

## Notes

# RESTORING RLUIPA'S EQUAL TERMS PROVISION

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## ABSTRACT

*The Religious Land Use and Institutionalized Persons Act's (RLUIPA) equal terms provision prohibits government from implementing a land-use regulation in a manner that treats religious assemblies and institutions less favorably than secular assemblies and institutions. Lower courts have only begun to interpret and apply RLUIPA's equal terms provision, but already they have significantly weakened its protections of religious liberty by giving the provision unnecessarily restrictive interpretations. Not surprisingly, in light of the Supreme Court's invalidation of the Religious Freedom Restoration Act of 1993 (RFRA), the lower courts' restrictive readings seem driven by concerns that a broader interpretation would exceed Congress's Fourteenth Amendment enforcement power. Yet the lower courts' concerns about the constitutionality of a broader interpretation are misplaced, and their restrictive readings of the equal terms provision severely weaken RLUIPA's protections of religious liberty. This Note argues that a textual interpretation of the provision, which would strictly prohibit unequal treatment of religious assemblies and institutions as compared to secular assemblies and institutions, falls within Congress's prophylactic power under Section 5 of the Fourteenth Amendment. Moreover, a textual interpretation is more consistent with Congress's intent to broadly protect religious liberty.*

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## INTRODUCTION

In the historic town of Goldsboro, North Carolina, churches—not shops and restaurants—occupy many of the downtown storefronts.<sup>1</sup> On a short stretch of Walnut Street alone, there are five storefront churches. City officials with an eye toward downtown revitalization and economic development have debated whether permitting churches to locate in these downtown storefronts is consistent with plans for downtown growth.<sup>2</sup> On one hand, churches provide a stable source of rental income for many downtown building owners who might otherwise struggle to find tenants.<sup>3</sup> On the other hand, opponents of the storefront churches argue that tax-exempt churches contribute little to the downtown tax base and can stymie efforts to open downtown bars and restaurants because of regulations prohibiting alcohol sales within fifty feet of schools and places of worship.<sup>4</sup>

Goldsboro's zoning ordinance permits places of worship to locate downtown, though it requires every place of worship to locate at least one hundred feet from the next.<sup>5</sup> Officials in other cities, frustrated by weak downtown tax bases and impediments to downtown revitalization, have banned churches from the downtown district altogether.<sup>6</sup> For example, another small town in North Carolina adopted a temporary ban on churches in its downtown area

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1. For a discussion of the role of storefront churches in economically depressed areas, see generally OMAR MCROBERTS, *STREETS OF GLORY: CHURCH AND COMMUNITY IN A BLACK URBAN NEIGHBORHOOD* (2003).

2. Anessa Myers, *Storefront Churches Not Part of City Plans*, GOLDSBORO NEWS-ARGUS (N.C.), Aug. 18, 2008, at 1A, available at [http://www.newsargus.com/news/archives/2008/08/18/storefront\\_churches\\_not\\_part\\_of\\_city\\_plans](http://www.newsargus.com/news/archives/2008/08/18/storefront_churches_not_part_of_city_plans).

3. See *id.* (noting that building owners often have no other choice but to rent to churches because “[t]here are [sic] not a crowd of people clamoring for space downtown”).

4. *Id.* Some Goldsboro Planning Commission members appeared fed up with the churches' failure to contribute to the downtown tax base. For example, one commission member commented that “(Churches) are killing the tax base downtown,” *id.* (alteration in original) (quoting Chris Boyette, Chairman, Goldsboro Planning Commission), and another member agreed that he had seen “enough churches downtown,” *id.* (quoting Hal Keck, Member, Goldsboro Planning Commission).

5. *Id.*

6. See, e.g., ROBBINSDALE, MINN., CODE § 521.01 (1998) (defining the “Downtown District” as permitting retail and commercial uses but not churches); see also Christine Dempsey, *Plan Bans New Churches Downtown*, HARTFORD COURANT (Conn.), Nov. 18, 2003, at B5 (reporting that the zoning commission approved a proposal to prohibit additional churches from locating in the downtown district).

in 2006.<sup>7</sup> City leaders argue that such bans are necessary to promote economic development, but churches and other places of worship excluded from downtown districts have frequently turned to the courts, alleging that the bans, or similarly restrictive zoning ordinances, discriminate on the basis of religion. Religious groups opposing the bans often rely on the equal terms provision of the Religious Land Use and Institutionalized Persons Act (RLUIPA) to advance statutory claims against the city or county responsible for the zoning practices.

Congress enacted RLUIPA in 2000 to protect the religious liberty of persons facing land-use restrictions, as well as prisoners and other institutionalized persons.<sup>8</sup> RLUIPA's land-use provisions protect individuals, religious assemblies, and religious institutions against two main categories of government action. First, RLUIPA prohibits land-use regulations that substantially burden religious liberty (the substantial burden provision).<sup>9</sup> Second, RLUIPA prohibits land-use regulations that treat unequally, discriminate against, exclude, or unreasonably limit religious groups.<sup>10</sup> RLUIPA's equal terms provision appears in the second category of protections. It prohibits governments from "impos[ing] or implement[ing] a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution."<sup>11</sup>

Much of the debate over the proper interpretation of RLUIPA's land-use provisions has centered on the act's substantial burden provision. In the years following RLUIPA's passage, courts have struggled to define what it means to substantially burden one's

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7. Emily Bazar, *N.C. Town Struggles to Keep Downtown Thriving*, USA TODAY, Oct. 9, 2006, at 2A (explaining that Kenly City Council members wanted to "revive the town's struggling downtown district and create a lively, prosperous business sector").

8. Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), Pub. L. No. 106-274, 114 Stat. 803 (codified as amended at 42 U.S.C. § 2000cc (2006)). Congress proclaimed that it was an act "[t]o protect religious liberty, and for other purposes." *Id.*

9. RLUIPA's substantial burden provision prohibits government from "impos[ing] or implement[ing] 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." 42 U.S.C. § 2000cc(a)(1). The provision further provides that such a regulation is not prohibited if it "(A) is in furtherance of a compelling governmental interest; and (B) is the least restrictive means of furthering that compelling governmental interest." *Id.* §§ 2000cc(a)(1).

10. The three provisions falling in this category are the equal terms provision, *id.* § 2000cc(b)(1), the nondiscrimination provision, *id.* § 2000cc(b)(2), and the exclusions and limits provision, *id.* § 2000cc(b)(3).

11. *Id.* § 2000cc(b)(1).

religion.<sup>12</sup> Although RLUIPA plaintiffs use the equal terms provision less frequently than the substantial burden provision,<sup>13</sup> courts have had just as many problems interpreting it. Specifically, courts have split on two important issues. The first involves how to establish unequal treatment: should religious assemblies and institutions be compared to all secular assemblies and institutions or only to *similarly situated* secular assemblies and institutions? The second is what level of scrutiny is appropriate for instances of unequal treatment.

The only two circuit courts that have addressed both issues—the Third Circuit and the Eleventh Circuit<sup>14</sup>—have reached contrary conclusions to both questions. In *Lighthouse Institute for Evangelism, Inc. v. City of Long Branch*,<sup>15</sup> the Third Circuit held that equal terms plaintiffs must show that a religious assembly or institution was treated on less than equal terms with a nonreligious assembly or institution that is “similarly situated *as to the regulatory purpose*.”<sup>16</sup> The Third Circuit further held that once that burden is met, the government is strictly liable for violations of the provision.<sup>17</sup> In other words, the unequal treatment is prohibited *even if* the government could show that its actions were narrowly tailored to achieve a

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12. See, e.g., *Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F.3d 338, 349 (2d Cir. 2007) (holding that the key inquiry under the substantial burden provision is whether the land-use regulation “directly *coerces* the religious institution to change its behavior”); *Guru Nanak Sikh Soc’y of Yuba City v. County of Sutter*, 456 F.3d 978, 988–89 (9th Cir. 2006) (noting that the “oppressive to a significantly great extent” test is more lenient than the Seventh Circuit’s effectively impracticable test); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004) (holding that “a ‘substantial burden’ must place more than an inconvenience on religious exercise” and is “akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly”); *San Jose Christian Coll. v. City of Morgan Hill*, 360 F.3d 1024, 1034 (9th Cir. 2004) (“[F]or a land use regulation to impose a ‘substantial burden,’ it must be ‘oppressive’ to a ‘significantly great’ extent. . . . [or] impose a significantly great restriction or onus upon such exercise.”); *Civil Liberties for Urban Believers (CLUB) v. City of Chi.*, 342 F.3d 752, 761 (7th Cir. 2003) (“[A] land-use regulation that imposes a substantial burden on religious exercise is one that . . . render[s] religious exercise . . . effectively impracticable.”).

13. See Daniel P. Lenington, *Thou Shalt Not Zone: The Overbroad Applications and Troubling Implications of RLUIPA’s Land Use Provisions*, 29 SEATTLE U. L. REV. 805, 815 (2006) (noting that § 2000cc(b), which includes the equal terms provision, has been “seldom used by plaintiffs”).

14. The Seventh Circuit has addressed the first issue, but not the second. This Note does not discuss the Seventh Circuit cases in detail because the analysis for both issues is largely intertwined.

15. *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253 (3d Cir. 2007).

16. *Id.* at 266.

17. *Id.* at 269.

compelling government interest. In contrast, the Eleventh Circuit held in *Midrash Sephardi, Inc. v. Town of Surfside*<sup>18</sup> that the “natural perimeter” for comparison is the broader category of assemblies or institutions, and that the statute does not require any further showing of similarity.<sup>19</sup> *Midrash Sephardi* further held that unequal treatment is prohibited *unless* the government can show that the land-use regulation is narrowly tailored to achieve a compelling state interest.<sup>20</sup>

Although disagreeing as to which free exercise principles should be part of the equal terms analysis, both the Third Circuit and the Eleventh Circuit added requirements not found in the plain terms of the provision. Courts appear reluctant to adhere to the plain text of the equal terms provision—which lacks both a similarly situated requirement *and* a compelling interest test—because they are wary of interpreting the provision in a manner that would exceed Congress’s power to enforce the Fourteenth Amendment. By grafting additional requirements onto the equal terms provision, courts ensure that the provision is simply a codification of existing free exercise principles rather than a more ambitious attempt to prevent or remedy constitutional violations in a specific context with a demonstrated history of unconstitutional land-use discrimination.

This Note argues that by adding requirements to the equal terms provision that are neither commanded nor invited by the text or structure of the statute, courts have weakened RLUIPA’s protections for religious liberty and overlooked serious concerns. Although a limited form of similarly situated analysis may be necessary for as-applied equal terms challenges to establish unequal treatment, the Third Circuit’s “similarly situated as to the regulatory purpose” requirement seriously distorts Congress’s intent in enacting RLUIPA by immunizing the government’s regulatory aims from judicial scrutiny. Moreover, the Eleventh Circuit’s application of strict scrutiny analysis contradicts settled canons of statutory construction and discredits Congress’s implicit judgment that there is no permissible reason for treating religious assemblies and institutions on less than equal terms than secular assemblies and institutions. Importantly, the lower courts have failed to explain why interpreting the provision according to its plain terms would exceed Congress’s authority to enforce the Fourteenth Amendment. This Note argues

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18. *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214 (11th Cir. 2004).

19. *Id.* at 1231.

20. *Id.* at 1235.

that a textual interpretation of RLUIPA's equal terms provision would not exceed Congress's legislative authority. To the contrary, such an interpretation would fall well within Congress's Section 5 authority as defined in *City of Boerne v. Flores*<sup>21</sup> and would vindicate Congress's intent to remedy a demonstrated record of discriminatory land-use regulation.

Part I briefly recounts the circumstances leading up to Congress's enactment of RLUIPA and then summarizes the impetus for and legislative history surrounding RLUIPA's equal terms provision. Part II describes the circuit split regarding the proper construction of the equal terms provision and discusses the ramifications of the lower courts' decisions. Finally, Part III proposes dispensing with both the similarly situated requirement and compelling interest test in favor of a textual interpretation of the equal terms provision to prevent diluting RLUIPA's religious liberty protections.

## I. HOW RLUIPA BECAME THE LAW

This Part summarizes the tumultuous events leading up to RLUIPA's enactment, discusses the legislative history relevant to RLUIPA's equal terms provision, and then briefly describes the substantive content and structure of RLUIPA's land-use provisions.

### A. *The Path from Sherbert to Boerne*

Congress's enactment of RLUIPA is the latest chapter in a ten-year struggle between Congress and the Court to determine the extent to which religious liberties are protected from government regulation. Until 1990, courts evaluated laws that infringed on religious liberty under the balancing test established by the U.S. Supreme Court in *Sherbert v. Verner*.<sup>22</sup> Under this balancing test, the Free Exercise Clause prevented government from applying a law—even a neutral and generally applicable law—in a manner that substantially burdened an individual's religious liberty unless that law

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

22. *Sherbert v. Verner*, 374 U.S. 398 (1963). In *Sherbert*, the Court held that South Carolina could not constitutionally apply its unemployment benefits statute to deny benefits to an individual who refused employment because it would require her to work on Saturday. *Id.* at 410.

was justified by a compelling state interest.<sup>23</sup> In 1990, *Employment Division v. Smith*<sup>24</sup> rejected that balancing test and held that the Free Exercise Clause does not prevent the government from establishing neutral laws of general applicability that only incidentally affect religious liberty.<sup>25</sup> Under *Smith*, neutral and generally applicable laws must only survive rational basis review even if religious liberties were infringed as a result of the general application of the law.<sup>26</sup>

The congressional response to *Smith* was swift, direct, and overwhelmingly bipartisan.<sup>27</sup> In 1993, Congress enacted the Religious Freedom Restoration Act of 1993 (RFRA)<sup>28</sup> with the express purpose of overturning *Smith* and “restor[ing] the compelling interest test as set forth in *Sherbert v. Verner*.”<sup>29</sup> RFRA applied to all government actions, including actions of state and local governments.<sup>30</sup>

Congress relied on its enforcement powers under Section 5 of the Fourteenth Amendment for the legislative authority to enforce RFRA against the states.<sup>31</sup> The Fourteenth Amendment prohibits

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23. *Id.* at 406–07 (evaluating whether South Carolina had a compelling interest in denying unemployment benefits to an individual who refused a job because of her adherence to a Saturday Sabbath).

24. *Employment Div. v. Smith*, 494 U.S. 872 (1990).

25. *Id.* at 878–79 (“We have never held that an individual’s religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. On the contrary, the record of more than a century of our free exercise jurisprudence contradicts that proposition.”). *Smith* upheld an Oregon law that prohibited consuming peyote. Native Americans alleged that the law infringed on their religious liberty because they used peyote in religious rituals. The Court held that Oregon could dismiss state employees caught using the drug even if the employees’ use occurred during religious rituals because the law did not target religious beliefs but rather was neutral and generally applicable. *Id.* at 890.

26. *Id.* at 885–88.

27. The bill, H.R. 1308, had 170 cosponsors, was passed by a voice vote in the House of Representatives, 139 CONG. REC. 9,687 (1993), and was passed as amended in the Senate by a vote of 97 to 3, 139 CONG. REC. 26,416 (1993).

28. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended at 42 U.S.C. § 2000bb (2006)), *invalidated in part* by *City of Boerne v. Flores*, 521 U.S. 507 (1997). RFRA says that “Government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.” 42 U.S.C. § 2000bb-1(a). Subsection (b) then establishes that a substantial burden on free exercise is only permissible if the burden furthers a compelling interest and is the least restrictive means of doing so. *Id.* § 2000bb-1(b).

29. 42 U.S.C. § 2000bb(b)(1) (explaining that the purpose of the act is to restore *Sherbert*’s compelling interest test and “to guarantee its application in all cases where free exercise of religion is substantially burdened”).

30. *Boerne*, 521 U.S. at 516 (describing RFRA’s application to state and local governments).

31. *Id.*

states from making or enforcing laws that (1) “abridge the privileges or immunities of citizens of the United States;” (2) “deprive [a] person of life, liberty, or property, without due process of law;” or (3) “deny to [a] person within its jurisdiction the equal protection of the laws.”<sup>32</sup> Section 5 of the Amendment gives Congress the power to enforce the Fourteenth Amendment’s provisions “by appropriate legislation.”<sup>33</sup>

Just four years after Congress enacted RFRA, however, the Supreme Court struck down the law as applied to state and local governments<sup>34</sup> on the basis that Congress had exceeded its Section 5 authority to regulate the states.<sup>35</sup> In the landmark decision of *City of Boerne v. Flores*, the Court held that RFRA did not *enforce* existing constitutional rights, but instead attempted to “decree the substance” of the Constitution’s free exercise right.<sup>36</sup> According to the Court, RFRA swept broadly to prohibit constitutionally permissible state and local regulatory prerogatives and lacked a “congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”<sup>37</sup>

The Court repeatedly criticized Congress for failing to demonstrate a factual basis for its conclusion that sweeping preventative or remedial legislation was needed to address widespread religious discrimination. Though Congress held hearings when enacting RFRA, the Court noted that “RFRA’s legislative record lack[ed] examples of modern instances of generally applicable

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32. U.S. CONST. amend. XIV.

33. *Id.* amend. XIV, § 5. In contrast to the Thirteenth Amendment, which gives Congress the authority to regulate private conduct, Congress may only regulate state and local governments pursuant to its Section 5 power. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 292–93 (3d ed. 2006) (explaining that Congress can only regulate state and local governments under its Section 5 power).

34. Subsequent cases have clarified that *Boerne* did not invalidate RFRA as applied to the federal government. *See* *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 126 S. Ct. 1211, 1216 (2006) (applying RFRA to the Federal Controlled Substances Act).

35. *Boerne*, 521 U.S. at 535.

36. *Id.* at 519 (“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.”).

37. *Id.* at 520, 532, 536 (“RFRA cannot be considered remedial, preventive legislation, if those terms are to have any meaning. RFRA is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior. It appears, instead, to attempt a substantive change in constitutional protections.”).

laws passed because of religious bigotry.”<sup>38</sup> The Court contrasted RFRA’s sparse legislative record with the voluminous evidence of discriminatory voting restrictions that supported Congress’s enactment of the Voting Rights Act of 1965.<sup>39</sup> Whereas the Voting Rights Act “prohibit[ed] certain types of laws” that Congress believed to “have a significant likelihood of being unconstitutional,” the Court held that RFRA was an attempt to substantively alter constitutional rights.<sup>40</sup>

After *Boerne*, the message from the Court to Congress was clear: if Congress wishes to protect religious liberty by regulating the states pursuant to its Section 5 power to enact prophylactic legislation to prevent or remedy discrimination, it must ensure that the legislation is a congruent and proportional response to widespread discrimination.<sup>41</sup>

#### *B. Congress Tries Again: The Religious Land Use and Institutionalized Persons Act*

The Court’s decision in *Boerne* sent Congress back to the drawing board. Less than one month after the Court handed down the opinion, the House of Representatives held the first of a series of hearings entitled “Protecting Religious Freedom After *Boerne v. Flores*” to consider what alternative sources of legislative authority were available to Congress.<sup>42</sup> Mindful that the Court had criticized Congress’s failure to establish an adequate record of discrimination to

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38. *Id.* at 530.

39. *See id.* at 525 (noting “evidence in the record reflecting the subsisting and pervasive discriminatory—and therefore unconstitutional—use of literacy tests”).

40. *Id.* at 532.

41. Although the message may have been explicit, the congruent and proportional standard established by the Court was not. Scholars have lamented the ambiguity inherent in the standard that Congress is required to follow. *See, e.g.*, Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 YALE L.J. 441, 458 (2000) (discussing the *Boerne* test’s ambiguity).

42. *See Protecting Religious Freedom After Boerne v. Flores: Hearing Before the H. Comm. on the Judiciary*, 105th Cong. 2 (1997) (statement of Rep. Canady, Chairman, H. Subcomm. on the Constitution) (“Because the freedom to practice one’s religion is a fundamental right, we are meeting this morning in the wake of *Boerne* to consider what sources of authority Congress may utilize to protect this most precious freedom from governmental infringement.”). Two other hearings followed. *Protecting Religious Freedom After Boerne v. Flores (Part II): Hearing Before the H. Comm. on the Judiciary*, 105th Cong. (1998); *Protecting Religious Freedom After Boerne v. Flores (Part III): Hearing Before the H. Comm. on the Judiciary*, 105th Cong. (1998).

support its Section 5 enactment of RFRA,<sup>43</sup> this time Congress made a concerted effort to hold hearings and otherwise gather recent examples of intentional religious discrimination.<sup>44</sup>

1. *Establishing a Record of Discrimination.* The hearings held in response to *Boerne*, and in association with subsequent religious liberties legislation,<sup>45</sup> featured extensive testimony from religious leaders, constitutional law scholars, and practicing attorneys.<sup>46</sup> One of these witnesses, Professor Douglas Laycock, suggested to Congress that Supreme Court and lower court decisions subsequent to *Employment Division v. Smith* continued to apply strict scrutiny to laws involving individualized assessments or targeting religious conduct.<sup>47</sup> Because such laws must survive strict scrutiny analysis, as

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43. See *Boerne*, 521 U.S. at 530–32 (“In contrast to the record which confronted Congress and the Judiciary in the voting rights cases, RFRA’s legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry. The history of persecution in this country detailed in the hearings mentions no episodes occurring in the past 40 years.”).

44. *Issues Relating to Religious Liberty Protection, and Focusing on the Constitutionality of Religious Protection Measures: Hearing Before the S. Comm. on the Judiciary*, 106th Cong. (1999); *Religious Liberty Protection Act of 1999: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 106th Cong. (1999); *Religious Liberty Protection Act of 1998: Hearing Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 105th Cong. (1998) [hereinafter *Religious Liberty Protection Act of 1998 Senate Hearing*]; *Religious Liberty Protection Act of 1998: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 105th Cong. (1998) [hereinafter *Religious Liberty Protection Act of 1998 House Hearing*]; *Protecting Religious Freedom After Boerne v. Flores (Part III)*, *supra* note 42; *Protecting Religious Freedom After Boerne v. Flores (Part II)*, *supra* note 42; *Protecting Religious Freedom After Boerne v. Flores*, *supra* note 42.

45. RLUIPA was “patterned after an earlier, more expansive bill, H.R. 1691.” 146 CONG. REC. 19,123 (2000) (statement of Rep. Canady). Although H.R. 1691 was the subject of “several committee hearings, two markups, and the filing of a Committee Report,” RLUIPA “passed the Senate and the House without committee action and by unanimous consent.” *Id.* Therefore, with the exception of the section-by-section analysis submitted by Rep. Canady after the vote, RLUIPA “is not accompanied by any recorded legislative history.” *Id.* Because RLUIPA was “patterned after” the earlier Religious Liberty Protection Act, the hearings and committee report cast light on Congress’s motivations in passing RLUIPA.

46. See, e.g., Roman P. Storzer & Anthony R. Picarello, Jr., *The Religious Land Use and Institutionalized Persons Act of 2000: A Constitutional Response to Unconstitutional Zoning Practices*, 9 GEO. MASON L. REV. 929, 984–85 (2001) (noting that Congress held nine hearings over a three-year period, and describing the evidence presented to Congress). In one hearing alone, Congress heard from seventeen witnesses including law professors, religious leaders, and practicing attorneys. See *Religious Liberty Protection Act of 1998 House Hearing*, *supra* note 44, at iii (listing witnesses).

47. See *Protecting Religious Freedom After Boerne v. Flores*, *supra* note 42, at 51 (statement of Douglas Laycock, Professor, Associate Dean for Research, University of Texas

opposed to just rational basis review, they are more likely to violate the Free Exercise Clause than neutral laws of general applicability.<sup>48</sup>

RLUIPA's legislative record contains numerous accounts of state and local laws evincing discrimination against religion, as well as laws with exemptions and individual assessments. Local zoning laws were among those most frequently cited.<sup>49</sup> For example, the rabbi of a Los Angeles congregation explained that even though the city "willingly grant[ed] permits and ma[de] accommodations for many other secular uses in the area [such as private clubs and schools]," it prohibited religious uses in the same zone.<sup>50</sup> Professor Laycock testified that the zoning law in Rolling Hills Estates, California, banned churches from commercial zones and only conditionally permitted them in the institutional zone but made "extensive provision for places of secular assembly, including public and private schools, government buildings, public and private clubs, recreational centers, movie theaters, live theaters, clubs for games with spectator seating, and many others."<sup>51</sup>

Although much of the evidence presented to Congress was anecdotal, Congress also considered a study by Brigham Young University scholars, which drew empirical conclusions by evaluating church zoning cases.<sup>52</sup> The study indicated that small religious groups

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Law School) (describing the Supreme Court's decision in *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993)).

48. *Id.* at 52 (noting that many state and local laws may violate the Free Exercise Clause based on *Lukumi's* requirement that laws lacking neutrality and general applicability be evaluated under strict scrutiny).

49. See H.R. REP. NO. 106-219, at 18 (1999) ("Hearings before the Subcommittee on the Constitution in the 105th and 106th Congresses provide a substantial record of evidence indicating a widespread pattern of religious discrimination in land use regulation.").

50. *Protecting Religious Freedom After Boerne v. Flores (Part II)*, *supra* note 42, at 33 (statement of Chaim Rubin, Rabbi, Congregation Etz Chaim in Los Angeles, California).

51. *Religious Liberty Protection Act of 1999*, *supra* note 44, at 110 (statement of Douglas Laycock, Professor, Associate Dean for Research, University of Texas Law School).

52. See H.R. REP. NO. 106-219, at 20 (noting that the Subcommittee on the Constitution "heard testimony regarding a study conducted at Brigham Young University finding that Jews, small Christian denominations, and nondenominational churches are vastly over represented in reported church zoning cases"). But a number of scholars have criticized the study both for being outdated and empirically unsound. See, e.g., Carolina R. Adams, Note, *The Constitutional Validity of the Religious Land Use and Institutionalized Persons Act of 2000: Will RLUIPA's Strict Scrutiny Survive the Supreme Court's Strict Scrutiny?*, 70 FORDHAM L. REV. 2361, 2397-400 (2002) (describing methodological flaws in the Brigham Young study); Ariel Graff, Comment, *Calibrating the Balance of Free Exercise, Religious Establishment, and Land Use Regulation: Is RLUIPA an Unconstitutional Response to an Overstated Problem?*, 53 UCLA L. REV. 485, 498-503 (2005) (criticizing Congress's evidence of discrimination in land use cases); see also Stephen Clowney, Comment, *An Empirical Look at Churches in the Zoning Process*,

comprise a disproportionately high percentage of all zoning litigants, suggesting that nonmainstream religious groups are particularly susceptible to discrimination through zoning laws.<sup>53</sup> On the basis of both the anecdotal and empirical evidence before it, the Committee on the Judiciary found that land-use regulations often discriminate on the basis of religion and that zoning laws are “commonly administered through individualized processes not controlled by neutral and generally applicable rules.”<sup>54</sup> The Committee concluded that legislative action was warranted “as a means of remedying these abuses of the First Amendment right to free exercise.”<sup>55</sup>

2. *Motivation for the Equal Terms Provision.* RLUIPA’s legislative history indicates that Congress enacted the equal terms provision in response to evidence that religious land uses are often treated less favorably than similar secular land uses, both on the face of zoning ordinances and in their application. The committee specifically pointed to zoning codes in the suburbs of Chicago that applied different rules to religious assemblies than to nonreligious assemblies.<sup>56</sup> According to the committee, these codes allowed “uses such as banquet halls, clubs, community centers, funeral parlors, fraternal organizations, health clubs, gyms, places of amusement, recreation centers, lodges, libraries, museums, municipal buildings, meeting halls, and theaters,” while excluding, or at least requiring a special-use permit, for similar religious assemblies.<sup>57</sup>

Thus, when Congress enacted RLUIPA’s equal terms provision, it was responding to subtle religious discrimination evidenced by the unequal treatment of religious assemblies and secular assemblies.<sup>58</sup>

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116 YALE L.J. 859, 868 (2007) (arguing that results from a study of New Haven, Connecticut zoning decisions “lend empirical support to the claim that pervasive discrimination against churches does not exist in the context of land use”).

53. See H.R. REP. NO. 106-219, at 20–21 (summarizing the results of the Brigham Young study).

54. *Id.* at 24.

55. *Id.* at 23.

56. *Id.* at 19.

57. *Id.* at 19–20. The Committee pointed out that “[o]ne explanation suggested for this disparate treatment was that local officials may not want non-tax-generating property taking up space where tax-generating property could locate.” *Id.* at 20.

58. See *id.* at 24 (“Many cities overtly exclude churches, others do so subtly. The motive is not always easily discernible, but the result is a consistent, widespread pattern of political and governmental resistance to a core feature of religious exercise: the ability to assemble for worship.”). The Committee specifically noted that “[c]hurches are often refused permission to

Implicit in the equal terms provision is a judgment that the only possible basis for disparate treatment of religious and secular assemblies is bias against religion. Zoning codes or zoning board decisions that accommodated secular uses while excluding similar religious uses were, in Congress's view, inherently discriminatory and therefore not neutral or generally applicable. The equal terms provision reflects Congress's judgment that this particular type of government action—unequal treatment of religious and secular assemblies—was egregious enough to warrant direct prohibition and “more precise standards than the substantial burden and compelling interest tests” found in the substantial burden provision.<sup>59</sup>

### C. *The Finished Product: The Equal Terms Provision in Context*

RLUIPA contains two substantive sections, one addressing land-use regulations, and the other addressing institutionalized persons.<sup>60</sup>

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meet in buildings designed for meetings, and in which secular meetings have been permitted.”  
*Id.*

59. 146 CONG. REC. 19,123 (2000) (statement of Rep. Canady) (noting, in the section-by-section analysis of RLUIPA, that the equal terms provision “directly address[es] some of the more egregious forms of land use regulation, and provide[s] more precise standards than the substantial burden and compelling interest tests”).

60. RLUIPA's land-use regulations read as follows:

§ 2000cc. Protection of land use as religious exercise

(a) Substantial burdens

(1) General rule

No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution—

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

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

(2) Scope of application

This subsection applies in any case in which—

(A) the substantial burden is imposed in a program or activity that receives Federal financial assistance, even if the burden results from a rule of general applicability;

(B) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, even if the burden results from a rule of general applicability; or

(C) the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved.

(b) Discrimination and exclusion

The equal terms provision is best viewed in context with RLUIPA's other land-use provisions because the text and structure of RLUIPA provide important signals regarding the proper interpretation of each individual provision. RLUIPA's land-use provisions are organized into two main sections: section (a), which contains the substantial burden provision, and section (b), which contains the equal terms provision as its first subsection.

RLUIPA's section (b) includes three separate provisions, the first being the equal terms provision. The section (b) provisions are conceptually distinct from section (a)'s substantial burden provision in that they "rest on claims of religious equality, not privilege."<sup>61</sup> Whereas the substantial burden provision privileges religion by prohibiting government from placing substantial burdens on religious exercise, the equal terms provision reflects an "alternative jurisprudential understanding of religious liberty" by requiring equality of treatment instead of privileged treatment.<sup>62</sup>

In contrast to the substantial burden provision, the text of the equal terms provision does not require that the unequal treatment substantially burden religious exercise to prove a violation. Nor does the equal terms provision contain the jurisdictional limitations of the substantial burden provision. Furthermore, the plain terms of the equal terms provision appear to completely prohibit unequal treatment. Whereas the substantial burden provision explicitly

(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.

(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.

(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.

42 U.S.C. § 2000cc (2006).

61. Robert W. Tuttle, *How Firm a Foundation? Protecting Religious Land Uses After Boerne*, 68 GEO. WASH. L. REV. 861, 864 (2000).

62. *Id.*; see also *id.* at 864–65 (explaining that the discrimination and exclusion provisions of section (b) "represent[] not only alternative grounds for protection but an alternative jurisprudential understanding of religious liberty," and noting that the section's provisions "rest on claims of religious equality, not privilege").

provides that substantial burdens on religion are prohibited *unless* they survive the compelling interest test, the equal terms provision prohibits all unequal treatment without exception.

To summarize, the structure of RLUIPA's land-use provisions suggests operative independence between section (a)—the substantial burden provision—and section (b), which includes the equal terms provision. According to its plain terms, the equal terms provision prohibits any land-use regulation that treats a religious assembly or institution on less than equal terms with a secular assembly or institution. The text of the statute does not indicate that Congress intended to apply the substantial burden requirement, the compelling interest test, or the jurisdictional limits from section (a) to the provisions in section (b). Nevertheless, lower courts interpreting the equal terms provision have been troubled by whether, and to what extent, section (a)'s requirements should be applied to the equal terms provision in section (b). Uncertainty regarding the constitutionality of the equal terms provision has further complicated what, on the surface, appears to be a relatively easy question of statutory interpretation.

## II. THE EQUAL TERMS PROVISION IN THE LOWER COURTS

Lower courts interpreting the equal terms provision have encountered several interpretive dilemmas, but only two are pertinent to this Note.<sup>63</sup> First, courts have considered whether the equal terms provision contains a similarly situated requirement. The Third Circuit held that “a regulation will violate the Equal Terms

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63. Courts have considered two additional interpretive questions that are not central to this Note's argument. The first is whether equal terms plaintiffs are required to show a substantial burden on religious exercise to prove an equal terms violation. The second is whether section (a)'s jurisdictional requirements should apply to the equal terms provision. All courts that have considered the first question have agreed showing a substantial burden is not required. *See, e.g.,* Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch, 510 F.3d 253, 262 (3d Cir. 2007) (“[T]he structure of the statute and the legislative history clearly reveal that the substantial burden requirement does not apply to claims under . . . the Equal Terms provision.”); *Digrugilliers v. Consol. City of Indianapolis*, 506 F.3d 612, 616 (7th Cir. 2007) (holding that proof of a substantial burden is not required for an equal terms violation). The Eleventh Circuit has twice raised the second interpretive question and suggested that the jurisdictional limits do not apply, but it has not found it necessary to resolve the question. *See, e.g.,* *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1229–30 (11th Cir. 2004) (“RLUIPA's text and structure suggest that [the substantial burden provision's] threshold jurisdictional test does not apply to [the] equal terms provision. . . . Because we find that the congregations allege conduct satisfying [the individualized assessment prong], we do not reach the question of whether they are *required* to satisfy this jurisdictional test.”).

provision only if it treats religious assemblies or institutions less well than secular assemblies or institutions that are similarly situated *as to the regulatory purpose*.<sup>64</sup> In contrast, the Seventh and Eleventh Circuits have held that the *statute* establishes the relevant comparison groups: religious assemblies and institutions are to be compared to secular assemblies and institutions to determine whether unequal treatment exists. Except for as-applied equal terms challenges, no further showing of similarity is required.<sup>65</sup>

Second, courts have struggled to determine what level of scrutiny, if any, should apply when unequal treatment exists. The Third Circuit applies a strict liability standard. That is, “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.”<sup>66</sup> The Eleventh Circuit, in contrast, applies strict scrutiny analysis.<sup>67</sup> The following Sections more thoroughly describe the Third and Eleventh Circuits’ approaches and argue that both are unnecessarily narrow and contrary to congressional intent.

#### A. *The Third Circuit’s Approach*

In *Lighthouse Institute for Evangelism, Inc. v. City of Long Branch*, the Third Circuit considered whether Long Branch land-use regulations violated RLUIPA’s equal terms provision. Lighthouse, which described itself as “a Christian church that seeks to minister to the poor and disadvantaged in downtown Long Branch,” purchased property in a district zoned for commercial use.<sup>68</sup> The city zoning ordinance permitted a variety of uses in commercial zones, including assembly halls, restaurants, movie theaters, colleges, and bowling

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64. *Lighthouse*, 510 F.3d at 266.

65. See *Vision Church v. Vill. of Long Grove*, 468 F.3d 975, 1003 (7th Cir. 2006) (noting that an equal terms plaintiff “need not demonstrate disparate treatment between two institutions similarly situated in all relevant respects, as required under equal protection jurisdiction,” but finding no unequal treatment when the church and school being compared were subject to different standards in different years); *Midrash Sephardi*, 366 F.3d at 1230 (“[T]he relevant ‘natural perimeter’ for consideration with respect to RLUIPA’s prohibition is the category of ‘assemblies or institutions.’”).

66. *Lighthouse*, 510 F.3d at 269.

67. See *Midrash Sephardi*, 366 F.3d at 1232 (“[A] violation of [the equal terms] provision, consistent with the analysis employed in *Lukumi*, must undergo strict scrutiny.”).

68. *Lighthouse*, 510 F.3d at 256–57 (quoting the description provided by the Lighthouse Institute for Evangelism).

alleys—but not churches.<sup>69</sup> Lighthouse applied for a zoning permit to use the property as a church, but the city denied the permit because the ordinance did not permit churches in the commercial district.<sup>70</sup> In response, Lighthouse sued the city, alleging constitutional and RLUIPA violations.<sup>71</sup>

While the litigation was pending, Long Branch changed its zoning ordinance by adopting a redevelopment plan, purportedly to revitalize an underdeveloped area of the city.<sup>72</sup> The plan designated the area where Lighthouse's property was located a “‘Regional Entertainment / Commercial’ sector,” and permitted as primary uses theaters, cinemas, dance and art studios, and culinary schools, among others.<sup>73</sup> It permitted bars, clubs, restaurants, and specialty retail stores as secondary uses.<sup>74</sup> The plan prohibited churches, schools, and government buildings from locating in this sector.<sup>75</sup> Lighthouse tried unsuccessfully to obtain a waiver from the zoning board.<sup>76</sup> Lighthouse appealed the board's decision to the city council, but was again denied.<sup>77</sup> The city council reasoned that permitting a storefront church “‘would jeopardize’ the development of the Broadway area, which was envisioned as ‘an entertainment/commercial zone with businesses that are for profit.’”<sup>78</sup>

After the second denial, Lighthouse filed an amended complaint, alleging that both the original ordinance and the new redevelopment plan violated the Free Exercise Clause and RLUIPA.<sup>79</sup> The court held that Long Branch's original zoning ordinance—but not the redevelopment plan—violated the equal terms provision.<sup>80</sup>

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69. *Id.* at 257.

70. *Id.*

71. *Id.*

72. *Id.* at 258.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* at 259.

77. *Id.*

78. *Id.* The council further “found that a church would ‘destroy the ability of the block to be used as a high end entertainment and recreation area’ due to a New Jersey statute which prohibits the issuance of liquor licenses within two hundred feet of a house of worship.” *Id.* (quoting the findings of the Long Branch City Council).

79. *Id.*

80. *Id.* at 272–73. Because the court found a violation of RLUIPA, it did not reach Lighthouse's free exercise claims. *Id.* at 273.

The Third Circuit explained that because Congress intended to codify free exercise jurisprudence, “the relevant analysis under the Equal Terms provision of RLUIPA must take into account the challenged regulations’ objectives.”<sup>81</sup> Accordingly, equal terms plaintiffs in the Third Circuit must prove that a religious institution or assembly was treated on less than equal terms than a nonreligious assembly or institution “that is similarly situated *as to the regulatory purpose*.”<sup>82</sup> Applying this construction of the equal terms provision to the Long Branch ordinance and redevelopment plan, the court found that because Long Branch had advanced no objectives for treating assembly halls differently than churches (and because no objectives were apparent), the ordinance violated the equal terms provision.<sup>83</sup> The redevelopment plan, however, did not violate the equal terms provision because churches are not similarly situated to the other allowed secular assemblies with respect to Long Branch’s goal of revitalizing an underdeveloped area of the town.<sup>84</sup> The court’s finding that churches are not similarly situated relied on a state law that prohibited establishments serving liquor within a certain distance of churches.<sup>85</sup>

Despite the court’s holding that Congress intended to codify free exercise jurisprudence—which, for laws that are not neutral and

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81. *Id.* at 266. The Third Circuit explained that “[u]nder Free Exercise cases, the decision whether a regulation violates a plaintiff’s constitutional rights hinges on a comparison of how it treats entities or behavior that have the same *effect* on its objectives.” *Id.* at 264. To support this assertion, the court pointed to the Supreme Court’s opinion in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). *Lighthouse*, 510 F.3d at 265. In *Lukumi*, the Court found that a series of facially neutral ordinances banning animal sacrifices violated the Free Exercise Clause because, taken together, they impermissibly singled out for prohibition animal sacrifices performed as part of Santeria rituals. *Lukumi*, 508 U.S. at 547. There, the Court examined the effect of the ordinances in light of the government’s stated objectives to determine if the ordinances were actually neutral and of general applicability. *See id.* at 533–46 (evaluating whether the ordinances were neutral and of general applicability).

82. *Lighthouse*, 510 F.3d at 266.

83. *Id.* at 272.

84. *Id.* at 270.

85. *See id.* (“It would be very difficult for Long Branch to create the kind of entertainment area envisaged by the Plan—one full of restaurants, bars, and clubs—if sizeable areas of the Broadway Corridor were not available for the issuance of liquor licenses.”). For the view that cities should not be permitted to use the existence of a state law as the basis for treating churches disparately, see *Digrugilliers v. Consolidated City of Indianapolis*, 506 F.3d 612, 616 (7th Cir. 2007). In *Digrugilliers*, the court explained that “[g]overnment cannot, by granting churches special privileges (the right of a church official to reside in a building in a nonresidential district, or the right of the church to be free from offensive land uses in its vicinity), furnish the premise for excluding churches from otherwise suitable districts.” *Id.*

generally applicable, includes strict scrutiny analysis<sup>86</sup>—the Third Circuit rejected strict scrutiny analysis for violations of the equal terms provision, opting instead for a strict liability standard.<sup>87</sup> The court explained that this deviation from free exercise principles was necessary because the “express language” of the equal terms provision signaled Congress’s intent that the provision “*not* include strict scrutiny.”<sup>88</sup>

Even though Long Branch failed to argue that the equal terms provision would be unconstitutional under the interpretation advanced by Lighthouse (no similarly situated requirement and strict liability), the court nevertheless included a lengthy footnote explaining that its limiting construction avoided concerns about the constitutionality of the provision. The court cautioned that a more expansive interpretation of the provision (such as that urged by the dissent) could exceed Congress’s Section 5 authority.<sup>89</sup>

Judge Jordan dissented from the majority’s view that equal terms plaintiffs must show unequal treatment of religious and secular assemblies or institutions that are similarly situated with respect to the regulatory objectives. He argued that the equal terms provision does not “require[] any greater similarity than is inherent in the broad terminology ‘assembly or institution.’”<sup>90</sup> Importantly, Judge Jordan refuted the majority’s assertion that his interpretation would strip local governments of their ability to implement rational zoning policies. He pointed out that the equal terms provision does not prevent local governments from restricting land use; it simply requires

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86. See *Lukumi*, 508 U.S. at 546 (“A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny. To satisfy the commands of the First Amendment, a law restrictive of religious practice must advance ‘interests of the highest order’ and must be narrowly tailored in pursuit of those interests.” (quoting *McDaniel v. Paty*, 435 U.S. 618, 628 (1978))).

87. *Lighthouse*, 510 F.3d at 269.

88. *Id.*

89. *Id.* at 267 n.11 (“Because we construe the statute to conform to the contours of Free Exercise jurisprudence with respect to [the similarly situated requirement], we need not reach the question whether Congress would have exceeded its powers under *Section 5 of the Fourteenth Amendment* . . . by mandating maximum-possible favorable treatment for religious institutions without regard for legitimate governmental objectives.” (emphasis added)).

90. *Id.* at 283 (Jordan, J., dissenting). Judge Jordan did not decide whether the majority’s application of a strict liability standard was proper under all circumstances. *Id.* at 286 n.34 (“I do not think it necessary to decide in this case whether [the Equal Terms provision] imposes strict liability under all circumstances because, at least with respect to a zoning ordinance that, on its face, treats religious assemblies on less than equal terms, strict scrutiny, no less than strict liability, will result in liability.”).

that restrictions be imposed equally on religious and nonreligious assemblies.<sup>91</sup>

Judge Jordan also rejected the majority's assertion that Congress intended to simply "replicate the analysis that would be undertaken in addressing a Free Exercise claim."<sup>92</sup> Arguing that a similarly situated requirement is unnecessary, he noted that "Congress enacted RLUIPA as *prophylactic* legislation to prevent discrimination against churches in the processes of land use regulation," and that this prophylactic legislation falls within Congress's Section 5 authority.<sup>93</sup>

### *B. The Eleventh Circuit's Approach*

The Eleventh Circuit decided three equal terms cases between 2004 and 2006. *Midrash Sephardi, Inc. v. Town of Surfside* was the first case to interpret the equal terms provision. In *Midrash Sephardi*, a Jewish Orthodox congregation leased property in Surfside's business district.<sup>94</sup> The business district permitted theaters, restaurants, private clubs, lodge halls, health clubs, and several types of schools, but prohibited churches and synagogues.<sup>95</sup> The congregation applied for a special-use permit and a zoning variance, but Surfside denied both.<sup>96</sup> The court held that Surfside's zoning ordinance, by permitting secular assemblies such as private clubs and lodge halls but prohibiting churches and synagogues, violated the equal terms provision.<sup>97</sup>

The *Midrash Sephardi* court rejected a similarly situated requirement on the ground that "the express provisions of RLUIPA . . . require a direct and narrow focus" and establish the "relevant 'perimeter'" for comparison.<sup>98</sup> Thus, the court defined the terms "assembly" and "institution" according to their plain meaning and found that churches, synagogues, private clubs, and lodge halls all fell within the prescribed categories.<sup>99</sup> Because Surfside prohibited

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91. *Id.* at 287.

92. *Id.* at 288 & n.36.

93. *Id.* at 288 n.36 (emphasis added).

94. *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1219–20 (11th Cir. 2004).

95. *Id.*

96. *Id.*

97. *Id.* at 1235.

98. *Id.* at 1230.

99. *Id.* at 1231.

churches and synagogues while permitting private clubs and lodge halls, the city violated the equal terms provision.

As for the appropriate level of scrutiny, the Eleventh Circuit explained<sup>100</sup> that the equal terms provision codified the line of precedent from *Smith* and *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*.<sup>101</sup> Under that line of precedent, the court applies strict scrutiny to laws that are not generally applicable or neutral.<sup>102</sup> Thus, the *Midrash Sephardi* court concluded that laws violating the equal terms provision are subject to strict scrutiny analysis.<sup>103</sup> Because Surfside's zoning ordinance was not narrowly tailored to advance its proffered interest of "retail synergy," the court invalidated the ordinance and found it unnecessary to determine whether "retail synergy" is a compelling interest.<sup>104</sup> Finally, the court upheld the constitutionality of the equal terms provision as interpreted, declaring it a valid exercise of Congress's Section 5 authority to remedy and prevent discriminatory land-use regulations.<sup>105</sup>

The second Eleventh Circuit case, *Konikov v. Orange County*,<sup>106</sup> involved a zoning ordinance that permitted "single-family homes, accessory buildings, home occupations, model homes, and family day care homes" but required a special-use permit for other uses, including churches.<sup>107</sup> The plaintiff regularly held Chabad meetings at his home but alleged that secular uses such as family day care homes received more favorable treatment under the zoning ordinance than his religious use. The court rejected the plaintiff's facial challenge to the zoning ordinance, finding that the code's unequal treatment of family day care homes and churches was narrowly tailored to further the county's compelling interest in "protecting choice in the context of the family."<sup>108</sup> The plaintiff also advanced an as-applied challenge, alleging that the county enforced the code against social groups meeting for religious purposes but not for secular purposes.<sup>109</sup> The court applied a form of similarly situated analysis to determine, in the

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100. *Id.* at 1232.

101. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1992).

102. *Midrash Sephardi*, 366 F.3d at 1232.

103. *Id.* at 1235.

104. *Id.*

105. *Id.* at 1239.

106. *Konikov v. Orange County*, 410 F.3d 1317 (11th Cir. 2005) (per curiam).

107. *Id.* at 1320.

108. *Id.* at 1327.

109. *Id.* at 1329.

context of an as-applied challenge, whether the code was actually being enforced unequally. Noting that “[g]roups that meet with similar frequency [to family gatherings and groups such as Boy Scouts] are in violation of the Code only if the purpose of their assembly is religious,” the court held that the county’s implementation of the code violated the equal terms provision.<sup>110</sup>

In the most recent Eleventh Circuit case, *Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward County*,<sup>111</sup> the court of appeals identified three types of equal terms violations: regulations that facially discriminate; facially neutral regulations that are gerrymandered to burden only religious assemblies and institutions; and truly neutral regulations that are “selectively enforced against religious . . . assemblies or institutions.”<sup>112</sup> Clarifying its previous holding in *Midrash Sephardi*, the court indicated that although there is no similarly situated requirement for the first two types of violations, “[a] plaintiff bringing an as-applied Equal Terms challenge must present evidence that a *similarly situated* nonreligious comparator received differential treatment.”<sup>113</sup>

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These cases from the Third and Eleventh Circuits reveal sharp disagreement over how to properly construct the equal terms provision. Both the Third Circuit, in *Lighthouse*, and the Eleventh Circuit, in *Midrash Sephardi* and subsequent cases, claim interpretations that follow the express terms of the statute and carry out Congress’s intent.<sup>114</sup> But to quell unnecessary doubts about the provision’s unconstitutionality, the courts ignored the express terms of the statute (or followed them only when convenient),

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110. *Id.* The court used strict scrutiny analysis but found that “Orange County ha[d] not put forth a compelling justification for this lesser treatment.” *Id.*

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

112. *Id.* at 1308.

113. *Id.* at 1311 (“If a plaintiff offers no similarly situated comparator, then there can be no cognizable evidence of less than equal treatment, and the plaintiff has failed to meet its initial burden of proof.”).

114. *See Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 268 n.13 (3d Cir. 2007) (“We surmise that the *Midrash-Sephardi* court required a strict scrutiny examination in order that its holding conform to existing Free Exercise case law . . . . However, we believe that, unlike the *Midrash-Sephardi* court, we have come to a constitutionally acceptable interpretation of [the equal terms provision], following its express terms, without incorporating additional terms into it.”).

compromising Congress's intent. Part III argues that both the *Lighthouse* and *Midrash Sephardi* approaches are less true to Congress's intent than a textual interpretation of the equal terms provision that dispenses with both a similarly situated requirement and a compelling interest test.

### III. THE CASE FOR A TEXTUAL INTERPRETATION OF THE EQUAL TERMS PROVISION

Only the Third and Eleventh Circuits have explored the contours of the equal terms provision at any depth, but neither has reached a satisfactory interpretation. Given that other circuits may soon have the opportunity to interpret the equal terms provision for the first time, this Note argues that courts should interpret the statute according to its express terms, which do not include a similarly situated requirement or a compelling interest test.

The Third and Eleventh Circuits' interpretations appear motivated by concerns that a textual interpretation of the equal terms provision would exceed Congress's Section 5 power<sup>115</sup> to enforce the Fourteenth Amendment.<sup>116</sup> The *Midrash Sephardi* court upheld the constitutionality of its interpretation of the equal terms provision, reasoning that "[b]ecause [it] codifies existing *Free Exercise*, *Establishment Clause*, and *Equal Protection* rights against states and municipalities that treat religious assemblies or institutions 'on less than equal terms' than secular institutions, [the provision] is an appropriate and constitutional use of Congress's authority under § 5."<sup>117</sup> The *Lighthouse* court similarly tailored its interpretation to

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115. State and local governments have also argued that RLUIPA violates the Establishment Clause. See, e.g., *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1240 (11th Cir. 2004) (evaluating "Surfside's contention that RLUIPA impermissibly elevates religion in a manner contravening the Establishment Clause" and upholding RLUIPA's constitutionality). Although the Supreme Court has not considered whether RLUIPA's land-use provisions are permissible under the Establishment Clause, it unanimously upheld RLUIPA's prisoner provisions against an Establishment Clause challenge. *Cutter v. Wilkinson*, 544 U.S. 709, 724–25 (2005). The Establishment Clause argument is beyond this Note's scope.

116. Patricia E. Salkin & Amy Lavine, *The Genesis of RLUIPA and Federalism: Evaluating the Creation of a Federal Statutory Right and Its Impact on Local Government*, 40 URB. LAW. 195, 216 (2008) (noting that courts have had problems "interpreting RLUIPA because [they] have had to choose whether to abide by Free Exercise jurisprudence, or to follow Congress' likely intent to expand religious protection"). Professor Salkin and Ms. Lavine also note that "[t]he most obvious challenge to this argument . . . is that RLUIPA was not intended to, and has not in practice, replaced constitutional free exercise standards; rather, numerous RLUIPA claims are brought in tandem with free exercise claims." *Id.* at 217.

117. *Midrash Sephardi*, 366 F.3d at 1239 (emphasis added).

existing Free Exercise jurisprudence because it feared that a more expansive interpretation would contravene Section 5.<sup>118</sup>

As a longstanding canon of statutory construction, courts may give a statute a narrowing interpretation to preserve its constitutionality.<sup>119</sup> Under the modern incantation of the avoidance canon, a court can narrowly construe a statute if the broader reading “*might* be unconstitutional”—the court need not decide that the reading “*would* be unconstitutional.”<sup>120</sup> But this canon is subject to an important limitation: a court should not construe a statute to avoid constitutional problems if the narrower interpretation “is plainly contrary to the intent of Congress.”<sup>121</sup> Here, the lower courts’ use of the avoidance canon to reach strained interpretations of the equal terms provision is inappropriate for three reasons. First, the lower courts’ concerns that a textual interpretation of the equal terms provision would exceed Congress’s Section 5 authority—although not surprising in light of the Court’s invalidation of RFRA in *Boerne*—are misplaced. Second, the lower courts’ interpretations contradict the express terms of RLUIPA, which demonstrate Congress’s intent to expand protections for religious liberty. Third, the lower courts’ approaches weaken RLUIPA’s protections for religious liberty in significant and undesirable ways.

#### A. *Constitutionality of the Textual Approach*

1. *The Nature of Congress’s Prophylactic Power.* By invalidating RFRA in *Boerne*, the Court signaled a strong shift in its approach to

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118. *Lighthouse*, 510 F.3d at 267 n.11 (noting that it “need not reach the question whether Congress would have exceeded its powers under Section 5 . . . by mandating maximum-possible favorable treatment for religious institutions without regard for legitimate governmental objectives”).

119. See Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945, 1949 (1997) (describing two forms of constitutional avoidance and explaining that the second—what he terms “classical” or “modern” avoidance—means that Congress interprets a statute to avoid an interpretation that could be unconstitutional). Professor Vermeule distinguishes classical from modern avoidance in that classical avoidance “requires the court to determine that one plausible interpretation of the statute *would* be unconstitutional, while the latter requires only a determination that one plausible reading *might* be unconstitutional.” *Id.* The Court articulated this canon in *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 575 (1988) (“[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.” (citing *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 499–501, 504 (1979))).

120. Vermeule, *supra* note 119, at 1949.

121. *Edward J. DeBartolo Corp.*, 485 U.S. at 575.

Congress's Section 5 power.<sup>122</sup> Prior to *Boerne*, *Katzenbach v. Morgan*<sup>123</sup> best articulated the dominant view: "By including § 5 the draftsmen sought to grant to Congress, by a specific provision applicable to the Fourteenth Amendment, the same broad powers expressed in the Necessary and Proper Clause."<sup>124</sup> *Boerne* rejected this view in favor of a more limited Section 5 power, explaining that Congress may *enforce* constitutional rights, but lacks the authority to define their meaning.<sup>125</sup> Yet—perhaps to avoid another institutional clash between the courts and Congress—lower courts seem to have forgotten that *Boerne* also reaffirmed Congress's power to enact prophylactic legislation to "deter[] or remed[y] constitutional violations."<sup>126</sup>

*Boerne* and its progeny show that when Congress legislates pursuant to its Section 5 power to prevent or remedy a history of constitutional violations, it can do more than merely codify a constitutional test.<sup>127</sup> Congress can prohibit "a broader swath of conduct" than the Constitution itself prohibits.<sup>128</sup> In *Boerne*, the Court explained that "[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power *even if* in the process it prohibits conduct which is *not itself unconstitutional* and intrudes into 'legislative spheres of autonomy previously reserved to the States.'"<sup>129</sup> To illustrate, the Court pointed to congressional bans on otherwise facially constitutional literacy tests.<sup>130</sup> The Court had upheld the literacy tests' constitutionality in

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122. See CHEMERINSKY, *supra* note 33, at 293–300 (discussing two alternative views of Congress's Section 5 power—the "nationalist" perspective and the "federalist" perspective—and noting that in *Boerne* "Congress expressly rejected [the nationalist] view and shifted to the federalist perspective").

123. *Katzenbach v. Morgan*, 384 U.S. 641, 650 (1966).

124. *Id.*

125. *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997); *see also supra* Part I.A.

126. *Boerne*, 521 U.S. at 518.

127. See *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 737–38 (2003) (noting that Congress, in exercising its Section 5 power, can do more than simply parrot the language of the Fourteenth Amendment, and can even prohibit a "somewhat broader swath of conduct" that is not prohibited by the text of the Fourteenth Amendment (quoting *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 81 (2000))); *Boerne*, 521 U.S. at 532 ("Preventive measures prohibiting certain types of laws may be appropriate when there is reason to believe that many of the laws affected by the congressional enactment have a significant likelihood of being unconstitutional.").

128. *Hibbs*, 538 U.S. at 737 (quoting *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 81 (2000)).

129. *Boerne*, 521 U.S. at 518 (emphasis added) (quoting *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976)).

130. *Id.*

*Lassiter v. Northampton County Board of Elections*<sup>131</sup> just seven years before holding that Congress could ban these literacy tests pursuant to its Section 5 power.<sup>132</sup> Other examples abound.<sup>133</sup> Title VII (which applies to state and local governments pursuant to Congress's enforcement power) prohibits practices having a "disparate impact on women or minorities," yet "[t]he Constitution forbids only deliberate or overt discrimination in employment."<sup>134</sup> And the Pregnancy Discrimination Act "redefined sex discrimination to include pregnancy discrimination" even though the Court has held that pregnancy discrimination does not violate the Constitution.<sup>135</sup>

The Court's post-*Boerne* Section 5 cases provide additional support for Congress's prophylactic authority, particularly when the right sought to be protected warrants heightened scrutiny. In *Nevada Department of Human Resources v. Hibbs*,<sup>136</sup> for example, the Court held that "the States' record of unconstitutional participation in, and fostering of, gender-based discrimination in the administration of leave benefits is weighty enough to justify the enactment of prophylactic § 5 legislation."<sup>137</sup> *Hibbs* involved a provision of the Family and Medical Leave Act that authorized suits against employers—including government employers—that interfered with rights granted by the act.<sup>138</sup> Upholding the legislation, the Court emphasized an important distinction between *Hibbs* and other cases that invalidated similar provisions authorizing suits against the state: here, Congress "directed its attention to [a type of discrimination that] triggers a heightened level of scrutiny."<sup>139</sup> The Court explained

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131. See *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45, 53 (1959) ("We cannot say . . . that [literacy tests are] not an allowable [state policy] measured by constitutional standards.").

132. *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966).

133. See Douglas Laycock, *Conceptual Gulfs in City of Boerne v. Flores*, 39 WM. & MARY L. REV. 743, 747–59 (1998) ("From 1866 to 1991, Congress repeatedly enacted enforcement legislation that went beyond judicial interpretations of the constitutional right being enforced. Most of these Acts were upheld or accepted into the fabric of the law without serious challenge.").

134. *Id.* at 752.

135. *Id.* at 753.

136. *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003).

137. *Id.* at 735.

138. *Id.* at 724.

139. *Id.* at 736; see also *id.* ("Because the standard for demonstrating the constitutionality of a gender-based classification is more difficult to meet than our rational basis test . . . it was easier for Congress to show a pattern of state constitutional violations." (citation omitted)). Other post-*Boerne* cases had found similar provisions authorizing suits against the state to be

that when the type of discrimination sought to be remedied warrants heightened scrutiny, “it [is] easier for Congress to show a pattern of state constitutional violations.”<sup>140</sup>

In interpreting RLUIPA's equal terms provision, the lower courts are ignoring Congress's intent as expressed in the plain terms and structure of the statute and reaching unnecessarily strained readings. Fretting that the equal terms provision might exceed Congress's Section 5 power if it is interpreted according to its plain terms, the *Lighthouse* and *Midrash Sephardi* courts have taken matters into their own hands, rushing in to save the constitutionality of a provision that is *already* a valid exercise of Congress's Section 5 authority. In the process, the lower courts are making too much of *Boerne*'s admonition that Congress's Section 5 powers are not unlimited, and not enough of *Boerne*'s reaffirmation that Congress can—within its Section 5 power—enact prophylactic legislation provided the legislation is a congruent and proportional response to a pattern of discrimination.

2. *Constitutionality of the Equal Terms Provision.* A textual interpretation of the equal terms provision is constitutional under *Boerne* and its progeny for two reasons. First, Congress demonstrated a pattern of religious discrimination that violated the Fourteenth Amendment, which provides the basis for enacting prophylactic legislation. Second, the equal terms provision, which strictly prohibits land-use regulations that treat religious and secular assemblies or institutions unequally, is a congruent and proportional response to this pattern of discrimination, satisfying *Boerne*.

Congress enacted the equal terms provision in direct response to reports of discriminatory land-use regulations that would violate the

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beyond the scope of Congress's Section 5 power, but those cases involved age and disability classifications. See *Bd. of Trs. v. Garrett*, 531 U.S. 356, 374 (2001) (invalidating a provision of the Americans with Disabilities Act (which requires employers to make reasonable accommodations for disabled employees) that abrogated state sovereign immunity because Congress failed to establish “a pattern of discrimination by the States” and essentially “rewr[o]te the Fourteenth Amendment law laid down by this Court in *Cleburne*”); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 91 (2000) (“In light of the indiscriminate scope of the Act's substantive requirements, and the lack of evidence of widespread and unconstitutional age discrimination by the States, we hold that the [The Age Discrimination in Employment Act of 1967's abrogation of State sovereign immunity] is not a valid exercise of Congress' [Section 5 power].”).

140. *Hibbs*, 538 U.S. at 736.

Fourteenth Amendment.<sup>141</sup> Numerous religious leaders and constitutional law scholars testified regarding specific instances of religious discrimination, including land-use regulations that categorically prohibited churches while permitting secular assemblies such as theaters and government buildings.<sup>142</sup> Land-use regulations that make classifications on the basis of religion, such as regulations categorically prohibiting churches and other places of worship, are subject to strict scrutiny when analyzed under the Equal Protection Clause.<sup>143</sup> Moreover, *Lukumi* established that laws burdening religion that are not neutral or generally applicable are subject to strict scrutiny.<sup>144</sup> Many of the land-use laws cited in RLUIPA hearings lacked general applicability and neutrality because they prohibited religious uses but not similar secular uses, or provided exceptions for secular uses without giving exceptions for religious uses.<sup>145</sup> Based on this evidence, Congress determined that it was appropriate to enact a prophylactic measure to prohibit discriminatory land-use regulations. Admittedly, a textual interpretation of the equal terms provision might prohibit some government regulations that would be constitutional if analyzed under free exercise or equal protection jurisprudence. For example, a court might find that a regulation excluding all tax-exempt assemblies and institutions from its downtown district is neutral and generally applicable and therefore only subject to rational basis review. In this case, a city's interest in economic development would survive rational basis review. Additionally, a textual interpretation of the equal terms provision would prohibit the zoning ordinance at issue in *Konikov v. Orange County*, provided a court classified family day care homes as an

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141. See *supra* Part I.B.

142. See *supra* notes 44–51 and accompanying text.

143. See *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985) (explaining that legislative classifications based on race, alienage, national origin, or other “personal rights protected by the Constitution” are subject to strict scrutiny). Some land-use regulations may involve more than one suspect classification. For example, land-use regulations that seek to exclude churches with a membership consisting largely of racial minorities could be based on both religious discrimination and racial discrimination. See *Religious Liberty Protection Act of 1998 House Hearing*, *supra* note 44, at 91–92 (statement of John Mauck, Attorney, Mauck, Bellande & Cheely, Chicago, Illinois) (describing how a Chicago zoning board denied a zoning application for a mostly African-American congregation to use a funeral parlor in a predominantly Caucasian part of town as a church).

144. *Cleburne*, 473 U.S. at 440.

145. See, e.g., H.R. REP. NO. 106-219, at 18–24 (1999) (describing these laws).

“assembly” or “institution” for purposes of the statute, even though the Eleventh Circuit found a compelling state interest.<sup>146</sup>

That the equal terms provision prohibits some constitutional behavior, however, does not mean that it exceeds Congress’s Section 5 authority. As *Hibbs* demonstrates, Congress can enact prophylactic legislation to prevent or remedy constitutional violations, provided the response is congruent and proportional to the harm. Here, Congress determined on the basis of extensive testimony that land-use ordinances frequently discriminate against religious assemblies and institutions by treating them less favorably than similar secular assemblies and institutions.<sup>147</sup> The examples presented to Congress were not confined to a particular area of the country.<sup>148</sup> Nor was it likely that existing constitutional remedies would adequately address the harm due to the difficulty of proving intentional discrimination.<sup>149</sup> Thus, Congress determined that a problem of this scope warranted a specific prohibition of land-use regulations that treat religious assemblies and institutions less favorably than secular assemblies and institutions. Given the record of discrimination Congress established through hearings leading up to RLUIPA’s enactment, this direct prohibition of a specific type of discriminatory land-use regulation is a congruent and proportional response under *Boerne* and its progeny.

### B. Congressional Intent

The lower courts’ interpretations of the equal terms provision—in addition to being unnecessary to preserve the constitutionality of the statute—are inconsistent with the avoidance canon because they contravene Congress’s expressed intent. RLUIPA states that its terms “shall be construed in favor of a *broad protection* of religious exercise, to the maximum extent permitted by the terms of [the Act] and the Constitution.”<sup>150</sup> The express language of RLUIPA and its legislative history support an interpretation that dispenses with a similarly situated requirement and a compelling interest test in favor of broader protection. The express language of the equal terms

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146. See *supra* Part II.B.

147. See *supra* Part I.B.

148. See H.R. REP. NO. 106-219, at 18 (“The frustration of [religious exercise] is not limited to certain religions or to certain areas of land. Churches, large and small, are unwelcome in suburban residential neighborhoods and in commercial districts alike.”).

149. See 146 CONG. REC. 16,698–99 (2000) (joint statement of Sen. Hatch and Sen. Kennedy) (noting that it can be “difficult to prove discrimination in any individual case”).

150. 42 U.S.C. § 2000cc-3(g) (2006) (emphasis added).

provision indicates that Congress was concerned with the differential treatment of *religious* assemblies or institutions compared to *secular* assemblies or institutions.<sup>151</sup> Congress defined the appropriate comparison group; therefore, courts need not look any further to determine if unequal treatment exists. What troubled Congress was that “[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.”<sup>152</sup> The proper comparison is between *religious* and *secular* assemblies and institutions, regardless of the government’s regulatory aims.

RLUIPA’s text and legislative history also indicate that Congress intended to strictly prohibit unequal treatment between secular and religious assemblies and institutions. The substantial burden provision explicitly provides that land-use regulations that substantially burden religious exercise should be evaluated under a compelling interest test. The equal terms provision, appearing in the very next section of RLUIPA, lacks any similar requirement. Moreover, the act’s sponsors indicated that the equal terms provision, as well as the other section (b) provisions, “*specifically prohibits* various forms of religious discrimination and exclusion.”<sup>153</sup> Representative Canady explained that the section (b) provisions “*directly address* some of the more egregious forms of land use regulation, and provide *more precise standards* than the substantial burden and compelling interest tests.”<sup>154</sup> In sum, the plain terms, structure, and legislative history of the equal terms provision argue against both a similarly situated requirement and application of strict scrutiny.

### C. *Other Approaches Weaken RLUIPA’s Protections for Religious Liberty*

The lower courts—in an attempt to quell misplaced concerns about the equal terms provision’s constitutionality—have reached interpretations that distort Congress’s intent and weaken RLUIPA’s

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151. See *id.* § 2000cc-3(b) (“Nothing in this chapter shall create any basis for restricting or burdening *religious* exercise or for claims against a *religious* organization[,] including any religiously affiliated school or university . . .” (emphasis added)).

152. 146 CONG. REC. 16,698 (joint statement of Sen. Hatch and Sen. Kennedy).

153. *Id.* (emphasis added).

154. 146 CONG. REC. 19,123 (2000) (statement of Rep. Canady) (emphasis added).

protections for religious liberty.<sup>155</sup> Though both interpretations are inconsistent with the express language of RLUIPA, the *Lighthouse* approach poses the most serious problems for religious liberty.

By requiring plaintiffs to show that a religious assembly or institution was treated less favorably than a secular assembly or institution that is similarly situated with respect to the regulatory purpose, the Third Circuit weakened RLUIPA's protections for religious liberty in two ways. First, it made it more difficult for religious groups to prove an equal terms violation. Second, it removed the government's regulatory objectives from judicial scrutiny.

Congress's decision to codify the appropriate comparison groups under the equal terms provision reflects its judgment that land-use regulations that differentiate between secular and religious assemblies or institutions are inherently likely to discriminate on the basis of religion. By statutorily prohibiting this type of unequal treatment, Congress removed a large stumbling block that often hinders religious groups seeking to challenge these types of laws. If a religious group challenged a land-use regulation of this type under traditional equal protection jurisprudence, it would have to show not only differential treatment, but also that the differential treatment was *because of* religion.<sup>156</sup> Discriminatory intent can be extremely difficult to prove,<sup>157</sup> particularly in the land-use context, in which zoning officials can hide behind vague and subjective justifications for zoning decisions to mask discriminatory motives.<sup>158</sup> The equal terms provision allows religious groups to block land-use laws that result in differential treatment of religious assemblies as compared to secular assemblies without the burden of proving discriminatory intent.

Unfortunately, the *Lighthouse* approach makes it more difficult for religious groups to prove an equal terms violation than Congress intended. The court's novel test, requiring plaintiffs to show that they

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155. See Salkin & Lavine, *supra* note 116, at 219 (noting that lower courts' "insistence that RLUIPA is a codification of existing constitutional precedent . . . has proven to be troubling, as courts interpreting RLUIPA's poorly defined terms have vacillated between applying precedent or applying the statute in the manner conforming to Congress' perceived intentions").

156. See, e.g., *Washington v. Davis*, 426 U.S. 229, 248 (1976) (explaining that there is no equal protection violation without a showing of discriminatory intent).

157. See Tuttle, *supra* note 61, at 921 ("[I]ntentional discrimination is difficult to prove . . .").

158. 146 CONG. REC. 16,698 (joint statement of Sen. Hatch and Sen. Kennedy) ("[O]ften, discrimination lurks behind such vague and universally applicable reasons as traffic, aesthetics, or not consistent with the city's land use plan." (internal quotation marks omitted)).

were treated on less than equal terms with a secular assembly or institution that is similarly situated *with respect to the government's regulatory purpose*, allows the government to escape liability simply by characterizing its regulatory objective so as to preclude a finding of unequal treatment. For example, by defining its regulatory objective as promoting nightlife, a city could justify treating churches differently than all secular assemblies and institutions because of laws prohibiting alcohol sales within a certain distance of houses of worship. Similarly, a city could presumably grant affirmative protections to churches and then use those privileges as a basis for treating churches differently.<sup>159</sup> Given that *Lighthouse* was decided in 2007, very few cases have applied this interpretation of the equal terms provision. Thus, it is unclear whether courts will permit plaintiffs to show that a city's proffered regulatory objective is mere pretext. Even if courts do permit a showing of pretext, however, such a showing would essentially require plaintiffs to prove intentional discrimination. But Congress, recognizing the difficulty of proving intentional discrimination in individual cases, sought to eliminate this requirement by enacting the equal terms provision. Congress had a good reason to do so. Numerous commentators have acknowledged the practical barriers to proving intentional discrimination in a given case.<sup>160</sup> Due to the increased difficulty of proving an equal terms violation, the *Lighthouse* approach will permit zoning boards to get away with religious discrimination provided they can come up with some permissible regulatory objective that explains their differential treatment of religious organizations.

The Third Circuit's similarly situated requirement also ignores evidence that Congress was specifically concerned not about land-use regulations that distinguished between for-profit and nonprofit assemblies and institutions, but rather about regulations that distinguished between religious and secular assemblies and institutions. Congress was well aware when it enacted the equal terms provision that local officials often justified disparate treatment by explaining that "[they] may not want non-tax-generating property

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159. See *Digrugilliers v. Consol. City of Indianapolis*, 506 F.3d 612, 616 (7th Cir. 2007) ("Government cannot, by granting churches special privileges . . . furnish the premise for excluding churches from otherwise suitable districts.").

160. See, e.g., Douglas Laycock, *State RFRA's and Land Use Regulation*, 32 U.C. DAVIS L. REV. 755, 781 (1999) ("Supreme Court precedent is skeptical of attempts to prove bad motive, even when Supreme Court doctrine requires the attempt.").

taking up space where tax-generating property could locate.”<sup>161</sup> Yet, the *Lighthouse* approach would permit precisely that result. Houses of worship and tax-generating assemblies such as movie theaters would not be similarly situated as to the regulatory purpose of generating additional tax revenue. Therefore, a city could exclude all tax-exempt assemblies and institutions from a district while permitting tax-generating assemblies and institutions without violating the equal terms provision.

A related, but distinct, problem of the *Lighthouse* approach is that it removes a government's regulatory objectives from judicial scrutiny. Because the government's regulatory objective is wrapped into the Third Circuit's similarly situated analysis, there is no further judicial scrutiny once a court finds that no unequal treatment existed. Presumably, then, a city could proffer virtually any interest to explain its differential treatment, even if that interest would never survive strict scrutiny by the courts. To illustrate, a city could claim that its regulatory objective is to increase its downtown tax base. Under the *Lighthouse* similarly situated requirement, it would be permissible for a city to exclude religious assemblies from the downtown district as long as other nonprofit assemblies were excluded as well. The regulatory objective—improving the downtown tax base—never receives scrutiny. Although a city's general interest in zoning has often been recognized as a compelling interest, more specific objectives, such as economic development, have not.<sup>162</sup>

The *Midrash Sephardi* approach is similarly flawed. Like the Third Circuit, the Eleventh Circuit makes an equal terms violation more difficult to prove by providing an escape hatch to governments capable of showing that their unequal treatment of religious assemblies is the least restrictive means of furthering a compelling government interest. If courts were to apply a rigorous form of strict scrutiny—the kind that is “strict in theory, but fatal in fact”<sup>163</sup>—zoning boards would rarely be able to demonstrate that the regulation at issue is narrowly tailored to achieve a compelling state interest. In that case, the Eleventh Circuit's approach would not be especially problematic. To its credit, the *Midrash Sephardi* approach has the

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161. H.R. REP. NO. 106-219, at 20 (1999).

162. Salkin & Lavine, *supra* note 116, at 236–38 (“Some courts have held that the general interest in enacting and enforcing a comprehensive system of zoning and land use regulation is compelling, but others have not.” (footnote omitted)).

163. *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995)).

advantage of permitting a government that has a truly compelling reason for treating secular and religious uses unequally to escape liability. In this sense, the *Midrash Sephardi* approach may address a common criticism of RLUIPA—that it impermissibly interferes with local regulatory prerogatives.<sup>164</sup> Given this relative advantage of the *Midrash Sephardi* approach over the *Lighthouse* approach, if courts feel compelled to give the equal terms provision a narrowing construction because of concerns about constitutionality, imposing a strict scrutiny test is at least marginally better than using the Third Circuit’s similarly situated requirement. Importantly, though, numerous scholars have recognized that when courts applied strict scrutiny to burdens on religious exercise before *Employment Division v. Smith*, it was often “strict in theory, but ever-so-gentle in fact.”<sup>165</sup> Thus, there is a risk that courts will apply a less-than-rigorous form of strict scrutiny in these religious land-use cases, consequently weakening the protections intended by Congress.

Moreover, the *Midrash Sephardi* approach seems to discredit Congress’s implicit judgment that no permissible reason justifies treating religious assemblies and institutions less favorably than secular assemblies and institutions. The equal terms provision homes in on a very narrow category of land-use regulations that, in Congress’s determination, is egregious enough to warrant direct prohibition. Even when the Court struck down RFRA as exceeding Congress’s Section 5 authority, it emphasized that Congress’s determinations as to “what legislation is needed to secure the guarantees of the Fourteenth Amendment” are “entitled to much deference.”<sup>166</sup> Adding strict scrutiny analysis that is not invited or even suggested by the text or structure of the statute narrows the scope of prohibited conduct in contravention of Congress’s intent.

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164. See, e.g., Marci A. Hamilton, *Federalism and the Public Good: The True Story Behind the Religious Land Use and Institutionalized Persons Act*, 78 IND. L.J. 311, 331 (2003) (noting that there was “significant and vehement opposition to RLUIPA, especially from local and state government organizations”).

165. Ira C. Lupu, *The Trouble with Accommodation*, 60 GEO. WASH. L. REV. 743, 756 (1992) (noting that the government nearly always prevailed in these cases); see also Note, *Religious Land Use in the Federal Courts Under RLUIPA*, 120 HARV. L. REV. 2178, 2182, 2188 (2007) (noting that prior to RLUIPA’s enactment, “religious land use plaintiffs were almost uniformly unsuccessful” under a compelling interest test, but arguing that plaintiffs have been more successful under RLUIPA’s substantial burden test).

166. *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (quoting *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966)).

## CONCLUSION

The equal terms provision does not prohibit Goldsboro, North Carolina, from taking steps to revitalize its downtown district and build its tax base. It simply requires Goldsboro to achieve this goal in a manner that treats secular and religious assemblies and institutions equally. If Goldsboro wishes to exclude churches from its downtown district, it must also exclude secular assemblies and institutions. If Goldsboro wishes to impose requirements or limitations on land uses in the downtown district, it must apply them equally to all assemblies and institutions—secular and religious. The Equal Protection Clause requires that the “democratic majority . . . accept for themselves and their loved ones what they impose on you and me.”<sup>167</sup> This is exactly what Congress, exercising its legislative authority to enforce the Fourteenth Amendment, intended when it enacted the equal terms provision.

Requiring that religious land uses be treated at least as well as similar land uses is one of the most basic guarantees of religious freedom. By codifying this guarantee in RLUIPA's equal terms provision, and making it easier for religious groups to prove unequal treatment, Congress responded in a measured fashion to extensive evidence of religious discrimination. The lower courts' approaches to interpreting the equal terms provision seriously distort Congress's intent and weaken RLUIPA's protections for religious liberty as a consequence. Courts should avoid the pitfalls of these interpretations by adopting a textual interpretation of RLUIPA's equal terms provision.

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167. *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 300 (1990) (Scalia, J., concurring).