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 *AMICI CURIAE* CIVIL LIBERTIES FOR URBAN BELIEVERS AND SOUTHEASTERN LEGAL FOUNDATION IN SUPPORT OF PETITIONER

KIMBERLY S. HERMANN
SOUTHEASTERN LEGAL FOUNDATION
560 W. Crossville Rd., Ste. 104
Roswell, GA 30075

JOHN W. MAUCK
Counsel of Record
MAUCK & BAKER, LLC
One N. LaSalle St., Ste. 600
Chicago, IL 60602
(312) 726-1243
jmauck@mauckbaker.com
Counsel for Amici Curiae

February 19, 2019

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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INTEREST OF *AMICI CURIAE*[1]

Civil Liberties for Urban Believers (CLUB), founded in 1992, is an unincorporated association of approximately 50 Chicago-area religious or not-for-profit Illinois corporations ranging in size from 15 to 5,000 members. Many members of CLUB have personally experienced zoning treatment on unequal terms when compared with non-religious assemblies and institutions.

Southeastern Legal Foundation (SLF) has an abiding interest in the protection of the freedoms set forth in the First Amendment—specifically the freedom of speech and the freedom to exercise one's religion. This is especially true when the law suppresses free discussion and debate on public issues that are vital to America's civil and political institutions, and when the law suppresses one from expressing his or her religious beliefs. SLF is profoundly committed to the protection of American legal heritage, which includes all of those protections provided for by our Founders in the First Amendment. SLF drafts legislative models, educates the public on key policy issues, and litigates often before the Supreme Court, including such cases as *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427 (2014), and *National Association of*

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[1] *Amici curiae* notified the parties 10 days before the filing of this brief of their intent and request to file it. All parties consented to the filing of this brief in letters. *See* Sup. Ct. R. 37.2(a). No counsel for a party has authored this brief in whole or in part, and no person other than *amici curiae*, their members, and their counsel has made a monetary contribution to the preparation or submission of this brief. *See* Sup. Ct. R. 37.6.

Manufacturers v. Department of Defense, 138 S. Ct. 617 (2018).

SUMMARY OF ARGUMENT

Congress was confronted with a problem. For many years, state and local zoning codes across the United States were providing more favorable treatment to non-religious assembly uses than religious ones. Religious assemblies were being excluded from areas where theaters and meeting halls were freely allowed to locate. Elsewhere, religious assemblies and institutions were required to seek permission before engaging in religious land use, whereas non-religious assemblies and institutions were not subject to any similar requirements.

Congress intended that the "equal terms" provision of the Religious Land Use and Institutionalized Persons Act (RLUIPA) rectify the problem of unequal treatment of religious and non-religious assemblies and institutions within state and local zoning codes. The purpose of the "equal terms" provision is clear in both its text and its legislative history.

Courts, however, have introduced a number of atextual limitations and factors into their analysis of RLUIPA's "equal terms" provision. In so doing, courts have openly disregarded the text and legislative history of the statute itself. As a direct result, the unequal treatment problem continues today. *Amici* therefore join Petitioner in asking this Court to resolve the

current circuit split in a manner consistent with the text and legislative history of RLUIPA's "equal terms" provision.

ARGUMENT

I. Congress identified a problem: the unequal treatment of religious and non-religious assemblies and institutions within state and local zoning codes.

The Religious Land Use and Institutionalized Persons Act (RLUIPA) was signed into law by President William J. Clinton on September 22, 2000. *See* Pub. L. No. 106-274, 114 Stat. 803-807, codified at 42 U.S.C. §§ 2000cc, *et seq*. Preceding the enactment of RLUIPA, Congress held nine hearings over the course of three years to evaluate the need for legislation to address discrimination against religious land use by state and local governments. During those hearings, witnesses provided Congress with "massive evidence" of widespread discriminatory zoning practices against religious institutions and assemblies. *See* 146 Cong. Rec. S7774-75 (daily ed. July 27, 2000) (joint statement of Sen. Hatch and Sen. Kennedy); H.R. Rep. No. 106-219, at 23-24 (1999). The unequal treatment of religious and non-religious assemblies and institutions was of particular concern. Zoning codes were frequently found to burden or exclude religious assemblies while favoring non-religious assembly uses:

> [B]anquet 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 are often permitted as of right in zones where churches require a special use permit, or permitted on special use permit where churches are wholly excluded.

H.R. Rep. 106-219, at 19-20.

One religious leader testified that the City of Los Angeles, California, recognized no obligation to accommodate the religious needs of a small gathering of Orthodox Jews, despite the willingness to accommodate a number of non-religious uses within the same area, "including recreational facilities, private clubs, schools, book clubs, embassy parties, charitable events, and motion picture and television filming." *Protecting Religious Freedom after* Boerne v. Flores *(Part II): Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 105th Cong. 33 (1998) (statement of Chaim Rubin, Rabbi, Congregation Etz Chaim in Los Angeles, California).

Another witness testified that the City of Clifton, New Jersey, denied a permit for a church to use an abandoned theater, because the town preferred that an art group take over the space. *Protecting Religious Freedom after* Boerne v. Flores *(Part III): Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 105th Cong. 11 (1998) (statement of Marc D. Stern, Legal Director, American Jewish Congress).

An attorney testified and submitted a statement that client churches were prevented from locating in a funeral parlor, a night club district, a theater, a Veterans of Foreign Wars meeting hall, an abandoned department store, and a Masonic Temple. *Religious Liberty Protection Act of 1998: Hearings on H.R. 4019 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 105th Cong. 92, 98 (1998) (statement of John Mauck, Attorney, Mauck, Bellande & Cheely, Chicago, IL).

Another witness testified and submitted a statement that Rolling Hills Estates, California, had banned the establishment of any new churches within city limits, despite the willingness to accommodate places of non-religious assembly, "including public and private schools, government buildings, public and private clubs, recreational centers, movie theaters, live theaters, clubs for games with spectator seating, and many others." *Religious Liberty Protection Act of 1999: Hearing on H.R. 1691 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 106th Cong. 102-103, 110 (1999) (statement of Douglas Laycock, Associate Dean for Research, University of Texas Law School).

Faced with "massive evidence" of widespread discriminatory state and local zoning practices, Congress identified the unequal treatment of religious and non-religious assemblies and institutions as a problem requiring a legislative solution.

II. Congress crafted a solution: the "equal terms" provision of RLUIPA was created to solve the unequal treatment problem.

Under RLUIPA, "[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).

The provision is a direct response to the observation that "[z]oning codes frequently exclude churches in places where they permit theaters, meeting halls, and other places where large groups of people assemble for secular purposes." 146 Cong. Rec. S7774.

The provision is a direct response to the recommendation to codify the following protection for churches experiencing land use problems: "that equal access is assured wherever a community allows a place of public assembly, be it a meeting hall, community centers, theaters, schools, wherever the zoning permits these kinds of uses, it should not be allowed to prohibit churches." *Protecting Religious Freedom after* Boerne v. Flores *(Part III): Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 105th Cong. 28 (1998) (statement of Steven T. McFarland, Director, Center for Law and Religious Freedom of the Christian Legal Society).

The provision is a direct response to the following questions: "[W]herever you allow a secular assembly, why not allow a religious assembly? Why discriminate on the basis of the content of the discussion that is

going on? If there is allowed a meeting hall discussing great books, why not allow a religious assembly discussing the Bible?" *Religious Liberty Protection Act of 1998: Hearings on H.R. 4019 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 105th Cong. 93 (1998) (statement of John Mauck, Attorney, Mauck, Bellande & Cheely, Chicago, IL).

Under the "equal terms" provision of RLUIPA, Congress intended to put an end to the unequal treatment of religious and non-religious assemblies and institutions under state and local zoning codes. Local governments would no longer be permitted to treat non-religious assembly uses more favorably than religious ones. The "equal terms" provision was created to ensure fundamental fairness.

III. The unequal treatment problem persists because courts have deviated from the text of the "equal terms" provision of RLUIPA and its legislative history.

When confronted with the text of the "equal terms" provision of RLUIPA and its legislative history, courts have been hesitant or unwilling to fully implement the solution crafted to solve the unequal treatment problem identified by Congress. Instead, courts have openly discussed their willingness to deviate from the text of the "equal terms" provision and its legislative history. The Court of Appeals for the Seventh Circuit provides such an example.

In the Seventh Circuit, Judge Cudahy, in defending the majority's introduction of an atextual limitation into the court's "equal terms" analysis, observed that "[a]lthough Congress may have intended to prescribe a standard more open-ended than traditional 'discrimination,' its application, as a practical matter, requires, for reasons suggested by the majority, some limitations to be provided by the judiciary." *River of Life Kingdom Ministries v. Vill. of Hazel Crest*, 611 F.3d 367, 374 (7th Cir. 2010) (Cudahy, J., concurring). Judge Manion similarly conceded that there were "potential flaws with the [majority's] standard, given the statutory text and historical and legislative background to the Religious Land Use and Institutionalized Persons Act." *Id*. at 375 (Manion, J., concurring). However, any departure from the statutory text and historical and legislative background of RLUIPA was deemed excusable, because the majority's standard—as applied to the case—was sufficient to produce an acceptable result. *Id*.

Judge Sykes was less forgiving in her evaluation of the majority's "equal terms" analysis, which authorized the exclusion of a church from an area where non-religious assembly uses—such as commercial gymnasiums and health clubs—were expressly permitted. *Id*. at 378 (Sykes, J., dissenting). In Judge Sykes' estimation, the majority's "interpretation departs from the text, structure, and history of RLUIPA." *Id*. Judge Sykes recognized that Congress intended to address the unequal treatment of religious and non-religious assemblies and institutions through the "equal terms" provision of RLUIPA. Hence, any

application of RLUIPA that fails to correct the unequal treatment is fundamentally at odds with both the text of the "equal terms" provision and its legislative history.

In the Third Circuit, Judge Roth criticized the Eleventh Circuit's text-based approach to RLUIPA's "equal terms" provision, arguing that "[i]ts reading of the statute would lead to the conclusion that Congress intended to force local governments to give any and all religious entities a free pass to locate wherever any secular institution or assembly is allowed." *Lighthouse Inst. for Evangelism, Inc. v. City of Long Beach*, 510 F.3d 253, 268 (3d Cir. 2007). Whether Congress intended for religious assemblies and institutions to have a "free pass" is certainly debatable. However, it is clear from the text of the "equal terms" provision and its legislative history that Congress was concerned about state and local governments burdening or excluding churches from areas where non-religious assembly uses are permitted.

Judge Jordan identified a significant consequence of the Third Circuit's rejection of the Eleventh Circuit's text-based approach. In deviating from the text of the "equal terms" provision and its legislative history, the Court found no violation of RLUIPA where "the challenged ordinances permit schools, assembly halls, gyms, theaters, cinemas, restaurants, and bars and clubs" but "[r]eligious assemblies, such as churches and synagogues, are not permitted." *Id*. at 285 (Jordan, J., concurring in part and dissenting in part). Casting further doubt on the Court's "equal terms" analysis,

Judge Jordan offered a modest proposal: "[W]e should be starting with the text. If we were taking the language Congress chose as the starting point of our analysis, we would not only be faithful to legislative intent, we would avoid the confusion that attends a multiplication of legal tests." *Id*.

There are consequences when courts stray from the text and legislative history of the laws they are tasked with interpreting and applying to the facts of each case. These consequences are especially severe when interpretation and application are permitted to run counter to text and legislative history. In those instances, a sharp course correction is warranted to restore the appropriate separation of powers.

CONCLUSION

For all these reasons, and those stated by Petitioner, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

KIMBERLY S. HERMANN
SOUTHEASTERN LEGAL FOUNDATION
560 W. Crossville Rd., Ste. 104
Roswell, GA 30075

JOHN W. MAUCK
Counsel of Record
MAUCK & BAKER, LLC
One N. LaSalle St., Ste. 600
Chicago, IL 60602
(312) 726-1243
jmauck@mauckbaker.com
Counsel for Amici Curiae