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 A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF THE JEWISH COALITION FOR RELIGIOUS LIBERTY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae the Jewish Coalition for Religious Liberty (JCRL) is a cross-denominational association of lawyers, rabbis, and communal professionals who practice Judaism and are committed to religious liberty. As adherents of a minority religion, JCRL's members have a strong interest in ensuring that religious liberty rights are protected. The group aims to protect the ability of all Americans to freely practice their faith and foster cooperation between Jews and other faith communities. To that end, JCRL's leaders have filed amicus briefs in this Court as well as lower federal and state courts, have published op-eds in prominent news outlets, and have established an extensive volunteer network to spur public statements and action on religious liberty issues by Jewish communal leadership.

INTRODUCTION AND SUMMARY OF ARGUMENT

Since the colonial era, America has had a complicated and contradictory relationship with religion. It has served as a haven from religious persecution for groups ranging from the Puritans to the Ukrainian Orthodox, to Jews and Muslims, to Catholics and Anabaptists. The United States was the first country where practitioners

1. Pursuant to this Court's Rule 37.6, counsel for *amicus curiae* certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amicus*, its members, and its counsel has made a monetary contribution intended to fund the preparation or submission of this brief. All parties have received timely notice of *amicus*'s intent to file and have consented to this filing.

of different faiths were not merely "tolerated," but were and are treated as members of the community and citizens without reservation.

Simultaneously, however, there is also a long and varied history of religious discrimination in the United States. From the expulsion of Roger Williams from the Massachusetts Bay Colony, to Missouri Executive Order 44 (also known as the Extermination Order) which directed that "Mormons must be treated as enemies, and must be exterminated or driven from the state," *see* Missouri Executive Order No. 44 (Oct. 27, 1838), to the persecution of Jehovah's Witnesses, and to discrimination visited upon minority groups such as Jews, Muslims, Hindus, and Sikhs, America has had its share of sordid episodes of religious intolerance. *See generally* Steven H. Shiffrin, *The Pluralistic Foundations of the Religion Clauses*, 90 Cornell L. Rev. 9, 28 (2004).

Congress has expressly recognized that policies and practices at all levels of government have fallen short of the oft-declared American ideal when it comes to the treatment of religious minorities. It has also recognized that while we may no longer practice forcible expulsion of religious dissidents, other forms of discrimination may deny religious individuals and communities the ability to worship and lead their lives as their faith requires. *See* 46 Cong. Rec. 16,698 (2000) (joint statement of Senators Orrin Hatch and Ted Kennedy). To help bring American practices in line with American ideals, Congress unanimously passed and the President signed the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), Pub. L. 106–274 (codified in 42 U.S.C. § 2000cc *et seq.*), which requires that government entities,

at all levels, administer "land use regulation[s] in a manner that treats a religious assembly or institution on … equal terms with a nonreligious assembly or institution." 42 U.S.C. §2000cc(b)(1).

Unfortunately, the Sixth Circuit (along with several other courts of appeals) has imposed atextual limitations on RLUIPA's equal-terms provision that flout Congress' intent and make it extremely difficult for plaintiffs to prevail. In enacting RLUIPA, Congress relied on an exhaustive legislative record showing that municipalities often invoke purported concerns about traffic, parking, and tax revenue to justify discriminatory treatment of religious facilities. Yet, in direct contravention of both the text and purpose of RLUIPA, the decision below would make those very same concerns central in determining whether a religious group faced unequal treatment. As Judge Thapar correctly recognized in his dissenting opinion, this cramped interpretation of RLUIPA "prevent[s] many religious groups from seeking the shelter that Congress sought to provide." Pet. App. 41a. And both the majority and dissent acknowledged that the courts of appeals have divided over the scope of this critical statutory protection.

A properly broad interpretation of RLUIPA is critical to Jewish groups that unfortunately continue to face discrimination over land-use issues. Orthodox Jews are treated as outsiders in many communities and have faced efforts to block them from building schools and religious facilities. Many of those efforts are based on thinly veiled (or not so thinly veiled) anti-Semitism—*i.e.*, a fear that the Jewish community will "take over" the town if it is allowed to build a school or synagogue. These efforts have occurred

in places ranging from Westchester County to Boca Raton, but the script is always the same: allowing a religious school or place of worship will increase traffic, decrease tax revenue, and be inconsistent with the city's preferred land uses. Time and time again, those proffered rationales have been revealed as pretextual. *See, e.g.*, Douglas Laycock, *State RFRAS and Land Use Regulation*, 32 U.C. Davis L. Rev. 755, 779-80 (1999) ("*State RFRAs*"). Yet under the Sixth Circuit's interpretation of RLUIPA, government entities would have leeway to invoke such concerns to obstruct schools and places of worship. *See id.* at 781 (noting that "[d]iscrimination is difficult to prove in any individual case," and "[s]ubjective criteria aggravate this problem, enabling officials to describe almost any zoning result in terms of a reason that is neutral and legitimate on its face."). The petition for certiorari should be granted to resolve the longstanding circuit split and correct the Sixth Circuit's flawed interpretation of the equal-terms provision.

ARGUMENT

I. The Text, History, And Purpose Of RLUIPA Make Clear That The Government May Not Treat A Religious Assembly Or Institution Differently From A Secular Institution Or Assembly.

RLUIPA's equal-terms provision is clear and unambiguous: "[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). As Judge Thapar correctly recognized, this provision requires a plaintiff to prove four elements:

"(1) the plaintiff is a religious assembly or institution, (2) subject to a land use regulation, (3) that, compared with a nonreligious assembly or institution, (4) treats the plaintiff on less than equal terms." Pet. App. 41a. Simply put, if a government entity allows a nonreligious assembly or institution in a certain area, it cannot exclude a religious assembly or institution, full stop.

The fundamental flaw of the decision below is that it grafts onto RLUIPA's text an additional element that significantly curtails the statute's protections. Under that approach—which has also been adopted by several other circuits—the plaintiff must show not only that it is treated worse than a "nonreligious assembly or institution," but also that it is similarly situated to that institution "*with regard to the regulation at issue*." Pet. App. 19a.

This additional gloss on the statutory text is no mere technicality. During the debates over RLUIPA, Congress received extensive evidence showing that, "[a]s they had done with racial minorities, municipalities clothed their objections to religious organizations with the same ordinary concerns: traffic, noise, and lost tax revenue." Pet. App. 39a (Thapar, J., dissenting); *see also* Pet. 6-7 (noting evidence before Congress that municipalities often attempted to ban religious institutions "from commercial zones because they allegedly do not enhance tax revenue or economic development."). Allowing those very same considerations to re-enter the RLUIPA inquiry through the back door would facilitate the exact types of discriminatory practices that Congress sought to prohibit.

The panel majority's approach also makes little sense in the context of RLUIPA's broader structure. Subsection

(a) of RLUIPA's land-use provisions prohibits government entities from implementing land-use regulations in a manner that substantially burdens religious exercise, unless the government can satisfy strict scrutiny. 42 U.S.C. § 2000cc(a). Subsection (b), in turn, mandates nondiscrimination and equal treatment of religious institutions. It is highly implausible that Congress would have mandated strict scrutiny for any regulation that *burdens* religious practice, yet allowed *discriminatory or unequal treatment* of religious groups to be justified if the government merely pointed to some regulatory interest in raising tax revenue or avoiding traffic. Under the correct interpretation of the statute, "a land-use regulation that on its face or in operative effect or application treats a religious assembly or institution less well than a nonreligious assembly or institution will violate the equal-terms provision *even if* it was adopted or implemented for reasons unrelated to religious discrimination." *River of Life Kingdom Ministries v. Village of Hazel Crest, Ill.*, 611 F.3d 367, 382 (7th Cir. 2010) (Sykes, J., dissenting).

This case illustrates the flaws of the panel majority's approach. Under the plain text of the equal-terms provision, it should have been sufficient for the plaintiff to identify a nonreligious assembly or institution that was allowed in the area in question, and then show that the religious assembly or institution was treated worse. Yet the majority instead required the plaintiff to offer "a permitted land use *that would generate a comparably small amount of revenue for the City*" as the plaintiff's proposed religious school. Pet. App. 36a (emphasis added). Of course, if mere differences in tax revenue could justify exclusion of religious assemblies or institutions, then "there would be grounds to exclude any new church from

any jurisdiction in the country," since such institutions are always tax-exempt. Douglas Laycock & Luke Goodright, *RLUIPA: Necessary, Modest, and Under-enforced*, 39 Fordham Urb. L. J. 1021, 1036 (2012) ("Laycock & Goodright").

Both the majority and the dissent below acknowledged that the circuits are split over the extent to which "regulatory purposes" may play a role in the equal-terms inquiry. *See* Pet. App. 21a-23a (majority rejecting Tenth and Eleventh Circuits' approach); Pet. App. 61a (dissent noting that "[e]very circuit to address the issue has given its own gloss to the Equal Terms provision"). And, due to the additional limitations that several circuits have grafted onto RLUIPA's text, there are large swaths of the country in which religious liberty is not currently being protected to the full extent intended by Congress. The need for this Court's review is imperative.

II. A Proper Interpretation Of RLUIPA Is Uniquely Important For Observant Jewish Communities.

A. Anti-Semitism remains an unfortunate problem in American political and social life, including in zoning and land use policies and practices.

The history of Jews in America presents a case study in both America's embracing of religious dissenters, and the discrimination visited upon the faithful, especially of those professing a minority religion.

1. Jews first landed in what is now the United States in 1654 after escaping persecution during the Portuguese

Inquisition in Recife, Brazil. Though they were permitted to land and stay in what was then New Amsterdam, they met with an unrelenting hostility from Governor Peter Stuyvesant. *See* Jonathan D. Sarna & David G. Dalin, Religion and State in the American Jewish Experience 39-41 (Notre Dame Press, 1997). Even after New Amsterdam became New York in 1664, and the Jewish community began to grow, a synagogue was not opened until 1682, and public worship was prohibited until a decade later. *See* Max J. Kohler, *Civil Status of the Jews in Colonial New York*, 6 Pubs. Am. Jewish Hist. Soc'y 81, 93-95 (1897), https://bit.ly/2DPRU6S. Jews thus found a refuge from the Inquisition that threatened their lives, but did not necessarily find the dignity of equal citizenship in the American colonies. *Id.*

Following the American Revolution and the Constitution's promise of equal treatment for all religious adherents, the Jewish community of Newport, Rhode Island wrote to George Washington expressing its hope that the new "Government, erected by the Majesty of the People … to bigotry [will] give[] no sanction, to persecution no assistance…." Letter from Moses Seixas, Warden, Yeshuat Israel, to President Washington (Aug. 17, 1790) in 6 The Papers of George Washington: Presidential Series, July-November 1790, 286, 286 n.1 (Dorothy Twohig et. al. eds., 1986). President Washington assured the community that all "who dwell in this land … shall sit in safety under his own vine and fig tree, and there shall be none to make him afraid." George Washington to the Hebrew Congregation in Newport, Rhode Island (Aug. 18, 1790), in *id.* at 285.

Despite these assurances, discrimination against Jews continued. During the Civil War, Ulysses S. Grant issued his infamous General Order No. 11, which accused "[t]he Jews, as a class [of] violating every regulation of trade established by the Treasury Department and also department orders," and declared that they "are hereby expelled from the Department [of the Tennessee] within twenty-four hours from the receipt of this order," on pain of arrest and imprisonment. 7 The Papers of Ulysses S. Grant, December 9, 1862—March 31, 1863, at 50 (John Simon ed., 1979). Only the intervention of President Lincoln caused the order to be set aside.[2] *See* Eric L. Muller, *All the Themes but One*, 66 U. Chi. L. Rev. 1395, 1422-23 (1999).

Discrimination against Jews has persisted to this day. For example, it is not uncommon to find property deeds with restrictive covenants against Jewish ownership, even though such covenants are not legally enforceable following this Court's decision in *Shelley v. Kraemer*, 334 U.S. 1 (1948). *See, e.g.*, Catherine Silva, *Racial Restrictive Covenants: Enforcing Neighborhood Segregation in Seattle*, Univ. Wash.: Seattle Civil Rights & Labor History Project (2009), https://bit.ly/2EeDZJg.

The history of American higher education is also replete with examples of discrimination against Jews. President A. Lawrence Lowell of Harvard University lamented that "the coming in large numbers of Jews of any kind" would "ruin" Harvard just like it "ruined" Columbia,

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2. Even President Lincoln is reported to have been inclined to sustain the order had it only expelled "Jew peddlers." Letter from Gen. Halleck to Gen. Grant. (Jan. 21, 1863).

and thus instituted a cap on the number of Jews his school would enroll. Jerome Karabel, The Chosen: The Hidden History of Admission and Exclusion at Harvard, Yale, and Princeton 88 (2005) (quoting letter from President Lowell to Prof. William Earnest Hoskins). Other Ivy League schools followed suit. *See generally id.*

2. Today, Jewish schools, houses of worship, and community centers exist in every state. Yet anti-Semitism has not been relegated to the distant past; instead, all too often, it is simply better masked. As society has become less tolerant of open expressions of bigotry, the anti-Semitic objections that used to be voiced openly are now couched in neutral language, ostensibly evincing concern about traffic, budgets, public schools, property values, and the like. *See* Laycock & Goodrich, *supra* at 1070.

This hostility is not limited to places where Jews are a small minority, but is present even in places where Jews have achieved political and economic success. For example, as described in *Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F.3d 338 (2d Cir. 2007), a municipality in the suburbs of New York City denied Westchester Day School (an Orthodox Jewish primary school) a permit to expand its facilities. Initially, the zoning board unanimously found that the proposed project would have "no significant adverse environmental impact." *Id.* at 345-46. However, following opposition by a "small but vocal group in the Mamaroneck community," the board reversed its decision, and when a federal court found the reversal to be unlawful, the board denied the permit outright. *Id.* at 346. The board attempted to justify its position by claiming that "the school made 'a willful attempt' to mislead the zoning board," that there were

"deficiencies in the school's traffic study," that there was "lack of adequate parking," and other seemingly neutral considerations. *Id.* at 351-52.

It took half a decade of litigation for federal courts to conclude that none of the reasons advanced by the board was supported by substantial evidence or could justify denying the school's permit application. As the district court ultimately concluded, the real basis for the opposition to the school's expansion was the desire by a "small but vocal group in the Mamaroneck community" to keep the number of Orthodox Jewish students in the community as low as possible. *See id.* at 346 (noting district court's findings that the permit was denied because of "undue deference to the … the small but influential group of neighbors who were against the school's expansion plans.").

Similarly, in 2007 when the Chabad of East Boca Raton sought to open a facility to conduct religious services and operate a religious school, it ran into opposition from local residents, which "was motivated by religious animus together with a desire to protect the residential quality of the … neighborhood." *Gagliardi v. City of Boca Raton*, No. 16-CV-80195-KAM, 2017 WL 5239570, at *1 (S.D. Fla. Mar. 28, 2017), *aff'd sub nom Gagliardi v. TJCV Land Tr.*, 889 F.3d 728 (11th Cir. 2018). After negotiations between Chabad, the City, and objecting residents, the religious community decided to carry out its project elsewhere in the City of Boca Raton, and secured appropriate changes to the zoning law to accomplish the task. *Id.* at *1–*3.

In response, both the City and Chabad were sued by a new group of objectors who described themselves

as "taxpayers of the City of Boca Raton and the Federal Government," residents of the City of Boca Raton, and members of "a Christian religion." *Id.* at *4. In their various lawsuits, these individuals argued that granting Chabad's application was improper both because it violated the Establishment Clause and because they themselves would suffer as a result of "traffic, difficulties in access for emergency vehicles, and a change in the character of the area." *Gagliardi*, 889 F.3d at 731. Although the courts ultimately dismissed the complaint for lack of standing, the proposed building has yet to be built more than twelve years later. *Id.* at 732.

In still another example, just several weeks ago, the Jewish Telegraphic Agency reported that a group of residents in Ocean County, New Jersey are counseling their neighbors against selling their homes to Orthodox Jews. The group, while blaming the Jewish community for "pressure sales," "build[ing] homes at the expense of the environment," and "seizing control" of the local governing bodies, dutifully intoned that its concerns are only about "zoning, housing density and local support for public schools," and not at all motivated by anti-Semitism. *See* Ben Sales, *Insisting it is not anti-Semitic, NJ Group Sees Haredi Orthodox as a Threat to 'Quality of Life*,' Jewish Telegraph. Agency (Jan. 23, 2019), https://bit.ly/2GwBWlV.

In short, Jewish life has flourished in the United States like in few other places on earth. But anti-Semitism has not disappeared; rather, where it is present, it is now better hidden and its adherents have learned the art of obfuscating their true views behind neutral sounding concerns over traffic, parking, tax revenue, and "community character."

B. RLUIPA's equal-terms provision is critical to preventing discrimination against Jewish religious schools and institutions.

As Judge Thapar explained in his dissent, the fundamental problem with the panel majority's approach is that it allows localities to "take a vague regulatory purpose and define the parameters [of relevant comparison] during the course of litigation, [thus] always avoid[ing] RLUIPA liability." Pet. App. 59a. To see how that could work in a city determined to keep out Jewish religious institutions, consider the usual justifications proffered when cities deny permits to synagogues or Jewish schools. The cities typically cite concerns over traffic, noise, and tax revenue. *See State RFRAs*, *supra* at 779-80. The problem is that these amorphous and seemingly anodyne concerns can easily be manipulated and turned against a disfavored group at any opportunity. *See*, *e.g.*, Laycock & Goodrich at 1070 (noting instance in which City of Los Angeles "required [a synagogue] to remove its parking spaces" and then "defended its denial of a [building] permit on the ground that there were no parking spaces.").

A city that does not wish to see a Jewish daycare in its neighborhood can always justify the denial of appropriate permits by the increased traffic that such a facility would bring, from the parents dropping off and picking up their children, as well as the numerous staff that the daycare center would employ. *See, e.g.*, *Westchester Day Sch.*, 504 F.3d 338. At the same time, if a Jewish community were to try to open a secondary school—which, owing to fewer staff, would generate less traffic, *see* Pet. App. 33a (noting that 600 children in daycare would require 159 staff members, but twice as many children in a school

setting would require only 275 staff members)—the city could turn around and, as in this case, object on the basis that the secondary school does not generate *enough* tax revenue compared to other potential uses of the property. As Judge Thapar emphasized, this results in a "heads the City wins, tails [the religious institution] loses" situation. Pet. App. 59a. With the "proper" boundary drawing coupled with the ability to "define the parameters [of relevant comparison] during the course of litigation," *id.*, the panel majority's approach would allow any city to completely exclude a Jewish school from its boundaries (something that, as noted above, many municipalities have tried to do).

Moreover, RLUIPA is uniquely important to observant Jewish communities due to the tenets of their faith. Orthodox Jews, and especially Hasidic Jews, "must live within walking distance of their synagogue in order to comply with religious rules concerning the Sabbath, so they tend to cluster in a particular neighborhood." Laycock & Goodrich, *supra*, at 1026. This clustering is often viewed by non-Jews as a threat "because Hasidic Jews are sometimes viewed as cultural outsiders, as not supporting the public schools, or as exercising undue political clout by voting as a bloc." *Id.* at 1026-27. That is, "some communities have opposed the location of a new Orthodox synagogue for fear that Orthodox Jews will move in and take over the community." *Id.* at 1027; *see also id.* (describing numerous instances across the country in which municipalities sought to block yeshivas run by Hasidic Jews); Ben Sales, *supra* (discussing opposition in Ocean County, NJ to selling property to religious Jews).

In short, a proper reading of RLUIPA would force local governments to do precisely what Congress sought to require them to do: treat religious institutions and communities on "equal terms" with secular institutions and communities. And while this protection is important to *all* religions, it is particularly important to minority religious communities like the Jews (especially those adhering to Orthodox Judaism) because as minorities these communities often lack the political power or resources to achieve equal treatment through the political process.

CONCLUSION

Under the current state of the law, RLUIPA's meaning—and therefore the protections available to religious communities—depend on the circuit where a challenge to a local land use regulation is filed. It is intolerable that congressionally mandated protections for religious communities should vary depending on the happenstance of where in the country the community chooses to worship. That this burden disproportionately falls on minority religious communities which, by virtue of their minority status, are unlikely to have sufficient political power to achieve equal treatment, makes the problem worse still. The time has come for this Court to clarify the meaning of RLUIPA and to recognize that it means what it says—local governments cannot place religious institutions on less than equal terms with non-religious institutions. The additional, atextual requirements imposed by various courts of appeals have no place in the statutory scheme. This Court should grant the petition for certiorari and reverse the judgment below.

Respectfully submitted,

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