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

AMICUS BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS*

The American Center for Law and Justice (ACLJ) is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys often appear before this Court as counsel either for a party, *e.g.*, *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009), or for amicus, *e.g.*, *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017).

This brief is also filed on behalf of the ACLJ's Committee to Defend Churches and Religious Schools from Discrimination which consists of over 61,000 Americans. The ACLJ and the Committee are dedicated to the defense of religious liberty generally, and in particular, to securing the protection that RLUIPA intended for churches and religious schools.

SUMMARY OF THE ARGUMENT

This Court's review is necessary both to bring a textually grounded approach to RLUIPA's Equal Terms provision and to arrest the erosion of religious liberty resulting from the lower courts' insertion of

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*Counsel of record for the parties timely received notice of the intent to file this brief and have filed with this Court blanket consents to the filing of amicus briefs. No counsel for any party in this case authored this brief in whole or in part. No person or entity aside from Amicus, their members, or their respective counsel made a monetary contribution to the preparation or submission of this brief.

qualifying terms contrary to the provision's straightforward requirements.

Although the Equal Terms provision requires courts simply to analyze whether religious assemblies and institutions are treated on equal terms with secular assemblies and institutions, the lower courts' addition of the qualifiers "similarly situated," "as to the regulatory purpose," or "with respect to accepted zoning criteria," has significantly hindered RLUIPA's goal of affording "broad protection of religious exercise." These qualifiers permit zoning authorities to subjugate protection for religious assemblies to artfully drafted zoning goals. The qualifiers also incentivize zoning authorities to change the regulatory purpose or zoning criteria during the course of frequently protracted litigation to ensure victory. Finally, these qualifiers inject needlessly complicated factual issues which are all too easily manipulated in the municipalities' favor. The playing field is then further tilted against religious assemblies by the deferential appellate review accorded to factual findings.

As occurred in this case, notwithstanding Congress's intent to level the playing field, religious assemblies face obstacles that the unambiguous Equal Terms provision never intended, putting religious assemblies in a position where they truly "can't win for losing."

ARGUMENT

Any right can be nullified by the addition of qualifiers. That is what has been happening to

RLUIPA rights in the lower courts. This Court should grant review in this case not only to bring order to the chaos prevailing among the federal appellate courts about the proper interpretation of RLUIPA's Equal Terms provision, but also to forestall further evisceration of the protection Congress intended RLUIPA's Equal Terms provision to provide.

The text of RLUIPA's Equal Terms provision is clear: "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) (2000). Thus, the "relevant 'natural perimeter' . . . is the category of assemblies and institutions." *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1230 (11th Cir. 2004); *Tree of Life Christian Sch. v. City of Upper Arlington*, 905 F.3d 357, 378 (6th Cir. 2018) (Thapar, J., dissenting) (Equal Terms cases involve a comparison between religious and nonreligious "assemblies" and "institutions," terms that must be given their natural and ordinary meaning); *River of Life Kingdom Ministries v. Vill. of Hazel Crest*, 611 F.3d 367, 389 (7th Cir. 2010) (Sykes, J., dissenting) (the statute requires courts to ask whether a zoning code treats "a religious assembly or institution less well than a nonreligious assembly or institution").

Congress did not further specify the categories of religious and secular assemblies or institutions that should be compared with each other. The term "similarly situated" is conspicuously absent. Yet, to varying degrees, eight circuits have imported the term "similarly situated" into the statute, requiring

that religious assemblies show that they are "similarly situated" to secular assemblies that were accorded better treatment by zoning authorities. *See Third Church of Christ, Scientist, of N.Y.C. v. City of New York*, 626 F.3d 667, 667 (2d Cir. 2010); *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 264 (3d Cir. 2007); *Opulent Life Church v. City of Holly Springs Miss.*, 697 F.3d 279, 292–93 (5th Cir. 2012); *Tree of Life Christian Sch.*, 905 F.3d at 368–69; *River of Life Kingdom Ministries,* 611 F.3d at 387; *Centro Familiar Cristiano Buenas Nuevas v. City of Yuma*, 651 F.3d 1163, 1172–73 (9th Cir. 2011); *Life Vision Church v. Vill. of Long Grove*, 468 F.3d 975, 1003 (7th Cir. 2006); *Rocky Mountain Christian Church v. Bd. of Cty. Comm'rs*, 613 F.3d 1229, 1237 (10th Cir. 2010); *Primera Iglesias Bautista Hispana of Boca Raton, Inc. v. Broward Cty.*, 450 F.3d 1295, 1311 (11th Cir. 2006) (Plaintiff must allege in as-applied Equal Terms challenges that the municipality "differentially treats similarly situated religious and nonreligious assemblies under a neutral zoning code.").

Similarly missing are the qualifiers "as to the government's regulatory purpose" or "with respect to accepted zoning criteria." Yet, the tests adopted by the Third, Fifth, and Ninth Circuits all require an inquiry into the zoning authority's "regulatory purpose." *See Lighthouse Inst.*, 510 F.3d at 264; *Opulent Life Church*, 697 F.3d at 292–93; *Centro Familiar Cristiano*, 651 F.3d at 1172–73. The tests adopted by the Sixth and Seventh Circuits require an inquiry into zoning criteria. *River of Life Kingdom Ministries*, 611 F.3d at 387 ("accepted zoning criteria"); *Tree of*

Life Christian Sch., 905 F.3d at 368–69 ("legitimate zoning criteria"). The Ninth Circuit stands alone in combining approaches by inquiring into the zoning authority's regulatory purpose "with respect to accepted zoning criteria." *Centro Familiar Cristiano Buenas Nuevas*, 651 F.3d at 1172–73.

Because Congress has employed the term "similarly situated" in numerous other statutes, Congress's choice to omit it from the Equal Terms provision must be deemed intentional. *See* Douglas Laycock & Luke Goodrich, *RLUIPA: Necessary, Modest, and Under-Enforced*, 39 Fordham Urb. L.J. 1021, 1061 n.242 (2012) (Congress has employed "similarly situated" approximately ninety-six times in a wide variety of federal statutes.). Similarly, the omission of any caveat related to a municipality's regulatory purpose or zoning criteria strongly suggests Congress did not intend RLUIPA to permit unequal treatment when it could be justified by the municipality's regulatory purpose or zoning criteria.

All these qualifiers have been added to the Equal Terms provision out of the apparent conviction that Congress must have meant something other than what it said. To the contrary, courts must "modestly" "'presume . . . that [the] legislature says . . . what it means and means . . . what it says.'" *Hamer v. Neighborhood Hous. Servs.*, 138 S. Ct. 13, 20 (2017) (quoting *Dodd v. United States*, 545 U.S. 353, 357 (2005)). When courts disagree with Congress's word choices, they "are perfectly entitled to say so—in lectures, in law review articles, and even in dicta. But [they] are not entitled to replace the statute Congress enacted with an alternative of [their] own design."

Yates v. United States, 135 S. Ct. 1074, 1101 (2015) (Kagan, J., joined by Scalia, Kennedy, & Thomas, JJ., dissenting). Adding qualifiers to the Equal Terms provision flies in the face of Congress's directive that courts should construe RLUIPA in favor of "broad protection of religious exercise to the maximum extent permitted by its terms and the Constitution." 42 U.S.C. § 2000cc-3(g) (2000).

I. This Court Should Grant Review Because the Circuit Courts' Addition of Extra-Textual Qualifiers Nullifies RLUIPA's Equal Terms Provision by Exalting Municipal Zoning Goals over Protection of Religious Assemblies.

Permitting the municipality's "regulatory purpose" or "zoning criteria" to determine whether religious and secular assemblies are similarly situated eviscerates the Equal Terms provision. Zoning authorities need only define the regulatory purpose narrowly enough to ensure that religious assemblies are excluded. For example, a significant number of RLUIPA cases involve zoning goals promoting economic interests. Unsurprisingly, such interests typically result in the exclusion of tax-exempt religious assemblies. *See, e.g.*, *Lighthouse Inst. for Evangelism, Inc.*, 510 F.3d at 258 (holding that the zoning redevelopment plan to economically revitalize underdeveloped section of the city justified the exclusion of Lighthouse Institute); *Tree of Life Christian Sch.*, 905 F.3d at 371–75 (holding that the regulatory purpose of "revenue maximization"

justified exclusion of Christian school); *River of Life Kingdom Ministries*, 611 F.3d at 377 (holding that the zoning purpose of establishing a commercial district justified exclusion of River of Life even though health clubs, gymnasiums, and daycare centers were permitted); *Riverside Church v. City of St. Michael*, 205 F. Supp. 3d 1014, 1036 (D. Minn. 2016) (adopting both the Third and Seventh Circuit's tests and holding that: (1) the government's regulatory purpose was to strengthen the City's economy by providing for business and retail uses; (2) zoning criteria included "generation of taxable revenue and shopping opportunities;" and (3) the church was properly excluded because it did not provide taxable revenue); *First Korean Church of N.Y., Inc. v. Cheltenham Twp. Zoning Hearing Bd. & Cheltenham Twp.*, No. 05-6389, 2012 U.S. Dist. LEXIS 25968, at *42 (E.D. Pa. Feb. 29, 2012) (holding that the regulatory purpose to "maximize tax base" justified exclusion of church).

Perhaps one of the most egregious examples of a municipality's use of economic "regulatory purposes" and "zoning criteria" to squeeze out a religious assembly occurred in *Calvary Chapel Bible Fellowship v. City of Riverside*, No. 16-259, 2017 U.S. Dist. LEXIS 217331 (C.D. Cal. Aug. 18, 2017). The saga began in 1996 when Calvary Chapel Bible Fellowship (CCBF) acquired its property in Riverside County in the Citrus/Vineyard zone in which religious assemblies were permitted. *Id.* at *4. Over the course of two decades, the relevant zoning ordinance was amended numerous times, with the final version permitting the church only if it submitted a "plot plan application" and agreed to operate an on-site

vineyard. *Id.* at *4–10. First, the county changed the zoning district's purpose: to promote "the wine-making atmosphere and long term viability of the wine-industry." *Id.* at *4.

The county then amended the ordinance definition of a public assembly as:

> Any place designed for or used for congregation or gather[ing] of 20 or more persons in one room where such gathering is of a public nature, assembly hall, *church,* auditorium, recreational hall, pavilion, place of amusement, dance hall, opera house, motion picture theater, outdoor theater or theater, are included within this term.

Id. at *32 (emphasis added). Another section of the ordinance provided, however, that public assemblies were only permitted as "special occasion facilities." *Id.* Special occasion facilities were only permitted subject to a "plot plan application," which required the applicant to show that the property would contain an on-site vineyard, and be used in conjunction with a dwelling or winery. *Id.* at *35.

The county argued and the court held that because these requirements applied to both secular and religious "public assemblies," there was no Equal Terms violation. *Id.* Thus, through clever zoning amendments redefining zoning criteria and purposes, the county effectively barred the church from using its property, (which it had acquired prior to all the zoning amendments). *Id.* at *34–35. Because the county cabined the church within a very narrow category of

"public assemblies," the court did not even consider whether other permitted uses, such as day care centers, were also secular comparators for purposes of the church's Equal Terms claim.

RLUIPA's legislative record indicates that Congress regarded municipal zoning authorities' regulatory purpose or zoning criteria as irrelevant in RLUIPA enforcement actions. Congress recognized that zoning ordinances which excluded religious assemblies were often motivated by economic concerns: "One explanation suggested for this disparate treatment was that local officials may not want non-tax-generating property taking up space where tax-generating property could locate." *See* H.R. Rep. No. 106-219, at 20 (1999). Describing the problem that RLUIPA addressed, Senators Orrin Hatch and Edward Kennedy observed that "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." 146 Cong. Rec. 16,698 (2000) (joint statement of Sen. Hatch and Sen. Kennedy).

Having understood that discriminatory treatment of churches was frequently motivated by economic concerns, Congress nevertheless prohibited such treatment. The Equal Terms provision targets zoning ordinances that exclude religious assemblies but allow many other uses that would promote economic interests, such as "banquet halls, clubs, community centers, funeral parlors, fraternal organizations, health clubs, gyms, places of amusement, recreation

centers, lodges, libraries, museums, municipal buildings, meeting halls, and theaters." H.R. Rep. No. 106-219, at 19. The only possible conclusion then is that Congress did not intend religious assemblies to be treated on unequal terms, regardless of whether the disparity furthered the municipality's "regulatory purpose," or "legitimate zoning criteria."

Additionally, the qualifiers "similarly situated," "as to the government's regulatory purpose" or "with respect to accepted zoning criteria" incentivize municipalities to amend zoning ordinances after RLUIPA claims are filed to tilt the playing field in the municipalities' favor. Exclusion of religious assemblies can be easily justified by zoning amendments that concoct new criteria or purposes to justify the exclusion. Such amendments can significantly protract the litigation. For example, in *Lighthouse Institute for Evangelism, Inc.,* the ordinance that the plaintiff initially challenged permitted numerous uses, including "assembly halls," but not churches. 510 F.3d at 257. Two years after the lawsuit began, the city amended that ordinance, adopting a redevelopment plan that redefined the regulatory purpose as economic revitalization of an underdeveloped area of the city. *Id*. at 258. The court held that the amended ordinance did not violate the Equal Terms provision because churches were not similarly situated to the other allowed secular assemblies with respect to the City's purpose of revitalizing an underdeveloped area of the town. *Id*. at 270.

In *Opulent Life Church*, 697 F.3d at 284, the City amended its zoning ordinance the night before oral

argument before the Fifth Circuit. The ordinance had permitted churches only if they obtained approval by neighboring property owners, the mayor and the Board of Aldermen. *Id.* at 283. The amended ordinance redefined the church's zoning district as a "Business Courthouse Square District," whose purpose was "to designate the area . . . for certain retail, office and service uses which will complement the historic nature and traditional functions of the court square area as the heart of community life." *Id.* at 293. All religious assemblies were excluded from the district, although museums, libraries and art galleries were permitted. *Id.* Nevertheless, the court remanded the case back to the district court to address whether the amended ordinance violated the Equal Terms provision. *Id.* at 299.

In this case, the City of Upper Arlington apparently recognized that Tree of Life was "similarly situated" with a nonprofit daycare after the district court held that Tree of Life was likely to prevail on its Equal Terms claim. The City accordingly amended its zoning code to exclude nonprofit daycare centers from the district. Based on the zoning amendment, the district court then granted summary judgment to the City. Pet. Br. App. at 221a–22a.

If federal courts interpreted the Equal Terms provision according to its plain terms, mid-litigation maneuvering by zoning authorities, such as took place here, would be unavailing.

II. This Court Should Grant Review Because the Extra-Textual Qualifiers Created by the Lower Courts Eviscerate the Equal Terms Provision by Hinging Protection for Religious Assemblies on Trivial Factual Distinctions between Religious and Secular Assemblies.

Contrary to the straightforward inquiry contemplated by the Equal Terms provision, the importation of qualifiers "similarly situated," "as to the government's regulatory purpose," or "with respect to accepted zoning criteria," has immersed much Equal Terms litigation in picayune factual issues involving trivial differences between religious and secular assemblies. As one court wryly put it: "The Court's prior opinion in this case addressed the question 'when is a church like a library?' Now the Court must address a more narrow question: 'when is this church like that library?'" *Immanuel Baptist Church v. City of Chi.*, No 17-00832, 2018 U.S. Dist. LEXIS 164738, at *1 (N.D. Ill. Sept. 26, 2018) (internal emphasis omitted).

The case at bar is a particularly grievous example of how the malleable "similarly situated comparator" requirement results in minute factual distinctions that gut the protection that the Equal Terms provision was intended to afford. The Sixth Circuit held that nonprofit daycare centers were not similarly situated secular comparators because even though expert testimony established that Tree of Life would generate more total revenue for the City, nonprofit daycare centers would generate more revenue per

square foot because they typically occupy much less space than the Tree of Life campus would occupy.[1] *Tree of Life Christian Sch.*, 905 F.3d at 374–75.

Subjective and multifaceted zoning criteria render the similarly situated secular comparator analysis even more prolix. For example, in *Society of American Bosnians & Herzegovinians v. City of Des Plaines*, No. 8628, 2017 U.S. Dist. LEXIS 26542 (N.D. Ill. Feb. 26, 2017), the relevant zoning criteria for determining whether to grant a rezoning request contained five highly subjective subparts:

> (1) whether the proposed amendment is consistent with the goals, objectives, and policies of the City's comprehensive plan;
> (2) whether the proposed amendment is compatible with current conditions and overall character of the development in the immediate vicinity of the property;
> (3) whether the proposed amendment is appropriate considering the adequacy of public facilities and services available to this subject property;
> (4) whether the proposed amendment will have an adverse effect on the value of properties throughout the jurisdiction; and

[1] Tree of Life's expert witness estimated that the new campus would serve 1200 students, grades K-12, with a workforce of 275 staff members and an annual payroll of $5 million. 905 F.3d at 374.

> (5) whether the proposed amendment reflects responsible standards for development and growth.

Id. at *7–8. In that case, a Muslim religious assembly ("AIC") sought to build a facility for religious and educational purposes in a district zoned for manufacturing uses. AIC asked the City to rezone the land from M-1 (manufacturing) to I-1 (institutional) in which places of worship, religious institutional headquarters, and schools were permitted. Even though the City granted identical rezoning requests to a science and arts academy and a nonprofit cultural society, it denied AIC's request. *Id*. at *3.

Under a straightforward application of the Equal Terms provision, AIC should easily have prevailed. Instead, after engaging in lengthy comparisons of AIC with the science and arts academy and the nonprofit cultural society, in light of the zoning criteria, the court threw up its hands and decided that more factual development was necessary to resolve the case. *Id*. at *37.

Similarly, in *Roman Catholic Archdiocese of Kansas City v. City of Mission Woods*, 337 F. Supp. 3d 1122 (D. Kan. 2018), the court conducted a lengthy factual analysis of whether a Catholic church's proposed use of a house adjacent to its property was similarly situated to uses previously approved for a secular private school. The analysis required consideration of no less than nine zoning criteria, and three different use approval requests by the private school. *Id*. at 1129, 1143–45. After weighing the evidence, the court decided that further factual

development was required and denied summary judgment to both the city and the church. *Id.* at 1145.

The inherently subjective nature of most zoning criteria also enables result-oriented interpretation by zoning officials. For example, in *Truth Foundation Ministries, NFP v. Village of Romeoville*, No. 7839, 2016 U.S. Dist. LEXIS 23598, at *53–54 (N.D. Ill. Feb. 26, 2016), the court denied a church's motion for a preliminary injunction on its Equal Terms claim because the church was not similarly situated to an art museum. Art museums were permitted uses in the "light manufacturing research park" where the church's property was located. *Id.* The court based its ruling on a zoning official's testimony that the ordinance did not actually mean the "conventional understanding of an art museum." *Id.* Rather the ordinance permitted "only artisans employed by the industrial inhabitants to display their works of art." *Id.* at *53. The trial court found the testimony credible because it comported with one of the zoning criteria which was "[t]o discourage uses . . . incompatible with planned industrial uses." *Id.* at *54.

A final problem with the fact-driven analyses required by the extra-textual modifiers is that they are subject to very deferential appellate review. Fed. R. Civ. P. 52(a). In other contexts where the plaintiff must show that he is similarly situated to another, the issue is a question of fact for the jury. *See, e.g.*, *McDonald v. Vill. of Winnetka*, 371 F.3d 992, 1002 (7th Cir. 2004) (Equal Protection Clause claim); *Riggs v. Airtran Airways, Inc.*, 497 F.3d 1108, 1117 (10th Cir. 2007) (ADEA claim); *Graham v. Long Island R.R.*, 230 F.3d 34, 39 (2d Cir. 2000) (Title VII claim).

At least within the Tenth Circuit, whether religious and secular entities are similarly situated is a jury question. *Roman Catholic Archdiocese of Kan. City*, 337 F. Supp. 3d at 1141 (citing *Rocky Mountain Christian Church*, 613 F.3d at 1236). Thus, as the Tenth Circuit held, a highly deferential "sufficiency of the evidence" standard of review must be applied to the jury's factual findings on the church's Equal Terms claim. *Rocky Mountain Christian Church*, 613 F.3d at 1235–36. The appellate court must not "weigh evidence, judge witness credibility, or challenge the factual conclusions of the jury," and the court must not "substitute [its] judgment for that of the jury." *Id.* at 1236.

Whether the fact-finder is judge or jury, religious liberty rights hinge on fact-intensive determinations that are contrary to the plain text of the Equal Terms provision and yet are unlikely to be reversed on appeal. In sum, RLUIPA's goal of providing maximum protection for religious assemblies cannot be realized when enforcement actions are mired in multifaceted factual determinations that the Equal Terms provision does not require.

CONCLUSION

Amicus respectfully requests this Court to grant the petition.

Respectfully submitted,

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