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WE'RE ON A MISSION FROM GOD: PROPERLY INTERPRETING RLUIPA'S "EQUAL TERMS" PROVISION

DANIEL MAZZELLA[†]

INTRODUCTION

About twenty-seven miles south of Chicago in Chicago Heights, in a dusty, rundown warehouse, with clutter all about, a small congregation settled in for Mass and began to pray.¹ "Our Father who art in heaven, Hallowed be thy name; Thy kingdom come . . ." ² But should such Kingdom ever come, it would find itself subject to myriad zoning regulations, which could put an end to the Kingdom before it even broke ground.³ That, at least, has been the experience of many of those assemblies and institutions awaiting the Kingdom's arrival, including the River of Life Church meeting in that warehouse.

The congregation of about thirty regular parishioners dreamed of having a real church instead of their current dingy warehouse.⁴ After some search, the church found a building in the village of Hazel Crest, a few miles south of Chicago Heights,

[†] Senior Articles Editor, *St. John's Law Review*; J.D., 2012, St. John's University School of Law; B.B.A., Accounting, 2008, Adelphi University; Certified Public Accountant (C.P.A.). The author would like to thank Professor Marc O. DeGirolami for his help in parsing an especially dense area of law, and the author's mother, who put up with being the test subject as he tried to find a way to make this subject understandable and readable.

¹ See *River of Life Kingdom Ministries v. Vill. of Hazel Crest*, 611 F.3d 367, 368 (7th Cir. 2010).

² *Matthew* 6:9–10 (The Holy Bible Catholic Edition RSV).

³ One can imagine an absurd situation in which God himself is denied a building permit by a planning board especially zealous about maintaining its zoning plan. However, the commencement of God's Kingdom on Earth is likely to lead to a significant revision of current law that may obviate such bothers.

⁴ *River of Life*, 611 F.3d at 368.

and purchased it.⁵ Their prayers appearing answered, they applied to the town for the necessary permits to operate a church.⁶

Meanwhile, the Village of Hazel Crest, grappling with a depressed downtown and declining tax revenues, had passed a comprehensive revitalization plan.⁷ The plan called for the creation of a pure commercial district around the train station in the downtown area.⁸ From this area, all non-commercial land uses, including religious land uses, were barred, with the goal of creating a bustling commercial district that would generate substantial tax revenues.⁹ The church's property fell squarely within this area.¹⁰

As the Village's plan expressly disallowed religious land uses in the zone, the congregation's application was summarily denied.¹¹ Soon thereafter, the congregation filed suit in federal court, invoking the Religious Land Use and Institutionalized Persons Act of 2000,¹² to reverse the village's zoning decision.¹³

Thus, *River of Life v. Village of Hazel Crest* began, providing another example of the tension that often exists between zoning authorities and religious persons and organizations. Tensions and emotions often run high where the local regulations restrict the ability of religious organizations to site where they wish and to worship as their religions dictate.¹⁴ The Bible says "[r]ender

⁵ *See id.*

⁶ *River of Life Kingdom Ministries v. Vill. of Hazel Crest*, No. 08C0950, 2008 WL 4865568, at *2 (N.D. Ill. July 14, 2008), *aff'd*, 611 F.3d 367 (7th Cir.2010).

⁷ *See River of Life*, 611 F.3d at 368.

⁸ *Id.*

⁹ *Id.*

¹⁰ *River of Life*, 2008 WL 4865568, at *2.

¹¹ *See id.*

¹² 42 U.S.C. § 2000cc (2006).

¹³ *See River of Life*, 2008 WL 4865568, at *2.

¹⁴ For lurid accounts of such battles, see MARCI A. HAMILTON, *GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW*, 78–110 (2005). However, the book has been the subject of a good deal of controversy, including an intense back and forth between professor Douglas Laycock and the author, as to the book's factual accuracy and the merits of policies advocated, with some claiming those policies to merely be fronts for the author's personal disillusionment with organized religion generally. *See generally* Douglas Laycock, *A Syllabus of Errors*, 105 MICH. L. REV. 1169 (2007); Marci A. Hamilton, *A Response to Professor Laycock*, 105 MICH. L. REV. 1189 (2007); Douglas Laycock, *God vs. The Gavel: A Brief Rejoinder*, 105 MICH. L. REV. 1545 (2007); Marc O. DeGirolami, *Recoiling from Religion*, 43 SAN DIEGO L. REV. 619 (2006).

therefore to Caesar the things that are Caesar's,"¹⁵ but where Caesar prevents religious organizations from functioning and worshipping as they must, the implicit understanding of mutual deference embodied in that Bible verse is violated. Additionally, the First Amendment's command against laws prohibiting the *free exercise* of religion is often violated.¹⁶

Beginning in 1993, in the wake of *Employment Division, Department of Human Resources of Oregon v. Smith*,¹⁷ these formerly local disputes became matters of federal import. *Smith* held that the free exercise clause did not preclude the enforcement of "generally applicable laws" on religious activities, even where such laws burdened religious exercise.¹⁸ *Smith's* holding outraged religious and civil rights organizations alike, who believed that the constitutional protections for religion had been reduced to a dangerous minimum.¹⁹ Congress, likewise outraged, sought to overturn *Smith* by statute.²⁰

The Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA") is Congress'²¹ latest attempt to overturn *Smith*.²² Congress' prior attempt to do so with the Religious

¹⁵ *Matthew 22:21*.

¹⁶ "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I (emphasis added). See generally *Sherbert v. Verner*, 374 U.S. 398 (1963).

¹⁷ 494 U.S. 872 (1990).

¹⁸ *Id.* at 878.

¹⁹ See HAMILTON, *supra* note 14, at 223–26.

²⁰ See *City of Boerne v. Flores*, 521 U.S. 507, 512–16 (1997) ("Congress enacted RFRA in direct response to the Court's decision in [*Smith*].").

²¹ The reader may have noticed the omission of the "s" after the possessive "Congress'." There presently exists a split of authority as to this matter among the many institutions concerned with the rules of the English language, such as the Associated Press. See Debra Cassens Weiss, *The Supreme Court is Split on Apostrophes*, ABA JOURNAL (Sept. 2, 2010, 9:45 AM), http://www.abajournal.com/news/article/the_supreme_court_is_split_on_apostrophes. However, the Supreme Court has ruled, and rules every time it releases an opinion, that "Congress'" is proper. See, e.g., *City of Boerne*, 521 U.S. at 511 (using "Congress'" exclusively). Though arguably dicta, as no case has ever required the resolution of this issue, the repeated use of "Congress'" in majority opinions is compelling. Furthermore, the split on the Court, formerly five-to-four, has in recent months expanded to six-to-three. See *id.* at 541 (Scalia, J., concurring) (using "Congress's" exclusively in his concurrence); Weiss, *supra*. Thus, the author intends to follow the binding precedent of the Supreme Court and will not append clearly unnecessary s's to his "Congress'."

²² See HAMILTON, *supra* note 14, at 95.

Freedom Restoration Act (“RFRA”) had proven to be unconstitutional,²³ thus Congress, hoping to cure any constitutional problems, wrote RLUIPA to be narrower in scope. Unlike RFRA, RLUIPA sought only, in relevant part,²⁴ to end discrimination against religious organizations in land use decisions.²⁵ A key component of RLUIPA is the “equal terms” provision which provides “[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.”²⁶

Though phrased simply, the “equal terms” provision has caused great interpretive problems. The statute, while “[having] the ‘feel’ of an equal protection law,” lacks a similarly situated comparator.²⁷ The statute, therefore, leads one to wonder: equal terms compared to what? The statute further fails to define “assembly” and “institution,” thus raising the further question: What is included in “assembly” and “institution”?

To date, three federal circuit courts of appeals have dealt with facial challenges²⁸ to zoning ordinances under the provision and have developed three different tests for its application.²⁹ The

²³ See *Boerne*, 521 U.S. at 536.

²⁴ As the statute’s name suggests, there are two halves to the statute. The “institutionalized persons” half, which is beyond the scope of this Note, concerns issues of free exercise in the context of prisons and other institutions, and has been the subject of Supreme Court litigation. See *Cutter v. Wilkinson*, 544 U.S. 709, 713–14 (2005) (upholding the act as constitutional under the Establishment Clause).

²⁵ See *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1226 (11th Cir. 2004).

²⁶ 42 U.S.C. § 2000cc(b)(1) (2006).

²⁷ *Midrash Sephardi*, 366 F.3d at 1229.

²⁸ In this context, the plaintiffs assert that the terms of challenged zoning ordinance on their face violate “equal terms.” This is in contrast to an as-applied challenge where the plaintiff makes no argument as to the ordinance’s terms, but only to the specific instance of its application. This Note is concerned solely with facial challenges.

²⁹ Two other circuits, the Tenth and the Second, have also been presented with the “equal terms” provision of RLUIPA, but under different circumstances. The Tenth Circuit case, *Rocky Mountain Christian Church v. Bd. of Cnty. Comm’rs*, was an appeal from a jury verdict in favor of the religious plaintiffs’s as-applied challenge to the zoning statute. 613 F.3d 1229, 1233, 1237 (10th Cir. 2010), *cert. denied*, 131 S. Ct. 978 (2011). The Second Circuit case, *Third Church of Christ, Scientist, of New York City v. City of New York*, likewise concerned an as-applied challenge to the zoning ordinance. See 626 F.3d 667, 668–69 (2d Cir. 2010). The Eleventh Circuit has also dealt with as-applied “equal terms” challenges on two occasions. See *Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward County*, 450 F.3d 1295,

Eleventh Circuit, in *Midrash Sephardi, Inc. v. Town of Surfside*,³⁰ held that the statute's language included all assemblies, with assembly retaining its basic definition of "a group gathered for a common purpose."³¹ Thus, the court held that if a broadly defined secular assembly is allowed in a zone, a religious assembly must likewise be allowed, lest the statute be violated.³² Upon finding a violation, the regulation must then survive strict scrutiny: the government must proffer a compelling state interest for the inequality and demonstrate that the means adopted were the narrowest possible.³³

Unlike the Eleventh Circuit, the Third Circuit judicially added a similarly situated requirement not otherwise found in the statute's text.³⁴ In *Lighthouse Institute for Evangelism, Inc. v. City of Long Branch*,³⁵ the court stated that the religious plaintiff must not be treated on less than equal terms than a secular assembly similarly situated as to the challenged regulation's "regulatory purpose."³⁶ That is, the court looks for "internal consistency" within the land use ordinance that all land uses having similar effects upon the ordinance's purpose are treated in equal fashion.³⁷ For example, a land use ordinance seeking to increase tax revenues would have to prohibit not just religious land uses but all other land uses tending to generate negligible tax revenue to not run afoul of the "equal terms" provision.³⁸ Additionally, once a violation is found, the municipality is held strictly liable for the violation.³⁹

1302 (11th Cir. 2006); *Konikov v. Orange County, Fla.*, 410 F.3d 1317, 1322 (11th Cir. 2005). This Note deals only with facial challenges to zoning ordinances under the "equal terms" provision. As such, the as-applied challenges of these other cases are beyond the scope of this Note.

³⁰ 366 F.3d 1214 (11th Cir. 2004).

³¹ *Id.* at 1231.

³² *See id.*

³³ *Id.* at 1232.

³⁴ *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 264, 266–67 (3d Cir. 2007).

³⁵ 510 F.3d 253 (3d Cir. 2007).

³⁶ *Id.* at 264 (emphasis added).

³⁷ *See id.* at 272.

³⁸ *See infra* Part II.D.

³⁹ *Lighthouse*, 510 F.3d at 269.

Finally, the Seventh Circuit also judicially added a similarly situated requirement, but declined to follow the Third Circuit's lead.⁴⁰ Believing the "regulatory purpose" to be far too subjective, the Seventh Circuit instead held that the religious plaintiff must be treated on less than equal terms than a secular assembly similarly situated as to "accepted zoning criteria."⁴¹ Thus, for example, a theater and a church would be similar as to the zoning criteria of "traffic" as both land-uses tend towards concentrated comings and goings of persons, either at the end of a show or at the end of a religious service.⁴² However, like the Third Circuit, should a violation be found, the municipality is held strictly liable.⁴³

The three-way circuit split is by itself a problem begging for resolution by the Supreme Court, but exacerbating the problem is the potential for serious constitutional issues depending on the interpretation adopted. As the Third and Seventh Circuits have noted, the Eleventh Circuit's interpretation, and the statute itself, taken to their natural extreme create an affirmative right for religious organizations to avoid generally applicable regulations.⁴⁴ Given such liberal definitions, nearly anything is either an assembly or an institution. Such a result goes beyond Congress' enforcement powers as defined in section five of the Fourteenth Amendment.⁴⁵ As the Court explained in *City of Boerne v. Flores*, section five gives Congress the power to enact remedial legislation to correct and prevent abuses, but does not allow Congress the power to substantively alter or add rights.⁴⁶ The Eleventh Circuit's interpretation arguably commits that very sin.⁴⁷

⁴⁰ *River of Life Kingdom Ministries v. Vill. of Hazel Crest*, 611 F.3d 367, 371 (7th Cir. 2010).

⁴¹ *See id.*

⁴² *Id.* at 373.

⁴³ *See id.* at 373–74.

⁴⁴ *See id.* at 371 ("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."); *Lighthouse*, 510 F.3d at 268 & nn.12–13.

⁴⁵ U.S. CONST. amend. XIV, § 5.

⁴⁶ *City of Boerne v. Flores*, 521 U.S. 507, 518–19 (1997).

⁴⁷ *See River of Life*, 611 F.3d at 371.

On the other hand, while the Third and Seventh Circuits avoid the constitutional problems of the Eleventh Circuit, it is an open question as to whether their interpretations are contravening Congress' intent.⁴⁸ The statute's text, even without resort to legislative history, makes clear that Congress intended to give religious plaintiffs a new tool with which to advance their interests.⁴⁹ The interpretations of the Third and Seventh Circuit make it significantly more difficult for religious plaintiffs to maintain their claims, and may be entirely too friendly to municipal defendants by structuring the inquiry solely in the municipality's terms—either the municipality's "regulatory purpose" or the "accepted zoning criteria" used by the municipality.⁵⁰ Additionally, the "similarly situated" requirement added by both circuits is without basis in the text of the statute.⁵¹ Thus, in an effort to avoid the evils of unconstitutionality, these courts appear to have chosen to risk the perceived lesser evil of contravening Congress' intent.

This Note argues that the interpretations given to the "equal terms" provision thus far are incorrect, and that a better approach is to compare secular and religious assemblies and institutions on the basis of their purposes. Part One of this Note provides the background to RLUIPA from *Sherbert* to the Act's enactment. In Part Two, *Midrash*, *Lighthouse*, and *River of Life* are presented in chronological order and each circuit's test is analyzed. In Part Three, the provision's plain text and its placement in the larger statutory scheme are analyzed in accordance with standard canons of construction. The current circuit approaches are then critiqued. Finally, a solution to the current circuit split based on the proposed test of the Seventh Circuit's dissenter is presented, which provides the best balance between effecting Congress' intent and preserving the statute's constitutionality.

⁴⁸ See *Lighthouse*, 510 F.3d at 287–88 (Jordan, J., dissenting).

⁴⁹ See 42 U.S.C. § 2000cc (2006) (providing four separate statutory provisions for religious plaintiffs to base claims upon).

⁵⁰ See *River of Life*, 611 F.3d at 385–86 (Sykes, J., dissenting).

⁵¹ See *id.* at 385 ("Tellingly, the *Lighthouse Institute* majority did not try to make an argument for its interpretation from the text and structure of the statute.").

Solving the current circuit split and developing a solid test has become more urgent in light of the recent economic downturn. As state and local governments come under increasing stress from falling tax revenues, they will resort to new and creative ways to raise funds, including changing zoning schemes to favor tax producing land uses over tax exempt land uses, of which religious land uses are prime exemplars. This danger is made clear by the fact that in *Midrash, Lighthouse*, and *River of Life*, the challenged zoning regulations were enacted specifically to revitalize depressed or underdeveloped zones to increase tax revenues.⁵²

I. THE COMPELLING (BUT NEUTRAL) RECENT HISTORY OF THE *FREE EXERCISE* CLAUSE

Section A of this Part discusses the rise and fall of *Sherbert v. Verner*,⁵³ and its replacement by *Employment Division, Department of Human Resources of Oregon v. Smith*⁵⁴ as the key case in free exercise jurisprudence. Also discussed is the case of *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*⁵⁵ and its impact on modern free exercise jurisprudence. Section B deals with the initial congressional response to the Supreme Court's holding in *Smith*, and the Court's disposition of the resultant legislation in *City of Boerne v. Flores*.⁵⁶ In Section C, the genesis of the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"),⁵⁷ Congress' second attempt to work around *Smith*, is presented. The concluding Section, D, provides a brief summary of where the law stood immediately following RLUIPA's passage.

⁵² See *id.* at 368; *Lighthouse*, 510 F.3d at 258; *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1221–22 (11th Cir. 2004).

⁵³ 374 U.S. 398 (1963).

⁵⁴ 494 U.S. 872 (1990).

⁵⁵ 508 U.S. 520 (1993).

⁵⁶ 521 U.S. 507 (1997).

⁵⁷ 42 U.S.C. § 2000cc (2006).

A. *The Fall of Sherbert and the Rise of Smith*

Sherbert v. Verner, from its inception in 1963, was the key case in free exercise jurisprudence.⁵⁸ The rule announced was that government regulations that substantially burden a person's free exercise of religion are subject to strict scrutiny.⁵⁹ That is, the government would have to show that the challenged regulation served a compelling state interest, and demonstrate that the means adopted are the narrowest possible, inflicting the smallest burden possible.⁶⁰

In *Sherbert*, the plaintiff, a Seventh Day Adventist,⁶¹ was denied unemployment benefits by the South Carolina Employment Security Commission following her refusal to work on Saturdays, her Sabbath day.⁶² Though the commission was empowered to make individualized exceptions for good cause, the commission held that religious conviction was not good cause.⁶³ Justice Brennan, writing for the majority, stated that this denial amounted to penalizing plaintiff for practicing her religion, thereby substantially burdening her right to free exercise.⁶⁴ The Court further held that South Carolina's interest in preserving the financial solidity of the state unemployment fund was not a

⁵⁸ See 1 KENT GREENAWALT, RELIGION AND THE CONSTITUTION: FREE EXERCISE AND FAIRNESS 236 (2009).

⁵⁹ See *id.*

⁶⁰ See *id.*

⁶¹ Though differences exist, in the main Seventh Day Adventists follow the traditional beliefs of conservative Christianity. See *The Seventh Day Adventist Church: Its Beliefs and Practices*, RELIGIoustolerance.org, <http://www.religioustolerance.org/sda2.htm> (last updated Nov. 10, 2009). The most obvious difference is the Adventist practice of observing the Sabbath on Saturday instead of Sunday—the practice at issue in *Sherbert*. See *id.* Doctrinally, a key difference is the rejection of the notion of “innate immortality.” See *id.* Far from believing that each person is immortal by way of the soul as commonly believed by most other Christian denominations, Adventists believe that upon death a person enters an unconscious state only to be “reawakened” on judgment day, at which point the person will either be granted eternal life or be permanently destroyed. See *id.* Also integral is the belief in Christ's imminent return and the attendant occurrence of a Rapture event. See *id.*

⁶² *Sherbert v. Verner*, 374 U.S. 398, 399–401 (1963).

⁶³ *Id.* at 400–01.

⁶⁴ *Id.* at 404.

compelling interest sufficient to justify the substantial burden imposed.⁶⁵ Thus, the employment commission could not constitutionally deny plaintiff unemployment benefits.⁶⁶

Over the next two decades, the Court would periodically revisit *Sherbert* and extend its logic to new areas. One such case was *Wisconsin v. Yoder*,⁶⁷ decided in 1972. There, a Wisconsin statute required all children to attend school until the age of sixteen; the parents of the child to be held criminally liable should the child not so attend.⁶⁸ A group of Amish parents, pursuant to their Mennonite beliefs, refused to allow their children to attend compulsory education beyond the eighth grade.⁶⁹ The parents of the children were convicted and fined for violating the statute.⁷⁰ A unanimous Court⁷¹ held that, as in *Sherbert*, the challenged regulation effectively prevented the faithful from exercising their religion by penalizing them with criminal sanction for following those beliefs.⁷²

However, in 1988,⁷³ as if to foreshadow what was to come, the Supreme Court expressly declined to either extend or apply the *Sherbert* rule in deciding *Lyng v. Northwest Indian Cemetery Protective Ass'n*.⁷⁴ The federal Forest Service intended to construct a seventy-five mile paved road connecting two

⁶⁵ See *id.* 406–08.

⁶⁶ *Id.* at 410.

⁶⁷ 406 U.S. 205 (1972).

⁶⁸ *Id.* at 207–08 & n.2.

⁶⁹ *Id.* at 207–08.

⁷⁰ *Id.* at 208.

⁷¹ Justices Rehnquist and Powell took no part in the consideration of this case. See *id.* at 236. Justice Douglas filed a partial dissent. He concurred in the result as to the Yoders, but would have remanded the case of the others for further proceedings to determine the wishes of the children. See *id.* at 243–46 (Douglas, J., dissenting). The decision, he explained, was more complex than simply balancing the state's interest in compulsory education against the parent's right to raise and rear his child. See *id.* at 241. Rather, the child is a distinct and vitally important third party whose preference and decision, provided the child is mature enough, may be dispositive in this context. See *id.* at 242. He emphasized that education in the modern world is so vitally important that any decision as to its continuation or cessation can easily determine the entire path of the child's life and foreclose or make available to him or her innumerable opportunities. Therefore, the child's voice ought to be heard. See *id.* at 244–46.

⁷² See *id.* at 218 (majority opinion).

⁷³ Also decided in 1988 was *Emp't Div., Dep't of Human Res. of Or. v. Smith* (*Smith I*), 485 U.S. 660 (1988), the lesser known and less controversial first iteration of the landmark case.

⁷⁴ 485 U.S. 439, 452 (1988).

California towns.⁷⁵ Work had been completed on either side of the seventy-five mile span such that all that remained to be completed was a six-mile span through the Chimney Rock national forest to connect the two halves of the road.⁷⁶ Several local Native American tribes objected to the proposed construction of the road through the area alleging that the road would result in irreparable harm to their centuries-old religious practices in the area.⁷⁷ The endangered practices required complete immersion in nature with no man-made interference.⁷⁸ The road, they argued, would make such immersion impossible.⁷⁹

In rejecting their claim, Justice O'Connor wrote that the Free Exercise clause does not require the bending of government action to every religious practice.⁸⁰ If the free exercise clause required such a result, it would become very difficult for the government to craft and implement any of its policies.⁸¹ Indeed, as the Court emphasized, in this case the Federal government owned the land outright and was exercising its right to build thereupon.⁸² Furthermore, the petitioner's position, if adopted, would "require *de facto* beneficial ownership of some rather spacious tracts of public property" for these tribes and would effectively federally subsidize their religious beliefs, something implicating potential Establishment Clause issues.⁸³

Where *Lyng* had merely declined to extend *Sherbert*, *Employment Division, Department of Human Resources of Oregon v. Smith*,⁸⁴ decided in 1990, affirmatively cut back the reach of *Sherbert* so far as to effectively render it largely toothless.⁸⁵ The Oregon state ordinance in question required the denial of unemployment benefits if the applicant had been dismissed for "misconduct," which often included illicit drug

⁷⁵ *Id.* at 442.

⁷⁶ *Id.*

⁷⁷ *Id.* at 451.

⁷⁸ *Id.* at 453.

⁷⁹ *Id.* at 451.

⁸⁰ *See id.*

⁸¹ *Id.* at 452.

⁸² *Id.* at 453.

⁸³ *Id.*

⁸⁴ 494 U.S. 872 (1990).

⁸⁵ *See id.* at 884 ("Even if we were inclined to breathe into *Sherbert* some life beyond the unemployment compensation field").

use.⁸⁶ Should “misconduct” be found, benefits would be denied, no exceptions.⁸⁷ Plaintiffs, two Native Americans, were fired from their jobs at a private drug rehabilitation organization after ingesting peyote at a religious ceremony,⁸⁸ and were subsequently denied unemployment benefits under the Oregon law.⁸⁹ In a situation that bore a remarkable outward similarity to the facts of *Sherbert*, the plaintiffs alleged that the law coerced them from freely exercising their religion by penalizing them for acting in accordance with their religion.⁹⁰

The Court held the tenets of an individual’s religion are no escape from the command of generally applicable laws.⁹¹ Justice Scalia, writing for the majority, stated, “[t]he government’s ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, ‘cannot depend on measuring the effects of a governmental action on a religious objector’s spiritual development.’”⁹² The rule petitioners sought, he warned, “would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind.”⁹³ Where in other areas, such as race, the application of strict scrutiny produces equality, here its application would create “a private right to ignore generally applicable laws—[a] constitutional anomaly.”⁹⁴

Sherbert and its progeny were distinguished in two ways. First, *Sherbert* itself was distinguished by noting that the employment insurance system there involved

⁸⁶ *Id.* at 874–75.

⁸⁷ *Id.* at 874–76.

⁸⁸ “[A] hallucinogen derived from the plant *Lophophora williamsii* Lemaire.” *Id.* at 874.

⁸⁹ *Id.*

⁹⁰ *See id.* at 875–76.

⁹¹ *Id.* at 885.

⁹² *Id.* (quoting *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 451 (1988)).

⁹³ *Id.* at 888 (citing *Gillette v. United States*, 401 U.S. 437, 450 (1971)). Interestingly, the district court decision of *Church of Lukumi Babalu Aye, Inc. v. Hialeah* is cited by the Court in this part of the opinion, apparently approving of the district court’s decision to enforce “animal cruelty laws” against the church plaintiff. *Id.* at 889 (citing *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 723 F. Supp. 1467, 1476 (S.D. Fla.1989)). Within three years, this seeming approval turned to unanimous disapproval. *See infra* notes 105–13 and accompanying text.

⁹⁴ *Employment Division*, 494 U.S. at 886.

“individualized . . . assessment[s].”⁹⁵ That system “lent itself to [the] individualized government[] assessment of the reasons for the relevant conduct.”⁹⁶ Consequently, a government could not deny unemployment benefits in cases of religious hardship without a compelling reason for doing so.⁹⁷ The law in *Sherbert*, therefore, was not “generally applicable.” Furthermore, the Court stated that the *Sherbert* test had never been successfully applied in any context other than the narrow category of unemployment insurance programs involving “individualized . . . assessment[s].”⁹⁸ By contrast, the Washington state law challenged in *Smith* was neutral and generally applicable: The statute was a categorical denial of benefits upon violation, with no individualized assessment of the motivating reasons for the relevant conduct.⁹⁹

Second, cases such as *Yoder* coupled other fundamental rights claims with the free exercise claim.¹⁰⁰ For example, in *Yoder*, the Court explained that the free exercise claim was intertwined with the fundamental right of parents to direct the education of their children as understood in *Pierce v. Society of Sisters*.¹⁰¹ Therefore, the progeny of *Sherbert* that ostensibly extended its reach did anything but. Rather, the progeny of

⁹⁵ *Id.* at 884.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *See id.*

⁹⁹ *See id.*

¹⁰⁰ *See id.* at 882 n.1.

¹⁰¹ *Id.* (citing *Pierce v. Soc’y of Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 532 (1925)). *Pierce* concerned an Oregon statute that required school age children to attend a state run public school in lieu of any other private school. *See Pierce*, 268 U.S. at 530–31. Should the child not attend a public school, the parents would be guilty of a misdemeanor. *Id.* at 530. The law effectively made private schools largely non-viable. *Id.* at 532. A Roman Catholic school and a secular school challenged the statute. *See id.* at 531–33. The Court unanimously held:

[The law] interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. . . . The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.

Id. at 534–35.

Sherbert were decided on non-free exercise grounds.¹⁰² Consequently, the claim in *Smith* being unconnected to any other asserted right, could not stand on *Sherbert* alone.¹⁰³

Many feared the rule announced in *Smith* had removed many of the protections enjoyed by religion and would lead to wide scale governmental interference with religion under the guise of "generally applicable" laws.¹⁰⁴ However, in 1993, the Court at least partially countered those fears by striking down an allegedly neutral law of general applicability in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*.¹⁰⁵ The city of Hialeah, Florida, upon hearing that practitioners of the Santeria religion¹⁰⁶ intended to establish a church within the city limits, convened several meetings of the town council.¹⁰⁷ At these meetings, the council passed several new ordinances prohibiting the slaughter of animals for purposes other than food consumption on the pretexts of preventing cruelty against animals and protecting public health and safety.¹⁰⁸ The ordinances, however, were structured in such a way that no person or organization other than a Santeria church could be affected.¹⁰⁹

¹⁰² *Employment Division*, 494 U.S. at 881–82.

¹⁰³ *See id.* at 882.

¹⁰⁴ *See* HAMILTON, *supra* note 14, at 225–26. *See also* Religious Freedom Restoration Act, 42 U.S.C. § 2000bb(a)(2) (2006) ("laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise.").

¹⁰⁵ 508 U.S. 520, 547 (1993).

¹⁰⁶ Santeria, a fusion of traditional West African religions and Catholicism, developed in the Caribbean, principally on the island of Cuba. *See id.* at 524. Central to the religion is the belief in *Orishas*: powerful spirits who aid the faithful in achieving their destinies. *Id.* The *Orishas* are not, however, immortal and require periodic ritualistic animal sacrifice to survive. *Id.* at 525. Animal sacrifice, thus, is crucial to the exercise of the Santeria faith. Common sacrificial animals include various birds (particularly chickens), goats, sheep and turtles. *Id.* Historically, practitioners of Santeria faced widespread persecution, and, as a consequence, largely practiced in secret. *Id.* To this day Santeria remains secretive and is seldom practiced openly. *Id.*

¹⁰⁷ *Id.* at 526.

¹⁰⁸ *Id.* at 527–28, 544.

¹⁰⁹ For example, one ordinance outlawed the sacrifice of animals in any private or public ritual for purposes other than food consumption. *Id.* at 527. A second ordinance then restricted the application of the first ordinance to groups that slaughter or sacrifice animals for any purpose as part of a ritual. *Id.* The net effect of this formulation was to outlaw Santeria animal sacrifice while providing an escape for other slaughterers of animals. In particular, under this formulation, kosher

The Supreme Court held that while the ordinances on their face were neutral and generally applicable, the statutes actually had the suppression of Santeria as their object.¹¹⁰ The ordinances had effectively been gerrymandered in such a way as to ensure only Santeria would be adversely impacted.¹¹¹ Thus, the law was neither neutral nor generally applicable, and therefore subject to strict scrutiny.¹¹² The proffered government interests of preventing cruelty to animals and protecting the public health were neither sufficient to sustain these ordinances, nor were they credible in light of the gerrymandered nature of the ordinances that made the ordinances both under and over inclusive.¹¹³ Hence, the Court held that where a law, albeit outwardly generally applicable and neutral, operates to affect religion specifically to the exclusion of other functionally equivalent activities that produce similar effects, the free exercise clause is offended and the challenged law must undergo strict scrutiny.¹¹⁴

animal slaughter for food consumption was exempted, despite being pursuant to a ritual. *Id.* at 536. Kosher slaughter was further exempted from the ordinances' incorporation by reference of other exemptions under state law, one of which was an express exemption for kosher slaughter. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 723 F. Supp. 1467, 1480 (S.D. Fla. 1989).

¹¹⁰ *Hialeah*, 508 U.S. at 534.

¹¹¹ *Id.* at 536.

¹¹² *Id.* at 546.

¹¹³ *Id.* at 545.

¹¹⁴ *Id.* at 545–46. There are essentially two variants of this holding, neither of which carried a majority of the Court. The first variant found in Justice Kennedy's opinion searches for, and emphasizes the finding of an impermissible motive for the challenged ordinances to render them non-neutral and subject to strict scrutiny. *See id.* at 540. The second variant proposed by Justice Scalia in his concurrence would ignore the underlying motive of the challenged ordinance and look solely to the ordinance's effects to determine both neutrality and general applicability. *Id.* at 558–59 (Scalia, J., concurring) (“Had the Hialeah City Council set out resolutely to suppress the practices of Santeria, but ineptly adopted ordinances that failed to do so, I do not see how those laws could be said to ‘prohibi[t] the free exercise’ of religion.”). The most reasonable assumption is that both variations are valid, and either the finding of an impermissible motive or gerrymandered effects would result in strict scrutiny for the challenged law. In the general case, the two conditions are almost certain to accompany each other. However, in the rare case where an evil motive is present without accompanying negative effects—that is, Justice Scalia's inept municipality—one must wonder what plaintiff would have an injury under the ordinance conferring standing to sue in the first place.

B. Congress Gets Religion

Notwithstanding its decision in *Lukumi*, the Supreme Court's decision in *Smith* caused great bipartisan concern that the constitutional protections afforded to religious exercise by *Sherbert* had been destroyed.¹¹⁵ Congress was concerned that a neutral and generally applicable law could burden religious exercise just as surely as a law targeting religion.¹¹⁶ Thus, Congress believed, the test most sensible and workable was the *Sherbert* test applied by the Federal courts over the prior four decades¹¹⁷—ignoring the Court's assertion in *Smith* that the *Sherbert* test had never been very active.¹¹⁸

To restore the pre-*Smith* balance, Congress enacted the Religious Freedom Restoration Act of 1993 ("RFRA") with unanimous bipartisan support.¹¹⁹ The Act operated to restore the *Sherbert* compelling interest test in all spheres to address asserted widespread discrimination against religion.¹²⁰ Furthermore, Congress, using its enforcement powers pursuant to section five of the Fourteenth Amendment, applied the RFRA to all governments—federal, state, and local.¹²¹

However, Congress' attempt to reverse *Smith* was rebuffed by the Court four short years later in *City of Boerne v. Flores*.¹²² Bishop Flores of Boerne, Texas invoked the statute in an effort to expand his growing church.¹²³ He asserted that local landmark ordinances impermissibly burdened his, and his congregation's, free exercise rights by preventing an expansion of the church.¹²⁴

¹¹⁵ See HAMILTON, *supra* note 14, at 225–26.

¹¹⁶ Religious Freedom Restoration Act, 42 U.S.C. § 2000bb(a)(2) (2006) ("laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise").

¹¹⁷ *Id.* § 2000bb(a)(5).

¹¹⁸ See *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 883 (1990).

¹¹⁹ See HAMILTON *supra* at note 14, 225.

¹²⁰ *City of Boerne v. Flores*, 521 U.S. 507, 515–16 (1997).

¹²¹ *Id.*

¹²² 521 U.S. 507 (1997).

¹²³ See *id.* at 512.

¹²⁴ *Id.*

Far from backing down in the face of unanimous congressional action, the Court declared the statute's application to state and local governments unconstitutional and reaffirmed *Smith*.¹²⁵

First, the Court stated that the power granted unto Congress by section five of the Fourteenth Amendment, far from being substantive or plenary, is remedial.¹²⁶ That is, Congress has the power to correct and prevent constitutional violations by the states and enforce those violated constitutional rights by appropriate legislation.¹²⁷ Congress does not, however, have the power to decree or alter substantive rights and then enforce such rights by appropriate legislation.¹²⁸ Rather, Congress' power is circumscribed by the text of the Constitution and the interpretation thereof by the Supreme Court.¹²⁹ The Court, not Congress, has "[t]he power to interpret the Constitution in a case or controversy."¹³⁰ Were it any other way, the Court continued, "Congress could define its own powers by altering the Fourteenth Amendment's meaning," thereby causing the Constitution to become an ordinary law, changeable by ordinary means.¹³¹

The Court held that for a law to be a valid use of Congress' remedial section five powers, the law must be *congruent* and *proportional* to the asserted evil.¹³² To be congruent and proportional, the law "should be adapted to the mischief and wrong which the [Fourteenth] [A]mendment was intended to provide against."¹³³ Here, the congressional record, the Court noted, was devoid of any examples of active religious discrimination within the last forty years.¹³⁴ Thus, enactment of a law so broad and powerful was out of all proportion and congruence considering the lack of evidence of actual serious,

¹²⁵ *See id.* at 536. Though unconstitutional as applied to the states, RFRA remains wholly constitutional and applicable against the federal government. *See Gonzales v. O Centro Espirita Beneficente União do Vegetal*, 546 U.S. 418, 439 (2006).

¹²⁶ *City of Boerne*, 521 U.S. at 519.

¹²⁷ *See id.*

¹²⁸ *See id.*

¹²⁹ *See id.* at 524.

¹³⁰ *Id.*

¹³¹ *Id.* at 529.

¹³² *Id.* at 520.

¹³³ *Id.* at 532 (quoting *United States v. Stanley (The Civil Rights Cases)*, 109 U.S. 3, 13 (1883)) (internal quotation marks omitted).

¹³⁴ *Id.* at 530.

widespread mischief.¹³⁵ The means adopted, moreover, had the effect of rendering void vast numbers of otherwise valid generally applicable and neutral laws—laws the Court had held in *Smith* were perfectly valid.¹³⁶ Hence, the Act had exceeded Congress' section five powers, and was therefore inapplicable to the states.¹³⁷

C. *Congress Tries Again*

Congress, having received the Court's admonition¹³⁸ in *Boerne*, prepared for the next round in this First Amendment ping-pong match. The lessons Congress learned from *Boerne* were that (1) a record of widespread discrimination must be established before a remedial statute can stand, and (2) the statute must be written more narrowly.¹³⁹

Senators Orrin Hatch of Utah and Edward Kennedy of Massachusetts led extensive senatorial hearings on land-use discrimination against religious organizations.¹⁴⁰ The congressional record compiled contained extensive testimony attesting to discrimination, numerous anecdotes of discrimination, and numerous statistical analyses evincing discrimination.¹⁴¹ Senators Hatch and Kennedy, on the basis of

¹³⁵ *See id.* at 531–32. However, the Court noted that even with a substantial record, RFRA could not “be considered remedial, preventive legislation, if those terms are to have any meaning. RFRA is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior.” *Id.* at 532.

¹³⁶ *Id.* at 534–35.

¹³⁷ *Id.* at 536. Justice Stevens in his concurrence would have invalidated the statute as a violation of the Establishment Clause. *Id.* (Stevens, J., concurring). He wrote that the legal weapon given to religious organizations by the statute was governmental preference for religion as opposed to irreligion, thus constituting an establishment of religion in general. *See id.* at 537 (“[T]he statute has provided the Church with a legal weapon that no atheist or agnostic can obtain. This governmental preference for religion, as opposed to irreligion, is forbidden by the [Establishment Clause of the First Amendment].”).

¹³⁸ “Admonition, *n.* Gentle reproof, as with a meat-axe. Friendly warning.” AMBROSE BIERCE, *THE UNABRIDGED DEVIL'S DICTIONARY* 12 (David E. Schultz & S.T. Joshi eds., 2000).

¹³⁹ *See City of Boerne*, 521 U.S. at 530–532.

¹⁴⁰ *See* 146 CONG. REC. S7774 (daily ed. July 27, 2000) (joint statement of Sen. Hatch and Sen. Kennedy).

¹⁴¹ *Id.* at S7775 (“[T]he hearing record reveals a widespread pattern of discrimination against churches as compared to secular places of assembly, and of discrimination against small and unfamiliar denominations as compared to larger

the evidence gathered, noted that discrimination often “lurks behind such vague and universally applicable reasons as traffic, aesthetics, or ‘not consistent with the city’s land use plan.’”¹⁴² Therefore, the senators concluded, “discrimination against religious [land] uses is a nationwide problem” demanding a federal solution.¹⁴³

Congress’ solution was the Religious Land Use and Institutionalized Persons Act of 2000 (“RLUIPA”), sponsored by Senators Hatch and Kennedy.¹⁴⁴ The Act passed easily, enjoying broad bipartisan support.¹⁴⁵ The purpose of the Act was to restore, to the extent permissible, the pre-*Smith* balance in the areas of land use regulation and institutionalized persons—that is, prisoners.¹⁴⁶ The scope was remarkably less than RFRA’s had been.

The “equal terms” provision is one of the protections provided for free exercise by the statute, stating 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.”¹⁴⁷ The congressional record includes statements indicating that the provisions of the statute were in large part codifications of existing free exercise jurisprudence, such as *Smith* and *Lukumi*, to, Congress hoped, avoid a repeat of *Boerne*.¹⁴⁸ In the land use half of the statute, section (a) appears to be a codification of *Sherbert* as defined by *Smith*.¹⁴⁹ Section (b)’s provisions appear

and more familiar ones. This factual record is itself sufficient to support prophylactic rules . . .”).

¹⁴² *Id.* at S7774.

¹⁴³ *Id.* at S7775.

¹⁴⁴ *See id.* at S7774.

¹⁴⁵ *See* HAMILTON *supra* note 14, at 96 (“President Clinton went on to say: ‘[Senators Hatch and Kennedy’s] work in passing this legislation once again demonstrates that people of all political bents and faiths can work together for a common purpose that benefits all Americans.’”).

¹⁴⁶ *See* 146 CONG. REC. S7778 (daily ed. July 27, 2000) (joint statement of Sen. Hatch and Sen. Kennedy).

¹⁴⁷ 42 U.S.C. § 2000cc(b)(1) (2006).

¹⁴⁸ “Each subsection closely tracks the legal standards in one or more Supreme Court opinions, codifying those standards for greater visibility and easier enforceability.” 146 CONG. REC. S7775 (daily ed. July 27, 2000). The record specifically cites to both *Smith* and *Lukumi* shortly after this statement. *Id.* at S7775–76.

¹⁴⁹ *See infra* Part III.A.

to be a codification of the *Smith-Lukumi* line of cases.¹⁵⁰ How well and to what extent the statute's terms adopt these precedents has, however, been heavily argued.

D. Conclusion—State of the Law on the Eve of RLUIPA

Sherbert today is severely restricted and is no longer the default rule. Rather, the default rule is now that of *Smith*, which allows for some burdening of religious exercise provided that such burdens are due to neutral laws of general applicability.¹⁵¹ However, should a law be found to be non-neutral and not generally applicable, as was the case in *Lukumi*, strict scrutiny may still apply. Furthermore, the inquiry into neutrality and general applicability is not limited to the terms of the challenged statute. Rather, neutrality may be violated if the effects of the statute are applied in a gerrymandered fashion or with a discriminatory motive.

Congress may act to protect free exercise, but must do so in a fashion that operates within the bounds defined by the Supreme Court. RLUIPA, the latest congressional attempt to protect free exercise, attempts to do so by adopting many of the Supreme Court's precedents as its rules. To date, the Supreme Court has not reviewed the land use portion of RLUIPA to determine whether Congress did so properly. Other courts have, however, and this Note's focus now turns there.

II. CIRCUIT BREAKER—THE THREE INTERPRETATIONS OF
“EQUAL TERMS”

To date, three circuit courts of appeals have dealt with RLUIPA's “equal terms” provision in highly similar contexts and have each come to very different conclusions as to its application. In this Part, each circuit's approach will be presented and analyzed in chronological order. Therefore, Section A concerns the Eleventh Circuit's handling of *Midrash Sephardi* in 2004; Section B concerns the Third Circuit's treatment of *Lighthouse* in 2007; and, lastly, Section C concerns the Seventh Circuit's

¹⁵⁰ See *infra* Part III.A.

¹⁵¹ However, following *Smith* at least twelve states had by 2006 passed statutes similar to the federal RFRA. See HAMILTON, *supra* note 14, at 109. In these states, the *Sherbert* rule may, depending on the precise formulation, still apply generally. See *id.*

disposition of *River of Life* in 2010. In Section D, a simple fact pattern will be presented and each circuit's approach applied to it to illustrate in concrete terms the application of each test.

A. *The Eleventh Circuit—Midrash Sephardi*

Confronted with a situation where the local zoning scheme excluded religious assemblies while allowing secular assemblies, the Eleventh Circuit held the “equal terms” provision violated.¹⁵²

The town of Surfside, Florida was a small municipality of approximately one square mile. Nonetheless, the town had contrived to divide itself into eight separate zones.¹⁵³ The town's zoning plan stated that any land use not specifically permitted in a zone was prohibited in that zone.¹⁵⁴ Religious land uses—in the words of the statute, “churches and synagogues”¹⁵⁵—were prohibited in all but one zone, and even there required a “conditional use permit” granted at the town's discretion.¹⁵⁶ The area along the main road through town had been zoned as a commercial district.¹⁵⁷ In this zone retail shopping, personal services, theaters, restaurants, private clubs, social clubs, lodge halls, dance studios, music instruction studios, modeling schools, language schools, and schools of athletic instruction were expressly allowed.¹⁵⁸ Churches and synagogues were prohibited.¹⁵⁹ The town's intention in doing so was to create a bustling business center to bolster year round tax revenue¹⁶⁰ and improve the town's economic position vis-à-vis its neighbors.¹⁶¹

¹⁵² *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1243 (11th Cir. 2004).

¹⁵³ *Id.* at 1219.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *See id.*

¹⁵⁷ *See id.* at 1219–20.

¹⁵⁸ *Id.* at 1220.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 1219–1222. Surfside's economy was otherwise dominated by tourism. *See id.* at 1219 (“[Surfside] has approximately 4,300 residents and an additional estimated tourist population of 2,030.”).

¹⁶¹ *Id.* at 1221–22.

Midrash Sephardi and Young Israel of Bal Harbour were two small Jewish congregations that chose to share rented space on the second floor of a building located in the commercial district.¹⁶² The town denied Midrash's applications for permits to operate as a synagogue in their rented space.¹⁶³ Midrash never appealed these denials.¹⁶⁴ Young Israel never applied for any permits or variances.¹⁶⁵ The two congregations joined to file an "equal terms" claim against the town, asserting that they had been treated on less than equal terms as compared to a non-religious assembly.¹⁶⁶ The district court granted summary judgment in favor of Surfside.¹⁶⁷ The congregations appealed.¹⁶⁸

The Eleventh Circuit first noted that the "equal terms" provision had the "feel" of an equal protection law¹⁶⁹ but lacked any explicit similarly situated requirement.¹⁷⁰ The court, therefore, concluded that the relevant consideration was whether land uses within the statute's "natural perimeter"¹⁷¹ were treated on "equal terms." From the terms of the statute, the court determined the "natural perimeter" for comparison provided by the statute was all assemblies and institutions.¹⁷²

However, the statute failed to define what qualifies as either an assembly or an institution.¹⁷³ In the absence of any statutory definition, the court defaulted to the plain meaning of the terms as found in the dictionary.¹⁷⁴ Thus, assembly was defined as "a company of persons collected together in one place [usually] and

¹⁶² *Id.* at 1220. Young Israel had been leasing space in the Coronado Hotel in Surfside's tourist district, but the building had been sold out from under them forcing them to join with Midrash temporarily. *See id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *See id.* at 1220–21.

¹⁶⁶ *Id.* at 1223, 1228–29.

¹⁶⁷ *Id.* at 1223.

¹⁶⁸ *Id.* at 1222–23.

¹⁶⁹ *Id.* at 1229.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 1230. The "natural perimeter" language is derived from Justice Harlan's concurrence in *Walz v. Tax Comm'n of New York*. *See* 397 U.S. 664, 696 (1970) (Harlan, J., concurring) ("In any particular case the critical question is whether the circumference of legislation encircles a class so broad that it can be fairly concluded that religious institutions could be thought to fall within the natural perimeter.").

¹⁷² *Midrash Sephardi*, 366 F.3d at 1230.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

usually for some common purpose (as deliberation and legislation, worship, or social entertainment),”¹⁷⁵ or, more simply, “a group gathered for a common purpose.”¹⁷⁶ An institution was likewise given its basic dictionary definition of “an established society or corporation: an establishment or foundation esp. of a public character.”¹⁷⁷

Midrash and Young Israel were clearly assemblies under the definition chosen. Thus, the question became whether the congregations were treated on less than “equal terms” versus secular assemblies.¹⁷⁸ The court focused the ordinance’s explicit allowance of “private clubs” in the zone.¹⁷⁹ “Private clubs” were likewise adjudged to be assemblies within the natural perimeter of the statute.¹⁸⁰ Thus, the conclusion became obvious: By allowing a secular assembly such as a private club to site in the zone, while precluding a religious assembly such as Midrash and Young Israel from doing so, the ordinances treated the assemblies on different terms in violation of the statute.¹⁸¹

The court then turned to the issue of what standard to apply. Holding the “equal terms” provision to be the codification of the *Smith-Lukumi* line of cases, the court concluded that the same rules should apply in the case of an “equal terms” violation.¹⁸² Thus, the challenged statute would be subject to strict scrutiny: Surfside must therefore adduce a compelling state interest for the inequality and prove the means adopted to be the least restrictive possible.¹⁸³ The court then invalidated the ordinances on the basis that the ordinances were not narrowly tailored, being simultaneously overinclusive and underinclusive.¹⁸⁴

Surfside, however, challenged the constitutionality of the statute on several bases.¹⁸⁵ Relevant here is only Surfside’s attack on the statute as being beyond Congress’ section five

¹⁷⁵ *Id.* (quoting WEBSTER’S 3D NEW INT’L UNABRIDGED DICTIONARY 131 (1993))

¹⁷⁶ *Id.* at 1231 (court’s rephrasing of the definition).

¹⁷⁷ *Id.* at 1230 (quoting WEBSTER’S 3D NEW INT’L UNABRIDGED DICTIONARY 1171 (1993)).

¹⁷⁸ *See id.* at 1231.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.* at 1232.

¹⁸³ *See id.*

¹⁸⁴ *Id.* at 1234–35.

¹⁸⁵ *Id.* at 1235–36.

powers under the Fourteenth Amendment.¹⁸⁶ The court found these contentions to be without merit.¹⁸⁷ First, the court noted that Congress had, unlike in RFRA, compiled a significant record of discrimination and had expressly stated in the legislative history its intention to codify existing Supreme Court precedent.¹⁸⁸ Second, the court noted that Congress enacted the statute as a remedial measure to correct the discrimination noted in the congressional record, permitting a broad interpretation.¹⁸⁹ Furthermore, because of the record of discrimination established, the statute could not be said to be either out of proportion or incongruent to the problem asserted.¹⁹⁰ Hence, RLUIPA was upheld as constitutional.¹⁹¹

B. The Third Circuit—Lighthouse

Presented with a comprehensive redevelopment plan seeking to create a culturally “vibrant” and “vital” downtown commercial district, the Third Circuit held that religious land uses could be excluded provided other land uses having similar effects on the plan’s “regulatory goals” were likewise excluded.¹⁹² Accordingly, the Third Circuit did not find the redevelopment plan violated the “equal terms” provision.¹⁹³

The Lighthouse Institute for Evangelism was a religious organization that sought to “minister to the poor and disadvantaged in downtown Long Branch, New Jersey.”¹⁹⁴ To better serve the poor and disadvantaged, Lighthouse purchased a building in downtown Long Branch, a depressed neighborhood

¹⁸⁶ *See id.* at 1236. Surfside also challenged the statute as a violation of the Establishment Clause, relying on Justice Stevens’ concurrence in *Boerne*, and as a violation of the Tenth Amendment. *Id.* Both challenges were unsuccessful, and are beyond the scope of this Note. *See id.*

¹⁸⁷ *Id.* at 1239–40.

¹⁸⁸ *Id.* at 1231–32, 1236, 1239–40.

¹⁸⁹ *See id.* at 1239.

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 1239–40.

¹⁹² *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 272 (3d Cir. 2007).

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 256.

with a large population living below the poverty line.¹⁹⁵ Lighthouse proceeded to apply for the appropriate permits from the city.¹⁹⁶

Long Branch had, however, enacted a comprehensive redevelopment plan to revitalize the depressed downtown area in which Lighthouse wished to site.¹⁹⁷ Under the terms of the plan, any land use not expressly allowed was prohibited as in *Midrash*.¹⁹⁸ Expressly allowed and encouraged were commercial land uses such as restaurants, bars, theaters, cinemas, retail dance studios, culinary schools, art workshops and studios, and fashion design schools.¹⁹⁹ Religious land uses, schools,²⁰⁰ and government buildings were prohibited by dint of their omission.²⁰¹ The city's stated purpose was to "[s]trengthen[] retail trade and City revenues," and to encourage a culturally "vibrant" and "vital" downtown district with a well developed retail sector.²⁰²

The city denied Lighthouse's application to operate as a church in the zone as the redevelopment plan prohibited such uses.²⁰³ Thereafter, Lighthouse filed an "equal terms" claim,²⁰⁴

¹⁹⁵ *See id.* at 278 (Jordan, J., dissenting).

¹⁹⁶ *Id.* at 279–80.

¹⁹⁷ *Id.* at 258 (majority opinion).

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ Specifically, elementary, middle and high schools were proscribed. *Id.* Certain specialty schools, such as culinary schools, were specifically allowed. *See id.*

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.* at 259.

²⁰⁴ The full procedural history is much more complicated than the abbreviated facts recounted in the main text. Lighthouse purchased the building in dispute in 1994. *Id.* at 257. Despite initial support from local leaders, the project soon ran into problems and Lighthouse's permit applications were denied. *Id.* at 278–80 (Jordan, J., dissenting). Between 1994 and 2001, Lighthouse applied for many permits and variances seeking approval for a church and soup kitchen, all of which were denied. *Id.* at 279–80. In 2001, Lighthouse filed for a preliminary injunction to compel Long Branch to grant Lighthouse's zoning permit. *Id.* at 280. The district court ruled for Long Branch, and the Third Circuit affirmed. *Id.* During this first round of litigation, Long Branch enacted the redevelopment plan. *Id.* at 280. Lighthouse sought approval for a church under the new plan, but was again denied. *Id.* at 281–82. In 2004, Lighthouse amended its complaint, adding RLUIPA and constitutional claims against Long Branch as to both the Redevelopment Plan and the prior ordinance. *Id.* at 282. In 2005, the district court granted summary judgment as to all claims for Long Branch. *Id.* Discussed in the main text is the appeal from the 2005 district court decision.

asserting less than equal treatment as compared to secular assemblies allowed by the statute.²⁰⁵ Taking its lead from *Midrash*, Lighthouse argued that where any secular assembly is allowed under the zoning ordinance, a religious assembly must also be allowed.²⁰⁶

The city argued that allowing religious land uses and schools would utterly thwart the city's purpose in enacting the redevelopment plan.²⁰⁷ The city asserted that the omission of religious land uses and schools was due to a New Jersey statute that prohibited the granting of liquor licenses within a specified distance of such land uses.²⁰⁸ A church, therefore, would create a zone around itself wherein no restaurants, bars, or clubs could site, thereby frustrating the city's attempt to foster a culturally "vibrant" and "vital" downtown.²⁰⁹

The court, siding with the city, rejected Lighthouse's invitation to adopt the Eleventh Circuit's *Midrash* test.²¹⁰ The court stated that the rule adopted in *Midrash* was far too expansive and was liable to exceed Congress' powers under section five of the Fourteenth Amendment.²¹¹ The lack of a similarly situated requirement in the *Midrash* test coupled with the broad definition of "assembly" and "institution" created a standard with no boundaries.²¹² According to the Third Circuit, under the *Midrash* test

if a town allows a local, ten-member book club to meet in the senior center, it must also permit a large church with a thousand members—or, to take examples from the Free Exercise caselaw, it must permit a religious assembly with rituals involving sacrificial killings of animals or the

²⁰⁵ *See id.* at 259.

²⁰⁶ *Id.* at 267.

²⁰⁷ *See id.* at 270.

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 270–71.

²¹⁰ *See id.* at 268.

²¹¹ *See id.* at 267 n.11, 268 & nn.12–13.

²¹² *See id.* at 268 n.12.

participation of wild bears²¹³—to locate in the same neighborhood regardless of the impact such a religious entity might have on the envisioned character of the [neighborhood].²¹⁴

The Third Circuit held such a test would create an affirmative right on the part of religious organizations to ignore zoning ordinances.²¹⁵ Such a result, the court stated, ran counter to both the text of the statute and the intent of Congress.²¹⁶

The court held a religious plaintiff must show that it was treated on less than “equal terms” as compared to a secular assembly similarly situated as to the challenged regulation’s “regulatory purpose.”²¹⁷ In arriving at this conclusion, the court began by looking at the legislative history behind RLUIPA.²¹⁸ Relying upon statements by members and committees of the House of Representatives and the Senate, the court concluded that RLUIPA was a precise codification of the *Smith-Lukumi* line of cases.²¹⁹ Specifically, the “equal terms” provision codified *Lukumi. Lukumi* and other Third Circuit precedents, the court continued, required that the challenged regulation be analyzed by the effects activities had upon the challenged statute’s “regulatory purpose.”²²⁰

²¹³ As fantastic as this reference may seem, the court is referring to *Blackhawk v. Pennsylvania*, a Third Circuit precedent written by then Circuit Judge Samuel Alito. 381 F.3d 202 (3d Cir. 2004). The Lakota Indians, of which plaintiff, though Lenape by blood, was one by adoption, hold black bears to be protectors of the Earth, essential to sanctify religious ceremonies and imbue worshippers with spiritual strength. *Id.* at 204. Plaintiff purchased in 1994 two black bear cubs, named Timber and Tundra, and began holding Lakota religious ceremonies on his property with them. *Id.* Pennsylvania requires a permit to keep such animals, and, beginning in 1997, there began a dispute as to the permit necessary. *See id.* at 205. Plaintiff claimed, on the basis of the Free Exercise clause, that he was exempt from needing to obtain the more expensive permit Pennsylvania claimed he needed. *See id.* Also, in 2000, the bears got loose and bit two people, resulting in the Pennsylvania Game Commission seeking an order to destroy Timber and Tundra. *See id.* at 206. The court accepted the Free Exercise claim, and separately prevented the destruction of the bears. *See id.* at 206, 214, 216.

²¹⁴ *Lighthouse*, 510 F.3d at 268.

²¹⁵ *See id.* at 269 n.14.

²¹⁶ *Id.* at 268.

²¹⁷ *Id.* at 266.

²¹⁸ *Id.* at 263.

²¹⁹ *See id.* at 264–65.

²²⁰ *Id.* at 264–67.

Here, the court held schools and religious land uses were similarly situated as to the regulatory purpose by reason of the New Jersey statute limiting the availability of liquor licenses near schools and churches.²²¹ The two land uses had similar effects upon the regulatory purpose as both, by operation of the New Jersey statute, would create areas around themselves wherein no restaurants, clubs, and bars could site, thereby frustrating Long Branch's purpose of creating a culturally "vital" and "vibrant" downtown area.²²² The redevelopment plan, therefore, prohibited the two land uses that would have detrimental effects upon the redevelopment plan's goals.²²³ Consequently, there was no violation of the "equal terms" provision.²²⁴ The court noted, however, that had a violation been found, the city would have been strictly liable.²²⁵

C. *The Seventh Circuit—River of Life*

The Seventh Circuit held that where a municipality sought through the application of "accepted zoning criteri[a]" to create a pure commercial district, there was no "equal terms" violation when the religious and secular assemblies similarly situated as to those "accepted zoning criteri[a]" were excluded.²²⁶

The village of Hazel Crest, Illinois, located some miles outside of Chicago Heights, was a small town in the midst of economic difficulties.²²⁷ Its downtown area by the railroad station had been depressed for some time.²²⁸ In an effort to revitalize the area, the village adopted a zoning plan that endeavored to create a pure commercial zone in and around the

²²¹ *Id.* at 272.

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.* The court did, however, find that the prior zoning ordinance did violate the "equal terms" provision. *See id.* at 272–73. As the record did not disclose the aims of the prior ordinance, and Long Branch failed to raise a triable issue of fact as to whether the ordinance treated religious and non-religious assemblies on less than "equal terms," Lighthouse was entitled to summary judgment. *Id.* However, because the ordinance had been superseded by the redevelopment plan, only monetary damages, including attorney's fees, were available to Lighthouse. *Id.* at 273.

²²⁵ *Id.* at 269.

²²⁶ *River of Life Kingdom Ministries v. Vill. of Hazel Crest*, 611 F.3d 367, 373–74 (7th Cir. 2010).

²²⁷ *Id.* at 368.

²²⁸ *Id.*

train station, the logic being that the proximity to the station would encourage traffic to bolster local business and tax revenue.²²⁹ Additionally, the village offered tax incentives to businesses that would site in the zone.²³⁰ As of July 2010, no businesses had moved to take advantage of those tax incentives.²³¹

River of Life Kingdom Ministries was a small congregation of about thirty regularly attending members that purchased an old warehouse and office²³² in the new commercial zone with the intention of renovating it into a church.²³³ At the time of purchase, River of Life was aware of the zoning plan, but went ahead with the purchase on the basis of some faulty legal advice—the faultiness of which was revealed when the church’s permits to operate as a church were denied by the village.²³⁴ Thereafter, River of Life proceeded to file an “equal terms” claim against Hazel Crest.²³⁵

The Seventh Circuit began by first surveying, and rejecting, the approaches of its sister circuit courts. Judge Posner, writing for the majority, rejected the *Midrash* test essentially for the

²²⁹ River of Life Kingdom Ministries v. Vill. of Hazel Crest, No. 08 C 0950, 2008 WL 4865568, at *2 (N.D. Ill. July 14, 2008), *aff’d*, 611 F.3d 367 (7th Cir. 2010).

²³⁰ *See id.*

²³¹ *See River of Life*, 611 F.3d at 375 n.1 (Manion, J., concurring).

²³² *Id.* at 368 (majority opinion). Between the various opinions in the *River of Life* case there is some disagreement as to what the building in question was. The district court recorded the building purchased as an “old warehouse and office.” *River of Life*, 2008 WL 4865568 at *2. Judge Manion in his concurrence and Judge Sykes in her dissent identify the building as an “abandoned car wash.” *River of Life*, 611 F.3d at 375 n.1 (Manion, J., concurring); *id.* at 377 (Sykes, J., dissenting) (“The property formerly housed a car wash . . .”). The author investigated the matter using Google’s Street View, and, based on the photographs, his personal experience with his family’s car wash business, and his father’s more than forty year car wash experience, has determined that the district court was almost certainly correct. *16842 Park Ave., Hazel Crest, Ill. 60429*, GOOGLE, <http://maps.google.com/maps?q=16842+Park+Ave.,+Hazel+Crest,+Ill.+60429&hl=en&sll=40.733432,-73.992452&sspn=0.074794,0.154324&hnear=16842+Park+Ave,+Hazel+Crest,+Cook,+Illinois+60429&t=m&z=16> (last visited Jan. 20, 2013).

²³³ *River of Life*, 2008 WL 4865568 at *2.

²³⁴ *See River of Life*, 611 F.3d at 378 (Sykes, J., dissenting).

²³⁵ *Id.* Hazel Crest was granted summary judgment in the district court, and had this grant affirmed by a Seventh Circuit panel. *Id.* at 368 (majority opinion). Subsequently, River of Life’s petition for a rehearing en banc was granted, resulting in the opinion discussed in the main text. *Id.*

same reasons as the Third Circuit.²³⁶ The court likewise rejected the *Lighthouse* test as too friendly to municipalities, and for entailing an inquiry into legislative history not likely to be profitable.²³⁷

The court, however, agreed with the general thrust of the *Lighthouse* test.²³⁸ That is, the court agreed as to the need for a similarly situated requirement similar to a “regulatory purpose” to limit the statute’s scope and the danger of an unbounded interpretation, such as that of *Midrash*, exceeding Congress’ powers.²³⁹ The court reasoned that the key defect of the *Lighthouse* test—the reliance upon a subjective standard—could be solved by a shift from “regulatory purpose” to “accepted zoning criteria.”²⁴⁰ “‘Purpose,’” Judge Posner wrote, “is . . . manipulable” whereas “[r]egulatory criteria’ are objective—and it is federal judges who will apply the criteria to resolve the issue.”²⁴¹

The court then turned to what “accepted zoning criteria” included.²⁴² After providing a brief survey of the history of cumulative and exclusive zoning, the court explained that these criteria include such traditional Euclidean zoning considerations as health, safety, and morals as well as concepts such as traffic and tax revenue generation.²⁴³ Thus, for example, a theater and a church would be similar as to “traffic” as both land uses tended towards concentrated comings and goings of persons, either at the end of a show or at the end of a religious service.²⁴⁴

²³⁶ See *id.* at 370. Furthermore, Judge Posner noted that the markedly more favorable treatment of religious organizations over similar secular organizations under the Eleventh Circuit’s test may raise Establishment Clause problems. *Id.* (“A subtler objection to the test is that it may be too friendly to religious land uses, unduly limiting municipal regulation and maybe even violating the First Amendment’s prohibition against establishment of religion by discriminating in favor of religious land uses.”). This statement appears to be based solely on Justice Stevens’s concurrence in *Boerne*. See *supra* note 137; *River of Life*, 611 F.3d at 375–76 (Manion, J., concurring). Whatever the validity of these concerns, they are beyond the scope of this Note.

²³⁷ See *River of Life*, 611 F.3d at 371.

²³⁸ See *id.*

²³⁹ *Id.* at 370–71.

²⁴⁰ *Id.* at 371.

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Id.* at 371–72.

²⁴⁴ *Id.* at 373.

Applying the criteria here, the court concluded that Hazel Crest truly had simply applied accepted zoning criteria in its attempt to carve out a pure commercial district.²⁴⁵ The court noted that the zoning ordinance specifically excluded other assemblies and institutions similar to churches, in the abstract, as to their tax generation and traffic potential.²⁴⁶ Thus, River of Life had no reasonable hope of success, and the court affirmed the grant of summary judgment to Hazel Crest.²⁴⁷

*D. A Simple Fact Pattern To Illustrate Each Circuit's Approach*²⁴⁸

The town of Rusty Wrench had fallen on hard times. Located in the Rust Belt, the heavy industry that had once formed the basis of the economy had been in decline for decades. The recent economic downturn signaled the death knell for the remaining industry in the town. The downtown area along the river, formerly a picture perfect American downtown replete with small Mom and Pop shops, had become run-down and was characterized by numerous boarded up shop windows and a decaying Woolworth's department store.

City leaders seeking to reverse the downward spiral and boost sagging tax revenues enacted a comprehensive redevelopment plan for the downtown area. In the downtown area, small boutique shops and restaurants were encouraged and property tax incentives were offered to businesses that would site there. Specifically allowed land uses included boutique shops, small retail stores, restaurants, cafés, catering halls, professional offices, and specialty schools such as dance, cooking, and art schools. The town's purpose was to create a "vital" and "vibrant" downtown area with a strong retail sector that would attract new investment and attract a new younger demographic.

Reverend Elmer Gantry was a traveling minister operating in the tri-county area. He became renowned for his revival meetings, and after many years of such revivals had finally,

²⁴⁵ *Id.* at 373–74.

²⁴⁶ *Id.* Land uses held to be similar to a religious land use, and likewise prohibited in the zone included "community centers, schools, and art galleries." *Id.* at 368.

²⁴⁷ *Id.* at 373–74.

²⁴⁸ This fact pattern is the creation of the author and is not from any case.

through tithes and donations, raised enough money to establish a proper church. Familiar with Rusty Wrench, and appreciating its central location in the area where his followers lived, Reverend Gantry looked to the depressed downtown by the river.

Forming Riverside Revival Ministries, Inc., Reverend Gantry purchased the abandoned Woolworth store in the downtown zone. He promptly sought the appropriate permits to renovate the building into a church. His applications were denied, and the matter soon made it to federal court.

Supposing this occurred in the Eleventh Circuit, the first question to be answered is whether the proposed religious use is an assembly within the meaning of the "equal terms" provision.²⁴⁹ Clearly, Reverend Gantry's church is a religious assembly within the statute's "natural perimeter."

Next, the court would determine whether the challenged ordinance allowed *any* other secular assembly to site within the zone.²⁵⁰ Here, the court would likely hone in on the express allowance of catering halls, though the inclusion of any assembly, including restaurants and cafés, would work as well given the terms of the analysis. Given a definition of an "assembly" as a "group gathered for a common purpose,"²⁵¹ a catering hall would be adjudged to be an assembly within the "natural perimeter" of the "equal terms" provision's language.

Thus, as a secular assembly is expressly allowed while a religious assembly is excluded, "equal terms" is violated. Thus, the burden would shift to Rusty Wrench to adduce a compelling state interest and to demonstrate that the means adopted were the narrowest possible.²⁵² The town's interest in creating a "vital" and "vibrant" downtown to increase tax revenues would not rise to the level of being compelling. Therefore, Rusty Wrench would be compelled to grant Reverend Gantry's zoning permit.

²⁴⁹ See *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1230 (11th Cir. 2004).

²⁵⁰ See *id.*

²⁵¹ *Id.* at 1231.

²⁵² See *id.* at 1232.

However, supposing Rusty Wrench was within the Third Circuit's jurisdiction, the first step would be to determine the challenged ordinance's "regulatory purpose."²⁵³ Here, the regulatory purpose is to create a "vital" and "vibrant" downtown to increase tax revenues.

The next step is to determine whether the statute is internally consistent in promoting that regulatory purpose.²⁵⁴ As the ordinance excludes all non-commercial uses that, like religious land uses, would not generate tax revenues, the court would likely rule that as to the underlying purpose of increasing tax revenues the ordinance is internally consistent. Therefore, the town excluded just those land uses that would have a detrimental effect upon the tax revenue generation purpose. Consequently there would be no "equal terms" violation, and the court would rule for Rusty Wrench against Reverend Gantry.

Finally, if Rusty Wrench was located within the Seventh Circuit's jurisdiction, the court would first determine the "accepted zoning criteria" Rusty Wrench used in creating its zoning plan.²⁵⁵ Here, the town clearly was crafting their zoning scheme in such a way as to maximize tax revenues.

The court would next determine whether all land uses similarly situated as to the zoning criteria used were treated on "equal terms."²⁵⁶ Here, the zoning ordinance created a pure commercial zone seeking to maximize taxable revenue. Land uses that do not produce property tax or sales tax revenues, including religious land uses, were all excluded under the terms of the statute, which allowed exclusively tax paying, profit seeking enterprises such as restaurants, boutique shops, professional offices and the like. Thus, the court would likely hold that Rusty Wrench had simply applied accepted zoning criteria and had treated all land uses equally on the basis of those criteria, and therefore hold for Rusty Wrench against Reverend Gantry.

²⁵³ See *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 270 (3d Cir. 2007).

²⁵⁴ See *id.* at 272.

²⁵⁵ See *River of Life Kingdom Ministries, Inc. v. Vill. of Hazel Crest*, 611 F.3d 367, 373 (7th Cir. 2010).

²⁵⁶ See *id.* at 373–74.

III. A RE-INTERPRETATION OF "EQUAL TERMS"

This Part is divided into three sections. The first Section introduces the canons of statutory construction that should guide and constrain the proper interpretation of the "equal terms" provision. RLUIPA as a whole is also presented to put the "equal terms" provision in its proper context as it relates to the rest of the statute. The second Section critiques the current three interpretations. Finally, Section three presents a proposed solution to the current circuit split based on Judge Sykes's interpretation of the "equal terms" provision.

A. *Limiting Canons of Construction.*

A basic canon of statutory construction is that a part of the statute should not be interpreted in such a way as to render it or other sections of the statute superfluous.²⁵⁷ In RLUIPA, the "equal terms" provision does not stand alone as the sole protection for religious land uses. Rather, the statute provides three other specific protections.

First, subsection (a)(1) provides that "[n]o government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government" can demonstrate the regulation is in furtherance of a compelling state interest and the means adopted are the least restrictive possible.²⁵⁸ The application of this section is conditioned on the fulfillment of one of three jurisdictional tests outlined in subsection (a)(2) being fulfilled: (A) "the substantial burden is imposed in a program or activity that receives Federal financial assistance," (B) the substantial burden affects interstate commerce, and (C) the substantial burden is imposed pursuant to a system that makes "individualized assessments of the proposed uses for the property involved."²⁵⁹

Thus, section (a) taken as a whole operates to restore the *Sherbert* test in those areas left open by the Court in *Smith*.²⁶⁰ That is, by the terms of the statute, *Sherbert* applies in situations

²⁵⁷ See *Corley v. United States*, 556 U.S. 303, 314 (2009).

²⁵⁸ 42 U.S.C. § 2000cc(a)(1).

²⁵⁹ *Id.* § 2000cc(a)(2).

²⁶⁰ *River of Life*, 611 F.3d at 381 (Sykes, J., dissenting).

involving individualized assessments,²⁶¹ where the federal government has effectively federalized an area via financial support,²⁶² and where a challenger to a regulation can make a claim intertwined with another right or power contained in the Constitution.²⁶³ Also significant is the self-contained nature of section (a), which clearly indicates Congress' intent to keep section (a)'s jurisdictional tests and compelling interest standard separate from the provisions in section (b).²⁶⁴

Second, subsection (b)(2) provides that “[n]o government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination.”²⁶⁵ Thus, a town could not, for example, enact an ordinance that prevents a Santeria church from operating, while allowing other religions to do so.²⁶⁶ This provision is essentially a codification of *Lukumi*.²⁶⁷ Where a statute has as its object the regulation or suppression of religious exercise, the challenged ordinance is presumptively invalid.²⁶⁸ However, unlike *Lukumi*, this provision, through its lack of any statement regarding the standard applied, operates as a strict liability statute, thus giving the challenged government no possible escape once a violation is found.²⁶⁹

Finally, subsection (b)(3) provides that a government may not impose a land use regulation that either: (A) “totally excludes religious assemblies from a jurisdiction,” or (B) “unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.”²⁷⁰ The general rule derived is that a government may not totally exclude religious land uses from its

²⁶¹ *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 884 (1990).

²⁶² See 146 CONG. REC. S7775 (daily ed. July 27, 2000) (joint statement of Sen. Hatch and Sen. Kennedy).

²⁶³ See *Smith*, 494 U.S. at 881.

²⁶⁴ See *River of Life*, 611 F.3d at 370–71; *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 269 (3d Cir. 2007).

²⁶⁵ 42 U.S.C. § 2000cc(b)(2).

²⁶⁶ See *supra* notes 105–14 and accompanying text.

²⁶⁷ See *supra* notes 106–15 and accompanying text.

²⁶⁸ See *River of Life*, 611 F.3d at 381–82 (Sykes, J., dissenting).

²⁶⁹ See *id.*

²⁷⁰ § 2000cc(b)(3). This subsection, by including only assemblies in (A) while including “assemblies, institutions, or structures” in (B), implies that there is a substantive difference between the categories of assemblies and institutions. *Id.* That is, certain land uses are, presumably, institutions only. However, this distinction, such as it may be, is beyond the scope of this Note.

jurisdiction.²⁷¹ Interestingly, however, part (B) of the subsection implies that there are reasonable grounds for excluding religious land uses from specific areas within a jurisdiction. Thus, so as not to render (B) superfluous, there must be some circumstances under which none of the statute's provisions, properly interpreted, have any vitality, thereby allowing a government to zone freely even as against religious land uses under some circumstances, provided such zoning does not result in total exclusion from the jurisdiction.

A second canon of statutory construction is the doctrine of constitutional avoidance. The doctrine allows courts to interpret a statute in a narrower fashion to preserve its constitutionality where there is cause to believe a broader reading suggested by the statute's plain terms may prove unconstitutional.²⁷² However, this doctrine is subject to two requirements. First, the broader reading must strongly suggest its unconstitutionality.²⁷³ Second, the narrower reading must be consonant with the legislative intent underlying it.²⁷⁴ That is, the narrower reading must still serve the legislative purpose and cannot be read to frustrate that purpose.²⁷⁵

Here, the potential constitutional issue is that the "equal terms" provision by its plain terms may exceed Congress' section five powers under the Fourteenth Amendment.²⁷⁶ Specifically, the "equal terms" provision may define a new right of religious assemblies and institutions to ignore neutral laws of general applicability, rather than guaranteeing to them rights defined in the Constitution and by the Supreme Court's precedents.²⁷⁷

The statute itself does not provide a definition of assembly or institution. Thus, if one were to, like the Eleventh Circuit, use a standard dictionary definition, the scope of the statute would be

²⁷¹ *River of Life*, 611 F.3d at 381–82 (Sykes, J., dissenting).

²⁷² *United States v. Fuey Moy*, 241 U.S. 394, 401 (1916) ("A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score.")

²⁷³ YULE KIM, CRS REPORT FOR CONGRESS: STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS 21 (2008).

²⁷⁴ *Id.*

²⁷⁵ *Id.*

²⁷⁶ *See Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 269 n.14 (3d Cir. 2007).

²⁷⁷ *See City of Boerne v. Flores*, 521 U.S. 507, 528–29 (1997).

nearly any land use conceivable.²⁷⁸ For example, the Eleventh Circuit's definition of assembly is "a company of persons collected together in one place [usually] and usually for some common purpose (as deliberation and legislation, worship, or social entertainment)."²⁷⁹ Put more simply, an assembly is a gathering of two or more persons for a common purpose.²⁸⁰ With such a definition what is not an assembly? As there is no explicit or implicit limiting principle, arguably a restaurant with a staff and a regular stream of customers is an assembly.²⁸¹ After all, the patrons, waiters and kitchen staff would be two or more persons gathered in one place for a common purpose. Ergo, suppose a town enacted a zoning ordinance allowing only restaurants in its "R-1" zone with no exceptions of any sort—a truly neutral law—and a religious assembly purchased land therein. The religious assembly could file, and succeed in, an action invoking the "equal terms" provision to compel the town to grant the religious assembly a permit to site there. The underlying logic would be that if a secular assembly—here a restaurant—is allowed by the zoning ordinance, the town must—to treat religious and non-religious assemblies on "equal terms"—allow a religious assembly. The provision's terms bear this result, with the consequence that the religious assembly has exercised a private right to ignore a neutral law of general applicability unquestionably constitutional as applied to other land uses—a "constitutional anomaly."²⁸²

B. A Critique of the Current Interpretations

The problem in *Midrash* as decided by the Eleventh Circuit is not its result, but rather its test, which commits two errors. First, the application of strict scrutiny here is utterly without

²⁷⁸ See *Lighthouse*, 510 F.3d at 269 n.14.

²⁷⁹ *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1230 (11th Cir. 2004) (quoting WEBSTER'S 3D NEW INT'L UNABRIDGED DICTIONARY 131 (1993)).

²⁸⁰ *Id.* at 1231.

²⁸¹ In *Lighthouse*, plaintiff indirectly made this argument. Relying on the *Midrash* test, plaintiff argued that Long Branch, having allowed a panoply of "assemblies," of which bars, clubs, and restaurants were prominent, had to allow religious assemblies such as itself to site. See *Lighthouse*, 510 F.3d at 267–68.

²⁸² *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 886 (1990).

basis in the statute.²⁸³ The statute operates as a strict liability statute.²⁸⁴ The design of the statute indicates that the compelling interest test applies only to section (a) of the statute and does not extend to section (b).²⁸⁵ Indeed, the amicus brief submitted by the United States argued this very point,²⁸⁶ and the Third and Seventh Circuits have both, correctly, held likewise.²⁸⁷

Second, the interpretation the court gave the statute may be “too friendly” to religious interests as noted by the Seventh Circuit.²⁸⁸ By using such broad definitions for “assembly” and “institution,” the statute implicates far more than is necessary.²⁸⁹ One would be hard pressed to find a land use under such broad definitions that would not qualify as either an “assembly” or “institution.” Indeed, the overinclusiveness of the definitions creates an affirmative right on the part of religious assemblies to ignore laws of general applicability—a result expressly disallowed in both *Smith* and *Boerne*.²⁹⁰

Where the Eleventh Circuit’s test swung too far in favor of religious plaintiffs, the pendulum in the Third Circuit swung too far in favor of municipalities. Though the Third Circuit correctly held the statute to impose a strict liability standard, the court made it all but impossible for a religious plaintiff to succeed in proving an “equal terms” violation.²⁹¹ That is, by defining the inquiry entirely in terms of the municipality’s “intent” or “regulatory purpose,” a municipality may always escape liability provided the asserted purpose is properly tailored.²⁹²

Furthermore, using a subjective standard such as the municipality’s “regulatory purpose” requires an inquiry into the legislative history underlying the zoning regulation.²⁹³ Such an inquiry “invites speculation concerning the reason behind

²⁸³ See *River of Life Kingdom Ministries v. Vill. of Hazel Crest*, 611 F.3d 367, 370–71 (7th Cir. 2010); *Lighthouse*, 510 F.3d at 268–69.

²⁸⁴ See *Lighthouse*, 510 F.3d at 268–69.

²⁸⁵ See *River of Life*, 611 F.3d at 382 (Sykes, J., dissenting).

²⁸⁶ See *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1231 (11th Cir. 2004).

²⁸⁷ See *River of Life*, 611 F.3d at 370–71; *Lighthouse*, 510 F.3d at 268–69.

²⁸⁸ See *River of Life*, 611 F.3d at 370.

²⁸⁹ See *Lighthouse*, 510 F.3d at 269 n.14.

²⁹⁰ See *id.*

²⁹¹ See *River of Life*, 611 F.3d at 371.

²⁹² See *id.*

²⁹³ See *id.*

exclusion of churches; invites self-serving testimony by zoning officials and hired expert witnesses; [and] facilitates zoning classifications thinly disguised as neutral but actually systematically unfavorable to churches”²⁹⁴

Moreover, the Third Circuit’s test makes the “equal terms” provision the equivalent of a Free Exercise claim, rendering the statute itself unnecessary.²⁹⁵ When one considers that when strict scrutiny applies a statute is almost certain to fail, the addition of strict liability by the statute seems to be an immaterial addition.²⁹⁶ The court, therefore, by its interpretation renders the statute superfluous—in direct violation of basic canons of statutory construction.²⁹⁷

The Seventh Circuit adopted a test that is substantially similar to that of the Third Circuit and suffers from many of the same flaws. In her spirited dissent, Judge Sykes argued that, (1) the majority’s new test turned the “equal terms” analysis on its head, and (2) the “accepted regulatory criteria” analysis was effectively the same as the Third Circuit’s “regulatory purpose” in effect.²⁹⁸ The majority’s analysis proceeded by comparing River of Life’s proposed church to those assemblies already excluded under the ordinance.²⁹⁹ Judge Sykes argued that the correct mode of analysis was a comparison of the proposed religious use against other uses *allowed* by the ordinance.³⁰⁰ The “equal terms” provision’s concern was that religious land uses were being treated less well than allowed secular assemblies, not that there be equivalence of disallowed uses.³⁰¹

²⁹⁴ *Id.*

²⁹⁵ *See Lighthouse*, 510 F.3d at 288 (Jordan, J., dissenting).

²⁹⁶ As the Supreme Court in *Boerne* explained:

Requiring a State to demonstrate a compelling interest and show that it has adopted the least restrictive means of achieving that interest is the most demanding test known to constitutional law. If “compelling interest really means what it says . . . , many laws will not meet the test. . . . [The test] would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind.”

City of Boerne v. Flores, 521 U.S. 507, 534 (1997) (quoting *Emp’t Div., Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872, 888 (1990) (internal quotation marks omitted)).

²⁹⁷ *See Lighthouse*, 510 F.3d at 288 (Jordan, J., dissenting).

²⁹⁸ *River of Life*, 611 F.3d at 386, 388 (Sykes, J., dissenting).

²⁹⁹ *Id.* at 373 (majority opinion).

³⁰⁰ *Id.* at 387–88 (Sykes, J., dissenting).

³⁰¹ *Id.* at 388.

Furthermore, Judge Sykes noted that “accepted zoning criteria” was just as amorphous and manipulable by zoning officials as “regulatory purpose.”³⁰² Indeed, many “regulatory purposes” could easily stand as “zoning criteria.”³⁰³ For example, a municipality could have as its purpose the increase of tax revenues, or apply zoning ordinance using tax generation capacity as the criteria for allowing and disallowing land uses.³⁰⁴ In either case, the municipality would have an easy victory—the inquiry having been decided on the municipality’s terms. Such a result clearly runs contrary to Congress’ intent.³⁰⁵

C. A Proposed Solution

Judge Sykes’s dissent in *River of Life* provides an excellent starting point for a workable solution. The proper test, Judge Sykes explained, is to assess whether religious and non-religious assemblies with a similar “primary purpose” are treated on “equal terms” as against each other.³⁰⁶ This approach, therefore, adopts the basic definition of an assembly as “a group of persons gathered together, usually for a particular purpose” and works directly with the common purpose mentioned in the definition.³⁰⁷ The inquiry, thus, focuses on the individual land uses being compared, preventing the municipality from setting the terms of the inquiry. Instead, each party would have an equal chance to litigate the equality of treatment between uses permitted.³⁰⁸ Should a violation be found, the municipality would be held strictly liable.³⁰⁹ The test, therefore, by having the terms of the

³⁰² *Id.* at 386.

³⁰³ *Id.*

³⁰⁴ *See id.* (“Routine ‘economic development’ and ‘tax-enhancement’ objectives—which can be characterized as ‘regulatory purposes’ or ‘accepted zoning criteria’—will immunize the exclusion of religious land uses from commercial, business, and industrial districts because religious assemblies do not advance these objectives and for-profit secular assemblies do.”).

³⁰⁵ *See id.* at 387, 389.

³⁰⁶ *See id.* at 391.

³⁰⁷ *Id.* at 389.

³⁰⁸ *See id.* at 390 (noting “hotels, motels, gymnasiums, health clubs, salons, restaurants, and taverns” as well as “day-care centers” are harder to classify, thus making their statuses as “assemblies” within the statute open to debate).

³⁰⁹ *See id.* at 370–71 (majority opinion); *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 269 (3d Cir. 2007).

inquiry set in this manner, would not be lopsided in favor of municipalities as it is under the Third and Seventh Circuit approaches, and Congress' intent would be given effect.

The "primary purpose" of an assembly would be assessed by looking at the use in the abstract—what is the usual primary "common purpose" of the people assembling for this land use?³¹⁰ Incidental purposes should be discarded to appropriately limit the inquiry.³¹¹ Furthermore, these people assembling for a common purpose must share "a degree of group affinity, organization, and unity around a common purpose"³¹² to further reasonably circumscribe the statute's breadth. Thus, a restaurant would not be an assembly equivalent to a church as the patrons of a restaurant have hardly any group identity; the patrons are simply there because, presumably, they are hungry. By contrast, parishioners to a church assemble because of their religious identity and to engage in the practice of their religion with others who likewise identify themselves with the religion. The distinction is clear, reasonable, and workable.

Applying this test to the Rusty Wrench example of Part II.D yields results similar to the Eleventh Circuit's test, but does so while appropriately limiting the inquiry. The first step in the analysis would be to determine which land uses allowed by the statute are assemblies within the statute.³¹³ Under the basic definition of a group of persons gathered together for a common purpose, restaurants, catering halls and specialty schools are all clear candidates in this context, despite the commercial nature of each. The next step is to then judge which of the identified assemblies implicate a sufficient "degree of group affinity, organization, and unity around a common purpose."³¹⁴ Of the three land uses identified, the specialty schools and catering hall land uses would imply such a group identity around a common purpose. First, in the case of the specialty schools, the students are generally organized into classes under the leadership of a

³¹⁰ See *River of Life*, 611 F.3d at 390 (Sykes, J., dissenting).

³¹¹ Doing otherwise would lead to absurd results where a hotel, the primary purpose of which is providing temporary lodging, that offers meeting hall or ballroom space for rent could be considered roughly equivalent assembly for purposes of the statute. See *id.*

³¹² *Id.*

³¹³ See *id.*

³¹⁴ *Id.*

teacher and are engaged in a common activity with the common goal of education in a particular field. Second, in the case of the catering hall, the persons gathering there generally do so in the context of celebrations such as wedding receptions—often following a religious wedding—where all invitees share a definite group affinity and identity in relation to the celebration. Thus, on these facts, the court would likely hold for Reverend Gantry and against Rusty Wrench.

This interpretation has the added benefits of avoiding the potential constitutional issue outlined above, effecting congressional intent, and remaining true to the text and structure of the statute as a whole. Returning to the restaurant example discussed in Part III.A, the private right enjoyed there by the religious organization challenging the zoning ordinance allowing only restaurants in the zone would no longer exist. Rather than simply looking for one-to-one equality of all possible non-religious assemblies versus all religious assemblies, the inquiry would be focused upon the allowed and allowable land uses and their “primary purposes.” In such a case, the relevant inquiry would be determining what the primary purpose of a restaurant is, and whether that purpose is similar to that of a church. Clearly, in such a case the “equal terms” provision would not be violated. The primary purpose of people assembling at a restaurant is to have a meal—the patrons do not identify with the restaurant or each other to any great or lasting degree. A church, as noted above, implicates much more: it implies a group identity for those assembling and they assemble precisely for the purpose of acting as a group in a common activity—religious worship. Therefore, the absurd result creating a “constitutional anomaly” noted earlier is addressed.

Likewise, Congress’ intent to provide religious organizations a new tool with which to combat impermissible discrimination in land use regulations would be fulfilled.³¹⁵ The religious plaintiff would be able to assert a claim with a reasonable chance of success provided the organization could identify an assembly or institution with a similar purpose allowed or allowable in the

³¹⁵ See 146 CONG. REC. S7776 (daily ed. July 27, 2000) (joint statement of Sen. Hatch and Sen. Kennedy).

zone.³¹⁶ Examples of such similarly purposed assemblies would be those pursuing charitable or educational ends,³¹⁷ essentially running the gamut of non-profit and tax exempt uses. However, the potential universe of similarly purposed assemblies would not be restricted to those two areas. Rather, the inquiry would be open to a case-by-case analysis of all the land uses allowed by the statute implicated. The open ended nature of the inquiry would allow nearly any religious plaintiff with a reasonable claim to survive a summary judgment motion. Furthermore, as cases are decided, the boundaries of the inquiry would become clearer and more reliable, providing guidance to both zoning boards and religious organizations, ultimately reducing discriminatory land use regulations and the associated legal battles.

Finally, this interpretation hews closely to the text and fits neatly within the overall statutory scheme unlike the current circuit approaches. The inquiry looks to the plain meaning of the words of the statute and gives them a meaning consonant with the underlying congressional intent and terms of the statute as a whole. Were one to adopt the Eleventh Circuit's test, the "equal terms" provision would be so powerful as to render subsections (b)(2) and (3) superfluous, and to render section (a) significantly less vital.³¹⁸ Likewise, if one were to adopt either the Third or Seventh Circuit's test, the "equal terms" provision would be rendered largely inoperative.³¹⁹

This proposed test, by contrast, appropriately mimics the Court's *Lukumi* analysis by invalidating laws that, though outwardly generally applicable, are either by their terms or

³¹⁶ Parenthetically, it should be noted that the "equal terms" provision does not confer immunity from zoning regulations. *See id.* at S7777. Indeed, were a "megachurch" to attempt to use the "equal terms" provision to get ancillary uses permitted—such as a bowling alley or a McDonald's—under the umbrella of allowing the basic religious land use of a church, the "equal terms" should not provide a means to circumvent an otherwise valid land use ordinance except in extremely rare circumstances. *See HAMILTON, supra* note 14, at 80 (noting the recent phenomenon of the "megachurch" resembling "self-contained communities"). In such a circumstance, the analysis would run into serious problems in the first leg of the analysis as it would be difficult, if not impossible, to determine the "primary purpose" of the religious land use for comparison against that of secular assemblies.

³¹⁷ After all, religious organizations do teach their followers the tenets of their religion, and commonly operate Sunday schools and the like as an adjunct to regular religious services.

³¹⁸ *See supra* notes 257–72 and accompanying text; *see also supra* Part III.B.

³¹⁹ *See River of Life*, 611 F.3d at 387; *see also supra* Part III.B.

effects discriminatory. With the "equal terms" as an objective inquiry as to the terms and effects of the statute in question, the province of (b)(2), dealing with either express or implied discrimination "*on the basis of religion*," would be left unaffected. Thus, a religious organization would be able to challenge a land use ordinance that, though generally applicable by design, was enacted with an improper motive under (b)(2). Likewise, (b)(3) would remain operable to prevent total exclusion from a jurisdiction as the other subsections of (b) would not be so powerful and far reaching to render such an exclusion impossible. Finally, section (a) would remain operable to handle situations involving laws that are not generally applicable and make use of individualized assessments. Thus, each provision would have a proper and distinct role to play with relatively little overlap between each.

CONCLUSION

The Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), the latest chapter in the battle between Congress and the Court over the proper application of the Free Exercise clause, seeks to prevent religious discrimination as identified by Congress in an extensive record. By its simple terms, the equal terms provision was well drafted to accomplish just such a result. However, its simplicity of construction is such that it has created tremendous problems of interpretation, and, indeed, has lent itself to interpretations with a high probability of being unconstitutional. But RLUIPA, and the equal terms provision in particular, need not suffer the same fate as RFRA or be rendered toothless. In *Midrash*, *Lighthouse*, and *River of Life* each circuit was cognizant of the danger and, in the cases of the Third and Seventh Circuit, took affirmative measures to avoid the danger, albeit by contravening Congress' intent. However, by reference to the common purposes of the assemblies compared, a reasonable middle ground is found that accomplishes Congress' intent and does so in a fashion that does not offend the Constitution.

Unfortunately, this sensible middle ground is not the law in any jurisdiction. Rather, at present, there exist three separate and distinct interpretations, each with myriad defects. The situation demands addressing by either Congress or the Supreme

Court to lay out, once and for all, the appropriate interpretation for courts to apply. Again, given the recent economic downturn, the need for such a settled interpretation has become more pressing. As municipalities struggle for ways to boost sagging tax revenues, they will engage in new and creative land use legislation that favors tax generating land uses over tax-exempt religious land uses such as churches. Thus, without a correct interpretation for zoning boards and religious organizations to rely upon, RLUIPA's grand purpose to prevent religious discrimination will be frustrated more often, and more seriously, as time goes on.