Ct. 2006); Church of the Hills of Bedminster v. Bedminster, No. 05-3332, 2006 U.S. Dist. LEXIS 9488 (D.N.J. 2006); New Life Ministries v. Charter Twp. of Mt. Morris, No. 05-74339, 2006 U.S. Dist. LEXIS 63848 (E.D. Mich. 2006); Blount v. Johnson, No. 7:04CV00429, 2006 U.S. Dist. LEXIS 11961 (W.D. Va. 2006); Chase v. City of Portsmouth, No. 2:05cv446, 2005 U.S. Dist. LEXIS 29551 (E.D. Va. 2005); Living Water Church of God v. Meridian, 384 F. Supp. 2d 1123 (W.D. Mich. 2005); Congregation Kol Ami v. Abington Twp., No. 01-1919, 2004 U.S. Dist. LEXIS 16397 (E.D. Pa. 2004); Jama v. United States INS, 343 F. Supp. 2d 338 (D.N.J. 2004).

[44] *Midrash*, 366 F.3d at 1219. For ease of discussion, both plaintiffs will be referred to as "Midrash."

Sabbath or weekly holidays. Consequently, followers generally attend synagogue at places close to home, so that they may walk to services.[45]

Despite being only one square mile, Surfside was divided into eight zoning districts, each with its own specific guidelines and requirements.[46] Depending on the zone, some uses were allowed as of right, and some required a special use permit or prior approval.[47] The zoning scheme was permissive, meaning "any use not specifically permitted [was] prohibited."[48] According to Surfside's Zoning Ordinances (SZO), churches and synagogues were forbidden in seven of the eight zones, and were only permitted after obtaining a conditional use permit in zone RD-1, the two-family residential district.[49]

Midrash leased a small space in the heart of Surfside's business district, an area designed to provide retail and personal services.[50] Business district regulations prevented "uses and activities which might be noisy, offensive, obnoxious, or incongruous in behavior, tone or appearance and which might be difficult to police."[51] Although various secular assemblies were allowed to locate in the business district,[52] Midrash was denied both a conditional use permit and a special variance, and told to find a location in the RD-1 zone.[53]

Midrash argued that relocating to the RD-1 district would prevent many of its members, especially those who were elderly, from attending services because the synagogue would no longer be within walking distance.[54] Surfside countered that "walking is not a *per se* requirement

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[45] *Id.* at 1221.

[46] *Id.* at 1219.

[47] *Id.*

[48] *Id.*

[49] *Id.* at 1219. According to the SZO, conditional use permits were required for particular uses of a public or semi-public character because "the nature of the use and possible impact on neighboring properties [required] the exercise of planning judgment." *Id.* Conditional use permits were also required for "education institutions and museums, off-street parking lots and garages, public and governmental buildings, and public utilities." *Id.*

[50] *Midrash,* 366 F.3d at 1219-20.

[51] *Id.* at 1220.

[52] *Id.* Permitted uses as of right in the business district included "[t]heaters and restaurants . . . private clubs and lodge halls, health clubs, dance studios, music instruction studios, modeling schools, language schools, and schools of athletic instruction . . . ." *Id.* The SZO provided certain guidelines as to where each of these types of businesses could be located within the business district. *Id.*

[53] *Id.*

[54] *Id.* at 1221.

of Orthodox Judaism."[55] Surfside further argued that because of constant competition from neighboring tourist towns, it was essential to have a business district solely devoted to revenue-generating entities that contributed to the town's tax base.[56] Surfside argued that this reasoning validated allowing certain assemblies, such as private clubs, while simultaneously excluding religious assemblies. Private clubs would contribute to the commercial flavor essential to revitalization while religious institutions "would erode Surfside's tax base . . . and would result in economic hardship on the residents."[57]

Surfside was originally awarded summary judgment on a claim for injunctive relief and attorneys' fees.[58] Subsequently, both congregations filed a complaint under both provisions of the newly enacted RLUIPA in November 2000.[59] The district court granted summary judgment for Surfside.[60] The Eleventh Circuit granted a stay of injunction pending the congregations' appeal.[61]

Examining the analysis of the district court, the Eleventh Circuit immediately took issue with the method by which the district court compared secular and non-secular institutions.[62] The court contended

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[55] *Midrash*, 366 F.3d at 1221 n.6. The Orthodox Jewish faith does allow those who are elderly or afflicted with a medical condition to use transportation to attend services.

[56] *Id.* at 1221-22.

[57] *Id.* at 1222.

[58] *Id.* The congregations originally brought a claim under 42 U.S.C. § 1983 which states "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . ." 42 U.S.C. § 1983 (2007). The congregation's claim under § 1983 originally involved a facial equal protection violation. However, this claim was not addressed by the district court and was later abandoned by Midrash and Young Israel in favor of an equal protection claim. *Midrash*, 366 F.3d at 1222.

[59] *Midrash*, 366 F.3d at 1222. As the substantial burden provision of RLUIPA is not the focus of this Comment, the court's holding on this point will not be discussed in any detail. However, it is important to note that the Eleventh Circuit found that Surfside's zoning scheme did not impose any substantial burdens on the congregations by requiring them to locate to a less convenient location. As the court noted, "a 'substantial burden' must place more than an inconvenience on religious exercise; a 'substantial burden' is akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly." *Id.* at 1227. The court did not feel that requiring members to walk further constituted a substantial burden within the meaning of RLUIPA. *Id.* at 1228.

[60] *Id.*

[61] *Id.*

[62] *Id.* at 1230.

that both the parties and the district court mistakenly assumed that the equal terms provision applied to "assemblies and institutions that are similarly situated in all relevant respects."[63] However, the court stated, the "natural perimeter"[64] for purpose of comparison under RLUIPA was the narrow category of assemblies and institutions as described within RLUIPA.[65] Consequently, the court held that "private clubs and lodges [were] similarly situated to churches and synagogues," under the SZO.[66] Thus, since secular assemblies were allowed in the business district while religious assemblies were not, the SZO violated the equal terms provision of RLUIPA.[67]

Once it found a violation, the court set about determining the appropriate level of scrutiny for the zoning code. Surfside advocated a rational basis review, arguing that the difference in treatment between secular and non-secular institutions was "rationally related to a legitimate purpose . . . ."[68] Midrash proposed a standard of strict scrutiny, forcing Surfside to demonstrate that the code was "narrowly tailored to advance a compelling interest."[69] The Eleventh Circuit held strict scrutiny to be the proper standard of review.[70]

Surfside argued that the synagogue would not harmonize with the retail needs of a business district because a religious institution is a "single destination where congregants fill a 'spiritual need' and then, presumably, vacate the area," whereas private clubs provided a social

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[63] *Id.*

[64] The natural perimeter test refers to Justice Harlan's dissent in *Walz v. Tax Comm'n of New York*, 397 U.S. 664 (1970). In his discussion concerning neutrality, Justice Harlan stated, "the critical question is whether the circumference of legislation encircles a class so broad that it can be fairly concluded that religious institutions could be thought to fall within the natural perimeter." *Id.* at 696 (Harlan, J., dissenting).

[65] *Midrash*, 366 F.3d at 1230. As RLUIPA does not define the terms "assembly" or "institution," the court applied the terms' ordinary meanings. An assembly is "'a company of persons collected together in one place [usually] and usually for some common purpose (as deliberation and legislation, worship, or social entertainment.'" *Id.* (citation omitted). An institution is "'an established society or corporation: an establishment or foundation esp. of a public character.'" *Id.* (citation omitted).

[66] *Id.* at 1231. The zoning ordinance grouped religious institutions together with places of assembly and defined a private club as "a building and facilities or premises, owned and operated by a corporation, association, person or persons *for social, educational or recreational purposes*, but not primarily for profit and not primarily to render a service which is customarily carried on as a business." *Id.*

[67] *Id.*

[68] *Id.*

[69] *Id.*

[70] *Midrash*, 366 F.3d. at 1232.

entertainment setting that meshed with the concept of a business district.[71] Midrash argued that it contributed to the entertainment feel of the area by holding regular social and entertainment gatherings after which members were known to patronize the area shops.[72] As Surfside could not present anything more than conclusory evidence that private clubs "actually contribute[d] to the business district in a way appreciably different than religious institutions," the court determined that the SZO was not generally applicable.[73] As a result, Surfside was forced to prove that its zoning scheme was narrowly tailored to further a compelling interest.[74] Surfside failed to carry this burden of proof because an interest in "retail synergy" was not pursued equally against religious and secular institutions, and could be achieved by employing a narrower ordinance that did not improperly distinguish between secular and religious organizations.[75] Thus, the Eleventh Circuit held that Surfside's Zoning Ordinance violated the equal terms provision of RLUIPA.[76] The *Midrash* analysis and holding provided a useful guide to courts for several years.

B. *Digrugilliers v. Consolidated City of Indianapolis (October 2007)*

In 2007, the Seventh Circuit relied heavily on *Midrash* to strike down a zoning ordinance in *Digrugilliers v. Consolidated City of Indianapolis*.[77] Plaintiff Toby Digrugilliers was the pastor of the Baptist Church of the West Side, a small Indianapolis congregation that leased a small space in a commercial zone (C-1) of Indianapolis.[78] Under the city's zoning code, the church was considered a religious use and, as such, was forbidden from being located in a commercial area.[79] The city informed the church that it would have to either apply for a special

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[71] *Id.* at 1233.

[72] *Id.*

[73] *Id.* at 1234.

[74] *Id.* at 1235.

[75] *Midrash*, 366 F.3d at 1235.

[76] *Id.* at 1243.

[77] 506 F.3d 612 (7th Cir. 2007).

[78] *Id.* at 614. Areas zoned for C-1 use were intended to act as buffer districts, separating entirely residential districts from districts that were entirely commercial or industrial in nature. *Id.*

[79] *Id.* Religious use was defined as "a land use . . . devoted primarily to the purpose of divine worship together with reasonably related accessory uses, . . . which may include but are not limited to, educational, instructional, social or residential uses." *Id.*

variance or vacate the premises.[80] The pastor, on behalf of the church, opted instead to file suit against the city alleging that requiring the church to obtain a variance violated the equal terms provision of RLUIPA.[81]

As in *Midrash*, the district court faced the hurdle of determining whether the Indianapolis zoning scheme treated religious assemblies on less equal terms than secular assemblies.[82] The court answered this question in the negative, basing its decision on two main premises. First, under the zoning code a religious use, by definition, included residential uses, which were similarly not allowed in commercial zones.[83] Second, an Indiana state law prohibited the sale of liquor within 200 feet and the sale of pornography within 500 feet of a church.[84] This ordinance only affected religious establishments and thus did not similarly impinge on commercial establishments. Based on these two justifications, the district court accepted the city's argument that a religious institution would interfere with the goal of the district in a way that a secular institution would not.

On appeal, the Seventh Circuit discounted the district court's first justification, stating that the city could not justify prohibiting religious use from a particular zone simply because the zoning code classified a religious use differently than RLUIPA.[85] The city attempted to rebut this argument by stating that the zoning code permitted religious institutions to locate in districts zoned SU-1[86] without having to obtain a variance. The court dismissed this assertion, stating, "an offset could not

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[80] *Id.* at 614. To apply for a special variance, the church would have to appear at a required hearing before the board of zoning appeals, pursuant to IND. CODE § 36-7-4-918.4. *Id.*

[81] *Id.* The equal terms provision of RLUIPA prohibits local government to "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." *Id.* (citing 42 U.S.C. § 2000cc(b)(1)).

[82] *Digrugilliers*, 506 F.3d at 615. The Indianapolis zoning code permitted a wide variety of secular assemblies and institutions, including: "assisted living facilities, auditoriums, assembly halls, community centers, senior citizens' centers, daycare centers, nursing homes, funeral homes, radio and television studios, art galleries, civic clubs, libraries, museums, junior colleges, correspondence schools, schools that teach data processing, and nurseries." Additionally, the code allowed certain accessory uses including cafeterias, "drugstores, florists, office-supply services and newsstands." *Id.* at 614-15.

[83] *Id.* at 615.

[84] *Id.* at 616.

[85] *Id.* at 615. The court specifically noted that the term religious assembly or institution as used in RLUIPA was a question of federal, not state, law.

[86] *Id.* "SU" denotes "Special Use."

eliminate the discrimination," and the availability of alternative sites was only relevant when a claim was brought under the substantial burden provision of RLUIPA.[87]

In regards to the second justification, the court stated that, although religious institutions were allowed "to be free from offensive land use in [their] vicinity,"—meaning the distance requirement between a church and the sale of alcohol or pornography—discrimination in favor of religion was not a defense to a zoning exclusion challenged under RLUIPA's equal terms provision.[88] The court observed that there was no indication that any institution selling either alcohol or pornography was or would be located within the prohibited perimeter.[89] Furthermore, the court stated, there was no evidence that such a prohibition would not also be beneficial to secular institutions, such as day care centers or nursing homes.[90] The court reasoned that state law was irrelevant because "a state cannot be permitted to discriminate against a religious land use by a two-step process in which the state's discriminating in favor of religion becomes a predicate for one of the state's subordinate governmental units to discriminate against a religious organization in violation of federal law."[91] The Seventh Circuit thus reversed and remanded the decision to the district court.[92]

Both *Midrash* and *Digrugilliers* stand for the proposition that government cannot facially treat religious and secular institutions on unequal terms. This includes both disallowing religious assemblies where secular assemblies are allowed, as in *Midrash*, and providing "extra protection" for religious assemblies in an attempt to prevent any

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[87] *Digrugilliers*, 506 F.3d at 616. The court further stated, "[i]f proof of substantial burden were an ingredient of the equal-terms provision, the provisions would be identical, which could not have been Congress's intent." *Id.* Additionally, there was nothing in the record that suggested the layout and topography of SU-1 would be suitable for the church's purpose. *Id.*

[88] *Id. See also* Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982). The Supreme Court stated that a church could only be granted special privileges if the same privilege extended to "like institutions"; otherwise, such special privileges violated the Establishment Clause. *Id.* at 124.

[89] *Digrugilliers*, 506 F.3d at 616.

[90] *Id.* at 617. The court noted that, although "many Baptist sects are strongly opposed to the drinking of alcoholic beverages, it does not follow that permitting the sale of such beverages in the vicinity of a Baptist church would impair the church's effective operation as a religious institution any more gravely than it would impair the effective operation of a day-care center, which is to say, probably not gravely at all." *Id.*

[91] *Id.*

[92] *Id.* at 618.

RLUIPA claims, as in *Digrugilliers*. Regardless of the method used, the equal terms provision of RLUIPA mandates equal treatment; no more, no less.

C. *The Lighthouse Institute for Evangelism, Inc v. City of Long Branch (November 2007)*

One month after the Seventh Circuit's ruling in *Digrugilliers*, the Third Circuit issued a contradictory opinion on an equal terms claim, suggesting the emergence of a different approach. In *Lighthouse Institute for Evangelism, Inc. v. City of Long Branch,*[93] the Third Circuit held that a zoning scheme banning religious assemblies from certain zones, while simultaneously allowing secular uses, did *not* violate the equal terms provision of RLUIPA.[94]

The Lighthouse Institute for Evangelism ("Lighthouse") began its operation in 1992 and ministered to the poor and disadvantaged of Long Branch, New Jersey.[95] In 1994, the organization relocated to a nearby property within the city's C-1 Central Commercial District.[96] The city's zoning code ("Ordinance") banned religious uses in the district, which forced the organization to continuously petition the City of Long Branch to allow it to use the property.[97] Each time, permission was denied.[98] In mid-2000, Lighthouse petitioned the city again, this time to allow it to use the property as a church.[99] Its application was denied because "the proposed use [was] not a permitted use in the Zone and would require prior approval from the Zoning Board of Adjustment."[100]

The church filed a claim under RLUIPA, which was subsequently dismissed by the district court.[101] On appeal, the Third Circuit found that the Ordinance did not bar, on its face, the religious use of property

[93] 510 F.3d 253 (3d Cir. 2007).

[94] *Id.* at 277.

[95] *Id.* at 256-57.

[96] *Id.* at 257. Among the uses allowed in the C-1 Commercial District were: restaurants, variety or retail stores, educational services, colleges, assembly halls, bowling alleys, motion picture theaters, governmental services, municipal buildings, and new automobile and boat show rooms. Churches were not listed as a permitted use. *Id.*

[97] *Id.* Lighthouse attempted to use the facility for a variety of uses including: a soup kitchen, a job skills training program, and a residence for its pastor. The church was only allowed to use the property as an office. *Id.*

[98] *Lighthouse*, 510 F.3d at 257.

[99] *Id.*

[100] *Id.* (citation omitted).

[101] *Id.*

within a C-1 zone because it was not clear from the record that Lighthouse would not be approved as an assembly hall.[102]

While the case against the Ordinance was still pending, the city adopted the Broadway Redevelopment Plan ("Plan"), which superseded the Ordinance.[103] The Plan was designed to encourage a "vibrant" and "vital" downtown area by "strengthening retail trade and city revenues, increasing employment opportunities, and attracting more retail and service enterprises."[104] The area allowed a number of secular institutions while it simultaneously disallowed religious institutions.[105] Following the Plan procedure, Lighthouse sought a "waiver of prohibition of church use," which was subsequently denied by the City Council.[106]

Lighthouse filed an amended complaint alleging that the Plan violated both provisions of RLUIPA; both parties subsequently filed cross motions for summary judgment.[107] The district court granted summary judgment for Long Branch on all claims, finding that the church did not show that it was treated worse than a secular institution.[108]

On appeal, the Third Circuit first contemplated whether an equal

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[102] *Id.* at 258.

[103] *Lighthouse*, 510 F.3d at 258.

[104] *Id.*

[105] *Id.* Primary uses in the area included: theaters, cinemas, culinary schools, dance studios, music instruction, theater workshops, fashion design schools, art studios, and workshops. There were also a number of permitted secondary uses, which included: restaurants, bars and clubs, and specialty retail. The Plan specifically stated that any uses not specifically provided for were prohibited. *Id.*

[106] *Id.* at 259. The Council gave three reasons for its denial: (1) the proposed religious use was not permitted in the zone; (2) Lighthouse's application lacked any information regarding finances, scope of the project, size of the congregation, or project design; and (3) the inclusion of a religious use would "jeopardize the development of the Broadway area, which was envisioned as an entertainment [or] commercial zone with businesses that were for profit." *Id.*

[107] *Id.* It should also be noted here that, because the Plan superseded the Ordinance, the court did not go into a detailed analysis of the Ordinance, citing it as a moot point.

[108] *Lighthouse*, 510 F.3d at 259-60. The district court found that Lighthouse did not demonstrate that it was treated any differently than a secular institution because: (1) it had a different effect on the availability of liquor licenses than a secular institution since New Jersey law only prohibits the sale of alcohol and pornography within a certain distance to a church and not any secular institution; and (2) there was no specific secular comparator that had planned a similar combination of uses. The district court further concluded that even if Lighthouse had been similarly situated to some secular assembly that was treated better under the Plan, the Plan could survive strict scrutiny as long as Long Branch demonstrated a compelling interest in promoting economic development that was narrowly tailored to meets its goal. *Id.* at 260.

terms plaintiff was required to show that the land use imposed a substantial burden on religious exercise.[109] The court answered that question in the negative, stating that "the structure of the statute and the legislative history clearly reveal that the substantial burden requirement does not apply to claims under 2(b)(1), the Equal Terms provision."[110] The Third Circuit also cited precedent set by other circuits to acknowledge that no court had found the equal terms provision to require the showing of a substantial burden.[111]

The court then debated whether a religious plaintiff was required to show that it was "similarly situated" to a secular comparator and that the secular comparator was treated better.[112] In stark contrast to previous holdings of other courts, the Third Circuit held that, as the equal terms provision simply codified the jurisprudence of the Free Exercise Clause, "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."[113] The court expressly rejected the holding in *Midrash*, fearing that such a reading of the equal terms provision would "give any and all religious entities a free pass to locate wherever any secular institution or assembly [was] allowed."[114] The court reasoned that if both a religious institution and a secular

[109] *Id.* at 262.

[110] *Id.* The court supported its holding by arguing that, because the substantial burden provision under RLUIPA included the term "substantial burden" and the equal terms provision did not, Congress was clearly aware of how to indicate when a substantial burden would need to be shown and thus voluntarily chose not to require a showing for the equal terms provision. *Id.* at 263. The court also noted that the sponsors of RLUIPA mentioned the phrase "substantial burden" in connection with the equal terms provision. *Id.*

[111] *Id.* at 264 (citing Konikov v. Orange County, 410 F.3d 1317 (11th Cir. 2005) (although a zoning scheme did not violate the substantial burdens provision of RLUIPA, it did violate the equal terms provision); Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214 (11th Cir. 2004) (zoning scheme that did not violate the substantial burden provision of RLUIPA did violate the equal terms provision); Digrugilliers v. Indianapolis, 506 F.3d 612 (7th Cir. 2007) (zoning scheme violated the equal terms provision); Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752 (7th Cir. 2003) (substantial burden and equal terms provisions were operatively independent of one another)).

[112] *Id.*

[113] *Lighthouse*, 510 F.3d at 268. However, the court stated that it was not necessary for a religious organization to prove the existence of a secular comparator that carries out the same functions. *Id.* at 266.

[114] *Id.* at 268. The court feared that "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 member . . . [or] permit 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." *Id.*

institution had a similar impact on a regulation's objectives, yet were treated differently, the municipality would be held strictly liable for the RLUIPA violation.[115]

Finally, the court turned its attention to whether the district court erred in granting summary judgment for the City of Long Branch.[116] As the purpose of the Plan was to "achieve redevelopment of an underdeveloped and underutilized segment of the City," the court found that religious institutions were not similarly situated to those secular assemblies that were allowed to locate in the redevelopment area.[117] The court emphasized a New Jersey statute that prohibited the sale of alcohol within 200 feet of a house of worship.[118] Lighthouse argued that the statute allowed a religious institution to perpetually waive its right to be insulated from the sale of alcohol.[119] Because each new liquor-license issued within 200 feet of a religious institution would require a waiver, the court feared that such a waiver would give religious institutions substantial control over downtown development.[120] The court also feared that by granting Lighthouse a perpetual waiver, it would have to amend the regulation to allow *all* religious institutions to waive their right to be insulated from the sale of alcohol, potentially entangling the city with free exercise of religion.[121] Thus, the court upheld summary judgment for Long Branch on the grounds that there was no evidence that the Plan treated religious assemblies any differently than secular assemblies in such a way that caused an equally negative impact on the goals of the Plan.[122]

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[115] *Id.* at 269.

[116] *Id.* at 270.

[117] *Id.* at 270-71.

[118] *Lighthouse*, 510 F.3d at 271. *See also* N.J. STAT. ANN. § 33:1-76 (2009). The New Jersey statute prevents the issuing of a liquor license and sale of alcoholic beverages within 200 feet of any "church or public schoolhouse or private schoolhouse not conducted for pecuniary profit."

[119] *See also* N.J. STAT. ANN. § 33:1-76.2 (2009). This provision is an exception to the statute preventing the sale of liquor within 200 feet of a house of worship. The statute specifically states that "if a plenary or limited retail distribution license has been or shall be granted on a waiver of its protection granted on authority of a church or school, and such license has been, or shall have been renewed on authority of annual waivers by the church or school for [fifteen] or more consecutive years, the holder of such license shall thereafter be entitled to apply for renewal or reissuance thereof without further or renewed authority, or waiver, of the church or school."

[120] *Lighthouse*, 510 F.3d at 271.The court also feared that requiring a waiver for each new license would create substantial confusion. *Id.*

[121] *Id.*

[122] *Id.* at 272.

In a harsh dissent, Judge Jordan strongly opposed the majority's interpretation of the similarly situated analysis.[123] The correct analysis, Judge Jordan argued, "should begin and, to the extent possible, end with the language of the statute."[124] Thus, since the statute prohibited religious institutions from locating in an area where secular assemblies were allowed, Judge Jordan believed the Plan necessarily violated the equal terms provision of RLUIPA.[125]

Unlike the majority, Judge Jordan felt the facts of the case strongly resembled those in *Midrash* and failed to accept the inevitable "parade of horribles" that the majority feared would come to pass using the *Midrash* analysis.[126] He argued that there was nothing in the language of RLUIPA that would prevent a municipality from placing other restrictions on religious assemblies, such as limitations on building size, to rationally regulate land use.[127]

Furthermore, Judge Jordan argued, "[v]iewing a RLUIPA claim as the precise equivalent of a Free Exercise claim renders the statute superfluous," because Congress defined a violation of the equal terms provision in terms of a difference in equality of treatment, not as a lack of neutrality and general applicability.[128] According to Judge Jordan, Long Branch could not get around this discrepancy by arguing that New Jersey state law prohibited liquor licenses within 200 feet of a house of worship, which would limit the zone's economic viability.[129] As a federal law, Judge Jordan opined, RLUIPA trumps state law, not to mention the fact that churches could waive their right to protection.[130]

Finally, Judge Jordan proffered five reasons why it was not necessary to graft a "similarly situated" analysis onto RLUIPA's equal terms provision.[131] First, even if an equal terms claim must be analyzed like a Free Exercise claim, there is no reason to impose a similarly situated requirement on the equal terms provision.[132] Second, both the

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[123] *Id.* at 283. Judge Jordan agreed with the portion of the majority's holding that (1) did not require a substantial burden analysis for the equal terms provision; and (2) did not require a plaintiff to show a similar comparator under the equal terms provision.

[124] *Id.*

[125] *Lighthouse*, 510 F.3d at 271.

[126] *Id.* at 287.

[127] *Id.*

[128] *Id.* at 288.

[129] *Id.* at 290.

[130] *Lighthouse*, 510 F.3d at 290-91.

[131] *Id.* at 292-93.

[132] *Id.* at 292.

Seventh and the Eleventh Circuits held that the equal terms provision did not require a similarly situated analysis.[133] Third, the plain language of RLUIPA does not state that religious and secular institutions must be similarly situated.[134] Fourth, the legislative history *does* suggest that Congress was trying to codify the Free Exercise Clause, but there is no precedent that, to bring a free exercise claim, a religious plaintiff must demonstrate that they are similarly situated with a secular institution.[135] Fifth, grafting a similarly situated analysis onto RLUIPA would give states "a ready tool for rendering RLUIPA *section 2(b)(1)* practically meaningless."[136]

Rather than following the precedent set forth by other jurisdictions, the Third Circuit turned RLUIPA equal terms analysis on its head. The issue in *Lighthouse* is no different than that presented in *Midrash*: whether government can use zoning to treat religious and secular institutions on unequal terms and thus bar religious assemblies from locating in a particular area. Decided under the *Midrash* analysis, the answer to this question is clearly no.[137] Just as in *Midrash*, the City of Long Branch adopted zoning regulations that on their face treated religious and secular institutions on unequal terms. Although the Third Circuit was under no obligation to follow the precedent established by other circuits, it is not clear that its interpretation of the equal terms provision of RLUIPA followed legislative intent or comprehended the consequences of its decision.

V. THE PROBLEM

A. The Return to Minimal Protection

RLUIPA has come a long way since its inception, protecting dozens of churches and various other religious institutions from the roadblocks of municipal zoning schemes. But the Third Circuit's holding in *Lighthouse* threatens to revert the development of these religious land use rights back 20 years, back to a time when any reason was good enough to protect government's right to zone out religion. Not long ago, religious institutions could be quarantined to particular areas

133 *Id.* at 292.
134 *Id.* at 293.
135 *Lighthouse*, 510 F.3d at 293.
136 *Id.*
137 *See supra* Part IV.A.

of towns and cities.[138] Churches could be forced to locate far from their congregation base and thriving metropolitan areas.[139] Oftentimes, municipalities did not even need a good reason, certainly not one that would withstand strict scrutiny, to justify these discriminatory schemes.[140] Discriminatory zoning would be acceptable as long as there was an alternative location for religious institutions, even if only theoretical.

For example, take the 1983 case *Lakewood, Ohio Congregation of Jehovah's Witnesses v. Lakewood*.[141] In that case, a congregation of Jehovah's Witnesses challenged the city's zoning scheme that prohibited religious institutions from locating in any zone except multi-family residential districts, business residential districts and retail districts.[142] Having already purchased land to build a new, larger facility in a zone designated for use by only one family residential property, the congregation sought the appropriate building permits, all of which were denied.[143] The church sought relief under the First, Fifth and Fourteenth Amendments.[144] On appeal, the Sixth Circuit found that the city ordinance was constitutional even though it prohibited religious institutions from locating in ninety percent of the city.[145] In making its determination, the court undertook an evaluation of the religious observances at stake and sought to identify the burden placed on the religious institution.[146] The court found that the zoning scheme did not fundamentally burden the congregation's ability to worship and follow its faith because a building and its particular location were not a "fundamental tenets" or "cardinal principals" of the Jehovah's Witness faith,[147] but were simply a convenience and basic desire of the

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[138] *See* 146 CONG. REC. S7,774 (2000). In the legislative history of RLUIPA, Congress noted that "[c]hurches have been excluded from residential zones because they generate too much traffic, and from commercial zones because they don't generate enough traffic."

[139] *See id.* Congress noted, "[c]hurches 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."

[140] *See* Lakewood, Ohio Congregation of Jehovah's Witnesses v. City of Lakewood, 699 F.2d 303 (6th Cir. 1983).

[141] *Id.*

[142] *Id.* at 305.

[143] *Id.*

[144] *Id.* at 304.

[145] *Lakewood*, 699 F.2d at 309.

[146] *Id.* at 306.

[147] *Id.* at 307.

congregation.[148] The court also found that, as the ordinance did not violate the faith of the congregation, the city was only required to satisfy rational basis scrutiny.[149] According to the court, the city's desire to minimize congestion, noise, and confusion created by motor vehicles met the rational basis test.[150] Thus, the court held that the city appropriately exercised its police power to preserve a "'quiet place where yards are wide, people few, and motor vehicles restricted.'"[151]

Certainly a city has a substantial interest in reducing traffic and noise in certain areas. Likewise, it is simple enough to realize that municipalities have an interest in creating designated zones for retail, industrial, or agricultural use. But it is difficult to see how allowing a religious institution into any one of these areas would disrupt the fundamental goals of the city for that area. Churches may be divided into various denominations, each with its own fundamental principles and faith prescriptions, but, by and large, churches are gathering places for communities. Not only do these religious institutions provide spiritual guidance for their followers, churches often do good work for the community at large: they provide food and shelter to the homeless; engage youth in positive, moral and safe activities; contribute financial support to depressed areas; service charitable organizations; and provide a social environment for the exchange of ideas. When viewed from this perspective, it is difficult to understand why municipalities almost automatically assume that residents and businesses would fall victim to the NIMBY phenomenon—that is, "I want these types of things in my community, just Not In My Backyard."

Perhaps churches would increase traffic in a residential neighborhood, but it is unlikely that such an increase would be significant. In *Lakewood*, the congregation only contained 175 members.[152] Yet, there was no mention in the Sixth Circuit's opinion that a traffic study was ever completed to determine the actual increase in traffic that the congregation would generate. Even more importantly, in

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[148] *Id.* The court stated that "[t]he lots available to the Congregation may not meets its budget or satisfy its tastes but the *First Amendment* does not require the City to make all land or even the cheapest or most beautiful land available to churches." *Id.*

[149] *Id.* at 308 (citing Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926)) (zoning ordinances were a legitimate exercise of police power as long as the regulations were not "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare.").

[150] *Lakewood*, 699 F.2d at 308.

[151] *Id.* at 308 (quoting Vill. of Belle Terre v. Boraas, 426 U.S. 1, 9 (1974)).

[152] *Id.* at 304.

the City of Long Branch, New Jersey, where nearly seventeen percent of the population is listed below the poverty level, the city determined that a religious institution catering to the poor and homeless would not be appropriate in the heart of the city's downtown area.[153] Long Branch stated that its primary goal was to revitalize a depressed area.[154] This cannot be accomplished solely through the addition of profit-generating businesses. Although this goal of economic redevelopment is undoubtedly a noble endeavor, it seems unclear what the city expects to happen to those impoverished families living in and around the business redevelopment area. Certainly the creation of a thriving retail district is not going to make these problems, or these citizens, simply disappear. It seems unusual that, as a matter of public policy, the city would prevent an institution that proactively works to help the city's impoverished get back on their feet from locating in the area where it seeks revitalization. Furthermore, it is difficult to justify allowing *non-profit* organizations, such as private lodges, in the business district while simultaneously excluding religions organizations. The court is not clear how allowing such non-profit enterprises could contribute to the vitality of the downtown area in a way that religious institutions could not.

This is exactly the type of unequal treatment supporters of RLUIPA sought to prevent—a secular assembly being allowed where a religious assembly is not. The equal terms provision is not about determining whether a city has placed some type of substantial burden on a religious institution that prevents the congregation from following its faith; there is already a provision in RLUIPA to deal with that particular situation. The equal terms provision is about seeking equality for both religious and secular institutions and preventing discrimination based solely on the character of the assembly. This leads to the next argument of this Comment. By holding that Long Branch did not violate the equal terms provision of RLUIPA, the Third Circuit has expressly gone against the legislative intent and plain language of the equal terms provision.

B. Misinterpreting and Ignoring the Legislative History and Stated Purpose of RLUIPA

The Supreme Court has often held that deference should be given

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[153] *See* U.S. Census Bureau, http://quickfacts.census.gov/qfd/states/34/3441310.html (last visited Nov. 14, 2009).

[154] *Lighthouse*, 510 F.3d at 258.

to Acts of Congress. As the Court once stated, "[t]his is not a mere polite gesture. It is a deference due to deliberate judgment by constitutional majorities of the two Houses of Congress that an Act is within their delegated power or is necessary and proper to the execution of that power."[155] It is Congress that has its ear on the pulse of the nation, listening to the desires of the people and answering the call to action. In the case of RLUIPA, Congress saw a need and decided to meet it head on. Acknowledging that the Constitution guarantees the right of religious freedom through the Free Exercise Clause, Congress stated "[t]he right to build, buy, or rent such a space is an indispensable adjunct of the core First Amendment right to assemble for religious purposes."[156] If the Third Circuit found the plain language of the equal terms provision to be unclear, there was ample evidence in the legislative history of RLUIPA to suggest that the purpose of the equal terms provision was not only to protect religious institutions from discrimination, but also to create an even playing field for secular and religious assemblies.[157]

The problem with the holding in *Lighthouse* is that it essentially transforms the entire purpose of the equal terms provision, thus rendering the provision, in its current form, virtually superfluous. The Third Circuit's conclusion in *Lighthouse* is 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*."[158] However, the plain language of RLUIPA simply states: "[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."[159] The statutory language suggests that a regulation that treats secular and religious institutions differently cannot stand. There is no mention in the text of the provision or in the

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[155] United States v. Five Gambling Devices, 346 U.S. 441, 449 (1953).

[156] 146 CONG. REC. S7774 (daily ed. July 27, 2000).

[157] 146 CONG. REC. S6688 (daily ed. July 13, 2000). As Senator Kennedy commented in his remarks on the need for RLUIPA, "[b]ut too often in our society today, thoughtless and insensitive actions by governments at every level interferes with individual religious freedoms, even though no valid public purpose is served by the governmental action. Our goal in proposing this legislation is to reach a reasonable and constitutionally sound balance between respecting the compelling interests of government and protecting the ability of people freely to exercise their religion." *Id.*

[158] *Lighthouse*, 510 F.3d at 266.

[159] 42 U.S.C. § 2000cc(b)(1) (2008).

legislative history that suggests that a religious institution and its secular comparator must have an equal impact on the objectives of a regulation before a court can acknowledge a violation of RLUIPA.

Under the *Lighthouse* zoning ordinance, religious institutions are not allowed to locate in the Broadway Corridor because any use not specifically listed is prohibited, and religious assemblies are not specifically listed.[160] This distinction might be justified if all public assemblies were prohibited from the area, but this is just not so. Long Branch specifically allowed assemblies such as theaters, cinemas, specialty schools and workshops.[161] Thus, on its face, the Redevelopment Plan necessarily fails to meet the equal terms provision of RLUIPA—secular assemblies are allowed while religious assemblies are not. Using the language of the statute, religious assemblies are treated on less than equal terms compared to nonreligious assemblies.

The equal terms provision is designed to require only a plain and simple analysis—nothing in the language of the statute suggests that municipalities or courts are required to determine if the allowed secular institutions and the prohibited religious institutions are "similarly situated." Congress recognized that, although it may be done overtly, land use regulation preventing religious institutions from occupying a certain area is oftentimes done covertly, with local governments hiding behind justifications such as traffic flow or aesthetics.[162] Congress made a decision based on gathered evidence that such a problem was pervasive enough to warrant legislation. After such legislation has been made, it is no longer up to the courts to determine whether the legislation is applicable.

Furthermore, other circuits have acknowledged that there are at least three ways that a municipality may violate the equal terms provision: (1) implementing a statute that "facially differentiates between religious and nonreligious assemblies"; (2) implementing a "facially neutral statute that is nevertheless 'gerrymandered' to place a burden solely on religious, as opposed to nonreligious, assemblies"; and (3) implementing a "truly neutral statute that is selectively enforced

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[160] *See Lighthouse*, 510 F.3d at 258.

[161] *Id.*

[162] 146 CONG. REC. S7774 (daily ed. July 27, 2000). Congress recognized that "[c]hurches have been denied the right to meet...in all sorts of buildings that were permitted when they generated traffic for secular purposes." 146 CONG. REC. S7775 (daily ed. July 27, 2000).

against religious, as opposed to nonreligious assemblies."[163] The regulation in *Lighthouse* falls squarely within the first violation—on its face, the Plan allows some secular assemblies while simultaneously disallowing religious assemblies. *Midrash* also involved a land use regulation that qualified under this first violation.[164] When viewed in this light, *Midrash* and *Lighthouse* seem nearly identical and, as such, should be subject to the same analysis and conclusion.[165]

C. *Equal Terms as another form of Equal Protection*

Drawing on RLUIPA's codification of the Free Exercise analysis, the Third Circuit asserted that an RLUIPA equal terms analysis should mimic the Free Exercise analysis. Although legislative history does indeed suggest that Congress intended to codify interpretations of the Free Exercise Clause, this does not necessarily insinuate that the proper analysis under the equal terms provision is identical to Free Exercise analysis.[166] As Judge Jordan noted in his *Lighthouse* dissent, "[v]iewing a RLUIPA claim as the precise equivalent of a Free Exercise claim renders the statute superfluous."[167] This view makes perfect sense as the free exercise of religion is already codified and guaranteed under the United States Constitution.[168] Furthermore, the Supreme Court has already laid out a framework for analysis of a Free Exercise claim.[169] RLUIPA, as it relates to provisional land use for religious institutions, is a separate form of religious protection: Congress saw a need in an area that the Free Exercise Clause alone was not protecting, and thus enacted RLUIPA to fill the gap. Nowhere in the legislative history of RLUIPA

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[163] Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward County, 450 F.3d 1295, 1308 (11th Cir. 2006).

[164] *See id.* at 1308-09. The court found that the zoning ordinance in question in *Midrash* facially violated the equal terms provision because it "created a zoning district in which certain non-religious assemblies and institutions were permitted, but religious assemblies were prohibited." The Eleventh Circuit, in *Midrash*, struck down the land use ordinance as a violation.

[165] For additional case law using *Primera Iglesia's* three categories of an equal protection violation, see generally Vision Church v. Vill. of Long Grove, 468 F.3d 975, 1003 (7th Cir. 2006).

[166] *See* 146 CONG. REC. S7776 (daily ed. July 27, 2000). In addressing the equal terms provision, supporters of RLUIPA specifically stated that the section enforces the Free Exercise Clause.

[167] *Lighthouse*, 510 F.3d at 288.

[168] U.S. CONST. amend I. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

[169] *See supra* notes 9-10 and accompanying text.

does Congress require courts to use a Free Exercise analysis when analyzing RLUIPA claims.

Rather, it is the position of this Comment that the equal terms provision of RLUIPA more closely resembles that of an Equal Protection claim.[170] In general, analysis under the Equal Protection Clause involves three basic steps: (1) identify the question presented; (2) identify the appropriate level of scrutiny to be applied; and (3) determine whether the governmental action in question meets the required level of scrutiny.[171]

Equal protection of land use was discussed extensively in the 1985 Supreme Court case *City of Cleburne v. Cleburne Living Center*.[172] The Court stated that determining whether or not a land use regulation violated the Equal Protection Clause was a two-step analysis. First, the court must determine if the uses in question are similarly situated.[173] If they are, the government must demonstrate a rational basis for distinguishing between the uses.[174] It is important to note here that, although the Supreme Court claimed to be using only a rational basis examination, Justice Marshall's dissent in *Cleburne* and subsequent cases have argued that such "rational basis" scrutiny was a form of heightened scrutiny.[175]

A strong advocate of this position was Judge Richard Posner, also

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[170] U.S. CONST. amend. XIV, § 1. The Constitution provides for equal protection under that law by stating "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws."

[171] *See* CHEMERINSKY, *supra* note 11, at 670-74.

[172] City of Cleburne v. Cleburne Living Ctr. Center, 473 U.S. 432 (1985). *Cleburne* involved a zoning ordinance that required institutions designed for the mentally retarded to obtain a special use permit prior to operation. When the Cleburne Living Center submitted an application for a special use permit, the City's Planning and Zoning Commission denied the permit. The Cleburne Living Center then filed suit alleging that the zoning ordinance was invalid on its face because the city allowed other types of group homes, such as fraternity and sorority houses, to locate in the zone without a permit.

[173] *See* Congregation Kol Ami v. Abington Twp., 309 F.3d 120, 136-37 (3d Cir. 2002) (citing *Cleburne*, 473 U.S. at 447-50 (1985)).

[174] *See id.* at 137 (citing *Cleburne*, 473 U.S. at 450, 461 (1985)).

[175] *See Cleburne*, 473 U.S. at 456 (1985) (Marshall, J., dissenting). In his dissent, Justice Marshall reasoned that the majority was applying something more than rational basis scrutiny. He stated, "[t]he Court holds the ordinance invalid on rational-basis grounds and disclaims that anything special, in the form of heightened scrutiny, is taking place. Yet Cleburne's ordinance surely would be valid under the traditional rational-basis test applicable to economic and commercial regulation. In my view, it is important to articulate, as the Court does not, the facts and principles that justify subjecting this zoning ordinance to the searching review—the *heightened scrutiny*—that actually leads to its invalidation." *Id.* (emphasis added).

the author of the Seventh Circuit's opinion in *Digrugilliers*. Using heightened scrutiny, Judge Posner issued a dissenting opinion in *Civil Liberties for Urban Believers v. City of Chicago*,[176] which would have held a Chicago zoning scheme to be in violation of the Equal Protection Clause.[177] Judge Posner pointed out that, in *Cleburne*, the city's ordinance would have passed the rational basis test as an economic and commercial regulation, yet, in the end, the regulation was struck down.[178] For Judge Posner, this suggested that the court was actually using a heightened form of scrutiny. Thus, it can be persuasively argued that heightened scrutiny should be used to analyze equal protection land use claims.[179]

Under this scrutiny, Judge Posner determined that Chicago's zoning ordinance had to fail for three reasons. First, requiring churches to seek a special permit to locate in areas other than a residential zone was both risky and expensive for the church because the grant of a permit depended on the opinion of the zoning board and the surrounding citizens.[180] Second, the city's argument that churches preferred to locate only in residential areas in order to avoid noise and commotion was not a decision for the government to make.[181] Finally, Judge Posner found

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[176] 342 F.3d 752 (7th Cir. 2003) [hereinafter *C.L.U.B.*].

[177] *Id.* This case involved a concerted effort by five churches in the Chicago area, which alleged that the Chicago zoning scheme violated their rights as to RLUIPA, free exercise, equal protection, and procedural due process. *Id.* at 758. Under the zoning scheme, churches were only allowed to locate in residential areas as of right, but had to obtain a special use permit to locate anywhere in a commercial or business zone. *Id.* at 755. In February 2000, the Chicago City Council amended the zoning scheme to require various secular assemblies to also obtain a special use permit before locating within any business or commercial zone. *Id.* at 758. Based on the amendment, the district court granted summary judgment in favor of the city. *Id.* at 759. On appeal, the Seventh Circuit affirmed the district court's ruling finding first that appellants had no valid claim under RLUIPA and second, that a general zoning scheme satisfies rational basis scrutiny under the Equal Protection Clause. *Id.* at 761-66.

[178] *Id.* at 769.

[179] *Id.* at 770. Judge Posner stated, "[c]hurches are no less sensitive a land use than homes for the mentally retarded. . . . When government singles out churches for special regulation, as it does in the Chicago ordinance, the risk of discrimination . . . is great enough to require more careful judicial scrutiny than in the ordinary equal protection challenge to zoning." *Id.*

[180] *Id.* at 771.

[181] *C.L.U.B.*, 342 F.3d at 772. Judge Posner argued that this was a decision best left to the individual churches, for perhaps they would prefer to trade the lack of noise and commotion for lower land prices and to be closer in "proximity to sinners, including prostitutes, drug addicts, and gang members, whose souls are particularly in need of saving." *Id.*

the city's argument that churches got preferred treatment by locating within the residential zone to be of little value. As he acknowledged, the city was likely worried that allowing churches to locate in a commercial zone would chase out commercial users. But the real worry, Judge Posner suspected, was that, with additional entities bidding on commercial land, the cost of such land would rise.[182] Judge Posner dismissed this concern, stating that "the aggregate demand of churches for land zoned commercial is too slight in relation to the amount of that land [to allow] them to bid on it to affect the price noticeably."[183] Finding no difference in the use of land between secular and religious institutions, Judge Posner concluded that the Chicago zoning ordinance violated the Equal Protection Clause.[184]

This heightened standard of scrutiny used to determine equal protection land use cases is a better fit for the equal terms analysis. As mandated in *Cleburne*, a court's first determination must be whether or not the religious and secular land uses are similarly situated.[185] According to the Third Circuit, religious and secular institutions could not be similarly situated under the Plan because of a New Jersey state law that prevents alcohol from being sold within 200 feet of a church.[186] This law does not apply to secular institutions. Long Branch argues that, as such, churches will have a disparate impact on the goal of the redevelopment district because the district cannot be a thriving entertainment metropolis if businesses, such as restaurants and clubs, are prohibited from obtaining a liquor license. The problem with this argument is that, under the New Jersey law, religious institutions can essentially obtain a permanent waiver against this insulation.[187] Furthermore, Lighthouse voluntarily and eagerly offered to waive its right to be a certain distance from the sale of alcohol.[188] Without this flimsy limitation, religious and secular institutions once again become

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[182] *Id.*

[183] *Id.*

[184] *Id.* at 773.

[185] City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 447-50 (1985).

[186] *See* Lighthouse Institute for Evangelism, Inc. v. City of Long Branch, 510 F.3d 253, 272 (3d Cir. 2007). *See also* N.J. STAT. ANN § 33:1-76 (2008). "No license shall be issued for the sale of alcoholic beverages within two hundred feet of any church."

[187] *See* N.J. STAT. ANN § 33:1-76 (2008). "The protection of this section may be waived at the issuance of the license and at each renewal thereafter, by the duly authorized governing body on authority of such church . . . such waiver to be effective until the date of the next renewal of the license." *Id.*

[188] *See Lighthouse*, 510 F.3d at 271.

similarly situated.

As similarly situated entities, the only way for the Plan to remain in force is for Long Branch to satisfy the standard of heightened scrutiny set forth in *Cleburne*.[189] Therefore, Long Branch must provide a compelling interest for the Plan and demonstrate that the Plan is narrowly tailored to accomplish that interest. It is worth a brief pause in this argument to note that the Third Circuit dismissed the use of strict scrutiny for a violation of RLUIPA's equal terms provision in favor of applying a standard of *strict liability*.[190] So, under the Third Circuit's own standards, the Plan must necessarily be a violation of RLUIPA.

Even if the standard were indeed rational basis, and not heightened scrutiny, the Long Branch Plan must still fail. As stated previously, in order to satisfy rational basis scrutiny, the Plan must be rationally related to a legitimate government purpose. The city's justification for not allowing religious institutions in the commercially zoned area is that such institutions do not contribute to the economy. There is no evidence in the record that religious institutions cannot or would not contribute to the economic success of a downtown commercial area. Churches naturally attract a consistent and constant flow of patrons that may spend time in the downtown area long after church services and activities have ended.

Similarly, even if the standard were strict scrutiny and not strict liability, Long Branch would still not be able to justify its Plan. The regulation prohibiting religious institutions from locating in the business district is over-inclusive because modern churches do contribute to retail and commercial activity. Churches of today are more than just once-a-week establishments. They have grown to be places not only of spiritual worship, but also of social interaction and community growth. Just because people go to an area for the specific purpose of attending church does not mean that they immediately vacate the area. Often, church members will patronize local shops, restaurants, and entertainment establishments. Long Branch could promote its goals of creating a vibrant and vital retail area while assuaging its fears concerning the state alcohol provision in a much narrower way.

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[189] *See C.L.U.B.*, 342 F.3d at 769. As Judge Posner noted, "[w]e should follow what the Supreme Court does and not just what it says it is doing." *Id.*

[190] *See Lighthouse*, 510 F.3d at 269. The court states, "if 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." *Id.*

Even without applying any of these other approaches, the Plan will still fail under the original approach the Third Circuit took in applying a Free Exercise claim analysis to a claim under the equal terms provision of RLUIPA. In order to pass muster under a Free Exercise claim, the Plan would first have to be one of neutral and general applicability.[191] On its face, Long Branch's zoning ordinance fails to satisfy this requirement because the Plan specifically permits secular assemblies to locate in the business district while simultaneously prohibiting non-secular religious assemblies.[192] As the Plan is not one of neutral and general applicability, it must still undergo the balancing of strict scrutiny as set forth in *Sherbert*.[193] Long Branch's desire to create a vibrant and vital downtown area is not a compelling governmental interest that justifies excluding religious assemblies and institutions. Just as the Eleventh Circuit noted in *Midrash*, such a goal could be attained using less restrictive means.[194] Long Branch's zoning ordinance sweeps too broadly to satisfy strict scrutiny, and, as such, must fail under an Equal Protection analysis. Again, it is important to remember that, according to the Third Circuit's own standard, once 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 objective," that regulation must automatically fail.[195] Under this standard, it is irrelevant whether Long Branch had a compelling governmental interest to justify the Plan; because it was not facially neutral or generally applicable, the plan automatically fails.

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[191] *See Lukumi*, 508 U.S. at 531 (citing Employment Div., Dept. of Human Resources v. Smith, 494 U.S. 872 (1990)). As the Supreme Court noted in *Lukumi*, "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Id.*

[192] For a complete list of permitted and prohibited uses in Long Branch's Redevelopment Plan see *supra* text accompanying note 104. *Contra Smith*, 494 U.S. at 882. The ban on peyote at issue in *Smith* applied to everyone in both religious and secular contexts and as such was a neutral law of general applicability. In *Lighthouse*, the prohibition on law use applies specifically to religious assemblies and institutions, thus preventing it from being a neutral law of general applicability.

[193] *See supra* text accompanying note 10. Under strict scrutiny, governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest.

[194] *See* Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1234 (11th Cir. 2004).

[195] *See Lighthouse* 510 F.3d at 269. The language of the court seems to suggest a standard of strict liability for any non-neutral ordinances that are not generally applicable.

However, the Third Circuit argued that Long Branch's zoning scheme did not violate the equal terms provision of RLUIPA because religious and secular institutions were not similarly situated as to the effect that each had on the regulation's objectives.[196] Under an Equal Protection analysis, it is troubling if the sale of alcohol is the only thing preventing a court from finding an RLUIPA violation.

D. Precedential Problems

The precedent established in *Lighthouse* lends itself to dangerous future judicial interpretation. The Third Circuit's holding, if adopted by other circuits, has the potential power to render the equal terms provision null and void. Currently, the only way to resolve the circuit split is for the Supreme Court to issue a ruling as to the proper interpretation of the equal terms provision of RLUIPA. Unfortunately, Lighthouse's petition for certiorari was denied on May 27, 2008.[197] Thus, future courts will have to follow either *Midrash* or *Lighthouse*, or develop their own unique interpretation. For courts choosing to follow *Lighthouse*, the future of the equal terms provision as an effective enforcement tool to implement the Free Exercise Clause and protect the rights of religious institutions in land use endeavors is at risk of becoming obsolete. This circuit split will prevent courts from addressing a national widespread problem and creating a targeted uniform solution. Instead, courts will be making individual decisions regarding the future of religious land use in their communities. Religious land use will thus be disproportionately heavy in some areas, while simultaneously being disproportionately scarce in others. Congress has decided that religious land use deserves codified statutory protection. As long as such a regulation is constitutionally sound, it is not up to the courts to interpret what that protection should look like.

VI. CONCLUSION

The current circuit split regarding the equal terms provision comes dangerously close to eroding the intent and purpose of RLUIPA itself. Based on the plain language of the provision, as well as the volumes of legislative history, it is painfully apparent that the Third Circuit simply wanted to allow municipalities to carve out "religion-free zones." This

[196] *See id.* at 266.

[197] *See* 510 F.3d 252 (3d Cir. 2007), *cert. denied*, 128 S. Ct. 2503 (2008).

archaic attitude sets religious freedom back 20 years, to a time when religious institutions all across the country were prohibited from establishing themselves in particular areas based on loosely formulated justifications.

This is not to suggest that society should not focus on commercial and residential development—there is no doubt that these are valuable components of society. But the key word here is component; there must be recognition by societal leaders that there are multiple components to every great city, including religious institutions and assemblies. Regardless of when, how, and where each individual incorporates religion into her own life, the landscape of a municipality cannot be complete without all of these institutions working together in *harmony*, rather than each from their own little corner of the world. There is strength in unity, and a close relationship between secular and religious institutions will help create a more solid society with citizens who understand the complete picture of life.