Amending and Interpreting the Equal Terms Provision of RLUIPA: Finding the Role of Congress in a Sea of Judicial Interpretation

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Introduction

Imagine that you are the pastor of a Christian congregation in Savannah, Georgia. Your church has been gathering for the past five years in the basement of a pizza shop on the outskirts of town. Although you started with only twenty-five members, your church has been rapidly growing and now consists of almost 100 members. Because you would like more space for your church and the ability to draw in more members from downtown Savannah, you start looking on the city's Main Street for an adequate property.

In the five years since you began running your basement church, the city of Savannah has attempted to revive its Main Street as a tourist district by encouraging a mixture of commercial, cultural, governmental, and residential uses in the area. As part of the city's revitalization project, any religious institution is required to obtain a conditional use permit—a special exception to use the land. You find the perfect place for your church—a vacant department store on Main Street. The building is in foreclosure and has to be purchased quickly to get the distressed sale price, so you buy it before receiving your permit.

Immediately, neighboring properties begin objecting to your application for a conditional use permit because they are concerned that the church will prevent the issuance of liquor licenses. A

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recently-enacted state law prohibits new bars, nightclubs, or liquor stores within 300 feet of a church. Because the city intends for Main Street to be an entertainment area, the Zoning Commission denies your permit. However, had your church been a secular organization, it would not have needed a conditional use permit because the Savannah City Code only requires religious organizations to obtain such permits. Membership organizations, performing arts centers, physical fitness facilities, museums, and even prisons can operate on Main Street without a permit.

Imagine further that you sue the city for a declaratory judgment, injunction, and damages under the Religious Land Use and Institutionalized Persons Act (RLUIPA), which states that land use regulations cannot treat a "religious assembly or institution on less than equal terms with a nonreligious assembly or institution."[1] On appeal, the Eleventh Circuit Court of Appeals rules in your favor, holding that the city regulation treats religious assemblies on less than equal terms with non-religious assemblies. Unfortunately, the ruling backfires. Instead of revising the ordinance to allow religious institutions as a permitted use, the Zoning Commission institutes a new ordinance prohibiting *any assembly* as a permitted use in the area and permitting only small shops and restaurants to remain. As a result of your lawsuit, therefore, the city's zoning ordinance transitions from a seemingly open and inviting rule for churches and other assemblies, to a prohibition of *any kind* of assembly in the area.

This hypothetical—based on the facts of two real court cases[2]—attempts to construct a real-world scenario that illustrates the inconsistent, confusing, and controversial application of the Equal Terms provision of RLUIPA. Although Congress designed RLUIPA to ensure the free exercise of religion in the United States through zoning administration,[3] the Act may have been more of a hindrance than help in promoting religious freedom.[4] Since RLUIPA's ratification in 2000, circuit courts have struggled to develop a standard test to apply

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[1] Religious Land Use and Institutionalized Persons Act (RLUIPA) of 2000, 42 U.S.C. § 2000cc(b)(1) (2006).

[2] *See* Covenant Christian Ministries, Inc. v. City of Marietta, 654 F.3d 1231 (11th Cir. 2011); Centro Familiar Cristiano Buenas Nuevas v. City of Yuma, 651 F.3d 1163 (9th Cir. 2011).

[3] *See infra* notes 56 and 57 and accompanying text.

[4] *See infra* Part III.B.1.

the Act, particularly the Equal Terms provision.[5] According to RLUIPA, local land use regulations cannot treat religious assemblies on "less than equal terms" than their secular counterparts.[6] While the Eleventh Circuit defines secular counterparts as any "assembly," the Third Circuit Court of Appeals defines such counterparts based on those addressed by the purpose of a particular zoning law.[7] The Eleventh Circuit therefore applies RLUIPA strictly upon the textual basis of the Act,[8] whereas the Third Circuit applies it based on the intent behind a particular zoning law.[9]

Few religious land use cases have arisen in the Third Circuit, most likely because the circuit provides little to no outlet for religious institutions to make claim.[10] A religious institution must prove that a zoning ordinance's purpose is discriminatory toward it by deciphering the intentions of the zoning commission and identifying a very similar secular comparator that is treated differently based on that decipherment.[11] Because churches and other religious groups must overcome this heavy burden when bringing a RLUIPA claim, it is likely that most of their claims are not even heard, let alone ruled in their favor.[12]

Comparatively, several religious land use cases have arisen in the Eleventh Circuit most likely because the circuit applies a broad reading of RLUIPA, and therefore it is "relatively easy" to prove that a

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5 Anthony Lazzaro Minervini, Comment, *Freedom from Religion: RLUIPA, Religious Freedom, and Representative Democracy on Trial*, 158 U. PA. L. REV. 571, 584 (2010).

6 *See* RLUIPA, 42 U.S.C. § 2000cc(b)(1) (2006).

7 *Compare* Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch, 510 F.3d 253, 266-67 (3d Cir. 2007), *with* Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1230-31 (11th Cir. 2004).

8 *See Midrash Sephardi*, 366 F.3d at 1230-31.

9 *See Lighthouse*, 510 F.3d at 270.

10 *See, e.g.*, *id.* at 266-69 (holding that a religious institution must prove that a zoning ordinance's overall purpose was discriminatory toward that particular institution, and that the ordinance is not subject to strict scrutiny); *see also* River of Life Kingdom Ministries v. Vill. of Hazel Crest, 611 F.3d 367, 371 (7th Cir. 2010) (stating that the Third Circuit's "regulatory purpose" test "makes the meaning of 'equal terms' in a federal statute depend on the intentions of local government officials" and therefore weighs in favor of government officials, rather than religious institutions).

11 *See, e.g.*, *Lighthouse* at 257, 266-68 (holding that a religious institution must prove that a zoning ordinance's overall purpose was discriminatory toward it based on a similar secular comparator, and that a theater was not considered similar enough to a church for that purpose); *see also River of Life Kingdom Ministries, 611 F.3d at 371.*

12 *See River of Life*, 611 F.3d at 371 (stating that the Third Circuit's "regulatory purpose" test is subjective and therefore difficult to prove as compared to the Seventh Circuit's "regulatory criteria" test).

violation of the Act occurred.[13] By interpreting the Equal Terms provision according to its plain language, the circuit frequently finds that a religious institution is not being treated similarly to some other type of "assembly" in a zoning area.[14] Unfortunately, this plain language interpretation has created pragmatic issues for public policy. Even when the court rules in favor of religious institutions, such rulings incentivize further restrictions on zoning ordinances, as noted in the hypothetical scenario. It seems that these religious institutions are not actually "winning" their cases, but rather only creating bigger problems for the free exercise of religion in the future.[15]

The solution is not to abolish the Equal Terms provision of RLUIPA, or to blindly select whichever interpretive analysis seems best in a given situation. Instead, Congress should amend the Equal Terms provision of RLUIPA to reflect the following: "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 *that is similarly situated as to regulation criteria*." Then, when claiming a RLUIPA violation, religious institutions should be required to show that they have been treated on less than equal terms with a secular institution that is *similarly situated* to them according to the stated criteria of the zoning ordinance—a method recently introduced by Judge Posner in the Seventh Circuit Court of Appeals.[16] For example, if a zoning ordinance excluded all noncommercial entities from an area, churches and other religious institutions could also be excluded because they would be considered noncommercial entities.[17] To reach both a consistent and pragmatic solution, each step is necessary. The first step of amending RLUIPA ensures a consistent textual basis for the interpretation of the statute; while the second step of applying the Seventh Circuit analysis ensures a pragmatic basis for the application of the statute.

Part I of this Comment discusses the background of RLUIPA, including its legislative history and current provisions. Part II ana-

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13 *See* Minervini, *supra* note 5 at 585-90.

14 *See id.* at 586-87.

15 *See* Covenant Christian Ministries, Inc. v. City of Marietta, 654 F.3d 1231, 1243 (11th Cir. 2011) (illustrating that cities can continue to block religious land use, so long as city ordinances similarly classify secular places of assembly as "special uses," requiring approval by the city).

16 River of Life Kingdom Ministries v. Vill. of Hazel Crest, 611 F.3d 367, 373-74 (7th Cir. 2010).

17 *See id.*

lyzes the three different circuit court interpretations of the Equal Terms provision of RLUIPA. Part III argues that (1) the Eleventh Circuit interpretation is the most consistent with the Equal Terms provision; (2) the Eleventh Circuit interpretation also presents significant pragmatic difficulties in its application; (3) to correct such difficulties, Congress must amend the provision to include a similarly situated requirement; and (4) under the amended provision, the Seventh Circuit interpretation would provide the most consistent and pragmatic analysis for future claims.

I. BACKGROUND

One of the unique successes of America has been "to secure freedom of religion as both a constitutional guarantee and a significant social reality."[18] Although freedom of religion in this nation certainly begins with the history of the Free Exercise Clause, it does not end there.[19] In fact, American history shows that religiously motivated claims and legislation have often been "at the cutting edge of constitutional freedoms, and have pulled analogous secular claims along in their wake."[20] RLUIPA is an example of such religiously motivated legislation.[21] This Part describes how the advancement of the Free Exercise Clause led to the development of RLUIPA and its current provisions, with Section A examining the history of the Free Exercise Clause, Section B describing RLUIPA's legislative history, and Section C explaining RLUIPA's current provisions.

A. *The Free Exercise Clause of the First Amendment*

Religious liberty in early America was founded upon a strong belief in liberty of conscience.[22] As James Madison wrote in 1785,

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[18] Thomas C. Berg, *Introductory Essay* to THE FIRST AMENDMENT: THE FREE EXERCISE OF RELIGION CLAUSE 17 (Thomas C. Berg ed., 2008).

[19] *See* JEROLD L. WALTMAN, RELIGIOUS FREE EXERCISE AND CONTEMPORARY AMERICAN POLITICS 5-19 (2011).

[20] Ira C. Lupu & Robert W. Tuttle, *The Forms and Limits of Religious Accommodation: The Case of RLUIPA*, 32 CARDOZO L. REV. 1907, 1909 (2011).

[21] *See* RLUIPA, 42 U.S.C. § 2000cc (2006) ("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 . . . .").

[22] *See generally* John Witte, Jr., *The Essential Rights and Liberties of Religion in the American Constitutional Experiment*, 71 NOTRE DAME L. REV. 371, 377-400 (1996).

"The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate."[23] This foundation prohibited even subtle forms of discrimination and demanded protection of religious minorities.[24] By the time the Constitution was ratified in 1789, nearly every state had a constitutional provision protecting religious liberty.[25]

After its ratification, many American citizens expressed concern that the Constitution lacked provisions to protect the rights of conscience.[26] Lawmakers in five states drafted proposals for amendments which urged protection for religious freedom.[27] Notably, however, when Congress began debating the implementation of an amendment, their proposals spoke of the "rights of conscience," rather than the "free exercise of religion."[28] The latter term was first introduced into the debate by Congressman Fisher Ames of Massachusetts, whose formulation of the amendment was later adopted.[29]

Although there is no recorded debate or discussion surrounding the decision to replace "rights of conscience" with the "free exercise of religion," the change was most likely made to clarify that the clause "protects religiously motivated conduct as well as belief."[30] Additionally, the "free exercise" term "singles out religion for special treatment," rather than protecting all ways of life.[31] The Supreme Court, however, has not always been consistent in deciding whether the Free Exercise Clause creates special religious exemptions to the general law.[32]

In *Reynolds v. United States*, the first case to directly interpret the Free Exercise Clause in 1879, the Supreme Court held that a Mormon could not contract plural marriages in violation of a federal anti-

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[23] *Id.* at 390, 394 (quoting James Madison, *Memorial and Remonstrance Against Religious Assessments* (1785), *reprinted in* 8 THE PAPERS OF JAMES MADISON 298 (Robert A. Rutland et al. eds. 1973)).

[24] *Id.* at 391-92.

[25] Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1455 (1990).

[26] Berg, *supra* note 18, at 17; McConnell, *supra* note 25, at 1480.

[27] McConnell, *supra* note 25, at 1480; *see also* Reynolds v. United States, 98 U.S. 145, 164 (1878).

[28] McConnell, *supra* note 25, at 1482.

[29] *Id.* at 1482.

[30] *Id.* at 1488.

[31] *Id.* at 1491.

[32] *See generally* WALTMAN, *supra* note 19, at 21-48.

polygamy statute.[33] The Court stated, "To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself."[34] In 1925, however, when deciding *Sherbert v. Verner*, the Court declared a South Carolina law to be unconstitutional because it denied a citizen unemployment benefits when she refused to work on a Saturday, her "Sabbath" day, and because it did not satisfy a "compelling state interest."[35] And in 1972, the Court in *Wisconsin v. Yoder* held that although a regulation may be "neutral on its face," it may nevertheless violate the Free Exercise Clause in its application if it "unduly burdens the free exercise of religion."[36]

In an attempt to settle the matter, the Court in 1990 in *Employment Division v. Smith* effectively overturned *Sherbert* by applying a type of rational basis test to a statute, rather than applying a compelling interest test.[37] In *Smith*, the Court upheld a state statute that required employees to be drug free at work, even though the Native Americans in the area were known to use small amounts of peyote in their spiritual ritual services.[38] The Court held that the statute was a "neutral, generally applicable law," and therefore, it did not require a compelling government interest to survive the Court's scrutiny.[39] Writing for the majority, Justice Scalia was careful to distinguish laws that are aimed at religious practice from those that are designed for other purposes that inadvertently infringe on the free exercise of religion.[40] He declared that although the former have been invalidated by

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33 Reynolds v. United States, 98 U.S. 145, 166 (1879).

34 *Id.* at 167.

35 Sherbert v. Verner, 374 U.S. 398, 406-07 (1963).

36 Wisconsin v. Yoder, 406 U.S. 205, 220 (1972).

37 *See* Emp't Div. v. Smith, 494 U.S. 872, 883-84 (1990) ("There being no contention that Oregon's drug law represents an attempt to regulate religious beliefs, the communication of religious beliefs, or the raising of one's children in those beliefs, the rule to which we have adhered ever since *Reynolds* plainly controls. 'Our cases do not at their farthest reach support the proposition that a stance of conscientious opposition relieves an objector from any colliding duty fixed by a democratic government.'").

38 *Id.* at 874, 890.

39 *Id.* at 879-83.

40 *See id.* at 885 ("The government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, 'cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development.'").

the Court, the latter should be generally accepted to avoid creating special privileges for religious groups.[41]

B. *Legislative History of the Religious Land Use and Institutionalized Persons Act*

In response to the Supreme Court's decision in *Smith*, Congress enacted the Religious Freedom Restoration Act of 1993 (RFRA).[42] RFRA was intended to reinstate the compelling interest test for neutral, generally applicable laws,[43] but may have had the effect of expanding that test to apply strict scrutiny to any statute that created a "substantial burden" on free exercise.[44] RFRA mandated that rules of general applicability affecting free exercise of religion could only survive strict scrutiny if the rules act "in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering the compelling governmental interest."[45] Conversely, in 1997 the Supreme Court in *City of Boerne v. Flores* held that RFRA was unconstitutional as applied to the states, because Congress had exceeded its remedial power under Section Five of the Fourteenth Amendment.[46]

The Court's decision in *Boerne* stunned Congress because it was the first time in many decades that the Court "refused to rubber stamp Congress's record."[47] The Court instructed Congress to consider whether the threat of religious discrimination in the states justified the federal intervention RFRA proposed.[48] Partly due to its frustration with the *Boerne* decision, but also its desire to replace RFRA with a law that passed "constitutional muster," Congress

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[41] *See id.* at 879-82.

[42] Religious Freedom Restoration Act (RFRA) of 1993, 42 U.S.C. § 2000bb (2006) ("[I]n *Employment Division v. Smith*, the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion . . . ." (citation omitted)), *invalidated by* City of Boerne v. Flores, 521 U.S. 507 (1997).

[43] *Id.* (stating that one of the purposes of the statute was to "restore the compelling interest test as set forth in *Sherbert v. Verner*").

[44] AM. BAR ASS'N, RLUIPA READER: RELIGIOUS LAND USES, ZONING AND THE COURTS 32 (Michael Giaimo & Lora A. Lucero eds., 2009) [hereinafter Giaimo & Lucero].

[45] RFRA, 42 U.S.C. § 2000bb-1 (2006), *invalidated by* City of Boerne v. Flores, 521 U.S. 507 (1997).

[46] *City of Boerne*, 521 U.S. at 511.

[47] Giaimo & Lucero, *supra* note 44, at 35.

[48] *See City of Boerne*, 521 U.S. at 536; Giaimo & Lucero, *supra* note 44, at 36.

immediately held hearings on the subject.[49] Such discussions led to the proposal of another statute in 1998, this time called the Religious Liberty Protection Act of 1998 (RLPA).[50] Although RLPA did not necessarily propose to narrow the impact of RFRA, it did introduce the discussion of religious land use.[51] In fact, most of the citizens testifying supported giving religious landowners more control in the land use process.[52]

Opponents of RLPA claimed that the legislation would make special exceptions for religious groups to already established laws, and would therefore violate the establishment clause of the First Amendment.[53] After it became clear that RLPA would not pass because of its strict scrutiny requirement of a "huge swath of laws,"[54] Congress focused its attention only on religious land use and the religious freedom of persons in prisons, and thus proposed RLUIPA.[55] From the numerous complaints of religious landowners and other evidence gathered at the hearings, Congress concluded that the evidence of religious discrimination in land use was "massive."[56] In fact, based on the evidence compiled from statistical studies and national surveys, Congress "noted that this epidemic spread from coast-to-coast, and across all denominations, with religious institutions being discrimi-

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[49] *See* Giaimo & Lucero, *supra* note 44, at 36.

[50] *See Religious Liberty Protection Act of 1998: Hearings on H.R. 4019 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 105th Cong. 1-4 (1998) [hereinafter *RLPA Hearings*] (opening statement of Rep. Charles Canady, Chairman, Subcomm. on the Constitution of the H. Comm. on the Judiciary, and text of proposed bill); WALTMAN, *supra* note 19, at 52-53.

[51] *See RLPA Hearings*, *supra* note 50, at 2 ("No government shall impose a land use regulation that . . . substantially burdens religious exercise, unless the burden is the least restrictive means to prevent substantial and tangible harm to neighboring properties or to the public health or safety . . . .").

[52] Giaimo & Lucero, *supra* note 44, at 36.

[53] *See, e.g.*, *Religious Liberty Protection Act of 1999: Hearing on H.R. 1691 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 106th Cong. 150-51 (1999) (prepared statement of Marci Hamilton, Professor of Law, Benjamin Cardozo Sch. of Law).

[54] Giaimo & Lucero, *supra* note 44, at 34.

[55] *See* WALTMAN, *supra* note 19, at 111.

[56] 146 CONG. REC. S7774 (daily ed. July 27, 2000) (joint statement of Sen. Orrin G. Hatch and Sen. Edward M. Kennedy) [hereinafter Joint Statement] ("Zoning codes frequently exclude churches in places where they permit theaters, meetings halls, and other places where large groups of people assemble for secular purposes . . . . Churches have been denied the right to meet in rented storefronts, in abandoned schools, in converted funeral homes, theaters, and skating rinks—in all sorts of buildings that were permitted when they generated traffic for secular purposes.").

nated against through the use of restrictive zoning codes and selective land use processes."[57]

According to the standard created in *Boerne*, Congress may act to enforce the Constitution when it has "reason to believe that many of the laws affected by the congressional enactment have a significant likelihood of being unconstitutional."[58] Given the evidence that was gathered, Congress justified RLUIPA as necessary to enforce the Free Exercise Clause specifically in land use regulations.[59] Instead of targeting all possible religious discrimination in the states like RFRA or RLPA had done, RLUIPA proposed to regulate only two areas where the government makes regular decisions that impact religious liberty: religious land use and the religious exercise of institutionalized persons.[60] Because of RLUIPA's more narrow focus, the Act easily passed both houses and was officially signed into law on September 22, 2000.[61]

C. *The Provisions of RLUIPA*

RLUIPA's land use regulations have two main goals: (1) alleviate any substantial burdens on religious exercise created by zoning laws, and (2) ensure that religious entities are treated equally with nonreligious entities in land use decisions.[62] Known as the "substantial burden" requirement, RLUIPA provides:

> 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.[63]

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[57] Misha C. Jacob-Warren, Note, *A Circuit Split: Interpretation of the Equal Terms Provision of the Religious Land Use and Institutionalized Persons Act*, 34 SETON HALL LEGIS. J. 57, 63 (2009).

[58] City of Boerne v. Flores, 521 U.S. 507, 532 (1997).

[59] Jacob-Warren, *supra* note 57, at 63.

[60] *See* RLUIPA, 42 U.S.C. § 2000cc (2006); WALTMAN, *supra* note 19, at 111.

[61] *See* WALTMAN, *supra* note 19, at 111 ("Both houses passed [RLUIPA] the same day it was brought to the floor . . . .").

[62] Jacob-Warren, *supra* note 57, at 64.

[63] RLUIPA, 42 U.S.C. § 2000cc(a)(1) (2006).

To obtain relief under this requirement, churches and other religious institutions must make a prima facie case that a zoning regulation significantly hinders their worship or other religious practice.[64] The typical scenario involves the denial of a land use permit to build or expand a religious building.[65] Courts must decide if such a denial, in a given circumstance, is enough to substantially burden a religious group from practicing their religion.[66]

Although RLUIPA's "substantial burden" requirement is often the focus of debate and litigation in its interpretation, RLUIPA also contains another hotly contested stipulation known as the Equal Terms provision, which is the focus of this Comment.[67] RLUIPA provides: "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."[68] Although the Equal Terms provision may seem simple on its face, it is not completely clear as to what constitutes "equal terms," or even how "assembly" should be defined.[69] Although Congress included this provision to be a separate protection from the substantial burden requirement,[70] it has created just as much controversy.[71]

Of particular controversy is whether the provision includes or lacks a similarly situated requirement.[72] In other words, the provision is unclear whether a religious institution that is denied privileges must

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64 *See* RLUIPA, 42 U.S.C. § 2000cc (2006); Giaimo & Lucero, *supra* note 44, at 49.

65 *See* Giaimo & Lucero, *supra* note 44, at 49.

66 *See id.*

67 *See* RLUIPA, 42 U.S.C. § 2000cc(b)(1) (2006); Jacob-Warren, *supra* note 57, at 65 ("Despite its strong congressional support, RLUIPA's equal terms provision has been surprisingly controversial.").

68 RLUIPA, 42 U.S.C. § 2000cc(b)(1) (2006). There are two other substantive sections to RLUIPA: the "Nondiscrimination" and "Exclusion and limits" paragraphs. *Id.* § 2000cc(b)(2)-(3). There has been little litigation over these provisions, however, and they do not contain anything relevant to this Comment.

69 *See* Jacob-Warren, *supra* note 57, at 81-90 (arguing that the Third Circuit's interpretation of "equal terms" and "assemblies" conflicts with legislative intent).

70 Joint Statement, *supra* note 56 (indicating that the two provisions of RLUIPA were designed to operate independently of one another, stating that "if government substantially burdens the exercise of religion, it must demonstrate that imposing that burden on the claimant serves a compelling interest by the least restrictive means. In addition . . . the bill specifically prohibits various forms of religious discrimination and exclusion").

71 *See* Jacob-Warren, *supra* note 57, at 66.

72 *See id.*; *see also* Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1230-31 (11th Cir. 2004) (illustrating a case where the court determined that churches are "similarly situated" to private clubs).

show that another institution similarly situated to it was granted those privileges, or merely that *any* other assembly was granted those privileges.[73] Although courts have defined the similarly situated requirement differently, it was first used as part of the analysis of an Equal Protection claim.[74] In 1985 the Supreme Court in *City of Cleburne v. Cleburne Living Center* used a two-step analysis to determine whether a land use regulation violated the Equal Protection Clause.[75] First, the Court determined whether the uses in question were similarly situated.[76] Upon determining that the uses were similarly situated because they sought to use the land for similar purposes, the Court required the government to show a rational basis for distinguishing between the uses.[77] In Equal Protection cases, then, the Court usually finds land uses to be similarly situated if they are using the land for a similar purpose.[78] Later interpretations have also indicated that land uses can be similarly situated if they have an equal impact on the objectives of a regulation,[79] or if they are defined by similar zoning criteria.[80]

Courts disagree, however, over whether such Equal Protection analysis should be applied to the Equal Terms provision of RLUIPA.[81] While certain courts have concluded that the provision does not contain a similarly situated requirement based on the text and intent of

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[73] *Compare Midrash Sephardi*, 366 F.3d at 1230 (holding a zoning ordinance to be invalid under RLUIPA because other assemblies, such as lodges and private clubs, were allowed in the business district, while churches were excluded), *with* River of Life Kingdom Ministries v. Vill. of Hazel Crest, 611 F.3d 367, 371-72 (7th Cir. 2010) (holding a zoning ordinance to be valid under RLUIPA because other secular assemblies allowed under the ordinance were not similarly situated to the religious assembly).

[74] *See* Jacob-Warren, *supra* note 57, at 84-86.

[75] Congregational Kol Ami v. Abington Township, 309 F.3d 120, 136-37 (3d Cir. 2002) (citing City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 447-50 (1985)).

[76] *See id.* (citing City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 447-50 (1985)).

[77] *See id.* (citing City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 449-50 (1985)).

[78] *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 447-50 (1985).

[79] *See* Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch, 510 F.3d 253, 264 (3d Cir. 2007).

[80] *See* River of Life Kingdom Ministries v. Vill. of Hazel Crest, 611 F.3d 367, 371 (7th Cir. 2010); *Lighthouse*, 510 F.3d at 264.

[81] *Compare* Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1229 (11th Cir. 2004) (holding a zoning ordinance to be invalid under RLUIPA because other assemblies, such as lodges and private clubs, were allowed in the business district, while churches were excluded), *with River of Life*, 611 F.3d at 374 (holding a zoning ordinance to be valid under RLUIPA because other secular assemblies allowed under the ordinance were not similarly situated to the religious assembly).

Congress,[82] other courts have argued that such a requirement is supported by Equal Protection analysis and is necessary for the practical application of the provision.[83] Courts essentially disagree over exactly how much protection the provision mandates or ought to mandate.[84]

II. CIRCUIT SPLIT

After reviewing the background and history of RLUIPA, it is somewhat easier to understand why courts have disagreed over its interpretation, particularly in regard to the Equal Terms provision.[85] Unfortunately, such disagreement has sent mixed messages to religious plaintiffs in terms of their obligations in establishing an Equal Terms violation.[86] Section A of this Part analyzes the Eleventh Circuit interpretation of the Equal Terms provision, which is textual in application. Section B, in contrast, analyzes the Third Circuit interpretation of the provision, which is pragmatic in application. Section C then analyzes the Seventh Circuit interpretation of the provision, which is also pragmatic in application but implemented through a stricter standard.

A. *Eleventh Circuit*

The Eleventh Circuit has consistently used a textual interpretation of the Equal Terms provision, and therefore has not added a similarly situated requirement to the statute.[87] The court generally finds in favor of religious assemblies if a state zoning ordinance or statute treats them on less than equal terms with *any other* assembly in the area.[88] Moreover, as determined by the Eleventh Circuit, there are three kinds of potential Equal Terms violations:

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[82] *See Midrash Sephardi*, 366 F.3d at 1229-30.

[83] *See Lighthouse*, 510 F.3d at 263.

[84] *See* Misha Jacob-Warren, *supra* note 57, at 66.

[85] *See* Minervini, *supra* note 5, at 584.

[86] *Id.*

[87] *See, e.g.*, *Midrash Sephardi*, 366 F.3d at 1230.

[88] *See, e.g.*, *id.* The Eleventh Circuit stated in *Midrash Sephardi*:

> Because RLUIPA does not define "assembly" or "institution," we construe these terms in accordance with their ordinary or natural meanings.
>
> An "assembly" is a "company of persons collected together in one place [usually] and usually for some common purpose (as deliberation and legislation, worship, or social entertainment)" . . . .
>
> . . . .

> (1) a statute that facially differentiates between religious and nonreligious assemblies or institutions; (2) a facially neutral statute that is nevertheless "gerrymandered" to place a burden solely on religious, as opposed to nonreligious, assemblies or institutions; or (3) a truly neutral statute that is selectively enforced against religious, as opposed to nonreligious assemblies or institutions.[89]

Although the Eleventh Circuit has not had the opportunity to address all three violations, it has significantly shaped how the first and third violations should be addressed.[90]

In 2004 the Eleventh Circuit, in *Midrash Sephardi, Inc. v. Town of Surfside*, addressed the first type of violation: a statute that facially differentiated between religious and nonreligious assemblies or institutions.[91] In *Midrash*, churches and synagogues were excluded from seven out of the eight zoning districts in Surfside and could only operate under a conditional use permit in the one zoning district where they were allowed.[92] The synagogues argued that locating in the one allotted district would be unduly burdensome, because Orthodox Judaism requires its believers to walk to religious services.[93] In addition, the synagogues argued that they were being treated on less than equal terms with other assemblies that were allowed in the business district.[94]

The Eleventh Circuit held the zoning ordinance to be unconstitutional because other assemblies, such as lodges and private clubs, were

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> . . . . Like churches and synagogues, private clubs are places in which groups or individuals dedicated to similar purposes—whether social, educational, recreational, or otherwise—can meet together to pursue their interests. We conclude therefore that churches and synagogues, as well as private clubs and lodges, fall within the natural perimeter of "assembly or institution." . . . .
>
> As noted above, the text of [the ordinance], which permits private clubs and other secular assemblies, excludes religious assemblies from Surfside's business district. Because we have concluded that private clubs, churches and synagogues fall under the umbrella of "assembly or institution" as those terms are used in RLUIPA, this differential treatment constitutes a violation of § (b)(1) of RLUIPA.

Id. at 1230-31 (first alteration in original) (citations omitted).

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

90 *See* Konikov v. Orange Cnty., 410 F.3d 1317, 1324-26 (11th Cir. 2005); *Midrash Sephardi*, 366 F.3d at 1230.

91 *Midrash Sephardi*, 366 F.3d at 1222.

92 *See id.* at 1219.

93 *Id.* at 1221.

94 *Id.* at 1228-29.

allowed in the business district, while churches were excluded.[95] The court reasoned that, although the Equal Terms provision "has the 'feel' of an equal protection law, it lacks the 'similarly situated' requirement usually found in equal protection analysis."[96] In other words, churches and synagogues ought to be treated just like any other assembly, not necessarily a similarly situated assembly.[97] The court defined "assembly," from Webster's Dictionary, as "a company of persons collected together in one place . . . and usually for some common purpose . . . ."[98] Under the *Midrash* court's rule, therefore, if a statute treats a religious assembly on less than equal terms with any other assembly, the court would automatically invalidate the statute as a violation of the Equal Terms provision.[99]

Further, in 2005, the Eleventh Circuit in *Konikov v. Orange County* addressed the third type of violation: a truly neutral statute that is selectively enforced against religious, as opposed to nonreligious, assemblies or institutions.[100] The court invalidated a zoning ordinance requiring a $912 fee for a special exception to be able to operate a religious organization inside a home.[101] Although the ordinance did not specifically single out religious assemblies, it did allow other assemblies, such as daycare centers, to operate without applying for a special exception.[102] In applying the *Midrash* test, the court found that because daycare centers could operate out of homes without applying for a special exception, the zoning ordinance treated religious assemblies on less than equal terms with nonreligious assemblies, and therefore was unconstitutional.[103] The court was deeply troubled by the fact that "a group meeting with the same frequency as Konikov's would not violate the [ordinance], *so long as religion is not discussed*."[104] Again, although the ordinance was neutral on its face, the court determined that it had been selectively applied to religious

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95 *See id.* at 1229.

96 *Id.*

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

98 *Id.* at 1230 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY: UNABRIDGED 131 (1993)).

99 *See id.* at 1228-31.

100 Konikov v. Orange Cnty., 410 F.3d 1317, 1326 (11th Cir. 2005).

101 *Id.* at 1320.

102 *Id.*

103 *Id.* at 1320-29.

104 *Id.* at 1328.

assemblies, and therefore the religious assemblies had been treated on less than equal terms with nonreligious assemblies.[105]

B. *Third Circuit*

Conversely, the Third Circuit recently interpreted the Equal Terms provision according to what it deemed the most pragmatic application of the provision—that a similarly situated requirement is a necessary element of the Equal Terms analysis and application.[106] In its 2007 decision, *Lighthouse Institute for Evangelism, Inc. v. City of Long Branch*, the only case in which it has addressed the subject, the court refused to apply the Equal Terms provision to any case where the religious institution could not show that it had been treated on less than equal terms with a "similarly situated secular comparator."[107] In *Lighthouse*, the plaintiff church had purchased land in an area that was undergoing redevelopment and revitalization.[108] Although assembly halls and theaters were permitted in the district, churches were not.[109] Lighthouse sued, claiming that the ordinance prohibiting churches from the district was unconstitutional both facially and as applied.[110]

The Third Circuit reasoned that "the Equal Terms provision does in fact require . . . a secular comparator that is similarly situated as to the regulatory purpose of the regulation in question . . . ."[111] The court found that, although the ordinance allowed nonreligious assemblies in the district, it did not permit any secular "assemblies or institutions whose presence would cause no lesser harm to the redevelopment and revitalization of the [district]" than the church.[112] Dismissing both of Lighthouse's claims, the court stated that the church had failed to "identify a better-treated secular comparator that is similarly situated in regard to the *objectives* of the challenged regu-

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105 *See id.* at 1328-29.

106 Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch, 510 F.3d 253, 264-68 (3d Cir. 2007).

107 *Id.* at 266-68.

108 *Id.* at 258.

109 *Id.* at 257.

110 *Id.*

111 *Id.* at 264.

112 Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch, 510 F.3d 253, 270 (3d Cir. 2007).

lation."[113] Essentially, because the church could not identify a secular institution allowed in the district that was more similar to itself than a theater, it could not claim that it had been treated on less than equal terms with those secular institutions.

C. *Seventh Circuit*

Like the Third Circuit, the Seventh Circuit recently applied a pragmatic interpretation of the Equal Terms provision, and therefore included a similarly situated requirement.[114] However, the Seventh Circuit implemented the requirement much differently than the Third Circuit, holding that a zoning ordinance or statute can be invalidated only if a religious assembly is treated on less than equal terms with a nonreligious assembly that is similarly situated *with respect to the zoning criteria*.[115]

Although the Seventh Circuit had previously interpreted the Equal Terms provision textually like the Eleventh Circuit,[116] the Seventh Circuit introduced this new pragmatic interpretation in its 2010 decision in *River of Life Kingdom Ministries v. Village of Hazel Crest*.[117] In *River of Life,* the plaintiff church wanted to relocate to a district in Illinois, but was prevented from doing so because the district was deemed "commercial."[118] The Seventh Circuit, basing its reasoning on the Third Circuit rationale, articulated that a zoning ordinance ought to be judged based on its criteria, rather than its purpose.[119] Given that the zoning ordinance in this case prohibited all noncommercial entities from the district, the church could be excluded because it was a noncommercial entity.[120] Although other secular assemblies were permitted in the area because they were considered "commercial," they were not similarly situated with the plaintiff church.[121]

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113 *Id.* at 268.

114 *See* River of Life Kingdom Ministries v. Vill. of Hazel Crest, 611 F.3d 367, 372-74 (7th Cir. 2010).

115 *See id.* at 371.

116 *See* Digrugilliers v. Consol. City of Indianapolis, 506 F.3d 612, 616-17 (7th Cir. 2007); *see also* Jacob-Warren, *supra* note 57, at 70 (noting that the court in *Digrugilliers* "relied heavily" on the Eleventh Circuit's analysis in *Midrash Sephardi*).

117 *See River of Life*, 611 F.3d at 371-74.

118 *Id.* at 368.

119 *Id.* at 371.

120 *Id.* at 373-74.

121 *See id.* at 371-74.

In his Seventh Circuit opinion, Judge Posner stated that neither the Eleventh Circuit nor the Third Circuit's approach to the Equal Terms provision was "entirely satisfactory."[122] Judge Posner reasoned that the Eleventh Circuit's definition of "assembly" was far too broad, as such a definition would include "most secular land uses—factories, nightclubs, zoos, parks, malls, soup kitchens, and bowling alleys, to name but a few."[123] According to the court, instead of comparing religious institutions to all secular assemblies to determine equivalence, the ultimate test ought to be whether an ordinance or regulation is properly related to relevant concerns.[124]

Judge Posner maintained that the Third Circuit also failed to recognize this understanding of the Equal Terms provision because "regulatory purpose . . . invites speculation concerning the reason behind exclusion of churches . . . and makes the meaning of 'equal terms' in a federal statute depend on the intentions of local government officials."[125] Instead, "if religious and secular land uses that are treated the same . . . from the standpoint of an accepted zoning criterion, such as 'commercial district,' or 'residential district,' or 'industrial district,' that is enough to rebut an [E]qual [T]erms claim . . . ."[126] Thus, the Seventh Circuit actually created a third interpretation of the Equal Terms provision by focusing on zoning criteria, rather than zoning purpose or application.[127]

III. ARGUMENT

Numerous authors, legal scholars, and judges have posited theories on why one of the above interpretations of the Equal Terms provision of RLUIPA is best for both religious institutions and zoning authorities.[128] While some argue that the Eleventh Circuit interpretation is best because it is most consistent with the actual language of

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122 *Id.* at 370.

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

124 *Id.* at 371-72.

125 *Id.* at 371 (citing Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1231 (11th Cir. 2004)).

126 *Id.* at 373.

127 *See id.* at 371-74.

128 *See, e.g.*, Minervini, *supra* note 5, at 583-84; *see also* Bram Alden, Comment, *Reconsidering RLUIPA: Do Religious Land Use Protections Really Benefit Religious Land Users?*, 57 UCLA L. REV. 1779, 1781 (2010).

RLUIPA,[129] others argue that either the Third or Seventh Circuit interpretations should be applied because both prevent privileged treatment of religious institutions and confusing zoning laws.[130] Essentially, while some argue for consistency in legal interpretation, others argue for practicality in the application of the law.[131]

Although both sides of the debate raise interesting points, neither argument is "entirely satisfactory," as Judge Posner might say.[132] Both sides fail to take into account the proper roles of both the Judiciary and Congress in resolving the confusion that RLUIPA's Equal Terms provision has caused. The Judiciary should not solve this problem on its own because it is limited to the language given to it by Congress. Although the Eleventh Circuit interpretation offers the most accurate and consistent analysis of the Equal Terms provision,[133] such an analysis creates pragmatic problems for both religious institutions and zoning authorities. To prevent inconsistency and pragmatic difficulties, Congress should amend RLUIPA to include a similarly situated requirement to the Equal Terms provision, and the courts should interpret the amended provision according to the Seventh Circuit "zoning criteria" analysis. Section A of this Part explains why the current form of RLUIPA should be interpreted textually as in the Eleventh Circuit. Section B analyzes how such an interpretation inherently creates pragmatic difficulties in its application. Section C discusses why an amendment is the best solution to the Equal Terms provision's inconsistencies and impracticalities, and Section D explains why such an amended provision would be best interpreted under the Seventh Circuit's "zoning criteria" analysis.

A. *Why the Eleventh Circuit Interpretive Framework Is the Most Accurate Interpretation Under the Current Statute*

The Eleventh Circuit provides the best interpretive framework for the analysis of Equal Terms challenges under the current statute because it is most consistent with the plain language and congressional

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129 Minervini, *supra* note 5, at 584.

130 *See* Alden, *supra* note 128, at 1801-02.

131 *Compare* Minervini, *supra* note 5, at 595-96, *with* Alden, *supra* note 128, at 1800-02.

132 *See* River of Life Kingdom Ministries v. Vill. of Hazel Crest, 611 F.3d 367, 370 (7th Cir. 2010).

133 *See infra* Part III.A.

intent of the statute.[134] As stated by Senator Orrin Hatch when RLUIPA was signed into law, "[Before RLUIPA], an assembly whose religious practice [was] burdened by an otherwise 'generally applicable' and 'neutral' law [could] obtain relief only by carrying the heavy burden of proving that there [was] an unconstitutional motivation behind a law . . . ."[135] Congress enacted RLUIPA to make it easier for religious plaintiffs to assert a substantial burden on their free exercise by "shedding the requirement that the zoning law have an 'unconstitutional motivation.'"[136] To create ease for religious plaintiffs, RLUIPA itself requires that it "be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution."[137]

The Eleventh Circuit has most accurately and consistently followed a broad interpretation of RLUIPA, including its Equal Terms provision.[138] In fact, the Eleventh Circuit has made clear that the "relevant 'natural perimeter' for consideration with respect to RLUIPA's prohibition is the category of 'assemblies or institutions.'"[139] In any challenge to the Equal Terms provision, the court must first evaluate whether an entity qualifies as an assembly or an institution.[140] Given that RLUIPA does not specifically define these terms, the court determined that the terms must be given their "ordinary or natural meanings," and therefore defined "assembly," from Webster's Dictionary, as "a company of persons collected together in one place [usually] and usually for some common purpose."[141]

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134 *See* Minervini, *supra* note 5, at 596.

135 146 CONG. REC. S6688 (daily ed. July 27, 2000) (statement of Sen. Orrin G. Hatch).

136 Christine M. Peluso, *Congressional Intent v. Judicial Reality: The Practical Effects of the Religious Land Use and Institutionalized Persons Act of 2000*, 6 RUTGERS J. OF L. & RELIGION 1, 14 (2004); *see* Joint Statement, *supra* note 56, at S4777 (stating "individualized [zoning] assessments readily lend themselves to discrimination, and . . . make it difficult to prove discrimination in any individual case . . . [RLUIPA constitutes] proportionate and congruent responses to the problems documented in this factual record."); *see also* Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1230 (11th Cir. 2004) (applying a standard of strict scrutiny to the zoning ordinance).

137 RLUIPA, 42 U.S.C. § 2000cc-3(g) (2006).

138 *See* Minervini, *supra* note 5, at 585-90, 596 (detailing the Eleventh Circuit's treatment of the Equal Terms provision since 2004, and concluding that "of all the interpretive approaches to Equal Terms challenges detailed above, the interpretation of [the Eleventh Circuit in *Midrash Sephardi*] is most consistent with the test and purpose of RLUIPA").

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

140 *Id.*

141 *Id.* (alteration in original) (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY: UNABRIDGED 131 (1993)).

After finding that an entity qualifies as an assembly or an institution, the court must then compare the dictionary definitions with any other entities allowed in a district under a zoning ordinance.[142] For example, in *Midrash*, the court compared the definitions of an assembly and an institution with the definition of a "private club" set forth in the case's zoning ordinance, concluding that "churches and synagogues, as well as private clubs and lodges, fall within the natural perimeter of 'assembly or institution.'"[143]

Finally, once the court concludes that a religious assembly was treated on less than equal terms with a nonreligious assembly, the court must apply a standard of strict scrutiny to the ordinance.[144] Prior to *Employment Division v. Smith*, "the Supreme Court applied strict scrutiny to cases in which a government discriminated against religion or religious exercise."[145] According to the Eleventh Circuit, the *Smith* Court indicated that strict scrutiny still applies "where a law fails to similarly regulate secular and religious conduct implicating the same governmental interests."[146] Because Equal Terms challenges are based upon such a situation, strict scrutiny is the proper standard to apply to those challenges.[147] Furthermore, although *Smith* did not apply strict scrutiny to neutral laws of general applicability, "[a] zoning law is not neutral or generally applicable if it treats similarly situated secular and religious assemblies differently because such unequal treatment indicates the ordinance improperly targets the religious character of an assembly."[148]

The Eleventh Circuit's method is most consistent and accurate because it interprets the Equal Terms provision according to its plain language and the intent of Congress. RLUIPA plainly reads that no religious assembly should be treated on less than equal terms with any nonreligious assembly.[149] According to the literal interpretation of

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142 *Id.* at 1231.

143 *Id.*

144 *See id.* at 1232.

145 Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1232 (11th Cir. 2004) (citing Thomas v. Review Bd., 450 U.S. 707, 718 (1981); Wisconsin v. Yoder, 406 U.S. 205, 215 (1972)).

146 *Midrash Sephardi*, 366 F.3d at 1232 (citing Emp't Div. v. Smith, 494 U.S. 872, 886 (1990)).

147 *See id.*

148 *Id.*

149 RLUIPA, 42 U.S.C. § 2000cc(b)(1) (2006) ("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.").

"assembly," religious assemblies should not be treated any differently than any other gathering of people coming together for a common purpose.[150] Additionally, Congress intended that the statute be interpreted broadly "to the maximum extent permitted" by the statute.[151] Because "individualized [zoning] assessments readily lend themselves to discrimination," Congress created RLUIPA as a broad protection against such discrimination.[152] In summary, because Congress intended RLUIPA to be a broad protection for the free exercise of religion and the statute's plain terms indicate a broad interpretation, the Eleventh Circuit's broad interpretive framework provides the best analysis for Equal Terms challenges to RLUIPA.

B. *The Eleventh Circuit Interpretative Framework Creates Pragmatic Difficulties for Public Policy*

Although the Eleventh Circuit interpretive framework most accurately represents the intent of Congress and is most consistent with the plain language of the Equal Terms provision of RLUIPA,[153] the effect of such an interpretation has produced poor public policy.[154] The current language of RLUIPA's Equal Terms provision is dangerous for both religious institutions and zoning authorities. First, the broad language can have the effect of rescinding the privileges of both religious and secular institutions.[155] Second, the broad language can also have the effect of creating special privileges for religious entities, thus making zoning laws inapplicable to such entities.[156]

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150 *See Midrash Sephardi*, 366 F.3d at 1234.

151 RLUIPA, 42 U.S.C. § 2000cc-3(g) (2006) ("[RLUIPA] shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of [RLUIPA] and the Constitution.").

152 *See* Joint Statement, *supra* note 56, at 6.

153 *See supra* Part III.A.

154 *See* Alden, *supra* note 128, at 1782.

155 *See id.* at 1802-03 ("Even if a religious institution can successfully make the demanding showing of unequal treatment that courts have required, RLUIPA imposes no obligation on municipal executives or legislatures to remedy the inequality by granting a religious entity the permit, variance, or other land use benefit it desires. Instead of correcting inequities by elevating religious land uses to the same footing as secular uses, governments can and do eliminate equal terms violations by rescinding privileges granted to secular institutions.").

156 *See* Giaimo & Lucero, *supra* note 44, at 61-74.

1. The Eleventh Circuit Interpretation Has Rescinded Many Land Use Privileges of Both Religious and Secular Institutions

Many of the issues that have arisen out of RLUIPA have been caused by the statute's poor wording, particularly the Equal Terms provision.[157] When the statute was first enacted, it suffered from a great deal of criticism.[158] Some feared that its broad language would result in an "extreme privileging of churches for which no justification is available."[159] Others also feared that the statute would "compromise land use authority by benefitting religious entities at the expense of municipalities."[160]

Although some Congressional leaders argued that such fears were unfounded,[161] the actual language of RLUIPA provides evidence to the contrary. As noted by the Eleventh Circuit, Webster's Dictionary defines "assembly" as "a company of persons collected together in one place [usually] and usually for some common purpose."[162] And "institution" is defined as "an established society or corporation: an establishment or foundation esp[ecially] of a public character."[163] Using these definitions, if a nonreligious assembly is allowed to gather in a district, but a religious assembly is prohibited from doing the same because of a zoning ordinance, is not the ordinance treating the religious assembly on less than equal terms with the nonreligious one?

The Eleventh Circuit certainly thinks so.[164] Unfortunately, such an interpretation has had poor effects on both zoning authorities *and* religious institutions.[165] RLUIPA does not obligate public legislatures

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157 *See* Alden, *supra* note 128, at 1789, 1795-96, 1816.

158 *See id.* at 1780-81.

159 *See* Lawrence G. Sager, Commentary, *Free Exercise After* Smith *and* Boerne, 57 N.Y.U. ANN. SURV. AM. L. 9, 15 (2000).

160 *See* Alden, *supra* note 128, at 1784.

161 *See, e.g.*, Joint Statement, *supra* note 56 ("This Act does not provide religious institutions with immunity from land use regulation, nor does it relieve religious institutions from applying for variances, special permits or exceptions, hardship approval, or other relief provisions in land use regulations, where available without discrimination or unfair delay.").

162 Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1230 (11th Cir. 2004) (alteration in original) (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY: UNABRIDGED 131 (1993)).

163 *Id.* (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY: UNABRIDGED 1171 (1993)).

164 *See id.* at 1231.

165 *See* Alden, *supra* note 128, at 1781-82, 1885-86.

to remedy an alleged inequality "by granting a religious entity the permit, variance, or other land use benefit it desires."[166] Rather, several local governments have actually rescinded privileges granted to both religious and secular institutions as a "reductive equalization process."[167] Given that such actions treat the institutions equally, the courts have condoned them.[168] For example, in *Petra Presbyterian Church v. Village of Northbrook*, the defendant village's zoning ordinance allowed community centers, fraternal associations, and political clubs, but not churches, to locate in the village's industrial zones.[169] After the plaintiff church was denied an application for rezoning, the church sued, claiming a violation of the Equal Terms provision of RLUIPA.[170] Before the case reached the Seventh Circuit, however, the village passed a "revised ordinance . . . that banned all membership organizations (not just churches) from the industrial zone."[171] As explained by Judge Posner in the Seventh Circuit opinion, the village "could redo its ordinance to comply with the 'less than equal terms' provision of RLUIPA in one of two ways: by permitting religious organizations in the industrial zone, or by forbidding all membership organizations in the zone."[172]

In another example, Covenant Christian Ministries (Covenant), a nondenominational church in Marietta, Georgia, entered into a contract to purchase eight acres of land in a residential area.[173] At the time of the contract, Marietta's zoning ordinance allowed religious institutions in residential areas only if they possessed a minimum lot size of five acres to act as a buffer between churches and the surrounding area.[174] As a result of a third-party lawsuit claiming that the ordinance violated the Equal Terms provision of RLUIPA by not applying the same buffer to non-religious uses, the zoning ordinance was amended to completely prohibit all religious institutions in a number of residential districts.[175] Because of the change, Covenant was

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166 *Id.* at 1802.

167 *Id.*

168 *See id.*

169 Petra Presbyterian Church v. Vill. of Northbrook, 489 F.3d 846, 847 (7th Cir. 2007).

170 *Id.* at 847-48.

171 *Id.* at 848.

172 *Id.* at 849.

173 Covenant Christian Ministries, Inc. v. City of Marietta, 654 F.3d 1231, 1236 (11th Cir. 2011).

174 *Id.*

175 *Id.*

prohibited from building in the residential area, and thus, the church filed its own lawsuit in 2006.[176] Although the district court and the Eleventh Circuit agreed that the ordinance had facially violated the Equal Terms provision by allowing private parks, playgrounds, and neighborhood recreation centers to build where religious institutions could not, the courts still did not allow Covenant to build its church.[177] Instead, the Eleventh Circuit upheld the decision of the district court to sever the ordinance by striking *any* assembly as a permitted use in the residential area.[178] As a result of two lawsuits claiming violations of RLUIPA, Marietta's zoning ordinance transitioned from a minimally restrictive rule for churches and other assemblies, to a prohibition of any kind of assembly whatsoever in the area.[179] Thus, when applied in this manner, the language of the Equal Terms provision of RLUIPA provides religious institutions with little to no practical benefit.

2. The Eleventh Circuit Interpretation Could Grant Religious Institutions Special Privileges over Secular Institutions

Although fewer examples exist, RLUIPA can also be used as a tool to grant special privileges to religious institutions, thus rendering zoning laws as inapplicable to them. Historically, critics of RLUIPA argued that the statute would arm religious groups with "a litigation trump card," thereby compromising the land use authority of state governments.[180] According to the reaction of some local authorities to the enactment of RLUIPA, the fears of such critics were well-founded.[181] For example, the city of Hancock Park in California simply dispensed with its residential zoning laws to avoid RLUIPA litigation.[182] In *League of Residential Neighborhood Advocates v. Los Angeles,* Congregation Etz Chaim sought to build a synagogue in a residential neighborhood without a conditional use permit as required

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176 *Id.* at 1237.

177 *Id.* at 1236-38, 1240.

178 *Id.* at 1238, 1240.

179 *See* Covenant Christian Ministries, Inc. v. City of Marietta, 654 F.3d 1231, 1236-38 (11th Cir. 2011).

180 *See* Alden, *supra* note 128, at 1785.

181 *See id.* at 1780-84.

182 *See* Giaimo & Lucero, *supra* note 44, at 66.

by the residential zoning laws.[183] Although the local authorities agreed that a synagogue would be an inappropriate use of the land in that area, they decided to ignore the zoning laws and grant approval because of the threat of a RLUIPA lawsuit.[184] The neighborhood, however, joined together to fight the building of the synagogue, and the Ninth Circuit Court of Appeals ruled that the "city could not simply and unilaterally abandon its land use code just because it faced a claim under RLUIPA."[185]

Some commentators have indicated that this RLUIPA case is typical of the reactions of local zoning authorities, and that many of those authorities do not have neighborhood groups fighting against them.[186] As described by Lawrence Sager, one of the first academics to discuss RLUIPA, "[a]s a result [of RLUIPA], almost any time a community does not allow the developmental plans of a church, it will face the costly and precarious prospect of defending itself in federal court."[187] In *Lighthouse*, the Third Circuit posited an example in which a town allowing a local ten-member book club to meet in a senior center would also be required to accommodate a thousand-member church under the Eleventh Circuit interpretation of the Equal Terms provision.[188] In such a situation, the special treatment of religion would become the rule.[189]

Both the Third and Seventh Circuits have been hesitant to give the Equal Terms provision a broad construction to avoid the prag-

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[183] League of Residential Neighborhood Advocates v. Los Angeles, 498 F.3d 1052, 1054 (9th Cir. 2007). Congregation Etz Chaim first sought a permit from the city, but it was denied. *Id.* The congregation then threatened to file a lawsuit under RLUIPA. *Id.* Instead of facing litigation, the city settled with Congregation Etz Chaim, thus allowing the congregation to build their synagogue without a permit. *Id.*

[184] *Id.* at 1053-54; *see also* Giaimo & Lucero, *supra* note 44, at 66 ("All those who ruled on the issue, from the initial local proceedings to the end of the state litigation, held that it was an inappropriate use.").

[185] Giaimo & Lucero, *supra* note 44, at 67 (citing League of Residential Neighborhood Advocates v. Los Angeles, 498 F.3d 1052, 1054 (9th Cir. 2007)).

[186] For example, the American Bar Association's *RLUIPA Reader* states:

> It is impossible to know how many times local governments have made concessions to RLUIPA to the detriment of neighbors who lack the sophistication or financial means to oppose it. In those circumstances, once the local government and the church have reached a deal, there may be no one in a position—financially or even legally—to challenge the government's acquiescence to RLUIPA.

Id.

[187] Sager, *supra* note 159, at 14.

[188] Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch, 510 F.3d 253, 268 (3d Cir. 2007).

[189] *See* Minervini, *supra* note 5, at 600.

matic difficulties of the Eleventh Circuit interpretation.[190] The courts are somewhat justified in assuming that such a "reading of the statute would lead to the conclusion 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."[191] Although the Third and Seventh Circuits oppose the Eleventh Circuit interpretation, neither has advocated for a constitutional challenge or congressional amendment to RLUIPA. Because RLUIPA's predecessor, RFRA, was declared unconstitutional in *Boerne*,[192] RLUIPA was specifically designed to pass "constitutional muster," and thus has not been challenged since its enactment in 2000.[193] Some courts, however, have hinted that RLUIPA could potentially become a Spending Clause or Commerce Clause violation if it is interpreted too broadly.[194] Instead of waiting for such a violation to occur, however, the Third and Seventh Circuits have attempted to re-write the statute through their narrow interpretations to circumvent the hazards of the Act.[195]

3. The Pragmatic Difficulties Created by the Eleventh Circuit Interpretation Cannot Be Corrected Through Judicial Interpretation

Based on the text of the Constitution, there is a strong argument that no court possesses the authority to interpret a piece of legislation according to a preferred reading if that reading conflicts with the plain language of the statute.[196] Although the Judicial Branch possesses the authority to interpret the law and even review the law for its constitu-

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190 *E.g.*, River of Life Kingdom Ministries v. Vill. of Hazel Crest, 611 F.3d 367, 371-72 (7th Cir. 2010); *Lighthouse*, 510 F.3d at 268.

191 *See Lighthouse*, 510 F.3d at 268.

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

193 *See* Giaimo & Lucero, *supra* note 44, at 36, 40.

194 *See id.* at 40 (citing Cutter v. Wilkinson, 544 U.S. 709, 727 n.2 (2005) (Thomas, J., concurring)); *see also* Cutter v. Wilkinson, 544 U.S. 709, 727 n.2 (2005) (Thomas, J., concurring) (quoting Sabri v. United States, 541 U.S. 600, 613 (2004) (Thomas, J., concurring)) ("[F]or a Spending Clause condition on a State's receipt of funds to be 'Necessary and Proper' to the expenditure of the funds, there must be 'some obvious, simple, and direct relation' between the condition and the expenditure of the funds.").

195 *See e.g.*, *River of Life*, 611 F.3d at 370-72; *Lighthouse*, 510 F.3d at 268.

196 *See* U.S. CONST. art. III, § 2, cl. 1 (stating that the "Judicial Power shall extend to all Cases . . . arising under the Laws of the United States" but does not extend to legislative actions).

tionality, the branch cannot insert an unintended interpretation into legislation.[197] Alexander Hamilton wrote that the authority of judicial review does not "suppose a superiority of the judicial to the legislative power."[198] Further, Hamilton stated

> It can be of no weight to say that the courts, on the pretense of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature. This might as well happen in the case of two contradictory statutes; or it might as well happen in every adjudication upon any single statute. The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body. The observation, if it prove any thing, would prove that there ought to be no judges distinct from that body.[199]

As described by Article Three, Section Two of the Constitution, the "Judicial Power . . . extend[s] to all Cases, in Law and Equity, arising under th[e] Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority."[200] This power, however, does not include the ability to supersede the intentions of the legislative body.[201] The Third and Seventh Circuits, therefore, have exceeded their authority by attempting to interpret the Equal Terms provision of RLUIPA according to their "pleasure" rather than Congress's will.[202]

Article One, Section Eight of the Constitution provides Congress with the power to "regulate Commerce with foreign Nations, and among the several States," as well as to "make all laws which shall be necessary and proper for carrying [out] the foregoing Powers."[203] The creation of RLUIPA by Congress, therefore, as a statute to protect the free exercise of religion in commerce among the states, was within

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197 *See* THE FEDERALIST NO. 78 (Alexander Hamilton).

198 THE FEDERALIST NO. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

199 *Id.* at 467-68.

200 U.S. CONST. art. III, § 2, cl. 1.

201 *See id.*

202 *See id.*; *see also* THE FEDERALIST NO. 78 (Alexander Hamilton) ("It can be of no weight to say that the courts, on the pretense of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature.").

203 U.S. CONST. art. I, § 8, cl. 18.

Congress's proper role.[204] Distinct from the Judiciary, then, only Congress has the authority to amend RLUIPA, and thus change its interpretation.[205] Therefore, the proper way to correct the pragmatic policy problems of the Eleventh Circuit interpretation is an amendment of RLUIPA by Congress.

C. *To Prevent the Pragmatic Difficulties of the Eleventh Circuit Interpretation, Congress Should Amend the Equal Terms Provision of RLUIPA to Include a Similarly Situated Requirement*

As stated above, the Eleventh and Third Circuits have expressly disagreed on whether the Equal Terms provision of RLUIPA requires a similarly situated comparator.[206] While the Third Circuit has held that religious organizations, to establish a violation, must identify a similarly situated nonreligious comparator that has been treated favorably, the Eleventh Circuit has been less strict.[207] In *Lighthouse*, the Third Circuit concluded that "the Equal Terms provision does in fact require . . . a secular comparator that is similarly situated as to the regulatory purpose of the regulation in question—similar to First Amendment Free exercise jurisprudence."[208] By contrast, in *Midrash*, the Eleventh Circuit expressly stated that the Equal Terms provision "lacks the 'similarly situated' requirement usually found in equal protection analysis."[209] The Seventh Circuit, as well, has taken a strong stance on the similarly situated requirement, stating that religious institutions must be compared to nonreligious institutions that are similarly situated as to accepted zoning criteria.[210]

It appears that the disagreement over how to apply the Equal Terms provision arose because of two main difficulties: (1) determining whether a similarly situated requirement exists, and (2) determin-

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204 *See id.*

205 *See* U.S. CONST. art. I, § 8, art. III, § 2, cl. 1.

206 *See supra* Part II.A-B.

207 *Compare* Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch, 510 F.3d 253, 264 (3d Cir. 2007), *with* Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1229 (11th Cir. 2004).

208 *Lighthouse*, 510 F.3d at 264.

209 *Midrash Sephardi*, 366 F.3d at 1229 (citing City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 447-50 (1985)).

210 River of Life Kingdom Ministries v. Vill. of Hazel Crest, 611 F.3d 367, 373-74 (7th Cir. 2010).

ing how to apply such a requirement if it indeed exists.[211] By reading the statute according to its plain meaning, the Eleventh Circuit interpretation is closest to the intent of Congress.[212] Such an application of the statute, however, has dangerous ramifications for both zoning authorities and religious institutions.[213] The Third and Seventh Circuit courts in particular have attempted to avoid these ramifications by adding a similarly situated requirement where one does not exist.[214]

Although a similarly situated requirement is necessary to avoid the pragmatic difficulties of the Equal Terms provision, the courts cannot implement it.[215] Rather, it is the responsibility of Congress to amend RLUIPA to reflect such a requirement.[216] Congress should therefore strongly consider amending the Equal Terms provision to mirror the following: "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 *that is similarly situated as to regulation criteria*." By adding the last phrase, courts would have a clear standard by which to judge alleged violations of RLUIPA.

As the *Covenant* case from the Eleventh Circuit demonstrates, RLUIPA's current application does not seem to be benefitting religious groups as Congress intended.[217] As noted by one scholar, "Instead of correcting inequities by elevating religious land uses to the same footing as secular uses, governments can and do eliminate equal terms violations by rescinding privileges granted to secular institutions."[218] By requiring religious institutions to point to a similarly situated secular comparator, governments would not be forced to take such measures. Like all other equal protection claims, churches and other religious institutions would be encouraged to raise claims against regulations that truly treat them unequally. Judge Posner simply stated, "If a church or community center, though different in many respects, do not differ with respect to any accepted zoning criterion, then an ordinance that allows one and forbids the other denies equal-

211 *See River of Life*, 611 F.3d at 373-74; *Lighthouse*, 510 F.3d at 264; *Midrash Sephardi*, 366 F.3d at 1229.

212 *See supra* Part III.A.

213 *See supra* Part III.B.

214 *See River of Life*, 611 F.3d at 371-73; *Lighthouse*, 510 F.3d at 268.

215 *See supra* Part III.B.3.

216 *See supra* Part III.B.3.

217 *See supra* notes 173-179 and accompanying text.

218 Alden, *supra* note 128, at 1802.

ity and violates the equal-terms provision."[219] Zoning authorities would likewise be encouraged to adjust their regulations accordingly, instead of making sweeping changes that hurt both religious and secular institutions.

Furthermore, adding a similarly situated requirement to the Equal Terms provision would prevent the treatment of religious institutions as privileged entities. Religious land users would need to meet the same zoning criteria as nonreligious land users, rather than being afforded an exception simply because some type of "assembly" is allowed in a district.[220] Most districts allow for assemblies of some type, and therefore, it is impractical to give religious institutions special privileges to essentially "set up shop" wherever they like.[221] Again, as Judge Posner stated, "[T]he clause of the First Amendment that guarantees the free exercise of religion does not excuse churches from having to comply with nondiscriminatory regulations."[222]

Finally, adding "regulation criteria" as the standard for applying the similarly situated requirement would prevent zoning authorities from creating nonexistent differences between churches and other allotted groups in a certain district. Zoning criteria is an objective test, unlike the subjective "zoning purpose" test of the Third Circuit.[223] Therefore, unlike the decision of the Third Circuit in *Lighthouse*, where the religious institution was not considered "similarly situated to the other allowed assemblies" because a New Jersey statute barred liquor licenses within 200 feet of a church,[224] the objective test of zoning criteria would only have considered the specific criteria of the ordinance, rather than the circumstances surrounding the ordinance.[225] In other words, because the zoning ordinance in that case allowed other not-for-profit entities within the district, under the zon-

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219 *River of Life*, 611 F.3d at 371.

220 *See id.* at 369-71.

221 *See id.* at 371-72.

222 *Id.* at 370.

223 *Id.* at 371-72 ("[T]he use of 'regulatory purpose' [by the Third Circuit] as a guide to interpretation invites speculation concerning the reason behind 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 (as by favoring public reading rooms over other forms of nonprofit assembly); and makes the meaning of "equal terms" in a federal statute depend on the intentions of local government officials.").

224 Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch, 510 F.3d 253, 270 (3d Cir. 2007).

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

ing criteria test, the religious institution would be considered similarly situated to the other allowed assemblies—because it is also not-for-profit—and therefore would have rightfully claimed a violation of RLUIPA.[226]

Amending the Equal Terms provision to reflect both a similarly situated requirement and a zoning criteria test for such a requirement would allow for balanced treatment of both religious and nonreligious land users. Although religious institutions would still be able to make valid claims for violations of RLUIPA, such claims would not create special privileges for religious institutions.

D. *The Seventh Circuit Provides the Best Interpretive Framework for the Analysis of Equal Terms Challenges to an Amended RLUIPA*

If Congress amends the Equal Terms provision of RLUIPA to reflect both a similarly situated requirement and a "regulation criteria" test for that requirement, the Seventh Circuit analysis in *River of Life* would provide the best interpretive framework for Equal Terms challenges in the future.[227] First, the Seventh Circuit interpretive framework already recognizes a similarly situated requirement. The court stated, a "regulation will violate the Equal Terms provision [of RLUIPA] only if it treats religious assemblies or institutions less well than secular assemblies or institutions that are similarly situated *as to the regulatory purpose*."[228] In other words, religious institutions could not claim unequal treatment by simply pointing to another secular assembly in a given district that has been treated more favorably.[229] Rather, religious institutions would need to show that such a secular assembly is similarly situated to them in regard to the criteria of the zoning regulation.[230]

Second, the Seventh Circuit interpretive framework recognizes a regulation criteria test for the similarly situated requirement.[231] As stated by the Seventh Circuit, "[t]he problems that we have identified

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226 *See id.* at 371, 373.

227 *See id.* at 371-74.

228 *Id.* at 368 (quoting Lighthouse Inst. For Evangelism, Inc. v. City of Long Branch, 510 F.3d 253, 266 (3d Cir. 2007)).

229 *See id.* at 371.

230 *See id.* at 371-72.

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

with the Third Circuit's test can be solved by a shift . . . from regulatory purpose to accepted zoning criteria."[232] The regulatory criteria analysis is an objective test, because it simply separates institutions by category—that is, commercial, noncommercial, industrial, and so on.[233] Under such a test, churches would still have a claim if, for example, they were excluded from purported commercial districts that allow other uses.[234] But churches would be prohibited from making claims if, for example, all noncommercial entities were excluded from a commercial district.[235]

Finally, such an interpretive framework would both preserve the functionality of zoning laws, as well as protect religious institutions from unequal treatment. By requiring religious institutions to point to a similarly situated secular institution, it is less likely that zoning authorities would change their ordinances to prohibit any and all privileges for fear of a RLUIPA claim.[236] Specifically, religious institutions would not be able to file a RLUIPA claim for simply being denied access to an area where other similarly situated institutions are also denied. By limiting RLUIPA's Equal Terms provision in this way, zoning authorities would be able to carry out their duties in protecting property without worrying about awarding special privileges to religious institutions.

At the same time, the objective test of zoning criteria would keep zoning authorities honest in the implementation of local ordinances.[237] For example, if a zoning ordinance allowed noncommercial or not-for-profit land uses, zoning authorities would be hard pressed to find a reason to deny such a land use to a church or other religious institution. Moreover, RLUIPA's other provisions still afford a tremendous amount of protection to religious institutions: RLUIPA prohibits any government regulation that "imposes a substantial burden on the religious exercise of a . . . religious assembly or institution," as well as any regulation that "discriminates against any assembly or institution on the basis of religion."[238] Therefore, even if one might argue that

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232 *Id.*

233 *Id.* at 371-72.

234 *Id.* at 374.

235 *See id.*

236 *See id.* at 372-73.

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

238 RLUIPA, 42 U.S.C. § 2000cc (2006).

adding a similarly situated comparator requirement and using the Seventh Circuit interpretation weakens the Equal Terms provision, one still cannot deny that religious institutions remain thoroughly protected. Therefore, the Seventh Circuit interpretative framework of an amended Equal Terms provision would produce the best results for both religious institutions and zoning authorities.

CONCLUSION

The Equal Terms provision of RLUIPA was created to ensure the equal treatment of religious institutions in land use regulations.[239] But the provision is not fulfilling its purpose. Rather, its application either creates special privileges for religious institutions, or further deprives those same institutions of land use. Although the Eleventh Circuit currently provides the most accurate and consistent interpretation of the provision, such an interpretation has proven to have serious pragmatic consequences for both religious institutions and zoning authorities.[240]

Though the Third and Seventh Circuit Courts have attempted to correct these frustrations, the Constitution does not grant them the power to do so.[241] Rather, Congress must amend RLUIPA's Equal Terms provision to reflect both a similarly situated requirement, as well as a regulatory criteria test for that requirement. If Congress enacts an amendment, Judge Posner's opinion in *River of Life* would provide an excellent source on how to apply the provision.

And if courts choose to apply the Seventh Circuit test, churches and other religious institutions would not have the luxury of bringing frivolous claims because they would be required to point to a similarly situated secular comparator. By using zoning criteria as the standard, zoning authorities would have a greater incentive to ensure that the criteria are clear, consistent, and pragmatically applied. By filtering out frivolous claims and incentivizing zoning authorities to grant consistent and pragmatic privileges, the amended statute would both protect religious institutions and create certainty in zoning administration. Thus, considering all these pieces together, the best solution to the interpretation and application of RLUIPA's Equal

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239 *See* Joint Statement, *supra* note 56.

240 *See supra* Part III.B.

241 *See supra* Part III.B.3.

Terms provision lies in restricting the legislative and judiciary branches to their proper purposes—providing both a textual basis and pragmatic application of the provision for all land users.