RLUIPA's Equal Terms Provision and the Split between the Eleventh and Third Circuits

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I. INTRODUCTION

This Note addresses the current split between the Eleventh Circuit and the Third Circuit Courts of Appeals regarding the Equal Terms provision of the Religious Land Use and Institutionalized Persons Act (RLUIPA).[1] RLUIPA is a young statute, and the U.S. Supreme Court has yet to address its land use provisions. Not surprisingly, nine years after RLUIPA's enactment, federal courts evaluate land use claims on a case-by-case basis without governing precedent.[2] As a result, a doctrinal split has developed between the Eleventh and Third Circuits regarding the interpretation of two aspects of RLUIPA's Equal Terms provision.[3] First, the Circuits

1. Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc–2000cc-5 (2006).

2. *See* Daniel P. Dalton, *The Religious Land Use and Institutionalized Persons Act Update (Recent Developments in Land Use, Planning and Zoning)*, 40 THE URBAN LAWYER 603, 604 (2008) (providing a summary of cases through 2007).

3. 42 U.S.C. § 2000cc(b)(1).

disagree as to what standard of comparison should be employed to determine whether a secular assembly or institution is treated more favorably than a religious assembly or institution.[4] Second, the Circuits dispute what standard of scrutiny applies to governmental regulations favoring secular assemblies or institutions over religious ones.[5]

These Circuit disputes are neither unimportant nor solely academic in nature. Religion is an important issue to most Americans—the most important issue to many—and worship is an essential part of it. The Equal Terms provision of RLUIPA provides that government may not prefer secular assemblies and institutions to religious assemblies and institutions in land use regulation. Interpretations of the Equal Terms provision, whether broad or narrow, therefore affect the ability of religious establishments to operate within highly zoned and often densely populated districts—that is, they have real consequences for persons residing in or near those districts with regard to where they can worship.

Interpretations of the Equal Terms provision also implicate the ability of local governments to enact appropriate land use regulations. Many American cities are currently engaged in development projects designed to increase commerce and revitalize the economies of urban districts. These cities often have an interest in excluding large religious establishments from commercial districts, particularly in states and municipalities that prohibit or restrict the selling of alcoholic beverages near houses of worship. Insofar as a broad reading of the Equal Terms provision may allow religious establishments to locate freely in commercial districts, important urban development projects could be frustrated.

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4. *Compare* Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1230 (11th Cir. 2004) (holding that "the relevant 'natural perimeter' for consideration . . . is the category of 'assemblies or institutions,'" thereby requiring a court to first determine whether the secular and religious entities are "assemblies" or "institutions" before comparing the governmental authority's treatment of each), *with* Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch, 510 F.3d 253, 268 (3d Cir. 2007) ("[A] religious plaintiff under the Equal Terms Provision must identify a better-treated secular comparator that is similarly situated in regard to the *objectives* of the challenged regulation.").

5. *Compare Midrash*, 366 F.3d at 1232 ("[A] violation of § (b)'s equal treatment provision . . . must undergo strict scrutiny."), *with Lighthouse*, 510 F.3d at 269 ("RLUIPA's Equal Terms Provision operates on a strict liability standard; strict scrutiny does not come into play.").

Because any interpretation of RLUIPA's Equal Terms provision will therefore significantly impact (1) the ability of persons to worship in convenient locations; (2) the extent to which religious establishments may locate in densely populated areas; and (3) the relative success of urban renewal projects, it is essential to interpret the Equal Terms provision in a way that both reasonably protects religious establishments from discrimination and allows governments some latitude to enact appropriate land use legislation. This Note argues that the comparison-by-category approach adopted by the Eleventh Circuit frustrates the purposes of valid land use regulations. Accordingly, the Third Circuit's requirement, set forth in *Lighthouse*—that a land use plaintiff point to a secular comparator that is similarly situated with regard to the objectives of the statute—is the preferred test. Conversely, the Eleventh Circuit's strict scrutiny requirement—applied in *Midrash*—is preferable to the Third Circuit's strict liability standard, since strict scrutiny allows the occasional statute designed to further a particularly compelling governmental interest to survive an Equal Terms provision challenge without posing any threat to the vast majority of valid claims.

This Note begins by briefly outlining the relevant RLUIPA provisions, after which it addresses the respective approaches of the circuits in *Midrash* and *Lighthouse*. Finally, it outlines the preferable test.

II. RLUIPA'S EQUAL TERMS PROVISION

RLUIPA's land use regulation is divided into two sections, "Substantial Burdens" and "Discrimination and Exclusion."[6] The former provides:

> 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 . . . unless the government demonstrates that imposition of the burden on that person, assembly, or institution-- (A) is in furtherance of a compelling governmental interest;

6. 42 U.S.C. § 2000cc.

> and (B) is the least restrictive means of furthering that compelling governmental interest.[7]

The Substantial Burdens section thus codifies the strict scrutiny test by its plain language.[8] In contrast, the Discrimination and Exclusion section contains three provisions, "Equal Terms," "Nondiscrimination," and "Exclusions and Limits," none of which explicitly codifies strict scrutiny.[9] The Equal Terms provision is the relevant one for this note. The provision provides:

> 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.[10]

As explained in Section III, part of the basis for the Circuit split is that the Eleventh and Third Circuits disagree as to what constitutes an "assembly" or "institution" for purposes of comparison under the Equal Terms provision. Though both Circuits agree that a plaintiff religious assembly or institution must point to a similarly situated secular comparator, they disagree as to what secular assemblies or institutions fall within this category.

III. THE CIRCUIT SPLIT

A. Midrash Sephardi, Inc. v. Town of Surfside

1. The "Category" Test

Midrash Sephardi, Inc. v. Town of Surfside involved a RLUIPA claim filed by two Orthodox Jewish synagogues against the Florida town of Surfside.[11] The synagogues asserted that Surfside's zoning ordinance violated the Equal Terms provision, since it allowed private clubs to locate in the town's business district, but did

7. 42 U.S.C. § 2000cc(a)(1).
8. *Id.*
9. 42 U.S.C. § 2000cc(b)(1)–(3).
10. 42 U.S.C. § 2000cc(b)(1).
11. 366 F.3d 1214 (11th Cir. 2004).

not extend the same privilege to churches and synagogues.[12] The key issue proved to be whether the private clubs and the synagogues were "similarly situated" for purposes of the Equal Terms provision—that is, whether the synagogues could be considered comparable "assemblies" or "institutions" to the private clubs, thereby prohibiting the regulation from treating synagogues on less than equal terms with the clubs.[13]

Reasoning that "[s]ection (b)(1) [the Equal Terms provision] makes clear that the relevant 'natural perimeter' for consideration with respect to RLUIPA's prohibition is the category of 'assemblies or institutions,'" the Eleventh Circuit determined that it was necessary to "first evaluate whether an entity *qualifies* as an 'assembly or institution,' . . . before considering whether a governmental authority treats a religious assembly or institution differently from a nonreligious assembly or institution."[14] After noting that RLUIPA defined neither "assembly" nor "institution," the Eleventh Circuit determined that these terms must be given their "ordinary or natural meanings,"[15] and proceeded to do so using *Webster's Third New International Unabridged Dictionary* and *Black's Law Dictionary*.[16] The court then compared these definitions with the definition of "private club" set forth in the zoning ordinance, concluding that "churches and synagogues, as well as private clubs and lodges, fall within the natural perimeter of 'assembly or institution.'"[17] The plaintiff synagogues were therefore similarly situated with respect to the private clubs permitted by the zoning ordinance.

The Eleventh Circuit's "category" approach thus determines whether entities are similarly situated by asking whether the entities

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12. *Id.* at 1222.

13. *Id.* at 1230.

14. *Id.* (citing 42 U.S.C. § 2000cc(b)(1)) (emphasis added).

15. *Midrash*, 366 F.3d at 1230.

16. *See* WEBSTER'S 3D NEW INT'L UNABRIDGED DICTIONARY 131 (1993) (defining "assembly" as "a company of persons collected together in one place [usually] and usually for some common purpose (as deliberation and legislation, worship, or social entertainment)"); *Id.* at 1171 (defining "institution" as "an established society or corporation: an establishment or foundation esp. of a public character"); BLACK'S LAW DICTIONARY 111 (7th ed. 1999) (defining "assembly" as "[a] group of persons organized and united for some common purpose"); *Id.* at 801 (defining "institution" as "[a]n established organization, esp. one of a public character . . . .").

17. *Midrash*, 366 F.3d at 1231.

fit the broad definitions of "assembly" or "institution" found in a common dictionary. If the answer for each entity is "yes," the entities are similarly situated. Because a wide variety of entities may easily be classified as "assemblies" or "institutions," the Eleventh Circuit's test forces courts to draw comparisons between entities that have little in common with regard to purpose.

2. Application of strict scrutiny

Concluding that the synagogues were being treated on less than equal terms with the similarly situated private clubs,[18] the Eleventh Circuit turned to the question of what standard of scrutiny applied to the ordinance.[19] It began its analysis with "the jurisprudential foundations for Congress's enactment of § (b) [the Discrimination and Exclusion section, containing the Equal Terms provision]."[20] The court noted that prior to *Employment Division v. Smith*,[21] "the Supreme Court applied strict scrutiny to cases in which government discriminated against religion or religious exercise."[22] Though *Smith* held that strict scrutiny would no longer apply to neutral laws of general applicability, the Supreme Court "indicated that the heightened standard of review would continue to apply where a law fails to similarly regulate secular and religious conduct implicating the same government interests"—in other words, the type of regulation targeted by the Equal Terms provision.[23]

The Eleventh Circuit then noted that the U.S. Supreme Court had addressed the concept of neutrality and general applicability in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,[24] holding that Hialeah's ordinances "had as their object the suppression of religion,"[25] thereby requiring the application of strict scrutiny.[26]

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18. *Id.*

19. *Id.* Interestingly, three different positions had been advanced on appeal: Surfside preferred rational basis review and the plaintiffs argued for strict scrutiny, while the United States, acting as Intervenor, urged the court to adopt a strict liability standard. *Id.*

20. *Id.*

21. 494 U.S. 872 (1990).

22. *Midrash*, 366 F.3d at 1232.

23. *Id.*

24. 508 U.S. 520 (1993).

25. *Id.* at 542.

26. *Id.* at 546.

Because RLUIPA "requir[es] equal treatment of secular and religious assemblies," the Eleventh Circuit reasoned that its Equal Terms provision "codifies the *Smith-Lukumi* line of precedent," meaning that "[a] zoning law is not neutral or generally applicable if it treats similarly situated secular and religious assemblies differently because such unequal treatment indicates the ordinance improperly targets the religious character of an assembly."[27] Therefore, a violation of the Equal Terms provision mandated applying strict scrutiny, consistent with the *Smith-Lukumi* line of precedent.[28] In other words, though § (a) [the Substantial Burdens section] explicitly codified a strict scrutiny requirement[29] and § (b) [the Discrimination and Exclusion section] did not,[30] the fact that the Equal Terms provision regulates the same issue broadly addressed by *Lukumi*—equal treatment of secular and religious assemblies—required strict scrutiny be read into the Equal Terms provision.

In sum, the Eleventh Circuit's "category" test determines whether secular and religious entities are similarly situated for purposes of the Equal Terms provision by asking whether they both fall within the broad definition of "assembly" or "institution" found in a common dictionary. If so, no regulation may treat the religious entity on less than equal terms with the secular entity. A regulation that does so is subject to strict scrutiny.

B. Lighthouse Institute for Evangelism, Inc. v. City of Long Branch

1. The "Objective of the Statute" Test

Lighthouse Institute for Evangelism, Inc. v. City of Long Branch[31] addressed a claim by a Christian church ("Lighthouse") and its pastor, the Reverend Kevin Brown, that two zoning ordinances promulgated by the city of Long Branch, New Jersey, violated RLUIPA's Equal Terms provision and the Free Exercise Clause of the First Amendment.[32] In 1994, Lighthouse had

27. *Midrash*, 366 F.3d at 1232.
28. *Id.*
29. 42 U.S.C. § 2000cc(a)(1).
30. *Id.* § 2000cc(b)(1).
31. 510 F.3d 253 (3d Cir. 2007).
32. *Id.* at 256.

purchased property located within Long Branch's Central Commercial district that was subject to a city ordinance permitting bowling alleys, movie theaters, and municipal buildings, but not churches.[33] Complicating the situation, a New Jersey statute restricted the sale of alcohol near religious establishments.[34]

On June 8, 2000, following Long Branch's denial of Lighthouse's application for a zoning permit to use its property for church services, Lighthouse filed suit against the city, "alleging a variety of constitutional and other violations," before amending its complaint to include RLUIPA claims.[35] After a rather tumultuous procedural history,[36] Lighthouse's Equal Terms provision and Free Exercise Clause claims found themselves in front of the Third Circuit in 2007.

As in *Midrash*, the dispositive issue with respect to the Equal Terms provision claim proved to be defining what constitutes a

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33. *Id.* at 257.

34. *Id.* at 259.

35. *Id.* at 257.

36. Following Long Branch's decision to remove the suit to federal court, the District Court denied Lighthouse's request for a preliminary injunction, a decision upheld in a nonprecedential opinion by the Third Circuit. *See* Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch, 100 Fed. Appx. 70 (3d Cir. 2004) (upholding denial of preliminary injunction). Prior to the Third Circuit's decision, but after Lighthouse filed suit, Long Branch enacted a new zoning ordinance superseding the one at issue. *See* Broadway Redevelopment Plan, N.J. STAT. ANN. 40A:12A-7 (2002). The new ordinance divided acceptable uses into "primary" and "secondary" categories. *Id.* The former included, among other things, movie theaters, dance studios, and art studios, while the latter included restaurants, bars, clubs, and specialty retail stores. *Id.* Neither churches nor schools nor government buildings were listed as a permitted use. *Id.* The ordinance prohibited "[a]ny uses not specifically listed." *Id.* Lighthouse filed an application for waiver with regard to the new ordinance in 2003, which Long Branch denied. *See* Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch, 510 F.3d 253, 259 (3d Cir. 2007) (stating history of the dispute). Lighthouse then amended its original complaint to assert Free Exercise clause and RLUIPA claims against the new ordinance. *See* Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch, 406 F. Supp. 2d 507 (D.N.J. 2005) (discussing assertion of Free Exercise and RLUIPA claims). The District Court decided that neither ordinance violated the Equal Terms provision, since Lighthouse had not shown it had been treated worse than a similarly situated secular assembly or institution. *Id.* at 518. The court held that (1) Lighthouse affected liquor licenses differently than secular assemblies; and (2) no secular comparator employing a similar combination of uses existed. *Id.* Moreover, the court determined that even if a similarly situated secular comparator existed, the ordinances survived strict scrutiny. *Id.*

similarly situated secular comparator. Though the Third Circuit ultimately rejected the "category" approach adopted by the Eleventh Circuit, it began its analysis of this issue using the same framework as its sister circuit. Like the Eleventh Circuit, the Third Circuit assumed that "Congress intended to codify the existing jurisprudence interpreting the Free Exercise clause" when it drafted the Equal Terms provision.[37] As such, the court noted *Smith*'s holding that neutral, generally applicable laws "are presumptively valid under the Free Exercise clause even if they impose an incidental burden on the exercise of religion."[38]

From there, however, the Third Circuit's approach differed significantly from the Eleventh Circuit's "category" test. Though the Eleventh Circuit concluded in *Midrash* that religious and secular entities are similarly situated provided they fall within the category of "assemblies or institutions" *as defined by the plain and ordinary meanings of those terms*,[39] the Third Circuit held that the secular and religious assemblies or institutions must be similarly situated "*as to the regulatory purpose*" of the statute at issue.[40] In other words, the government cannot permit secular exemptions to a generally applicable regulation without providing similar exemptions for religious claims "*that would have a similar impact on the protected interests*."[41]

The court based this interpretation of the Free Exercise Clause on the U.S. Supreme Court's decision in *Lukumi*[42] and on its own opinions in *Fraternal Order of Police v. City of Newark*,[43]

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37. *Lighthouse*, 510 F.3d at 264.

38. *Id.* at 265 (citing Employment Div. v. Smith, 494 U.S. 872, 878–79 (1990)).

39. *Midrash*, 366 F.3d at 1230.

40. *Lighthouse*, 510 F.3d at 266 (emphasis added).

41. *Id.* at 265 (emphasis added).

42. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993). Discussing *Lukumi*, the *Lighthouse* court noted that "the reason the [*Lukumi*] ordinance was suspect was not merely because it allowed secular versions of the religious behavior it prohibited, but because both behaviors impacted the city's declared goals in the same way." *Lighthouse*, 510 F.3d at 265.

43. Fraternal Order of Police v. City of Newark, 170 F.3d 359 (3d Cir. 1999). *Fraternal Order of Police* concerned Muslim police officers challenging a police department's prohibition on beards. The point of the regulation, according to the department, was to encourage uniform appearance in its police force. The regulation contained exemptions for undercover officers and for officers with particular medical conditions. The Third Circuit held that the medical exemption

Tenafly Eruv Assoc., Inc. v. Borough of Tenafly,[44] and *Blackhawk v. Pennsylvania*.[45] Concluding that "[h]eightened scrutiny [is] warranted only when a principled distinction [cannot] be made between the prohibited religious behavior and its secular comparator in terms of their effects on the regulatory objectives,"[46] the court reasoned that a regulation violates the Equal Terms provision "only if it treats religious assemblies or institutions less well than secular assemblies or institutions that are similarly situated *as to the regulatory purpose*."[47] The Third Circuit then explicitly rejected the "category" approach adopted by the Eleventh Circuit, reasoning that under the "category" approach "all assemblies and institutions 'travel' together under RLUIPA . . . ."[48] The Third Circuit concluded that such an approach gave too much leeway to religious entities; "a town allow[ing] a local, ten-member book club to meet in the senior center . . . must also permit a large church with a thousand members . . . ,"[49] since both would fall within the broad definition of "assembly" or "institution" employed by the Eleventh Circuit. Accordingly, the Third Circuit held that, to have a claim under the Equal Terms provision, a plaintiff must find a better-treated comparator which is "similarly-situated in regard to the *objectives* of the challenged regulation."[50]

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was subject to heightened scrutiny while the undercover exemption was not, since undercover officers are not supposed to be identified as police. Put another way, the undercover exemption did not "undermine the Department's interest in uniformity." *Id.* at 366.

44. Tenafly Eruv Assoc., Inc. v. Borough of Tenafly, 309 F.3d 144 (3d Cir. 2002). *Tenafly* addressed a township's attempt to prohibit Orthodox Jewish groups from affixing signs to utility poles. Discussing *Tenafly*, the *Lighthouse* court noted that "not *all* exceptions to the facially neutral rule were troublesome, only the ones that bore the same relation to the purposes of the regulation, *i.e.*, preventing clutter . . . ." *Lighthouse*, 510 F.3d at 266.

45. Blackhawk v. Pennsylvania, 381 F.3d 202 (3d Cir. 2004). Pennsylvania had denied a Native American man who kept bears for religious reasons an exemption from a wildlife permit fee, despite exempting zoos and some circuses. The *Lighthouse* court noted that the exemptions for zoos and circuses "undermine[d] the interests served by the fee provision to at least the same degree as would a [religious] exemption." *Lighthouse*, 510 F.3d at 266 (citing *Blackhawk*, 381 F.3d at 211).

46. *Lighthouse*, 510 F.3d at 266.

47. *Id.* (emphasis added).

48. *Id.* at 268.

49. *Id.*

50. *Id.*

2. Application of strict liability

Having set forth its "objective of the statute" test, the Third Circuit then turned to the issue of whether a regulation that treats a religious entity on less than equal terms with a similarly situated secular entity is subject to strict scrutiny. Noting that RLUIPA's Substantial Burdens section codifies strict scrutiny by its plain language while the Discrimination and Exclusion section does not, the court concluded that Congress did not intend to incorporate strict scrutiny into the Equal Terms provision.[51] In advancing this textual argument, the Third Circuit again explicitly broke with the Eleventh Circuit. Though the latter assumed in *Midrash* that strict scrutiny must be read into the Equal Terms provision because "RLUIPA's equal terms provision codifies the *Smith-Lukumi* line of [Free Exercise] precedent,"[52] the Third Circuit found that "Congress clearly signaled its intent that the operation of the Equal Terms provision *not* include strict scrutiny by the express language of sections 2a(1) and 2b(1) [the Substantial Burdens and Discrimination and Exclusion sections] . . . ."[53] Rather than apply strict scrutiny, the Third Circuit determined that a strict liability standard applies in cases where "a land-use regulation treats religious assemblies or institutions on less than equal terms with nonreligious assemblies or institutions," provided those nonreligious assemblies and institutions have the same effect on the objectives of the statute as the religious assemblies and institutions.[54]

IV. WHICH APPROACH IS PREFERABLE?

The question of which Circuit's approach is preferable is a difficult one, as both courts advanced cogent arguments supporting their reasoning. The preferred approach is a hybrid. The Eleventh Circuit's "category" test requires accommodation of any religious assembly or institution treated on less than equal terms with any secular assembly or institution, broadly defined. Such a requirement

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51. *Id.* at 269.

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

53. *Lighthouse*, 510 F.3d at 269.

54. *Id.*

imposes an unworkable burden on legislators devising land use regulations. The Third Circuit's "objective of the statute" test is more limited and arguably more workable. On the other hand, the Third Circuit's strict liability standard may invalidate regulations designed to further unusually important governmental interests that should not be curtailed. As such, strict scrutiny should be applied in Equal Terms provision cases to allow courts a means to uphold the occasional narrowly tailored regulation designed to further a compelling state interest.

A. The Third Circuit's "objective of the statute" test should be applied

The Third Circuit's "objective of the statute" test serves a necessary gatekeeping function, and thus must be preferred over the Eleventh Circuit's "category" test. Admittedly, the Third Circuit's test makes little sense from the perspective of textual interpretation. If Congress had intended for the Equal Terms provision to incorporate this test, Congress probably would have said so explicitly. Because RLUIPA does not define "assembly" and "institution," the Eleventh Circuit's "category approach"—which interprets the plain and ordinary language of the statute—makes sense from the perspective of textual interpretation. Indeed, the Third Circuit employed a textual interpretation argument to support its decision in *Lighthouse* that strict liability, and not strict scrutiny, should apply to regulations that violate the Equal Terms provision.

In practice, however, the "category" approach would prove unworkable. One need only consider the Third Circuit's example of a city forced to accommodate a 1,000-person church because of the presence of a ten-person book club. The obvious implication of this example is that an expansive definition of "assembly" or "institution" covers entities far too disparate to deserve accommodation. Practically, a "category" approach subjects land use regulations, including those designed toward furthering compelling governmental interests, to challenge from any religious assembly or institution interested in operating in the area governed by the regulation. For legislators interested in, for example, revitalizing a district ravaged by urban blight, this burden may be too much to bear.

The Third Circuit's "objective of the statute" test does not present the same problem. Whatever its indefensibility from a textual perspective, its logic is appealing. To take the Third Circuit's example, consider a regulation prohibiting non-commercial land uses in the downtown district with an exemption for the ten-member book club but not the 1,000-member church. Assume the purpose of the statute is to encourage the commercial development of the downtown district by prohibiting uses that detract from or interfere with commercial business. Permitting the ten-member book club would have little effect on the purpose of the statute, while granting an exemption to the church might tie up downtown traffic, create parking problems, and possibly implicate other laws involving the sale of alcohol near religious establishments. The point of the Third Circuit's test is that the law cannot be said to be treating these assemblies unequally when the assemblies themselves have widely disparate impacts on the regulation's purpose. Put another way, the "objective of the statute" test serves a gatekeeping function by screening out claims involving secular and religious entities not susceptible to easy comparison.

B. The Eleventh Circuit's strict scrutiny standard should be adopted

Assuming that the Third Circuit's "objective of the statute" test is adopted, one might question whether it matters if strict scrutiny or strict liability is employed in an Equal Terms provision case. It seems likely that the majority of claims capable of surviving the "objective of the statute" test have at least some merit. Nevertheless, state and local governments have much to gain and plaintiffs little to lose by applying strict scrutiny to regulations challenged under the Equal Terms provision.

Admittedly, the Third Circuit's textual argument for applying strict liability has substantial merit. It is difficult to see why Congress would explicitly codify strict scrutiny in the Substantial Burdens section and not the Discrimination and Exclusion section, yet expect the test to be applied in the latter section as well. From a practical standpoint, however, strict scrutiny poses little threat to plaintiffs. Strict scrutiny is, from the government's perspective, the most onerous constitutional test; it shows scant mercy, invalidating almost every regulation it touches. As such, plaintiffs would not be

significantly burdened by an interpretation reading a strict scrutiny requirement into the Equal Terms provision. The government, however, might be significantly aided by such an interpretation. In rare cases where an Equal Terms provision claim capable of surviving the gatekeeping function of the Third Circuit's "objective of the statute" test is matched against an unusually compelling and narrowly tailored governmental interest, courts should be able to uphold the regulation.

Consider the following example: a city regulation zones the downtown district for commercial use only, intending to increase tax revenues and revitalize downtown businesses. The zoning regulation permits exemptions for non-commercial religious and non-religious uses at the discretion of the city. Within this district is an old log cabin in which a famous American statesman was born. The monument is quite popular, attracts visitors from all over the country, and is a historical landmark. Despite the heavy foot traffic and occasional parking problems created by the monument, the city has issued an exemption to the monument on the grounds that the state has a compelling interest in preserving historical buildings on their original sites. A 500-person church now wishes to locate downtown, arguing that the majority of its parishioners live within a mile of the downtown district. The city knows that allowing the church to rent property there will cause severe parking problems and excessive foot traffic, both of which will interfere with shopping and dining downtown. The city therefore decides to deny the church's request for an exemption.

The church's claim would likely survive the gatekeeping function of the Third Circuit's test, since the church could point to the monument as a similarly situated secular comparator: the monument and the church both increase traffic and decrease the availability of the downtown district for commercial use, and therefore have the same effect on the objective of the regulation (promoting business downtown). In such a case, the regulation should be subject to strict scrutiny. The preservation of a historical landmark is a compelling state interest, and it is unlikely that the zoning regulation could be more narrowly tailored and still accomplish its objective of promoting downtown commerce. A regulation *mandating* exemptions for religious institutions, for example, would allow any congregation, no matter how large, to locate downtown, thereby destroying the commercial nature of the

district. Yet under the Third Circuit's strict liability test, the church's claim would succeed even though the church frustrates the objective of a narrowly tailored statute designed to further a compelling state interest. Employing strict scrutiny would ensure both circuits reach the same result—denying the church's request for a zoning exemption.

V. CONCLUSION

In sum, RLUIPA's Equal Terms provision implicates important issues, such as the ability of religious establishments to locate in densely populated areas, and the extent to which state and local governments can exclude them from commercial districts. Interpreting this provision requires weighing the interests of persons to worship where they please against the interests of state and local governments in enacting effective land use regulations. The Third Circuit's "objective of the statute" approach is preferable because of its gatekeeping function. Though the Eleventh Circuit's "category" approach is appealing from the perspective of textual interpretation, it requires too much of legislators, forcing them to accommodate any religious entity that can point to any secular comparator, regardless of that comparator's effect on the objective of the regulation. Conversely, the Eleventh Circuit's strict scrutiny test is preferable to the Third Circuit's strict liability test, since the former imposes a minimal burden on plaintiffs while providing courts a means to protect important governmental interests. For now, however, the Circuits remain split on this issue, and it remains to be seen if the U.S. Supreme Court will resolve the conflict.