

NO SAFE HARBOR:
CLARIFYING BURDENS OF PROOF IN RLUIPA'S EQUAL TERMS
PROVISION

“Property must be secured, or liberty cannot exist.”¹

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INTRODUCTION

Although zoning ordinances often benefit community infrastructure and overall welfare, they are increasingly used to discriminate against certain religious groups or individuals.² The Department of Justice flagged dozens of these cases over the past two decades.³ In northern Virginia, for example, a surge of Islamophobia recently fueled municipal efforts to prevent the construction of several mosques.⁴ At a town meeting involving a mosque's construction, residents directly voiced their bigotry, with one local yelling at a Muslim: “Nobody, nobody, nobody wants your evil cult in this county.”⁵ On a slightly more discrete level, elected officials veiled their biased intentions behind concerns over the proposed buildings' impacts on zoning ordinances, traffic patterns, and sewage lines—concerns that were suspiciously nonexistent when these same authorities had considered similar construction projects advanced by other groups of constituents.⁶

¹ H.R. Res. 438, 112th Cong. (2011) (quoting John Adams).

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² Emma Green, *The Quiet Religious-Freedom Fight That Is Remaking America*, THE ATLANTIC (Nov. 5, 2017), <https://www.theatlantic.com/politics/archive/2017/11/rluipa/543504/>.

³ U.S. DEP'T OF JUSTICE, UPDATE ON THE JUSTICE DEPARTMENT'S ENFORCEMENT OF THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT: 2010 – 2016 (2016).

⁴ Petula Dvorak, *A Smokescreen for Bigotry: Disguising Anti-Muslim Bias with Land Use Objections*, THE WASHINGTON POST (Jan. 2, 2017), https://www.washingtonpost.com/local/a-smokescreen-for-bigotry-disguising-anti-muslim-bias-with-land-use-objections/2017/01/02/14040744-d129-11e6-a783-cd3fa950f2fd_story.html.

⁵ *Id.*

⁶ *Id.*

Exclusionary zoning measures discriminate against countless other faith traditions as well, either explicitly or implicitly.⁷ In the suburbs of New York City, for example, a municipal council prevented Orthodox synagogues from operating because they had too few parking spaces—despite the council’s awareness that Orthodox Jews do not drive to Sabbath services.⁸ In Ohio, a city board cited economic concerns when prohibiting a Christian church from operating in a commercial district despite allowing secular assemblies to gather in the same location.⁹ The list goes on.¹⁰

Surprisingly, these assaults on free exercise seem to proliferate even though federal law has been implemented to quell them.¹¹ In 2000, a unanimous Congress attempted to counter the discriminatory effects of exclusionary zoning on religious institutions by enacting the Religious Land Use and Institutionalized Persons Act (RLUIPA).¹² *Inter alia*,¹³ RLUIPA contains four provisions that control how local governments may draft and implement their respective land use¹⁴ regulations.¹⁵ Of particular relevance to the subject of this Comment, RLUIPA’s equal terms provision provides that a zoning regulation cannot be implemented “in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.”¹⁶ However, the effectiveness of this provision within the statutory scheme is currently muddled by intermediate federal courts’ divergent and incorrect readings of its equal terms provision.¹⁷ As of this writing, six circuit courts disagree on the provision’s interpretation and the United States Supreme Court refuses to resolve the

⁷ U.S. DEP’T OF JUSTICE, *supra* note 3, at 6.

⁸ *Congregation Toras Chiam Case*, FIRST LIBERTY INST. (Aug. 21, 2019), <https://firstliberty.org/cases/toraschaim/>.

⁹ See *Tree of Life Christian Schs. v. City of Upper Arlington*, 905 F.3d 357, 366 (6th Cir. 2018), *cert. denied*, 139 S. Ct. 2011, 2012 (2019).

¹⁰ See, e.g., U.S. DEP’T OF JUSTICE, *supra* note 3, at 7-8.

¹¹ *Id.*

¹² 42 U.S.C. § 2000cc.

¹³ RLUIPA also provides for religious exercise protections for institutionalized persons. See *id.* § 2000cc-1.

¹⁴ Throughout this Comment, “land use” and “zoning” are to be treated as synonymous terms.

¹⁵ 42 U.S.C. § 2000cc(a)-(b).

¹⁶ *Id.* § 2000cc(b)(1).

¹⁷ See *id.*

split.¹⁸ Consequently, religious entities continue to suffer from disparate-impact discrimination in the form of exclusionary zoning, while municipalities languish as their development plans are stalled due to litigation fears.¹⁹ In short, both religious and municipal entities remain confounded as they try to navigate their respective roles in the land use process.²⁰

The Supreme Court most recently denied certiorari to a case affected by this circuit split in 2019.²¹ In *Tree of Life Christian Schools v. City of Upper Arlington*, the Sixth Circuit's interpretation of RLUIPA's equal terms provision stripped the provision of its intended protections for religious entities. First, the court inappropriately injected additional standards on the religious entity's prima facie case. Second, the court ignored the statutory text's embrace of strict liability when the court inserted a strict scrutiny "safe harbor" for the government in the same provision.²² Accordingly, the court's interpretation of the equal terms provision validated a municipality's discriminatory zoning ordinances, which prevented a Christian school from operating on a certain parcel of land because of its religious affiliation.

Because fundamental First Amendment rights are at stake, it is imperative that the Supreme Court set a fitting standard for interpreting RLUIPA's equal terms provision. Part I of this Comment's Background section discusses the history and purpose of municipal zoning and land use ordinances. Part II provides a statutory overview of RLUIPA. Part III analyzes the Supreme Court's treatment of statutes that affected religious exercise in the years leading up to RLUIPA's

¹⁸ See *Tree of Life*, 905 F.3d at 367-70; *Centro Familiar Cristiano Buenas Nuevas v. City of Yuma*, 651 F.3d 1163, 1169 n. 25 (9th Cir. 2011); *River of Life Kingdom Ministries v. Vill. of Hazel Crest*, 611 F.3d 367, 368-74 (7th Cir. 2010); *Lighthouse Inst. for Evangelism v. City of Long Branch*, 510 F.3d 253, 264-69 (3d Cir. 2007); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1228-36 (11th Cir. 2004).

¹⁹ Alan C. Weinstein, *Religious Land Use Regulation Under the Religious Land Use and Institutionalized Persons Act*, in *LOCAL GOVERNMENT, LAND USE, AND THE FIRST AMENDMENT: PROTECTING FREE SPEECH AND EXPRESSION* 182-83 (Brian J. Connolly ed., ABA Publ'g 2017).

²⁰ *Id.* at 187-88.

²¹ *Tree of Life*, 139 S. Ct. at 2012 (2019).

²² 905 F.3d at 370-376 (opinion of Gilman, J.); 382-86 (Thapar, J., dissenting). A safe harbor is "a provision (as in a statute or regulation) that affords protection from liability or penalty." See also *Safe Harbor*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("1. An area or means of protection. 2. A provision (as in a statute or regulation that affords protection from liability or penalty.)").

enactment. Part IV examines the subsequent six-way split among circuit courts of appeals over the interpretation of RLUIPA's equal terms provision up through the most recent case receiving appellate review, *Tree of Life Christian Schools v. City of Upper Arlington*. Then, the Analysis section presents a seventh alternative for interpreting the equal terms provision that, unlike the circuit courts' approaches, clearly aligns with the text and purpose of the equal terms provision. Notably, this Comment's solution to applying RLUIPA's equal terms provision refrains from implementing a strict scrutiny safe harbor for the government and refuses to exact heightened pleading standards upon the plaintiff's prima facie claim.

BACKGROUND

I. THE HISTORY AND PURPOSE OF MUNICIPAL ZONING

A. *Constitutional Origins of Zoning Ordinances*

In the late nineteenth century, municipalities across America began to react to growing urbanization and industrialization problems by implementing zoning ordinances.²³ Zoning ordinances greatly aided communities by enhancing residents' safety, health, and overall quality of life.²⁴ Moreover, they encouraged economic productivity and efficiency.²⁵ Despite their benefits, however, zoning ordinances often discriminated against marginalized groups and individuals, especially on racial or socioeconomic grounds.²⁶ Today, exclusionary zoning continues to affect numerous communities, including racial

²³ JULIAN CONRAD JUERGENSMEYER ET AL., *LAND USE PLANNING AND DEVELOPMENT REGULATION LAW* 44-46 (3d ed. West Academic Publ'g 2018).

²⁴ *Id.*

²⁵ *Id.*

²⁶ See Cecilia Rouse et al., *Exclusionary Zoning: Its Effect on Racial Discrimination in the Housing Market*, THE WHITE HOUSE (June 17, 2021), <https://www.whitehouse.gov/cea/blog/2021/06/17/exclusionary-zoning-its-effect-on-racial-discrimination-in-the-housing-market/>. See also Jonathan Rothwell & Douglas S. Massey, *The Effect of Density Zoning on Racial Segregation in U.S. Urban Areas*, 44 URB. AFFS. REV. 779, 780 (2009).

minorities,²⁷ the poor,²⁸ the elderly,²⁹ mobile home owners,³⁰ disabled people,³¹ and religious entities.³²

Municipal litigation involving land use interests began to proliferate across the United States at the turn of the twentieth century.³³ In these initial cases, the Supreme Court overwhelmingly deferred to municipalities' decisions because they fell under the states' police power, which extends to political subsidiaries, including municipal governments.³⁴ Writing for the majority in *Hadacheck v. Sebastian*, Justice McKenna succinctly expressed this view, maintaining that of the state government's powers, the police power is "one of the most essential"³⁵ and "the least limitable."³⁶ His rationale for the police power's primacy was equally to the point: "There must be progress, and if in its march private interests are in the way, they must yield to the good of the community."³⁷

In 1925, the Supreme Court specifically affirmed the constitutionality of zoning as part of the state's police powers in *Village of Euclid v. Amber Realty Company*.³⁸ There, the Court set forth a deferential standard toward municipal zoning, stating that if an ordinance was "fairly debatable, the legislative judgment must be allowed to control."³⁹ In support of this stance, the Court emphasized that the then-recent phenomenon of rapid urbanization introduced new issues relating to the public health, safety, morals, and general welfare.⁴⁰ Drawing from this observation, the Court then held that the emergence of any of the aforementioned issues within a community justified govern-

²⁷ Rothwell, *supra* note 26, at 780-85.

²⁸ William A. Fischel, *An Economic History of Zoning and a Cure for Its Exclusionary Effects*, 41 URB. STUD. 317, 331 (2004).

²⁹ Michael Kling, *Zoned Out: Assisted-Living Facilities and Zoning*, 10 ELDER L.J. 187, 200 (2002).

³⁰ See David C. Keating, *Exclusionary Zoning: In Whose Interests Should the Police Power Be Exercised?*, 23 REAL EST. L.J. 304, 314-19 (1995).

³¹ See BRIAN W. BLAESSER & ALAN C. WEINSTEIN, *FEDERAL LAND USE LAW AND LITIGATION* § 9:20 (2021).

³² See 146 CONG. REC. 14,283 (2000) (statement of Sen. Orrin Hatch) (land use regulations are "seemingly insurmountable barrier[s]" to the freedom of religion).

³³ JUERGENSMEYER ET AL, *supra* note 23, at 45-46.

³⁴ *Id.*

³⁵ *Hadacheck v. Sebastian*, 239 U.S. 394, 410 (1915).

³⁶ *Id.*

³⁷ *Id.*

³⁸ 272 U.S. 365, 397 (1926).

³⁹ *Id.* at 388 (citing *Radice v. New York*, 264 U.S. 292, 294 (1924)).

⁴⁰ See *id.* at 386-87.

mental intervention for the public good when said intervention was substantially related to resolving the relevant issue(s).⁴¹ Shortly thereafter, in *Nectow v. City of Cambridge*, the Court reaffirmed this standard by applying it to invalidate a zoning ordinance.⁴² After setting this constitutional framework for zoning ordinances and related municipal actions in the 1920s, the Supreme Court did not address the matter again until the 1970s.⁴³

B. *Justifications for, and Exceptions to, Zoning Ordinances*

Aside from general police powers, courts have cast a wide net when justifying zoning ordinances. Their stated reasons include preservation of property values,⁴⁴ preservation of character and aesthetics,⁴⁵ traffic safety,⁴⁶ public health,⁴⁷ regulation of competition,⁴⁸ promotion of morals,⁴⁹ fiscal zoning to increase taxes,⁵⁰ managing growth,⁵¹ and zoning to lower condemnation costs.⁵²

These justifications are not absolute, however. First, where a zoning ordinance is deemed to be insufficiently related to the achieve-

⁴¹ *Id.* at 395.

⁴² *Nectow v. City of Cambridge*, 277 U.S. 183, 188-89 (1928).

⁴³ JUERGENSMEYER ET AL., *supra* note 23, at 47.

⁴⁴ See *State ex rel. Saveland Park Holding Corp. v. Wieland*, 69 N.W.2d 217, 222 (Wis. 1955) ("Anything that tends to destroy property values of the inhabitants of the village necessarily adversely affects the prosperity, and therefore the general welfare, of the entire village.").

⁴⁵ See *Lamb v. City of Monroe*, 99 N.W.2d 566, 571 (Mich. 1959).

⁴⁶ See *Jarvis Acres, Inc. v. Zoning Comm'n of Town of East Hartford*, 301 A.2d 244, 249 (Conn. 1972); *Price v. Cohen*, 132 A.2d 125, 129 (Md. 1957); *Flora Realty & Inv. Co. v. City of Ladue*, 246 S.W.2d 771, 779 (Mo. 1952).

⁴⁷ Joseph Schilling & Leslie S. Linton, *The Public Health Roots of Zoning: In Search of Active Living's Legal Genealogy*, 28 AM. J. PREVENTIVE MED., 96, 97-102 (2005).

⁴⁸ See *Wal-Mart Stores, Inc. v. City of Turlock*, 41 Cal. Rptr. 3d 420, 440 (Cal. Ct. App. 2006).

⁴⁹ See *McCarthy v. City of Manhattan Beach*, 264 P.2d 932, 938 (Cal. 1953); *St. Louis Gunning Advertisement Co. v. City of St. Louis*, 137 S.W. 929, 962 (Mo. 1911).

⁵⁰ See *Watson v. Town Council of Bernalillo*, 805 P.2d 641, 646 (Cal. 1991); *Chrismon v. Guilford Cnty.*, 370 S.E.2d 579, 592 (N.C. 1988); *Goffinet v. Christian Cnty.*, 357 N.E.2d 442, 447 (Ill. 1976); *Info Please, Inc. v. Bd. of Cnty. Comm'rs of Morgan Cnty.*, 600 P.2d 86, 90 (Colo. App. 1979).

⁵¹ See *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 339 (2002); *Miller v. Bd. of Pub. Works of City of Los Angeles*, 234 P. 381, 386-88 (Cal. 1925).

⁵² See *United States v. 480.00 Acres of Land*, 557 F.3d 1297, 1311 (11th Cir. 2009); *Ventures in Property I v. City of Wichita*, 594 P.2d 671, 683 (Kan. 1979); *State v. Gurda*, 243 N.W. 317, 320 (Wis. 1932); *Bd. of Comm'rs of State Insts. v. Tallahassee Bank & Trust Co.*, 108 So. 2d 74, 85-86 (Fla. Dist. Ct. App. 1958).

ment of land use objectives, it will be invalidated.⁵³ Second, courts can utilize the Fourteenth Amendment and the Fair Housing Act to invalidate zoning ordinances if they result in exclusion or discrimination—whether disparate treatment or disparate impact—to homeownership or rental.⁵⁴ Third, courts are also able to apply RLUIPA when religious entities are negatively affected by zoning.⁵⁵ Despite their seemingly definitive scopes, zoning ordinances are not always rigid. Municipal governments customarily allow individuals and entities to apply for certain permits that, upon obtaining the requisite board's or committee's (oft-discretionary) approval, exempt the permit holders from certain zoning ordinance requirements.⁵⁶ The most common examples of this include special use permits, variances, and conditional permits.⁵⁷

II. STATUTORY OVERVIEW OF RLUIPA

RLUIPA's land use provisions provide broad First Amendment protections in matters involving real property.⁵⁸ Within these provisions, "religious exercise" is defined as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief,"⁵⁹ including the "use, building, or conversion of real property for the purpose of religious exercise."⁶⁰ Covering a wide range of circumstances, the land use provisions apply where a substantial burden upon a religious entity is (1) imposed in a program that receives federal funding,⁶¹ (2) affects interstate commerce,⁶² or (3) occurs as the result of a zoning decision involving an individualized assessment.⁶³

RLUIPA's four land use provisions work in tandem to uphold zoning standards in keeping with First Amendment principles.⁶⁴ Importantly, a government's zoning ordinance can continue to oper-

⁵³ JUERGENSMEYER, *supra* note 23, at 49.

⁵⁴ *Id.* at 220, 227. *See also* U.S. CONST. amend. XIV, § 1; 42 U.S.C. § 3604.

⁵⁵ JUERGENSMEYER, *supra* note 23, at 457. *See also* 42 U.S.C. § 2000cc.

⁵⁶ W. COLE DURHAM & ROBERT SMITH, 3 RELIGIOUS ORGANIZATIONS AND THE LAW, § 29:2 (2d ed. 2021).

⁵⁷ *Id.*

⁵⁸ 42 U.S.C. § 2000cc.

⁵⁹ *Id.* § 2000cc-5(7)(A).

⁶⁰ *Id.* § 2000cc-5(7)(B).

⁶¹ *Id.* § 2000cc(a)(2)(A).

⁶² *Id.* § 2000cc(a)(2)(B).

⁶³ *Id.* § 2000cc(a)(2)(C).

⁶⁴ 42 U.S.C. § 2000cc-5(7)(B).

ate only if it satisfies all four provisions.⁶⁵ The first provision involves a strict scrutiny test.⁶⁶ Here, the government cannot impose “a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person” without establishing a compelling interest to be accomplished in the least restrictive means.⁶⁷ The ensuing equal terms provision narrows the government’s reach further by providing that a zoning regulation cannot be implemented “in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.”⁶⁸ Following this, the third provision mandates that a zoning regulation cannot “discriminate[] against any assembly or institution on the basis of religion or religious denomination.”⁶⁹ Lastly, the fourth provision provides that a zoning regulation cannot jurisdictionally exclude religious assemblies or unreasonably limit religious assemblies, institutions, or structures.⁷⁰

On a closer level, RLUIPA’s equal terms provision consists of four connected elements.⁷¹ The first element requires the plaintiff to be a religious assembly or institution,⁷² while the second element requires the plaintiff to be subject to the challenged zoning regulation.⁷³ The third and fourth elements are inseparably intertwined—the challenged zoning regulation must be compared with a secular assembly or institution⁷⁴ to determine whether it treats the plaintiff on less than equal terms, including the treatment of exceptions to the zoning regulation.⁷⁵ While the lower courts apply virtually the same straightforward methodology when establishing the former two elements, these same courts approach the latter two elements in radically divergent and confusing ways.⁷⁶

⁶⁵ *Id.* § 2000cc.

⁶⁶ *Id.* § 2000cc(a)(1).

⁶⁷ *Id.* § 2000cc(a).

⁶⁸ *Id.* § 2000cc(b)(1).

⁶⁹ *Id.* § 2000cc(b)(2).

⁷⁰ 42 U.S.C. § 2000cc(b)(3).

⁷¹ *Id.* § 2000cc(b)(1).

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* See, e.g., *Centro Familiar Cristiano Buenas Nuevas v. City of Yuma*, 651 F.3d 1163, 1172-75 (9th Cir. 2011); *Corp. of the Cath. Archbishop of Seattle v. City of Seattle*, 28 F. Supp. 3d 1163, 1168-70 (W.D. Wash. 2014).

⁷⁶ Compare *Thai Meditation Ass’n of Alabama, Inc. v. City of Mobile, Alabama*, 980 F.3d 821, 833-34 (11th Cir. 2020) (requiring the plaintiff to present evidence that they were treated unequally compared to a similarly situated nonreligious comparator), and *Lighthouse Inst. for*

III. RLUIPA'S JUDICIAL AND LEGISLATIVE PRECEDENT

The First Amendment to the U.S. Constitution provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”⁷⁷ However, there is a major exception to this rule: conflicting governmental interests may sometimes be found to outweigh, and thus supersede, an individual’s right to free exercise.⁷⁸ Since the mid-twentieth century, the Supreme Court has continued to modify the constitutional standard that governs how laws that burden free exercise are to be addressed in light of governmental interests and the First Amendment.⁷⁹ As discussed below, these changes have led to the relatively recent enactment of RLUIPA.

A. *Judicial Genesis of the Strict Scrutiny Standard*

The Supreme Court initially examined statutes that burdened religious freedom under the “strict scrutiny” standard⁸⁰—the highest standard of review that a court will use to assess the constitutionality of governmental discrimination.⁸¹ To satisfy strict scrutiny, the challenged statute must further a compelling governmental interest in keeping with the least restrictive means possible.⁸²

In 1963, the Court first applied this standard to constitutional questions regarding religious exercise in *Sherbert v. Verner*.⁸³ In that case, an employee was terminated after she refused to work on Saturdays, the day of rest for Seventh Day Adventists.⁸⁴ She was subsequently denied state unemployment compensation benefits under a South Carolina statute because she had “fail[ed], without good cause,

Evangelism, Inc. v. City of Long Branch, 510 F.3d 253, 270 (3d Cir. 2007) (finding that the plaintiff bears the burden of showing unequal treatment), *with Centro*, 651 F.3d at 1173 (“[t]he burden is not on the church to show a similarly situated secular assembly, but on the city to show that the treatment received by the church should not be deemed unequal, where it appears to be unequal on the face of the ordinance.”).

⁷⁷ U.S. CONST. amend. I.

⁷⁸ *See, e.g.*, 42 U.S.C. § 2000bb(a)(5) (1993).

⁷⁹ *See, e.g.*, *Emp. Div., Dep’t of Hum. Res. of Oregon v. Smith*, 494 U.S. 872, 882-83 (1990); *Sherbert v. Verner*, 374 U.S. 398, 406 (1963).

⁸⁰ Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1281 (2007).

⁸¹ *Id.* at 1304.

⁸² *Id.* at 1281.

⁸³ *Sherbert*, 374 U.S. at 403.

⁸⁴ *Id.* at 399.

to accept available suitable work when offered . . . by the employment office or the employer."⁸⁵ After determining that the employee's religious exercise had been burdened⁸⁶ and that the state did not demonstrate a "compelling state interest"⁸⁷ that "justifie[d] the substantial infringement of [the employee's] First Amendment right,"⁸⁸ the Court held that the challenged statute was unconstitutional as applied to the employee.⁸⁹

In *Wisconsin v. Yoder*, the Court reaffirmed its allegiance to the strict scrutiny standard in the free exercise context.⁹⁰ In *Yoder*, the challenged Wisconsin statute mandated school attendance for residents up until the age of sixteen.⁹¹ First, the Court determined that the statute burdened the Amish faith because adherents believed that sending children to high school threatened their way of life and salvation with worldly influences.⁹² Second, the Court held that Wisconsin's otherwise compelling interests in educating its youth would not be thwarted by permitting Amish children to skip high school since the Amish community presented reasonable, societally beneficial alternatives to these children (i.e., "continuing, agricultural vocational education").⁹³ In deciding that the statute should not apply to the Amish community, the Court emphasized that "regulations of general applicability" were not necessarily constitutional.⁹⁴

⁸⁵ *Id.* at 400-01 (quoting S.C. CODE ANN. § 41-35-120 (1941)).

⁸⁶ *Id.* at 403-04.

⁸⁷ When demarcating the bounds of a "compelling state interest," the Court stated that "no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, [o]nly the gravest abuses, endangering paramount interest, give occasion for permissible limitation." *Id.* at 406 (quoting *Thomas v. Collins*, 323 U.S. 516, 530 (1945)).

⁸⁸ *Id.*

⁸⁹ *Sherbert v. Verner*, 374 U.S. 398, 410 (1963).

⁹⁰ *Wisconsin v. Yoder*, 406 U.S. 205, 234-35 (1972).

⁹¹ *Id.* at 207 (citing WIS. STAT. § 118.15 (1969)).

⁹² *Id.* at 209-10.

⁹³ *Id.* at 234-36.

⁹⁴ *Id.* at 220-21 ("A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for government neutrality if it unduly burdens the free exercise of religion. The Court must not ignore the danger that an exception from a general obligation of citizenship on religious grounds may run afoul of the Establishment Clause, but that danger cannot be allowed to prevent any exception no matter how vital it may be to the protection of values promoted by the right of free exercise.").

B. *The Smith Test and the Demise of Strict Scrutiny*

Strict scrutiny persisted as the Supreme Court's choice for approaching governmental burdens on free exercise until its decision in *Employment Division, Department of Human Resources of Oregon v. Smith*.⁹⁵ In this 1990 decision, the Court completely changed course as it held that, to defeat a claim of undue religious burden, a state need only establish that the challenged statute is valid, neutral in scope, and of general applicability.⁹⁶ In *Smith*, two employees were fired from their jobs at a drug rehabilitation center after ingesting an illegal substance, peyote, as practiced in the Native American Church.⁹⁷ They were subsequently denied Oregon unemployment compensation benefits because their discharge stemmed from work-related "misconduct."⁹⁸ The Court held that the state's criminal statute prohibiting peyote⁹⁹ was constitutional as applied to the employees¹⁰⁰ because it was generally applicable and did not intend to infringe upon religious exercise.¹⁰¹ The Court further held that respective states are granted the option to enact religious exemptions to their statutes, but they are not constitutionally required to do so.¹⁰²

C. *RFRA: A Short-Lived Resurrection of Strict Scrutiny*

The 103rd Congress reacted to the *Smith* decision by passing the Religious Freedom Restoration Act of 1993 (RFRA).¹⁰³ Support for the bill was overwhelming, with a unanimous House,¹⁰⁴ 97 senators,¹⁰⁵

⁹⁵ Emp. Div., Dep't of Hum. Res. of Oregon v. Smith, 494 U.S. 872, 883-89 (1990).

⁹⁶ *Id.* at 877-80.

⁹⁷ *Id.* at 874.

⁹⁸ *Id.*

⁹⁹ *Id.* (citing ORE. REV. STAT. § 475.992(4)(a) (1987) and OR. ADMIN. R. 855-80-021(3)(s) (1988)).

¹⁰⁰ *See id.* at 890.

¹⁰¹ Emp. Div., Dep't of Hum. Res. of Oregon v. Smith, 494 U.S. 872, 877-80 (1990). According to the Court, "[G]overnment's ability to enforce generally applicable prohibitions of socially harmful conduct . . . cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development. To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is 'compelling' . . . contradicts both constitutional tradition and common sense." *Id.* at 885 (internal quotation marks and citations omitted).

¹⁰² *Id.* at 890; 42 U.S.C. § 2000bb (1993).

¹⁰³ 42 U.S.C. § 2000bb (1993).

¹⁰⁴ Religious Freedom Restoration Act of 1993: Voice Vote, 139 CONG. REC. H2356 (daily ed. May 11, 1993).

and the President all lending support.¹⁰⁶ Citing *Sherbert* and *Yoder*, RFRA mandated that courts apply the strict scrutiny standard in cases where either federal, state, or local government actions burdened religious exercise.¹⁰⁷ This meant that the government could burden religious exercise only when the government could definitively establish a compelling state interest and when such action was carried out by the least restrictive means possible.¹⁰⁸

RFRA did not last long in its original form, however. In 1997, the Supreme Court held RFRA was unconstitutional as applied to states and municipalities in *City of Boerne v. Flores*.¹⁰⁹ This case centered on a local zoning regulation's burden on a church's religious exercise.¹¹⁰ The congregation desired to expand their church building, while the municipality sought to enforce regulations preventing building modifications in a historic district.¹¹¹ The Court held that RFRA did not apply to state and local regulations because Congress had exceeded its remedial authority under the Fourteenth Amendment by determining constitutional violations rather than enforcing them.¹¹² According to the Court, Congress did not demonstrate a "congruence and proportionality" between the injury and the law established as a remedy¹¹³ because Congress could not show any "widespread pattern of religious discrimination in this country."¹¹⁴ The Court ultimately held that, since it could not find a pattern of disparate treatment through neutral laws of general applicability, RFRA was unconstitutionally overbroad.¹¹⁵

¹⁰⁵ Religious Freedom Restoration Act of 1993: Roll Call Vote No. 311, 139 CONG. REC. S4461 (daily ed. Oct. 27, 1993).

¹⁰⁶ William J. Clinton, 42nd President of the United States, Remarks on Signing the Religious Freedom Restoration Act of 1993 (Nov. 22, 1993), in 29 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS Issue 46 (Nov. 22, 1993) 2377, at 2377-78.

¹⁰⁷ 42 U.S.C. § 2000bb (1993).

¹⁰⁸ *Id.*

¹⁰⁹ *City of Boerne v. Flores*, 521 U.S. 507, 532 (1997).

¹¹⁰ *Id.* at 512.

¹¹¹ *Id.*

¹¹² *Id.* at 519.

¹¹³ *Id.* at 520.

¹¹⁴ *Id.* at 531.

¹¹⁵ *City of Boerne v. Flores*, 521 U.S. 507, 534-55 (1997).

D. *RLUIPA: Congress' Balanced Approach to Strict Scrutiny*

In an attempt to restore the strict scrutiny standard to all free exercise cases without upsetting the Court's decision in *Boerne*, Congress proposed the Religious Liberty Protection Act of 1998 (RLPA).¹¹⁶ Instead of relying solely on the Fourteenth Amendment's enforcement powers¹¹⁷ as in RFRA,¹¹⁸ RLPA established its authority¹¹⁹ under the Commerce¹²⁰ and Spending Clauses,¹²¹ alongside the Fourteenth Amendment's enforcement powers.¹²² However, the bill died in the Senate Judiciary Committee.¹²³ In 2000, a rejuvenated Congress enacted an extremely similar bill, the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), establishing its authority under the same powers as RLPA.¹²⁴ Aside from establishing Article I authority,¹²⁵ RLUIPA passed constitutional muster because the issues to be remedied were targeted, substantial, and backed by a myriad of evidence.¹²⁶

IV. THE SIX-WAY CIRCUIT SPLIT ON RLUIPA'S EQUAL TERMS PROVISION

As mentioned above, the Eleventh,¹²⁷ Third,¹²⁸ Seventh,¹²⁹ Fifth,¹³⁰ Second,¹³¹ Ninth,¹³² and Sixth Circuit Courts of Appeals¹³³

¹¹⁶ Religious Liberty Protection Act of 1998, H.R. 4019, 105th Cong. (1998); S. 2148, 105th Cong. (1998).

¹¹⁷ U.S. CONST. amend. XIV, § 5.

¹¹⁸ S. DOC. NO. 106-08, at 113 (2003); see 42 U.S.C. § 2000bb (1993).

¹¹⁹ Patricia 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, 205 (2008).

¹²⁰ U.S. CONST. art. 1, § 8, cl. 3.

¹²¹ U.S. CONST. art. 1, § 8, cl. 1.

¹²² H.R. 4019, 105th Cong. (2nd Sess. 1998); S. 2148, 105th Cong. (2nd Sess. 1998).

¹²³ H.R. 1691, 106th Cong. (1st Sess. 1999) (as passed by the House and referred to the Senate Judiciary on Nov. 19, 1999).

¹²⁴ Salkin & Lavine, *supra* note 119, at 206-07.

¹²⁵ *Id.* at 207.

¹²⁶ See *id.* at 206.

¹²⁷ *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1241 (11th Cir. 2004).

¹²⁸ *Lighthouse Inst. for Evangelism v. City of Long Branch*, 510 F.3d 253, 287 (3d Cir. 2007).

¹²⁹ *River of Life Kingdom Ministries v. Vill. of Hazel Crest*, 611 F.3d 367, 391 (7th Cir. 2010).

¹³⁰ *Elijah Group, Inc. v. City of Leon Valley*, 643 F.3d 419, 424 (5th Cir. 2011).

¹³¹ *Third Church of Christ, Scientist v. City of New York*, 626 F.3d 667, 671 (2d Cir. 2010).

remain divided over the interpretation of RLUIPA's equal terms provision. This Section seeks to spell out the differences between these approaches.

A. *The Eleventh Circuit's Approach in Midrash Sephardi v. Town of Surfside*

In 2004, the Eleventh Circuit became the first federal appellate court to tackle RLUIPA's equal terms provision.¹³⁴ The case, *Midrash Sephardi v. Town of Surfside*, centered on a Floridian island town's treatment of two Orthodox Jewish synagogues.¹³⁵ Both synagogues were located in a business district that prohibited religious properties.¹³⁶ The synagogues applied for special use permits and zoning variances to circumvent this roadblock, but the town denied their requests.¹³⁷ The denial complicated matters because no suitable alternatives for the synagogue's location were available in the town. Any alternatives would render the task of walking to worship too arduous for elderly adherents¹³⁸ because Orthodox Jewish adherents cannot drive cars to worship on the Sabbath.¹³⁹

The town of Surfside attempted to justify its zoning ordinance by claiming that the measure was "designed in part to invigorate the business district and to create a strong tax base through its [seaside] retail district."¹⁴⁰ Notably, this business district offered the only retail services in a town almost exclusively dependent on tourism.¹⁴¹ In addition to commercial enterprises, Surfside allowed "private clubs and similar places of assemblage" in this district because the town reasoned that such organizations contributed to the retail nature of the district.¹⁴²

¹³² *Centro Familiar Cristiano Buenas Nuevas v. City of Yuma*, 651 F.3d 1163, 1175 (9th Cir. 2011).

¹³³ *Tree of Life Christian Schs. v. City of Upper Arlington*, 905 F.3d 357, 387 (6th Cir. 2018).

¹³⁴ *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1219 (11th Cir. 2004).

¹³⁵ *Id.* at 1218-19.

¹³⁶ *Id.* at 1220.

¹³⁷ *Id.*

¹³⁸ *Id.* at 1221.

¹³⁹ *Id.*

¹⁴⁰ *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1221 (11th Cir. 2004).

¹⁴¹ *Id.* at 1221-22.

¹⁴² *Id.* at 1222.

When assessing the synagogues' claim in light of the equal terms provision, the Eleventh Circuit interpreted the provision to encompass a very broad definition of "assembly or institution" when comparing secular and religious uses.¹⁴³ Furthermore, the court held that the equal terms provision and substantial burden provision of RLUIPA each operated independently.¹⁴⁴ The court also held that, unlike the substantial burden provision, the equal terms provision does not require the plaintiff to meet a threshold jurisdictional test.¹⁴⁵ Moreover, it maintained that the equal terms provision in RLUIPA lacks the "similarly situated" requirement characteristic within many equal protection analyses.¹⁴⁶

Most notably, however, the Eleventh Circuit held that the equal terms provision "renders a municipality strictly liable for its violation."¹⁴⁷ At the same time, the court imposed an exception to strict liability: it determined that when a proper secular comparator for the religious entity is found, the challenged regulation is subject to strict scrutiny, meaning that the regulation may avoid automatic liability by satisfying the strict scrutiny standard.¹⁴⁸ In other words, the court held that it can reach a decision under the equal terms provision without determining whether the secular institution is treated on better terms (the provision's fourth element).¹⁴⁹

B. *The Third Circuit's Approach in Lighthouse Institute for Evangelism v. City of Long Branch*

In 2007, the Third Circuit established its own standard for interpreting RLUIPA's equal terms provision in *Lighthouse Institute for Evangelism v. City of Long Branch*.¹⁵⁰ Like the synagogues in *Midrash Sephardi*, a Christian church was excluded by a city board from conducting worship services in a downtown business district that

¹⁴³ *Id.* at 1230-31.

¹⁴⁴ *Id.* at 1229.

¹⁴⁵ *Id.*

¹⁴⁶ *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1229 (11th Cir. 2004).

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 1232-33.

¹⁴⁹ *Id.*

¹⁵⁰ *Lighthouse Inst. for Evangelism v. City of Long Branch*, 510 F.3d 253, 265-68 (3d Cir. 2007).

allowed some secular assemblies and institutions, such as assembly halls and municipal buildings, to operate there.¹⁵¹

In determining that Long Branch's zoning ordinance was violative of the equal terms provision, the Third Circuit held that the equal terms provision does *not* require a plaintiff to show that the unequal treatment imposed a substantial burden on the plaintiff's exercise of religion because the language is not included within the provision's confines.¹⁵² Aside from the text, the court also looked to legislative history to substantiate its approach, quoting RLUIPA co-sponsor Senator Orrin Hatch:

[RLUIPA would] ensure that if a government action substantially burdens the exercise of religion . . . the government must demonstrate that imposing the burden serves a compelling public interest and does so by the least restrictive means. In addition, with respect to land use regulation, the bill specifically prohibits various forms of religious discrimination and exclusion.¹⁵³

Moreover, in its holding, the Third Circuit indicated that an equal terms provision implies that secular and religious assemblies or institutions should be assessed by how "similarly situated" they are to one another.¹⁵⁴ According to the court, the strength of this correlation is determined by the effect the respective comparators have on the regulatory *purpose* of the regulation.¹⁵⁵ Like the Eleventh Circuit, the Third Circuit essentially read the strict scrutiny standard into RLUIPA's equal terms provision. Unlike its sister court, however, the Third Circuit held that the challenged statute is subject to said standard only after a similarly situated, proper secular comparator is first identified *and* is found to be treated on better terms than its religious counterpart within the regulation.¹⁵⁶

¹⁵¹ *Id.* at 256.

¹⁵² *Id.* at 262-63.

¹⁵³ 146 CONG. REC. S7774 (daily ed. July 27, 2000) (statement of Sen. Orrin Hatch).

¹⁵⁴ *Lighthouse Inst.*, 510 F.3d at 264.

¹⁵⁵ *Lighthouse Inst. for Evangelism v. City of Long Branch*, 510 F.3d 253, 264-65 (3d Cir. 2007).

¹⁵⁶ *Id.*

C. *The Seventh Circuit's Approach in River of Life Kingdom Ministries v. Village of Hazel Crest*

In 2010, the Seventh Circuit joined the fray when it applied the equal terms provision in *River of Life Kingdom Ministries v. Village of Hazel Crest*.¹⁵⁷ In this case, a Christian church sought to relocate to a building in a dilapidated area recently rezoned by the village to exclude the operations of any noncommercial organizations, including houses of worship, schools, community centers, and art galleries.¹⁵⁸ The village, a suburb of Chicago, argued that it amended its zoning districts in an attempt to revitalize a commercial center near a busy commuter train station.¹⁵⁹

In determining that the village of Hazel Crest's ordinance did not violate RLUIPA's equal terms provision, the Seventh Circuit took a very similar approach to the Third Circuit in *Lighthouse Institute*.¹⁶⁰ To begin, the Seventh Circuit did not interpret the equal terms provision to require a plaintiff to show that the unequal treatment imposed a substantial burden on its exercise of religion.¹⁶¹ Furthermore, it held that the equal terms provision implies that secular and religious institutions should be compared by determining how "similarly situated" they are to one another.¹⁶² The court read a strict scrutiny standard into the provision, determining that the challenged regulation is only subject to said standard after a similarly situated, proper secular comparator is first identified *and* is found to be treated on better terms than its religious counterpart within the regulation.¹⁶³

When measuring whether the religious entity and its secular comparator were "similarly situated," however, the Seventh Circuit established an approach different from its sister court.¹⁶⁴ Here, the Seventh Circuit analyzed the *regulatory criteria* instead of the *purpose* of the regulation.¹⁶⁵ According to the court, while "'purpose' is subjective

¹⁵⁷ *River of Life Kingdom Ministries v. Vill. of Hazel Crest*, 611 F.3d 367, 371 (7th Cir. 2010).

¹⁵⁸ *Id.* at 368.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 368-69, 371-72.

¹⁶¹ *Id.* at 168-69.

¹⁶² *Id.*

¹⁶³ *River of Life Kingdom Ministries v. Vill. of Hazel Crest*, 611 F.3d 367, 368-69 (7th Cir. 2010).

¹⁶⁴ *Id.* at 371.

¹⁶⁵ *Id.*

and manipulable,” “regulatory criteria are objective,” and thus present a more just standard of analysis.¹⁶⁶ Critically, however, the court seemed to admit that the test it created and applied in *River of Life* “seems less than airtight.”¹⁶⁷

D. *The Second Circuit’s Approach in Third Church of Christ, Scientist, of New York City v. City of New York*

The Second Circuit addressed RLUIPA’s equal terms provision in 2010.¹⁶⁸ In *Third Church of Christ, Scientist v. City of New York*, a struggling church contracted with a catering company to raise funds.¹⁶⁹ With permission from the city government, the catering company utilized the church’s building space for events and, in exchange, the company restored the facility.¹⁷⁰ Several months later, the city issued a Notice of Intent to Revoke the previously issued permit, stating that “the catering establishment is not an accessory use because . . . it appears to be a principal commercial establishment at the premises.”¹⁷¹ When the city issued a final revocation of the permit a few days later, the church sued the city under RLUIPA’s equal terms provision.¹⁷²

After it crafted its own analysis for the provision, the Second Circuit held that the city violated RLUIPA’s equal terms provision.¹⁷³ Accordingly, the court’s test required that a proper secular comparator must be “similarly situated” to its religious counterpart for all “functional intents and purposes of the regulation.”¹⁷⁴ After ascertaining this, the court examined whether the secular and religious counterparts were treated unequally by the city government.¹⁷⁵ Notably, the court did not include a strict scrutiny standard into its reading of the provision.¹⁷⁶

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 374.

¹⁶⁸ *Third Church of Christ, Scientist v. City of New York*, 626 F.3d 667, 668 (2010).

¹⁶⁹ *See id.*

¹⁷⁰ *See id.*

¹⁷¹ *Id.*

¹⁷² *See id.* at 669.

¹⁷³ *Id.* at 672.

¹⁷⁴ *Third Church of Christ, Scientist v. City of New York*, 626 F.3d 667, 668 (2010).

¹⁷⁵ *See id.* at 672.

¹⁷⁶ *See id.* at 669.

E. *The Fifth Circuit's Approach in* *Elijah Group, Inc. v. City of Leon Valley*

In 2011, the Fifth Circuit provided its take on RLUIPA's equal terms provision in *Elijah Group, Inc. v. City of Leon Valley*.¹⁷⁷ There, a Christian church bought a property within a business district that disallowed houses of worship from obtaining special use permits within district boundaries.¹⁷⁸ However, the city permitted the church to use the property for specified nonreligious activities such as day-care services.¹⁷⁹ Additionally, the business district allowed private clubs and lodges to request special use permits to occupy business districts.¹⁸⁰ The church argued that the ordinance treated churches less favorably than other secular, nonretail entities.¹⁸¹

Without adopting any of its sister circuits' tests, the Fifth Circuit concluded that Leon Valley's ordinance violated RLUIPA's equal terms provision.¹⁸² In doing so, the court established its own test whereupon a religious entity must demonstrate "more than simply that its religious use is forbidden and some other nonreligious use is permitted" to establish unequal treatment because the equal terms provision "must be measured by the ordinance itself and the criteria by which it treats institutions differently."¹⁸³ Upon applying this test, the court found that the ordinance treated the church on less than equal terms as compared with similarly situated nonreligious institutions.¹⁸⁴

F. *The Ninth Circuit's Approach in* *Centro Familiar Cristiano Buenas Nuevas v. City of Yuma*

The Ninth Circuit first interpreted RLUIPA's equal terms provision in 2011.¹⁸⁵ In *Centro Familiar Cristiano Buenas Nuevas v. City of Yuma*, the defendant-appellee city had denied a conditional use per-

¹⁷⁷ *Elijah Grp., Inc. v. City of Leon Valley*, 643 F.3d 419, 423-24 (5th Cir. 2011).

¹⁷⁸ *Id.* at 421.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 424.

¹⁸¹ *See id.* at 421.

¹⁸² *Id.* at 422-24, n. 19.

¹⁸³ *Elijah Grp., Inc. v. City of Leon Valley*, 643 F.3d 419, 424 (5th Cir. 2011).

¹⁸⁴ *Id.*

¹⁸⁵ *See Centro Familiar Cristiano Buenas Nuevas v. City of Yuma*, 651 F.3d 1163, 1165 (9th Cir. 2011).

mit to a Christian church shortly after the church had acquired new property on the city's main street.¹⁸⁶ Importantly, before it purchased the property, the church needed a conditional use permit to conduct worship services on the property because the owner was not willing to hold off selling the property while the permit was sought.¹⁸⁷ For its part, the city maintained that the presence of a church would hinder the city's plans to revive its main street as an entertainment district.¹⁸⁸ Specifically, the city argued that if the church were allowed to operate on the street, the state's prohibition on liquor licenses within a 300-foot proximity of a church building would trigger, thereby reducing the potential of the street's entertainment purpose.¹⁸⁹

When addressing this fact pattern, the Ninth Circuit adopted a context-driven approach. Essentially, the court held that determining the equality of treatment between religious and secular assemblies or institutions depends on the situation.¹⁹⁰ It also rejected strict scrutiny's application within the equal terms provision by holding that the government can justify its treatment on different terms so long as it relates to a legitimate regulatory purpose and not the religious nature of the institution.¹⁹¹ Because the city of Yuma could not demonstrate that its denial of the conditional use permit was not due to the religious nature of the church, thus triggering the liquor licensing statute, the court held that the city violated the equal terms provision.¹⁹²

G. *The Sixth Circuit's Approach in Tree of Life Christian Schools v. City of Upper Arlington*

In 2018, the Sixth Circuit first addressed RLUIPA's equal terms provision in *Tree of Life Christian Schools v. City of Upper Arlington*.¹⁹³ In *Tree of Life*, a K-12 Christian school system sought to purchase a large property to consolidate its schools on one campus.¹⁹⁴ This property was formerly a 254,000-square-foot office building, the

¹⁸⁶ *Id.* at 1166.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ ARIZ. REV. STAT. § 4-207(A) (2000).

¹⁹⁰ *Centro Familiar*, 651 F.3d at 1172.

¹⁹¹ *Id.* at 1171-72.

¹⁹² *Id.* at 1175.

¹⁹³ See *Tree of Life Christian Schs. v. City of Upper Arlington*, 905 F.3d 357, 367 (6th Cir. 2018).

¹⁹⁴ *Id.* at 362.

largest in the city.¹⁹⁵ At its highest point in the early 2000s, the office building's occupants generated 29% of all income-tax revenue collected by the city.¹⁹⁶ Additionally, the property was located within an office district that was primarily zoned for commercial use.¹⁹⁷ Under the city's redevelopment ordinance for the district, houses of worship were deemed conditional uses, while both secular and religious schools were explicitly prohibited.¹⁹⁸ However, child daycare centers were allowed within the district up until the city council amended the ordinance in response to Tree of Life's suit.¹⁹⁹ In determining that the redevelopment ordinance did not violate RLUIPA, the Sixth Circuit established yet another unique approach to the Act's equal terms provision²⁰⁰ when it refrained from adopting a test for determining a proper secular comparator under the equal terms provision.²⁰¹ Instead, it forced the religious entity to identify its own secular comparator to present to the district court as a comparator on remand, thereby putting the burden of proof on the religious organization instead of the government.²⁰²

The Sixth Circuit began its analysis rather uncertainly as it stressed that the text of RLUIPA's equal terms provision lacked any "guidepost" for what Congress meant by the term "equal."²⁰³ The court then turned to its sister courts for help in deciphering the provision's allegedly cryptic meaning.²⁰⁴ In particular, the Sixth Circuit somewhat adopted the Seventh Circuit's approach in holding that a proper secular comparator in an equal terms claim need only be "similarly situated *with regard to the regulation at issue*,"²⁰⁵ particularly "with regard to legitimate [non-pretextual] zoning criteria."²⁰⁶ The Sixth Circuit then determined that revenue maximization was a legiti-

¹⁹⁵ *Id.*

¹⁹⁶ *See id.*

¹⁹⁷ *See id.* at 361.

¹⁹⁸ *Id.* at 361-62.

¹⁹⁹ *Tree of Life Christian Schs. v. City of Upper Arlington*, 905 F.3d 357, 362 (6th Cir. 2018).

²⁰⁰ *See id.* at 365-76.

²⁰¹ *See id.* at 368-70.

²⁰² *Id.* at 370-71.

²⁰³ *Id.* at 367.

²⁰⁴ *See id.*

²⁰⁵ *Tree of Life Christian Schs. v. City of Upper Arlington*, 905 F.3d 357, 368 (6th Cir. 2018) (emphasis added).

²⁰⁶ *See id.* at 370.

mate zoning criterion for the City of Upper Arlington.²⁰⁷ The court justified the city's rationale by pointing out that the city already possessed the means to enforce its criterion.²⁰⁸ In particular, the city had the ability to collect personal income taxes from a nonprofit's employees and thereby access the effectiveness of its revenue generation.²⁰⁹ The court also used this rationale to demonstrate why nonprofit daycares were not a proper secular comparator to the religious school.²¹⁰

ANALYSIS

I. A SEVENTH ALTERNATIVE FOR THE U.S. SUPREME COURT'S CONSIDERATION

Clearly, the circuit courts have failed to establish a uniform standard for interpreting RLUIPA's equal terms provision's third and fourth elements.²¹¹ Courts cannot agree as to the standards for identifying a proper secular comparator for the religious entity, nor can they agree as to whether the strict scrutiny standard should be available to the government to justify its discriminatory measures. Moreover, these same courts have not accurately interpreted the textual meaning of the equal terms provision. Religious organizations and local governments alike ought to know the standard so they can successfully navigate the land use process without unnecessarily overwhelming the First Amendment freedom of religious exercise. A sensible solution would be for the Supreme Court to grant certiorari to a pertinent case and issue a nationwide standard that reflects the statute's purpose. In doing so, the Court should approach the third and fourth elements of RLUIPA's equal terms clause according to the text. First, the Court must interpret the text so that the plaintiff, the religious entity, is not excessively burdened by having to demonstrate a "similarly situated" comparator. Second, the equal terms provision should hold the gov-

²⁰⁷ See *id.* at 371-72.

²⁰⁸ See *id.*

²⁰⁹ *Id.* at 373.

²¹⁰ *Id.*

²¹¹ See, e.g., *Tree of Life Christian Schs. v. City of Upper Arlington*, 905 F.3d 357, 367-70 (6th Cir. 2018); *Centro Familiar Cristiano Buenas Nuevas v. City of Yuma*, 651 F.3d 1163, 1169 n. 25 (9th Cir. 2011); *River of Life Kingdom Ministries v. Vill. of Hazel Crest*, 611 F.3d 367, 368-74 (7th Cir. 2010); *Lighthouse Inst. for Evangelism v. City of Long Branch*, 510 F.3d 253, 264-69 (3d Cir. 2007); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1228-36 (11th Cir. 2004).

ernment strictly liable for any discriminatory actions that violate that provision.

A. *The Plaintiff Should Not Have the Burden of Demonstrating a “Similarly Situated” Secular Comparator*

A proper understanding of RLUIPA’s equal terms provision necessitates a close reading of the text itself. As emphasized by the majority in *Midrash* and Judge Thapar in his dissent in *Tree of Life*, the equal terms provision never explicates that the proper secular comparator must be “similarly situated” to its religious counterpart; instead, the provision’s text *solely* establishes that, in presenting a proper secular comparator, the plaintiff need only demonstrate that the religious and secular entities both qualify as “assembl[ies] or institution[s].”²¹² Indeed, no qualifiers beyond these basic categories are mentioned;²¹³ therefore, it does not make sense for them to be implied, especially as RLUIPA was enacted to broadly protect the religious exercise of religious entities and individuals.²¹⁴

After identifying the criteria to be compared with the plaintiff religious entity, typically secular assemblies and institutions, the courts should look to the natural and ordinary meaning of these terms.²¹⁵ Accordingly, an “assembly” constitutes a “group of people organized and united for some common purpose,”²¹⁶ while an “institution” is “an established organization, esp. one of a public character”²¹⁷ Critically, the proper secular comparators need only to fall somewhere within the confines of these definitions; they do *not* need to be of the same species as the religious entity.²¹⁸ As mentioned

²¹² *Tree of Life*, 905 F.3d at 378 (Thapar, J., dissenting); *Midrash*, 366 F.3d at 1230. Critically, the operative words in RLUIPA’s equal terms provision enables the government to challenge whether the plaintiff’s comparator was actually “similarly situated” to the religious entity. This should not be a heightened pleading requirement for the plaintiff. Rather, it should serve as a governmental rebuttal to an as-applied challenge. The government can utilize this standard to argue that the regulation does not treat religious organizations on less than equal terms.

²¹³ 42 U.S.C. § 2000cc(b)(1).

²¹⁴ *Id.*

²¹⁵ *Tree of Life*, 905 F.3d at 378 (Thapar, J., dissenting); *Midrash*, 366 F.3d at 1230.

²¹⁶ *Midrash*, 366 F.3d at 1231 (quoting *Assembly*, BLACK’S LAW DICTIONARY (7th ed. 1999)).

²¹⁷ *Id.* (quoting *Institution*, BLACK’S LAW DICTIONARY (7th ed. 1999)).

²¹⁸ *Tree of Life*, 905 F.3d at 383.

above, this is in keeping with Congress' intention for RLUIPA—to provide extensive protections for religious exercise.²¹⁹

Importantly, although equal protection provisions in other statutes may explicitly incorporate the narrow language of “similarly situated,” this does not imply that the phrase may simply be “read into” RLUIPA or any other statute with an equal terms provision that does not include the phrase.²²⁰ The fact that Congress included the phrase “similarly situated” in RLUIPA’s substantial burden provision²²¹ but left the phrase out of the equal terms provision is telling.²²² This fits in line with Congress’ intention to interpret the statute broadly—for courts to “construe the statute in favor of a broad protection of religious exercise, to the maximum extent permitted” and place the ultimate burden on the government.²²³ Surprisingly, only the Eleventh Circuit has respected the statute’s text in this manner.²²⁴

B. *The Equal Terms Provision Lacks a Strict Scrutiny Safe Harbor*

The language of RLUIPA’s text firmly establishes that there is no room for the government to successfully vindicate its *prima facie* violation of the statute’s equal terms provision.²²⁵ The reasoning here is very similar to the above reasoning as to why the “similarly situated” standard does not apply in the equal terms provision.²²⁶ To begin with, *no* strict scrutiny language exists in RLUIPA’s equal terms provision,²²⁷ whereas such language is found throughout the substantial burden provision laid out directly beforehand.²²⁸ The inclusion of this language in RLUIPA demonstrates that Congress was aware of the terminology but consciously decided against incorporating it through-

²¹⁹ 42 U.S.C. § 2000cc(3)(g).

²²⁰ *Tree of Life*, 905 F.3d at 379. See also *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985); *Caminetti v. United States*, 242 U.S. 470, 485 (1917) (“It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain . . . the sole function of the courts is to enforce it according to its terms.”).

²²¹ 42 U.S.C. § 2000cc(a).

²²² Peter T. Reed, *What Are Equal Terms Anyway?*, 87 NOTRE DAME L. REV. 1313, 1334 (2012).

²²³ 42 U.S.C. § 2000cc(3)(g).

²²⁴ See *Midrash*, 366 F.3d at 1230.

²²⁵ See *Tree of Life*, 905 F.3d at 382 (Thapar, J., dissenting).

²²⁶ See *supra* Analysis Part I, A.

²²⁷ 42 U.S.C. § 2000cc(b).

²²⁸ See *id.* § 2000cc(a).

out all the statute's land use provisions.²²⁹ Again, this approach makes logical sense in a statute imbued with broad protections for plaintiff religious entities.²³⁰

Despite his accurate observations regarding the equal terms provision's textual analysis, Judge Thapar surprisingly pivots on the initial contentions he drew from them.²³¹ In his dissent, he argues that the government may rebut the secular comparator that the religious entity presented in its *prima facie* challenge by applying the "similarly situated" standard.²³² This train of thought is inconsistent with his earlier contentions that the "similarly situated" standard cannot be found in the equal terms provision's text and thus cannot be implied.²³³ Moreover, it contravenes the Judge's accurate observation that no safe harbor exists for the government within the provision.²³⁴ According to the text and Congress' intentions for RLUIPA, the municipal government simply cannot defend its actions when it treats religious and secular institutions in disparate manners.

In short, because RLUIPA's equal terms provision does not include terms that allow the government to rebut its *prima facie* violation of the equal terms provision, the government has no other option but to be held strictly liable for said violation.²³⁵ Therefore, no safe harbor exists for the government within the provision once *any* secular institution or assembly is found to have been treated on different terms by the requisite government than it treated the religious entity. These measures help to keep the government accountable and in line with the First Amendment.

²²⁹ See *Tree of Life*, 905 F.3d at 382.

²³⁰ *Centro Familiar Cristiano Buenas Nuevas v. City of Yuma*, 651 F.3d 1163, 1171 (9th Cir. 2011) ("The Constitutional phrases, 'substantial burden,' 'compelling governmental interest,' and 'least restrictive means' are all included in the 'substantial burden' provision, not the 'equal terms' provision."); *Lighthouse Inst. for Evangelism v. City of Long Branch*, 510 F.3d 253, 269 (3d Cir. 2007) ("[W]e find that Congress clearly signaled its intent that the operation of the Equal Terms provision not include strict scrutiny by the express language of [the Substantial Burden provision].").

²³¹ See *Tree of Life*, 905 F.3d at 382.

²³² See *id.*

²³³ See *id.* at 378.

²³⁴ See *id.* at 382.

²³⁵ See *id.* at 383.

C. *Application in Tree of Life Christian Schools v. City of Upper Arlington*

Applying this Comment's suggested interpretation of RLUIPA's equal terms provision to cases examined in the preceding sections,²³⁶ it is clear that the city of Upper Arlington would have violated this provision when it denied the Christian school system from using the purchased property for educational (and religious) purposes.²³⁷ The issue comes down to the court's interpretation of the equal terms provision's comparator element. Had the Sixth Circuit appropriately interpreted this element, it would have accepted the secular comparators presented by Tree of Life—hospitals and daycares.²³⁸ The matter is all the more transparent because the parties, Tree of Life and Upper Arlington, did *not* dispute that hospitals apply in their capacity as institutions and daycares apply in their capacity as assemblies.²³⁹ Instead, the city only argued that daycares would not serve as proper secular comparators because they were not “similarly situated” to a religious K–12 school and because the city ordinance did not allow any form of daycare—secular or religious—in the commercial district where Tree of Life's new property was located.²⁴⁰

As to Upper Arlington's first contention, the “similarly situated” standard should not have been applied in the Court's calculus for the reasons stated above.²⁴¹ Therefore, the secular comparators presented by Tree of Life should have been allowed, and the city would have been held strictly liable.²⁴² In a similar vein, the city's second contention fails because its logic is not grounded in the actual timeline. When Tree of Life applied for a conditional use permit, the zoning ordinance allowed all daycares, while prohibiting schools and requir-

²³⁶ See *supra* Analysis Part I, A–B.

²³⁷ While he deviates somewhat, Justice Thapar champions many facets of this interpretation in his dissent. See *Tree of Life*, 905 F.3d at 383–87.

²³⁸ *Id.* at 361–62.

²³⁹ See *id.* at 383 (dissent discusses how hospitals categorically and definitionally apply as institutions and how daycares categorically and definitionally apply as assemblies).

²⁴⁰ See *id.* at 364.

²⁴¹ See *supra* Analysis Part I A–B.

²⁴² When Judge Thapar applies his analysis in *Tree of Life*, he fails to mention that Upper Arlington could have applied the “similarly situated” standard in its rebuttal. Instead, he states that Upper Arlington's rebuttal must look at the secular comparators that *Tree of Life* presented. *Tree of Life*, 905 F.3d at 387. This is especially confusing, because earlier, he stated that the government's rebuttal may incorporate the “similarly situated” standard.

ing houses of worship to petition for approval.²⁴³ Only *after* this case's litigation commenced did Upper Arlington amend its zoning ordinance to exclude all daycares.²⁴⁴ Thus, Tree of Life would have been able to fulfill the third element of RLUIPA's equal terms provision by presenting a proper secular comparator in nonreligious daycares.²⁴⁵

After identifying a proper secular comparator, it would have been relatively simple for Tree of Life to demonstrate that the city of Upper Arlington treated it on lesser terms than its secular counterparts in zoning affairs, thereby satisfying the equal terms provision's fourth element. Essentially, the city's zoning ordinance forced religious entities to satisfy additional steps—applying for and receiving approval on a conditional use permit—unlike nonreligious institutions such as daycares.²⁴⁶ This is a form of disparate impact, as any example of an express governmental distinction requiring additional roadblocks for one entity versus another establishes unequal treatment.²⁴⁷

Most importantly, according to the provision's text, there is no opportunity for the municipal government to justify its unequal treatment based on the principles found in the strict scrutiny standard.²⁴⁸ Instead, the municipal government must be held strictly liable for its discriminatory actions. Surely a municipal government can exclude religious buildings from a certain sector, but it can do so only if it excludes secular assemblies and institutions from the district as well. Depending on the situation, governments may have legitimate interests grounded in the public welfare that trump constitutional interests. Nonetheless, realizing government interests through exclusionary zoning measures by favoring secular over religious usage of property is a clear violation of the First Amendment's free exercise clause.

CONCLUSION

As of this writing, the United States Circuit Courts of Appeals have failed to interpret RLUIPA's equal terms provision in a manner

²⁴³ *Tree of Life*, 905 F.3d at 361-62.

²⁴⁴ *Id.* at 383.

²⁴⁵ *See id.*

²⁴⁶ *Id.* at 383-84.

²⁴⁷ *Id.* at 384. *See also* Centro Familiar Cristiano Buenas Nuevas v. City of Yuma, 651 F.3d 1163, 1171 (9th Cir. 2011); *Elijah Grp., Inc. v. City of Leon Valley*, 643 F.3d 419, 424 (5th Cir. 2011).

²⁴⁸ 42 U.S.C. § 2000cc(b)(1).

consistent with the explicit text and intended purpose of the Act. When interpreting RLUIPA's equal terms provisions, courts should not read "similarly situated" into the comparator requirement. Instead, the courts should hold the government strictly liable if it cannot successfully rebut a plaintiff's prima facie case by showing that the religious entity's presented secular comparator, if an assembly or institution, was treated on equal terms with the religious entity. This correct interpretation will help to better protect religious exercise as intended by the statute while informing all parties on how to best navigate through the zoning process.