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RLUIPA and Exclusionary Zoning: Government Defendants Should Have the Burden of Persuasion in Equal Terms Cases

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**RLUIPA AND EXCLUSIONARY ZONING:
GOVERNMENT DEFENDANTS SHOULD HAVE
THE BURDEN OF PERSUASION
IN EQUAL TERMS CASES**

*Thomas E. Raccuia**

Zoning and other land use regulations are often used to hinder the operation of religious institutions or the construction of their facilities. In 2000, Congress passed the Religious Land Use and Institutionalized Persons Act (RLUIPA), in part to combat such exclusionary land use practices. RLUIPA's Equal Terms Provision forbids governments from imposing land use regulations that treat religious institutions on less than equal terms with secular institutions. Despite the apparent clarity of the statutory language, federal circuit courts have disagreed over the allocation of burdens of proof in Equal Terms cases. Some circuits have held that religious plaintiffs have the burden of persuasion, while others have held that the burden of persuasion falls on government defendants. The allocation of burdens is important because it is generally more difficult for the party charged with the burden of persuasion to succeed at trial. This Note approaches the circuit split by examining RLUIPA's legislative history and public policy goals, as well as comparing Equal Terms cases with federal exclusionary zoning cases, and with Free Exercise Clause jurisprudence. Ultimately, this Note argues that in light of the above comparisons, as well as RLUIPA's clear statutory text, the government, not the religious plaintiff, should have the burden of persuasion in Equal Terms cases.

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INTRODUCTION

In July 2009, a group of American Muslims purchased the old Burlington Coat Factory building at 45 Park Place in Lower Manhattan, two blocks from the former World Trade Center site.¹ The group's plan to develop the building as a community center—which would include a prayer space, among other amenities²—attracted little media attention³ until May 2010, when Community Board 1 approved the project.⁴ Shortly thereafter, bloggers⁵ and newspaper columnists⁶ began to devote extensive coverage to the project, which would become widely known as the “Ground Zero Mosque.”⁷

In the months that followed, the project, by then titled Park51,⁸ became a national controversy. Despite vocal support for Park51 in some quarters,⁹ by August, polls indicated that a majority of Americans were opposed to the plan.¹⁰ The controversy continued to grow during the 2010 midterm elections, and opposition to Park51 became a litmus test for some

1. See Ralph Blumenthal & Sharaf Mowjood, *Muslim Prayers and Renewal Near Ground Zero*, N.Y. TIMES, Dec. 9, 2009, at A1 (noting that the building's location, particularly its proximity to the World Trade Center, was an important factor for the buyers).

2. See Anushay Hossain, *Park 51: The Ground Zero Mosque Is Not a Mosque*, HUFFINGTON POST (Aug. 19, 2010, 12:38 PM), http://www.huffingtonpost.com/anushay-hossain/park-51-the-ground-zero-m_b_686950.html (noting that the community center would include a culinary school, auditorium, swimming pool, basketball court, and prayer space).

3. See Justin Elliott, *How the “Ground Zero Mosque” Fear Mongering Began*, SALON (Aug. 16, 2010, 7:01 AM), http://www.salon.com/2010/08/16/ground_zero_mosque_origins/ (“[There were] no news articles on the mosque for five and a half months.”).

4. See NEW YORK, N.Y., Manhattan Community Board 1 Res. (May 25, 2010), available at <http://www.nyc.gov/html/mancb1/downloads/pdf/Resolutions/10-05-25.pdf> (approving the project, entitled the Cordoba House Project).

5. See Pamela Geller, *SIOA Campaign Offensive: Stop the 911 Mosque!*, ATLAS SHRUGS (May 7, 2010, 1:26 PM), http://atlasshrugs2000.typepad.com/atlas_shrugs/2010/05/sioa-action-alert-stop-the-911-mosque.html (“[F]ight the grotesque plans to build a monster mosque on . . . hallowed ground.”).

6. See Dorothy Rabinowitz, *Liberal Piety and the Memory of 9/11*, WALL ST. J., Aug. 4, 2010, at A15 (noting opposition to the project among New Yorkers).

7. See *id.* (“The enlightened class can't understand why the public is uneasy about the Ground Zero mosque.”).

8. See Dan Amira, *Ground Zero Mosque Gets Less Muslim-Invasion-Sounding Name*, N.Y. MAG. (July 14, 2010, 10:05 AM), http://nymag.com/daily/intel/2010/07/ground_zero_mosque_gets_lets_m.html (noting that developers dropped the original name, “Cordoba House,” which conjured images of the Moors' conquest of Spain).

9. See, e.g., Rabinowitz, *supra* note 6 (noting Mayor Michael Bloomberg's vocal support for Park51); *Build That Mosque: The Campaign Against the Proposed Cordoba Centre in New York Is Unjust and Dangerous*, ECONOMIST, Aug. 7, 2010, at 32 (criticizing Newt Gingrich's and Sarah Palin's vocal opposition to Park51).

10. See Celeste Katz, *CNN Poll: Nearly 70% of Americans Oppose NYC Mosque Plan*, N.Y. DAILY NEWS (Aug. 11, 2010, 12:40 PM), <http://www.nydailynews.com/blogs/dailypolitics/2010/08/poll-nearly-70-of-americans-op.html> (“[N]early 70 percent of all Americans oppose the controversial plan . . . while just 29 percent favor the construction.”); *Mosque-Building and Its Discontents*, ECONOMIST (Aug. 19, 2010, 1:59 PM), http://www.economist.com/blogs/democracyinamerica/2010/08/islamic_cultural_centre_sorta_near_ground_zero (citing poll in which 57.9 percent of respondents indicated that Park51 should not be built).

conservative politicians and candidates.¹¹ Republican New York gubernatorial candidate Carl Paladino promised to “stop the mosque,” and vowed to seize the property via eminent domain if necessary.¹² His approach echoed earlier efforts to employ land use laws to halt the construction from moving forward; New York’s Landmarks Preservation Commission rejected demands to grant the Burlington Coat Factory building historical protection, which would have precluded development of the property.¹³

Although Park51 has by now largely disappeared from the national dialogue (at least compared with the hysteria of August 2010),¹⁴ the controversy was an extreme manifestation of the difficulties religious institutions sometimes face when trying to find a home.¹⁵ Small or unpopular religious institutions, mosques in particular, often must overcome attempts to subject them to exclusionary zoning practices.¹⁶ The Religious Land Use and Institutionalized Persons Act of 2000¹⁷ (RLUIPA) protects religious institutions from discriminatory land use regulation.¹⁸

RLUIPA forbids governments from implementing land use regulations that treat a “religious assembly or institution on less than equal terms with a

11. See Bobby Ghosh, *Islam in America: It’s Part of the Fabric of Life, but Protests Reveal a Growing Hostility to the Religion of Muslims*, TIME, Aug. 30, 2010, at 22 (noting that Park51 is a “volatile political issue”).

12. See Celeste Katz, *Carl Paladino Advertises on Ground Zero Mosque Issue*, N.Y. DAILY NEWS (Aug. 5, 2010, 4:17 PM), <http://www.nydailynews.com/blogs/dailypolitics/2010/08/carl-paladino-advertises-on-gr.html> (noting a televised Paladino campaign ad that drew comparisons between Paladino’s opposition to Park51 and rival candidate Andrew Cuomo’s support for the project). Paladino would go on to lose the election to Cuomo. See Nicholas Confessore, *Cuomo Cruises to Win in New York Governor’s Race*, N.Y. TIMES (Nov. 2, 2010), <http://www.nytimes.com/2010/11/03/nyregion/03nygov.html>.

13. See Javier C. Hernandez, *Mosque near Ground Zero Clears Key Hurdle*, N.Y. TIMES (Aug. 3, 2010, 12:45 PM), <http://cityroom.blogs.nytimes.com/2010/08/03/mosque-near-ground-zero-clears-key-hurdle/> (noting unanimous vote against granting historic protection).

14. See Justin Elliot, *Whatever Happened to the “Ground Zero Mosque”?*, SALON (Dec. 31, 2010, 11:01 AM), http://www.salon.com/2010/12/31/park_51_a_look_back/singleton/ (noting the sudden disappearance of the Park51 controversy from the national conversation); Abbie Fentress Swanson, *Park 51 Opens Renovated Space with Photo Exhibit of NYC Immigrant Children*, WNYC CULTURE (Sept. 21, 2011), <http://culture.wnyc.org/articles/features/2011/sep/21/park-51-gallery-show/> (noting Park51’s quiet opening, and plans to continue the growth of the facility over several years).

15. See *infra* Part I.A.2.

16. See *infra* notes 70–73 and accompanying text.

17. See 42 U.S.C. § 2000cc (2006).

18. This Note is not the first to recognize the possibility that the use of zoning regulations in opposition to Park51 would likely implicate RLUIPA. Sean Foley, for example, while generally arguing for a narrow interpretation of RLUIPA, asserts that a rejection of Park51 by the city would have violated the Equal Terms Provision. See Sean Foley, Comment, *RLUIPA’s Equal-Terms Provision’s Troubling Definition of Equal: Why the Equal-Terms Provision Must Be Interpreted Narrowly*, 60 U. KAN. L. REV. 193, 194 (2011) (“Had either local body rejected Park51, the city would have violated [RLUIPA].”). For an in-depth analysis of RLUIPA’s application to Park51, see generally Alex R. Whitted, Note, *Park51 as a Case Study: Testing the Religious Land Use and Institutionalized Persons Act*, 45 IND. L. REV. 249 (2011) (analyzing hypothetical RLUIPA claims that might follow the New York City Department of City Planning’s rejection of Park51’s application for a building permit).

nonreligious assembly or institution.”¹⁹ This clause is known as the “Equal Terms” provision. RLUIPA was enacted just over a decade ago,²⁰ but the federal courts of appeals have not yet produced a clear consensus as to the application of the Equal Terms Provision.

Specifically, the courts disagree over the allocation of burdens of proof²¹ in challenges brought under the Equal Terms Provision.²² A few federal circuit courts have held that plaintiffs must prove that the challenged land use regulation treats them less than equally,²³ while others have instead held that the burden of persuasion²⁴ lies with the government.²⁵ The allocation of burdens of proof is important because it is often outcome-determinative; parties charged with the burden of persuasion are generally less likely to prevail.²⁶

This Note approaches the circuit split by comparing the allocation of burdens of proof in Equal Terms cases with federal exclusionary zoning cases,²⁷ and with Free Exercise Clause jurisprudence.²⁸ In light of these comparisons, as well as RLUIPA’s text and public policy concerns, this Note argues that in Equal Terms claims, the government, not the religious plaintiff, should have the burden of persuasion.

Part I of this Note begins with a discussion of land use regulations and their exclusionary effects. After a brief description of burdens of proof, it provides background information on RLUIPA and its enactment. Finally, it surveys federal exclusionary zoning case law, and outlines Free Exercise jurisprudence. Part II discusses the circuit split that has emerged as federal courts interpret the Equal Terms Provision. Part III analyzes the relevance of exclusionary zoning cases and the Free Exercise Clause to interpreting RLUIPA, discusses public policy considerations. This Note concludes that government defendants should be charged with the burden of persuasion in Equal Terms cases.

I. ZONING AND LAND USE LAWS, BURDENS OF PROOF, RLUIPA, EXCLUSIONARY ZONING CASE LAW, AND FREE EXERCISE JURISPRUDENCE

This part begins by explaining the mechanics of zoning and land use laws, and outlines how such laws have historically been used to discriminate and exclude. It then defines burdens of proof and explains the consequences of their allocation. Next, it highlights the sections of RLUIPA that are relevant to this Note, and explores the history and intent of the statute. Finally, this part surveys federal exclusionary zoning case

19. See 42 U.S.C. § 2000cc(2)(b)(1).

20. See *infra* note 94 and accompanying text.

21. See *infra* Part I.B.

22. See *infra* Part II.

23. See *infra* Parts II.B–II.C.

24. The “burden of persuasion” is a distinct aspect of the burden of proof. See *infra* Part I.B for a more detailed explanation of burdens of proof.

25. See *infra* Parts II.A, II.D.

26. See *infra* Part I.B.

27. See *infra* Part I.D.1.

28. See *infra* Part I.D.2.

law, and traces the evolution of the Supreme Court's Free Exercise jurisprudence.

A. *The Role of Zoning and Land Use Regulations*

RLUIPA is directed at all forms of land use regulation,²⁹ which includes a broad array of techniques such as eminent domain,³⁰ protection of landmarked buildings,³¹ and zoning. Zoning is the primary focus of this Note because it is the land use device most frequently at issue in Equal Terms cases.³² This section defines zoning and then outlines its history, including its development into a tool for discrimination.

1. A Definition and Brief History of Zoning

Zoning is a mechanism that local governments use to create and designate districts in which compatible uses of property are allowed and incompatible uses are excluded.³³ Zoning is an extension of the concept of public nuisance,³⁴ which protects property owners from activities that interfere with the use and enjoyment of their property.³⁵ The idea is that some uses of land are inherently injurious to other uses, and thus should be separated. For example, a city might restrict one area to industrial land uses, another area to commercial land uses, and another to residential uses only.³⁶

29. See 42 U.S.C. § 2000cc(b)(1) (2006) (“No government shall impose or implement a *land use regulation*.” (emphasis added)).

30. See PATRICIA E. SALKIN, *AMERICAN LAW OF ZONING* § 17:1 (5th ed. 2011) (“Eminent domain permits the government to appropriate private property without the owner’s consent.”); see also *supra* note 12 and accompanying text.

31. See SALKIN, *supra* note 30, § 27:6 (“[P]reservation commissions . . . [have] authority to designate landmarks [T]he degree of protection in any given municipality will vary.”); see also *supra* note 13 and accompanying text.

32. See *infra* Part II.

33. See *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 732 (1995) (“[O]nly compatible uses are allowed.” (quoting D. MANDELKER, *LAND USE LAW* § 4.16 (5th ed. 2003))). In addition to the local zoning code, state laws might further limit specific types of land uses by, for example, placing restrictions on the location of adult-video stores or the issuance of liquor licenses. See James G. Dwyer, *No Place for Children: Addressing Urban Blight and Its Impact on Children Through Child Protection Law, Domestic Relations Law, and “Adult-Only” Residential Zoning*, 62 ALA. L. REV. 887, 900 (2011) (“[L]aws further proscribe . . . activities that would otherwise fall within the category of permissible uses—for example, adult-only retail stores.”); see also *infra* notes 235, 265–66, and accompanying text.

34. See David C. Keating, *Exclusionary Zoning: In Whose Interests Should the Police Power Be Exercised?*, 23 REAL EST. L.J. 304, 304 (1995) (noting zoning’s roots as a legislative extension of the doctrine of public nuisance).

35. See 58 AM. JUR. 2D *Nuisances* § 34 (2011) (defining public nuisance as “conduct or omissions which offend, interfere with, or cause damage to the public . . . in a manner such as to endanger or injure the property . . . of a considerable number of persons” (citing *New York ex rel. Spitzer v. Operation Rescue Nat’l*, 273 F.3d 184 (2d Cir. 2001))).

36. See Dwyer, *supra* note 33, at 900 (explaining that designating some land exclusively for industrial use and other land exclusively for residential use demonstrates a state’s power to restrict the use of private property). Not all zoning plans restrict each zone to one use. In a “cumulative” zoning code, for example, “higher uses” are permitted in all zones where “lower uses” are permitted, but “lower uses” are not permitted in areas zoned for “higher

Government regulation of land use dates back to medieval England,³⁷ and many cities in the United States had adopted laws similar to today's zoning ordinances as early as the nineteenth century.³⁸ The first modern comprehensive zoning code was enacted in New York City in 1916,³⁹ and shortly thereafter, the Supreme Court upheld the constitutionality of zoning in *Village of Euclid v. Ambler Realty*.⁴⁰ *Euclid* held that zoning was a valid exercise of the state police power,⁴¹ and guaranteed cities in every state the right to engage in zoning for the health, safety, and welfare of the community.⁴² Since the *Euclid* decision, zoning has become ubiquitous; the Standard State Zoning Enabling Act of 1922 has been one of the most successful model statutes ever promulgated.⁴³

One noteworthy feature of modern zoning is the conditional use permit.⁴⁴ A city or town will typically utilize a conditional use permit when it wants to allow a particular use of land in a given zone, but only under certain circumstances.⁴⁵ To ensure that any such conditions are met, the given land use will be permitted only pursuant to the issuance of a conditional use permit.⁴⁶ Ordinarily, the city's zoning board of adjustment or another local administrative body is charged with approval of applications for, and

uses." See *River of Life Kingdom Ministries v. Vill. of Hazel Crest*, 611 F.3d 367, 371–72 (7th Cir. 2010) (en banc) (noting that noncumulative zoning ordinances over time became preferred over the early, cumulative zoning ordinances).

37. See SALKIN, *supra* note 30, § 1:2 (“[C]ontrol of land use may date back to . . . 1066 in Norman England.”).

38. See William A. Fischel, *An Economic History of Zoning and a Cure for Its Exclusionary Effects*, 41 URB. STUD. 317, 318 (2004) (“Many cities had ordinances with some zoning-like features in the 19th century.”).

39. See *id.* at 319 (“Had New York not been first, several other cities were poised to take the title.”); Josh Whitehead, Note, *Using Disparate Impact Analysis to Strike Down Exclusionary Zoning Codes*, 33 REAL EST. L.J. 359, 371–72 (2005) (explaining that New York enacted its zoning code in response to the construction of the thirty-six-floor Equitable Building two years earlier, which lacked setbacks and blocked sunlight from reaching the surrounding streets).

40. 272 U.S. 365 (1926).

41. See *id.* at 390 (“We find no difficulty in sustaining restrictions of the kind thus far reviewed.”). A state’s police power can be defined as “power in government which restrains individuals from transgressing the rights of others, and restrains them in their conduct so far as is necessary to protect the rights of all” or the “residual power of the state, comprising that portion of the sovereignty of the state not surrendered by the terms of the United States Constitution to the Federal Government.” See BALLENTINE’S LAW DICTIONARY 958–59 (3d ed. 1969).

42. See SALKIN, *supra* note 30, § 2:22 (noting that courts in all states approved of zoning after *Euclid*); Whitehead, *supra* note 39, at 371 (“[M]unicipalities have the right to engage in comprehensive zoning for the general health, safety, and welfare.”).

43. See Fischel, *supra* note 38, at 324 (noting the powerful influence of the Standard State Zoning Enabling Act of 1922).

44. Conditional use permits are also variously referred to as “special exceptions,” “special permits,” “special use permits,” and the like. See SALKIN, *supra* note 30, § 14:1 (noting that the terms are all “qualitatively the same”).

45. See *id.*

46. See *id.* (“[A]pproval is a condition precedent.”).

issuance of, conditional use permits.⁴⁷ Today, almost every zoning code utilizes conditional use permits to some extent.⁴⁸

2. An Overview of Exclusionary Zoning

Although the original goal and justification of zoning was purported to be the improvement of community health, safety, and welfare,⁴⁹ land use laws have long been used as a tool for discrimination and exclusion.⁵⁰ Examples of techniques that have been used to exclude racial minorities include racially explicit zoning,⁵¹ restrictive covenants,⁵² blockbusting,⁵³ and redlining.⁵⁴ The Supreme Court has held each of these techniques to violate either the Fourteenth Amendment or the Fair Housing Act;⁵⁵ nevertheless, exclusionary zoning persists.

Deprived of the abovementioned tools, cities continued to engage in discriminatory and exclusionary zoning through the use of facially neutral criteria like minimum lot size, minimum floor area, aesthetic criteria like setback requirements, and forbidding multi-family housing.⁵⁶ Indeed, exclusionary zoning grew throughout the 1950s, '60s,⁵⁷ and '70s.⁵⁸ While the term "exclusionary zoning" is sometimes applied in reference only to ordinances tending to exclude racial minorities,⁵⁹ it can also refer to the use

47. *See id.* ("Each is allowed only upon approval of a board of adjustment . . .").

48. *See id.* ("Nearly all zoning ordinances make some use of special-permit procedures.").

49. *See supra* text accompanying note 42.

50. *See SALKIN, supra* note 30, § 22:1 (noting opposition among residents of Long Island in the 1920s to the influx of blacks, Catholics, and Jews from New York City).

51. *See Whitehead, supra* note 39, at 362–63 (noting a 1911 Baltimore ordinance that made it unlawful for black people to move into residences located on white blocks).

52. Restrictive covenants are conditions written into deeds barring the property owner from selling it to anyone who is not white. *See id.* at 364.

53. Blockbusting is the practice whereby real estate speculators induce white people to sell their homes below market price by instilling the fear that large numbers of minorities are moving into the neighborhood. *See id.* at 367–69.

54. Redlining refers to the practice of insurance companies refusing to insure, or insisting upon exorbitant rates to insure, property in areas of high minority concentration. *See id.* at 369–71.

55. *See id.* at 360 ("Over the years, the Supreme Court found all of these tools unconstitutional, per the Fourteen[th] Amendment and the Fair Housing Act.").

56. *See SALKIN, supra* note 30, § 22:6 (noting the exclusionary effects of large lot zoning, setback requirements, and limitations on apartment construction); Fischel, *supra* note 38, at 330 (noting that zoning could be used as a tool "to reduce potential contact between races . . . by the facially neutral expedient of insisting on large lots and single family homes"). *See generally* Adam Gordon, *Making Exclusionary Zoning Remedies Work: How Courts Applying Title VII Standards to Fair Housing Cases Have Misunderstood the Housing Market*, 24 *YALE L. & POL'Y REV.* 437 (2006) (arguing that zoning, even absent any discriminatory intent, has generally led to an increase in the cost of housing, which has in turn resulted in the exclusion of minorities).

57. *See Gordon, supra* note 56, at 440 ("[T]he use of exclusionary zoning had greatly intensified in the 1950s and 1960s.").

58. *See Fischel, supra* note 38, at 317–18 ("[D]uring the 1970s [zoning] became more generally exclusionary.").

59. *See Whitehead, supra* note 39, at 371 ("[Z]oning codes . . . have eliminated the possibility of many people of color from living in the community. This practice has been dubbed 'exclusionary zoning.'").

of zoning to exclude the poor,⁶⁰ the elderly,⁶¹ disabled persons,⁶² mobile home owners,⁶³ and religious organizations.⁶⁴

RLUIPA's legislative history documents numerous instances of exclusionary zoning in the religious context.⁶⁵ Examples include a city's refusal to allow construction of a Mormon temple based on aesthetics,⁶⁶ the suspension of a religious mission for the homeless because it was located on the second floor of a building without an elevator,⁶⁷ the imposition of limits on occupancy and operational hours of religious services,⁶⁸ and the practice of requiring churches to obtain conditional use permits.⁶⁹

In addition to the congressional record, there is evidence indicating that exclusionary zoning is increasingly likely to affect mosques and other Islamic institutions. Discrimination against Muslims is increasing across the United States,⁷⁰ and such discrimination has been expressed most intensely through opposition to the construction or expansion of mosques.⁷¹ An August 2010 report in *The New York Times* documented vocal and widespread opposition to mosque construction across the country.⁷² Opponents of the construction of mosques often cite zoning criteria to justify their opposition.⁷³

B. *The Importance of Burdens of Proof*

This section provides an overview of the concept of burdens of proof, and explains the differences between each distinct burden. It then explains

60. See Fischel, *supra* note 38, at 331.

61. See Michael Kling, *Zoned Out: Assisted-Living Facilities and Zoning*, 10 ELDER L.J. 187, 200 (2002) (noting that zoning ordinances often push assisted living facilities for the elderly to the city's outskirts, far from essential services and public transportation).

62. See BRIAN W. BLAESSER & ALAN C. WEINSTEIN, FEDERAL LAND USE LAW & LITIGATION § 9:20 (2011) (explaining the applicability of the Fair Housing Act to zoning ordinances which discriminate against the disabled). For a further discussion of the Fair Housing Act, see *infra* Part I.D.1.b.

63. See Keating, *supra* note 34, at 314–19 (noting, for example, a Pennsylvania ordinance which permitted mobile homes only upon the issuance of a conditional use permit, and a Michigan ordinance restricting mobile homes to a designated mobile home park).

64. See *infra* text accompanying note 120.

65. See 146 CONG. REC. 14,283 (2000) (statement of Sen. Hatch) (characterizing land use regulations as “seemingly insurmountable barrier[s]” to the free exercise of religion).

66. See *id.*

67. See 146 CONG. REC. 14,285 (statement of Sen. Kennedy).

68. See *id.*

69. See *id.* (“[T]wenty-two of the twenty-nine zoning codes in the northern suburbs of Chicago effectively exclude churches, unless they have a special use permit.”).

70. See Ghosh, *supra* note 11, at 23 (noting that hate speech against Muslims is growing and becoming an “accepted form of racism in America”).

71. See *id.* (noting that most heated anti-Muslim encounters involve mosques).

72. See Laurie Goodstein, *Around Country, Mosque Projects Meet Opposition*, N.Y. TIMES, Aug. 8, 2010, at A1 (noting mosque-construction controversies in New York, Tennessee, California, and Wisconsin).

73. See John Schwartz, *Zoning Law Aside, Mosque Projects Face Battles*, N.Y. TIMES, Sept. 4, 2010, at A11 (“Opponents of new mosque construction often cite factors other than religion, like parking and traffic.”).

the importance of the allocation of burdens of proof to the outcomes of cases.

The general term “burden of proof” encompasses two related, but distinct, responsibilities—the burden of production, and the burden of persuasion.⁷⁴ The burden of production does not require a party to prove his claim; he must merely bring forth evidence to support particular propositions that are necessary to his claim.⁷⁵ In other words, the burden of production does not require a party to convince a jury that he is correct, but merely to produce enough evidence that a reasonable jury could find in his favor.⁷⁶ Satisfaction of the burden of production is often referred to as making a “prima facie case.”⁷⁷

The burden of persuasion, by contrast, is a higher standard. In most civil actions, it requires a party to establish the truth of a given proposition⁷⁸ by a preponderance of the evidence.⁷⁹ A party with this burden bears the ultimate risk of non-persuasion;⁸⁰ in other words, he prevails only if he convinces the fact-finder that he is correct.⁸¹

In most cases, the burdens of production and persuasion will fall on the same party: the plaintiff.⁸² In some cases, however, once the party charged with the burden of production establishes a prima facie case, the burden of persuasion shifts to the opposing party.⁸³ Due to the comparative ease of satisfying a burden of production as opposed to a burden of persuasion, the allocation of burdens will often be dispositive of the outcome of a given case.⁸⁴ Generally, it is more difficult for the party charged with the burden of persuasion to prevail.⁸⁵

74. See 29 AM. JUR. 2D *Evidence* § 171 (2011).

75. See *Hurley v. Hurley*, 754 A.2d 1283, 1286 (Pa. Super. Ct. 2000) (“A burden of production tells the court which party must come forward with evidence to support a particular proposition.”).

76. See 21B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 5122 (2d ed. 2005) (“The burden of production . . . refers to the obligation of the party to produce enough evidence at trial to justify sending the case to the jury.”).

77. See 29 AM. JUR. 2D *Evidence* § 171 (2011).

78. See BALLENTINE’S LAW DICTIONARY 161 (3d ed. 1969).

79. See 21B WRIGHT ET AL., *supra* note 76, § 5122. A preponderance of the evidence is “superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.” BLACK’S LAW DICTIONARY 1301 (9th ed. 2009).

80. See BLACK’S LAW DICTIONARY, *supra* note 79, at 223.

81. See 21B WRIGHT ET AL., *supra* note 76, § 5122 n.39 (“A burden of persuasion is a requirement that a party convince the finder of fact . . . of the truth of an issue.”).

82. See *id.* § 5122.

83. See, e.g., *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (explaining that once the plaintiff in an employment discrimination case establishes a prima facie case, the burden shifts to the employer to prove a nondiscriminatory reason for the adverse employment decision).

84. See 31A C.J.S. *Evidence* § 191 (2011) (“[W]here the burden of proof lies . . . is rarely without consequence.”).

85. See *id.* § 190 (“[I]f evidence is evenly balanced, the party that bears the burden of persuasion must lose.”).

C. *The Religious Land Use and Institutionalized Persons Act*

This section begins by summarizing RLUIPA's legislative history, as well as the purposes and policy goals of the statute. It then outlines the two major land use sections of the statute, the Substantial Burden Provision and the Equal Terms Provision. Finally, this section addresses RLUIPA's textual allocation of burdens of proof, as well as the statute's internal guidelines for interpretation.

1. The History of RLUIPA's Enactment

RLUIPA was the final result of a long battle between Congress and the Supreme Court, which began with the Court's holding in *Employment Division, Department of Human Resources v. Smith*.⁸⁶ In *Smith*, the Court held that neutral laws, even those whose application infringes on religious liberty, would be subject only to rational basis review.⁸⁷ The *Smith* decision proved unpopular,⁸⁸ and Congress attempted to "overrule" it via the Religious Freedom Restoration Act of 1993⁸⁹ (RFRA).

The Supreme Court struck down RFRA shortly after its enactment in *City of Boerne v. Flores*.⁹⁰ The Court explained that RFRA was too broad, and exceeded Congress's authority under Section 5 of the Fourteenth Amendment⁹¹ to enact remedial legislation.⁹² The practical consequence of *Boerne* was that Congress's Section 5 power to enact remedial legislation

86. 494 U.S. 872 (1990); see *infra* notes 189–97 and accompanying text.

87. See Sarah Keeton Campbell, Note, *Restoring RLUIPA's Equal Terms Provision*, 58 DUKE L.J. 1071, 1077 (2009) ("Under *Smith*, neutral and generally applicable laws must only survive rational basis review even if religious liberties were infringed . . .").

88. See *id.* ("[R]esponse to *Smith* was swift, direct, and overwhelmingly bipartisan.").

89. 42 U.S.C. § 2000bb (2006).

90. 521 U.S. 507, 536 (1997) ("Broad as the power of Congress is under the Enforcement Clause of the Fourteenth Amendment, RFRA contradicts vital principles necessary to maintain separation of powers . . ."). RFRA still applies to the federal government; *Boerne* invalidated it only as applied to the states. See Campbell, *supra* note 87, at 1078 n.34.

91. Section 5 of the Fourteenth Amendment gives Congress the "power to enforce, by appropriate legislation," the other provisions of the amendment. See U.S. CONST. amend. XIV, § 5. RLUIPA, by contrast, has survived challenges that it violated Congress's Section 5 powers. See 10 ROBERT L. HAIG, BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS § 110:42 (3d ed. 2011) (noting that almost every federal court that has considered RLUIPA's land use provisions has upheld them); 2 DOUGLAS W. KMIEC, ZONING & PLANNING DESKBOOK § 7:46 (2d ed. 2011) (noting that the Eleventh Circuit upheld RLUIPA against claims that Congress lacked power under Section 5 to enact it (citing *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214 (11th Cir. 2004))); Matthew Chandler, Comment, *Moral Mandate or Personal Preference? Possible Avenues for Accommodation of Civil Servants Morally Opposed to Facilitating Same-Sex Marriage*, 2011 BYU L. REV. 1625, 1639 (2011) (explaining that RLUIPA is a valid exercise of Congress's power under the Commerce and Spending Clauses). But see Caroline R. Adams, Note, *The Constitutional Validity of the Religious Land Use and Institutionalized Persons Act of 2000: Will RLUIPA's Strict Scrutiny Survive the Supreme Court's Strict Scrutiny?*, 70 FORDHAM L. REV. 2361, 2393–2403 (2002) (arguing that RLUIPA exceeds Congress's Section 5 power).

92. See Anthony L. Minervini, Comment, *Freedom from Religion: RLUIPA, Religious Freedom, and Representative Democracy on Trial*, 158 U. PA. L. REV. 571, 581 (2010) ("The Court held that Congress had exceeded its remedial power under Section 5 of the Fourteenth Amendment . . .").

was limited to the extent that such legislation must be proportional to specific, widespread, and documented discrimination.⁹³

Congress passed, and President Clinton signed, RLUIPA in September 2000.⁹⁴ RLUIPA was enacted to replace RFRA,⁹⁵ and Congress wrote it narrowly to address two areas in which a record of widespread discrimination could be demonstrated: religious land use, and the religious exercise of institutionalized persons.⁹⁶ Since RLUIPA's enactment, it has consistently survived constitutional challenges.⁹⁷

There is ample evidence that RLUIPA's intent was not only to replace RFRA, but to codify the Supreme Court's Free Exercise Clause jurisprudence as articulated in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*.⁹⁸ Much of that evidence can be found in RLUIPA's legislative history.⁹⁹ Courts interpreting RLUIPA have also widely acknowledged the congressional intent to codify Free Exercise Clause jurisprudence.¹⁰⁰

Congress was also concerned with protecting minority or "unpopular" religions,¹⁰¹ which are more likely to be subjected to discriminatory land use regulations.¹⁰² Commentators¹⁰³ and at least one court¹⁰⁴ have also

93. See Campbell, *supra* note 87, at 1079 ("[I]f Congress wishes to protect religious liberty by regulating the states pursuant to its Section 5 power . . . it must ensure that the legislation is a congruent and proportional response to widespread discrimination.").

94. See David G. Savage & Richard Simon, *U.S. Restores Special Protections for Religious Groups*, L.A. TIMES, Sept. 23, 2000, at A18 ("President Clinton signed into law Friday a bill designed to restore strong legal protections for religious freedom when conflicts arise with cities [and] zoning boards . . .").

95. See Minervini, *supra* note 92, at 582 ("In response to . . . *Boerne*, Congress drafted [RLUIPA]."). It is worth noting that prior to RLUIPA, religious land use plaintiffs were almost universally unsuccessful, in both constitutional challenges and under RFRA. See Note, *Religious Land Use in the Federal Courts Under RLUIPA*, 120 HARV. L. REV. 2178, 2183 (2007) (noting that religious plaintiffs were consistently unsuccessful).

96. See Campbell, *supra* note 87, at 1080–82 (outlining the Congressional record documenting widespread religious discrimination in local land use laws). RLUIPA's effects on institutionalized persons are outside the scope of this Note.

97. See James C. Dunkelberger, Note, *Missed Opportunity or Dodged Bullet? The Tenth Circuit's Non-decision in Rocky Mountain Christian Church v. Board of County Commissioners.*, 2011 BYU L. REV. 99, 111 n.80 (2011) (noting that federal courts have overwhelmingly affirmed RLUIPA's constitutionality).

98. 508 U.S. 520 (1993); see *infra* notes 198–204 and accompanying text.

99. See 146 CONG. REC. 16,699 (2000) (joint statement of Sen. Hatch and Sen. Kennedy on the Religious Land Use and Institutionalized Persons Act of 2000) ("[T]he land use sections of the bill . . . enforce the Free Exercise . . . Clause[] as interpreted by the Supreme Court."); 146 CONG. REC. 16,622 (statement of Rep. Canady) ("The Religious Land Use and Institutionalized Persons Act is a bill designed to protect the free exercise of religion."); Statement by President William J. Clinton upon Signing S. 2869, 36 WEEKLY COMP. PRES. DOC. 2168 (Sept. 22, 2000) ("[RLUIPA] recognizes the importance the free exercise of religion plays in our democratic society.").

100. See *infra* notes 222, 229 and accompanying text.

101. See 146 CONG. REC. 16,698 (joint statement of Sen. Hatch and Sen. Kennedy on the Religious Land Use and Institutionalized Persons Act of 2000) ("[N]ew, small, or unfamiliar churches in particular, are frequently discriminated against."); see also Minervini, *supra* note 92, at 572 ("Religious liberty is a bedrock principle of our national heritage.").

102. See 146 CONG. REC. 14,283–84 (statement of Sen. Hatch) (noting a city's refusal to allow construction of a Mormon temple); Marci A. Hamilton, *Federalism and the Public*

recognized this motivation. Plaintiffs in RLUIPA cases are often either religions that are small and obscure,¹⁰⁵ or historically subject to discrimination,¹⁰⁶ and recent evidence suggests that local zoning and land use controls often facilitate opposition to the construction of mosques.¹⁰⁷

2. An Overview of RLUIPA's Substantial Burden and Equal Terms Provisions

RLUIPA restricts land use regulations in two principal ways. First, RLUIPA forbids governments from imposing or implementing land use regulations¹⁰⁸ in a manner that “imposes a substantial burden on the religious exercise of . . . a religious assembly or institution.”¹⁰⁹ This is generally referred to as the Substantial Burden Provision.¹¹⁰ Second, RLUIPA forbids governments from imposing or implementing land use regulations in “a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.”¹¹¹ This is generally referred to as the Equal Terms Provision.

Good: The True Story Behind the Religious Land Use and Institutionalized Persons Act, 78 IND. L.J. 311, 346 (2003) (noting that the legislative history of the Religious Liberty Protection Act—an RLUIPA precursor that never passed—cites a Brigham Young University study that identified zoning criteria as a pretext for discrimination against “minority” churches).

103. See Lora Lucero, *Knowing RLUIPA More Important as Communities Get More Diverse*, PROF. DEV. INST. (Oct. 21, 2010, 3:14 PM), <http://rutgerspdi.blogspot.com/2010/10/knowing-rluipa-more-important-as.html> (describing RLUIPA as a shield protecting minority religions); *Religious Land Use in the Federal Courts Under RLUIPA*, *supra* note 95, at 2198 n.131 (recognizing a congressional desire to prevent minority religions from becoming disadvantaged).

104. See *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1236 (11th Cir. 2004) (“RLUIPA targets zoning codes which . . . exclude churches, especially ‘new, small or unfamiliar churches . . . [like] black churches and Jewish shuls and synagogues.’” (alteration in original) (quoting 146 Cong. Rec. 16,698)).

105. See *River of Life Kingdom Ministries v. Vill. of Hazel Crest*, 611 F.3d 367, 368 (7th Cir. 2010) (noting that the plaintiff was a church composed of only sixty-seven members).

106. See *Midrash*, 366 F.3d at 1221 (noting that the plaintiffs were two Orthodox synagogues).

107. See *supra* note 73 and accompanying text.

108. See Whitted, *supra* note 18, at 271 (“RLUIPA’s broad definition of ‘religious exercise’ allows for the assumption that every religious entity has certain values or beliefs that must be expressed or symbolized through land use.” (citing *Rocky Mountain Christian Church v. Bd. of Cnty. Comm’rs*, 612 F. Supp. 2d 1163, 1171–72 (D. Colo. 2009))).

109. 42 U.S.C. § 2000cc(a)(1) (2006).

110. See *generally* *Guru Nanak Sikh Soc’y of Yuba City v. Cnty. of Sutter*, 456 F.3d 978 (9th Cir. 2006) (holding that the County’s denial of a conditional use permit to build a Sikh temple substantially burdened the plaintiff’s religious exercise in violation of RLUIPA). Although courts have used the Substantial Burden Provision for comparative purposes when interpreting the Equal Terms Provision, *see, e.g.,* *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 262–64 (3d Cir. 2007), the Substantial Burden Provision is outside the scope of this Note’s inquiry.

111. 42 U.S.C. § 2000cc(b)(1).

3. Interpreting RLUIPA: Allocation of the Burden of Persuasion and Rules of Construction

RLUIPA's text specifically addresses burdens of proof. The fourth main section of RLUIPA is titled "Judicial Relief."¹¹² Among other things, it establishes a private right of action under RLUIPA,¹¹³ and allocates burdens of proof.¹¹⁴ Section 2000cc-2(b), titled "Burden of Persuasion," states that if the plaintiff produces a prima facie case alleging a violation of section 2000cc, the government has the burden of persuasion, except that the burden is on the plaintiff in claims under the Substantial Burden Provision.¹¹⁵ The Equal Terms Provision is part of section 2000cc.¹¹⁶

Section 2000cc-3 of RLUIPA, titled "Rules of Construction," explains how the statute should be interpreted.¹¹⁷ Section 2000cc-3(g) reads: "This chapter 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."¹¹⁸

D. Two Models for Comparison: Exclusionary Zoning and the Free Exercise Clause

This section introduces two lines of case law that offer persuasive models for comparison with claims under RLUIPA's Equal Terms Provision: (1) challenges to exclusionary zoning ordinances, and (2) claims under the Free Exercise Clause of the U.S. Constitution.¹¹⁹

Each line of cases has its own unique parallels to Equal Terms cases. Challenges to exclusionary zoning ordinances are an apt comparison to challenges under RLUIPA's Equal Terms Provision because laws challenged under the Equal Terms Provision can be understood as examples of exclusionary zoning.¹²⁰ Both involve government regulations that work to exclude classes of people from the use and enjoyment of land in particular areas. Because of the fundamental Due Process principle that

112. 42 U.S.C. § 2000cc-2.

113. *See id.* § 2000cc-2(a) ("A person may assert a violation of this [Act] . . . and obtain appropriate relief against [the] government.").

114. *See id.* § 2000cc-2(b) ("If a plaintiff produces prima facie evidence to support a claim alleging a violation of the Free Exercise Clause or a violation of section 2000cc of this title, the government shall bear the burden of persuasion on any element of the claim, except that the plaintiff shall bear the burden of persuasion on whether the law (including a regulation) or government practice that is challenged by the claim substantially burdens the plaintiff's exercise of religion.").

115. *See id.*

116. *See id.* § 2000cc(b)(1). This Note ultimately concludes that RLUIPA's text places the burden of production on religious plaintiffs, and the ultimate burden of persuasion on the government. *See infra* notes 262–63, 309–10 and accompanying text. Despite the apparent clarity of the language in section 2000cc-2(b), at least two federal circuits have interpreted it otherwise. *See infra* Parts II.B–C.

117. 42 U.S.C. § 2000cc-3.

118. *Id.* § 2000cc-3(g).

119. *See* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .") (emphasis added).

120. *See supra* notes 59–64 and accompanying text.

“persons similarly situated should be treated alike,”¹²¹ it is reasonable to expect at least some consistency in all types of exclusionary zoning cases. Free Exercise claims provide a relevant model for comparison because it is often maintained that RLUIPA was intended to codify Free Exercise Clause jurisprudence.¹²²

1. A Survey of Federal Exclusionary Zoning Jurisprudence

Federal courts rarely hear challenges to zoning ordinances.¹²³ Two factors contribute to the scarcity: the power to zone belongs to the states,¹²⁴ and strict standing requirements make it difficult for plaintiffs to bring their claims in federal courts.¹²⁵ Nevertheless, federal courts have occasionally addressed exclusionary zoning, and because land use law varies widely by state,¹²⁶ this Note exclusively addresses federal cases. Specifically, this section will explore the allocation of burdens of proof in two types of such cases: Equal Protection challenges,¹²⁷ and discrimination claims brought under the federal Fair Housing Act¹²⁸ (FHA).

a. Equal Protection Challenges to Exclusionary Zoning Practices

The Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution states, in part, that “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”¹²⁹ This provision provides a mechanism for challenging discriminatory government action.¹³⁰ As explained below, the mechanics of Equal Protection challenges depend upon the type of discrimination alleged and the plaintiff’s identity.¹³¹

121. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) (citing *Plyer v. Doe*, 457 U.S. 202, 216 (1982)).

122. *See supra* notes 98–100 and accompanying text.

123. *See Keating, supra* note 34, at 306 (noting the scarcity of federal exclusionary zoning case law). State courts are far less deferential to the decisions of local zoning boards than federal courts. *See* 4 EDWARD H. ZIEGLER ET AL., RATHKOPF’S THE LAW OF ZONING AND PLANNING § 67:3 (4th ed. 2011) (noting that state court judges have greater overall familiarity with zoning law and legislation than do federal judges); 2 KMEC, *supra* note 91, § 7:11 (noting state courts’ application of stricter standards of review than the rational basis test typical of federal courts in zoning cases, and that “the landowner has a better chance of having the zoning invalidated” in state court).

124. *See Keating, supra* note 34, at 304 (explaining that zoning is a state police power).

125. *See id.* at 306 (noting that to establish standing in federal court, a plaintiff must show that he has been personally excluded from a locality, and that a favorable ruling would allow him to live there).

126. *See Hamilton, supra* note 102, at 337 (“[E]ach state has . . . develop[ed] its own land use jurisprudence . . .”).

127. *See* U.S. CONST. amend. XIV, § 1.

128. *See* 42 U.S.C. §§ 3601–3631 (2006).

129. U.S. CONST. amend. XIV, § 1.

130. *See* ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 668 (3d ed. 2006) (“[T]he Supreme Court has relied on the Equal Protection Clause as a key provision for combating invidious discrimination and for safeguarding fundamental rights.”).

131. *See id.* at 670 (“Equal protection analysis always must begin by identifying how the government is distinguishing among people.”).

Justice Byron R. White's majority opinion in *City of Cleburne v. Cleburne Living Center*¹³² demonstrates that in Equal Protection challenges to exclusionary zoning ordinances, burdens of proof are dependent upon the plaintiff's identity.¹³³ The case arose when the city of Cleburne, Texas, denied the Cleburne Living Center's request for a conditional use permit¹³⁴ to operate a group home for the mentally retarded.¹³⁵ CLC filed suit alleging that the denial violated the Equal Protection Clause.¹³⁶

Justice White's opinion summarized of the Court's Equal Protection jurisprudence.¹³⁷ He explained that ordinarily, legislation is presumed valid and will be sustained unless the challenger can prove that the distinction made by the statute is not rationally related to a legitimate government interest.¹³⁸ Under rational basis review, the plaintiff always has the burden of persuasion.¹³⁹ However, if a statute makes a distinction based on certain suspect classifications,¹⁴⁰ strict scrutiny applies, and the burden of persuasion shifts to the government to prove that the statute is suitably tailored to serve a compelling government interest.¹⁴¹ In *Cleburne*, the Court ultimately declined to recognize the mentally retarded as a suspect or quasi-suspect class,¹⁴² but nevertheless invalidated the zoning ordinance because there was no rational basis to conclude that the home would pose a threat to any of the city's legitimate interests.¹⁴³

The burden of persuasion's relationship to the plaintiff's identity in Equal Protection claims is also demonstrated in *Village of Belle Terre v. Boraas*.¹⁴⁴ In *Belle Terre*, the Supreme Court rejected an Equal Protection challenge to a zoning ordinance that forbade more than two unrelated persons from living together.¹⁴⁵ A homeowner in Belle Terre, New York,

132. 473 U.S. 432 (1985).

133. This is not unique to zoning cases; it is true of all claims under the Equal Protection Clause. *See infra* notes 137–41 and accompanying text.

134. *See Cleburne*, 473 U.S. at 436 n.3 (noting that the zoning ordinance permitted hospitals and nursing homes as of right, but required a permit for hospitals for the “feeble-minded”); *see also supra* notes 44–48 and accompanying text.

135. *See Cleburne*, 473 U.S. at 435.

136. *See id.* at 437.

137. *See id.* at 439–42.

138. *See id.* at 440.

139. *See* CHEMERINSKY, *supra* note 130, at 672 (“The rational basis test is enormously deferential to the government, and only rarely have laws been declared unconstitutional for failing to meet this level of review.”).

140. *See Cleburne*, 473 U.S. at 440 (“The general rule gives way, however, when a statute classifies by race, alienage, or national origin.”). An intermediate level of scrutiny applies to classifications based on gender. The government bears the burden of proving that such classifications are “substantially related to a sufficiently important governmental interest.” *Id.* at 441.

141. *See id.* at 440.

142. *See id.* at 442 (“[W]e conclude for several reasons that the Court of Appeals erred in holding mental retardation a quasi-suspect classification . . .”).

143. *See id.* at 448.

144. 416 U.S. 1 (1974).

145. *See id.* at 9–10. The ordinance restricted land use to single-family dwellings, and defined “family” to exclude groups in excess of two people not related by blood, adoption, or marriage. *See id.* at 2.

who had leased his house to six college students, was served with a notice to remedy his violation of the zoning ordinance.¹⁴⁶ The homeowner (and three of his tenants) then brought suit against the Village, seeking an injunction and a declaration that the ordinance was unconstitutional.¹⁴⁷

Justice William O. Douglas's majority opinion upholding the ordinance did not specifically address burdens of proof, but his invocation of rational basis review¹⁴⁸ indicates that the burden of persuasion was on the plaintiffs.¹⁴⁹ Because the plaintiffs failed to persuade the court that the ordinance did not have a rational relationship to a permissible state objective, the ordinance was upheld.¹⁵⁰

*b. Challenges to Zoning Ordinances Claiming Racial Discrimination
Under the Fair Housing Act*

Unlike zoning ordinances that exclude religious institutions,¹⁵¹ ordinances that explicitly make distinctions based on race are unconstitutional. The Supreme Court expressly invalidated such laws in *Buchanan v. Warley*.¹⁵² Nevertheless, after *Buchanan*, municipalities continued to engage in racially exclusionary zoning¹⁵³ via facially neutral ordinances.¹⁵⁴ Facially neutral laws that have a discriminatory effect are generally upheld absent evidence of discriminatory intent.¹⁵⁵ As a result, constitutional challenges to such ordinances have generally been unsuccessful.¹⁵⁶

146. *See id.* at 2–3.

147. *See id.* at 3.

148. *See id.* at 8 (explaining that there is no Equal Protection violation if the law is “reasonable, not arbitrary” (quoting *F.S. Royster Guano, Co. v. Virginia*, 253 U.S. 412, 415 (1920))).

149. *See supra* notes 137–41 and accompanying text.

150. *See Belle Terre*, 416 U.S. at 8–10 (explaining that the police power is not limited to issues of health or cleanliness, and that concerns about noise and traffic were legitimate state objectives).

151. Under certain circumstances, a zoning ordinance may exclude religious institutions without running afoul of either the constitution or RLUIPA. *See supra* notes 234–36 and accompanying text.

152. *See* 245 U.S. 60, 82 (1917) (holding zoning ordinance forbidding black people from living on a “white block” a direct violation of the Fourteenth Amendment). Not surprisingly, *Buchanan* resulted in the decline of such racially explicit ordinances, or at least their enforcement. *See Whitehead, supra* note 39, at 363 (noting that the *Buchanan* decision put an end to the enforcement of neighborhood segregation, if not segregation itself, which continued with “increasing ferocity”); *see also supra* notes 51, 55 and accompanying text.

153. *See Gordon, supra* note 56, at 440 (noting an increase in exclusionary zoning in the 1950s and 1960s).

154. *See Whitehead, supra* note 39, at 373 (noting that exclusionary zoning ordinances generally are not facially discriminatory).

155. *See, e.g.,* *Washington v. Davis*, 426 U.S. 229, 239 (1976) (“[O]ur cases have not embraced the proposition that a law . . . is unconstitutional *solely* because it has a racially disproportionate impact.”).

156. *See Gordon, supra* note 56, at 441 (“The Equal Protection Clause is . . . useless for most exclusionary zoning challenges . . .”).

However, plaintiffs have brought successful exclusionary zoning claims under the federal Fair Housing Act.¹⁵⁷ The FHA does not expressly forbid the enactment of exclusionary zoning ordinances, but ordinances that are passed with a discriminatory intent have nonetheless been held to violate section 3604(a)¹⁵⁸ of the Act.¹⁵⁹ Intent is notoriously difficult to prove, so such cases are rare.¹⁶⁰ Most successful challenges operate under a disparate impact theory—every circuit except for the District of Columbia has recognized disparate impact claims under the FHA.¹⁶¹ The two most influential disparate impact cases have been *Metropolitan Housing Development Corp. v. Village of Arlington Heights* (*Arlington Heights II*)¹⁶² and *Huntington Branch, NAACP v. Town of Huntington*.¹⁶³

The *Arlington Heights II* saga began when the City of Arlington Heights, Illinois¹⁶⁴ denied the Metropolitan Housing Development Corporation's (MHDC) petition to rezone property on which it wished to construct low and moderate income housing.¹⁶⁵ MHDC and three black individuals filed

157. 42 U.S.C. §§ 3601–3631 (2006). The FHA is also known as Title VIII of the Civil Rights Act of 1968. See Whitehead, *supra* note 39, at 360.

158. Section 3604(a) reads, in pertinent part, “[I]t shall be unlawful to . . . make unavailable or deny, a dwelling to any person because of race.” 42 U.S.C. § 3604(a).

159. See Whitehead, *supra* note 39, at 373 (“If a court finds any indication that a discriminatory intent exists . . . it will find the ordinance unlawful under the Fair Housing Act.”).

160. See *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights* (*Arlington Heights II*), 558 F.2d 1283, 1290 (7th Cir. 1977) (“Intent, motive, and purpose are elusive subjective concepts.” (quoting *Hawkins v. Town of Shaw*, 461 F.2d 1171, 1172 (5th Cir. 1972))); Whitehead, *supra* note 39, at 373 (“[O]ften the intent of a governing body is quite difficult to detect.”).

161. See Gordon, *supra* note 56, at 446 (citing *Simms v. First Gibraltar Bank*, 83 F.3d 1546, 1555 (5th Cir. 1996); *Mountain Side Mobile Home Estates P’ship v. HUD*, 56 F.3d 1243, 1250–51 (10th Cir. 1995); *Jackson v. Okaloosa Cnty.*, 21 F.3d 1531, 1543 (11th Cir. 1994); *Casa Marie, Inc. v. Super. Ct.*, 988 F.2d 252, 269 n.20 (1st Cir. 1993); *United States v. Starrett City Assocs.*, 840 F.2d 1096, 1100 (2d Cir. 1988); *Keith v. Volpe*, 858 F.2d 467, 482–84 (9th Cir. 1988); *Arthur v. City of Toledo*, 782 F.2d 565, 574–75 (6th Cir. 1986); *Smith v. Town of Clarkton*, 682 F.2d 1055, 1065 (4th Cir. 1982); *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 147–48 (3d Cir. 1977); *Arlington Heights II*, 558 F.2d at 1290; *United States v. City of Black Jack*, 508 F.2d 1179, 1184–85 (8th Cir. 1974)). The Supreme Court recently granted certiorari to determine whether disparate impact claims are cognizable under the FHA. See *Gallagher v. Magner*, 619 F.3d 823 (8th Cir. 2010), *cert. granted*, 132 S. Ct. 548 (2011); *Magner v. Gallagher*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/magner-v-gallagher/> (last visited Feb. 23, 2012) [hereinafter SCOTUSBLOG] (noting that the Court will decide whether a lawsuit can be brought for a violation of the FHA based on a practice that is not discriminatory on its own, but has a discriminatory effect). The Court heard oral arguments on February 29, 2012. See SCOTUSBLOG, *supra*.

162. 558 F.2d 1283 (7th Cir. 1977).

163. 844 F.2d 926 (2d Cir. 1988).

164. At the time, Arlington Heights’s population was overwhelmingly white. See *Arlington Heights II*, 558 F.2d at 1286–87 (noting that in 1970, only 27 of Arlington Heights’ 64,884 residents were black). Not much has changed; as of the 2010 Census, Arlington Heights’s population is 88.2 percent white and only 1.3 percent black. See *Arlington Heights (village), Illinois*, CENSUS.GOV, <http://quickfacts.census.gov/qfd/states/17/1702154.html> (last visited Feb. 23, 2012).

165. See *Arlington Heights II*, 558 F.2d at 1286 (“[T]he Village Board of Trustees voted to deny the petition.”). The property was restricted to single-family homes. See *id.*

suit in federal court alleging that the denial was racially discriminatory, claiming violations of the Equal Protection Clause and the FHA.¹⁶⁶

Reading FHA section 3604(a)'s "because of race"¹⁶⁷ language broadly, the Seventh Circuit concluded that a zoning policy could violate the FHA even without discriminatory intent.¹⁶⁸ The court explained that section 3604(a) is violated when, even without discriminatory intent, the defendant engages in conduct for which the "natural and foreseeable" consequence is to discriminate based on race.¹⁶⁹

The court noted, however, that a mere showing of discriminatory effects does not prove a violation of the FHA¹⁷⁰—it merely establishes a prima facie case.¹⁷¹ Having found that the Village Board of Trustees' denial of MHDC's petition to rezone had a disparate impact on black people,¹⁷² the court articulated a four-factor balancing test to determine whether the FHA had been violated: (1) the strength of the plaintiff's showing of discriminatory effects, (2) evidence of discriminatory intent, (3) the defendant's interest in taking the challenged action, and (4) whether the plaintiff seeks to compel the defendant to provide housing or merely stop the defendant from preventing property owners from providing housing.¹⁷³ Ultimately, the Seventh Circuit considered the four factors, determined that it was "a close case," and remanded to the district court to determine whether the FHA had been violated.¹⁷⁴

In contrast to the Seventh Circuit's balancing test, the Second Circuit held in *Huntington Branch, NAACP v. Town of Huntington*¹⁷⁵ that once a plaintiff has established a prima facie case of disparate impact, the burden

166. *See id.* The case would eventually reach the Supreme Court, which found no Equal Protection violation, and remanded it to the Seventh Circuit to determine whether there was a violation under the FHA. *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp. (Arlington Heights I)*, 429 U.S. 252, 270–71 (1977).

167. *See supra* note 158 and accompanying text.

168. *See Arlington Heights II*, 558 F.2d at 1290 ("We cannot agree that Congress in enacting the Fair Housing Act intended to permit municipalities to systematically deprive minorities of housing opportunities simply because those municipalities act discreetly.").

169. *See id.* at 1288.

170. *See id.* at 1290 ("[W]e refuse to conclude that every action which produces discriminatory effects is illegal.").

171. *See Gordon, supra* note 56, at 444 ("[T]he *Arlington Heights II* court then turned to possible avenues for the municipal defendant to rebut th[e] prima facie case."). In other words, a showing of discriminatory effects satisfies plaintiff's burden of production. *See supra* note 77 and accompanying text.

172. *See Arlington Heights II*, 558 F.2d at 1288 ("[T]he Village's action . . . had the effect of perpetuating segregation in Arlington Heights.").

173. *See id.* at 1290 ("[C]ourts must use their discretion in deciding whether . . . relief should be granted.").

174. *See id.* at 1293–94 (explaining that, should the district court determine on remand that no other suitable land existed within Arlington Heights, the Village's refusal to rezone violated the FHA).

175. 844 F.2d 926 (2d Cir. 1988).

of persuasion shifts to the government to prove that its actions did not violate the FHA.¹⁷⁶

The town of Huntington, New York¹⁷⁷ rejected Housing Help, Inc.'s (HHI) proposal to rezone property on which it wished to construct a multi-family subsidized apartment complex in a section of Huntington that was 98 percent white.¹⁷⁸ HHI, two black residents of Huntington, and the local chapter of the NAACP brought suit alleging that the town's refusal to rezone violated the FHA.¹⁷⁹

The Second Circuit began its opinion by noting the broad mandate of the FHA's stated policy goal: to "provide, within constitutional limitations, for fair housing throughout the United States."¹⁸⁰ Like the Seventh Circuit, the Second Circuit affirmed that discriminatory intent was not required for an FHA violation,¹⁸¹ and found that the plaintiffs had established prima facie evidence of discriminatory effects—Huntington's refusal to amend its zoning ordinance had the effect of perpetuating segregation.¹⁸²

Next, however, the court's analysis departed from the Seventh Circuit framework. Rather than weighing the *Arlington Heights II* factors and coming to a decision, the court imposed an affirmative burden of persuasion on the defendants.¹⁸³ In order to rebut a prima facie showing, a defendant must present "bona fide and legitimate justifications for its action with no less discriminatory alternatives available."¹⁸⁴ Although Huntington presented seven arguments purporting to justify its actions, the court held that the town had not carried its burden, and ordered rezoning of HHI's property.¹⁸⁵

176. *See id.* at 939 ("Once a plaintiff has made a prima facie showing . . . a defendant must present bona fide and legitimate justifications for its action with no less discriminatory alternatives available." (citing *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 149 (1977))).

177. At the time litigation arose, Huntington's population was 95 percent white and 3.35 percent black. The town, located on Long Island's north shore, was essentially segregated; its black population was concentrated in six census tracts. *See id.* at 929. As of the 2010 Census, Huntington is 93.2 percent white, and 2.2 percent black. *See Huntington CDP, New York*, CENSUS.GOV, <http://quickfacts.census.gov/qfd/states/36/3636233.html> (last visited Feb. 23, 2012).

178. *See Huntington*, 844 F.2d at 930–31, 937. The site on which HHI wished to build was zoned exclusively for single family homes. *See id.* at 931.

179. *See id.* at 928.

180. *See id.* (citing 42 U.S.C. § 3601 (2006)) (noting the widespread racial segregation that precipitated enactment of the FHA).

181. *See id.* at 935 (holding that Title VIII encompasses "segregation resulting from the application of facially neutral rules").

182. *See id.* at 938.

183. *See id.* at 939. The court did note, however, that the *Arlington Heights II* factors could still be relevant to a final determination. *See id.* at 935 ("[W]e are not persuaded to adopt precisely the formulation of the *Arlington Heights II* factors . . . [they] are to be considered in a final determination on the merits rather than as a requirement for a prima facie case.").

184. *See id.* at 939 (citing *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 149 (3d Cir. 1977)).

185. *See id.* at 940–42 ("[W]e find the reasons asserted are entirely insubstantial.").

2. An Overview of the Supreme Court's Free Exercise Jurisprudence

The First Amendment to the Constitution forbids the government from enacting any law “prohibiting the free exercise” of religion.¹⁸⁶ Prior to 1990, the Free Exercise Clause was understood to require courts to apply strict scrutiny analysis to any laws interfering with the free exercise of religion.¹⁸⁷ When courts apply strict scrutiny, the burden of persuasion is always on the government.¹⁸⁸

In *Employment Division, Department of Human Resources of Oregon v. Smith*,¹⁸⁹ however, the Supreme Court expressly rejected the assumption that strict scrutiny applies to all laws impeding the free exercise of religion.¹⁹⁰ *Smith* arose when two Native Americans were fired from their jobs because they used peyote,¹⁹¹ which Oregon classifies as an illegal drug.¹⁹² When their applications for unemployment benefits subsequently were denied because they had been fired for misconduct—ingesting peyote—they brought suit claiming that the denial violated the Free Exercise Clause.¹⁹³

The Court rejected the plaintiffs' argument that strict scrutiny should apply,¹⁹⁴ and held that the Free Exercise Clause does not exempt activity forbidden by neutral laws of general applicability merely because such activity is of a religious nature.¹⁹⁵ The practical result of *Smith* was that neutral laws, even those that burden the free exercise of religion, are subject to rational basis review.¹⁹⁶ In rational basis review, the plaintiff always has the burden of persuasion.¹⁹⁷

Smith, however, did not result in the death of strict scrutiny for all Free Exercise cases. Three years later, the Court again faced a Free Exercise

186. U.S. CONST. amend. I.

187. See CHEMERINSKY, *supra* note 130, at 1247–48 (“[I]n 1963, the Court expressly held that strict scrutiny should be used in evaluating laws burdening free exercise of religion For the next 27 years, the Court usually purported to apply strict scrutiny to religion clause claims.”).

188. See *id.* at 671; see also *supra* notes 140–41 and accompanying text.

189. 494 U.S. 872 (1990).

190. See CHEMERINSKY, *supra* note 130, at 1259 (“There is no doubt that *Smith* changed the test for the Free Exercise Clause. Strict scrutiny was abandoned for evaluating laws burdening religion.”).

191. Peyote is a hallucinogenic drug that is harvested from cacti that grow in Texas and northern Mexico, and its use has long been associated with the sacramental rites of the Native American Church. See Randy Dotinga, *Peyote Won't Rot Your Brain*, WIRED (Nov. 4, 2005), <http://www.wired.com/medtech/health/news/2005/11/69477>.

192. See *Smith*, 494 U.S. at 874 (noting that the Oregon State Board of Pharmacy classified peyote as a Schedule I drug).

193. See *id.*

194. See *id.* at 885–86 (explaining that cases involving differential treatment based on race, where the use of a compelling government interest test is appropriate, are “not remotely comparable” to plaintiffs' peyote use).

195. See *id.* at 878–79 (“We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate.”). The Oregon law forbade all Peyote use, not just religious use. *Id.* at 874.

196. See CHEMERINSKY, *supra* note 130, at 1259 (“[N]eutral laws of general applicability only have to meet the rational basis test, no matter how much they burden religion.”).

197. See *supra* note 139 and accompanying text.

challenge in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*.¹⁹⁸ In *Lukumi*, members of the Santeria religion challenged a zoning ordinance in the city of Hialeah, Florida, which forbade ritual animal sacrifices.¹⁹⁹ The Court unanimously held that the zoning ordinance violated the Free Exercise Clause.²⁰⁰

The Court distinguished *Smith*, explaining that strict scrutiny applied because the challenged zoning ordinance was not neutral or generally applicable; it was clearly enacted to suppress the practice of Santeria.²⁰¹ The ordinance could not survive strict scrutiny because the city could employ other means to achieve its purported goals—protecting public health and preventing cruelty to animals²⁰²—without burdening the exercise of Santeria.²⁰³ Thus, after *Lukumi*, non-neutral laws that interfere with the free exercise of religion are subject to strict scrutiny.²⁰⁴

Stated alternatively, *Smith* and *Lukumi* stand for the proposition that the assignment of burdens of proof in Free Exercise claims depends on the challenged statute's neutrality. If the statute is neutral and generally applicable, the plaintiff has the burden of persuasion. But if a plaintiff produces evidence that a non-neutral law interferes with the free exercise of his religion, the burden of persuasion shifts to the government.

II. FROM MIDRASH TO CENTRO FAMILIAR: THE CIRCUIT SPLIT EMERGES

This part explains the circuit split that has surfaced in the years since RLUIPA was enacted. Although their standards are not identical, the Third Circuit²⁰⁵ and the Seventh Circuit²⁰⁶ both place the burden of persuasion on religious institutions challenging land use regulations under the Equal Terms Provision. By contrast, the Ninth²⁰⁷ and Eleventh²⁰⁸ Circuits have

198. 508 U.S. 520 (1993).

199. *See id.* at 527 (“[T]he city council adopted three substantive ordinances addressing the issue of religious animal sacrifice.”). Animal sacrifice is one of the primary forms of Santeria devotion. *Id.* at 524.

200. *See id.*

201. *See id.* at 534 (“The record in this case compels the conclusion that suppression of the central element of the Santeria worship service was the object of the ordinances.”).

202. *See id.* at 543 (explaining that the ordinances were underinclusive of their purported goals).

203. *See id.* at 544–45.

204. *See* CHEMERINSKY, *supra* note 130, at 1261 (“After *Smith* and [*Lukumi*] . . . a law that is not neutral or of general applicability would be found unconstitutional unless it met strict scrutiny.”).

205. *See* Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch, 510 F.3d 253, 270 (3d Cir. 2007) (articulating five elements plaintiff must prove to bring a successful claim under the Equal Terms Provision); *see also infra* notes 224–36 and accompanying text.

206. *See* River of Life Kingdom Ministries v. Vill. of Hazel Crest, 611 F.3d 367, 371–73 (7th Cir. 2010) (explaining that plaintiffs must prove regulation treats them less well than a nonreligious comparator that has an equivalent impact in terms of accepted zoning criteria); *see also infra* notes 237–45 and accompanying text.

207. *See* Centro Familiar Cristiano Buenas Nuevas v. City of Yuma, 651 F.3d 1163, 1173 (9th Cir. 2011) (“[B]urden is not on the church . . . but on the city . . .”); *see also infra* notes 250–66 and accompanying text.

208. *See* Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1230 (11th Cir. 2004) (holding that plaintiffs can shift burden to the government by demonstrating that the

held that the burden of persuasion is on the government.²⁰⁹ This part summarizes the holdings and reasoning of each circuit.

*A. The Eleventh Circuit Places the Burden of Persuasion
on Government Defendants*

The Eleventh Circuit was the first to interpret RLUIPA's Equal Terms Provision,²¹⁰ and it placed a light burden of production on religious plaintiffs, which, when met, shifts the burden of persuasion to the government. This section begins with a brief summary of the facts confronted by the Eleventh Circuit in *Midrash Sephardi, Inc. v. Town of Surfside*,²¹¹ and then examines the reasoning behind the court's holding.

Midrash arose when two Orthodox²¹² synagogues near Miami Beach²¹³ challenged a zoning ordinance that excluded churches and synagogues from locations where private clubs were permitted²¹⁴. The Eleventh Circuit held that it violated the Equal Terms Provision.²¹⁵ The *Midrash* court noted that both the synagogues and the town assumed that the Equal Terms Provision only applied when religious assemblies or institutions were treated less than equally with *similarly situated* nonreligious assemblies or institutions.²¹⁶ However, the court rejected this assumption, and instead held that if a land use regulation treats a religious assembly or institution less than equally with *any* nonreligious assembly or institution, it violates the Equal Terms Provision.²¹⁷ The court explained that because RLUIPA does not define "institution" or "assembly," the terms must be construed by their natural meanings.²¹⁸

Midrash places the burden of production on the religious institution challenging the land use regulation: a plaintiff must prove that (1) it is an

regulation treats them differently than any secular assembly or institution); *see also infra* notes 210–23 and accompanying text.

209. The Second, Fifth, and Tenth Circuits have also recently considered the Equal Terms Provision. *See generally* *Elijah Grp. Inc., v. City of Leon Valley*, 643 F.3d 419 (5th Cir. 2011); *Third Church of Christ, Scientist of N.Y.C. v. City of New York*, 626 F.3d 667 (2d Cir. 2010); *Rocky Mountain Christian Church v. Bd. of Cnty. Comm'rs*, 613 F.3d 1229 (10th Cir. 2010), *cert. denied*, 131 S. Ct. 978 (Jan. 10, 2011). None of these cases produced its own clear test, and although the defendant in *Rocky Mountain* filed a petition with the Supreme Court for a writ of certiorari challenging RLUIPA's constitutionality, the Court declined to hear the case. *See Rocky Mountain*, 131 S. Ct. 978; *see also* Lucero, *supra* note 103 (noting the *Rocky Mountain* defendant's intention to file a petition for a writ of certiorari with the Supreme Court).

210. *See* David M. Finkelstein, *The Rhetoric of Originalism*, 12 J.L. Soc'y 42, 58 (2011) (noting that the Eleventh Circuit was the first to interpret the Equal Terms Provision).

211. 366 F.3d 1214 (11th Cir. 2004).

212. *See id.* at 1221.

213. *See id.* at 1219. Surfside is a small town north of Miami Beach comprising about one square mile. *See id.*

214. *See id.* at 1220. Permitted uses included private clubs and lodge halls. *See id.*

215. *See id.* at 1219 ("We first hold that the . . . provision excluding churches and synagogues . . . violates the Equal Terms provision of RLUIPA.").

216. *See id.* at 1230 ("The parties assume that [the Equal Terms provision] applies to assemblies or institutions that are similarly situated in all relevant respects.").

217. *See id.*

218. *See id.* at 1230.

assembly or institution, and (2) the land use regulation gives differential treatment to any nonreligious assembly or institution.²¹⁹

Relying on definitions from both *Webster's Third New International Unabridged Dictionary* and *Black's Law Dictionary*, the court held that synagogues and private clubs both fell within the natural perimeters of "assembly" and "institution."²²⁰ Because private clubs were permitted by Surfside's zoning ordinance and synagogues were not, the court held that the ordinance violated RLUIPA's Equal Terms Provision.²²¹ The court then explained that because RLUIPA codifies *Lukumi*,²²² and *Lukumi* requires strict scrutiny analysis, the burden shifted to Surfside to persuade the court that there was a compelling government interest that could justify violation of the Equal Terms Provision.²²³

B. *The Third Circuit Places the Burden of Persuasion on Religious Plaintiffs*

The Third Circuit was the next to consider RLUIPA's Equal Terms Provision, in *Lighthouse Institution for Evangelism, Inc. v. City of Long Branch*.²²⁴ This section reviews the facts of the case, and highlights the Third Circuit's use of Free Exercise jurisprudence as a basis for its decision to allocate the burden of persuasion to the plaintiff.

The case arose when the City of Long Branch, New Jersey denied the Lighthouse Institute for Evangelism's proposal to operate a church on its property.²²⁵ Lighthouse filed suit against Long Branch alleging a violation of RLUIPA's Equal Terms Provision.²²⁶

219. *See id.* ("[W]e must first evaluate whether an entity qualifies as an 'assembly or institution' . . . before considering whether the governmental authority treats [it] differently.").

220. *See id.* at 1230–31.

221. *See id.* at 1231.

222. *See id.* at 1232; *see also supra* notes 98–100 and accompanying text.

223. *See Midrash*, 366 F.3d at 1232 ("[A] violation of [the Equal Terms Provision], consistent with the analysis employed in *Lukumi*, must undergo strict scrutiny."). Although some federal courts disagree with the Eleventh Circuit's view that strict scrutiny applies to violations of the Equal Terms Provision, that dispute is outside the scope of this Note. *See Centro Familiar Cristiano Buenas Nuevas v. City of Yuma*, 651 F.3d 1163, 1172 (9th Cir. 2011) (rejecting compelling government interest as an exception to the Equal Terms Provision); *River of Life Kingdom Ministries v. Vill. of Hazel Crest*, 611 F.3d 367, 370–71 (7th Cir. 2010) (rejecting strict scrutiny for lack of statutory textual support); *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 269 (3d Cir. 2007) ("Equal Terms provision operates on a strict liability standard."); *infra* note 309 and accompanying text.

224. 510 F.3d 253 (3d Cir. 2007).

225. *See id.* at 259. The city's Redevelopment Plan forbade the development of property without prior approval from the City Council, and churches were not permitted in the zone, which the city intended to turn into a vibrant downtown corridor. *See id.* at 258.

226. *See id.* at 259. The complaint also alleged violation of the Free Exercise Clause. *See id.* Prior to Long Branch's enactment of the Redevelopment Plan, Lighthouse had challenged the city's original zoning ordinance, which also forbade churches from the area; after Lighthouse's development proposal was denied, it amended its original complaint to challenge the Redevelopment Plan as well. *See id.*

The District Court granted Long Branch's motion for summary judgment, and the Third Circuit affirmed the order.²²⁷ The Third Circuit explained its decision by noting that RLUIPA's purpose was to codify existing Free Exercise Clause jurisprudence,²²⁸ which the court understood to require a comparison between religious conduct and analogous secular conduct that affects the challenged regulation's goals in a similar fashion.²²⁹ Thus, the court held that a land use regulation violates the Equal Terms Provision only if it treats nonreligious institutions better than religious institutions that are similarly situated with respect to the regulatory purpose of the law.²³⁰

The court enumerated a five-part test that plaintiffs must satisfy to meet their burden of persuasion. A challenger must prove: "(1) it is a religious assembly or institution, (2) subject to a land use regulation, which regulation (3) treats the religious assembly on less than equal terms with (4) a nonreligious assembly or institution (5) that causes no lesser harm to the interests the regulation seeks to advance."²³¹ The court assigned this burden to the plaintiffs without reference to RLUIPA section 2000cc-2(b),²³² which allocates burdens of proof under the statute.²³³

In the Third Circuit's view, Lighthouse did not meet its burden because churches and other assemblies permitted by the city's Redevelopment Plan were not similarly situated with respect to the plan's purpose.²³⁴ A New Jersey statute prohibited the issuance of liquor licenses in the vicinity of churches,²³⁵ and therefore a church would cause more harm to the

227. See *Lighthouse*, 510 F.3d at 277 ("We . . . affirm the District Court's entry of summary judgment.").

228. The court qualified its assertion that RLUIPA codifies the *Smith-Lukumi* line of cases by explaining that RLUIPA does not embrace strict scrutiny in Equal Terms cases. See *id.* at 269 ("[W]e find that Congress clearly signaled its intent that the operation of the Equal Terms provision *not* include strict scrutiny by the express language of [the Substantial Burden Provision] and [the Equal Terms Provision]."). The Substantial Burden Provision expressly requires strict scrutiny, and the Equal Terms Provision is silent on the issue. See 42 U.S.C. § 2000cc(a)(1), (b)(1) (2006).

229. See *Lighthouse*, 510 F.3d at 265–66 (citing *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993); *Blackhawk v. Pennsylvania*, 381 F.3d 202 (3d Cir. 2004); *Tenafly Eruv Ass'n v. Borough of Tenafly*, 309 F.3d 144 (3d Cir. 2002); *Fraternal Order of Police v. City of Newark*, 170 F.3d 359 (3d Cir. 1999)).

230. See *Lighthouse*, 510 F.3d at 266; see also HAIG, *supra* note 91, § 110:45 (arguing that the Third Circuit's test is a "more reasoned interpretation" than the Eleventh's).

231. *Lighthouse*, 510 F.3d at 270.

232. The court mentions section 2000cc-2(b) earlier in its opinion, but only in the context of explaining that proof of a substantial burden on the plaintiff's religious exercise is unnecessary in an Equal Terms claim. See *id.* at 263 ("[Section 2000cc-2(b)] merely establish[es] that, where substantial burden is an element of the claim, the plaintiff must prove it; [it] do[es] not address when substantial burden is such an element.").

233. See *supra* notes 112–16 and accompanying text.

234. See *Lighthouse*, 510 F.3d at 272 (noting a lack of evidence that the Plan "treats a religious assembly on less than equal terms with a secular assembly that would cause an equivalent negative impact on Long Branch's regulatory goals").

235. See *id.* at 270.

Redevelopment Plan's goal of developing a vibrant downtown corridor than would other permitted institutions.²³⁶

*C. The Seventh Circuit Places the Burden of Persuasion
on Religious Plaintiffs*

Like the Third Circuit, the Seventh Circuit held that RLUIPA's Equal Terms Provision places the burden of persuasion on religious institutions to show that the challenged land use regulation treats them less than equally. This section explains the reasoning behind the Seventh Circuit's slight variation on the Third Circuit's *Lighthouse* test.

In *River of Life Kingdom Ministries v. Village of Hazel Crest*,²³⁷ the Seventh Circuit was critical of the tests created by the Eleventh and Third Circuits,²³⁸ and sought to create its own.²³⁹ The court rejected the *Midrash* test on the grounds that it was too friendly to religion, suggesting that the Eleventh Circuit's reading of the Equal Terms Provision might violate the Establishment Clause.²⁴⁰ Criticism of the Third Circuit was more measured; the Seventh Circuit's principal critique of the *Lighthouse* standard was its vagueness.²⁴¹ Judge Richard A. Posner, writing for the majority, explained that the *Lighthouse* test's reliance on identification of a zoning ordinance's "regulatory purpose" invites speculation, and might help zoning authorities cloak discrimination with facially neutral language.²⁴²

The Seventh Circuit's solution was to remove the "regulatory purpose" language from the Third Circuit's test, and replace it with "accepted zoning criteria."²⁴³ The court reasoned that where "purpose" is subjective, "criteria" is objective, and thus less susceptible to manipulation.²⁴⁴ Thus, if a land use regulation treats religious and nonreligious land uses the same

236. *See id.* ("[I]t is clear that Long Branch could not create a downtown area where restaurants, clubs, bars, retail and entertainment facilities synergize if Long Branch could not issue liquor licenses throughout that area.").

237. 611 F.3d 367 (7th Cir. 2010) (en banc).

238. *See River of Life*, 611 F.3d at 370 ("Neither the Third Circuit's nor the Eleventh Circuit's approach . . . is entirely satisfactory."); *see also* HAIG, *supra* note 91, § 110:45 (characterizing the Eleventh Circuit's test as an "overly-expansive interpretation" of the Equal Terms Provision).

239. *See River of Life*, 611 F.3d at 368 (noting the existence of the circuit split as a factor in deciding to hear the case en banc).

240. *See id.* at 370 (citing *Emp't Div. v. Smith*, 494 U.S. 872 (1990)). The Establishment Clause is outside the scope of this Note, and will not be addressed.

241. *See id.* at 371–72.

242. *See id.* (explaining that the "regulatory purpose" test invites self-serving testimony by zoning boards and their expert witnesses).

243. *See id.* Examples of such criteria include the designation of districts, such as a commercial or residential district, and zoning goals such as traffic management. *See id.* at 373.

244. *See id.* at 372; *see also* Foley, *supra* note 18, at 213, 226 (arguing that the Seventh Circuit's test reflects deference to cities' right to zone for the general welfare of the community, and that the test will have limited value outside of the specific facts in *River of Life*).

with respect to an established zoning criterion, the Equal Terms Provision is satisfied.²⁴⁵

Essentially, the burden of persuasion is on the plaintiff to prove that it was treated worse than a secular comparator that had an equivalent negative impact on accepted zoning criteria.²⁴⁶ Like the Third Circuit,²⁴⁷ the *Lighthouse* court held that plaintiffs have the burden of persuasion without addressing²⁴⁸ RLUIPA section 2000cc-2(b).²⁴⁹

D. The Ninth Circuit Places the Burden of Persuasion on Government Defendants

The Ninth Circuit considered the Equal Terms Provision for the first time²⁵⁰ in *Centro Familiar Cristiano Buenas Nuevas v. City of Yuma*.²⁵¹ The Ninth Circuit adopted a variation on the Seventh Circuit's "accepted zoning criteria" test, but with respect to burdens of proof, its decision is most similar to the Eleventh Circuit's test.²⁵² Like the Eleventh Circuit,²⁵³ the Ninth Circuit places a light burden of production on plaintiffs, which, if met, shifts the burden of persuasion to the government.²⁵⁴ This section explains how the Ninth Circuit's literal reading of RLUIPA's text guided the court's decision.

245. See *River of Life*, 611 F.3d at 373 (explaining that like treatment with respect to an accepted zoning criterion is enough to rebut an Equal Terms claim).

246. See *id.* Judge Posner used the example of a movie theater's effect on traffic to demonstrate how the test would work in practice. See *id.* A movie theater, like a church, generates traffic only at specific times during the day—the two have an equivalent negative impact on the goal of reducing traffic. *Id.* Thus, a plaintiff that could prove that it was excluded while a movie theater was permitted would prevail. *Id.*

247. See *supra* text accompanying notes 232–33.

248. In dissent, Judge Diane S. Sykes acknowledged the burden shifting paradigm mandated by section 2000cc-2(b), but Posner's majority opinion completely ignored it. See *River of Life*, 611 F.3d at 390 (Sykes, J., dissenting) ("RLUIPA shifts the burden of persuasion to the government once the plaintiff 'produces prima facie evidence.'" (quoting 42 U.S.C. § 2000cc-2(b) (2006))).

249. See *supra* notes 112–16 and accompanying text.

250. See Robert H. Thomas, *9th Circuit: Church's Use Permit Requirement Violates RLUIPA Equal Terms*, INVERSECONDEMNATION.COM (July 20, 2011), <http://www.inversecondemnation.com/inversecondemnation/2011/07/9th-circuit-churchs-use-permit-requirement-rluipa-equal-terms.html> (noting that the Equal Terms Provision was an issue of first impression for the Ninth Circuit).

251. 651 F.3d 1163 (9th Cir. 2011).

252. Cf. *Foley*, *supra* note 18, at 194 n.14 ("[T]he Ninth Circuit . . . virtually adopted the Third Circuit's test.").

253. See *supra* notes 210–23 and accompanying text.

254. See *Centro Familiar*, 651 F.3d at 1173 ("The burden is not on the church to show a similarly situated secular assembly, but on the city to show that the treatment received by the church should not be deemed unequal, where it appears to be unequal on the face of the ordinance." (citing 42 U.S.C. § 2000cc-2(b) (2006))). Although they treat the mechanics of burden shifting similarly, the Ninth and Eleventh Circuits' tests are not identical. The Ninth Circuit requires the government to rebut a prima facie case by demonstrating that a challenged land use regulation treats religious and nonreligious institutions equally, whereas the Eleventh Circuit engages in strict scrutiny analysis; it asks the government to rebut a showing of unequal treatment by demonstrating that such treatment is justified by a compelling government interest. See *supra* Part II.A. Whether strict scrutiny is the appropriate analysis is outside the scope of this Note.

Due in large part to a state statute prohibiting the issuance of liquor licenses within three hundred feet of a church,²⁵⁵ the City of Yuma, Arizona denied Centro Familiar Cristiano Buenas Nuevas's request for a conditional use permit²⁵⁶ to operate a church on its property.²⁵⁷ Centro Familiar then sued under the Equal Terms Provision, seeking a declaratory judgment invalidating the City Code, an injunction requiring the city to issue a conditional use permit, and damages.²⁵⁸

In the Ninth Circuit's evaluation of Centro Familiar's claims, it adopted the Seventh Circuit's "accepted zoning criteria" test with one important distinction.²⁵⁹ Rather than requiring the church to identify a secular comparator, the *Centro Familiar* court instead held that the plaintiff's burden of production is satisfied by a mere showing that the land use regulation appears unequal on its face.²⁶⁰ Once such a showing is made, the burden shifts to the city to prove that the church was not being treated less than equally with respect to accepted zoning criteria.²⁶¹

The court explained that RLUIPA's text expressly places the burden of persuasion on the government,²⁶² not the church: "If a plaintiff produces prima facie evidence to support a claim alleging a violation of the Free Exercise Clause or a violation of section 2000cc of this title, the government shall bear the burden of persuasion on any element of the claim."²⁶³

Noting that the City Code expressly excluded religious institutions (while permitting nonreligious institutions), the court found that the plaintiff had

255. See also *supra* note 235 and accompanying text.

256. See *supra* notes 44–48 and accompanying text.

257. See *Centro Familiar*, 651 F.3d at 1166 (noting Centro Familiar's awareness prior to purchasing the property that its application for a conditional use permit might be denied). The property was located in Yuma's Old Town district, in which churches were required to obtain conditional use permits to operate, but other membership organizations were permitted as of right. See *id.*

258. See *id.* at 1167. After Centro Familiar lost the property to foreclosure, the claims for the injunction and declaratory judgment were deemed moot, but the claim for damages survived. See *id.* at 1167–68.

259. See *id.* at 1173 ("[A] city violates the Equal Terms provision only when a church is treated on a less than equal basis with a secular comparator, similarly situated with respect to an accepted zoning criteria."); see also *supra* note 243 and accompanying text.

260. See *Centro Familiar*, 651 F.3d at 1173 ("The burden is . . . on the city to show that the treatment received by the church should not be deemed unequal, where it appears to be unequal . . .").

261. See *id.*

262. See *id.* at 1171.

263. *Id.* (quoting 42 U.S.C. § 2000cc-2(b) (2006)). The Ninth Circuit's literal reading of section 2000cc-2(b) recalls Justice Clarence Thomas's opinion in *Connecticut National Bank v. Germain*. See 503 U.S. 249, 253–54 (1992) ("[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says When the words of a statute are unambiguous . . . 'judicial inquiry is complete.'" (citations omitted) (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981))). The court also recognized RLUIPA's interpretive mandate, noting that the Act should be interpreted "in favor of a broad protection of religious exercise." See *Centro Familiar*, 651 F.3d at 1172 (quoting 42 U.S.C. § 2000cc-3(g)).

established a prima facie case.²⁶⁴ The City of Yuma argued that the prohibition on the issuance of liquor licenses near churches was an acceptable zoning criterion that justified the exclusion of churches, but was unable to persuade the court.²⁶⁵ Because the Code excluded religious organizations, instead of “uses which would impair the issuance of liquor licenses,” the court held that the city was unable to meet its burden, and found that the City Code violated RLUIPA’s Equal Terms Provision.²⁶⁶

III. GOVERNMENT DEFENDANTS SHOULD HAVE THE BURDEN OF PERSUASION IN EQUAL TERMS CASES

This part first assesses the viability of each of the three models introduced in Part I.D—the Equal Protection Clause, the federal Fair Housing Act, and the Free Exercise Clause—as models for comparison to the Equal Terms Provision. It then addresses considerations of the public policy consequences attendant to the allocation of burdens of proof in Equal Terms claims. This Note concludes that considered as a whole, the weight of authority suggests that the government should have the burden of persuasion in Equal Terms claims.

A. *The Limited Relevance of Equal Protection Challenges to Equal Terms Cases*

Challenges to exclusionary zoning ordinances under the Equal Protection Clause appear to be the least persuasive model for comparison with the assignment of burdens of proof in RLUIPA Equal Terms cases. This section explains the limitations of Equal Protection challenges as useful models for comparison.

In Equal Protection claims, burdens of proof are necessarily dependent on the plaintiff’s identity.²⁶⁷ As demonstrated in *Belle Terre*²⁶⁸ (and to a lesser degree in *Cleburne*²⁶⁹), whether the plaintiff is a member of a “suspect class” can make or break a claim.²⁷⁰ Although this aspect of the Supreme Court’s Equal Protection jurisprudence is ordinarily discussed using the language of standards of review,²⁷¹ it is no less intertwined with the assignment of burdens of proof.²⁷²

264. *See Centro Familiar*, 651 F.3d at 1171 (“It is hard to see how an express exclusion of ‘religious organizations’ from uses permitted as of right by other ‘membership organizations’ could be other than ‘less than equal terms’ . . .”).

265. *See id.* at 1173 (“[T]he 300-foot restriction on liquor licenses does not vitiate the inequality.”).

266. *See id.* at 1173–75. The Code also required a conditional use permit for schools, which likewise impeded the issuance of liquor licenses under Arizona law, but it excluded *all* religious organizations, not just churches, and the liquor license prohibition concerned proximity to churches only. *See id.*

267. *See supra* note 131 and accompanying text.

268. *See supra* notes 144–50 and accompanying text.

269. *See supra* notes 132–41 and accompanying text.

270. *See supra* note 140 and accompanying text.

271. *See supra* note 140 and accompanying text.

272. *See supra* note 141 and accompanying text.

In an Equal Protection challenge to an exclusionary zoning ordinance, if the plaintiff is not a member of a suspect class, the ordinance will be presumed valid, and the plaintiff will bear the burden of persuasion.²⁷³ If the plaintiff is a member of a suspect class that is excluded by the ordinance, the burden shifts to the government to prove that the ordinance is narrowly tailored to serve a compelling state interest.²⁷⁴

Upon first glance, this framework may initially appear to be quite useful for analogizing to Equal Terms claims. Consider a hypothetical scenario, in which a religious plaintiff challenges a zoning ordinance under the Equal Protection Clause. The assumption under established Equal Protection framework is that one would need only to determine whether the religious organization qualifies as a member of a suspect class, which would then determine the appropriate level of scrutiny, and by extension, the allocation of burdens of proof. The next step would be to ask how the result of the Equal Protection analysis would influence a hypothetical claim brought by the same religious organization under RLUIPA's Equal Terms Provision.

Unfortunately, the simplicity and consistency of the Equal Protection framework collapses in the case of a religious plaintiff. Religious status has proven to be an exception to the "suspect class" model upon which Equal Protection analysis is grounded; plaintiffs cannot count on their status as a religious organization alone to predict a particular standard of review or assignment of burdens of proof.²⁷⁵

The Court's Free Exercise jurisprudence undermines the Equal Protection framework for determining burdens of proof. After the Supreme Court's decisions in *Smith*²⁷⁶ and *Lukumi*,²⁷⁷ religious status no longer guarantees that strict scrutiny analysis (and its attendant placement of the burden of persuasion on the government) will apply. Returning to the hypothetical religious plaintiff, Equal Protection analysis will not yield a definitive assignment of burdens of proof, and thus there is no resultant structure to compare with a similar claim brought under RLUIPA's Equal Terms Provision. Because the assignment of burdens of proof in Equal Protection claims brought by religious plaintiffs is always uncertain, it makes little sense to attempt to compare its framework to the Equal Terms context.²⁷⁸

*B. The Fair Housing Act Favors the Allocation of the Burden
of Persuasion to Government Defendants in Equal Terms Cases*

This section contends that exclusionary zoning jurisprudence under the FHA favors the placement of the burden of persuasion on the government in Equal Terms cases, and explains why *Huntington*, in particular, is a persuasive model for comparison.

273. See *supra* notes 137–38 and accompanying text.

274. See *supra* notes 140–41 and accompanying text.

275. See *supra* notes 189–203 and accompanying text.

276. See *supra* notes 189–96 and accompanying text.

277. See *supra* notes 198–204 and accompanying text.

278. See *supra* note 156.

Both of the FHA cases discussed in Part I.D.1.b roughly parallel the Eleventh and Ninth Circuits' burden-shifting paradigm. Under *Midrash*, a plaintiff establishes a prima facie case by demonstrating that a land use regulation affords differential treatment to a nonreligious institution.²⁷⁹ Under *Centro Familiar*, plaintiffs establish a prima facie case if the land use regulation appears unequal on its face.²⁸⁰ Under both *Arlington Heights II*²⁸¹ and *Huntington*,²⁸² a plaintiff establishes a prima facie case by demonstrating the discriminatory effects of a land use regulation. Once a prima facie case has been established, both of the Equal Terms tests then shift the burden of persuasion to the government.²⁸³ At this point, the comparison with the FHA cases becomes a bit muddier.

While the four-factor analysis that follows a showing of discriminatory effects in the *Arlington Heights II* test has been characterized as an avenue "for the municipal defendant to rebut [a] prima facie case,"²⁸⁴ the court's opinion partially undermines that characterization. The court does not describe the factors as a means for rebuttal, but instead as guiding its own ultimate decision.²⁸⁵ Defendants are not required to prove anything, or even refute the existence of discriminatory impact. In this sense, the burden of persuasion does not fall squarely on either party; ultimately, whether a violation has occurred is a matter of judicial discretion. In addition, the fourth factor, action preventing construction²⁸⁶, is so specific to a particular set of facts that it makes little sense to apply it in the typical Equal Terms fact pattern, where a religious institution seeks to operate out of a preexisting facility.²⁸⁷

Huntington is the more consistent parallel. Unlike *Arlington Heights II*, it is unequivocal in its allocation of burdens of proof. Once a plaintiff has made a prima facie case, a defendant must present "bona fide and legitimate justifications for its action with no less discriminatory alternatives available."²⁸⁸

Although the burden shifting framework is consistent with both *Midrash* and *Centro Familiar*, the *Huntington* court's language is remarkably similar to the Ninth Circuit's explanation of the *Centro Familiar* defendant's

279. See *supra* note 219 and accompanying text.

280. See *supra* note 260 and accompanying text. The *Midrash* standard has also been described using the language of facial inequality. See *supra* note 217 and accompanying text.

281. See *supra* notes 168–71 and accompanying text.

282. See *supra* notes 178–82 and accompanying text.

283. See *supra* notes 222–12, 253–54 and accompanying text.

284. See *supra* notes 171, 173 and accompanying text.

285. See *supra* note 173 and accompanying text.

286. See *supra* note 173 and accompanying text.

287. The plaintiffs in *Midrash* challenged a zoning ordinance which prohibited the operation of synagogues that were already extant. See *supra* notes 212–14 and accompanying text. The plaintiff in *Lighthouse* brought suit when the city denied its proposal to operate a church from a building it already occupied. See *supra* note 225 and accompanying text. The plaintiff in *Centro Familiar* was denied a conditional use permit to operate a church from a building it had just purchased. See *supra* note 257 and accompanying text.

288. See *supra* note 184 and accompanying text.

failure to meet its burden to prove that the ordinance did not treat *Centro Familiar* less than equally. The proffered justification for the exclusion of churches—a statutory prohibition of the issuance of liquor licenses near churches—was legitimate, but there was a less discriminatory alternative: instead of religious organizations, the ordinance could have excluded uses impairing the issuance of liquor licenses.²⁸⁹

It is also noteworthy that the *Huntington* court referenced the FHA's policy goal of providing fair housing to the extent possible under the Constitution in explaining its decision.²⁹⁰ The court's decision can be understood as a manifestation of that policy goal; placing the burden of persuasion on the government makes it easier for plaintiffs to prevail,²⁹¹ and thus in theory increases the availability of fair housing.

Likewise, the Ninth Circuit's opinion in *Centro Familiar* references section 2000cc-3(g) of RLUIPA,²⁹² which states that the Act should be interpreted "in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter."²⁹³ The court's decision recognizes RLUIPA's interpretive mandate; placing the burden of persuasion on the government adds another layer of protection to the exercise of religion.

FHA case law suggests that governments defending exclusionary zoning ordinances under the Act should have the burden of persuasion. Although the *Arlington Heights II* test's usefulness for comparative purposes is limited by its ambiguity and fact-specific inquiry,²⁹⁴ the *Huntington* case provides a compelling parallel to Equal Terms cases, and both favor the placement of the burden of persuasion on the government.²⁹⁵ If land use regulations that make distinctions based on religion are viewed as examples of exclusionary zoning, and if persons similarly situated should be treated alike by the government,²⁹⁶ the FHA framework favors allocation of the burden of persuasion to the government in RLUIPA Equal Terms cases.

C. Free Exercise Jurisprudence Favors the Allocation of the Burden of Persuasion to Government Defendants in RLUIPA Equal Terms Cases

This section begins by recounting the influence of Free Exercise jurisprudence on RLUIPA, and then explaining why that influence favors placing the burden of persuasion on the government in Equal Terms claims. It then argues that the Third and Seventh Circuits' justification for departing from Free Exercise framework is undermined by RLUIPA's clear statutory

289. See *supra* notes 265–66 and accompanying text.

290. See *supra* note 180 and accompanying text.

291. See *supra* note 84 and accompanying text.

292. See *supra* note 274.

293. 42 U.S.C. § 2000cc-3(g) (2006).

294. See *supra* text accompanying notes 284–94.

295. But see *supra* notes 284–88 and accompanying text (explaining that although both *Huntington* and *Arlington Heights II* favor placing the burden of persuasion with the government, the *Arlington Heights II* burden shifting paradigm is less concrete).

296. See *supra* note 121 and accompanying text.

text, which commands allocation of the burden of persuasion to the government.

Burdens of proof in Free Exercise claims are dependent upon the nature of the challenged law.²⁹⁷ As the Supreme Court held in *Smith* and *Lukumi*, neutral laws of general applicability will receive rational basis review, wherein the plaintiff has the burden of persuasion.²⁹⁸ In contrast, non-neutral laws that make distinctions between secular and religious activities are subject to strict scrutiny,²⁹⁹ where the burden of persuasion rests with the government.³⁰⁰ There is ample evidence that Congress intended RLUIPA to codify the holdings of *Smith* and *Lukumi*.³⁰¹ If that is the case, it would follow that if a land use regulation is non-neutral—if it excludes religious organizations but allows secular organizations, or if it requires a conditional use permit for churches, but allows secular institutions to operate as of right—the burden of persuasion should be on the government.

The Eleventh,³⁰² Third,³⁰³ and Seventh³⁰⁴ Circuits understood RLUIPA to codify the Supreme Court's Free Exercise jurisprudence as articulated in the *Smith* and *Lukumi* decisions. And yet, when confronted by challenges to such laws, the Third³⁰⁵ and Seventh³⁰⁶ Circuits placed the burden of persuasion on the religious plaintiff.

The Third Circuit explained this apparent incongruity by asserting that congressional intent to codify *Smith* and *Lukumi* was not absolute.³⁰⁷ In the court's view, the fact that the Equal Terms Provision makes no mention of strict scrutiny, while the Substantial Burden Provision expressly requires it, signals congressional intent to take strict scrutiny off the table in Equal Terms cases, *Smith* and *Lukumi* notwithstanding.³⁰⁸

While this argument might have merit,³⁰⁹ it also ignores the text of section 2000cc-2(b), which expressly requires the government to bear the burden of persuasion in Equal Terms cases.³¹⁰ It is telling that the Third³¹¹

297. See *supra* note 204 and accompanying text.

298. See *supra* note 197 and accompanying text.

299. See *supra* note 201 and accompanying text.

300. See *supra* note 188 and accompanying text.

301. See *supra* Part I.C.1.

302. See *supra* note 222 and accompanying text.

303. See *supra* note 228 and accompanying text.

304. The Seventh Circuit's opinion is silent as to whether RLUIPA codifies Free Exercise jurisprudence, but its adoption of a variant on the Third Circuit's test can be understood as an endorsement of that view. See *supra* notes 241–45 and accompanying text.

305. See *supra* note 231 and accompanying text.

306. See *supra* notes 243–45 and accompanying text.

307. See *supra* note 228 and accompanying text.

308. See *supra* note 228 and accompanying text.

309. Whether strict scrutiny analysis is appropriate in Equal Terms claims has been widely discussed elsewhere. See, e.g., Campbell, *supra* note 87, at 1104 (arguing that applying strict scrutiny contravenes congressional intent); Terry M. Crist III, Comment, *Equally Confused: Construing RLUIPA's Equal Terms Provision*, 41 ARIZ. ST. L.J. 1139, 1155 (2009) (endorsing the Eleventh Circuit's strict scrutiny standard based on RLUIPA's intent and purpose); Minervini, *supra* note 92, at 606–07 (arguing that together, RLUIPA's text and purpose support a strict scrutiny approach).

310. Section 2000cc-2(b) reads:

and Seventh³¹² Circuits did not even attempt to claim otherwise, because no other interpretation of section 2000cc-2(b) is plausible.

If statutory silence on the issue of strict scrutiny in Equal Terms cases implies that Congress intended to foreclose such analysis from judicial purview, as the Third Circuit contends, then surely the express statutory allocation of burdens of proof in Equal Terms cases must also foreclose judicial discretion. Even if Congress meant to remove *Lukumi*'s strict scrutiny requirement from the Equal Terms Provision, by including section 2000cc-2(b) in RLUIPA, it clearly intended to retain *Lukumi*'s implicit requirement that the burden of persuasion must fall on the government. Indeed, the statutory language unambiguously requires it.³¹³ As the Supreme Court has noted in *Connecticut National Bank v. Germain*,³¹⁴ "courts must presume that a legislature says in a statute what it means and means in a statute what it says. . . . When the words of a statute are unambiguous . . . 'judicial inquiry is complete.'"³¹⁵

Regardless of congressional intent, the result should still be the same. If RLUIPA completely codifies *Lukumi*, strict scrutiny applies, and thus the burden is on the government. If RLUIPA codifies *Lukumi* with the exception that strict scrutiny does not apply to the Equal Terms Provision, section 2000cc-2(b) nevertheless keeps the burden on the government—instead of justifying a violation, the government instead has to prove that one has not occurred. Thus, as both a jurisprudential model for comparison, and a source of legislative history, the Free Exercise Clause suggests that in RLUIPA Equal Terms cases, the government must bear the burden of persuasion.

D. Public Policy Considerations Favor the Allocation of the Burden of Persuasion to Government Defendants in RLUIPA Equal Terms Cases

Interpretations of RLUIPA should be informed by public policy considerations. First, the public policy of the United States favors the free exercise of religion.³¹⁶ Second, and related, is RLUIPA's goal of protecting religious exercise to the maximum extent permitted by the Act and the Constitution.³¹⁷ Third, RLUIPA's legislative history demonstrates

If a plaintiff produces prima facie evidence to support a claim alleging a violation of the Free Exercise Clause or a violation of section 2000cc of this title, the government shall bear the burden of persuasion on any element of the claim, except that the plaintiff shall bear the burden of persuasion on whether the law (including a regulation) or government practice that is challenged by the claim substantially burdens the plaintiff's exercise of religion.

42 U.S.C. § 2000cc-2(b) (2006); *see also supra* notes 112–16 and accompanying text.

311. *See supra* note 232 and accompanying text.

312. *See supra* text accompanying notes 247–49.

313. *See supra* notes 112–16 and accompanying text.

314. *See Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992).

315. *Id.* (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)); *see supra* note 263 and accompanying text.

316. *See supra* note 101 and accompanying text.

317. *See supra* notes 117–18 and accompanying text.

congressional concern with protecting minority and unpopular religions.³¹⁸ Finally, consistent procedure in challenges to all forms of exclusionary zoning is desirable from a public policy perspective. All of these policy considerations favor the allocation of the burden of persuasion to the government in Equal Terms cases.

In order to realize the policy of protecting the free exercise of religion, to the extent that it is possible to read the Equal Terms Provision as affording religious exercise greater protection, courts should do so. RLUIPA allocates the burden of persuasion to government defendants in Equal Terms cases.³¹⁹ This interpretation better protects the free exercise of religion than does placing the burden on religious plaintiffs because, generally speaking, it is more difficult for the party charged with the burden of persuasion to prevail.³²⁰

The policy of protecting minority and unpopular religions is also better served by reading RLUIPA to charge the government with the burden of persuasion. Such religions, Islam in particular, are often faced with obstacles unrelated to land use law,³²¹ and may have limited funds with which to litigate.³²² The additional obstacle of carrying the burden of persuasion only serves to make it more difficult for members of such religions to freely exercise their faith—a direct conflict with the policy of protecting the free exercise of minority and unpopular religions.

While the vulnerability of minority and unpopular religions was undoubtedly one of RLUIPA's motivations,³²³ is not limited to such religious institutions. Protecting religious exercise to the extent possible under the Constitution³²⁴ means protecting all religions equally; thus, although RLUIPA's allocation of the burden of persuasion to the government in Equal Terms claims may be a byproduct of concern for the minority, it applies to challenges brought by all religious institutions.

One of the fundamental principles of due process is that those similarly situated should be treated alike by the government.³²⁵ Accordingly, policy should favor equal treatment for all plaintiffs challenging exclusionary zoning policies. Nonreligious exclusionary zoning jurisprudence under the FHA generally places the burden of persuasion on government defendants;³²⁶ and the same burden should apply to challenges to exclusionary zoning ordinances brought under the Equal Terms Provision.

318. *See supra* notes 101–07 and accompanying text.

319. *See supra* notes 116, 223, 261 and accompanying text.

320. *See supra* note 84 and accompanying text.

321. *See supra* note 70 and accompanying text.

322. *See supra* note 258 and accompanying text.

323. *See supra* notes 101–04 and accompanying text.

324. *See supra* notes 117–18 and accompanying text.

325. *See supra* note 121 and accompanying text.

326. *See supra* note 295 and accompanying text.

CONCLUSION

RLUIPA and its Equal Terms Provision reflect the foundational American principle of religious freedom. Exclusionary zoning practices threaten that ideal. Governments engaged in nonreligious exclusionary zoning carry the burden of persuasion when they are challenged. Governments accused of violating citizens' rights to freely exercise their religion are charged with a similar burden. These examples, coupled with a policy-sensitive reading of RLUIPA's text, leave only one appropriate solution to the Equal Terms circuit split: government defendants must bear the burden of persuasion in Equal Terms cases.

Congress could have chosen to place the burden of persuasion on plaintiffs in Equal Terms cases, but chose to put the burden on the government instead. Given that burdens of proof are extremely important to the outcome of any case, that choice appears to be wise. The Eleventh and Ninth Circuits recognized the wisdom of Congress's choice, and should the Supreme Court hear an Equal Terms case, it should do the same.