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RLUIPA'S EQUAL TERMS CLAUSE AND THE CIRCUIT SPLIT: STRIKING A
BALANCE BETWEEN ECONOMIC CONCERNS AND PROTECTING RELIGIOUS
LIBERTY

*Amber Wheeler**

I. INTRODUCTION

Churches are being eliminated from downtown and commercial areas for countless reasons. They are unpopular in residential districts because they allegedly create too much traffic and noise. Religious assemblies are excluded from downtown and commercial areas because they do not attract enough traffic to generate retail and tax revenues for the surrounding areas, and the traffic that they do draw tends to be irregular (e.g., only when services or religious events are scheduled.¹) Notwithstanding the unpopular perceptions and the pushback from local zoning boards that religious institutions inevitably face when searching for a place to serve their community, these religious institutions maintain a First Amendment right to exist and to exercise their religion. In other words, churches have a First Amendment right to not only practice their religion, but also to have a location to do so. Churches are unable to practice this fundamental right if they do not have a physical space to do so. When local municipalities and zoning boards place restrictions on where churches can and cannot build, they are essentially restricting their free exercise of religion. Often, their freedom of how to choose how best to represent their congregation and to fulfill their faith is characteristically burdened by hostile zoning authorities regulated by a local zoning board.

Apart from these restrictions, justifications exist as to why there is a zoning process in the first place. Historically, zoning originated as an attempt to create legislatively-fixed plans of a community.² In more cases

* J.D., Class of 2020, Mississippi College School of Law. I am grateful for the thoughtful and engaging conversations with, and comments from Professor Mark Modak-Truran, who inspired this project and in guiding me in its development. Further thanks to the *Mississippi College Law Review* Editorial Board for continuously pushing me to make this Article better.

1. See *River of Life Kingdom Ministries v. Village of Hazel Crest*, 611 F.3d 367, 371 (7th Cir. 2010); *Lighthouse Inst. for Evangelism v. City of Long Branch*, 510 F.3d 253, 270 (3d Cir. 2007) (noting that “churches are by their nature not likely to foster the kind of extended-hours traffic and synergistic spending” desired in a commercial district).

2. Ashira P. Ostrow, *Judicial Review of Local Land Use Decisions: Lessons from RLUIPA*, 31 HARV. J.L. & PUB. POLY 717, 727 (2008) (arguing that municipalities

than not, local officials within municipalities exercise broad discretion to deny special zoning permits, excluding churches based on ambiguous standards such as whether the use is “consistent with the character of the neighborhood” or “consistent with the health, safety, and welfare of the community.”³ As a result, substantive planning has been replaced by subjective zoning decisions that disregard principal First Amendment rights, making it convenient for local zoning officials to disguise what appears to be on the surface proper zoning regulations of churches, but in all actuality, are arbitrary, discriminatory, or a combination of the two. This tension raises the question of what the appropriate balance between religious freedom is and a community’s ability to regulate land use. In efforts to answer this question, Congress enacted the Religious Land Use and Institutionalized Persons Act (RLUIPA), which prohibits the government from implementing a land-use regulation in a manner that treats religious assemblies and institutions less favorably than secular assemblies and institutions.⁴

This Comment does not argue for a particular interpretation of religious exercise under RLUIPA. Rather, it reviews how three different circuit courts have interpreted the equal terms provision, specifically analyzing how these courts are dealing with the tension between commercial land use regulations and religious land use regulations. The Eleventh Circuit interprets the provision textually, finding a violation when a city treats any type of religious land use with any assembly or institution on less than equal terms.⁵ The Third and Seventh Circuits both use a “similarly situated” test, though each circuit’s test differs slightly. The similarly situated requirement forces a religious assembly to demonstrate that it was treated on less-than-equal terms compared to a similar or comparable assembly.⁶

zone individual parcels of land on a highly discretionary, case-by-case basis (“The absence of substantive planning means that zoning officials, who often lack training or planning expertise, have no objective guidelines against which to measure individual zoning requests. . . . This combination of factors leaves ample room for inconsistency and corruption in the zoning process.”)).

3. Douglas Laycock & Luke W. Goodrich, *RLUIPA: Necessary, Modest, and Under-Enforced*, 39 FORDHAM URB. L.J. 1021, 1022 (2012).

4. Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §§ 2000cc-2000cc(5) (2006).

5. *See* Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1229-35 (11th Cir. 2004).

6. *Lighthouse Inst. for Evangelism v. City of Long Branch*, 510 F.3d 253, 257 (3d Cir. 2007).

This Article is divided into three parts. Part I discusses the development of the conflict between churches and zoning authorities regarding the Supreme Court's free exercise doctrine that led to the enactment of RLUIPA and briefly describes the mechanics of the equal terms provision. Part II describes the circuit split concerning the proper interpretation of the equal terms provision and explains the tests put forth by the Eleventh, Third, and Seventh Circuits. Part III examines each jurisdiction's interpretation of their application of RLUIPA, defining how each jurisdiction appears to deal with this tension, and will analyze which interpretations appear to be most protective of religious land use and which appear to be the least protective. This Comment argues that the Third and Seventh Circuit fail to reconcile the purpose of RLUIPA, weighing commercial interests within municipalities higher than religious liberty. Moreover, the Eleventh Circuit's interpretation of RLUIPA's equal terms provision strikes a reasonable balance between religious assemblies and commercial districts within municipalities in the zoning context.

II. HISTORICAL BACKGROUND OF RLUIPA AND HOW IT BECAME THE LAW

This part begins with a brief explanation of the history of zoning and land use laws. Next, this section will summarize the events and legislative history leading up to RLUIPA's enactment and then briefly describe its substantive provisions and the structure of RLUIPA's land-use provisions. It will then explain the conflicts that have occurred between churches and city zoning officials in terms of land use regulation that further developed the need for RLUIPA.

A. An Introduction to the Zoning Conflict

Conflict between municipalities and religious institutions based on land use issues have not always been a topic of concern. The intentions of early city planners were to separate residential districts from commercial and industrial areas in order to stabilize neighborhoods and protect property values.⁷ Zoning is an extension of the concept of public nuisance,⁸ which is defined as "an unreasonable interference with a right common to the general public, such as a condition dangerous to health, offensive to community

7. See J. Gregory Richards, *Zoning for Direct Social Control*, 1982 DUKE L.J. 761, 762 (1982).

8. Thomas E. Raccuia, *RLUIPA and Exclusionary Zoning: Government Defendants Should Have the Burden of Persuasion in Equal Terms Cases*, 80 FORDHAM L. REV. 1853, 1858 (2012).

moral standards, or unlawfully obstructing the public in the free use of public property.”⁹ The idea is that some uses of land are inherently injurious to other uses and should be separated.¹⁰ For instance, a city might restrict one area to industrial land uses while restricting another area to commercial land uses and another to residential uses.¹¹ However, by the end of the nineteenth century, local governments became increasingly more concerned about the compatibility of land uses within municipalities.¹² The first modern comprehensive zoning code was enacted in New York City in 1916,¹³ and not long after that, the Supreme Court upheld the constitutionality of zoning in *Village of Euclid v. Ambler Realty*.¹⁴

In its landmark decision in *Euclid*, the Supreme Court confirmed the validity of zoning as a proper exercise of the State’s police power,¹⁵ thus establishing the act of zoning as the primary means of land use regulation in the United States. The Supreme Court held that a zoning ordinance violates due process only if it is “clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.”¹⁶ Following the *Euclid* decision, churches became more intertwined with land use regulations and zoning ordinances.¹⁷ Some zoning regulations protected churches, keeping out places such as saloons from locating near religious institutions.¹⁸ As parishioners moved to suburbs, so did churches, and between 1937 and 1948, religious construction in the United States substantially increased.¹⁹ As a result, cities began zoning them out of certain areas, reasoning that they intruded on their peace and quiet.²⁰ As the conflict of “Euclidean Zoning”²¹ became more

9. *Public Nuisance*, BLACK’S LAW DICTIONARY (10th ed. 2014).

10. Raccuia, *supra* note 8, at 1858.

11. *Id.*

12. Ashira P. Ostrow, *Judicial Review of Local Land Use Decisions: Lessons from RLUIPA*, 31 HARV. J.L. & PUB. POLY 717, 728 (2008).

13. Raccuia, *supra* note 8, at 1859.

14. *Village of Euclid v. Ambler Realty*, 272 U.S. 365 (1926).

15. *Id.* at 390.

16. *Id.* at 395.

17. Danielle Acker Susanj, *RLUIPA’s Equal Terms Clause and the Circuit Split: It’s All About the Money*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2209989.

18. Susanj, *supra* note 17; See JAMES E. CURRY, PUBLIC REGULATION OF THE RELIGIOUS USE OF LAND: A DETAILED AND CRITICAL ANALYSIS OF A HUNDRED COURT CASES 3 (1964) (discussing *Village of Euclid v. Ambler Realty Co.*).

19. Susanj, *supra* note 17, at 3; See CURRY, note 18 (noting how churches were protected from certain types of uses).

20. Susanj, *supra* note 17, at 3.

21. Ostrow, *supra* note 12, at 732.

prevalent in the land use regulation context, the conflict between religious institutions and local governments became a concern, and the need for legislation became apparent.

B. Congress Struggles with Free Exercise Jurisprudence

Freedom of religion is one of the most notable and significant rights in the United States. The First Amendment states that, “Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof”²² In the almost twenty years since Congress has enacted RLUIPA, the struggle between Congress and the Court to determine the extent to which religious liberties were protected from governmental action has proved to be tumultuous, controversial, and has been constantly challenged. A rift has developed between the Supreme Court and Congress on how to consistently interpret the right to Free Exercise in regard to the lack of protection for religious freedom.

Until 1990, under *Sherbert v. Verner*,²³ courts evaluated Free Exercise claims under the “compelling state interest” test which provided that, when a governmental action or regulation imposed a significant burden on a sincerely-held religious belief, that governmental action was unconstitutional as against the religious institution or practitioner unless it was the “least restrictive” means of furthering a “compelling governmental interest,” also known as strict scrutiny.²⁴ In 1990, in *Employment Division v. Smith*,²⁵ the Supreme Court rejected *Sherbert*'s strict scrutiny test when it upheld as constitutional an Oregon state law that prohibited the use of a hallucinogenic substance known as peyote in religious practice, even though peyote was frequently used in Native American religious practices.²⁶ According to the Court in *Smith*, so long as a state law was

22. U.S. CONST. AMEND. I.

23. *Sherbert v. Verner*, 374 U.S. 398 (1963). The Court held that South Carolina could not constitutionally apply its eligibility restrictions for unemployment compensation to deny benefits to a Seventh-Day Adventist who refused work on Saturday because of her religion. *Id.* at 410.

24. *Id.* at 406-09.

25. *Employment Division v. Smith*, 494 U.S. 872, 890 (1990). The Court held constitutional an Oregon law prohibiting the knowing or intentional possession of a “controlled substance,” which included peyote. The two Native Americans contended that the law infringed on their religious liberty because they used peyote as part of their religious ceremonies as members of the Native American Church. The Supreme Court held that the Oregon law did not target religious beliefs but was neutral and generally applicable.

26. *Id.* at 874.

neutral and generally applicable, religious observers were required to comply with the law.²⁷

Congress expressed its disagreement with the Court's decision in *Smith* when it passed the Religious Freedom Restoration Act of 1993 (RFRA).²⁸ Congress's express purpose in enacting the law was to overturn *Smith* and to "restore the compelling interest test as set forth in *Sherbert v. Verner*,"²⁹ effectively attempting to rewrite what was constitutionally enforced in previous Supreme Court cases. Congress enacted and enforced RFRA against the states by relying on its enforcement powers under Section 5 of the Fourteenth Amendment.³⁰ The Fourteenth Amendment prohibits states from making or enforcing laws that (1) "abridge the privileges or immunities of citizens of the United States" (2) "deprive any person of life, liberty, or property, without due process of law," nor (3) "deny to any person within its jurisdiction the equal protection of the laws."³¹ Section 5 of the Amendment gives Congress the power to enforce the Fourteenth Amendment's provisions "by appropriate legislation."³²

Only four years after Congress enacted RFRA, the Supreme Court struck down RFRA as it applied to the states in *City of Boerne v. Flores*³³

27. *Id.* at 878-82. ("We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate.")

28. 42 U.S.C. § 2000 (1994). RFRA provides that, "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b)." 42 U.S.C. § 2000bb-1(a). Subsection (b) then maintains that a substantial burden of a person's exercise of religion is applicable if the burden furthers a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest.

29. 42 U.S.C. § 2000bb(b)(1) (explaining that the purposes of the Act are to restore the compelling interest test in *Sherbert* and "to guarantee its application in all cases where free exercise of religion is substantially burdened").

30. *City of Boerne v. Flores*, 521 U.S. 507, 516-17 (1997) (describing RFRA's application to state and local governments: "[t]he Act's mandate applies to any 'branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States,' as well as to any 'State or . . . subdivision of a State.'").

31. U.S. CONST. amend. XIV.

32. U.S. CONST. amend. XIV., § 5; See Sarah Keeton Campbell, *Restoring RLUIPA's Equal Terms Provision*, 58 DUKE L.J. 1071, 1078 (2009); See also ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPALS AND POLICIES* 292-93 (3d ed. 2006) (explaining that Congress can only regulate state and local governments under its Section 5 power).

33. *City of Boerne*, 521 U.S. 507. *City of Boerne* involved a church that was attempting to expand their congregation. The church was denied a zoning permit by local zoning authorities on the basis of a local zoning ordinance that had recently been passed. The ordinance authorized the city's Historic Landmark Commission to prepare a preservation plan with historic landmarks and districts. As a result, the commission was

on the basis that Congress had acted beyond the scope of its Section 5 powers to regulate the states.³⁴ *City of Boerne* was a zoning case where a Catholic Archbishop was denied a request for a building permit by local zoning authorities who argued that the church was part of a historic district.³⁵ The church sued under RFRA arguing that its congregation had outgrown their current church, and the ruling was a substantial burden on their free exercise of religion and did not contain a compelling state interest.³⁶ The issue in the case was whether Congress had exceeded its enforcement power under Section 5 of the Fourteenth Amendment³⁷ by enacting RFRA.³⁸ The Court explained that Congress's power under Section 5 was remedial and prevented unconstitutional actions.³⁹ Notwithstanding this remedial power, RFRA was not considered a "remedial, preventive legislation" that was intended to address the free exercise of religious liberty violations committed by the states.⁴⁰ According to the Court, if Congress chooses to have remedial power to enforce and protect religious liberty by regulating the states under Section 5, then the legislation had to show "congruence and proportionality" in accordance to the violations and how it would attempt to correct those violations.⁴¹ Because RFRA was not remedial and did not meet the "congruence and proportionality" test, RFRA was disproportionate and was deemed unconstitutional as applied to the states.⁴² Despite this holding, RFRA continues to be controlling as to the federal government.

required to preapprove construction affecting historic landmarks or buildings in a historic district.

34. *Id.* at 519 ("[A]s broad as the congressional enforcement power is, it is not unlimited. Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is. It has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation.").

35. *Id.* at 511–12.

36. *Id.*

37. U.S. CONST. AMEND. XIV § 5. This section provides, "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

38. *City of Boerne*, 521 U.S. at 517.

39. *Id.* at 519.

40. *Id.* at 532. Justice Kennedy wrote for the Court, explaining that, "RFRA is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior. It appears, instead, to attempt a substantive change in constitutional protections."

41. *Id.* at 520.

42. *Id.* at 530–32 (further explaining the congruence and proportionality test). Justice Kennedy contended that, "while preventive rules are sometimes appropriate remedial measures, there must be a congruence between the means used and the ends to

After the Court's landmark decision in *Boerne*, it was clear that the decision in *Smith* would not be overturned. Further, Congress's attempt to broadly define constitutional standards by creating RFRA was essentially an attempt to alter constitutional rights, rather than by simply enforcing a constitutional right.⁴³ However, unsurprisingly, Congress did not accept the Court's decision and shifted its attention to drafting a redefined statute that protected religious liberties while simultaneously meeting the Court's approval.

C. Take Two: Congress Passes RLUIPA

Just three weeks after the Court invalidated the Religious Freedom Restoration Act in *Boerne*, Congress began to work on legislation "to enhance the level of protection afforded to religious freedom."⁴⁴ The House of Representative's Subcommittee held a series of hearings to reevaluate and assess the need to protect religious freedom. These hearings led to the introduction of various bills, one of which included the Religious Liberty Protection Act of 1999 ("RLPA") and the eventual passage of RLUIPA.⁴⁵ Similar to RFRA, RLPA attempted to reenact RFRA by once again introducing strict scrutiny for state laws that burdened religious exercise. But this time Congress attempted to use its Article I powers rather than its Section 5 powers to do so.⁴⁶ Despite passing in the House, RLPA was delayed in the Senate which forced Congress to abandon strict scrutiny as the test for all laws that burdened religious freedom.⁴⁷

Continued lobbying focused primarily on protection in two particular areas: religious land use privileges and religious expression for institutionalized persons. As a result, eventually led to RLPA's evolution into the more narrow and focused Religious Land Use and Institutionalized

be achieved. The appropriateness of remedial measures must be considered in light of the evil presented."

43. *Id.* at 535–36.

44. Michael Paisner, *Boerne Supremacy: Congressional Responses to City of Boerne v. Flores and the Scope of Congress's Article I Powers*, 105 COLUM. L. REV. 537, 541 (2005).

45. See H.R. REP. NO. 106-219 (1999).

46. See Marci A. Hamilton, *Federalism and the Public Good: The True Story Behind the Religious Land Use and Institutionalized Persons Act*, 78 IND. L.J. 311, 333–34 (2003) (explaining the development of religious liberty bills eventually leading to the passage of RLUIPA).

47. Sean Foley, *RLUIPA's Equal-Terms Provision's Troubling Definition of Equal: Why the Equal-Terms Provision Must Be Interpreted Narrowly*, 60 KAN. L. REV. 193, 199 (2012).

Persons Act (“RLUIPA”).⁴⁸ RLUIPA prohibits the government from implementing a land use regulation in a manner that treats religious assemblies and institutions less than favorably than secular assemblies and institutions.⁴⁹ Prior to the enactment of RLUIPA, Congress held nine hearings over a three-year period and compiled extensive and widespread evidence of religious discrimination in the land use context.⁵⁰ Congress determined that land use regulations lacked objective, generally applicable standards, leaving zoning officials with infinite discretion in determining whether to deny or grant zoning requests.⁵¹ As a result, RLUIPA passed with unanimous bipartisan consent and was signed into law by President Clinton on September 22, 2000.⁵²

1. The Equal Terms Provision in Context

RLUIPA’s land-use section protects individuals, religious assemblies, and religious institutions against two main categories of government action. One category provides that RLUIPA prohibits land-use regulations that substantially burden religious liberty, also known as the substantial burden provision.⁵³ The second category directly addresses discrimination.⁵⁴ One subsection provides that a jurisdiction cannot treat a religious assembly or institution on less than equal terms with a secular assembly or institution,⁵⁵ and it cannot discriminate against an assembly or institution based on religious denomination.⁵⁶ Another subsection directly addresses exclusion, providing that land-use regulation may not totally

48. Foley *supra* note 50; See Hamilton *supra* note 49, at 334 (detailing lobbying efforts that ultimately caused the development of RLPA into RLUIPA).

49. Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §§ 2000cc-2000cc(5) (2006).

50. 146 CONG. REC. S7774 (daily ed. July 27, 2000) (joint statement of Senators Hatch and Kennedy).

51. See H.R. REP. NO. 106-219. (1999).

52. See *Bill Summary & Status 106th Congress (1999-2000) S.2869*, <https://www.congress.gov/bill/106th-congress/senate-bill/2869>.

53. RLUIPA’s substantial burden provision is a type of religious exemption, stating that if a land-use regulation substantially burdens the free exercise of religion, the government must show that the burden serves a compelling interest and is the least restrictive means. 42 U.S.C. § 2000cc(a)(1) (2006).

54. 42 U.S.C. § 2000cc(b). (“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.”)

55. 42 U.S.C. § 2000cc(b)(1).

56. 42 U.S.C. § 2000cc(b)(2).

exclude religious assemblies or unreasonably limit religious assemblies, institutions, or structures within a jurisdiction.⁵⁷

The equal terms provision section is conceptually distinct from the first section's substantial burden provision in that it "rest[s] on claims of religious equality, not privilege."⁵⁸ In other words, while the substantial burden provision ensures religious privilege by prohibiting the government from placing substantial burdens on religious exercise, the equal terms provision reflects an "alternative jurisprudential understanding of religious liberty" by requiring equality of treatment and not privileged treatment.⁵⁹ In contrast to the substantial burden provision, the text of the equal terms provision does not require that the unequal treatment substantially burdens religious exercise to prove an RLUIPA violation. Additionally, the explicit terms of the equal terms provision completely prohibits unequal treatment. Where the substantial burden provision explicitly provides that substantial burdens on religion are prohibited unless they survive the compelling interest test, the equal terms provision prohibits *all* unequal treatment.

To summarize, the first category and the second category are inherently distinct from one another. The plain terms of the equal terms provision prohibit any land-use regulation that treats a religious assembly or institution on less than equal terms with a secular assembly or institution. Nowhere in the statute does the text indicate that Congress intended to apply the substantial burden requirement or the compelling interest test from the first category.

Much of the debate over the proper interpretation of RLUIPA's land-use provisions has centered around the Act's substantial burden section and equal terms provision. Yet, in almost two decades since its passage, and after substantial consideration amongst seven different circuit courts, both provisions still remain unclear. There has been confusion amongst the lower courts on how to interpret the equal terms provision and to what extent the substantial burden category should be applied to the equal terms provision. However, this Comment will focus on the lower courts' interpretations of the equal terms provision *only*. Uncertainty regarding the courts' understanding of the equal terms provision has resulted in overcomplicating what should have been a reasonably easy concept of statutory interpretation.

57. 42 U.S.C. § 2000cc(b)(3)(A).

58. Campbell, *supra* note 35, at 1084.

59. *Id.*

D. The Conflicts That Led to the Need for RLUIPA

1. Religious and Racial Hostility in the Zoning Context

Discrimination against religion is one reason why some churches are unpopular and unwelcomed, and there are many cases that maintain that religious discrimination continues to be significant. At the same time, the intent to discriminate is difficult to prove and is easy to mask. More often than not, resistance is phrased in unsubstantiated concerns about traffic, parking, noise, or property values.⁶⁰ Another way officials can reject churches is by requiring churches to obtain a special-use permit which is often subject to ambiguous conditions or left to the broad discretion of local officials.⁶¹ Or these elusive zoning ordinances can refuse religious institutions on the basis of ill-defined concerns about the “character of the neighborhood” or “general welfare.”⁶² Another problematic concern is that any of the conflicts mentioned above between religious institutions and local municipalities could serve as pretext in which a city or zoning official offers what they consider to be a legitimate nondiscriminatory reason for the conflict that is actually just discrimination against a church.

A very relevant and recent example is the pervasive hostility and discrimination that Muslim Americans face. More specifically, hostility towards Muslim mosques. A 2016 Detroit News report found that, while Muslim groups represented 14% of RLUIPA cases prior to 2010, they make up 44% of cases since that time.⁶³ In October 2015, the Justice Department filed a lawsuit against Pittsfield Township in Detroit for failing to approve a zoning request for an Islamic school, accusing the township of violating the religious land use act.⁶⁴ The township was accused of violating the law when it denied zoning approval to allow the Michigan Islamic Academy (MIA) to build a school on a vacant part of land.⁶⁵ The group ran a school

60. Laycock & Goodrich, *supra* note 3, at 1026; See Adam J. MacLeod, *A Non-Fatal Collision: Interpreting RLUIPA Where Religious Land Uses and Community Interests Meet*, 42 URB. LAW 41, 129 (2010) (“A municipality that has provided a plausible rationale for its decision is far less likely to have acted in a discriminatory manner than one that provides no reasons, or that gives an arbitrary or irrational justification. The arbitrariness or opaqueness of a land use decision can serve as a signal that discrimination lurks below the surface.”).

61. Laycock & Goodrich, *supra* note 3, at 1028-29; See Susanj *supra* note 17.

62. Laycock & Goodrich, *supra* note 3, at 1028-29.

63. Jennifer Chambers, *Feds Target Religious Bias in Zoning Fights* (May 24, 2016), <https://www.detroitnews.com/story/news/local/michigan/2016/05/24/feds-target-religious-bias-zoning-fights/84881958/>.

64. *Id.*

65. *Id.*

in Ann Arbor and sought to build in Pittsfield Township because it had outgrown its current location.⁶⁶ In 2016, the Justice Department settled with Pittsfield Charter Township.⁶⁷ As part of the settlement, the Township agreed to permit MIA to build a school on the vacant parcel of land, to treat the school and all other religious groups equally, and to publicize its non-discrimination policies and practices.⁶⁸ Other minority faiths have also faced a disproportionate share of hostility including Sikhs, Buddhists, Brazilian-based religions, as well as majority faiths such as Christians who occasionally draw hostile reactions because they are unpopular with their political opponents.⁶⁹

2. Fiscal Costs and Taxes in Commercial Districts

Churches also face hostility because many municipalities want to attract and incentivize revenue-generating entities rather than tax-exempt non-profits.⁷⁰ As a result, the presence of churches may hurt these municipalities financially. Some critics of RLUIPA have argued that tax revenue is a legitimate and a compelling land-use interest.⁷¹ Still, if this were really the case, it would require less work to exclude any new religious institutions from developing. Existing churches would be grandfathered in, and this would prevent any new church from ever having the opportunity to be created.⁷² One noteworthy court decision rejected a city's argument that "revenue generation" (having a Costco store on the church's property) was a compelling interest. The court observed that "if revenue generation were a compelling state interest, municipalities could exclude all religious institutions from their cities."⁷³ One participant in a Department of Justice listening session told government officials that religious land use was just not viewed as a critical part of the discussion about zoning and municipal

66. *Id.*

67. Department of Justice, *Justice Department and Pittsfield Charter Township Resolve Lawsuit Over Denial of Zoning Approval for Islamic School* (September 29, 2016), <https://www.justice.gov/opa/pr/justice-department-and-pittsfield-charter-township-resolve-lawsuit-over-denial-zoning>.

68. *Id.*

69. Laycock & Goodrich, *supra* note 3, at 1028-29 (providing numerous cases dealing with hostility towards minority faiths in the zoning context).

70. Department of Justice, *Combating Religious Discrimination Today: Final Report*, (July 2016), <https://www.justice.gov/crt/file/884181/download>.

71. Laycock & Goodrich, *supra* note 3, at 1036.

72. *Id.*

73. *Cottonwood Christian Ctr. v. Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203, 1228 (C.D. Cal. 2002).

planning.⁷⁴ However, participants noted that even in situations where local leaders did not maintain any hostility towards religious institutions, the result was still the same—religious congregations were faced with unfair and unjust land use restrictions.

Churches also face hostility in commercial or entertainment districts. Common complaints deal with the fact that churches who encroach on commercial or entertainment districts ultimately inconvenience the community. Additionally, some common complaints are that religious institutions do not attract enough people at the proper hours. Or, churches do not draw in interested shoppers which could harm the surrounding shopping areas rather than aiding in drawing consumer traffic like a business in the same location would. Another issue is that, notwithstanding the lack of revenue, communities do not want churches there because of the traffic—people do not want to be inconvenienced (even if it means being inconvenienced only on Sunday or possibly even Wednesday). Two circuits have upheld the exclusion of churches based on commercial concerns.⁷⁵

On the other hand, churches *do* contribute to cities' economic welfare, rather than harming it, which seems to be the common theme surrounding religious land use in the zoning context. Some local government officials view churches in a positive light, noting that they offer services that taxpayers might not fund.⁷⁶ For instance, if a city or neighborhood is struggling to fill commercial districts, the presence and activity of a church could potentially be a benefit. This is in part due to the fact that a church building generates the same amount of tax revenue for the city as an empty building would, as well as the presence and activity of people outside regular business hours deters crimes and other adverse activities.⁷⁷ Nevertheless, the question still remains as to whether RLUIPA helps rather than hinders the issue of whether or not churches are permitted to locate where secular places of assembly can locate. More specifically, can churches move in next to liquor stores, bars, or adult stores if they wish to?

74. Department of Justice, *supra* note 70 (The participant went on to say, "I've looked at 40 comprehensive plans. Nobody is sitting out there and saying, 'You know what's really important in our community, the religious land use needs.'").

75. *See River of Life*, 611 F.3d 367; *See also Lighthouse Inst.*, 510 F.3d at 253.

76. Susanj, *supra* note 17, at 8-10.

77. *See* JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* 44-45, 98-99 (1993) (noting that mixed zoning uses encourage people to be present at different times, increasing safety and economic benefits to enterprises looking for consumers).

3. NIMBY Opposition

In addition to economic hostility and racial discrimination against churches, churches are often subject to Not in My Backyard (“NIMBY”) challenges. NIMBY is a characterization of resistance by residents to a proposed development in their local area.⁷⁸ NIMBY often carries the implication that residents are opposing the development because it is too close to them, and that they would likely support it if it were built farther away. These nearby residents often express concerns regarding parking and traffic issues, aesthetics, maintaining agricultural land, loss of space in general, a decrease in property values, or the welfare of its residents.⁷⁹

Although many land uses face NIMBY oppositions, religious activities in particular bring with it unique side effects that neighboring land users do not support. Typically, people do not raise opposition to a new grocery store, a Target, or a new gym being built because residents gain some benefit from these developments, and these developments create an additional convenience to their lives. There will be employment opportunities as a result of these new developments, and the city will gain tax revenue from it. But more likely than not, residents are not going to have any interest in attending a new church. Some already have roots in a church and some people have no interest in going to church in the first place. They gain no benefit from seeing a new church being built. In contrast, a grocery store, department store, or new gym are certainly going to attract the same size, if not more people than a church. Yet, these types of crowds differ because they occur on different days and at different hours. In other words, while a church might attract the same size crowd as these other buildings, it could be argued that this crowd is probably its entire group of supporters, and these groups only come together on a specific day during certain hours.

According to a 2018 Gallup poll, 50% of Americans said they were a member of a church or synagogue; however, only about 22% of Americans attended church or synagogue every week.⁸⁰ Furthermore,

78. Susanj, *supra* note 17, at 11-13.

79. *Rocky Mountain Christian Church v. Bd. of County Comm’rs of Boulder County*, 613 F.3d 1229 (10th Cir. 2010). In this case, the county rejected an Evangelical Christian church from expanding its campus in a rural part of Boulder County, citing concerns about increased traffic, loss of open space, and the welfare of its residents.

80. Gallup Poll, *Topics on Religion*, <https://news.gallup.com/poll/1690/religion.aspx> (last visited Dec. 20, 2019) (providing an exhaustive list of statistics regarding religion in America). Interestingly enough, even though 50% of Americans stated they were a member of a church or synagogue, when

worshipers who regularly attend church are divided among people with different denominations, so any new church can only expect to serve only a small part of the population of wherever it chooses to go. So, for the majority of residents, any cost that a new church does generate exceeds the expected benefit.⁸¹

As Doug Laycock points out, deference to NIMBY objections creates problematic policy concerns.⁸² One argument is that by enabling neighbors veto power over the location of churches, their constitutional rights are being subjected to “the standardless whim of neighbors who are under no obligation to adhere to any rules or to give any weight whatsoever to the free exercise of religion.”⁸³ Another reason is that if NIMBY objections are always a genuine basis for excluding churches, then it is possible that churches would always be excluded. Lastly, considering the fact that there is so much discretion in the zoning process to begin with, it is extremely difficult to tell when NIMBY complaints are authentic, “when they are exaggerated expressions of opposition to all new development, and when they are pretext for anti-religious animus.”⁸⁴ This results in any opposition to churches being easily masked by city officials who argue some form of economic concern they have for their town, but in reality, these concerns often serve as pretext for hostile and unequal treatment of churches.⁸⁵

On the other hand, NIMBY should be defended—but within reason and with limitations. Cities should still be able to impose reasonable land use regulations as long as they do not overreach and to ensure that churches have equal opportunity to be located within that jurisdiction. It is obvious that city officials often take advantage of how easy it is to defend their opposition to churches moving into their towns through some sort of NIMBY objection. Nevertheless, while there should be some pushback against NIMBY, NIMBY serves as an example of property owners exercising their constitutional rights. It is a stretch to argue that if all NIMBY objections were always accepted, then all churches would be excluded.

The belief that secondary effects generated by churches are burdensome to its residents is not unfounded. Neighbors use NIMBY to

asked whether or not they happened to attend church or synagogue in the last days, only 32% said they had.

81. Laycock & Goodrich, *supra* note 3, at 1032.

82. Laycock & Goodrich, *supra* note 3, at 1032-1035.

83. Laycock & Goodrich, *supra* note 3, at 1035.

84. *Id.*

85. *Id.*

voice their constitutional rights to express legitimate concerns that their property value will be negatively affected by the creation of a building and parking lot in their neighborhood. While NIMBY objections should be carefully analyzed, this does not mean that residents' property rights should take a backseat at the expense of a church trying to follow through with their religious agenda. This does not mean that cities can completely zone out all religious institutions. It just means that cities should be given a reasonable amount of deference to NIMBY objections and should have a reasonable amount of power to place restrictions on when religious institutions choose to occupy certain land, so long as they can prove beyond a surface level explanation as to why zoning out a church is necessary.

Regardless of either position, this raises the question of whether or not there can be a proper balance between religious institutions' uses and neighbors' interests. Further, how far can residents go with their NIMBY objections? It could easily be argued that the problem with NIMBY objections is that anywhere that a church chooses to reside is going to be someone's backyard. Notwithstanding these potential concerns, both residents and churches have a First Amendment right to exist. Churches have the First Amendment right to exercise their religion and to have a physical space in which to exercise this religion. Residents have the constitutional right to exercise legitimate concerns dealing with their property.

III. THE CIRCUIT COURTS' SPLIT IN RLUIPA EQUAL TERMS CASES

A. The Eleventh Circuit

The Eleventh Circuit became the first circuit to decide one of the major equal terms cases. The Eleventh Circuit test for determining whether or not there has been an RLUIPA violation states that "a plaintiff has the burden of showing the following elements: '(1) the plaintiff must be a religious assembly or institution, (2) subject to a land use regulation, that (3) treats the religious assembly on less than equal terms, with (4) a nonreligious assembly or institution.'"⁸⁶ If the plaintiff makes this prima facie showing, then the government has the burden of proving that its action passes the strict scrutiny test.⁸⁷

86. *Covenant Christian Ministries, Inc. v. City of Marietta*, 654 F.3d 1231, 1245 (11th Cir. 2011) (citing *Primera Iglesia Bautista Hispana, Inc. v. Broward County*, 450 F.3d 1295, 1307-08 (11th Cir. 2006)).

87. *Id.*

In *Midrash Sephardi v. Inc. Town of Surfside*,⁸⁸ two small Jewish Orthodox congregations in a town north of Miami Beach⁸⁹ leased property within Surfside's business district.⁹⁰ Surfside's business district permitted theaters, restaurants, private clubs, lodge halls, health clubs, dance studios, and a variety of different schools; however, churches and synagogues were prohibited.⁹¹ While the two synagogues leased space in the area zoned for business, only one applied for a special-use permit to use the space for religious purposes.⁹² The city denied the application, arguing that allowing churches and synagogues in the business district would "erode Surfside's tax base" and would result in economic hardship on the residents.⁹³ The city went on to argue that churches and synagogues contribute "little synergy to retail shopping areas and disrupt the continuity of retail environments."⁹⁴

The Eleventh Circuit held that Surfside's zoning ordinance allowing secular assemblies such as private clubs and lodge halls, but excluding churches and synagogues, violated the equal terms provision.⁹⁵ When analyzing and interpreting the "similarly situated" aspect of RLUIPA, the court adopted a textual interpretation and defined "assembly" and "institution" in their ordinary meanings, relying on Webster and Black's Law Dictionary.⁹⁶ The court defined "assembly" as either "a company of persons collected together in one place and usually for some common purpose (as deliberation and legislation, worship, or social entertainment)"⁹⁷ or "[a] group of persons organized and united for some common purpose."⁹⁸ The court further defined "institution" as "an established society or corporation: an establishment or foundation

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

89. *Id.* at 1219. Surfside is a small coastal town north of Miami Beach and south of Bal Harbour, Florida, comprising about one square mile and has 4,300 residents and an estimated tourist population of 2,030.

90. *Id.* at 1220.

91. *Id.*

92. *Id.* at 1220-21.

93. *Id.* at 1222.

94. *Id.*

95. *Id.* at 1219 ("We first hold that the SZO's provision excluding churches and synagogues from locations where private clubs and lodges are permitted violates the equal terms provision of RLUIPA.").

96. *Id.* at 1230.

97. *Id.* (quoting WEBSTER'S 3D NEW INT'L UNABRIDGED DICTIONARY 131 (1993)).

98. *Id.* (quoting BLACK'S LAW DICTIONARY 801 (7th ed. 1999)).

especially of a public character”⁹⁹ or “an established organization, especially one of a public character”¹⁰⁰

The court held that synagogues and private clubs both fell within the natural perimeters of “assembly” and “institution.”¹⁰¹ The court reasoned that churches and synagogues fell within this “natural perimeter of ‘assembly or institution,’ because churches and synagogues shared similar purposes to places like private clubs where “social, educational, recreational . . . can meet together to pursue their interests.”¹⁰² The court declined to adopt the similarly situated requirement it identified in its analysis on the Equal Protection Clause.¹⁰³ The *Midrash Sephardi* court rejected the similarly situated requirement on the ground that “[t]he relevant ‘natural perimeter’ for consideration with respect to RLUIPA’s prohibition is the category of ‘assemblies or institutions,’” and further, that the “express provisions of RLUIPA . . . require a direct and narrow focus.”¹⁰⁴ Despite the fact that the equal terms provision “has the ‘feel’ of an equal protection law, it lacks the ‘similarly situated’ requirement usually found in equal protection analysis.”¹⁰⁵ Because Surfside permitted private clubs and lodge halls in the business district while excluding churches and synagogues, the city had violated the equal terms provision of RLUIPA.¹⁰⁶

In terms of the appropriate level of scrutiny, the *Midrash* court explained that the equal terms provision in RLUIPA codified the *Smith*¹⁰⁷ and *Lukumi Babalu Aye, Inc. v. City of Hialeah*¹⁰⁸ rulings. Under this line of precedent, the court explained that “[a] zoning law is not neutral or generally applicable if it treats similarly situated secular and religious assemblies differently”¹⁰⁹ Thus, laws violating the equal terms provision are subject to strict scrutiny.¹¹⁰ The court went on to conclude that Surfside’s zoning ordinance was not narrowly tailored to further

99. *Id.* (quoting WEBSTER’S 3D NEW INT’L UNABRIDGED DICTIONARY 1171 (1993)).

100. *Id.* at 1230-31 (quoting BLACK’S LAW DICTIONARY 801 (7th ed. 1999)).

101. *Id.* at 1230-31.

102. *Id.* at 1231.

103. *Id.* at 1230 (discussing the similarly situated requirement the district court adopted and why the district court erred in doing so).

104. *Id.*

105. *Id.* at 1229.

106. *Id.* at 1231.

107. *Employment Div. Dep’t. of Human Res. v. Smith*, 494 U.S. 872, 877 (1990).

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

109. *Id.* at 1232.

110. *Id.* at 1235.

advance the “proffered interests of retail synergy.”¹¹¹ The city essentially excluded religious assemblies that did not serve an economic purpose while simultaneously permitting secular assemblies despite the fact that the secular assemblies “endanger[ed] Surfside’s interest in retail synergy as much or more than churches and synagogues.”¹¹²

B. The Third Circuit

The Third Circuit rejected the Eleventh Circuit’s approach in *Lighthouse Institute for Evangelism, Inc. v. City of Long Branch* based on a “similarly situated requirement.” Lighthouse Institute for Evangelism purchased property in a district that was subjected to the City of Long Branch Ordinance.¹¹³ The city ordinance permitted many uses within the district, including restaurants, assembly halls, bowling alleys, movie theaters, educational services, and colleges; however, churches were not listed as a permitted use.¹¹⁴ Lighthouse applied for a zoning permit to use the property for religious purposes, but the city denied the application because the city did not permit churches in the commercial district.¹¹⁵ In response to this, Lighthouse filed suit against the city alleging constitutional violations and claiming that the ordinance violated RLUIPA.¹¹⁶

While the litigation on the ordinance was pending, Long Branch changed its zoning ordinance and adopted a redevelopment plan “in order to achieve redevelopment of an underdeveloped and underutilized segment of the City.”¹¹⁷ The goals of the redevelopment plan included: bolstering retail trade, city revenues, and employment opportunities and “[a]ttract[ing] more retail and service enterprises’ in order to boost a “vibrant’ and ‘vital’ downtown residential community.”¹¹⁸ The redevelopment area permitted theaters, cinemas, culinary schools, dance studios, theater workshops, and fashion design schools.¹¹⁹ Other secondary uses included restaurants, bars and clubs, and specialty retail stores.¹²⁰

111. *Id.*

112. *Id.*

113. *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 257 (3d Cir. 2007).

114. *Id.*

115. *Id.* (noting that the “proposed use [was] not a permitted use in the Zone” and “would require prior approvals from the Zoning Board of Adjustment”).

116. *Id.*

117. *Id.* at 258.

118. *Id.*

119. *Id.*

120. *Id.*

However, churches, schools, or government buildings were not permitted uses, and the design guidelines of the plan specifically prohibited any uses that were not specifically listed.¹²¹

Lighthouse requested a waiver from the zoning board specifying they wanted to use the property for church functions, including prayer, pastoral residence, church offices, and a religious gift shop.¹²² The waiver was not approved, and Lighthouse appealed the board's decision to the Long Branch City Council, but was once again denied.¹²³ The City Council reasoned that a church would "destroy the ability of the block to be used as a high end entertainment and recreation area due to a New Jersey statute which prohibits the issuance of liquor licenses within two hundred feet of a house of worship."¹²⁴ The City Council essentially reasoned that Lighthouse would have a negative impact on the economic revitalization of the new plan because permitting a storefront church would "jeopardize the development of the Broadway area, which was envisioned as 'an entertainment/commercial zone with businesses for profit.'"¹²⁵

After being denied twice, Lighthouse filed an amended complaint claiming that the new redevelopment plan violated the Free Exercise Clause and RLUIPA.¹²⁶ The district court granted Long Branch's motion for summary judgment, and the Third Circuit affirmed the order.¹²⁷ The Third Circuit divided its analysis into pre-amendments to the plan and post-amendment to the redevelopment plan.¹²⁸ The Third Circuit explained that the RLUIPA equal terms section included neither a substantial burden nor a strict scrutiny requirement.¹²⁹ Rather, the Third Circuit agreed with the district court when it held that a land use regulation violates the equal terms provision of RLUIPA only if it treats religious assemblies or institutions "less well" than nonreligious assemblies or institutions that are similarly situated with respect to the *regulatory purpose*.¹³⁰

First, applying this analysis to the redevelopment plan, the court held that the plan did not violate the equal terms provision because churches are not similarly situated to the other allowed assemblies with respect to the goals of the plan where, based off the state statute, churches would hamper

121. *Id.*

122. *Id.* at 259.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.* at 277.

128. *Id.*

129. *Id.* at 270.

130. *Id.* at 266

Long Branch's ability to "achieve redevelopment of an underdeveloped and underutilized segment of the City."¹³¹ The Long Branch ordinance, on the other hand, did violate the equal terms provision.¹³² Because the ordinance permitted a range of different uses in the Central Commercial District, while simultaneously excluding churches, the city treated Lighthouse on less than equal terms with the non-religious assemblies that caused similar harm to the regulatory purpose of the district.¹³³ The court ruled that this violated the equal terms provisions because the ordinance's goals were not documented, and so it was unclear as to what the city's objectives were for the district.¹³⁴ Also, the ordinance violated the equal terms provision because the ordinance did not clarify "why a church would cause greater harm to the regulatory objectives than an 'assembly hall' that could be used for unspecified meetings."¹³⁵

The Third Circuit based its reasoning on why it adopted the similarly situated argument on the fact that Congress intended to codify the Supreme Court's existing jurisprudence interpreting RLUIPA's Free Exercise Clause.¹³⁶ The court explained that the impact of certain secular behaviors but not certain religious behaviors "must be examined in light of the purpose of the regulation."¹³⁷ Further, "when a government permits exemptions to an otherwise generally applicable government regulation, the Free Exercise Clause requires that the government accord equal treatment to religion-based claims for exemptions that would have a similar impact on the protected interest."¹³⁸ The court rejected the Eleventh Circuit's expansive reading on the equal terms provision, explaining that the Eleventh Circuit's reading of the statute would lead to the assumption that "Congress intended to force local governments to give any and all religious entities a free pass to locate wherever any secular institution or assembly is allowed."¹³⁹

C. The Seventh Circuit

Initially, the Seventh Circuit followed the Eleventh Circuit's strict scrutiny interpretation but, in 2010, made the decision to switch to a revised

131. *Id.* at 270.

132. *Id.* at 272.

133. *Id.* at 272-73.

134. *Id.*

135. *Id.* at 272.

136. *Id.* at 264.

137. *Id.* at 265.

138. *Id.*

139. *Id.* at 268.

version of the Third Circuit's similarly situated requirement.¹⁴⁰ The Seventh Circuit's resolution was to switch the focus from the "regulatory purpose" language from the Third Circuit test and replace it with "accepted zoning criteria."¹⁴¹ So, instead of requiring the secular comparator to be similarly situated with respect to a regulatory purpose, it must be similarly situated with respect to an accepted zoning criterion.¹⁴² The court explained that "purpose" was subjective and "regulatory criteria" was objective and was thus less susceptible to manipulation.¹⁴³

In *River of Life*, a small church wanted to relocate to a building in the Village of Hazel Crest.¹⁴⁴ The building where the church wanted to relocate was not only located in a dilapidated part of town, but was also zoned as a commercial district that excluded any new noncommercial uses in order to revitalize the commercial district in that area.¹⁴⁵ The zoned commercial district excluded new noncommercial uses from the district including churches, community centers, schools, and galleries.¹⁴⁶ When the city denied the church's attempts to relocate in the district, the church sued.¹⁴⁷ The Seventh Circuit held that the city did not violate RLUIPA because the church was excluded from a "commercial zone" in accordance with all other non-commercial uses in relation to "an accepted zoning criteria."¹⁴⁸

Judge Posner expressed reservations when considering whether or not to adopt the Third or Eleventh Circuit tests.¹⁴⁹ He concluded that neither the Eleventh nor Third Circuit approach would be followed in his decision.¹⁵⁰ Judge Posner completely dismissed the Eleventh Circuit's test in *Midrash Sephardi*, explaining that this approach would give religious

140. *River of Life Kingdom Ministries v. Village of Hazel Crest*, 611 F.3d 367, 368-69 (7th Cir. 2010). The original opinion adopted the Third Circuit's test, which in turn prompted an en banc rehearing to resolve the inter-circuit conflict with respect to the proper test for applying the equal-terms provision.

141. *Id.* at 371.

142. *Id.*

143. *Id.*

144. *Id.* at 368.

145. *Id.*

146. *Id.*

147. *Id.* at 368.

148. *Id.* at 371.

149. *Id.* at 370 (noting that "[n]either the Third Circuit's nor the Eleventh Circuit's approach, though in application they might yield similar or even identical results—and results moreover that would strike most judges as proper—is entirely satisfactory").

150. *Id.* at 368-71.

land use favored treatment and would violate the Establishment Clause.¹⁵¹ Discussing the topic of equality, Judge Posner wrote that the equal terms provision fulfills its objective when it compares the city's treatment of different assemblies in relation to the district's objective and zoning criteria—commercial, residential, industrial, or some combination of the three—rather than a dictionary definition or a regulatory purpose that could easily be manipulated by zoning officials.¹⁵² However, the court even admitted that the zoning criteria test was “less than airtight,” referring to regulatory criteria as parking, traffic control, and generating municipal revenue, including “ample shopping” opportunities.¹⁵³

IV. FINDING A CONTINUUM TO ANALYZE THE EQUAL TERMS PROVISION ON

A. Putting Things in Perspective

As the circuits have split over exactly how to apply the equal terms provision in RLUIPA, the tests they have chosen to guide their interpretations have proven to weigh the economic considerations differently. It is obvious that the courts have been unable to follow a consistent framework in interpreting the equal terms provision. The courts have established that there are different ways of dealing with the problem between religious institutions and city officials in the zoning context in terms of how the equal terms provision is interpreted as it relates to commercial districts. This creates the question of what has driven the courts to different conclusions and *why*. In other words, are some jurisdictions giving the equal terms provision a reading that seems consistent with the text and still preserves some right for religious assembly or institutions in that area? Or are the courts leaning too far in favor of commercial uses and thus in favor of the city and its zoning officials?

Nevertheless, as discussed above, cities and towns often have a vested interest in keeping out churches that might undermine their own economic developments that provide them some type of benefit that a religious institution might otherwise not provide. Where cities maintain such an interest, it is not likely that they will be willing to strike a fair balance between religious interests and their own, and these views are illustrated in the circuit court decisions discussed about in this Article. In such situations, it becomes increasingly muddled and confusing to

151. *Id.* at 368-70.

152. *Id.*

153. *Id.* at 373-74.

determine if RLUIPA can even establish some balance of power between municipalities and religious institutions or if it just further muddies the exercise of religious freedom waters.

A. A Continuum of Interpretations on Equal Terms

1. The Eleventh Circuit

The Eleventh Circuit's cases have considered non-religious assemblies when evaluating equal terms violations. This means that the economic considerations given in instances such as in the Third and Seventh Circuits are not always successful. In *Midrash Sephardi*,¹⁵⁴ the Eleventh Circuit interprets the provision textually, finding a violation when a city treats any type of religious land use with any type of assembly on less than equal terms.¹⁵⁵ The court in *Midrash Sephardi* found a violation of RLUIPA because non-religious assemblies—private clubs—were permitted where religious institutions were not.¹⁵⁶

The court also declined to adopt the “similarly situated” requirement reasoning that it has the “feel” of an equal protection law, but the text lacks the similarly situated requirement usually found in the equal protection analysis.¹⁵⁷ With respect to the Third and Seventh Circuits that adopted the similarly situated requirement, the economic rationales presented by the cities proved to be the more successful argument for the cities, as noted by Judge Sykes in her dissent in *River of Life*.¹⁵⁸ So, it would appear that the Eleventh Circuit approach is more protective of religious liberty because its reading of the equal terms provision is consistent with the actual text of the provision in preserving the right for religious institutions in that area.

2. The Third and Seventh Circuits

Like the Seventh Circuit, the Third Circuit also required a “similarly situated” comparator in order to find an equal terms violation. The plaintiff must show that the religious assembly and secular assemblies “are similarly

154. The Eleventh Circuit explained that the equal terms provision “lacks the similarly situated requirement usually found in equal protection analysis.” *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1229-35 (11th Cir. 2004).

155. *Id.* at 1232.

156. *Id.* at 1231.

157. *Id.* at 1229.

158. *River of Life Kingdom Ministries v. Village of Hazel Crest*, 611 F.3d 367, 386 (7th Cir. 2010).

situated as to the regulatory purpose” of the ordinance.¹⁵⁹ This means that a city can exclude religious institutions and allow a movie theater, gym, or bar, so long as the exclusion of the religious institutes serves a legitimate regulatory purpose—such as something that would increase economic revenue for the city.¹⁶⁰ This “similarly situated” reading enables a personalized discretionary organization of land-use regulation, and subsequently, the potential for pretextual discrimination. This type of discrimination was specifically what Congress was trying to eliminate when it enacted RLUIPA.

The Third Circuit believed that a broad textual interpretation, like the Eleventh Circuit’s, interfered with local economic development. The court explained that the impact of the behaviors, those that are both allowed and forbidden, were to be examined in light of the *purpose of the regulation*. The court declared that the proper comparison was between a religious assembly and a similar secular assembly that similarly impact a regulation’s aims.¹⁶¹ This standard, combined with the amount of discretion that city officials have in the zoning context, further encourages city officials to propose economic rationales as to why they zone out religious institutions. Using this discretionary authority further supports the likelihood that their claims will be successful. This standard also seems nonsensical because it has the ability to weigh commercial interests higher than religious liberty, leaving religious institutions nowhere to go.

3. Coming to a Consensus?

It is difficult to understand how the Third and Seventh Circuits are reconciling the purposes of RLUIPA, and the Third Circuit’s “regulatory purpose” requirement even appears to raise more questions than it does answers. The court never explains exactly *how* to determine what an ordinance’s regulatory purpose actually is. As Professor Douglas Laycock points out, there are several possible approaches to determining an ordinance’s regulatory purpose.¹⁶² The court could look for statements of purpose in the ordinance itself,¹⁶³ but these are often absent.¹⁶⁴ Or, the court could look for an “objective” purpose by considering how the zoning code

159. *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 266 (3d Cir. 2007).

160. *Id.* at 270-71.

161. *Id.* at 266.

162. Laycock & Goodrich, *supra* note 3, at 1064.

163. *Id.*

164. *Id.*

operates and the other types of uses that it allows.¹⁶⁵ However, this inquiry is extremely flexible and easily manipulated by city officials.¹⁶⁶ The issue is that RLUIPA's equal provisions clause does not answer the question of what a regulatory purpose is. The only question required to ask, according to the equal terms provision, is whether or not the same rules are applied to both religious and non-religious assemblies.

The Seventh Circuit's "accepted zoning criteria" test does not appear to resolve any of the Third Circuit's problems either. Instead, the Seventh Circuit was left with the task of trying to figure out what "accepted zoning criteria" was, which was essentially the same problem that the Third Circuit had initially created for themselves. Other than parking and traffic, the court did not clarify what fell under the accepted zoning criteria.¹⁶⁷ Additionally, the "regulatory purpose" and "accepted zoning criteria" tests make it easy to bypass the equal terms clause in RLUIPA altogether. Cities can always justify the exclusion of religious institutions with economic rationales. This standard motivates city officials to invoke economic rationales because they know that these rationales are more than likely to weigh in their favor when compared to religious institutions. A city merely has to say that a religious institution would not generate revenue because they are tax exempt, and this would be enough for the Third and Seventh Circuits. This result would almost always guarantee the exclusion of religious assemblies.

The "similarly situated" test does not align with the text or purpose of RLUIPA. If Congress had intended for there to be a "similarly situated" requirement, they could have easily included it into the equal terms provision. But the equal terms provision was enacted as a "flat-objective rule."¹⁶⁸ Furthermore, the Seventh and Third Circuit approaches are not consistent with the purposes of protecting religious freedom. The courts have developed a restricted interpretation of the equal terms provision and added additional language that further complicates and convolutes the meaning of the provision into what should have been a straightforward rule that Congress originally intended it to be. This reading allows for a high likelihood of discrimination with the ability to use economic revitalization as pretext to excluding churches. The way that the courts chose to handle these situations proved that they weighed in favor of zoning out religious institutions in favor of economic development

165. *Id.*

166. *Id.*

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

168. Laycock & Goodrich, *supra* note 3, at 1061.

On the other hand, some unintended consequences have resulted due to the enactment of RLUIPA. RLUIPA was enacted because there was a need for a sense of uniformity and clarity in the protection of free exercise of religion that extended to religious institutions and assemblies. However, the opposite seems to have occurred. Rather than resolving the area of conflict between the city officials and religious institutions, the statute has essentially created a new area of conflict amongst the courts in determining how to interpret the provisions within RLUIPA. The circuit split reveals that courts have yet to come to a common understanding on how best to handle the zoning conflict. Now, more than ever, there is a lack of uniformity and clarity spread across the jurisdictions on how to handle these issues. Based off of the courts' decisions so far, it does not appear that they are going to come to a mutual understanding anytime soon. This Comment has sought to provide some level of coherence to the issue by pinpointing major trends in the way that courts have interpreted the ways to deal with the equal terms provision Provision within RLUIPA. Notwithstanding this analysis, RLUIPA has not necessarily provided courts with a consistent framework, but it has highlighted something that was easy to mask by pretext: that churches continue to be a disfavored use in the zoning context and their basic First Amendment rights are continuously being subjected to unrestricted decisions made by local city officials.

V. CONCLUSION

The First Amendment provides protection to religious institutions to allow them to practice their religion, and as such, these religious institutions are constitutionally required to have a *place* to serve and practice their religion. RLUIPA was enacted to combat discriminatory attempts by local governments to apply zoning ordinances to churches and other religious institutions. Over the nineteen years since its enactment, RLUIPA has proven its value, ensuring religious institutions the necessary leverage needed to provide for an individual assessment and to provide an even playing field in terms of the ability to demonstrate unequal treatment in the zoning context. The lower courts' approaches to interpreting the equal terms provision are inconsistent, ranging from textual interpretations favoring the protection of religious liberty to sharply narrowed interpretations weighing the economic interests higher than those of religious institutions through some form of a regulatory purpose or zoning criteria. The key question going forward is whether or not the lower courts can formulate some type of continuum of interpretations consistent with balancing both the cities' economic concerns in its community with the core

First Amendment rights that the equal terms clause of RLUIPA provides for religious institutions within these municipalities.