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 THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS; NATIONAL ASSOCIATION OF EVANGELICALS; ETHICS AND RELIGIOUS LIBERTY COMMISSION OF THE SOUTHERN BAPTIST CONVENTION; THE LUTHERAN CHURCH–MISSOURI SYNOD; CHURCH OF GOD IN CHRIST, INC.; GENERAL CONFERENCE OF THE SEVENTH-DAY ADVENTIST CHURCH; THE SIKH COALITION; AND CHRISTIAN LEGAL SOCIETY AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Religious organizations associated with faith traditions practiced by tens of millions of Americans appear on this brief. *Amici* are The Church of Jesus Christ of Latter-day Saints; National Association of Evangelicals; Ethics and Religious Liberty Commission of the Southern Baptist Convention; The Lutheran Church–Missouri Synod; General Conference of the Seventh-Day Adventist Church; Church of God in Christ, Inc.; The Sikh Coalition; and Christian Legal Society. Despite disagreements on many points of faith, we are united in supporting robust legal protections for religious freedom—including the freedom to gather with fellow believers to worship and for other religious purposes. The decision below threatens the religious freedom we cherish and the need to foster vibrant faith communities. Its controlling legal standard undermines the right to equal treatment in the Religious Land Use and Institutionalized Persons Act (RLUIPA) by allowing land use authorities to treat secular uses more favorably than religious ones. We submit this brief to assist the Court in understanding the harms that religious institutions of all faiths will continue to suffer unless the Court grants review and restores

[1] Counsel for all parties were timely notified of the intent to file this *amicus curiae* brief, and all parties have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici* and their counsel made any monetary contribution intended to fund the preparation or submission of this brief.

RLUIPA as a meaningful security for religious freedom.

SUMMARY OF ARGUMENT

For many religions, faith requires gathering with fellow believers to worship, to receive sacraments and participate in other sacred ordinances, to hear the word of God, to learn, to serve, and to minister. Without this basic right to gather, there is no meaningful religious liberty. But too often, state and local governments erect arbitrary bars to land development that prevent faith communities from building a church or temple, mosque or school, to meet their religious needs.

In 2000, Congress acted to end the widespread abuse of land use regulations to thwart religious exercise. RLUIPA secures the fundamental right to assemble for religious purposes. One of the statute's provisions, at issue here, proscribes any land use regulation that "treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution." 42 U.S.C. § 2000cc(b)(1). In the 18 years since its adoption, RLUIPA's equal-terms clause has never been interpreted by this Court.

Several circuits have adopted judicial tests that depart from statutory text and all too often defeat claims under RLUIPA's equal-terms clause. The Sixth Circuit followed this trend in the decision below. It denied petitioner's equal-terms claim because Petitioner Tree of Life Christian Schools purportedly failed to demonstrate that it is "similarly situated with respect

to legitimate zoning criteria." Pet. App. 23a. Yet RLUIPA's text nowhere contains such a requirement. Denying petitioner relief because of a legal standard not in the statute severely undermines RLUIPA's protection from unequal treatment. Unless reviewed and reversed, the decision below will deepen an already troubling trend among the circuits that allows State and local governments to impose land use regulations on religious assemblies and institutions that they do not impose on secular ones.

The petition catalogs an established conflict among the federal circuits that this case is well-positioned to resolve. As religious organizations whose membership includes millions of Americans, we respectfully ask this Court to grant review. Petitioner's central argument is that RLUIPA's equal-terms provision should be interpreted and applied as written. We agree. Only fidelity to statutory text can secure religious organizations' right to equal treatment.

Judge Thapar, writing in dissent, neatly captured the essential reasons for granting the petition:

> There comes a time with every law when the Supreme Court must revisit what the circuits are doing. That time has come. Every circuit to address the issue has given its own gloss to the Equal Terms provision. Whether a religious plaintiff can succeed under the Equal Terms provision thus depends entirely on where it sues. And not only have the circuits split on the issue, but many of them have also neutralized the Equal Terms provision. By importing words into the text of the statute, the

> courts have usurped the legislative role and replaced their will for the will of the people.

Pet. App. 61a.

ARGUMENT

I. This Case Holds Urgent National Importance for Major Religious Organizations.

A. RLUIPA aims to secure the right to assemble for religious purposes.

The questions presented hold national importance for the religious organizations that appear here as *amici curiae*. For them and their adherents, resolving the questions raised by petitioner is necessary to enjoy the religious freedom that Congress secured through RLUIPA.

Our Nation's fundamental commitment to religious freedom is enshrined in the First Amendment, which protects both "the free exercise of religion" and the cognate right of "peaceable assembly." U.S. Const. amend. I; accord *Thomas* v. *Collins*, 323 U.S. 516, 530 (1945). Together these rights secure the ability of religious Americans to gather and worship with fellow believers. "For many individuals, religious activity derives meaning in large measure from participation in a larger religious community." *Corp. of Presiding Bishop* v. *Amos*, 483 U.S. 327, 342 (1987) (Brennan, J., concurring in the judgment). The understanding that assembling for religious purposes is indispensable to religious freedom is as old as America itself. Nearly

four centuries ago, the fledgling colony of Massachusetts guaranteed its people the "full libertie to gather themselves into a Church Estaite." *The Body of Liberties of the Massachusetts Collonie in New England* (1641), *reprinted in* 5 The Founders' Constitution 47 (Philip B. Kurland & Ralph Lerner eds., 1986).

But the advent of modern land use regulations has made the venerable right to gather in religious communities vulnerable to bureaucratic resistance and anti-religious animus. To secure that right, Congress enacted RLUIPA. When introducing the bill, its sponsors—Senator Hatch and Senator Kennedy—issued a joint statement explaining that certain land use regulations can abridge religious freedom. "Churches and synagogues cannot function without a physical space adequate to their needs and consistent with their theological requirements. The right to build, buy, or rent such a space is an indispensable adjunct of the core First Amendment right to assemble for religious purposes." 146 Cong. Rec. S7774 (July 27, 2000) (joint statement of Sens. Hatch & Kennedy) (Joint Statement); accord Douglas Laycock & Luke W. Goodrich, *RLUIPA: Necessary, Modest, and Under-Enforced*, 39 Fordham Urb. L.J. 1021, 1022 (2012) ("In every major religion, believers gather together for shared rituals and communal expressions of faith. They cannot do so without a physical space. Thus, a restriction on the ability to build a church is a restriction on the free exercise of religion.").

Three years of congressional hearings produced "massive evidence" that the right to assemble for

religious purposes "is frequently violated." Joint Statement at S7774. Among such abuses, Congress found that religious land use applicants often get unequal treatment:

> 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. * * * Churches have been denied the right to meet in rented storefronts, in abandoned schools, in converted funeral homes, theaters, and skating rinks—in all sorts of buildings that were permitted when they generated traffic for secular purposes.

Id. at S7774–75. The record "demonstrated that nonreligious assemblies are often treated far better by zoning authorities than religious assemblies." *Id.* at S7777 (quoting Letter from Baptist Joint Committee on Public Affairs (July 14, 2000)). Instances of unequal treatment were rife. "[R]ecreation centers, health clubs, backyard barbecues and banquet halls are frequently the subjects of more favorable treatment than a home Bible study, a church's homeless feeding program or a small gathering of individuals for prayer." *Ibid.*

Congress enacted RLUIPA to end these abuses. The statute limits the authority of federal, state, and local governments to enforce land use regulations that abridge religious freedom. A religious claimant may challenge a land use regulation that imposes a "substantial burden" on "religious exercise" unless the

government demonstrates that the regulation serves "a compelling governmental interest" and is "the least restrictive means" of advancing that interest. 42 U.S.C. § 2000cc(a)(1). A land use regulation is also void if it reflects religious discrimination. *Id.* § 2000cc(b)(2). And such a regulation offends RLUIPA if it "totally excludes" or "unreasonably limits" religious assemblies. *Id.* § 2000cc(b)(3).

At issue in this case is RLUIPA's other directive. Known as the equal-terms clause, it provides that "[n]o 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." 42 U.S.C. § 2000cc(b)(1). Under this provision, a religious assembly or institution establishes a prima facie claim by showing that a land use regulation treats it "on less than equal terms with a nonreligious assembly or institution." *Ibid.* The equal-terms clause thus operates as "a flat objective rule." Laycock & Goodrich, 39 Fordham Urb. L.J. at 1062.

RLUIPA's Senate sponsors explained that the equal-terms clause targets "various forms of discrimination against or among religious land uses" by "enforc[ing] the Free Exercise Clause rule against laws that burden religion and are not neutral and generally applicable." Joint Statement at S7776; see also *Church of Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 546 (1993) ("A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny.").

In the 18 years since its enactment, this Court has never squarely addressed RLUIPA's equal-terms clause. Lower courts have issued conflicting decisions, as the petition aptly describes. What calls out for this Court's intervention is not merely the fact of lower-court disarray, but that confusion over the equal-terms provision often imposes the heaviest burdens on unpopular, small, and otherwise vulnerable religious institutions.

B. Lower-court conflict and error concerning RLUIPA's equal-terms clause especially harm unpopular and minority religious communities.

Despite its plain language, RLUIPA's equal-terms clause has produced confusion in the lower courts. The Second, Tenth, and Eleventh Circuits hew more closely to RLUIPA as written, while the Third, Fifth, Seventh, and Ninth Circuits have put judicial glosses on the statutory text that tend to undercut RLUIPA's guarantee of equal treatment. This decisional conflict means that a religious assembly or institution faces potentially contradictory legal results depending on the circuit where it brings a claim.

Religious organizations often face adverse judicial decisions under RLUIPA's equal-terms clause when a circuit requires the religious claimant to identify "a secular comparator that is similarly situated as to the regulatory purpose of the regulation in question."

Lighthouse Inst. for Evangelism, Inc. v. *City of Long Branch*, 510 F.3d 253, 264 (3d Cir. 2007).

On that score, consider the First Korean Church of New York. In 1996, it purchased a property outside Philadelphia at a sheriff's sale. *First Korean Church of New York, Inc.* v. *Cheltenham Twp. Zoning Hearing Bd.*, No. 05-6389, 2012 WL 645986, at *2 (E.D. Pa. Feb. 29, 2012), aff'd, No. 12-1917, 2013 WL 362819 (3d Cir. Jan. 24, 2013). The property consisted of nearly 34 acres and included Lynnewood Hall—"[t]he largest surviving Gilded Age mansion" in the area.[2] For the previous four decades, the property had been used as a theological seminary but had fallen into grave disrepair.[3]

First Korean proposed to use the property as a seminary and church. 2012 WL 645986, at *3. But in 2003, the township adopted a zoning ordinance that excluded these uses while permitting cemeteries and golf courses. *Id.* at *15. So First Korean brought an equal-terms claim under RLUIPA. *Ibid.*

Relying on Third Circuit precedent, the district court denied the church's claim. Because "First Korean's intended use would be tax-exempt," the court reasoned that the church "fail[ed] to show why these non-religious institutions [golf courses and cemeteries]

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[2] Spencer Peterson, *Buy Philly's Storied, 'Cannibalized' Lynnewood Hall for $20M*, Curbed (July 9, 2014, 7:04 PM), https://www.curbed.com/2014/7/9/10077846/lynnewood-hall-for-sale.

[3] *The McIntire Era*, Lynnewood Hall, https://lynnewoodhall.wordpress.com/the-mcintire-era/ (last visited Feb. 14, 2019).

are similarly situated to religious institutions with regard to the 2003 Ordinance's objective of increasing the tax base." 2012 WL 645986, at *15. By that same logic, nonprofit religious uses could *always* be distinguished from functionally identical for-profit secular uses—an irrelevant distinction that largely neutralizes the equal-terms clause.

Other courts have denied claims under RLUIPA's equal-terms clause for failure to identify a nonreligious assembly or institution that is similarly situated to the religious claimant as to the municipality's regulatory purpose:

- A town prohibited a Baptist church from displaying an electronic sign but allowed a nearby public school to do so. *Signs for Jesus* v. *Town of Pembroke, NH*, 230 F. Supp. 3d 49, 67 (D.N.H. 2017). In assessing the church's equal-terms claim, the court followed the Third Circuit and "require[d] proof that the plaintiff has been treated less well than a similarly situated secular comparator, * * * ask[ing] whether the proposed comparator is similarly situated 'in light of the purpose of the regulation.'" *Ibid.* (quoting *Lighthouse*, 510 F.3d at 264–65). Measured by this standard, the court reasoned that the public school was not a "valid comparator" as the town "cannot prevent [the school] from having an electronic sign because the state has deprived the Town of any power to regulate governmental land uses." *Ibid.* On this basis, the court found that the church and school were not "similarly situated." *Ibid.*

- A city resolution placed restrictions on the operation of a homeless shelter and community center located in the basement of a church in a residential neighborhood. See *First Lutheran Church* v. *City of St. Paul*, 326 F. Supp. 3d 745, 753–54 (D. Minn. 2018). On a motion for preliminary injunction, the district court concluded that the church "ha[d] not shown a likelihood of prevailing on the merits of its equal-terms claim." *Id.* at 765. Although the same restrictions did not apply to a nearby university, library, or coffee house, the court was not convinced that "these three institutions are appropriate comparators, *i.e.*, similarly situated to First Lutheran with respect to the regulatory purposes of [the city's resolution] or the * * * zoning criteria." *Ibid.* The preliminary injunction was issued on other grounds. See *id.* at 753.

The barriers to equal treatment erected by an inquiry into similarly situated nonreligious comparators are heightened when a land use authority can impose unequal treatment on religious assemblies and institutions if it is justified by "accepted zoning criteria." *River of Life Kingdom Ministries* v. *Vill. of Hazel Crest, Ill.*, 611 F.3d 367, 371 (7th Cir. 2010) (en banc).

Consider the barriers faced by Irshad Learning Center, "a Muslim religious and educational group." *Irshad Learning Ctr.* v. *Cty. of Dupage*, 937 F. Supp. 2d 910, 914 (N.D. Ill. 2013). Although it bought a property previously used by a secular private school, the city denied Irshad the same conditional use permit granted

to the secular school even while the city also granted a conditional use permit to a Montessori day care to operate within the same zoning area. *Id.* at 936. Irshad challenged the city's denial as a violation of RLUIPA's equal-terms clause. *Id*. at 932.

Despite these glaring facts, the district court granted summary judgment for the city. 937 F. Supp. 2d at 935–36. It reasoned that the previous secular private school "had substantially different operational characteristics with regard to relevant zoning criteria," such as less traffic, fewer students, and shorter operating hours. *Id.* at 935. As for the comparison to the day care, the court concluded that Irshad "ha[d] not advanced any argument or made any attempt to demonstrate that [the day care's] property and/or proposed use were similar to [Irshad's] with respect to any accepted zoning criterion." *Id.* at 936. The district court's rulings directly followed from the Seventh Circuit's standard, which focused on secular comparators and accepted zoning criteria rather than on the equal treatment of religious and nonreligious assemblies and institutions. *Id.* at 933. Other courts have reached objectionable results under the same standard:

- A year-round Bible camp sought to locate in a single-family residential zoning district that "permit[ted] certain religious and secular assemblies" but prohibited "recreational camps." *Eagle Cove Camp & Conference Ctr., Inc.* v. *Town of Woodboro, Wis.*, 734 F.3d 673, 683 (7th Cir. 2013), abrogated on other

grounds by *Holt* v. *Hobbs*, 135 S. Ct. 853 (2015). The court of appeals observed that when "religious and secular land uses that are treated the same from the standpoint of an accepted zoning criterion, * * * that is enough to rebut an equal-terms claim." *Ibid.* (quoting *River of Life*, 611 F.3d at 373). Based on that standard, the court rejected the camp's equal-terms claim. Because the town's zoning regulations legitimately sought to "ensure[ ] quiet seclusion for families living in the area," the regulations did "not treat religious land uses * * * less favorably than their secular counterparts." *Ibid.* The court's focus, in other words, was on whether the government had articulated a persuasive reason for treating religious and nonreligious uses differently, not on RLUIPA's mandate that they be treated equally.

- A town's zoning scheme "permit[ted] nonreligious assembly and institutional uses of public, quasi-public, and governmental buildings and facilities, that include[d] museums and art galleries." *Truth Found. Ministries, NFP* v. *Vill. of Romeoville*, No. 15 C 7839, 2016 WL 757982, at *14 (N.D. Ill. Feb. 26, 2016) (internal quotation marks omitted). The zoning scheme excluded churches, including Truth Foundation Ministries. *Ibid.* The court denied its motion for a preliminary injunction because the court did not think that Truth Foundation Ministries had "shown a reasonable likelihood of success that the [town's] Zoning Code violated the Equal Terms provision of RLUIPA." *Id.* at *15. The court pointed out

that the church "has failed to provide evidence showing a relationship between the comparative uses and the accepted zoning criteria, as required by the Seventh Circuit's decision *River of Life*." *Id.* at *14. The court essentially held that although the zoning scheme excluded religious uses, it satisfied the equal-terms clause because of the differences between religious and nonreligious land uses.

- A Chicago zoning ordinance permitted libraries and theatres but prohibited churches. *Immanuel Baptist Church* v. *City of Chicago*, 283 F. Supp. 3d 670, 679 (N.D. Ill. 2017). The court determined that the Seventh Circuit's standard required that "the Church present evidence sufficient to support a reasonable inference that at least the principal uses of 'churches' are comparable to at least the principal uses of 'libraries' or 'theaters' as they relate to the relevant zoning criterion—*i.e.*, the need for off-street parking." *Id.* at 678. Applying this test, the court held that Immanuel Baptist Church failed to support its equal-terms claim with adequate evidence. *Id.* at 680–81.

RLUIPA's equal-terms clause offers even less protection for religious assemblies and institutions when courts like the Ninth Circuit apply a standard that combines the Third Circuit's "regulatory purpose" and the Seventh Circuit's "accepted zoning criteria." *Centro Familiar Cristiano Buenas Nuevas* v. *City of Yuma*, 651 F.3d 1163, 1172–73 (9th Cir. 2011).

- The Spirit of Aloha Temple, which practices "Integral Yoga," was denied a permit for non-agricultural activities (religious services, sacred events, and classes) because of alleged traffic safety concerns, while a lavender farm and a garden farm retreat center were granted permits. *Spirit of Aloha Temple* v. *Cty. of Maui*, 322 F. Supp. 3d 1051, 1055, 1067 (D. Haw. 2018). The Temple's equal-terms claim faltered on the curious ground that the court could not tell whether the roads adjoining the Temple and the non-religious entities were similar enough in width. See *id.* at 1067.

- The Victory Center, which hosts "theology classes, social services, literacy and tutoring, exercise and nutrition, and ministry services," was excluded from a city's retail zone that allowed "educational, cultural, or governmental" uses. *Victory Ctr.* v. *City of Kelso*, No. 3:10-CV-5826-RBL, 2012 WL 1133643, at *6 (W.D. Wash. Apr. 4, 2012). The court denied the Center summary judgment: "If the city had limited the allowable educational, cultural, or governmental uses to retail purposes, the city would probably 'demonstrate that the less-than-equal-terms are on account of a legitimate regulatory purpose, not the fact that the institution is religious in nature.'" *Ibid.* (quoting *Centro Familiar*, 651 F.3d at 1172).

The damage inflicted by circuit court precedent that departs from RLUIPA's text is not limited to courts within that circuit alone. Even when a circuit has not interpreted the equal-terms clause, district

courts rely on other circuits' standards, to the detriment of religious assemblies and institutions. Illustrating the problem are district court decisions from the Eighth Circuit:

- A church brought an equal-terms claim because a city gave a theater favorable treatment within a business and retail zone. See *Riverside Church* v. *City of St. Michael*, 205 F. Supp. 3d 1014, 1021 (D. Minn. 2016). Lacking guidance from the Eighth Circuit, the district court relied on decisions from the Third and Seventh Circuits. It accordingly "consider[ed] the regulatory purpose of the Zoning Ordinance as well as the zoning criteria relevant to" a particular zone. *Id.* at 1036. Guided by these considerations, the court denied the equal-terms claim. The court found that the church was not sufficiently similar to a movie theater "[w]ith respect to these purposes and zoning criteria." *Ibid.* Besides, the court added, the church "does not generate taxable revenue" and would impair traffic safety more than a theater. *Ibid.*

- In *Marianist Province of United States* v. *City of Kirkwood*, No. 4:17-CV-805RLW, 2018 WL 4286409, at *1–3, *5 (E.D. Mo. Sept. 7, 2018), an all-male Marianist high school sought permission to install lights on its renovated baseball field. But the city denied permission, despite allowing lights on the local public high school's ball fields. *Id.* at *2–3. The district court rejected the Marianist high school's equal-terms challenge. *Id.* at *5. Specifically, the court found that the public high school

> was "not a valid comparator because it is a public, not private, high school" and because state law limits the ability of local governments to regulate public schools. *Ibid.* The court did not pause to consider that RLUIPA—like all of federal civil rights law—prevails over conflicting state law.

The key lesson from these decisions is that religious institutions and assemblies lose a critical bulwark from RLUIPA when courts impose legal standards beyond or contrary to the statutory text. Those judicial standards, however well-intentioned, contradict RLUIPA's guarantee of equal treatment for religious institutions and assemblies as they seek to develop a place for gathering, worship, and other religious purposes. Religious freedom suffers when land use regulations prevent a faith community from building or improving property to make it fit for religious uses. And it is often unpopular or minority faiths that find themselves most vulnerable to local indifference or prejudice. Granting review would give the Court an opportunity to restore RLUIPA's equal-terms clause as a meaningful safeguard for the Nation's wide diversity of religious groups—including *amici*.

C. Review is needed to ensure that RLUIPA's equal-terms clause is interpreted and applied as written.

The deep and entrenched circuit split that petitioner documents amply justifies review. But an equally urgent reason is that the decision below is

wrong. By adopting an erroneous legal standard, the Sixth Circuit's decision defeats the legal protection that RLUIPA guarantees. A misguided inquiry into secular comparators and zoning standards allows local governments to treat religious organizations unequally in defiance of the statute—and in defiance of their civil rights.

Only weeks ago, the Court reaffirmed the principle of judicial fidelity to statutory text. "[I]t's a fundamental canon of statutory construction that words generally should be interpreted as taking their ordinary * * * meaning * * * at the time Congress enacted the statute." *New Prime Inc.* v. *Oliveira*, 139 S. Ct. 532, 539 (2019) (internal quotation marks and citations omitted). The same principle controls here. Review is imperative to ensure that federal courts interpret and apply RLUIPA's equal-terms clause as written.

The words chosen by Congress are uncomplicated. "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." 42 U.S.C. § 2000cc(b)(1). Under this "flat objective rule," Laycock & Goodrich, 39 Fordham Urb. L.J. at 1062, a prima facie equal-terms claim consists of four elements: "(1) the plaintiff must be a religious assembly or institution, (2) subject to a land use regulation, that (3) treats the religious assembly on less than equal terms, with (4) a nonreligious assembly or institution," *Primera Iglesia Bautista Hispana of Boca Raton, Inc*. v. *Broward Cty.*, 450 F.3d 1295, 1307–08 (11th Cir. 2006).

The Sixth Circuit resisted this straightforward interpretation. It complained that the equal-terms clause "provides no guideposts for what Congress meant by the term 'equal.' " Pet. App. 17a. Hinting that favoring religious land use might violate the Establishment Clause, the court also rejected the possibility that RLUIPA "require[s] municipalities to extend preferential treatment to religious entities." *Id.* at 18a (punctuation altered).[4] Instead, the Sixth Circuit reviewed case law from other circuits and adopted what it considered "the majority approach." *Id.* at 23a. Under its newly minted standard, the court of appeals asked whether petitioner's land use is "similarly situated with regard to legitimate zoning criteria." *Ibid.*

This standard substantially departs from RLUIPA's text. As Judge Thapar explained, "The Equal Terms provision prohibits local governments from treating a religious assembly or institution on less than equal terms than a 'nonreligious assembly or institution.' 'Similarly situated' appears nowhere in that mandate. And it is not for courts to assume that Congress meant something other than what it said."

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[4] A misplaced concern with the Establishment Clause was no reason for the Sixth Circuit to adopt its limiting construction of RLUIPA. The court of appeals made a category mistake by describing RLUIPA as a religious *preference*. In fact, it is a religious *exemption* of a kind that this Court has upheld against Establishment Clause challenge in no fewer than ten decisions. See Carl H. Esbeck, *Do Discretionary Religious Exemptions Violate the Establishment Clause?*, 106 Ky. L.J. 603, 604 (2018).

Pet. App. 43a–44a (Thapar, J., dissenting) (citations omitted).

A baseless requirement to identify a secular comparator is not the lower court's only mistake. Its standard also requires evidence that petitioner's property is "similarly situated *with regard to legitimate zoning criteria*." Pet. App. 23a (emphasis added). This focus on zoning criteria is thoroughly flawed. Nothing in the equal-terms clause allows the government to evade liability for imposing unequal terms on a religious assembly or institution, no matter how purportedly legitimate its zoning criteria. In passing RLUIPA, Congress determined that imposing unequal regulatory terms on a religious assembly or institution is always illegitimate. That is what the statute means by forbidding any "land use regulation" that applies to a religious assembly or institution "on less than equal terms with a nonreligious assembly or institution." 42 U.S.C. § 2000cc(b)(1). Unequal treatment *is* the statutory offense. A legal standard like the Sixth Circuit's "allows for an individualized, discretionary administration of land-use regulation, and consequently, a high potential for discrimination—the exact outcomes Congress was trying to eliminate." Laycock & Goodrich, 39 Fordham Urb. L.J. at 1061.

The decision below violates RLUIPA in another respect. RLUIPA requires 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). Even if the equal-terms clause were ambiguous, which

it isn't, Congress has directed courts to construe the clause in favor of protecting religious exercise. To see how far the Sixth Circuit departed from this congressional mandate, compare its legal standard with the text of the equal-terms clause. The court of appeals demanded evidence that petitioner's proposed land use is "similarly situated [to a secular comparator] with respect to a legitimate zoning criterion." Pet. App. 23a. By contrast, RLUIPA permits relief on evidence that a land use 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). The statute plainly offers relief on easier terms than the decision below. In construing the statute *against* religious land use, the Sixth Circuit flouted RLUIPA.

Applied to the record in this case, the Sixth Circuit's legal standard yielded a predictable loss for Tree of Life. Petitioner's equal-terms claim arose when the city denied permission to use its office building as a religious school. See Pet. App. 2a–3a. As things stood when petitioner filed its lawsuit, Upper Arlington's ordinance allowed a child day care center to operate in its office district but prohibited all schools, including religious schools. See *id.* at 5a.

Despite these straightforward facts, the Sixth Circuit denied petitioner's equal-terms claim. Applying its new standard, the court of appeals endorsed the city's asserted interest in revenue maximization as "a legitimate zoning criterion"—partly out of concern that rejecting it "runs counter to the principles of federalism."

Pet. App. 28a.[5] The court rebuffed petitioner's argument that the city had imposed unequal treatment by permitting a day care center while prohibiting a religious school because "daycares generate far more revenue on a per-square-foot basis than Tree of Life would." *Id*. at 36a (punctuation altered).

Guided by a mistaken legal standard, the Sixth Circuit's decision is unsound. The lower court's concern with the revenue generated by a day care center is immaterial. Religious land use often differs from secular land use—but that hardly matters. RLUIPA does not say that a religious use must be the same as a secular use to be protected. Instead, the point of the equal-terms clause is to protect *religious* land use, not to deny protection because religious land use differs from

[5] Even setting aside the flaws in its legal standard, the Sixth Circuit's concern with federalism is misplaced. Revenue maximization may be a perfectly sensible zoning criterion in many circumstances, but it cannot lawfully displace Congress's determination to prohibit the unequal regulatory treatment of religious assemblies and institutions. In this case, the court of appeals was evidently concerned that rejecting revenue maximization as a legitimate zoning criterion would unconstitutionally trench on state and local zoning powers. But as a federal statute, RLUIPA prevails over contrary state laws—not the other way around. U.S. Const. art. VI (Supremacy Clause). Preserving local autonomy at the expense of religious land use is, from the statute's perspective, like reaching for a gas can to put out a fire. Congress enacted the statute to stop the unequal zoning treatment of religious assemblies and institutions—not to perpetuate it. See Joint Statement at S7775 ("Churches have been denied the right to meet in rented storefronts, in abandoned schools, in converted funeral homes, theaters, and skating rinks—in all sorts of buildings that were permitted when they generated traffic for secular purposes.").

secular land use. By excusing unequal treatment toward religious land use, a legal standard like the one applied by the court below renders RLUIPA a dead letter.

A straightforward application of RLUIPA shows that what matters in this case is whether Upper Arlington's land use ordinance subjects Tree of Life to a land use regulation that treats it worse than nonreligious institutions or assemblies like a secular day care facility. See 42 U.S.C. § 2000cc(b)(1) (prohibiting any land use regulation that "treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution"). The record contains abundant facts supporting Tree of Life's equal-terms claim. RLUIPA guarantees it the freedom to operate a religious school on the same terms as nonreligious assemblies or institutions in Upper Arlington's commercial zone. Yet the absence of this Court's guidance allowed the Sixth Circuit to deny that freedom based on a faulty legal standard.

* * *

RLUIPA is a civil rights statute. It would be intolerable for lower courts to erect a non-textual legal standard that routinely defeated claims of race or sex discrimination. It is no more tolerable for the Sixth Circuit and other lower courts to reduce RLUIPA's equal-terms clause to "an exercise in cleverness and imagination." *Nollan* v. *California Coastal Comm'n*, 483 U.S. 825, 841 (1987). Only the most unimaginative regulator could fail to articulate "legitimate zoning criteria," Pet. App. 23a, that appear to justify the unequal

treatment of religious assemblies and institutions. In that respect, the legal standard adopted by the court below threatens to perpetuate the very abuses that Congress enacted RLUIPA to eliminate.

Review is warranted to resolve hopeless confusion in the lower courts and to ensure that RLUIPA's equal-terms clause is interpreted and applied as written. Only this Court can restore that critical portion of RLUIPA as a meaningful brake on the infringement of religious freedom by land use authorities. Without such intervention, the statute's guarantee of freedom to gather for religious purposes will continue to offer only uncertain protection.

CONCLUSION

For these reasons, the Court should grant the petition for certiorari.

Respectfully submitted,

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