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 FOR *AMICUS CURIAE* ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The Association of Christian Schools International (ACSI) is a nonprofit, non-denominational religious association that provides support services to 24,000 Christian schools in more than 100 countries. ACSI and its members seek to advance the common good by providing quality education and spiritual formation to students. ACSI's religious calling is to promote a vibrant Christian faith that embraces every aspect of life. As such, ACSI has an interest in protecting religious liberty and religious practice against government attempts to restrict them.

SUMMARY OF ARGUMENT

The decision below reflects just how far many lower courts have strayed from the plain text and purpose of the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), to the detriment of the very religious groups RLUIPA was supposed to protect. Prior to the passage of RLUIPA, municipalities were free to treat religious assemblies or institutions on less than equal terms with nonreligious assemblies or institutions. To combat that discrimination, Congress passed RLUIPA, explicitly providing that such unequal treatment was unlawful. Despite that straightforward proscription, the Sixth Circuit reached an outcome impossible to square with what Congress

[1] Letters consenting to the filing of this brief are on file with the Clerk. Counsel of record for both parties received notice at least 10 days prior to the due date of *amicus curiae*'s intention to file this brief. No counsel for a party authored this brief in whole or in part, and no person, other than *amicus* or their counsel, made any monetary contribution to the preparation or submission of this brief.

intended: it somehow found lawful the City of Upper Arlington's treatment of Tree of Life Christian Schools on less than equal terms with nonreligious assemblies or institutions. The Sixth Circuit justified its conclusion by considering the City's zoning interests, including its interest in tax revenue maximization, in assessing the land-use restrictions on Tree of Life. RLUIPA does not allow for such an analysis.

The Court should grant certiorari to reject the interest-balancing analysis of the Sixth Circuit and to correct a troubling trend among lower courts of ignoring the text and purpose of RLUIPA. RLUIPA's plain text requires that religious assemblies and institutions must be afforded equal treatment with nonreligious assemblies and institutions. It does *not* allow courts to conduct a further analysis of government zoning interests in order to rescue land use regulations that treat religious assemblies and institutions on less than equal terms. But lower courts have done just that—grafting an interest-balancing test onto a flat ban on unequal treatment.

The result, in many circuits, is that municipalities have been given free rein to discriminate against religious assemblies or institutions in land use regulation, as long as they can conjure up a zoning interest to justify their actions. As a practical matter, this has allowed municipalities to continue to rely on the same discriminatory zoning criteria that RLUIPA was meant to eradicate. Unless this Court steps in to restore a proper textual analysis of RLUIPA equal-terms claims, this discriminatory treatment will go on, and Congress's purpose in enacting RLUIPA will continue to be frustrated.

ARGUMENT

I. RLUIPA'S EQUAL TERMS PROVISION DOES NOT CONTEMPLATE AN INTEREST-BALANCING TEST

RLUIPA contains two sections regulating land use. The first section—the Substantial Burden provision—bars land use regulations that impose a substantial burden on religious exercise (including a religious assembly or institution), unless the government demonstrates that the burden "is in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000cc(a)(1). RLUIPA's second section—the Equal Terms provision—prohibits land use regulations that treat "a religious assembly or institution on less than equal terms with a nonreligious assembly or institution." *Id.* § 2000cc(b)(1).

The plain language of the Equal Terms provision is a flat ban on any land use regulation that treats religious assemblies or institutions less favorably than nonreligious assemblies or institutions. Unlike the Substantial Burden provision, the Equal Terms provision does not allow *some* unequal treatment if the government can show the unequal treatment is narrowly tailored to further a compelling governmental interest; rather, it says the terms of land use regulations must be "equal"—full stop. The approach taken by the Sixth Circuit here, and by several other courts of appeals, is impossible to square with the text or purpose of RLUIPA, for it would allow governments to justify imposing *unequal terms* on religious assemblies as long as they can muster a "compelling" or "legitimate" zoning interest. That is clearly not what RLUIPA says or what it was designed to do.

A. RLUIPA's Plain Text Requires Governments To Treat Religious And Nonreligious Assemblies And Institutions On "Equal Terms"

RLUIPA's text is clear: the Equal Terms provision prohibits local governments from "treat[ing] a religious assembly or institution on less than equal terms with a nonreligious assembly or institution." *See* 42 U.S.C. § 2000cc(b)(1). This provision prevents the government from treating any religious assembly or institution differently from any other assembly or institution, regardless of the government's regulatory objectives or interests. It is an "objective rule" that specifies "the way in which the two land uses must be similar" (i.e., "they must both fall within the categories of 'assembly' or 'institution'") and requires that such similar uses "must be regulated on equal terms."[2] Laycock & Goodrich, *RLUIPA: Necessary, Modest, and Under-Enforced*, 39 Fordham Urb. L.J. 1021, 1062 (2012).

This plain-language reading of the statute's text should be the end of the matter. "It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if

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[2] As Judge Thapar noted in dissent below, the relevant comparison is simply between religious assemblies or institutions and nonreligious assemblies or institutions. Pet. App. 43a (Thapar, J., dissenting). There is no further requirement that the nonreligious assembly or institution be "'similarly situated'" to the religious assembly or institution. *See id.* The lower courts, however, have injected much uncertainty into this area of law by adding this atextual requirement. *See id.* n.1 (collecting cases). Adhering to the plain text—and interpreting the Equal Terms provision simply to prohibit local governments from treating any religious assembly or institution on less than equal terms than any nonreligious assembly or institution—would alleviate a lot of confusion.

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); *see also 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.").

Congress's purpose in passing the Equal Terms provision buttresses this plain-text reading of the statute. *See, e.g.*, *United States* v. *American Trucking Ass'n*, 310 U.S. 534, 542 (1940) ("In the interpretation of statutes, the function of the courts … is to construe the language so as to give effect to the intent of Congress."). The purpose of the provision, Congress explained, was to "prevent a municipal zoning authority from treating houses of worship, scripture studies in homes, and religious schools in a manner less favorably than nonreligious assemblies." H.R. Rep. No. 106-219, at 17 (1999). The Equal Terms provision embodies Congress's judgment that "the only possible basis for disparate treatment of religious and secular assemblies is bias against religion." Campbell, *Restoring RLUIPA's Equal Terms Provision*, 58 Duke L.J. 1071, 1083 (2009); *see also River of Life Kingdom Ministries* v. *Village of Hazel Crest*, 611 F.3d 367, 389 (7th Cir. 2010) (Sykes, J., dissenting) (provision "reflects a congressional judgment about state and local regulation of religious land uses: Regulations that treat religious assemblies or institutions less well than nonreligious assemblies or institutions are inherently not neutral"). The remedy that RLUIPA requires for this discrimination is simple: state and local governments must adhere to a uniform rule of neutrality in applying land use regulations to religious and nonreligious assemblies.

Nothing in the text of RLUIPA instructs courts to consider the *purposes* of a land use regulation or to take broader zoning criteria into account in applying the Equal Terms provision. The Equal Terms provision does not allow local governments "to come up with a regulatory purpose that justifies the exclusion of religion." Mosley, *Zoning Religion Out of the Public Square: Constitutional Avoidance and Conflicting Interpretations of RLUIPA's Equal Terms Provision*, 55 Ariz. L. Rev. 465, 495 (2013). Rather, RLUIPA directs courts to evaluate whether a land use regulation treats a religious assembly or institution on "less than equal terms" compared to a secular assembly or institution and, if such unequal treatment exists, to hold that the discriminatory treatment unlawful.

B. RLUIPA's Equal Terms Provision Does Not Incorporate An Analysis Of Government Interests

The lower court warped the Equal Terms provision by adding to the requirements of the plain text.[3] It declared the Equal Terms provision "ambiguous"–citing "the undefined statutory words 'equal terms'"—and grafted on an analysis of the government's "legitimate

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[3] Many other circuit courts have made the same mistake. For instance, while the court below imputed a government interest analysis into the Equal Terms provision via a purported ambiguity in the meaning of "equal terms," the Eleventh Circuit allows the government an opportunity to satisfy strict scrutiny because it believes doing so is "[c]onsistent with the analysis employed in" the Court's First Amendment jurisprudence. *See Midrash Sephardi, Inc.* v. *Town of Surfside*, 366 F.3d 1214, 1235 (11th Cir. 2004). Regardless of *where* the interest balancing analysis comes from, however, it is still "a departure from the text." Laycock & Goodrich, 39 Fordham Urb. L.J. at 1060.

zoning criteria."[4] Pet. App. 23a. But there is nothing ambiguous about the plain text of the Equal Terms provision. *See supra* Section I.A.; *see, e.g.*, *Yates* v. *United States*, 135 S. Ct. 1074, 1097 (2015) (Kagan, J., dissenting) (courts should not find ambiguities where the "'statute's text and structure suggests none'").

Even if there were an ambiguity here, the solution cannot possibly be to import an interest-balancing test into the Equal Terms provision. "It is apparent on the face of [RLUIPA] that the substantial-burden provision contains a defense of compelling government interest, and that the equal-terms provision does not." Laycock & Goodrich, 39 Fordham Urb. L.J. at 1058.[5] RLUIPA therefore does not sanction an analysis that would allow state and local governments to justify treating religious assemblies and institutions less favorably than nonreligious assemblies and institutions; the Equal Terms provision is a flat proscription. *See* Campbell, 58 Duke L.J. at 1084-1085 ("Whereas the substantial burden provision explicitly provides that

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[4] Of course, the fact that a statutory term is undefined does not make it ambiguous. *See, e.g.*, *FDIC* v. *Meyer*, 510 U.S. 471, 476 (1994) ("In the absence of … a [statutory] definition, we construe a statutory term in accordance with its ordinary or natural meaning.").

[5] *Compare* 42 U.S.C. § 2000cc(a)(1) (land use regulations may not impose a substantial burden on religious exercise "*unless* the government demonstrates that imposition of the burden on that person, assembly, or institution" is in "furtherance of a compelling government interest" and "is the least restrictive means of furthering that compelling governmental interest" (emphasis added)), *with id.* § 2000cc(b)(1) ("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.").

substantial burdens on religion are prohibited *unless* they survive the compelling interest test, the equal terms provision prohibits all unequal treatment without exception." (emphasis in original)).

If Congress had intended to include a strict-scrutiny "escape hatch" for the government in the Equal Terms provision, it could have done so—after all, it included such a requirement in the Substantial Burden provision. Courts should presume that this divergence was intentional, reflecting Congress's deliberate judgment about what standard of review should apply. *See, e.g.*, *Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

This conclusion from the interplay between the language of the Substantial Burden and Equal Terms provisions is buttressed by Congress's general purpose in passing RLUIPA. The law states that its terms "shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of [RLUIPA] and the Constitution." 42 U.S.C. § 2000cc-3(g). Grafting an interest analysis onto the Equal Terms provision is directly counter to this rule of construction provided by the statute's text.

Further, analysis of RLUIPA's enactment history makes clear that the inclusion of a governmental-interest analysis in the Substantial Burden provision and its exclusion in the Equal Terms provision was not a drafting accident. The Religious Liberty Protection Act, the bill that predated RLUIPA, "from the very beginning pointedly provided a standard of justification

for substantial burdens, but none for excluding religious assemblies in places where secular assemblies were permitted." Laycock & Goodrich, 39 Fordham Urb. L.J. at 1058. Indeed, the final version of the predecessor bill featured provisions that were substantively similar to RLUIPA's. *See* H.R. Rep. No. 106-219, at 2-4. The distinction between the two provisions from the early drafting of the Religious Liberty Protection Act through the final text of RLUIPA "did not persist by accident through multiple drafts and three years of deliberation." Laycock & Goodrich, 39 Fordham Urb. L.J. at 1058-1059 & n.226. Rather, "[s]upporters of the bill repeatedly discussed whether there should be a compelling-interest exception to the equal-terms provision," but the "view that prevailed was that there are no acceptable justifications for such discrimination." *Id.* at 1059 n.226. Indeed, the legislative history of RLUIPA shows that Congress affirmatively eschewed such an exception for the Equal Terms provision. *See* 146 Cong. Rec. 19,123 (2000) (statement of Rep. Charles Canady) (noting, in the section-by-section analysis of RLUIPA, that the Equal Terms provision "provide[s] more precise standards than the substantial burden and compelling interest tests").

The lower court's interest-balancing test only serves to disadvantage religious assemblies and institutions. "A city can nearly always come up with some plausible sounding explanation for why it treats churches worse than other assemblies." Laycock & Goodrich, 39 Fordham Urb. L.J. at 1065. If, for instance, generating maximum municipal tax revenue were an accepted interest, "churches can be treated worse than every assembly that is not tax exempt," which would "justify total exclusion of churches." *Id.* This result "cannot be squared with RLUIPA's text,

history, or purpose." *Id.*; *see also Lighthouse Inst. for Evangelism, Inc.* v. *City of Long Branch*, 510 F.3d 253, 293 (3d Cir. 2007) (Jordan, J., concurring in part and dissenting in part) (centering the RLUIPA inquiry on municipalities' zoning objectives gives them "a ready tool for rendering [the Equal Terms provision] practically meaningless"); *River of Life*, 611 F.3d at 386 (Sykes, J., dissenting) (focusing on the government's regulatory zoning criteria "dooms most, if not all, equal-terms claims"). Here, both the "express language of RLUIPA and its legislative history support an interpretation [of the Equal Terms provision] that dispenses with … a compelling interest test in favor of broader protection."[6] Campbell, 58 Duke L.J. at 1099.

Thus, nothing in RLUIPA permits courts to consider the government's motives for treating religious organizations unequally. Rather, local government treatment of religious assemblies and institutions on less than equal terms with secular assemblies and institution violates RLUIPA's straightforward proscription.

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[6] As Judge Thapar noted in dissent in the opinion below, some courts "have suggested that a plain meaning interpretation of the Equal Terms provision may create constitutional problems." Pet. App. 46a n.3 (Thapar, J., dissenting). Indeed, various circuit courts have read requirements like strict scrutiny into the Equal Terms provision "as a matter of constitutional avoidance." Mosley, 55 Ariz. L. Rev. at 478. But the constitutional avoidance canon has a notable exception: courts cannot narrow a statute if the narrower interpretation is "plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). Congress gave such a contrary intent in RLUIPA when it 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).

II. THE LOWER COURT'S APPROACH FOSTERS DISCRIMINATION AGAINST RELIGIOUS ASSEMBLIES AND INSTITUTIONS

Importing an interest-balancing test is not only contrary to RLUIPA's plain text; it also would enable the very discrimination RLUIPA was meant to combat. In hearings held prior to the passage of RLUIPA, Congress found voluminous evidence of municipalities using zoning codes and interests to treat religious institutions and assemblies "in a manner less favorably than nonreligious assemblies." H.R. Rep. No. 106-219, at 17. Congress drafted the Equal Terms provision to shut the door on such discrimination, yet the lower court's focus on government zoning interests opens the door wide again.

A. RLUIPA's History Demonstrates Congress's Concern With Local Governments Using Zoning Codes To Discriminate Against Religious Institutions

"The equal-terms provision is best understood not in isolation but in the context of RLUIPA's other protections for religious land uses and against the backdrop of the decade-long tug of war between Congress and the Supreme Court over the protection of religious liberty." *River of Life*, 611 F.3d at 378 (Sykes, J., dissenting). Until 1990, courts "requir[ed] the government to justify any substantial burden on religiously motivated conduct by a compelling state interest and by means narrowly tailored to achieve that interest." *Employment Div., Dep't of Human Res. of Or.* v. *Smith*, 494 U.S. 872, 894 (1990) (O'Connor, J., concurring). However, in *Smith*, the Supreme Court held that facially neutral and generally applicable laws need not satisfy strict scrutiny. *Id.* at 879.

"Three years later, in direct response to the *Smith* decision … Congress enacted the Religious Freedom and Restoration Act (RFRA), reapplying and extending the strict scrutiny test to all government actions, including those of state and local governments, that imposed substantial burdens on religious exercise." 146 Cong. Rec. 16,698, 16,702 (2000) (statement of Sen. Harry Reid). But in "*City of Boerne* v. *Flores*, the Supreme Court held that Congress lacked the authority to enact RFRA as applied to state and local governments." 146 Cong. Rec. 14,283 (2000) (statement of Sen. Orrin Hatch). Specifically, the Court determined that RFRA's protections exceeded Congress's remedial power under § 5 of the Fourteenth Amendment, and that "[w]hile preventive rules are sometimes appropriate remedial measures, there must be a congruence between the means used and the ends to be achieved." *City of Boerne* v. *Flores*, 521 U.S. 507, 530 (1997). The Court noted that, although Congress had held hearings prior to drafting, "RFRA's legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry." *Id.*

After *City of Boerne*, Congress proceeded to build a careful record of the problems RLUIPA was ultimately designed to remedy. Congress held numerous hearings[7] on religious discrimination prior to drafting

[7] *See, e.g.*, *Issues Relating to Religious Liberty Protection, and Focusing on the Constitutionality of Religious Protection Measures: Hearing Before the S. Comm. on the Judiciary*, 106th Cong. (1999); *Religious Liberty Protection Act of 1999: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 106th Cong. (1999); *Religious Liberty Protection Act of 1998: Hearing Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 105th Cong. (1998); *Religious Liberty Protection Act of 1998: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 105th Cong. (1998);

RLUIPA, which revealed that "land use regulations, either by design or neutral application, often prevent religious assemblies and institutions from obtaining access to a place of worship." 146 Cong. Rec. 14,283 (statement of Sen. Orrin Hatch). Examples of findings from the hearings include:

- "[Z]oning authorities have used their power to restrict churches' times of operation and the number of persons who may attend worship services, and zoning policies have effectively excluded minority faiths from certain jurisdictions and shut down the community ministries of houses of worship." H.R. Rep. No. 106-1048, at 272 (2001).

- There was "massive evidence that" religious institutions and assemblies were "frequently discriminated against on the face of zoning codes and also in the highly individualized and discretionary processes of land use regulation. 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. Or the codes permit churches only with individualized permission from the zoning board, and zoning boards use that authority in discriminatory ways." 146 Cong. Rec.

Protecting Religious Freedom After Boerne v. Flores (Part III): Hearing Before the H. Comm. on the Judiciary, 105th Cong. (1998); *Protecting Religious Freedom After Boerne v. Flores (Part II): Hearing Before the H. Comm. on the Judiciary*, 105th Cong. (1998); *Protecting Religious Freedom After Boerne v. Flores: Hearing Before the H. Comm. on the Judiciary*, 105th Cong. (1997).

16,698 (joint statement of Sens. Orrin Hatch and Ted Kennedy).

- "Sometimes, zoning board members or neighborhood residents explicitly offer race or religion as the reason to exclude a proposed church, especially in cases of black churches and Jewish shuls and synagogues." *Id.*

Further, Congress criticized municipalities for concealing their objections to religious organizations "behind such vague and universally applicable reasons as traffic, aesthetics, or not consistent with the city's land use plan." 146 Cong. Rec. 16,698 (joint statement of Sens. Orrin Hatch and Ted Kennedy). Congress explained that "[f]inding a location for a new church … can be extremely difficult in the face of pervasive land use regulation and the nearly unlimited discretionary power of land use authorities" such that "[c]hurches, large and small, are unwelcome in suburban residential neighborhoods and in commercial districts alike." H.R. Rep. No. 106-219, at 18. Indeed, it was "not uncommon for ordinances to establish standards for houses of worship differing from those applicable to other places of assembly, such as where they are conditional uses or not permitted in any zone." *Id.* at 19. One example from suburban Chicago demonstrated that "twenty-two of the twenty-nine suburbs effectively denied churches the right to locate except by grant of a special use permit." *Id.* Congress noted that "it was within the complete discretion of land use regulators whether these individuals had the ability to assemble for worship": "'The zoning board did not have to give a specific reason,'" but could "'say it is not in the general welfare'" or that the church was "'taking property off the tax rolls.'" *Id.* at 19-20.

Faced with this evidence, Congress drafted RLUIPA to institute specific protections against unequal treatment. It found that "[l]and use regulation is commonly administered through individualized processes [and the] standards in individualized land use decisions are often vague, discretionary, and subjective." H.R. Rep. No. 106-219, at 24. For example, Congress was well aware that tax revenue was one of a number of reasons local land use regulation tended to treat religious organizations unequally. *See id.* at 19 (Local governments "'can say it is not in the general welfare, or they can say that you are taking property off the tax rolls.'").

B. Courts' Refusal To Enforce RLUIPA As Written Has Prevented The Law From Having The Remedial Effect Congress Intended

Congress passed RLUIPA to address the serious and urgent problem of unfair treatment of religious organizations under municipal zoning laws. But the federal courts have largely failed to apply the law, instead crafting an array of interest-balancing tests that have frustrated and obscured RLUIPA's basic prescription of "equal terms."

Under these lower court tests, a local government need not provide equal terms to religious institutions, as long as they can find some "legitimate" (Pet. App. 21a) or "accepted" (*River of Life*, 611 F.3d at 371) criteria on which to base a distinction between a religious assembly or institution and secular ones. And there is no need for the municipality to define these criteria with any specificity unless and until they find themselves in court. *See* Pet. App. 119a (remanding to give the City an opportunity to show for the first time that

secular comparators would generate more tax revenue than Tree of Life).

Indeed, despite RLUIPA, municipalities continue to refuse to accommodate religious organizations for a host of reasons: traffic and noise (*Vision Church* v. *Village of Long Grove*, 468 F.3d 975, 991 (7th Cir. 2006)), parking space (*River of Life*, 611 F.3d at 373), even the protection of water supplies (*Hunt Valley Baptist Church, Inc.* v. *Baltimore Cty.*, 2017 WL 4801542, at *28 (D. Md. Oct. 24, 2017)). Other criteria are even more vague and subjective: "'complement[ing] the historic nature and traditional functions of the … area as the heart of community life'" (*Opulent Life Church* v. *City of Holly Springs*, 697 F.3d 279, 285 (5th Cir. 2012)), "ensur[ing] quiet seclusion for families living in the area" (*Eagle Cove Camp & Conference Ctr., Inc.* v. *Town of Woodboro*, 734 F.3d 673, 683 (7th Cir. 2013)), or the "main street" criterion—creating a "'vibrant' and 'vital' downtown residential community" with "extended-hours traffic and synergetic spending" (*Lighthouse Inst.*, 510 F.3d at 270).[8]

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[8] It is reasonable for a zoning board to consider things like traffic and noise when creating a zoning plan, and RLUIPA does not stop it from imposing restrictions on religious organizations. Those terms simply must be applied equally to all assemblies and institutions. *See Digrugilliers* v. *Consolidated City of Indianapolis*, 506 F.3d 612, 615 (7th Cir. 2007) ("Whatever restrictions the City imposes on other users of land in C–1 it can impose on the Baptist Church of the West Side without violating the 'equal terms' provision."). A municipality can go so far as to ban all assemblies and institutions from an area if it wants to. *Lighthouse Inst.*, 510 F.3d at 286 (Jordan, J., concurring in part and dissenting in part) ("[A]n ordinance prohibiting churches in a zone would not likely violate [the Equal Terms provision] if nonreligious assemblies and institutions were also prohibited." (citing *Konikov* v. *Orange Cty.*, 410 F.3d 1317, 1325-1326 (11th Cir.2005) (per curiam))).

Tax revenue is a particularly troubling zoning criterion. Despite RLUIPA's supposed protections, some municipalities have continued to use tax revenue maximization as a basis to discriminate, even so far as allowing other nonprofits or tax-exempt organizations in a zone where religious organizations are prohibited. *See, e.g.*, *Opulent Life*, 697 F.3d at 293 ("Insofar as this language can be read as purporting to create a commercial district, that justification fails because other noncommercial, non tax-generating uses are permitted in the district, as Holly Springs conceded at oral argument."); *Christian Assembly Rios De Agua Viva* v. *City of Burbank*, 237 F. Supp. 3d 781, 792 (N.D. Ill. 2017) ("On its face, the Prior Ordinance appears to treat similar assemblies on less than equal terms, then, because the secular institutions do not necessarily generate significant tax revenue and are non-commercial in nature."). Perhaps more concerning, some courts have *sanctioned* this use of tax revenue interests to discriminate against even tax-generating religious assemblies and institutions. In the case below, for instance, the municipality gamed its tax revenue maximization formula so as to demand that a church school demonstrate an employee payroll that would produce *enough* income tax per square foot to satisfy the municipality's revenue maximization goals. This impossibly vague and subjective inquiry turns the clear mandate of RLUIPA on its head.[9]

RLUIPA simply prohibits making a categorical decision that places of worship, religious schools, or other religious assemblies and institutions pose unique and insurmountable problems—problems that justify prohibiting them or placing special burdens on them—that nonreligious assemblies and institutions do not.

[9] Where a municipality simply creates an exclusively commercial zone, the restriction at least has the benefits of clarity and

When a challenger shows that an ordinance treats religious and nonreligious assemblies or institutions differently, the burden is supposed to shift to the municipality to prove that equal terms are being applied. 42 U.S.C. § 2000cc-2(b). A vague and subjective judgment call like the City's in this case—particularly one defined during the course of litigation—cannot be enough to carry that burden. As Judge Thapar put it:

> [I]f cities can take a vague regulatory purpose and define the parameters during the course of litigation, they can always avoid RLUIPA liability. All they have to do is find the parameters that make them win. Of course, if the ordinance itself mandated a particular way of calculating revenue, the case might be different. But here, the City's formula is something of a liability-avoiding chameleon.

Pet. App. 59a (Thapar, J., dissenting).

Congress crafted and unanimously passed a solution to these problems: municipalities must apply equal terms to religious and nonreligious assemblies and institutions. But this solution depends on the courts to enforce it. The atextual approach of the court below fails to do that.

CONCLUSION

This Court should grant certiorari and reverse.

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objectivity—assemblies and institutions that pay taxes are welcome, and others are not. *River of Life*, 611 F.3d at 373 ("[A] commercial assembly belongs in an all-commercial district and a noncommercial assembly, secular or religious, does not.").

Respectfully submitted.

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