TREAT THY NEIGHBOR AS THYSELF? EQUAL PROTECTION AND THE SCOPE OF RLUIPA'S EQUAL TERMS CLAUSE

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† Associate Editor, *Cardozo Law Review*, Volume 43. J.D. Candidate, May 2022, Benjamin N. Cardozo School of Law; B.A., Duke University, 2017. I would like to thank Professor Stewart Sterk for his guidance and constructive criticism. I would also like to thank the amazing editors of the *Cardozo Law Review* for their tireless work in preparing this Note for publication. Most importantly, I would like to thank my wife, parents, and extended family for their consistent and unconditional support.

INTRODUCTION

Can municipalities use the zoning power to prevent racial or religious minorities from moving in? Not expressly. In 1917, almost a decade before the dawn of modern "Euclidean" zoning[1]—and several decades before *Brown v. Board of Education* abolished "separate but equal"[2]—the Supreme Court decided that racially segregated zoning, then common,[3] was unconstitutional.[4] But municipalities have other ways to exclude minorities via the zoning power.[5]

When residents of a municipality want to exclude a religious group from moving in, the local zoning authority can prevent the religious

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1 *Compare* Buchanan v. Warley, 245 U.S. 60 (1917) (holding unconstitutional a law establishing racially segregated zones for housing and "places of assembly"), *with* Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (upholding, for the first time, a modern zoning scheme with residential, commercial, and industrial zones).

2 Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954).

3 Roger L. Rice, *Residential Segregation by Law, 1910–1917*, 34 J.S. HIST. 179, 179–82 (1968) (explaining that racially segregated zoning existed in Baltimore, Richmond, Norfolk, Ashland, Roanoke, Portsmouth, Winston-Salem, Greenville, Atlanta, Louisville, St. Louis, Oklahoma City, and New Orleans); Jonathan T. Rothwell, *Racial Enclaves and Density Zoning: The Institutionalized Segregation of Racial Minorities in the United States*, 13 AM. L. & ECON. REV. 290, 293 (2011).

4 *Buchanan*, 245 U.S. at 81–82 ("[T]he ordinance annulled . . . the civil right of a white man to dispose of his property . . . to a person of color and of a colored person to make such disposition to a white person. . . . [This ordinance] is in direct violation of . . . the Fourteenth Amendment of the Constitution preventing state interference with property rights except by due process of law.").

5 For example, a neighborhood can zone for low-density or single-family housing, which can present an insurmountable economic obstacle for minorities. *See* Andrew H. Whittemore, *The Experience of Racial and Ethnic Minorities with Zoning in the United States*, 32 J. PLAN. LITERATURE 16, 17–19 (2017); Rothwell, *supra* note 3, at 291 ("Using two datasets of land regulation for the largest metropolitan areas, the results indicate that anti-density regulations are responsible for a large share of the observed patterns in segregation between 1990 and 2000."); S. Burlington Cnty. NAACP v. Mount Laurel, 336 A.2d 713, 717 (N.J. 1975) (recognizing that poor racial minority groups are "barred from so many municipalities by reason of restrictive land use regulations . . . . [allowing only] relatively high-priced, single-family detached dwellings on sizeable lots and, in some municipalities, expensive apartments"). A moratorium on development is another way to maintain the neighborhood's ethnic status quo. *See, e.g.*, Associated Home Builders, Inc. v. City of Livermore, 557 P.2d 473, 617–18 (Cal. 1976) (Mosk, J., dissenting) (stating that the development moratorium, upheld by the majority, was intended to "keep newcomers out of the city"). Some states have made efforts to prevent such exclusionary practices. *See, e.g.*, Laurel Wamsley, *Oregon Legislature Votes to Essentially Ban Single-Family Zoning*, NPR (July 1, 2019, 7:03 PM), https://www.npr.org/2019/07/01/737798440/oregon-legislature-votes-to-essentially-ban-single-family-zoning [https://perma.cc/48UU-FSEE]; S. Burlington Cnty. NAACP v. Mount Laurel (*Mt. Laurel II*), 456 A.2d 390 (N.J. 1983); *see also* Joseph William Singer, *Trump Administration Withdraws Obama Era Rules on "Affirmatively Furthering Fair Housing" (AFFH)*, HARV. UNIV. (Aug. 18, 2020), https://scholar.harvard.edu/jsinger/blog/trump-administration-withdraws-obama-era-rules-"affirmatively-furthering-fair-housing" [https://perma.cc/2FLT-RSHB].

group from building, operating, or expanding a house of worship or religious school.[6] At zoning hearings, objectors to a proposed house of worship or religious school usually invoke neutral concerns like parking, traffic, or revenue, but these concerns can and often do veil discriminatory or mixed motives.[7] Minority groups, like Orthodox Jews,[8] Muslims,[9] Hindus,[10] Buddhists,[11] Sikhs,[12] and racial minorities,[13] are disproportionately subjected to zoning disapproval.[14]

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6 *See, e.g.*, *Accusations of Anti-Semitism Return to a New York Village*, ECONOMIST (Dec. 10, 2020) [hereinafter *Accusations of Anti-Semitism*], https://www.economist.com/united-states/2020/12/10/accusations-of-anti-semitism-return-to-a-new-york-village [https://perma.cc/K8QT-UJ2X]; H.R. REP. NO. 106-219, at 22, 23 n.111 (1999) ("It is very easy . . . for land use regulators to exclude Orthodox Jews from living in a neighborhood by excluding their place of worship.") ("[T]he mayor told the city manager to deny the permit because 'We don't want Spics in this town.' . . . [Another town] denied a permit to a black church . . . on the ground that the city would soon look like Patterson, a predominantly African-American city nearby.").

7 *See* 146 CONG. REC. S7774 (daily ed. July 27, 2000) (joint statement of Sens. Orrin Hatch and Edward Kennedy, RLUIPA's cosponsors) ("[O]ften, discrimination lurks behind such vague and universally applicable reasons as traffic, aesthetics, or 'not consistent with the city's land use plan.'"); U.S. DEP'T OF JUST., COMBATING RELIGIOUS DISCRIMINATION TODAY: FINAL REPORT 23 (2016) ("Roundtable Participants—including lawyers, advocates, and community members—repeatedly emphasized that . . . [the zoning] discrimination has become less overt in recent years. . . . [A pastor] said: 'They used to . . . say we don't want more Christians. Now they . . . say . . . you've got building code issues and traffic [problems].'" (last alteration in original)); Ben Sales, *Insisting It Is Not Anti-Semitic, NJ Group Sees Haredi Orthodox as a Threat to 'Quality of Life,'* JEWISH TELEGRAPHIC AGENCY (Jan. 23, 2019, 5:30 PM), https://www.jta.org/2019/01/23/united-states/insisting-it-is-not-anti-semitic-nj-group-sees-haredi-orthodox-as-a-threat-to-their-quality-of-life [https://perma.cc/L9SG-VPNU] ("The expansion has created a backlash from some non-Orthodox neighbors, who often say their objections are about zoning, housing density and local support for public schools. But the Orthodox residents and others see some of the criticism as anti-Semitic."); *Mt. Laurel II*, 456 A.2d at 410 ("Papered over with studies, rationalized by hired experts, the ordinance at its core is true to nothing but Mount Laurel's determination to exclude the poor. Mount Laurel is not alone; we believe that [the practice] is widespread . . . .").

8 *See Accusations of Anti-Semitism*, *supra* note 6; Douglas Laycock & Luke W. Goodrich, *RLUIPA: Necessary, Modest, and Under-Enforced*, 39 FORDHAM URB. L.J. 1021, 1026–27 (2012).

9 *See* Laycock & Goodrich, *supra* note 8, at 1025–26.

10 *See id.* at 1029.

11 *See, e.g.*, Cambodian Buddhist Soc'y of Conn., Inc. v. Plan. & Zoning Comm'n, 941 A.2d 868, 873, 907 (Conn. 2008); Vietnamese Buddhism Study Temple in Am. v. City of Garden Grove, 460 F. Supp. 2d 1165 (C.D. Cal. 2006).

12 *See, e.g.*, Guru Nanak Sikh Soc'y v. Cnty. of Sutter, 456 F.3d 978 (9th Cir. 2006).

13 *See, e.g.*, H.R. REP. NO. 106-219, at 23 n.111 (1999).

14 *See id.* at 20 ("[A] study conducted at Brigham Young University [found] that Jews, small Christian denominations, and nondenominational churches are vastly over represented in reported church zoning cases."); Laycock & Goodrich, *supra* note 8, at 1029 ("Jews, Muslims, Buddhists, and Hindus constitute only about 3% of the United States population. But in the first ten years under RLUIPA, they represented 34% of DOJ's caseload. Cases involving racial-minority Christian congregations represented another 30%.").

In 2000, after considering extensive evidence[15] of zoning laws that abridged the First Amendment right to assemble for religious purposes, Congress unanimously passed[16] the Religious Land Use and Institutionalized Persons Act (RLUIPA).[17] RLUIPA's equal terms clause, emulating the Fourteenth Amendment's Equal Protection Clause,[18] provides that "[n]o government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution."[19]

Like the Equal Protection Clause, the equal terms clause prohibits disparate treatment, unless that disparate treatment is fairly justified by a nondiscriminatory governmental interest.[20] Thus, if a municipality permits the operation of a ten-member book club, the equal terms clause compels that municipality to permit a ten-member bible study, since those comparators are similarly situated with respect to any relevant, nondiscriminatory governmental interests.[21] However, the

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15 146 CONG. REC. S7774 (daily ed. July 27, 2000) (joint statement of Sens. Orrin Hatch and Edward Kennedy) ("The hearing record compiled massive evidence that [the right to assemble for worship] is frequently violated.").

16 U.S. DEP'T OF JUST., REPORT ON THE TENTH ANNIVERSARY OF THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT 2, 4 (2010), http://www.justice.gov/crt/rluipa_report_092210.pdf [https://perma.cc/CCN4-HHXQ].

17 42 U.S.C. § 2000cc. RLUIPA governs not only zoning regulations, but also regulations that affect the religious practices of prisoners and other "institutionalized persons." 42 U.S.C. § 2000cc-1; *see, e.g.*, Holt v. Hobbs, 574 U.S. 352 (2015) (holding that RLUIPA protects a prisoner's right to grow a beard in accordance with his religious beliefs). This Note focuses exclusively on the land use section of the statute.

18 The equal terms clause was apparently intended to enforce Free Exercise rights rather than Equal Protection rights. *See* 146 CONG. REC. S7775 (daily ed. July 27, 2000) (joint statement of Sens. Orrin Hatch and Edward Kennedy) (defending the constitutionality of RLUIPA, the senators wrote, "The land use sections of the bill have a . . . constitutional base: they enforce the Free Exercise . . . Clause."). Nonetheless, courts and scholars have noted the close relation between the equal terms clause and the Equal Protection Clause. *See, e.g.*, Tree of Life Christian Schs. v. City of Upper Arlington, 905 F.3d 357, 368 (6th Cir. 2018) ("[O]ne could plausibly read the equal terms provision *in pari materia* with the Fourteenth Amendment's Equal Protection Clause."); Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1229 (11th Cir. 2004) ("[The equal terms clause] has the 'feel' of an equal protection law."); Lighthouse Inst. for Evangelism Inc. v. City of Long Branch, 100 F. App'x 70, 77 (3d Cir. 2004) (citing an Equal Protection zoning case, *Congregation Kol Ami v. Abington Twp*, 309 F.3d 120 (3d Cir. 2002), to help construe the equal terms clause).

19 42 U.S.C. § 2000cc(b)(1).

20 *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985) (concluding that the Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike"); *infra* Section II.B (explaining that the circuit courts have construed the equal terms clause to uphold disparate treatment that is justified by a nondiscriminatory governmental interest).

21 *See* Konikov v. Orange Cnty., 410 F.3d 1317, 1328–29 (11th Cir. 2005) (holding that a small neighborhood religious group is similarly situated to a small local boy scout club).

clause would not compel that municipality to permit a megachurch with one thousand members, since a megachurch is distinguishable from a small book club with regard to nondiscriminatory zoning criteria like traffic and parking.[22] These are extreme examples; other scenarios do not have such clear answers. Can a municipality disparately exclude houses of worship in order to promote a nightlife culture,[23] or in order to maximize tax revenue?[24]

This Note addresses the question of which governmental interests should fairly justify disparate treatment of religious land uses under RLUIPA's equal terms clause. To answer this question, this Note compares the equal terms clause to the Fourteenth Amendment's Equal Protection Clause. Under Equal Protection, whether a governmental interest fairly justifies disparate treatment depends on the standard of review applied by the court.[25] Available standards of review variously accept legitimate, important, or compelling governmental justifications.[26] The scope of RLUIPA's equal terms clause, too, depends on whether it will accept a legitimate governmental justification or whether it should demand an important or compelling one.

Part I of this Note discusses RLUIPA generally, including its historical context, and argues that the statute should be construed broadly. Parts II and III of this Note focus on RLUIPA's equal terms clause. Part II critiques the construction of the clause prevalent among the circuit courts of appeals. Part III proposes that the equal terms clause should be construed in accordance with the "intermediate scrutiny" standard of review applied in Equal Protection jurisprudence.

I. BACKGROUND: RLUIPA

Though this Note will later focus on the construction of RLUIPA's equal terms clause, this Part concerns the policy and intent behind RLUIPA as a whole. Examining RLUIPA's historical context and text, this Part ultimately concludes that the statute should be understood as

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

23 *See, e.g.*, *id.* at 270–72.

24 *See, e.g.*, River of Life Kingdom Ministries v. Vill. of Hazel Crest, 611 F.3d 367, 373–74 (7th Cir. 2010) (en banc); Tree of Life Christian Schs. v. City of Upper Arlington, 905 F.3d 357, 371–72 (6th Cir. 2018).

25 *See generally* Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481, 496–518 (2004).

26 *Id.*

broadly as possible to comprehensively protect religious exercise within the statute's areas of operation.[27]

A. *The Road to RLUIPA*

To understand RLUIPA and the policy behind it, this Section begins by describing the unique historical context in which the statute was adopted. One judge described this historical context as a "decade-long tug of war between Congress and the Supreme Court over the protection of religious liberty."[28] Throughout the 1990s, Congress zealously tugged to establish broader protections for religious liberty.[29] RLUIPA's historical context suggests that the statute should be given a broad interpretation to give effect to congressional purpose and policy.[30]

In 1963, the Supreme Court in *Sherbert v. Verner* held that laws that burden the First Amendment right to free exercise of religion are valid only if justified by a "compelling" state interest.[31] The *Sherbert* rule remained good law through the late 1980s.[32] But in *Employment Division v. Smith*, decided in 1990, the Supreme Court effectively overruled *Sherbert*,[33] holding that a law may burden religious exercise so long as the law is facially neutral and generally applicable.[34] Respondents in *Smith* were Native Americans who were fired from their jobs after ingesting peyote, an illegal hallucinogenic drug, for sacramental purposes at their Native American church.[35] They were subsequently denied state unemployment benefits on the basis that they had been fired for work-related misconduct.[36] Respondents alleged that this denial of benefits infringed on their First Amendment right to

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27 *See* 42 U.S.C. § 2000cc-3(g) ("This Act shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this Act and the Constitution.").

28 *River of Life*, 611 F.3d at 378 (Sykes, J., dissenting); *accord* Cutter v. Wilkinson, 544 U.S. 709, 714 (2005) ("RLUIPA is the latest of long-running congressional efforts to accord religious exercise heightened protection from government-imposed burdens . . . .").

29 *See River of Life*, 611 F.3d at 378.

30 *See id.* at 375 (Manion, J., concurring); *id.* at 378 (Sykes, J., dissenting); Tree of Life Christian Schs. v. City of Upper Arlington, 905 F.3d 357, 376 (6th Cir. 2018) (Thapar, J., dissenting).

31 Sherbert v. Verner, 374 U.S. 398, 403 (1963).

32 *See* Thomas v. Rev. Bd. of Ind. Emp. Sec. Div., 450 U.S. 707, 719–20 (1981); Hobbie v. Unemp. Appeals Comm'n, 480 U.S. 136, 141 (1987).

33 Emp. Div. v. Smith, 494 U.S. 872, 907–08 (1990) (Blackmun, J., dissenting).

34 *See id.* at 878–79.

35 *Id.* at 874.

36 *Id.*

freely exercise their religion.[37] The Court held that the denial of unemployment benefits did not violate the First Amendment right to free exercise because the burden on religious exercise was "not the object of the [law] but merely the incidental effect of a generally applicable and otherwise valid provision . . . ."[38]

Groups from across the political spectrum, including the American Civil Liberties Union, numerous religious groups, and many constitutional scholars, immediately criticized and opposed the *Smith* decision.[39] In response, Congress, with uncharacteristically broad bipartisan support,[40] passed the Religious Freedom Restoration Act of 1993 (RFRA), which reinstated the *Sherbert* rule, applying strict scrutiny to *any* law that substantially burdens religious exercise.[41] RFRA's broad applicability and support signaled an impassioned and near-ubiquitous desire to protect religious liberty against the new vulnerability caused by *Smith*.[42]

The Supreme Court soon decided that RFRA was in fact *too* broad, sending Congress back to the drawing board. In imposing RFRA on state governments, Congress had relied on its Fourteenth Amendment

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37 *Id.*

38 *Id.* at 878.

39 *See* Linda Greenhouse, *Court Is Urged to Rehear Case on Ritual Drugs*, N.Y. TIMES, May 11, 1990, at A16 (noting the broad opposition to the *Smith* decision); Nat Hentoff, *Justice Scalia vs. the Free Exercise of Religion*, WASH. POST (May 19, 1990), https://www.washingtonpost.com/archive/opinions/1990/05/19/justice-scalia-vs-the-free-exercise-of-religion/28fac3d4-37e3-4278-8559-26f1107026a5 [https://perma.cc/V2A6-5WK3] (calling the Court's opinion "alarming"). Recently, in *Fulton v. City of Philadelphia*, petitioner asked the Court to overrule *Smith*. Brief for Petitioners at 37–52, Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021). Three Justices agreed, while two others, finding for petitioner on narrower grounds, nonetheless acknowledged that "the textual and structural arguments against *Smith* are . . . compelling." *Fulton*, 141 S. Ct. at 1883 (Barrett, J., concurring).

40 The bill, H.R. 1308, had 170 cosponsors and was passed by a voice vote in the House of Representatives. H.R. 1308, 103d Cong. (1st Sess. 1993); 139 CONG. REC. 9687 (1993). It was subsequently passed as amended in the Senate by a vote of ninety-seven to three. 139 CONG. REC. 26416 (1993). President Clinton quipped at the signing ceremony that the bill's bipartisan support "shows, I suppose, that the power of God is such that even in the legislative process miracles can happen." President William J. Clinton, Remarks on Signing the Religious Freedom Restoration Act of 1993, *in* 2 PUBLIC PAPERS OF THE PRESIDENTS OF THE U.S.: WILLIAM J. CLINTON 2000 (Nov. 16, 1993).

41 42 U.S.C. § 2000bb; *see* City of Boerne v. Flores, 521 U.S. 507, 512 (1997) ("Congress enacted RFRA in direct response to the Court's decision in *Employment Div., Dept. of Human Resources of Ore. v. Smith*."); H.R. REP. NO. 103-88, at 1 (1993) ("[RFRA] responds to the Supreme Courts decision in [*Smith*] by creating a statutory right requiring that the compelling governmental interest test be applied in cases in which the free exercise of religion has been burdened by a law of general applicability.").

42 *See* sources cited *supra* notes 40–41.

power to make prophylactic laws enforcing constitutional rights.[43] But in *City of Boerne v. Flores*,[44] decided in 1997, the Supreme Court held that RFRA, as applied to state governments, was not a valid enforcement provision but rather an unconstitutional attempt to redefine the scope of a constitutional right.[45] The Court explained that Fourteenth Amendment enforcement measures must be aimed at state laws that have a "significant likelihood of being unconstitutional."[46] Congress had failed to show that the broad range of state laws governed by RFRA was likely to be unconstitutional under the *Smith* standard.[47] The Court contrasted RFRA with the Voting Rights Act of 1965, which was supported by a legislative record containing extensive evidence of discriminatory laws.[48]

Congress, still wanting to afford heightened protection to religious liberty, went back to the drawing board. Soon after *Boerne* was decided, the House and Senate Committees on the Judiciary held a series of nine hearings exploring new religious liberty measures.[49] This time, they were careful to hear testimony describing specific state laws that

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43 *See* U.S. CONST. amend. XIV, § 5 ("The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article."); *Boerne*, 521 U.S. at 516 (citing S. REP. NO. 103-111, at 13–14 (1993) and H.R. REP NO. 103-88, at 9 (1993)).

44 *Boerne*, 521 U.S. at 507. Notably, respondent in *Boerne* was a house of worship alleging that denial of its building permit posed a substantial burden on its religious exercise. *Id.* at 511.

45 *See id.* at 532.

46 *Id.*

47 *Id.* at 533–35.

48 *Id.* at 530 ("In contrast to the record which confronted Congress and the judiciary in the voting rights cases, RFRA's legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry.").

49 *See Protecting Religious Freedom After Boerne v. Flores: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 105th Cong. (1997); *Congress' Constitutional Role in Protecting Religious Liberty: Hearing Before the S. Comm. on the Judiciary*, 105th Cong. (1997); *Congress, the Court, and the Constitution: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 105th Cong. (1998); *Protecting Religious Freedom After Boerne v. Flores (Part II): Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 105th Cong. (1998); *Protecting Religious Freedom After Boerne v. Flores (Part III): Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 105th Cong. (1998); *Religious Liberty Protection Act of 1998: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 105th Cong. (1998); *Religious Liberty Protection Act of 1998: Hearing Before the S. Comm. on the Judiciary*, 105th Cong. (1998); *Religious Liberty Protection Act of 1999: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 106th Cong. (1999); *Religious Liberty: Hearing Before the S. Comm. on the Judiciary*, 106th Cong. (1999); *see also* Laycock & Goodrich, *supra* note 8, at 1022.

infringed on religious liberty.[50] Extensive evidence,[51] statistical and anecdotal,[52] suggested that land use regulations, highly discretionary in nature, were particularly likely to infringe on religious liberty,[53] either deliberately or unintentionally.[54]

A new bill, the Religious Liberty Protection Act (RLPA), was introduced in Congress in 1998,[55] and again in 1999.[56] RLPA emulated RFRA, reinstating the *Sherbert* rule, except that RLPA's *Sherbert* provision responded to *Boerne* by limiting its own applicability to federally funded programs and government actions that affected interstate commerce.[57] Aside from its broad *Sherbert* provision, RLPA contained specific measures directed at land use regulation.[58]

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50 *See* H.R. REP. NO. 106-219, at 18–24 (1999) (summary of hearing testimony); *see also* Douglas Laycock, *State RFRAs and Land Use Regulation*, 32 U.C. DAVIS L. REV. 755, 770–75 (1999) (summary of hearing testimony).

51 146 CONG. REC. S7774 (daily ed. July 27, 2000) ("The hearing record compiled massive evidence that [the right to assemble for worship] is frequently violated.").

52 *See* H.R. REP. NO. 106-219, at 17 ("Statistical and anecdotal evidence strongly indicates a pattern of abusive and discriminatory actions by land use authorities . . . .").

53 *See id.* at 17–18.

54 *See id.* at 18 ("Land use regulations frequently discriminate by design, other times by their neutral application, and sometimes by both.").

55 H.R. 4019, 105th Cong. (2d Sess. 1998).

56 H.R. 1691, 106th Cong. (1st Sess. 1999).

57 *See* Religious Liberty Protection Act of 1999, H.R. 1691, 106th Cong. § 2 (1999). The bill's drafters viewed RLPA's *Sherbert* provision as a valid exercise of Congress's Commerce and Spending Clause powers. *See* H.R. REP. NO. 106-219, at 14–16 (1999).

58 RLPA's land use regulation section read:

> (b) Land Use Regulation.—
>
> (1) Limitation on land use regulation.—
>
> (A) Where, in applying or implementing any land use regulation or exemption, or system of land use regulations or exemptions, a government has the authority to make individualized assessments of the proposed uses to which real property would be put, the government may not impose a substantial burden on a person's religious exercise, unless the government demonstrates that application of the burden to the person is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest.
>
> (B) No government shall impose or implement a land use regulation in a manner that does not treat religious assemblies or institutions on equal terms with nonreligious assemblies or institutions.
>
> (C) No government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination.
>
> (D) No government with zoning authority shall unreasonably exclude from the jurisdiction over which it has authority, or unreasonably limit within that jurisdiction, assemblies or institutions principally devoted to religious exercise.

H.R. 1691 § 3(b).

Congress declined to pass RLPA's broadly applicable *Sherbert* provision,[59] but RLPA's land use provisions ultimately became law one year later as part of RLUIPA,[60] a religious liberty bill that focused exclusively on regulations governing land use and institutionalized persons.[61] RLUIPA passed unanimously in both houses of Congress,[62] and it was signed into law in September 2000.[63] RLUIPA lacks the sweeping religious liberty protections of RFRA and RLPA;[64] instead, RLUIPA shields religious exercise from what Congress understood to be two particularly prevalent harms: land use regulations and regulations of institutionalized persons.[65] Though relatively narrow in scope, RLUIPA is underscored by the same congressional zeal for religious liberty that inspired RFRA and RLPA.[66] This suggests that, within its areas of operation, RLUIPA should be construed to afford broad protection to religious liberty.

B. *RLUIPA*

RLUIPA's operative clauses should be read in accordance with the statute's codified "Rules of Construction," which implore that all of its provisions "shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution."[67]

RLUIPA's land use provision protects religious uses against a wide range of burdensome and discriminatory land use regulations. The

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59 *See* Laycock & Goodrich, *supra* note 8, at 1022.

60 RLPA's operative clauses with respect to land use, like those of its successor RLUIPA, consisted of a substantial burdens clause, an equal terms clause, a nondiscrimination clause, and an exclusions and limits clause (though these descriptive titles were introduced only later as part of RLUIPA). *Compare* H.R. 1691 § 3(b), *with* 42 U.S.C. § 2000cc (2000).

61 42 U.S.C. § 2000cc.

62 U.S. DEP'T OF JUST., REPORT ON THE TENTH ANNIVERSARY OF THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT 2 (2010), http://www.justice.gov/crt/rluipa_report_092210.pdf [https://perma.cc/CCN4-HHXQ].

63 President William J. Clinton, Statement on Signing the Religious Land Use and Institutionalized Persons Act of 2000 (Sept. 22, 2000), *in* 36 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 2168 (Sept. 25, 2000).

64 *Compare* 42 U.S.C. § 2000cc (RLUIPA), *with* H.R. 1691 § 2 (RLPA), *and* 42 U.S.C. § 2000bb-1 (RFRA).

65 *See* 146 CONG. REC. S7774 (daily ed. July 27, 2000) (joint statement of Sens. Orrin Hatch and Edward Kennedy).

66 *See id.* at S7777 (statement of Sen. Edward Kennedy) ("[RLUIPA] reflects our commitment to protect religious freedom and our belief that Congress still has the power to enact legislation to enhance that freedom, even after the Supreme Court's decision in 1997 that struck down the broader Religious Freedom Restoration Act that 97 Senators joined in passing in 1993.").

67 *See* 42 U.S.C. § 2000cc-3(g).

provision includes four operative clauses: the substantial burdens clause, the equal terms clause, the nondiscrimination clause, and the exclusions and limits clause.[68] The substantial burdens clause provides that a land use regulation may not impose a substantial burden on religious exercise unless the regulation constitutes the "least restrictive means" by which to further a compelling governmental interest.[69] To

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[68] RLUIPA's land use regulation section reads:

> § 2000cc. Protection of land use as religious exercise
>
> (a) Substantial burdens
>
> (1) General rule
>
> No 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 demonstrates that imposition of the burden on that person, assembly, or institution—
>
> (A) is in furtherance of a compelling governmental interest; and
>
> (B) is the least restrictive means of furthering that compelling governmental interest.
>
> (2) Scope of application
>
> This subsection applies in any case in which—
>
> (A) the substantial burden is imposed in a program or activity that receives Federal financial assistance, even if the burden results from a rule of general applicability;
>
> (B) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, even if the burden results from a rule of general applicability; or
>
> (C) the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved.
>
> (b) Discrimination and exclusion
>
> (1) Equal terms
>
> No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.
>
> (2) Nondiscrimination
>
> No government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination.
>
> (3) Exclusions and limits
>
> No government shall impose or implement a land use regulation that—
>
> (A) totally excludes religious assemblies from a jurisdiction; or
>
> (B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.

42 U.S.C. § 2000cc.

[69] *Id.* § 2000cc(a)(1).

ensure that the substantial burdens clause was constitutional under *Smith*,[70] Congress limited the clause's scope to laws that involve individualized assessments, govern federally funded programs, or affect interstate commerce.[71] Invoking the *Sherbert* standard, the substantial burdens clause expressed Congress's long-held judgment that facial neutrality, general applicability, and legitimate governmental interests are not adequate justifications for a statute that infringes on religious exercise, at least in the context of land use regulation.[72]

RLUIPA's equal terms clause, reflecting the Equal Protection Clause of the Fourteenth Amendment,[73] provides that "[n]o government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution."[74] Like the Equal Protection Clause, the equal terms clause protects against disparate treatment.

By using the words "*impose* or *implement*," the equal terms clause makes available two types of claims: facial challenges and as-applied challenges.[75] Facial challenges target the *imposition* of *facially discriminatory* zoning ordinances. A facially discriminatory ordinance might allow secular assemblies and institutions to operate as of right, while at the same time requiring religious uses to obtain a special use permit. Alternatively, a facially discriminatory ordinance might allow secular assemblies to operate *on a condition*—usually, approval of a special use permit—while at the same time *unconditionally prohibiting* religious uses.[76] As-applied challenges, on the other hand, target *facially neutral* land use ordinances that are *implemented* unequally. For example, a zoning board might violate the equal terms clause by approving a special use permit application for a secular use and then

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70 H.R. REP. NO. 106-219, at 17 (1999).

71 42 U.S.C. § 2000cc(a)(2).

72 *See supra* Section I.A.

73 *See supra* note 18.

74 42 U.S.C. § 2000cc(b)(1).

75 *Id.* (emphasis added); Elijah Grp., Inc. v. City of Leon Valley, 643 F.3d 419, 422 (5th Cir. 2011) ("When we focus on the text of the Clause, we read it as prohibiting the government from 'imposing,' i.e., enacting, a facially discriminatory ordinance or 'implementing,' i.e., enforcing a facially neutral ordinance in a discriminatory manner.").

76 *See, e.g.*, H.R. REP. NO. 106-219, at 19–20 (giving examples of facially discriminatory ordinances in suburban Chicago); Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1220, 1231 (11th Cir. 2004) (holding ordinance violated RLUIPA on its face).

rejecting a special use permit application for a substantially similar religious use.[77]

RLUIPA's land use provision contains two additional operative clauses. The nondiscrimination clause prohibits land use regulations that *discriminate* against an assembly or institution on the basis of religion.[78] The exclusions and limits clause prohibits land use schemes that *totally exclude* or *unreasonably limit* religious assemblies or institutions.[79]

By including four distinct protections against discriminatory and burdensome land use regulations, Congress evidently intended RLUIPA to operate as an expansive and comprehensive protection for religious land uses against undue regulation. This broad reading is especially appropriate in light of RLUIPA's "Rules of Construction."[80]

II. ANALYSIS: CONSTRUING THE EQUAL TERMS CLAUSE

Part I of this Note described RLUIPA and how it became law. Part I concluded that the RLUIPA's text and historical context indicate that, on the whole, the statute should be construed in a way that broadly protects religious liberty (within RLUIPA's areas of operation). The remainder of this Note focuses on construing RLUIPA's equal terms clause—a task that has proved vexing for two decades.[81]

The key question of construction surrounding the equal terms clause is whether the clause should uphold seemingly discriminatory zoning laws that are in fact *justified* by some legitimate governmental interest, like traffic prevention or tax generation.[82] On its face, the equal terms clause can plausibly be read as a bald restatement of the Equal Protection Clause, which *does* uphold such laws, so long as the

77 *See, e.g.*, Konikov v. Orange Cnty., 410 F.3d 1317, 1327–29 (11th Cir. 2005) (ordinance was facially neutral but its application—discretionarily allowing a small boy scout club but not a small prayer club—violated RLUIPA).

78 42 U.S.C. § 2000cc(b)(2).

79 *Id.* § 2000cc(b)(3); *see, e.g.*, Chabad of Nova, Inc. v. City of Cooper City, 575 F. Supp. 2d 1280, 1289–91 (S.D. Fla. 2008).

80 *See* 42 U.S.C. § 2000cc-3(g).

81 *See generally* PATRICIA E. SALKIN, *RLUIPA: Nondiscrimination and Equal Terms*, *in* 3 AM. L. ZONING § 28:7 (5th ed. 2020) (describing generally some of the "numerous questions" raised by the equal terms clause's text and interpretation); Tree of Life Christian Schs. v. City of Upper Arlington, 905 F.3d 357, 367–69 (6th Cir. 2018).

82 *See Tree of Life*, 905 F.3d at 367–72.

underlying governmental interest is *legitimate*.[83] This would be a narrow construction of RLUIPA, rendering the equal terms clause duplicative of Equal Protection. As this Note will show, the majority of the circuit courts of appeals have effectively endorsed this very narrow construction.[84]

However, some courts, including the Eleventh Circuit Court of Appeals, have construed the clause to invalidate regulations that Equal Protection would otherwise uphold.[85] The Eleventh Circuit has read the equal terms clause to require that disparate treatment be justified by a *compelling* governmental interest.[86] Judge Thapar of the Sixth Circuit[87] and some scholars[88] have gone so far as to argue that *no* governmental interest can justify disparate treatment under the equal terms clause.

This Part argues that Congress intended the equal terms clause to provide additional protection for religious uses, beyond what the Equal Protection Clause already provided them. Namely, Congress intended the equal terms clause to protect against discrimination that "lurks behind" legitimate zoning interests such as traffic, parking, and tax revenue generation.[89] Accordingly, this Part argues that most circuit courts of appeals have inadequately construed the equal terms clause.

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83 *See, e.g.*, *id.* at 368 ("[O]ne could plausibly read the equal terms provision *in pari materia* with the Fourteenth Amendment's Equal Protection Clause."); Midrash Sephardi v. Town of Surfside, 366 F.3d 1214, 1229 (11th Cir. 2004) (remarking that the equal terms clause "has the 'feel' of an equal protection law").

84 *See infra* Section II.B.

85 *See Midrash Sephardi*, 366 F.3d at 1229; *see also* sources cited *infra* note 88–89.

86 *See Midrash Sephardi*, 366 F.3d at 1232.

87 *See Tree of Life*, 905 F.3d at 379 (Thapar, J., dissenting) ("Congress was aware of the strict scrutiny buzzwords and included *none* of them in the Equal Terms provision. We must respect that decision and refrain from adding it in ourselves. And that means that if governments do not carry their burden once shifted, RLUIPA holds them liable without exception.").

88 *See* Laycock & Goodrich, *supra* note 8, at 1058–59 ("It is apparent on the face of the statute that the substantial-burden provision contains a defense of compelling government interest, and that the equal-terms provision does not. . . . Despite the clarity of the statutory text, several courts have generally imposed limiting constructions on the equal-terms provision, refusing to interpret it according to its terms."); Sarah Keeton Campbell, *Restoring RLUIPA's Equal Terms Provision*, 58 DUKE L.J. 1071 (2009).

89 *See* 146 CONG. REC. S7774 (daily ed. July 27, 2000) (joint statement of Sens. Orrin Hatch and Edward Kennedy) ("Sometimes, zoning board members or neighborhood residents explicitly offer race or religion as the reason to exclude a proposed church . . . . More often, discrimination lurks behind such vague and universally applicable reasons as traffic, aesthetics, or 'not consistent with the city's land use plan.'").

A. *Equal Protection's Guarantee Against Discriminatory Zoning*

As this Note will demonstrate, the majority of the circuit courts of appeals have construed the equal terms clause to protect against zoning laws that disparately affect religious uses, unless this disparate treatment is justified by a *legitimate* governmental interest, like tax revenue generation or traffic reduction.[90] These courts have overlooked the fact that the Equal Protection Clause of the Fourteenth Amendment already provides that same guarantee to religious uses under *City of Cleburne v. Cleburne Living Center*, decided in 1985.[91] In *Cleburne*, the city's zoning ordinance required a special use permit for the operation of group homes for the mentally handicapped, alcoholics, or drug addicts.[92] At the same time, the ordinance permitted other care and group homes, like nursing homes and fraternity houses, to operate as of right.[93] The Court invalidated the ordinance on the basis that the city had not presented any "legitimate" interest by which to justify the disparate treatment.[94] Put differently, the ordinance was unconstitutional because it failed to provide "equal" treatment to entities that were "similarly situated"[95] with respect to the legitimate interests promoted by the ordinance.[96]

Over the two decades that followed it, the Court's holding in *Cleburne* was applied by several circuit courts in evaluating Equal Protection challenges to land use regulations that disparately affected a religious use.[97] For example, in *Cornerstone Bible Church v. City of Hastings*,[98] a church brought an Equal Protection challenge to an ordinance that prohibited churches in a commercial zone while permitting an Alcoholics Anonymous and a Masonic Lodge.[99] The

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90 *See infra* Section II.B.

91 City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985).

92 *Id.* at 447.

93 *Id.* at 447–48.

94 *Id.* at 448.

95 *Id.* at 439.

96 *See id.* at 450 (finding that the impermissible and permissible group homes were similarly situated to each other with respect to all relevant governmental interests, including traffic, fire hazards, serenity, and neighborhood safety).

97 *See* Cornerstone Bible Church v. City of Hastings, 948 F.2d 464, 471–72 (8th Cir. 1991); Christian Gospel Church, Inc. v. City & Cnty. of San Francisco, 896 F.2d 1221, 1225 (9th Cir. 1990); Congregation Kol Ami v. Abington Twp., 309 F.3d 120, 136–38 (3d Cir. 2002); *see also* C.L. for Urb. Believers v. City of Chicago, 342 F.3d 752, 769–70 (7th Cir. 2003) (Posner, J., dissenting) (explaining that the *Cleburne* standard applies equally to religious land use discrimination).

98 Cornerstone Bible Church v. City of Hastings, 948 F.2d 464 (8th Cir. 1991).

99 *Id.* at 471.

Eighth Circuit, citing *Cleburne*, found no legitimate interest by which to differentiate churches from those two permitted uses.[100] The church was "similarly situated" to the permitted entities with respect to the legitimate interests ostensibly promoted by the ordinance.[101] The Third and Ninth Circuits issued equivalent holdings in *Congregation Kol Ami*[102] and *Christian Gospel Church*.[103]

Cornerstone Bible Church, *Congregation Kol Ami*, and *Christian Gospel Church* all understood *Cleburne* to mandate a two-step test.[104] First, the courts considered whether the entities were "similarly situated" with respect to the relevant governmental objectives advanced by the zoning ordinance.[105] If the entities were found to be "similarly situated," then the court applied a rational basis standard of review, inquiring whether the disparate treatment was nonetheless justified by a legitimate governmental objective.[106] This two-pronged test is redundant.[107] If the government had a legitimate reason for differential treatment, then the entities could not have been similarly situated.[108] At bottom, *Cleburne* and its progeny hold that the Equal Protection Clause protects religious (and other) land uses against disparate zoning treatment, unless the disparate treatment is justified by a legitimate governmental interest.

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100 *Id.*

101 *Id.* ("Any differentiation must be relevant to the objectives the City is attempting to achieve through its ordinance.").

102 *Congregation Kol Ami*, 309 F.3d at 137 ("[A] court must . . . examine whether the complaining party is similarly situated to [permitted] uses . . . . [T]he city . . . [may cite] the different impact that such entities may have on the asserted goal of the zoning plan.").

103 Christian Gospel Church, Inc. v. City & Cnty. of San Francisco, 896 F.2d 1221, 1225 (9th Cir. 1990) ("In order to prevail, the Church must make a showing that a class that is similarly situated has been treated disparately.").

104 *See Congregation Kol Ami*, 309 F.3d at 136–37.

105 *Id.*

106 *Id.*

107 *Cornerstone Bible Church* highlighted assemblies with liquor licenses as entities that were similarly situated to the churches but nonetheless might be entitled to differential treatment, since the city had "no choice but to locate [them] in the C–3 zone because . . . state law prohibits liquor establishments in residential areas." Cornerstone Bible Church v. City of Hastings, 948 F.2d 464, 471(8th Cir. 1991). But a court could just as easily find that this legitimate zoning interest rendered the entities not "similarly situated." *See* Signs for Jesus v. Town of Pembroke, 977 F.3d 93, 109–11, 113 (1st Cir. 2020) (upholding an ordinance that allowed a public school, but not a church, to have an electric sign, on the basis that the entities were not similarly situated, *since state law compelled* the town to allow the public school's sign).

108 *See* Giovanna Shay, *Similarly Situated*, 18 GEO. MASON L. REV. 581, 598 (2011). "[T]he U.S. Supreme Court has not historically viewed [similarly situated] as a separate, threshold requirement, but rather as one and the same as the equal protection merits inquiry." *Id.* The only theoretical difference is that the plaintiff has the burden of proving the first prong, and the government has the burden of proving the second. *Congregation Kol Ami*, 309 F.3d at 136–37.

B. *The Courts of Appeals' Construction of the Equal Terms Clause*

When tasked with construing RLUIPA's equal terms clause, almost all of the circuit courts have simply reproduced the *Cleburne* Equal Protection standard without acknowledging that they are doing so. The First,[109] Second,[110] Third,[111] Fifth,[112] Sixth,[113] Seventh,[114] Ninth,[115] and Tenth[116] Circuits have all acknowledged that a religious plaintiff's equal terms claim fails if the alleged disparate treatment was justified by a legitimate governmental (zoning) interest.

In contrast to *Cleburne* and its Equal Protection progeny, these equal terms decisions have deliberately employed a one-pronged test, asking only whether the regulation provides disparate treatment to religious and secular entities that are "similarly situated" to each other in relation to legitimate zoning criteria.[117] If they are found to be "similarly situated," then the regulation violates the equal terms clause.[118] However, if the disparate treatment furthers a legitimate

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109 *Signs for Jesus*, 977 F.3d at 109.

110 *See* Third Church of Christ, Scientist v. City of New York, 626 F.3d 667, 668 (2d Cir. 2010) (evaluating comparators in light of "functional intents and purposes relevant" to the disparate treatment).

111 *See* Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch, 510 F.3d 253, 270–72 (3d Cir. 2007).

112 *See* Elijah Group, Inc. v. City of Leon Valley, 643 F.3d 419, 424 (5th Cir. 2011) ("The 'less than equal terms' must be measured by the ordinance itself and the criteria by which it treats institutions differently."); Tree of Life Christian Schs. v. City of Upper Arlington, 905 F.3d 357, 368 (6th Cir. 2018) (explaining that the Fifth Circuit test resembles the Third Circuit test).

113 *See Tree of Life Christian Schs.*, 905 F.3d at 370.

114 *See* River of Life Kingdom Ministries v. Vill. of Hazel Crest, 611 F.3d 367, 371 (7th Cir. 2010) (en banc). With *River of Life*, the Seventh Circuit effectively renounced its previous support of the *Midrash* rule. *See id.* at 377 (Sykes, J., dissenting) ("Until this case we had followed the Eleventh Circuit's interpretation of the equal-terms provision, first announced in *Midrash Sephardi* . . . . The en banc court now prefers the Third Circuit's approach, announced in *Lighthouse* . . . ." (internal citations omitted)).

115 *See* Centro Familiar Cristiano Buenas Nuevas v. City of Yuma, 651 F.3d 1163, 1172–73 (9th Cir. 2011). *Centro Familiar*'s analysis is somewhat unique. *See infra* notes 178–83 and accompanying text.

116 *See* Rocky Mountain Christian Church v. Bd. of Cnty. Comm'rs, 613 F.3d 1229, 1236–37 (10th Cir. 2010) (evaluating comparators in light of legitimate and relevant zoning criteria, like size and location). In *Tree of Life*, the Sixth Circuit wrongly characterized the Tenth Circuit as an "outlier" for employing a "similarly situated" test that asked *whether a reasonable jury could conclude* that the entities were similarly situated. *Tree of Life*, 905 F.3d at 370. The Sixth Circuit seemingly failed to grasp that the Tenth Circuit only engaged in a "reasonable jury" inquiry because of the case's procedural posture as an appeal of a denial of a motion for judgment as a matter of law. *Rocky Mountain Christian Church*, 613 F.3d at 1235, 1237.

117 *See, e.g.*, *Centro Familiar*, 651 F.3d at 1172 ("[W]e cannot accept the notion that a 'compelling governmental interest' is an exception to the equal terms provision . . . .").

118 *See, e.g.*, *id.*

governmental interest, like tax revenue generation (bars, but not churches, generate tax revenue)[119] or traffic prevention (churches cause unique traffic problems on Sundays),[120] then the entities are not "similarly situated" and the regulation does not violate the equal terms clause.[121]

These equal terms decisions deliberately decline to apply the ostensible second prong of the *Cleburne* test, the "standard of review" that asks whether the disparate treatment of similarly situated uses is justified by a legitimate governmental interest.[122] As has been explained, the two-pronged *Cleburne* test is in any case entirely redundant, so the one-pronged equal terms test produces the same results as the two-pronged *Cleburne* test. Under either test, the government prevails only by naming a legitimate zoning concern unique to the religious use.[123] Some circuit courts have unwisely asserted that by omitting a "standard of review," they are construing the equal terms clause *broadly*.[124] The opposite is true. These courts have in fact construed the equal terms clause as duplicating *Cleburne*.[125]

One of the few circuit decisions to adopt a genuinely broad construction of the equal terms clause is *Midrash Sephardi v. Town of Surfside*, decided by an Eleventh Circuit panel in 2004.[126] In *Midrash*, which was the first federal appellate decision to consider the scope of the equal terms clause, the panel facially invalidated a zoning ordinance that permitted private clubs but prohibited churches and synagogues.[127] Instead of accepting a legitimate governmental interest by which to justify the disparate treatment, the panel demanded a compelling one.[128]

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119 *See River of Life*, 611 F.3d at 373–74 (en banc); *Tree of Life*, 905 F.3d at 371–72.

120 *See River of Life*, 611 F.3d at 372–73.

121 *See* Signs for Jesus v. Town of Pembroke, 977 F.3d 93, 109 (1st Cir. 2020) ("Although several circuits have articulated different approaches [in construing the equal terms clause], they all generally require that the comparators be similarly situated with respect to the purpose of the underlying regulation.").

122 *See supra* Section II.A.

123 *See supra* Section II.A.

124 *See, e.g.*, Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch, 510 F.3d 253, 269 (3d Cir. 2007) ("We hold that RLUIPA's Equal Terms provision operates on a strict liability standard; strict scrutiny does not come into play."); Centro Familiar Cristiano Buenas Nuevas v. City of Yuma, 651 F.3d 1163, 1172 (9th Cir. 2011) ("[B]ecause it would violate the 'broad construction' provision, we cannot accept the notion that a 'compelling governmental interest' is an exception to the equal terms provision . . . .").

125 *See Centro Familiar*, 651 F.3d at 1172 ("That is not to say that anything allowable for any institution has to be allowed for a church under the equal terms provision. . . . This is not the case, but the reason why is not [a standard of review].").

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

127 *Id.* at 1231.

128 *Id.* at 1232.

Midrash was eventually rejected by every other circuit that considered an equal terms claim.[129] Its holding was criticized on several grounds. The Third Circuit, en banc, reasoned that, under *Midrash*, a municipality that allows operation of a ten-member book club must also permit operation of a large church with one thousand members.[130] Several circuit courts pointed out that a compelling interest test has no basis in the text of the equal terms clause.[131] The Seventh Circuit, en banc, characterized the *Midrash* holding as unfair favoritism toward religion, since it affords religious uses a special zoning privilege: the ability to operate wherever any one secular assembly operates, regardless of whether the secular assembly is comparable to the religious one.[132] Writing for the court, Judge Posner argued that *Midrash*'s holding not only goes beyond the equal terms clause's guarantee of "equal" treatment, but it also runs afoul of the First Amendment's Establishment Clause.[133] In *Konikov v. Orange County*, decided shortly after *Midrash*, the Eleventh Circuit retreated, limiting

129 *See supra* notes 109–16 and accompanying text.

130 Lighthouse Inst. for Evangelism v. City of Long Branch, 510 F.3d 253, 268 (3d Cir. 2007). This criticism was probably unfounded. *See* Westchester Day Sch. v. Vill. of Mamaroneck, 386 F.3d 183, 191 (2d Cir. 2004) ("We know of no controlling authority, either in the Supreme Court or any circuit holding that traffic problems are incapable of being deemed compelling."). Aside from the potential existence of a compelling interest by which to distinguish between the book club and the megachurch, a city could avoid this result from the outset by imposing a maximum occupancy requirement in its zoning ordinance, or by permitting only book clubs with fifty or fewer members. *See Lighthouse Inst.*, 510 F.3d at 286–87 (Jordan, J., dissenting in part). Moreover, a city that allowed operation of a ten-person book club *by special use* would not be compelled to allow a thousand-member church under the *Midrash* rule, since *Konikov* limited *Midrash* to facial challenges. *See infra* note 134 and accompanying text. Thus, the book club hypothetical is fallacious and misleading. *Lighthouse Inst.*, 510 F.3d at 286–87 (Jordan, J., dissenting in part).

131 *Lighthouse Inst.*, 510 F.3d at 268–69; River of Life Kingdom Ministries v. Vill. of Hazel Crest, 611 F.3d 367, 370–71 (7th Cir. 2010) (en banc); Centro Familiar Cristiano Buenas Nuevas v. City of Yuma, 651 F.3d 1163, 1171–72 (9th Cir. 2011). Is this a fair criticism? The Constitution does not mention the terms "strict scrutiny," "compelling interest," or "narrowly tailored," but the Court has not hesitated to employ strict scrutiny in a number of contexts, including, notably, its Equal Protection and Free Exercise jurisprudence. *See, e.g.*, Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 702 (2007) (Equal Protection); Thomas v. Rev. Bd. of Ind. Emp. Sec. Div., 450 U.S. 707, 718 (1981) ("The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest."). Moreover, the equal terms clause borrows a "similarly situated" requirement from Equal Protection jurisprudence. Why not also borrow a standard of review? *See Centro Familiar*, 651 F.3d at 1171–72 (suggesting an answer: because Congress expressly included strict scrutiny terminology in RLUIPA's substantial burden provision but chose to omit it from the equal terms provision).

132 *See River of Life*, 611 F.3d at 369–71.

133 *See id.* at 370.

the *Midrash* holding to facial challenges[134] and effectively holding that, in an as-applied challenge, disparate treatment *can* be justified by a legitimate governmental interest.[135]

Judges and scholars have described a "circuit split" regarding construction of the equal terms clause,[136] but in reality, *Midrash* is an outlier.[137] Though there is some variance among the other circuits' exact formulations,[138] they all permit disparate treatment to be justified by a legitimate governmental interest, like maximizing municipal tax

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134 *See* Konikov v. Orange Cnty., 410 F.3d 1317, 1324–25 (11th Cir. 2005). Why distinguish between facial and as-applied challenges? The Eleventh Circuit suggested a justification in *Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward County*: if a religious assembly or institution challenging a facially neutral statute fails to present a secular comparator that is similarly situated in relevant aspects, then there is "no cognizable evidence of less than equal treatment." 450 F.3d 1295, 1311 (11th Cir. 2006). By contrast, a statute that uses religious classifications rather than neutral criteria is itself evidence of discrimination. *See Lighthouse Inst.*, 510 F.3d at 285 (Jordan, J., dissenting in part) (explaining that facially discriminatory land use statutes with legitimate ends can be reformulated using neutral criteria to achieve those legitimate ends).

135 The *Konikov* opinion examines at length whether the religious and secular assemblies at issue were "similarly situated" with respect to relevant community interests. *Konikov*, 410 F.3d at 1327 (examining whether the assemblies had a "comparable community impact"). This "similarly situated" inquiry replicates a deferential standard of review that defers to a "legitimate" governmental interest. *See supra* notes 118–26 and accompanying text. After concluding that the religious and secular assemblies were similarly situated, the *Konikov* opinion proceeds to apply a strict scrutiny analysis, asking, in a brief paragraph, whether a compelling interest existed to justify the disparate enforcement. *Konikov*, 410 F.3d at 1329. This inquiry is superfluous: If the court has found no *legitimate* reason for the disparate treatment, the court certainly will not find a *compelling* justification for it. *Konikov* thus rendered impotent the strict scrutiny test articulated in *Midrash*.

136 *See* Laycock & Goodrich, *supra* note 8, at 1060 ("The circuits are currently split on the legal standard governing a facial equal-terms challenge."); Tree of Life Christian Schs. v. City of Upper Arlington, 905 F.3d 357, 387 (6th Cir. 2018) (Thapar, J., dissenting) ("[T]he circuits [are] split on the issue . . . ."); Brian K. Mosley, *Zoning Religion out of the Public Square: Constitutional Avoidance and Conflicting Interpretations of RLUIPA's Equal Terms Provision*, 55 ARIZ. L. REV. 465, 476–88 (2013) (discussing the circuit split); Hunt Valley Baptist Church, Inc. v. Baltimore Cnty., No. SAG-17-0804, 2020 WL 618662, at *10–13 (D. Md. Feb. 10, 2020) (describing a circuit split and evaluating ordinance according to both positions); Amber Wheeler, Note, *RLUIPA's Equal Terms Clause and the Circuit Split: Striking a Balance Between Economic Concerns and Protecting Religious Liberty*, 38 MISS. COLL. L. REV. 173 (2020).

137 *See* Signs for Jesus v. Town of Pembroke, 977 F.3d 93, 109 (1st Cir. 2020) ("Although several circuits have articulated different approaches, they all generally require that the comparators be similarly situated with respect to the purpose of the underlying regulation.").

138 Circuits disagree as to which party should bear the burden of proving whether a legitimate governmental zoning interest exists. *See* Laycock & Goodrich, *supra* note 8, at 1060. Another issue that has divided the circuits is whether the disparate effects of state law on religious and secular institutions can justify disparate municipal zoning treatment. *Compare* Digrugilliers v. Consol. City of Indianapolis, 506 F.3d 612 (7th Cir. 2007) (no), *with Lighthouse Inst.*, 510 F.3d 253 (yes), *and Signs for Jesus*, 977 F.3d 93 (yes), *and* Centro Familiar Cristiano Buenas Nuevas v. City of Yuma, 651 F.3d 1163 (9th Cir. 2011) (left unresolved).

revenue,[139] or promoting nightlife culture.[140] This construction provides religious uses no protection beyond what *Cleburne* already provided.

C. *Issues with the Current Construction of the Equal Terms Clause*

Scholars and dissenting circuit judges have criticized the current construction of the equal terms clause as too narrow.[141] They are correct; a narrow interpretation violates RLUIPA's text, intent, and purpose. First and foremost, RLUIPA's text itself implores that all its provisions "shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution."[142] Furthermore, the decade of congressional zeal for religious liberty that culminated in RLUIPA's passage underscores the need to construe all its provisions broadly to protect religious exercise.[143]

A more nuanced criticism of the majority construction is that it provides no protection against mixed motives or seemingly legitimate government justifications that are in fact pretextual. RLUIPA's legislative history repeatedly expresses a concern for discrimination that "lurks" behind legitimate zoning concerns like traffic, parking, safety, and tax revenue.[144] The House Judiciary Committee report that preceded RLUIPA[145] repeatedly acknowledged that zoning concerns

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139 *See, e.g.*, River of Life Kingdom Ministries v. Vill. of Hazel Crest, 611 F.3d 367, 373–74 (7th Cir. 2010) (en banc); *Tree of Life*, 905 F.3d at 371–72.

140 *See Lighthouse Inst.*, 510 F.3d at 270–72.

141 *See* sources cited *supra* note 87.

142 42 U.S.C. § 2000cc-3(g).

143 *See supra* Section I.A.

144 146 CONG. REC. S7774 (daily ed. July 27, 2000) (joint statement of Sens. Orrin Hatch and Edward Kennedy).

145 *See* H.R. REP. NO. 106-219 (1999) (accompanying RLPA). RLUIPA was unaccompanied by a committee report of its own; RLPA's committee report also serves RLUIPA with respect to land use. The RLPA report predated RLUIPA by just a year, and the bills contained nearly identical land use sections. *See* Campbell, *supra* note 88, at 1080 n.45; Laycock & Goodrich, *supra* note 8, at 1022.

like traffic,[146] safety,[147] parking,[148] and tax revenue[149] are often used as pretexts to mask discrimination.[150] Senators Hatch and Kennedy, RLUIPA's cosponsors, reiterated this concern when presenting the bill before the Senate.[151]

One particular entry in RLUIPA's legislative history acutely demonstrates the error of the current construction of the equal terms clause. RLUIPA's committee report described a survey of suburban Chicago zoning codes, which found that secular assemblies, like clubs, gyms, and theaters, were often permitted as of right in zones where houses of worship required a special use permit, or secular assemblies were permitted by special use permit where churches were wholly excluded.[152] The report acknowledged that this disparate treatment might sometimes be at least partially motivated by an effort to maximize tax revenue, rather than by pure discriminatory animus.[153] But apparently RLUIPA's drafters did not believe that tax revenue priorities

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146 H.R. REP. NO. 106-219, at 20 ("[A] pattern of abuse . . . exists among land use authorities . . . often using mere pretexts (such as traffic, safety, or behavioral concerns) to mask [discriminatory motives].").

147 *Id.*

148 *Id.* at 23 (explaining that land use regulators often refuse permits for Orthodox Jewish synagogues due to insufficient parking, despite the fact that Orthodox Jews do not drive on the Sabbath, when services are held).

149 *See id.* at 19 ("The zoning board did not have to give a specific reason [for denying a special use permit to a church]. They can say it is not in the general welfare, or they can say that you are taking property off the tax rolls." (quoting testimony of John Mauck, land use attorney, Mauck, Bellande & Cheely, Chicago, IL)).

150 Along with the committee report's express language, the anecdotal evidence presented therein further signals congressional skepticism of proposed justifications for land use regulations that in effect limit religious exercise. While the report noted examples of overt discrimination, it also described examples of discrimination shrouded by pretext. In Tennessee, a Mormon church was denied a permit to operate, despite the fact that three large (non-Mormon) churches operated nearby, on the basis that the Mormon church would injure the "suburban estate character" of the city. Elsewhere, Orthodox Jewish synagogues were denied permits on the basis of insufficient parking, despite the fact that the congregants would not need parking, since services were to be held on the Sabbath when Orthodox Jews do not drive. One Orthodox Jewish synagogue ultimately agreed to construct the unneeded parking spaces, only to be denied a permit on the basis that the additional parking would cause too much traffic. *Id.* at 22–23.

151 146 CONG. REC. S7774 (daily ed. July 27, 2000) (joint statement of Sens. Orrin Hatch and Edward Kennedy) ("[O]ften, discrimination lurks behind such vague and universally applicable reasons as traffic, aesthetics, or 'not consistent with the city's land use plan.'").

152 H.R. REP. NO. 106-219, at 19–20 (discussing "banquet halls, clubs, community centers, funeral parlors, fraternal organizations, health clubs, gyms, places of amusement, recreation centers, lodges, libraries, museums, municipal buildings, meeting halls, and theaters").

153 *Id.* at 20 ("One explanation suggested for this disparate treatment was that local officials may not want non-tax-generating property taking up space where tax-generating property could locate.").

could justify disparate treatment—if they did, presumably they would have codified an explicit exception to the equal terms clause.[154]

In violation of this expressed congressional intent, the current construction of the equal terms clause does allow disparate treatment of religious uses to be justified by tax revenue concerns; the Seventh Circuit, en banc, ruled so in *River of Life Kingdom Ministries v. Village of Hazel Crest*.[155] Ironically, the disparate treatment at issue in *River of Life* was the exact kind that RLUIPA's congressional sponsors bemoaned, right down to the location in which it occurred: suburban Chicago.

In light of RLUIPA's text, legislative history, and historical context, the equal terms clause should be construed in a way that does not allow disparate treatment of churches to be justified by merely "legitimate" interests like tax revenue generation and promotion of nightlife culture. Of course, the equal terms clause was not intended to exempt houses of worship entirely from reasonable zoning regulation.[156] However, under the current construction, savvy municipalities will often be able to discriminate by identifying some legitimate zoning concern unique to a religious comparator and using it as a pretext.[157] Such a narrow construction is problematic.

III. PROPOSAL: APPLY INTERMEDIATE SCRUTINY

Thus far, this Note has argued that the equal terms clause should not be construed as a mere restatement of the *Cleburne* standard. This Note has concluded from RLUIPA's historical context, text, and legislative history that the equal terms clause should be construed broadly, in a way that protects religious uses against mixed motives and pretextual justifications for disparate treatment. This Part proposes a novel way to construe the equal terms clause, one that gives full effect to congressional intent without producing absurd results. The equal terms clause should be construed to apply "intermediate scrutiny," an Equal Protection standard of review reserved for "quasi-suspect" classifications.

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154 *See* 42 U.S.C. § 2000cc(b)(1).

155 River of Life Kingdom Ministries v. Vill. Of Hazel Crest, 611 F.3d 367, 373 (7th Cir. 2010).

156 *See* 146 CONG. REC. S7774, S7776 (daily ed. July 27, 2000) (joint statement of Sens. Orrin Hatch and Edward Kennedy) ("This Act does not provide religious institutions with immunity from land use regulation, nor does it relieve religious institutions from applying for variances, special permits or exceptions, hardship approval, or other relief provisions in land use regulations, where available without discrimination or unfair delay.").

157 *See River of Life*, 611 F.3d at 386 (Sykes, J., dissenting) ("Zoning decisions are *always* tied to accepted land-use 'criteria.'"); *supra* note 7.

A. *Background: Equal Protection Standards of Review*

Over the past half century, the Supreme Court has developed a tiered approach to Equal Protection, applying different standards of review to different types of discrimination (e.g., race, gender, class).[158] As has been explained, the Equal Protection Clause prohibits disparate treatment, but only when the disparate treatment is not fairly justified by a sufficiently weighty governmental interest.[159] Whether the Equal Protection Clause accepts a proposed governmental justification often depends on the standard of review applied, which in turn depends on which group, in the case at hand, has been subjected to disparate treatment.[160] For example, when a law classifies on the basis of *race*, subjecting different races to disparate treatment, the Equal Protection Clause requires the law to be "narrowly tailored" to advancing a "compelling" governmental interest.[161] This race standard has been termed "strict scrutiny."[162] When a law classifies on the basis of gender, subjecting different genders to disparate treatment, the Equal Protection Clause requires the law to be "substantially related" to an "important" governmental interest.[163] The gender standard, which also applies to legitimacy, has been dubbed "intermediate" or "heightened" scrutiny.[164]

Other laws, such as those that classify based on disability,[165] class,[166] state residence,[167] and citizenship,[168] are upheld so long as they are justified by a "legitimate" governmental interest.[169] Thus, in *Cleburne*, the Court found an Equal Protection violation because the city had failed to present any *legitimate* governmental interest that would justify the regulation at issue, which permitted group homes but not group homes for disabled people.[170] The government claimed that the disparate treatment was justified by its interests in traffic safety, fire

158 *See generally* Goldberg, *supra* note 25.

159 *See id.*; *see also* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439–40 (1985) ("The Equal Protection Clause . . . is essentially a direction that all persons *similarly situated* should be treated alike." (emphasis added)).

160 *See* Goldberg, *supra* note 25.

161 *See id.* at 496–503.

162 *See id.* at 508.

163 *See, e.g.*, Craig v. Boren, 429 U.S. 190, 197 (1976).

164 *See* Goldberg, *supra* note 25.

165 *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 442 (1985).

166 *See, e.g.*, James v. Valtierra, 402 U.S. 137 (1971).

167 *See, e.g.*, Williams v. Vermont, 472 U.S. 14 (1985).

168 *See, e.g.*, Plyler v. Doe, 457 U.S. 202 (1982).

169 *See Cleburne*, 473 U.S. at 448.

170 *Id.*

safety, and neighborhood serenity, but the Court rejected these claims, since the permitted group homes apparently had the same effect on these interests as did the excluded group home for the disabled.[171] The uses were "similarly situated" in relation to the interests underlying the statute at issue; there was no legitimate interest by which they differed. Therefore, the disparate treatment was unjustified.[172]

B. *RLUIPA's Equal Terms and Equal Protection Standards of Review*

Part II of this Note argued that RLUIPA's equal terms clause should not be construed as a mere restatement of the *Cleburne* standard for land use discrimination, a standard that circuit courts had applied to religious uses even before RLUIPA's passage.[173] The congressional intent behind RLUIPA's equal terms clause is highly suspicious of land use regulations that disparately affect religious uses.[174] To give effect to this congressional suspicion, courts should treat land use regulations challenged under the equal terms clause as "quasi-suspect" and thus apply "intermediate scrutiny." Accordingly, courts should require that the land use ordinance be substantially related to advancing an important governmental interest.

Applying "intermediate scrutiny" would give effect to RLUIPA's underlying purpose of combatting pretextual justifications and mixed motives.[175] By requiring *substantial relation* to an *important* governmental interest, courts will uphold disparate treatment only when discriminatory animus is unlikely to be a major factor in the zoning decision. Requiring a showing of an "important" governmental interest makes it harder for a municipality and its residents to fashion pretexts for opposing a religious use.[176] And requiring that the zoning

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171 *Id.* at 450 (uses were similarly situated with respect to traffic, fire hazards, serenity, and neighborhood dangers). *But see* Ry. Express Agency v. New York, 336 U.S. 106, 110 (1949) ("It is no requirement of equal protection that all evils of the same genus be eradicated or none at all."); Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 488 (1955) ("It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.").

172 *Cleburne*, 473 U.S. at 448.

173 *See supra* Section II.A.

174 *See supra* Section II.C.

175 *See supra* Section II.C.

176 *See* River of Life Kingdom Ministries v. Vill. of Hazel Crest, 611 F.3d 367, 386 (7th Cir. 2010) (Sykes, J., dissenting) ("Zoning decisions are *always* tied to accepted land-use 'criteria.'"); U.S. DEP'T OF JUST., COMBATING RELIGIOUS DISCRIMINATION TODAY: FINAL REPORT 23 (2016) ("Roundtable Participants—including lawyers, advocates, and community members—repeatedly emphasized that . . . [the zoning] discrimination has become less overt in recent years. . . . [A

regulation be "substantially related" to that interest helps to detect ingenuine justifications, as courts will assess whether the proposed interest was in fact furthered by the disparate treatment.[177]

The Ninth Circuit Court of Appeals, in construing the equal terms clause, comes close to applying the "substantial relation" prong of the intermediate scrutiny test. In *Centro Familiar Cristiano Buenas Nuevas v. City of Yuma*, the Ninth Circuit panel held that the clause requires land use regulations to be "reasonably well adapted to 'accepted zoning criteria.'"[178] This standard evokes intermediate scrutiny's mandate that classifications be "substantially related" to advancing a governmental interest.[179]

In *Centro Familiar*, the Ninth Circuit test correctly rejected a proposed justification that was likely ingenuine. The ordinance at issue allowed certain secular assemblies to operate as of right while forcing "religious organizations" to obtain a conditional use permit.[180] The city claimed that its actions were justified because churches, unlike the permissible secular assemblies, would restrict the local availability of liquor licenses under state law. The city also claimed that religious organizations, unlike the permissible secular ones, would chill the vibrant character of the nightclub district and would thus constitute "blight."[181] While the court recognized that the liquor license concern "may justify" the exclusion of churches, the court held that the ordinance was overinclusive because it also applied to other religious uses, like religious lodges and agencies, that would not have affected liquor licenses under state law.[182] The court also found that many uses permitted as of right, such as apartment buildings, post offices, and prisons, would have the same "blighting" effect as a church on a block of bars and nightclubs, so the statute was also underinclusive.[183]

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pastor] said: 'They used to . . . say we don't want more Christians. Now . . . [they say] you've got building code issues and traffic [problems].'" (last alteration in original)); *see also* sources cited *supra* note 7.

177 *See* Tree of Life Christian Schs. v. City of Upper Arlington, 905 F.3d 357, 386 (6th Cir. 2018) (Thapar, J., dissenting) (criticizing the majority's failure to scrutinize whether the disparate zoning treatment in fact substantially furthered a governmental interest).

178 Centro Familiar Cristiano Buenas Nuevas v. City of Yuma, 651 F.3d 1163, 1175 (9th Cir. 2011).

179 However, this standard falls short of strict scrutiny's mandate that disparate treatment be "narrowly tailored" to advancing a governmental interest. *See id.* ("In order to excuse facial treatment of a church on 'less than equal terms,' the land-use regulation must be reasonably well adapted to 'accepted zoning criteria,' even though 'strict scrutiny' in a Constitutional sense is not required.").

180 *Id.* at 1166.

181 *Id.*

182 *Id.* at 1173–74.

183 *Id.* at 1174–75.

While the result in *Centro Familiar* is encouraging, a full-fledged intermediate scrutiny standard is more administrable and will provide a more robust protection for religious uses, consistent with RLUIPA's intent. An intermediate scrutiny standard is more administrable because courts can rely on precedent from Equal Protection cases. For example, gender discrimination cases consistently reject classifications that are based on stereotypes or harmful assumptions.[184] Likewise, the equal terms clause, applying intermediate scrutiny, should not allow disparate treatment to be justified by harmful stereotypes. For example, the assumption that churches are not "vibrant and vital,"[185] and could "blight" a trendy district,[186] is a harmful and baseless stereotype.[187]

As has been explained at length, RLUIPA's legislative history explicitly indicates that failure to generate tax revenue from a religious use should not be considered an adequate justification for disparate treatment.[188] To give effect to congressional intent, under intermediate scrutiny, a court could find that the marginal tax revenue that would be forfeited if churches were permitted is too insubstantial to be "substantially related" to an "important" governmental interest. A court could also strike down the exclusionary ordinance as overinclusive and underinclusive by identifying permitted uses that were unlikely to generate substantial revenue and excluded religious uses that were likely to generate, indirectly, substantial municipal revenue.[189]

C. *Intermediate Scrutiny and the Equal Terms "Similarly Situated" Requirement*

Applying intermediate scrutiny would not constitute a total departure from existing equal terms jurisprudence, because

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184 *See, e.g.*, Frontiero v. Richardson, 411 U.S. 677 (1973) (wives are dependent); Craig v. Boren, 429 U.S. 190 (1976) (young men are reckless); Miss. Univ. for Women v. Hogan, 458 U.S. 718 (1982) (women make better nurses); United States v. Virginia, 518 U.S. 515 (1996) (women are not cut out for intense military training).

185 Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch, 510 F.3d 253, 258, 270–72 (3d Cir. 2007).

186 *Centro Familiar*, 651 F.3d at 1166.

187 *See, e.g.*, VIBRANT CHURCH, https://vibrantchurch.com [https://perma.cc/83VS-6FBF]; VIBRANT CHURCH, https://www.vibrant.ch [https://perma.cc/B9ZC-RPS9]; CONGREGATION MICAH, http://www.congregationmicah.org [https://perma.cc/YPV4-TL3U] ("A vibrant Reform synagogue serving all of middle Tennessee").

188 *See supra* notes 151–53 and accompanying text.

189 *See* Ram A. Cnaan, Tuomi Forrest, Joseph Carlsmith & Kelsey Karsh, *If You Do Not Count It, It Does Not Count: A Pilot Study of Valuing Urban Congregations*, 10 J. OF MGMT., SPIRITUALITY & RELIGION 2 (2013) (finding that religious congregations make significant economic contributions to their local communities: $476,663.24 per year on average).

intermediate scrutiny, like existing equal terms jurisprudence, applies a "similarly situated" requirement.[190] In the gender discrimination context, the Supreme Court has acknowledged that there are some "basic biological differences" between men and women that may sometimes justify disparate treatment.[191] Thus, the Supreme Court's decision in *Michael M. v. Superior Court* upheld a statutory rape law that penalized men only, on the basis that men and women are not similarly situated with respect to the risks of sexual intercourse and unwanted pregnancy.[192] The Court was careful to note that the disparate treatment was justified by the government's (important) interest in effective enforcement, since females would not report crimes that they themselves could be prosecuted for.[193] More recently, in *Nguyen v. INS*, decided in 2001, the Court held that men and women are not similarly situated with respect to proving biological parenthood.[194]

The Court's decisions in *Michael M.* and *Nguyen* should reassure courts that application of intermediate scrutiny will not lead to absurd results like the hypothetical regarding a ten-person book club and a megachurch.[195] In light of gender discrimination precedent, a megachurch's massive size and impact on traffic is certainly a "basic difference" by which to distinguish it from a ten-member book club.[196] Moreover, reducing traffic and ensuring sufficient public parking can be *important* interests.[197]

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190 *See generally* Shay, *supra* note 108, at 606–11.

191 *See* Nguyen v. INS, 533 U.S. 53, 73 (2001).

192 Michael M. v. Super. Ct., 450 U.S. 464, 471 (1981) ("[Y]oung men and young women are not similarly situated with respect to the problems and the risks of sexual intercourse. Only women may become pregnant, and they suffer disproportionately the profound physical, emotional and psychological consequences of sexual activity.").

193 *Id.* at 473–74 ("[A] gender-neutral statute would frustrate [the State's] interest in effective enforcement. . . . [A] female is surely less likely to report violations of the statute if she herself would be subject to criminal prosecution. . . . [A gender-neutral statute] may well be incapable of enforcement.").

194 *Nguyen*, 533 U.S. at 73.

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

196 *Nguyen*, 533 U.S. at 73 ("basic biological differences" between men and women may be acknowledged in law).

197 *See* Westchester Day Sch. v. Vill. of Mamaroneck, 386 F.3d 183, 191 (2d Cir. 2004) ("We know of no controlling authority, either in the Supreme Court or any circuit holding that traffic problems are incapable of being deemed compelling."). By contrast, understanding the equal terms clause as an application of "strict scrutiny" could indeed lead to absurd results and would thus reach beyond congressional intent. "Strict scrutiny," requiring a "compelling" governmental interest, is so hard to satisfy that it has sometimes been called "strict in theory, but fatal in fact." *See, e.g.*, Fullilove v. Klutznick, 448 U.S. 448, 507 (1980) (Powell, J., concurring). The equal terms clause was not intended to exempt houses of worship from zoning regulation altogether. *See* 146

Notably, though intermediate scrutiny's "similarly situated" requirement adequately recognizes fundamental differences, it is still easier for plaintiffs to satisfy than the exacting standard applied in equal terms decisions. Equal terms cases have used the "similarly situated" requirement as an excuse to defer to "legitimate" governmental interests, but this would be antithetical to the central tenet of "intermediate scrutiny": that disparate treatment of a quasi-suspect class can only be justified by "important" interests. Under intermediate scrutiny, comparators are presumed to be "similarly situated" unless the defendant is able to show some *fundamental difference* between the comparators that fairly justifies the disparate treatment.[198]

When are differences fundamental? Some scholars have explained that, under intermediate scrutiny, comparators are similarly situated unless they differ with respect to an *important* governmental interest.[199] Their rationale is that the similarly situated inquiry is not an element of an Equal Protection claim, or a "threshold" test; rather, it is simply a way of restating the Equal Protection Clause's guarantee of equal treatment: likes must be treated alike.[200] Since, under intermediate scrutiny, suspect classifications must be tied to an *important* governmental interest, it follows that classes are similarly situated unless they differ with respect to an important governmental interest.[201] To this end, it is notable that the Court in *United States v. Virginia* discussed whether the policy at issue was justified by "*important* differences between men and women."[202]

A more subtle difference exists regarding the scope of the similarly situated inquiry. Facial equal terms challenges must show that excluded

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CONG. REC. S7774, 7776 (daily ed. July 27, 2000) (joint statement of Sens. Orrin Hatch and Edward Kennedy) ("This Act does not provide religious institutions with immunity from land use regulation, nor does it relieve religious institutions from applying for variances, special permits or exceptions, hardship approval, or other relief provisions in land use regulations, where available without discrimination or unfair delay.").

198 *See Nguyen*, 533 U.S. at 73 (basic biological differences); United States v. Virginia, 518 U.S. 515, 549 (1996) (important differences between men and women).

199 *See* William R. Engles, *The "Substantial Relation" Question in Gender Discrimination Cases*, 52 U. CHI. L. REV. 149, 153–54 (1985).

200 Shay, *supra* note 108, at 598, 615–22 ("[T]he U.S. Supreme Court has not historically viewed it as a separate, threshold requirement, but rather as one and the same as the equal protection merits inquiry."). The Court succinctly legitimated this view in *Cleburne* by stating that the Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike." City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985). For a discussion about equality, see Centro Familiar Cristiano Buenas Nuevas v. City of Yuma, 651 F.3d 1163 (9th Cir. 2011); River of Life Kingdom Ministries v. Vill. of Hazel Crest, 611 F.3d 367 (7th Cir. 2010).

201 *See* Engles, *supra* note 199.

202 *Virginia*, 518 U.S. at 549 (emphasis added).

religious uses, *in aggregate*, are similarly situated to a permitted secular use. By contrast, under intermediate scrutiny, a plaintiff can (sometimes) establish the "similarly situated" element by showing that *some* members of a disadvantaged class were similarly situated to *some* members of an advantaged class—even if the classes, in aggregate, were clearly not similarly situated.[203] Thus, in *United States v. Virginia*, the Court did not require a showing that women, in aggregate, were similarly situated to men with respect to the single-sex military program at issue, but only that *some* women were willing to undertake the rigorous program.[204]

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[203] This tactic was used most explicitly in *Frontiero v. Richardson*, 411 U.S. 677 (1973). The law at issue in *Frontiero* was a government benefit for military members' dependent spouses; the law presumed wives, but not husbands, were dependent. When *Frontiero* was decided in 1973, most wives were in fact dependent on their husbands, and the inverse was rare; thus, the classes, in aggregate, were not similarly situated. *See* Annemette Sorensen & Sara McLanahan, *Married Women's Economic Dependency, 1940–1980*, 93 AM. J. OF SOCIO. 659, 669 (1987) (finding that, in 1970, over half of wives were dependent on their husbands, as opposed to less than six percent of husbands on their wives); *Frontiero*, 411 U.S. at 688–89 ("[T]he Government maintains that, as an empirical matter, wives in our society frequently are dependent upon their husbands, while husbands rarely are dependent upon their wives."); Frontiero v. Laird, 341 F. Supp. 201, 208 (M.D. Ala. 1972), *rev'd*, 411 U.S. 677 (1973) ("There is no evidence before this Court proving that so many male members are in fact dependent on their wives . . . [n]or is there proof that so many female members have dependent husbands . . . ."). Nonetheless, the plurality opinion (without objection from the concurring Justices) invalidated the statute on the basis that *some* of the disadvantaged women were similarly situated to *some* of the advantaged men. *Frontiero*, 411 U.S. at 688 ("[T]he statutes operate so as to deny benefits to a female member, such as appellant Sharron Frontiero, who provides less than one-half of her spouse's support, while at the same time granting such benefits to a male member who likewise provides less than one-half of his spouse's support."). *But see* Califano v. Webster, 430 U.S. 313, 318 n.5 (1977) (upholding a congressional statute that provided higher retirement benefits for women than for men, reasoning that "women *on the average* [had] received lower retirement benefits than men" and not requiring proof that each woman so benefited had suffered discrimination or that each disadvantaged man had not) (emphasis added).

[204] *Virginia*, 518 U.S. 515. In that case, the Court held that Virginia could not maintain its historic, specialized men-only military institute without also creating an identical option for women. *Id.* at 557. The opinion knowingly disregarded ample criteria by which the sexes, *in aggregate*, could be reasonably distinguished with respect to the specialized, physically rigorous military program. *Id.* at 516–17 (expert testimony regarding "gender-based developmental differences"); *id.* at 523 (far fewer women than men were interested in the program); *id.* at 524 ("substantial benefits" of single-sex education); *id.* at 566 (Scalia, J., dissenting) ("the long tradition, enduring down to the present, of men's military colleges supported by both States and the Federal Government"). Justice Scalia's dissent correctly noted that the Court had invalidated the state action on the basis that *some* affected women were similarly situated to men. *See id.* at 573 (Scalia, J., dissenting) ("[The Court's] conclusion [is] that VMI's single-sex composition is unconstitutional because there exist several women (or, one would have to conclude under the Court's reasoning, a single woman) willing and able to undertake VMI's program."); *see also id.* at 517 ("Virginia maintains that methodological differences are justified by the important differences between men and women in learning and developmental needs, but . . . estimates of

Even if courts are reluctant to apply a full-fledged intermediate scrutiny standard of review to equal terms claims, they can at least look to gender discrimination jurisprudence as a guide for how to employ an effective "similarly situated" requirement without having to inject the *Cleburne* "legitimate interest" standard.

CONCLUSION

This Note has argued that Congress intended RLUIPA's equal terms clause to reach beyond the protections against land use discrimination offered by the Equal Protection Clause under *Cleburne*. Today, land use discrimination most often lurks behind pretextual justifications, and the equal terms clause was intended to reach beyond these pretexts. This Note proposed that the equal terms clause should be construed to apply intermediate scrutiny, expanding on the *Cleburne* standard to provide a more robust protection for religious uses.

A question left unresolved by this Note is whether Congress *can* legislatively designate certain classifications as "quasi-suspect" in the context of constitutional rights. Just before RLUIPA's passage, *City of Boerne v. Flores* held that Congress had no right to define the scope of a constitutional right.[205] This question is interesting but beyond the scope of this Note.

what is appropriate for *most women*, no longer justify denying opportunity to women whose talent and capacity place them *outside the average description*." (second emphasis added)). *Virginia* suggested that a statute is invalid if a substantial number of disadvantaged class members are similarly situated to members of an advantaged class. *But see id.* at 573 (Scalia, J., dissenting) (citing *Califano*, 430 U.S. at 318 & n.5).

[205] City of Boerne v. Flores, 521 U.S. 507, 536 (1997).