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## Incommensurable Uses: RLUIPA's Equal Terms Provision and Exclusionary Zoning in *River of Life Kingdom Ministries v. Village of Hazel Crest*

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# INCOMMENSURABLE USES: RLUIPA'S EQUAL TERMS PROVISION AND EXCLUSIONARY ZONING IN *RIVER OF LIFE KINGDOM MINISTRIES V. VILLAGE OF HAZEL CREST*

**Abstract:** On July 2, 2010, the U.S. Court of Appeals for the Seventh Circuit in *River of Life Kingdom Ministries v. Village of Hazel Crest* held that the “equal terms” provision of the Religious Land Use and Institutionalized Persons Act requires a comparison of religious and secular land uses with respect to an accepted zoning criteria. In so doing, the Seventh Circuit confronted a circuit split in the application of the equal terms provision and carved out a compromise between competing concerns about control over land-use regulations. This Comment discusses the difficulty of equal treatment within the context of exclusionary zoning and argues that *River of Life* puts control over zoning regulations into the courts and out of the hands of religious institutions.

## INTRODUCTION

In 2010, President Obama sparked controversy when he asserted the right of Muslims to equal treatment under the law in his comments on the Ground Zero mosque.<sup>1</sup> This controversy illustrates how equality in the context of religious freedom is a polarizing concept in the realm of public opinion.<sup>2</sup> The U.S. Courts of Appeal have been forced to confront this controversy head-on when applying the “equal terms” provision of the Religious Land Use and Institutionalized Persons Act (RLUIPA).<sup>3</sup> The equal terms provision prohibits the government from imposing land-use regulations that treat religious institutions “on less than equal terms” than nonreligious institutions.<sup>4</sup> During RLUIPA’s ten-year history, courts have adopted different tests to the equal terms provision.<sup>5</sup> In 2010, in *River of Life Kingdom Ministries v. Village of Hazel Crest*,

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<sup>1</sup> Sheryl Gay Stolberg, *Obama Backs Islam Center Near 9/11 Site*, N.Y. TIMES, Aug. 14, 2010, at A1.

<sup>2</sup> *See id.*

<sup>3</sup> 42 U.S.C. § 2000cc(b)(1) (2006); *see infra* notes 22–34 and accompanying text.

<sup>4</sup> 42 U.S.C. § 2000cc(b)(1).

<sup>5</sup> U.S. DEP’T OF JUSTICE, REPORT ON THE TENTH ANNIVERSARY OF THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT 13 (2010), *available at* [http://www.justice.gov/crt/rluipa\\_report\\_092210.pdf](http://www.justice.gov/crt/rluipa_report_092210.pdf).

the U.S. Court of Appeals for the Seventh Circuit decided that the appropriate solution to this problem was to carve out a compromise between religious institutions, municipalities, the federal government, and the courts for control over land-use regulations.<sup>6</sup> As a result, the Seventh Circuit affirmed the denial of Village of Hazel Crest's motion for a preliminary injunction against enforcement of the zoning regulation.<sup>7</sup>

Part I of this Comment outlines the background and holding of *River of Life*.<sup>8</sup> Part II then traces the relationship between different constructions of the equal terms provision and the modes of control over land-use regulation.<sup>9</sup> Part II then explores the Seventh Circuit's efforts to strike a compromise with its "accepted zoning criteria" test.<sup>10</sup> Finally, Part III argues that *River of Life* demonstrates how equal treatment within the context of exclusionary zoning is in fact impossible.<sup>11</sup> In effect, *River of Life* puts control over zoning regulations into the courts and out of the hands of religious institutions.<sup>12</sup>

#### I. DIVERGENT APPLICATIONS OF RLUIPA'S EQUAL TERMS PROVISION AND THE SEVENTH CIRCUIT'S SEARCH FOR A COMPROMISE

The River of Life Kingdom Ministries is a small church that occupies a warehouse in Chicago Heights, Illinois.<sup>13</sup> In 2007, the church wanted to relocate to a building in the nearby Village of Hazel Crest.<sup>14</sup> That building, however, was in an area designated by the town's zoning ordinance as a commercial district.<sup>15</sup> The zoning ordinance had been amended to exclude new non-commercial uses so the district around the train station could be revitalized as a commercial center.<sup>16</sup> The ordinance therefore excluded churches and other non-commercial institutions like community centers, schools, and art galleries.<sup>17</sup>

<sup>6</sup> See 611 F.3d 367, 368–71 (7th Cir. 2010).

<sup>7</sup> *Id.* at 374.

<sup>8</sup> See *infra* notes 13–52 and accompanying text.

<sup>9</sup> See *infra* notes 53–62 and accompanying text.

<sup>10</sup> See *infra* notes 63–77 and accompanying text.

<sup>11</sup> See *infra* notes 78–90 and accompanying text. This Comment uses the term "exclusionary zoning" to refer to the practice of zoning areas for certain uses to the exclusion of others. See *River of Life*, 611 F.3d at 372 (quoting *People ex rel. Skokie Town House Builders, Inc. v. Morton Grove*, 157 N.E.2d 33, 36 (1959)).

<sup>12</sup> See *infra* notes 86–90 and accompanying text.

<sup>13</sup> *River of Life Kingdom Ministries v. Village of Hazel Crest*, 611 F.3d 367, 368 (7th Cir. 2010).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

On February 15, 2008, the River of Life Kingdom Ministries sued the Village of Hazel Crest under RLUIPA's equal terms provision and moved for a preliminary injunction against the enforcement of the zoning ordinance.<sup>18</sup> The district judge denied the motion, and a panel of the Seventh Circuit Court of Appeals affirmed that the church was unlikely to prevail when the case was fully litigated.<sup>19</sup> The Seventh Circuit then granted a rehearing en banc due to a disagreement among the circuits as to the proper test for applying the equal terms provision.<sup>20</sup> It ultimately created its own "accepted zoning criteria" test that compromised between religious institutions, municipalities, the federal government, and the courts for control over land-use regulations.<sup>21</sup>

### A. *RLUIPA and the Circuit Split*

RLUIPA is the latest chapter in a long struggle between the courts, the federal government, and municipalities over religious liberty.<sup>22</sup> In *River of Life*, the Seventh Circuit had to determine the proper standard for applying RLUIPA's equal terms provision to the church's petition.<sup>23</sup> The equal terms provision states that "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."<sup>24</sup> The circuit courts have struggled to apply the equal terms provision and have disagreed on two points: (1) how to compare religious institutions to secular ones, and (2) the level of scrutiny to apply for instances of unequal treatment.<sup>25</sup>

Judge Richard Posner, writing for the majority in *River of Life*, examined the different approaches the Third and Eleventh Circuits have

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<sup>18</sup> *River of Life Kingdom Ministries v. Village of Hazel Crest*, No. 08C0950, 2008 WL 4865568, at \*1 (N.D. Ill. July 14, 2008), *aff'd in part*, 585 F.3d 364 (7th Cir. 2009), *reh'g en banc granted, opinion vacated, and aff'd*, 611 F.3d 367 (7th Cir. 2010).

<sup>19</sup> *River of Life*, 611 F.3d at 368.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 368–71.

<sup>22</sup> See 146 CONG. REC. 16,702 (2000) (statement of Sen. Reid); Sarah Keeton Campbell, Note, *Restoring RLUIPA's Equal Terms Provision*, 58 DUKE L.J. 1071, 1073–74 (2009); Anthony Lazzaro Minervini, Comment, *Freedom From Religion: RLUIPA, Religious Freedom, and Representative Democracy on Trial*, 158 U. PA. L. REV. 571, 572–602 (2010) (discussing RLUIPA's history and the application of the equal terms provision).

<sup>23</sup> 42 U.S.C. § 2000cc(b)(1) (2006); *River of Life*, 611 F.3d at 368.

<sup>24</sup> 42 U.S.C. § 2000cc(b)(1).

<sup>25</sup> Campbell, *supra* note 22, at 1074, 1085–86. This Comment only briefly addresses the debate over the level of scrutiny; it instead focuses on the methods by which courts compare religious institutions to secular institutions. See *infra* notes 53–77 and accompanying text.

taken to the equal terms provision.<sup>26</sup> In 2007, the Third Circuit decided in *Lighthouse Institute for Evangelism, Inc. v. City of Long Branch* that “a regulation will violate the Equal Terms provision only if it treats religious assemblies or institutions less well than secular assemblies or institutions that are similarly situated *as to the regulatory purpose*.”<sup>27</sup> The Seventh Circuit understood this approach to require a court considering whether the equal terms provision has been violated to first identify the regulatory purpose of the ordinance at issue and then to compare the religious assembly to secular assemblies in light of the regulatory purpose.<sup>28</sup> A zoning ordinance violates the equal terms provision if the secular assembly and religious assembly do not differ in any way “material to the regulatory purpose” but the ordinance nevertheless treats the religious institution worse than the secular institution.<sup>29</sup> The Third Circuit decided that a regulation that disfavors a religious institution in such a way should be subject to a strict liability analysis rather than a strict scrutiny analysis.<sup>30</sup>

Unlike the Third Circuit, the Eleventh Circuit simply compares the religious assembly to a similarly situated secular assembly, defined as a group gathered for a common purpose.<sup>31</sup> A regulation that would permit a secular assembly to locate in a district must permit a similarly situated church to do so as well.<sup>32</sup> For example, in 2004, in *Midrash Sephardi, Inc. v. Surfside*, the Eleventh Circuit held that private clubs are assemblies that are similarly situated to churches and synagogues.<sup>33</sup> Also unlike the Third Circuit, the Eleventh Circuit decided that any unequal treatment of religious institutions will be subject to a strict scrutiny analysis rather than a strict liability analysis.<sup>34</sup>

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<sup>26</sup> *River of Life*, 611 F.3d at 368–69.

<sup>27</sup> 510 F.3d 253, 266 (3d Cir. 2007). The Third Circuit also noted that “there is no need . . . for the religious institution to show that there exists a secular comparator that performs the same functions.” *Id.*

<sup>28</sup> 611 F.3d at 368–69.

<sup>29</sup> *Id.* at 369; *Lighthouse Inst.*, 510 F.3d at 266.

<sup>30</sup> See *Lighthouse Inst.*, 510 F.3d at 269.

<sup>31</sup> See, e.g., *Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward County*, 450 F.3d 1295, 1308–11 (11th Cir. 2006); *Konikov v. Orange County*, 410 F.3d 1317, 1324–25 (11th Cir. 2005); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1230–31 (11th Cir. 2004).

<sup>32</sup> See *River of Life*, 611 F.3d at 369; *Midrash Sephardi*, 366 F.3d at 1230–31.

<sup>33</sup> 366 F.3d at 1231.

<sup>34</sup> *River of Life*, 611 F.3d at 369 (citing *Midrash Sephardi*, 366 F.3d at 1232).

### B. The “Accepted Zoning Criteria” Test

Although the Seventh Circuit in *River of Life* acknowledged that the different tests used by the Eleventh and Third Circuits may yield similar or identical results, it declined to follow either approach.<sup>35</sup> First, it decided that the Eleventh Circuit’s broad understanding of the term “assembly” would allow for comparisons of incommensurable uses of land.<sup>36</sup> It reasoned that equality “signifies not equivalence or identity but proper relation to relevant concerns.”<sup>37</sup> Second, it decided that the Eleventh Circuit’s test “may be *too* friendly to religious land uses” and thus may violate the Establishment Clause.<sup>38</sup> Third, it expressed concern that the Third Circuit’s application of the equal terms provision would allow self-serving zoning officials to disguise systematic discrimination of religious institutions under the veil of a “regulatory purpose.”<sup>39</sup>

Given these perceived shortcomings, the Seventh Circuit forged its own course and held that the proper application of RLUIPA’s equal terms provision is the “accepted zoning criteria” test: “If a church and a community center, though different in many respects, do not differ with respect to any accepted zoning criterion, then an ordinance that allows one and forbids the other denies equality and violates the equal terms provision.”<sup>40</sup> The Seventh Circuit decided not to apply strict scrutiny to a discriminatory ordinance because it perceived such analysis to lack textual basis to only have been used by the Eleventh’s Circuit “to solve a problem of the court’s own creation”—that is, the over-protection of religious institutions.<sup>41</sup>

In sum, the Seventh Circuit’s followed the Third Circuit’s narrow reading of “assembly” but modified the test by shifting the focus from

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<sup>35</sup> *See id.* at 370–71.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 371.

<sup>38</sup> *Id.* at 370 (citing *Saints Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 895, 900 (7th Cir. 2005)).

<sup>39</sup> *Id.* at 371.

<sup>40</sup> *River of Life*, 611 F.3d at 371.

<sup>41</sup> *See id.* at 370–71. The Seventh Circuit limited the holding to the application of RLUIPA’s equal terms provision and raised three other protections against religious discrimination: (1) courts must apply strict scrutiny to a land-use regulation “that imposes a substantial burden on the religious exercise of a . . . religious assembly or institution”; (2) “no government shall impose or implement a land use regulation in a manner that discriminates against any assembly or institution on the basis of religion or religious denomination”; or (3) that “totally excludes religious assemblies from a jurisdiction.” *See id.* at 374 (citing 42 U.S.C. § 2000cc(a)(1), (b)(2), (b)(3) (2006)).

regulatory purpose to regulatory criteria.<sup>42</sup> Thus, the outcome would not depend on subjective, and potentially self-serving, testimony by local officials.<sup>43</sup> Rather, by focusing on regulatory criteria, the test shifted the interpretive standard from a subjective one—looking into the intent behind a zoning ordinance—to an objective one, to be determined by federal judges who apply the accepted criteria.<sup>44</sup>

The concurrence and dissent in *River of Life* raised a number of criticisms to the majority approach.<sup>45</sup> Judge Ann Claire Williams concurred in the judgment but argued that the “regulatory purpose” approach is still the best approach for three reasons: (1) it is simpler than having judges decipher the accepted zoning criteria; (2) judges will look to regulatory purposes for guidance anyways; and (3) zoning officials could still couch discriminatory zoning policies in terms of accepted criteria.<sup>46</sup> Judge Diane S. Sykes dissented, arguing that the use of an accepted criterion such as “tax-enhancement” would always allow zoning officials to exclude religious land uses from commercial, industrial, and business districts.<sup>47</sup> Furthermore, traffic control and other criteria would force religious institutions out of residential areas, leaving religious institutions with nowhere to go.<sup>48</sup> For example, the increase in traffic generated by a church can be the basis for its exclusion from a residential area.<sup>49</sup>

Nevertheless, the majority denied River of Life Kingdom Ministries’ motion for an injunction against the zoning ordinance because it decided that the church would be unable to prove the ordinance violated the equal terms provision of the RLUIPA.<sup>50</sup> The court held that generating municipal tax revenue is a concern of land-use regulation.<sup>51</sup> Therefore, the creation of a commercial district is an accepted zoning criterion, and the ordinance treated religious and secular uses the same.<sup>52</sup>

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<sup>42</sup> See *id.* at 371.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 371.

<sup>45</sup> See, e.g., *id.* at 376–77 (Williams, J., concurring); *id.* at 377–92 (Sykes, J., dissenting).

<sup>46</sup> *River of Life*, 611 F.3d at 376–77 (Williams, J., concurring).

<sup>47</sup> *Id.* at 386 (Sykes, J., dissenting). Scholars have likewise criticized the tax-enhancement rationale to a zoning ordinance because its practical effect is to allow for widespread opposition to the exercise of religion. See Douglas Laycock, *State RFRA's and Land Use Regulation*, 32 U.C. DAVIS L. REV. 755, 762 (1999).

<sup>48</sup> *River of Life*, 611 F.3d at 386 (Sykes, J., dissenting).

<sup>49</sup> Laycock, *supra* note 47, at 774–75 (citations omitted).

<sup>50</sup> *Id.* at 373 (majority opinion).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

## II. BALANCING COMPETING CONCERNS OVER LAND-USE REGULATIONS

### A. *The Equal Terms Provision and Control over Land-Use Regulations*

The varying constructions of the equal terms provision<sup>53</sup> reveal different schemes of control over land-use regulations.<sup>54</sup> On the one hand, the Third Circuit's regulatory purpose test limits the power of religious institutions to challenge local zoning ordinances.<sup>55</sup> The Third Circuit's view is that the Eleventh Circuit's application of the equal terms provision gives too much power to religious institutions, which contradicts Congress's intent to deny religious institutions blanket immunity from land-use regulations.<sup>56</sup> The Seventh Circuit in *River of Life* echoes the concern that the Eleventh Circuit's test may disproportionately favor religious institutions.<sup>57</sup> Thus, the Third and Seventh Circuits proposed tests that curb the power of religious institutions.<sup>58</sup>

On the other hand, the Eleventh Circuit looked to the intent of Congress to achieve a different result—to provide religious institutions with the power to challenge zoning regulations.<sup>59</sup> In 2004, the Eleventh Circuit in *Midrash Sephardi, Inc. v. Surfside* concluded that RLUIPA does not define “assembly” or “institution,” and the court therefore opted to define these terms in accordance with their dictionary definitions.<sup>60</sup> The court further looked to the intent of the legislators who expressed

<sup>53</sup> Compare *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 268 (3d Cir. 2007) (reasoning that plaintiffs suing under the equal terms provision must identify the objectives of the regulation), with *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1230–31 (11th Cir. 2004) (reasoning that the terms “assembly” or “institution” should be construed according to their natural meanings for the purposes of finding a violation of the equal terms provision).

<sup>54</sup> See *Lighthouse Inst.*, 510 F.3d at 268; *Midrash Sephardi*, 366 F.3d at 1230, 1231 & n.14.

<sup>55</sup> See *Lighthouse Inst.*, 510 F.3d at 268.

<sup>56</sup> See *id.* (“[The Eleventh Circuit’s reading of RLUIPA] would lead to the conclusion that Congress intended to force local governments to give any and all religious entities a free pass to locate wherever any secular institution or assembly is allowed.”); see also 146 CONG. REC. 16,700 (2000).

<sup>57</sup> 611 F.3d 367, 370 (7th Cir. 2010). A related, more general, argument against RLUIPA is that local governments may be better able to balance the interests of secular and religious institutions in a given community. Richard C. Schragger, *The Role of the Local in the Doctrine and the Discourse of Religious Liberty*, 117 HARV. L. REV. 1810, 1846 (2004). By having a federal regulation, however, religion may be seen as a class for favored treatment across local and state boundaries. *Id.*

<sup>58</sup> See *River of Life*, 611 F.3d at 370–71; *Lighthouse Institute*, 510 F.3d at 268.

<sup>59</sup> See *Midrash Sephardi*, 366 F.3d at 1231 n.14. Although Judge Posner criticized the use of a strict scrutiny analysis, the Eleventh Circuit’s application of strict scrutiny may very well be a way to balance the interests of municipalities and religious institutions. See *River of Life*, 611 F.3d at 370–71; *Midrash Sephardi*, 366 F.3d at 1231–32.

<sup>60</sup> *Midrash Sephardi*, 366 F.3d at 1230–31.



the need to protect churches and other religious institutions from unfair zoning ordinances.<sup>61</sup> In this way, the Eleventh Circuit followed an originalist construction of the equal terms provision to empower religious institutions against discriminatory zoning practices.<sup>62</sup>

### B. *Imaginative Reconstruction: The Balancing Act*

The Seventh Circuit's "accepted zoning criteria" test articulated in *River of Life* responded to concerns over the balance of power between the courts, municipalities, and religious institutions raised by both the Third and Eleventh Circuits' tests.<sup>63</sup> On the one hand, the Seventh Circuit's test answered the concern that RLUIPA unduly limits municipal regulation and favors religious institutions.<sup>64</sup> On the other hand, the test also aimed to limit the role of "self-serving testimony by zoning officials and hired expert witnesses."<sup>65</sup> Thus, the test also advances the aims of RLUIPA by protecting religious institutions from unfair zoning ordinances.<sup>66</sup>

This imaginative reconstruction of the equal terms provision reflects a balancing act in deciding who controls land-use regulations.<sup>67</sup> Judge Posner's reluctance to adhere strictly to RLUIPA's terms may reflect a more balanced application of congressional intent than an originalist or strict construction of the statute.<sup>68</sup> Indeed, Senators

<sup>61</sup> See *id.* at 1231 n.14 ("Zoning codes frequently exclude churches in places where they permit theaters, meeting halls, and other places where large groups of people assemble for secular purposes.") (quoting 146 CONG. REC. 16,698 (2000)); Minervini, *supra* note 22, at 582–84 (discussing the history, congressional intent, and application of RLUIPA). Scholars have confirmed these concerns through surveys conducted in Illinois. See Laycock, *supra* note 47, at 761 n.16 (citations omitted).

<sup>62</sup> See, e.g., *Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward County*, 450 F.3d 1295, 1308–11 (11th Cir. 2006); *Konikov v. Orange County*, 410 F.3d 1317, 1324–25 (11th Cir. 2005); *Midrash Sephardi*, 366 F.3d at 1230–31.

<sup>63</sup> See 611 F.3d at 370–71.

<sup>64</sup> See *id.*

<sup>65</sup> *Id.* at 371.

<sup>66</sup> See *id.*

<sup>67</sup> See *id.*; Richard A. Posner, *Statutory Interpretation—In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 817–21 (1983). According to the practice of "imaginative reconstruction," Judge Posner explains:

The judge should try to think his way as best he can into the minds of the enacting legislators and imagine how they would have wanted the statute applied to the case at bar. . . . To construe a statute strictly is to limit its scope and its life span. . . . The letter killeth but the spirit giveth life.

*Id.*

<sup>68</sup> See *River of Life*, 611 F.3d at 371; 146 CONG. REC. 16,700 (2000); Posner, *supra* note 67, at 817–21.

Hatch and Kennedy noted in a joint statement that RLUIPA “does not provide religious institutions with immunity from land use regulation.”<sup>69</sup> Furthermore, the “accepted zoning criteria” would allow judges to act in the place of Congress when striking a compromise with municipalities in the application of RLUIPA to specific cases.<sup>70</sup>

Despite this attempt at compromise and balance, the “accepted zoning criteria” test also raises the difficulty of equal application of the law in the context of exclusionary zoning.<sup>71</sup> Judge Posner’s majority opinion outlined the merits of exclusionary zoning to set the stage for applying the equal terms provision in light of Hazel Crest’s commercial objectives.<sup>72</sup> He went on to explain that the village was merely excluding noncommercial land uses from an area suitable for commercial uses.<sup>73</sup> Thus, Judge Posner assumed the legitimacy of setting aside land for commercial use to the exclusion of other uses.<sup>74</sup>

Judge Sykes, in her dissent, questioned the legitimacy of exclusionary zoning as understood in the application of RLUIPA.<sup>75</sup> She noted that the equal terms provision reflects a congressional judgment that local land-use regulations that treat religious institutions worse than other institutions are inherently not neutral.<sup>76</sup> Thus, in her view, the majority’s emphasis on exclusionary zoning is inconsistent with RLUIPA’s equal terms provision.<sup>77</sup>

### III. EQUALITY AND EXCLUSIONARY ZONING

Despite the Seventh Circuit’s best efforts in *River of Life* to balance the various approaches to the equal terms provision, a system of exclusionary zoning is incompatible with the goal of equal treatment under a zoning ordinance.<sup>78</sup> The Third and Eleventh Circuits were both correct to identify the unequal amount of control exerted by either reli-

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<sup>69</sup> 146 CONG. REC. 16,700.

<sup>70</sup> See *River of Life*, 611 F.3d at 371.

<sup>71</sup> See *infra* notes 78–85 and accompanying text.

<sup>72</sup> See *River of Life*, 611 F.3d at 371–73.

<sup>73</sup> *Id.* at 373–74.

<sup>74</sup> See *id.* at 371–74.

<sup>75</sup> *Id.* at 388–89 (Sykes, J., dissenting).

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> See *River of Life Kingdom Ministries v. Village of Hazel Crest*, 611 F.3d 367, 388–89 (7th Cir. 2010) (Sykes, J., dissenting). There are also other reasons to question the legitimacy of exclusionary zoning. See Jerry Frug, *The Geography of Community*, 48 STAN. L. REV. 1047, 1083–1108 (1996) (arguing that certain exclusionary zoning practices contribute to fragmented and isolated communities).

gious institutions or municipalities under each test—no matter which interpretation is used, either religious institutions or municipalities would end up with more power over land-use regulations.<sup>79</sup>

The Seventh Circuit's new "accepted zoning criteria" test shifts control over land-use regulations out of the hands of religious institutions and into those of the courts and municipalities.<sup>80</sup> That test gives courts more control over land-use regulation by integrating the practice of "imaginative reconstruction" in the application of the equal terms provision.<sup>81</sup>

As a result, the new test may decrease the number of cases brought under RLUIPA.<sup>82</sup> Furthermore, the "accepted zoning criteria" test does not solve the problem of local officials couching their discriminatory zoning ordinances in general terms.<sup>83</sup> In fact, as Judge Sykes noted in her dissent, municipalities are now free to discriminate against religious institutions in commercial areas because religious institutions do not advance commercial interests.<sup>84</sup> In addition, the burden of identifying an accepted zoning criterion, which could be a mask for discriminatory zoning regulations, would discourage religious institutions from bringing the suit in the first place.<sup>85</sup>

Finally, *River of Life* implicitly tips the balance in favor of local municipalities in the Seventh Circuit by acknowledging their right to prioritize certain parcels of land for commercial use.<sup>86</sup> Judge Posner wrote that "[c]ommercery and industry must be recognized for what they are: necessary and desirable elements of the community."<sup>87</sup> Despite Judge Posner's attempt to carve out a compromise, the "accepted zoning cri-

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<sup>79</sup> See *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 268 (3d Cir. 2007); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1231 n.14 (11th Cir. 2004).

<sup>80</sup> See *River of Life*, 611 F.3d at 371.

<sup>81</sup> See *id.*; Posner, *supra* note 67, at 817–21. Or, the new test does not meaningfully affect the power of local zoning officials to provide self-serving regulatory criteria as justifications for certain zoning ordinances. *River of Life*, 611 F.3d at 376–77 (Williams, J., concurring).

<sup>82</sup> See Edward W. McClenathan, *Swinging the Big Stick: How the Circuits Have Interpreted RLUIPA and What Practitioners Need to Know*, 36 REAL EST. L.J. 405, 425 (2008).

<sup>83</sup> See *River of Life*, 611 F.3d at 386 (Sykes, J., dissenting).

<sup>84</sup> See *id.*

<sup>85</sup> See *id.*

<sup>86</sup> See *River of Life*, 611 F.3d at 371–73 (majority opinion).

<sup>87</sup> *Id.* at 372 (citing Harry B. Madsen, *Noncumulative Zoning in Illinois*, 37 CHI.-KENT L. REV. 108, 113–14 (1960)).

teria” test may deter religious institutions from suing under RLUIPA’s equal terms provision.<sup>88</sup>

Although one need not fault the court for favoring municipal governments, the decision in *River of Life* raises the question whether there is a normative difference between religious and secular land uses.<sup>89</sup> It also raises the difficulty of applying RLUIPA’s equal terms provision within the context of exclusionary zoning.<sup>90</sup>

### CONCLUSION

The decision in *River of Life* reflects the challenge of applying the concept of land-use equality in the context of exclusionary zoning. This difficulty is a cue to scholars and jurists to reconsider the practical application of RLUIPA within the context of exclusionary zoning. For the time being, the application of RLUIPA’s equal terms provision exposes the incompatibility of equal treatment of the law with exclusionary zoning practices.

TOKUFUMI J. NODA

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<sup>88</sup> See *id.* at 371–73. Nevertheless, Judge Posner seems to leave the door open for successful claims under the equal terms provision by stating that “should a municipality create what purports to be a pure commercial district and then allow other uses, a church would have an easy victory if the municipality kept it out.” *Id.* at 374.

<sup>89</sup> Adam J. MacLeod, *A Non-Fatal Collision: Interpreting RLUIPA Where Religious Land Uses and Community Interests Meet*, 42 URB. LAW. 41, 73–76 (2010). This comparison itself, however, runs into the same problem of comparing incommensurable social goods. *Id.* at 75–76. For example, because religion and health benefit society in different ways, perhaps both are equally important. *Id.*

<sup>90</sup> See *supra* notes 78–85 and accompanying text.

