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Parting the Red Sea: Prescriptions for the RLUIPA Equal Terms Provision's Expanding Circuit Split

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PARTING THE RED SEA: PRESCRIPTIONS FOR THE RLUIPA EQUAL TERMS PROVISION'S EXPANDING CIRCUIT SPLIT

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Congress unanimously passed the Religious Land Use and Institutionalized Persons Act (RLUIPA) in 2000. The Act marked the culmination of a decades-long dialogue between Congress and the Supreme Court. RLUIPA's passage embodied Congress's resolve to provide religious free exercise protections—particularly as it pertained to religious land use. Since 2000, however, RLUIPA's Equal Terms Provision has been subject to differing judicial interpretations, resulting in an expanding circuit split. This Note analyzes the circuit split and offers guidance to future interpreters.

First, this Note examines the social, legislative, and judicial history leading to RLUIPA's enactment. Second, it analyzes the contours of interpretations adopted by eight United States Circuit Courts of Appeals. Extrapolating from extant interpretations, it offers a judicial prescription for how future courts, particularly the Supreme Court, should interpret RLUIPA's Equal Terms Provision to resolve the circuit split. Finally, it proposes a legislative prescription for how Congress could amend RLUIPA to clarify ambiguities perceived by the judiciary.

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I. INTRODUCTION

"The best laid schemes o' *Mice* an' *Men*
Gang aft agley"[1]

Imagine a hypothetical religious institution—for example, a Methodist Church or an Islamic Mosque. Now, take this religious institution and situate it in two different states. First, imagine it is in Georgia.[2] Second, imagine it is in Pennsylvania.[3] Both institutions desire to relocate to a downtown area to accommodate their growing membership. However, a local land use plan stymies their efforts. Each institution believes that the plan treats them on less than equal terms than a secular institution.

The Georgia and Pennsylvania municipalities had previously enacted their land use plans to "encourage a 'vibrant' and 'vital' downtown residential community centered on a core 'sustainable retail "main" street.'"[4] Primary uses under this plan include "theaters, cinemas, culinary schools, dance studios, music instruction, theater workshops, fashion design schools, and art studios and workshops."[5] Secondary uses include "[r]estaurants, bars and clubs, and specialty retail."[6] Religious institutions are not listed as a permitted use, and "[a]ny uses not specifically listed" in the plan are prohibited.[7]

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[1] This line of poetry from Robert Burns's "To a Mouse" recounts how even the best laid plans of man often fail to accomplish their intended goal—a notion particularly relevant to RLUIPA's Equal Terms Provision. 1 ROBERT BURNS, *To a Mouse, in* THE KILMARNOCK EDITION OF THE POETICAL WORKS OF ROBERT BURNS 72 (William Scott Douglas ed., 7th ed. 1890).

[2] Georgia is in the United States Court of Appeals for the Eleventh Circuit's jurisdiction. *See Geographic Boundaries of United States Courts of Appeals and the United States District Courts* (illustration), *in Court Role and Structure*, USCOURTS.GOV, https://www.uscourts.gov/about-federal-courts/court-role-and-structure [https://perma.cc/6SH4-F9B6] (providing the geographic jurisdiction of the Eleventh Circuit).

[3] Pennsylvania is in the United States Court of Appeals for the Third Circuit's jurisdiction. *See id*. (providing the geographic jurisdiction of the Third Circuit).

[4] This hypothetical adopts the land use plan's language from a case that came before the United States Court of Appeals for the Third Circuit. *See* Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch, 510 F.3d 253, 258 (3d Cir. 2007) (describing the zoning plan's provisions).

[5] *Id.*

[6] *Id.*

[7] *Id.*

Both religious institutions applied for the required permits to proceed with their relocations; however, both municipalities denied the institutions' applications. After exhausting local remedies, the religious institutions filed federal complaints in their respective district courts, alleging that the municipalities' land use plans violate the Religious Land Use and Institutionalized Persons Act (RLUIPA), specifically its Equal Terms Provision.[8] The federal district courts rule in favor of the respective local municipalities. The religious institutions in Pennsylvania and Georgia appeal to the United States Courts of Appeals for the Third and Eleventh Circuits, respectively.[9]

Specifying a violation of RLUIPA's Equal Terms Provision as the cause of action produces an illuminating result. Considering a complaint solely under that provision, the religious institutions would likely receive different outcomes.[10] The Georgia religious institution would likely prevail on its appeal,[11] while the Pennsylvania institution would likely fail.[12] The disparate results would not be due to the institutions' religion or proposed building project but because of the Third and Eleventh Circuits' differing interpretations of RLUIPA's Equal Terms Provision.[13]

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[8] *See* 42 U.S.C. § 2000cc(b)(1) (providing that "[n]o government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution").

[9] *See, e.g.*, Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1220–25 (11th Cir. 2004) (presenting litigant information and a typical procedural history of a claim brought under RLUIPA's Equal Terms Provision).

[10] *See* Tree of Life Christian Schs. v. City of Upper Arlington, 905 F.3d 357, 387 (6th Cir. 2018) (Thapar, J., dissenting) ("Whether a religious plaintiff can succeed under the Equal Terms provision depends entirely on where it sues."). *Compare Midrash Sephardi*, 366 F.3d at 1228–29 (providing the Eleventh Circuit's interpretation of RLUIPA's Equal Terms Provision), *with Lighthouse Inst. for Evangelism*, 510 F.3d at 253 (providing the Third Circuit's interpretation of RLUIPA's Equal Terms Provision).

[11] *See Midrash Sephardi*, 366 F.3d at 1231 ("[The land use plan], which permits private clubs and other secular assemblies, excludes religious assemblies from [the municipality's] business district. Because we have concluded that private clubs, churches and synagogues fall under the umbrella of 'assembly or institution' as those terms are used in RLUIPA, this differential treatment constitutes a violation of § (b)(1) of RLUIPA.").

[12] *See Lighthouse Inst. for Evangelism*, 510 F.3d at 272 (affirming summary judgment finding no RLUIPA violation because the religious institution "has placed no evidence in the record that the [land use plan] treats a religious assembly on less than equal terms with a secular assembly").

[13] *See* discussion *infra* Part III.

Since RLUIPA's enactment in 2000,[14] its Equal Terms Provision[15] has presented a puzzle for eight United States Circuit Courts of Appeals.[16] Before analyzing the varying interpretations of RLUIPA's Equal Terms Provision, Part II presents background information concerning the social, legislative, and judicial history leading to RLUIPA's enactment. Then, Part III analyzes the three interpretive camps that courts have generally formed and offers commentary about nuances in each circuit's interpretive approach. Next, Part IV provides a judicial prescription for how future courts—particularly the U.S. Supreme Court—should rule if it hears a case involving RLUIPA's Equal Terms Provision. Finally, Part V proposes a legislative prescription that could resolve the discord among judges—especially absent a Supreme Court decision.

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[14] *See infra* note 65 and accompanying text.

[15] 42 U.S.C. § 2000cc(b)(1).

[16] *See* Signs for Jesus v. Town of Pembroke, 977 F.3d 93, 109–10 (1st Cir. 2020) (providing the First Circuit's interpretation of RLUIPA's Equal Terms Provision); *Lighthouse Inst. for Evangelism*, 510 F.3d at 262–69 (the Third Circuit's interpretation); Canaan Christian Church v. Montgomery County, 29 F.4th 182, 196–98 (4th Cir. 2022) (the Fourth Circuit's); Opulent Life Church v. City of Holly Springs, 697 F.3d 279, 290–92 (5th Cir. 2012) (the Fifth Circuit's); Tree of Life Christian Schs. v. City of Upper Arlington, 905 F.3d 357, 369–71 (6th Cir. 2018) (the Sixth Circuit's); River of Life Kingdom Ministries v. Village of Hazel Crest, 611 F.3d 367, 368–74 (7th Cir. 2010) (en banc) (the Seventh Circuit's); New Harvest Christian Fellowship v. City of Salinas, 29 F.4th 596, 604–09 (9th Cir. 2022) (the Ninth Circuit's); *Midrash Sephardi*, 366 F.3d at 1228–31 (the Eleventh Circuit's); *see also* discussion *infra* Part III.

II. BACKGROUND

A. TUG OF WAR: THE LEGISLATIVE AND JUDICIAL JOURNEY TO RLUIPA

1. Backdrop to RLUIPA. It is necessary to acknowledge the social, legislative, and judicial history of RLUIPA to understand the current jurisprudence surrounding RLUIPA's Equal Terms Provision.[17] The "road-to-RLUIPA" was not a smooth journey, nor a linear path.[18] Like most legislation addressing religious free exercise, RLUIPA involved an intense "back-and-forth" between the Supreme Court and Congress.[19]

Land use discrimination has long been an illness the United States has battled.[20] Christopher Silver notes that "[w]hat began as a means of improving the blighted physical environment . . . became a mechanism for protecting values and excluding the undesirables."[21] Such discriminatory regulations were initially

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[17] *See Tree of Life Christian Schs.*, 905 F.3d at 376 (Thapar, J., dissenting) ("[A] page of history is worth a volume of logic." (alteration in original) (quoting N.Y. Trust Co. v. Eisner, 256 U.S. 345, 349 (1921))); Noah Kane, Note, *Treat Thy Neighbor as Thyself? Equal Protection and the Scope of RLUIPA's Equal Terms Clause*, 43 CARDOZO L. REV. 823, 828 (2021) (describing the historical context in order to understand RLUIPA and the policies behind it); *see also* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 252–53 (2012) ("Part of the statute's context is the *corpus juris* of which it forms a part, and this corpus can be dauntingly substantial. What is required, according to a British judge, is a 'conspectus of the entire relevant body of the law for the same purpose.'" (quoting Ealing L.B.C. v. Race Relations Bd., [1972] A.C. 342 (HL) 361 (appeal taken from Eng.)).

[18] *See* Kane, *supra* note 17, at 828–31 (discussing the interaction between Congress and the Supreme Court regarding religious liberty protections); *see also Lighthouse Inst. for Evangelism*, 510 F.3d at 261 ("RLUIPA is 'the latest of long-running congressional efforts to accord religious exercise heightened protection from government-imposed burden, consistent with [Supreme Court] precedent.'" (alteration in original) (quoting Cutter v. Wilkinson, 544 U.S. 709, 714 (2005))).

[19] *See Lighthouse Inst. for Evangelism*, 510 F.3d at 261 (describing the back-and-forth between Congress and the Supreme Court); *see also* River of Life Kingdom Ministries v. Village of Hazel Crest, 611 F.3d 367, 378 (7th Cir. 2010) (en banc) (Sykes, J., dissenting) (describing the road to RLUIPA as a "decade-long tug of war between Congress and the Supreme Court over the protection of religious liberty").

[20] *See generally* RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA (2017) (discussing America's history of land use discrimination).

[21] Christopher Silver, *The Racial Origins of Zoning in American Cities*, *in* URBAN PLANNING AND THE AFRICAN AMERICAN COMMUNITY: IN THE SHADOWS (June Manning Thomas &

invalidated by the Supreme Court as facially discriminatory. In response to these rulings, zoning officials began employing more covert techniques to discriminate against undesired residents.[22] As Judge Amul Thapar notes, "[r]ather than saying 'no blacks allowed,' zoning ordinances instead imposed minimum-size house requirements and excluded mobile homes and multiple-dwelling units in certain districts."[23] In response to these discriminatory actions, Congress enacted the Fair Housing Act (FHA) in 1968.[24] The FHA codified land use protections based on race, color, religion, sex, familial status, and national origin—however, only related to the sale or rental of residential property.[25] The subsection below considers the implications of land use discrimination based on religion in an institutional context and Congress's efforts to provide protections.

2. Background with Respect to Religious Free Exercise. Legislative actions and judicial ideology surrounding religious land use protections are rooted in the Free Exercise[26] and Establishment Clauses[27] of the U.S. Constitution.[28] While this body of

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Marsha Ritzdorf eds., Sage Publications 1997), *quoted in Tree of Life Christian Schs.*, 905 F.3d at 376 (Thapar, J., dissenting).

[22] *Tree of Life Christian Schs.*, 905 F.3d at 376 (Thapar, J., dissenting) ("At first, municipalities passed zoning codes that discriminated on their face. But the Supreme Court struck those down. So local officials employed more covert methods in the hope of evading scrutiny." (citing Buchanan v. Warley, 245 U.S. 60, 70–71, 82 (1917)).

[23] *Id.* (citing Andrew H. Whittemore, *The Experience of Racial and Ethnic Minorities with Zoning in the United States*, 32 J. PLAN. LITERATURE 16, 19 (2017)).

[24] *See* 42 U.S.C. § 3604 (showing the enactment of the Fair Housing Act on April 11, 1968).

[25] *See id.* § 3604(a) (making it unlawful "[t]o refuse to sell or rent . . . or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin").

[26] U.S. CONST. amend. I, cl. 2 ("Congress shall make no law . . . prohibiting the free exercise [of religion] . . . .").

[27] U.S. CONST. amend. I, cl. 1 ("Congress shall make no law respecting an establishment of religion . . . .").

[28] While these clauses are articulated in the U.S. Constitution (i.e., a federal document), the Supreme Court has held that these clauses, via the Incorporation Doctrine, are equally applicable to state governments. *See* Twining v. New Jersey, 211 U.S. 78, 99 (1908) ("[I]t is possible that some of the personal rights safeguarded by the first eight Amendments against National action may also be safeguarded against state action, because a denial of them would be a denial of due process of law."); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) ("The fundamental concept of liberty embodied in [the Fourteenth Amendment] embraces the liberties guaranteed by the First Amendment."); *see also* Brian K. Mosley, Note, *Zoning Religion out of the Public Square: Constitutional Avoidance and Conflicting Interpretations*

constitutional thought is well-developed, relying on the Free Exercise Clause for religious land use protections represents its greatest strength and weakness.[29] This "Achilles Heel" exists due to the recognized tension between the Free Exercise Clause and the Establishment Clause.[30] The Free Exercise Clause protects individuals' rights to exercise their religion without governmental interference.[31] The Establishment Clause prevents the U.S. government from promoting or establishing a state-sponsored religion.[32] Therefore, Congress must strike a balance modulating how much it protects religious freedom and religious land use without being unduly supportive of religious institutions.[33]

The first significant judicial opinion to influence RLUIPA was *Sherbert v. Verner*.[34] In this 1963 Supreme Court decision, Justice Brennan cited language from *NAACP v. Button*, where the Court held that governments must justify infringement on a person's free exercise right by a "compelling state interest in the regulation of a subject within the State's constitutional power to regulate."[35] The *Sherbert* rule, as it became known, remained good law until 1990.[36]

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of RLUIPA's Equal Terms Provision, 55 ARIZ. L. REV. 465, 470 (2013) (citing evidence that the Free Exercise Clause was incorporated and applied to states via the Fourteenth Amendment).

[29] *See* Lindsey Edinger, Comment, *Creating Confusion Rather than Clarity: The Sixth Circuit's (Lack of) Decision in* Tree of Life Christian Schools v. City of Upper Arlington, 58 B.C. L. REV. E. SUPP. 182, 185–86 (2017) (discussing the tension that exists between the Free Exercise and Establishment Clauses).

[30] *See id.* at 185 (These two clauses exist in tension with one another . . . ."). *See also* Cutter v. Wilkinson, 544 U.S. 709, 719 (2005) ("While the [Free Exercise and Establishment Clauses] express complementary values, they often exert conflicting pressures.").

[31] *See Cutter*, 544 U.S. at 719 ("[T]he Free Exercise Clause[] requires government respect for, and noninterference with, the religious beliefs and practices of our Nation's people.").

[32] *See id.* ("The first of the two [Religion] Clauses, commonly called the Establishment Clause, commands a separation of church and state.").

[33] *See* Edinger, *supra* note 29, at 185–86 (discussing the need for the government to balance religious autonomy without promoting a state religion). *See also* Estate of Thornton v. Caldor, Inc., 472 U.S. 703, 708 (1985) ("Under the [Free Exercise and Establishment] Clauses, government must guard against activity that impinges on religious freedom, and must take pains not to compel people to act in the name of any religion.").

[34] *See* Mosley, *supra* note 28, at 470 (discussing the relevance of *Sherbert v. Verner* to Free Exercise jurisprudence).

[35] Sherbert v. Verner, 374 U.S. 398, 403 (1963) (quoting NAACP v. Button, 371 U.S. 415, 438 (1963)).

[36] *See* Kane, *supra* note 17, at 828 (discussing the implications of *Smith* on the validity of the *Sherbert* rule); Sarah Keeton Campbell, Note, *Restoring RLUIPA's Equal Terms*

In 1990, the Supreme Court significantly cabined the *Sherbert* rule with its decision in *Employment Division v. Smith*.[37] Writing for the majority, Justice Scalia cited the Court's ruling in *Minersville School District Board of Education v. Gobitis*, holding that "a facially neutral and generally applicable law that infringed upon free exercise rights need not be justified by a compelling governmental interest to be constitutional."[38] This about-face by the Court spawned a flurry of public criticism and legislative action to establish broader free exercise protections.[39] Within these proposed actions, religious land use protections found a foothold.[40]

To counter the Court's decision in *Smith* and reinstate the *Sherbert* rule,[41] Congress passed the Religious Freedom Restoration Act (RFRA) in 1993.[42] Relying on Congress's enforcement powers under the Fourteenth Amendment,[43] RFRA sought to counter the Court's ruling in *Smith*.[44] RFRA provided that the "[g]overnment

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Provision, 58 DUKE L.J. 1071, 1077 (2009) ("In 1990, *Employment Division v. Smith* rejected [the *Sherbert* rule] and held that the Free Exercise Clause does not prevent the government from establishing neutral laws of general applicability that only incidentally affect religious liberty." (footnotes omitted)).

[37] *See* Campbell, *supra* note 36, at 1077 (discussing the implications of *Smith* on the validity of the *Sherbert* rule).

[38] Michael K. Sabers, *Well, It Depends on What Your Definition of "Unconstitutional" Is: The Eighth Circuit's Misinterpretation of* Flores *in* Christians v. Crystal Evangelical Free Church, 44 S.D. L. REV. 432, 433 (1999); *see also* Emp. Div. v. Smith, 494 U.S. 872, 879 (1990) ("Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs. The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities." (footnote omitted in original) (quoting Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 594–95 (1940)); Kane, *supra* note 17, at 828 (discussing the implications of *Employment Division v. Smith*).

[39] *See* Kane, *supra* note 17, at 829 ("Groups from across the political spectrum . . . immediately criticized and opposed the *Smith* decision."); Sabers, *supra* note 38, at 433 ("In direct response to *Smith*, Congress enacted the Religious Freedom Restoration Act of 1993 (RFRA).").

[40] *See* Kane, *supra* note 17, at 829 (discussing the implications of *Smith*).

[41] *See* City of Boerne v. Flores, 521 U.S. 507, 515 (1997) (articulating that one of RFRA's stated purposes was to reinstate the *Sherbert* rule).

[42] *See id.* at 507 (stating that "Congress enacted RFRA in direct response" to *Smith*).

[43] *See* U.S. CONST. amend. XIV, § 5 ("The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.").

[44] *See* Campbell, *supra* note 36, at 1077 ("Congress enacted the Religious Freedom Restoration Act (RFRA) with the express purpose of overturning *Smith* and 'restor[ing] the

may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling government interest; and (2) is the least restrictive means of furthering that compelling governmental interest."[45] This provision embraced a form of strict scrutiny, one of the highest bars articulated in U.S. constitutional law.[46] Despite Congress's efforts, in 1997, the Supreme Court held RFRA unconstitutional in *City of Boerne v. Flores*.[47] Citing federalism concerns, Justice Kennedy wrote, "[b]road as the power of Congress is under the Enforcement Clause of the Fourteenth Amendment, RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance."[48] The Court explained that Congress's attempt to protect religious free exercise in RFRA reached too far.[49] Specifically, the Court held that RFRA lacked a congruence and proportionality between the threat identified and the means adopted to remedy that threat.[50]

In *Boerne*, Justice Kennedy affirmed that Congress has the power to remedy state and local violations of the Free Exercise Clause;[51] however, when exercising this power, Congress must accept the Court's narrow interpretation of the Free Exercise Clause as decided in *Smith*.[52] Justice Kennedy noted that "RFRA [was] not so confined."[53] Specifically, he wrote that RFRA's broad coverage

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compelling interest test as set forth in *Sherbert v. Verner*.'" (alteration in original) (footnote omitted) (quoting 42 U.S.C. § 2000bb(b)(1))).

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

[46] *See Boerne*, 521 U.S. at 509 ("Requiring a State to demonstrate a compelling interest and show that it has adopted the least restrictive means of achieving that interest is the most demanding test known to constitutional law.").

[47] *See id.* at 508 ("RFRA is not a proper exercise of Congress' § 5 enforcement power because it contradicts vital principles necessary to maintain separation of powers and the federal-state balance.").

[48] *Id.* at 536.

[49] *See id.* at 507–08, 532, 536 (discussing Congress's overreach in enacting RFRA).

[50] *See id.* at 530 ("While preventive rules are sometimes appropriate remedial measures, there must be a congruence between the means used and the ends to be achieved. The appropriateness of remedial measures must be considered in light of the evil presented.") (citing South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966)).

[51] *See id.* at 519 ("We agree with respondent, of course, that Congress can enact legislation under § 5 enforcing the constitutional right to the free exercise of religion.").

[52] *See id.* at 534 ("The substantial costs RFRA exacts . . . far exceed any pattern or practice of unconstitutional conduct under the Free Exercise Clause as interpreted in *Smith*.").

[53] *Id.* at 532.

represented an "intrusion at every level of government" without identifying a widespread issue of Free Exercise violations as required by *Smith*.[54] Thus, RFRA represented a response that was neither congruent nor proportional.[55] To borrow the words of Justice Blackmun from a different opinion, Congress "launche[d] a missile to kill a mouse."[56]

As a result of the Court's decision in *Boerne*, Congress considered alternative legislative options.[57] Following *Boerne's* guidance,[58] the House and Senate Committees on the Judiciary held nine hearings exploring alternative protections for religious land use, among other rights, while respecting constitutional boundaries.[59] During these hearings, the Committees entertained "extensive evidence, statistical and anecdotal," regarding religious land use discrimination.[60] From these hearings, RLUIPA's immediate predecessor, the Religious Liberty Protection Act of 1999 (RLPA),[61] was drafted yet failed to gain Congressional support.[62] RLPA contained provisions addressing religious land use discrimination.[63] These provisions were later codified in RLUIPA.[64]

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[54] *Id.*

[55] *See id.* ("RFRA is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior.").

[56] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1036 (1992) (Blackmun, J., dissenting).

[57] *See* River of Life Kingdom Ministries v. Village of Hazel Crest, 611 F.3d 367, 380 (7th Cir. 2010) (Sykes, J., dissenting) ("Congress went back to the drawing board, narrowed its focus, and began compiling a legislative record of free-exercise violations . . . ."); *see also* Kane, *supra* note 17, at 829–32 (discussing how the Supreme Court's decision in *Boerne* sent Congress "back to the drawing board").

[58] *See Boerne*, 521 U.S. at 530 ("In contrast to the [legislative] record which confronted Congress and the Judiciary in the voting rights cases, RFRA's legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry. The history of persecution in this country detailed in the hearings mentions no episodes occurring in the past 40 years.").

[59] *See* Kane, *supra* note 17, at 830–31 (identifying the legislative actions Congress took leading to RLPA).

[60] *Id.* at 831.

[61] Religious Liberty Protection Act of 1999, H.R. 1691, 106th Cong. (1999).

[62] *See* Kane, *supra* note 17, at 831–32 (discussing RLUIPA's immediate predecessor—RLPA).

[63] *See* H.R. 1691 § 3(b) (showcasing religious land use protections contained in RLPA).

[64] *See* 42 U.S.C. § 2000cc (providing the religious land use protections contained in RLUIPA).

B. CONGRESS ENACTS RLUIPA

In 2000, Congress unanimously passed RLUIPA—a testament to its resolve to implement religious land use protections.[65] RLUIPA was signed into law by then-President Clinton on September 22, 2000.[66]

This Note deals exclusively with the Equal Terms Provision of RLUIPA; however, it is critical to understand all of RLUIPA in context.[67] RLUIPA addresses two subject matter areas—religious land use and institutionalized persons.[68] The religious land use provisions of RLUIPA include two sections: "Substantial Burdens"[69] and "Discrimination and Exclusion."[70] Congress also included a section in RLUIPA regarding "Rules of Construction,"[71] which is particularly relevant to the analysis in Parts III–V of this Note.

This Note only considers the "Discrimination and Exclusion" subsection,[72] which includes three distinct provisions.[73] The first provision, and the primary focus of this note, is the "Equal Terms Provision," which states that "[n]o government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution."[74] The second provision—"Nondiscrimination"—states that "[n]o government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious

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[65] *See* Amber Wheeler, Note, *RLUIPA's Equal Terms Clause and The Circuit Split: Striking a Balance Between Economic Concerns and Protecting Religious Liberty*, 38 MISS. COLL. L. REV. 173, 181 (2020) (discussing the unanimous, bipartisan passage of RLUIPA). *See also* 146 CONG. REC. 16,698–702 (2000) (providing Senators Hatch and Kennedy's motivations for enacting RLUIPA).

[66] *See* Wheeler, *supra* note 65, at 181 (discussing the presentment of RLUIPA).

[67] *See* SCALIA & GARNER, *supra* note 17, at 252–53 (discussing the importance of understanding a statute's context).

[68] *See* 42 U.S.C. §§ 2000cc–2000cc-1 (showing the scope of RLUIPA—"Protection of Land Use as Religious Exercise" and "Protection of Religious Exercise of Institutionalized Persons").

[69] *Id.* § 2000cc(a).

[70] *Id.* § 2000cc(b).

[71] *Id.* § 2000cc-3.

[72] *Id.* § 2000cc(b).

[73] *Id.* § 2000cc(b)(1)–(3) (providing the three provisions of the "Discrimination and exclusion" subsection).

[74] *Id.* § 2000cc(b)(1).

denomination."[75] Finally, the third provision addresses "Exclusions and Limits" by stating that "[n]o government shall impose or implement a land use regulation" that "totally excludes religious assemblies from a jurisdiction" or "unreasonably limits religious assemblies, institutions, or structures within a jurisdiction."[76] Congress also addressed the proper construction of RLUIPA.[77]

In § 2000cc-3(g), entitled "Broad Construction," Congress states that "[RLUIPA] shall[78] be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution."[79] As discussed later in this Note, this subsection is Congress's express instruction to interpreters that it intended to impart the strongest protections possible to religious free exercise. Thus, judges should not cabin the plain language of RLUIPA's text with language that judges feel should have been included by Congress. If Congress intended to limit RLUIPA, it would have.[80]

Among the provisions of the "Discrimination and Exclusion" subsection—unlike the "Substantial Burdens" subsection—there are no jurisdictional limits, nor is strict scrutiny or a balancing test provided.[81] Furthermore, in terms of statutory interpretation, it is relevant that the Equal Terms Provision is a standalone provision—it is not part of the provisions prohibiting discrimination, total exclusions, or unreasonable limitations.[82] The latter of these two points is the basis for this Note's analysis in Parts IV and V.

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[75] *Id.* § 2000cc(b)(2).

[76] *Id.* § 2000cc(b)(3).

[77] *See id.* § 2000cc-3(g) (discussing how RLUIPA should be construed).

[78] Here, it is significant that Congress elected to use "shall" instead of "may." Justice Scalia and Bryan Garner state that "[t]he traditional, commonly repeated rule is that *shall* is mandatory and *may* is permissive." SCALIA & GARNER, *supra* note 17, at 112. Therefore, interpreters of RLUIPA's Equal Terms Provision must construe it to provide the broadest free exercise protections.

[79] 42 U.S.C. § 2000cc-3(g).

[80] *See* SCALIA & GARNER, *supra* note 17, at 93–100 (discussing the Omitted-Case Canon).

[81] *Compare* 42 U.S.C. § 2000cc(a) (providing the "Substantial Burdens" subsection which includes a balancing test and strict scrutiny), *with* 42 U.S.C. § 2000cc(b) (no balancing test or strict scrutiny requirement).

[82] *See* Douglas Laycock & Luke W. Goodrich, *RLUIPA: Necessary, Modest, and Under-Enforced*, 39 FORDHAM URB. L.J. 1021, 1058 (2012) ("It is apparent on the face of [RLUIPA] that the substantial-burden provision contains a defense of compelling government interest, and that the equal-terms provision does not. The substantial-burden provision is in subsection (a)(1), and the compelling-interest defense is embedded in a sentence that states

C. COMPONENTS OF AN RLUIPA EQUAL TERMS CLAIM

The Eleventh Circuit has identified four elements of an action brought under RLUIPA's Equal Terms Provision: "(1) the plaintiff must be a religious assembly or institution, (2) subject to a land use regulation, that (3) treats the religious assembly on less than equal terms, with (4) a nonreligious assembly or institution."[83]

Additionally, the Eleventh Circuit has identified three varieties of Equal Terms violations. First, there can be "a statute that facially differentiates between religious and nonreligious assemblies or institutions."[84] Second, there can be "a facially neutral statute that is nevertheless 'gerrymandered' to place a burden solely on religious, as opposed to nonreligious, assemblies or institutions."[85] Third, there can be "a truly neutral statute that is selectively enforced against religious, as opposed to nonreligious assemblies or institutions."[86]

III. THE CIRCUIT SPLIT

On March 22, 2022, the United States Court of Appeals for the Ninth Circuit issued an opinion in *New Harvest Christian Fellowship v. City of Salinas*.[87] In *New Harvest*, the Ninth Circuit categorized the circuit split surrounding RLUIPA's Equal Terms Provision into three interpretive camps.[88] At the highest level of interpretation, the first two camps adopt a non-textualist approach, while the third camp adopts a textualist approach. This Note adopts an analogous three-camp framework to analyze the circuit split.

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the rule on substantial burdens. The equal-terms, nondiscrimination, and exclusion-and-limitation provisions are in the three subsections of section (b), and no defense is stated for any of them. This distinction did not happen by accident.").

[83] Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward County, 450 F.3d 1295, 1307–08 (11th Cir. 2006) (first citing 42 U.S.C. § 2000cc(b)(1); and then citing Midrash Sephardi, Inc. v. Town of Surfside, 336 F.3d 1214, 1232 (11th Cir. 2004)).

[84] *Id*. at 1308.

[85] *Id*.

[86] *Id*.

[87] New Harvest Christian Fellowship v. City of Salinas, 29 F.4th 596, 604–05 (9th Cir. 2022) (articulating the Ninth Circuit's interpretation of RLUIPA's Equal Terms Provision).

[88] *See id*. at 606 n.10 (articulating the "three camps" as viewed by the Ninth Circuit).

The Ninth Circuit's first camp[89] includes the Third and Sixth Circuits, which "require[] . . . plaintiffs [to] 'put forward' similarly situated nonreligious assemblies in order to make a prima facie case."[90] After reviewing existing opinions, this Note also puts the First, Fourth, and Seventh Circuits in this camp.[91] Note that these circuits' interpretations impart "extra-legislative" language into the text of RLUIPA's Equal Terms Provision.

The Ninth Circuit's second camp includes the Fifth and Ninth Circuits,[92] "requiring only that the plaintiff bring forward sufficient evidence that the challenged regulation makes an express distinction between religious and nonreligious assemblies."[93] Initially, the religious and nonreligious assemblies do not have to be similarly situated.[94] Once the plaintiff has established a prima facie case, the "burden shift[s] to the government to show . . . that the religious and nonreligious assemblies are not . . . similarly situated."[95] Similar to the first camp, these circuits' interpretations impose "extra-legislative" requirements on RLUIPA's Equal Terms Provision.

Finally, the Ninth Circuit's third camp includes the Eleventh Circuit,[96] which does not require a plaintiff to provide "similarly situated nonreligious assemblies" to establish a prima facie case.[97] However, this approach provides that "the government may carry its burden only by showing that the challenged provision survives strict scrutiny."[98]

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[89] *See id.* (describing the first camp identified by the Ninth Circuit).

[90] *Id.* (first citing Tree of Life Christian Schs. v. City of Upper Arlington, 905 F.3d 357, 373 (6th Cir. 2018); and then citing Lighthouse Inst. for Evangelism, Inc, v. City of Long Branch, 510 F.3d 253, 270 (3d Cir. 2007)).

[91] *See infra* sections III.A.*1*, *3* & *5*.

[92] *See New Harvest Christian Fellowship*, 29 F.4th at 606 n.10 (providing the members of the second camp identified by the Ninth Circuit).

[93] *Id*.

[94] *See id*. (citing that the religious and nonreligious assemblies need not be similarly situated).

[95] *Id*.

[96] *Id*. (describing the Eleventh Circuit's approach as a third camp).

[97] *Id.*

[98] *Id*.

A. CAMP #1: "SIMILARLY SITUATED COMPARATOR" REQUIREMENT

1. The First Circuit. In *Signs for Jesus v. Town of Pembroke*, the First Circuit held that the "first step in the RLUIPA 'equal terms' analysis is to identify a relevant secular comparator."[99] The First Circuit observed that while circuits have adopted varying approaches, "they all generally require that the comparators be similarly situated with respect to the purpose of the underlying regulation."[100] Therefore, the First Circuit adopted the first camp's approach. The First Circuit, however, had the opportunity to further develop the qualifications for a "relevant secular comparator."[101]

In *Signs for Jesus*, the religious entity seeking relief identified two local governmental entities, both of which were permitted to construct electronic signage in the district where the religious entity was not.[102] The First Circuit distinguished the different regulatory authority with respect to the two entities, noting that "the state has deprived the Town of any power to regulate governmental land uses"; therefore, the "[c]hurch and its signs are . . . subject to the Town's regulatory authority, while [the governmental entities] are not."[103] The First Circuit held that the religious entity's RLUIPA Equal Terms claim failed due to a lack of evidence of a "non-governmental secular entity" treated on better terms.[104] Therefore, the First Circuit requires a similarly situated non-governmental, secular comparator to establish a prima facie case in its Equal Terms jurisprudence.[105]

2. The Third Circuit. The Third Circuit's opinion in *Lighthouse Institute for Evangelism, Inc. v. City of Long Branch* falls into the

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[99] Signs for Jesus v. Town of Pembroke, 977 F.3d 93, 109 (1st Cir. 2020).

[100] *Id.*

[101] *See id.* at 110 (discussing the distinction the First Circuit identified regarding a governmental entity as an appropriate comparator for an RLUIPA Equal Terms claim).

[102] *See id.* at 109 (discussing how the church identified a public school and a state agency as comparators).

[103] *Id.* at 109–10 (quoting Signs for Jesus v. Town of Pembroke, 230 F. Supp. 3d 49, 67 (D.N.H. 2017) (the district court's opinion in this case)).

[104] *See id.* at 110 ("The Church . . . puts forth no evidence that a non-governmental secular entity is treated on other than equal terms . . . .").

[105] *See id.* at 109–10 (summarizing the First Circuit's interpretation of RLUIPA's Equal Terms Provision).

Ninth Circuit's first camp—with a caveat.[106] In this case, the judge held that "a regulation will violate 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*."[107] The Third Circuit relied on statements in the Congressional Record appearing to evidence Congress's intent to codify Free Exercise jurisprudence when it enacted RLUIPA.[108] Therefore, the Third Circuit analyzed claims under RLUIPA's Equal Terms Provision following the guidance in Free Exercise jurisprudence offered by the Supreme Court in *Smith* and in Third Circuit precedent.[109]

Judge Roth then rejected the approach adopted by the Eleventh Circuit.[110] The Eleventh Circuit's approach is discussed in more detail later in this Part; however, for present purposes, it is sufficient to know that the Eleventh Circuit adopted a textualist interpretation of RLUIPA's Equal Terms Provision and imposed strict scrutiny on the land use regulation at issue.[111] Countering the Eleventh Circuit's interpretation, Judge Roth stated that the Eleventh Circuit's view "would lead to the conclusion that Congress intended to force local governments to give any and all religious entities a free pass to locate wherever any secular institution or assembly is allowed."[112] The Third Circuit believed this view contradicts the Equal Terms Provision's text and Congress's intent.[113]

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[106] *See* Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch, 510 F.3d 253, 266 (3d Cir. 2007) (providing the Third Circuit's approach to RLUIPA's Equal Terms Provision).

[107] *Id.* (holding that the religious and secular entities being compared need not perform the same functions; they just have to be similarly situated in regard in regard to the regulatory purpose).

[108] *See id.* at 264 (providing legislative history that the Third Circuit relied on to reach its interpretation).

[109] *See id.* at 266 ("We see that the Free Exercise jurisprudence of the Supreme Court and of this Court teaches that the relevant comparison for purposes of 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 aims*.").

[110] *See id.* at 267 ("[W]e agree with . . . the District Court . . . that we should decline [the] invitation to adopt the Eleventh Circuit's expansive reading of . . . [RLUIPA].").

[111] *See* Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1232 (11th Cir. 2004) (providing the Eleventh Circuit's interpretation of RLUIPA's Equal Terms Provision).

[112] *Lighthouse Inst. for Evangelism*, 510 F.3d at 268.

[113] *See id.* (discussing the Third Circuit's criticisms of the Eleventh Circuit's interpretation).

The Third Circuit further rejected the Eleventh Circuit's interpretation by holding that "RLUIPA's Equal Terms provision operates on a strict liability standard; strict scrutiny does not come into play."[114] Referring to the structure of RLUIPA, the Third Circuit observed that the "Substantial Burdens" section[115] includes a strict scrutiny provision.[116] In contrast, the "Discrimination and Exclusion" subsection[117] (i.e., the subsection inclusive of the Equal Terms Provision) does not contain a strict scrutiny provision.[118] Thus, the Third Circuit held that since Congress did not include a strict scrutiny provision in RLUIPA's Equal Terms Provision, "this 'disparate exclusion' was part of the intent of Congress and not an oversight."[119]

3. The Fourth Circuit. As a matter of first impression for the Fourth Circuit, *Canaan Christian Church v. Montgomery County* appears to fall into the first camp articulated by the Ninth Circuit.[120] Citing the First, Fifth, Sixth, Seventh, and Ninth Circuits' opinions, the Fourth Circuit held that a claim under RLUIPA's Equal Terms Provision requires a secular comparator "similarly situated *with regard to the regulation at issue*."[121] The Fourth Circuit's initial treatment of RLUIPA's Equal Terms Provision erred on the side of brevity, and a petition for writ of certiorari was filed with the Supreme Court on September 16, 2022.[122] That petition was denied on January 9, 2023.[123]

4. The Sixth Circuit. The Sixth Circuit's opinion in *Tree of Life Christian Schools v. City of Upper Arlington* falls into the first camp

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[114] *Id.* at 269.

[115] 42 U.S.C. § 2000cc(a).

[116] *See Lighthouse Inst. for Evangelism*, 510 F.3d at 269 (noting that the strict scrutiny provision appears in the Substantial Burdens Provision).

[117] 42 U.S.C. § 2000cc(b).

[118] *See Lighthouse Inst. for Evangelism*, 510 F.3d at 269 (noting that the Equal Terms Provision does not contain a strict scrutiny requirement).

[119] *Id.* (citing Russello v. United States, 464 U.S. 16, 23 (1983).

[120] *See* Canaan Christian Church v. Montgomery County, 29 F.4th 182, 196 (4th Cir. 2022) ("We have not yet addressed [the Equal Terms] provision of RLUIPA.").

[121] *Id.* (citing Tree of Life Christian Schs. v. City of Upper Arlington, 905 F.3d 357, 368 (6th Cir. 2018)).

[122] Petition for Writ of Certiorari, Burtonsville Assocs. v. Montgomery County, 143 S. Ct. 566 (2023) (No. 22-260).

[123] Burtonsville Assocs. v. Montgomery County, 143 S. Ct. 566, 566 (2023).

described by the Ninth Circuit.[124] Writing for the majority, Judge Gilman held that to establish a violation of the Equal Terms Provision of RLUIPA, the plaintiff must establish the existence of a secular comparator that is similarly situated "with regard to the legitimate zoning criteria set forth in the municipal ordinance in question."[125] Judge Gilman stated that this "legitimate zoning criteria" approach "best captures" the comparison idea required by RLUIPA's Equal Terms Provision.[126] The Sixth Circuit further held that religious plaintiffs must first identify a similarly situated secular comparator treated on less than equal terms regarding the legitimate zoning criteria.[127] After identifying a qualifying similarly situated secular comparator, the burden of persuasion shifts to the government.[128]

In reaching this interpretation, the Sixth Circuit offered considerable commentary on the court's role in statutory interpretation.[129] The Sixth Circuit "look[s] first to the text and, if the meaning of the language is plain, then 'the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce [the statute] according to its terms.'"[130] However, when a statute's language is ambiguous, the court can consider persuasive authority to aid in its interpretation.[131] Applying these principles to the case before it, the court found the phrase "equal terms" ambiguous within RLUIPA's Equal Terms Provision.[132] As a result, the court identified "similarly situated with regard to the legitimate zoning criteria" as the most appropriate interpretation of "equal terms."[133]

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[124] *See Tree of Life Christian Schs.*, 905 F.3d at 358 (stating that the case was a matter of first impression for the Sixth Circuit).

[125] *Id.* at 367–69.

[126] *Id.* at 369.

[127] *See id.* at 370 (clarifying that plaintiffs bear the burden of making out a prima facie case).

[128] *Id.* (noting that only after a plaintiff establishes a prima facie case does the burden of persuasion shift to the government).

[129] *See id.* at 367 (describing the Sixth Circuit's approach to statutory interpretation).

[130] *Id.* (quoting Wysocki v. Int'l Bus. Mach. Corp., 607 F.3d 1102, 1106 (6th Cir. 2010)).

[131] *See id.* (quoting *In re* Carter, 553 F.3d 979, 986 (6th Cir. 2009)) (discussing the court's interpretive approach when statutory language is ambiguous).

[132] *See id.* ("[The text of RLUIPA] provides no guideposts for what Congress meant by the term 'equal.'").

[133] *Id.* at 370 ("The concept of 'similarly situated with regard to legitimate zoning criteria' is simply the most reasonable interpretation of the undefined statutory words 'equal terms.'

The Sixth Circuit highlighted the spectrum on which courts could fall when interpreting "equal terms."[134] On the broadest and most protective end of the spectrum, a court could confer meaning to "equal terms," which could impart "preferential treatment to [a] religious entit[y]."[135] However, the court noted that such an interpretation would likely violate the Establishment Clause.[136] On the narrowest end of the spectrum, a court could "plausibly read the equal terms provision *in pari materia* with the . . . Equal Protection Clause."[137] This interpretation, however, would "render the equal terms provision superfluous."[138] Therefore, the Sixth Circuit concluded that its interpretation strikes the appropriate balance on this spectrum and aligns with decisions by its sister courts.[139]

5. The Seventh Circuit. The Seventh Circuit, sitting en banc, adopted a unique interpretation of RLUIPA's Equal Terms Provision in *River of Life Kingdom Ministries v. Village of Hazel Crest*.[140] Writing for the majority, Judge Posner rejected the positions held by the Third and Eleventh Circuits.[141] Instead, Judge Posner articulated a variation of the interpretation offered by the Third Circuit.[142] Recall that the Third Circuit's interpretation is that "a regulation will violate 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*

And interpreting ambiguous statutory language is a core function of the courts." (citing United States *ex rel.* Jones v. Horizon Healthcare Corp., 160 F.3d 326, 336 (6th Cir. 1998))).

[134] *See id.* at 367–68 (discussing the spectrum on which courts could fall regarding the interpretation of the RLUIPA's Equal Terms Provision).

[135] *Id.* at 368.

[136] *See id.* (discussing how this view would likely violate the First Amendment's Establishment Clause).

[137] *Id.*

[138] *Id.*

[139] *See id.* at 369 (discussing the Sixth Circuit's rationale for adopting its interpretive approach to the RLUIPA's Equal Terms Provision).

[140] *See* River of Life Kingdom Ministries v. Village of Hazel Crest, 611 F.3d 367, 368 (7th Cir. 2010) ("The Court granted rehearing en banc to consider the proper standard for applying the equal-terms provision of [RLUIPA].").

[141] *See id.* at 368–70 ("Neither the Third Circuit's nor the Eleventh Circuit's approach, though in application they might yield similar or even identical results—and results moreover that would strike most judges as proper—is entirely satisfactory.").

[142] *See id.* at 371 (discussing the problem with the Third Circuit's test and proposing a shift of focus from regulatory purpose to accepted zoning criteria).

regulatory purpose."[143] The Seventh Circuit proposed that "regulatory purpose" should be replaced with "accepted zoning criteria."[144] Justifying the Seventh Circuit's position, Judge Posner wrote that "'[p]urpose' is subjective and manipulable, so asking about 'regulatory purpose' might result in giving local officials a free hand in answering the question 'equal with respect to what?' 'Regulatory criteria' are objective—and it is federal judges who will apply the criteria."[145]

Judge Posner acknowledged the lack of "airtightness" of the interpretation offered; however, he noted that RLUIPA's "equal-terms provision is not the only or . . . most important protection" against religious land use discrimination.[146] Applying the test to the case before the Seventh Circuit, he stated that if religious and secular land uses are treated the same from the perspective of "accepted zoning criteria," then an Equal Terms claim is easily rebuttable.[147] If a municipality, however, were to impose a zoning regulation that zones an area for commercial use but allows other non-commercial uses but not religious land uses, then such an entity would likely have a claim under RLUIPA's Equal Terms Provision.[148] Judge Posner acknowledged that this hypothetical is relatively simple and, in the future, there will likely be cases that are "harder to classify" and tend to "blur the character of particular zoning districts."[149]

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

[144] *See River of Life Kingdom Ministries*, 611 F.3d at 371 ("The problems that we have identified with the Third Circuit's test can be solved by a shift of focus from regulatory *purpose* to accepted zoning *criteria*.").

[145] *Id.* Judge Posner also wrote that "the 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 witnesses; facilitates zoning classifications thinly disguised as neutral but actually systematically unfavorable to churches (as by favoring public reading rooms over other forms of nonprofit assembly); and makes the meaning of 'equal terms' in a federal statute depend on the intentions of local government officials." *Id*.

[146] *Id*. at 374.

[147] *See id*. (applying the test offered by Judge Posner to the case before the Seventh Circuit).

[148] *See id*. at 373–74 (distinguishing the situation where religious land uses are excluded from a commercial land use area while other non-religious land uses are not).

[149] *Id.* at 374.

B. CAMP #2: "SIMILARLY SITUATED COMPARATOR" REQUIREMENT—WITH A CAVEAT

1. The Fifth Circuit. Drawing inspiration from the Seventh and Ninth Circuits, the Fifth Circuit in *Opulent Life Church v. City of Holly Springs* articulated a nuanced interpretation of RLUIPA's Equal Terms Provision.[150] Writing for the majority, Judge Elrod held that, to analyze a claim under RLUIPA's Equal Terms Provision, "[t]he 'less than equal terms' must be measured by the ordinance itself and the criteria by which it treats institutions differently."[151]

Agreeing with the Ninth Circuit, the Fifth Circuit held that one way a plaintiff can establish a prima facie case is to demonstrate that "an ordinance . . . expressly differentiates religious land uses from nonreligious land uses," thus constituting a facially discriminatory claim.[152] After establishing a prima facie case, the government must "affirmatively satisfy [a] two-part test to bear its burden of persuasion."[153] The first part of the test requires the court to determine "the regulatory purpose or zoning criterion behind the regulation at issue, as stated explicitly in the text of the ordinance or regulation."[154] Then, the court must determine "whether the religious assembly or institution is treated as well as every other nonreligious assembly or institution that is 'similarly situated' with respect to the stated purpose or criterion."[155] The outcome of this two-part test dictates the success or failure of the action brought under RLUIPA's Equal Terms Provision.

Here, unlike circuits in the first camp, religious assemblies and institutions do not have to identify a similarly situated secular comparator to establish a prima facie case. The burden of persuasion regarding a similarly situated comparator analysis falls

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[150] *See* Opulent Life Church v. City of Holly Springs, 697 F.3d 279, 292 (5th Cir. 2012)) ("The Seventh and Ninth Circuits require a comparator that is similarly situated with respect to 'accepted zoning criteria.'" (first citing Centro Familiar Cristiano Buenas Nuevas v. City of Yuma, 651 F.3d 1163, 1172–73 (9th Cir. 2011); and then citing River of Life Kingdom Ministries v. Village of Hazel Crest, 611 F.3d 367, 371–73 (7th Cir. 2010))).

[151] *Id.* at 291 (citing Elijah Group, Inc. v. City of Leon Valley, 643 F.3d 419, 424 (5th Cir. 2011)).

[152] *Id.* (citing *Centro Familiar*, 651 F.3d at 1171).

[153] *Id.* at 293.

[154] *Id.* at 292.

[155] *Id.* at 292–93.

on the government as part of the two-part test articulated by the Fifth Circuit.

2. The Ninth Circuit. In *New Harvest Christian Fellowship v. City of Salinas*, the Ninth Circuit was acutely aware of RLUIPA's Equal Terms Provision's circuit split.[156] Identifying the case before the court as a facial challenge,[157] Judge Rakoff explained that the court "consider[s] only the text of the zoning ordinance, not its application."[158] As a result, the Ninth Circuit held that for a plaintiff to establish a prima facie case supporting an equal terms violation, the plaintiff must demonstrate that the contested ordinance "draws an 'express distinction' between religious assemblies and nonreligious assemblies."[159] After establishing a prima facie case, the burden shifts to the municipality.[160] The municipality must then prove that any nonreligious assembly permitted to act in a way a religious entity is unable to is not similarly situated "with respect to an accepted zoning criteri[on]."[161]

Therefore, unlike the first camp, the plaintiff does not bear the burden of having to "point to similarly situated nonreligious comparators."[162] The Ninth Circuit held that "the similarly situated comparators come into play, in a facial challenge, only after the plaintiff has put forward sufficient evidence that the regulation makes an express distinction between religious and nonreligious assemblies."[163] Finally, as a fellow member of the second camp, the Ninth Circuit adopted the two-part test articulated by the Fifth Circuit in *Opulent Life*.[164]

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[156] *See* New Harvest Christian Fellowship v. City of Salinas, 29 F.4th 596, 606 n.10 (9th Cir. 2022) (discussing the Ninth Circuit's awareness of an expanding circuit split).

[157] *See id.* at 605 (discussing the requirements of a facial challenge).

[158] *Id.* (quoting Calvary Chapel Bible Fellowship v. County of Riverside, 948 F.3d 1172, 1176 (9th Cir. 2020)).

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

[160] *See id.* (holding that if the plaintiff makes out a prima facie case, the burden of persuasion shifts to the municipality).

[161] *Id.* at 606 (alteration in original) (citing *Centro Familiar*, 651 F.3d at 1173).

[162] *Id. See also id.* ("The burden is not on the [religious assembly or institution] to show a similarly situated secular assembly, but on the city to show that the treatment received by the [religious assembly or institution] should not be deemed unequal, where it appears to be unequal on the face of the ordinance." (quoting *Centro Familiar*, 651 F.3d at 1173)).

[163] *Id.*

[164] *See id.* at 607 (applying the two-part test articulated by the Fifth Circuit).

C. CAMP #3: A TEXTUALIST APPROACH—WITH AN EXCEPTION

1. The Eleventh Circuit. The Eleventh Circuit occupies a textualist camp of its own.[165] In *Midrash Sephardi, Inc. v. Town of Surfside*, Judge Wilson noted that "RLUIPA allows courts to determine whether a particular system of classifications adopted by a city subtly or covertly departs from requirements of neutrality and general applicability."[166] Adopting the *Smith-Lukumi* line of precedent, the Eleventh Circuit held 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."[167] Therefore, a violation of the RLUIPA's Equal Terms Provision must be subject to strict scrutiny.[168]

Two observations explain the Eleventh Circuit's interpretation. First, the court noted that while the Equal Terms Provision "has the 'feel' of an equal protection law, it lacks the 'similarly situated' requirement usually found in equal protection analysis."[169] Second, the Equal Terms Provision holds zoning authorities strictly liable, thus making a discriminatory ordinance per se unlawful regardless of justifications.[170]

Shying away from the "similarly situated comparator" requirement employed by the first and second camps,[171] the Eleventh Circuit analyzed the Equal Terms Provision's "natural perimeter."[172] Judge Wilson justified this view by holding that "the express provisions of RLUIPA . . . require a direct and narrow focus,"[173] which results in the "relevant 'natural perimeter'" being

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[165] *See id.* at 606 n.10 (noting that the Eleventh Circuit is in its own camp).

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

[167] *Id.*

[168] *See id.* ("Thus, a violation of § (b)'s equal treatment provision, consistent with the analysis employed in *Lukumi*, must undergo strict scrutiny." (citing Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546 (1993))).

[169] *Id.* at 1229.

[170] *See id.* ("[Section] (b)(1) renders a municipality strictly liable for its violation, rendering a discriminatory land use regulation *per se* unlawful without regard to any justifications supplied by the zoning authority.").

[171] *See supra* sections III.A & III.B.

[172] *See Midrash Sephardi*, 366 F.3d at 1230 (discussing Justice Harlan's natural perimeter test and the proper natural perimeter for the RLUIPA's Equal Terms Provision).

[173] *Id.*

the category of "assemblies or institutions" contemplated by RLUIPA.[174] Therefore, the court must "evaluate whether an entity qualifies as an 'assembly or institution,' as that term is used in RLUIPA, before considering whether the governmental authority treats a religious assembly or institution differently than a nonreligious assembly or institution."[175] Since the Equal Terms Provision does not define "assembly" or "institution," the two words must be "construe[d] . . . in accordance with their ordinary and natural meanings."[176] The Eleventh Circuit proceeded to cite definitions of "assembly" and "institution" from Webster's Dictionary and Black's Law Dictionary.[177]

The final point the Eleventh Circuit made in *Midrash* is that, even after the Supreme Court's decision in *Smith*, "it remains true that a law that is not neutral or generally applicable must undergo strict scrutiny."[178] Therefore, the Eleventh Circuit held that a violation of RLUIPA's Equal Terms Provision "indicates that the offending law also violates the *Smith* rule requiring neutrality and general applicability. Consistent with the analysis employed in *Lukumi*, a law violating § (b) must therefore undergo [strict scrutiny]."[179] In *Midrash*, the Eleventh Circuit did not address what analysis is appropriate if a law is neutral and generally applicable yet still discriminates between religious and secular entities.[180] Two years later, the Eleventh Circuit had such an opportunity.

In 2006, the Eleventh Circuit decided *Primera Iglesia Bautista Hispana v. Broward County*.[181] In this case, the court identified three ways of violating RLUIPA's Equal Terms Provision. First,

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[174] *Id.*

[175] *Id.*

[176] *Id.*

[177] *See id.* (defining "assembly" and "institution" (first citing WEBSTER'S 3D NEW INT'L UNABRIDGED DICTIONARY 131 (1993); and then citing BLACK'S LAW DICTIONARY 111 (7th ed. 1999).

[178] *Id.* at 1232; *see also id.* ("[The Supreme Court] indicated that [strict scrutiny] would continue to apply where a law fails to similarly regulate secular and religious conduct implicating the same government interest." (citing Emp. Div. v. Smith, 494 U.S. 872, 879 n.3 (1990))).

[179] *Id.* at 1235.

[180] *See id.* (failing to discuss what analysis should be conducted when a law is both neutral and generally applicable, yet still discriminates against religious assemblies and institutions).

[181] Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward County, 450 F.3d 1295 (11th Cir. 2006).

there could be "a statute that facially differentiates between religious and nonreligious assemblies or institutions."[182] When a law is facially discriminatory, like in *Midrash*, the zoning ordinance under review must survive strict scrutiny.[183] Second, there could be "a facially neutral statute that is nevertheless 'gerrymandered' to place a burden solely on religious, as opposed to nonreligious, assemblies or institutions."[184] When a zoning ordinance is facially neutral but gerrymandered, like in *Lukumi*,[185] the plaintiff must "show that the challenged zoning regulation separates permissible from impermissible assemblies or institutions in a way that burdens 'almost only' religious uses."[186] Third, there could be "a truly neutral statute that is selectively enforced against religious, as opposed to nonreligious assemblies or institutions."[187] When a zoning ordinance is challenged as applied, a plaintiff "must present evidence that a *similarly situated* nonreligious comparator received differential treatment under the challenged regulation."[188]

IV. PRESCRIPTION #1: JUDICIAL INTERVENTION

A. EXISTENCE OF A CIRCUIT SPLIT

As illustrated in Part III, Circuits have divided into three interpretive camps with respect to RLUIPA's Equal Terms Provision, each of which has sub-interpretations providing a nuanced perspective. Judge Thapar of the Sixth Circuit points out that this circuit split means that the success or failure of a claim under RLUIPA's Equal Terms Provision turns on where the

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[182] *Id.* at 1308.

[183] *See id*. at 1308–09 ("A panel of this Court held that the ordinance facially violated RLUIPA's Equal Terms Provision, and struck the ordinance down after determining that it failed strict scrutiny review.").

[184] *Id.* at 1308.

[185] *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 521 (1993) (discussing how the ordinance was "gerrymandered" to suppress Free Exercise).

[186] *Primera Iglesia Bautista Hispana*, 450 F.3d at 1309.

[187] *Id.* at 1308.

[188] *Id.* at 1311. This third, as-applied category identified by the Eleventh Circuit aligns with analysis offered by the first camp. *See* discussion *supra* section III.A.

plaintiff sues.[189] As a result, he argues that the "time has come" for the Supreme Court to "revisit what the circuits are doing."[190]

B. A PROPER INTERPRETATION OF RLUIPA'S EQUAL TERMS PROVISION

If the Supreme Court grants certiorari in a case involving RLUIPA's Equal Terms Provision, the Court should adopt a textualist interpretation. A textualist interpretation is most appropriate because it satisfies Congress's legislative intent and gives full effect to the statute. In many circuits, district judges have abandoned the intent of the Equal Terms Provision and "import[ed] words into the text of [RLUIPA that] have usurped the legislative role and replaced [the courts'] will for the will of the people."[191] This Section offers three reasons why a textualist interpretation is appropriate: (1) it remedies perceived ambiguities in RLUIPA's text, (2) it is constitutionally valid, and (3) it effectuates Congress's intent.

1. Remedying Perceived Ambiguities in RLUIPA's Equal Terms Provision. The Eleventh Circuit interpreted the Equal Terms Provision in *Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward County* to have four distinct elements: "(1) the plaintiff must be a religious assembly or institution, (2) subject to a land use regulation, that (3) treats the religious assembly on less than equal terms, with (4) a nonreligious assembly or institution."[192] Within this distillation of the Equal Terms Provision, one reasonable

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[189] *See* Tree of Life Christian Schs. v. City of Upper Arlington, 905 F.3d 357, 387 (6th Cir. 2018) (Thapar, J., dissenting) ("Whether a religious plaintiff can succeed under the Equal Terms provision depends entirely on where it sues.").

[190] *Id.*

[191] *Tree of Life Christian Schs.*, 905 F.3d at 387. *Cf.* THE FEDERALIST NO. 47, at 326 (James Madison) (Jacob E. Cooke ed., 1961) ("Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for *the judge* would then be *the legislator*." (alterations in original) (quoting CHARLES DE SECONDAT, BARON DE MONTESQUIEU, THE SPIRIT OF LAWS 173 (Thomas Nugent, trans., Batoche Books 2001) (1748))); SCALIA & GARNER, *supra* note 17, at 53 ("Interpretation or construction is 'the ascertainment of the thought or meaning of the author of . . . the legal document, as expressed therein, according the rules of language and subject to the rules of law." (quoting H.T. Tiffany, *Interpretation and Construction*, *in* 17 AMERICAN AND ENGLISH ENCYCLOPEDIA OF LAW 1, 2 (David S. Garland & Lucius P. McGehee eds., 2d ed. 1900)).

[192] Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward County, 450 F.3d 1295, 1307 (11th Cir. 2006).

ambiguity exists, which can be remedied by a textualist interpretation.

The phrase "equal terms" could be susceptible to different reasonable interpretations. The Seventh Circuit noted in *River of Life Kingdom Ministries v. Village of Hazel Crest* that "'equality' is a complex concept."[193] As Professor Douglas Laycock and Mr. Luke Goodrich discuss, however, RLUIPA "does not require the land uses to be equal, or even require the 'effects' of the land uses to be equal. It requires the 'terms' on which they are 'treat[ed]' to be equal."[194] Adopting this interpretation of "equal terms" would abate the inconsistency among the circuits while simultaneously effectuating Congress's intent to protect religious land use to the fullest extent of the law.[195] Furthermore, adopting this interpretation would not unconstitutionally preference religious assemblies and institutions over secular ones, nor would it unduly burden government control over land use within its jurisdiction.[196] In light of this interpretation, "it matters not how burdensome or unjustified the regulation, so long as religious assemblies are treated the same as nonreligious assemblies both facially and [as-applied]."[197]

2. The Constitutionality of a Textualist Interpretation. As discussed in Part II, RLUIPA culminated a long and arduous dialogue between Congress and the Supreme Court and provided a legislative response to the Court's invalidation of RFRA in *Boerne*. This contentious back-and-forth has manifested itself in the appellate courts' decisions not to adopt a textualist interpretation of RLUIPA's Equal Terms Provision. The courts fear a textualist interpretation may exceed Congress's Section 5 powers under the Fourteenth Amendment.[198] Under Congress's Section 5 powers, the

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[193] River of Life Kingdom Ministries v. Village of Hazel Crest, 611 F.3d 367, 371 (7th Cir. 2010).

[194] Laycock & Goodrich, *supra* note 82, at 1062 (alteration in original).

[195] *See* Tree of Life Christian Schs. v. City of Upper Arlington, 905 F.3d 357, 380 (6th Cir. 2018) ("Congress explicitly stated that courts are to 'construe the statute in favor of a broad protection of religious exercise, to the maximum extent permitted.'" (quoting 42 U.S.C. § 2000cc-3(g))); Campbell, *supra* note 36, at 1097 ("[L]ower courts are ignoring Congress's intent as expressed in the plain terms and structure of [RLUIPA] . . . .").

[196] *See* Campbell, *supra* note 36, at 1097 ("A textual interpretation of the equal terms provision is constitutional under *Boerne* and its progeny . . . .").

[197] Laycock & Goodrich, *supra* note 82, at 1064.

[198] *See* Campbell, *supra* note 36, at 1097 ("Fretting that the equal terms provision might exceed Congress's Section 5 power if it is interpreted according to its plain terms, the

Supreme Court has held that "Congress does not enforce a constitutional right by changing what the right is. It has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation."[199] The Court has also held that with any action under Congress's Section 5 powers, "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[200] The congruence and proportionality test articulated by the Court in *Boerne* can be satisfied by a robust inquiry into "a demonstrated pattern of religious discrimination."[201]

Adopting a textualist interpretation of RLUIPA's Equal Terms Provision would not cause RLUIPA to exceed the scope of Congressional power.[202] First, Congress compiled a record of unconstitutional discrimination against religious assemblies and institutions compared to secular assemblies and institutions.[203] Second, Congress's response to this demonstrated pattern of discrimination, RLUIPA, is congruent and proportional to the "injury to be prevented or remedied": less than equal treatment of religious assemblies and institutions with regard to land use regulation.[204] Responding to *Boerne*'s rejection of RFRA, Congress narrowly tailored RLUIPA to satisfy the Court's congruence and proportionality test.[205]

Lighthouse and *Midrash Sephardi* courts have taken matters into their own hands, rushing in to save the constitutionality of a provision that is *already* a valid exercise of Congress's Section 5 authority."); *see also* U.S. CONST. amend. XIV, § 5 ("The Congress shall have the power to enforce, by appropriate legislation, the provisions of [the Fourteenth Amendment].").

[199] City of Boerne v. Flores, 521 U.S. 507, 519 (1997).

[200] *Id.* at 520.

[201] *See* Campbell, *supra* note 36, at 1097 (discussing that Congress "demonstrated a pattern of religious discrimination" regarding land use that satisfied the threshold necessary to enact prophylactic legislation in the form of RLUIPA).

[202] *See id.* (arguing that a textual interpretation of RLUIPA would not exceed Congress's Section 5 powers under the Fourteenth Amendment).

[203] *See* River of Life Kingdom Ministries v. Village of Hazel Crest, 611 F.3d 367, 380 (7th Cir. 2010) ("Congress . . . compil[ed] a legislative record of free-exercise violations in . . . laws affecting land use by religious organizations . . . .").

[204] Campbell, *supra* note 36, at 1097 ("[T]he equal terms provision, which strictly prohibits land use regulations that treat religious and secular assemblies or institutions unequally, is a congruent and proportional response to this pattern of discrimination, satisfying *Boerne*.").

[205] *See* Freedom Baptist Church of Delaware Cnty. v. Township of Middletown, 204 F. Supp. 2d 857, 873–74 (E.D. Pa. 2002) ("Nor is the RLUIPA hostile to *City of Boerne*. Far from having the 'sweeping coverage' of the RFRA that ensured that statute's 'intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and

In the Circuit Courts' attempts to avoid the perceived constitutional questions raised by a textualist interpretation of RLUIPA's Equal Terms Provision, they have contravened the express purpose of the act.[206] Judge Thapar of the Sixth Circuit recognized that Congress's efforts to mitigate religious land use discrimination have been tempered—not by Congress but by the courts.[207] Specifically, "courts . . . have added requirements into RLUIPA that prevent many religious groups from seeking the shelter that Congress sought to provide."[208]

3. A Textualist Approach Satisfies Congress's Intent. The United States Congress has a long and well-documented history.[209] Throughout its history, Congress has utilized the phrase "similarly situated" 129 times in the language comprising the United States Code.[210] However, Congress fails to use this phrase in the statutory

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regardless of subject matter' . . . the RLUIPA here is targeted solely to low visibility decisions with the obvious—and, for Congress, unacceptable—concomitant risk of idiosyncratic application." (quoting City of Boerne v. Flores, 521 U.S. 507, 532 (1997)); *see also id.* at 874 ("To the extent that, conceivably, the RLUIPA may cover a particular case that is not on all fours with an existing Supreme Court decision, it nevertheless constitutes the kind of congruent and, above all, proportional remedy Congress is empowered to adopt under § 5 of the Fourteenth Amendment.").

[206] *See* Campbell, *supra* note 36, at 1100–01 (arguing that the interpretations adopted by the circuit courts are counter to Congress's intent).

[207] *See* Tree of Life Christian Schs v. City of Upper Arlington, 905 F.3d 357, 378 (6th Cir. 2018) (Thapar, J., dissenting) ("[F]ault lies not with Congress, but with the courts . . . .").

[208] *Id. See also* Ernest F. Lidge III, *The Courts' Misuse of the Similarly Situated Concept in Employment Discrimination Law*, 67 MO. L. REV. 831, 850 (2002) (discussing how a "similarly situated" requirement potentially excludes plaintiffs from the protection of the applicable law in the employment discrimination context).

[209] *See, e.g.*, SARA L. HAGEDORN & MICHAEL C. LEMAY, THE AMERICAN CONGRESS: A REFERENCE HANDBOOK 3–51 (2019) (providing background and history of the United States Congress).

[210] This count is based on a search completed in the text field of "https://uscode.house.gov/" using the phrase "similarly situated" on October 25, 2022. This research method was inspired by the work of Professor Douglas Laycock and Mr. Luke W. Goodrich. *See* Laycock & Goodrich, *supra* note 82, at 1062 (describing the research technique that I used to count occurrences of a particular phrase in the United States Code).

language of RLUIPA.[211] So, why do courts feel compelled to read this language into RLUIPA's Equal Terms Provision?[212]

Some scholars and judges point to the avoidance canon[213] as justification for not adopting a textualist interpretation of the Equal Terms Provision and for imposing "extra-legislative" requirements.[214] While there may be some validity in relying on this canon to narrow certain legislation, RLUIPA's Equal Terms Provision is an exception.[215] As Judge Thapar noted, "[c]ourts cannot narrow a statute if the narrower interpretation is 'plainly contrary to the intent of Congress.'"[216] Here, a narrow interpretation is counter to Congress's intent. One need not look further than 42 U.S.C. § 2000cc-3(g), which states, "[t]his chapter shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution."[217] Therefore, since (1) a textual interpretation of the Equal Terms Provision is permissible under RLUIPA[218] and (2) the act passes the "congruence and proportionality" test articulated in *Boerne*,[219] judges should not use the avoidance canon to narrow the scope of RLUIPA's Equal Terms Provision.

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[211] *See Tree of Life Christian Schs.*, 905 F.3d at 379 ("Congress knew about 'similarly situated' standards from the Equal Protection context and chose *not* to incorporate them into RLUIPA."); Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1229 (11th Cir. 2004) ("[W]hile [RLUIPA's Equal Terms Provision] has the 'feel' of an equal protection law, it lacks the 'similarly situated' requirement usually found in equal protection analysis.").

[212] *See* Lighthouse Inst. for Evangelism v. City of Long Branch, 510 F.3d 253, 267 n.11 (3d Cir. 2007) ("Because we construe [RLUIPA's Equal Terms Provision] to conform to the contours of Free Exercise jurisprudence [by imposing the similarly situated comparator requirement], we need not reach the question whether Congress would have exceeded its powers under Section 5 of the Fourteenth Amendment, under which the Equal Terms provision is enacted, by mandating maximum-possible favorable treatment for religious institutions without regard for legitimate governmental objectives.").

[213] *See* Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV 109, 138–43 (2010) (providing an overview of the avoidance canon).

[214] *See Tree of Life Christian Schs.*, 905 F.3d at 380 n.3 (discussing judges' reliance on the constitutional avoidance doctrine when considering the RLUIPA Equal Terms Provision).

[215] *See id.* (discussing but ultimately dismissing the argument for utilizing the constitutional avoidance doctrine, then rebutting this assertion).

[216] *Id.* (quoting Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council, 485 U.S. 568, 575 (1988)).

[217] 42 U.S.C. § 2000cc-3(g).

[218] *See id.* (providing no prohibition of a textual interpretation).

[219] *See* Campbell, *supra* note 36, at 1097 ("[T]he equal terms provision, which strictly prohibits land use regulations that treat religious and secular assemblies or institutions

RLUIPA's Equal Terms Provision, having satisfied bicameralism and presentment, reflects "a congressional judgment about state and local regulation of religious land uses."[220] When courts impose a "similarly situated comparator" requirement, they "displace[] this congressional judgment."[221] Judge Thapar discussed that it is beyond the scope of judicial power to introduce "standards into legislation, even if [courts] think that the law would benefit as a result."[222] Further, he sardonically noted that he is unaware of an "add-a-gloss" canon that permits courts to "circumvent [their] defined role when it suits [them]."[223]

While less intrusive than the "similarly situated comparator" requirement imposed by the majority of circuit courts, the Eleventh Circuit introduced a non-textual strict scrutiny standard that also contravenes Congressional intent.[224] A reading of RLUIPA reveals that Congress did incorporate a strict scrutiny standard in the "Substantial Burden" section of RLUIPA; however, Congress included no such test in the Equal Terms Provision.[225] As a result,

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unequally, is a congruent and proportional response to this pattern of discrimination, satisfying *Boerne*.").

[220] River of Life Kingdom Ministries v. Village of Hazel Crest, 611 F.3d 367, 389 (7th Cir. 2010) (Sykes, J., dissenting).

[221] *Id. See also* THE FEDERALIST NO. 78, at 526 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) ("The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body.").

[222] Tree of Life Christian Schs. v. City of Upper Arlington, 905 F.3d 357, 379 (6th Cir. 2018).

[223] *Id. See also id.* at 381 ("If judges disagree with Congress's choice, [they] are perfectly entitled to say so—in lectures, in law review articles, and even in dicta. But [judges] are not entitled to replace the statute Congress enacted with an alternative of their own design." (quoting Yates v. United States, 574 U.S. 528, 570 (2015) (Kagan, J., dissenting))).

[224] *See* Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1232 (11th Cir. 2004) ("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 [the Equal Terms Provision], consistent with the analysis employed in *Lukumi*, must undergo strict scrutiny."). *See also* 146 CONG. REC. 19,123 (2000) (statement of Rep. Charles T. Canady) ("Section 2(b) codifies parts of the Supreme Court's constitutional tests as applied to land use regulation. These provisions directly address some of the more egregious forms of land use regulation, and provide more precise standards than the substantial burden and compelling interest tests. These provisions overlap, but some cases may fall under only one section, or the elements of one section may be easier to prove than the elements of other sections.").

[225] *Compare* 42 U.S.C. § 2000cc(a)(1) (imposing a strict scrutiny requirement), *with* 42 U.S.C. § 2000cc(b)(1) (no strict scrutiny requirement).

"[w]e . . . know that Congress was aware of the strict scrutiny buzzwords and included *none* of them in the Equal Terms Provision."[226] As with the "similarly situated comparator" requirement advocated for by the majority of circuit courts, the Supreme Court should abandon the "strict scrutiny" requirement imposed by the Eleventh Circuit if it considers RLUIPA's Equal Terms Provision.[227]

V. PRESCRIPTION #2: LEGISLATIVE INTERVENTION

Given more than twenty-five unsuccessful petitions for writ of certiorari, Congress should revisit the statutory language it passed to clarify the meaning of RLUIPA's Equal Terms Provision.[228] This Part will survey why Congress should revisit the Equal Terms Provision and offer proposals for how Congress should approach amendments to the act.

A. CONGRESSIONAL ACQUIESCENCE

Congressional acquiescence occurs when the judicial interpretation of a statute is "authoritatively enhanced" by Congress's subsequent action or inaction.[229] Courts relying on congressional acquiescence perceive Congress's action or inaction as congressional approval of the judicial interpretation.[230] This interpretive rationale, at first glance, seems potentially applicable to the judicial interpretation of RLUIPA's Equal Terms Provision in light of Congress's inaction. This notion is misguided, however.[231]

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[226] *Tree of Life Christian Schs.*, 905 F.3d at 382 (Thapar, J., dissenting).

[227] *See* Campbell, *supra* note 36, at 1100 ("In sum, the plain terms, structure, and legislative history of the equal terms provision argue against . . . [the] application of strict scrutiny.").

[228] Based on a search completed on WestLaw in the "U.S. Supreme Court Petitions for Writ of Certiorari" database using the search terms "RLUIPA" and "Equal Terms Provision." The search was completed on August 25, 2023.

[229] Robert J. Gregory, *The Clearly Expressed Intent and the Doctrine of Congressional Acquiescence*, 60 U.M.K.C. L. REV. 27, 28 (1991) ("Congressional acquiescence refers to the process by which an extant interpretation of a statute is authoritatively enhanced by virtue of subsequent action or non-action by Congress that is allegedly indicative of congressional approval of the interpretation.").

[230] *See id.* (discussing courts' interpretation of congressional silence).

[231] *See* Amy Coney Barrett, *Statutory Stare Decisis in the Courts of Appeals*, 73 GEO. WASH. L. REV. 317, 322–23 (2005) (discussing the "misguided" concept of congressional

To prevent future courts, or perhaps even the Supreme Court, from adopting inappropriate interpretations of the Equal Terms Provision under the guise of congressional acquiescence, Congress should act to clarify its intent.

This Section relies upon the rationale offered by Justice Amy Coney Barrett regarding congressional acquiescence.[232] Justice Barrett cites ignorance, ambiguity, relevance, and constitutional impediments as reasons that congressional inaction does not indicate congressional approval.[233] I consider each of these grounds in turn.

1. Congressional Ignorance. The first assumption of congressional acquiescence is that Congress is aware of appellate courts' statutory interpretations.[234] In the United States' tripartite governmental system, Congress has "structurally allocated" the job of appellate review of lower court decisions to the Supreme Court.[235] As a result, Congress primarily concerns itself with matters on the Supreme Court's docket. Therefore, if the Supreme Court does not grant certiorari to address interpretive errors arising in lower courts, those errors will likely fail to garner the attention of Congress.[236] Empirical evidence bolsters this assumption, indicating that "Congress is generally unaware of circuit-level statutory interpretations."[237]

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acquiescence). *See id.* at 330–31 (noting that congressional acquiescence has somewhat fallen out of favor with jurists and academics; however, it remains prevalent enough to deserve attention). Justice Barrett's assertion remains accurate as a Westlaw search for "congressional acquiescence" returns numerous secondary sources citing the concept in the years since Justice Barrett's 2005 article.

[232] *See id.* at 330–39 (reviewing the tenets of congressional acquiescence).

[233] *See id.* (discussing why each rationale behind the concept of congressional acquiescence is misguided).

[234] *See id.* at 331 ("The acquiescence rationale, which assumes that a majority of Congress supports a particular statutory interpretation, only works if a majority of Congress knows about the statutory interpretation at issue.").

[235] *See id.* at 346 ("The courts of appeals should not, however, expect Congress to perform a job that Congress has structurally allocated to the Supreme Court through the appellate review process.").

[236] *See id.* ("Accordingly, it would be at least reasonable to infer that Congress expects the Supreme Court to bear the burden of monitoring and response vis-à-vis the lower courts, leaving Congress free to monitor and respond to only the Supreme Court's relatively small docket.").

[237] *Id.* at 331. *See generally* Stefanie A. Lindquist & David A. Yalof, *Congressional Responses to Federal Circuit Court Decisions*, 85 JUDICATURE 61 (2001) (presenting empirical evidence indicating Congress's unawareness of circuit-level statutory interpretations).

2. The Ambiguity of Congressional Acquiescence. In addition to Congress being aware of circuit courts' interpretation of statutes, it must also "be reasonable for the court to interpret Congress's post-opinion silence as satisfaction with the opinion."[238] Justice Barrett asserts, however, that "[c]ongressional silence is meaningless."[239] There can be numerous explanations for congressional inaction after the issuance of judicial opinions; one may be "an unwillingness to expend political capital to fix the error."[240] This point is particularly relevant in 2023, considering the nation's polarized political climate.[241]

3. Relevance. Justice Barrett identifies that "the acquiescence rationale relies not on the intent of the enacting Congress, but on the intent of subsequent Congresses whose inaction may ratify the Court's statutory gloss."[242] However, the inaction of later Congresses is less relevant to the interpretation of legislation than the statutorily expressed intention of the enacting Congress.[243] To honor the unanimous expression of the 106th United States Congress,[244] the current Congress should act to clarify which interpretation of the Equal Terms Provision captures RLUIPA's intended purpose.

4. Constitutional Impediments. Under the congressional acquiescence rationale, there are two plausible interpretations of Congress's silence. First, courts could interpret Congress's silence as meaning "[y]es, we meant 'X.'"[245] Second, courts could interpret

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[238] Barrett, *supra* note 231, at 335.

[239] *Id.*

[240] *Id.*

[241] *See* Drew DeSilver, *The Polarization in Today's Congress Has Roots That Go Back Decades*, PEW RSCH. CTR. (Mar. 10, 2022), https://www.pewresearch.org/short-reads/2022/03/10/the-polarization-in-todays-congress-has-roots-that-go-back-decades/ [https://perma.cc/ST3G-RFPP] ("It's become commonplace among observers of U.S. politics to decry partisan polarization in Congress. Indeed, a Pew Research Center analysis finds that, on average, Democrats and Republicans are farther apart ideologically than at any time in the past 50 years.").

[242] Barrett, *supra* note 231, at 337.

[243] *See id.* ("Both the Supreme Court and the courts of appeals have asserted repeatedly that the intent of the Congress that enacted statute controls the interpretation of the statute.")

[244] *See* 146 CONG. REC. 16,698–703 (2000) (demonstrating passage of RLUIPA by unanimous consent in the Senate); 146 CONG. REC. 16,621–22 (2000) (demonstrating passage of RLUIPA by unanimous consent in the House of Representatives).

[245] Barrett, *supra* note 231, at 339.

the silence as Congress saying, "[w]e did not mean 'X' at the time, but 'X' sounds good to us now."[246] The second interpretation presents constitutional concerns.[247]

This interpretation raises the possibility that "inaction of a current Congress [could] ratify a potential departure from the statutory scheme [originally passed, which] circumvents the constitutional limits on the legislative process."[248] The constitutional limits referred to by Justice Barrett are the requirements of bicameralism and presentment.[249] If Congress is allowed to "silently amend" a statute via the acquiescence rationale, they are simultaneously circumventing the President's ability to veto such an amendment.[250] Similarly, only one house of Congress would need to acquiesce in order to ratify a court's gloss—even if the other house would rather correct the court's error. This would effectively violate the requirement that both houses of Congress approve of new laws. To avoid such constitutional concerns, especially in the absence of a Supreme Court decision, Congress should exercise its power to amend the Equal Terms Provision to clarify its meaning.

B. CONGRESSIONAL OVERRIDE

American constitutional law broadly affirms that Congress can enact overrides that supersede judicial statutory interpretations.[251] These overrides serve an essential function in the separation of powers by "check[ing]" the "lawmaking inherent in statutory interpretation" and maintaining "legislative supremacy in the statutory realm."[252] Further, courts welcome these "corrections"

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[246] *Id.*

[247] *See id.* ("[The second plausible interpretation] runs headlong into the Constitution.").

[248] *Id.*

[249] *See id.* ("[E]ven assuming that silence could somehow satisfy the requirement of bicameralism, ratification by inaction circumvents the requirement of presentment.").

[250] *See id.* (discussing how such silent amendments would subvert the President's veto power).

[251] *See* Deborah A. Widiss, *Undermining Congressional Overrides: The Hydra Problem in Statutory Interpretation*, 90 TEX. L. REV. 859, 875 (2012) (asserting the validity of congressional overrides).

[252] *Id.*

from Congress, particularly when they clarify Congress's legislative intentions.[253]

For legislative overrides to be effective, Professor Deborah Widiss offers two assumptions. First, Congress must not be ignorant of judicial decisions.[254] If Congress is unaware of an erroneous statutory interpretation, it cannot remedy the error. Second, congressional overrides must "effectively constrain judicial activism."[255] Research indicates that, even after a congressional override, there is still a resulting "dissensus" in the judiciary—particularly in overrides concerning civil rights.[256] Therefore, if Congress overrides present judicial interpretations of RLUIPA's Equal Terms Provision, the onus is on Congress to ensure subsequent judicial opinions follow the amended statutory language.

C. PROPOSED AMENDMENTS TO RLUIPA'S EQUAL TERMS PROVISION

So, how could Congress amend RLUIPA's Equal Terms Provision? First, I propose that Congress clarify whether it intends for the Equal Terms Provision to incorporate a "similarly situated comparator" requirement. Second, I propose that Congress define "equal terms."

1. Should a "Similarly Situated Comparator" Requirement Be Included or Excluded from RLUIPA's Equal Terms Provision? Having used "similarly situated" language throughout the United States Code,[257] Congress should clearly state whether the Equal Terms Provision includes such a requirement. Currently, religious assemblies and institutions in different parts of the country are

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[253] *See id.* at 875–76 ("Legal commentators frequently characterize overrides as a helpful 'colloquy' between the courts and Congress; courts, acting as agents of Congress in this context, engage in a good-faith effort to interpret statutes in line with legislative intent and welcome 'corrections' from Congress when appropriate.").

[254] *See id.* at 876 ("The first is that Congress pays attention to judicial decisions.").

[255] *Id.*

[256] *See id.* at 877 ("[A] study found that tax overrides almost never generated dissensus but that civil rights overrides almost always did."). *See also* JEB BARNES, OVERRULED? LEGISLATIVE OVERRIDES, PLURALISM, AND CONTEMPORARY COURT-CONGRESS RELATIONS 194 (2004) ("[I]n the cases of civil rights overrides, courts were far from faithful agents. Instead, they seemed to resist congressional oversight, applying the law along partisan lines, even if Congress managed to pass reasonably clear overrides."); *see generally id.* app. at 197–210 (providing a summary of analysis of congressional overrides).

[257] *See supra* note 210 and accompanying text.

operating under different interpretations,[258] resulting in some religious entities having a higher pleading burden and burden of proof than others.[259] Therefore, to provide maximum clarity for future actions brought under the Equal Terms Provision, Congress could provide language to the effect of:

> (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* <u>*which is similarly situated*</u>; or
> (2) *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.* <u>*The religious assembly or institution and nonreligious assembly or institution need not be similarly situated.*</u>

2. What Does Congress Mean by "Equal Terms"? As discussed in Parts III and IV, the phrase "less than equal terms" in the Equal Terms Provision has generated confusion among the courts of appeals. Therefore, to effectuate the enacting Congress's intent, this Note proposes that Congress codify the approach offered by Professor Douglas Laycock and Mr. Luke W. Goodrich.[260] Such an amendment could take the form of a subsection stating:

> *"As used in section 2000cc(b) of this title—*
> *(1) The phrase "less than equal terms" means the basis on which a religious assembly or institution is treated as compared to a nonreligious assembly or institution."*

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[258] *See* discussion *supra* Part III.

[259] *See* Tree of Life Christian Schs. v. City of Upper Arlington, 905 F.3d 357, 379 (6th Cir. 2018) (Thapar, J., dissenting) (stating that a similarly situated comparator requirement "imposes a heightened pleading burden on the plaintiff").

[260] *See* Laycock & Goodrich, *supra* note 82, at 1062 (stating that RLUIPA "does not require the land uses to be equal, or even require the 'effects' of the land uses to be equal. [RLUIPA] requires the 'terms' on which they are 'treat[ed]' to be equal" (last alteration in the original)).

VI. CONCLUSION

The time has come for either the Supreme Court or Congress to intervene in the interpretive confusion surrounding RLUIPA's Equal Terms Provision. Part III of this Note demonstrates that the current circuit split results in religious assemblies and institutions throughout the United States receiving disparate outcomes in adjudications involving similar alleged statutory violations.

Should the Supreme Court grant certiorari to future petitions, the Court should adopt a textualist interpretation of RLUIPA's Equal Terms Provision and reject the various circuits' imposition of a "similarly situated comparator" requirement or a strict scrutiny standard. A textualist interpretation is the appropriate way to effectuate the intent behind RLUIPA's Equal Terms Provision and respect the judgment of Congress.

Should Congress reconsider the language of RLUIPA's Equal Terms Provision, Members should amend the provision to clarify their legislative intent regarding a "similarly situated comparator" requirement and the meaning of "less than equal terms." By clarifying these items within the context of RLUIPA's Equal Terms Provision, Congress would mitigate the confusion among the eight circuit courts of appeals that have considered the provision.