No. 18-944

# In The Supreme Court of the United States

TREE OF LIFE CHRISTIAN SCHOOLS,
*Petitioner*,

v.

CITY OF UPPER ARLINGTON, OHIO,
*Respondent.*

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

**BRIEF OF *AMICUS CURIAE* CATHOLICVOTE.ORG EDUCATION FUND IN SUPPORT OF PETITIONER**

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CatholicVote.org Education Fund ("CatholicVote") is a nonpartisan voter education program devoted to promoting religious freedom for people of all faiths. It seeks to serve our country by supporting educational activities that promote an authentic understanding of ordered liberty and the common good. Given its educational mission and focus on religious freedom, CatholicVote is very concerned about the deep-seated circuit split regarding the proper scope and meaning of the equal-terms provision in the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc(b)(1), which is directly implicated in *Tree of Life Christian Schools v. City of Upper Arlington, Ohio*, 905 F.3d 357 (6th Cir. 2018) ("*Tree of Life*"). Whereas Congress expressly instructed courts to "construe the statute in favor of a broad protection of religious exercise, to the maximum extent permitted," 42 U.S.C. § 2000cc-3(g), and this Court has recognized that RLUIPA provides "expansive protection for religious liberty," *Holt v. Hobbs*, 135 S.Ct. 853, 860 (2015), six Circuit Courts have interpreted the equal-terms provision in six distinct ways. Each of these varied tests improperly narrows RLUIPA's "very broad

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[1] As required by Rule 37.2(a), *amicus* provided counsel of record for each party with timely notice of its intent to file this amicus brief, and each party filed a blanket consent to the filing of amicus curiae briefs in this matter. Pursuant to Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part, and no person other than the *amicus* and its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

protection" of religious exercise, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751, 2760 (2014), by either (1) adding limiting language to the equal-terms provision or (2) importing some form of scrutiny analysis into RLUIPA's burden shifting framework. Confronted with such diverse and inconsistent interpretations, the Second and Tenth Circuit have resolved equal-terms challenges but have declined to adopt any of their sister Circuits' interpretations. CatholicVote, therefore, comes forward to encourage this Court to provide a uniform interpretation of RLUIPA's equal-terms provision, one that is rooted in the text of the statute and that accords religious exercise the "expansive protection" that Congress intended.

## REASONS FOR GRANTING THE WRIT

Review is warranted in this case for at least two reasons. First, the Sixth Circuit's decision in *Tree of Life* broadens an already entrenched circuit split between and among the Third, Fifth, Seventh, Ninth, and Eleventh Circuits regarding the proper interpretation of RLUIPA's equal-terms provision. A divided Sixth Circuit panel reviewed—and rejected—each of the five unique interpretations that its sister Circuits had promulgated, adding a sixth test for deciding when a zoning regulation "treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution." 42 U.S.C. § 2000cc(b)(1) ("section (b)(1)"). These sharp divisions have not only created widespread confusion among the federal courts as to the proper scope and meaning of the equal-terms provision, but also undermined Congress's goal of providing uniform and

"expansive protection" to religious exercise, *Holt*, 135 S.Ct. at 860, to counteract the highly subjective and discriminatory nature of zoning. 146 Cong. Rec. 16,698 (2000) (joint statement of Senators Orrin Hatch and Ted Kennedy) (noting that "[c]hurches … are frequently discriminated against on the face of zoning codes and also in the highly individualized and discretionary processes of land use regulation.") ("Joint Statement"). After more than 18 years—and six different tests—it is time for the Court to resolve the circuit split and clarify the test that governs this "important and recurring legal issue." *River of Life Kingdom Ministries v. Village of Hazel Crest, Illinois*, 611 F.3d 367, 378 (7th Cir. 2010) (Sykes, J., dissenting).

Second, each of these different interpretations conflicts with well-established principles of statutory construction by doing one or more of the following: (1) introducing "similarly situated" language into section (b)(1), even though the text does not expressly require a similarly situated secular comparator; (2) contravening Congress's stated intent to provide "broad protection of religious exercise, to the maximum extent permitted," 42 U.S.C. § 2000cc-3(g); and (3) permitting the government to meet its burden by satisfying strict scrutiny (Eleventh Circuit and possibly the Tenth Circuit) or possibly rational basis review (Ninth Circuit). Yet, unless a straightforward text-based reading of the equal-terms provision conflicts with the Constitution, courts should neither read terms into the statute nor narrow the broad protection of religious exercise that Congress intended. *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. and*

*Const. Trades Council*, 485 U.S. 568, 575 (1988) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.").

At least three Circuit Courts, however, have suggested that their narrowing language is necessary to avoid constitutional infirmity. *See*, *e.g.*, *Lighthouse Inst. for Evangelism, Inc. v. City of Long Beach*, 510 F.3d 253, 267 n.11 (3d Cir. 2007) (suggesting that the dissent's text-based approach "would render section 2(b)(1) unconstitutional by creating a substantively altered right not heretofore cognizable in Free Exercise jurisprudence"); *Tree of Life*, 905 F.3d at 368 (concluding that a plain meaning interpretation would "extend preferential treatment to religious entities" and, therefore, "would likely run afoul of the First Amendment's Establishment Clause"); *River of Life*, 611 F.3d at 370 (expressing concern that the Eleventh Circuit's test "may be *too* friendly to religious land uses" and may "even violat[e] the First Amendment's prohibition against establishment of religion") (emphasis in original). Yet none of these Circuit Courts have undertaken the constitutional analysis required under *Cutter v. Wilkinson*, 544 U.S. 709 (2005), to determine whether RLUIPA's equal-terms provision as written is a permissible accommodation of religion.

Supreme Court review, therefore, is needed to resolve whether a text-based reading of the equal-terms provision (as employed by the Eleventh Circuit and the dissenters in the Third, Sixth, and Seventh Circuits) violates the Free Exercise or

Establishment Clause. If such a plain reading is determined to violate the First Amendment, then this Court must decide which of the five different "similarly situated" interpretations is the proper understanding of the equal-terms provision. If, on the other hand, this Court concludes that a text-based approach is consistent with the Free Exercise and Establishment Clauses, then the interpretations of the Third, Fifth, Sixth, Seventh, and Ninth Circuits directly conflict with this Court's canons of statutory construction by adding words to the statutory text and disregarding congressional intent, leaving this Court to determine whether the Eleventh Circuit, the dissenters in the Third, Sixth, and Seventh Circuits, or some other interpretation provides the proper understanding of the equal-terms provision.

## I. Only This Court Can Resolve the Entrenched Six-way Circuit Split Regarding the Appropriate Interpretation of RLUIPA's Equal-terms Provision.

When drafting RLUIPA, Congress expressly instructed courts to "construe the statute in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this Chapter and the Constitution." 42 U.S.C. § 2000cc-3(g). Toward this end, Congress unmoored the definition of "exercise of religion" from this Court's First Amendment case law, expanding the definition to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A); *Hobby Lobby*, 134 S.Ct. at 2761-62 (describing how Congress changed the definition of "exercise of

religion" "[i]n RLUIPA, in an obvious effort to effect a complete separation from First Amendment case law"). In so doing, Congress provided "expansive protection for religious liberty." *Holt*, 135 S.Ct. at 860; *id.* at 859 (quoting *Hobby Lobby*, 134 S.Ct. at 2760) (explaining that "Congress enacted RLUIPA and its sister statute, [RFRA], 'in order to provide very broad protection for religious liberty'").

Yet in the 18-plus years since its passage, none of the Circuit Courts have given RLUIPA's equal-terms provision the broad scope Congress intended. *See*, *e.g.*, *Lighthouse*, 510 F.3d at 268 (rejecting a text-based reading of the equal-terms provision because it would "force local governments to give any and all religious entities a free pass to locate wherever any secular institution or assembly is allowed"); *Tree of Life*, 905 F.3d at 368 (decrying a plain reading because it would "require municipalities to extend preferential treatment to religious entities"). Instead of providing religious assemblies and institutions with the "expansive protection" intended under section (b)(1), the Circuit Courts have limited its scope by either imposing an extra-textual requirement that religious assemblies and institutions be similarly situated to a secular comparator (with respect to one or both of the regulatory purpose and zoning criteria) or creating an affirmative defense (enabling government officials to justify disparate treatment of religious assemblies and institutions under strict scrutiny or some other standard). The result has been a patchwork of conflicting tests that limits the protection Congress intended to afford religious exercise and undermines the uniform application of RLUIPA. *Tree of Life*, 905

F.3d at 387 (Thapar, J., dissenting) ("Whether a religious plaintiff can succeed under the Equal Terms provision thus depends entirely on where it sues.").

Furthermore, instead of considering whether the equal-terms provision is a permissible accommodation of religious exercise under *Cutter*, the lower courts have sought to conform the equal-terms provision to this Court's Free Exercise and Establishment Clause case law, *see*, *e.g.*, *Lighthouse*, 510 F.3d at 269 (contending that Congress used "the language 'equal terms'" to "incorporat[e] the element of Free Exercise case law … that requires a determination that there is a secular comparator as to the objectives of the challenged regulation")—even though Congress disconnected RLUIPA from those precedents to enlarge the protection given religious exercise. *See Hobby Lobby*, 134 S.Ct. at 2761-62.

Not surprisingly, given the ad hoc nature of rewriting a federal statute, the number of differing interpretations of the equal-terms provision has continued to increase. Since 2004, six Circuits (the Third, Fifth, Sixth, Seventh, Ninth, and Eleventh) have adopted six distinct tests, while two others (the Second and Tenth) have declined to adopt any of these specific tests. Although the Eleventh Circuit rooted its interpretation in the ordinary meaning of the statutory text, each subsequent Circuit Court to interpret section (b)(1) has considered—and rejected—that approach as well as the varying interpretations of its sister Circuits. And while these tests differ from each other, they fall into two general camps: (1) the text-based approach employed by both the Eleventh Circuit

(which imports a strict scrutiny affirmative defense) and the dissenters in the Third, Sixth, and Seventh Circuits (who do not), and (2) the "similarly situated" approaches used in the Third, Fifth, Sixth, Seventh, and Ninth Circuits. Accordingly, Supreme Court review is necessary to determine which camp provides the proper method of interpretation and then which of the competing tests within that camp accurately captures Congress's intent. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984) (instructing that when the "intent of Congress is clear" courts "must give effect to the unambiguously expressed intent of Congress").

### A. Under the plain meaning approach, the equal-terms provision is violated whenever a religious assembly or institution is treated on less than equal terms with any secular assembly or institution.

The Eleventh Circuit was the first circuit court to interpret section (b)(1). Given that RLUIPA did not define "assembly" and "institution," the court looked to the plain meaning of these terms. Once the court determined that the plaintiff and at least one nonreligious entity "f[e]ll within the natural perimeter of 'assembly or institution,'" *i.e.*, the dictionary definition of one of those terms, it considered whether the local government provided "differential treatment" to the religious and secular entities. *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1230-31 (11th Cir. 2004). Because it did, the religious assembly or institution was treated on less than equal terms in violation of

section (b)(1). *Id*. at 1231. Noting that RLUIPA required a "direct and narrow focus," the court rejected the similarly situated requirement that the district court had used because such additional language was not part of the "express provisions" of section (b)(1). *Id*. at 1230; *id*. at 1229 (noting that although "§ (b)(1) has the 'feel' of an equal protection law, it lacks the "similarly situated" requirement usually found in equal protection analysis").

Under the Eleventh Circuit's test, the plaintiff bears the burden of establishing a prima facie case, but section (b)(1) does not impose strict liability on the government. Drawing on RLUIPA's legislative history, the court concluded that the "equal terms provision codifies the *Smith-Lukumi* line of precedent," which permits the government to show that its differential treatment satisfies strict scrutiny. *Id*. at 1232. Under this analysis, a zoning ordinance that treats a religious assembly or institution on less than equal terms is neither neutral nor generally applicable—because it "improperly targets the religious character of an assembly"—and, therefore, is subject to strict scrutiny under *Lukumi*. *Id*.

The dissenters in the Third, Sixth, and Seventh Circuits also have adopted a plain reading of section (b)(1)'s text, finding a violation whenever "a land-use regulation that on its face or in its operative effect or application treats a religious assembly or institution less well than a nonreligious assembly or institution … *even if* it was adopted or implemented for reasons unrelated to religious discrimination." *River of Life*, 611 F.3d at 382 (Sykes, J., dissenting); *Tree of Life*, 905 F.3d

at 381 (Thapar, J., dissenting) ("So long as a plaintiff can point to a nonreligious 'assembly' or 'institution,' … [t]he text requires nothing more. Neither should courts.").

Each of the dissenters, though, rejected the Eleventh Circuit's strict scrutiny gloss, concluding that Congress knew how to include such a requirement into the statute (having done so in RLUIPA's substantial burden provision which immediately precedes section (b)(1)) but chose not to provide local governments with such an affirmative defense. *See*, *e.g.*, *id.* at 382-83 (Thapar, J., dissenting). Thus, even within the plain meaning camp, there is disagreement as to whether section (b)(1) codifies the strict scrutiny analysis from *Smith* and *Lukumi* or establishes a strict liability standard.

### B. The Third, Fifth, Sixth, Seventh, and Ninth Circuits all introduce a similarly situated comparator requirement into section (b)(1) but disagree on which specific test to apply.

The differences between the Eleventh Circuit's plain meaning interpretation and the similarly situated approaches are pronounced. The Circuit Courts adopting a "similarly situated" requirement (1) reject the Eleventh Circuit's addition of a strict scrutiny affirmative defense and (2) conclude that section (b)(1)'s "equal terms" language cannot be read literally (because of possible Free exercise and Establishment problems) but must be understood to require a similarly situated comparator. These Circuits, however, do not agree on the way to

determine which religious and secular assemblies and institutions are similarly situated, creating a five-way circuit split between and among these courts.

The Third Circuit was the first to consider (and reject) the Eleventh Circuit's interpretation. Under the Third Circuit's test, a religious plaintiff cannot compare its treatment to just any nonreligious assembly or institution; rather, religious entities must show that they are treated "less well than secular assemblies or institutions that are similarly situated *as to the regulatory purpose*" of the challenged regulation. *Lighthouse*, 510 F.3d at 266. In the court's view, requiring "a secular comparator that is similarly situated as to the regulatory purpose of the regulation in question" is necessary to implement Congress's intent to codify this Court's Free Exercise jurisprudence. *Id.* at 254. But if the plaintiff can make the requisite prima facie showing, the Third Circuit takes section (b)(1) to impose strict liability on the government.

The en banc Seventh Circuit agreed that the equal-terms provision imposed a similarly situated requirement, but the case spawned five different opinions regarding the proper interpretation of section (b)(1). The majority rejected the Third Circuit's test, concluding that requiring religious and nonreligious comparators to be similarly situated in relation to the government's "regulatory purpose" interjected too much subjectivity into the analysis. The majority worried that local officials would be able to craft pretextual or ex post justifications for the zoning regulation, thereby making it both harder for religious plaintiffs to find

a proper secular comparator and easier for the government to discriminate against churches and other religious entities. Consequently, the Seventh Circuit adopted (what it took to be) a more objective standard, asking whether religious and secular organizations are similarly situated "from the standpoint of an accepted zoning criterion." *River of Life*, 611 F.3d at 371. The majority noted that "[t]he shift is not merely semantic," because "'[r]egulatory criteria' are objective," and "federal judges … will apply the criteria to resolve the issue," not "self-serving … zoning officials." *Id.*

The Ninth Circuit combined the Third and Seventh Circuits' interpretations. Under this hybrid test, a court must consider whether a religious assembly or institution (1) "is 'similarly situated as to the regulatory purpose,'" and (2) "where necessary to prevent evasion of the statutory requirement" is being treated "equal[ly] with respect to 'accepted zoning criteria.'" *Centro Familiar Cristiano Buenas Nuevas v. City of Yuma*, 651 F.3d 1163, 1172-73 (9th Cir. 2011). Diverging from the Third Circuit, the Ninth Circuit shifted the burden to the government to show "that the treatment received by the [religious organization] should not be deemed unequal, where it appears to be unequal on the face of the ordinance." *Id.* at 1173. In addition, the Ninth Circuit suggested that once the plaintiff establishes its prima facie case, the government may have a type of rational basis affirmative defense. *Id.* at 1175 ("[T]o excuse facial treatment of a church on 'less than equal terms,' the land use regulation must be reasonably well adapted to 'accepted zoning criteria,' even though strict scrutiny in a Constitutional sense is not

required."). Such a low standard has the potential to significantly restrict the scope of RLUIPA's protection of religious exercise.

One year later, the Fifth Circuit broadened the circuit split by requiring courts to focus only on the regulatory purposes set forth in the text of the land use regulation. To determine whether a religious assembly or institution received "less than equal terms," the Fifth Circuit considered whether that religious organization was "similarly situated with respect to the … purpose or criterion" that was "stated explicitly in the text of the ordinance." *Opulent Life Church v. City of Holly Springs*, 697 F.3d 279, 292-93 (5th Cir. 2012). And, consistent with the Ninth Circuit, the Fifth Circuit placed the burden on the government to prove that the religious and secular comparators were similarly situated and that the religious plaintiff was "treated as well as every other" such secular comparator. *Id*.

In *Tree of Life*, the Sixth Circuit fashioned yet another test. The panel majority replaced the Third Circuit's "regulatory purpose" and the Seventh Circuit's "accepted zoning criteria" with "legitimate zoning criteria." 905 F.3d at 369. Under this "legitimate zoning criteria" test, the religious and secular comparators must be similarly situated with respect to "the legitimate zoning criteria set forth in the municipal ordinance in question." *Id*. Thus, the Sixth Circuit drew on the language of the Third and Seventh Circuit tests but, consistent with the Fifth and Ninth Circuits, focused its analysis on the specific text of the ordinance.

### C. Confronted with the entrenched circuit split, the Second and Tenth Circuits have decided equal-terms cases without adopting a specific test, while district courts in circuits that have not interpreted section (b)(1) have been left to guess what the proper test is.

Given such varied interpretations of the equal-terms provision, the Second and Tenth Circuits have declined to enter the fray. *See Centro Familiar*, 651 F.3d at 1169 n.25 (noting that "the Tenth and [Second] Circuits did not need to decide between the circuits"). In *Third Church of Christ, Scientist, of New York City v. City of New York*, the Second Circuit acknowledged that "[w]e have yet to decide the precise outlines of what it takes to be a valid comparator under RLUIPA's equal-terms provision," 626 F.3d 667, 669 (2d Cir. 2010), and went on to conclude that it did not have to adopt a particular test to resolve the case before it. *Id.* at 670 ("The differences in the mechanism for selecting an appropriate secular comparator that these cases present need not concern us today."). Given that the religious and nonreligious comparators performed virtually identical functions in the same zoning district, the court suggested that all of the tests would find a violation of section (b)(1). In so holding, however, the court invoked elements of both the "similarly situated" camp (noting that the religious and secular comparators were "similarly situated with regard to their legality," *id.*) and the plain meaning camp (contending that "RLUIPA … is less concerned with whether formal differences may be found between religious and non-religious

institutions—they almost always can—than with whether, in practical terms, secular and religious institutions are treated equally," *id.* at 671). As a result, the Second Circuit's position does not fit neatly into either camp.

Characterizing the Tenth Circuit's position presents a similar difficulty. In *Rocky Mountain Christian Church v. Bd. of County Comm'rs*, the Tenth Circuit approved the district court's instruction, which required the plaintiff to show that the government "'treated [plaintiff] less favorably … than [the government] treated a similarly situated nonreligious assembly or institutions.'" 613 F.3d 1229, 1236 (10th Cir. 2010). The court also noted that "the many substantial similarities allow for a reasonable jury to conclude that [the religious and secular comparators] were similarly situated." *Id.* at 1237. Although using "similarly situated" language, the Tenth Circuit did not—and has not—specified the way in which the comparators must be similarly situated, leading the Sixth Circuit to characterize the Tenth Circuit as "an outlier." *Tree of Life*, 905 F.3d at 370. Furthermore, the Tenth Circuit did not decide whether section (b)(1) provides local officials with an affirmative defense, but decided only that if there is such an affirmative defense, it would have to require strict scrutiny. *Rocky Mountain*, 613 F.3d at 1237-38.

The uncertainty and confusion between and among these Circuit Courts have filtered down to district courts in other Circuits. In the First Circuit, a district court resolved a facial challenge under section (b)(1) by expressing agreement with the Sixth Circuit, applying the Third Circuit's

regulatory purpose test, and then invoking the Eleventh Circuit's discussion of similarly situated in *Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward County*, 450 F.3d 1295, 1311 (11th Cir. 2006), which dealt with an as-applied challenge. *See Signs for Jesus v. Town of Pembroke*, 230 F. Supp.3d 49, 67-68 (D.N.H. 2017). In the Fourth Circuit, a district court noted the differences between and among the Circuit Courts and, instead of selecting a specific test, applied what it viewed as "the more stringent standard." *Redemption Cmty. Church v. City of Laurel, Maryland*, 333 F. Supp.3d 521, 532 (D. Md. 2018). In the Eighth Circuit, a district court recognized that the Circuits "are in conflict with one another" and ultimately combined the Third and Seventh Circuits' approaches, considering whether the comparators were similarly situated as to "the regulatory purpose of the Zoning Ordinance as well as the zoning criteria." *Riverside Church v. City of Saint Michael*, 205 F. Supp.3d 1014, 1035-36 (D. Minn. 2016). Such differences highlight the need for Supreme Court review and directly support Judge Thapar's recognition that "[w]hether a religious plaintiff can succeed under the Equal Terms provision thus depends entirely on where it sues." *Tree of Life*, 905 F.3d at 387 (Thapar, J., dissenting).

## II. This Court Must Decide Whether a Plain Reading of Section (b)(1) Raises Free Exercise or Establishment Clause Problems Such That the Constitutional Avoidance Doctrine May Justify Adding Language to the Equal-terms Provision.

Under well-established principles of statutory construction, "[i]f the intent of Congress is clear, that is the end of the matter; for the court … must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43. To determine congressional intent, courts should first look to the text of the statute at issue: "the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain … the sole function of the courts is to enforce it according to its terms." *Caminetti v. United States*, 242 U.S. 470, 485 (1917). Under the constitutional avoidance doctrine, though, if a plain meaning interpretation of the equal-terms provision "raises serious constitutional doubts," then courts "may adopt an alternative that avoids those problems." *Jennings v. Rodriguez*, 138 S.Ct. 830, 836 (2018); *Clark v. Martinez*, 543 U.S. 371, 385 (2005). But courts cannot use the avoidance doctrine where the alternative "construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp.*, 485 U.S. at 575; *Commodity Futures Trading Comm'n v. Schor,* 478 U.S. 833, 841 (1986) (noting that the constitutional doubt "canon of construction does not give a court the prerogative to ignore the legislative will in order to avoid constitutional adjudication"). If the alternative interpretation contravenes Congress's intent, then the court must reject that reading and

decide whether a plain meaning interpretation violates the Constitution.

In the RLUIPA context, Congress stated its intent expressly. Courts are "to construe the statute in favor of a broad protection of religious exercise, to the maximum extent possible." 42 U.S.C. § 2000cc-3(g). Accordingly, when interpreting section (b)(1), courts "must give effect to [this] unambiguously expressed intent of Congress," *Chevron*, 467 U.S. at 842, by analyzing "the language in which [section (b)(1)] is framed, and if that is plain … enforc[ing] it according to its terms." *Caminetti*, 242 U.S. at 485. The Eleventh Circuit did exactly that, focusing on the plain meaning of "assemblies or institutions" and concluding that section (b)(1) is violated when a religious assembly or institution is excluded under a zoning ordinance but a secular assembly or institution is not. *See Midrash*, 366 F.3d at 1231; *River of Life*, 611 F.3d at 369 (noting that "[t]he Eleventh Circuit reads the language of the equal-terms provision literally: a zoning ordinance that permits *any* 'assembly,' as defined by dictionaries, to locate in a district must permit a church to locate there as well").

At least three Circuit Courts, however, have expressed concern that the "broad scope" of the Eleventh Circuit's text-based reading raises constitutional concerns. *Lighthouse*, 510 F.3d at 269 n.14. Although not invoking the constitutional avoidance doctrine by name, each of these Circuits has proffered a narrower reading of the equal-terms provision to avoid the alleged constitutional problems created by the Eleventh Circuit's plain meaning interpretation. In *Lighthouse*, the Third

Circuit contended that a purely text-based interpretation constituted an "expansive reading of section 2(b)(1)" that "goes beyond existing free exercise jurisprudence and as such would render section 2(b)(1) unconstitutional by creating a substantively altered right not heretofore cognizable in Free Exercise jurisprudence." *Id.* at 269 n.14. The Sixth Circuit worried that a straightforward reading of section (b)(1)'s text jeopardized Establishment Clause principles, not Free Exercise: "Did Congress intend for the statute to require municipalities to extend preferential treatment to religious entities? We think not. Such a requirement … would likely run afoul of the First Amendment's Establishment Clause." *Tree of Life*, 905 F.3d at 368. And the Seventh Circuit expressed similar concerns: "A subtler objection to the [Eleventh Circuit's] test is that it may be *too* friendly to religious land uses, unduly limiting municipal regulation and maybe even violating the First Amendment's prohibition against establishment of religion by discriminating in favor of religious land use." *River of Life*, 611 F.3d at 370 (emphasis in original). Despite these concerns, none of these Circuit Courts considered whether as written RLUIPA's equal-terms provision provides a permissible accommodation of religion, even though this Court did just that in *Cutter* when analyzing section 3 of RLUIPA.

Thus, review is necessary to determine whether a plain reading of section (b)(1), which advances Congress's intent to provide "expansive protection for religious liberty," conflicts with one or both of the religion clauses. *Holt*, 135 S.Ct. at 860. If it does, then the Third, Fifth, Sixth, Seventh, and

Ninth Circuits might be justified in narrowing the express language of section (b)(1) by reading a similarly situated requirement into the equal-terms provision. Of course, the Eleventh Circuit's plain reading approach also might avoid the alleged constitutional problem by permitting the government to demonstrate that the zoning ordinance in question is narrowly tailored to a compelling interest. *See*, *e.g.*, *Lighthouse*, 510 F.3d at 268 n.13 (concluding that the Eleventh Circuit "required a strict scrutiny examination in order that its holding conform to existing Free Exercise case law"). Thus, if this Court determines that the constitutional avoidance doctrine applies, it must decide between the Eleventh Circuit's plain meaning plus strict scrutiny approach and the five tests that require a similarly situated comparator. Moreover, even after settling on a specific interpretation, this Court still would have to determine whether this narrowed interpretation is "plainly contrary to the intent of Congress," *Edward J. DeBartolo Corp.*, 485 U.S. at 575—which was to provide "very broad protection for religious liberty," *Hobby Lobby*, 134 S.Ct. at 2760—and if so, strike down section (b)(1) as unconstitutional. *Miller v. French*, 530 U.S. 327, 336 (2000) ("[W]e agree that constitutionally doubtful constructions should be avoided where 'fairly possible.' But where Congress has made its intent clear, 'we must give effect to that intent.'") (citations omitted).

If, on the other hand, this Court concludes that a plain reading of section (b)(1) is consistent with the religion clauses, the approaches that add "similarly situated" language should be rejected

because they violate well-established rules of statutory construction. *See Henson v. Santander Consumer USA Inc.*, 137 S.Ct. 1718, 1725 (2017) ("[W]hile it is of course our job to apply faithfully the law Congress has written, it is never our job to rewrite a constitutionally valid statutory text…."); *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-54 (1992) ("[I]n interpreting a statute a court should always turn first to one, cardinal canon before all others … that courts must presume that a legislature says in a statute what it means and means in a statute what it says there."). A straightforward interpretation of section (b)(1)'s terms may have a "broad scope" consistent with Congress's expressed intent, but if such a reading does not raise Free Exercise or Establishment concerns, there is no basis for adding terms to RLUIPA.[2]

Furthermore, there are good reasons to believe that the equal-terms provision *is* a permissible accommodation of religious exercise such that the Third, Fifth, Sixth, Seventh, and Ninth Circuits' interpretations violate the canons of statutory construction discussed above. In *Cutter*, this Court recognized that RLUIPA was "the latest of long-running congressional efforts to accord religious exercise heightened protection from government-imposed burdens." 544 U.S. at 715. The

[2] The Sixth and Seventh Circuits also assert that "equal" in section (b)(1) is ambiguous such that the introduction of "similarly situated" into the equal-terms provision is warranted. Yet even if section (b)(1) is ambiguous, review remains necessary to determine which of the five distinct similarly situated tests is the correct one.

unanimous Court upheld section 3 of RLUIPA against constitutional attack because it fell within the space between the religion clauses, being "neither compelled by the Free Exercise Clause nor prohibited by the Establishment Clause." *Id.* at 719. Specifically, this Court concluded that section 3 was a permissible accommodation of religion because it (1) "alleviate[d] exceptional government-created burdens on private religious exercise," (2) "[took] adequate account of the burdens a requested accommodation may impose on nonbeneficiaries," and (3) was "administered neutrally among different faiths." *Id.* at 720.

Section (b)(1) also appears to satisfy each of these conditions. In passing RLUIPA, Congress recognized that "[t]he right to assemble for worship is at the very core of the free exercise of religion." 146 Cong. Rec. S7774-01 at S7774 (2000). Section 3 lifted the burden imposed on institutionalized persons "who are unable freely to attend to their religious needs and are therefore dependent on the government's permission and accommodation for exercise of their religion." *Cutter*, 544 U.S. at 721. Congress intended section (b)(1) to do the same for religious assemblies and institutions, which are frequently at the mercy of government officials in the zoning context: "Churches … are frequently discriminated against on the face of zoning codes and also in the highly individualized and discretionary processes of land use regulation." Joint Statement at 16,698; *id.* (explaining that "often, discrimination lurks behind such vague and universally applicable reasons as traffic, aesthetics, or not [being] consistent with the city's land use plan").

Furthermore, section 3 took adequate account of the burden imposed on nonbeneficiaries because it did not "elevate accommodation of religious observances over an institution's need to maintain order and safety" and would "be applied in an appropriately balanced way." *Cutter*, 544 U.S. at 722. The same can be said about the equal-terms provision. Section (b)(1) does not promote religious exercise over a community's need to control and regulate zoning. Contrary to the Third Circuit's suggestion, the equal-terms provision does not preclude a town from regulating the size of buildings, animal killings, or wild bears pursuant to neutral, generally applicable laws. *Lighthouse*, 510 F.3d at 268. What a town cannot do, however, is permit a ten-member book club to meet in the senior center and then prohibit a new, small church to use the same space or allow a large theater to be built but not a large church. *See id.* at 287 (Jordan, J., dissenting); 146 Cong. Rec. at S7774 ("Churches in general, and new, small, or unfamiliar churches in particular, are frequently discriminated against on the face of zoning codes…. Zoning codes frequently exclude churches in places where they permit theaters, meeting halls, and other places where large groups of people assemble for secular purposes.").

Moreover, section (b)(1)'s express terms ensure that it does not provide a benefit to religious assemblies or institutions that is not available to secular assemblies or institutions. After all, a government's obligation to treat such religious groups the same as a secular group is triggered only if a secular assembly or institution already is permitted to use facilities or to build within a

particular zone or district. Although, as *Cutter* explained, "[r]eligious accommodations … need not 'come packaged with benefits to secular entities,'" *Cutter*, 544 U.S. at 724 (quoting *Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 338 (1987)), section (b)(1) provides a religious entity with the "benefit" of a zoning ordinance only where a nonreligious assembly or institution already has received that same benefit. Under section (b)(1), then, local governments are free to regulate assemblies and institutions provided they do so on equal (*i.e.*, the same) terms. Finally, as this Court confirmed in *Cutter*, "RLUIPA does not differentiate among bona fide faiths," extending the protection of the equal-terms provision to all religious assemblies or institutions. *Id*. at 724. Thus, there is no reason to believe that one religious assembly or institution would be preferred over another.

Accordingly, there is reason to believe that the Third, Sixth, and Seventh Circuits, like the Sixth Circuit in *Cutter*, "misread [this Court's] precedents to require invalidation of RLUIPA as 'impermissibly advancing religion by giving greater protection to religious rights than to other constitutionally protected rights.'" *Id*. at 724. And if so, these Circuits cannot appeal to the constitutional avoidance doctrine to justify adding language to the equal-terms provision. Yet this Court is the only one that can definitively decide the constitutional question and, in so doing, resolve the long-standing and well-entrenched circuit split.

## CONCLUSION

For the reasons set forth above, this Court should grant Tree of Life Christian Schools' petition for a writ of certiorari.

Respectfully submitted,

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