

ZONING RELIGION OUT OF THE PUBLIC SQUARE: CONSTITUTIONAL AVOIDANCE AND CONFLICTING INTERPRETATIONS OF RLUIPA'S EQUAL TERMS PROVISION

Brian K. Mosley*

The Religious Land Use and Institutionalized Person Act ("RLUIPA") provides statutory relief where the constitutional right to free exercise of religion is impinged by restrictive zoning ordinances. This Note examines the "Equal Terms" provision of RLUIPA, which forbids governments from treating "a religious assembly or institution on less than equal terms with a nonreligious assembly or institution." Seven circuit courts have addressed the meaning of the Equal Terms provision. While those cases can be described as falling into two approaches—the strict scrutiny requirement and the similarly situated requirement—courts are further split within those approaches, and some courts have avoided endorsing either. This Note argues that this is not because of any ambiguity in the text itself. The different interpretations arise from the limitations that the circuit courts have read into the statute on the basis of constitutional avoidance. The Note then proposes a straightforward, broad reading of the statute—wherever governments allow secular assemblies and institutions, they must also permit religious assemblies and institutions on no less than equal terms. This reading, without any caveats, would be more consistent with the text, history, and purpose of the Act. It would also provide a rule that is easier to administer without violating existing constitutional principles.

* J.D. Candidate, University of Arizona James E. Rogers College of Law, 2013. I would like to thank Professors Toni M. Massaro and David Marcus, as well as the editors of the *Arizona Law Review*, including Stuart Kottle, Victor Nilsson, Cindy Schmidt, and Julie Wilson-McNerney. I would also like to thank my family for their encouragement and Shanna Mosley for supporting me through law school and life.

TABLE OF CONTENTS

INTRODUCTION	466
I. HISTORICAL, STATUTORY, AND JURISPRUDENTIAL CONTEXT	469
A. The Road to RLUIPA: From <i>Reynolds</i> Through RFRA	469
B. RLUIPA: Its Enactment and Provisions	472
C. The Supreme Court's RLUIPA Jurisprudence	475
II. INTERPRETING RLUIPA'S EQUAL TERMS PROVISION.....	476
A. The Strict Scrutiny Requirement (The Eleventh Circuit).....	478
B. The Dissimilar Formulations of the Similarly Situated Requirement.....	480
1. Regulatory Purpose (The Third Circuit).....	480
2. Regulatory Criteria (The Seventh Circuit).....	482
3. Either Regulatory Purpose or Criteria (The Ninth Circuit)	484
4. The Latest Formulation (The Fifth Circuit).....	486
C. The Uncommitted Circuits	487
III. SIMPLIFYING AND STRENGTHENING THE PROTECTIONS OF THE EQUAL TERMS PROVISION	488
A. The Conflicts and Deficiencies of the Current Interpretations	489
B. Responding to the Concerns	491
1. Constitutional Avoidance	491
2. Practical Concerns	493
C. The Broader Interpretation Called for by the Text, History, and Purpose ..	494
CONCLUSION	497

INTRODUCTION

Houses of worship are the literal and symbolic centers for the religious organizations that build them and the community of adherents that use them. Unsurprisingly, these buildings frequently function as proxies in attacks on the religious, ethnic, or racial groups that they serve. In more serious disputes, such as the Civil Rights movement in the United States or the ongoing sectarian conflict in Iraq, the bombings of religious buildings have defined the height of the conflicts.¹ The purpose of such attacks is not merely to destroy a building, but to attack and suppress a religious, ethnic, or racial community by taking away its house of worship and place in society.

In less extreme cases, opposition to minority religious, racial, and ethnic groups often manifests itself through restrictive zoning ordinances. In Egypt,

1. The 1963 bombing of the 16th Street Baptist Church in Alabama was one of the more significant events contributing to the passage of the Civil Rights Act of 1964. Donald Q. Cochran, *Ghosts of Alabama: The Prosecution of Bobby Frank Cherry for the Bombing of the Sixteenth Street Baptist Church*, 12 MICH. J. RACE & L. 1, 1 (2006). The 2006 bombing of the Al Askari Mosque in Iraq destroyed its famous golden dome and touched off a heated escalation of sectarian violence resulting in tens of thousands of deaths across the country. Stephen Farrell, *U.S. Says Airstrike Killed Insurgent Who Planned Mosque Bombing*, N.Y. TIMES, Aug. 5, 2007, at A14.

restrictions on the construction of Coptic Christian churches have exacerbated sectarian tensions.² In the United States, the national debate in 2010 over the so-called “Ground Zero Mosque” was a highly publicized example of the opposition that minority religions frequently face in establishing a place in which to exercise their religion.³ When restrictive zoning ordinances place unequal burdens on religious land use, the inevitable impression is that not only the building, but also its members and their faith, are not welcome.

When Congress enacted the Religious Land Use and Institutionalized Persons Act (“RLUIPA”)⁴ it emphasized this close relationship between restrictions on religious buildings and restrictions on free exercise rights.⁵ In fact, constitutional and policy debates regarding the proper relationship between church and state are often symbolically couched in terms of religion being excluded from or included in the public square.⁶ Many of the cases in this Note considered the propriety of zoning ordinances that literally excluded churches from prominent areas of town.⁷ While ostensibly a matter of the statutory interpretation of RLUIPA, these cases also raise difficult constitutional questions that the courts have failed to directly address. On the one hand, can cities zone religious organizations out of preferred areas without impermissibly showing a preference

2. David D. Kirkpatrick, *Egypt: Government to Investigate Disputes over Coptic Churches*, N.Y. TIMES, Oct. 14, 2011, at A8 (“Egyptian laws impose more onerous requirements on the building of churches than on mosques, and attempts to get around the process to build new churches have often set off sectarian clashes.”).

3. A 15-story mosque and community center was proposed in a building two blocks north of the site where the twin towers fell on September 11, 2001. Michael Barbaro, *Debate Heating Up on Plans for Mosque Near Ground Zero*, N.Y. TIMES, July 31, 2010, at A1. New York City Mayor Michael Bloomberg cited religious freedom and said that it is not the government’s place to dictate the location for a house for worship. *Id.* Although the project faced little opposition from the local government, national political figures and even the Anti-Defamation League expressed opposition to the project. *Id.*

4. 42 U.S.C. §§ 2000cc to 2000cc-5 (2012).

5. 146 CONG. REC. S7774-01 (2000) (joint statement of Sens. Hatch and Kennedy) (“The right to assemble for worship is at the very core of the free exercise of religion. . . . The right to build, buy, or rent such a space is an indispensable adjunct of the core First Amendment right to assemble for religious purposes.”).

6. *See, e.g., McCreary County v. ACLU of Ky.*, 545 U.S. 844, 907 (2005) (Scalia, J., dissenting) (critiquing the majority’s attempt to cabin its decision so as not to “require governments across the country to sandblast the Ten Commandments from the public square”); Eric W. Treene, *Religion, the Public Square, and the Presidency*, 24 HARV. J.L. & PUB. POL’Y 573, 577–78 (2001); John C. Danforth, Op-Ed., *Onward, Moderate Christian Soldiers*, N.Y. TIMES, June 17, 2005, at A27 (“[E]fforts to haul references of God into the public square, into schools and courthouses, are far more apt to divide Americans than to advance faith.”).

7. *See, e.g., Centro Familiar Cristiano Buenas Nuevas v. City of Yuma*, 651 F.3d 1163, 1171 (9th Cir. 2011) (explicitly excluding religious organizations from the Old Town District on Main Street without a special use permit); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1219 (11th Cir. 2004) (prohibiting churches and synagogues from seven of eight zoning districts, including the central business district, without a special use permit).

for the comparable secular uses that are permitted? On the other hand, can cities routinely grant religious organizations exemptions to zoning ordinances without violating the Establishment Clause?

The Equal Terms provision of RLUIPA is supposed to prohibit zoning laws that treat religious assemblies or institutions on less than equal terms than nonreligious assemblies or institutions.⁸ But there is disagreement in the courts over which land uses to compare and what to do if the terms are less than equal. One approach compares anything that fits into the plain meaning of an assembly or institution but allows less than equal terms if they pass a strict scrutiny analysis.⁹ A second approach only compares assemblies or institutions that are “similarly situated,” but then strictly prohibits any less than equal terms.¹⁰ Within the second approach there is further disagreement, with each circuit defining “similarly situated” in a different way.¹¹ Finally, some circuits have avoided adopting these or any other clear interpretation.¹²

These conflicting interpretive approaches are detrimental to religious organizations, government zoning bodies, and the courts. Congress noted that restrictive zoning ordinances most severely affect small, minority religious groups.¹³ These groups are the least likely to have the political or popular influence necessary to change the zoning laws, and RLUIPA was designed to give them recourse in the courts when the political process fails.¹⁴ However, small religious groups are also unlikely to have the resources necessary to engage in protracted litigation. The unsettled meaning of the Equal Terms provision places whatever protections it was designed to provide beyond the reach of those it was designed to protect. The government zoning authorities are similarly harmed because they cannot be certain if they are in compliance and must spend money defending their ordinances in court. Finally, district courts considering such cases are left without meaningful guidance. As a result, many of the cases heard on appeal have been reversed.¹⁵ A clear and settled interpretation would remedy these problems for religious organizations, government zoning bodies, and the courts.

In this Note, I examine RLUIPA’s Equal Terms provision and the constitutional concerns that have provoked its disparate interpretations. I propose that giving full effect to the protections as written in the Act would provide a rule

8. 42 U.S.C. § 2000cc.

9. *See infra* Part II.A.

10. *See infra* Part II.B.

11. *See infra* Part II.B.

12. *See infra* Part II.C.

13. 146 CONG. REC. S7774-01 (2000).

14. *Cf.* *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (“[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.”).

15. *See, e.g.,* *Centro Familiar Cristiano Buenas Nuevas v. City of Yuma*, 651 F.3d 1163, 1175 (9th Cir. 2011); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1219 (11th Cir. 2004).

that is simpler to apply and more consistent in its outcomes, while more fully addressing the problem Congress intended to remedy. This broad interpretation would neither offend existing Establishment Clause jurisprudence, nor drastically expand the protections that the courts have already approved using the various competing tests they have fashioned from the statute.

Part I recounts the shifting interpretations of the Free Exercise Clause that led to the passage of RLUIPA. It then analyzes the Equal Terms provision, its place in RLUIPA, and the Supreme Court cases interpreting RLUIPA. Part II examines the ways in which the Equal Terms provision has been applied in the seven circuits that have considered it thus far. I argue that these varied tests arise not from a differing interpretation of the language of the statute, but from an under-acknowledged application of the constitutional avoidance doctrine.¹⁶ Part III compares the conflicting rules developed and explains their deficiencies. I address the constitutional and practical concerns that arise from giving the Equal Terms provision its broadest construction in favor of religious exercise.¹⁷

Finally, I argue that the statute be applied as written—permitting religious assemblies and institutions in the same areas and on the same terms that nonreligious assemblies and institutions are allowed. This interpretation would protect minority religious, ethnic, and racial communities by providing the broad protections the statute calls for, as well as a more consistent, predictable, and expedient resolution to violations of their constitutional free exercise rights.

I. HISTORICAL, STATUTORY, AND JURISPRUDENTIAL CONTEXT

A proper interpretation of the Equal Terms provision requires an understanding of three things: first, the historical development of constitutional and statutory protections for the free exercise of religion; second, RLUIPA's legislative history and the way the Equal Terms provision fits into the protections of the Act as a whole; and third, the Supreme Court cases that have interpreted RLUIPA.

A. The Road to RLUIPA: From Reynolds Through RFRA

Like the rest of the Bill of Rights, the First Amendment's religion clauses originally restricted only the federal government and left the individual states free

16. The constitutional avoidance doctrine provides that courts should avoid interpretations of statutes that raise serious constitutional questions, rather than adopting the constitutionally questionable interpretation and being required to conduct a full constitutionality analysis. *See, e.g.*, *Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 455 (1989); *N.L.R.B. v. Catholic Bishop of Chi.*, 440 U.S. 490, 510 (1979) (Brennan, J., dissenting). However, like all canons of statutory construction, this principle should only be used to guide the interpretation of the statute's plain language, not to depart from it. *United States v. Locke*, 471 U.S. 84, 96 (1985) (“[Courts] cannot press statutory construction ‘to the point of disingenuous evasion’ even to avoid a constitutional question.” (quoting *Moore Ice Cream Co. v. Rose*, 289 U.S. 373, 379 (1933))).

17. 42 U.S.C. § 2000cc-3(g) (2012).

to continue to define for themselves the relationship between church and state.¹⁸ The Supreme Court did not even address the meaning of the Free Exercise Clause for almost 100 years; when it did, it rejected a challenge to a federal criminal prohibition of polygamy in *Reynolds v. United States*.¹⁹

After being incorporated and applied to the states under the Fourteenth Amendment,²⁰ the Free Exercise Clause was later afforded strict scrutiny in *Sherbert v. Verner*.²¹ There, the Court overturned the denial of unemployment benefits to a Seventh-day Adventist who quit her job when it required her to work on Saturday in violation of her beliefs.²² The Court held that when a government action places a substantial burden on a person's ability to act on a sincere religious belief, that government action must further a compelling state interest by the least burdensome means possible.²³ This test was reaffirmed in *Wisconsin v. Yoder*, where the Court allowed Amish parents to remove their children from school after the eighth grade despite a state law requiring attendance through the tenth grade.²⁴

Although claims based on the Free Exercise Clause theoretically enjoyed the benefit of strict scrutiny, in practice the Supreme Court and circuit courts often rejected such claims.²⁵ Within two decades of the introduction of strict scrutiny, the Court began to narrow the *Sherbert-Yoder* test. Significantly, during this period of narrowing strict scrutiny application, a series of circuit court cases found that restrictive zoning did not impose a substantial burden on Free Exercise rights.²⁶ This narrowing culminated in the seminal Free Exercise case, *Employment*

18. See *Barron v. City of Baltimore*, 32 U.S. 243, 250-51 (1833) (holding that the Bill of Rights applies only to the federal government).

19. 98 U.S. 145 (1878). The Court immediately recognized a number of the recurring considerations and concerns of Free Exercise jurisprudence, including: Thomas Jefferson's "wall of separation"; the distinction between religious beliefs, which may not be prohibited by legislation, and religious actions, which may; and the rationale that to interpret the clause otherwise would "permit every citizen to become a law unto himself." *Id.* at 164-67.

20. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

21. 374 U.S. 398 (1963). As a stylistic matter, this Note will employ the term "strict scrutiny" even though this test is sometimes referred to as the compelling interest test and other times described as elevated or heightened scrutiny.

22. *Id.* at 400-02.

23. *Id.* at 406-07.

24. 406 U.S. 205, 207 (1972).

25. Kathleen M. Sullivan, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 85 & n.440 (1992).

26. See *Christian Gospel Church, Inc. v. City of San Francisco*, 896 F.2d 1221, 1224 (9th Cir. 1990) (allowing religious uses to be zoned out of residential zones without special permission); *Messiah Baptist Church v. County of Jefferson*, 859 F.2d 820, 824-25 (10th Cir. 1988) (allowing religious uses to be zoned out of agricultural zones); *Grosz v. City of Miami Beach*, 721 F.2d 729, 739 (11th Cir. 1983) (allowing a prohibition on religious meetings in a residential home); *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood*, 699 F.2d 303, 306-07 (6th Cir. 1983) (allowing religious uses to be zoned out of residential zones).

Division, Department of Human Resources of Oregon v. Smith, which narrowly cabined the applicability of strict scrutiny.²⁷

In *Smith*, as in *Sherbert*, the government had denied unemployment benefits based on the plaintiffs' adherence to their religion, which in this case involved the religious use of peyote.²⁸ Like *Reynolds*, this case involved a criminal prohibition, and the Court emphasized many of the separationist themes originally introduced in *Reynolds*.²⁹ The Court held that a neutral and generally applicable law will usually defeat a Free Exercise challenge.³⁰ The Court reframed its previous precedents and held that strict scrutiny is only applicable when a law is not neutral, when a Free Exercise claim is coupled with another constitutional right, or when the claim involves an administrative scheme that makes an individualized assessment of eligibility.³¹

Three years later in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, the Court made it clear that it is not enough for a statute to merely appear to be facially neutral and generally applicable.³² In *Hialeah*, the city passed a zoning ordinance that it claimed neutrally regulated animal slaughter, but in fact targeted only ritual animal sacrifice.³³ While a genuinely neutral and generally applicable law will prevail over a Free Exercise claim, the principles of neutrality can be violated when the actual object of the statute is the suppression of religion.³⁴

This change, from strict scrutiny under *Sherbert* and *Yoder* to little or no scrutiny of neutral, generally applicable laws under *Smith*, touched off the modern era of Free Exercise jurisprudence. Since *Smith*, both the federal and state legislatures have passed a number of laws in an attempt to reinstitute heightened protections for religious exercise, and many of the Supreme Court's cases regarding Free Exercise claims have addressed the interpretation and constitutionality of these statutes.

The first and most sweeping attempt to statutorily reinstate strict scrutiny was the Religious Freedom Restoration Act ("RFRA").³⁵ The text of RFRA took

27. 494 U.S. 872 (1990).

28. *Smith*, 494 U.S. at 874.

29. *Id.* at 879; *see supra* note 19.

30. *Smith*, 494 U.S. at 882.

31. *Id.* at 881–82, 884.

32. 508 U.S. 520, 534 (1993).

33. *Id.* at 526–27. The city argued that the ordinances were neutral and generally applicable as to the Santeria religious practice of animal sacrifice. *Id.* at 527–29. The Court held that they were not neutral because they were underinclusive and overbroad and "had as their object the suppression of religion." *Id.* at 542. The use of the terms "sacrifice" and "ritual" gave reason to believe that the actual intent was to target religious actions. *Id.* The ordinances were not generally applicable because they only applied to religiously motivated actions. *Id.* at 544–45. As a result, the ordinances failed to qualify for the deferential *Smith* test and the Court overturned them by applying the *Sherbert–Yoder* strict scrutiny test. *Id.* at 546.

34. *Id.*

35. 42 U.S.C. §§ 2000bb to 2000bb–4 (2012).

direct issue with the Court's holding in *Smith* and sought to restore the strict scrutiny test set forth in *Sherbert* and *Yoder*.³⁶ RFRA initially applied to all government action, whether state or federal, that burdened religious exercise.³⁷

In *City of Boerne v. Flores*, the Supreme Court held that RFRA was unconstitutional in its application to states.³⁸ Congress had relied upon its constitutional remedial authority under section 5 of the Fourteenth Amendment in passing RFRA.³⁹ However, the Court held that when Congress seeks to define the scope of the Free Exercise Clause, it is venturing beyond its remedial powers and intruding on the judiciary's role of interpreting the Constitution.⁴⁰ The Court held that Congress had the right to hold the federal government to the higher standard of strict scrutiny, but went beyond its remedial powers in requiring states to do the same.⁴¹

In response, a number of states subsequently adopted their own versions of RFRA.⁴² Thus, while *Smith* technically abrogated strict scrutiny as a constitutional requirement in most cases, the federal government and the states with such statutes must still conform to the strict scrutiny requirements that they have statutorily imposed upon themselves. Recognizing the distinction between the free exercise protections that are constitutionally required and those that are statutorily imposed is critical to constructing the proper interpretation of RLUIPA's Equal Terms provision.

B. RLUIPA: Its Enactment and Provisions

RLUIPA came into being as a direct result of the history recounted in the previous Section. Although RFRA successfully reinstated strict scrutiny to all actions of the federal government, Congress continued to pursue legislation that would also apply strict scrutiny to the states. After its remedial authority under the Fourteenth Amendment was found to be insufficient in *City of Boerne*, Congress explored legislation based on other enumerated powers.⁴³ For example, Congress

36. 42 U.S.C. § 2000bb.

37. 42 U.S.C. § 2000bb-2 (1994).

38. 521 U.S. 507, 533-34 (1997).

39. *Id.* at 516-17. In describing Congress's Fourteenth Amendment remedial authority the Court noted:

While the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies, the distinction exists and must be observed. There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.

Id. at 519-20.

40. *Id.* at 519-24.

41. *Id.* at 534-36.

42. Brett D. Proctor, Note, *Using the Spending Power to Circumvent City of Boerne v. Flores: Why the Court Should Require Constitutional Consistency in Its Unconstitutional Conditions Analysis*, 75 N.Y.U. L. REV. 469, 492 (2000).

43. 146 CONG. REC. S7774-01 (2000).

considered using its power to set conditions incident to spending in the proposed Religious Liberty Protection Act,⁴⁴ which passed in the House but stalled in the Senate.⁴⁵

Instead of mandating strict scrutiny for all government actions that burdened free exercise rights, Congress next focused on a few, well-studied areas where congressional fact finding clearly justified the use of Congress's remedial power under the Fourteenth Amendment.⁴⁶ Congress passed RLUIPA in 2000 after conducting extensive hearings and making the finding that religious organizations regularly faced unconstitutional treatment in land use.⁴⁷

This Note focuses on the Equal Terms provision of RLUIPA. However, this provision is only one part of RLUIPA, and it can only be properly understood in the context of the whole act. RLUIPA is conventionally lumped with RFRA as an attempt to reinstate strict scrutiny in the wake of *Smith*.⁴⁸ While that characterization may hold true for most of the Act, the Equal Terms provision is different because it prohibits certain government action, rather than subjecting it to strict scrutiny.

Before discussing the substantive sections of RLUIPA, it is important to be aware of two interpretive provisions. First, the "Definitions" section defines "religious exercise" to specifically include "[t]he use, building, or conversion of real property for the purpose of religious exercise."⁴⁹ Second, the "Rules of Construction" section provides that the Act "shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution."⁵⁰

RLUIPA contains two substantive sections: one protecting land use, and the other protecting institutionalized persons. Both of these impose strict scrutiny on government actions that substantially burden religious exercise in those areas.⁵¹

44. *Id.*

45. The failure in the Senate was in part based on concerns regarding civil rights and discrimination against unprotected classes. *Id.*

46. *Id.*

47. 42 U.S.C. §§ 2000cc to 2000cc-5 (2012); 146 CONG. REC. S7774-01.

48. *See, e.g.,* *Sossamon v. Texas*, 131 S. Ct. 1651, 1655-56 (2011); *Cutter v. Wilkinson*, 544 U.S. 709, 714 (2005).

49. 42 U.S.C. § 2000cc-5(7)(B). Another significant procedural rule under the statute shifts the burden of proof to the government after the plaintiff produces a prima facie case under RLUIPA or the Free Exercise Clause. *Id.* § 2000cc-2(b).

50. *Id.* § 2000cc-3(g). The language plainly directs courts to give expansive meaning to RLUIPA's provisions. *Id.* However, while the language "to the maximum extent" calls for a broad interpretation, the inclusion of the limiting word "permitted" also implies that the interpretation should not be so broad that it becomes unconstitutional. *Id.* This could mean that the statute both rejects and requires the application of the constitutional avoidance canon. *See supra* note 16. Its invocation to avoid possible conflict through a narrow interpretation is rejected, while its application to avoid the actual unconstitutionality of an overbroad reading is required.

51. Those sections require a substantial burden on religious exercise, and include a limiting jurisdictional test, requiring interstate commerce or federal financial assistance.

The land use section of RLUIPA is further divided into two subsections: the “Substantial Burdens” subsection just described, and the “Discrimination and Exclusion” subsection.⁵² The Equal Terms provision is one of three provisions in the Discrimination and Exclusion subsection:

(b) Discrimination and exclusion

(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.⁵³

Unlike the rest of RLUIPA, the Discrimination and Exclusion subsection contains no jurisdictional limitations and provides no strict scrutiny or other balancing test.⁵⁴ It is also important to note that the Equal Terms provision is distinct from the provisions prohibiting discrimination, total exclusions, or unreasonable limitations. The rule against surplusage therefore dictates that the Equal Terms provision must protect against something more or different than those provisions do.⁵⁵

42 U.S.C. §§ 2000cc(a)(2)(A)–(B), 2000cc–1(a). Rather than relying solely on the remedial authority under section five of the Fourteenth Amendment, these limitations provide an additional basis for Congress’s authority under the Spending Clause and Commerce Clause. *Sossamon*, 131 S. Ct. at 1656. The land use section also imposes strict scrutiny when the implementation involves individualized assessments. 42 U.S.C. § 2000cc(a)(2)(C). This justification is based on the exception stated in *Smith* and the fact that many zoning statutes allow individual determinations and exceptions.

52. 42 U.S.C. § 2000cc.

53. *Id.*

54. *Id.* § 2000cc(b)(1)–(3).

55. The rule against surplusage is a canon of statutory construction which provides that “[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant . . .” *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (citing 2A N. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 46.06, at 181–86 (rev. 6th ed. 2000)).

C. The Supreme Court's RLUIPA Jurisprudence

The Supreme Court has considered RLUIPA claims on two occasions, both involving the strict scrutiny requirement in the Institutionalized Persons section of the Act.⁵⁶ Even though the Court has not yet addressed the Equal Terms provision, or even the religious land-use section, the cases addressing the Institutionalized Persons section of the Act give some indication of how the Court might interpret the land-use portion of the statute.

In the first case, *Cutter v. Wilkinson*, the Supreme Court upheld the constitutionality of the Institutionalized Persons section of RLUIPA and its application to the states.⁵⁷ The Court reiterated an earlier holding that because there is some “play in the joints” between accommodations that are required by the Free Exercise Clause and those that are prohibited under the Establishment Clause, a legislature can pass laws within those boundaries without violating the Constitution.⁵⁸ The Court then upheld the constitutionality of RLUIPA because even though it accommodated religious practice beyond what is required by the Free Exercise Clause, it did not unlawfully foster religion, and therefore did not violate the Establishment Clause.⁵⁹

The Court’s primary reason for finding the “provision compatible with the Establishment Clause [was] because it alleviates exceptional government-created burdens on private religious exercise.”⁶⁰ The Court stated that the right to free exercise is not just about belief and profession, but about physically assembling to worship.⁶¹ It held that, due to the unparalleled degree of control the state exercises over prisoners, RLUIPA is a reasonable protection of those who are relying “on the government’s permission and accommodation for exercise of their religion.”⁶²

In the second case, *Sossamon v. Texas*, the Supreme Court held that RLUIPA did not constitute a waiver of sovereign immunity.⁶³ As in *Cutter*, the

56. *Sossamon*, 131 S. Ct. 1651; *Cutter v. Wilkinson*, 544 U.S. 709 (2005).

57. 544 U.S. at 725.

58. *Id.* at 719 (quoting *Walz v. Tax Comm’n*, 397 U.S. 664, 669 (1970)).

59. *Id.* at 714. In the context of institutionalized persons, RLUIPA was interpreted to allow order and safety to remain a higher priority than accommodation of religious observances. *Id.* at 722.

60. *Id.* at 720 (citing *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 705 (1994) (reasoning that government need not “be oblivious to impositions that legitimate exercises of state power may place on religious belief and practice”)); *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 349 (1987) (O’Connor, J., concurring) (finding that removal of government-imposed burdens on religious exercise is more likely to be perceived “as an accommodation of the exercise of religion rather than as a Government endorsement of religion”).

61. *Cutter*, 544 U.S. at 720.

62. *Id.* at 721.

63. 131 S. Ct. 1651 (2011). This is because states are protected from suit and can only waive that protection when waiver is unequivocally expressed in the text of the relevant statute. *Id.* at 1658; *see also* U.S. CONST. amend. XI. RLUIPA only provides for

Court noted the history leading up to the passage of RLUIPA and that it was passed as a reaction to the limited free exercise protections available after *Smith* and *City of Boerne*.⁶⁴ The dissent repeatedly emphasized the broad construction required by this history and the express interpretive guidance written into the statute itself.⁶⁵

The Court's reasoning in *Cutter* and *Sossamon* applies with equal force to the government-created burdens of zoning. Zoning laws control what kinds of religious buildings can be built, in what locations,⁶⁶ and even whether existing buildings can be used for religious purposes.⁶⁷ Religious organizations, in a similar manner to institutionalized persons, are dependent upon the government's permission and accommodation in order to assemble for worship. As the Court noted in *Sossamon*, the historical background demonstrates that RLUIPA is designed to expand free exercise rights beyond those required by the Constitution or RFRA, and its protections should be broadly construed.

Part I of this Note has presented the history behind RLUIPA, from the expansion and retraction of the constitutional free exercise right, to the creation and interpretation of various statutory rights. In addition to this historical context, the Equal Terms provision has also been discussed in the context of the whole Act. Finally, the Supreme Court jurisprudence has found that both the history and the text of the Act itself call for meaningful protections. This background is essential to understanding the shortcoming of the circuit courts' decisions presented in Part II, and the need for the broad, straightforward interpretation that I propose in Part III.

II. INTERPRETING RLUIPA'S EQUAL TERMS PROVISION

The problem with the current interpretations of the Equal Terms provision is that each of the seven circuits that have addressed the provision seem unsatisfied by the tests from the other circuits. Despite the variety of tests, the Supreme Court has not addressed the Equal Terms provision or any of RLUIPA's land use provisions. Because each circuit has added its own requirements to the provision, it is helpful to analyze what the text of the statute says before looking at the limitations read in by the circuit courts.

The Equal Terms provision is the first provision of the "Discrimination and Exclusion" subsection and can be broken down into five elements: "[1] No government shall [2] impose or implement a land use regulation in a manner that treats [3] a religious assembly or institution [4] on less than equal terms with [5] a

"appropriate relief," which the Court held did not clearly manifest intent to include damages, and so plaintiffs are limited to equitable relief. *Sossamon*, 131 S. Ct. at 1658.

64. *Sossamon*, 131 S. Ct. at 1655–56; see *supra* Part I.A.1–2.

65. *Sossamon*, 131 S. Ct. at 1663, 1668–69 (Sotomayor, J., dissenting); see *supra* note 50 and accompanying text.

66. *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1219 (11th Cir. 2004) (prohibiting churches and synagogues in seven of eight zoning districts and requiring them to obtain a conditional use permit before building in the eighth).

67. *Konikov v. Orange County*, 410 F.3d 1317, 1320 (11th Cir. 2005).

nonreligious assembly or institution.”⁶⁸ The first three elements have not been contested because all of the Equal Terms cases considered by the circuit courts have involved religious organizations suing municipalities over zoning ordinances.⁶⁹

The final two elements have been the focus of most claims under the Equal Terms provision of RLUIPA. The courts have debated whether less than equal terms are entirely prohibited or if they can be permitted if justified by a strict scrutiny analysis. The courts have also debated which nonreligious assemblies or institutions should be looked at as comparators to the religious ones. Specifically, must a court consider all assemblies and institutions, or only those that are “similarly situated” in some way?

The Eleventh Circuit held that strict scrutiny should be applied to a zoning ordinance that treats religious uses on less than equal terms with any nonreligious assembly or institution.⁷⁰ The Third Circuit held that the religious and nonreligious land uses being compared must be similarly situated—an approach that treats the Equal Terms protection more like an Equal Protection claim.⁷¹ Although this initial split between the Third and Eleventh Circuits has been addressed elsewhere,⁷² in the last few years the Seventh Circuit switched sides from strict scrutiny to similarly situated, and four other circuits have either refused to adopt either interpretation or have adopted the previous rulings with modifications.⁷³ These varying interpretations spring not from the text of the statute but from the limitations that the circuit courts have read into the statute

68. 42 U.S.C. § 2000cc (2012); *see also* *Centro Familiar Cristiano Buenas Nuevas v. City of Yuma*, 651 F.3d 1163, 1170–72 (9th Cir. 2011); *Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward County*, 450 F.3d 1295, 1307 (11th Cir. 2006).

69. The first element simply requires the defendant to be a government. It is conceivable that a private entity might also be a defendant if the state-action doctrine applied to a company town or private zoning authority. *Marsh v. Alabama*, 326 U.S. 501, 509 (1946). The second allows both facial challenges to zoning or landmarking laws, and as-applied challenges to the way in which they are implemented. Land use regulations are defined as referring to zoning or landmarking law. 42 U.S.C. § 2000cc–5(5). The third requirement could obviously be contested under the proper set of facts, but what makes an assembly or institution “religious” has not been addressed in these cases and is beyond the scope of this Note. The Supreme Court has offered general guidance but no concrete test for the difficult question of what is a religion. *See United States v. Seeger*, 380 U.S. 163, 176 (1965) (“A sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption comes within the statutory definition.”). The authors of RLUIPA did not define “religious,” or even “assembly or institution.”

70. *See infra* Part II.A.

71. *See infra* Part II.B.1.

72. *See, e.g., Daniel Dalton, The Religious Land Use and Institutionalized Persons Act Update (Recent Developments in Land Use, Planning and Zoning)*, 40 URB. LAW. 603, 604 (2008); Matthias Kleinsasser, Note, *RLUIPA's Equal Terms Provision and the Split Between the Eleventh and Third Circuits*, 29 REV. LITIG. 163 (2009).

73. *See infra* Part II.

from Free Exercise and Equal Protection jurisprudence as a matter of constitutional avoidance.

A. The Strict Scrutiny Requirement (The Eleventh Circuit)

The first circuit court to interpret the Equal Terms provision gave it the broadest meaning. The Eleventh Circuit held, in *Midrash Sephardi, Inc. v. Town of Surfside*, that a town violated the Equal Terms provision of RLUIPA by excluding two small Orthodox Jewish synagogues from its central business district while permitting a variety of similar secular uses including theaters, private clubs, lodge halls, and schools.⁷⁴ Before reaching its conclusion, the court noted that the Equal Terms provision presented three “difficulties of statutory construction.”⁷⁵ First, unlike other sections of RLUIPA, it does not contain a threshold jurisdictional test. Second, even though the provision feels like an Equal Protection law, it has no similarly situated requirement.⁷⁶ Finally, the provision imposes strict liability for its violation, without consideration of the government’s reasons.⁷⁷

As to the first point, the court acknowledged that the text and structure of the Act suggested that such a jurisdictional test is not necessary for claims under the Equal Terms provision in particular.⁷⁸ If there were a threshold test, the court stated that it would come from RLUIPA’s Substantial Burdens subsection.⁷⁹ Under this test, the court held that the synagogues’ complaint met the test because the city had an individualized assessment process.⁸⁰ But the court left the issue of whether such a test was required to future cases.⁸¹

Second, the court rejected the requirement that the religious and nonreligious assemblies or institutions must meet an additional “similarly situated” test.⁸² Instead, the court gave the terms “assembly” and “institution” their ordinary, dictionary definitions and considered any organization that fit those definitions as falling within the “natural perimeter” of applicability.⁸³ Applying the plain

74. 366 F.3d 1214, 1219–20 (11th Cir. 2004). The city had provisions for obtaining a special-use permit, but it denied the applications of the synagogues in this case. *Id.* The city did not require any special use permits for the nonreligious assemblies or institutions. *Id.*

75. *Id.* at 1229.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* at 1229–30. It is not clear from the opinion whether the court meant that the jurisdictional test might be required by reading it in from the other section of RLUIPA or by the constitutional requirements laid out in *Smith*. *See id.*

82. *Id.* at 1230. The parties had assumed that the Equal Terms provision required the assemblies and institutions to be “similarly situated in all relevant respects.” *Id.* Based on that similarly situated test, the district court held that because private clubs and secular institutions were a more social setting that provided better synergy with a shopping district, they were not similarly situated with churches and synagogues. *Id.*

83. *Id.*

meaning of the words, the court held that churches and synagogues could not be treated on less than equal terms than private clubs and lodges.⁸⁴

Third, the court held that in this case the unequal treatment could not be justified under a strict scrutiny analysis.⁸⁵ Again, the court acknowledged that the strict scrutiny requirement found in RLUIPA's other sections was missing from the Equal Terms provision, but the court seemed to read it in as a constitutional requirement.⁸⁶

After resolving these three problems, the court addressed the town's arguments that RLUIPA was unconstitutional.⁸⁷ The court deferred to Congress's fact finding and held that RLUIPA was a permissible remedial measure under section 5 of the Fourteenth Amendment.⁸⁸ The court found that the statute had a valid secular purpose; did not impermissibly advance religion; and did not lead to "excessive entanglement" between church and state. Under those findings, the Act passed the traditional *Lemon* test for determining violations of the Establishment Clause.⁸⁹

In two subsequent cases, the Eleventh Circuit reiterated its holding that less than equal treatment is *not* prohibited if it passes strict scrutiny, and that the nonreligious comparator assembly or institution only needs to fall within the plain meaning of the words "assembly" or "institution."⁹⁰ Unlike the facial challenge to the zoning ordinance in *Midrash Sephardi*, these two cases both involved as-applied challenges to facially neutral zoning statutes.⁹¹ The court held that in an as-applied challenge, a "similarly situated" requirement was appropriate because the plaintiff must point to an actual assembly or institution that was treated better.⁹²

84. *Id.* at 1231.

85. *Id.* at 1235.

86. *Id.* at 1231. The court cited the legislative history which described the Equal Terms provision as "enforce[ing] the Free Exercise Clause rule against laws that burden religion and are not neutral and generally applicable." *Id.* at 1231-32. The city argued for "rational basis" review, the congregations for strict scrutiny, and the United States as *amici* argued for holding the city strictly liable without the escape of a balancing test. *Id.* at 1231. The court then reasoned that because this Free Exercise Clause rule came from the *Smith* and *Lukumi* cases, the strict scrutiny required by those cases must come in with the rule. *Id.* at 1231-32.

87. *Id.* at 1235-36.

88. *Id.* at 1239.

89. *Id.* at 1241-42. The court also found that while RLUIPA intrudes to some degree on local land-use decisions, it does not violate principles of federalism under the Tenth Amendment. *Id.* at 1242.

90. *Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward County*, 450 F.3d 1295, 1311 (11th Cir. 2006); *Konikov v. Orange County*, 410 F.3d 1317, 1324-25 (11th Cir. 2005).

91. *Primera Iglesia Bautista Hispana*, 450 F.3d at 1310; *Konikov*, 410 F.3d at 1327-28.

92. *Primera Iglesia Bautista Hispana*, 450 F.3d at 1311 n.11.

B. The Dissimilar Formulations of the Similarly Situated Requirement

1. Regulatory Purpose (The Third Circuit)

In contrast to the Eleventh Circuit, the Third Circuit adopted a much more limited interpretation of the Equal Terms provision. A divided panel of the Third Circuit rejected the Eleventh Circuit's strict scrutiny requirement and broad plain-meaning interpretation of the words "assembly or institution."⁹³ Instead, the Third Circuit majority required that the comparator assembly or institution be similarly situated as to a regulatory purpose.

In *Lighthouse Institute for Evangelism, Inc. v. City of Long Branch*, a city rejected a small church's attempts to open a house of worship in the "Broadway Corridor" even though the city allowed assembly halls, theaters, and schools in the area.⁹⁴ The church first filed a suit against the city challenging ordinances that prevented Lighthouse from expanding into the downtown area from 1995 to 2000.⁹⁵ While that litigation was pending, the city passed its Redevelopment Plan in 2002, which also prohibited churches from the area and superseded the previous ordinances.⁹⁶

The majority applied its similarly situated test and held that the city's old zoning ordinance violated the Equal Terms provision, but that its new redevelopment plan did not.⁹⁷ Both the old ordinance and the new plan allowed a number of secular assemblies and institutions while not permitting churches, but the new plan specified a regulatory purpose whereas the old ordinance did not.⁹⁸ In other words, even though the city was violating the Equal Terms provision at the start of the litigation, it did not have to treat the church any better; it was enough to simply articulate a regulatory purpose that the church did not serve.

Unlike the strict scrutiny balancing test, here the regulatory purpose did not have to be a compelling, or even important, government concern. The purpose of the redevelopment plan was to create a retail main street that would anchor a vibrant and vital downtown residential community, and the city argued that the church would not foster that kind of atmosphere.⁹⁹ The city also noted that a law prohibiting liquor licenses within 200 feet of the church would prevent the bars and clubs the city wanted in the area.¹⁰⁰ The court's majority chose not to address the city's contention that the very nature of a church was unlikely to contribute to the goals of the new district.¹⁰¹ Instead, it accepted the alcohol statute as a

93. *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 262–64, 268–69 (3d Cir. 2007). The district court had followed the Eleventh Circuit and applied strict scrutiny. *Id.* at 260.

94. *Id.* at 257–58.

95. *Id.*

96. *Id.* at 258.

97. *Id.* at 270–73.

98. *Id.*

99. *Id.* at 270–72.

100. *Id.*

101. *Id.*

distinguishing characteristic that invalidated the other organizations and assemblies as secular comparators.¹⁰²

The Eleventh and Third Circuit's different interpretive decisions are interesting. As for the strict scrutiny requirement, the Third Circuit majority relied on the textual argument that because other sections of RLUIPA include the strict scrutiny test, Congress would have included it in the Equal Terms section as well if it intended it to apply.¹⁰³ Although the majority agreed with the Eleventh Circuit's view that the Equal Terms provision was meant to codify existing Free Exercise jurisprudence, it reasoned that this general intent did not allow it to read in the strict scrutiny test that was conspicuously absent.¹⁰⁴

The Third Circuit's introduction of the similarly situated test was previously rejected by the Eleventh Circuit, which refused to read a similarly situated limitation into the plain meaning of the words "assembly or institution."¹⁰⁵ In footnotes, the Third Circuit majority questioned the constitutionality of the Eleventh Circuit's broad plain-meaning interpretation of "organization or assembly" and suggested that the Eleventh Circuit had to read in the additional requirement of strict scrutiny to preserve the statute's constitutionality.¹⁰⁶

But the Third Circuit contradicted itself. While the majority chided the Eleventh Circuit for reading requirements into the language of the statute, it failed to acknowledge that its own requirement—that the secular comparator be "similarly situated as to regulatory purpose"—was also an extra-statutory embellishment intended to preserve the constitutionality of its own interpretation.¹⁰⁷

The strongly worded dissenting opinion in the Third Circuit opinion supported the Eleventh Circuit's broader interpretation. It characterized the majority's holding as allowing the city to tell religion "to take a back seat to [its] economic development goals."¹⁰⁸ The dissent felt that reading in the similarly situated test contradicted the plain language of the statute and the plain purpose of Congress, and provided "a ready tool" by which local governments could render the Equal Terms requirement "practically meaningless."¹⁰⁹ In this case, the liquor

102. *Id.* The majority noted in passing that "there may be room for disagreement over [the city's] prioritizing of the availability of alcohol consumption over the ability to seek spiritual enlightenment," but it concluded that because the alcohol prohibition was meant to help churches, the city and the statute did not "suggest improper motives." *Id.* at 272.

103. *Id.* It also looked at the legislative history and found additional support for its conclusion. *Id.*

104. *Id.* at 268–69.

105. *Id.* at 267–68.

106. *Id.* at 264–68 nn.11–14.

107. *Id.* The majority looked to Third Circuit Free Exercise cases, which required a secular comparator to be similarly situated as to the regulatory purpose, and concluded that the Equal Terms provision required the same limitation. *Id.*

108. *Id.* at 278 (Jordan, J., dissenting).

109. *Id.* at 293.

licensing issue accepted as the regulatory purpose was not even a legitimate concern because the law explicitly allowed its restrictions to be waived, and the church had agreed to do so.¹¹⁰ Further, even if the law were not waivable, a simple supremacy analysis would determine that a municipality cannot point to a state law to excuse its violation of a federal one.¹¹¹ Finally, the dissent defended the constitutionality of its “straightforward reading” against criticism from the majority,¹¹² noting that Congress had complied with all of the requirements for a constitutional remedial measure as laid out in *City of Boerne*.¹¹³

2. Regulatory Criteria (The Seventh Circuit)

The Seventh Circuit had initially followed the Eleventh Circuit’s strict scrutiny interpretation but decided to switch to a modified version of the Third Circuit’s similarly situated requirement.¹¹⁴ Instead of requiring the secular comparator to be similarly situated as to a regulatory purpose, the Seventh Circuit held that it must be similarly situated as to an accepted zoning criterion.¹¹⁵

In *River of Life Kingdom Ministries v. Village of Hazel Crest*, Judge Posner, who wrote one of the previous decisions following the Eleventh Circuit’s test, considered whether to adopt the Third Circuit’s test instead.¹¹⁶ He concluded that neither interpretive approach was entirely satisfactory.¹¹⁷ Judge Posner completely dismissed the Eleventh Circuit’s analysis, but determined that the “problems . . . with the Third Circuit’s test can be solved by a shift of focus from regulatory purpose to accepted zoning criteria.”¹¹⁸ Presumably, this meant that regulatory purposes (such as the desire to create a vibrant party atmosphere) would not be accepted but regulatory criteria (like the impact on parking or the

110. *Id.* at 289–91. The dissent also suggested that such a statute is of dubious constitutionality. *Id.* at 291 n.38.

111. *Id.* at 289–91. The dissent noted that the Seventh Circuit had reached the same conclusion. *Id.*

112. *Id.* at 288 n.36.

113. *Id.* (reasoning that if the plain language of the statute was “unconstitutionally broad, the proper result would be to strike it down as unconstitutional, not to re-draft it” (citing *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997))).

114. See *Digrugilliers v. Consol. City of Indianapolis*, 506 F.3d 612 (7th Cir. 2007); *Vision Church v. Village of Long Grove*, 468 F.3d 975 (7th Cir. 2006). However, these cases were re-characterized as only addressing and interpreting the Equal Terms provision tangentially. *River of Life Kingdom Ministries v. Village of Hazel Crest*, 611 F.3d 367, 369–70 (7th Cir. 2010). The original panel in *River of Life Kingdom Ministries v. Village of Hazel Crest* adopted the Third Circuit’s test, prompting an en banc rehearing to resolve the intra-circuit split. 611 F.3d at 368; *River of Life Kingdom Ministries v. Village of Hazel Crest*, 585 F.3d 364, 374 (7th Cir. 2009), *vacated on reh’g en banc sub nom.* *River of Life Kingdom Ministries v. Village of Hazel Crest*, 611 F.3d 367 (7th Cir. 2010).

115. *River of Life Kingdom Ministries*, 611 F.3d at 371.

116. *Id.* at 367. Although only Judge Sykes dissented, there were three concurring opinions, each reflecting a different view on the interpretive approach that should have been taken. *Id.* at 367, 374–77.

117. *Id.* at 368–71.

118. *Id.* at 371.

occupancy) would be fine. In other words, a city could not simply argue that a church did not serve some general purpose that the city was trying to achieve with its zoning laws, but instead needed to show that the church and other assemblies or institutions were being excluded based on some specific zoning criteria.

The remainder of the opinion defended against the charge that this is merely a semantic change.¹¹⁹ Judge Posner insists that a regulatory purpose is subjective and prone to manipulation, whereas a zoning or regulatory criteria is an objective measure.¹²⁰ In the end, the opinion acknowledges that its test is “less than airtight” and would not work as well where the zoning choices are not based on a single conventional zoning criterion. But, in consolation, Judge Posner points would-be religious plaintiffs toward other protections offered under RLUIPA and the First Amendment.¹²¹

While the majority opinion clearly marks a departure from the Eleventh Circuit’s strict scrutiny test to the Third Circuit’s similarly situated test, most of the judges on the en banc panel did not support the refinement articulated by Judge Posner.¹²² The three concurrences all questioned various aspects of the majority opinion, making it more like a majority outcome reached through plurality reasoning. The first expressed doubt that the distinction articulated would be meaningful in many cases.¹²³ Most of the judges believed that the Seventh Circuit should have adopted the “regulatory purpose” formulation from the Third Circuit and dismissed the switch to “criteria” as unnecessary, meaningless, and just as likely to be manipulated.¹²⁴ Indeed, the outcome of this case again proves how

119. *Id.* at 371–74.

120. *Id.* at 371–73. Judge Posner cites various zoning cases and treatises in support of this conclusion. *Id.*

121. *Id.* at 374.

122. Six of the 11 judges in the majority wrote in concurrences that the new “regulatory criteria” test was less appropriate, of no practical distinction, or should not have been reached on these facts. *Id.* at 374–77. The three concurrences were all written by the members of the original panel. *Id.*; *River of Life Kingdom Ministries v. Village of Hazel Crest*, 585 F.3d 364, 374 (7th Cir. 2009), *vacated on reh’g en banc sub nom. River of Life Kingdom Ministries v. Village of Hazel Crest*, 611 F.3d 367 (7th Cir. 2010).

123. *River of Life Kingdom Ministries*, 611 F.3d at 374 (Cudahy & Rovner, JJ., concurring).

124. The second judge essentially only agreed with the outcome because the city had changed its zoning ordinance during the course of the litigation to exclude all the reasonable comparators that it had previously allowed. *Id.* at 375 (Manion, J., concurring). This concurrence emphasized the majority opinion’s acknowledgement that its rule was imperfect, cited some of the issues raised by the dissent with approval, and questioned the majority’s cursory conclusion that an Establishment Clause violation was likely if the Equal Terms provision were given a broader interpretation. *Id.* at 375–76. This concurrence also noted that crafting a rule for all hypothetical situations was the hard part of this decision and questioned the wisdom of trying to craft a universally governing standard. *Id.* In the final concurrence, the author of the original panel’s opinion reiterated his belief that the Third Circuit’s approach was the most appropriate. *Id.* at 376 (Williams, Cudahy & Rovner, JJ., concurring). It noted that the regulatory criteria was as easily manipulated as regulatory

easily a city can avoid compliance with the Equal Terms provision. As in the Third Circuit's *Lighthouse Institute for Evangelism, Inc. v. City of Long Branch*, the city prevailed here by simply changing its zoning ordinance during the course of the litigation to rely on regulatory criteria that happen to exclude churches.¹²⁵

Like the Third Circuit decision in *Lighthouse Institute for Evangelism*, which the Seventh Circuit followed, the Seventh Circuit's decision in *River of Life Kingdom Ministries* also included a strongly worded dissent calling for a broader interpretation like the one the Eleventh Circuit adopted.¹²⁶ In addition to echoing some of the critiques from the dissent in *Lighthouse Institute for Evangelism*, the dissent here looked to the whole Act and noted that the direction taken by the majority conflates the meaning of the Equal Terms provision and the Nondiscrimination provision.¹²⁷ The dissent noted that the tests, whether regulatory purpose or zoning criteria, are "more appropriate to ferreting out religious or sectarian animus," which is the evil remedied by the Nondiscrimination provision.¹²⁸ The dissent argued that if the Equal Terms provision is to be given independent meaning, as required by canons of statutory construction, it must address unequal treatment that is not, or at least cannot be proven to be, motivated by any discriminatory intent.¹²⁹ Finally, the dissent criticized the similarly situated tests as improperly focusing on whether the religious uses are being excluded for the same regulatory reason as other excluded uses, rather than asking if they are being treated less than equally with the included assemblies and organizations, as dictated by the statute.¹³⁰

3. *Either Regulatory Purpose or Criteria (The Ninth Circuit)*

In *Centro Familiar Cristiano Buenas Nuevas v. City of Yuma*, the Ninth Circuit adopted the similarly situated requirement but did not consistently define what makes something similarly situated.¹³¹ First, it held that less than equal terms could be justified based on a "legitimate regulatory purpose," noting that its test was "about the same as the Third Circuit's."¹³² Then, the court described the Seventh Circuit's regulatory criteria formulation as a refinement that would be "appropriate where necessary" but went on to use that regulatory criteria test even though the court found that it made no practical difference in that case.¹³³ The

purpose, and created extra work for the court while not providing any help for zoning criteria that are unique or nontraditional. *Id.* at 376–77.

125. In this case the city added a zoning law prohibiting new noncommercial uses. *Id.* at 368 (majority opinion).

126. The dissent by Judge Sykes is longer than the majority opinion and the three concurrences combined. *Id.* at 367–77 (majority and concurring opinions); *Id.* at 377–92 (Sykes, J., dissenting).

127. *Id.* at 377–92 (Sykes, J., dissenting).

128. *Id.* at 389.

129. *Id.* at 385.

130. *Id.* at 388.

131. 651 F.3d 1163, 1172–73 (9th Cir. 2011).

132. *Id.*

133. *Id.* at 1173.

court rejected the strict scrutiny requirement because it was not included in the text, but it also noted that doing so would violate the interpretive requirement that the statute be given a broad construction.¹³⁴

The factual and procedural circumstances of the case are worth considering in detail because they are representative of the common themes and issues in the other cases. The City of Yuma had worked for years to revive its Old Town Main Street area into a tourist and entertainment district with a “mixture of commercial, cultural, governmental, and residential uses.”¹³⁵ These efforts had been underway for over a decade and included a long-term redevelopment plan, the creation of a federal national heritage area, and millions of public dollars in investment, financing, and planning.¹³⁶ The district court found “that the City ha[d] a bona fide, unique, and long-term redevelopment plan for Main Street.”¹³⁷ However, that plan did not include religious organizations.¹³⁸ In fact, while the zoning code for the Old Town District permitted a variety of uses, including membership organizations, it specifically excluded religious organizations.¹³⁹

Centro Familiar Cristiano Buenas Nuevas is a young religious congregation of around 250 members that was searching for a permanent building in which to hold its services.¹⁴⁰ The Church leased half of a former movie theater but continued to search for a permanent location because the building was inadequate to carry out the activities essential to its faith.¹⁴¹ The Church considered a number of properties and attended multiple redevelopment meetings with the City to determine the zoning and other requirements of each potential location.¹⁴² The Church eventually purchased a former department store that was located in the Old Town District on Main Street.¹⁴³

The City Planning and Zoning Commission denied the conditional use permit that would have exempted the Church from the ban on religious organizations.¹⁴⁴ The Commission noted the benefits of rehabilitating a deteriorated, long-vacant building and the increase in people coming downtown during off-hours.¹⁴⁵ However, the Commission’s concerns included the lack of tax

134. *Id.* at 1172.

135. *Id.* at 1165–66.

136. *Centro Familiar Cristiano Buenas Nuevas v. City of Yuma*, 615 F. Supp. 2d 980, 983–84 (D. Ariz. 2009), *rev'd and remanded*, 651 F.3d 1163 (9th Cir. 2011).

137. *Id.* at 984.

138. *Id.*

139. *Id.*

140. *Centro Familiar Cristiano Buenas Nuevas*, 651 F.3d at 1165; *Centro Familiar Cristiano Buenas Nuevas*, 615 F. Supp. 2d at 984.

141. *Centro Familiar Cristiano Buenas Nuevas*, 615 F. Supp. 2d at 985.

142. *Id.* (citing redevelopment meetings, parking requirements, and special use permit near military base).

143. *Id.* at 986. Although the Church was aware of the need to obtain an exemption from the zoning code, the building was in foreclosure and the seller was unwilling to wait. *Id.* at 986–87.

144. *Id.* at 987–88.

145. *Id.* at 987.

revenue, a state statute preventing liquor licensing within 300 feet of churches, and the unique nature of Main Street.¹⁴⁶ The Church first appealed to the City Council and then filed suit in Arizona District Court alleging, inter alia, that the zoning ordinance was violating its First Amendment Free Exercise rights and RLUIPA's Equal Terms requirement.¹⁴⁷

The Ninth Circuit rejected the idea that RLUIPA merely codifies existing Free Exercise jurisprudence. The court found that it would be meaningless for Congress to have passed a law that effectively said only that the First Amendment applies to land use.¹⁴⁸ It reviewed and considered all of the previous circuit court decisions interpreting the Equal Terms provision.¹⁴⁹ It rejected the strict scrutiny test and adopted the similarly situated requirement based primarily on the Third Circuit's "regulatory purpose" analysis.¹⁵⁰ It also noted that the Seventh Circuit's "zoning criteria" refinement might be helpful in close cases where it was difficult to determine if the city was presenting an artificial reason for its actions.¹⁵¹

The Ninth Circuit found that the town treated the church on less than equal terms with other similarly situated uses.¹⁵² Significantly, even though it was supposed to be following the same interpretation as the Third Circuit, it reached a different conclusion on similar facts. Here, as in the Third Circuit case, there was a ban on bars within a certain radius of the church, but whereas the Third Circuit rejected the church's claim on that basis, the Ninth Circuit approved it.¹⁵³

4. *The Latest Formulation (The Fifth Circuit)*

In 2012, the Fifth Circuit became the latest court to adopt a similarly situated requirement that "differs slightly" from every other formulation given.¹⁵⁴ In an earlier case, the Fifth Circuit had reviewed the other circuits' tests but explicitly refused to adopt or reject any of them.¹⁵⁵ In three brief paragraphs, the

146. *Id.* at 987–88. The report specifically noted that while there were other churches in the Old Town District, none were located along the commercial strip of Main Street with its unique features and that locating in another area of Old Town would not have been met with the same disfavor. *Id.*

147. *Id.* at 988. The church also brought claims under the Arizona Religious Freedom Restoration Act. ARIZ. REV. STAT. ANN. §§ 41-1493 to -1493.02 (2013). *Id.*

148. *Centro Familiar Cristiano Buenas Nuevas v. City of Yuma*, 651 F.3d 1163, 1172–73 (9th Cir. 2011).

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*; *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 270–73 (3d Cir. 2007).

154. *Opulent Life Church v. City of Holly Springs*, 697 F.3d 279, 292 (5th Cir. 2012).

155. *Elijah Grp., Inc. v. City of Leon Valley*, 643 F.3d at 422–24 & n.19 (5th Cir. 2011).

court in that first case essentially took a common sense approach to affirming the facially “less than equal” treatment found by the district court.¹⁵⁶

Although that first panel intended to avoid choosing sides, it used the phrase “similarly situated,”¹⁵⁷ and so when the Equal Terms provision came up in *Opulent Life Church v. City of Holly Springs*, the court conceded that it had actually rejected the Eleventh Circuit’s strict scrutiny test and aligned itself with the other circuits.¹⁵⁸ The Fifth Circuit’s test, like the Ninth Circuit’s, considers either regulatory purpose or regulatory criteria.¹⁵⁹ However, it requires that the purpose or criteria be stated explicitly in the zoning regulation and that the religious uses be treated as well as every other nonreligious use.¹⁶⁰

Similar to what occurred in other cases, the city in *Opulent Life Church* changed its zoning law during the course of litigation. The court first held that the city’s earlier zoning law was a clear violation of the Equal Terms provision because it required churches—and only churches—to obtain approval from 60% of property owners within a 1,300-foot radius and to obtain discretionary approval of the mayor and board.¹⁶¹ The city even conceded that its former ordinance was a violation, but the court remanded on the issue of the current zoning law that the city had implemented on the “eve of oral argument.”¹⁶²

C. The Uncommitted Circuits

Two other circuits have considered the Equal Terms provision, but both of them merely affirmed without offering a definitive interpretation. The Tenth Circuit noted the debate in other circuits but affirmed the jury’s findings without reaching the question of what the proper test should be.¹⁶³ The Second Circuit noted that other circuits had “differences in the mechanism for selecting an appropriate secular comparator,” but deferred to the district court’s findings that

156. *Id.* at 424. The Ninth Circuit summarized the Fifth Circuit’s original test in this way: “[A] church must show ‘more than simply that its religious use is forbidden and some other nonreligious use is permitted,’ because the [E]qual [T]erms provision ‘must be measured by the ordinance itself and the criteria by which it treats institutions differently.’” *Centro Familiar Cristiano Buenas Nuevas*, 651 F.3d at 1169 n.25.

157. *Elijah Grp.*, 643 F.3d at 424.

158. 697 F.3d at 292.

159. *Id.*

160. *Id.*

161. *Id.* at 293.

162. *Id.* at 281, 293.

163. *Rocky Mountain Christian Church v. Bd. of Cnty. Comm’rs.*, 613 F.3d 1229, 1233–36 (10th Cir. 2010). A megachurch that had been continually expanding its various operations was denied a permit to make an addition to its school. *Id.* at 1234–35. An extensive list of municipal and religious organizations joined the county board as *amici curiae* and the United States stepped in as intervener to defend on behalf of the church. *Id.* at 1229. The comparator here was another high school that had previously been approved for an exception similar to the one denied the church for its high school. *Id.* at 1236–37.

the comparators were similarly situated.¹⁶⁴ The court did not adopt or reject any of the other circuits' tests, but it did use the contested "similarly situated" language for identifying a comparator.¹⁶⁵ However, the court described the test in new terms, requiring "that the institutions are similarly situated *for all functional intents and purposes relevant here.*"¹⁶⁶

In addition to these two circuits that considered the Equal Terms provision without deciding on an interpretation, the majority of circuits have not even considered cases involving it. The few circuit opinions that have been issued offer opinions that are: (1) internally divided by strong dissents; (2) in conflict with the other circuits; or (3) a reversal of their prior interpretation. This leaves the majority of district courts without authoritative guidance on how to apply the Equal Terms provision.

III. SIMPLIFYING AND STRENGTHENING THE PROTECTIONS OF THE EQUAL TERMS PROVISION

A single sentence of just 31 words, the Equal Terms provision should be "straightforward," as the dissent declared in *River of Life*.¹⁶⁷ Indeed, the problems arise not from a lack of textual clarity, but from the perception that it creates—what one of the concurrences in *River of Life* described as "a somewhat mysterious and unprecedented device," which, "as a practical matter, requires . . . some limitations to be provided by the judiciary."¹⁶⁸ The conflicting interpretations are a result of the differing views on which limitations are required and how to define those limitations.

However, the courts have been asking the wrong question. They should not be asking themselves which limiting principle to adopt. They should be asking whether any limitation is required at all. The statute explicitly requires the broadest constitutionally permissible interpretation.¹⁶⁹ The proper question is not whether that broad interpretation is "odd or unprecedented," but whether it is constitutional.

This Part addresses the problems and inconsistencies with the current limiting tests. It then rebuts the constitutional and practical concerns that have

164. *Third Church of Christ v. City of New York*, 626 F.3d 667, 668–70 (2d Cir. 2010). The city of New York sought to revoke a church's permit to host catering events while it had allowed similar events at other nonreligious establishments in the same zone. *Id.* The city sought to revoke the Church's accessory use permit but had only issued Notices of Violation to a co-operative apartment and hotel that had hosted similar events in violation of their certificates of occupancy. *Id.*

165. *Id.* at 668.

166. *Id.* (emphasis added). The Fifth Circuit described the Second Circuit's approach as combining the Third and Seventh Circuits' tests. *Elijah Grp., Inc. v. City of Leon Valley*, 643 F.3d 419, 423 (5th Cir. 2011).

167. *River of Life Kingdom Ministries v. Village of Hazel Crest*, 611 F.3d 367, 377 (7th Cir. 2010) (en banc) (Sykes, J., dissenting).

168. *Id.* at 374 (Cudahy & Rovner, JJ., concurring).

169. 42 U.S.C. § 2000cc-3(g) (2012).

been raised against a broader interpretation. Finally, it argues that a broader reading of the statute is called for by the text, history, and purpose of the statute.

A. The Conflicts and Deficiencies of the Current Interpretations

The current conflicting interpretations of the Equal Terms provision create uncertainty for everyone involved in litigation: the churches, who cannot judge the merits of their claim; the zoning authorities, who cannot determine if they are in compliance; and the district courts, who cannot look to the circuit courts for guidance.

The primary problem is that the current interpretations all apply the Equal Terms provision in a way that allows the municipality to justify the unequal treatment. The two general approaches to what constitutes “less than Equal Terms,” both actually permit less than equal terms. The Eleventh Circuit applies the prohibition from the statutory language to determine if there is a violation, but then allows the government to justify its “less than equal” treatment if it meets strict scrutiny. The other circuits apply the prohibition from the statutory language only after allowing the municipality to justify its less than Equal Terms based on an acceptable regulatory purpose, regulatory criteria, or some other variation on that principle.

Because of these conflicting tests, the courts cannot even agree on which assemblies or institutions should be compared. The Eleventh Circuit has different tests for determining the comparator depending on whether the claim is facial or as-applied. In a facial challenge, it gives the terms “assembly or institution” their plain dictionary meaning and rejects a similarly situated requirement by reasoning that the text of the statute already provided the relevant natural perimeter.¹⁷⁰ In as-applied challenges, the Eleventh Circuit holds that a similarly situated requirement is needed.¹⁷¹ This requires identifying an actual nonreligious assembly or institution that received better treatment in similar circumstances, making the similarly situated terminology appropriate.¹⁷²

In contrast, the other circuits require the nonreligious comparator to be similarly situated in both facial and as-applied claims. This means that if the

170. *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1230 (11th Cir. 2004). In a facial challenge, this comparator may be hypothetical because the plaintiff merely needs to show that the zoning ordinance on its face treats religious uses less than equally when compared to nonreligious uses.

171. The court identified three distinct ways that a land use regulation could violate the Equal Terms provision. Religious organizations or assemblies are treated less than equally as compared to their secular counterparts by a statute that: (1) facially differentiates; (2) is facially neutral but “gerrymanders” to place an unequal burden; or (3) is truly neutral but is selectively enforced. The first two categories only require a theoretical secular comparator. The third type of violation, in which the statute is truly neutral, requires the plaintiff to prove selective or unequal enforcement as-applied. *Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward County*, 450 F.3d 1295, 1308 (11th Cir. 2006).

172. *See id.* at 1311.

plaintiff can identify a valid, similarly situated comparator, the government may not treat the religious assembly or institution less than equally no matter how compelling the government's interest. However, if the government can argue that the nonreligious comparator is not similarly situated in any way, the government is not required to treat the religious plaintiff on equal terms.

Although more recent courts that have addressed these early tests have commented upon the problems, no circuit has offered a solution. The Second Circuit noted the differences of opinion and simply created its own test.¹⁷³ The Fifth Circuit specifically initially refused to adopt any of the tests and took a common sense approach.¹⁷⁴ The Ninth Circuit adopted the regulatory purpose test while noting that the regulatory criteria refinement might be helpful in some cases.¹⁷⁵

These conflicting rules cause confusion that open the door for government manipulation. Religious uses can always be argued to be different than secular uses, which is part of the reason why the Eleventh Circuit rejected a similarly situated test. The problem under the Third Circuit's interpretation is that if the government can identify any regulatory purpose that the comparator serves better than the religious use, the two will not be considered similarly situated and the religious use need not be treated equally. The Seventh and Ninth Circuit tried to solve this problem with the regulatory purpose by instead looking at regulatory criteria.¹⁷⁶ The Fifth Circuit recognized the ease with which cities could also evade that requirement. Accordingly, it required that the purpose or criteria be stated explicitly in the zoning regulation and that the religious uses be treated as well as every other nonreligious use.¹⁷⁷

A final point of disagreement is whether Congress merely intended to codify existing Free Exercise precedent, and how that should affect the interpretation of the Equal Terms provision. The Third and Eleventh Circuits thought that Congress did intend to do that.¹⁷⁸ The Tenth Circuit noted that there was a disagreement and that the disagreement was driving the disparate interpretations, but it did not even attempt to decide the issue.¹⁷⁹ The Eleventh Circuit's requirement of strict scrutiny is essentially just an application of the

173. *Third Church of Christ v. City of New York*, 626 F.3d 667, 669–73 (2d Cir. 2010).

174. *Elijah Grp., Inc. v. City of Leon Valley*, 643 F.3d 419, 424 & n.19 (5th Cir. 2011).

175. *Centro Familiar Cristiano Buenas Nuevas v. City of Yuma*, 651 F.3d 1163, 1172–73 (9th Cir. 2011).

176. *River of Life Kingdom Ministries v. Village of Hazel Crest*, 611 F.3d 367, 371 (7th Cir. 2010) (en banc).

177. *Opulent Life Church v. City of Holly Springs*, 697 F.3d 279, 292 (5th Cir. 2012).

178. *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 262–64, 268–69 (3d Cir. 2007); *Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward County*, 450 F.3d 1295, 1308 (11th Cir. 2006).

179. *Rocky Mountain Christian Church v. Bd. of Cnty. Comm'rs.*, 613 F.3d 1229, 1233 (10th Cir. 2010).

Smith–Lukimi line of precedent that a statute that is not truly neutrally applicable must be subjected to strict scrutiny.¹⁸⁰ Similarly, the Third Circuit’s test using similarly situated secular comparators was based on its preexisting Free Exercise precedents.¹⁸¹ Curiously, the Ninth Circuit chose to adopt those limiting features that were based on Free Exercise jurisprudence, even though it rejected the view that RLUIPA was merely a codification of that jurisprudence.¹⁸²

B. Responding to the Concerns

The concerns about adopting a broader interpretation are twofold. First, a broader interpretation would impermissibly favor religions or in some other way violate the Constitution. Second, there are practical reasons for the seemingly unequal treatment of religious land uses, and requiring truly equal treatment would lead to problematic, if not absurd, consequences. Neither concern justifies a departure from the plain language of the statute.

1. Constitutional Avoidance

The limitations that the courts have read into the statute are motivated by the constitutional avoidance doctrine.¹⁸³ By reading in the limitations from Free Exercise jurisprudence, the courts could reassure themselves that their interpretations of the Equal Terms provision did not violate the Constitution. Because religious organizations have prevailed in many of the cases, there has been no reason to read the statute in a broader fashion that could potentially run afoul of the Establishment Clause.

The question of whether a broader interpretation would necessarily violate the Constitution has not been squarely addressed. The Eleventh Circuit held that the statute was constitutional, but that was only after it added the strict scrutiny balancing test.¹⁸⁴ The Third Circuit expressed doubts about whether the Eleventh Circuit’s test would be constitutional if it had not added strict scrutiny, but only in dicta in a footnote.¹⁸⁵ Other opinions expressed similar doubts in passing about the constitutionality of a broader reading of the statute.¹⁸⁶ In contrast, the dissents and some of the concurrences were more optimistic that a broad interpretation would or could be constitutional.¹⁸⁷

180. *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1231–33 (11th Cir. 2004).

181. *Lighthouse Inst. for Evangelism*, 510 F.3d at 265–66.

182. *Centro Familiar Cristiano Buenas Nuevas v. City of Yuma*, 651 F.3d 1163, 1172–73 (9th Cir. 2011).

183. *See supra* note 16.

184. *See Midrash Sephardi, Inc.*, 366 F.3d at 1231–36.

185. *Lighthouse Inst. for Evangelism*, 510 F.3d at 264–68 & nn.11–14.

186. *Id.* at 266 n.11.

187. Two judges seemed less certain there would be a problem and said the issue of constitutionality should not be referenced in dicta because it was not briefed or argued. *River of Life Kingdom Ministries v. Village of Hazel Crest*, 611 F.3d 367, 375–76 (7th Cir. 2010) (Manion, J., concurring); *id.* at 391 & n.7 (Sykes, J., dissenting).

The problem with these narrow interpretations is that reading the statute as merely an incorporation of the existing Free Exercise Clause makes the Equal Terms provision only as strong as the minimal protections required by current Free Exercise jurisprudence. As the Ninth Circuit noted, the Equal Terms provision does not use the language of the Free Exercise Clause cases, and it would have been meaningless for Congress to pass a law that simply says “the Constitution applies to land use provisions.”¹⁸⁸

The Supreme Court’s decisions upholding the Institutionalized Persons section of RLUIPA made it clear that Congress is free to legislate beyond that which the Free Exercise Clause would require, as long as it does not implicate the Establishment Clause limitations.¹⁸⁹ This is because the legislative authority is derived from the remedial powers under section 5 of the Fourteenth Amendment. When Congress finds repeated violations of constitutional rights, it can legislate to correct those violations.¹⁹⁰ As discussed above, the Court’s reasoning for rejecting the Establishment Clause challenges to the Institutionalized Persons section of the Act applies directly to the Land Use and Equal Terms provisions as well.¹⁹¹

This general wariness about the Equal Terms provision stems from the feeling that it is a “mysterious and unprecedented device.”¹⁹² But the truth is that statutes routinely expand the application of constitutionally based norms and impose statutory bans on behavior that is technically constitutionally permissible. In this regard, the Equal Terms provision is no different than laws banning discrimination based on race or gender in the context of private employment or public accommodations.¹⁹³ Neither of these requirements is a constitutional right, but they have been statutorily mandated by Congress.

In fact, a statutory requirement of equal treatment is not even unprecedented in Free Exercise jurisprudence. In a string of cases, the Supreme Court repeatedly held that local school boards could not prevent religious organizations from using school facilities if they allowed secular organizations to use them.¹⁹⁴ The Court repeatedly rejected claims that this was a violation of the Establishment Clause.¹⁹⁵ Why would the result be any different where a local zoning board is required to allow religious assemblies and institutions to use land in the same way as nonreligious assemblies and institutions?

188. *Centro Familiar Cristiano Buenas Nuevas v. City of Yuma*, 651 F.3d 1163, 1172 (9th Cir. 2011).

189. *Cutter v. Wilkinson*, 544 U.S. 709, 719 (2005).

190. *See City of Boerne v. Flores*, 521 U.S. 507, 517 (1997).

191. *See supra* text accompanying notes 61–72.

192. *River of Life Kingdom Ministries*, 611 F.3d at 374 (en banc) (Cudahy & Rovner, JJ., concurring).

193. *See, e.g., Katzenbach v. McClung*, 379 U.S. 294, 305 (1964) (upholding the prohibition under the Civil Rights Act of 1964 against racial discrimination in places of public accommodation as a valid exercise of Congress’s authority to regulate commerce).

194. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001); *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Bd. of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226 (1990); *Widmar v. Vincent*, 454 U.S. 263 (1981).

195. *See supra* note 194.

In addition to the Supreme Court's ringing endorsement of laws that offer relief from government-imposed burdens, a broad interpretation of the Equal Terms provision would also pass other Establishment Clause tests. The Eleventh Circuit adopted the broadest interpretation and still found that the Equal Terms provision passed the *Lemon* test. It likewise passes the reasonable-observer test because an observer of a religious building is unlikely to be aware of zoning laws at all, let alone whether any particular religious building was given an exemption. Even if the reasonable observer were aware of the exemption, the exemption would only be allowing the church to be where other assemblies or institutions already were. The idea that a reasonable observer would consider private religious land use to be an impermissible government advancement or endorsement of religion is highly implausible. If a court truly feels that a broader interpretation might be unconstitutional, it should devote more attention to those concerns than a passing reference in a footnote before it abandons the broader interpretation called for by the statute.

2. Practical Concerns

It is also worth addressing a few of the common practical reasons given in these cases for excluding religious uses. Most of these concerns can be remedied, and none rise to the level of such an absurd result that it requires the plain language of the statute to be abandoned.

Several cases involved state alcohol-buffer-zone laws, which prevent establishments that serve alcohol within a certain radius of a church.¹⁹⁶ While noting that it was strange for the city to value the availability of alcohol over the availability of religious instruction, the Third Circuit majority allowed the city to ban churches in order to promote bars.¹⁹⁷ However, as the dissent in that case noted, the Supremacy Clause does not allow a city to violate a federal law requiring that the religious land use be treated equally by pointing to the need to comply with a state law.¹⁹⁸ States should either add an opt-out provision to such laws, as Arizona did during the course of the Ninth Circuit case,¹⁹⁹ or those laws should be at least partially preempted by RLUIPA. Laws designed to keep bars from moving in next to churches should not be turned around to prevent a willing church from locating in an entertainment district.

Another common reason offered by cities is that the religious uses will not create the kind of tax revenue the city is hoping to generate from its downtown area or along its major roadways.²⁰⁰ However, this is not always true because some

196. *Centro Familiar Cristiano Buenas Nuevas v. City of Yuma*, 651 F.3d 1163, 1166 (9th Cir. 2011); *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 270 (3d Cir. 2007).

197. *Lighthouse Inst. for Evangelism, Inc.*, 510 F.3d at 270–72.

198. *Id.* at 290 (Jordan, J., dissenting).

199. ARIZ. REV. STAT. ANN. § 4–207(C)(4) (2013); *Centro Familiar Cristiano Buenas Nuevas*, 651 F.3d at 1175.

200. *See, e.g., River of Life Kingdom Ministries v. Village of Hazel Crest*, 611 F.3d 367, 373 (7th Cir. 2010).

religious buildings include auxiliary uses such as bookstores and schools that would create both sales and payroll taxes. To the extent that religious land uses generate less tax revenue, they will do so no matter where they are located. In fact, many desirable land uses create little tax revenue, including most government land uses such as libraries and parks.

Municipalities often argue that the religious use is incompatible with the lively entertainment character of the neighborhood that they are trying to foster.²⁰¹ The problem with this justification is that the government is taking the most prominent and desirable areas of town and making a judgment that those areas are so important to the town's entertainment or tourism prospects that they cannot be wasted on religious uses. Government cannot make these kinds of value judgments without showing an unconstitutional preference for nonreligious assemblies.

Finally, there is the concern that churches will be allowed to locate wherever they wish. The Third Circuit described this problem as being forced to allow a thousand-member church in any area that a ten-member book club was permitted because they are both assemblies. The limiting interpretations provided by the circuit courts solve this problem by having the city argue that the difference in size is a compelling interest or a regulatory purpose or criteria. But this allows a city to prohibit churches and then say that the reason it is banning churches is because the city has concerns with parking for large assemblies. If the city really wanted to address parking, it should prohibit all assemblies or institutions with more than a certain number of members. The current interpretations allow cities to prohibit churches if parking is a legitimate regulatory purpose or criteria, even if they permit other large assemblies or institutions.

C. The Broader Interpretation Called for by the Text, History, and Purpose

The current interpretations of the Equal Terms provision have failed to produce consensus. They should be replaced with a straightforward application of the text as written. The Eleventh Circuit's addition of a strict scrutiny test has been rejected by all the other circuits.²⁰² The similarly situated requirement began with a divided panel of the Third Circuit and then moved through a fractured en banc panel of the Seventh Circuit.²⁰³ The Ninth and Fifth Circuits have started with these divided opinions, and then made their own changes.²⁰⁴ The two other circuits that have looked at the provision have adopted none of these interpretations.²⁰⁵

The whole history of Free Exercise Clause jurisprudence, the statutory enactments leading up to RLUIPA, and the specific history of the Act itself call for a broader interpretation.²⁰⁶ Congress had several years of hearings in which it determined that religious assemblies and institutions were regularly and widely

201. See, e.g., *Centro Familiar Cristiano Buenas Nuevas v. City of Yuma*, 615 F. Supp. 2d 980, 983–84 (D. Ariz. 2009), *rev'd and remanded*, 651 F.3d 1163 (9th Cir. 2011).

202. See *supra* Part II.

203. See *supra* Part II.B.1–2.

204. See *supra* Part II.B.3–4.

205. See *supra* Part II.C.

206. See *supra* Part I.

subjected to unequal treatment in violation of Free Exercise rights.²⁰⁷ It found that the problem was most acute among small, newcomer religions and those of ethnic and racial minorities.²⁰⁸ The plaintiffs in the cases discussed in this Note further confirm Congress's findings both in terms of the continuing unequal treatment of religious land use and the tendency of small minority churches to be affected.

A broader reading of the provision would also better serve the purpose of the law. Congress noted that while sometimes explicitly racial and religious motivations are expressed, "[m]ore often, the discrimination lurks behind such vague and universally applicable reasons as traffic, aesthetics, or 'not consistent with the city's land use plan.'"²⁰⁹ Yet the various similarly situated tests openly allow the exact same vague and universally applicable excuses that were the primary evil which the law was designed to remedy.

Read in its broadest terms, as RLUIPA specifically requires,²¹⁰ the Equal Terms provision would mean that wherever the government allows nonreligious assemblies or organizations, it must also allow religious ones. The terms "assembly" or "institution" should be given their normal dictionary definitions.²¹¹ Instead of trying to determine when the courts should consider nonreligious assemblies or institutions to be similarly situated, the courts should accept Congress's implicit judgment in the Equal Terms provision that all religious assemblies and institutions are similarly situated with all nonreligious assemblies and institutions.

If this definition were followed, the government would not be given the opportunity to come up with a regulatory purpose that justifies the exclusion of religion; it would simply be required to treat religious and nonreligious assemblies and institutions on equal terms. Similarly, governments would not be allowed to try to justify any violations of the statute by arguing that it is serving a compelling interest with a narrowly tailored response. The government would still be able to prescribe the terms for which assemblies or institutions it allowed in certain zones—such as square footage, occupancy limitations, or parking requirements—but those terms would have to treat the religious uses no less than equal with the

207. 146 CONG. REC. S7774-01 (2000).

208. *Id.*

209. *Id.*

210. 42 U.S.C. § 2000cc-3(g) (2012).

211. For instance the Eleventh Circuit adopted the following definitions: An "assembly" is "a company of persons collected together in one place [usually] and usually for some common purpose (as deliberation and legislation, worship, or social entertainment)," Webster's 3d New Int'l Unabridged Dictionary 131 (1993); or "[a] group of persons organized and united for some common purpose." Black's Law Dictionary 111 (7th ed.1999). An institution is "an established society or corporation: an establishment or foundation esp. of a public character," Webster's 3d New Int'l Unabridged Dictionary 1171 (1993); or "[a]n established organization, esp. one of a public character . . ." Black's Law Dictionary 801 (7th ed.1999).

Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1230-31 (11th Cir. 2004).

others. The government would not be able to prohibit a church for any reason that it did not apply equally to other assemblies and institutions because that would be an unequal term.

There are several reasons to read the Equal Terms provision as a flat prohibition that examines the terms applied to all assemblies or institutions. First, this reading would simplify the determination of Equal Terms claims and provide more consistent outcomes. The courts would not be required to consider strict scrutiny balancing or determine whether the regulatory purpose or criteria was legitimate. Broadly interpreting the plain meaning of the statute would mean more consistent outcomes, rather than having each circuit come up with its own formulation of extra-statutory limitations.

Second, such a broad interpretation of the statute is consistent with a reading of RLUIPA as a whole. The “Rules of Construction” section specifically requires that it be accorded the strongest protection in favor of free exercise that is permissible under the Constitution.²¹² The strict scrutiny limitation was included in other sections of the Act, and so its absence in the Equal Terms provision can only mean that Congress intended no such limitation. Other parts of the Act carefully incorporate the language of existing precedents,²¹³ but the Equal Terms provision conspicuously omits the words “similarly situated.” As such, reading it as an Equal Protection provision requiring similarly situated comparators is not justified. Congress already determined that the religious uses were similarly situated and mandated that they be regulated on at least equal terms with other uses.

Third, Congress made extensive findings of fact to support its conclusion that unequal treatment was widespread. Courts are typically deferential to congressional fact-finding and should be equally deferential here. Legislative history shows that Congress was concerned that governments used neutral-sounding regulatory purposes and criteria, but that the effects were far from neutral.²¹⁴ Only a broad interpretation flatly prohibiting less than equal application of terms regardless of motive can remedy the specific evil that Congress intended to remedy.

Finally, the outcome of the existing outcomes in previous cases would not change significantly under this test, but lower courts would have a far more straightforward rule to apply. Many of the circuit courts have overturned the rulings of the district courts because there has been no clear guiding precedent for the district courts to follow.²¹⁵ This more straightforward rule would also provide clear guidance to zoning authorities on how to draft their ordinances, and to religious organizations on how to know when they have a valid complaint.

212. *Id.*

213. *Id.* §§ 2000cc(a), 2000cc-1.

214. 146 CONG. REC. S7774-01 (2000).

215. *See, e.g.,* Centro Familiar Cristiano Buenas Nuevas v. City of Yuma, 651 F.3d 1163, 1175 (9th Cir. 2011); Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1219 (11th Cir. 2004).

CONCLUSION

Attacks on religious buildings and opposition to their construction have long been associated with the repression of religious, ethnic, and racial minorities. The ability to create houses of worship is inextricably linked with the free exercise of religion. Therefore, when municipalities place unequal zoning restrictions on religious assemblies and institutions, they are placing an impermissible burden on the constitutional rights guaranteed by the Free Exercise Clause. Such zoning restrictions also evince a constitutionally questionable preference for secular purposes, assemblies, and land use over religious observance.

Congress passed RLUIPA after years of study and findings that these unconstitutional restrictions on religious exercise were pervasive. Congress also realized that municipalities that placed restrictions on religious buildings often justified this unequal treatment of religious land uses through the means of vague and universally applicable zoning purposes and criteria. RLUIPA provides several remedies for the problems that Congress identified, but the Equal Terms provision is uniquely capable of combating this kind of surreptitious discrimination.

Unfortunately, the circuit courts interpreting the Equal Terms provision have read in limitations to its application based on the limited protection offered by current Free Exercise jurisprudence. These limitations include allowing governments to justify unequal treatment using a strict scrutiny balancing test or to present their own regulatory purpose or zoning criteria to justify the preferential treatment given to secular land uses. As a remedial measure that specifically calls for the most expansive, constitutionally permissible interpretation possible, the courts should not be limiting the application based on the minimal protections of modern Free Exercise jurisprudence. The courts should instead give the Equal Terms provision the broadest remedial effect its text supports without violating the Establishment Clause.

The broadest plain meaning of the statute is that wherever governments allow secular assemblies and institutions, they must also permit religious assemblies and institutions on no less than equal terms. This interpretation—without any caveats—is most consistent with RLUIPA’s text and Congressional intent, and also provides a clear and simple rule that will provide more consistent outcomes. This interpretation will not violate the Establishment Clause because it only calls for equal treatment of religious uses where secular uses are already permitted. It can only be used to prohibit unfavorable treatment of religion, and requiring parity cannot lead to special or preferential treatment.
