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I. INTRODUCTION

In *Rocky Mountain Christian Church v. Board of County Commissioners*,[1] the United States Court of Appeals for the Tenth Circuit considered whether Boulder County officials violated the Religious Land Use and Institutionalized Persons Act[2] ("RLUIPA") when it denied the Rocky Mountain Christian Church's ("Rocky Mountain" or "RMCC") special use application, which would have allowed RMCC to expand its Boulder County facilities.[3] In a relatively straightforward application of RLUIPA's statutory language, the court concluded that Boulder County had violated RLUIPA's requirement that Rocky Mountain's permit be considered on "equal terms" with secular institutions in the application process and that, as a religious institution, Rocky Mountain should be free from exclusion or unreasonable limitations on its assemblies or structures within the county.[4]

This Note argues that although the Tenth Circuit correctly decided *Rocky Mountain*, the case will have limited precedential value for two reasons. First, the case's procedural posture and the county's failure to raise key issues and arguments on appeal severely limited the court's ability to review the district court's decision. Second, while the court touched on two important issues that have caused circuit splits over the correct interpretation of RLUIPA's equal terms provision, the court ultimately, albeit prudently, failed to weigh in decisively on these issues.

II. FACTS AND PROCEDURAL HISTORY

In 1978, Boulder County took affirmative steps to "curb[] urban sprawl, maintain[] open space to preserve the county's rural

1. 613 F.3d 1229 (10th Cir. 2010), *cert. denied*, 131 S. Ct. 978 (2011).
2. 42 U.S.C. §§ 2000cc–2000cc-5 (2006).
3. *Rocky Mountain*, 613 F.3d at 1233.
4. *Id.* at 1236–40.

character, and sustain[] agriculture" by enacting its comprehensive plan ("Comprehensive Plan").[5] Pursuant to the Comprehensive Plan, the County Land Use Code designated certain areas as "Agricultural Districts."[6] Within the Agricultural Districts, "offices, warehouses, and retail stores are prohibited," and all facilities with "occupancy loads exceeding 100 people [must] apply for a special use permit."[7] The county used numerous criteria when deciding whether to grant a special use application, including whether the proposed use was in "accordance with the comprehensive plan, and not an over-intensive use of land or excessive depletion of natural resources."[8]

Although located in an agricultural district, RMCC's fifty-five acre campus shares proximity with a number of structures and facilities. These include several subdivisions, "a wastewater treatment facility, a high school, and the 500,000 square foot Boulder Technology Center."[9] RMCC's facilities consist of a 106,000 square foot main building, a maintenance building, and numerous temporary modular units.[10] The size of RMCC's current facilities are the result of gradual expansion since its founding in 1984 and two successful applications for special use permits, which allowed Rocky Mountain to increase the size of its buildings to their present dimensions.[11]

RMCC submitted the special use application at issue in *Rocky Mountain* in 2004 and "met opposition at each level of review."[12] Despite RMCC's efforts to scale back its proposed expansion after initial opposition, the county partially denied RMCC's modified application, allowing RMCC to expand only its main worship building and replace their temporary modular units with a small permanent building.[13] Shortly thereafter, RMCC sued Boulder County under RLUIPA in district court. At the close of RMCC's

5. *Id.* at 1233.

6. *Id.*

7. *Id.*

8. *Id.* at 1233–34 (internal quotation marks and citation omitted).

9. *Id.* at 1234. Neither the high school nor the Boulder Technology Center are subject to the requirements of the Comprehensive Plan. *Id.* at 1234 n.1 ("The high school is not subject to the County's zoning authority and the Boulder Technology Center's industrial zoning district predates the Comprehensive Plan.").

10. *Id.* at 1234.

11. *Id.*

12. *Id.*

13. *Id.* at 1235.

evidence, the county moved for judgment as a matter of law under Federal Rule of Civil Procedure 50(a).[14] The court denied the motion on all issues but the county's affirmative defenses, which the court deferred.[15] Ultimately, "[a]fter a twelve-day trial, the jury found for RMCC" under RLUIPA's equal terms, unreasonable limitations, and substantial burden provisions.[16] Although the jury awarded RMCC no damages, the court "entered a permanent injunction requiring the County to approve RMCC's special use application" and "denied the County's renewed motion for judgment as a matter of law."[17] The county appealed.[18]

III. SIGNIFICANT LEGAL BACKGROUND

A. General Provisions of RLUIPA

Congress enacted RLUIPA to protect individuals from "land use regulation that would impose a substantial burden on the person's free exercise of religion."[19] A substantial burden will invalidate a regulation unless the government can demonstrate that the burden "is the least restrictive means of furthering [a] compelling governmental interest."[20] In addition to the substantial burden provision, RLUIPA identifies and prohibits three other "categories" of discriminatory government conduct. First, under the equal terms provision, the government may not "implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution."[21] Second, under the nondiscrimination provision, RLUIPA prohibits religious discrimination against any assembly or institution when implementing land use regulations.[22] Finally, under the exclusion and limits provision, "[n]o government shall impose or implement a land use regulation that: (A) totally excludes religious

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. John J. Dvorske, Annotation, *Validity, Construction, and Operation of Religious Land Use and Institutionalized Persons Act of 2000*, 181 A.L.R. FED. 247 (2010).

20. 42 U.S.C. § 2000cc(a)(1) (2006).

21. *Id.* § 2000cc(b)(1).

22. *Id.* § 2000cc(b)(2).

assemblies from a jurisdiction; or (B) *unreasonably limits* religious assemblies, institutions, or structures within a jurisdiction."[23]

B. Interaction Between RLUIPA and the Free Exercise Clause

Although RLUIPA is a relatively new statute, key issues have already emerged regarding the interaction between the Constitution's Free Exercise Clause[24] and the equal terms provision of RLUIPA.[25] First, circuit courts disagree about whether courts may weigh the nature of the challenged action against the government's regulatory interest, which would essentially provide an affirmative defense for the government in RLUIPA cases.[26] The second important issue courts face is "whether the equal terms provision contains a 'similarly situated' requirement."[27]

1. What level of scrutiny, if any, should the court apply to government action under RLUIPA?

The Third and Eleventh Circuit Courts of Appeals are at odds as to whether RLUIPA allows non-neutral government actions to stand so long as they pass strict scrutiny. In *Midrash Sephardi, Inc. v. Town of Surfside*,[28] the Eleventh Circuit answered that question in the affirmative. The court held that the Town of Surfside violated RLUIPA when it denied special use permits to two Orthodox Jewish congregations.[29] Both congregations had been meeting in the business district until the town denied one of the groups a special business permit to continue operating in its location.[30] Neither group attempted to reapply for a variance or to relocate because only

23. *Id.* § 2000cc(b)(3) (emphasis added). The *Rocky Mountain* court discussed only the second prong of the exclusion and limits provision, referring to RLUIPA's prohibition on regulation that unreasonably limits religious assemblies as the "unreasonable limitations" provision. The remainder of this Note employs this shorthand label.

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

25. *See* River of Life Kingdom Ministries v. Vill. of Hazel Crest, 611 F.3d 367, 368 (7th Cir. 2010); Rocky Mountain Christian Church v. Bd. of Cnty. Comm'rs, 613 F.3d 1229, 1237 (10th Cir. 2010); Sarah Keeton Campbell, Comment, *Restoring RLUIPA's Equal Terms Provision*, 58 DUKE L.J. 1071, 1086–93 (2009).

26. *Rocky Mountain*, 613 F.3d at 1237.

27. *Id.* at 1238.

28. 366 F.3d 1214 (11th Cir. 2004).

29. *Id.* at 1219.

30. *Id.* at 1220.

one zoning district allowed churches, and they claimed that no suitable land was available in that district.[31] The town maintained that its strict zoning of the business district was required to maintain a strong tax base and that it could not afford to place noneconomic establishments there without risking economic instability.[32]

The court looked to the Supreme Court's Free Exercise jurisprudence to determine what level of scrutiny, if any, RLUIPA afforded the town's interest in its strict zoning policy. The court concluded that RLUIPA codified the Supreme Court's *Smith-Lukumi* precedent that requires courts to strictly scrutinize any ordinance that is not both neutral and generally applicable.[33] By treating the synagogues differently than similarly situated secular assemblies, the town's ordinance was neither neutral nor generally applicable. Through the lens of strict scrutiny, the town's ordinance neither furthered compelling governmental interests, nor was it narrowly tailored to further those interests.[34] The court reasoned that the "proffered interests of retail synergy [were] not pursued against analogous nonreligious conduct [e.g., meeting in a private club], and those interests could be achieved by narrower ordinances that do not improperly distinguish between similar secular and religious assemblies."[35]

By contrast, the Third Circuit has rejected the notion that RLUIPA allows a non-neutral ordinance to survive even though it withstands strict scrutiny. In *Lighthouse Institute for Evangelism, Inc. v. City of Long Branch*,[36] the court concluded "that RLUIPA's Equal Terms provision operates on a strict *liability* standard; strict *scrutiny* does not come into play."[37] The court based this conclusion on the "clear divide" between the substantial burden provision, which expressly includes the balancing test in the statutory language, and

31. *Id.* at 1220–21.

32. *Id.* at 1221–22.

33. *Id.* at 1232 (citing Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993); Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872 (1990), *superseded in part by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (1993) (Notably, the Supreme Court has invalidated RFRA as applied to states and local governments in City of Boerne v. Flores, 521 U.S. 507 (1997). Congress has since amended RFRA through the RLUIPA.).

34. *Rocky Mountain*, 613 F.3d at 1235.

35. *Id.*

36. 510 F.3d 253 (3d Cir. 2007).

37. *Id.* at 269 (emphasis added).

the equal terms provision, which does not.[38] The court acknowledged that its conclusion parted ways with the Eleventh Circuit. The court reasoned that although it agreed with the Eleventh Circuit's "deference to Congress's intent to codify the [Supreme Court's] Free Exercise precedent," the statutory language manifested Congress's intent to exclude a strict scrutiny analysis from RLUIPA's equal terms provision.[39] As such, the court held that "if a land use regulation treats religious assemblies or institutions on less than equal terms with nonreligious assemblies or institutions that are no less harmful to the governmental objectives in enacting the regulation, that regulation—without more—fails under RLUIPA."[40]

2. Does the equal terms provision contain a "similarly situated" requirement?

Once again, the Third and Eleventh Circuits have squared off in determining to what extent RLUIPA's equal terms provision requires religious organizations, in order to establish a violation, to identify a similarly situated nonreligious comparator that had been treated favorably.[41] In *Lighthouse*, discussed above, the Third Circuit concluded that "the Equal Terms provision does in fact require . . . a secular comparator that is similarly situated as to the regulatory purpose of the regulation in question—similar to First Amendment Free Exercise jurisprudence."[42] As a result, the city's regulation would violate the equal terms provision only if it treated religious groups worse than secular groups "that are similarly situated *as to the [City's stated] regulatory purpose*."[43] This led the court to conclude

38. *See id. Compare* 42 U.S.C. § 2000cc(a), *with id.* § 2000cc(b).

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

40. *Id.*

41. Implied from the language of the statute, the "similarly situated" requirement is drawn by analogy from Equal Protection jurisprudence. *See* 42 U.S.C. § 2000cc(b)(1) (2006) ("No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution."); Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1229 (11th Cir. 2004) (citing City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985)).

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

43. *Id.* at 266. The court stated that to establish a violation of the RLUIPA Equal Terms provision the plaintiff "must show (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." *Id.* at 270. The first four elements of an equal terms cause of action under the Third Circuit's test are identical to the test in the Eleventh Circuit.

that the city's land use plan did not violate RLUIPA even though it did not allow a church to locate in the downtown business district. The city's goal in adopting the plan was to "achieve redevelopment of an underdeveloped and underutilized segment of the City."[44] The court reasoned that churches are not similarly situated to the secular organizations and assemblies allowed by the plan in light of the plan's goals and aims.[45]

By contrast, the *Midrash* court seems to take inconsistent positions on whether a similarly situated comparator is required at all. On the one hand, the *Midrash* court expressly stated that the equal terms provision "lacks the 'similarly situated' requirement usually found in equal protection analysis."[46] At the same time, the court seemed to inadvertently invoke the similarly situated comparator analysis in concluding that the Town of Surfside violated RLUIPA.[47] Putting aside these inconsistencies, it is clear that it gave no consideration to the town's regulatory goals in determining whether the synagogues were similarly situated to other assemblies allowed to locate in the business district. Instead, the opinion sought to determine whether a violation occurred by exploring the boundaries of key terms used in RLUIPA's equal terms provision.[48] According to the court, the plain meaning of "assembly" is a "group gathered for a common purpose."[49] Under this natural, though broad, definition, the city's disparate treatment of a synagogue, which was *not* allowed in the business district, and a private club,

Id. (citing Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward Cnty., 450 F.3d 1295, 1307 (11th Cir. 2006)).

44. *Id*. at 270.

45. *Id*. at 270–71.

46. *Id*. at 1229 ("[W]hile § (b)(1) has the 'feel' of an equal protection law, it lacks the 'similarly situated' requirement usually found in equal protection analysis.").

47. *Id*. at 1231 ("Finding that private clubs and lodges are similarly situated to churches and synagogues, we turn to whether under RLUIPA, Surfside may treat them differently."). Despite the court's baffling language, it is clear that even if *Midrash* is read in light of later Eleventh Circuit cases to require a "similarly situated" comparator, *see infra* note 52, then it must also be read to define that requirement so broadly as to remove from it much meaning.

48. *Midrash*, 366 F.3d at 1230–31. The Third Circuit characterized the Eleventh Circuit's approach as an application of the "natural perimeter" test developed by Justice Harlan in Walz v. Tax Comm'n, 397 U.S. 664 (1970). Under that test "a regulation is considered neutral and presumptively valid . . . if its 'circumference . . . encircles a class so broad that it can be fairly concluded that religious institutions could be thought to fall within the natural perimeter.'" *Lighthouse*, 510 F.3d at 267 (quoting *Walz*, 397 U.S. at 696 (Harlan, J., concurring) (second ellipses in original)).

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

which *was* allowed, violated RLUIPA.[50] Thus, as another court noted, the effect of the *Midrash* court's rule is that "where private clubs are allowed, so must churches be."[51]

Later Eleventh Circuit cases have slightly modified the court's original stance to expressly require a similarly situated comparator in some circumstances.[52] For example, in *Konikov v. Orange County*, the court apparently limited *Midrash* by requiring a similarly situated secular comparator where a church brought an as-applied challenge to a statute.[53] As a result, even the Eleventh Circuit seemingly restricts its otherwise expansive view of the RLUIPA equal terms provision by requiring identification of a favored similarly situated secular comparator for a plaintiff to prove that the government is selectively enforcing a facially neutral statute.[54]

IV. THE COURT'S DECISION

In *Rocky Mountain Christian Church v. Board of County Commissioners*,[55] the Tenth Circuit upheld the district court's denial of the county's motion for judgment as a matter of law, effectively

50. *Id*. The court referred approvingly to the town's definition of "private club" as "a building and facilities or premises, owned and operated by a corporation, association, person or persons *for social, educational or recreational purposes,* but not primarily for profit and not primarily to render a service which is customarily carried on as a business." *Id*. (quoting SURFSIDE, FLA., ZONING ORDINANCE § 90-2(20)) (internal quotation marks omitted).

51. River of Life Kingdom Ministries v. Vill. of Hazel Crest, 611 F.3d 367, 369 (7th Cir. 2010).

52. *See* Konikov v. Orange Cnty., 410 F.3d 1317, 1327–29 (11th Cir. 2005); *see also River of Life*, 611 F.3d at 383–84 (Sykes, J., dissenting); *Lighthouse*, 510 F.3d at 268. The *Midrash* court itself seems to take inconsistent positions on whether a "similarly situated" comparator is required. *Compare Midrash*, 366 F.3d. at 1229 ("[W]hile § (b)(1) has the 'feel' of an equal protection law, it lacks the 'similarly situated' requirement usually found in equal protection analysis."), *with id.* at 1231 ("Finding that private clubs and lodges are similarly situated to churches and synagogues, we turn to whether under RLUIPA, Surfside may treat them differently."). Despite the court's baffling language, it is clear that even if *Midrash* is read in light of later Eleventh Circuit cases to require a "similarly situated" comparator, then it must also be read to define that requirement so broadly as to remove from it much meaning.

53. *See Konikov*, 410 F.3d at 1327–29.

54. *See id*.; *River of Life*, 611 F.3d at 384 (Sykes, J., dissenting) ("In an as-applied 'selective enforcement' claim, however, the [*Konikov* court] held that an equal-terms plaintiff will generally be required to identify a similarly situated nonreligious assembly or institution that was treated more favorably." (citing Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward Cnty., 450 F.3d 1295, 1311 (11th Cir. 2006))).

55. 613 F.3d 1229 (10th Cir. 2010), *cert. denied*, 131 S. Ct. 978 (2011).

sustaining the jury's conclusion that the county's denial of RMCC's special use application violated RLUIPA.[56]

A. Standard of Review: Sufficiency of the Evidence

Because of the procedural posture of the case, the Tenth Circuit applied the highly deferential "sufficiency of the evidence" standard in reviewing the district court proceedings.[57] Under this standard, the court could overturn denial of the county's motion only if it concluded that when "'viewed in the light most favorable to the non-moving party, the evidence and all reasonable inferences to be drawn from it point but one way, in favor of the moving party.'"[58] As a result, the county bore the burden to show that no reasonable inference supported the jury's verdict. The court clearly stated its intention to avoid weighing the credibility of witnesses or other evidence, challenging the factual conclusions of the jury, or otherwise substituting its judgment for the jury's.[59]

B. The Court's Discussion of RLUIPA's Substantive Provisions

The court discussed the merits of the county's arguments on only two of RLUIPA's substantive provisions: the equal terms and the unreasonable limitations provisions. The court affirmed the permanent injunction entered against the city on those two prongs of the jury's verdict, which obviated the need to "review the sufficiency of the evidence of the substantial burden claim."[60] The county also preserved a constitutional challenge to RLUIPA's substantial burden provision, but failed to do so regarding the other provisions because it failed to adequately brief those issues.[61] Because the permanent injunction could be sustained on grounds of the equal terms and the unreasonable limitations provisions, the court declined to reach the county's constitutional challenge based on the substantial burden provision. The court reasoned that it generally "wish[es] to avoid, when possible, deciding constitutional questions

56. *Id.* at 1233.

57. *Id.* at 1235–36.

58. *Id.* at 1235 (quoting Praseuth v. Rubbermaid, Inc., 406 F.3d 1245, 1250 (10th Cir. 2005)).

59. *See, e.g.*, *id.* at 1235–36, 1239.

60. *Id.* at 1239.

61. *Id.*

and thereby overturn legislative enactments and etch in stone rules of law beyond the reach of most democratic process."[62]

1. The court's equal terms analysis

On appeal, the county made two important arguments challenging the district court ruling. First, it argued that "RMCC did not present sufficient evidence for the jury to find that it violated RLUIPA's equal terms provision."[63] Second, it argued that it was entitled to an affirmative defense because the Comprehensive Plan—and, hence, the regulation of RMCC—was rationally related to a legitimate governmental interest.[64]

The county's first argument struck at the heart of the similarly situated comparator issue. At trial, RMCC pointed to Dawson School, a neighboring facility that successfully applied to the county for expansion in 1995.[65] Both parties presented evidence attempting to emphasize either the school's similarity or dissimilarity to RMCC. The county argued that the school's expansion was "half the size of RMCC's in terms of raw square footage," that RMCC proposed a dramatic expansion of one building rather than expansions to several smaller buildings, and that the traffic caused by RMCC would exceed the school's by ten times.[66] On the other hand, RMCC testified that both proposals would have allowed facilities to expand to around 200,000 square feet, both resulted in identical expansions of the number of students served, and both were sited on "agricultural lands of importance."[67] The evidence presented by the parties allowed the reviewing court to conclude easily that "[a]lthough the two proposed expansions were not identical, the many substantial similarities allow for a reasonable jury to conclude that RMCC and Dawson School were similarly situated."[68]

The court also easily dispensed with the county's affirmative defense/scrutiny argument. Without deciding whether or not RLUIPA even allows courts to inquire as to the government's

62. *Id.* (quoting United States v. Cardenas-Alatorre, 485 F.3d 1111, 1115 n.9 (10th Cir. 2007)) (internal quotation marks omitted).

63. *Id.* at 1236.

64. *Id.* at 1237.

65. *Id.* at 1236–37.

66. *Id.* at 1236.

67. *Id.* at 1236–37.

68. *Id.* at 1237.

justification for a non-neutral statute, the court concluded that where a statute is discriminatorily applied the rule is "subject to strict scrutiny, not rational basis review."[69] Because the court had already concluded that the county treated RMCC less favorably than a similarly situated comparator, the Comprehensive Plan was applied non-neutrally and had to withstand strict scrutiny.[70] The county did not argue that it enjoyed a "strict scrutiny defense" and thus waived the argument.[71]

2. The court's unreasonable limitations analysis

Citing only to RLUIPA's mandate that a land-use regulation may not totally exclude or place unreasonable limitations on a religious assembly in a given jurisdiction, the court concluded that the evidence at trial "was more than adequate for a reasonable jury to find for RMCC on this claim."[72] Despite evidence that the county had approved several other churches' permits, the court emphasized testimony from several witnesses that revealed a general animus against churches in applying for special use applications.[73] The record also revealed specific opposition to RMCC's efforts to "appease the County's concerns" and other actions by the county that appeared to be designed to prolong the process and increase costs for RMCC.[74] Together, these instances would support a jury finding of specific discriminatory limitations the county sought to impose against RMCC.[75] Thus, the court upheld the district court's conclusion that the county's implementation of the land use regulation unreasonably limited RMCC.[76]

69. *Id.*

70. *Id.* at 1237–38.

71. *Id.* at 1238.

72. *Id.* at 1238–39 (citing 42 U.S.C. § 2000cc(b)(3) (2006)).

73. *Id.* at 1238. One county commissioner even reportedly said, "[T]here will never be another mega church . . . in Boulder County." *Id.* (internal quotation marks and citation omitted).

74. *Id.* at 1238–39.

75. *Id.*

76. *Id.* at 1239.

V. ANALYSIS

Although *Rocky Mountain* demonstrates a straightforward application of RLUIPA's equal terms and unreasonable limitations provisions, its precedential value will be limited for two reasons. First, the case's procedural posture required the court to give great deference to the jury's findings. This deference, coupled with the county's failure to adequately preserve the constitutional issue and properly raise the affirmative defense/scrutiny issue for those provisions, allowed the court to sidestep complicated legal issues and simply review findings of fact that it concluded it was obligated to uphold. Second, the court refused to adopt either the Third or Eleventh Circuit position on whether RLUIPA's equal terms provision requires evaluation of a similarly situated secular comparator. The result of the court's willingness to punt (or bide its time) is that this case will likely remain an outlier, providing little guidance for a future court's attempt to sort out the "similarly situated" question.

A. The Case's Posture and Lawyering Diminished Rocky Mountain*'s Precedential Value*

At the outset, it is clear that the court correctly decided the equal terms and unreasonable limitations claims, given the heavy deference it was obligated to give to the trial court findings. What is less clear is how much difference it would have made had the case come up on summary judgment, or even on a motion to dismiss. While the intricacies of the civil procedure questions are beyond the scope of this Note, they will be important as future judges and practitioners attempt to apply *Rocky Mountain*. Some of the precedential value of the case is lost simply because so few cases proceed to trial, and *Rocky Mountain* seemed to turn on the testimony of witnesses revealing animus against expansion by RMCC and other churches.[77] This is especially clear in the court's review of the claim that the county placed unreasonable limitations on RMCC. The jury instructions simply required jurors to determine whether the county's regulation deprived RMCC and others of "reasonable

77. *See, e.g.*, *id.* at 1238–39 (emphasizing the conflicting testimony surrounding RMCC's efforts to appease the county and the county's apparent determination to oppose the proposed expansion).

opportunities to practice their religion."[78] It is easy to imagine that same question coming before a court as a question of law on undisputed facts. Obviously, the court's discussion and deference to the trial court will provide little guidance to a lower court in determining what "unreasonably limits" a religious entity.[79]

Even more important than the court's review of the trial court's findings, the county's failure to adequately raise several key arguments allowed the court to sidestep some important and unresolved issues.[80] The most important of these was whether the county was entitled to an affirmative defense that would have allowed the action to stand so long as it passed strict scrutiny. The court's conclusion that the county's regulation was neither neutral nor generally applicable should have come as no surprise to the county. In 2006, the Tenth Circuit made clear that it favors "a fact-specific inquiry to determine . . . whether the facts support an argument that the challenged rule is applied in a discriminatory fashion that disadvantages religious groups or organizations."[81] Such discrimination, coupled with "'a pattern of ad hoc discretionary decisions'" may amount to "a system of individualized exemptions triggering strict scrutiny."[82] In *Rocky Mountain*, where the county knew that the finder of fact had already identified discriminatory

78. *Id*. at 1238 (citation and internal quotation marks omitted).

79. *See* 42 U.S.C. § 2000cc(b)(3) (2006). Of course, it is possible that the statute's language was meant to allow the courts to give content to the reasonableness standard through incremental, ad hoc judicial process. However, because the court did not have occasion to determine whether the county's actions constituted an unreasonable limitation as a matter of law, *Rocky Mountain* will be of little use in such a process.

80. One of these issues is the constitutionality of RLUIPA. A number of courts have already considered whether RLUIPA passes constitutional muster. They have overwhelmingly answered that question in the affirmative. *See, e.g.*, Westchester Day Sch. v. Vill. of Mamaroneck, 504 F.3d 338, 353–56 (2d Cir. 2007) (upholding RLUIPA's constitutionality in face of Fourteenth Amendment, Establishment Clause, Commerce Clause, and Tenth Amendment challenges); Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1235–43 (11th Cir. 2004) (upholding RLUIPA's constitutionality when challenged on Establishment Clause, Fourteenth Amendment, and Tenth Amendment grounds); Mayweathers v. Newland, 314 F.3d 1062 (9th Cir. 2002) (upholding RLUIPA's constitutionality in the face of Spending Clause, Establishment Clause, federalism arguments, and other constitutional challenges). Because the *Rocky Mountain* court correctly concluded that constitutional review was not warranted in this case, the corresponding lack of guidance to lower courts on this issue is both appropriate and self-evident.

81. Grace United Methodist Church v. City of Cheyenne, 451 F.3d 643, 651 (10th Cir. 2006).

82. *Id*. at 653 (quoting Axson-Flynn v. Johnson, 356 F.3d 1277, 1299 (10th Cir. 2004)).

animus on the county's part, it could have easily argued that the court should at least allow the county to demonstrate a compelling governmental interest. Of course, demonstrating that the county's regulation was narrowly tailored to advance this compelling governmental interest would likely have been impossible.[83] Nevertheless, this case serves as a lesson to future advocates by illustrating RLUIPA's fertile ground for interpretive arguments and providing a cautionary tale to attorneys seeking to raise (and preserve) the proper issues.

Fortunately, there is little in the *Rocky Mountain* opinion that suggests that the court would resolve the affirmative defense question in favor of the Eleventh Circuit approach, and advocates should hesitate to rely on the court adopting this approach in the future. Courts and commentators alike have criticized the Eleventh Circuit's strict scrutiny gloss.[84] Despite the Eleventh Circuit's stated rationale, the *Midrash* approach essentially attempts to remedy one interpretive error with another. To begin with, this approach first gives an unnecessarily broad definition of "assembly" and "institution," which are key RLUIPA terms.[85] This broad definition fosters a real danger that religious institutions will be immunized from local zoning ordinances. For example, if a private club—an assembly—could locate in a business district, a church must be allowed as well unless the court allows the government some way to rationalize its exclusion. That will be possible only if RLUIPA allows the court to scrutinize the government's objectives. As such, the Eleventh Circuit has read a "compelling governmental interest" test

83. *See, e.g.*, Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (describing strict scrutiny as "'strict' in theory and fatal in fact"). *But see* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 797 (2006) ("Contrary to the Gunther myth, laws can (and do) survive strict scrutiny with considerable frequency."). Even Winkler acknowledges in his empirical study of the application of strict scrutiny that *local* laws limiting the free exercise of religion, when applied in a discriminatory manner, "are invariably overturned." *Id.* at 796–97, 830–31, 857–62.

84. *See supra* Part III.B.1 (discussing the Third Circuit's criticism that addition of the strict scrutiny analysis to the equal terms provision ignores congressional intent to establish a "clear divide" between the test for equal terms and the test of substantial burden).

85. As noted above, the Eleventh Circuit defined "assembly" as "a group gathered for a common purpose" and "institution" as "'an established society or corporation: an establishment or foundation esp. of a public character.'" *Midrash*, 366 F.3d at 1230–31 (quoting WEBSTER'S 3D NEW INTERNATIONAL UNABRIDGED DICTIONARY 1171 (1993)).

into the equal terms provision merely to attempt to cabin its first interpretive mistake. Thus, the most appropriate way to characterize the Eleventh Circuit's stance is an unnecessary mechanism to assure that the court's expansive application of the equal terms provision does not "overprotect religious assembles [sic] in comparison to their closest secular counterparts."[86]

If faced with a situation more closely analogous to *Midrash* or *Lighthouse*, discussed above, the court should instead adopt the strict liability scheme supported by the actual language of RLUIPA and favored by the Third Circuit. Although this would also threaten to "overprotect religious assemblies" if left unchecked, the court could then cabin the possible claims under the equal terms provision by requiring the government to treat assemblies and institutions on equal terms only in light of the government's regulatory purpose or goals.[87] It could do so by either adopting the Third Circuit's similarly situated rule in *Lighthouse*, or by adopting a substantially similar standard. Under such an approach, our hypothetical church and club would not be similarly situated comparators because a church does more violence to the government's stated goal of economic development. But, if the government allowed some other secular assembly or institution that posed a similar threat to the government's regulatory purpose—such as the headquarters for a political party—excluding the church would violate RLUIPA's equal terms provision.

B. Giving Effect to RLUIPA's Equal Terms Provision Through Similarly Situated Comparators

The court's analysis in *Rocky Mountain* leaves its stance on the similarly situated issue unclear. The court seems to assume, without deciding, that a similarly situated comparator was necessary in this case. Yet the court prudently gave no indication on how it might decide the similarly situated question in future cases. The above discussion demonstrates that *Midrash* and *Lighthouse* offer two contrasting approaches to interpreting RLUIPA's equal terms

86. River of Life Kingdom Ministries v. Vill. of Hazel Crest, 611 F.3d 367, 370–71 (7th Cir. 2010) ("There is no textual basis for the [strict scrutiny] gloss, and religious discrimination is expressly prohibited elsewhere in the statute. The gloss was needed only to solve a problem of the court's own creation.").

87. *See* Lighthouse Institute for Evangelism, Inc. v. City of Long Branch, 510 F.3d 253, 266 (3d Cir. 2007).

provision, both weighing in on the affirmative defense and comparator issues. Although the Third Circuit's *Lighthouse* approach is more logically and textually sound, especially in cases like *Rocky Mountain,* each approach has its ardent supporters and detractors.[88] While the court will eventually need to evaluate these approaches and either adopt one of them or devise its own, *Rocky Mountain* was not the appropriate case to do so for two reasons.

First, the case would have come out the same either way. Under the Eleventh Circuit's unrefined *Midrash* approach, Dawson School would certainly have qualified as an "institution" under the plain meaning of that word.[89] Because Dawson School was allowed to expand and RMCC was not, the county violated the equal terms provision. This is even truer under the Eleventh Circuit's later *Konikov* case, which would probably require a similarly situated comparator in an as-applied challenge anyway.[90] Likewise, under the Third Circuit's *Lighthouse* standard—which will find an assembly or institution similarly situated only in light of its comparative impact on the government's regulatory purpose—the county would have a hard time showing that Dawson School was not similarly situated. At the trial court level, the jury resolved this question in favor of RMCC.[91] However, even if the relevant facts had been undisputed, Dawson School was almost certainly similarly situated as a matter of law because the county's stated purpose was to maintain the rural character of the district and avoid over-intensive use.[92] In light of this regulatory purpose, the two institutions were at least equally harmful. Thus, the county violated the equal terms provision by treating Dawson School more favorably.

88. *See, e.g.*, *River of Life*, 611 F.3d at 370. In *River of Life*, decided a few months after *Rocky Mountain*, Judge Posner criticized the *Lighthouse* approach as relying too heavily on the government's subjective statement of "regulatory purpose," which is too easy to manipulate. *Id.* at 371. Judge Posner favored a similar test, but would rely on an ordinance's "regulatory criteria," which he contends are more objective. *Id. see also id.* at 374 (Cudahy, J., concurring) ("I see little real contrast in basic approach or result between the Third Circuit and the majority analysis . . . ."). Judge Sykes, dissenting in *River of Life*, rejected both the Third Circuit approach and the majority's modification, favoring instead the Eleventh Circuit approach, "with some elaboration." *Id.* at 377 (Sykes, J., dissenting).

89. *See Midrash*, 366 F.3d at 1230–31.

90. *See* Konikov v. Orange Cnty., 410 F.3d 1317, 1327–29 (11th Cir. 2005).

91. Rocky Mountain Christian Church v. Bd. of Cnty. Comm'rs, 613 F.3d 1229, 1235–36 (10th Cir. 2010).

92. *See id.* at 1233.

Advocates briefing these issues in the future may be tempted to argue that *Rocky Mountain* demonstrates the Tenth Circuit's implicit adoption of the Third Circuit's similarly situated approach. Indeed, the court's discussion of which facts were relevant at the trial level seems to indicate that the surrounding area's designation as an agricultural district, and the regulatory purposes accompanying that distinction, were considered when the jury decided that Dawson School and RMCC were similarly situated.[93] However, such a reading of *Rocky Mountain* makes more of this case than the text supports. Rather, the case should be read to reveal nothing more than understandable hesitation to adopt a test ill-suited to this type of case. As this Note demonstrates, resolving the circuit split on either the scrutiny or similarly situated issues would likely require resolution of both issues. Legally significant factual dissimilarities between *Rocky Mountain* and the other cases addressing these issues makes this set of facts a poor arena to hash out these important questions. Unlike both *Midrash* and *Lighthouse*, which considered facial challenges to ordinances that excluded churches from a given zoning district,[94] *Rocky Mountain* addressed a challenge to the county's unequal application of the existing scheme.[95] Given the as-applied nature of this case, the Eleventh/Third Circuit split provides essentially an illusory distinction.[96] Thus, adopting either circuit's approach, while it may have fostered greater prospective clarity, would have forced the court into this divisive issue without it making a meaningful difference to the outcome of the case at hand.

VI. CONCLUSION

The court's opinion in *Rocky Mountain* alluded to two of the most important issues surrounding application of RLUIPA. The case's procedural posture and the issues and arguments briefed by the county, however, limited the precedential impact of the decision. Further, the opinion seems to indicate the court's prudent

93. *See id.* at 1236–37.

94. *See* Lighthouse Institute for Evangelism, Inc. v. City of Long Branch, 510 F.3d 253, 257–58 (3d Cir. 2007); *Midrash*, 366 F.3d at 1219–20.

95. *See Rocky Mountain*, 605 F.3d at 1236.

96. This is because the Eleventh Circuit's *Konikov* decision would require a similarly situated comparator in as-applied cases, as discussed above. *See* Konikov v. Orange Cnty., 410 F.3d 1317, 1327–29 (11th Cir. 2005).

willingness to bide its time and not rush into the similarly situated or scrutiny questions where the case's facts do not favor resolution of the issues. Thus, although *Rocky Mountain* could have done more to provide prospective guidance to lower courts, it instead merely set the stage for future parties to press the court to adopt one of the existing rules or devise one of its own.

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