

No. 18-944

IN THE
Supreme Court of the United States

TREE OF LIFE CHRISTIAN SCHOOLS,

Petitioner,

—v.—

CITY OF UPPER ARLINGTON, OHIO,

Respondent.

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

**BRIEF FOR *AMICUS CURIAE* PARENTS OF STUDENTS
OF TREE OF LIFE CHRISTIAN SCHOOL
IN SUPPORT OF PETITIONER**

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INTEREST OF AMICUS CURIAE¹

The Three Hundred and Forty Two (342) parents of students who attend Tree of Life Christian School are individuals dedicated to raising their children up in a strong religious faith tradition.² Amici believe Christian Schools offer a Christ-centered learning environment and are committed to achieving educational goals grounded in biblical truth. This type of education provides the framework to help children discover and understand the truth about the world around them and equip them to address the issues from a Christian perspective.

**INTRODUCTION AND
SUMMARY OF ARGUMENT**

The opinion below adopts an unnecessarily narrow interpretation of RLUIPA. Fifteen years earlier, the opinion's author wrote another opinion—one that held RLUIPA unconstitutional as a facial violation of the Establishment Clause. *See Cutter v. Wilkinson*, 349 F.3d 257 (6th Cir. 2003). This Court, of course, unanimously

1 No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amicus curiae, or its counsel made a monetary contribution intended to fund its preparation or submission. Letter of the Parties general consent to the filing of amicus briefs are on file with the Court. Web sites cited in this brief were last visited on February 14, 2019.

2 The names of the 342 parents of students of Tree of Life Christian School are set forth in Appendix 1 to this brief.

reversed. *See Cutter v. Wilkinson*, 544 U.S. 709 (2005). But maybe this helps to explain why the court below, and others, have adopted constricted interpretations of RLUIPA that defy the statutory text. Congress saw RLUIPA as creating a necessary set of protections for vulnerable religious institutions. But many judges are more suspicious of RLUIPA and, as a result, have adopted confining and unjustified interpretations of it.³ *See* J.A. at 37a (Thapar, J., dissenting) (“[C]ourts have forgotten this country’s sacred vow and failed to give RLUIPA the effect its written text demands.”).

This case presents important questions about RLUIPA’s equal-terms provision, which places religious assemblies—like schools and churches—on equal footing with secular assemblies located in the same zoning district and under the same zoning code. Amicus agrees with Petitioner that conflicts between rulings in the courts of appeals

³ The opinion below is a good example. It mentions the Establishment Clause repeatedly, and frequently raises the concern that RLUIPA unfairly gives religious institutions preferential treatment. With such a mindset, a narrow construction for RLUIPA follows quickly. *See, e.g.*, J.A. at 18a (“Did Congress intend for the statute to require municipalities to extend preferential treatment to religious entities? We think not. Such a requirement . . . would likely run afoul of the First Amendment’s Establishment Clause.”); J.A. at 22a (worrying about the “preferential treatment to religious assemblies” that would result if “an excluded religious assembly or institution could invoke RLUIPA to secure an exemption from the ordinance, but an excluded secular assembly or institution—say, a union hall—could not”).

on the questions presented warrant this Court's review.

Amicus respectfully urge this Court to restore to RLUIPA to its true and intended scope. Amicus are parents of children who attend Tree of Life. Amicus believe deeply in its religious mission, and amicus have seen that religious mission undermined by Respondent's actions in this case. Amicus want simply to tell their story, in part because that story matters in itself and in part because that story bears on the reasons why Congress adopted RLUIPA, as well as the proper construction of that statute. Amicus believe the decision below undermines religious schools and RLUIPA's protection of them. In particular, amicus object to its conclusion that local governments can claim tax revenue as a compelling governmental interest for banning religious schools. Finally, for reasons that follow, amicus believe the Court should simply apply the plain, statutory text, not a judicial gloss, when evaluating claims under RLUIPA's equal-terms provision.

ARGUMENT

I. The Gift of Religious Education in Religious Schools

The meta-narrative, the overarching story of this case, has to do with the opportunity this new building will be to students and families at Tree of Life Christian Schools. For both children and their parents, the place where pupils learn, and worship has value far beyond its monetary worth. It could well be, for many children and their parents, that space is sacred and effectively

priceless, worth far more than the simple dollar value the property might suggest. This is true, we submit, for Tree of Life. Moreover, other religious organizations may even have a requirement that members live close to worship space, adding even greater importance to the location. Others may choose to locate in areas where religious schools are readily accessible so they are part of a community that addresses religious education and spirituality together so as to best inculcate religious ideals. The importance people give to place, be it a local community, a school, or place of worship, may help to explain in part why these contests become highly charged, as religion is at the core of how many people identify themselves.

Amicus believe a school's ultimate purpose should be to equip children to understand the truth about life, the world, and their place in it. They also believe in order to understand these truths, the deeper questions regarding the meaning and purpose of life cannot be ignored. The curriculum of public education cannot guide students through these deeper questions of life, and it cannot use the Word of God as its standard of truth. Christian schools, on the other hand, seek to equip students to recognize the Lordship of Christ in all subject areas of learning, and to respond in obedience to His call to be transforming influences in society.

Yet not only does a school shape a child's mind, it shapes a child's heart as well. All schools have a vision for the kind of person they want their students to become. Schools do not merely convey information; they seek to educate the emotions and influence the living actions of a child's life.

The power a school has to impress a worldview on a youngster is great.

II. The Gift of Religious Education at Tree of Life

Tree of Life Christian Schools takes its name from the Bible. The book of *Genesis* describes the Garden of Eden: “In the middle of the garden were the tree of life and the tree of the knowledge of good and evil.” *Genesis* 2:9. The tree of life is a theme Scripture returns to repeatedly, in different contexts. *See, e.g.,* PROVERBS 3:18 “[Wisdom] is a tree of life to those who take hold of her; those who hold her fast will be blessed.”); REVELATIONS 22:2 (“On each side of the river stood the tree of life, bearing twelve crops of fruit, yielding its fruit every month. And the leaves of the tree are for the healing of the nations.”). Tree of Life has taken these passages to heart, earnestly seeking to create a religious community that develops children into thoughtful, resourceful, compassionate Christians, devoted to God in Christ.

Tree of Life is deeply committed to the Christian faith. Parents choose Tree of Life instead of the public schools, and instead of other private schools, because of the religious mission that pervades everything Tree of Life does. Tree of Life’s mission statement puts this point squarely: “In partnership with the family and the church, the mission of Tree of Life Christian Schools is to glorify God by educating students in His truth and disciplining them in Christ.” J.A. at 63a. The goal of Christian education, Tree of Life believes, is to guide children towards an understanding that God is at the center of every pursuit of knowledge.

Tree of Life's Vision Statement makes this point: "As students are led to spiritual, intellectual, social and physical maturity, they become disciples of Jesus Christ, walking in wisdom, obeying His word and serving in his Kingdom." J.A. at 64a. Tree of Life seeks to be the place where God molds the hearts of students in submission to Him, equipping them to be the hands and feet of Jesus Christ in the world. There is no greater purpose for a school than to guide students towards embracing the world in this way.

Tree of Life provides secular education, of course, in the same way public schools and other private schools do. Students learn reading, writing, and arithmetic; they play sports and musical instruments. But all of it is done with the ultimate purpose of forming students to be Christians prepared for the modern world. The Tree of Life's philosophy of education is explicit that "the Bible [be at the center] of a child's education, and a child must "evaluate all he/she studies through the lens of God's Word." J.A. at 64a. The district court summarized things well: "The primary purpose of Tree of Life is 'to assist parents and the Church in educating and nurturing young lives in Christ.'" J.A. at 63a (quoting the Complaint).

Naturally then, religious formation and instruction are vital aspects of daily life for students at Tree of Life. Every student has Bible class every day. Every day students begin with prayer and devotions. There is worship every other week, often led by students, often assisted by pastors at local Christian churches. Parents agree to a Statement of Faith and to the above Mission and Vision Statements; teachers do the

same and also commit to being active members of Christian congregations. *See* J.A. at 147.

Yet while Tree of Life takes its Christian foundation quite seriously, it is also studiously nondenominational. Tree of Life, in fact, takes special pride in the diversity of its students. Students come from more than 120 local churches. Not only are all kinds of Christian denominations represented, Tree of Life students are also geographically diverse, coming from 18 different countries (31 including parents' country of origin). Racial diversity too is something Tree of Life greatly treasures. Its schools have substantial populations of Asian, African-American, and Caucasian students, with 44% of its students coming from minority populations.

III. The Impact of the Decision Below

Religious schools, like Tree of Life, are vital to the efforts of religious communities to transmit their faith to the next generation—and thus vital if the free exercise of religion is to mean anything. Public schools, of course, observe a strict religious neutrality. So private religious schools are the only place children can get the kind of religious education that amici believe God wants for their children. *See Wisconsin v. Yoder*, 406 U.S. 205, 213–14 (1972) (“[T]he values of parental direction of the religious upbringing and education of their children in their early and formative years have a high place in our society.”).

But, of course, throughout the history of this country, religious schools have had difficulty with state and local governments, Emma Green, [The Quiet Religious Freedom Fight That Is Remaking America](#), *The Atlantic Magazine*, Nov. 5, 2017.

Religious schools fought for the bare right to exist, *see Pierce v. Society of Sisters*, 268 U.S. 510 (1925), and for the right to teach the Bible as they saw fit, *see Meyer v. Nebraska*, 262 U.S. 390 (1923). More recently, this Court stepped in to protect religious schools from the reach of anti-discrimination laws, when it both confirmed the existence of the ministerial exception and held that certain teachers at religious schools could qualify as ministers. *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012). And Congress too has joined in this effort, recognizing religious schools would not last very long without the ability to choose teachers and staff who share their religious commitments. *See* 42 U.S.C. § 2000e-1 (Title VII does not apply to “a religious . . . educational institution . . . with respect to the employment of individuals of a particular religion”); *see also Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327 (1987) (upholding this provision, unanimously, from Establishment Clause attack).

RLUIPA too is part of the legal bulwark protecting religious schools, and this case vividly demonstrates the need for it. Upper Arlington here refuses to let Tree of Life use its building for a religious school. Its rationale is purely monetary: If other people owned the building, they might pay more in tax revenue. Tree of Life purchased the building after looking at more than twenty sites over the course of two years. Its property size meant Tree of Life could consolidate its various campus into one. J.A. at 64a. Many years later, Tree of Life still owns this building and pays to maintain it. But Upper Arlington

refuses to allow Tree of Life to use the space. Upper Arlington hopes economic pressures will force Tree of Life to sell the building to someone who will generate more tax revenue. Upper Arlington knows it has the upper hand; that is why it has been willing to forego roughly a million dollars in tax revenue from Tree of Life. *See* J.A. at 34a.

Meanwhile the costs on Tree of Life, and on amici, have been significant. Tree of Life is forced to bear the expenses of maintaining a property it does not use. Instead of having a unified campus in a centralized location in a new space, Tree of Life has had to continue on with its old system of multiple campuses, miles apart from each other. This means longer commuting distances for families, especially those with children at several different Tree of Life schools. It also means increased operating expenses for Tree of Life, because consolidation would have naturally eliminated some duplicated expenses. *See* J.A. at 65a.

Moreover, the facilities at Tree of Life's current campuses are problematic, as Upper Arlington well knows. The Indianola and Dublin campuses reside in the main buildings of sponsoring churches, which are old and in great need. There is little space for things like sports or theater; the Indianola campus has no green grass and bad electrical. The facilities are not suitable for the kinds of high-quality, Bible-based and technologically innovative education Tree of Life wants to deliver. And with all the uncertainty about the new property, Tree of Life has no long-term leases for its existing campuses; it is simply

an at-will tenant, with the lack of security that implies. *See* J.A. at 147a.

Tree of Life has lost students because of these problems, and it has had to turn students away because its existing space is too small. *See* J.A. at 316a-320a. This is not merely lost revenue for Tree of Life. This is a lost chance to bring children up in the vision of the Christian faith that Tree of Life advances. And having had to keep on with multiple campuses has also hurt the religious community of Tree of Life in real though intangible ways. Tree of Life conceives of itself as a unified religious community. But it often feels like a family split up and forced to live in different homes with no end date in sight.

This fracture in Tree of Life has other consequences as well. It imperils the kinds of diversity that Tree of Life thinks is valuable and that Tree of Life believes are God's will. Students from the Dublin Campus are disproportionately Caucasian and Asian and disproportionately come from households with more financial resources. Students from the Indianola Campus are disproportionately African-American and disproportionately come from households with fewer financial resources. Those students belong together, but they are being kept apart. We believe, as this Court does, that racial discrimination is odious. *See Brown v. Board of Education*, 347 U.S. 483, 493 (1954) ("Today [education] is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life

if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.”)

Government has a fundamental, overriding interest in eradicating racial discrimination in education. But rather than trying to eradicate racial separation, Upper Arlington is unwittingly entrenching it through its unjust and misconceived land-use policies. To be sure, Tree of Life has tried to counteract these effects. It regularly brings the campuses together for evening events; it arranges for children on the different campuses to still take field trips together. Tree of Life has been managing these problems, but only this Court can solve them.

IV. Congress Enacted RLUIPA So That Local Governments Could Not Use Zoning to Deny Religious Assembly Based on Property Taxes.

The Court below held zoning requirements based upon potential tax revenue generated by the users did not violate RLUIPA. This decision is wrong and requires reversal.

As noted in the petition and described above, Tree of Life purchased the property in question, which includes a 254,000 square foot office building, to consolidate its campuses. Prior to purchasing the property, Tree of Life sought permission to operate as a church with a private school. That application was rejected. Subsequent attempts at seeking a conditional use and amendments to the ordinance were also unsuccessful. *See* J.A. at 6a-8a. The Court of Appeals recited the long history of decisions by the

district court, appeals and remands, which brought the case back before the Court of Appeals. *See* J.A. at 8a-11a. Although the case involves a number of other issues, the key issue has become whether the maximizing of income by the City is a permissible basis for restricting Tree of Life's use of the property and whether there was unequal treatment with regard to that use.

Religious institutions like Tree of Life often face hostility in the zoning context because they are tax exempt and local governmental officials do not like when property comes off the tax rolls. Some opponents of RLUIPA have argued that tax revenue is a permissible, and indeed a compelling governmental interest in the context of land use. But if that were so, then even more clearly than with any "not-in-my-backyard" objection, there would be grounds to exclude any new church from any jurisdiction in the country. Existing churches would be grandfathered in and no new church could ever form.

The classic property tax case is *Cottonwood Christian Academy v. Cypress Redevelopment Agency*, 218 F.Supp.2d 1203 (C.D. Cal. 2002). There, a large Christian Church assembled an 18-acre site from six smaller and undeveloped parcels. But once the larger site had been assembled, the city decided it wanted a Costco instead, and it denied the Church a permit to build and sought to condemn the property instead. In response to a RLUIPA lawsuit, the city argued that it had a compelling governmental interest in generating tax revenue. The Court rejected that argument for an obvious reason: "[I]f revenue generation were a compelling state interest,

municipalities could exclude all religious institutions from their cities.” *Id.* at 1228.

Counsel for Amici has litigated over 100 RLUIPA cases throughout the United States in the past decade, has published books and treatises on religious land use litigation⁴ and has encountered the same issue time and again:⁵ local

4 Daniel P. Dalton, Litigating Religious Land Use Cases, *Second Edition*, (published by the American Bar Association, August, 2016)

5 See, e.g., *Acad. of Our Lady of Peace v. City of San Diego*, 835 F.Supp.2d 895 (S.D. Cal. 2011) (City refused to allow school to remodel property based on City Council members’ promise to neighbors who supported his election); *Carlinville S. Baptist Church v. City of Carlinville, Ill.*, No. 08-3074, 2008 WL 2959784 (C.D. Ill. July 30, 2008) (City rezoned former Walmart property when it learned that Church had bought it, so as to maintain property-tax revenue); *Celebration Community Church v. City of Muskegon*, Case No. 1:08-cv-314 (W.D. Mich. 2008) (settled) (City refused to issue land use permit for Church that purchased a former car dealership, so as to maintain property-tax revenue); *Church of Our Savior v. City of Jacksonville Beach*, 69 F.Supp.3d 1299 (M.D. Fla. 2014) (City denied Church permit to develop land for religious assembly because it was off a major road and City wanted more tax revenue); *Hope Rising Cmty. Church v. Municipality of Penn Hills*, No. CV 15-1165, 2015 WL 7720380 (W.D. Pa. Oct. 28, 2015) (City rezoned office-building property resulting in Church losing its lease); *House Where Jesus Shines, Inc. v. City of Bellmead*, No. 08-CV-117, 2009 WL 10669584 (W.D. Tex. Sept. 11, 2009) (City held “emergency zoning hearing,” to rezone land after learning that Church purchased it); *Lighthouse Cmty. Church of God v. City of Southfield*, 382 F.Supp.2d 937 (E.D. Mich. 2005) (City amended parking requirements in an office zone to deny Church occupancy based on lack of parking); *Marianist Province of United States v. City of*

governments often do not seem to consider the positive impact religious assemblies can have on their communities. A University of Pennsylvania study found religious congregations make significant economic contributions to local communities. See Ram A. Cnaan et al., *If You Do Not Count It, It Does Not Count: A Pilot Study of Valuing Urban Congregations*, 10 JOURNAL OF MGMT, SPIRITUALITY & RELIGION 3 (2013). The study assigned monetary values to a variety of categories of activity, ranging from hosting weddings to teaching children social responsibility, which researchers then used to calculate the annual economic contributions made by religious congregations in the Philadelphia area to their communities. The conclusion was remarkable: The study determined the congregations provided an average of \$476,663.24 each year in economic contributions to the community.

Churches also face opposition on the closely related ground they put a damper on commercial or entertainment districts. In *Centro Familiar Cristiano Buenas Nuevas v. City of Yuma*, 651 F.3d 1163 (9th Cir. 2011), the City sought to revive its main street with a “mixture of

Kirkwood, No. 4:17-CV-805RLW, 2018 WL 4286409 (E.D. Mo. Sept. 7, 2018) (City allowed public schools lights for athletic fields but denied religious schools the same lights); *Salvation Temple Church v. Hazel Park*, Case No. 2:10-cv-14148 (E.D. Mich. 2010) (settled) (City had a zoning district that precluded “all religious assembly,” but allowed secular assembly); *Summit Church v. Randolph Cty. Dev. Auth.*, No. 2:15-CV-82, 2016 WL 865302 (N.D.W.Va. Mar. 2, 2016) (City allowed a theater but precluded a religious assembly based on loss of taxes).

commercial, cultural, governmental and residential uses that will help to ensure a lively pedestrian-oriented district.” *Id.* at 1165. When a church sought to occupy a large vacant building that had once served as a factory and warehouse, the City refused a permit, preferring “a vacant hunk” to a church. *Id.* As the panel explained, “This is sort of reverse urban blight case, with the twist that instead of bars and nightclubs being treated as blighting their more genteel environs, the Church is treated as blighting the bar and the nightclub district.” *Id.*

The Ninth Circuit concluded excluding the church violated RLUIPA. The city’s ordinance treated religious organizations worse than non-religious ones; the City permitted many other uses that “would have [had] the same practical effect as a church of blighting a potential block of bars and nightclubs,” including apartment buildings, post offices and prisons. *Id.* at 1174-75. Thus, the Court concluded, the City’s commercial concerns did not justify excluding the Church.

Concerns regarding traffic congestion and parking are not compelling interests. *See Lighthouse Cmty. Church of God v. City of Southfield*, 382 F.Supp.2d 937 (E.D. Mich. 2005). Preserving property values is also not a compelling interest. *See Westchester Day Sch. v. Vill. of Mamaroneck*, 417 F.Supp.2d 477 (S.D.N.Y. 2006). Potential aesthetic impacts are not compelling interests. *See Cottonwood Christian Academy v. Cypress Redevelopment Agency*, 218 F.Supp.2d 1203 (C.D. Cal. 2002). Intrinsically vague standards like preserving the harmony of the neighborhood, ensuring consistent implementation of regulations, and preserving

property values are not compelling interests. See *Cambodian Buddhist Soc’y of CT., Inc. v. Newtown Planning & Zoning Comm’n*, No. CV030350572S, 2005 WL 3370834 (Conn. Super. Ct. Nov. 18, 2005). General interests in enacting and enforcing a comprehensive plan are not compelling interests. See *Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F. 3d 338, 353 (2d Cir. 2007). And revenue generation is not a compelling interest. See *Cottonwood Christian Academy v. Cypress Redevelopment Agency*, 218 F.Supp.2d 1203 (C.D. Cal. 2002).

As is the case with other religious institutions in other localities, Tree of Life here will likely provide economic benefits to Upper Arlington. While residents sometimes express concern religious institutions will lower their property values, studies indicate they actually tend to bring property values up. In one study, for example, researchers found “that neighborhood churches are amenities that enhance property values [for] at least one-half mile[.]” Thomas M. Carroll et al., *Living Next to Godliness: Residential Property Values and Churches*, 12 J. REAL. EST. FIN. & ECON. 319, 328 (1996).

V. The Court Should Apply the Plain Text of the Equal-Terms Provision.

As courts have continued deciding RLUIPA disputes between religious institutions and local governments, the circuit courts have now split over how to interpret the Equal Terms provision. Several tests have developed. These tests diverge in how they measure equal or unequal treatment, as well as whether a local government is strictly liable (or subject simply to strict scrutiny) if it

treats churches differently than other institutions. Moreover, some tests make a city's stated reasons for excluding a church more relevant or determinative than others. What has emerged as one constant, however, is that conflicts over economic goals and redevelopment are common and divisive. But suffice it to say, many of these lower court rulings, including that of the court below, conflict with the express terms of RLUIPA and this Court's precedents.

A unanimous Congress enacted RLUIPA in order to provide "very broad protection for religious liberty." *Holt v. Hobbs*, 135 S.Ct. 853, 859 (2015) (quoting *Burwell v. Hobby Lobby Stores*, 134 S.Ct. 2751 (2014)); see also *Cutter v. Wilkinson*, 544 U.S. 709, 714-15 (2005). RLUIPA provides "greater protection for religious exercise than is available under the First Amendment." *Holt*, 135 S. Ct. at 860. As RLUIPA's co-sponsors, Senators Kennedy and Hatch, observed:

The right to assemble for worship is at the very core of the free exercise of religion. Churches and synagogues cannot function without a physical space adequate to their needs and consistent with their theological requirements. The right to build, buy, or rent such a space is an indispensable adjunct of the core First Amendment right to assemble for religious purposes.

146 Cong. Rec. S7,774-01 (daily ed. July 27, 2000).

The Equal Terms provision provides that "[n]o government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms

with a nonreligious assembly or institution.” 42 U.S.C. § 2000cc(b)(1). The act does not define “equal terms” further, and federal courts of appeal are not unified on how to construe that phrase.

On one side of the split, the Eleventh Circuit has—for the most part—interpreted the language literally and broadly in favor of religious exercise, as the statute requires. Under the Eleventh Circuit’s test, if a municipality allows any “nonreligious assembly” to locate in a zone it must also allow a religious assembly to locate in that zone, unless the unequal treatment of religious uses can satisfy “strict scrutiny.” *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1230-32 (11th Cir. 2004). The Eleventh Circuit has explained that while the provision “has the ‘feel’ of an equal protection law, it lacks the ‘similarly situated’ requirement usually found in equal protection analysis.” *Id.* at 1229.

On the other side, the Third Circuit has held that a religious assembly is not entitled to be treated on equal terms with just any nonreligious assembly use. Rather, “a regulation will violate the Equal Terms provision only if it treats religious assemblies or institutions less well than secular assemblies or institutions that are similarly situated as to the regulatory purpose.” *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 266 (3d Cir. 2007).

Not satisfied with either the Eleventh Circuit’s or the Third Circuit’s approach, the Seventh Circuit adopted its own test. That test is not as protective as the Eleventh Circuit’s test and it does not focus on the municipality’s subjective “regulatory purpose” for the zoning ordinance (as

the Third Circuit’s test does). Instead, it focuses on whether the secular institution’s use of the property is comparable with respect to accepted and objective “zoning criterion.” *River of Life Kingdom Ministries v. Village of Hazel Crest*, 611 F.3d 367, 371 (7th Cir. 2010).⁶

In the instant case, the Sixth Circuit adopted its own test for analyzing an Equal Terms claim. To start, the Court rejected a reading that would be no more protective than the Fourteenth Amendment’s Equal Protection Clause; in other words, a plaintiff need not prove that it is “similarly situated to a comparator in all relevant respects.” J.A. at 18a (citations and quotations omitted). However, the Sixth Circuit decided to follow the Third and Seventh Circuit tests in holding that the “comparison required by RLUIPA’s equal terms provision is to be conducted with regard to the legitimate zoning criteria set forth in the municipal ordinance in question.” J.A. at 21a.

Amici contend this Court should follow the text of the Equal Terms provision. First, RLUIPA does not decide whether there has been unequal treatment by looking to any “regulatory purpose” or “criteria”; it simply states that unequal treatment is unlawful. *See* 42 U.S.C. § 2000cc(b)(1). Second, RLUIPA must be “construed in favor of a broad protection of religious exercise, *to the maximum extent* permitted[.]” 42 U.S.C. 2000cc-3(g) (emphasis added). Giving governments an extra

⁶ Judge Sykes argued in dissent that “[t]he distinction between ‘accepted zoning criteria’ and the ‘regulatory purpose’ of exclusionary zoning is nonexistent or too subtle to make any difference.” *River of Life*, 611 F.3d at 386.

layer of protection by adding a “regulatory purpose” or “criteria” test is not construing RLUIPA as broadly as possible. The Eleventh Circuit test is closest to the text and intent of the statute.

A. The Eleventh Circuit’s Equal Terms Test

The Eleventh Circuit was the first federal appellate court to decide a major Equal Terms case. In its most recent iteration, the Eleventh Circuit test for determining a violation says “a plaintiff has the burden of showing the following elements: (1) the plaintiff must be a religious assembly or institution, (2) subject to a land use regulation, that (3) treats the religious assembly on less than Equal Terms, with (4) a nonreligious assembly or institution.” *Covenant Christian Ministries, Inc. v. City of Marietta*, 654 F.3d 1231, 1245 (11th Cir. 2011) (citations and quotations omitted). If the plaintiff makes this *prima facie* showing, the government then has the burden to show its actions pass strict scrutiny.

The facts of *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214 (11th Cir. 2004), are helpful to review in light of this petition. The Town of Surfside is a small coastal town north of Miami had a total of six churches and synagogues. The city only allowed religious institutions in one of its eight zones, and then only with a permit, even though it permitted most other types of uses within the business district. The city justified its approach by pointing to the goal of invigorating its business district and tax base. A synagogue sued the town. It claimed that it was important for its members to walk to synagogue, so it needed

to be located nearby, in the town's business district. The town claimed permitting religious institutions would create economic hardship, and the permitted private clubs created more retail "synergy" than a church would. *See id.* at 1219. The Eleventh Circuit found a violation of RLUIPA because nonreligious assemblies—private clubs—were permitted where religious institutions were not. *Id.* at 1231.⁷

B. The Problem with the 3rd and 7th Circuit Equal Terms Test

Economic rationales, like the ones offered by Upper Arlington here, highlight the underlying differences in the circuits' standards. The Third and Seventh Circuits both require a "similarly situated" comparator before there can be an Equal Terms violation, and they then look either to the regulatory purpose or criteria that led to the exclusion of a religious organization. The Seventh Circuit in *River of Life* effectively allowed the city to differentiate not between non-religious and religious institutions, but between commercial and non-commercial institutions.

But of course, religious institutions will almost always be non-commercial in character, so this test will allow local governments to exclude churches and other religious organizations just by noting their non-commercial nature. The economic justification for the differentiation—that is, whether or not an assembly would generate

⁷ See also, *Konikov v. Orange County*, 410 F.3d 1317 (11th Cir. 2005), and *Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward County*, 450 F.3d 1295 (11th Cir. 2006).

revenue for the city—effectively trumps the rights religious organizations have under RLUIPA. In cases where the requirement of “similarly situated” with respect to either regulatory purpose or criteria has been applied, the economic rationale becomes a winning argument for the city, a concern Judge Sykes raised in dissent in *River of Life*. See *River of Life Kingdom Ministries v. Village of Hazel Crest*, 611 F.3d 367, 386 (7th Cir. 2010) (en banc) (Sykes, J., dissenting).

Again there is no requirement in the Equal Terms provision that comparators must be “similarly situated” with regard to the regulatory purpose or criteria, or comparators be non-commercial. Indeed, as the circuits using that standard have conceded, allowing city officials essentially to plead economic reasons and exclude churches is a “less than airtight” standard, *River of Life*, 611 F.3d at 374, where the city’s stated goal may be no more connected to public welfare than ensuring residents have “ample and convenient shopping” in a given area, *id.* at 373. Furthermore, such a standard encourages city officials to invoke economic rationales, because such claims guarantee success even when they are pretextual.

RLUIPA does not sweep away cities’ power to make economic decisions. The Eleventh Circuit’s formulation comes closest to the statutory text by striking a reasonable balance between competing economic and non-commercial interests in urban spaces. Both sides have the potential to prevail, even when economic issues are at stake; the test allows consideration of any assembly as a potential comparator, without imposing a requirement that a comparator be non-commercial

simply because religious organizations typically are. The Eleventh Circuit's formulation is the circuit test most true to the text of the Equal Terms provision.⁸

⁸ While the Eleventh Circuit's test is superior to that of the Third and Seventh Circuits, it is not perfect. For example, it allows governments to rebut a prima facie RLUIPA violation by showing that strict scrutiny is satisfied. This is a-textual and improper; nothing in the text of RLUIPA supports such an inference. J.A. at 50a (Thapar, J., dissenting). Even so, we doubt that this affects the outcome of many RLUIPA cases.

CONCLUSION

Amici believe deeply in the religious mission of Tree of Life, and see that mission compromised by Upper Arlington's actions. Amici understand local governments have concerns about economic development. But local governments cannot use their zoning powers to threaten ways of life that so many Americans consider fundamental to their well-being. Money is valuable, but it does not categorically trump the rights of religious organizations under the Equal Terms provision of RLUIPA.

For the foregoing reasons, this Court should grant review and reverse the judgment below.

February 14, 2019

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The Families of Students at
Tree of Life Christian School*

APPENDIX 1

***Amicus Curiae* – Parents of Students of Tree
of Life Christian School**

1. David Adair
2. Joseph Adkins
3. Sara Cabrera
4. Corneita Allen
5. Antonio Allen
6. Rosanne Arnspiger
7. Curtis Arnspiger
8. Sherry Austin
9. Oluseyi Awofeso
10. Bukola Awofeso
11. Wole Bankole
12. Bola Bankole
13. Janinah S Barreto Hernandez
14. Eliezer Rodriguez Cosme
15. Brian Barringer
16. Kristin Barringer
17. Peter Batchelder
18. Molly Bauman
19. Austin Bauman
20. Jennifer Bennett
21. Darrin Bennett
22. Anne Bently
23. John Bently
24. Amy Besier
25. Matthew Besier
26. Chelsea Boggs
27. Chris Boggs
28. Kenneth Boltz
29. Kimberly Boltz
30. Megan Bomba
31. Kelly Bond
32. Mary Bondurant

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33. David Bondurant
34. Tammy Botkin
35. Brian Botkin
36. Kameron Bray
37. Heather Brazeal-Shank
38. Debra Broadnax
39. Dennis Boradnax
40. Lisa Brown
41. William Brown
42. Crystal Brown
43. Orita Buggs
44. Caleb Buggs
45. Brian Bumgarner
46. Erin Bumgarner
47. Melissa Burns
48. Scott Burns
49. Susan Butler
50. Jennifer Cameron
51. Kyle Chamberlain
52. Hannah Chamberlain
53. Sarah Chou
54. Kenneth Clark
55. Veronica Clark
56. Richard Claxton
57. Cheryl Clinton
58. Candace Clunk
59. Dave Clunk
60. Jeannie Cochran
61. Douglas Cochran
62. Audra Connell
63. Ian Connell
64. Thomas Corner
65. Christine Corner
66. Malikah Cotton
67. Andrew Cousens
68. Rebecca Cousens

69. Tricia Crawford
70. Andy Danec
71. Stephen Davis
72. Treina Davis
73. Jo Ann Davis
74. Brent Davis
75. Thomas Diehl
76. Dana Diehl
77. Jason Dishop
78. Maria Dishop
79. Candace Dolph
80. Emanuel Dolph
81. Michael Donnally
82. Rebecca Donnally
83. Beth Dotson
84. Amy Douglas
85. Michael Douglas
86. Matthew Draudt
87. Tracy Draudt
88. Joseph Dykes
89. Hale Ebony
90. Sarah Eder
91. Christopher Eder
92. Kimberly Edmondson
93. Jeff Edersveld
94. Debora Ellzey
95. Jacob Ellzey
96. Kelly Endicott
97. Noah Endicott
98. Debra Erwin
99. Roger Erwin
100. Lauren Evans
101. Stephanie Farquharson
102. Leonard Farquharson
103. Amy Fischbach
104. Richard Fischbach

105. Katie Fisher
106. Chad Fisher
107. Douglas Forbes
108. Stephanie Forbes
109. Christopher Franke
110. Catherine Franke
111. Steve Frisbey
112. Evelyn Steve
113. Kevin Frost
114. Cuc Phan
115. Glenda Gammel
116. Tammy Garbe
117. Bill Garbe
118. Shudonica Garlington
119. Graham Geisler
120. Gretchen Gerhardt
121. Shannon Gligora
122. Joshua Glupker
123. Bethany Glupker
124. Michelle Goode
125. Elizabeth Gordon
126. Cristopher Gordon
127. Jacob Goyer
128. Lori Goyer
129. Brad Graley
130. Heather Graley
131. Vance Green
132. Shane Griggs
133. Denaе Griggs
134. Lissa Haffner
135. Zach Haffner
136. Terrence Hall
137. Kewaune Hall
138. Gary Harrington
139. Julia Harrington
140. Tiffany Harris

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141. Kenneth Heater
142. Lois Heater
143. Jackie Heimbush
144. Cassandra Hendrix
145. Yohana Hill
146. Dawn Hill
147. Bobbie Hively
148. Greg Hively
149. Kyle Hobbs
150. Kylie Hobbs
151. Jay Hoffman
152. Colleen Hoffman
153. Jacqueline Hollins
154. Anthony Hollins
155. Ronald Horne
156. Angela Horne
157. JD Hoskinson
158. Rhonda Hoskinson
159. Joel Hostetler
160. Katharine Hostetler
161. Judy Huang
162. Angela Huff
163. Laurie Ihlenfield
164. Jeff Ihlenfield
165. Tiffany Jackson
166. Ricky Jackson, Sr.
167. Philip Jones
168. Mandy Jones
169. Rebecca Jordan
170. Brandon Jordan
171. Kevin Jorgensen
172. Kari Jorgensen
173. Penelope Kauffman
174. Matthew Kehlmeier
175. Kathleen Kehlmeier
176. John Keith

177. Tiffany Keith
178. Kareem King
179. Kathy King
180. Michael Knisley
181. Jaimi Knisley
182. Renne Komula
183. Dena Komula
184. Mikhail Kosenkov
185. Irina Kosenhov
186. Allen Leach
187. Qingging Leach
188. Mark Lecky
189. Julie Lecky
190. John Lewis
191. Judy Huang
192. Dan Liu
193. Run Xiao
194. David Cory Lofin
195. Sarah Loftin
196. Lucy Mahatma
197. Gina Mantor
198. Niles Mantor
199. Misty Martin
200. Tom Martin
201. Matthew Maruster
202. Christa Maruster
203. William Mayes
204. Gretchen Mayes
205. Barry Mazik
206. Lisa Mazik
207. Delia McCubbin
208. James McCubbin
209. John McLaughlin
210. Eric McLaughlin
211. Joella McNeill
212. Mike McNeill

213. Cyrano Menefee
214. Janalisa Menefee
215. Kelsie Meyers
216. Kyle Meyers
217. Thomas Milem
218. Matthew Miller
219. Theresa Miller
220. Irene Mitcheson
221. Katie Morton
222. Thomas Morton
223. Julie Myers
224. Erin Nealy
225. Libby Neely
226. Tim Neely
227. Paulena Nice
228. Jeffrey Nice
229. Margret Nicholson
230. Joyce Oppong
231. Merri Lynn Osborn
232. Tammy Owens
233. Robin Owens
234. Chanita Pace
235. Roderick Peeks
236. Kimberly Peeks
237. Beth Peppers
238. Samuel Peppers III
239. Kaelyn Poindexter
240. Michael Poindexter
241. Jeffrey Porter
242. Deborah Porter
243. Cameron Powell
244. Krista Powell
245. Edward Pugsley
246. Marie Pugsley
247. Natalie Qualls
248. Susan Rich

249. David Rich
250. Brian Robson
251. Nikki Rodriguez
252. Eliel Rodriguez
253. Gail Rodriguez
254. Tim Rule
255. Sony Rule
256. Ashley Sanders
257. Travis Sanders
258. Steve Sandor
259. Sachiko Sandor
260. Justin Saunders
261. Douglas Saunders
262. Jacqueline Saunders
263. Justin Saunders
264. Tim Scarberry
265. Coleen Scarberry
266. Magally Schmidt
267. William Schmidt
268. David Schneider
269. Kimberly Schneider
270. Jonathan Shah
271. Heather Shah
272. Douglas Shank
273. Heather Brazeal Shank
274. MARRISA Siebold
275. Thomas Simone
276. Sherry Simone
277. Nathan Smith
278. Katie Smith
279. Peter Starkey
280. Kimberly Starkey
281. Charles Stechschulte
282. Rebecca Stechschulte
283. Dr. Sandra Stenhoff
284. Aaron Stenhoff

285. Jeff Stoughton
286. Christina Stoughton
287. Kevin Strous
288. Kathy Strous
289. Sajekti Sulistyorini
290. Joseph Dykes
291. Dave Summers
292. Shannon Summers
293. Philip Taylor
294. Melinda Taylor
295. Suan Thang
296. Luan Thang
297. Everett Thompson
298. Pearl Thompson
299. Troy Thrash
300. Amber Thrash
301. Tammy Titus
302. Jamal Titus
303. Trevor Tolley
304. Lynn Tolley
305. Donald Tong III
306. Aimee Torres Quintero
307. Fredy Torres Quintero
308. Catherine Troolin
309. Mike Troolon
310. Stacy Urbancic
311. Jennifer Valentine
312. Shane Valentine
313. James VanHorn
314. Lori VanHorn
315. Karen Vogt
316. Erica Vroman
317. Matthew Vroman
318. Douglas Ward
319. Tracy Ward
320. Molly Waters

- 321. Jonathan Waters
- 322. Scott Wells
- 323. Judy Wells
- 324. Ann Wilhoite
- 325. Loice Wilhoite
- 326. Vivette Wilson
- 327. Kyle Winters
- 328. Meghan Winters
- 329. Betsy Woken
- 330. Rafael Woken
- 331. Ephraim Woodineh
- 332. Dagmawit Taddese
- 333. Jennifer Woodring
- 334. Mark Woodring
- 335. Ryan Young
- 336. Christine Young
- 337. Jocelyn Zartman
- 338. Dalan Zartman
- 339. Matthew Zelnik
- 340. Penny Zelnik
- 341. William Scott Zerkle
- 342. Shannon Zerkle