

RLUIPA: HOW EQUALITY AND FAIRNESS IN LAND USE REGULATIONS DO NOT ALWAYS COEXIST

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*“Religious liberty is a constitutional value of the highest order, and the Framers of the Constitution included protection for the free exercise of religion in the very first Amendment. This Act recognizes the importance the free exercise of religion plays in our democratic society.”*¹ – President Bill Clinton

I. INTRODUCTION

The ability to practice religion free of discrimination is one of the most cherished freedoms in our nation. It is a guiding principle that the First Amendment guarantees all citizens: freedom of religion and religious liberty.² Nearly six in ten people in the United States say that religion plays a very important role in their lives.³ However, protecting religious exercise⁴ has become a more prevalent issue as of late, especially with regards to religious institutions.

In recent years, there has been a shift in the practice of religious services, forming into a sanctuary not just for worship, but also for entertainment.⁵ Religious institutions have buildings that can seat hundreds, and sometimes thousands of people, and can bring with them heavy traffic and the need for large parking

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¹ *Statement on Signing the Religious Land Use and Institutionalized Persons Act of 2000* (Sep. 22, 2000), available at http://www.justice.gov/jmd/lsl/legislative_histories/pl106274/presidentialstatement-09-22-00.pdf.

² U.S. CONST. amend. I.

³ *Among Wealthy Nations U.S. Stands Alone In Its Embrace of Religion*, PEW RESEARCH GLOBAL ATTITUDES PROJECT (Dec. 19, 2002), <http://www.pewglobal.org/2002/12/19/among-wealthy-nations/>.

⁴ *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 273 (3d Cir. 2007). “The exercise of religion often involves not only belief and profession but the performance of (or abstention from) physical acts: assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, abstaining from certain foods or certain modes of transportation.” *Id.*

⁵ MARCI A. HAMILTON, *GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW* 79 (2005).

lots.⁶ The rise in religious institutions throughout the United States has brought forth mixed feelings within communities.⁷ It has also become a catalyst for the passage of more land ordinances that discriminate against them. Religious institutions have been discriminated against on the face of zoning codes⁸ by being excluded from areas within communities where other, secular buildings are allowed. Municipalities face constant pressure to bring in new business in order to increase profitability and create a strong economic infrastructure for residents to live. This includes businesses such as movie theatres, restaurants, and bars.⁹ As a result, non-secular institutions are being excluded from communities in favor of revenue-generating options.

Discrimination has been observed throughout the United States in the form of land use regulations. For example, discrimination was seen in the small town of Airmont, New York, in which a Hasidic Jewish Congregation wished to build a 170-student dormitory on 19 acres where the Congregation also wanted to put its yeshiva.¹⁰ A local zoning code in Rockland County prohibited the building of religious boarding schools and thus, there was a question of protection under the Religious Land Use and Institutionalized Persons Act of 2000 (“RLUIPA”).¹¹ Members of the community, however, were opposed to the idea of building the boarding school and considered the RLUIPA as infringing on the town’s rights.¹² As a result of the apparent discrimination within the zoning ordinance, the Congregation filed

⁶ *Id.*

⁷ Robert Johnson, *A New Church? Not in Their Backyard*, N.Y. TIMES (Apr. 3, 2005), http://www.nytimes.com/2005/04/03/realestate/03nati.html?_r=0 (finding that new churches in rural and suburban areas are prompting opposition from homeowners in increasing numbers). A lot of people who live in quiet areas perceive a new church as a hassle. *Id.*

⁸ *Joint Statement of Sen. Hatch & Sen. Kennedy*, 146 CONG. REC. S7774-01 (daily ed. July 27, 2000). “Churches in general, and new, small, or unfamiliar churches in particular, are frequently discriminated against on the face of zoning codes and also in the highly individualized and discretionary processes of land use regulation.” *Id.*

⁹ *Religious Land Use and Institutionalized Persons Act (RLUIPA)*, THE UNITED STATES DEPARTMENT OF JUSTICE, <http://www.justice.gov/crt/about/hce/rluipaexplain.php> (last visited Jan. 5, 2015).

¹⁰ Peter Applebome, *Where Zoning Seems a Test of Tolerance*, N.Y. TIMES (June 15, 2005), <http://www.nytimes.com/2005/06/15/nyregion/15towns.html>.

¹¹ *Id.*

¹² *Id.* “Everyone’s up in arms about it . . . it’s a quiet neighborhood, everyone’s on well water, no one thinks it belongs here . . . you’ve now got the federal government superseding all local zoning ordinances.” *Id.*

suit. They claimed that Airmont had violated the Religious Land Use and Institutionalized Persons Act and that the zoning code was discriminatory in nature against Hasidic boarding schools.¹³

The Religious Land Use and Institutionalized Persons Act of 2000¹⁴ was passed to alleviate any religious discrimination that may take place in any number of these settings against persons or institutions.¹⁵ Its purpose is to “address what Congress perceived as inappropriate restrictions on religious land uses, especially by ‘unwanted’ and ‘newcomer’ religious groups.”¹⁶ Congressional hearings showed many instances where localities were using facially neutral zoning laws to exclude religious groups and institutions from operating in commercial areas.¹⁷ The RLUIPA prohibits zoning ordinances that substantially burden religious institutions “absent the least restrictive means of furthering a compelling governmental interest.”¹⁸ With the passing of the RLUIPA, there have naturally been many groups that have voiced their opinion about its purpose and effect. This has included religious and non-religious groups that have feelings both for and against the act. The Becket Fund¹⁹ is one group who has defended the religious rights of people throughout the country and has been extremely vocal in their support of the RLUIPA.²⁰

¹³ *Id.*

¹⁴ 42 U.S.C.A. § 2000cc (2000).

¹⁵ *Joint Statement of Sen. Hatch & Sen. Kennedy, supra* note 8, at 7775. Statement of Senator Kennedy: “Mr. President, religious freedom is a bedrock principle in our Nation. The Religious Land Use and Institutionalized Persons Act of 2000 reflects our commitment to protect religious freedom and our belief that Congress still has the power to enact legislation to enhance that freedom.” *Id.*

¹⁶ *Centro Familiar Cristiano Buenas Nuevas v. City of Yuma*, 651 F.3d 1163, 1170 (9th Cir. 2011) (citing *Guru Nanak Sikh Society v. County of Scutter*, 456 F.3d 978, 994 (9th Cir. 2006)).

¹⁷ Amy Parrish, Esq., *How RLUIPA Zoning Affects Your Ministry*, M&B, http://www.mauckbaker.com/article.aspx?site_id=11178&article_id=327990 (last visited Jan. 5, 2015).

¹⁸ *Religious Land Use and Institutionalized Persons Act (RLUIPA)*, *supra* note 9.

¹⁹ *Our Mission*, THE BECKET FUND, <http://www.becketfund.org/our-mission/> (last visited Feb. 8, 2015). The Becket Fund maintains a website dedicated to protecting religious freedom. *Id.*

²⁰ *Id.* The Becket Fund is a non-profit, public interest legal and educational institute with a mission to protect the free expression of all faiths. *Id.* It was founded in 1994 and mainly focuses on First Amendment litigation on behalf of people of faith against the government, and in defense of the government when it is sued for being religion-friendly. *Id.*

Since the passing of the Religious Land Use and Institutionalized Persons Act of 2000, courts have disagreed over how to interpret its Equal Terms provision.²¹ Specifically, disagreements have formed between circuits over the following issues: what qualifies as a religious assembly or institution, whether religious assemblies or institutions should be compared to similarly situated assemblies or institutions, and what level of scrutiny should be applied. The Third Circuit, for instance, has held that a regulation violates the Equal Terms provision only if it treats religious assemblies or institutions less well than secular assemblies or institutions that are similarly situated as to the regulatory purpose.²² Also, if a similar comparator is treated more favorably than a religious institution, the ordinance will be invalidated, as RLUIPA establishes strict liability for violations.²³ The Seventh Circuit used a slightly modified test from the Third Circuit, by not using the purpose of the regulation imposed standard, but rather looking at the regulatory and zoning criteria.²⁴ The Eleventh Circuit took a broad approach to the term “assembly” and stated that if a zoning regulation allows for a secular assembly, all religious assemblies must be permitted as well.²⁵ However, unlike the Third Circuit, if a similar secular institution is found, the law in question is subject to strict scrutiny.²⁶ This means that the law will be invalidated if found not to be narrowly tailored to achieve a compelling government end.²⁷ Finally and most recently, the Ninth Circuit focused on the text of the statute and what the term “equal” meant, and found

²¹ 42 U.S.C. § 2000cc. The Equal Terms provision ensures that there is equal treatment between secular and non-secular entities. *Id.*

²² *Lighthouse Inst. for Evangelism*, 510 F.3d at 256.

²³ *Id.*

²⁴ *River of Life Kingdom Ministries v. Vill. of Hazel Crest*, 611 F.3d 367, 368 (7th Cir. 2010).

²⁵ *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1231 (11th Cir. 2004).

²⁶ *Strict Scrutiny Definition*, LEGAL INFORMATION INSTITUTE, http://www.law.cornell.edu/wex/strict_scrutiny (last visited Jan. 5, 2015). See also *United States v. Carolene Products Co.*, 304 U.S. 144 (1938). Strict scrutiny is a form of judicial review that courts use to determine whether a law or statute is constitutional. *Id.* In order to pass strict scrutiny, the law must be justified by a compelling governmental interest, it must be narrowly tailored, and must be the least restrictive means for achieving that interest. *Id.*

²⁷ *Id.*

that a municipality can justify a zoning ordinance if it relates to a legitimate regulatory purpose.²⁸

This Note addresses the RLUIPA's affect on the community, as well as on the court system. This Note also breaks down the current split between the Third Circuit, Seventh Circuit, Ninth Circuit, and Eleventh Circuit, regarding the interpretation of the Equal Terms provision of the Religious Land Use and Institutionalized Person Act of 2000. Specifically, the focus will be on the following: (1) which court's test should be preferred in determining whether a religious assembly or institution is treated differently from a secular one, and (2) what level of scrutiny should be applied to a governmental land regulation that unequally burdens religious institutions or assemblies.

This Note begins by outlining the history of religious land use criteria that the courts have used, followed by the passing of the Religious Land Use and Institutionalized Persons Act of 2000. This includes an extensive review of the Equal Terms provision. The Note then addresses the RLUIPA's affect on the community and the courts. Specifically within the courts, this Note will break down the various tests and methods that they have used in devising rulings on religious land-use cases. Next, it will examine the current split between the Third, Seventh, Ninth, and Eleventh Circuit's, through various case law. Finally, it will address what the preferable test should be for courts to follow when confronted with a religious land use case. This will include which interpretation of the Equal Terms provision should be favored, as well as what level of scrutiny should be applied.

II. BEFORE THE PASSING OF THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT OF 2000

Before the Religious Land Use and Institutionalized Persons Act of 2000 was passed, both Congress and the Supreme Court struggled in deciding how to interpret and resolve issues regarding land usage and religious freedom. Prior to 1990, the U.S. Supreme Court applied a two-part test from *Wisconsin v. Yoder*.²⁹ In the case, the respondents were members of the Old

²⁸ *Centro Familiar Cristiano Buenas Nuevas v. City of Yuma*, 651 F.3d 1163, 1171 (9th Cir. 2011).

²⁹ *Wisconsin v. Yoder*, 406 U.S. 205 (1972). The court reasoned that in order for Wisconsin to be able to compel school attendance, "it must appear either that the State does not deny the free exercise of religious belief by its requirement, or that there is a state interest of sufficient magnitude to override

Order Amish religion. A Wisconsin compulsory-attendance law required them to cause their children to attend public or private school until reaching age 16, but the respondents refused to obey. The respondents were charged and convicted of violating the compulsory-attendance law. Respondents argued that the law violated their First and Fourteenth Amendment free exercise rights, and that their religion was their way of life so they should have been excluded from the attendance law. In order to determine whether a governmental regulation violated the First Amendment, the court created the following two-part test: (1) whether the regulation substantially burdened a religious practice, and (2) if so, whether the burden was justified by a compelling governmental interest.³⁰ In 1990, the Supreme Court, dissatisfied with its previous free-exercise jurisprudence, crafted a new test in *Employment Division v. Smith*.³¹ In that case, the respondents were fired from their job after ingesting peyote.³² They were members of a Native American Church, which consumed peyote as a part of their religious ritual.³³ Under Oregon law, possession of a controlled substance was prohibited unless it was prescribed by a medical practitioner.³⁴ Respondents then applied to the petitioner, the Employment Division of the Department of Human Resources of Oregon, for unemployment compensation, but were denied

the interest claiming protection under the Free Exercise Clause.” *Id.* Using the balancing test, the court ruled that the application of the law was unconstitutional as applied to the respondents and the Amish religion because parents have the right to provide an equivalent education that is privately operated. *Id.*

³⁰ Gary D. Taylor, *Congress Passes, President Signs the Religious Land Use and Institutionalized Persons Act of 2000*, 2 (Nov. 20, 2000) (unpublished brief), available at <http://lu.msue.msu.edu/pamphlet/Blaw/AcrobatPamphlet/ReligiousLU.PDF>. This meant local governments could ideally place restrictions on religious land use or activities, but would have to present evidence of a compelling governmental interest if the restriction was challenged. *Id.*

³¹ *Emp’t Div., Dep’t. of Human Res. v. Smith*, 494 U.S. 872 (1990). The court ruled that although there is a First Amendment right to freedom of religion, the State has a compelling interest to prohibit illegal conduct. *Id.* See also, *An Overview of the Religious Land Use and Institutionalized Persons Act (“RLUIPA”)*, AMERICAN CENTER FOR LAW AND JUSTICE, <http://aclj.org/us-constitution/aclj-memorandum-an-overview-of-the-religious-land-use-and-institutionalized-persons-act-rluipa-2004> (last visited February 21, 2015) (“Until *Smith*, federal free exercise claims were reviewed under the strict scrutiny test from *Sherbet v. Verner*.”).

³² *Smith*, 494 U.S. at 874.

³³ *Id.*

³⁴ *Id.* at 875.

because they had been discharged for “work-related misconduct.”³⁵ In *Smith*, the court held that “if prohibiting the exercise of religion . . . is not the object . . . but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended.”³⁶

The ruling in *Smith* overturned the balancing test that was established in *Sherbert v. Verner*.³⁷ Under the *Sherbert* test, “governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest.”³⁸ In that case, Appellant was a member of the Seventh-day Adventist Church and was fired from her job for not working on Saturdays, which was the day of her Sabbath.³⁹ Because of this, she was unable to obtain other employment and had to file for unemployment compensation.⁴⁰ The State Commission denied her unemployment because she would not accept suitable work when offered.⁴¹ The Supreme Court held that the disqualification of benefits imposed a burden on Appellant’s free exercise of religion.⁴² Also, it held there were no compelling state interests that justified the substantial infringement on this right.⁴³

Congress showed apparent disagreement with the courts ruling in *Smith*, by enacting the Religious Freedom Restoration Act of 1993 (RFRA).⁴⁴ The purpose of the RFRA was to restore the compelling interest test as set forth in cases like *Yoder*, to guarantee its application in all cases where free exercise of religion is substantially burdened;⁴⁵ and to provide a claim or defense to persons whose religious exercise is substantially burdened by government.⁴⁶ The new test laid out under the RFRA stated that: “Government shall not substantially burden a person’s exercise of religion . . . unless the government can demonstrate that application of the burden to the person (1) is in furtherance of a

³⁵ *Id.*

³⁶ *Id.* at 878.

³⁷ *Sherbert v. Verner*, 374 U.S. 398 (1963).

³⁸ *Smith*, 494 U.S. at 883.

³⁹ *Sherbert*, 374 U.S. at 399.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 403.

⁴³ *Id.* at 404.

⁴⁴ 42 U.S.C. § 2000bb (1993).

⁴⁵ 42 U.S.C. § 2000bb(b)(1).

⁴⁶ 42 U.S.C. § 2000bb(b)(2).

compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.”⁴⁷

The problem with the RFRA was that it was found to be unconstitutional because it attempted to substantively change constitutional standards.⁴⁸ This was evident in *City of Boerne v. Flores*,⁴⁹ in which the court ruled that Congress had exceeded its power in determining constitutional authority.⁵⁰ The case revolved around a church located in Boerne, Texas, which challenged an ordinance that denied their ability to enlarge their building under the RFRA.⁵¹ At that time, the Church was able to hold approximately 230 parishioners, which was too small for the steady growth that it was encountering at the time.⁵² Under the ordinance passed by the city, the Commission had to preapprove the construction of the church.⁵³ When the church applied for a building permit, the city authorities denied it and as a result, the church brought suit under the RFRA as basis for relief.⁵⁴ In reference to the RFRA, the court held that Congress did not have “the power to decree or alter substantive rights and then enforce such rights by appropriate legislation.”⁵⁵ The court concluded that the RFRA “contradict[ed] vital principles necessary to maintain separation of powers and the federal balance,” and thus, it exceeded Congress’ power and the validity of the cities’ ordinance.⁵⁶

After the Religious Freedom Restoration Act was struck down, Congress attempted to pass the Religious Liberty Protection Act of 1998 (RLPA).⁵⁷ The RLPA attempted to protect a person’s religious exercise, (1) in a program or activity, operated by a government, that receives Federal financial assistance; or (2) in or affecting commerce with foreign nations, among the several States,

⁴⁷ Mary L. Topliff, *Validity, Construction, and Application of Religious Freedom Restoration Act*, 135 A.L.R. FED. 121 (1996).

⁴⁸ *Congress Passes, President Signs the Religious Land Use and Institutionalized Persons Act of 2000*, *supra* note 30, at 3.

⁴⁹ *City of Boerne v. Flores*, 521 U.S. 507 (1997).

⁵⁰ *Id.* at 536.

⁵¹ *Id.* at 511.

⁵² *Id.* at 512.

⁵³ *Id.*

⁵⁴ *City of Boerne*, 521 U.S. at 512.

⁵⁵ *Id.* at 519.

⁵⁶ *Id.* at 508.

⁵⁷ *Religious Liberty Protection Act of 1998: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 105th Cong. (1998), available at http://www.justice.gov/jmd/lis/legislative_histories/pl106-274/hear-134-1998.pdf.

or with the Indian tribes.⁵⁸ However, after disputes among Congress over its provisions, the RLPA was stripped down to two categories: land use and prisons.⁵⁹ As a result, Congress passed the Religious Land Use and Institutionalized Persons Act of 2000. Its purpose was similar to the RLPA: to determine whether a local land ordinance places an undue burden on the exercise and practice of religion.⁶⁰

III. THE PASSING OF THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT OF 2000

The Religious Land Use and Institutionalized Persons Act of 2000⁶¹ is a federal statute that was passed by Congress on July 27, 2000, and was signed by President Bill Clinton on September 22, 2000.⁶² The bill targets two areas: land use regulations and persons in prisons, mental hospitals, and similar state institutions.⁶³ The need for legislation that protects religious institution interests came about after “massive evidence” was compiled showing municipalities were discriminating against churches and zoning codes and were not able to “build, buy, or rent space to assemble for religious purposes.”⁶⁴ A prime example was illustrated in *Irshad Learning Center v. County of DuPage*, in which a mosque and Islamic educational center in the Chicago suburbs was seeking to expand its facility had its application denied by the county board.⁶⁵ Because of the growth of the mosque, there was a pressing need to increase the availability of parking spaces.⁶⁶ However, the city denied their application on the irrational grounds that the mosque had not alleged accurate estimates of how many parking spaces were needed anywhere in their application.⁶⁷

⁵⁸ *Id.* at 2.

⁵⁹ HAMILTON, *supra* note 5, at 95.

⁶⁰ *Id.*

⁶¹ 42 U.S.C. § 2000cc.

⁶² *Statement on Signing the Religious Land Use and Institutionalized Persons Act of 2000*, *supra* note 1.

⁶³ *Joint Statement of Sen. Hatch & Sen. Kennedy*, *supra* note 8, at 16698.

⁶⁴ *Id.* “The hearing record contains much evidence that these forms of discrimination are very widespread. Some of this evidence is statistical—from national surveys of cases, churches, zoning codes, and public attitudes.” *Id.*

⁶⁵ *Irshad Learning Ctr. v. Cnty. of DuPage*, 804 F. Supp. 2d 697, 703 (N.D. Ill. 2011).

⁶⁶ *Id.*

⁶⁷ *Id.*

The RLUIPA's authority is limited to Congress' power to regulate under the Commerce Clause, the Spending Clause, and Section Five of the Fourteenth Amendment.⁶⁸ In a statement given by President Clinton upon signing the bill into law, he described the RLUIPA as having the authority to "forbid state and local governments from imposing a substantial burden on the exercise of religion⁶⁹ unless they could demonstrate that imposition of such a burden is the least restrictive means of furthering a compelling governmental interest."⁷⁰ The RLUIPA aims to protect the religious liberties of inmates from substantial burden, as well as religious institutions from unequal land restrictions.⁷¹

The RLUIPA initially came under fire through various constitutional challenges, claiming that the act was in violation of the Spending Clause, Commerce Clause, Establishment Clause, the Tenth, Eleventh, and Fourteenth Amendments to the Constitution, and the separation of powers.⁷² Congress was the first to address these issues and the courts followed suit.⁷³ In *Freedom Baptist Church of Delaware County v. Township of Middletown*,⁷⁴ a church in Philadelphia's southwestern suburbs brought an action against the municipal government challenging various land use restrictions as violations of the RLUIPA.⁷⁵ The Court upheld the constitutionality of the RLUIPA, holding that "insofar as state or local authorities 'substantially burden' the economic activity of religious organizations, Congress has ample authority to act under the Commerce Clause."⁷⁶ The Court also upheld its constitutionality under the Free Exercise Clause of the First Amendment, the Establishment Clause of the First Amendment, and the Equal Protection Clause of the Fourteenth

⁶⁸ *Id.*

⁶⁹ *Joint Statement of Sen. Hatch & Sen. Kennedy, supra* note 8. "The definition of 'religious exercise' includes the use, building, or conversion of real property for religious exercise." *Id.*

⁷⁰ *Statement on Signing the Religious Land Use and Institutionalized Persons Act of 2000, supra* note 1.

⁷¹ 42 U.S.C. § 2000cc.

⁷² John J. Dvorske, J.D., *Validity, Construction, and Operation of Religious Land Use and Institutionalized Persons Act of 2000*, 181 A.L.R. FED. 247 (2002).

⁷³ *Joint Statement of Sen. Hatch & Sen. Kennedy, supra* note 8.

⁷⁴ *Freedom Baptist Church of Delaware Cnty. v. Twp. of Middletown*, 204 F. Supp. 2d 857, 859 (E.D. Pa. 2002).

⁷⁵ Dvorske, *supra* note 72, at Section 3.

⁷⁶ *Freedom Baptist Church*, 204 F. Supp. 2d at 867.

Amendment, claiming that these subsections are rooted in Supreme Court jurisprudence.⁷⁷

IV. THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT AND DISPUTES WITHIN THE COMMUNITY

Since the passing of the RLUIPA, there has been a mix of feelings from individuals and homeowners living in small-town communities who have seen the effects that the statute has on them. A home is often a family's largest investment and so, when there is a threat to their property value or a change to their neighborhood, sentiments of displeasure predictably follow. Some people believe that a new church is a hassle and that it is just another big building with a parking lot.⁷⁸ To others, "it could be a car dealership, a hospital, a university; it doesn't matter-especially if it is in your neighborhood."⁷⁹ Unfortunately for homeowners, neighborhood disputes can sometimes turn into arguments larger than anticipated. This was seen in Hancock Park, Los Angeles,⁸⁰ where a Jewish congregation sought a conditional-use permit to build a synagogue on its property.⁸¹ The city reached an agreement with the congregation that they could use the property for a synagogue, as long as it did not exceed a certain number of worshipers and they not use the property for other activities.⁸² When the neighborhood opposed the agreement and took action, the congregation took offense. One Rabbi claimed, "this incident goes way beyond a zoning dispute, this is anti-Semitism."⁸³

Several members of Congress seemed to agree with the Rabbi, as can be seen in the joint statement of Senators Hatch and Kennedy.⁸⁴ They stated, "sometimes, zoning board members or

⁷⁷ *Id.* at 869.

⁷⁸ Johnson, *supra* note 7.

⁷⁹ HAMILTON, *supra* note 5, at 81.

⁸⁰ *Hancock Park*, L.A. TIMES, <http://maps.latimes.com/neighborhoods/neighborhood/hancock-park/> (last visited Jan. 5, 2015). Hancock Park is a historic residential neighborhood in the central region of Los Angeles, California. *Id.* It was developed in the 1920s by the Hancock family and has a population of approximately 10,000 people, according to the 2000 U.S. Census. *Id.*

⁸¹ *How to Zone a Synagogue?*, L.A. TIMES (Aug. 29, 2007), <http://www.latimes.com/news/opinion/la-ed-synagogue29aug29,0,711883.story>.

⁸² *Id.*

⁸³ Tom Tugend, *City Building & Safety Inspectors Briefly Interrupt Kol Nidrei Services at Hancock Park Shul*, JEWISH JOURNAL (Sept. 24, 2007), http://www.jewishjournal.com/community_briefs/article/city_building_safety_insp_ctors_briefly_interrupt_kol_nidrei_services_at/.

⁸⁴ *Joint Statement of Sen. Hatch & Sen. Kennedy*, *supra* note 8.

neighborhood residents explicitly offer race or religion as the reason to exclude a proposed church, especially in cases of black churches and Jewish shuls and synagogues; more often, discrimination lurks behind such vague and universally applicable reasons as traffic, aesthetics, or ‘not consistent with the city’s land use plan.’⁸⁵ According to the joint statement of Senators Hatch and Kennedy, discrimination can be applied to common and legitimate reasons for questioning land use determinations. From their statement, it seems that they accuse community members who oppose religious institutions from using property for religious matters of being discriminatory, despite their reasoning for bringing forth a claim.

Although community members have been labeled as perpetrators of discrimination, that has not stopped them from voicing legitimate concerns over municipalities allowing construction and expansion of religious buildings. For one thing, new religious buildings could increase traffic and congestion in a neighborhood. This was seen in Virginia Beach, Virginia, in which Buddhist monks filed a lawsuit in order to be allowed to worship at their homes.⁸⁶ In their suit, the monks complained that the city of Virginia Beach violated the Religious Land Use and Institutionalized Persons Act when it denied a use permit to their group, the Buddhist Education Center of America, Inc.⁸⁷ However, neighbors in the community were not in support of the monks obtaining permission to hold services, complaining that it would draw too much traffic and “was inappropriate for a primarily residential and farming community.”⁸⁸

On top of the concern of traffic and congestion, the size of religious institutions and their followers are also greatly increasing today. Religious institutions across the United States have erupted in size over the last decade and the number of “megachurches”⁸⁹ has leaped to more than 1,300 today, from 50 in

⁸⁵ *Id.*

⁸⁶ Deirdre Fernandes, *Monks File Suit Against City to Worship at Home*, REDORBIT (Sept. 28, 2008), http://www.redorbit.com/news/science/1570620/monks_file_suit_against_city_to_worship_at_home/.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Mega Churches Mean Big Business*, CNN (Jan. 21, 2010), <http://www.cnn.com/2010/WORLD/americas/01/21/religion.mega.church.christian/>. Megachurches are extra-large churches that can accommodate upwards of 15,000 people and are common among members of the evangelical Christian faith. *Id.*

1970.⁹⁰ One example is Second Baptist Church, which is a congregation located in Houston, Texas.⁹¹ The church has five locations, over 63,000 members, and a weekly attendance of over 23,000 members.⁹² It also includes a fitness center, several bookstores, information desks, a café, a K-12 school, and free automotive repair service for single mothers.⁹³ With churches of this size and following taking over a community, a church and its congregation can essentially become their own town within a city. Since city governments are supposed to ensure that residential neighborhoods remain peaceful and attractive to families, “when they abandon their principles for religious entities, homeowners feel betrayed.”⁹⁴ Thus, there is a legitimate concern among community members for allowing new religious institutions in small neighborhoods, because of the fear of its expansion into a “megachurch.”

In addition to the size of churches, which has been rapidly growing, another concern among community members is the duration for which they are being used. No longer are religious institutions only being used on Sundays.⁹⁵ Now, religious services take place multiple times a week. Also, religious institutions are being used for other purposes such as weddings, schooling, and receptions. The traditional view of a church has shifted into a social event facility and has made a staggering amount of money in the process.⁹⁶ As such, community members opposing religious institutions from being built have a justifiable concern because the level of activity and duration of use of these facilities has significantly increased as of late.

⁹⁰ Jesse Bogan, *America's Biggest Megachurches*, FORBES (June 26, 2009), <http://www.forbes.com/2009/06/26/americas-biggest-megachurches-business-megachurches.html>.

⁹¹ SECOND BAPTIST CHURCH (Jan. 2, 2014), <http://www.second.org/Woodway.aspx>. See also, *Top 100 Largest Churches*, OUTREACH MAGAZINE (2008), <http://www.sermoncentral.com/articleb.asp?article=top-100-largest-churches>.

⁹² SECOND BAPTIST CHURCH, *supra* note 91.

⁹³ Bogan, *supra* note 90.

⁹⁴ HAMILTON, *supra* note 6, at 96.

⁹⁵ Johnson, *supra* note 7. “The old concept of a church . . . that people walk to once a week and then go home is a thing of the past . . . being a successful church today means being a growth-oriented, seven-day-a-week operation.” *Id.*

⁹⁶ *Mega Churches Mean Big Business*, *supra* note 89. According to Scott Thumma, professor of sociology and religion at Hartford Seminary, the mega church on average has about \$6.5 million in income a year. *Id.*

V. HOW DISCRIMINATION ACCUSATIONS CAN MASK ACTUAL
DISPUTES UNDER THE RELIGIOUS LAND USE AND
INSTITUTIONALIZED PERSONS ACT

Although the Religious Land Use and Institutionalized Persons Act has been beneficial in many regards, there are times where its use in lawsuits takes away from the actual reason the dispute is being brought forth in the first place. This was seen in Castle Hills, Texas, in *Castle Hills Baptist Church v. City of Castle Hills*.⁹⁷ The plaintiff Castle Hills First Baptist Church filed suit against the defendant City of Castle Hills, challenging the City's denial of special use permits to the Church.⁹⁸ The Church was a non-profit corporation and Christian ministry, which was located on twenty-five acres of property comprised of several buildings and parking lots.⁹⁹ Castle Hills is a Type "A" general law city and is largely a single-family-home community with "a few churches and some commercialization along the major arterials."¹⁰⁰ In the case, the Church wanted to expand its premises and facilities by adding a supplemental parking lot and making use of the fourth story of a building, by way of a special use permit application.¹⁰¹ After some time, the City voted to deny the Church's special use permit application to use the fourth floor of the building, as well as the supplemental parking lot.¹⁰² The Church argued not only that it was being substantially burdened under the RLUIPA, but also that the City's conduct in denying both proposed site changes should be considered religious discrimination.¹⁰³

The Court, however, felt that the Church was not being discriminated against in this case. In regards to the supplemental parking lot, the court noted that the Church enjoyed significant parking in its current lot and that the only burden worked upon the Church is one of "financial cost and inconvenience, as well as

⁹⁷ *Castle Hills First Baptist Church v. City of Castle Hills*, 2004 U.S. Dist. LEXIS 4669 (W.D. Tex. 2004).

⁹⁸ *Id.* at *5.

⁹⁹ *Id.* at *9-10.

¹⁰⁰ *Id.*

¹⁰¹ *Castle Hills First Baptist Church*, 2004 U.S. Dist. LEXIS 4669, at *12.

¹⁰² *Id.* at *15, *22. Referring to the fourth floor of the building, the City denied the Church's request because it conflicted with an original ordinance. *Id.* at *22. In terms of the supplemental parking lot, the City stated that it had "determined that drainage and traffic concerns were not adequately addressed by the Church's plan and that sufficient off-site parking existed to meet the Church's needs . . ." *Id.*

¹⁰³ *Id.* at *50.

the frustration of not getting what one wants.”¹⁰⁴ The Court also addressed the notion of discrimination by disagreeing that the City was being unfair towards the Church by denying their special use permits. The court stated:

[T]his city struggles against size, not religious practice There is no evidence here that the City harbors ill-will toward the Baptist faith or practice or worshipers, nor that the City means by its aggressive zoning decisions to alter or impede the religion in any way. Rather, the City means to halt this Church’s growth, not spiritually, but geographically.¹⁰⁵

In its opinion, the court attempted to point out that just because a church’s special use permit was denied by a city, this does not necessarily lead to the conclusion that religious discrimination was at play. Here, the City had a legitimate concern in balancing the Church’s interest with that of the community’s with regards to growth and expansion, and sometimes the result does not fall in favor of the religious institution. Fair dealing is an important principle in our society and it would be unjust to treat property owners and religious institutions differently when they are situated in the same location. Thus, this case shows how the RLUIPA can sometimes be used unfairly by religious institutions to try to get what they desire.

VI. THE RLUIPA AND ITS EFFECT ON THE COURT SYSTEM

Federal Courts have been split on how to interpret the Religious Land Use and Institutionalized Persons Act’s land use requirements, and specifically the Equal Terms provision.¹⁰⁶ In particular, the Third Circuit, Seventh Circuit, Ninth Circuit, and Eleventh Circuit have differing opinions as to what standard of comparison should be used to determine whether a religious assembly or institution is treated differently from a secular one.

¹⁰⁴ *Id.* at *48.

¹⁰⁵ *Id.* at *54. *See also* HAMILTON, *supra* note 5, at 102.

¹⁰⁶ 42 U.S.C. § 2000cc(b)(1). The Equal Terms Clause states: “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.” *Id.*

This also includes what level of scrutiny to apply to governmental land regulations that do unequally burden religious institutions or assemblies.

The Equal Terms provision of the RLUIPA is broken down into two sections: substantial burdens, and discrimination and exclusion.¹⁰⁷ The substantial burden section provides that:

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.¹⁰⁸

The discrimination and exclusion section of the RLUIPA states:

- (1) No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.
- (2) No government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination
- (3) No government shall impose or implement a land use regulation that
 - a. Totally excludes religious assemblies from a jurisdiction; or
 - b. Unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.¹⁰⁹

¹⁰⁷ 42 U.S.C. § 2000cc.

¹⁰⁸ 42 U.S.C. § 2000cc(a)(1).

¹⁰⁹ 42 U.S.C. § 2000cc(b)(1).

The Equal Terms provision of the Religious Land Use and Institutionalized Persons Act requires equal treatment of secular and religious assemblies and allows courts the freedom to decide whether a particular zoning regulation adopted by a city or municipality departs from requirements of neutrality and general applicability.¹¹⁰ In order to show a violation of the Equal Terms provision of the RLUIPA, the following elements must be met: (1) the plaintiff must be a religious institution; (2) subject to a land use regulation; that (3) treats the religious institution on less than equal terms; with (4) a nonreligious institution.¹¹¹

VII. THE CIRCUIT SPLIT

A. Third Circuit: Lighthouse Inst. For Evangelism, Inc. v. City of Long Branch

Lighthouse Institute for Evangelism, Inc. v. City of Long Branch involved a RLUIPA claim by the plaintiffs concerning whether a municipality may exclude religious assemblies or institutions from a particular zone, where some secular assemblies or institutions are allowed.¹¹² The plaintiffs were the ‘Lighthouse Institute for Evangelism’¹¹³ and its pastor, Reverend Kevin Brown. The City of Long Branch, New Jersey was the defendant. The plaintiffs purchased property that was located within the “C-1 Central Commercial District,” which was subject to the defendant’s land ordinance.¹¹⁴ The ordinance allowed for numerous uses such as restaurants and retail stores, but a church was not one of them.¹¹⁵ The plaintiffs submitted an application for a zoning permit to use the property as a church but the defendants denied the application.¹¹⁶ As a result, the plaintiffs filed suit claiming the ordinance violated the RLUIPA.¹¹⁷

While the issue was being litigated, the defendants further changed the ordinance to strictly limit the use of properties within

¹¹⁰ *Id.* See also *Congregation Rabbinical College of Tartikov, Inc. v. Village of Pomona*, 915 F. Supp. 2d 574 (S.D.N.Y. 2013).

¹¹¹ 42 U.S.C. § 2000cc(b)(1).

¹¹² *Lighthouse Inst. for Evangelism*, 510 F.3d at 256.

¹¹³ *Id.* “Lighthouse Institute for Evangelism” was a Christian church that sought to aid the disadvantaged in Long Branch, New Jersey. *Id.*

¹¹⁴ *Id.* at 257.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Lighthouse Inst. for Evangelism*, 510 F.3d at 256.

the “Broadway Corridor” where the property was located under a redevelopment plan.¹¹⁸ Subsequently, the plaintiffs filed an amended complaint asserting that the ordinance and the redevelopment plan prevented ‘Lighthouse’ from locating in a certain area of downtown Long Branch.¹¹⁹ The plaintiffs argued that the defendant City of Long Branch violated the RLUIPA’s Equal Terms provision by allowing secular assemblies, but not religious ones, to locate in the zones they regulate.¹²⁰

The Third Circuit first touched on the point of whether the plaintiff, in an action under RLUIPA’s Equal Terms provision, must show that the alleged discriminatory land-use regulation imposes a substantial burden on its religious exercise.¹²¹ In deciding this issue, the court turned to the Seventh and Eleventh Circuits, and ruled that a plaintiff need not show a substantial burden on its religious exercise to prevail under the Equal Terms provision.¹²²

Next, the court dealt with whether a plaintiff needed to show that it was similarly situated to a secular comparator that was better treated by comparison.¹²³ The plaintiffs contended that they should only have to show that “the challenged land-use regulation treat[ed] one or more nonreligious assemblies or institutions better than a religious assembly or institution, without regard for the objectives of the regulation or the characters of the secular and religious comparators.”¹²⁴ The court ruled that a regulation violates the Equal Terms provision only if it treats religious assemblies or institutions less well than secular assemblies or institutions that are similarly situated as to the regulatory purpose.¹²⁵ Here, the Third Circuit strayed away from the Eleventh Circuit’s interpretation in *Midrash Sephardi, Inc. v. Town of Surfside*,¹²⁶ stating that if a zoning regulation allows a

¹¹⁸ *Id.* at 258. The redevelopment plan was created to increase employment opportunities and attract more retail and service enterprises. *Id.* It also created new application requirements for development within the area, which included filling out an RFQ (Request for Qualifications), and an RFP (Request for Proposal). *Id.* All property plans needed to be approved by City Council before the property could be developed. *Id.*

¹¹⁹ *Lighthouse Inst. for Evangelism*, 510 F.3d at 256.

¹²⁰ *Id.* at 263.

¹²¹ *Id.*

¹²² *Id.* at 264.

¹²³ *Id.*

¹²⁴ *Lighthouse Inst. for Evangelism*, 510 F.3d at 264.

¹²⁵ *Id.* at 267.

¹²⁶ *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214 (11th Cir. 2004).

secular assembly, all religious assemblies must be permitted.¹²⁷ The Third Circuit felt that this was the correct interpretation based on its past case law:¹²⁸ the court has consistently understood Free Exercise analysis to include an examination of the comparators' relation to the aims of the regulation.¹²⁹

Finally, the Third Circuit addressed the issue of what level of scrutiny to apply to governmental land regulations that do unequally burden religious institutions or assemblies. The court held that a strict liability standard should come into play, rather than a strict scrutiny standard.¹³⁰ This determination was based on an interpretation by the court of the intent of Congress.¹³¹ The Third Circuit believed that Congress clearly signaled its intent that the operation of the Equal Terms provision not include strict scrutiny, as seen in sections 2(a)(1) and 2(b)(1).¹³² Thus, the Third Circuit held that if a land-use regulation treats religious assemblies or institutions on less than equal terms with nonreligious assemblies . . . that regulation—without more—fails under RLUIPA.¹³³

B. Eleventh Circuit: Midrash Sephardi, Inc. v. Town of Surfside

Midrash Sephardi, Inc. v. Town of Surfside involved a RLUIPA claim by two synagogues, Midrash and Young Israel,¹³⁴ against the town of Surfside in Florida.¹³⁵ The synagogues served the Surfside Bal Harbour area of Miami-Dade County, Florida.¹³⁶ Chapter 90 of the Code of the Town of Surfside divided the area into eight zoning districts and set forth specific regulations governing various districts.¹³⁷ Under Article IV of the Code, churches and synagogues were prohibited in seven out of the eight zoning districts.¹³⁸ The one zone in which churches and synagogues were permitted was by way of a conditional use permit

¹²⁷ *Id.* at 268.

¹²⁸ *See, e.g.,* Fraternal Order of Police v. City of Newark, 170 F.3d 359 (3d Cir. 1999); Tenafly Eruv Ass'n v. Borough of Tenafly, 309 F.3d 144 (3d Cir. 2002); Blackhawk v. Pennsylvania, 381 F.3d 202 (3d Cir. 2004).

¹²⁹ *Lighthouse Inst. for Evangelism*, 510 F.3d at 265.

¹³⁰ *Id.* at 269.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Lighthouse Inst. for Evangelism*, 510 F.3d at 269.

¹³⁵ *Midrash Sephardi*, 366 F.3d at 1220.

¹³⁶ *Id.* at 1218.

¹³⁷ *Id.* at 1219.

¹³⁸ *Id.*

and approval by the Surfside Town Commission.¹³⁹ The Code also states that regulations governing the business district are “intended to prevent uses and activities which might be noisy, offensive, obnoxious, or incongruous in behavior, tone or appearance.”¹⁴⁰ Churches and synagogues were prohibited in the business district, while theatres and restaurants were allowed.¹⁴¹

Surfside denied Midrash’s application for a special use permit and their application for a zoning variance to operate in its current location.¹⁴² The plaintiffs brought a claim challenging the Surfside Zoning Ordinance, arguing that it excluded churches and synagogues from locations where private clubs and lodges were permitted.¹⁴³ Thus, the plaintiffs argued that the land regulation violated § (b)(1) of the RLUIPA, that “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.”¹⁴⁴

Turning first towards what constitutes a similarly situated secular comparator, the Eleventh Circuit began by defining assemblies¹⁴⁵ and institutions.¹⁴⁶¹⁴⁷ The court found that the defendant’s land regulation’s definition of a “private club” comported with a natural understanding of the term “assembly”.¹⁴⁸ The court reasoned that like churches and synagogues, private clubs were places in which groups or individuals could meet together to pursue their interest.¹⁴⁹ Thus, churches and synagogues, as well as private clubs, fall within the natural

¹³⁹ *Id.*

¹⁴⁰ *Midrash Sephardi*, 366 F.3d at 1220.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.* at 1219.

¹⁴⁴ 42 U.S.C. § 2000cc(b)(1).

¹⁴⁵ *Midrash Sephardi*, 366 F.3d at 1230. Assembly is defined by the *Midrash Sephardi* court as “a company of persons collected together in one place (usually) and usually for some common purpose.” *Id.*

¹⁴⁶ *Id.* “Institution” is defined by the *Midrash* Court as “an established society or corporation; an establishment or foundation esp. of a public character.” *Id.*

¹⁴⁷ *Id.* The court concluded that section (b)(1) of the Equal Terms provision made clear that the relevant natural perimeter for consideration with respect to RLUIPA’s prohibition is the category of assemblies or institutions; that under RLUIPA, the starting point is to first evaluate whether an entity qualifies as an “assembly or institution.” *Id.*

¹⁴⁸ *Midrash Sephardi*, 366 F.3d at 1231.

¹⁴⁹ *Id.*

perimeter of “assembly or institution.”¹⁵⁰ Because Surfside’s land regulation permitted private clubs and other secular assemblies and excluded religious assemblies even though they fall under the umbrella of “assembly or institution,” the differential treatment constituted a violation of § (b)(1) of RLUIPA.¹⁵¹

The Eleventh Circuit took a different approach than the Third Circuit in regards to the level of scrutiny to be applied. The court first looked to the Supreme Court’s decision in *Employment Division v. Smith*.¹⁵² Although noting that prior to *Smith*, the Supreme Court applied strict scrutiny to cases in which a government discriminated against religion or religious exercise, the court in *Smith* indicated that “the heightened standard of review would continue to apply where a law fails to similarly regulate secular and religious conduct implicating the same government interests.”¹⁵³ The Eleventh Circuit also looked to the case of *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,¹⁵⁴ which had held that city ordinances violated principles of neutrality by improperly targeting religion.¹⁵⁵ The court also found that the ordinances were both underinclusive and overbroad in their suppression of religion and thus, subjected them to strict scrutiny.¹⁵⁶

Using both cases as precedent, the Eleventh Circuit determined that the RLUIPA’s Equal Terms provision codifies the *Smith-Lukumi* line of precedent.¹⁵⁷ The Eleventh Circuit stated that when determining whether a city ordinance or land regulation is in violation of the RLUIPA, courts should look towards whether it departs from requirements of neutrality and general applicability.¹⁵⁸ It found that the synagogues were being treated unfairly in relation to the secular businesses under Surfside’s zoning regulations.¹⁵⁹ Further, that the regulation was over inclusive concerning Surfside’s goals of promoting retail

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Emp’t Div. Dept. of Human Res. v. Smith*, 494 U.S. 872 (1990).

¹⁵³ *Midrash Sephardi*, 366 F.3d at 1232.

¹⁵⁴ *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). Petitioners, the church and its president, applied for zoning approval to establish a church including a ritual of animal sacrifice. *Id.* In response, the city held an emergency meeting and passed an ordinance prohibiting animal sacrifice. *Id.*

¹⁵⁵ *Midrash Sephardi*, 366 F.3d at 1232.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

activity because the synagogues contributed to the retail and commercial activity of the business district.¹⁶⁰ The court concluded that, “a zoning law is not neutral or generally applicable if it treats similarly situated secular and religious assemblies differently^[161] Thus, a violation of 42 USCS § 2000cc’s equal treatment provision . . . must undergo strict scrutiny.”¹⁶²

C. Seventh Circuit: River of Life Kingdom Ministries v. Village of Hazel Crest

In *River of Life Kingdom Ministries v. Village of Hazel Crest*, the Seventh Circuit issued its own ruling on whether a city land regulation unfairly discriminated against churches.¹⁶³ Appellant (River of Life) was a small church in downtown Chicago.¹⁶⁴ River of Life was operating out of a rented space in a small warehouse.¹⁶⁵ The church wanted to relocate to Hazel Crest in the southern suburbs of Chicago, but the building they chose was in a part of town designated by a zoning ordinance as a commercial district.¹⁶⁶ The local zoning ordinance excluded new noncommercial uses from the district, which included churches.¹⁶⁷ River of Life sued under the Equal Terms provision and moved for a preliminary injunction against the enforcement of the zoning ordinance.¹⁶⁸

In determining whether there was a violation of the Equal Terms provision, the Seventh Circuit analyzed the Third and Eleventh Circuits’ respective tests. Looking first at the Eleventh Circuit’s test, the Seventh Circuit believed that their approach was not satisfactory because it would “give religious land uses favored treatment.”¹⁶⁹ In evaluating the Eleventh Circuit’s use of the term “assembly,”¹⁷⁰ the Seventh Circuit argued that it was too broad

¹⁶⁰ *Midrash Sephardi*, 366 F.3d at 1233.

¹⁶¹ The court argued that such unequal treatment indicates that the ordinance improperly targets the religious character of an assembly. *Id.*

¹⁶² *Midrash Sephardi*, 366 F.3d at 1232.

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

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *River of Life*, 611 F.3d at 368.

¹⁶⁹ *Id.* at 369.

¹⁷⁰ *Id.* The Court in *River of Life* feared that the term “Assembly” would be too inclusive of secular land uses such as “factories, nightclubs, zoos, parks, malls, soup kitchens, and bowling alleys.” *Id.*

and would include most secular land uses even though most of them would have different effects on a municipality from a church.¹⁷¹ Essentially, according to the *Midrash Sephardi* court, if a secular assembly such as a movie theatre or restaurant was allowed, a church must be as well.¹⁷² Finally, the *Hazel Crest* court believed that the Eleventh Circuit's test would be too friendly to religious land use and may limit municipal regulation.¹⁷³

Looking next at the Third Circuit's test, the Seventh Circuit criticized its use of the phrase "regulatory purpose."¹⁷⁴ Instead, the court proposed using the idea of "accepted zoning criteria".¹⁷⁵ The Seventh Circuit in *River of Life* determined that the defendant Hazel Crest was applying conventional criteria for commercial zoning when it banned noncommercial land uses, and that the particular zoning decision was actually motivated by a land-use concern that was neutral from a religious standpoint.¹⁷⁶ The court determined that if religious and secular land uses were treated the same from the standpoint of an accepted zoning criterion, that would be enough to rebut an Equal Terms claim.¹⁷⁷

D. Ninth Circuit: Centro Familiar Cristiano Buenas Nuevas v. City of Yuma

In *Centro Familiar Cristiano Buenas Nuevas v. City of Yuma*, the Ninth Circuit most recently weighed in on the Equal Terms provision of the Religious Land Use and Institutionalized Persons Act.¹⁷⁸ In the case, the plaintiffs were a Christian congregation that sued for a declaratory judgment, injunction, and damages, when the City of Yuma, Arizona prevented them from conducting church services in a building they had bought for that purpose.¹⁷⁹ The church had bought a vacant lot to hold services, but the city told the church that it would need a conditional use

¹⁷¹ *Id.* at 370.

¹⁷² *Id.* at 369.

¹⁷³ *River of Life*, 611 F.3d at 371.

¹⁷⁴ *Id.* at 373. The court found that the term "purpose" was too subjective and manipulative. *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 373.

¹⁷⁷ *Id.*

¹⁷⁸ *Centro Familiar Cristiano Buenas Nuevas v. City of Yuma*, 651 F.3d 1163 (9th Cir. 2011).

¹⁷⁹ *Id.* at 1165.

permit to hold services.¹⁸⁰ The Yuma City Code required religious organizations to obtain a conditional use permit to operate in the Old Town District, but “membership organizations could operate in Old Town without a permit.”¹⁸¹ Additionally, the seller was not willing to hold off on selling the property while the permit was sought.¹⁸² Thus, the church had to buy the property knowing that the permit might be denied by the city in order to take advantage of the low selling price.¹⁸³ Ultimately, the City Planning and Zoning Commission denied the conditional use permit because the church would interfere with a “24/7 downtown neighborhood involving retail, residential, office and entertainment.”¹⁸⁴

The court focused on the text of the RLUIPA, specifically in regards to the section stating that “the imposition be ‘on less than equal terms with a nonreligious assembly or institution.’”¹⁸⁵ The court stated that the statute imposes the burden of persuasion on the government, not the religious institution, and that the ordinance established a clear prima facie case for unequal treatment.¹⁸⁶ The court goes on to say that they cannot accept the argument that a “compelling governmental interest” is an exception to the Equal Terms provision, or that the church has the burden of proving a substantial burden under the Equal Terms provision.¹⁸⁷

The court then focused on what the analysis under the Equal Terms provision should be, stating that it should focus on what the term “equal” means in the context.¹⁸⁸ The court believed that when determining if something is equal, it is essential that you look to whether the characteristic or action taken is materially relevant or not.¹⁸⁹ They use the example that “one can legitimately treat a tall person differently from a short person for the purposes of picking a basketball team, but not for the purposes

¹⁸⁰ *Id.* at 1166.

¹⁸¹ *Id.* at 1166-67.

¹⁸² *Id.* at 1167.

¹⁸³ *Centro Familiar Cristiano*, 651 F.3d at 1166.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 1171.

¹⁸⁶ *Id.* at 1171. “If a plaintiff produces prima facie evidence to support a claim alleging a violation of the Free Exercise Clause or a violation of section 2000cc of this title, the government shall bear the burden of persuasion on any element of the claim.” *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Centro Familiar Cristiano*, 651 F.3d at 1172.

¹⁸⁹ *Id.*

of picking a jury.”¹⁹⁰ Similar to the Third Circuit’s analysis, the court states that the city may be able to justify its actions if it can demonstrate that “the less-than-equal terms are on account of a legitimate regulatory purpose, not the fact that the institution is religious in nature.”¹⁹¹ Ultimately, the court found that the ordinance did not justify the exception to religious organizations and clearly treated them on less than equal terms.¹⁹² The court also briefly touched on the scrutiny to be applied, stating that that ordinance must be reasonably well adapted to “accepted zoning criteria, even though strict scrutiny in a Constitutional sense is not required.”¹⁹³

VIII. THE PREFERRED APPROACH

Determining which test courts should apply requires an evaluation of each circuit’s approach, and which is superior. The preferred approach should ultimately be a combination of the Ninth Circuit and Third Circuit’s analysis of the Equal Terms provision, as well as the Third Circuit’s use of “strict liability” when a statute violates that provision.

A. The Approach That Should Be Adopted

A combination of the Third Circuit and Ninth Circuit’s criteria offer the best test that should be adopted as the preferred approach when interpreting the statutory text of the Equal Terms provision.¹⁹⁴ The Ninth Circuit held that a court should focus on what the term “equal” truly means in the context of the situation under the Equal Terms provision.¹⁹⁵ When examining “equality,” it should be properly related to the relevant concern.¹⁹⁶ The Third Circuit held that the relevant analysis that should take place in determining a Free Exercise challenge to a regulation is “between its treatment of certain religious conduct and the analogous secular conduct that has a similar impact on the regulation’s

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.* at 1173, 1175.

¹⁹³ *Centro Familiar Cristiano*, 651 F.3d at 1175.

¹⁹⁴ 42 U.S.C. § 2000cc(b)(1). “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.” *Id.*

¹⁹⁵ *Centro Familiar Cristiano*, 651 F.3d at 1172.

¹⁹⁶ *Id.*

aims.”¹⁹⁷ Thus, a regulation will violate the Equal Terms provision only if it treats religious assemblies or institutions on lesser grounds than secular assemblies or institutions that are “similarly situated as to the regulatory purpose.”¹⁹⁸

Thus, the preferred approach should first examine a land use regulation and determine its impact on the community. Under the Ninth Circuit’s approach, it will be necessary to establish what the “equal terms” are within the land use regulation. This will be important because it will be essential for identifying what parties will ultimately be impacted by the regulation.¹⁹⁹ This makes sense because it directly parallels the idea of the Equal Terms provision, to promote equality between secular and non-secular institutions. Once the equal terms within the land use regulation are established, the Third Circuit’s test will become applicable in determining its purpose and if secular and non-secular institutions are treated unequally. The Third Circuit test makes sense because it is consistent with the intent of Congress to protect and enforce the Free Exercise and Free Speech Clauses.²⁰⁰ The Third Circuit’s test also looks to the impacts that the assemblies have on the regulations purpose and if they are widely disparate, they are not unequal.²⁰¹

This approach is beneficial because of the way that churches and religious institutions are changing and becoming more of a social activity center, rather than a house of worship. For example, the purpose of a zoning ordinance may be to restrict the type of land use in a downtown area to only include businesses, with the exception of a homeless shelter. If a church were placed on the property as opposed to the homeless shelter, there will be a significant increase in the amount of traffic, noise, and congestion. On the other hand, a homeless shelter serves the needs of the community and has little effect on the ordinance. The impact that the two buildings will have on the regulatory purpose of the ordinance is dissimilar so there should be no consideration of unequal treatment on the part of the church.

¹⁹⁷ *Lighthouse Inst. for Evangelism*, 510 F.3d at 266.

¹⁹⁸ *Id.* at 268. The Third Circuit thus concluded that a plaintiff must identify a “better-treated secular comparator that is similarly situated in regard to the objectives of the challenged regulation.” *Id.*

¹⁹⁹ *Centro Familiar Cristiano*, 651 F.3d at 1172. “Equality . . . signifies not equivalence or identity, but proper relation to relevant concerns.” *Id.*

²⁰⁰ *Joint Statement of Sen. Hatch & Sen. Kennedy*, *supra* note 8, at 16699.

²⁰¹ *Lighthouse Inst. for Evangelism*, 510 F.3d at 268.

The Seventh Circuit criticized the Third Circuit's approach by stating that it leaves the door open for speculation and discrimination.²⁰² Instead, they proposed that the problems with the Third Circuit test could be solved by shifting the focus from regulatory purpose to accepted zoning criteria.²⁰³ This argument is not entirely tenable. Although municipalities should not have the ability to overtly discriminate against religious institutions, they should have the opportunity to make decisions in the best interest of the community. This was seen in *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. Lakewood*, in which the court upheld the constitutionality of a municipal zoning ordinance that restricted churches from building in the city.²⁰⁴ The court stated that the city had "legitimately and rationally exercised its police power to preserve a quiet place where yards are wide, people few, and motor vehicles restricted."²⁰⁵ Individuals choose to live in a given community for a reason.²⁰⁶ As such, municipalities should be able to pass zoning ordinances that conform to the interests of the community, as long as they accord equal treatment among secular and religious-based institutions that have a similar impact on a protected interest. If they are dissimilar in purpose, then the Third Circuit correctly points out that there is no reason to think that the ordinance is treating religious institutions unequally.

²⁰² *River of Life*, 611 F.3d at 371. "Use of 'regulatory purpose' as a guide to interpretation invites speculation concerning the reason behind exclusion of churches; invites self-serving testimony by zoning officials and hired expert witness." *Id.*

²⁰³ *Id.*

²⁰⁴ *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. Lakewood*, 699 F.2d 303 (6th Cir. 1983). In the case, the Lakewood, Ohio Congregation of Jehovah's Witnesses challenged the city of Lakewood, Ohio's zoning ordinance, which designated portions of the city for exclusive residential use. *Id.* The Congregation had entered into a contract to buy a lot in the city that was zoned for single-family dwellings. *Id.* The Board of Zoning Appeals denied the Congregation's application for an exception to build a church on the property because it would "create traffic hazards, increase noise levels, potentially decrease property values, and cause various other problems." *Id.* The Court agreed with the city, reasoning that the ordinance did not prohibit the Congregation from worshipping since they could build the church on another piece of property. *Id.*

²⁰⁵ *Id.* at 308.

²⁰⁶ Johnson, *supra* note 7. "People move to the suburbs and to small towns in search of some personal space at a reasonable price People in small towns don't like change They get so used to fighting against commercial and industrial development that a new church is just another big building with a parking lot to them." *Id.*

This idea is also consistent with the notion that municipalities want to act in the best interest of the community by making the city as economically profitable as possible. This is so the city presents itself as an attractive place to live for residents. If a city were to consistently approve special use permits for religious institutions, there would be a hindrance on the amount of businesses within the community, and thus potentially less income for the town to utilize as a result. This would also cause a city to lose tax income, which would increase the burden on taxpayers. A city has a legitimate need to consider its growth and so the interests of religious institutions must be balanced against that of the city.²⁰⁷ Just because a religious institution's special use permit is not granted does not necessarily mean that discrimination is present. This idea was seen in *Lighthouse*, in that revitalizing a downtown area could bring forth new jobs and economic opportunities to an impoverished area. It would allow for a community to rebuild economically, which is something a religious institution may not be able to offer.

Although municipalities do have an interest in generating profit and revenue for their cities, this is not to discount the functions and roles that religious institutions play within the community. To many individuals, churches are considered to be places of guidance and wisdom. They can provide food and shelter to the homeless and help out in the community. However, without continuous business and a thriving economy, there will be no city for the religious institution to locate and build upon. Thus, the significance of the Third Circuit's test for evaluating the regulatory purpose of a given zoning ordinance is apparent: To not necessarily keep religious institutions out of a community, but to make sure that there is actual discrimination at play, or whether it is merely just a community's intention to work for the betterment of its residents.

Therefore, the combination of the Ninth Circuit and Third Circuit ideals are most appropriate to interpret the Equal Terms provision. This test allows a court to easily categorize what the purpose of an ordinance is and whether it is treating a religious institution on equal grounds to a secular one. It also ensures that discrimination is not present within a given zoning ordinance.

²⁰⁷ *Castle Hills First Baptist Church*, 2004 U.S. Dist. LEXIS 4669, at *98.

B. Why The Other Circuit's Approaches Should Not Alternatively Be Adopted

The Eleventh Circuit's interpretation of the Equal Terms provision of the RLUIPA should not be applied. Their interpretation of what constitutes an "assembly" is too broad, and will undoubtedly cause debate over what should fit into this definition for lawmakers creating land regulations. The Eleventh Circuit defined 'assembly' as: "a company of persons collected together in one place (usually) and usually for some common purpose."²⁰⁸ In theory, under this definition any religious institution or assembly can locate wherever they please, as long as there is a secular institution that is also allowed in the same area. The Third Circuit commented that this reasoning would be contrary to the intent of Congress, as well as to the text of the statute.²⁰⁹ Additionally, the Seventh Circuit pointed out that under this standard, the definition of "assembly" would encompass a wide range of secular land uses that have different effects on a city or municipality.²¹⁰

Similarly, the Seventh Circuit's approach to interpreting the Equal Terms provision should not be adopted because using an "accepted zoning criteria" standard still allows for municipalities to discriminate against religious institutions. Although the intention of applying this standard is to classify property lots for specific zoning regulations, it still allows for municipalities to change the zoning ordinance once the religious assembly applies for a use permit. This was seen in *River of Life*, when the town amended the zoning ordinance to exclude new noncommercial uses for the district.²¹¹

The Ninth and Third Circuit's interpretation of the Equal Terms provision is superior to the Seventh and Eleventh Circuits. Unlike the Eleventh Circuit, whose interpretation is very broad

²⁰⁸ *Midrash Sephardi*, 366 F.3d at 1230.

²⁰⁹ *Lighthouse Inst. for Evangelism*, 510 F.3d at 268. The Third Circuit gave the following example to depict why the Eleventh Circuit reasoning is too broad:

If a town allows a local, ten-member book club to meet in the senior center, it must also permit a large church with a thousand members . . . to locate in the same neighborhood regardless of the impact such a religious entity might have on the envisioned character of the area. *Id.*

²¹⁰ *River of Life*, 611 F.3d at 370.

²¹¹ *Id.* at 368.

and would encompass land uses for secular organizations that have any numbers of effects on the community, the Ninth Circuit looks at what equality means with respect to the situation at hand and whether or not it is materially relevant.²¹² The Third Circuit requires that a plaintiff show that it was treated less well than a nonreligious comparator that had a negative impact that was comparable. This interpretation is a much more realistic threshold to meet because a regulation is not necessarily unequal just because it allows for different behaviors between religious and secular institutions. Also, unlike the Seventh Circuit, the Third Circuit's test allows for a much more objective standard. This is because the Third Circuit looks to the regulation's purpose on its face, so its objective is easily identified. On the other hand, the Seventh Circuit's use of accepting zoning criteria leaves room for municipalities to change the ordinance as they see fit.

Further, municipalities have an interest in maintaining a profitable economy that will attract new residents to the town. Under the Eleventh Circuit's test, by allowing one religious institution to establish itself in the municipality because there is a secular comparator, this could potentially open the floodgates for numerous others to locate within it as well. This repercussion could disrupt the fundamental goals of a town to provide business and revenue to its residents. Thus, the Eleventh Circuit's approach should not be adopted.

C. What Level of Scrutiny Should be Applied

The final issue to decide is what level of scrutiny courts should apply under the Equal Terms provision. The *Midrash* court argued that a strict scrutiny standard should be applied because this falls in line with legislative history.²¹³ The court believed that the Equal Terms provision of the RLUIPA codified the *Smith-Lukumi* line of precedent, stating that:

[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. Thus, a violation of § (b)'s equal treatment provision,

²¹² *Centro Familiar Cristiano*, 651 F.3d at 1172.

²¹³ *Midrash Sephardi*, 366 F.3d at 1232.

consistent with the analysis employed in *Lukumi*, must undergo strict scrutiny.²¹⁴

However, courts should not follow the *Midrash Sephardi* standard because this is inconsistent with Congress' intent.

Courts should instead follow the Third Circuit's strict liability standard when interpreting the Equal Terms provision, as opposed to the strict scrutiny standard, and interpret the statute in a strictly textual manner. Under a strict liability standard, if a land-use regulation treats religious institutions on less favorable grounds than nonreligious institutions that are no less harmful to the regulatory objective, that without more, the regulation fails. As the court in *Lighthouse Institute* noted, a strict scrutiny provision already exists under section 2(a) of the Substantial Burdens section, and there is a clear divide between claims that fall under 2(a) and 2(b).²¹⁵ Thus, Congress' intent seems to be clear since a strict scrutiny standard exists only under 2(a), and section 2(b) is silent on the matter. Further, using a strict liability standard still limits the discretion of municipalities to potentially pass discriminatory zoning ordinances, and at the same time still protects religious institutions. Reading the Equal Terms provision in a strictly textual manner will prevent any discrepancy over its text, which will work to the benefit of religious institutions. Thus, the preferred approach should be to apply a strict liability standard over a strict scrutiny standard.

IX. CONCLUSION

The split among the circuits over how to interpret the Equal Terms provision of the Religious Land Use and Institutionalized Persons Act of 2000 seems to be ongoing and continuous. Thus, there is a necessity for Congress or the Supreme Court to state a universal approach that courts can look to as guidance when deciding issues relating to the RLUIPA. A combination of the Ninth Circuit and Third Circuit approaches offer the best way for courts to interpret the Equal Terms provision. By analyzing the land use regulation and determining what the "equal terms" are within it, followed by an evaluation of its regulatory purpose, courts can have a clear way of identifying whether secular and non-secular institutions are treated equally.

²¹⁴ *Id.*

²¹⁵ *Lighthouse Inst. for Evangelism*, 510 F.3d at 269.

If a land use regulation is found to be in violation of the Equal Terms provision, courts should then apply a strict liability standard consistent with the Third Circuit's approach. Not only is an application of strict liability consistent with Congress' intent, it also assists in preventing discrimination by municipalities against religious institutions.

Without a universal approach for courts to look to, religious institutions may continue to be disadvantaged by the various and differing tests that are in place throughout the judicial system. The need for consistency becomes more urgent as municipalities look to build and expand their towns, and face ever-increasing pressures to build a profitable infrastructure. Accordingly, the Third and Ninth Circuit's approaches should be followed to alleviate any future discrepancies towards religious institutions.