SOME ASSEMBLIES ARE MORE EQUAL THAN OTHERS: DIVERGENT APPLICATIONS OF RLUIPA'S EQUAL-TERMS PROVISION

by David C. Mann[*]

I. INTRODUCTION

Dissatisfied with the judiciary's application of the Free Exercise Clause of the First Amendment,[1] Congress has more than once enacted legislation to expand its scope in favor of religious practice.[2] The Religious Land Use and Institutionalized Persons Act[3] (hereinafter "RLUIPA") is "the latest of long-running congressional efforts to accord religious exercise heightened protection from government-imposed burdens."[4] Among the various limitations on land-use restrictions, the equal-terms provision of RLUIPA (hereinafter "equal-terms provision") provides 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."[5] This "mysterious and unprecedented device for providing an anti-discrimination requirement"[6] has proven to be a source of disagreement between the federal circuits.

In the decade since the passage of RLUIPA, three circuits have addressed the question of how to interpret the equal-terms provision, and each has supplied a different answer, resulting in a three-way circuit split. The Eleventh Circuit was the first to establish its response in a series of

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[1] U.S. CONST. amend. I ("Congress shall make no law . . . prohibiting the free exercise [of religion] . . . .").
[2] *See, e.g.*, Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb to 2000bb-4 (2006). "Congress enacted RFRA in direct response to" *Employment Div. v. Smith*. City of Boerne v. Flores, 521 U.S. 507, 512 (1997). *See infra* Part II.C.
[3] 42 U.S.C. §§ 2000cc to 2000cc-5 (2006).
[4] Cutter v. Wilkinson, 544 U.S. 709, 714 (2005).
[5] 42 U.S.C. § 2000cc(b)(1) (2006).
[6] River of Life Kingdom Ministries v. Village of Hazel Crest, Ill., 611 F.3d 367, 374 (7th Cir. 2010) (en banc) (Cudahy, J., concurring).

opinions in 2004, 2005, and 2006.[7] The Third Circuit adopted a conflicting view in 2007.[8] Most recently, in 2010, the Seventh Circuit abandoned its earlier following of the Eleventh Circuit's lead and forged a third path, much closer to that of the Third Circuit.[9]

This Article will first explore the judicial and legislative history of restrictions on governmental interference with the free exercise of religion over the past several decades, culminating with the enactment of RLUIPA in 2000.[10] Next, it will examine the divergent approaches of the Eleventh, Third, and Seventh Circuits to interpreting and applying the equal-terms provision.[11] Finally, it will analyze these approaches in light of their convergent results, attempt to determine whether there exists any substantial difference between them, and recommend a hybrid that simultaneously reflects the will of Congress, adapts recent Supreme Court jurisprudence, respects constitutional limitations, and protects the right to the free exercise of religion.[12]

II. HISTORY

A. Sherbert v. Verner

In 1963, the Supreme Court enunciated the principle that government action which creates even an incidental burden on the practice of religion requires a compelling state interest to withstand judicial scrutiny.[13] In *Sherbert v. Verner*,[14] South Carolina denied unemployment

[7] *See* Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214 (11th Cir. 2004); Konikov v. Orange County, 410 F.3d 1317 (11th Cir. 2005); Primera Iglesia Bautista Hispana of Boca Raton v. Broward County, 450 F.3d 1295 (11th Cir. 2006).
[8] *See* Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch, 510 F.3d 253 (3d Cir. 2007).
[9] *See River of Life*, 611 F.3d 367 (7th Cir. 2010) (en banc).
[10] *See infra* Part II.
[11] *See infra* Part III.
[12] *See infra* Part IV.
[13] *See* Sherbert v. Verner, 374 U.S. 398, 403 (1963) ("[A]ny incidental burden on the free exercise of appellant's religion may be justified by a 'compelling state interest . . . .'").
[14] *Sherbert*, 374 U.S. 398.

benefits to a Seventh-Day Adventist who had lost her job for refusing to work on Saturdays[15] because a state law required that all applicants be available for work and have good cause to decline suitable work from the unemployment office or their employers.[16] The court decided the law imposed a burden on the free exercise of religion equivalent to a fine imposed for Saturday worship.[17] Since "no showing merely of a rational relationship to some colorable state interest would suffice"[18] to justify the substantial infringement, the court sought a compelling state interest.[19] Not finding one,[20] the court ruled the law unconstitutional because it forced the Seventh-Day Adventist to abandon her religious convictions to obtain employment.[21]

B. Wisconsin v. Yoder

Almost a decade later, the Supreme Court formulated as the essence of *Sherbert* and all earlier jurisprudence on the subject the principle "that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."[22] In *Wisconsin v. Yoder*,[23] the state convicted several Amish families for violating a compulsory school attendance law by refusing to send their children to school after the eighth grade.[24] The court applied the same disjunctive test to the law as in *Sherbert*[25]—it must either

[15] *See id.* at 399 n. 1 ("[P]rohibition against Saturday labor is a basic tenet of the Seventh-day Adventist creed . . . .").
[16] *Id.* at 400.
[17] *Id.* at 404.
[18] *Id.* at 406.
[19] *See id.* at 406.
[20] *See id.* at 407. Just two years earlier, the Supreme Court had ruled Pennsylvania could constitutionally prohibit Sabbatarians from operating businesses on Sundays. Braunfield v. Brown, 366 U.S. 599 (1961). The majority in *Sherbert* stated the state interest in that case was to provide a uniform day of rest and claimed exemptions for Sabbatarians would have created significant administrative problems and a competitive advantage for the exempted class such that the scheme would be unworkable. *Sherbert*, 374 U.S. at 408-09.
[21] *Id.* at 410.
[22] *See* Wisconsin v. Yoder, 406 U.S. 205, 215 (1972).
[23] *Yoder*, 406 U.S. 205.
[24] *Id.* at 205.
[25] *See Sherbert*, 374 U.S. at 403 ("either no infringement . . . of free exercise, or . . . 'compelling state interest'").

not infringe on the freedom of religion, or it must advance a compelling state interest.[26] It determined that compulsory school attendance substantially interfered with the religious development of Amish children and that the impact on religious practice was severe and inescapable.[27] It then rejected the state interest in educating Amish children until age sixteen as less than compelling,[28] especially when combined with the parental right to control the education of one's children.[29] The court thus invalidated the compulsory school attendance law with respect to the Amish[30] and carved out an exemption on their behalf.[31]

C. Employment Division v. Smith

In 1990, the Supreme Court limited the application of the *Sherbert* test[32] to contexts with "individualized governmental assessment of the reasons for relevant conduct"[33] and declined to extend it to "valid and neutral law[s] of general applicability."[34] In *Employment Division v. Smith*,[35] Oregon initially denied unemployment benefits to applicants who had lost their jobs at a private drug rehabilitation organization for using peyote at religious ceremonies.[36] Following *Sherbert*, the Oregon Supreme Court found the applicants were entitled to unemployment benefits,[37] but the U.S. Supreme Court considered the test inapplicable to this type of law[38]—it was not part of a "system of individual exemptions" which the state "may not refuse to extend . .

[26] *See Yoder*, 406 U.S. at 214 ("either . . . not deny the free exercise of religious belief . . . or . . . state interest of sufficient magnitude").
[27] *Id.* at 218.
[28] *See id.* at 228-29.
[29] *See id.* at 233.
[30] *See id.* at 234.
[31] *See id.* at 236.
[32] *See supra* Part II.C.
[33] Employment Div. v. Smith, 494 U.S. 872, 884 (1990).
[34] *Id.* at 879 (1990) (citing United States v. Lee*,* 455 U.S. 252, 263 n. 3 (1982) (Stevens, J., concurring)).
[35] *Smith*, 494 U.S. 872.
[36] *Id.* at 874.
[37] *Id.* at 875.
[38] *See id.* at 885.

. to cases of 'religious hardship' without compelling reason."[39] The majority refused to hold that "an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate"[40] because it would "make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself."[41] The court considered the prohibition on the use of peyote a generally applicable law and thus a constitutional exercise of the state's power despite its incidental negative impact on religious exercise.[42]

D. Religious Freedom Restoration Act

Three years after *Smith*, Congress responded by enacting the Religious Freedom Restoration Act (hereinafter "RFRA"),[43] claiming the Supreme Court had "virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion."[44] RFRA received very strong support in both houses of Congress, passing the House of Representatives by unanimous consent and the Senate by a vote of ninety-seven to three.[45] It purported to restore the compelling interest test of *Sherbert* and *Yoder*[46] and "guarantee[d] its application in all cases where free exercise of religion is substantially burdened,"[47] even neutral laws of general applicability.[48] In order to pass muster, a law must not

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[39] *Id.* at 884 .
[40] *Id.* at 878-79.
[41] *Id.* at 879.
[42] *See id.* at 890.
[43] *See supra* note 2.
[44] 42 U.S.C. § 2000bb(a)(4) (2006).
[45] *See* Peter Steinfels, *Clinton Signs Law Protecting Religious Practices*, N.Y. TIMES, Nov. 17, 1993, *available at* http://www.nytimes.com/1993/11/17/us/clinton-signs-law-protecting-religious-practices.html (last accessed Sept. 18, 2010).
[46] The majority in *Smith* disagreed that it ever applied to all cases and thus likely would have disagreed that it could be said to be restored. "We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." Employment Div. v. Smith, 494 U.S. 872, 878-79 (1990). In addition, the majority in *Flores* later noted "the Act imposes in every case a least restrictive means requirement—a requirement that was not used in the pre-*Smith* jurisprudence RFRA purported to codify." City of Boerne v. Flores, 521 U.S. 507, 535 (1997).
[47] 42 U.S.C. § 2000bb(b)(1) (2006).

only have furthered a compelling governmental interest, it must also have been the least restrictive means of doing so.[49] The limitations of RFRA applied to all levels of government[50] until the Supreme Court struck it down[51] and Congress amended it in response.[52]

E. City of Boerne v. Flores

In 1997, the Supreme Court invalidated RFRA as beyond congressional authority.[53] In *City of Boerne v. Flores*,[54] a municipality denied a building permit to a church to expand their building, which was located in an historic district.[55] The archbishop of the diocese sued in federal court, citing RFRA.[56] The district court ruled RFRA exceeded Congress' enactment powers under the Fourteenth Amendment, but the Fifth Circuit disagreed and reversed.[57] In the end, the Supreme Court sided with the district court. It recognized that congressional enforcement power is not unlimited[58] and that Congress does not have the "power to determine what constitutes a constitutional violation."[59] To hold otherwise would have, in the opinion of the court, undermined the supremacy of the Constitution and allowed shifting legislative majorities to circumvent the amendment process.[60] The majority emphasized remedial measures must be proportional to the evils they address[61] and concluded the potential threats to religious exercise were not significant enough to justify "intrusion at every level of government,

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[48] 42 U.S.C. § 2000bb-1(a) (2006).
[49] 42 U.S.C. § 2000bb-1(b) (2006).
[50] *See* 42 U.S.C. § 2000bb-2(1) (1994), *amended by* Pub. L. No. 106-274 § 7(a), Sept. 22, 2000, 114 Stat. 806, and 42 U.S.C. § 2000bb-3(a) (1994), *amended by* Pub. L. No. 106-274 § 7(b), Sept. 22, 2000, 114 Stat. 806.
[51] *See infra* Part II.E.
[52] *See infra* Part II.F.
[53] *See* City of Boerne v. Flores, 521 U.S. 507, 536 (1997).
[54] *Flores*, 521 U.S. 507.
[55] *Id.* at 512 (1997).
[56] *Id.*
[57] *Id.*
[58] *Id.* at 518 (citing Oregon v. Mitchell, 400 U.S. 112, 128 (1970)).
[59] *Id.* at 519.
[60] *Id.* at 529.
[61] *See id.* at 530.

displacing laws and prohibiting official actions of almost every description and regardless of subject matter."[62] The court thus sent Congress back to the drawing board.[63]

F. Religious Land Use and Institutionalized Persons Act

Three years after *Flores*, Congress again responded by enacting new legislation.[64] RLUIPA was even more popular in Congress than RFRA, passing both houses by unanimous consent.[65] Instead of invoking the enforcement powers under the Fourteenth Amendment, RLUIPA invokes the Spending Clause and the Commerce Clause and limits its scope to only the two areas in its title.[66] The provisions of both areas apply to programs and activities which receive federal funds[67] and to cases which affect interstate and foreign commerce.[68] The land-use provisions also apply to situations in which "government makes . . . individualized assessments of the proposed uses for the property involved,"[69] language consonant with the only usage of the *Sherbert* test approved in *Smith*.[70] In addition to these prohibitions regarding substantial burdens on free exercise, the section on land-use includes a separate subsection devoted to discrimination and exclusion.[71] This subsection contains the equal-terms provision, the nondiscrimination provision,[72] and the exclusion and limitation provision,[73] none of which

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[62] *Id.* at 532.
[63] *See infra* Part II.F.
[64] Cutter v. Wilkinson, 544 U.S. 709, 715 (2005).
[65] *See* David Dunlap, *God, Caesar and Zoning*, N.Y. TIMES, Aug. 27, 2000, *available at* http://www.nytimes.com/2000/08/27/realestate/god-caesar-and-zoning.html (last accessed Sept. 19, 2010). *See also* Steinfels *supra* note 45.
[66] *Cutter*, 544 U.S. at 715. The *Cutter* court confirmed the constitutionality of RLUIPA's provisions regarding institutionalized persons with respect to the Establishment Clause. *Id.* at 714.
[67] *See* 42 U.S.C. § 2000cc(a)(2)(A) (2006); 42 U.S.C. § 2000cc-2(b)(1) (2006).
[68] *See* 42 U.S.C. § 2000cc(a)(2)(B) (2006); 42 U.S.C. § 2000cc-2(b)(2) (2006).
[69] 42 U.S.C. § 2000cc(a)(2)(C) (2006).
[70] *See supra* Part II.C.
[71] *See* 42 U.S.C. § 2000cc(b) (2006).
[72] 42 U.S.C. § 2000cc(b)(2) (2006) ("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.").
[73] 42 U.S.C. § 2000cc(b)(3) (2006) ("No government shall impose or implement a land use regulation that . . . totally excludes religious assemblies from a jurisdiction . . . or . . . unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.").

mentions the issue of substantial burdens on free exercise. RLUIPA also amended RFRA to apply only to the federal government, removing references to states and subdivisions of states,[74] in an attempt to rehabilitate it in light of *Flores*.[75]

In the equal-terms provision, Congress has created a short, novel antidiscrimination measure without precedent.[76] The lack of guidance from either the statute itself or from prior court decisions directly on point has forced the federal judiciary to adapt related free-exercise jurisprudence to establish a practical framework for administering it. Given this open range, it cannot be surprising that disagreements have arisen among the federal circuits over the proper implementation, with three circuits constructing three different tests. What is more remarkable is that these three tests yield almost identical results despite their dissimilar elements and emphases.

III. CIRCUITS

A. Eleventh Circuit

The Eleventh Circuit was the first to face the difficult task of taking the new equal-terms provision, evaluating a particular set of facts, and rendering judgment faithful to the intent of the legislators who passed RLUIPA. The development of its unique approach was a three-part process. The court established a framework to assess facial challenges in 2004,[77] refined it one year later to handle as-applied challenges,[78] and refined it further one year after that to handle challenges based on religious gerrymandering.[79]

1. Facial Challenges

[74] *See* Pub. L. No. 106-274, § 7, 114 Stat. 803.
[75] *See supra* Part II.E.
[76] *See supra* Part I.
[77] *See infra* Part III.A.1.
[78] *See infra* Part III.A.2.
[79] *See infra* Part III.A.3.

In *Midrash Sephardi, Inc. v. Town of Surfside*,[80] a one-square mile town just north of Miami Beach, Florida,[81] objected to two Orthodox Jewish synagogues, Midrash Sephardi and Young Israel,[82] conducting religious services within a business district, one on the second floor of a bank and the other in a leased space in a hotel.[83] The town's zoning ordinance prohibited churches and synagogues from operating in all but one of the eight zones and required them to obtain a conditional-use permit from the town commission to operate in the last one,[84] while simultaneously allowing private clubs and lodges in the business district without a special permit.[85] After two earlier suits in which the parties exchanged claims and counterclaims without much success, the congregations' third amended complaint contained additional claims based on the freshly minted RLUIPA.[86] The district court, however, ruled for Surfside, granting the town summary judgment on the congregations' new claims as well as its own counterclaim for an injunction, and the congregations appealed.[87]

After concluding the town's zoning ordinance did not create a substantial burden on religious exercise under the substantial-burden section of RLUIPA,[88] the Eleventh Circuit proceeded to analyze the equal-terms provision. The court began by acknowledging the difficulties of statutory construction in applying this nontraditional equal-protection law which "lacks the 'similarly situated' requirement usually found in equal protection analysis"[89] and that

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[80] Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214 (11th Cir. 2004).
[81] *Id.* at 1219.
[82] *Id.*
[83] *Id.* at 1222.
[84] *Id.* at 1219. In 1995, Surfside had denied Midrash Sephardi a special-use permit due to the synagogue's failure to get permission from the bank, and the synagogue neither appealed nor reapplied. Young Israel never applied for a special permit. *See id.* at 1220.
[85] *See id.* at 1233.
[86] *Id.* at 1222. The congregations filed the amended complaint only two months after the passage of RLUIPA. *See id.*
[87] *Id.*
[88] *Id.* at 1225-29. *See also* 42 U.S.C. § 2000cc(a) (2006).
[89] *Midrash*, 366 F.3d at 1229. *See also* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 447-50 (1985) (overturning zoning ordinance under which permit denied to group seeking to build home for the mentally retarded).

appears to "render[] a municipality strictly liable for its violation . . . without regard to any justifications supplied by the zoning authority."[90] Based on the plain language of RLUIPA, the Eleventh Circuit agreed with the Seventh Circuit that the nondiscrimination section, which includes the equal-terms provision, operates independently of the substantial-burden section[91] such it does not explicitly require the jurisdictional nexus carefully crafted in response to *Flores*.[92]

The court then entered into the heart of the conflict between the three circuits and addressed whether the equal-terms provision requires that religious congregations which challenge land-use restrictions be similarly situated to other assemblies and institutions in all relevant respects.[93] The district court had applied such a requirement, found that churches and synagogues did not create the same synergy in the shopping district as did private clubs, and ruled that Surfside's zoning ordinance therefore did not violate the equal-terms provision.[94] The Eleventh Circuit, however, emphasized that RLUIPA itself supplied the natural perimeter of consideration—assemblies and institutions—and that the district court had erred in ignoring this.[95] Without a statutory definition of *assembly* or *institution*, however, the court then turned to general-purpose and legal dictionaries to discern their meanings and concluded churches, synagogues, private clubs, and lodges all met the broad definition under RLUIPA.[96] In the

[90] *Midrash*, 366 F.3d at 1229. It seems that the equal-terms provision applies even when there is no burden whatsoever; differential treatment alone is enough.
[91] *See id.* *See also* Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752 (7th Cir. 2003) (upholding city ordinance requiring special permits for religious congregations to operate in certain zones).
[92] *See supra* Part II.E.
[93] *Midrash*, 366 F.3d at 1230.
[94] *See id.*
[95] *Id.*
[96] *Id.* at 1230-31.

court's view, this differential treatment constituted a violation of the equal-terms provision, triggering further judicial scrutiny.[97]

The Eleventh Circuit then had to determine the appropriate level of scrutiny and apply it to Surfside's zoning ordinance.[98] It examined previous Supreme Court free-exercise jurisprudence, including *Smith*,[99] *Yoder*,[100] and *Lukumi*,[101] and concluded Congress intended to codify that particular line of precedent in RLUIPA.[102] The court reasoned that a "zoning law is not neutral or generally applicable if it treats similarly situated secular and religious assemblies differently"[103] and that, consistent with precedent, the zoning ordinance therefore had to undergo strict scrutiny.[104] The court then carefully considered and rejected the town's justification for the differential treatment. The zoning ordinance itself stated that the purpose of the business district is to provide goods and services to the town's residents and tourists and to prevent activities that would interfere with its commercial synergy.[105] Surfside argued that religious institutions are generally only open one day per week, at a time when most businesses are closed, but that private clubs and lodges provide a more social setting and contribute to the synergy by virtue of their nature as entertainment.[106] The court denied the broad characterizations of both religious and secular institutions, noting that the synagogues in question meet throughout the week and

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[97] *See id.* at 1231. It is not clear why the court implied that all differential treatment automatically constitutes a violation but one that could theoretically be justified under the standard of strict scrutiny. It seems that justified differential treatment should not be considered to constitute a violation at all.
[98] *See id.* The town had advocated rational-basis review, the synagogues strict scrutiny, and the U.S. government strict liability. *Id.*
[99] *See supra* Part II.C.
[100] *See supra* Part II.B.
[101] Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993) (overturning a city ordinance which appeared to be a neutral law of general applicability on its face but which specifically targeted Santerian ritualistic animal slaughter).
[102] *Midrash*, 366 F.3d at 1232.
[103] *Id.*
[104] *See id.* In applying strict scrutiny, the court thus treats facially differential treatment between religious and secular institutions as the equivalent of substantial burden on free exercise.
[105] *Id.* at 1233.
[106] *Id.*

that members regularly visit businesses before and afterward, making the zoning ordinance overinclusive, and also noting that some private clubs only meet infrequently, making it underinclusive.[107] The court believed that "Surfside's failure to treat the analogous groups equally indicates that Surfside improperly targeted religious assemblies."[108] Having established that the zoning ordinance is not narrowly tailored to advance the town's interest, it was unnecessary to decide whether commercial synergy qualifies as a compelling interest, and the court explicitly declined to do so.[109] After investigating and upholding the constitutionality of RLUIPA with respect to the Fourteenth Amendment and the Establishment Clause,[110] the Eleventh Circuit ruled that Surfside's zoning ordinance violated the equal-terms provision and was thus an invalid restriction on the free exercise of religion.[111]

2. As-Applied Challenges

One year later, the Eleventh Circuit refined its approach to the equal-terms provision when faced with an as-applied challenge. In *Konikov v. Orange County*,[112] the city of Orlando issued a code-violation notice to Rabbi Joseph Konikov for holding frequent religious meetings in his residence in the Sand Lake Hills subdivision and fined him fifty dollars each day beyond a certain date that the violation had not been cured.[113] The Orange County Code required applications for special exceptions for most nonresidential uses in the rabbi's residential zone, including religious organizations and day-care centers, but the rabbi had never applied for a special exception.[114] In his federal suit, Konikov challenged the code under both the substantial-

[107] *Id.*
[108] *Id.* at 1235.
[109] *See id.*
[110] *See id.* at 1235-43.
[111] *See id.* 1243.
[112] Konikov v. Orange County, 410 F.3d 1317 (11th Cir. 2005).
[113] *Id.* at 1320. The city was still imposing daily fines on Konikov at the time of appellate oral arguments. *Id.*
[114] *Id.* at 1320-21.

burden and equal-terms provisions, but the district court ruled in favor of the city on both claims.[115]

The Eleventh Circuit came to the same conclusion as the district court regarding the substantial-burden claim. Since a substantial burden on free exercise "place[s] more than an inconvenience on religious exercise . . . [and] directly coerces the religious adherent to conform his or her behavior accordingly,"[116] the court reasoned that the requirement that Konikov apply for a special exemption did not coerce his behavior and therefore did not qualify as a substantial burden.[117] His substantial-burden claim thus fell flat. The court then expanded on *Midrash*[118] and examined his equal-terms claim as both a facial and an as-applied challenge, applying different tests and finding the former lacking but the latter substantiated and valid.[119]

For the facial challenge, the court closely followed its decision in *Midrash*, citing it extensively.[120] It applied the same natural perimeter of the words *assembly* and *institution* and decided that a religious organization—the term used in the code-violation notice—fell within its bounds and was therefore within the scope of RLUIPA protection.[121] The court then considered the types of uses the code allowed without a permit, namely family day-care homes, model homes, and home occupations.[122] It concluded that model homes or home occupations are not assemblies under the usual definition and that family day-care homes could withstand strict scrutiny even if they were.[123] An exception for family day-care homes, which include foster

[115] *See id.* at 1321-22.
[116] *Id.* at 1323 (citing Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1227 (11th Cir. 2004)).
[117] *Konikov*, 410 F.3d at 1323-24.
[118] *See supra* Part III.A.1.
[119] *See Konikov*, 410 F.3d at 1324-29.
[120] *See id.* at 1324-25. The court cites *Midrash* eight times over the span of four paragraphs. *See id.*
[121] *See id.* at 1325.
[122] *See id.* at 1325-26.
[123] *See id.* The court reasoned that prospective buyers do not gather at model homes for a common purpose and that home occupations are limited to the incidental use of no more than two family members. It indicated that family day care homes could be considered assemblies under a broad definition but addressed the matter no further. *See id.*

homes, "simply acknowledges the fundamental right to freedom of personal choice in marriage and family life."[124] In the court's view, such differential treatment was narrowly tailored to advance a compelling state interest of protecting personal choice in family matters.[125]

Satisfied that on its face the code treated all assemblies and institutions equally, the court turned to the as-applied challenge to analyze whether its enforcement had nevertheless been unequal.[126] In particular, it compared the Code Enforcement Board's classification of the gatherings at Konikov's residence as a prohibited use and of other gatherings similar in all relevant respects as permitted uses.[127] The court thus moved beyond the natural perimeter of the words in the code and equal-terms provision and sought a specific, similarly situated, nonreligious entity for comparison—what later the Eleventh Circuit termed a similarly situated comparator[128] and the Third Circuit a secular comparator.[129] In making its evaluation of the meetings, the board had considered the frequency, the number of attendees and vehicles, advertisement through print and online media, openness the general public, and whether the meetings were ongoing or temporary.[130] The court noted a code enforcement officer had testified groups meeting with the same frequency for social or family purposes would not incur a violation.[131] It compared the gatherings at the rabbi's residence to cub-scout meetings, friends getting together to watch sports, birthday parties, holiday celebrations, and family dinners and found no relevant difference.[132] The court concluded all such events were permissible so long as

[124] *Id.* at 1326.
[125] *Id.* at 1327.
[126] *See id.*
[127] *See id.* at 1327-28.
[128] Primera Iglesia Bautista Hispana of Boca Raton v. Broward County, 450 F.3d 1295, 1311 (11th Cir. 2006).
[129] *See infra* Part III.B.
[130] *Konikov*, 410 F.3d at 1327.
[131] *Id.* at 1328.
[132] *See id.*

religion was not the primary focal point.[133] It did not address whether it needed to find a singular secular comparator that was similar in all relevant respects rather than cobbling together several that were similar in only some respects, but of the events listed only the cub-scout meeting might have qualified—none of the others are regularly advertised or open to public. Whatever the case, the court concluded this differential treatment based on religion violated the equal-terms provision, triggering strict scrutiny.[134] It then summarily stated that Orange County had not presented a compelling state interest, that its disparate administration of the code could not withstand strict scrutiny, and that it thus constituted a violation of RLUIPA.[135]

3. Religious-Gerrymander Challenges

One year later, the Eleventh Circuit further refined its approach to recognize that a facially neutral land-use regulations can nevertheless be gerrymandered to disfavor religious organizations and that such regulations would violate the equal-terms provision. In *Primera Iglesia Bautista Hispana of Boca Raton v. Broward County*,[136] the county denied a church a zoning variance to a regulation that required a thousand-foot separation between a certain agricultural zone and nonagricultural and nonresidential uses in neighboring zones.[137] Following the Supreme Court's analysis in *Lukumi*,[138] the court identified a religious gerrymander as a facially neutral law carefully crafted to burden only religious assemblies and institutions.[139] It then formulated the test that the challenger "would have to show that the challenged zoning regulation separates permissible from impermissible assemblies or institutions in a way that

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[133] *See id.* The opinion reads "*so long as religion is not discussed*" (emphasis in original). *See id.* This is an unfair exaggeration. There is no indication whatsoever that the Code Enforcement Board would ever issue a code-violation notice, for example, to a family who prayed before dinner or to friends who talked about the meaning of Christmas during a holiday party.
[134] *See id.* at 1329. The court again used the term *violation* before applying strict scrutiny. *See supra* note 97.
[135] *See id.* The court did not mention any of the city's arguments or even whether it had even made any.
[136] Primera Iglesia Bautista Hispana of Boca Raton v. Broward County, 450 F.3d 1295 (11th Cir. 2006).
[137] *See id.* at 1300.
[138] Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993).
[139] *See Primera Iglesia*, 450 F.3d at 1308.

burdens 'almost only' religious uses."[140] The church had presented no evidence on the claim and the court quickly concluded the zoning ordinances were not at all gerrymandered, as the separation requirement applied to all similar uses and there existed no special exceptions for secular uses.[141] Since the zoning ordinances were facially neutral[142] and the church could not identify any similarly situated comparator for the as-applied challenge,[143] the court dismissed the church's equal-terms claim.[144]

With *Midrash, Konikov*, and *Primera Iglesia*, the Eleventh Circuit blazed a new path through free-exercise jurisprudence and laid out its currently unique approach to applying the equal-terms provision. To determine whether there exists unequal treatment between religious and secular organizations, the court confines itself to the natural perimeter of the terms *assembly* and *institution* for facial challenges—including perhaps religious-gerrymander facial challenges[145]—but it searches for a similarly situated comparator for as-applied challenges. In either case, if the court finds differential treatment, it then applies strict scrutiny to determine whether this treatment violates RLUIPA.

B. Third Circuit

Not long after the Eleventh Circuit laid out its framework for interpreting the equal-terms provision,[146] the Third Circuit adopted a conflicting approach which insists on identifying similarly situated secular comparators and exchanges strict scrutiny for strict liability. In

[140] *Id.* at 1309. The court did not mention the requirement to identify similarly situated comparators until its subsequent discussion of as-applied challenges, so it is unclear whether it applies to religious-gerrymander facial challenges. *See id.* at 1310-11.
[141] *Id.* at 1309-10.
[142] *Id.* at 1309.
[143] *See id.* at 1313.
[144] *See id.* at 1314.
[145] *See supra* note 140.
[146] *See supra* Part III.A.

Lighthouse Institute for Evangelism, Inc. v. City of Long Branch,[147] a New Jersey city denied Lighthouse's application to use its property as a church in a commercial district which permitted uses such as restaurants, retail stores, educational facilities, assembly halls, bowling alleys, cinemas, government buildings, and car and boat showrooms.[148] Since the proposed use was not among the permitted uses, the church would have had to seek prior approval from the zoning board.[149] Instead of appealing or seeking a variance, the church sued under the equal-terms provision, losing its case in district court and on appeal because it failed to show it could not simply gain approval as an assembly hall.[150]

While the litigation was ongoing, however, the city enacted a redevelopment plan for the area which superseded the zoning ordinance with the goal of strengthening retail tax revenue, increasing the number of jobs, and attracting more businesses to the area.[151] The permitted uses were largely the same as under the ordinance except that government buildings and schools were no longer included.[152] Lighthouse submitted a new application, requesting a waiver to the prohibition on churches, but the city again denied it.[153] This time the church appealed, but the city council also denied the application because, among other reasons, a New Jersey state statute prohibited issuing liquor licenses within two hundred feet of houses of worship, and thus the presence of the church would prevent the use of the block as an upscale entertainment and recreation area.[154] After the Third Circuit remanded the original suit, Lighthouse amended its

[147] Lighthouse Institute for Evangelism, Inc. v. City of Long Branch, 510 F.3d 253 (3d Cir. 2007).
[148] *Id.* at 257.
[149] *See id.*
[150] *See id.*
[151] *Id.* at 258.
[152] *See id.*
[153] *Id.* at 259. The church's proposal included a plan for a church, church offices, a pastoral residence, and a religious gift shop. *See id.*
[154] *Id. See also* N.J. Stat. Ann. § 33:1-76 (West 2010) ("[N]o license shall be issued for the sale of alcoholic beverages within two hundred feet of any church or public schoolhouse or private schoolhouse not conducted for pecuniary profit . . . .").

complaint to claim the new redevelopment plan violated the equal-terms provision.[155] The district court ruled against the church a second time, granting the city summary judgment.[156]

The Third Circuit began its analysis by agreeing with the Seventh and Eleventh Circuits that the equal-terms provision is independent of the substantial-burden section of RLUIPA, thus overruling the district court in that part of its decision.[157] The court echoed the Eleventh Circuit's conclusion[158] that Congress intended that RLUIPA codify existing free-exercise jurisprudence.[159] The majority first looked to the Supreme Court's decisions in *Smith* and especially *Lukumi* for the principle that "whether a regulation violates a plaintiff's constitutional rights hinges on a comparison of how it treats entities or behavior that have the same *effect* on its objectives"[160] (emphasis in original). It then turned to the Third Circuit's own case law regarding neutral laws of general applicability and its use of similarly situated comparators to find three such laws nevertheless unconstitutional.[161] The court explained that its understanding of the Supreme Court's and its own jurisprudence led it to conclude that "the relevant comparison for the purposes of a Free Exercise challenge to a regulation is between its treatment of certain religious conduct and the analogous secular conduct that *has a similar impact on the regulation's aims*"[162] (emphasis in original) and that heightened scrutiny is warranted "only

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[155] *Lighthouse*, 510 F.3d at 259.
[156] *Id.* at 260.
[157] *See id.* at 262-64. *See also* Konikov v. Orange County 410 F.3d 1317-29 (11th Cir. 2005); Digrugilliers v. Consolidated City of Indianapolis, 506 F.3d 612, 616 (7th Cir. 2007) ("The equal-terms section is violated whenever religious land uses are treated worse than comparable nonreligious ones, whether or not the discrimination imposes a substantial burden on the religious uses.").
[158] *See supra* Part III.A.1.
[159] *Lighthouse*, 510 F.3d at 264.
[160] *Id.*
[161] *Id.* at 265-66. *See also* Fraternal Order of Police v. City of Newark, 170 F.3d 359 (3d Cir. 1999) (overturning police department rule that required all officers shave their beards, in light of objections by Muslims); Tenafly Eruv Assoc., Inc. v. Borough of Tenafly, 309 F.3d 144 (3d Cir. 2002) (overturning prohibition against fliers selectively enforced against Orthodox Jews); Blackhawk v. Pennsylvania, 381 F.3d 202 (3d Cir. 2004) (overturning state's refusal to waive wildlife permit fee for Native American who owned bears for religious purposes despite categorical waivers for zoos and circuses).
[162] *Lighthouse*, 510 F.3d at 266.

when a principled distinction could not be made between the prohibited religious behavior and its secular comparator in terms of their effects on the regulatory objectives."[163] Applying these principles to RLUIPA, the Third Circuit formulated its new test that "a regulation will violate the Equal Terms provision only if it treats religious assemblies or institutions less well than secular assemblies or institutions that are similarly situated *as to the regulatory purpose*"[164] (emphasis in original) and characterized it as a strict liability standard.[165]

Cognizant of its creation of a circuit split, the Third Circuit proceeded to explain why it declined to follow the Eleventh Circuit's "expansive reading of the statute."[166] The majority expressed concern that such an interpretation would "force local governments to give any and all religious entities a free pass to locate wherever any secular institution is located"[167] no matter what the size and no matter what sort of unusual religious activity would occur there[168] and its belief that this was contrary to the express will of Congress.[169] The court thus justified its requirement to identify a similarly situated secular comparator as necessary to avoid this absurd result.[170] It then went on to defend its rejection of strict scrutiny in favor of strict liability by pointing to how Congress structured the provisions of RLUIPA. The majority stressed that the substantial-burden section—which all three circuits agree is independent of the equal-terms provision—explicitly directs the application of strict scrutiny whereas the equal-terms provision

[163] *Id.*
[164] *Id.* at 266 (3d Cir. 2007). The district court had ruled that a similarly situated secular comparator had to have the same combination of uses as the religious assembly, but the Third Circuit viewed this as too narrow and emphasized regulatory purposes. *See id.* at 264.
[165] *Id.* at 266 n. 11.
[166] *See id.* at 267.
[167] *See id.* at 268.
[168] *See id.* The majority referenced the cases it had discussed earlier and gave the examples of ritual animal sacrifice and the use of wild bears. *See id.*
[169] *Id.*
[170] *See id.*

is silent on the matter[171] and that the very term *equal terms* suggests a requirement to identify a "secular comparator as to the objectives of the challenged regulation."[172] Together these signaled to the court that Congress intended a strict liability standard for the equal-terms provision.

Having enunciated and justified its new test, the Third Circuit applied it to Long Branch's original zoning ordinance and new redevelopment plan, fortuitously providing us with an example of a regulation which fails the test and one which passes it.[173] Upon remand, it had become clear Long Branch did not interpret the term *assembly hall* under the zoning ordinance to comprehend religious assemblies, and since the goals of ordinance were not well documented, the court concluded the city had failed to establish a genuine issue of fact, granting summary judgment to the church on this part of its claim.[174] As the ordinance was no longer in effect, however, the court ordered monetary damages but no injunctive relief despite the violation of the equal-terms provision.[175]

The redevelopment plan, on the other hand, clearly spelled out its purpose, in its name and more explicitly in its provisions.[176] The city had argued that churches, due to the state law prohibiting the issuance of liquor licenses near houses of worship, "would hinder the development of the kind of modern entertainment-oriented district that Long Branch envisaged."[177] The court claimed it did not need to address whether churches by their very nature would not advance such a goal—perhaps because that would too closely resemble the strict scrutiny analysis the court had just rejected—and only reasoned churches would indeed

[171] *See id.* at 269. RLUIPA does not use the words *strict scrutiny* and instead spells out its components, i.e., a compelling governmental interest and the use of the least restrictive means. *See* 42 U.S.C. § 2000cc(a)(1) (2006).
[172] *Lighthouse*, 510 F.3d at 269.
[173] *See id.* at 270-273.
[174] *See id.* at 272-273.
[175] *See id.* at 273.
[176] *See id.* at 270 .
[177] *Id.*

create an obstacle to promoting businesses with liquor licenses in the target area.[178] Lighthouse had offered to waive its rights under the statute in perpetuity and had objected to the state itself creating a distinction between religious and secular assemblies with the alcohol-free-zone law and then invoking that distinction to justify disparate treatment.[179] The court rejected both of these arguments. It said that a waiver in perpetuity would be ineffective under the statute and that it would need to be renewed whenever a nearby liquor license was renewed or transferred, giving the church too much control over the development of the area.[180] In addition, Long Branch could not simply allow all religious institutions to set up shop in the designated zone provided they agree to waive their rights under the law because this would risk the city becoming unacceptably entangled with the beliefs of various religious groups.[181] The court then noted the legislature enacted the alcohol-free-zone law to favor churches rather than disfavor them and that, viewed with the redevelopment plan, there was no suggestion of improper motives to exclude churches, especially since the same law also applies to schools.[182] Without a similarly situated secular comparator, the Third Circuit thus concluded the redevelopment plan did not violate the equal-terms provision.[183]

The Third Circuit's opinion, however, was not unanimous, and the dissent endorsed a distinct view, combining the Eleventh Circuit's natural perimeter guideline[184] and the majority's strict liability standard.[185] In rejecting the similarly situated comparator requirement, it placed

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[178] *Id.*
[179] *See id.* at 271.
[180] *See id.*
[181] *See id.* The court was presumably referring to the fact that religious groups have varying levels of acceptance of the consumption of alcohol.
[182] *Id.* at 272.
[183] *See id.*
[184] *See supra* Part III.A.
[185] *Lighthouse*, 510 F.3d at 286 n. 34 (Jordan, J., dissenting) ("The Majority . . . holds that RLUIPA imposes a strict liability standard. I do not think it necessary to decide in this case whether section 2(b)(1) imposes strict liability under all circumstances . . . .").

great weight on the text of the equal-terms provision itself because "[t]he correct analysis should begin and, to the extent possible, end with the language of the statute"[186] and noted that dictionaries supply the necessary meaning of *assembly* and *institution*.[187] It stressed that the court faced a facial challenge to the zoning ordinance and that there was no need to find a similarly situated comparator when the text itself distinguishes between religious and secular conduct[188] and furthermore that there were no Supreme Court cases holding that parties must identify one to establish a free-exercise claim.[189] The dissent then addressed the majority's fears that the natural perimeter guideline would give religious institutions free rein to locate anywhere within municipalities[190] and thereby "make rational zoning impossible whenever a church is in the mix."[191] It suggested that an ordinance could keep churches out of a particular zone without any difficulty if it simply also applied to secular institutions[192] and that municipalities could avoid the issues about the large size or unusual activities of churches with general rules that apply across the board within the zone.[193] It then dismissed the majority's argument that the alcohol-free-zone law could provide justification for disparate treatment, underlining that RLUIPA is a federal law and that therefore a state law cannot supply the basis for a defense to it.[194] Finally, the dissent criticized the majority's interpretation for making it too difficult for churches to find relief under the equal-terms provision because "creative municipal officials are their lawyers should not find it difficult when a zoning conflict arises to find functional differences between the religious and

[186] *Id.* at 283 (Jordan, J., dissenting).
[187] *See id.* at 284 n. 29 (Jordan, J., dissenting).
[188] *Id.* at 292 (Jordan, J., dissenting).
[189] *Id.* (Jordan, J., dissenting).
[190] *See id.* at 286 (Jordan, J., dissenting).
[191] *Id.* (Jordan, J., dissenting).
[192] *See id.* (Jordan, J., dissenting).
[193] *Id.* at 287 (Jordan, J., dissenting).
[194] *Id.* at 290 (Jordan, J., dissenting). The dissent pointed to the Seventh Circuit's recent rejection of the very same argument. *See id. See also* Digrugilliers v. Consolidated City of Indianapolis, 506 F.3d 612 (7th Cir. 2007).

nonreligious assemblies"[195] and render the equal terms-provision practically meaningless.[196] Under its own analysis, the dissent would have ruled both the zoning ordinance and the redevelopment plan violated the equal-terms provision.[197]

With *Lighthouse*, the Third Circuit created a rift within the federal judiciary with its interpretation of the equal-terms provision. To determine whether there exists unequal treatment between religious and secular organizations, the court attempts to identify a secular comparator similarly situated as to the regulatory purpose, and if it finds one that has received more favorable treatment under the regulation, it applies a strict scrutiny standard and concludes that there exists a violation of the equal-terms provision without any further judicial scrutiny. The dissent offered a third alternative, discarding the similarly situated secular comparator but adopting the strict liability standard, an approach which the minority of the Seventh Circuit was soon to endorse in part.[198]

C. Seventh Circuit

Although it initially accepted the Eleventh Circuit's framework for evaluating claims under the equal-terms provision,[199] the Seventh Circuit recently changed gears and established its own framework of strict liability and secular comparators similarly situated with respect to accepted regulatory criteria, very similar to the Third Circuit's which focuses on regulatory purpose.[200] In *River of Life Kingdom Ministries v. Village of Hazel Crest, Ill.*,[201] an Illinois town denied a application for special permission to a small church to relocate to a property within a

[195] *Lighthouse*, 510 F.3d at 293 (Jordan, J., dissenting).
[196] *Id.* (Jordan, J., dissenting).
[197] *See Id.* at 282 (Jordan, J., dissenting) ("In my view, both the C-1 Ordinance and the Redevelopment Plan are unlawful.").
[198] *See supra* Part III.C.
[199] *See* Vision Church v. Village of Long Grove, 468 F.3d 975 (7th Cir. 2006); Digrugilliers v. Consolidated City of Indianapolis, 506 F.3d 612 (7th Cir. 2007).
[200] *See supra* Part III.B.
[201] River of Life Kingdom Ministries v. Village of Hazel Crest, Ill., 611 F.3d 367 (7th Cir. 2010) (en banc).

commercial district that originally allowed and meeting halls but not churches and that, after the town amended the zoning ordinance, later also extended its exclusion to community centers, secular schools, meeting halls, and art galleries.[202] The church sued under the equal-terms provision, but it lost its case in district court and on appeal.[203] Motivated the inconsistency between the federal circuits and in its prior decisions, the full court reheard the case to clarify and to confirm its unique approach to the equal-terms provision.[204]

Judge Richard Posner, writing for the majority, began the *en banc* opinion by distinguishing the new test, critiquing those of both the Eleventh and Third Circuits and explaining how the Seventh's Circuit's solves the various problems they generate.[205] The majority expressed concern that the dictionary definition of *assembly* and *institution* which the Eleventh Circuit uses would prove too broad to permit reasonable zoning restrictions on churches.[206] "'Assembly' so understood would include most secular land uses [such as] factories, nightclubs, zoos, parks, malls, soup kitchens, and bowling alleys, to name but a few" because "visitors to each of these institutions have a 'common purpose' in visiting."[207] It claimed the Eleventh Circuit's test has an overly simplistic view of equality[208] which fails to appreciate that it "signifies not equivalence or identity but proper relation to relevant concerns."[209] It explained this distinction by giving the example that "[i]t would not promote equality to require . . . that all workers should have the same wages . . . [b]ut that it does promote

[202] *See* River of Life Kingdom Ministries v. Village of Hazel Crest, Ill., 585 F.3d 364, 368 (7th Cir. 2009).
[203] *River of Life*, 611 F.3d at 368.
[204] *Id.*
[205] *See id.* at 368-73.
[206] *See id.* at 370.
[207] *Id.* Later in the opinion, Judge Posner discusses some of the various ways that types of assemblies differ. "[A] church is more like a movie theater, which also generates groups of people coming and going at the same time, than like a public library, which generates a smoother flow of traffic throughout the day." *Id.* at 373.
[208] *See id.* at 371.
[209] *Id.*

equality to require equal pay for equal work."[210] The court indicated, however, that it agreed with the Eleventh Circuit's ultimate decision in *Midrash*, just not the test used to reach that decision.[211]

The majority's qualms with the Third Circuit's test were somewhat subtler. It objected to the test's focus on identifying the regulatory purpose behind a zoning ordinance that excludes churches because it "invites speculation concerning the reason behind the exclusion . . . [and] self-serving testimony be zoning officials and hired expert witnesses . . . [,] facilitates zoning classifications thinly disguised as neutral but actually systematically unfavorable to churches . . . [, and] makes the meaning of 'equal terms' in a federal statute depend on the intentions of local government officials."[212] It suggested the solution lies in shifting focus from subjective regulatory purposes to objective accepted regulatory criteria, a change which Judge Posner insisted is not merely semantic, though he does not explain how beyond merely stating that there exist accepted regulatory criteria which federal judges can apply such as exclusive residential, commercial, and industrial zoning.[213]

In the majority's view, applying just such a criterion of exclusive commercial zoning makes the instant case straightforward.[214] "Hazel Crest has therefore created a commercial district that excludes churches *along with* community centers, meeting halls, and libraries because these secular assemblies, like churches, do not generate significant taxable revenue or offer shopping opportunities"[215] (emphasis in original). The motivation or purpose behind the

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[210] *Id.*
[211] *Id.* at 370.
[212] *See id.* at 371.
[213] *Id.* For the purposes of this Article, we will treat regulatory purpose as the goal of a zoning ordinance (e.g., maximize the number of liquor licenses in a given area [immediate goal] or create lively entertainment district [ultimate goal]) and regulatory criteria as the concrete means to reach its goals (e.g., exclude all institutions which limit the number of nearby liquor licenses).
[214] *Id.* at 373-74.
[215] *Id.* at 373.

land-use regulation becomes irrelevant because it treats religious and secular uses the same with respect to this criterion.[216] If a city, however, purports to delimit a purely commercial zone but allows some secular assemblies though not churches—like Hazel Crest did with the original ordinance—then it would violate the equal-terms provision.[217] Since the amended ordinance was consistent across the board, it did not amount to a violation and the church's challenge failed.[218]

Three concurrences followed the majority opinion to express skepticism about the difference between the regulatory purpose and accepted regulatory criteria tests and to question the latter's superiority. Judge Richard Cudahy saw "little contrast in basic approach or result between the Third Circuit and the majority analysis" and suspected the distinction "may not be as pronounced as the majority opinion suggests" and that "the search by the different circuits for an entirely objective test is probably in vain."[219] Judge Daniel Manion proposed that "it might be more prudent to resolve the straightforward case before us rather than speculating on how to resolve a more difficult case in the future."[220] And Judge Ann Williams indicated her preference for the Third Circuit's test given that "[t]he 'regulatory purpose' test is simpler and does not require federal judges to determine which zoning districts fit within 'accepted regulatory criteria'—and indeed, what those are in the first place" and that "[z]oning officials could just as easily use accepted criteria as a pretext for action as they could articulate a regulatory purpose."[221]

Judge Diane Sykes was the only judge out of twelve to dissent from the majority opinion, expressing her belief that the Seventh Circuit had been right to follow the Eleventh Circuit's

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[216] *Id.*
[217] *See id.*
[218] *See id.* at 374.
[219] *See id.* at 374-75 (Cudahy, J., concurring).
[220] *See id.* at 375 (Manion, J., concurring).
[221] *See id.* at 376 (Williams, J., concurring). Judge Williams also question how productive using accepted criteria would be in evaluating nontraditional zoning schemes. *See id.*

method in its earlier decisions.[222] She accused the Third Circuit and the majority of "conflat[ing] the specific protections contained in the equal-terms provision with the more general anti-discrimination rule contained in subsection (b)(2)."[223] She pointed out that the Third Circuit did not base its arguments on the text of RLUIPA itself and instead invoked Supreme Court free-exercise jurisprudence,[224] and poorly at that since it contains no general similarly situated requirement.[225] "[N]othing in *Smith* or *Lukumi* requires a plaintiff to [identify a similarly situated comparator]—certainly not in the case raising a *facial* free-exercise challenge"[226] (emphasis in original). Judge Sykes claimed such an interpretation "eviscerates the equal-terms provision [because] in its practical effect, this test will defeat all facial equal-terms claims and perhaps most religious-gerrymander and as-applied challenges as well."[227] She believed the majority opinion "evince[d] a degree of deference toward land-use regulation that is fundamentally inconsistent with RLUIPA,"[228] thereby declaring the majority had misinterpreted Congressional intent. Along with the dissent in *Lighthouse*, Judge Syke's view is the most favorable to religious assemblies, but even she explicitly declined to go so far as to say that practically all businesses, despite qualifying as assemblies under the usual definition, also qualify as assemblies under RLUIPA such that cities must allow churches to operate in absolutely any district where any business is located.[229]

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[222] *See id.* at 377 (Sykes, J., dissenting).
[223] *See id.* at 385 (Sykes, J., dissenting). *See also* 42 U.S.C. §2000cc(b)(2) (2006) ("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.").
[224] *See id.* (Sykes, J., dissenting).
[225] *See id.* at 386 (Sykes, J., dissenting).
[226] *Id.* at 387 (Sykes, J., dissenting).
[227] *Id.* (Sykes, J., dissenting). Judge Sykes ignored the majority's agreement with the Eleventh Circuit's opinion in *Midrash*, which provides a clear counterexample against her categorical claim. *See id.* at 370.
[228] *River of Life*, 611 F.3d at 388 (Sykes, J., dissenting).
[229] *See Id.* at 390 (Sykes, J., dissenting). To avoid this unacceptable result, Judge Sykes creates what she considers a more nuanced definition of *assembly* by adding an extra element, i.e., "a degree of group affinity, organization, and unity around a common purpose." *Id.*

With *River of Life*, the Seventh Circuit parted ways with Eleventh Circuit and forged a path that runs parallel with the Third Circuit's and remains virtually if not actually indistinct throughout its course. Instead of the regulatory purposes behind land-use regulations, the Seventh Circuit looks to the supposedly more objective accepted regulatory criteria but otherwise uses a framework identical to that of the Third Circuit. This leaves the Eleventh Circuit alone in its interpretation confining the requirement of identifying similarly situated secular comparators to facial challenges and applying strict scrutiny rather than strict liability.

IV. ANALYSIS

A. Divergent Approaches, Convergent Results

1. Regulatory Purpose versus Accepted Regulatory Criteria

In *River of Life*, Judge Posner acknowledged the approaches of the Eleventh and the Third Circuit "might yield similar or even identical results—and results moreover that would strike most judges as satisfactory."[230] As similar as these are in practice, an even greater similarity now exists between the Third Circuit's regulatory purpose test and the Seventh Circuit's accepted regulatory criteria test. In outlining the Seventh Circuit's framework, Posner marked a fine distinction between these two tests, so fine in fact that a third of the full court considered it essentially meaningless in practice[231] but which in actuality has substantial disadvantages.

The Seventh Circuit claimed regulatory purpose and accepted regulatory criteria differ in that the former is subjective and thus manipulable whereas the latter is objective and thus

[230] *Id.* at 369.
[231] *See supra* Part III.C. Posner offered no hypothetical cases in which the Third and Seventh Circuits would differ in their outcomes, but *Digrugilliers* compared to *Lighthouse* seems like a reasonable possible example. *See infra* note 237.

useful.[232] If we understand *purpose* as the goal of a regulation and *criteria* as the means to achieve that goal, then we can begin to see a distinction. In establishing a zone which excludes religious assemblies, the goals may be to promote commercial synergy, to attract investment, to create a lively entertainment district for residents, to promote local tourism, to support job growth, to increase tax revenue, to balance the city budget, or any combination of these and/or any other immediate and ultimate goals. That we cannot possibly compile an exhaustive list of such goals lends support to the opinion that regulatory purpose is too subjective to serve as the basis of a truly objective test.[233] This subjectivity allows municipal officials to claim any of the above licit goals as the purpose behind the regulation and to hide illicit goals such as hindering free exercise. Shifting the focus to the means to achieve whatever goal municipalities have avoids this problem. It does not matter whether the city council members wanted to increase tax revenues or to create a part of town where they could hang out and go drinking after a long, dry city council meeting;[234] it only matters that they have used accepted regulatory criteria to craft the zoning ordinance.[235] This shift in focus does not entirely eliminate the possibility of using accepted zoning criteria to achieve illicit goals, but it presumably makes it more difficult.

Although the Seventh Circuit claimed its test as an improvement over the Third Circuit's test, the accepted regulatory criteria purpose test suffers from unique drawbacks. First, Posner offered only a single example of an accepted zoning criterion—exclusive zoning according to

[232] *See River of Life*, 611 F.3d at 371.
[233] The judiciary regularly and uncontroversially evaluates governmental interests in applying strict scrutiny, intermediate scrutiny, and rational-basis review, so it is unclear why it would have any more difficulty evaluating governmental purposes, given that one can always formulate purposes as interests and vice versa.
[234] *See River of Life*, 611 F.3d at 373 ("Of course we can't be certain, or even confident, that a particular zoning decision was actually motivated by a land-use concern that is neutral from the standpoint of religion.").
[235] *See id.* ("But if religious and secular land uses that are treated the same . . . from the standpoint of an accepted zoning criterion, such as 'commercial district,' or 'residential district,' or 'industrial district,' that is enough to rebut an equal-terms claim . . . .").

general land use[236]—and no clear mechanism to identify other such criteria, especially in the face of controversy. The Seventh and Third Circuits, for example, disagree over the acceptability of excluding uses which limit other uses nearby under state rather than municipal law.[237] Second, an accepted zoning criterion such as exclusive zoning does not tell us where religious assemblies belong, for they are not residential, commercial, or industrial, and thus still allows cities some freedom to exclude them wherever it is most convenient. Third, using only *accepted* regulatory criteria limits the ability of zoning boards to devise nontraditional schemes to address novel challenges[238] and thus seems short-sighted. Whatever the Seventh Circuit's new test gains in terms of objectivity it more than loses in terms of uncertainty and rigidity.

Even if a minority of the Seventh Circuit dismisses the difference, the accepted regulatory criteria test provides a greater—and perhaps unclear and excessive—restriction on municipalities than the regulatory purpose test. Whatever their actual differences, however, for the remainder of this Article we will treat the Third and the Seventh Circuit's approaches as functionally identical for the purposes of comparing them to the Eleventh Circuit's approach.

2. Secular Comparators versus Strict Scrutiny

If we minimize the differences between the Third and Seventh Circuits' tests and collapse them into one, two basic approaches to interpreting the equal-terms provision remain. These in turn prove remarkably similar upon further investigation, having very similar kinds of analysis but giving it teeth in different parts.[239] Whether a court applies strict scrutiny or seeks a secular

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[236] *Id.* at 371.

[237] *See* Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch, 510 F.3d 253 (3d Cir. 2007) (ruling that cities *can* rely on state law that requires an alcohol-free-zone around churches to justify differential treatment); Digrugilliers v. Consolidated City of Indianapolis, 506 F.3d 612 (7th Cir. 2007) (ruling that cities *cannot* rely on state law that requires an alcohol-free-zone around churches to justify differential treatment).

[238] *River of Life*, 611 F.3d at 376 (Williams, J., concurring).

[239] *Lighthouse*, 510 F.3d at 269 n. 14 (3d Cir. 2007) ("With our definition of comparator as a secular assembly that has a similar impact as a religious assembly on the regulation's aims, we are putting the teeth into section 2(b)(1) that it needs to follow Free Exercise case law.").

comparator, the answer will often be the same because in the end both tests try to answer the same underlying question: Does the municipality exclude religious assemblies from certain zones simply because they are religious?

The Third and Seventh Circuits answer this question in one step. To determine whether the exclusion is due to the religious nature of houses of worship and not some other reason, they attempt to identify an included use that differs only in that it is nonreligious, much like a control group in a scientific experiment, and if they find one, they apply strict liability and the municipality loses. The Eleventh Circuit, on the other hand, answers the question in two parts. It first determines whether the municipality allows any assembly whatsoever in the zones which exclude religious assemblies. It then applies strict scrutiny to determine whether there is a difference between the religious assemblies and the allowed uses—secular comparators in everything but name—significant enough to justify the differential treatment, examining the governmental interest involved in the process. Both tests thus necessarily compare the excluded uses and the included uses in light of the purpose of the regulation[240] to determine whether municipalities have engaged in prohibited religious discrimination.

The primary difference between these two basic approaches is that the Eleventh Circuit explicitly evaluates the validity of the governmental purpose, though construing it as governmental interest in the familiar terminology of strict scrutiny, and the Third and Seventh Circuits only do so implicitly if at all.[241] The Eleventh Circuit's approach thus protects free exercise from illegitimate or insignificant governmental purposes when the Third Circuit's may

[240] *See supra* note 233. It is likely that zoning criteria become accepted zoning criteria through an evaluation of their purpose, as Posner did in justifying exclusive zoning. *See River of Life*, 611 F.3d at 371-73.

[241] The Third Circuit does not appear to question the validity of the purpose of creating "a 'vibrant' and 'vital' downtown community centered on an entertainment and retail district." *Lighthouse*, 510 F.3d at 270. The Seventh Circuit relies on the zoning criteria being widely accepted, perhaps in an attempt to remedy the Third Circuit's excessive deference to municipal officials. *See River of Life*, 611 F.3d at 371.

not, and its reliance on previously recognized compelling state interests as a guide provides both the certainty and flexibility that the Seventh Circuit's lacks. An optimal approach, however, might combine the clarity and simplicity of the Third and Seventh Circuits with the fairness of the Eleventh Circuit.

B. Proposed Hybrid Approach

All three circuits claimed to follow established Supreme Court free-exercise jurisprudence.[242] The Eleventh Circuit incorporated the standard of strict scrutiny and rejected the similarly situated comparator requirement—at least for facial challenges[243]—while the Third and Seventh Circuits did the exact opposite.[244] An alternative would be to incorporate both elements and merge them into a single test, evaluating zoning ordinances by identifying secular comparators similarly situated with respect to a compelling governmental interest.[245]

The structure of this new test would closely resemble the Third Circuit's approach at first, but once a court has identified a secular comparator similarly situated with respect to the regulatory purpose, it would then go one step further and apply strict scrutiny to that purpose, determining whether the interest is compelling and whether the ordinance is narrowly tailored to advance it. If a court could not identify such a comparator or found the differential treatment survived strict scrutiny, the municipality would prevail; otherwise, the challenger would prevail, and the court would strike down the ordinance. This proposed combination of equal-protection

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[242] *See* Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1232 (11th Cir. 2004) ("Thus, a violation of § (b)'s equal treatment provision, consistent with the analysis employed in *Lukumi,* must undergo strict scrutiny."); *Lighthouse*, 510 F.3d at 264 ("As we will explain, what the Equal Terms provision does in fact require is a secular comparator that is similarly situated as to the regulatory purpose of the regulation in question-similar to First Amendment Free Exercise jurisprudence."). In adopting and modifying the Third Circuit's approach, the Seventh Circuit can be presumed to adopt its reasoning as well. *See supra* Part III.C.

[243] *See supra* Part III.A.

[244] *See supra* Part III.B–C.

[245] This formulation jettisons the strict liability standard, but it does not appear in the free-exercise Supreme Court case law which the three circuits cited nor does it explicitly appear on the face of the equal-terms provision. *See* 42 U.S.C. § 2000cc(b)(1) (2006).

and free-exercise principles would chart a neutral course and balance the competing interests of municipalities and religious groups. The similarly situated secular comparator would protect cities from religious assemblies acquiring the power to locate almost anywhere simply because they are religious and thus interfere with rational zoning policy, while the application of strict scrutiny would protect religious assemblies from cities imposing restrictions on them with less than compelling justifications. The compromise between the federal circuits could immediately achieve a significant level of stability and maturity by relying on the rich case law regarding compelling state interests and narrow tailoring rather than compiling a list of accepted regulatory criteria from scratch like the Seventh Circuit has suggested.

Admittedly, this formulation should yield approximately the same results as the Eleventh Circuit's test, but it would acknowledge that all the circuits necessarily engage in the same types of comparison as the other circuits, at least for any serious challenge under the equal-terms provision.[246] In *Midrash*, for example, after defending its rejection of the similarly situated comparator requirement, the Eleventh Circuit compared synagogues to private clubs in detail in order to apply strict scrutiny, in much the same way as the Third and Seventh Circuits look for a secular comparator.[247] This synthesis of the various approaches would also recognize the novelty of the equal-terms provision in combining distinct legal principles and that the three circuits have not split so far apart in their interpretation of it as to be completely irreconcilable.

C. Further Establishment Clause Concerns

[246] If a challenger cannot identify any assembly under the broad definition of *assembly* or *institution*, then the Eleventh Circuit would not engage in further comparison, but such a challenge would be so weak as to be trivial. *See supra* Part III.A.1.
[247] *See* Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1233-35 (11th Cir. 2004).

The majority opinion in *River of Life* raised the issue of whether the Eleventh Circuit's test for the equal-terms provision might violate the Establishment Clause.[248] The Eleventh Circuit had ruled that the equal-terms provision itself was consistent with this constitutional limitation in *Midrash*,[249] but Judge Posner suggested the Eleventh Circuit had added the strict scrutiny requirement "to avoid making its test overprotect religious assemblies in comparison to their closest secular counterparts,"[250] though in the end he did not conclude the test actually violated the Establishment Clause.

While the equal-terms provision may not violate the Establishment Clause, it seems be only half of a fully neutral statutory scheme. That is, RLUIPA prohibits government from favoring secular assemblies over religious assemblies, but it does not prohibit the opposite. It is not inconsistent with such a law, but the lack of concern for mistreatment of secular assemblies is tangible. As Judge Posner notes in *River of Life*, the equal-terms provision guarantees the equal treatment of churches, synagogues, mosques, and temples but not, for example, secular humanist reading rooms.[251] The equal-terms provision is comparable to a law which guarantees free speech for men but is completely silent about free speech for women. The implication would be that Congress is unconcerned about the rights of women. With RLUIPA, the implication is that Congress is simply unconcerned for whatever reason about the right of the

[248] *See* River of Life Kingdom Ministries v. Village of Hazel Crest, Ill., 611 F.3d 367, 370 (7th Cir. 2010) (en banc).
[249] *See Midrash*, 366 F.3d at 1240-42. The church applied the *Lemon* test to reach this conclusion. *See id.* *See also* Lemon v. Kurtzman, 403 U.S. 602 (1952).
[250] *River of Life*, 611 F.3d at 370.
[251] *See id.* Posner names American Atheists, the American Humanist Association, the Freedom From Religious Foundation, the Godless Americans Political Action Committee, Internet Infidels, and the Skeptics Society as potentially excluded real-life organizations. *Id.*

nonreligious to assemble. Given that only one member of Congress has publicly acknowledged his disbelief in God,[252] this can hardly be surprising.

At least one rejected interpretation of the equal-terms provision, however, would very likely violate the Establishment Clause. Judge Sykes favored discarding both strict scrutiny and the secular comparator requirement in her dissenting opinion in *River of Life*.[253] She argued that "[a] decision method that justifies excluding religious assemblies from a zone because nonreligious assemblies are also excluded turns the equal-terms provision on its head,"[254] but it is she who, at least according to the eleven of twelve Seventh Circuit judges who disagreed with her, has it completely backward. Instead of prohibiting the exclusion of assemblies *because* they are religious, she would prohibit the application of neutral rules of general applicability to exclude assemblies simply *if* they are religious, resulting in RLUIPA thus actively advancing religion in violation of the *Lemon* test.[255] Fortunately, Judge Sykes viewpoint failed to carry the day, and the Seventh Circuit endorsed a more reasonable position that treats religion on equal rather than specially favored terms.

V. CONCLUSION

The Supreme Court is unlikely to resolve the split over the interpretation of the equal-terms provision as long as the various circuits continue to reach comparable outcomes.[256] If the

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[252] *See Rep. Stark Applauded for Atheist Outlook: Believed to Be First Congressman to Declare Nontheism*, ASSOCIATED PRESS, Mar. 3, 2007, *available* at http://www.msnbc.msn.com/id/17594581/ (last accessed Oct. 9, 2010).

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

[254] *River of Life*, 611 F.3d at 388 (Sykes, J., dissenting).

[255] *See* Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971) ("First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . ; finally, the statute must not foster 'an excessive government entanglement with religion.'"). Judge Syke's interpretation, unlike the majority's interpretation, does not allow for a theoretical secular counterpart of the equal-terms provision because together they would utterly destroy municipal zoning power; a city could never exclude any institution from any zone at all since all institutions would qualify under one of the two provisions. For this reason, Judge Sykes view cannot be seen as anything but prohibited favorable treatment for religious institutions.

[256] The only clear example of an different outcome depends heavily on a federalism issue rather free-exercise or equal-protection issue and does not relate directly to the split in interpretation. *See supra* note 237.

analysis in this Article is correct, we should not expect a major divergence in results since all three approaches are quite similar at the core. The most significant difference is that the Third Circuit does not explicitly evaluate the validity of regulatory purposes, but this does not entail that it would accept a truly spurious or arbitrary limitation on the location of religious assemblies if one were to come before it. And while the Eleventh Circuit and Seventh Circuits use different standards—compelling state interest and accepted regulatory criteria, respectively—to limit the ability of cities to exclude religious assemblies from certain areas, these standards are not so fundamentally dissimilar that direct conflict is clearly inevitable. All this suggests the circuit split might last for quite some time. Given its documented track record of taking matters into its own hands and legislating when courts do not reach the desired interpretation, it would not be at all surprising to see Congress rather than the Supreme Court resolve the split via an amendment to RLUIPA if one or more circuits hand down decisions too restrictive in its view on the free exercise of religion.

The indefinite and potentially prolonged duration of the circuit split should not deter the search for the optimal approach to interpreting the equal-terms provision. Three circuits have provided three different candidates over the past several years. The proposal presented in this Article represents another, one that attempts to merge the strengths of the other approaches, eliminate their respective weaknesses, and balance the conflicting interests of cities and religious assemblies. The equal-terms provision, as a fusion of free-exercise and equal-protection law, has created a unique challenge for the judiciary, and it requires an innovative legal solution.