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 OF *AMICUS CURIAE* CITIZENS FOR COMMUNITY VALUES IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

What must a religious assembly or institution show in order to demonstrate that is has been treated "on less than equal terms" with a nonreligious assembly or institution, sufficient to establish a claim under RLUIPA's Equal Terms provision?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

STATEMENT OF *AMICUS CURIAE*[1]

The Ohio Christian Education Network ("OCEN") is a network led by Citizens for Community Values ("CCV"), Ohio's Family Policy Council. Today, there are 26 member schools of the OCEN, covering all corners of the state of Ohio. While these schools come from diverse theological backgrounds, they unite around core principles, including ensuring every child has access to a quality Christian education that meets their needs, and that local governments should not unfairly discriminate against or penalize Christian schools.

Both issues are at stake in *Tree of Life Christian Schools v. City of Upper Arlington*. The schools of OCEN have a great heart for ensuring any family that wishes to provide a Christian education for their child has access to a neighborhood school. The Sixth Circuit's decision, if affirmed, will have a chilling effect on the ability of Christian schools to enter new communities.

Furthermore, if Upper Arlington's discriminatory practices against a Christian school are upheld, many other Ohio municipalities may decide that Christian schools (and religious institutions of all stripes) are not the most profitable use of land in their town, and thus establish policies and procedures for blocking schools from entering their community.

The schools of OCEN care deeply about the well-being of the children in their schools. Anything that distracts

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[1] No counsel for any party authored this brief in whole or in part, nor did any counsel or party make any monetary contribution intended to fund the preparation or submission of this brief. All parties' counsel of record received timely notice of the intended filing of this brief, and all consented to its filing.

or detracts from their mission of providing a high-quality, biblically based education is a threat to their core mission. The ongoing dispute over the City of Upper Arlington's discriminatory policies undermines the very ability of a Christian school to fulfill its mission. This is why we urge the Court to consider this case.

SUMMARY OF ARGUMENT

In the nearly two decades that Religious Land Use and Institutionalized Persons Act ("RLUIPA") has been on the books, this Court has never heard a case on RLUIPA's "Equal Terms" provision, 42 U.S.C. § 2000cc(b)(1). Absent guidance from this Court, the lower courts have fractured, even disagreeing over how much they disagree. That is reason enough for the Court to hear this case.

The substance of the circuit split is another, more compelling reason to grant a writ of certiorari here. Most of the courts of appeals who have applied the Equal Terms provision have elected to rewrite it. Suspicious that the actual text of the statute is *too* generous to religious land uses, the courts have added new language to the statute. The majority of courts have intentionally narrowed RLUIPA's protections, despite Congress's express mandate to construe RLUIPA "in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution." 42 U.S.C. § 2000cc–3(g).

The majority's approach has ultimately turned RLUIPA on its head. The majority of courts require that an Equal Terms plaintiff identify a nonreligious comparator that is "similarly situated" with respect to the zoning regulation's regulatory purpose (that is, the

purpose of a commercial or residential district), or to "accepted zoning criteria" (things like traffic, parking, tax revenue, and neighborhood vibe). While the "similarly situated comparator" concept is a routine feature of equal protection legislation, Congress did not include it in RLUIPA's Equal Terms provision. Congress instead identified the parameters for comparison: religious "assemblies" and "institutions" must be treated on equal terms with their nonreligious counterparts.

Moreover, Congress passed RLUIPA because cities routinely masked discriminatory zoning decisions in precisely the seemingly neutral—but practically very malleable—considerations that the majority of circuits now use to distinguish between proper and improper comparators. As a result, cities have a free hand to decide *against whom* a religious institution is compared, and *by what standard* the comparison is made. The practical application of the zoning purposes tests (there are at least three) in the district courts shows how far the tests stray from RLUIPA's text and purpose.

ARGUMENT

I. Without guidance and correction from this Court, lower courts have split over the proper application of the Equal Terms provision.

RLUIPA provides that "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). Congress directed that the RLUIPA, the Equal Terms provision included, "shall be construed in favor of a broad protection

of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution." 42 U.S.C. § 2000cc–3(g). But rather than apply the straightforward terms of the statute and heed Congress's mandate, "[e]very circuit to address the issue has given its own gloss to the Equal Terms provision." *Tree of Life Christian Sch. v. City of Upper Arlington, Ohio*, 905 F.3d 357, 387 (6th Cir. 2018) (Thapar, J., dissenting).

The majority of courts—the Third, Fifth, Sixth, Seventh, and Ninth Circuits—require an Equal Terms plaintiff to identify a nonreligious comparator that is "similarly situated" with respect to the zoning ordinance's "regulatory purpose,"[2] "accepted zoning criteria,"[3] or both the regulatory purpose *and* the zoning criteria "as stated explicitly in the text of the

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[2] *Lighthouse Institute for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 266 (3d Cir. 2007) ("We conclude instead that a religious plaintiff under the Equal Terms Provision must identify a better-treated secular comparator that is similarly situated in regard to the *objectives* of the challenged regulation.")

[3] *Tree of Life Christian Sch. v. City of Upper Arlington, Ohio*, 905 F.3d 357, 369 (6th Cir. 2018) ("Accordingly, we adopt the majority approach, as discussed in the Third, Seventh, and Ninth Circuits' cases set forth above"); *Centro Familiar Cristiano Buenas Nuevas v. City of Yuma*, 651 F.3d 1163, 1173 (9th Cir. 2011) ("The city violates the equal terms provision only when a church is treated on a less than equal basis with a secular comparator, similarly situated with respect to an accepted zoning criteria."); *River of Life Kingdom Ministries v. Village of Hazel Crest, Ill.*, 611 F.3d 367, 371 (7th Cir. 2010) (en banc) ("The problems that we have identified with the Third Circuit's test can be solved by a shift of focus from regulatory *purpose* to accepted zoning *criteria*.").

ordinance or regulation."[4] The Sixth Circuit described the various tests collectively as requiring a comparison "with regard to the legitimate zoning criteria set forth in the municipal ordinance in question." *Tree of Life*, 905 F.3d at 669. In this brief, *amicus* will refer to the majority tests collectively as the "legitimate zoning criteria" test.

The Eleventh Circuit hewed closely to the statutory text. At least with respect to facial challenges to a zoning ordinance, the court "must first evaluate whether an entity qualifies as an 'assembly or institution,' as that term is used in RLUIPA." *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1230 (11th Cir. 2004). The court then must determine whether the city treats that secular entity differently than a religious one; discrimination is usually established when a city permits secular assemblies and institutions in zones from which it excludes religious ones. *Id.* Under that test, differential treatment is a per se violation of the statute; "[the Equal Terms provision] renders a municipality strictly liable for its violation, rendering a discriminatory land use regulation *per se* unlawful without regard to any justifications supplied by the zoning authority." *Id.* at 1229.[5] Importantly, the Eleventh Circuit observed that while the Equal Terms provision "has the 'feel' of an equal protection law, it lacks the 'similarly situated'

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[4] *Opulent Life Church v. City of Holly Springs, Miss.*, 697 F.3d 279, 292-93 (5th Cir. 2012)

[5] The *Midrash* court later opined that a city could escape liability for violating the Equal Terms provision by showing that the discriminatory ordinance passes strict scrutiny. *Midrash*, 366 F.3d at 1232.

requirement usually found in equal protection analysis." *Id.*

The circuit split is deep and long-standing. This Court must step in and resolve it.[6]

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[6] There is disagreement among the circuits over whether there are any additional tests. The Tenth Circuit declared only that a plaintiff must show "substantial similarities" between itself and a secular comparator that "allow for a reasonable jury to conclude" that the two are similarly situated. *Rocky Mountain Christian Church v. Bd. of Cty. Comm'rs*, 613 F.3d 1229, 1237 (10th Cir. 2010). Applying that standard, district courts in the Tenth Circuit consider that a jury question in most instances. *Roman Catholic Archdiocese of Kansas City in Kansas v. City of Mission Woods*, 337 F. Supp. 3d 1122, 1141 (D. Kan. 2018); *Grace Church of Roaring Fork Valley v. Bd. of Cty. Comm'rs of Pitkin Cty., Colorado*, 742 F. Supp. 2d 1156, 1163 (D. Colo. 2010). The Sixth Circuit believes this is a separate test, while the Fifth Circuit does not. *Compare Tree of Life*, 905 F.3d at 370 (6th Cir. 2018) ("we . . . reject the Tenth Circuit's test.") with *Opulent Life*, 697 F.3d at 291-92 (identifying the two approaches as the Eleventh Circuit versus the Third, Seventh, and Ninth Circuits).

The courts likewise disagree about whether the Second Circuit created a new test. The Second Circuit itself purported to take no side in the "similarly situated" debate, but considered whether the religious and nonreligious uses were similarly situated with respect to their legality. *Third Church of Christ, Scientist, of New York City v. City of New York*, 626 F.3d 667, 670 (2d Cir. 2010). But the Fifth Circuit believes that the Second created a new test (albeit unwittingly). *Elijah Grp., Inc. v. City of Leon Valley,* Tex., 643 F.3d 419, 423 (5th Cir. 2011).

II. The "legitimate zoning criteria" test exceeds judicial authority both by ignoring Congress's mandate to construe RLUIPA broadly and by rewriting the statutory text.

Congress mandated that RLUIPA "shall" be construed as broadly as possible. 42 U.S.C. § 2000cc–3(g). The "legitimate zoning criteria" test purposefully ignores this mandate. The Seventh Circuit, sitting en banc, was clear about its aims: acknowledging that the Eleventh Circuit's approach represented a literal application of RLUIPA's text, *River of Life*, 611 F.3d at 369, the Seventh Circuit rejected it as "troubling" because such an approach "may be *too* friendly to religious land uses" or "might be deemed favoritism to religion and thus violate the establishment clause." *Id.* at 370. The Sixth Circuit similarly described the Eleventh Circuit's straightforward textual application as "unique and troubling." *Tree of Life*, 905 F.3d at 369. The Third Circuit likewise adopted a narrow reading of the Equal Terms provision, for fear that a broad reading would require that in any zone where a city permits a 10-member book club to meet, it *must* permit ritualized animal slaughter, "the participation of wild bears," and megachurches as well. *Lighthouse*, 510 F.3d at 268.[7]

[7] As the dissent in *Lighthouse* correctly pointed out, that parade of horribles is rather unlikely. RLUIPA does not "prevent[ ] a city from including in its zoning ordinances rational terms restricting the use of land, as long as those terms apply equally to religious assemblies and nonreligious assemblies." *Lighthouse*, 510 F.3d at 287 (Jordan, J., concurring in part and dissenting in part).

Courts "are not free to rewrite the statute that Congress has enacted"—even if a given court happens not to like the results (or hypotheticals) that the statutory text compels. *Dodd v. United States*, 545 U.S. 353, 359 (2005). Moreover, Congress's marching orders were for a broad interpretation of RLUIPA's protections, "to the maximum extent permitted" by RLUIPA's own text and the Constitution. Adherence to that express statutory mandate surely demands more than a narrow construction and a head nod to concerns about unarticulated Establishment Clause conflicts or "the participation of wild bears."

Courts have not only narrowed what Congress intentionally made broad, but they have also rewritten the statute wholesale by adding a "similarly situated" test. The Equal Terms provision does not have the "similarly situated" language found in typical equal protection cases. *Midrash*, 366 F.3d at 1229. Instead, Congress created a unique "natural perimeter" for Equal Terms claims: assemblies and institutions. *Id.* at 1230.

The majority of lower courts have nonetheless decided to improve upon Congress's drafting by adding the "similarly situated" requirement. The Third Circuit did so out of the belief that RLUIPA merely codifies this Court's Free Exercise precedents.[8] *Lighthouse*, 510 F.3d at 264-65. The Sixth and Ninth Circuits—which did *not* believe that RLUIPA merely codified Free Exercise jurisprudence—added the "similarly situated" requirement as a means of determining what "equal"

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[8] Specifically *Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872 (1990) and *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

means. *Tree of Life*, 905 F.3d at 370; *Centro*, 651 F.3d at 1172. But whatever the reason, that decision was an error; one that exceeds the judiciary's powers and begins to intrude upon the legislature's.

That error also weakens RLUIPA itself. As one scholar observed, adding a "similarly situated" requirement to the statute renders the "assemblies and institutions" language superfluous. Peter T. Reed, Note, *What Are Equal Terms Anyway?* 87 Notre Dame L. Rev. 1313, 1333-34 (2012). But if "assemblies or institutions" is not superfluous, then a comparator must both be an "assembly" or "institution" and "similarly situated," rendering the Equal Terms provision "narrower than the constitutional standard." *Id.* While courts disagree over whether Congress meant to codify *only* existing Free Exercise jurisprudence, no court has opined that Congress meant to codify something less than constitutional protections for religious land uses.

Even the Eleventh Circuit, which stayed closer to the statutory text than the other courts, added its own spin. While the Eleventh Circuit (correctly) held that differential treatment of a religious land use violates the Equal Terms provision, it created a "strict scrutiny safe harbor" for cities: A city can avoid liability for a facial violation of the Equal Terms provision by demonstrating that the discrimination is narrowly tailored to achieve a compelling government interest. *Midrash*, 366 F.3d at 1232. But that "safe harbor" appears nowhere in the Equal Terms provision. Nor is it apparent that "the maximum extent permitted" by the Constitution *compels* a strict scrutiny safe harbor

or forecloses the strict liability that the Equal Terms provision facially imposes.

III. The "legitimate zoning criteria" test vitiates RLUIPA's purpose.

There are two ways to read the Seventh Circuit's explication of "accepted zoning criteria," either of which renders the Equal Terms provision practically meaningless. The first is to treat "accepted zoning criteria" as coterminous with the descriptions of the zones themselves: "if religious and secular land uses that are treated the same . . . from the standpoint of an accepted zoning criterion, such as 'commercial district,' or 'residential district,' or 'industrial district,' that is enough to rebut an equal-terms claim." *River of Life*, 611 F.3d at 373. But surely RLUIPA's broad construction means that a city must do more than say that Zone A is for businesses, Zone B is for houses, and Zone C is for factories, and then declare that a religious school has no secular comparators because it is not a businesses, house, or factory.

Moreover, that relatively simple tripartite scheme is ill-suited for application to the many non-traditional zoning schemes throughout the country. *Id.* at 376 (Williams, J., concurring). For example, it does not readily map on to "institutional buildings" zones, like the one in Northbrook, which was the only zone in which churches could locate. *Petra Presbyterian Church v. Vill. of Northbrook*, 489 F.3d 846, 847 (7th Cir. 2007). Nor is it a comfortable fit for the "industrial zone" in Romeoville that accommodated museums and art galleries, but not a religious institution. *Truth Found. Ministries, NFP v. Vill. of Romeoville*, No. 15 C 7839, 2016 WL 757982, at *15 (N.D. Ill. Feb. 26, 2016).

The second interpretation of "accepted zoning criteria" is as a reference to the types of concerns that typically motivate zoning decisions. In the Seventh Circuit's telling, such "accepted" concerns include parking space, traffic control, municipal revenue generation, "ample and convenient shopping," or "creating a 'Street of Fun.'" *Id.* at 368-69, 373. That is how the Ninth Circuit interpreted the test. *Centro*, 651 F.3d at 1173. But that approach is ultimately destructive of RLUIPA's ends. It was the discretionary application of those very criteria that prompted the passage of RLUIPA. When introducing RLUIPA, Senators Hatch and Kennedy identified the following as the core problem to be remedied by the new statute:

> 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.
>
> 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. More often, discrimination lurks behind such vague and universally applicable reasons as traffic, aesthetics, or "not consistent with the city's land use plan." Churches have been excluded from residential zones because they generate too much traffic, and from commercial zones

> because they don't generate enough traffic. Churches have been denied the right to meet in 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. 16698.

The floor statement of two senators cannot set the meaning of a statute. But the statement from Senators Hatch and Kennedy does crystalize the critical error in the zoning criteria test. Congress found that municipalities routinely excluded religious assemblies and institutes from zones where they permitted secular ones, and they often masked their discriminatory zoning decisions in anodyne-but-malleable standards like traffic and congruence with a zoning plan. Congress passed RLUIPA to remedy precisely that ill. But majority's zoning purposes tests shields municipalities from liability as long as they couch zoning decisions in those very standards. The majority test permits, with almost surgical precision, the very thing RLUIPA was meant to forbid.

This case is exemplar of the dangers in the zoning criteria. Here, the city excluded Tree of Life Schools from the office district because the school's use was inconsistent with the city's zoning goal of maximizing tax revenues. *Tree of Life*, 905 F.3d at 361. Tree of Life showed that it would generate more tax revenue in absolute dollars for the city than a daycare (a permitted use in the office district), and one might think that "maximizing tax revenues" generally means maximizing revenues in absolute dollars. But the city (and the court) moved the goalposts. The court

reasoned that Tree of Life was not similarly situated to a daycare because a daycare would likely use a larger percentage of a smaller building than Tree of Life's proposed use, and so would "generate far more revenue on a per-square-foot basis than Tree of Life would." *Id.* at 375-76.[9]

As Judge Sykes explained, "'economic development' and 'tax-enhancement' objectives . . . will immunize the exclusion of religious land uses from commercial, business, and industrial districts because religious assemblies do not advance these objectives and for-profit secular assemblies do." *Id.* at 386. And in like fashion, [t]raffic control, density management, and noise-reduction objectives will tend to immunize the exclusion of religious land uses from residential districts because religious land uses may be inconsistent with these purposes or criteria in ways that secular assembly uses are not." *Id.* The district courts' application of the legitimate zoning criteria test bears out her concern:

***Immanuel Baptist Church v. City of Chicago*, 283 F. Supp. 3d 670 (N.D. Ill. 2017):** In *Immanuel Baptist Church*, the City of Chicago ordered a church with about 80 weekly attenders to add parking to its 3900 square-foot church, in accordance with a city ordinance requiring a certain number of off-street parking spaces for religious assemblies. 283 F. Supp. 3d at 674. The church raised a facial challenge to the

[9] The Seventh Circuit asserted an "accepted zoning criteria" test would be more objective than other options, and would be left in the hands of judges to apply. So administered, the court believed, cities would not be able to manipulate the criteria to discriminate against religious land uses. That optimism proved ill-founded.

ordinance under the Equal Terms provision, arguing that the City discriminated against churches as compared to libraries smaller than 4000 square feet, which had no off-street parking obligations at all. *Id.* Applying the "accepted zoning criteria" test, the district court found that a library was not a similarly situated comparator because "the Church has not shown it is comparable to a small library with respect to its parking needs." *Id.* at 679. The difference, as alleged by the city and accepted by the court, is that churches "create[ ] regular assemblages of people" with "groups of people coming and going at the same time"; libraries, on the other hand, "generate a smoother flow of traffic throughout the day." *Id.* On that basis, the district court dismissed the church's RLUIPA claim (albeit with leave to amend the complaint).

One might reasonably question whether the library's "smoother flow of traffic throughout the day" *necessarily* means that it has no need for off-street parking, such that the church could never make out a prima facie claim of unequal treatment by pointing to a library as a competitor. But the "accepted zoning criteria" test—along with casual dicta from the Seventh Circuit declaring that "a church is more like a movie theater . . . than like a public library" with respect to traffic patterns, *River of Life*, 611 F.3d at 373—means that a church is unlikely to prevail on an Equal Terms claim when the relevant zoning distinction is something as anodyne and easily manipulated as "parking needs" or "traffic flow."

***Irshad Learning Center v. City of Dupage*, 937 F. Supp. 2d 910 (N.D. Ill. 2013):** The district court's decision in *Irshad* is in the same vein. There, the

Irshad Learning Center, a Muslim religious and education group, sought a property on which to hold Thursday evening prayer services and Saturday afternoon youth educational sessions. 937 F. Supp. 2d at 934-35. The Learning Center bought a large residence that the previous owners had converted into a nonreligious private school. The school, located in a residential zone, had received a conditional use permit that authorized 65 students attending the school five days a week. *Id* at 934. But the city denied the Learning Center a conditional use permit to hold its prayer services and educational sessions there. The district court granted summary judgment to the City on the Learning Center's subsequent RLUIPA challenge. According to the court, the Learning Center's proposed use was not similarly situated to the school because the proposed religious use would involve 100 worshippers one day per week, as well as weekend uses—which the court characterized as "exceed[ing]" the use by the private school "in duration and intensity."[10] *Id.* at 935.

The city raised "concerns that included additional traffic and disturbances," as well as "noise and light generated by larger numbers of people" with the Learning Center's use of the former school. *Id.* The district court accepted the city's argument, ultimately concluding that the Learning Center's use of the former school "could conceivably affect public health, safety, comfort, or the general welfare of the neighboring

[10] Query whether using a building two days per week plus holidays "exceeds" the five days per week use of a school—much less does so beyond reasonable dispute, justifying summary judgment. The Center's claim likely would have reached a jury if it had been brought within the Tenth Circuit.

residents or otherwise create a nuisance." *Id.* Query whether RLUIPA is doing any work at all if a religious use may be rejected because it "could conceivably affect" the "comfort" of local residents. But in any event, the district court accepted as legitimate zoning criteria the very criteria that RLUIPA's sponsors said were routinely used to discriminate against religious uses: "More often, discrimination lurks behind such vague and universally applicable reasons as traffic, aesthetics, or 'not consistent with the city's land use plan.' Churches have been excluded from residential zones because they generate too much traffic . . . Churches have been denied the right to meet in . . . abandoned schools." 146 Cong. Rec. 16698 (Statement of Sens. Hatch and Kennedy).

***Riverside Church v. City of St. Michael*, 205 F. Supp. 3d 1014, 1035 (D. Minn. 2016):** The District of Minnesota's decision in *Riverside Church* is the most shocking example of the futility of the legitimate zoning criteria test. There, a church sought to purchase a movie theater in a business district so that it could broadcast worship services from its main campus (located elsewhere) on one of the screens in the theater. 205 F. Supp. 3d at 1023. The city permitted movie theaters in the business district as a conditional use, but excluded religious assemblies. *Id.* The church sought a conditional use permit for its proposed use of the theater.

The City denied the permit. The city "cited concerns about the negative impact of a religious institution on neighboring commercial properties, as well as concerns about a religious institution's parking needs." *Id.* at 1025. The city concluded that a religious institution is

"not similar to a 15 screen multiplex theater in terms of traffic generation, parking needs or impacts, retail synergy or commercial use." *Id.* at 1025-26.

The district court signed off on that effective ban of churches from the business district. The court opined that a church seeking to broadcast its service on a movie theater screen is *not* "similarly situated" to a movie theater seeking to broadcast a movie on the exact same screen because a church is not a commercial entity. *Id.* at 1036. Applying both the regulatory criteria and zoning purposes tests, the district court first explained that the "regulatory purposes" for the business district included providing space for business use and strengthening the city's economy, and the related "zoning criteria" included "generation of taxable income and shopping opportunities." *Id.* Unsurprisingly, a church is not similarly situated to a movie theater as compared to those purposes: "A church is not in the business of selling items to the public and . . . does not generate taxable revenue. A movie theater, in contrast, typically focuses on selling tickets and food to moviegoers and is a for-profit entity that generates taxable revenue." *Id.* The district court also noted that a church is not similarly situated to a movie theater with respect to traffic flow (one of the *River of Life* court's "accepted zoning criteria") because "Churches typically have one service, or perhaps two or three services back to back, which would lead to high levels of traffic at the beginning and end of each service. Movie theaters, on the other hand, generally have multiple screenings with staggered start times, resulting in a more even traffic flow." *Id.*

The *Riverside Church* decision would have been predictable under the pre-RLUIPA regime, where "[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. 16698. And cities routinely discriminated against religious land uses by relying on "vague and universally applicable reasons" like "traffic . . . or 'not consistent with the city's land use plan.'" *Id.* But RLUIPA was designed to forbid that state of affairs—not to bless it.

The district courts in *Riverside Church* and *Immanuel Baptist* both purported to apply the zoning criteria test from *River of Life*. And the contradictory outcomes in those cases illustrates the extent to which the "zoning criteria" test will accommodate the very ills RLUIPA is supposed to remedy. In *River of Life*, the court mused that where "maintenance of regular (as opposed to sporadic and concentrated) vehicular traffic" is the zoning objective, "a church is more like a movie theater, which also generates groups of people coming and going at the same time, than like a public library, which generates a smoother flow of traffic throughout the day." *River of Life*, 611 F.3d at 373. And for that reason, "[t]he equal-terms provision would . . . require the zoning authorities to allow the church in the zone with the movie theater because the church was more like the for-profit use (the movie theater) than the not-for-profit use (the public library)." *Id*. The court proved to be too optimistic. For while the district court in *Immanuel Baptist* tacitly agreed and concluded that a church was not "similarly situated" to a library with respect to traffic flow, the *Riverside Church* court ostensibly applied the exact same test, but concluded

that churches' traffic patterns were not similar to those of movie theaters either. As it turns out, movie theaters and libraries are evidently more like each other than either is like a church—at least when a city wants them to be.

But the Court need not go deep into the weeds to see that courts are undermining RLUIPA. The majority rule, as exemplified in *Riverside Church* and *Tree of Life*, eliminates a broad class of potential comparators under the Equal Terms provision. Nearly any for-profit assembly or institution is an inapposite comparator where the city's professed zoning criteria is "taxable revenue" or "retail space." And if a church that desires to broadcast a worship service on a movie theater screen is not "similarly situated" to a movie theater broadcasting a movie on the exact same screen, one has to wonder if it is even possible to find a "similarly situated" comparator under the existing tests.

CONCLUSION

"This language is plain. To prove an equal-terms violation, a plaintiff 'religious assembly or institution' need only establish that the challenged land-use regulation treats it on 'less than equal terms with a nonreligious assembly or institution.'" *River of Life*, 611 F.3d at 382 (Sykes, J., dissenting). Congress did not enact the "similarly situated" burden that courts have laid upon plaintiffs—and over which the courts of appeal are widely fractured. *Tree of Life*, 905 F.3d at 379 (Thapar, J., dissenting). This Court should grant a writ of certiorari to clean up the circuit split and restore a proper application of the Equal Terms provision that accords with its text and purpose (and with Congress's interpretive command).

Respectfully submitted,

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