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The "Hard Question" Of The Establishment Clause

Coupled With A RLUIPA Update

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INTRODUCTION

The First Amendment of the United States Constitution provides "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." Local governments can be subject to establishment clause claims when religious displays are on public property. In addition, local land use decisions regarding religious institutions are subject to increased scrutiny under the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), Congress's attempt to protect free exercise. This paper summarizes new developments in RLUIPA case law and considers establishment clause issues after the Supreme Court's most recent decision.

The doctrine interpreting the establishment clause is notoriously complicated. Current Supreme Court nominee Elena Kagan, when asked what test she would apply to establishment clause cases, called it a "hard, hard question." The Supreme Court's recent decision in *Salazar v. Buono*[1] provided little clarification. As Justice Kennedy stated, "[t]o date, this Court's jurisprudence in this area has refrained from making sweeping pronouncements, and this case is ill suited for announcing categorical rules."[2] Media coverage largely ignored the Court's narrow, technical holding and mischaracterized the cross' fate – which was remanded for the district court's consideration. The *Buono* decision sparked substantial public interest because of the sensitive establishment issues and public interest continues to grow since the decision. (The cross, which had been covered with a box during the litigation, was stolen by vandals following the Supreme Court decision. It mysteriously reappeared shortly after, but, after determining that the cross was an imposter, the Justice Department ordered its removal.[3]) Although not central to Justice Kennedy's narrow holding, *Buono* does include substantial sweeping language about the proper role of religion in the public sphere. This paper will discuss the contributions of *Buono* to establishment clause doctrine and consider if any practical guidance can be discerned from the case and upcoming changes on the Supreme Court.

ESTABLISHMENT CLAUSE

The Court has traditionally, albeit inconsistently, relied on the three-prong *Lemon* test to determine whether a government action violates the establishment clause. Although *Lemon v. Kurtzman* was the first case to combine the purpose,

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[1] *Salazar v. Buono*, 2010 WL 1687118 (U.S. 2010) (*Buono*).

[2] *Id.*

[3] Ashby Jones, *The Mojave Cross: A Strange Case Gets a Whole Lot Weirder*, THE WASHINGTON POST LAW BLOG (May 21, 2010), http://blogs.wsj.com/law/2010/05/21/the-mojave-cross-a-strange-case-gets-a-whole-lot-weirder/.

effect, and entanglement prongs, the components of the test evolved in a series of cases over a two-decade period. Under *Lemon*, a government law or action is constitutional if it (1) has a secular purpose; (2) has an effect that neither advances nor inhibits religion; and (3) avoids excessive entanglement with religion.[4]

Since *Lemon*, however, a deeply divided court has at times ignored, modified, or supplemented the *Lemon* test to create alternative standards. In *Marsh v. Chambers*, for example, the Court upheld Nebraska's practice of opening each legislature session with a prayer by a publicly-funded chaplain based on history alone.[5] In her concurrence in *Lynch v. Donnelly*, Justice O'Connor introduced the "endorsement" test as a "clarification of establishment clause doctrine."[6] The endorsement test considers whether the government action would appear to a reasonable or objective observer as an endorsement of religion.[7] But the justices never agree on the characteristics of this reasonable observer. Justice O'Connor rejected the use of an actual individual observer in favor of a reasonable observer that would be "aware of the history and context of the community and the forum in which the religious display appears."[8] Justice Scalia has openly criticized the *Lemon* test,[9] and a plurality opinion by then Chief Justice Rehnquist declared the *Lemon* test "not useful" to deciding the constitutionality of a Ten Commandments display.[10]

In the specific context of religious displays, the Court's decisions reflect a highly fact-intensive analysis. In *County of Allegheny v. ACLU*, for example, a deeply divided Court held that a nativity scene in a county courthouse violated the establishment clause, but found a holiday display including a Christmas tree and a menorah constitutional.[11] Similarly, in a pair of decisions issued on the same day, the Court found a posting of the Ten Commandments in a courthouse unconstitutional[12] but permitted a display of the Ten Commandments on the grounds of a state capitol.[13]

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[4] *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

[5] *Marsh v. Chambers*, 463 U.S. 783 (1983).

[6] *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984).

[7] *See McCreary County v. ACLU*, 545 U.S. 844, 883 (2005); *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 777 ("when the reasonable observer would view a government practice as endorsing religion . . . it is our duty to hold the practice invalid.") (O'Connor, J., concurring in part and concurring in judgment).

[8] *Pinette*, 515 U.S. at 780-81.

[9] *McCreary County*, 545 U.S. at 900-01 (Scalia, J., dissenting).

[10] *Van Orden v. Perry*, 545 U.S. 677, 686 (2005).

[11] *County of Allegheny v. ACLU*, 492 U.S. 573 (1989).

[12] *McCreary County*, 545 U.S. 844.

[13] *Van Orden*, 545 U.S. 677.

Justice Breyer, the swing vote in the two cases, emphasized the long and uncontroversial history of the state capitol display over the recent and divisive posting in the county courthouse.[14]

Buono: Path to the Supreme Court

The Veterans of Foreign Wars ("VFW") installed a white cross on Sunrise Park in the Mojave National Desert in 1934, with a plaque commemorating the veterans of World War I. The National Park Service never formally permitted the memorial and private citizens maintained the cross for more than 70 years.[15]

The complicated procedural history of *Buono* was critical to the Court's holding narrow holding. After the park service denied a request to install a Buddhist symbol on Sunrise Rock in 1999, the park service announced their intention to remove the cross.[16] Congress responded by prohibiting the use of public funds to remove the cross.[17] Three months later, Frank Buono, a retired National Park Service employee, filed suit alleging that the presence of the cross in the preserve violated the establishment clause. In this initial challenge (*Buono I*), the district court agreed that the cross violated the establishment clause and issued an injunction ordering the government to remove the cross.[18] While *Buono I* was pending in district court, Congress designated Sunrise Rock as a national memorial and allocated funding for its rehabilitation.[19]

The government appealed the injunction to the Ninth Circuit. Prior to oral arguments, Congress authorized a land exchange between the park service and the VFW.[20] In its decision affirming the district court's finding that the cross violated the establishment clause, the Ninth Circuit chose not to address whether the land transfer statute would remedy the violation (*Buono II*).[21] The government did not appeal.

When the government continued to implement the land exchange, Buono sought to enforce the injunction. The district court found the land transfer statute was "an attempt by the government to evade the permanent injunction enjoining

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[14] *Id.* at 703-04 (Breyer, J., concurring in judgment).

[15] *Buono v. Kempthorne*, 527 F.3d 758, 760 (9th Cir. 2008) (*Buono IV*).

[16] *Id.* at 769.

[17] *Id.*

[18] *Buono v. Norton*, 212 F. Supp. 2d 1202 (C.D. Cal. 2002) (*Buono I*).

[19] *Buono IV*, 527 F.3d at 770.

[20] *Id.* at 771.

[21] *Buono v. Norton*, 371 F.3d 543, 546 (9th Cir. 2004) (*Buono II*).

the display of the Latin Cross atop Sunrise Rock" (*Buono III*).[22] The Ninth Circuit affirmed (*Buono IV*) and the government appealed to the Supreme Court.

Minimal Impact on Establishment Clause Doctrine

The Court's splintered decision in *Buono* offers little clarity for local governments facing establishment clause issues. The case produced no less than six separate opinions, and only Chief Justice Roberts joined Justice Kennedy's plurality opinion in full. And because the government did not appeal the Ninth Circuit's finding that the cross on federal land violated the establishment clause (*Buono II*), the legal issue of whether the injunction should issue in the first instance was a final, non-appealable judgment. The only issue, therefore, was "whether the District Court properly enjoined the Government from implementing the land-transfer statute."[23]

Justice Kennedy reversed and remanded for the district court to conduct a "proper inquiry."[24] The plurality opinion provided little concrete guidance as to the content of a proper inquiry, but did mandate consideration of remedies less drastic than overturning a congressional act. In particular, Justice Kennedy argued that the district court improperly "belittl[ed] the Government's efforts as an attempt to 'evade' the injunction."[25] Instead, the analysis should provide greater deference to "Congress's prerogative to balance opposing interests and its institutional competence to do so."[26] The injunction had "presented Congress with a dilemma . . . It could not maintain the cross without violating the injunction, but it could not remove the cross without conveying disrespect for those the cross was seen as honoring."[27] Rather than characterizing the land transfer statute as an evasive tactic, Justice Kennedy considered the statute an appropriate expression of Congress's "policy of accommodation for a symbol that . . . has complex meaning beyond the expression of religious views."[28]

In issuing the original injunction, the district court held that the cross (on federal land) had the *effect* of endorsing religion as viewed by a reasonable observer. While Justice Kennedy questioned whether the reasonable observer standard applied to an object on private land, he argued that even if the standard

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[22] *Buono v. Norton*, 364 F. Supp. 2d 1175, 1182 (C.D. Cal. 2005) (*Buono III*).

[23] *Buono*, 2010 WL 1687118, *10.

[24] *Id.* at *15.

[25] *Id.* at *12.

[26] *Id.*

[27] *Id.* at *11.

[28] *Id.* at *12.

was appropriate, the transfer (to private land) might cure the establishment clause violation as viewed by a reasonable observer.[29]

Because the lower court's original finding that the cross (on federal land) violated the establishment clause was not appealable, the Court was forced to assume the original injunction was valid. Regardless, Justice Kennedy noted that his opinion "should not be read to suggest this Court's agreement with that judgment, some aspects of which may be questionable."[30] In framing the "proper inquiry" for lower courts, Justice Kennedy posited that the "goal of governmental endorsement does not require eradication of all religious symbols in the public realm . . . [or] avoid[ance] [of] any public acknowledgment of religion's role in society."[31] Long criticized for its malleability, Justice Kennedy described the reasonable observer as one "who knows all of the pertinent facts and circumstances surrounding the symbol and its placement."[32] Applied to this case, "the message conveyed by the cross would be assessed in the context of all relevant factors."[33] Foremost among the factors to be considered in determining the cross's message, in Justice Kennedy's opinion, would be Congress's appropriate policy of accommodation.

While not creating a new establishment clause test, or substantially clarifying the existing doctrine, *Buono* does amplify two trends in the Court's establishment clause jurisprudence. First, Justice Kennedy continued the Court's move to secularize Christian religious symbols. His opinion emphasized that the cross does not simply symbolize Christian beliefs. Instead, it is "a symbol often used to honor and respect those whose heroic acts, noble contributions, and patient striving held secure an honored place in history for this Nation and its people . . . evok[ing] thousands of small crosses in foreign fields marking the graves of Americans who fell in battles . . ."[34] Second, Justice Kennedy approved an accomodationist approach to the establishment clause – an understanding that the Constitution does not require the elimination of religious symbols from the public sphere.

Buono demonstrates that five justices are willing to narrowly interpret the establishment clause, at least to the extent described by Justice Kennedy. Chief Justice Roberts joined Justice Kennedy's opinion in full, but also wrote separately to argue the Constitution does not require the government to complete an "empty

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[29] *Id.*

[30] *Id.* at *13.

[31] *Id.* at *14.

[32] *Id.*

[33] *Id.*

[34] *Id.*

ritual."[35] Justice Alito, concurring in part and in the judgment, argued that the factual record was sufficient for the Court to decide that the land transfer statute was a valid, constitutional exercise of congressional authority.[36] While also questioning the appropriateness of the endorsement test, Justice Alito argued that the reasonable observer would not view the land transfer as an endorsement of religion, but would instead "appreciate that the transfer represents an effort by Congress to address a unique situation and to find a solution that best accommodates conflicting concerns."[37] Justices Scalia and Thomas concurred only in the judgment, noting that they were "forced to forgo an opportunity to clarify the law."[38] Buono had standing to enforce his original injunction, which Justice Scalia described as "proscrib[ing] the cross's presence on public property."[39] But Justice Scalia argued that Buono had no standing to expand the injunction to private property; Buono was effectively seeking "new relief."[40] With this framing, Justice Scalia determined that Buono had not demonstrated that the transfer would cause him any injury because the cross's continued display on private land was "merely speculative" and because Buono's objection was to the cross's display on public, not private, land.[41]

Justice Stevens, joined by Justices Ginsburg and Sotomayor, dissented from the decision. In contrast to Justice Scalia's description of the original injunction, Justice Stevens noted that the injunction "barred the Government from 'permitting the display of the Latin cross in the area of Sunrise Rock in the Mojave National Preserve.'"[42] The land transfer, therefore, violated the injunction by permitting the cross's continued display. Justice Breyer, in a separate opinion, dissented on the grounds that the district court's holding was properly within their authority under the law of injunctions; as such, the establishment clause issue should not have been reached.[43] Justice Breyer's dissent does not provide much insight into his view of the establishment clause, but it should be noted that the outcome he promoted would force the government to remove the cross, a long-standing monument that was uncontroversial for the majority of its tenure. This result could be contrasted with his decision in *Van*

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[35] *Id.* at *16 (Roberts, C.J., concurring).

[36] *Id.* at *16-19 (Alito, J., concurring in part and concurring in the judgment).

[37] *Id.* at *18 (Alito, J., concurring in part and concurring in the judgment).

[38] *Id.* at *21 (Scalia, J., concurring in judgment).

[39] *Id.* at *19 (Scalia, J., concurring in judgment).

[40] *Id.* at *19-20 (Scalia, J., concurring in judgment).

[41] *Id.* at *20 (Scalia, J., concurring in judgment) (noting Buono's many statements to the effect that "he has no objection to Christian symbols on private property").

[42] *Id.* at *24 (Stevens, J., dissenting).

[43] *Id.* at *38 (Breyer, J., dissenting).

Orden, which considered divisiveness a critical factor, but any comparisons are limited by the procedural posture of *Buono*.

Justice Stevens' anticipated retirement, and Solicitor General Elena Kagan's potential appointment, may not substantially affect future establishment clause cases as Kagan is generally expected to fit into the Court's liberal camp. Given her career path, little is known about Solicitor General Kagan's views of the establishment clause. During her confirmation hearings, Kagan asserted the need for flexibility to balance the competing goals of the free exercise and establishment clauses. She also noted that six current justices have questioned the continued viability of the *Lemon* test, but did not offer her own view of the test, calling it a "hard, hard question." Political commentators have speculated that Kagan will either be too liberal or too conservative, upset with a memo she wrote for Justice Marshall twenty years ago or that she abandoned her old position (calling the memo "the dumbest thing she had ever heard") in her confirmation hearing. In reality, Kagan nicely highlighted the context-specific nature of establishment clause jurisprudence, but provided no clear insight into how she might rule on a future religious display case.

Land Transfers as a Remedy to Establishment Clause Violations

Some courts and commentators have characterized the Seventh Circuit as applying a presumption that transferring land to a private party ends an inappropriate endorsement of religion.[44] The Ninth Circuit's decision that the land transfer did not cure the establishment clause violation (*Buono IV*) split with Seventh Circuit precedent, to the extent that the cases could be read to adopt a presumption in favor of land transfers. In rejecting to adopt a presumption, the Ninth Circuit argued that establishment clause jurisprudence requires a highly fact-specific inquiry.[45]

The Supreme Court did not directly address the issue, but it seems clear that at least six justices support an approach to the establishment clause that is extremely context and fact sensitive. Justice Kennedy, joined in full by Chief Justice Roberts, clearly rejected "categorical rules" in favor of a "fact-specific inquiry." Justices Stevens, Ginsburg, and Sotomayor, as demonstrated by their rejection of the *Buono* land transfer, are unlikely to find a presumption appropriate. Justice Breyer showed his appreciation of context with his contrary results in *Van Orden* and *McCreary County*. And if Solicitor General Kagan

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[44] *See Freedom from Religion Foundation, Inc. v. City of Marshfield*, 203 F. 3d 487 (7th Cir. 2001) ("[a]bsent unusual circumstances, a sale of real property is an effective way for a public body to end its inappropriate endorsement of religion."); *Mercier v. Fraternal Order of Eagles*, 395 F. 3d 693 (7th Cir. 2005).

[45] *Buono IV*, at 779 n. 13.

replaces Justice Stevens, her confirmation hearing comments indicate that she too would reject a broadly applied presumption.

The Court's insistence on flexibility in its establishment clause jurisprudence provides little guidance to lower courts, but instead suggests they wrestle with the specific facts and context in each case. As a result, local governments cannot predict the outcome of an establishment clause challenge. It is clear that a majority of the Court (Justices Kennedy, Roberts, Alito, Scalia, and Thomas) now favors a policy of accommodating religion in public spaces, a shift from Justice O'Connor's time on the Court. As such, local governments may expect slightly more freedom to continue longstanding religious displays, especially if they can be characterized as secular (like the cross and the Ten Commandments, for example).

RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT ("RLUIPA")

The Religious Land Use and Institutionalized Persons Act ("RLUIPA"; 42 U.S.C.A. §§ 2000cc *et seq.*) is intended to preserve the religious exercise provisions afforded by the First Amendment in the context of state and local land use regulations. RLUIPA prohibits local governments from imposing or implementing a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious institution, unless the government can show that the imposition of the burden furthers a compelling government interest and is the least restrictive means of furthering that compelling government interest. A land use ordinance is considered a substantial burden when it is oppressive to a significantly great extent.[46]

RLUIPA contains provisions mandating that local land use regulations shall grant "equal treatment" to a religious assembly or institution; not discriminate against any assembly or institutions on the basis of religion or religious denomination; and not impose or implement a land use regulation that totally excludes religious assemblies from a jurisdiction or unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.

Substantial Burden

In *World Outreach Conference Center v. City of Chicago*, the Seventh Circuit issued a consolidated opinion resolving two cases between religious organizations and cities.[47] In the first case, World Outreach, a Christian sect that operated a community center in a poor Chicago neighborhood, wanted to run the

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[46] *Guru Nanak Sikh Society of Yuba City v. County of Sutter*, 456 F.3d 978, 988 (9th Cir. 2006).

[47] 591 F. 3d 531 (7th Cir. 2007).

center in the same way the YMCA had for the 80 years before World Outreach purchased the property – using the apartments as single-room-occupancy units ("SRO").[48] The community center was a legal nonconforming use, so World Outreach did not need a special use permit to operate in a shopping district, but it did need a new SRO license.[49] When World Outreach applied for the SRO license, the City incorrectly required them to obtain a special use permit first.[50] The City undertook a number of apparently politically motivated actions, including a zoning change that effectively barred World Outreach from getting a special use permit and a frivolous lawsuit, because the building was sold to World Outreach instead of a Chicago alderman's preferred developer.[51] Months after World Outreach filed suit and two years after their original application, the City issued the SRO license without explanation.[52]

The Seventh Circuit first dismissed Chicago's claims that RLUIPA was an unconstitutional exercise of congressional authority. Judge Posner asserted that RLUIPA was an appropriate exercise of Congress's section 5 of the Fourteenth Amendment because it codified the Supreme Court's interpretation of the Constitution in *Sherbert v. Verner*.[53] Judge Posner also noted that RLUIPA is also based on Congress's commerce and spending authority.[54] As to the merits of the World Outreach claims, the court described situation as a "malicious prosecution of a religious organization by City officials."[55] The conduct clearly imposed a substantial burden with no possible justification.[56] The court rejected World Outreach's equal terms claim because the discrimination was not on religious grounds, but agreed that the group had a valid equal protection clause claim.[57]

In the second case decided in *World Outreach*, the City of Peoria had designated a building on church property a landmark and refused to allow the church to demolish it to build a new family life center.[58] The court found that in

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[48] *Id.* at 535.

[49] *Id.* at 535-36.

[50] *Id.* at 536.

[51] *Id.*

[52] *Id.*

[53] *Id.* at 534 (discussing *Sherbert v. Verner*, 374 U.S. 398 (1963).

[54] *Id.* at 533-34.

[55] *Id.* at 537.

[56] *Id.* at 537-38.

[57] *Id.* at 538.

[58] *Id.* at 539.

light of the size of the religious organization and the availability of alternative on-site locations for the new building, the burden imposed on the church was not substantial. As Judge Posner noted "[a]ny land use regulation that a church would like not to have to comply with imposes a 'burden' on it, and so the adjective 'substantial' must be taken seriously lest RLUIPA be interpreted to grant churches a blanket immunity from land-use regulation."[59]

Equal Terms

In *Rocky Mountain Christian Church v. Boulder County*, an existing church sought a special use permit to expand its church and school facilities and to build a gym.[60] The County denied the permit request, finding that the proposed expansion was incompatible with the surrounding area and an overly intensive use of the land that would cause traffic congestion and injure the welfare of residents.[61] The district court granted an injunction requiring the County to approve the application after a jury found for the church on its substantial burden, equal terms, and unreasonable limitations claims.

The Tenth Circuit held that the County violated RUILPA's equal terms and unreasonable limitations requirements and thus found it unnecessary to reach the substantial burden issue. With regard to equal terms, the court found sufficient evidence for the jury to conclude that the County treated a similarly situated non-religious school differently.[62] The County asserted an affirmative defense that their generally applicable law was rationally related to a legitimate government interest.[63] The court noted the circuit split on whether RUILPA includes an affirmative defense, but declined to weigh in, instead deciding that strict scrutiny applied in this instance because the County had not applied the law in a neutral manner.[64] The Court also affirmed the jury's finding that the County's zoning ordinance, as applied, had unreasonably limited religious assemblies. Sufficient evidence of the limitations on opportunities for churches included the time and expense of the special use application process and a Commissioner's comment that there would "never be another mega church" in the County.[65]

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[59] *Id.*

[60] 605 F. 3d 1081 (10th Cir. 2010).

[61] *Id.* at 1086.

[62] *Id.* at 1087-88.

[63] *Id.* at 1088.

[64] *Id.* at 1088-89.

[65] *Id.* at 1089-90.

The Seventh Circuit, on the other hand, opted to add its voice to the equal terms circuit split, rejecting the Eleventh Circuit's broader interpretation in favor of a test similar to that employed by the Third Circuit. In *River of Life Kingdom Ministries v. Village of Hazel Crest*, a church sued to prevent Hazel Crest from enforcing its zoning ordinance, which designated the area where the church wished to relocate as a commercial district.[66]

Writing for the majority, Judge Posner rejected the Eleventh Circuit equal terms test, which requires an ordinance that permits *any* assembly to permit a church as well. The court argued that the Eleventh Circuit test, though a literal reading of the equal terms provision, would "give religious land uses favored treatment," possibly even violating the establishment clause by "discriminating in favor of religious land uses."[67] Under the Third Circuit test, in contrast, a regulation violates the equal terms provision only if it treats religious assemblies worse than secular assemblies "that are similarly situated as to the regulatory purpose."[68] Judge Posner found flaws in the Third Circuit test as well, arguing that focusing on the regulatory purpose "invites speculation" and makes the equal terms provision too susceptible to the interpretation of local government officials.[69] And so the court slightly modified the test to focus on objective "accepted zoning criteria" or "regulatory criteria" instead.[70] Perhaps to demonstrate how objective criteria are different than regulatory purposes, the court summarized the history of exclusionary zoning, of which the Hazel Crest commercial district is a prime example. Hazel Crest's commercial zone was intended to generate municipal revenue and excludes churches along with all secular assemblies that do not generate taxable revenue, thereby treating similarly situated assemblies on equal terms.[71] The court notes that determining the zoning criteria may be less straightforward in future cases that "blur the character of particular zoning districts."[72]

The addition of the Seventh Circuit's equal terms test may provide local agencies with some additional flexibility to treat religious land uses differently than secular assemblies, when those secular assemblies uniquely fit the "regulatory criteria" or "regulatory purpose" of the district. The circuits have still not reached any clear consensus, however, on how to apply RLUIPA's equal terms provision.

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[66] 2010 WL 2630602 (7th Cir. 2010).

[67] *Id.* at *2-3.

[68] *Id.* at *1.

[69] *Id.* at *4.

[70] *Id.*

[71] *Id.* at 6.

[72] *Id.*