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*Andrew Cleves**

I. INTRODUCTION

In warm, sunny Broward County, Florida, a dispute arose between a church and local government.[1] The church, Primera Iglesia Baustista Hispana of Boca Raton, Inc. (Primera), purchased a house to renovate into a church.[2] The county, which zoned the area for agricultural use, sought "to protect, preserve and enhance the rural character and lifestyle of existing low density areas and agricultural uses."[3] The two sides could not agree on how to use the land. The dispute lasted nearly a decade, and each side spent countless hours and dollars on litigation over the equal terms provision of the Religious Land Use and Institutionalized Persons Act (RLUIPA).[4]

Halfway across the country, in Indianapolis, a similar conflict arose when a small Baptist congregation leased a building for church services.[5] Indianapolis, however, forbade religious use without a variance, having created a zone to serve as a "buffer[] between residential . . . and entirely commercial or industrial districts."[6] However, the city permitted many different land uses without a variance, including auditoriums and assemblies.[7] The Indianapolis parties also litigated under RLUIPA's equal terms provision.[8]

Congress enacted RLUIPA in 2000, in response to a perceived need

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

2. *Id.* at 1301.

3. *Id.* at 1300.

4. Primera purchased the property in December 1997 and the Eleventh Circuit ruled in June 2006. *Id.* at 1300.

5. Digrugilliers v. Consol. City of Indianapolis, 506 F.3d 612, 614 (7th Cir. 2007).

6. *Id.* (internal punctuation omitted).

7. *Id.* at 614–615.

8. *Id.* at 614.

to protect the religious liberty of land users, prisoners, and other institutionalized persons.[9] This Comment addresses RLUIPA's land use provision, which covers two main areas of government action. The first land use section prohibits governments from imposing laws that substantially burden religious exercise.[10] The second land use provision addresses laws that discriminate against or exclude religious assemblies or institutions.[11] The equal terms provision, in the latter section, provides that "[n]o government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution."[12]

Since RLUIPA's enactment, courts have struggled with interpreting the Act's different provisions. The majority of the litigation has centered on the substantial burden section. Recently, however, interpreting the equal terms provision has confounded the courts. Specifically, the courts have failed to reach uniform resolution on three main issues: (1) what qualifies as a religious assembly or institution,[13] (2) whether religious assemblies or institutions should be compared to similarly situated assemblies or institutions,[14] and (3) what is the appropriate level of scrutiny.[15]

Three circuits have addressed these issues, reaching different conclusions. The Eleventh Circuit construed "assemblies or institutions" in accordance with the terms' natural meaning and determined laws demonstrating unequal treatment must survive strict scrutiny.[16] In contrast, the Third Circuit asserted the equal terms provision operates on a strict liability standard and has concluded all plaintiffs must identify a similarly situated secular comparator with

9. *See* Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), Pub. L. No. 106-274, 114 Stat. 803 (codified as amended at 42 U.S.C. § 2000cc (2006)); 146 CONG. REC. S7774-01 (2000).

10. 42 U.S.C. § 2000cc (a) (2006).

11. *Id.* § 2000cc (b).

12. *Id.* § 2000cc (b)(1).

13. *See, e.g.*, Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1230 (11th Cir. 2004); River of Life Kingdom Ministries v. Vill. of Hazel Crest, 611 F.3d 367, 369 (7th Cir. 2010).

14. *See, e.g.*, *Midrash*, 366 F.3d at 1230; *Hazel Crest*, 611 F.3d at 370.

15. *See, e.g.*, *Midrash*, 366 F.3d at 1230–1232; *Hazel Crest*, 611 F.3d at 370–371.

16. *Midrash*, 366 F.3d at 1230–1232.

respect to the ordinance's regulatory purpose.[17] Finally, the Seventh Circuit held that all equal terms provision plaintiffs must present similarly situated assemblies or institutions with respect to "accepted zoning criteria."[18] The Seventh Circuit also determined the assembly definition should more closely consider the assembly's effect on the municipality and incorporated the Third Circuit's strict liability standard.[19]

This circuit split has created unequal burdens on municipalities and religious assemblies across the country. For example, the Indianapolis church, in the Seventh Circuit's jurisdiction, must present a similarly situated assembly or institution as a prerequisite to bringing a successful claim. On the other hand, any challenged Broward County, Florida laws, in the Eleventh Circuit's jurisdiction, must serve a compelling government interest and be narrowly tailored to achieve that goal or interest. This unequal treatment has placed an inordinate burden on churches and governments in their efforts to comply with the law.

This Comment argues that the Seventh Circuit's accepted zoning criteria test, with minor changes, offers the best method to analyze the equal terms provision. Part II of the Comment describes the circumstances surrounding RLUIPA's enactment and places the equal terms provision in context. Part III illustrates the different courts' equal terms provision analysis. In Part IV, this Comment critiques the circuits' assembly definition, similarly situated requirement, and scrutiny standard. Finally, Part V concludes the Supreme Court should issue a guiding opinion that implements a modified version of the Seventh Circuit's accepted zoning criteria standard.

II. HOW RLUIPA BECAME LAW

Many contentious events surrounded RLUIPA's passage. These events illuminate the motivation for the equal terms provision and place it in statutory context.

17. Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch, 510 F.3d 253, 268–269 (3rd Cir. 2007).

18. *Hazel Crest*, 611 F.3d at 371.

19. *Id.*

A. The Free Exercise Struggle

Congress's enactment of RLUIPA was the latest installment of a decade-long struggle between the judiciary and Congress over preserving religious liberty in America. The Supreme Court's decision in *Employment Division v. Smith* initiated this struggle.[20] In *Smith*, the government denied a Native American unemployment benefits after his employer fired him for ingesting peyote as part of a religious practice.[21] The Court held that laws of general, neutral applicability do not need a compelling government interest when applied to religious practices.[22] Therefore, the Court found no free exercise violation.[23] This ruling overturned the *Sherbert v. Verner* balancing test, which the courts employed for years and on which federal and state governments relied.[24] The *Sherbert* test required a compelling government interest for any law that substantially burdened religious exercise notwithstanding whether that law was neutrally applied.[25] The resulting change adopted in *Smith* had the following consequences: (1) laws that had only an incidental affect on religious liberty were permissible,[26] and consequently, (2) neutral and generally applicable laws infringing on religious liberties only needed to survive rational basis review.[27]

The Supreme Court applied the *Smith* standard in *Church of the Lukumi Babalue Aye, Inc. v. City of Hileah*.[28] There, a church claimed city ordinances that prevented the church from practicing animal sacrifice violated the Free Exercise Clause.[29] The church had leased land, announced a plan to establish a house of worship, and had begun

20. Emp't Div. v. Smith, 494 U.S. 872 (1990).

21. *Id.* at 874.

22. *Id.* at 886.

23. *Id.*

24. Sherbert v. Verner, 374 U.S. 398 (1963). The *Sherbert* Court held that South Carolina could not constitutionally withhold unemployment benefits to an individual who was unemployed because she refused to work on her day of Sabbath. *Id.* at 410.

25. *Smith*, 494 U.S. at 883.

26. *Id.* at 878.

27. *Id*. at 878–885.

28. Church of the Lukumi Babalue Aye, Inc. v. City of Hileah, 508 U.S. 520 (1993).

29. *Id.* at 527, 528.

to obtain the appropriate permits.[30] The city subsequently passed a series of ordinances that ultimately banned only animal sacrifices, a religious practice of the church.[31] The *Lukumi* Court invalidated the ordinances, holding they were religious gerrymandering, not neutral and generally applicable.[32]

Despite decisions like *Lukumi*, Congress disagreed with *Smith* and quickly responded by enacting the Religious Freedom Restoration Act (RFRA).[33] RFRA expressly rejected *Smith* and intended to restore the *Sherbert* compelling interest test.[34] Congress concluded that (1) religiously "neutral" laws might still burden religious exercise, (2) governments need compelling justification to substantially burden religion, (3) *Smith* essentially eliminated the requirement that governments justify burdens imposed by neutral laws, and (4) the compelling interest test was functional.[35]

The Supreme Court responded in-kind and struck down RFRA just four years later in *City of Boerne v. Flores*.[36] The *Boerne* Court concluded that RFRA "far exceed[s] any pattern or practice of unconstitutional conduct" under the post-*Smith* Free Exercise Clause.[37] The Court struggled with RFRA's lack of a factual basis, finding a distinct absence of proof of hostility, burdens, or widespread patterns of discrimination.[38] Therefore, "[t]he stringent test RFRA demands of state laws reflects a lack of proportionality or congruence between the means adopted and the legitimate end to be achieved."[39] In *Boerne*, the courts denied Congress's attempt to protect religious liberty.

30. *Id.* at 525, 526.

31. *Id.* at 526–528.

32. *Id.* at 535, 540.

33. The Supreme Court handed down the Employment Division v. Smith decision in 1990 and Congress passed RFRA in 1993.

34. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified as amendment at 42 U.S.C. § 2000bb (2006)); 42 U.S.C. § 2000bb (b)(1) (2006).

35. 42 U.S.C. § 2000bb (a)(2)–(5).

36. City of Boerne v. Flores, 521 U.S. 507, 536 (1997).

37. *Id.* at 534.

38. *Id.* at 530–531.

39. *Id.* at 533.

B. The Religious Land Use and Institutionalized Persons Act: Building a Foundation.

Only a few weeks after *Boerne*, the House of Representatives held a series of hearings entitled *Protecting Religious Freedom After* Boerne v. Flores.[40] Cognizant of the *Boerne* reasoning, Congress strove to collect information and gather support for legislation, which Congress deemed necessary to preserve religious freedom.[41] The subsequent congressional hearings featured testimony from constitutional law scholars, religious leaders, and practicing attorneys.[42]

RLUIPA's hearing record compiled "massive evidence" that local governments all throughout the country had violated individuals' religious exercise rights.[43] Senators Orrin Hatch and Ted Kennedy[44] concluded governments often facially discriminated against churches in zoning regulations and though land use regulation's "highly individualized discretionary process."[45] The record demonstrated zoning codes often excluded churches but permitted "theaters, meeting halls, and other places where large groups of people assemble for secular purposes."[46] The studies found that discrimination occurred most often through "vague and universally applicable" zoning reasons such as "not consistent with the city's land use plan."[47] In one instance, Los Angeles prohibited fifty elderly Jews from meeting for prayer in a

40. Sarah Keeton Campbell, Note, *Restoring RLUIPA's Equal Terms Provision*, 58 DUKE L.J. 1071, 1079 (2010) (citing *Protecting Religious Freedom After* Boerne v. Flores*: Hearing Before the H. Comm. on the Judiciary*, 105th Cong. 2 (1997); *Protecting Religious Freedom After* Boerne v. Flores *(Part II): Hearing Before the H. Comm. on the Judiciary*, 105th Cong. (1998); *Protecting Religious Freedom After* Boerne v. Flores *(Part III): Hearing Before the H. Comm. on the Judiciary*, 105th Cong. (1998)).

41. *See id.*; 146 CONG. REC. S7774 (2000).

42. *See* 146 CONG. REC. S7774–S7777 (2000) (citing testimony and reports from Professor Douglas Laycock, Professor Jay Bybee, Thomas C Berg, and the Baptist Joint Committee on Public Affairs).

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

44. Senators Hatch and Kennedy worked on the Religious Freedom Restoration Act and co-sponsored the Senate RLUIPA bill. Senator Hatch was the Chairman of the Senate Committee on the Judiciary. 146 CONG. REC. S7774–S7775 (2000).

45. *Id*.

46. *Id*.

47. 146 CONG. REC. S7774 (2000).

six-square mile neighborhood.[48] The city expressly said the neighborhood did not have room for a worship place and it did not want to create a precedent for one.[49] However, the city permitted other assemblies to meet, including schools and recreational users.[50]

Though most of the information was anecdotal, Congress also sought empirical information, and considered a study conducted by Brigham Young University (BYU).[51] The study showed that small religious groups were "vastly overrepresented in reported church zoning cases."[52] It highlighted, for example, that "Jews account for only 2% of the population" but were involved in 20% of all litigation involving church locations.[53] Based on all the evidence, the senators concluded that "[i]t is impossible to make separate findings about every jurisdiction, or to legislate in a way that reaches only those jurisdictions that are guilty."[54]

C. RLUIPA: The Act

Given the discrimination described above, Congress drafted the following provisions as RLUIPA's land use section:

> (a) Substantial burdens
>
> (1) General rule: No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution—
>
> (A) is in furtherance of a compelling governmental interest; and
>
> (B) is the least restrictive means of furthering that compelling governmental interest . . . .
>
> (b) Discrimination and exclusion

48. Douglas Laycock, *State RFRAs and Land Use Regulation*, 52 U.C. DAVIS L. REV. 755, 779 (1999). Senators Hatch and Kennedy cited this law review article in their joint statement before the Senate. 146 CONG. REC. S7775 (2000).

49. Laycock, *supra* note 49, at 779.

50. *Id*.

51. *See id*. at 770–771 (citing a Brigham Young University study).

52. *Id.* at 771.

53. *Id*.

54. 146 CONG. REC. S7775 (2000).

> (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.[55]

The substantial burden section also includes jurisdictional limits in (a)(2), which indicates the provision includes (1) any federal assistance programs, (2) anything affecting commerce, and (3) any government land use regulations.[56]

D. The Equal Terms Provision in Context

Many scholars compare the substantial burden section and equal terms provision[57] even though the two are "operatively independent."[58] Legislative history aids the interpretion of the provisions by demonstrating the emphasis and limitations drafters placed on each section.

Especially instructive are the joint statements of Senators Hatch and Kennedy, and a coalition letter.[59] The statements briefly explain the

55. 42 U.S.C. § 2000cc (2006).

56. 42 U.S.C. § 2000cc(a)(2) (2006).

57. *See, e.g.*, Campbell, *supra* note 41, at 1083–1085; Anthony Lazzaro Minervini, Comment, *Freedom From Religion: RLUIPA, Religious Freedom, and Representative Democracy on Trial*, 158 U. PA. L. REV. 571, 583 (2010).

58. Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752, 761 (7th Cir. 2003).

59. 146 CONG. REC. S7774-01, S7774–S7777 (2000). The referenced coalition letter is from the Coalition for the Free Exercise of Religion, written by the general counsel of the Baptist Joint Committee on Public Affairs. The letter is one of several included in the Congressional Record along with the joint statements by Senators Hatch and Kennedy. The Congressional Record also includes a letter from the U.S. Department of Justice—Office of Legislative Affairs, and a letter from the Leadership Conference on Civil Rights. *Id.*

different sections' scrutiny standards. The senators argued that widespread discrimination and individual assessments necessitated the heightened scrutiny level of the substantial burden section.[60] For the equal terms provision, the senators indicated it "enforce[s] the Free Exercise Clause rule against laws that burden religion and are not neutral and generally applicable."[61] The coalition letter addressed the two sections in a similar fashion. It justified the substantial burden section by highlighting the following: (1) the section does not grant religious assemblies immunity, (2) the claim will fail if a claimant cannot demonstrate a substantial burden, and (3) the government has the opportunity to rebut any substantial burden claim.[62] After this lengthy substantial burden justification, the letter only mentions the equal terms provision in passing.[63] This legislative history explains the difference between the provisions' scrutiny standards and suggests that Congress was much more concerned with the substantial burden section.

Finally, the legislative history offers some sense of RLUIPA's limitations. Senators Hatch and Kennedy admitted that the "Act does not provide religious institutions with immunity from land use regulation."[64] They further established that churches still have to apply for permits when available absent discrimination or unfair delay.[65]

E. RLUIPA's Impact and Burden on Local Governments

Critics have since discovered flaws in the legislative process and congressional justification for RLUIPA. For instance, while religious landowners testified about discrimination, no homeowners testified, and Congress denied local government organizations the opportunity to speak.[66] Additionally, recent scholarship has questioned the BYU study

60. 146 CONG. REC. S7774-01, S7775 (2000).

61. *Id.* at S7776.

62. *Id.* at S7777.

63. The author discussed the equal terms provision in less than half a sentence. *Id.*

64. *Id.* at S7776.

65. *Id.*

66. Marci A. Hamilton, *Federalism and the Rehnquist Court*, ASS'N OF AM. L. SCHS., http://www.aals/profdev/constitutional/hamilton.html (last visited Nov. 14, 2010); *see also* Patricia E. Salkin & Amy Lavine, *The Genesis of RLUIPA and Federalism: Evaluating the Creation of a Federal Statutory Right and Its Impact on Local Government*, 40 URB. LAW. 195, 207 (2008); Marci Hamilton,

for using outdated statistics and for analyzing only zoning decisions the plaintiffs appealed.[67] For example, a New Haven, Connecticut study, which is more representative than the BYU study, found no evidence of bias.[68] The study's author concluded that "local governments remain capable of impartially evaluating" interests in land use disputes.[69]

Just as Congress justified legislation with many anecdotal discrimination cases, other anecdotal evidence suggests that some municipalities have suffered substantial burdens under RLUIPA. In Boulder, Colorado, officials have long sought to protect the county's "spectacular beauty" from Denver's encroaching suburbs.[70] However, a church, which had already expanded from thirty-six families to 2,200 people on a 55-acre plot, wanted to double its facility size.[71] The parties went to court, and if Boulder lost, it would have had to pay both its own legal bills and the church's.[72] Therefore, although Congress sought to alleviate burdens on one population through RLUIPA, it created a new set of burdens on a different population.

RLUIPA was, in sum, the product of a decade-long struggle between the Executive and Judicial Branches over religious liberty regulations. Congress enacted RLUIPA due to a perceived need to protect the religious liberty of land users. However, municipalities and courts have suffered their own burdens in light of RLUIPA.

Struggling with Churches as Neighbors: Land Use Conflicts between Religious Institutions and Those Who Reside Nearby, FINDLAW (Jan. 17, 2002), http://writ.news.findlaw.com/hamilton/20020117.html.

67. Stephen Clowney, Comment, *An Empirical Look At Churches In The Zoning Process*, 116 YALE L.J. 859, 865–866, 868 (2007).

68. *Id*. at 861, 865. Mr. Clowney argued New Haven, Connecticut was an excellent test subject for the following reasons: (1) the laws and demographics of the city: the medium-sized university town was full of educated elites "who are often accused of being 'hostile to religion and to churches," and Connecticut laws made no special exceptions for religious land uses; (2) the heterogeneous mix of religious groups in New Haven "roughly mirror[ed] the distribution of religious groups at a national level"; and (3) the New Haven government maintained specific records on all zoning appeal applications filed since 1954. *Id.* at 861–862.

69. *Id.* at 868.

70. Diana B. Henriques, *As Exemptions Grow, Religion Outweighs Regulation*, N.Y. TIMES (Oct. 8, 2006), http://www.nytimes.com/2006/10/08/business/08religious.html?pagewanted=6&_r=2.

71. *Id.*

72. *Id.*

III. CIRCUIT COURT INTERPRETATIONS OF RLUIPA'S EQUAL TERMS PROVISION

Despite the apparent simple and straightforward construction of the equal terms provision, courts have struggled with its interpretation and application. Specifically, the circuits have conflicting views on three points. First, the courts have divergent understandings on the definition and context of assembly or institution. Second, the circuits are split over a similarly situated requirement. Finally, the circuits have disagreed on the appropriate level of scrutiny.

A. The Eleventh Circuit

In *Midrash Sephardi, Inc. v. Town of Surfside*, the Eleventh Circuit's first and most prominent equal terms provision decision, the court addressed an ordinance prohibiting churches and synagogues in seven of eight zoning districts.[73] The ordinance permitted churches in the residential district only after obtaining a conditional use permit.[74] Two Jewish congregations wanted a synagogue within walking distance of their homes—located in the town's business district—because Orthodox Judaism forbids using transportation on the Sabbath.[75] Surfside claimed the ordinance was designed "to invigorate the business district" and create a strong tax base.[76] According to Surfside, allowing churches and synagogues would erode the tax base and cause economic hardship.[77] The *Midrash* court ruled that the ordinance violated RLUIPA's equal terms provision.[78]

The *Midrash* court first analyzed the statutory construction of the substantial burden and nondiscrimination provisions, and concluded the provisions were "operatively independent of one another."[79] The court noted the substantial burden jurisdictional nexus did not apply to the

73. Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1219 (11th Cir. 2004).
74. *Id.*
75. *Id.* at 1220, 1221.
76. *Id.* at 1221.
77. *Id.* at 1222.
78. *Id.* at 1219.
79. Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1229 (11th Cir. 2004).

equal terms provision because "§ (a)(2), by its terms, applies to 'subsection' (a)."[80]

The court then rejected the district court's similarly situated requirement on the basis that RLUIPA provisions "require a direct and narrow focus."[81] Instead, the court considered the congregation's claim in light of the category of "assemblies or institutions."[82] Therefore, before analyzing a potential statutory violation, the court needed to determine whether an entity qualified as an assembly or institution.[83] The court looked to assemblies' "ordinary or natural meaning" for a definition, which was "a company of persons collected together in one place usually and usually for some common purpose (as deliberation and legislation, worship, or social entertainment)."[84] Because Surfside treated churches and synagogues differently from private clubs and lodges—both organizations within the assemblies or institution definition—the court concluded Surfside violated the equal terms provision.[85] In reaching this conclusion, the *Midrash* court asserted the equal terms provision codified free exercise jurisprudence.[86] Therefore, the court applied a strict scrutiny analysis to determine whether the law was neutral and generally applicable.[87]

The Eleventh Circuit subsequently addressed the equal terms provision in *Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward County*.[88] There, a Baptist congregation sued based on the county's agricultural zone requirements.[89] The *Primera* court ruled that a plaintiff must present a similarly situated "nonreligious comparator" for any as-applied equal terms challenge, and the church had failed to

80. *Id.*

81. *Id.* at 1230.

82. *Id.*

83. *Id.*

84. *Id.* (some internal formatting omitted). The *Midrash* court got its definitions of assembly and institution from Webster's Dictionary and Black's Law Dictionary. *Id.*

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

86. *Id.* at 1232.

87. *Id.*

88. 450 F.3d 1295 (11th Cir. 2006). This Comment discussed the *Primera* facts in Part I. A Baptist church filed an equal terms provision lawsuit after the County prevented the church from relocating in an agricultural use zone. *Id.* at 1300–1302.

89. *Id.* at 1299–1300.

meet this burden.[90] Therefore, the court upheld the Broward County ordinance excluding churches from the agricultural zone.[91]

B. The Third Circuit

In *Lighthouse Institute for Evangelism, Inc. v. City of Long Branch*, the Third Circuit Court of Appeals largely rejected the Eleventh Circuit's approach.[92] Lighthouse was "a Christian church that [sought] to minister the poor and disadvantaged in downtown Long Branch."[93] Lighthouse purchased property in Long Branch's "Central Commercial District," which permitted assembly halls and municipal buildings but excluded churches.[94] Long Branch consistently denied Lighthouse's applications, even though Lighthouse wanted to use the property for activities like a soup kitchen and job skills training program.[95]

In the midst of litigation, Long Branch changed its zoning ordinance and created a redevelopment plan to improve the city's revenue, job markets, and overall economic opportunities.[96] Under the new plan, the city allowed studios and clubs, but expressly prohibited churches, schools, and government buildings in the commercial district.[97] Long Branch also denied Lighthouse under the new ordinance, claiming a church would prevent the block from being used as "a high end entertainment and recreation area."[98]

The *Lighthouse* court first compared the equal terms and substantial burden sections, distinguishing the two based on the statute's plain text and legislative history.[99] The court noted that § 2(a)(1), not § (2)(b)(1), provided the substantial burden requirement, and the court further found

90. *Id.* at 1311–1313.

91. *Id.* at 1314.

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

93. *Id.* at 256.

94. *Id.* at 257.

95. *Id.*

96. *Id.* at 258.

97. *Id.*

98. Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch, 510 F.3d 253, 259 (3rd Cir. 2007).

99. *Id.* at 262.

no legislative history connecting the provisions.[100]

Addressing the similarly situated component, the court held plaintiffs must show a similarly situated "secular comparator" with respect to the challenged ordinance's "regulatory purpose."[101] The court considered the free exercise analysis, which compares secular and religious conduct that "has a similar impact on the regulation's aims."[102] In requiring a similarly situated comparator, the Third Circuit rejected the *Midrash* assembly categorization.[103]

The court also rejected the Eleventh Circuit's scrutiny standard, holding the "[e]qual [t]erms provision operates on a strict liability standard; strict scrutiny does not come into play."[104] Under this standard, if a land use regulation treats secular and religious assemblies unequally, the court automatically invalidates the regulation.[105] The court found the strict liability standard in the statute's plain text, arguing that the exclusion of strict scrutiny in the equal terms provision, coupled with its inclusion in the substantial burden section, demonstrated congressional intent.[106]

After evaluating these factors, the *Lighthouse* court determined the original ordinance, but not the redevelopment plan, violated the equal terms provision.[107] The original ordinance failed because the court rejected the assertion that churches would cause greater harm to the regulatory purposes than an unspecified assembly hall.[108] The redevelopment plan, however, survived scrutiny because "churches are not similarly situated to the other allowed assemblies with respect to" the plan's economic development goals.[109]

100. *Id.* at 262–263.

101. *Id.* at 264.

102. *Id.* at 266.

103. *Id.* at 268.

104. Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch, 510 F.3d 253, 269 (3rd Cir. 2007).

105. *Id.*

106. *Id.*

107. *Id.* at 270, 272.

108. *Id.* at 272.

109. *Id.* at 270.

C. The Seventh Circuit

In *River of Life Kingdom Ministries v. Hazel Crest*,[110] the Seventh Circuit issued the most recent equal terms provision ruling, which significantly shifted the circuit split balance. The Seventh Circuit noted that its jurisdiction had previously[111] "followed the Eleventh Circuit's interpretation."[112] However, in *Hazel Crest*, the circuit adopted a test similar to the Third Circuit approach.

The regulation challenged in *Hazel Crest* concerned a business district zone that permitted a wide variety of commercial and retail uses, including recreational buildings and community centers, but excluded churches.[113] The town had suffered many years of economic decline and the city hoped to revitalize the area as a commercial center.[114] A church, River of Life, challenged the regulation. River of Life had only sixty-seven members, operated out of a warehouse, and purchased a building for relocation.[115] After the church filed an equal terms provision claim, Hazel Crest amended its ordinance to exclude some secular assemblies, including meeting halls, schools, and community centers.[116] The court upheld the town's zoning ordinance,[117] reaching its conclusion largely through analyzing the other circuits' interpretations of equal terms provision.

The Seventh Circuit vehemently disagreed with the Eleventh Circuit's assembly definition and strict scrutiny analysis.[118] The court criticized the Eleventh Circuit's assembly analysis as reading the statute too literally by including "*any* 'assembly,'" and argued the approach "would

110. River of Life Kingdom Ministries v. Vill. of Hazel Crest, 611 F.3d 367 (7th Cir. 2010).

111. The previous cases include the following: Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752 (7th Cir. 2003); Vision Church v. Vill. of Long Grove, 468 F.3d 975 (7th Cir. 2006); and Digrugilliers v. Consol. City of Indianapolis, 506 F.3d 612 (7th Cir. 2007).

112. *Hazel Crest*, 611 F.3d at 377 (Sykes, J., dissenting).

113. *Id.* at 368, 377.

114. *Id.*

115. *Id.* at 368.

116. *Id.* at 364, 368.

117. *Id.* at 374.

118. River of Life Kingdom Ministries v. Vill. of Hazel Crest, 611 F.3d 367, 369–370 (7th Cir. 2010).

give religious land uses favored treatment."[119] The *Hazel Crest* court asserted the broad assembly definition would encompass most secular land uses, such as parks and soup kitchens, because "visitors to each have a 'common purpose' in visiting."[120] The assembly definition should instead, according to the court, focus on the assemblies' effects "on the municipality and its residents."[121] The Seventh Circuit subsequently argued the Eleventh Circuit's strict scrutiny requirement was unnecessary for two reasons: (1) there was no textual basis for the claim and (2) "religious discrimination is expressly prohibited elsewhere in the statute."[122]

The *Hazel Crest* court then argued the Third Circuit's regulatory purpose test gave local authorities too much subjective leeway.[123] The circuit therefore shifted the focus "from regulatory *purpose* to accepted zoning *criteria*."[124] Accepted zoning criteria would prevent local authorities from manipulating their zoning regulations and would instead allow federal judges to apply more objective standards.[125]

The *Hazel Crest* court then analyzed potential accepted zoning criteria before upholding Hazel Crest's amended ordinance.[126] The Seventh Circuit postulated that separate zoning areas, including residential and municipal, would "insure a better and more economical use of municipal services."[127] Therefore, Hazel Crest was not unique to exclude churches and non-commercial assemblies from a certain zone.[128] The Seventh Circuit ultimately held that treating "religious and secular land uses . . . the same from the standpoint of an accepted zoning criteria, such as 'commercial district,' or 'residential district,' . . . is enough to rebut" an equal terms provision claim.[129]

In sum, the circuits that have addressed the equal terms provision

119. *Id.* at 369.
120. *Id.* at 370.
121. *Id.*
122. *Id.* at 370–371.
123. *Id.*
124. River of Life Kingdom Ministries v. Vill. of Hazel Crest, 611 F.3d 367, 371 (7th Cir. 2010).
125. *Id.*
126. *Id.* at 371–374.
127. *Id.* at 372.
128. *Id.* at 373.
129. *Id.*

lawsuits differ on three primary issues. First, the circuits split on the appropriate assembly definition. The Eleventh Circuit defined assembly within its "ordinary or natural meaning[],"[130] while the Third and Seventh Circuits criticized this definition as too broad.[131] Second, the circuits split over the similarly situated requirement. The Third and Seventh Circuits applied a similarly situated requirement in relation to the ordinance's regulatory purpose and accepted zoning criteria respectively.[132] The Eleventh Circuit rejected the similarly situated requirement all together.[133] Third, the circuits split on the appropriate level of scrutiny, with the Eleventh Circuit applying a strict scrutiny analysis[134] while the Third and Seventh Circuits appled strict liability.[135]

IV. DISCUSSION: EVALUATING THE COURTS' INTERPRETATION OF THE EQUAL TERMS PROVISION

The Seventh Circuit offers the best equal terms provision test. With some modifications and additions, all courts should implement the *Hazel Crest* standard. This subpart first discusses the assembly definition, which the courts should define in an economic context, contrary to the circuits' current approaches. Next, this subpart considers the similarly situated comparator element, for which the Seventh Circuit, with its accepted zoning criteria standard, presented the best analysis. Finally, this subpart analyzes the potential scrutiny standards and concludes the Third Circuit appropriately chose a strict liability standard.

A. Assembly Definition: Why an Economic Context?

The courts should define assembly in terms of the assembly's economic impact instead of the ordinary or natural meaning.[136] The

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

131. Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch, 510 F.3d 253, 268 (3rd Cir. 2007); River of Life Kingdom Ministries v. Vill. of Hazel Crest, 611 F.3d 367, 369 (7th Cir. 2010).

132. *Lighthouse*, 510 F.3d at 264; *Hazel Crest*, 611 F.3d at 371.

133. *Midrash*, 366 F.3d at 1230.

134. *Id.* at 1232.

135. *Lighthouse*, 510 F.3d at 269; *Hazel Crest*, 611 F.3d at 371.

136. *Midrash*, 366 F.3d at 1232.

Eleventh Circuit alone defined assembly in its ordinary and natural meaning—a company of people usually collected in one place for a common purpose.[137] Instead of offering an alternative definition, the Third and Seventh Circuits merely argued this interpretation was too broad.[138] Despite not offering a new definition, the Third and Seventh Circuits correctly assessed the Eleventh Circuit's approach. The Seventh Circuit offered better reasoning, explaining that the definition was too broad because it would encompass secular land uses that have different effects on the municipality.[139] The courts could solve the broad definition issue and concerns over municipality effect by defining assembly in an economic context.

Defining assembly in an economic context would solve several problems. First, it would cover the impact on a municipality. Furthermore, defining assembly in an economic context would provide a clear definition to an otherwise ambiguous provision, and it would offer a balanced approach to help diffuse the burdens on churches and municipalities. Finally, using the economic context approach would shift some of the zoning power back to municipalities. Courts could apply this economic assembly definition in several different manners. For example, the courts could define an assembly as a group of people collected for a common purpose that generates a certain amount or percentage of tax revenue.

Scholars and officials at all levels have long considered cultivating economic growth on a local scale a priority. Leading urban planning experts have asserted that cities are the "economic engine of society."[140] President Clinton recognized this when he enacted legislation that offered tax incentives to spur economic growth in certain urban areas.[141] Other scholars have concluded that "commerce and industry . . . [are]

137. *Id.*

138. *See Lighthouse*, 510 F.3d at 268; River of Life Kingdom Ministries v. Vill. of Hazel Crest, 611 F.3d 367, 370 (7th Cir. 2010).

139. *Hazel Crest*, 611 F.3d at 370.

140. Steven J. Eagle, Kelo, *Directed Growth, and Municipal Industrial Policy*, 17 SUP. CT. ECON. REV. 63, 96 (2009) (citing scholars Jane Jacobs and Professor Richard Schragger).

141. Jennifer Forbes, Note, *Using Economic Development Programs as Tools for Urban Revitalization: A Comparison of Empowerment Zones and New Markets Tax Credits*, 2006 U. ILL. L. REV. 177, 183 (discussing the EZ/EC tax incentives enacted after the Los Angeles riots as part of a domestic policy shift using market-based incentives to revitalizes urban areas).

necessary and desirable elements of the community."[142]

In many of the equal terms provision lawsuits, municipalities had defined zones based on economic need, illustrating the importance and impact of economics on local governments. The *Hazel Crest* court concluded the city "created a commercial district that excludes churches *along with* community centers" because none of these assemblies, "like churches . . . generate significant taxable revenue or offer shopping opportunities."[143] Surfside, the town in *Midrash*, argued it designed the ordinance to create a strong tax base and invigorate the business district.[144] In *Lighthouse*, Long Branch's amended redevelopment plan strove to improve the city's revenue and job opportunities.[145] Defining assembly in economic terms would allow cities to meet these economic needs.

Defining assembly in an economic context would also alleviate some of the burden municipalities have suffered while still recognizing congressional intent. Despite efforts to compromise, municipalities have faced litigation, suffered large legal fees, and have had their efforts to exercise the police power through zoning impaired.[146] Furthermore, the evidence relied upon by Congress to support RLUIPA has recently been scrutinized. For instance, neither homeowners nor municipalities testified at the congressional hearings,[147] and subsequent studies have rebuffed the empirical evidence supporting RLUIPA.[148] Though these factors do not invalidate the anecdotal discrimination cases, they suggest the equal terms provision burdens municipalities more than legislators intended. Senators Hatch and Kennedy explicitly said RLUIPA leaves

142. Harry B. Madsen, *Noncumulative Zoning in Illinois*, 37 CHI.-KENT L. REV. 105, 113 (1960).

143. *Hazel Crest*, 611 F.3d at 373.

144. Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1221–1222 (11th Cir. 2004).

145. Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch, 510 F.3d 253, 258 (3rd Cir. 2007).

146. *See* Salkin & Lavine, *supra* note 67, at 253–255 (highlighting several examples of drawn out legal battles, including a dispute involving a Jewish congregation that wanted to add an additional 20,000-square feet to a Victorian home in a historic district that included a 5,000-square foot home for the rabbi); *see also supra* note 5 and accompanying text (discussing how the dispute between the church and government in *Primera* lasted from 1997–2006).

147. Salkin & Lavine, *supra* note 67, at 207.

148. Salkin & Lavine, *supra* note 67, at 257; Ashira Pelman Ostrow, *Judicial Review of Local Land Use Decisions: Lessons From RLUIPA*, 31 HARV. J.L. & PUB. POL'Y 717, 754 (2008).

all policy choices to the states.[149] Defining assembly in economic terms would permit municipalities to regulate based on economic need where they see fit. Just as RLUIPA was a compromise between the judiciary and legislature,[150] this assembly definition would serve as a compromise between churches and municipalities.

Permitting municipalities to zone based on economic need would also return some local authority to zoning, an area local governments traditionally controlled.[151] The judiciary treated zoning laws deferentially under the original zoning conception and gave municipalities great control over land use planning.[152] However, as scholars have indicated, municipalities under modern zoning often take a wait-and-see approach, which has led to a highly discretionary and individualized assessment-zoning method.[153] Through RLUIPA Congress sought to prevent this individualized assessment. Adopting an economic assembly definition would protect churches by establishing explicit criteria but also return some zoning control to municipalities.

For these reasons, the courts should define assembly within an economic context for the benefit of both municipalities and religious assemblies.

B. Similarly Situated Comparator and Accepted Zoning Criteria

Under this Comment's proposed equal terms provision analysis, courts should require plaintiffs to present similarly situated assemblies with respect to the accepted zoning criteria the city implements. The Third and Seventh Circuits use the similarly situated element. The Third Circuit evaluated the similarly situated assembly in light of the municipality's regulatory purpose. The Seventh Circuit's consideration

149. 146 CONG. REC. S7776 (2000).

150. Congress demonstrated the first signs of compromise when it responded to *Boerne* by attempting to compile "massive evidence of discrimination." Furthermore, before Congress passed RLUIPA, the Senate Judiciary Committee drafted the Religious Liberty Protection Act of 1999. However, the bill never made it out of the committee due in part to the Act's wide scope. Salkin & Lavine, *supra* note 67, at 205–206.

151. Ostrow, *supra* note 149, at 719.

152. Ostrow, *supra* note 149, at 721; *see also* Vill. of Euclid v. Amber Reality Co., 272 U.S. 365 (1926) (establishing judicial deference).

153. Ostrow, *supra* note 149, at 734, 735.

of accepted zoning criteria, and not the regulatory purpose, offered an objective analysis point designed to protect churches and municipalities. This subpart first addresses the similarly situated component and then applies it to the accepted zoning criteria.

1. Similarly Situated Comparator

Analyzing equal terms provision claims based on a similarly situated assembly is consistent with Supreme Court precedent and congressional intent. Furthermore, all three circuits have, at least arguably, adopted the similarly situated requirement.

The Eleventh Circuit first expressed contradictory reasoning by using a similary situated standard in *Midrash* before adopting that standard in *Primera*. After the *Midrash* court ruled the equal terms provision needed a more direct and narrow focus than a similarly situated standard, the court asserted the equal terms provision codified the *Smith-Lukumi* free exercise precedent.[154] This precedent established that a "zoning law is not neutral or generally applicable if it treats *similarly situated* secular and religious assemblies differently."[155] The *Primera* court subsequently applied a similarly situated standard to as applied equal terms provision challenges.[156] Therefore, at best, the Eleventh Circuit adopted the similarly situated requirement. At worst, the Eleventh Circuit contradicted itself.

Regardless of the Eleventh Circuit's determination, the Third and Seventh Circuits' similarly situated requirement is consistent with congressional intent and free exercise precedent. RLUIPA's authors explicitly designed the equal terms provision to "enforce the Free Exercise Clause rule" against laws that are not neutral and generally applicable.[157] As the *Midrash* court described, Free Exercise Clause precedent analyzes similarly situated comparators to determine any constitutional violations.[158] The circuits subsequently created different

154. Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1230, 1232 (11th Cir. 2004).

155. *Id.* at 1232 (emphasis added).

156. Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward Cnty., 450 F.3d 1295, 1311 (11th Cir. 2006).

157. 146 CONG. REC. S7776 (2000).

158. *Midrash*, 366 F.3d at 1232.

standards based on this Free Exercise Clause influence. While the Eleventh Circuit adopted the strict scrutiny standard, the Third Circuit read the free exercise implications to require a similarly situated standard.[159]

The similarly situated requirement is the most appropriate analysis, as essentially all three circuits adopted it, and it is consistent with precedent and congressional intent. Having established why plaintiffs must present a similarly situated comparator, this subpart will now consider the basis for other institutions to be considered similarly situated to the religious assemblies.

2. Accepted Zoning Criteria

The Seventh Circuit's accepted zoning criteria analysis offers the best test. It requires equal terms provision plaintiffs to present similarly situated comparators with respect to the ordinance's accepted zoning criteria.[160] This objective standard will protect municipal interests, religious liberty, and satisfy congressional concerns about discrimination.

The Third Circuit's regulatory purpose test, on the other hand, leaves the door open for individualized assessment and discrimination. The Seventh Circuit summarized the problem well:

> [T]he use of 'regulatory purpose' as a guide to interpretation invites speculation concerning the reason behind the exclusion of churches; invites self-serving testimony by zoning officials and hired expert witnesses; facilitates zoning classifications thinly disguised as neutral but actually systematically unfavorable to churches . . . .[161]

This discretionary freedom directly contradicts what Senators Hatch and Kennedy sought to accomplish. The *Lighthouse* case itself illustrates the problem. The Third Circuit, in upholding the ordinance, overlooked Long Branch's subjective intent when it changed the zoning ordinance, with the new purpose to improve the city's economic market, in the

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

160. River of Life Kingdom Ministries v. Vill. of Hazel Crest, 611 F.3d 367, 371 (7th Cir. 2010).

161. *Id.*

midst of litigation.[162]

Conversely, the Seventh Circuit's accepted zoning criteria protects against individualized assessment and subjective intent by providing objective standards. The court's *Hazel Crest* decision offered some examples of objective, accepted zoning criteria, including maintaining parking space, traffic control, and generating municipal revenue.[163] Establishing objective criteria would put all parties on notice. Churches would know where they could locate, and municipalities would know the accepted regulation criteria. Furthermore, as the *Hazel Crest* court noted, federal judges could easily apply the criteria to resolve lawsuits.[164]

In *Grace United Methodist Church v. City of Cheyenne*, the Tenth Circuit explained why objective standards do not create individualized assessment.[165] The case concerned an ordinance that mandated certain variance denials, which forced the zoning board to deny a church's request to operate a day care.[166] The court held the denial was not an individualized assessment because the ordinance application was based on objective criteria and the board had no discretion.[167] This same logic applies to any zoning laws once the municipality integrates its accepted zoning criteria into the ordinances.

Though accepted zoning criteria protects against individualized assessments, the judiciary must vigilantly apply the test. In both *Lighthouse* and *Hazel Crest*, the courts misapplied the standard. In each case, the municipality changed the zoning ordinance or plan once the religious assembly applied for a permit. In *Lighthouse*, the city created the redevelopment plan to improve the city's economy and added schools and government buildings to the prohibition list.[168] The *Hazel Crest* town amended the ordinance to exclude more secular assemblies,

162. *Lighthouse*, 510 F.3d at 258.

163. *Hazel Crest*, 611 F.3d at 373.

164. *Id.* at 371.

165. Grace United Methodist Church v. City of Cheyenne, 451 F.3d 643 (10th Cir. 2006).

166. *Id.* at 654.

167. *Id.*

168. Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch, 510 F.3d 253, 256, 258 (3rd Cir. 2007).

including meeting halls, schools, and community centers.[169] These changes, after the religious assembly instituted a zoning request, are the same type of discrimination Congress sought to protect against. Therefore, courts cannot permit these post-request plan alterations for the accepted zoning criteria standard to truly uphold free exercise precedent and legislative intent.

Though some disapprove of the accepted zoning criteria because it adds to the statute's plain text,[170] practicality concerns also make it the best test. As Judge Cudahy of the Seventh Circuit noted, "[A]lthough Congress may have intended to prescribe a standard more open-ended . . . its application, as a practical matter requires . . . some limitations to be provided by the judiciary."[171] The practicality relates to the burden municipalities and religious assemblies have suffered through an open-ended standard and the judicial-congressional struggle over religious liberty protection laws. After the Supreme Court's denial of legislative attempts to combat discrimination, adding these requirements to the plain text satisfies the judiciary and addresses the congressional concerns.

Applying the accepted zoning criteria standard to previous free exercise and equal terms provision cases would lead to a similar outcome. The standard covers the *Lukumi* religious gerrymandering concerns by forcing municipalities to adopt accepted criteria that apply across the board. Applied to equal terms provision cases—such as the dispute involving the Indianapolis Baptist church—religious organizations would prevail because they are similarly situated to assembly halls and auditoriums, which are permitted in these zones.[172] The Boulder ordinance should also survive, because maintaining an agricultural zone could be an accepted zoning criterion.[173] Finally, the

169. *Hazel Crest*, 611 F.3d at 368.

170. *See, e.g.*, Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1230 (11th Cir. 2004); Campbell, *supra* note 41, at 1105 ("The lower courts' approaches to interpreting the equal terms provision seriously distort Congress's intent and weaken RLUIPA's protections for religious liberty as a consequence. Courts should avoid the pitfalls of these interpretations by adopting a textual interpretation of RLUIPA's equal terms provision.").

171. *Hazel Crest*, 611 F.3d at 374 (Cudahy, J., concurring).

172. Digrugilliers v. Consol. City of Indianapolis, 506 F.3d 612, 614 (7th Cir. 2007); *see also infra* Part I (describing *Digrugilliers*, 506 F.3d 612).

173. Henriques, *supra* note 71 (illustrating that the city is not religiously gerrymandering to

ordinance at issue in *Midrash* would still fail because it allowed similarly situated private clubs and lodges with respect to the accepted zoning criterion of creating a strong tax base.[174]

For these reasons, courts should evaluate all equal terms provision claims based on similarly situated comparators with respect to accepted zoning criteria.

C. Scrutiny: The Lack of a Need for a Strict Scrutiny Standard

The appropriate scrutiny level is the final point to address. A strict scrutiny standard is unnecessary for several reasons. First, Congress included a strict scrutiny analysis in RLUIPA's substantial burden section, a completely separate section from the equal terms provision. Second, other sections of RLUIPA have built-in standards that address the strict scrutiny concerns. Finally, by the time the accepted zoning criteria analysis applies strict scrutiny, the ordinance would have already undergone a searching scrutiny. Therefore, courts should implement a strict liability standard for the equal terms provision.

RLUIPA's substantial burden section—not the equal terms provision—offers governments the opportunity to justify their regulations through a strict scrutiny analysis. The equal terms provision merely states "no government shall impose . . . a land use regulation . . . ."[175] Courts and commentators have concluded the two provisions are "operatively independent," a telling indicator that the equal terms provision does not utilize a strict scrutiny analysis.[176] The *Lighthouse* case used the operative independence inference to conclude that "[s]ince Congress evidently knew how to require a showing of a substantial burden, it must have intended not to do so in the [e]qual

exclude the school because the policy has long been in place).

174. Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1221–1222 (11th Cir. 2004).

175. 42 U.S.C. § 2000cc(b)(1) (2006).

176. *See, e.g.*, Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752, 762 (7th Cir. 2003); *Midrash*, 366 F.3d at 1229; *see also* Campbell, *supra* note 41, at 1100 ("The substantial burden provision explicitly provides that land-use regulations that substantially burden religious exercise should be evaluated under a compelling interest test. The equal terms provision, appearing in the very next section of RLUIPA, lacks any similar requirement."); Minervini, *supra* note 58, at 583 ("It is important to note at the outset that the Discrimination and Exclusion provisions of the RLUIPA operate independently of the Substantial Burden provision . . . .").

[t]erms provision."[177]

The legislative history justifying these two sections reemphasizes the *Lighthouse* conclusion. Senators Hatch and Kennedy spent a significant amount of time justifying the strict scrutiny standard of the substantial burden section while only mentioning that the equal terms provision enforced the Free Exercise Clause.[178] The justification efforts also signify the importance and emphasis drafters placed on the two provisions.[179]

The *Hazel Crest* court offered some insightful contextual comments with respect to the weight drafters placed on the equal terms provision. Specifically, the majority considered that the "equal terms provision is not the only or even the most important protection against religious discrimination by zoning authorities."[180] The opinion further described the many other RLUIPA land use provisions that protect religious liberty, including the substantial burden section, the nondiscrimination provision, and the exclusion and limits provision.[181] Furthermore, as one scholar noted, reading a strict scrutiny analysis into the equal terms provision would essentially duplicate the substantial burden section.[182]

All of these factors demonstrate that the equal terms provision does not require a strict scrutiny analysis. However, one must also consider that under the proposed equal terms provision test, the ordinance will have already undergone the searching scrutiny the Eleventh Circuit sought to enact through strict scrutiny. The Eleventh Circuit, with a broad assembly definition, permits many equal terms provision claims to proceed before analyzing them under strict scrutiny. The accepted zoning criteria test allows fewer qualifying plaintiffs, but the test

177. Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch, 510 F.3d 253, 263 (3rd Cir. 2007) (citing Russello v. United States, 464 U.S. 16, 23 (1983)).

178. 146 CONG. REC. S7775–S7776 (2000).

179. In addition to the Senators' statements justifying the two provisions, as noted in Part IID, the general counsel for the Coalition for the Free Exercise of Religion wrote a letter included in the legislative history. The author justified the substantial burden section by highlighting the following: (1) the section does not grant religious assemblies immunity, (2) if a claimant cannot demonstrate a substantial burden the claim will fail, and (3) the government has the opportunity to rebut any substantial burden claim. 146 CONG. REC. S7777 (2000).

180. River of Life Kingdom Ministries v. Vill. of Hazel Crest, 611 F.3d 367, 374 (7th Cir. 2010).

181. *Id.*

182. Salkin & Lavine, *supra* note 67, at 247.

immediately invalidates the ordinance if it meets the initial criteria.

Therefore, as the *Lighthouse* court concluded, the "[e]qual [t]erms provision operates on a strict liability standard; strict scrutiny does not come into play."[183]

V. CONCLUSION

The best equal terms provision analysis requires plaintiffs to present similarly situated comparators with respect to the ordinance's accepted zoning criteria, and applies strict liability once the plaintiff has met that standard. This analysis solves several problems. First, the analysis acknowledges the struggle between Congress and the judiciary over religious liberty jurisprudence by advocating a compromise that addresses each side's concerns. Second, the compromise alleviates the burdens felt by both municipalities and religious land users. For example, Boulder, Colorado, could justify its regulations without fear of spending thousands of dollars on litigation, and the Indianapolis Baptist church could locate in its requested area. The test offers clear criteria for all parties—religious land users, municipalities, and the courts. Finally, the test addresses free exercise and congressional discrimination concerns. The objective accepted zoning criteria would uncover any municipal religious gerrymandering attempts and strike down laws that are not neutral and generally applicable.

The Supreme Court needs to issue a guiding opinion to this respect. Then, all parties will have a clear standard, and a Florida evangelical church and a Chicago synagogue will be treated the same. The Supreme Court must explicitly address situations where municipalities change their zoning ordinances after a religious land user initiates a zoning request. So long as the Supreme Court addresses this issue or, in the alternative, the lower courts adopt the test and self-regulate, courts will have an effective method by which to analyze equal terms provision challenges.

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