COMMENT

When Religion and Land Use Regulations Collide: Interpreting the Application of RLUIPA's Equal Terms Provision

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The Religious Land Use and Institutionalized Persons Act ("RLUIPA") aims to protect the religious liberties of individuals and assemblies facing land use restrictions. However, local governments across the nation struggle to draft adequate land use regulations because federal circuit courts have split over the seemingly straightforward language of RLUIPA's provisions. A uniform and clear interpretation of RLUIPA is crucial to resolve two important issues. The first issue concerns how to establish equal treatment between religious and secular assemblies. The second issue is whether strict scrutiny applies to laws that fail to do so.

This Comment provides the first comprehensive examination of these issues within the split between the Eleventh and Ninth Circuits over RLUIPA's equal terms provision. By analyzing statutory interpretation, congressional intent, and public policy, this Comment concludes that the Ninth Circuit is correct in holding that RLUIPA only requires equal treatment between assemblies that are similar in size, purpose, and impact for land use purposes. Furthermore, strict scrutiny does not apply in an equal terms provision challenge. Following this clear interpretation of

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RLUIPA is crucial for courts to analyze an equal terms challenge accurately. In addition, this approach provides a safeguard on the American conception of a free society by balancing local government control and religious freedom.

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INTRODUCTION

Across the United States, a new religion called Anychurch developed a strong following after several celebrity sightings at Anychurch events.[1] As the religion gained popularity, residents of a small suburban neighborhood in Anytown, California formed a local congregation to worship according to Anychurch beliefs.[2] The congregation quickly grew from a 50-member group into a 1,000-member religious institution that housed members, offered educational courses, and even included a cafe. Eventually, the rapid growth of the congregation harmed the neighborhood. Property values depreciated because of congestion, and parked cars lined the neighborhood streets. Neighbors pushed for government action to remedy the problem by urging new land use laws to limit the size of organizations in local neighborhoods. The resulting regulation required any religious or secular organization with more than 100 members to meet outside a residential area.[3] While Anytown has the right to impose land use regulations, the regulations must conform to the requirements of federal law. In particular, land used regulations are subject to the Religious Land Use and Institutionalized Persons Act ("RLUIPA").[4]

[1] Hypothetical scenario developed from the increasingly popular celebrity sightings at the Scientology Celebrity Center in Los Angeles, California. *See generally* Courtney Hazlett, *Will Smith, Jada the New Faces of Scientology?*, MSNBC (Mar. 17, 2008), http://www.today.com/id/23664621/site/todayshow/ns/today-entertainment/t/will-smith-jada-new-facesscientology/#.UP8VtaFU5EB (describing recent celebrity sightings including: Will Smith, Kirstie Alley, Lisa Marie Presley, Greta Van Susteren, Tom Cruise, and the voice of Bart Simpson, Nancy Cartwright).

[2] Hypothetical also based on a situation in Bellmore, New York, where a small local church quickly established a large following. Neighborhood opposition to the church grew and the residents proposed new zoning legislation to limit churches in the area. *See, e.g.*, Michael Ganci, *Bellmore Church Goes to Court Tuesday to Address Violations*, BELLMOREPATCH (Aug. 12, 2012), *available at* http://bellmore.patch.com/groups/business-news/p/bellmore-church-goes-to-court-tuesday-to-address-violations (noting local opposition to the Walk in Love for Jesus Church because of decreased property value claims).

[3] Regulation developed from an existing hypothetical about a 10-person book club and a 1,000-member church, which circuit court cases and commentators discuss. *See* Centro Familiar Cristiano Buenas Nuevas v. City of Yuma, 651 F.3d 1163, 1172 (9th Cir. 2011) (discussing the Third Circuit's book club example); Sean Foley, *RLUIPA's Equal-Terms Provision's Troubling Definition of Equal: Why the Equal-Terms Provision Must Be Interpreted Narrowly*, 60 U. KAN. L. REV. 193, 225-26 (2010) (describing the ten person book club example as a potentially "bizarre result" of RLUIPA's application).

[4] *See, e.g.*, Religious Land Use and Institutionalized Persons Act (RLUIPA) of 2000, 42 U.S.C. § 2000cc (2000) (stating that land use regulations cannot

RLUIPA aims to protect the religious liberties of individuals and assemblies facing land use restrictions.[5] However, because federal circuit courts have split regarding RLUIPA's land use requirements, Anytown's new regulation may or may not comply with RLUIPA. Local governments across the nation face difficulty when drafting land use regulations because courts have struggled to interpret the seemingly clear language of RLUIPA's provisions.[6]

In particular, courts have split on two important issues concerning the requirement that land use restrictions place religious and secular assemblies on equal terms. The first issue concerns the burden of proof of a RLUIPA violation by establishing unequal treatment between religious and secular assemblies.[7] The second issue is determining the level of scrutiny appropriate for reviewing instances of unequal treatment.[8]

The Ninth Circuit and the Eleventh Circuit have reached contrary interpretations of the equal terms provision within RLUIPA.[9] In

substantially burden religious expression unless the government can satisfy strict scrutiny review); Tokufumi J. Noda, *Incommensurable Uses: RLUIPA's Equal Terms Provision and Exclusionary Zoning in* River of Life Kingdom Ministries v. Vill. of Hazel Crest, Ill., 52 B.C. L. REV. E-SUPP. 71, 71-72 (2011) (arguing that the Seventh Circuit put control over religious zoning into the hands of the courts).

[5] *See* 42 U.S.C. § 2000cc(a)(1); *see also* 146 CONG. REC. 16,622 (daily ed. July, 2000) (statement of Rep. Canady) (asserting that RLUIPA uses congressional authority to protect the right to gather and worship for religious purposes).

[6] *See, e.g.*, Matthias Kleinsasser, *RLUIPA's Equal Terms Provision and the Split Between the Eleventh and Third Circuits*, 29 REV. LITIG. 163, 163-64 (2009) (stating that a circuit split has developed between the Eleventh and the Third Circuits regarding RLUIPA's Equal Terms provision); Daniel P. Lennington, *Thou Shalt Not Zone: The Overbroad Applications and Troubling Implications of RLUIPA's Land Use Provisions*, 29 SEATTLE U. L. REV. 805, 816 (2006) (stating that RLUIPA's overbroad drafting has caused overbroad applications by courts); Alan C. Weinstein, *The Effect of RLUIPA's Land Use Provisions on Local Governments*, 39 FORDHAM URB. L.J. 1221, 1242 (2012) (noting that local governments face additional barriers during land use regulation because of RLUIPA).

[7] *See, e.g.*, Sarah Keeton Campbell, *Restoring RLUIPA's Equal Terms Provision*, 58 DUKE L.J. 1071, 1074 (2009) (explaining that the first equal terms issue involves establishing equal treatment comparison factors); Lennington, *supra* note 6, at 815 (describing RLUIPA's provision that prohibits "discrimination and exclusion"). *See generally* Noda, *supra* note 4, at 73 (describing how circuit courts have struggled to apply the equal terms provision when comparing assemblies and deciding the level of scrutiny).

[8] *See* Campbell, *supra* note 7, at 1074.

[9] *Compare* Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1230-31 (11th Cir. 2004) (adopting a broad interpretation of the equal terms provision and definition of assembly), *with* Centro Familiar Cristiano Buenas Nuevas v. City of Yuma, 651 F.3d 1163, 1173 (9th Cir. 2011) (adopting a tailored RLUIPA application

Midrash Sephardi, Inc. v. Town of Surfside, the Eleventh Circuit took a literalist approach when interpreting the equal terms provision.[10] This literalist approach requires governments to treat all religious and secular assemblies equally, regardless of size, purpose, or community impact.[11] The Eleventh Circuit determined that strict scrutiny is the appropriate test for reviewing violations of RLUIPA.[12] Conversely, in *Centro Familiar Cristiano Buenas Nuevas v. City of Yuma*, the Ninth Circuit took a similarly situated approach to the equal terms provision.[13] The similarly situated approach only compares religious and secular assemblies that are similar in size, purpose, and impact for regulatory land use purposes.[14] Laws that cause unequal treatment between similarly situated assemblies, rather than all assemblies, violate RLUIPA and are not subject to a strict scrutiny analysis.[15]

This Comment finds that the Ninth Circuit is correct in holding that RLUIPA only requires equal treatment between similarly situated religious and secular assemblies. Part I describes the historical background of RLUIPA by examining the relevant cases and statutes surrounding the free exercise of religion. Part II further introduces the circuit split between the Ninth and Eleventh Circuits and explains each court's reasoning. Finally, Part III argues that the Ninth Circuit correctly interprets the equal terms provision by requiring a similarly situated approach. First, statutory interpretation of the equal terms provision requires a narrowly tailored, similarly situated analysis when comparing religious and secular assemblies. Proper statutory

that focuses on similarly situated assemblies). Other circuits also disagree as to aspects of the equal terms provision. This Comment does not examine other circuit decisions because their analyses are very similar to those of the Eleventh and Ninth Circuits.

[10] *See generally Midrash*, 366 F.3d at 1230-31 (outlining the Eleventh Circuit's application of RLUIPA's equal terms provision).

[11] *See id.* at 1231 (noting the Eleventh Circuit's interpretation of a common purpose). The text of RLUIPA's equal terms provision actually uses the terms "assembly" and "institution". In the interest of space and in an effort to avoid repetitiveness, this Comment uses the term "assembly" to represent both "assembly" and "institution". RLUIPA and the court opinions do not distinguish between the two terms to warrant a constant reference to both.

[12] *See Midrash*, 366 F.3d at 1232.

[13] *See generally Centro Familiar*, 651 F.3d at 1172-73 (outlining the Ninth Circuit's application of RLUIPA's equal terms provision).

[14] *See id.* (discussing the Ninth Circuit's analysis of size, purpose, and impact when examining a potential equal terms violation). *See generally* Guru Nanak Sikh Soc'y of Yuba City v. Cnty. of Sutter, 456 F.3d 978, 983-84 (9th Cir. 2006) (noting that traffic, property values, effect on surrounding land, and coherent development plan are factors courts should consider in determining whether to grant a CUP).

[15] *See Centro Familiar*, 651 F.3d at 1175.

interpretation also indicates that strict scrutiny does not apply to the equal terms provision. Second, the similarly situated approach, absent strict scrutiny, fulfills congressional intent by guaranteeing truly equal treatment between religious and secular assemblies. Finally, a similarly situated approach promotes public policy concerns of community growth and effectively safeguards the freedom of religious assemblies and local governments.

I. BACKGROUND

Over the past fifty years, Congress and the Supreme Court have battled to determine the extent to which the government may protect religious liberties.[16] Congress has consistently tried to increase protection for religious exercise.[17] However, the Supreme Court has continually questioned Congress's ability to promote religious liberties under the First Amendment.[18] The First Amendment's Free Exercise Clause prevents the government from interfering with an individual's practice of any chosen religion.[19] In contrast, the Establishment Clause prohibits the government from establishing or endorsing any religion.[20] The Supreme Court has actively monitored Congress and aimed to confine the limits of legislative power within both First Amendment religion clauses.[21] RLUIPA represents the most recent

[16] *See generally* Cutter v. Wilkinson, 544 U.S. 709, 714 (2005) (noting that RLUIPA is the latest congressional effort to accord heightened protection for religious exercise); Campbell, *supra* note 7, at 1076-77 (highlighting the history of the free exercise jurisprudence that led to RLUIPA); Foley, *supra* note 3, at 196 (explaining the battle between Congress and the Supreme Court over religious protections).

[17] *See, e.g.*, *Cutter*, 544 U.S. at 714-16 (outlining past congressional efforts to heighten protections for religious exercise); Campbell, *supra* note 7, at 1076-77 (noting that RLUIPA is the "latest chapter in a ten-year struggle between Congress and the Court" over religious exercise regulation); Foley, *supra* note 3, at 196 (stating that legislative bodies have consistently provided increased religious protections).

[18] *See, e.g.*, sources cited *supra* note 17 (discussing the historical conflict between the Supreme Court and Congress regarding religious exercise protections).

[19] *See* U.S. CONST. amend. I. *See generally* Foley, *supra* note 3, at 195 (arguing that the religion clauses of the First Amendment conflict with each other); Patricia E. Salkin & Amy Lavine, *The Genesis of RLUIPA and Federalism: Evaluating the Creation of a Federal Statutory Right and Its Impact on Local Government*, 40 URB. LAW. 195, 196 (2008) (arguing that the religion clauses of the First Amendment simultaneously prevent the government from establishing religion and from prohibiting its free exercise).

[20] *See* Salkin & Lavin, *supra* note 19, at 196.

[21] See *generally* Church of Lukumi Babalu Aye v. Hialeah, 508 U.S. 520, 569 (1993) (Souter, J., concurring) (explaining that principles of religious conduct may regulate laws only if the conduct poses a substantial threat to public safety); Frederick

congressional effort to protect religious liberties in the increasingly regulated land use context.[22] However, the road to RLUIPA was a long struggle, marked by important Supreme Court decisions and congressional legislative efforts.[23]

A. Sherbert v. Verner

Until recently, courts evaluated all laws that infringed on religious liberty under the balancing test established by the Supreme Court in *Sherbert v. Verner*.[24] *Sherbert* concerned a Seventh-day Adventist who lost her job for refusing to work on Saturdays, as required by her faith.[25] The state denied the plaintiff unemployment benefits because she had no legitimate cause for refusing to work.[26] The Court held that the state action improperly placed a substantial burden on the plaintiff's religious practice, violating the Free Exercise Clause.[27]

After determining that the termination involved a substantial burden on religious practice, the Court found that regulations involving the Free Exercise Clause required strict scrutiny.[28] Strict scrutiny mandates that the government may not substantially burden religious exercise without demonstrating that the burden furthers a compelling

Mark Gedicks, *The Normalized Free Exercise Clause: Three Abnormalities*, 75 IND. L.J. 77, 82-83 (2000) (stating that the Supreme Court has refused to recognize a free exercise right to exemptions throughout history).

[22] *See generally* Bram Alden, *Reconsidering RLUIPA: Do Religious Land Use Protections Really Benefit Religious Land Users?*, 57 UCLA L. REV. 1779, 1806 (2010) (stating that the Free Exercise and Establishment Clauses render RLUIPA's substantial burden and equal terms provisions somewhat redundant and unnecessary); Terry M. Crist III, *Equally Confused: Construing RLUIPA's Equal Terms Provision*, 41 ARIZ. ST. L.J. 1139, 1166 (2009) (explaining the redundancies and complications associated with RLUIPA); Roman P. Storzer & Anthony R. Picarello, Jr., *The Religious Land Use and Institutionalized Persons Act of 2000: A Constitutional Response to Unconstitutional Zoning Practices*, 9 GEO. MASON L. REV. 929, 930 (2001) (stating that RLUIPA protects land uses similarly to the First and Fourteenth Amendments).

[23] *See generally* Campbell, *supra* note 7, at 1076 (outlining the history of religious freedom legislation in the United States).

[24] Sherbert v. Verner, 374 U.S. 398, 406 (1963); *see, e.g.*, Anthony Lazzaro Minervini, *Freedom from Religion: RLUIPA, Religious Freedom, and Representative Democracy on Trial*, 158 U. PA. L. REV. 571, 578 (2010) (stating that courts applied *Sherbert* until 1988).

[25] *See Sherbert*, 374 U.S. at 399.

[26] *See id.* at 400-01.

[27] *See id.* at 408-10.

[28] *See, e.g.*, Minervini, *supra* note 24, at 578 (outlining *Sherbert*'s factual record and its holding).

governmental interest.[29] The Court found that the state's denial of unemployment benefits failed strict scrutiny.[30] The state's interests in withholding unemployment funds and preventing the mere possibility of fraudulent unemployment claims did not outweigh the religious burdens imposed on individuals.[31] Therefore, the Court established the *Sherbert* test, which prevents governments from applying a law in a manner that substantially burdens an individual's religious liberty.[32]

B. Employment Division v. Smith

Although *Sherbert* protected employees by recognizing religious liberties, courts still debated the interpretation of the Free Exercise Clause. In 1990, *Employment Division v. Smith* rejected the *Sherbert* test as applied to neutral and generally applicable laws.[33] *Smith* found that under the Free Exercise Clause, laws can burden religion so long as they apply to everyone and do not specifically target religious practices.[34]

Smith brought an action against the state of Oregon for denial of unemployment benefits after his job termination for using the controlled substance peyote.[35] Smith used peyote for religious practices.[36] The state refused Smith unemployment benefits because a state statute disqualified employees from benefits if the termination was due to work-related misconduct.[37] The state considered Smith's use of peyote as a work-related misconduct.[38] The Supreme Court determined that strict scrutiny was inapplicable and upheld the state

[29] *See, e.g.*, *id.* (describing strict scrutiny as applied in *Sherbert*).

[30] *See id.*

[31] *See, e.g.*, *id.* (holding that the state did not demonstrate a compelling governmental interest).

[32] *See, e.g.*, Campbell *supra* note 7, at 1076-77 (discussing *Sherbert*'s holding); Foley, *supra* note 3, at 197 (stating that *Sherbert* applied strict scrutiny); Adam J. MacLeod, *Resurrecting the Bogeyman: The Curious Forms of the Substantial Burden Test in RLUIPA*, 40 REAL EST. L.J. 115, 167 (2011) (stating that *Sherbert*'s balancing applied only "in a context that lent itself to individualized governmental assessment of the *reasons* for the relevant conduct").

[33] Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 921 (1990); *see* Foley, *supra* note 3, at 197.

[34] *See, e.g.*, Foley, *supra* note 3, at 197 (stating that the Constitution permits laws that burden religion so long as everyone is burdened equally and the law does not single out specific religious practices).

[35] *See Smith*, 494 U.S. at 874.

[36] *See id.* at 875.

[37] *See id.* at 874.

[38] *See id.*

statute.[39] The Free Exercise Clause did not prevent the government from establishing neutral laws of general applicability that only incidentally affect religious liberty.[40] A regulation is permissible as long as it does not specifically aim to burden a religious practice.[41] In this case, the Court found that the state statute was constitutional because the statute applied to all employees equally and did not target religion.[42] Therefore, *Smith* refused to apply strict scrutiny in situations where neutral laws only incidentally burden religious practices.[43]

Following the *Smith* approach, neutral laws that generally apply to everyone must survive rational basis review.[44] This level of judicial review requires that the government have a rational basis for imposing a law.[45] As long as the law does not specifically aim to burden a religious practice and meets the rational basis standard, the law is constitutional.[46] Therefore, *Smith* upheld the state's decision to refuse unemployment benefits based on a violation of a neutral law that incidentally burdened religion.[47]

C. Religious Freedom Restoration Act

In response to *Smith*'s narrow protection of religion, Congress attempted to limit the Supreme Court's decision and create greater protections for religious practices.[48] In 1993, Congress enacted the Religious Freedom Restoration Act ("RFRA") with the express purpose of increasing religious liberties.[49] RFRA prohibited the

[39] *See* Minervini, *supra* note 24, at 573.

[40] *See* Foley, *supra* note 3, at 197.

[41] *See, e.g.*, *id.* (quoting *Smith*).

[42] *See, e.g.*, *id.* (quoting *Smith*).

[43] *See, e.g.*, Campbell, *supra* note 7, at 1077 (stating that *Smith* required that generally applicable laws need only survive rational basis review); Foley, *supra* note 3, at 197 (quoting *Smith*).

[44] *See, e.g.*, Campbell, *supra* note 7, at 1077 (describing how under *Smith*, neutral and generally applicable laws only need to pass rational basis review, regardless of whether the laws infringe on religious liberties).

[45] *See, e.g.*, Minervini, *supra* note 24, at 573 (explaining how *Smith* compelled lower courts to apply rational basis review to "generally applicable" laws).

[46] *See, e.g.*, Campbell, *supra* note 7, at 1077 (discussing *Smith*'s effect of upholding generally applicable laws that only incidentally restrict religious exercise).

[47] *See* Emp't Div., Dep't of Human Res. of Or. v. Smith, 492 U.S. 872, 878, 890 (1990).

[48] *See* Campbell, *supra* note 7, at 1077; Crist, *supra* note 22, at 1145.

[49] *See* Religious Freedom Restoration Act (RFRA) of 1993, Pub. L. No. 103-141, 1993 U.S.C.C.A.N. (107 Stat.) 1488, *invalidated by* City of Boerne v. Flores, 521 U.S.

government from substantially burdening an individual's exercise of religion, even if the burden resulted from a neutral law of general applicability.[50] RFRA incorporated the *Sherbert* balancing test and restored strict scrutiny for all laws that substantially burdened religious exercise.[51] Like *Sherbert*, RFRA required the government to prove that a burden on religion was the least restrictive means available to achieve a compelling governmental interest.[52] RFRA applied to all federal, state, and local governments, even if a regulation was neutral and generally applicable.[53] However, the Supreme Court recognized RFRA as an attempt to counteract *Smith*'s incidental burden exception and did not welcome congressional efforts to circumvent the decision.[54]

D. Boerne v. Flores

Only four years after Congress enacted RFRA, the Supreme Court struck down the law's application to state and local governments.[55] While RFRA still applies to federal government regulations, in *City of Boerne v. Flores*, the Court held that Congress exceeded its authority to regulate states.[56] The Court found that RFRA impermissibly expanded the Constitution's Free Exercise right by restricting state and local regulations.[57] RFRA's strict scrutiny requirement was an improper congressional remedy for protecting religious liberties because Congress overstepped its power by altering a constitutional right.[58] *Smith* had established that rational basis applied to all laws, unless the law specifically burdened religion.[59] Therefore, Congress

507 (1997).

[50] *See id.*

[51] *See, e.g.*, Foley, *supra* note 3, at 198 (noting that RFRA restored strict scrutiny for all laws that substantially burdened religious exercise); Daniel Kazhdan, *How Jewish Laws of Resistance Can Aid Religious Freedom Laws*, 100 CALIF. L. REV. 1069, 1070 (2012) (noting that RFRA restored the pre-*Smith* balancing test).

[52] *See Boerne*, 521 U.S. at 515-16 (reciting RFRA's requirements).

[53] *See id.*

[54] *See id.* at 534; Campbell, *supra* note 7, at 1078; Foley, *supra* note 3, at 199 (noting the Supreme Court's quick action to strike down RFRA).

[55] Campbell, *supra* note 7, at 1078; Foley, *supra* note 3, at 199.

[56] *Boerne,* 521 U.S. at 536; *see* Campbell, *supra* note 7, at 1078.

[57] *See Boerne*, 521 U.S. at 519, 532 (holding that legislation that alters the meaning of the Free Exercise Clause is unenforceable because Congress does not have the power to alter constitutional rights).

[58] *See id.* at 533-34.

[59] *See* Minervini, *supra* note 24, at 573.

could not sidestep *Smith* by requiring strict scrutiny for neutral and generally applicable laws.[60]

E. Religious Liberty Protection Act

Despite *Boerne,* Congress continued efforts to avoid the *Smith* holding and extend protection for religious practices.[61] Just three weeks after *Boerne*, Congress attempted to protect religious practices in more specific circumstances by addressing religious zoning discrimination against churches.[62] To avoid another finding of unconstitutionality, Congress drafted a more narrowly tailored statute than RFRA to address this discrimination.[63]

Congress's first attempt at restoring religious liberties in the land use context was the Religious Liberty Protection Act ("RLPA").[64] RLPA essentially echoed the protections offered by RFRA, except that Congress relied on a different constitutional power as a basis for passing the Act.[65] However, RLPA faced opposition within Congress and subsequently did not pass into law.[66]

F. Religious Land Use and Institutionalized Persons Act

After failed attempts to establish legislation that successfully protected religious practices, Congress finally passed RLUIPA, a narrower religious freedom bill, on September 22, 2000.[67] Contrary to RFRA's application to all state and federal laws that burden religion, RLUIPA is much more specific in application.[68] In the context of land

[60] *See Boerne*, 521 U.S. at 532, 534 (noting that RFRA provides sweeping coverage that exceeds congressional power); Foley, *supra* note 3, at 199.

[61] *See* Foley, *supra* note 3, at 199; Michael Paisner, *Boerne Supremacy: Congressional Responses to* City of Boerne v. Flores *and the Scope of Congress's Article I Powers*, 105 COLUM. L. REV. 537, 541 (2005) (describing how *Boerne* did not halt congressional efforts to increase religious liberties).

[62] *See* Foley, *supra* note 3, at 199 (explaining that Congress disagreed with the decision in *Bourne* and immediately began working on new legislation to increase religious protections).

[63] *See id.*

[64] *See id.*

[65] *See id.*

[66] *See* Crist, *supra* note 22, at 1146 (noting that RLPA encountered considerable opposition from Congress and did not pass).

[67] Religious Land Use and Institutionalized Persons Act (RLUIPA) of 2000, 42 U.S.C. § 2000cc (2012); *see, e.g.*, Foley, *supra* note 3, at 199 (noting that RLUIPA is a more limited and focused version of RLPA).

[68] *See* Caroline R. Adams, *The Constitutional Validity of the Religious Land Use and Institutionalized Persons Act of 2000: Will RLUIPA's Strict Scrutiny Survive the Supreme*

use regulations, RLUIPA specifically prohibits the government from influencing religious freedom.[69] RLUIPA protects the right to assemble and worship free from burdensome state and local government interference.[70] First, RLUIPA prohibits land use regulations that substantially burden religious liberty.[71] Second, RLUIPA prohibits land use regulations that unequally treat, discriminate against, exclude, or unreasonably limit religious groups.[72] The equal terms provision appears in the second category of protections.[73] This provision is a point of contention among courts because its application is unclear and susceptible to different interpretations.[74]

II. THE CIRCUIT SPLIT REGARDING THE EQUAL TERMS PROVISION

Because Congress did not clearly define RLUIPA's equal terms provision, courts have split on two important issues that arise in the equal terms context. The first issue concerns which groups to compare when determining unequal treatment.[75] This issue involves whether to compare religious assemblies to all secular assemblies, or only to secular assemblies that share similar characteristics.[76] The second issue involves the appropriate level of scrutiny for reviewing unequal treatment.[77]

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

In *Midrash*, the Eleventh Circuit held that a zoning law allowing private assemblies in a business district but prohibiting synagogues

Court's Strict Scrutiny?, 70 FORDHAM L. REV. 2361, 2376 (2002).

[69] *See* 146 CONG. REC. 16,622 (daily ed. July 27, 2000) (statement of Rep. Canady) (asserting that RLUIPA uses Congress's authority to protect religious freedoms); Crist, *supra* note 22, at 1147.

[70] *See* Crist, *supra* note 22, at 1147.

[71] *See* 42 U.S.C. § 2000cc(a)(1); Foley, *supra* note 3, at 200-01 (noting that the substantial burden provision affords the strongest protections under RLUIPA to prohibit land use regulations).

[72] *See* 42 U.S.C. § 2000cc(b)(1)-(3); Noda, *supra* note 4, at 71.

[73] *See* 42 U.S.C. § 2000cc(b)(1).

[74] *See* Kleinsasser, *supra* note 6, at 163-64.

[75] *See* Campbell, *supra* note 7, at 1074 (explaining that the first equal terms issue involves establishing equal treatment comparison factors); Lennington, *supra* note 6, at 814-15. *See generally* Foley, *supra* note 3, at 194 (explaining that the equal terms provision "attempts to force municipalities to treat religious assemblies equally as compared to other assemblies in land use decisions").

[76] *See* Campbell, *supra* note 7, at 1074.

[77] *See id.*

violated the equal terms provision.78 Regarding the first issue of determining equal treatment, the court found that the equal terms provision requires a literalist approach that compares all religious and secular assemblies.[79] Concerning the second issue of appropriate scrutiny level, the court applied strict scrutiny to laws that potentially violated the equal terms provision.[80]

Midrash involved a RLUIPA claim filed by two Orthodox Jewish synagogues against the Florida town of Surfside.[81] The town prohibited churches and synagogues within the business district, but allowed private social assemblies in the district.[82] The synagogues asserted that Surfside's zoning ordinance violated RLUIPA's equal terms provision.[83] The district court granted summary judgment in favor of Surfside against the synagogues' RLUIPA claim, finding no equal terms violation.[84] The synagogues appealed.[85]

On appeal, the Eleventh Circuit reversed the district court's decision.[86] The court addressed the first issue of whether synagogues are comparable assemblies to all private secular clubs.[87] If synagogues are on equal terms with secular clubs, then the city must allow synagogues in the business district, just like secular organizations.[88] For an equal terms comparison, *Midrash* found that the first step is to determine whether an entity meets the qualifications for an assembly.[89] RLUIPA's equal terms comparison only applies to assemblies.[90] After noting that RLUIPA does not define assembly, the Eleventh Circuit considered the literal dictionary definition of the term.[91] The dictionary defines assembly as any group gathered for a

[78] *See* Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1231 (11th Cir. 2004); Edward W. McClenathan, *Swinging the Big Stick: How the Circuits Have Interpreted RLUIPA and What Practitioners Need to Know*, 36 REAL EST. L. J. 405, 422 (2008).

[79] *See Midrash*, 366 F.3d at 1231.

[80] *See id.* at 1232.

[81] *See id.* at 1220.

[82] *See id.*

[83] *See id.* at 1228-29.

[84] *See id.* at 1219.

[85] *See id.* at 1218-19.

[86] *See id.* at 1219.

[87] *See id.* at 1231.

[88] *See id.*

[89] *See id.* at 1230.

[90] *See id.*

[91] *See id.* at 1230-31 (noting that RLUIPA's prohibitions create a broad natural perimeter).

common purpose.[92] The court then applied this definition to the zoning ordinance.[93] The court concluded that the zoning ordinance applied to any type of group gathered for a common purpose within the zoning district.[94] An ordinance that permits any assembly, as defined by the dictionary, to locate in a district must permit religious assemblies to locate there as well.[95] Therefore, RLUIPA essentially required equal treatment between all secular and religious assemblies.[96] As a result, the *Midrash* court decided that the city violated the equal terms provision of RLUIPA by treating synagogues on unequal terms with private assemblies.[97]

After concluding that the government regulation furthered unequal treatment, the Eleventh Circuit addressed the application of strict scrutiny.[98] The court began by considering the standard of review in past relevant cases.[99] According to *Smith*, the Free Exercise Clause requires application of strict scrutiny to laws that are not generally applicable.[100] The Eleventh Circuit reasoned that a regulation that treats religious assemblies on less than equal terms is not neutral or generally applicable.[101] Therefore, precedent mandated the application of strict scrutiny.[102]

In addition, *Midrash* considered the language of RLUIPA to support application of strict scrutiny to equal terms violations.[103] Although the equal terms provision does not include an explicit mandate, RLUIPA's first requirement prohibiting laws that substantially burden religion

[92] *See id.* (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, UNABRIDGED 131 (3d ed. 1993)).

[93] *See id.* at 1231.

[94] *See id.*

[95] *See id.*

[96] *See id.*

[97] *See id.*

[98] *See id.*

[99] *See id.* at 1231-32.

[100] *See* Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 882-83 (1990) (refusing to apply strict scrutiny in situations when neutral laws incidentally burdened religious practices). *See generally* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 540 (1993) (holding that a law burdening religious practice that is not neutral or generally applicable must undergo the most rigorous scrutiny).

[101] *See Midrash*, 366 F.3d at 1232. *See generally Church of the Lukumi Babalu*, 508 U.S. at 542 (holding that the zoning ordinances were not neutral because their purpose was to suppress religion).

[102] *See Midrash*, 366 F.3d at 1232.

[103] *See id.*

expressly requires strict scrutiny.[104] Because the equal terms and substantial burden provisions both regulate religious land use issues, the court concluded that strict scrutiny also applied to both provisions.[105] Under strict scrutiny, the government can only justify a religious land use regulation by demonstrating a compelling government interest.[106] In *Midrash*, the court invalidated the zoning ordinance because the regulation treated religious institutions as unequal to secular assemblies.[107] Therefore, the Eleventh Circuit's literalist approach compared religious and secular assemblies and applied strict scrutiny for violations of the equal terms provision.

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

Contrary to the Eleventh Circuit, in *Centro Familiar*, the Ninth Circuit only compared similarly situated assemblies for purposes of the equal terms provision.[108] In addition, *Centro Familiar* held that strict scrutiny does not apply to laws that potentially violate the equal terms provision.[109] The case involved the Centro Familiar Christiano Buenas Nuevas Church, which purchased property in Yuma, Arizona without first obtaining a conditional use permit ("CUP").[110] A state provision required churches, but not secular assemblies, to obtain a CUP.[111] After the property purchase, Centro Familiar encountered substantial objection to obtaining a CUP because of a state law banning certain businesses near churches.[112] The law prohibited new bars, nightclubs, or liquor stores from operating within 300 feet of any church.[113] The city feared that the presence of a church would limit the revitalization efforts in the Main Street area to promote tourism.[114]

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[104] *See* Religious Land Use and Institutionalized Persons Act (RLUIPA) of 2000, 42 U.S.C. § 2000cc(a)(1); *see, e.g.*, *Midrash*, 366 F.3d at 1231-32 (stating that violations of the equal treatment are subject to strict scrutiny).

[105] *See, e.g.*, *Midrash*, 366 F.3d at 1232 (discussing the level of scrutiny that applies for RLUIPA).

[106] See id.

[107] *See id.* at 1235.

[108] *See* Centro Familiar Cristiano Buenas Nuevas v. City of Yuma, 651 F.3d 1163, 1173 (9th Cir. 2011).

[109] *See id.* at 1171.

[110] *See id.* at 1166.

[111] *See id.* at 1166-67.

[112] *See id.* at 1166.

[113] *See id.*

[114] *See id.*

Subsequently, the city denied the CUP because a church in the area conflicted with the city's interest.[115]

The church alleged a RLUIPA violation and sought declaratory judgment to invalidate the city's provision that churches must acquire a CUP.[116] The church also sought an injunction requiring the issuance of a CUP in the present case.[117] The district court concluded that the different treatment between churches and secular groups did not violate RLUIPA.[118] While the appeal was pending, Centro Familiar lost ownership of the property due to foreclosure.[119]

On appeal, the Ninth Circuit held that both the claims for declaratory judgment and injunction were moot because the church no longer owned the property.[120] However, the damages claim could proceed as long as the church proved a RLUIPA violation.[121] With respect to the CUP requirement, the court noted that the city targeted religious assemblies.[122] The city provision specifically required a CUP for religious assemblies but not for other similar situated assemblies, like schools, prisons, or post offices.[123] Therefore, because the city treated religious and secular assemblies unequally in violation of RLUIPA, the Ninth Circuit reversed and remanded the case.[124]

In reaching that decision, the Ninth Circuit established a similarly situated test for analyzing whether a municipal zoning regulation violated RLUIPA's equal terms provision.[125] The Ninth Circuit acknowledged that the equal terms provision does not define comparable classes of religious and secular assemblies.[126] As a result, the Court interpreted the provision to require equal treatment only among similarly situated assemblies.[127]

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[115] *See id.*

[116] *See id.* at 1167.

[117] *See id.*

[118] *See id.*

[119] *See id.*

[120] *See id.* at 1167-68.

[121] *See id.* at 1168.

[122] *See id.* at 1171.

[123] *See, e.g.*, *id.* at 1173, 1175 (discussing how prisons and post offices are treated differently than religious institutions).

[124] *See id.* at 1175.

[125] *See, e.g.*, *id.* at 1172-73 (adopting the similarly situated test).

[126] *See, e.g.*, *id.* at 1173-74 (noting that courts should only compare similarly situated assemblies during an equal terms analysis).

[127] *See id.* at 1173.

The similarly situated analysis requires courts to compare religious and secular assemblies.[128] To determine if two assemblies are similarly situated, courts must ask whether the government's purpose and treatment of religious and secular groups are similar.[129] Courts must first identify a regulation's purpose.[130] The regulatory purpose of land use laws usually addresses specific land uses or impacts.[131] Residential, commercial, and rural classifications are examples of different land uses, while traffic, noise, or environmental issues are examples of various impacts.[132]

After considering a regulation's purpose, courts must then compare treatment of similarly situated religious and secular assemblies in light of the regulatory purpose.[133] If two assemblies are similar in purpose, yet receive unequal treatment, the government must provide a legitimate reason for a regulation's disparate treatment.[134] The government must demonstrate that the regulation applies unequally because of a genuine regulatory purpose, and not simply because an assembly is religious.[135]

In *Centro Familiar*, the court found that the CUP requirement treated similarly situated religious and secular assemblies differently.[136] Centro Familiar shared similar use and impacts with other secular assemblies in the city, so the court considered these

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[128] *See id.*

[129] *See, e.g.*, *id.* (discussing how assemblies might be similarly situated with "respect to 'accepted zoning criteria'"). *See generally* Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch, 510 F.3d 253, 264 (3d Cir. 2007) (describing how the equal terms provision requires a similarly situated comparator for regulatory purposes).

[130] *See, e.g.*, *Centro Familiar*, 651 F.3d at 1172 (starting the analysis with a discussion of regulatory purpose).

[131] *See, e.g.*, *id.* (discussing the parking impacts of different assemblies). *See generally* Konikov v. Orange Cnty., 410 F.3d 1317, 1323-26 (11th Cir. 2005) (comparing similarly situated qualities of religious assemblies to home day cares, model homes, and home occupations for purposes of applying RLUIPA).

[132] *See Centro Familiar*, 651 F.3d at 1173; *see, e.g.*, *Konikov*, 410 F.3d at 1328 (describing a zoning code that treated meetings with religious purpose differently than meetings with a social purpose).

[133] *See, e.g.*, *Centro Familiar*, 651 F.3d at 1172-73 (discussing equal terms provision and similarly situated assemblies). *See generally* River of Life Kingdom Ministries v. Vill. of Hazel Crest, Ill., 611 F.3d 367, 368-69 (7th Cir. 2010) (noting that there is no need for religious assemblies to show that there is a secular assembly that performs the same function).

[134] *See Centro Familiar*, 651 F.3d at 1172.

[135] *See id.*

[136] *See id.* at 1175.

assemblies similarly situated.[137] However, the city only required churches, but not the similarly situated secular assemblies, to obtain a CUP.[138] The CUP requirement furthered no regulatory purpose beyond limiting churches in the area.[139] In addition, the requirement did not apply to all similarly situated assemblies.[140] Therefore, the Ninth Circuit found a RLUIPA violation because the CUP requirement treated similarly situated religious and secular assemblies differently without any legitimate regulatory purpose.[141]

III. CIRCUIT SPLIT ANALYSIS

Comparing the circuit court decisions, the Ninth Circuit correctly held that RLUIPA only requires equal treatment between similarly situated religious and secular assemblies.[142] First, statutory interpretation of the equal terms provision provides for a similarly situated approach without strict scrutiny.[143] Second, Congress intended that a similarly situated approach — rather than application of a strict scrutiny test — is appropriate in cases involving RLUIPA equal terms violations.[144] Finally, the similarly situated approach promotes public policy favoring community growth and protects the interests of religious assemblies and local governments.[145]

A. Statutory Interpretation of the Equal Terms Provision Requires a Similarly Situated Approach, Absent a Strict Scrutiny Standard

When analyzing the language of the equal terms provision, statutory interpretation favors the Ninth Circuit's similarly situated approach

[137] *See id.* at 1174-75.

[138] *See id.* at 1175.

[139] *See id.* at 1173.

[140] *See id.* at 1175.

[141] *See id. But see* Hale O Kaula Church v. Maui Planning Comm'n, 229 F. Supp. 2d 1056, 1070-71 (D. Haw. 2002) (declaring that law requiring nonagricultural groups to apply for CUP in agricultural zone was facially neutral because the constraint applied to all groups).

[142] *See generally* James C. Dunkelberger, *Missed Opportunity or Dodged Bullet? The Tenth Circuit's Non-Decision in* Rocky Mountain Christian Church v. Board of County Commissioners, 2011 B.Y.U. L. REV. 99, 104-05 (2011) (discussing different court interpretations of similarly situated assemblies).

[143] *See Centro Familiar*, 651 F.3d at 1171-73; *see, e.g.*, Campbell, *supra* note 7, at 1100 (arguing that strict scrutiny does not belong in an equal terms analysis).

[144] *See* sources cited *supra* note 143.

[145] *See infra* Part III.C.

over the Eleventh Circuit's literalist approach.[146] In addition, the Ninth Circuit correctly held that RLUIPA does not provide for strict scrutiny in the equal terms provision.[147] A proper reading of the RLUIPA clearly dictates that strict scrutiny only applies to the substantial burden provision, not the equal terms provision.[148]

1. Statutory Interpretation Favors the Similarly Situated Approach

The wording of the equal terms provision requires equal treatment between religious and secular assemblies, and a similarly situated analysis successfully accomplishes this goal.[149] Because RLUIPA does not define assembly, courts should consider qualities such as size, purpose, and impact to ensure a fair equal terms analysis.[150] These qualities help give objective meaning to the term assembly, beyond the Eleventh Circuit's expansive definition of a group gathered for a common purpose. Ignoring these qualities risks an overly broad application of the equal terms provision to literally any group gathering.[151] Considering size, purpose, and impact provides an accurate assessment of whether a regulation illegally targets religious assemblies or appropriately regulates all assemblies with similar qualities.[152] If a regulation targets all assemblies that share a particular quality, then the regulation does not further unequal treatment between religious and secular assemblies.[153] Therefore, comparing the

[146] *See generally Centro Familiar*, 651 F.3d at 1171 (outlining the similarly situated approach); Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch, 510 F.3d 253, 268 (3d Cir. 2007) (noting that the Eleventh Circuit's reasoning does not persuade the Third Circuit).

[147] *See Centro Familiar*, 651 F.3d at 1171-72.

[148] *See* 42 U.S.C. § 2000cc(a), (b) (containing a compelling governmental interest requirement in the substantial burden provision, which requires strict scrutiny, and not in the equal terms provision); *see, e.g.*, *Lighthouse*, 510 F.3d at 269 (holding that strict scrutiny does not apply to the equal terms provision).

[149] *See generally Centro Familiar*, 651 F.3d at 1172-73 (discussing the Ninth Circuit's similarly situated approach and the reasoning behind the court's decision).

[150] *See, e.g.*, *id.* at 1172 (discussing how courts should put equality into context by considering size, purpose, and impact).

[151] *See, e.g.*, Kleinsasser, *supra* note 6, at 168 (discussing the Eleventh Circuit's approach that groups entities together, even if they have little common purpose).

[152] *See, e.g.*, *Centro Familiar*, 651 F.3d at 1172-73 (discussing the "characteristics that may or may not be material" for an equality analysis).

[153] *See, e.g.*, *id.* at 1172 (arguing that distinctions are appropriate if they are due to legitimate regulatory purposes).

qualities and impacts of religious and secular assemblies is necessary to determine whether a regulation truly provides equal treatment.[154]

Critics may argue that statutory interpretation favors the *Midrash* literalist approach.[155] This approach provides the best means for ensuring equal treatment of religious assemblies by offering greater protection against regulation.[156] The text of the equal terms provision does not clearly define the meaning of assembly, so courts should adopt the literal dictionary definition.[157] Assuming a literal definition of assembly allows broad categorization of religious and secular assemblies.[158] Critics therefore argue that zoning ordinances permitting a secular assembly must likewise permit all religious assemblies.[159]

However, the *Midrash* approach erroneously permits less regulation for legitimate land use purposes by broadly defining an assembly within RLUIPA.[160] The expansive definition of an assembly covers entities that are far too disparate to deserve similar accommodations.[161] Using the *Midrash* approach, a 10-person book club is equal to a 1,000-person church for zoning purposes.[162] If a city allows the book club to assemble, the city must also allow the 1,000-person church in the same area.[163] This result is illogical because a government may have a legitimate, nondiscriminatory reason to

[154] *See generally* Foley, *supra* note 3, at 210-11 (discussing the reasoning behind the Third Circuit's similarly situated approach).

[155] *See generally* Campbell, *supra* note 7, at 1090-91 (outlining the Eleventh Circuit's similarly situated approach).

[156] *See* Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1231-32 (11th Cir. 2004); Foley, *supra* note 3, at 205-06; McClenathan, *supra* note 78, at 423.

[157] *See* River of Life Kingdom Ministries v. Vill. of Hazel Crest, Ill., 611 F.3d 367, 389 (7th Cir. 2010); *Midrash*, 366 F.3d at 1230-31; Foley, *supra* note 3, at 205.

[158] *See, e.g.*, Kleinsasser, *supra* note 6, at 167-68 (discussing the Eleventh Circuit's broad definition of assembly).

[159] *See generally* Crist, *supra* note 22, at 1156 (arguing in favor of a broad interpretation of the similarly situated language).

[160] *See generally* Kleinsasser, *supra* note 6, at 167-68 (discussing the Eleventh Circuit's broad definition of assembly and the implications of adopting such a definition).

[161] *See generally River of Life Kingdom Ministries*, 611 F.3d at 389-90 (contrasting the common understanding of assembly with the dictionary definition of assembly).

[162] *See, e.g.*, Centro Familiar Cristiano Buenas Nuevas v. City of Yuma, 651 F.3d 1163, 1172 (9th Cir. 2011) (discussing the book club example); Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch, 510 F.3d 253, 268 (3d Cir. 2007) (using the book club example to argue against the Eleventh Circuit's interpretation of RLUIPA).

[163] *See* sources cited *supra* note 162.

prohibit assemblies based on size.[164] A 10-person book club and a 1,000-person church may have widely disparate impacts that may warrant different regulatory treatment.[165]

In contrast, the Ninth Circuit's similarly situated approach produces results that are more logical. For purposes of the equal terms provision, a ten-person book club is only comparable to similarly situated assemblies, such as a ten-person church.[166] RLUIPA's wording does not place a total prohibition on the regulation of religious assemblies.[167] Rather, the wording requires equal treatment between religious and secular assemblies, and the similarly situated approach best accomplishes this analysis. As long as a regulation applies to similarly situated religious and secular assemblies, the regulation is appropriate.[168] The Eleventh Circuit's literalist approach ignores this acceptable application of zoning restrictions by improperly interpreting the provision too broadly.[169] Therefore, the Ninth Circuit's similarly situated test, which uses specific assembly characteristics to narrowly analyze restrictions, better follows statutory interpretation of the equal terms provision.

2. Statutory Interpretation Argues Against the Application of Strict Scrutiny

Proper statutory interpretation also indicates that strict scrutiny does not belong in an analysis of the equal terms provision.[170] RLUIPA places the substantial burden and equal terms provisions in different sections, which creates a clear divide between the two provisions.[171]

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[164] *See, e.g.*, *Lighthouse*, 510 F.3d at 268 (describing that the result would conflict with the text of the statute and Congress's intent); Foley, *supra* note 3, at 225 (discussing how the book club example is a "bizarre result" of an overly broad interpretation of RLUIPA's equal terms provision).

[165] *See* sources cited *supra* note 164 (arguing that a 10-person book club and a 1,000-person church are not comparable assemblies in an equal terms analysis).

[166] *See Centro Familiar*, 651 F.3d at 1172; *Lighthouse*, 510 F.3d at 268.

[167] *See generally* Religious Land Use and Institutionalized Persons Act (RLUIPA) of 2000, 42 U.S.C. § 2000cc(b) (2000) (stating RLUIPA's application to discrimination and exclusion of religious assemblies).

[168] *See, e.g.*, *Centro Familiar*, 651 F.3d at 1172-73 (stating that a regulation that restricts all organizations above a certain size is legitimate).

[169] *See generally* Kleinsasser, *supra* note 6, at 167-68 (discussing the implications of this broad definition).

[170] *See, e.g.*, *Lighthouse*, 510 F.3d at 269 (discussing how the exclusion of strict scrutiny from the equal terms provision was not due to congressional oversight).

[171] *See, e.g.*, 42 U.S.C. § 2000cc(a), (b)(1) (demonstrating the separate sections of the substantial burden and equal terms provisions within RLUIPA); Kleinsasser, *supra*

RLUIPA includes the strict scrutiny standard of review only in the substantial burden provision.[172] The equal terms provision contains no reference to strict scrutiny.[173] Thus, strict scrutiny does not apply in an equal terms analysis.[174]

Critics argue that the Eleventh Circuit's application of strict scrutiny applies to the equal terms provision is proper.[175] Even though the equal terms provision does not include the strict scrutiny standard, the substantial burden provision implies strict scrutiny is appropriate.[176] Reading the statute as a whole, strict scrutiny would apply to the equal terms provision because the substantial burden provision includes this standard of review.[177] In addition, the equal terms analysis should follow the precedent set by the line of previous Free Exercise Clause cases that implemented strict scrutiny.[178] Therefore, strict scrutiny belongs in an equal terms analysis.[179]

However, a plain meaning interpretation of the provision suggests that the Eleventh Circuit inappropriately applied strict scrutiny in *Midrash*.[180] Reading RLUIPA as a whole is important but does not

note 6, at 165-66 (describing the separation of the equal terms and substantial burden provisions).

[172] *See generally* 42 U.S.C. § 2000cc(a), (b) (including strict scrutiny in subsection (a), but not in subsection (b)).

[173] *See id.* at § 2000cc(b) (omitting the compelling governmental interest language that is in the substantial burden provision).

[174] *See, e.g.*, *Lighthouse*, 510 F.3d at 262, 269 (noting that the structure of the statute and legislative history clearly indicate that strict scrutiny does not apply to the equal terms provision); Foley, *supra* note 3, at 220 (noting that "Congress did not intend for strict scrutiny anywhere in the application of the equal-terms provision.").

[175] *See, e.g.*, River of Life Kingdom Ministries v. Vill. of Hazel Crest, Ill., 611 F.3d 367, 370-71 (7th Cir. 2010) (discussing the Eleventh Circuit's reasoning for including strict scrutiny); Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1232 (11th Cir. 2004) (stating that a violation of the equal terms provision must undergo strict scrutiny).

[176] *See, e.g.*, *Midrash*, 366 F.3d at 1231-32 (discussing the jurisprudential foundation for applying strict scrutiny from the substantial burden provision to the equal terms provision).

[177] *See, e.g.*, *Lighthouse*, 510 F.3d at 269 (addressing the Eleventh Circuit's application of strict scrutiny using the *Smith-Lukumi* line of cases as a justification); *Midrash*, 366 F.3d at 1232 (discussing why the strict scrutiny also applies to the equal terms provision).

[178] *See, e.g.*, Foley, *supra* note 3, at 219 (discussing the Eleventh Circuit's position regarding strict scrutiny).

[179] *See Midrash*, 366 F.3d 1232; *see, e.g.*, MacLeod, *supra* note 32, at 175 (concluding that courts should apply strict scrutiny to the equal terms provision).

[180] *See, e.g.*, Foley, *supra* note 3, at 214-15 (arguing that the Eleventh Circuit's interpretation "facially violates the Establishment Clause" and is "subject to a constitutional challenge").

justify implying a requirement from one provision to another.[181] Rather, each section of RLUIPA is distinct, such that the equal terms and substantial burden provisions employ separate standards of review.[182] Therefore, statutory interpretation opposes applying the strict standard included in the substantial burden provision to the equal terms provision. [183]

In addition, unlike the substantial burden provision, the equal terms provision did not develop from case precedent involving the Free Exercise Clause, as critics argue.[184] The equal terms provision of RLUIPA complements the substantial burden provision but exists as its own statutory creation rather than evolving from case law.[185] While strict scrutiny applies to Free Exercise Clause legislation involving the substantial burden provision, strict scrutiny does not apply to the equal terms provision.[186] Because the equal terms provision developed from legislation, past precedent that supports strict scrutiny is irrelevant to the equal terms provision. Therefore, the Ninth Circuit properly chose not to apply strict scrutiny.

B. Legislative History Supports the Similarly Situated Approach and Reveals that Strict Scrutiny Is Not Applicable to the Equal Terms Provision

In addition to adhering to proper statutory interpretation, the similarly situated approach best follows congressional intent to ensure equal treatment of religious and secular assemblies. This approach still provides local governments with land use control, but also protects

[181] *See* Centro Familiar Cristiano Buenas Nuevas v. City of Yuma, 651 F.3d 1163, 1171-72 (9th Cir. 2011); *Lighthouse*, 510 F.3d at 269; Foley, *supra* note 3, at 220.

[182] *See Centro Familiar*, 651 F.3d at 1171-72; Foley, *supra* note 3, at 220. *See generally* River of Life Kingdom Ministries v. Vill. of Hazel Crest, Ill., 611 F.3d 367, 370-71 (7th Cir. 2010) (commenting on the problems with the Eleventh Circuit's approach).

[183] *See, e.g.*, *Lighthouse*, 510 F.3d at 269 (noting that Congress did not intend to include strict scrutiny in the equal terms provision).

[184] *See* Foley, *supra* note 3, at 230 (noting that the equal terms provision was not designed to codify the *Smith* line of cases). *But see* Kleinsasser, *supra* note 6, at 169 (noting that the *Midrash* court found that the equal terms provision was consistent with the *Smith* line of cases mandating strict scrutiny).

[185] *See, e.g.*, Foley, *supra* note 3, at 219 (arguing that the equal terms provision did not grow from the *Smith-Lukumi* line of cases).

[186] *See generally* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546 (1993) (holding that law burdening religious practice that is not neutral or generally applicable must undergo strict scrutiny); Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 878-79 (1990) (refusing to apply strict scrutiny in situations when neutral laws incidentally burden religious practices).

religious assemblies as Congress desired.[187] In addition, a review of legislative history suggests that strict scrutiny is not applicable to the equal terms provision.[188]

1. Congress Favored the Similarly Situated Approach

The similarly situated approach adheres to congressional intent of ensuring that religious and secular assemblies receive equal treatment while deferring to local government.[189] The similarly situated approach guarantees equal treatment because courts consider characteristics that truly promote equality, without favoring religious or secular assemblies.[190] The approach also respects Congress's desire to defer to the judgments of local governments. Congress recognized that land use regulations were one of the few remaining areas of control for local governments.[191] Communities utilize land use control to shape the community's character and serve collective needs.[192] The similarly situated approach provides local governments with control over land use regulation, as long as the regulation affords equal treatment to similarly situated assemblies.[193] Therefore, courts should uphold congressional intent and focus on similar characteristics shared by religious and secular assemblies to determine equality.

Critics argue that the similarly situated approach ignores congressional intent to protect religion and provides a loophole for governments to regulate religious land use.[194] The history of RLUIPA

[187] *See, e.g.*, *Centro Familiar*, 651 F.3d at 1172 (discussing how Congress intended to apply broad protections for religious exercise). *See generally* Lighthouse, 510 F.3d at 268 (noting that Congress did not intend to force local governments to give up all land use control).

[188] *See infra* Part III.B.2.

[189] *See, e.g.*, Foley, *supra* note 3, at 202 (noting that Congress was concerned about local government treatment of religious institutions). *See generally* Campbell, *supra* note 7, at 1100 (arguing that strict scrutiny does not belong in an equal terms analysis).

[190] *See generally* Rocky Mountain Christian Church v. Bd. of Cnty. Comm'rs, 613 F.3d 1229, 1236 (10th Cir. 2010) (describing county's favorable treatment of secular assemblies compared to religious assemblies).

[191] *See* Foley, *supra* note 3, at 223 (noting that land use was one of the last remaining areas of regulation under local government control).

[192] *See, e.g.*, Kleinsasser, *supra* note 6, at 164 (discussing local governments' ability to enact land use regulations under RLUIPA).

[193] *See generally id.* (discussing how local government regulatory efforts must afford equal treatment to religious and secular assemblies); Konikov v. Orange Cnty., 410 F.3d 1317, 1323 (11th Cir. 2005) (noting that requiring applications for variances, special permits, or other relief provisions does not offend RLUIPA's goals).

[194] *See, e.g.*, Alden, *supra* note 22, at 1816 (arguing that a broad interpretation of

suggests that Congress intended for RLUIPA to insulate religious assemblies from land use regulations.[195] The similarly situated approach improperly allows local government to restrict religious assemblies if a restriction also applies to any similarly situated secular assembly.[196] Thus, the literalist approach, where size or impact of an assembly is not relevant, better prohibits governments from circumventing the equal terms requirement. Therefore, *Midrash*'s literalist approach adheres to the congressional intent of protecting religion by offering broader protection for religious free exercise than the similarly situated approach.[197]

However, the broad classification that critics advocate actually counters congressional intent because the literalist approach provides religious assemblies with blanket immunity from land use regulations.[198] Congress aimed to guarantee equality between religious and secular assemblies but never intended for local government to favor religious assemblies.[199] The similarly situated approach ensures that governments can still regulate land use issues in general, without the excessive regulatory constraints of the literalist approach.[200] Therefore, congressional intent favors the similarly situated approach because this approach balances local government authority to impose land use regulations with religious protection.[201]

RLUIPA helps close the loopholes in the statute).

[195] *See generally* Cutter v. Wilkinson, 544 U.S. 709, 714 (2005) (noting that RLUIPA is the latest congressional effort to bolster religious liberties for assemblies); Foley, *supra* note 3, at 196 (stating that RLUIPA is the most recent effort to "determine the proper dimensions of the wall between church and state").

[196] *See generally* Alden, *supra* note 22, at 1816 (discussing how local courts are "creatively circumventing RLUIPA's mandates" because of the statute's vague language).

[197] *See generally* Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch, 510 F.3d 253, 267-68 (3d Cir. 2007) (describing the *Midrash* literalist approach and notions regarding congressional intent, but declining to adopt the approach).

[198] *See generally* Centro Familiar Cristiano Buenas Nuevas v. City of Yuma, 651 F.3d 1163, 1172-73 (9th Cir. 2011) (discussing the various applications of the equal terms provision and analyzing the problems with a broad interpretation of similarly situated assemblies).

[199] *See, e.g.*, *Centro Familiar*, 651 F.3d at 1172 (discussing Congress's intent to balance religious exercise protections with local government regulatory powers).

[200] *See, e.g.*, *id.* at 1172 (noting that an equal terms analysis should focus on context to balance the needs of local governments and religious assemblies).

[201] *See generally* Foley, *supra* note 3, at 223 (discussing how land use control is one of the last areas of local government control).

2. Legislative History Reveals that Strict Scrutiny Does Not Apply to the Equal Terms Provision

Legislative history also indicates that strict scrutiny should not apply because Congress did not include strict scrutiny in the equal terms provision.[202] Congress codified strict scrutiny in the substantial burden provision, but explicitly declined to do so in the equal terms provision.[203] When Congress includes strict scrutiny in one provision, yet explicitly excludes the standard from another, this exclusion indicates that strict scrutiny does not apply when unmentioned.[204]

Critics argue that strict scrutiny applies to the equal terms provision.[205] Congress's omission of a strict scrutiny standard from the equal terms provision may be due to neglect or the political aims of individual representatives.[206] Alternatively, including strict scrutiny for the substantial burden provision evidences congressional intent for the standard to apply to the equal terms provision.[207] The substantial burden provision directly precedes the equal terms provision, so including strict scrutiny again would be redundant.[208] Therefore, critics argue that legislative history indicates the application of strict scrutiny to the equal terms provision is appropriate.[209]

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[202] *See generally id.* at 219-20 (describing two reasons why strict scrutiny is not applicable to the equal terms provision).

[203] *See* Kleinsasser, *supra* note 6, at 173 (noting that RLUIPA's substantial burden provision clearly codifies strict scrutiny; however, the equal terms provision does not (citing Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch, 510 F.3d 253, 269 (3d Cir. 2007)).

[204] *See, e.g.*, Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch, 510 F.3d 253, 269 (3d Cir. 2007) (noting that Congress intended to codify strict scrutiny in the substantial burden provision and not in the equal terms provision); Foley, *supra* note 3, at 220 (discussing how RLUIPA's structure shows that strict scrutiny does not apply to the equal terms provision).

[205] *See* Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1232 (11th Cir. 2004); *see, e.g.*, MacLeod, *supra* note 32, at 175 (arguing that courts should apply strict scrutiny to an equal terms analysis).

[206] *See, e.g.*, Crist, *supra* note 22, at 1157 (stating that Congress may have neglected to include strict scrutiny in the equal terms provision).

[207] *See, e.g.*, Foley, *supra* note 3, at 219-20 (outlining critics' arguments in favor of strict scrutiny); Kleinsasser, *supra* note 6, at 174 (arguing that strict scrutiny should apply in an equal terms analysis)).

[208] *See generally Lighthouse*, 510 F.3d at 269 (discussing the Eleventh Circuit's reasoning for applying strict scrutiny to the equal terms provision, which relied upon the *Smith-Lukumi* line of precedent).

[209] *See, e.g.*, Crist, *supra* note 22, at 1158 (discussing congressional intent to apply strict scrutiny to the equal terms provision).

However, Congress's omission of strict scrutiny is not due to neglect or carelessness because Congress understood the importance of codifying strict scrutiny in detail.[210] Prior to RLUIPA, Congress engaged in a long battle with the Supreme Court concerning the application of strict scrutiny to religion.[211] With regard to RLUIPA, including strict scrutiny for the substantial burden provision indicated that Congress understood the significance of a strict scrutiny standard within the religious context.[212] The inclusion of strict scrutiny in the substantial burden provision, and not in the equal terms provision, marks a clear congressional decision.[213] Therefore, Congress did not intend that strict scrutiny apply to the equal terms provision.

C. Public Policy Supports the Similarly Situated Approach by Promoting Community Growth

RLUIPA's equal terms provision also implicates significant public policy issues that support the similarly situated analysis and a lower level of scrutiny. The similarly situated approach provides clarity for governments that want to impose land use restrictions to promote community goals.[214] In order for local governments to enact appropriate land use regulations, legislators must first devise appropriate land use measures that adhere to RLUIPA standards.[215]

The Ninth Circuit's similarly situated approach offers a simple, narrow framework for governments to follow. If local governments attempt to comply with the Eleventh Circuit literalist approach, they

[210] *See, e.g.*, Foley, *supra* note 3, at 220 (noting how Congress "explicitly declined" to codify strict scrutiny in the equal terms provision); Kleinsasser, *supra* note 6, at 173 (discussing the Third Circuit's interpretation that Congress did not intend to apply strict scrutiny to the equal terms provision).

[211] *See, e.g.*, Cutter v. Wilkinson, 544 U.S. 709, 714 (2005) (noting that RLUIPA is the latest congressional effort to increase religious liberties for individuals and assemblies).

[212] *See* 146 CONG. REC. S7774-01 (daily ed. July 27, 2000) (joint statement of Sens. Hatch and Kennedy) (noting that zoning regulations frequently discriminate against churches); *see also* Storzer & Picarello, *supra* note 22, at 952 (noting that RLUIPA echoes the First Amendment's requirement that local governments cannot burden religion without a compelling reason (citing Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 568 (1993)).

[213] *See, e.g.*, Foley, *supra* note 3, at 220 (noting that Congress did not intend to require strict scrutiny anywhere in the application of the equal terms provision).

[214] *See generally* Noda, *supra* note 4, at 77 (noting that the Eleventh Circuit's literalist approach may disproportionately favor religious assemblies, while the similarly situated approach attempts to curtail the power of religious assemblies).

[215] *See generally* Foley, *supra* note 3, at 201-02 (describing how local governments need clear guidelines for devising land use regulations to prevent RLUIPA violations).

will be unable to enact land use regulations.[216] Local governments would need to devise all-or-nothing regulation plans. If governments allow even the smallest secular assembly in a particular zoning area, then they must also permit a large church in the same area.[217] The equal terms provision should not force governments to abandon all community improvement plans simply because they fear a RLUIPA lawsuit.[218] The Ninth Circuit provides a remedy by allowing government to regulate religious assemblies, as long as the regulation applies to similarly situated assemblies.[219] To promote flourishing communities with religious and secular assemblies, the equal terms provision must apply only to similarly situated entities.

CONCLUSION

The equal terms provision of RLUIPA provides that the government cannot prefer secular assemblies to religious assemblies in land use regulations.[220] A uniform and clear interpretation of RLUIPA is important for courts to analyze an equal terms challenge accurately. Despite RLUIPA's seemingly simple equal terms provision, two important issues have emerged.[221] The first issue concerns how to

[216] *See generally* Noda, *supra* note 4, at 74 (describing how regulation that allows any secular assembly in a zoning area must also permit similarly situated religious assemblies in the same area).

[217] For example, in 2006, Baltimore allowed the Maryland Archdiocese to destroy a 100-year-old building despite the city's urban renewal plan. *See* Caryn Tamber, *Religious Institutions Claim Federal Law Trumps Local Zoning*, MARYLAND DAILY RECORD, Feb. 19, 2008, *available at* http://www.storzerandgreene.com/images/www.mddailyrecord.com.pdf. The urban renewal plan called for the preservation of historic buildings like the church. *See id.* However, officials feared the possible RLUIPA threat and approved the demolition. *See id.*

[218] *See generally* Karen L. Antos, Note, *A Higher Authority: How the Federal Religious Land Use and Institutionalized Persons Act Affects State Control Over Religious Land Use Conflicts*, 35 B.C. ENVTL. AFF. L. REV. 557, 561-62 (2008) (noting that local governments oppose RLUIPA because of the limits the legislation imposes on land use regulations); *Land Use Regulation & Religious Institutions in Focus at MAS*, MUN. ART SOC. OF NEW YORK (Oct. 17, 2008 1:32 PM), http://mas.org/land-use-regulation-religious-institutions-in-focus-at-mas (noting RLUIPA's impact throughout the country as local governments rethink their planning efforts due to threats of litigation).

[219] *See generally* Centro Familiar Cristiano Buenas Nuevas v. City of Yuma, 651 F.3d 1163, 1173 (9th Cir. 2011) (outlining the Ninth Circuit's definition of similarly situated).

[220] *See* 42 U.S.C. § 2000bb(b)(1) (2000) (noting that local governments cannot impose regulations that treat religious assemblies "on less than equal terms with nonreligious" assemblies).

[221] *See, e.g.*, Kleinsasser, *supra* note 6, at 163-64 (discussing the two issues of

establish equal treatment, and the second issue is whether strict scrutiny applies to laws that fail to do so.[222]

The Ninth Circuit correctly held that for regulatory purposes, courts should apply a similarly situated test, absent strict scrutiny, when analyzing equal treatment of assemblies.[223] First, statutory interpretation of the equal terms provision requires a narrowly tailored similarly situated analysis when comparing religious and secular assemblies.[224] Proper statutory interpretation also indicates that strict scrutiny does not apply to the equal terms provision.[225] Second, the similarly situated approach, absent strict scrutiny, adheres to congressional intent by guaranteeing truly equal treatment between religious and secular assemblies.[226] Finally, a similarly situated approach promotes an effective safeguard on the American conception of a free society by balancing local government control and religious freedom.[227]

disagreement over the equal terms provision).

[222] *See, e.g.*, Campbell, *supra* note 7, at 1074 (noting the two equal terms issues).

[223] *See, e.g.*, *Centro Familiar*, 651 F.3d at 1175 (outlining the Ninth Circuit's holding).

[224] *See supra* Part III.A.1.

[225] *See supra* Part III.A.2.

[226] *See supra* Part III.B.

[227] *See supra* Part III.C.