

WHAT ARE EQUAL TERMS ANYWAY?

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INTRODUCTION

In 1994 the Lighthouse Institute for Evangelism purchased property in downtown Long Branch, New Jersey.¹ The property was meant to be the new site of a church, which had been renting a nearby building for several years. The property was zoned central commercial, allowing a wide variety of uses permitted as of right: restaurants, variety stores and other retail stores, educational services and colleges, assembly halls, bowling alleys, theaters, governmental services, municipal buildings, and new automobile or boat showrooms.² A religious assembly, however, was not a permitted use. Between 1995 and 2000, Lighthouse sought approval to use the property for religious worship, as a soup kitchen, for a job skills training program, and as a residence for their pastor.³

In mounting frustration, Lighthouse sued the city in June of 2000 on federal constitutional and statutory grounds. While the case was pending, Long Branch changed the applicable zoning ordinance to limit land uses comparable to religious assemblies.⁴ The new ordinance permitted theaters, cinemas, culinary schools, and dance studios as primary uses. Restaurants, bars and clubs, and specialty retail were among secondary uses.⁵ Any unlisted uses were prohibited, including churches and synagogues.⁶ The new plan specified its goals: increasing retail trade, city revenues, and employment opportu-

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1 *Lighthouse Inst. for Evangelism v. City of Long Branch*, 510 F.3d 253, 256–57 (3d Cir. 2007).

2 *Id.* (internal citations omitted).

3 *Id.* Eventually the city permitted Lighthouse to use the property as office space. *See id.*

4 *Id.* at 258.

5 *Id.*

6 *Id.*

nities so as “to encourage a ‘vibrant’ and ‘vital’ downtown residential community.”⁷ Upon reapplication under the new statute, the City Council found that the religious assembly would “destroy the ability of the block to be used as a high end entertainment and recreation area”⁸ and consequently denied the application.

This sort of zoning gridlock is precisely the situation the Religious Land Use and Institutionalized Persons Act (RLUIPA) is designed to govern. The “equal terms” provision of RLUIPA requires 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 It invokes two of the fundamental liberties of the western world—religious freedom and the free use of private property. Yet a decade after passage and after consideration by seven different circuit courts, the provision’s meaning remains elusive.¹⁰ Today, the plight of the Lighthouse Institute and the city of Long Branch would be resolved by no less than four different methods, depending on the circuit hearing the case.¹¹

This Note argues for the superiority of the Eleventh Circuit’s interpretation of the provision based on the statute’s history, text, and purpose. Part I provides an overview of land use law, the Free Exercise clause jurisprudence of the Supreme Court, and RLUIPA. Part II presents and defends the Eleventh Circuit’s interpretation of the equal terms provision. Part III presents and rejects the alternative interpretations offered by other circuit courts.

7 *Id.*

8 *Id.* at 259.

9 42 U.S.C. § 2000cc(b) (2006).

10 *See* Centro Familiar Cristiano Buenas Nuevas v. City of Yuma, 651 F.3d 1163 (9th Cir. 2011); Elijah Grp., Inc. v. City of Leon Valley, 643 F.3d 419 (5th Cir. 2011); Third Church of Christ, Scientist v. City of New York, 626 F.3d 667 (2d Cir. 2010); Rocky Mountain Christian Church v. Bd. of Cnty. Comm’rs, 613 F.3d 1229 (10th Cir. 2010); River of Life Kingdom Ministries v. Vill. of Hazel Crest, 611 F.3d 367 (7th Cir. 2010) (en banc); *Lighthouse Inst. for Evangelism, Inc.*, 510 F.3d at 253; Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward Cnty., 450 F.3d 1295 (11th Cir. 2006); Konikov v. Orange Cnty., 410 F.3d 1317 (11th Cir. 2005); Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214 (11th Cir. 2004).

11 Of the five circuits to consider facial challenges under the equal terms provision, the Eleventh, Ninth, and Fifth Circuits would likely support The Lighthouse Institute, while the Third and Seventh would back Long Branch. *See infra* Parts II and III.

I. BACKGROUND

A. Overview of Land Use Regulations

Since *Village of Euclid, Ohio v. Ambler Realty Company*¹² and the rise of single-use, noncumulative zoning, land use law and religious land uses have been on a collision course. Why? Broadly and crudely speaking, neither the vocabulary nor the methodology of land use law accounts for the type of land uses represented by religious institutions or the type of benefits that religious institutions offer to the physical landscape. To understand why, it is necessary to understand the typical regulatory scheme.

Zoning is the division of land into zones or districts often represented on an accompanying zoning map.¹³ These zones are defined by permissible land uses,¹⁴ such as the traditional categories of agricultural, residential, commercial, and industrial uses.¹⁵ Districts are drawn to separate uses that are likely to be incompatible, keeping heavy industry, for example, separate from residential areas.¹⁶ Early zoning laws followed a “cumulative” or “inclusive” zoning model that ranked land uses in a hierarchy from least offensive (single-family housing) to most offensive (heavy industry, garbage dumps, etc.), and excluded more noxious uses from areas zoned for less noxious uses, while allowing less offensive uses in any zone.¹⁷ The 1960s, however, saw a shift toward noncumulative (or “single-use”) zoning as cities sought to control centralized land for industrial and commercial uses, excluding, for instance, commercial and residential uses from an industrial district.¹⁸

12 272 U.S. 365 (1926).

13 1 PATRICIA E. SALKIN, *AMERICAN LAW OF ZONING* §§ 9:2–3 (5th ed. 2008).

14 *See id.* § 9:2.

15 *See id.* § 9:8; *see also* *People ex rel. Skokie Town House Builders, Inc. v. Vill. of Morton Grove*, 157 N.E.2d 33, 36 (Ill. 1959) (discussing industrial, commercial, and residential districts).

16 *See* SALKIN, *supra* note 13, § 9:11.

17 *Euclid*, for example, had six zones, numbered U1–U6 from least to most noxious, U1 uses could be located in any zone, U2 could be located in U2–U6, U3 in U3–U6, etc. *See Euclid*, 272 U.S. at 380; *see also* SALKIN, *supra* note 13, § 9:14 (explaining cumulative zoning).

18 *See Morton Grove*, 157 N.E.2d at 36 (explaining the economic justifications for exclusively separating residential, commercial, and industrial uses); SALKIN, *supra* note 13, § 9:15 (explaining the justifications for exclusive noncumulative zoning); Roderick M. Hills, Jr. & David Schleicher, *The Steep Costs of Using Noncumulative Zoning to Preserve Land for Urban Manufacturing*, 77 U. CHI. L. REV. 249, 254–56 (2010) (explaining that noncumulative zoning was originally justified as a protection of industrial uses against higher-paying residential uses).

The rigidity of the districting process can be softened by “a variety of zoning techniques which individualize [the process]” to make it more flexible.¹⁹ These techniques include special permits, special exceptions, conditional zoning, contract zoning, variances, incentive zoning, or simply inaction against a nonconforming use.²⁰ These all serve a unique role in the regulatory process, but for our purposes can be lumped together as instances of discretionary, individualized decisionmaking. While these decisions are often theoretically made with reference to a list of zoning goals, such goals are notoriously indefinite and vacuous, “providing no genuine standards for individual decisions.”²¹

So why does this system conflict with religious land uses? Religious assemblies do not easily fit into any of the broad zoning categories, and are not aligned with any traditional zoning interests. Religious assemblies are excluded from residential areas because they produce increased and unpredictable traffic and allegedly undermine property values.²² Religious assemblies are excluded from commercial districts because they do not attract enough traffic and the traffic they do draw tends to be only sporadic (i.e., only when services or events are scheduled).²³ Religious assemblies are often prohibited

19 SALKIN, *supra* note 13, § 9:17.

20 See generally *id.* §§ 9:17–23, 55.

21 Carol M. Rose, *New Models for Local Land Use Decisions*, 79 NW. U. L. REV. 1155, 1162 (1985); see Adam J. MacLeod, *A Non-Fatal Collision*, 42 URB. LAW. 41, 70–71 (2010) (“The spectre of pretext hangs especially over individualized assessments that are based on vague standards, which leave significant discretion to the decision maker. Those who perceive widespread anti-religious bias look skeptically upon decisions based on ‘the public health, safety, morals, convenience, order, prosperity, and general welfare of the City . . .’”); see also *Rocky Mountain Christian Church v. Bd. of Cnty. Comm’rs*, 613 F.3d 1229, 1234 (10th Cir. 2010) (noting that the county evaluated special use permits off of such criteria as height requirement, harmony with the character of the neighborhood, compatibility with the surrounding area, accordance with the comprehensive plan, and not an over-intensive use of land or excessive depletion of natural resources).

22 See, e.g., *Konikov v. Orange Cnty.*, 410 F.3d 1317, 1327 (11th Cir. 2005) (noting that the county justified excluding a Rabbi from holding regular prayer meetings at his home because the use was frequent and introduced additional traffic in the area); *Congregation Kol Ami v. Abington Twp.*, 309 F.3d 120, 143 (3d Cir. 2002) (noting that “churches may be incompatible with residential zones, as they ‘bring congestion; they generate traffic and create parking problems; they can cause a deterioration of property values in a residential zone . . .’” (citing *Jewish Reconstructionist Synagogue v. Vill. of Roslyn Harbor*, 342 N.E.2d 534 (1975))).

23 See, e.g., *River of Life Kingdom Ministries v. Vill. of Hazel Crest*, 611 F.3d 367, 373 (7th Cir. 2010) (en banc) (noting that exclusion of churches from at least some of a municipality’s commercial zones is “not unique” to Hazel Crest); *Lighthouse Inst. for Evangelism v. City of Long Branch*, 510 F.3d 253, 270 (3d Cir. 2007) (noting that

from industrial districts because they use land that could be producing industrial jobs and because they may conflict with industrial uses due to nuisance-type claims.²⁴ This means that religious land uses are often required to seek approval through an individualized decision-making process. Within that process, religious land uses have all the traditional zoning interests aligned against them—homeowners,²⁵ developers, and municipalities concerned with revenue.²⁶

Thus, there is no immediate incentive or pressure to allow a religious land use, while there often is immediate incentive and pressure to exclude it. However, this policy is short sighted. There is abundant evidence of the positive contribution religious land uses make to the surrounding community such as increasing social capital,²⁷ sponsoring numerous community support programs and thousands of volun-

“churches are by their nature not likely to foster the kind of extended-hours traffic and synergistic spending” desired in a commercial district). This problem is exacerbated by laws in many states that prohibit a business from operating with a liquor license within a certain distance from a church. *See* *Centro Familiar Cristiano Buenas Nuevas v. City of Yuma*, 651 F.3d 1163, 1166 n.2 (9th Cir. 2011) (considering the implications of a similar law in Arizona); *Lighthouse*, 510 F.3d at 270–71, n.15 (discussing the implications of New Jersey’s statute prohibiting the issuance of a liquor license within two hundred feet of any church); *Digrugilliers v. Consolidated City of Indianapolis*, 506 F.3d 612, 615 (7th Cir. 2007) (considering a similar law in Indiana).

24 *See* Daniel Kirkpatrick, Comment, *Zoned Secular*, 81 WASH. L. REV. 191, 208 (2006) (outlining Seattle’s prohibition of religious land uses in industrial zones); *see also* *Petra Presbyterian Church v. Vill. of Northbrook*, 409 F. Supp. 2d 1001, 1002–03 (N.D. Ill. 2006), *aff’d*, 489 F.3d 846 (7th Cir. 2007) (considering a challenge to a regulation that permitted some assembly uses, but not religious assemblies, in an industrial zone).

25 *See* William A. Fischel, *The Homevoter Hypothesis: How Home Values Influence Local Government Taxation, School Finance, and Land-use Policies* (2001) (arguing that “homevoters” drive land use policy by voting to protect property values).

26 *See* 2 WILLIAM W. BASSETT ET. AL., RELIGIOUS ORGANIZATIONS AND THE LAW § 17:63 (2011); Edward L. Glaeser, *The Incentive Effects of Property Taxes on Local Governments*, 89 PUBLIC CHOICE 93 (1996) (“If there are rules concerning the type of taxes that can be levied . . . then governments will maximize their revenues subject to those rules.”).

27 *See* C. ERIC LINCOLN & LAWRENCE H. MAMIYA, THE BLACK CHURCH IN THE AFRICAN-AMERICAN EXPERIENCE 151 (1990) (noting that urban churches often serve as a meeting place for numerous religious and nonreligious community organizations); CATERINA GOUVIS ROMAN & GRETCHEN E. MOORE, MEASURING LOCAL INSTITUTIONS AND ORGANIZATIONS: THE ROLE OF COMMUNITY INSTITUTIONAL CAPACITY IN SOCIAL CAPITAL (Urban Institute, 2004), *available at* http://www.urban.org/UploadedPDF/410998_Local_Institutions.pdf (reporting a correlation between the number of religious institutions in an area and positive social capital).

teer community service hours,²⁸ and even increasing property values.²⁹

B. *Free Exercise Jurisprudence*

Not only are religious land uses demonstrably beneficial to a community, but they are also at the heart of the First Amendment right to Free Exercise of religion. This section provides a brief overview of the Court's Free Exercise jurisprudence in order to understand the background of RLUIPA.

From 1963 to 1990, the familiar strict scrutiny test of *Sherbert v. Verner*³⁰ governed Free Exercise jurisprudence. In 1990, the Court turned in a different direction in the landmark case *Employment Division v. Smith*.³¹ The Court laid out three categories of Free Exercises cases: "hybrid" rights, individualized assessments, and laws of "neutral and general applicability."

Hybrid rights cases involve Free Exercise rights in conjunction with other constitutional protections. The Court wrote: "The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated

28 Andrew Billingsley & Cleopatra Howard Caldwell, *The Church, the Family, and the School in the African American Community*, 60 J. NEGRO EDUC. 427, 434 (1991) (reporting that the average religious institution supports at least four community outreach programs); DIANE COHEN & A. ROBERT JAEGER, SACRED PLACES AT RISK 18 (1998), available at http://www.sacredplaces.org/pdf/places_at_risk.pdf (finding that the average congregation houses four ongoing community service programs and provides over 5300 hours of volunteer support to its community programs).

29 Thomas M. Carroll et al., *Living Next to Godliness: Residential Property Values and Churches*, 12 J. REAL EST. FIN. & ECON. 319, 328 (1996) ("We find that neighborhood churches are amenities that enhance property values [for] at least one-half mile [around].").

30 374 U.S. 398 (1963) (striking down the denial of unemployment benefits to a plaintiff who lost her job after refusing to work on Saturdays for religious reasons, because the denial placed a substantial burden on Free Exercise that could not withstand strict scrutiny).

31 494 U.S. 872 (1990). While the court did not overturn *Sherbert*, and claimed to be acting consistently with precedent, no one was fooled. See, e.g., *id.* at 891 (O'Connor J., concurring) ("In my view, today's holding dramatically departs from well-settled First Amendment jurisprudence, appears unnecessary to resolve the question presented, and is incompatible with our Nation's fundamental commitment to individual religious liberty."); ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 1259 (3rd ed. 2006) ("There is no doubt that *Smith* changed the test for the free exercise clause. Strict scrutiny was abandoned for evaluating laws burdening religion; neutral laws of general applicability only have to meet the rational basis test, no matter how much they burden religion.").

action” have involved multiple constitutional protections.³² In these hybrid cases, strict scrutiny is applied.³³

A second category of Free Exercise cases is instances of individualized governmental assessment.³⁴ Exemplified by *Sherbert* and other unemployment benefit cases, these cases require strict scrutiny of any substantial burden on free exercise³⁵ whenever the state has a system of “individual exemptions” that require individualized consideration of a person’s situation.³⁶ While the Court had applied the *Sherbert* test in other contexts, the Court in *Smith* discounted these cases, noting that in such cases “we have always found the test satisfied.”³⁷

The third and most significant category of Free Exercise cases asks whether a law is neutral and of general applicability. “[A] law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice.”³⁸ However, a law that is not neutral and of general applicability “must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest.”³⁹

This third category was fleshed out a few years later in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*.⁴⁰ First, a law must be neutral; it must not have as its “object” to “infringe upon or restrict practices because of their religious motivation.”⁴¹ The Free Exercise clause requires not only facial neutrality, but also “forbids subtle departures from neutrality” and “religious gerrymanders” that effectually discriminate against religion.⁴² Nonetheless, the Court made it clear that the law must be intentionally discriminatory, it must have been enacted “because of not merely in spite of” its effect on religious practice.⁴³ Additionally, a law must be “of general applicability” not

32 *Smith*, 494 U.S. at 881.

33 *Id.* at 908 (Blackmun, J., dissenting).

34 *See id.* at 883–84 (majority opinion).

35 *See id.* at 883.

36 *Id.* at 884 (quoting *Bowen v. Roy*, 476 U.S. 693, 708 (1986) (plurality opinion)).

37 *Id.* The Court cites as examples *Gillette v. United States*, 401 U.S. 437 (1971), and *United States v. Lee*, 455 U.S. 252 (1982).

38 *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993).

39 *Id.* at 531–32.

40 508 U.S. 520 (1993).

41 *Id.* at 533 (citing *Smith*, 494 U.S. at 878–79).

42 *Id.* at 534 (citing *Gillette*, 401 U.S. at 452; *Walz v. Tax Comm’n of New York City*, 397 U.S. 664, 696 (1970) (Harlan, J., concurring)).

43 *Id.* at 540.

just (or primarily) applicable against religious conduct.⁴⁴ If a law is not neutral and of general applicability, then the Court will apply strict scrutiny to the ordinance.⁴⁵

Lukumi notes that “we can . . . find guidance in our equal protection cases” when determining whether a law is neutral and generally applicable.⁴⁶ The fundamental principle of Equal Protection is that “all persons similarly situated shall be treated alike.”⁴⁷ The Supreme Court applied this language to the land use context in *City of Cleburne, Texas v. Cleburne Living Center*,⁴⁸ in which the city refused to permit a group home for the mentally handicapped.⁴⁹ The question was whether the city discriminated against the disabled when it excluded the group home. *Cleburne* laid out a three-step analysis.⁵⁰ First, a denied land use must be similarly situated to another land use.⁵¹ Second, there must be “disparate treatment” between the compared entities.⁵² If the first two steps are satisfied, then the regulation is subject to rational basis scrutiny (or heightened scrutiny if a suspect class).⁵³ Applying this test, the Court listed a variety of “other care and multiple-dwelling facilities” permitted in the zone, including apartment houses, multiple dwellings, boarding and lodging houses, fraternity or sorority houses, dormitories, apartment hotels, hospitals, sanitariums, and nursing homes.⁵⁴ These uses were “similarly situated” to the group home because both uses were care and multiple-dwelling facilities.⁵⁵ With this established, the disparate treatment was evident. The group home was only allowed in the district by special permit while the other uses were permitted by right.⁵⁶ Finally, the Court found that there was no rational basis for the disparate treatment between

44 *Id.* at 542.

45 *See id.* at 531–32.

46 *Id.* at 540.

47 *Plyler v. Doe*, 457 U.S. 202, 216 (1982) (quoting *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)).

48 473 U.S. 432 (1985).

49 *Id.* at 447–48.

50 The structure of the analysis is fairly clear in *Cleburne* itself. Several Circuits have also named these steps when applying *Cleburne*. *See, e.g.*, *Congregation Koi Ami v. Abington Twp.*, 309 F.3d 120, 138–39 (3d Cir. 2002); *Christian Gospel Church, Inc. v. City of San Francisco*, 896 F.2d 1221, 1225 (9th Cir. 1990).

51 *Cleburne*, 473 U.S. at 447–48.

52 *Id.*

53 *Id.* at 448.

54 *Id.* at 447.

55 *Id.* at 448. The Court does not explain how it set the parameters of this category.

56 *Id.*

the excluded group home and the permitted care and multiple-dwelling facilities.⁵⁷ Pre-RLUIPA, the circuit courts applied this analysis repeatedly in disputes involving religious land uses—finding similarly situated uses, analyzing for disparate treatment, and applying rational basis review—and usually upheld any disparate treatment under a rational basis test.⁵⁸

C. Overview of RLUIPA

The Religious Land Use and Institutionalized Persons Act was introduced and co-sponsored by Senators Hatch and Kennedy, and passed both houses unanimously.⁵⁹ As its name implies, the Act is limited to two areas of concern: land use and penal institutions. The latter relies for its constitutionality on the Spending Clause for support, and was upheld by the Supreme Court in *Cutter v. Wilkerson*.⁶⁰ This Note concerns the land use provisions, codified at 42 U.S.C. § 2000cc.

RLUIPA contains four land use provisions, divided into two sections. The first section re-instates the “substantial burden” test of *Sherbert*⁶¹ and the ill-fated Religious Freedom Restoration Act,⁶² but limits its scope to land use.⁶³ Strict scrutiny is applied to substantial burdens on religious land uses. Congressional authority to enact this section is grounded in the Spending Clause, the Commerce Clause, and the

57 *Id.* at 450.

58 *See, e.g.*, *Congregation Koi Ami v. Abington Twp.*, 309 F.3d 120, 143–44 (3d Cir. 2002) (upholding a zoning ordinance that prohibited a synagogue from locating in a residential district); *Christian Gospel Church, Inc. v. San Francisco*, 896 F.2d 1221, 1221 (9th Cir. 1990) (upholding the denial of a zoning permit to establish a church in a residential area under the Free Exercise Clause and Equal Protection Clause); *Messiah Baptist Church v. Cnty. of Jefferson*, 859 F.2d 820 (10th Cir. 1988) (upholding the denial of a zoning permit to build a church in an agricultural district under rational basis review); *Lakewood, Ohio Congregation of Jehovah’s Witnesses, Inc. v. City of Lakewood*, 699 F.2d 303 (6th Cir. 1983) (upholding a zoning ordinance that prohibited new church buildings in most residential districts); *Grosz v. City of Miami Beach*, 721 F.2d 729, 730 (11th Cir. 1983) (upholding the application of a zoning law that prohibited “organized, publicly attended religious services” in residential areas to a ten-member house church).

59 *See* 146 CONG. REC. 16703 (July 27, 2000) (noting that the Act passed the Senate unanimously); 146 CONG. REC. 16622 (July 27, 2000) (indicating the same for the House of Representatives).

60 *See* 42 U.S.C. § 2000cc-1 (2006); *Cutter v. Wilkinson*, 544 U.S. 709, 713–14 (2005).

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

62 This statute attempted to legislatively require a return to the *Sherbert* test, but was declared unconstitutional in *City of Boerne v. Flores*, 521 U.S. 507, 511 (1997).

63 42 U.S.C. § 2000cc(a).

Free Exercise Clause via the Fourteenth Amendment's Enforcement Clause.⁶⁴ Its application to local governments is ultimately grounded in the constitutional category of "individualized governmental assessments" reaffirmed in *Smith* and constitutionally requiring strict scrutiny.⁶⁵

The second section is labeled "discrimination and exclusion" and contains the following three separate provisions:

- (1) Equal terms. No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.
- (2) Nondiscrimination. No government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination.
- (3) Exclusions and limits. No government shall impose or implement a land use regulation that—(A) totally excludes religious assemblies from a jurisdiction; or (B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.⁶⁶

While this section does not include any jurisdictional statement, the legislative history makes it clear that these provisions parallel the "neutral and generally applicable" test of *Smith* and *Lukumi*.⁶⁷ The first of these three provisions, the equal terms provision, is the primary focus of this Note.

Finally, there are two miscellaneous provisions of RLUIPA worth noting: the burden shifting provision, which arguably introduces one of the Court's scrutiny tests into the equal terms provision,⁶⁸ and the broad construction provision, requiring the statute to 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."⁶⁹ Both of these provisions will be discussed in more detail below.

64 *Id.* § 2000cc(b).

65 *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 537 (1993) (noting that the land use regulation under examination constituted an individualized governmental assessment); *Emp't Div. v. Smith*, 494 U.S. 872, 884 (1990).

66 42 U.S.C. § 2000cc(b).

67 "[The equal terms provision] and [the discrimination clause] prohibit various forms of discrimination against or among religious land uses. These sections enforce the Free Exercise Clause rule against laws that burden religion and are not neutral and generally applicable." 146 CONG. REC. 16,699 (July 27, 2000) (Joint Statement of Sen. Hatch and Sen. Kennedy) [hereinafter Joint Statement].

68 42 U.S.C. § 2000cc-2(b). *See infra* Part II.C.

69 *Id.* § 2000cc-3(g).

After *City of Boerne v. Flores*⁷⁰ struck down the Religious Freedom Restoration Act, due in part to the lack of Congressional findings, RLUIPA's sponsors left a careful and exhaustive legislative history cataloging routine but veiled discrimination against religious land uses.⁷¹ These findings were summarized in a joint statement submitted by sponsoring Senators Hatch and Kennedy. The sponsors noted that “[t]he right to assemble for worship is at the very core of the free exercise of religion.”⁷² Yet, “the hearing record compiled massive evidence that this right is frequently violated.”⁷³ This discrimination was occasionally expressly stated, with zoning board members or neighbors “explicitly offer[ing] race or religion as the reason to exclude.”⁷⁴ Far more frequently, however, the primary problem was land use law itself, which often protected “covert” religious gerrymanders and discriminatory individualized assessments.⁷⁵ As Senators Hatch and Kennedy explained:

Churches . . . are frequently discriminated against on the face of zoning codes and also in the highly individualized and discretionary processes of land use regulation. Zoning codes frequently exclude churches in places where they permit theaters, meetings halls, and other places where large groups of people assemble for secular purposes. Or the codes permit churches only with individualized permission from the zoning board, and zoning boards use that authority in discriminatory ways [This] discrimination lurks behind such vague and universally applicable reasons as traffic, aesthetics, or “not consistent with the city’s land use plan.”⁷⁶

These concerns about otherwise facially neutral gerrymanders and discriminatory individualized assessments were expressly noted by the

70 521 U.S. 507 (1997).

71 See Sarah Keeton Campbell, Note, *Restoring RLUIPA’s Equal Terms Provision*, 58 DUKE L.J. 1071, 1080–83 (2009) (providing a succinct summary of legislative findings not fully discussed in this Note).

72 Joint Statement, *supra* note 67, at 16,698.

73 *Id.* There is a heated debate among commentators about the strength of these findings. Compare Douglas Laycock, *State RFRA’s and Land Use Regulation*, 32 U.C. DAVIS L. REV. 755, 767–68 (1999) (summarizing several studies showing that most religious land use decisions are decided on an individualized basis), with Marci A. Hamilton, *Federalism and the Public Good: The True Story Behind the Religious Land Use and Institutionalized Persons Act*, 78 IND. L.J. 311, 342–52 (arguing that there was little evidence in the record of actual discrimination against religious land uses). See generally MacLeod, *supra* note 21, at 62–65 (2010) (providing an overview of the literature discussing whether Congressional findings of routine discrimination were sufficient).

74 Joint Statement, *supra* note 67, at 16,698.

75 *Id.* at 16,699 (“Where [discrimination] occurs, it is often covert.”).

76 *Id.* at 16,698.

Court in *Lukumi* as well.⁷⁷ The solution to this legislative and judicial concern was RLUIPA, which attacked religious gerrymanders and subjective discrimination by local zoning officials by “codifying [the Court’s] standards for greater visibility and easier enforceability.”⁷⁸

II. THE ELEVENTH CIRCUIT’S CATEGORICAL RULE

This background in land use regulation and Free Exercise jurisprudence provides the basis for the circuits’ interpretations of the equal terms provision. This Part describes the Eleventh Circuit’s “categorical” rule, in contrast to the “contextual” and “purposive” rules advanced by other courts. The equal terms provision has three basic elements, which parallel the three elements of the *Cleburne* test:⁷⁹ (1) Similarly-situated entities: are both the religious land use and the non-religious land use either an assembly or institution? (2) Treated similarly: is the religious land use treated on less than equal terms than the nonreligious land use? (3) Level of scrutiny: Can the city’s justification of any unequal terms withstand strict scrutiny?

However, the statute makes two alterations to the *Cleburne* rule. In the similarly-situated step, Congress has defined a class of comparable land uses in lieu of the traditional contextual similarly-situated analysis. This change accounts for the “categorical” label attached to the Eleventh Circuit’s rule. Second, the statute substitutes strict scrutiny review for rational basis review given the Court’s opinion in *Lukumi* which applied strict scrutiny to non-neutral regulations.⁸⁰ The following three Subsections examine each of the three parts of the equal terms provision in turn.

A. Assembly / Institution

In *Midrash Sephardi, Inc. v. Town of Surfside*,⁸¹ the Eleventh Circuit became the first circuit court to interpret RLUIPA’s equal terms provision. The relationship between the Equal Protection rule announced in *Cleburne* and RLUIPA’s equal terms provision was contested from the start. As noted above, the *Cleburne* test required courts to deter-

⁷⁷ See *supra* notes 34–45 and accompanying text.

⁷⁸ Joint Statement, *supra* note 67, at 16,699.

⁷⁹ *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1230 (11th Cir. 2004) (“Under RLUIPA, we must first 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.”).

⁸⁰ See *supra* note 39 and accompanying text.

⁸¹ *Midrash Sephardi*, 366 F.3d at 1214.

mine whether land uses are similarly-situated in a fact-intensive case-by-case analysis. The equal terms provision, however, only asks whether religious “assemblies or institutions” are treated on less than equal terms than nonreligious “assemblies or institutions.” The District Court Magistrate Judge in *Midrash* directly applied this familiar contextual similarly-situated analysis and ignored the language of assembly or institution entirely.⁸²

The Eleventh Circuit disagreed, pointing to the assembly or institution language of the statute: “While [the provision] has the ‘feel’ of an equal protection law, it lacks the ‘similarly situated’ requirement usually found in equal protection analysis.”⁸³ Rather than requiring the case-by-case contextual analysis of *Cleburne*, the statutory text already identified the relevant “natural perimeter”—assemblies and institutions.⁸⁴ RLUIPA’s terms “require a direct and narrow focus” on this category.⁸⁵

The Eleventh Circuit did not, however, reject the analogy to *Cleburne*. The statute’s categorical approach serves the same purpose as a contextual similarly-situated analysis. Indeed, the court concluded that the compared uses were in fact “similarly situated” because both uses were assemblies or institutions.⁸⁶ To avoid confusion, the Eleventh Circuit’s approach under this element will be referred to as “categorical” or “categorical similarly-situated” to differentiate it from the contextual similarly-situated analysis of *Cleburne* and the purposive similarly-situated test introduced later.⁸⁷ The Eleventh Circuit went on to define assembly and institution according to ordinary meaning definitions.⁸⁸ The Eleventh Circuit concluded that

82 *Id.* at 1230.

83 *Id.* at 1229 (citing *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 447–50 (1985)).

84 *Id.* at 1230 n.12 (citing *Walz v Tax Comm’n of New York City*, 397 U.S. 664, 696 (1970) (Harlan, J., concurring)).

85 *Id.* at 1230.

86 *Id.* at 1231 (“Finding that private clubs and lodges are similarly situated to churches and synagogues, we turn to whether under RLUIPA, Surfside may treat them differently.”).

87 The Eleventh Circuit’s test has also been referred to as a “differential treatment” test and a “natural perimeter” test. *See River of Life Kingdom Ministries v. Vill. of Hazel Crest*, 611 F.3d 367, 370 (7th Cir. 2010) (en banc); Campbell, *supra* note 71, at 1075.

88 The Eleventh Circuit cites two dictionary definitions for “assembly”: “a company of persons collected together in one place [usually] and usually for some common purpose (as deliberation and legislation, worship, or social entertainment),” and “[a] group of persons organized and united for some common purpose.” *Midrash*, 366 F.3d at 1230 (citing WEBSTER’S 3D NEW INT’L UNABRIDGED DICTIONARY 131 (1993) and BLACK’S LAW DICTIONARY 111 (7th ed. 1999)). The legislative record at least indi-

private clubs and lodges fall within the category of “assembly or institution.” Likewise, the plaintiff synagogue fit within the statutory language.

This categorical approach serves two primary aims. First, it prophylactically fights religious discrimination. Religious institutions are unique both in their prevalence and as a land use type.⁸⁹ A contextual similarly-situated analysis is notoriously difficult to apply when the compared entity is atypical and unique, because it is difficult to locate a comparable entity.⁹⁰ This is only exacerbated in the land use context by the subjectivity of many zoning decisions.⁹¹ Thus, the statute defines a category of similar uses, comparable in breadth to the “care and multiple-dwelling facilities” category identified in *Cleburne*.⁹² This proactive legislative solution is justified by the subjectivity of the zoning process⁹³ and by the extensive legislative record showing that this individualized process is frequently manipulated to discriminate against religious institutions.⁹⁴ Second, the categorical approach pro-

cate that theaters and meeting halls are assembly uses, as well as “other places where large groups of people assemble for . . . purposes.” Joint Statement, *supra* note 67, at 16,698. Roughly speaking, this seems to have three basic elements: (1) a gathering of persons, (2) for a common purpose or activity, and (3) some “degree of group affinity, organization, and unity around [that] common purpose.” *River of Life*, 611 F.3d at 390 (Sykes, J. dissenting). Among seemingly included uses are: theaters, meeting halls, private clubs, gymnasiums, health clubs, music halls and auditoriums, etc. *See id.* (citing uses that are likely or unlikely to be assemblies). Most recently, the Eleventh Circuit has found that private parks, playgrounds, and neighborhood recreation centers are assemblies under the statute. *See Covenant Christian Ministries, Inc. v. City of Marietta, Ga.*, 654 F.3d 1231, 1246 (2011). The Eleventh Circuit also cites dictionary definitions for “institution,” which has elements of (1) being an established organization or society, and (2) usually having a public purpose. *See Midrash*, 366 F.3d at 1230 (citing WEBSTER’S 3D NEW INT’L UNABRIDGED DICTIONARY 1171 (1993)). Land uses like colleges, schools, and libraries fit this definition.

89 *See supra* Part I.A (explaining the uniqueness of religious land uses in the modern zoning scheme).

90 This has been most thoroughly explored in the employment discrimination context. *See, e.g.*, Tricia M. Beckles, Comment, *Class of One: Are Employment Discrimination Plaintiffs at an Insurmountable Disadvantage if They Have No “Similarly Situated” Comparators?*, 10 U. PA. J. BUS. & EMP. L. 459, 464 (2008) (outlining the problem of uniquely situated employees); Suzanne B. Goldberg, *Discrimination by Comparison*, 120 YALE L.J. 728, 757–60 (2011) (summarizing problems of uniquely situated employees).

91 *See supra* notes 19–21 and accompanying text.

92 *See supra* notes 49–54 and accompanying text.

93 *See supra* notes 19–21 and accompanying text.

94 *See* Joint Statement, *supra* note 67, at 16,698 (“The hearing record compiled massive evidence that this right is frequently violated. Churches in general, and new, small, or unfamiliar churches in particular, are frequently discriminated against on

vides a clear standard for local governments, allowing them to zone in accordance with federal law and so avoid expensive, fact-intensive lawsuits required by the *Cleburne* test.⁹⁵

B. *Less than Equal Terms*

The next question is whether the government treats the two uses differently, or on “less than equal terms.” The language of “less than equal terms” corresponds to *Cleburne*’s disparate treatment requirement.⁹⁶ Or in the classic language of *Plyler v. Doe*,⁹⁷ religious and non-religious assemblies and institutions must be “treated alike.” This is determined by examining how the statute’s terms (or government actions) treat the religious and nonreligious uses.

There are three basic fact-patterns on the analysis under this element. First, and most common, are cases where the only statutory “term” is land use type. When the nonreligious use is permitted by the statute while the religious use is not permitted, then the religious use is clearly treated on less than equal terms. For example, in *Midrash*, the statute permitted private clubs and lodges in the zoning district, but excluded synagogues.⁹⁸ This is blatantly unequal treatment. In the example of Lighthouse Institute, the church is excluded but possible comparators—theaters, cinemas, culinary schools—were permitted as of right.⁹⁹ Once again, this is clearly differential treatment. Because zoning regulations often employ use type as the primary regulatory scheme,¹⁰⁰ this simple analysis is all that is necessary for the vast majority of facial challenges.¹⁰¹

Other land use regulations, however, will place additional restrictions on land uses in the terms of the statute, besides use type. Limita-

the face of zoning codes and also in the highly individualized and discretionary processes of land use regulation.”).

95 See SALKIN, *supra* note 13, § 28.7 (noting that “[h]ow to frame a similarly situated secular use has proven to be difficult”).

96 See *supra* notes 48–58 and accompanying text.

97 See *Plyler v. Doe*, 457 U.S. 202, 216 (1982).

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

99 See *supra* notes 1–8 and accompanying text.

100 See *supra* Part I.A (noting the prevalence of use-based zoning in the United States).

101 This was true in five of the seven primary cases considered by the circuit courts so far. See *Centro Familiar Cristiano Buenas Nuevas v. City of Yuma*, 651 F.3d 1163, 1165 (9th Cir. 2011); *Elijah Grp., Inc. v. City of Leon Valley*, 643 F.3d 419, 421 (5th Cir. 2011); *River of Life Kingdom Ministries v. Vill. of Hazel Crest*, 611 F.3d 367, 368 (7th Cir. 2010) (en banc); *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 257 (3d Cir. 2007); *Midrash*, 366 F. 3d at 1222.

tions on density or occupancy, height, and square footage are prime examples. For instance, a 2000-member church is not treated on less than equal terms than a 100-person capacity meeting hall just because the latter is permitted and the former is not.¹⁰² An ordinance that permits 100-person meeting halls and 100-person religious assemblies is treating the uses on equal terms; the municipality could freely exclude either a 2000-person meeting hall or a 2000-person church.¹⁰³ The analysis here is distinct from either a contextual or categorical similarly-situated analysis. The focus is not on the similar characteristics of the compared land uses, but on the terms offered to those land uses by the governing entity. The first question is whether the land uses are similar, the question here is whether they are *treated* similarly. This second-type of disparate treatment challenge is very rare due to the prevalence of use-based zoning. In fact, no circuit court has considered this type of case thus far.

The most difficult cases involve as-applied challenges to neutral statutes that are allegedly implemented on less than equal terms, typically by granting a special exception or variance.¹⁰⁴ There are no statutory terms to draw from in this situation, so a court must analyze an actual comparative use to determine whether there has been disparate treatment. For instance, consider a zone that only allows mosques and meeting halls by special exception. A special exception is granted to the 100-person capacity meeting hall, but not to a mosque. The first question is whether the uses are categorically similarly-situated. They clearly both fall within the category of assembly or institution. The second question is whether the uses were treated differently. The statutory terms treats them both the same; both are only permissible by special exception. Yet one is permitted and one is not. If the statute does not provide any clues, then a court must examine the details of the permitted use to try to determine the basis for the differential treatment. These characteristics provide the basis for determining whether the uses were in fact treated differently. In this example, a court probably should assume that the meeting hall capacity played some role in granting one use and not the other.

There are two observations worth making about these as-applied cases. First, they look and feel like a contextual similarly-situated anal-

102 This is based on an example provided by the Third Circuit in *Lighthouse*, 510 F.3d at 268.

103 See *id.* at 286–87 (Jordan, J., dissenting) (responding to the majority’s hypothetical); see also *Centro Familiar*, 651 F.3d at 1172 (responding to the hypothetical as well).

104 See *supra* note 20 and accompanying text (discussing a variety of flexible zoning options).

ysis because the two uses are being compared to determine whether they were treated similarly. Indeed, the Eleventh Circuit labels this a similarly-situated test.¹⁰⁵ But this superficial similarity should not be overemphasized. The form and content of the analysis remains the same in as-applied cases and facial challenges.¹⁰⁶ The end goal is to determine first, whether the uses are similar (which is a categorical analysis under RLUIPA), and second, whether the uses are treated similarly (which must be contextual in as-applied cases with neutral statutes).

The second observation is that this analysis creates a perverse incentive for local governments to work at this as-applied level, since the resulting analysis is necessarily more stringent. Arguably, the Eleventh Circuit and other courts have compensated for this in their analysis, requiring a less stringent similarity than traditionally required in Equal Protection cases.¹⁰⁷ Even if the rule does create a perverse incentive, however, it seems to be the best reading of the statute for the reasons provided above.

C. *Level of Scrutiny*

The final element of the analysis shifts the burden to the government to explain its discriminatory actions. The equal terms provision does not textually require this step at all. Nonetheless, the Eleventh

105 See *Primera Iglesia Bautista Hispana, Inc. v. Broward Cnty.*, 450 F.3d 1295, 1311 (11th Cir. 2006); *Konikov v. Orange Cnty., Fla.*, 410 F.3d 1317, 1327–29 (11th Cir. 2005).

106 The same principled distinction is made in other equal protection contexts. The similarly-situated element requires a different analysis than the disparate treatment element. *Plyler v. Doe*, 457 U.S. 202, 216 (1982). In unemployment discrimination, relevant similarly-situated factors might include whether the comparators are doing the “same work,” have the same supervisor, have similar seniority in the company, or committed the same infraction. The disparate treatment element would consider whether there is equal pay, or whether the discipline of one employee was more severe than that of another.

107 This argument is beyond the scope of this article. However, the Eleventh Circuit decision in *Konikov* provides an example of this tendency. In that case, the court did not even identify a comparable non-religious use. See *Konikov*, 410 F.3d at 1317. *Konikov* involved a Rabbi who held religious meetings in his home. He was cited for “operating a religious organization” in a residential zoning area. *Id.* at 1320. The Eleventh Circuit concluded that *Konikov* was treated on less than equal terms because “a group meeting with the same frequency as *Konikov*’s would not violate the Code, so long as religion is not discussed,” such as a Cub Scout meeting or a gathering to watch sports. *Id.* at 1328.

Circuit read the provision to require strict scrutiny, a reading criticized by several other circuits.¹⁰⁸

There is some textual support for including strict scrutiny in the equal terms provision. The burden shifting provision of RLUIPA states that “the government shall bear the burden of persuasion on any element of the claim” once the “plaintiff produces prima facie evidence to support a claim alleging a violation of the Free Exercise Clause or a violation of [RLUIPA’s substantive provisions].”¹⁰⁹ This implies some kind of additional step beyond the plaintiff’s prima facie case because the government must bear the burden to show something. The problem with this reading is that the government’s burden is explicitly addressed in the substantial burden provisions of RLUIPA: the government bears the burden of strict scrutiny.¹¹⁰ Given that strict scrutiny is *explicitly* required by the substantial burden provision, it is a strained construction to *imply* strict scrutiny in the equal terms provision. This is the primary challenge to the Eleventh Circuit’s reading.¹¹¹

However, there are several reasons why the Eleventh Circuit’s reading is sound.¹¹² The burden shifting provision does apply to the equal terms provision and must mean *something*. A House sponsor noted that the burden shifting provision “simplifies enforcement” in those instances where strict scrutiny has been required by the Supreme Court.¹¹³ As explained earlier,¹¹⁴ both the equal terms provision and the antidiscrimination provision closely parallel the structure of the neutral and generally applicable rule of *Smith* and *Lukumi*,

108 Three circuits specifically reject the inclusion of strict scrutiny. *Centro Familiar Cristiano Buenas Nuevas v. City of Yuma*, 651 F.3d 1163, 1171–72 (9th Cir. 2011) (finding that the burden shifting provision did not overcome other textual problems with the inclusion of strict scrutiny, such as the presumption of the broad construction clause in favor of broader protections); *River of Life v. Hazel Crest*, 611 F.3d 367, 370 (7th Cir. 2010) (en banc); *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 266 (3d Cir. 2007).

109 42 U.S.C. § 2000cc-2(b) (2006).

110 *See id.* §§ 2000cc(a), 2000cc-1(a).

111 *But see* Terry M. Crist III, Comment, *Equally Confused: Construing RLUIPA’s Equal Terms Provision*, 41 ARIZ. ST. L.J. 1139, 1157 (2009) (noting that expressly including strict scrutiny within the statutory language of the “substantial burden” section while not expressly including it in the equal terms provision makes sense given that strict scrutiny is, under *Smith*, constitutionally required in the latter instance but not the former).

112 Anthony Lazzaro Minervini, Comment, *Freedom From Religion: RLUIPA, Religious Freedom, and Representative Democracy on Trial*, 158 U. PA. L. REV. 571, 606–08 (2010) (arguing for inclusion of strict scrutiny in the equal terms provision).

113 *See* 146 CONG. REC. 16621–22 (2000) (statement of Rep. Canady).

114 *See supra* notes 79–80 and accompanying text.

and are meant to “enforce” that rule.¹¹⁵ Because they are meant to enforce *Smith* and *Lukumi*, the burden shifting provision applies, as this legislative history explains. Given that the Court required strict scrutiny in *Smith* and *Lukumi* for laws that are not neutral and of general applicability, and given the parallel structure of the equal terms provision, the most plausible construction of the statute is to require strict scrutiny.¹¹⁶ Strict scrutiny was applied pre-*Smith* to any substantial burden on religion, and the Court since *Smith* has made it clear that strict scrutiny is appropriate when a law is not neutral and of general applicability.¹¹⁷ Thus, the statutory and constitutional context of the equal terms provision support the inclusion of strict scrutiny analysis.

III. A CRITIQUE OF ALTERNATIVE INTERPRETATIONS

Reviewing previous circuit decisions in June 2011, the Fifth Circuit identified four discrete interpretations of the equal terms provision, and arguably adopted a fifth.¹¹⁸ Indeed, of the seven circuits to decide equal terms cases, only the Ninth Circuit purports to be following the test of another circuit, and, as explored below, it may misinterpret the Seventh Circuit test it claims to follow. Thus, there are arguably seven different tests utilized at the circuit level, at varying degrees of development. Aside from the Eleventh Circuit’s interpretation, however, the other circuits fall into two broad categories, both criticizing the categorical similarly-situated analysis adopted in *Midrash*. The first set of cases apply some variation of *Cleburne*’s contextual similarly-situated test instead of the equal terms provision. Conceptually, these cases reject RLUIPA’s substitution of a categorical similarly-situated test and use a contextual similarly-situated test instead. The second set of cases adopts variations on a purposive similarly-situated test. Conceptually, these cases reject RLUIPA’s substitution of strict scrutiny for rational basis review.

115 Joint Statement, *supra* note 67, at 16,699.

116 It might be argued that *Locke v. Davey*, 540 U.S. 712, 720 n.3 (2004) only requires rational basis scrutiny for Equal Protection claims. That case did present an Equal Protection claim on the basis of religion, and the Court summarily applied rational basis scrutiny, but it only did so after determining that the contested program was neutral and generally applicable under the Free Exercise Clause. *Id.*

117 See *supra* notes 38–39 and accompanying text.

118 *Elijah Grp., Inc. v. City of Leon Valley*, 643 F.3d 419, 422–24 (5th Cir. 2011).

A. *Writing in a Contextual Similarly Situated Requirement*

The Tenth Circuit and Second Circuit both read in some type of contextual similarly-situated requirement.¹¹⁹ The Tenth Circuit case *Rocky Mountain Christian Church v. Board of County Commissioners*¹²⁰ involved a church's application for a special use exception to expand the church's existing school in an area the county had zoned agricultural.¹²¹ Another school had recently been granted a special exception to expand in the same agricultural zone, but the church's application was denied.¹²² A jury found for the church, and the Tenth Circuit affirmed, but specifically approved of the trial court's troubling jury instruction: the church must establish that the county "[1] treated [the church] less favorably . . . than [the County] treated [2] a similarly situated [3] nonreligious assembly or institution."¹²³

This jury instruction closely follows the text of the equal terms provision, except for the inclusion of the words "similarly situated."¹²⁴ This requirement does not appear in the statute's language. It is not simply indicating a categorical approach—"assembly or institution" is a separate element of the instruction. And while it is an as-applied case, the Tenth Circuit is not simply following the Eleventh Circuit's as-applied test,¹²⁵ since less favorable treatment is also a separate element of the jury instruction. It simply added an additional element to the text.

The Second Circuit made a similar move when it addressed an as-applied equal terms challenge in *Third Church of Christ, Scientist v. City of New York*.¹²⁶ New York cited the Manhattan church for operating "large scale catering activities" at the church, which was located in a residential zone.¹²⁷ The church successfully argued at trial that two hotels in the same zone also had large-scale catering operations but were not cited for violations.¹²⁸ The trial court found for the church,

119 See *Third Church of Christ, Scientist v. City of New York*, 626 F.3d 667, 669–70 (2d Cir. 2010); *Rocky Mountain Christian Church v. Bd. of Cnty. Comm'rs*, 613 F.3d 1229, 1236 (10th Cir. 2010).

120 613 F.3d 1229 (10th Cir. 2010).

121 *Id.* at 1234.

122 *Id.* at 1236.

123 *Id.*

124 "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." 42 U.S.C. § 2000cc(b)(1) (2006).

125 See *supra* notes 105–07 and accompanying text.

126 626 F.3d 667 (2d Cir. 2010).

127 *Id.* at 670–71.

128 *Id.* at 669.

and the Second Circuit affirmed.¹²⁹ The court never considered the statute's "assembly or institution" language, but instead concluded that the equal terms provision is concerned "with whether, in practical terms, secular and religious institutions are treated equally."¹³⁰ This meant that, because both operations involved "large scale catering activities" that were formally prohibited in the residential zone, the two uses were "similarly situated for all functional intents and purposes relevant here."¹³¹ This, of course, is merely the contextual similarly-situated test of *Cleburne*.¹³²

Both of these circuits considered as-applied challenges, which do require some type of contextual analysis.¹³³ As both circuits develop a fuller reading of the equal terms provision, their reading may more closely resemble the Eleventh Circuit's reading. However, the tendency to simply follow *Cleburne* is present in both circuits as well as several district courts. For instance, the district courts in both *Midrash* and in *Lighthouse* required compared uses to be contextually similarly situated in facial challenges.¹³⁴ And both the Tenth and Second Circuits, so far, merely tack a *Cleburne* analysis onto the equal terms provision.

These cases completely fail to confront the statute's text. The category of "assembly or institution" is plainly meant to parallel the work done in *Cleburne* to define a category of similarly-situated uses.¹³⁵ If a contextual similarly-situated requirement is written back into the statute, then there is no way to account for the specific category defined by the statute. Indeed, if the statute requires compared uses to be both "assemblies or institutions" and contextually similarly-situated, then the equal terms provision is narrower than the constitutional standard. Given that RLUIPA was passed in response to the narrowed standard of *Smith* and *Lukumi*, and given the problems RLUIPA

129 *Id.* at 668.

130 *Id.* at 671.

131 *Id.* at 668.

132 It is worth noting that neither of these circuits apply a very rigorous similarly-situated requirement. Both deemphasize the need for exacting similarity. *See id.* at 671 ("[N]o court has held that the secular comparator's use need be identical to the religious entity's."); *Rocky Mountain Christian Church v. Bd. of Cnty. Comm'rs*, 613 F.3d 1229, 1236–37 (10th Cir. 2010) ("[While t]he County highlights several differences . . . the many substantial similarities allow for a reasonable jury to conclude that [the uses] were similarly situated.").

133 *See supra* notes 105–07 and accompanying text.

134 *See Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 264 (3d Cir. 2007); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1230 (11th Cir. 2004).

135 *See supra* notes 48–58 and accompanying text.

claimed to address, it is very unlikely that the statute codifies a narrower standard than that presented in those cases.¹³⁶

If Congress meant to simply codify the three-step rule of *Cleburne* it could have expressly prohibited discrimination against religious land uses, or used the “similarly situated” language. Indeed, if that was the intent, it would have done so. Simply placing such language in the statute would have resolved any question of the provision’s constitutionality. In fact, Congress did expressly use such language in the nondiscrimination provision.¹³⁷ The equal terms provision, in contrast, does not expressly require discrimination as an element.¹³⁸ Thus, in order to give meaning to both clauses, the nondiscrimination clause is best understood to codify *Smith* and *Lukumi* and protect against blatant religious discrimination, while the equal terms provision, by expressly defining a category of comparable uses, serves as a prophylactic deterrence measure applied in situations that, according to congressional research, often mask discrimination.¹³⁹

Finally, writing an additional element into the text conflicts with the statute’s broad construction clause.¹⁴⁰ The statute stipulates that any ambiguity “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.”¹⁴¹ Writing in a contextual similarly-situated requirement serves to narrow, not broaden, protection of religious exercise. Therefore, if the statute is ambiguous, a court should read the statute to not require a contextual similarly-situated requirement.

B. *Writing in a Purposive Similarly Situated Requirement*

The Third Circuit, the Seventh Circuit, and (arguably) the Ninth Circuit reject both the categorical and contextual approaches in favor

136 See *supra* Part II.A.

137 See *River of Life Kingdom Ministries v. Vill. of Hazel Crest*, 611 F.3d 367, 385 (7th Cir. 2010) (Sykes J., dissenting) (citing *Corley v. United States*, 556 U.S. 303 (2009)).

138 See 42 U.S.C. § 2000cc(b) (2006).

139 See Joint Statement, *supra* note 67, at 16,698 (“The bill is based on three years of hearings—three hearings before the Senate Committee on the Judiciary and six before the House Subcommittee on the Constitution—that addressed in great detail both the need for legislation. . . . The hearing record compiled massive evidence that [the right to assemble for worship] is frequently violated.”).

140 42 U.S.C. § 2000cc-3(g); see *supra* note 69 and accompanying text.

141 42 U.S.C. § 2000cc-3(g).

of a purposive similarly-situated requirement.¹⁴² These courts misread the statute to not require strict scrutiny and are therefore forced to reintroduce a purposive element into the equal terms provision. All three circuits considered very similar cases. The facts of *Lighthouse Institute for Evangelism, Inc. v. City of Long Branch*¹⁴³ discussed in the introduction of this Note are representative. The zoning ordinance there did not permit a religious assembly in a commercial zone but permitted (among other uses) theaters and cinemas.¹⁴⁴ The purpose of the ordinance was to increase retail trade, city revenues, and employment opportunities so as to “encourage a ‘vibrant’ and ‘vital’ downtown residential community.”¹⁴⁵ These cases raise four primary arguments against a categorical test and for a purposive test, which will be labeled the “definitional argument,” the “legislative history argument,” the “definition of equal argument,” and the “strict scrutiny argument.”¹⁴⁶

142 *Centro Familiar Cristiano Buenas Nuevas v. City of Yuma*, 651 F.3d 1163, 1171–72 (9th Cir. 2011) (finding that the burden shifting provision did not overcome other textual problems with the inclusion of strict scrutiny, such as the presumption of the broad construction clause in favor of broader protections); *River of Life*, 611 F.3d at 370 (en banc); *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 266 (3d Cir. 2007).

143 510 F.3d 253 (3d Cir. 2007).

144 *Id.* at 258.

145 *Id.*

146 A fifth argument raised by the Seventh Circuit is the possibility of Establishment Clause problems with the Eleventh Circuit’s reading. *River of Life*, 611 F.3d at 370 (en banc). The Seventh Circuit argued that a zoning district that “forbids all assemblies except gymnasiums” would be required to permit a church, but need not allow “a secular humanist reading room” or the “local chapter of the Cat Fanciers’ Association.” *Id.* This may be problematic under the Establishment Clause, the court argued, insofar as the ordinance favors the church over the other uses. *Id.* Supreme Court support for this position is limited to Justice Stevens’s concurrence in *City of Boerne v. Flores*, 521 U.S. 507, 536–37 (1997) (Stevens, J., concurring). Stevens’s opinion has been repeatedly rejected since then, upholding a variety of broad legislation in the “corridor” between the Free Exercise Clause and the Establishment Clause. The Supreme Court has applied the Religious Freedom Restoration Act to federal government action, implying its constitutionality under the Establishment Clause. See *Gonzales v. O Centro Espirata Beneficente Uniao do Vegetal*, 546 U.S. 418, 435–36 (2006). The Court also unanimously upheld the institutionalized persons section of RLUIPA against an Establishment Clause challenge. *Cutter v. Wilkinson*, 544 U.S. 709, 713 (2005). Both of these cases upheld far broader legislative accommodations of religion than even the broadest interpretation of the equal terms provision. This same point is made in Judge Manion’s concurrence in *River of Life*. See *River of Life*, 611 F.3d at 375–76 (Manion, J., concurring) (noting that Judge Posner’s argument was based entirely on dicta found in Justice Steven’s concurrence in *City of Boerne*).

First, the courts argue that the categorical approach is too broad because the Eleventh Circuit's definition includes uses that have "different effects on the municipality and its residents"¹⁴⁷ and on the objectives of the zoning ordinance. The Third Circuit, for example, argues that the test is inconsistent with the statutory text and congressional intent because it does not take into account the size or nature of the religious use.¹⁴⁸ Thus, a city that allowed a ten member book club would be forced to allow a religious assembly with rituals "involving sacrificial killings of animals," and would be required to do so "regardless of the impact such a religious entity might have on the envisioned character of the area."¹⁴⁹ This argument has broadened into the claim that the Eleventh Circuit's reading would "force local governments to give any and all religious entities a free pass to locate wherever any secular institution or assembly is allowed."¹⁵⁰

This definitional argument is unpersuasive because it focuses on policy outcomes rather than the statutory text, and because it misconstrues the test to get the policy outcome wrong. As previously explained, the Eleventh Circuit's reading is rooted in RLUIPA's text.¹⁵¹ Any alternative rule must be able to explain why the statute uses the category of "assembly or institution" rather than using the more familiar similarly-situated language,¹⁵² and any such explanation must be able to give independent meaning to the nondiscrimination clause¹⁵³ and be justified under the broad construction clause.¹⁵⁴ Overbroad statutory text is a policy question to be changed legislatively, not a reason to rewrite the statute judicially.

147 *River of Life*, 611 F.3d at 370 (en banc). The Seventh Circuit rightly notes that "different effects" on the municipality include not only aesthetic effects, but also "a difference in municipal services required" such as police services. *Id.*

148 *Lighthouse*, 510 F.3d at 268.

149 *Id.* at 268. The second fact-scenario is adopted from *Lukumi*, and is discussed in more detail *supra* at notes 38–45 and accompanying text.

150 *Id.*; see also *Elijah Grp., Inc. v. City of Leon Valley*, 643 F.3d 419, 422 (5th Cir. 2011) ("Under that reading, virtually every facially discriminatory ordinance violates the Equal Terms Clause."). But see *Lighthouse*, 510 F.3d at 286 (Jordan, J., dissenting) (noting that this argument had "shock value" but "I do not read RLUIPA as somehow preventing a city from including . . . rational terms restricting the use of land, so long as those terms apply equally to religious assemblies and nonreligious assemblies"); Bram Alden, Comment, *Reconsidering RLUIPA: Do Religious Land Use Protections Really Benefit Religious Land Users?*, 57 UCLA L. REV. 1779, 1783–88 (2010) (reviewing the "parade of horrors" advanced by critics of RLUIPA and noting that these apocalyptic predictions have proven groundless).

151 See *supra* Part II.

152 See *supra* notes 135–36 and accompanying text.

153 See *supra* notes 137–39 and accompanying text.

154 See *supra* notes 140–41 and accompanying text.

Additionally, the Eleventh Circuit's reading does *not* give religious land uses a free pass from government regulation. As explained before, permitting a ten member book club only means that a government must offer the same terms to a religious assembly¹⁵⁵ or else satisfy strict scrutiny. In the end, the Third Circuit's "parade of horrors" has little more than shock value, jumping to baseless assertions rather than confronting the argument of the Eleventh Circuit.¹⁵⁶

The second argument against the Eleventh Circuit is that Congress intended "to codify the existing jurisprudence interpreting the Free Exercise clause"¹⁵⁷ in RLUIPA. According to the Third Circuit, this means that the equal terms provision must codify the "neutral and generally applicable" rule of the Court post-*Smith*. This neutrality analysis "hinges on a comparison of how [the government] treats entities or behavior that have the same *effect* on its objectives."¹⁵⁸ Therefore, the equal terms provision is only violated when a regulation "treats religious assemblies or institutions less well than secular assemblies or institutions that are similarly situated *as to the regulatory purpose*."¹⁵⁹ The Eleventh Circuit's "expansive reading of the statute"¹⁶⁰ is contrary to the text and the "expressed intent of Congress."¹⁶¹

The Third Circuit misreads the legislative record. The section of the sponsors' statement cited by the Third Circuit is headlined "Fourteenth Amendment," and argues for the constitutionality of RLUIPA's land use provision under the Enforcement Clause test articulated in *City of Boerne v. Flores*. The sponsors' claim is two-fold. First, Congress has "reason to believe" that RLUIPA's provisions are a "proportional and congruent response to the problems documented."¹⁶² The Court in *Boerne* struck down the Religious Freedom Restoration Act because Congress, to legislate under the Enforcement Clause, must have "reason to believe that many of the laws affected by the congressional enactment have a significant likelihood of being unconstitutional."¹⁶³ Second, the land use provisions are congruent and proportional to the "legal standards" of Free Exercise opinions, "codifying those stan-

155 See *supra* notes 102–04 and accompanying text.

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

157 *Id.* at 264 (majority opinion) (citing Joint Statement, *supra* note 67, at 16,704).

158 *Id.*

159 *Id.* at 266.

160 *Id.* at 267.

161 *Id.* at 268.

162 Joint Statement, *supra* note 67, at 16,699.

163 *City of Boerne v. Flores*, 521 U.S. 507, 532 (1997), *as cited in* Joint Statement, *supra* note 67, at 16,699.

dards for greater visibility and easier enforceability.”¹⁶⁴ Specifically, “[the equal terms provision] and [the discrimination provision] enforce the Free Exercise Clause rule against laws that burden religion and are not neutral and generally applicable.”¹⁶⁵ This is the statement the Third Circuit cites against the Eleventh Circuit’s reading. However, the sponsors are merely making a jurisdictional statement, an affirmation that the provisions are constitutional. This is not a reason to accept or reject the Eleventh Circuit’s approach, even if the Third Circuit’s purposive reading of *Smith* and *Lukumi* were accurate.¹⁶⁶ Since both readings are constitutional under the Enforcement Clause, the Third Circuit’s argument does not address the key interpretative questions: does Congress intend for the category of “assembly or institution” to signify similarly-situated uses? How does the equal terms provision differ from the nondiscrimination provision? As argued above, the text and history of the Act support the Eleventh Circuit’s reading.

The third argument against the Eleventh Circuit is that the statutory language “less than equal terms” justifies writing in a purposive similarly-situated element.¹⁶⁷ The Seventh Circuit makes this argument on the basis of the word “equal.” “[E]quality,’ except when used of mathematical or scientific relations, signifies not equivalence or identity but proper relation to relevant concerns.”¹⁶⁸ For example, “it would not promote equality to require . . . that all workers should have the same wages. But it does promote equality to require equal pay for equal work, even though workers differ in a variety of respects, such as race and sex.”¹⁶⁹ Thus, “equality” must be considered relative to criteria enumerated either in the terms of the zoning ordinance or in typical zoning practices. The Eleventh Circuit fails to link the equal terms language to such a criterion. As the Seventh Circuit succinctly charges: “The fact that two land uses share a dictionary definition does not make them ‘equal’ within the meaning of a statute.”¹⁷⁰

The Seventh Circuit’s conclusion here is based entirely on its analogy to the employment discrimination context, but the argument

164 Joint Statement, *supra* note 67, at 16,699.

165 *Id.*

166 See *supra* 38–46 and accompanying text (summarizing the Court’s neutral and generally applicable test).

167 See *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 268 n.13 (3d Cir. 2007).

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

169 *Id.*

170 *Id.*

is flawed. The flaw can be seen by putting RLUIPA's text and the two employment discrimination tests in parallel with *Plyer's* classic maxim, "All persons similarly situated should be treated alike."¹⁷¹

Illustrated visually:

	Characteristics of comparators:	Treatment of comparators:
Plyer	All persons similarly situated	Should be treated alike
RLUIPA	Comparable "assemblies or institutions"	On at least "equal terms"
Emp't test	Equal work	Equal pay
Flawed Emp't	All workers	Same wages

In the court's example, all that changes is the first element. "All workers should have the same wages" is only flawed because the category "all workers" is drawn too broadly. The alternative, "equal pay for equal work" narrows this category from "all workers" to "those who do equal work." The meaning of the second element remains the same, it only shifts from "same wages" to "equal wages."¹⁷² All this example shows is that the first element must be defined according to relevant concerns ("equal work" not "all workers"), or else the result is not "equal" at all.

However, in the equal terms provision, the word "equal" only appears in the second element: "less than equal terms." The Seventh Circuit's argument is simply using language from the second element of the test to regurgitate its earlier argument that the Eleventh Circuit's category of "assemblies and institutions" is too broad. The proper linguistic use of the word "equal" cannot answer that question. The fact that two land uses share a dictionary definition may in fact mean that the uses share relevant characteristics and thus show that they are similarly-situated. A dictionary definition cannot, however, determine whether one is treated "on less than equal terms" than the

171 *Plyer v. Doe*, 457 U.S. 202, 216 (1982).

172 The same is true when the Seventh Circuit carries the analogy over into a RLUIPA analysis. "If a church and a community center, though different in many respects, do not differ with respect to any accepted zoning criterion, then an ordinance that allows one and forbids the other denies equality and violates the equal-terms provision." *River of Life*, 611 F.3d at 371 (en banc). Here again, the focus is on the similarly-situated analysis. Whether the uses differ with respect to zoning criteria does not alter the fact that one was allowed and one was forbidden.

other. But, of course, the Eleventh Circuit does not claim that it can.¹⁷³

Aside from the arguments already enumerated, writing in a similarly-situated requirement *as to regulatory purpose* makes little sense. Zoning is a highly discretionary exercise with few safeguards against abuse of this discretion, only made more discretionary by the unique nature of religious land uses.¹⁷⁴ Congress enacted RLUIPA because of concern that this discretion was being abused: often “discrimination lurks behind such vague and universally applicable reasons as traffic, aesthetics, or ‘not consistent with the city’s land use plan.’”¹⁷⁵ However, it is precisely these subjective judgments that the Third Circuit writes *into* the equal terms provision.

The Seventh Circuit levels this same criticism against the Third Circuit. The “regulatory purpose” standard “facilitates zoning classifications thinly disguised as neutral but actually systemically unfavorable to churches” by making a federal statute depend on the subjective “intentions of local government officials.”¹⁷⁶ RLUIPA is meant to uncover “thinly disguised” discrimination; it is not meant to protect any novel or arbitrary purpose zoning officials can create.¹⁷⁷ The Third Circuit’s test not only undermines the purpose of the statute evidenced in the legislative record but also makes what is left of the provision easily manipulable by zoning officials.

Instead, the Seventh Circuit suggests that uses be similarly-situated as to “accepted zoning criteria.”¹⁷⁸ Citing the prominence and desirability of single-use, noncumulative zoning, the Seventh Circuit indicates that the categories of commercial, residential, and industrial uses are acceptable criteria.¹⁷⁹ Moving to objective criteria, the court argues, avoids the pitfalls of the Third Circuit test.

173 See *supra* Part II.B.

174 See *supra* notes 22–26 and accompanying text.

175 Joint Statement, *supra* note 67, at 16,698.

176 *River of Life*, 611 F.3d at 371 (en banc).

177 The Seventh Circuit cites the objective of one city to create a “Street of Fun.” See *id.* at 368–369 (citing Clifton Hill, FUN BY THE FALLS, <http://www.cliftonhill.com>) as a patently absurd zoning purpose that obviously provides no basis upon which to judge whether a city is acting discriminatorily.

178 *Id.* at 371.

179 The Seventh Circuit includes several extensive quotations discussing single-use noncumulative zoning. See *id.* at 371–73 (quoting *People ex rel. Skokie Town House Builders, Inc. v. Vill. of Morton Grove*, 157 N.E.2d 33, 36 (1959); SALKIN, *supra* note 13, § 9:15; Harry B. Madsen, *Noncumulative Zoning in Illinois*, 37 CHI.-KENT L. REV. 108, 113–14 (1960)). The Ninth Circuit adopts this test but misreads this section of *River of Life*, concluding that “accepted zoning criteria” are parking, vehicular traffic, and generation of tax revenue. See *Centro Familiar Cristiano Buenas Nuevas v. City of*

But these “accepted zoning criteria” suffer from the same weaknesses as the Third Circuit’s purposive test, as acknowledged by a three-judge concurrence.¹⁸⁰ Religious assemblies do not fit well into the single-use zoning system, and thus exclusion of religious assemblies can usually be explained away fairly easily when considered in light of zoning criteria like “commercial,” “residential,” or “industrial.”¹⁸¹ In fact, most religious land uses do not fit into *any* of these categories.¹⁸² As the Senate sponsors succinctly noted, “Churches have been excluded from residential zones because they generate too much traffic, and from commercial zones because they don’t generate enough traffic.”¹⁸³ The Seventh Circuit explicitly admits this, noting that exclusion of churches from a commercial zone is fairly common practice.¹⁸⁴ Thus, the Seventh Circuit incorporates single-use zoning into the statute as an acceptable basis for disparate treatment, the very problem that created the impetus for the statute in the first place.¹⁸⁵

The fourth argument against the Eleventh Circuit criticizes the adoption of a strict scrutiny analysis, arguing instead for a purposive similarly-situated test that holds governments strictly liable for violations. As the Ninth Circuit put it, “Both because the language of the equal terms provision does not allow for it, and because it would violate the ‘broad construction’ provision, we cannot accept the notion that a ‘compelling governmental interest’ is an exception to the equal terms provision.”¹⁸⁶

Yuma, 651 F.3d 1163, 1173 (9th Cir. 2011). One commentator suggests that this moves the discussion into an impossible gridlock. See Tokufumi J. Noda, Comment, *Incommensurable Uses*, 52 B.C. L. REV. E. SUPP. 71 (2011), available at http://www.bc.edu/bclr/esupp_2011/06_noda.pdf (“*River of Life* demonstrates how equal treatment within the context of exclusionary zoning is in fact impossible.”).

180 *River of Life*, 611 F.3d at 376–77 (Williams, J., concurring) (“Zoning officials could just as easily use accepted criteria as a pretext for action as they could articulate a regulatory purpose. The ‘accepted regulatory criteria’ test therefore presents a risk of self-serving testimony just as the majority believes the ‘regulatory purpose’ approach would.”).

181 SALKIN, *supra* note 13, § 28.7 (explaining that the Seventh Circuit considered a “exclusive use district” to be an acceptable zoning criterion).

182 See *supra* notes 22–26 and accompanying text; Noda, *supra* note 179, at 76 (“Judge Diane S. Sykes dissented, arguing that the use of an accepted criterion such as ‘tax-enhancement’ would always allow zoning officials to exclude religious land uses from commercial, industrial, and business districts.”) (citing *River of Life*, 611 F.3d at 386 (Sykes, J., dissenting)).

183 Joint Statement, *supra* note 67, at 16,698.

184 *River of Life*, 611 F.3d at 373 (en banc).

185 See *supra* notes 72–78 and accompanying text.

186 *Centro Familiar Cristiano Buenas Nuevas v. City of Yuma*, 651 F.3d 1163, 1172 (9th Cir. 2011).

The exact opposite is true. In fact, by rejecting strict scrutiny, these circuits are simply writing *Cleburne's* rational basis review back into the statute. These courts are only required to write a purposive element into the “less than equal terms” language because they write out strict scrutiny.

The Ninth Circuit's recent decision in *Centro Familiar*,¹⁸⁷ which claimed to follow the Seventh Circuit's test,¹⁸⁸ demonstrates the similarity between a purposive similarly-situated analysis and constitutional standards of review.¹⁸⁹ The case involved nearly identical facts to *Lighthouse*: a church was prohibited from holding services in an abandoned retail store that they had purchased, because it was not a permitted use in the bar and nightclub district.¹⁹⁰ Nearly every other land use, including “membership organizations,” was permitted in the district, except for religious organizations and educational services. This was intentional. Arizona state law did not grant liquor licenses within 300-feet of either churches or K-12 schools.¹⁹¹ The city argued that churches would dampen the vitality of the entertainment district, primarily because the state liquor license statute would prevent the city from licensing neighboring properties.¹⁹²

The Ninth Circuit rejected the Eleventh Circuit's test and strict scrutiny, and instead adopted the Seventh Circuit's purposive rule: compared uses must receive unequal treatment as measured by “objective zoning criteria.”¹⁹³ This seems to leave the court with two options. Either entertainment is not an “objective zoning criteria” at all and RLUIPA is violated, or entertainment is an objective zoning criteria and unequal treatment is justified. Instead, the Ninth Circuit took a third path. According to the court, the “express distinction” between churches and other uses in the district shifted the burden of persuasion to the government.¹⁹⁴ The government's proffered ratio-

187 651 F.3d 1163 (9th Cir. 2011).

188 *See id.* at 1174.

189 The analytical similarity between the purposive analysis and strict scrutiny can also be shown by considering what a test that required both a purposive analysis and then strict scrutiny would look like. The means-ends analysis in the former would be redundant. *See* Matthias Kleinsasser, Note, *RLUIPA's Equal Terms Provision and the Split Between the Eleventh and Third Circuits*, 29 REV. LITIG. 163, 174-77 (2009) (arguing that both the Third Circuit's purposive test and a strict scrutiny test should be used under the equal terms provision).

190 *See Centro Familiar*, 651 F.3d at 1165-66.

191 *See id.* at 1166. The statute was subsequently changed to permit a church to waive the ban in cases like this one. *See id.* at 1167.

192 *See id.* at 1171.

193 *Id.* at 1173.

194 *See id.* at 1171.

nale—the liquor license statute—was insufficient because the regulation was not “reasonably well adapted” to an accepted zoning criteria.¹⁹⁵ It was not reasonably well adapted for three reasons. First, there was no indication in the land use regulation that the state liquor license law was the reason churches were excluded. Second, the exclusion was too broad because it excluded all “religious organizations,” while the state law only prohibited liquor licenses near “churches.” Likewise, the city excluded all “educational services” while the state law only prohibited liquor licenses near “schools.” Third, the city permitted other land uses with the same “practical effect” of stifling entertainment, such as prisons and post offices.¹⁹⁶ Thus, the regulation violated the equal terms provision.

The Ninth Circuit’s reasoning is contrived, and it is contrived because the court is forced to engage in Cleburne-style review without reference to constitutional standards of equal protection. The Ninth Circuit would have us believe that the liquor license problem is not actually the reason religious organizations are excluded—in a situation where it clearly *is* the reason religious organizations are excluded. Rather than simply say that the city’s interest is not compelling, the court holds that the statute is not “reasonably well adapted” to the end. What “reasonably well adapted” actually means, where it finds statutory support, and how it relates to the more familiar “narrowly tailored” or “rationally related” tests is a mystery. What is clear, however, is that “reasonably well adapted” is an obvious substitute for the constitutional standard of review that the Ninth Circuit reads out of the statute.

Insofar as a means-ends standard of review is appropriate for the equal terms provision, the appropriate standard of review is the “narrowly tailored” requirement of strict scrutiny. Moving the purposive analysis from the disparate treatment element back to a strict scrutiny inquiry resolves the practical problems of a purposive similarly-situated test. First, it parallels the constitutional analysis, requiring a showing of unequal treatment before shifting to rational basis or strict scrutiny review. Given that the equal terms clause “enforces” this jurisprudence, this parallel makes sense. It is only after unequal treatment has been established that the government need offer any rationale at all. Second, once the burden of proof has shifted to the government, there is no concern about the subjectivity of the purposive analysis or self-serving testimony from zoning officials offering post hoc justifications, because the government is incentivized to present its most

195 *Id.* at 1175.

196 *See id.*

rational basis or most compelling state interest to justify its actions. Third, strict scrutiny permits a court to consider whether a proffered government interest is compelling. It was painfully clear that this was lacking in the Ninth Circuit's opinion, which could then have found that the liquor license problem was not a compelling government interest rather than relying on semantics. An examination of the quality of the proffered reason seems essential to the equal protection rationale that only the most compelling purposes justify discrimination on the basis of a suspect class like religion.¹⁹⁷

CONCLUSION

The physical neighborhood religious assembly is the cornerstone of the First Amendment protection of religious free exercise. Centuries ago, De Tocqueville noted that America's religious associations laid the groundwork for American civil society.¹⁹⁸ And as Robert Putnam noted in his classic sociological work, *Bowling Alone*, De Tocqueville's observation is perhaps even more true today.¹⁹⁹ Indeed, the neighborhood religious congregation is a noted source of the social capital that plays a pivotal role in the functioning of America's cities and neighborhoods.

This narrative, however, has been threatened in recent decades by single-use zoning, which is designed to maximize property values, development, and "commercial synergy."²⁰⁰ Single-use zoning has placed religious land use in a class of its own, often excluding religious land uses from the traditional residential, commercial, and industrial zones. This means that religious land uses are often left to seek approval through a variety of subjective and individualized assess-

197 See *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985) ("[W]hen a statute classifies by [a suspect class] . . . these factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy For these reasons . . . these laws are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest."); see also *supra* note 116 and accompanying text (arguing for strict scrutiny).

198 See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 280 (Harvey Mansfield & Delba Winthrop trans., 2000).

199 ROBERT D. PUTNAM, *BOWLING ALONE* 66–69 (2000) ("Faith communities . . . are arguably the single most important repository of social capital in America. . . . [N]early half of all associational memberships in America are church related, half of all personal philanthropy is religious in character, and half of all volunteering occurs in a religious context. . . . Religious institutions directly support a wide range of social activities well beyond conventional worship . . . provid[ing] an important incubator for civil skills, civil norms, community interests, and civic recruitment.").

200 See *supra* Part I.A.

ments. In seeking such approval, religious land uses have all the dominant zoning interests against them—homeowners, developers, and cash-strapped municipalities. Against this background, it is no surprise that Congressional hearings found “massive evidence that . . . [c]hurches in general, and new, small, or unfamiliar churches in particular, are frequently discriminated against on the face of zoning codes and also in the highly individualized and discretionary processes of land use regulation.”²⁰¹

To resolve this problem, Congress passed the Religious Land Use and Institutionalized Persons Act (RLUIPA), which included four specific protections of religious land uses.²⁰² Among these protections is the equal terms provision: “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.”²⁰³ This Note addressed the present circuit split over the meaning of this provision.

The equal terms provision is designed to enforce, via the Fourteenth Amendment, the requirement that statutes restricting religious exercise be “neutral and of general applicability.”²⁰⁴ The provision enforces this rule by statutorily defining a category of similar uses, namely, all “assemblies or institutions.”²⁰⁵ Land use regulations must treat religious assemblies or institutions on at least “equal terms” with nonreligious assemblies and institutions or else justify the unequal treatment under strict scrutiny. This does not mean that municipalities must permit religious land uses in a given zoning district, but it does mean that, if a municipality permits nonreligious assemblies or institutions in a given zoning district, it must offer the same terms to religious assemblies or institutions. In the *Lighthouse* example given in the introduction above, the city of Long Branch may exclude the church from its downtown commercial district, but can only do so if it also excludes nonreligious assemblies or institutions. If it permits the latter, it must also permit the former. This closely tracks Equal Protection analysis of land use regulations exemplified in *Cleburne*, except that the statute is careful to define the category of similar uses to make enforcement easier. This interpretation of the equal terms provision was first articulated by the Eleventh Circuit in *Midrash*.

201 Joint Statement, *supra* note 67, at 16,698.

202 See *supra* Part I.C.

203 42 U.S.C. § 2000cc(b) (2006).

204 See Joint Statement, *supra* note 67, at 16,699.

205 See *supra* Part II.

There have been two types of significant and erroneous deviations of this rule since then.²⁰⁶ First, a number of courts have tried to read *Cleburne's* similarly-situated analysis into the equal terms provision, noting as separate requirements that compared uses must not only both be assemblies or institutions, but also that the uses be contextually similarly-situated. The categorical requirement of the statute is designed as a substitute for *Cleburne's* contextual similarly-situated test because of the uniqueness of religious land uses. Requiring both elements undermines the purpose of the provision and weakens the protection it offers. In practice, this shields covert discrimination against religious land uses, especially small or unpopular religious groups.

The second significant deviation from the statutory text is a requirement that compared uses be similarly-situated as to the regulatory purpose of the land use regulation, in addition to the elements stated in the statutory text. This interpretation is followed by the Third, Seventh, and now the Ninth Circuits in slightly different forms. Each form, however, suffers from the same problem. RLUIPA is designed to fight the structural discrimination against land uses implicit in single-use zoning and the covert discrimination that results in the ensuing individualized exception process. The purposive similarly-situated approach of these circuits writes the problem—single-use zoning and the subjective assessment process—back into the statute. If the object of RLUIPA is to uncover “zoning classifications thinly disguised as neutral but actually systemically unfavorable” to religious land uses, then the purposive analysis of these circuits completely undermines that object by refusing to examine the zoning classifications themselves.²⁰⁷ Such purposive analysis properly belongs to strict scrutiny analysis, where both the weight of the government interest and its tailoring will be closely examined by the judicial decisionmaker. This second deviation from the text also has real consequences on the ground for minority religious groups seeking approval for building projects.

In a multicultural society that acknowledges and celebrates the important role that the physical local religious assembly plays in our cities, these consequences should not be overlooked in the name of commercial synergy. Because of the manifest purpose of Congress and the unambiguous language of the statute, misguided judicial

206 See *supra* Part III.

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

attempts to instead use the equal terms provision to enshrine exclusionary zoning and the systematic disparate treatment of religious land uses ought to be rejected.

