No. 22-309

In The
Supreme Court of the United States

CITY OF SALINAS,

Petitioner,

v.

NEW HARVEST CHRISTIAN FELLOWSHIP,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

KEVIN T. SNIDER
Counsel of Record
MATTHEW B. MCREYNOLDS
PACIFIC JUSTICE INSTITUTE
P.O. Box 276600
Sacramento, CA 95827
Telephone: (916) 857-6900
E-mail: ksnider@pji.org
mmcreynolds@pji.org

Attorneys for Respondent

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

QUESTION PRESENTED

Respondent's Alternate Question: What is the test for an Equal Terms claim under the Religious Land Use and Institutionalized Persons Act (42 U.S.C. § 2000cc(b)(1))?

PARTIES

The Petitioner is the City of Salinas.

The Respondent is New Harvest Christian Fellowship.

CORPORATE DISCLOSURE STATEMENT

In accordance with Supreme Court Rule 29.6, Respondent makes the following disclosure:

Respondent is a religious nonprofit corporation and issues no stock.

STATEMENT OF RELATED PROCEEDINGS

New Harvest Christian Fellowship v. City of Salinas, No. 19-cv-00334-SVK (N.D. Cal.), order granting summary judgment entered on May 29, 2020.

New Harvest Christian Fellowship v. City of Salinas, No. 20-16159 (9th Cir.), opinion issued March 22, 2022.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Ninth Circuit is reported at 29 F.4th 596 (9th Cir. 2022). App. 1-30. The order denying the City of Salinas' petition for rehearing is found at App. 62. The district court's order granting summary judgment for Salinas is reported at 463 F. Supp. 3d 1027 (N.D. Cal. 2020) and is fully set forth at App. 31-61.

STATEMENT OF JURISDICTION

The U.S. Court of Appeals for the Ninth Circuit issued a decision on December 9, 2021. Petitioner invoked this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

"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).

INTRODUCTION

Respondent,[1] New Harvest Christian Fellowship, concedes, as it must, that a division exists among the circuits as to the test under the Equal Terms provision of the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc(b)(1).[2] Even so, denial of the Petition for Writ of Certiorari is proper in that New Harvest could have prevailed in any circuit. However, should the Court be inclined to grant Salinas' Petition, the question presented should be revised as follows: What is the test for an Equal Terms claim under RLUIPA?

STATEMENT OF THE CASE[3]

A. New Harvest's Background and Ministries

A Pentecostal church, New Harvest, worshipped in the downtown area of Salinas, California. App. 33. For more than twenty-five years the Church rented a 4,600 square-foot building on Main Street under a conditional use permit (CUP). *Id*. The CUP was extended twice. At the time of the last CUP extension, New Harvest informed the City of its intention not to occupy its downtown rented building on a long-term basis, hoping

[1] This Response to the City of Salinas' Petition for Writ of Certiorari is filed pursuant to a request of the Court made on October 18, 2022.

[2] All statutory references are to RLUIPA.

[3] The facts, largely not in dispute, are set forth in the Ninth Circuit and district court opinions.

to either buy a permanent building or build elsewhere. But when not able to find a suitable property, the Church continued to rent in the downtown building as a "legal nonconforming use." *Id*.

Over time, the Church experienced growth and averaged close to 200 attendees on Sundays. Due to the increased size of the congregation, the Church outgrew the capacity of its building to accommodate services and ministries.

In addition to its traditional worship services on Sunday mornings, the Church provided two groups for children, Kids' Praise (ages 5-12) and God's Armor Bearers (ages 13-17). Short on space, the children left the building and met across the alley at a dance studio the Church rented by the hour on Sunday mornings.

New Harvest held a midweek service on Tuesday evenings. App. 34. The services began with all of the congregation meeting together in the main sanctuary for congregational worship for thirty minutes. Adults stayed in the sanctuary to listen to teaching, while children separated in smaller groups. The group for teenage boys (ages 12-17) stepped outside to the back of the Church to prevent the sound of their activities from interfering with the adult service. Another group for younger boys (ages 5-11) also met. The teenage and younger boys met only twice per month, alternating weeks to accommodate them due to lack of space. The Church discontinued the girls' groups on Tuesdays due to lack of space. App. 34.

B. In a Downtown Core Area, Salinas established a special three-block section

Salinas created a "vibrancy plan" focused on a three-block section referred to as a Main Street Restricted Area. App. 4. The purpose of the vibrancy plan "is to stimulate commercial activity within the City's downtown, which had been in a state of decline, and to establish a pedestrian friendly, active and vibrant Main Street." App. 33. As its goal, the City wished to bring in tourists and those seeking leisure and entertainment. App. 56. The Church congregation met for worship and its ministries on Main Street within the three-block section, which is part of the section called the Downtown Core Area. App. 3.

For the Downtown Core Area, the Salinas Zoning Code enumerates an "Assembly Use Provision" which specifically prohibits clubs, lodges, places of religious assembly, and similar assembly uses on the ground floor of buildings facing a three-block section of Main Street.[4] App. 63. Other than that, there are no prohibitions on nonreligious assemblies. App. 16. For example, "[t]heatres are classified in the zoning code as 'commercial recreation.'"[5] Salinas permits theaters in the Main Street Restricted Area "with only a nondiscretionary site plan review required, so long as they are less than

---

[4] Salinas Zoning Code § 37-40.310(a)(2).

[5] Salinas City Code § 37-10.270.

two thousand square feet in floor area; otherwise, a conditional use permit is required." App. 22, n. 12.[6]

City ordinances provide additional exceptions to ground floor assembly uses on Main Street; these exceptions revolve around live entertainment that includes musicals, theatricals, dances, cabarets, or comedy acts.[7] App. 63.

In addition to these zoning codes, whether by exemption or CUP, a number of secular assemblies exist within the three-block section of the Downtown Core Area. They include four large venues. Adjacent to the Church sits the El Rey Theater. Though built during the depths of the Great Depression in 1935, the theater seated 700 viewers for showings during this golden age of film. Now reconfigured with a reduced current seating of 400 on the ground floor, the theater has sat vacant for a number of years. App. 55. Not far away, a modern facility called Maya Cinema shows first run films in multiple viewing rooms on the ground floor. Varying in size, these viewing rooms seat from 44 to 170 moviegoers. *Id*. Also on Main Street, Fox Theater hosts events such as wedding banquets, quinceañeras, music concerts, and business conferences. For banquets, the Fox Theater can sit 300, and for wedding ceremonies, 500 on the ground floor. App. 56. The fourth venue, Ariel Theatre, offers year-round programs in theater arts for children and adolescents. *Id*. The Ariel

---

[6] *Id*. at § 37-20.240, Table 37.30.110 and n. 6; *see also*, *id*. at § 37-60.270.

[7] *Id*. at § 37-40.310(a)(3).

Theatre's auditorium seats 289. Like the other three venues, it operates on Main Street.

C. New Harvest purchased a building across the street in the Downtown Core Area

The lack of an adequate facility prompted New Harvest's Pastor, Rev. Ignacio Torres, to search for a larger facility. Pastor Torres learned that a two-story, 11,750 square-foot building ("Beverly Building") across the street from the Church's current site was for lease. A cavernous room which can seat 299 comprises the first floor. App. 11. Negotiations turned from leasing to purchasing the building which eventually occurred.[8] During that process, Pastor Torres discovered that the City did not favor the purchase. App. 4.

Relying on his understanding of RLUIPA, Pastor Torres filed applications on behalf of the Church for a zoning code amendment and CUP to allow the congregation to conduct worship services on the ground floor of the Beverly Building. App. 4. The Church's ministries necessitated that the congregation assemble for its main Sunday services on the ground floor of the Beverly Building because the height of the second floor—the same as a standard living room (9' 1")—was not acoustically suitable for live music. App. 30.

The City's Planning Commission voted to deny New Harvest's applications based on the assembly

---

[8] While the case was on appeal, New Harvest sold the building (App. 6-7) and relocated off of Main Street.

uses provision in the Salinas Zoning Code. App. 34. New Harvest appealed the Planning Commission's decision to the Salinas City Council. After hearing a presentation by the Salinas Community Development Director and public comment, the City Council denied the appeal. *Id*.

New Harvest filed suit for relief under RLUIPA's Substantial Burden and Equal Terms provisions.[9] The Church brought its Equal Terms cause of action based on both facial and as-applied challenges. On cross-motions for summary judgment, the district court ruled for the City on both claims. The Ninth Circuit reversed as to the Equal Terms claim, finding that the regulation facially draws an express distinction between religious assembly use on the ground floor on Main Street and all other nonreligious assemblies (save for clubs and lodges). App. 16.

REASONS FOR DENYING THE PETITION

New Harvest cannot in good faith deny the existence of divisions among the U.S. Circuit Courts of Appeals on the test for RLUIPA's Equal Terms provision. Nevertheless, if the facts presented in this case were brought in other circuits, the Church could put forward strong arguments which might prove persuasive and result in a favorable outcome.

[9] Only the Equal Terms provision is at issue here.

Despite the circuit splits on the interpretation of RLUIPA's Equal Terms provision, the Court should deny the Salinas Petition for a Writ of Certiorari.

I. Under Any Test, New Harvest Could Have Prevailed

Although grouping the circuit courts according to their tests without oversimplifying their positions stands as a challenge, this Brief turns to that task.

First, in its opinion, the panel for the Ninth Circuit noted "three distinct approaches to facial challenges under the Equal Terms provision," App. 19, n. 10, and placed itself with the Fifth Circuit. Next, the Eleventh Circuit takes a textual approach that sits apart from the other circuits. The panel identified the Third and Sixth Circuits as "another camp." Of interest, on the same day of the publication of the Ninth Circuit's opinion, the Fourth Circuit also happened to issue an opinion on Equal Terms. Since the Fourth Circuit essentially follows the Third and Sixth Circuits, New Harvest will include it in that grouping.

Beyond these three camps, the Seventh Circuit views itself as having fashioned a distinctive Equal Terms test. Although not all circuits agree with that view, it will be reviewed for completeness.

Finally, this section excludes the First, Second, Eighth, and Tenth Circuits from the analysis. Although each of these circuits sat for appeals on Equal Terms

claims,[10] those courts have not been presented with a fact pattern allowing them to proffer a full and meaningful analysis of the Equal Terms provision. Instead they either conflate the camps or decline to choose a test.[11]

A. Fifth and Ninth Circuits

The Fifth and Ninth Circuits use similar tests for reviewing claims coming under the Equal Terms provision.[12] Since New Harvest prevailed in the Ninth Circuit, it follows that the Church would also prevail in the Fifth Circuit.

To establish a prima facie Equal Terms violation in the Ninth Circuit, a religious entity must show (1) an imposition or implementation of a land-use regulation, (2) by a government, (3) on a religious assembly or institution, (4) that treats a religious assembly or

---

[10] *See*, *Signs for Jesus v. Town of Pembroke*, 977 F.3d 93, 97 (1st Cir. 2020); *Third Church of Christ, Scientist v. City of New York*, 626 F.3d 667, 669 (2d Cir. 2010); *Congregation Rabbinical Coll. of Tartikov, Inc. v. Vill. of Pomona, NY*, 945 F.3d 83, 125 (2d Cir. 2019); *Marianist Province of the United States v. City of Kirkwood*, 944 F.3d 996, 999 (8th Cir. 2019); *Rocky Mountain Christian Church v. Board of Cty. Comm'rs of Boulder Cty.*, 613 F.3d 1229, 1236-38 (10th Cir. 2010).

[11] There are no published decisions from the D.C. Circuit analyzing an Equal Terms claim.

[12] That the Ninth Circuit tethers itself to the Fifth Circuit (App. 19-20) is difficult to reconcile with the Fifth Circuit's assertion that its test is slightly different from the Ninth Circuit. *Opulent Life Church v. City of Holly Springs, Miss.*, 697 F.3d 279, 292 (5th Cir. 2012). Despite this, for purposes of this brief, New Harvest will treat the circuits together.

institution "on less than equal terms with a nonreligious assembly or institution." *Calvary Chapel Bible Fellowship v. Cty. of Riverside*, 948 F.3d 1172, 1175-76 (9th Cir. 2020) (citing *Centro Familiar Cristiano Buenas Nuevas v. City of Yuma*, 651 F.3d 1163, 1170-71 (9th Cir. 2011) (internal quotation marks omitted)).

The panel for the Ninth Circuit sitting for the New Harvest case explained that the Ninth and the Fifth Circuits' test "makes it easier for the plaintiff to make out a prima facie case" because a plaintiff need only "bring forward sufficient evidence that the challenged regulation makes an express distinction between religious and nonreligious assemblies, regardless of whether those assemblies are similarly situated." *New Harvest Christian Fellowship v. City of Salinas*, No. 20-16159 (9th Cir. March 22, 2022); App. 19. The panel stated further:

> As the Fifth Circuit has observed, this is functionally a two-part test, requiring the government to establish: (1) that the zoning criterion . . . is an acceptable one; and (2) that the religious assembly or institution is treated as well as every other nonreligious assembly or institution that is "similarly situated" with respect to that criterion.

App. 19-20 (citing *Opulent Life Church v. City of Holly Springs, Miss.*, 697 F.3d 279, 292 (5th Cir. 2012)).

The Fifth Circuit first encountered an Equal Terms claim when a city in Texas amended its zoning code for the announced purpose of stimulating the local

economy by creating a retail corridor on a given road. The amendments reclassified certain uses in a business zone which resulted in the elimination of the right of churches to obtain special use permits in those zones. By contrast, the municipality preserved the right of some similar nonretail-nonreligious-institutions to obtain special use permits. When a church attempted to use property in the zone for religious services, the city obtained a restraining order. *Elijah Group, Inc. v. City of Leon Valley*, 643 F.3d 419, 421 (5th Cir. 2011).

Confronted with a facial challenge under the Equal Terms provision, the Fifth Circuit determined that a religious institution must "show more than simply that its religious use is forbidden and some other nonreligious use is permitted." Instead, the Fifth Circuit test requires that "the less than equal terms" is "measured by the ordinance itself and the criteria by which it treats institutions differently." *Id*. at 424. Based on the zoning criteria which prevented a house of worship from even applying for a special use permit as other institutions could, the Court ruled for the church.

As to affirmative defenses, neither the Fifth nor Ninth Circuits countenance "a 'compelling government interest' as an exception to the equal terms provision, or that the church has the burden of proving a 'substantial burden' under the equal terms provision." *Centro Familiar Cristiano Buenas Nuevas*, 651 F.3d at 1170-71. *See*, *Opulent Life Church v. City of Holly Springs, Miss.*, 697 F.3d at 292, n. 12.

In sum, because the Fifth and Ninth Circuits use the same formula for assessing claims under Equal Terms, it stands to reason that New Harvest would also prevail in the Fifth Circuit.

B. Eleventh Circuit

Under the facts present in this case, New Harvest would find a straightforward path to a favorable judgment in the Eleventh Circuit. The textual approach used by the Eleventh Circuit rests as the most orthodox reading of the Equal Terms provision. The test looks to whether a local government imposed (i.e., enacted) a land use regulation such that a sacred assembly or institution is treated on less than equal terms to a secular assembly or institution. *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1230-31 (11th Cir. 2004).

In *Midrash Sephardi*, two Florida synagogues brought a challenge to the Town of Surfside's zoning ordinance which prohibited houses of worship in a given location yet allowed lodges and private clubs. Using a straight forward reading of the statute, the panel found that RLUIPA's express language in the Equal Terms provision requires "a direct and narrow focus." *Id*. at 1230. Thus, the initial question focuses on whether an entity "qualifies as an 'assembly' or 'institution' . . . before considering whether the government . . . treats a [religious entity] differently than a nonreligious assembly or institution." *Id.* "The 'natural perimeter'" of the Equal Terms provision "is the category

of 'assemblies and institutions.'" *Id*. The meaning of *assembly* and *institution* in the statute comes from their "ordinary or natural meanings." *Id.*

Applying the Eleventh Circuit's test to the facts involving New Harvest, the Church would likely prevail on a facial challenge because the Salinas ordinances allow any kind of secular assembly on the ground floor (except for clubs and lodges).

Besides facial challenges, the Eleventh Circuit explains a religious-institution-plaintiff's requirement in an as-applied challenge. "A plaintiff bringing an as-applied Equal Terms challenge must present evidence that a *similarly situated* nonreligious comparator received differential treatment under the challenged regulation." *Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward Cnty.*, 450 F.3d 1295, 1311 (11th Cir. 2006). In view of that as-applied construct, New Harvest would also prevail because of the four large assembly venues operating in the Downtown Core Area on the ground floor, i.e., two cinemas, a children's theater, and a multipurpose theater. In the Eleventh Circuit, any secular assembly or institution constitutes an appropriate comparator. *Konikov v. Orange County*, 410 F.3d 1317, 1325-26 (11th Cir. 2005).[13]

Where the Eleventh Circuit departs from a textual reading centers around its allowance for an affirmative defense. Under such circumstances, a government may succeed by demonstrating a compelling interest under

[13] The nonprofit children's theater would qualify as an institution. App. 39.

a strict scrutiny standard of review. *Midrash Sephardi*, 366 F.3d at 1231. Believing that Congress codified the *Smith-Lukumi*[14] line of precedent, a local government must show that the unequal treatment of religious assemblies and institutions is done for a compelling state interest that is narrowly tailored. *Id.* at 1232. The government may carry its burden only by showing that the challenged provision survives strict scrutiny.

Returning to the facts of this present case, since Salinas' vibrancy plan fails to reach the high threshold required under strict scrutiny, this affirmative defense would be unavailing. As such, it is highly likely that New Harvest would prevail in the Eleventh Circuit.

C. Third, Fourth, and Sixth Circuits

The Fourth and Sixth Circuits borrow the test for Equal Terms review from the Third Circuit. *Canaan Christian Church v. Montgomery Cnty.*, 29 F.4th 182 (4th Cir. 2022); *Tree of Life Christian Sch.'s v. City of Upper Arlington*, 905 F.3d 357 (6th Cir. 2018). Except where the Fourth and Sixth Circuits diverge or add meaningful nuance, this section focuses on the Third Circuit.

The Third Circuit determined that under Equal Terms analysis a court must consider a local government's objectives. *Lighthouse Institute for Evangelism, Inc. v. City of Long Beach*, 510 F.3d 253, 266 (3d

---

[14] *See, Employment Div. v. Smith*, 494 U.S. 872 (1990); *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

Cir. 2007). Thus, a land use law violates 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*." *Id*. (emphasis in original). A religious entity must show that a religious institution or assembly's use "causes no lesser harm to the interests the regulation seeks to advance." *Id*. at 270.

The Third Circuit's approach to understanding those interests is illustrated in *Lighthouse*. There, a Christian church sought to minister to the poor and disadvantaged in downtown Long Branch, New Jersey. As such, it attempted to obtain permission from Long Branch to use a property for a variety of uses, including as a soup kitchen and a job skills training program. A city ordinance aimed to encourage a "vibrant" and "vital" downtown, stood at odds with the church's vision for ministry. The panel affirmed the district court's grant of summary judgment against the church on a facial challenge. This occurred even though the panel framed the legal question as revolving around whether a violation of the Equal Terms provisions occurs when "a municipality . . . excludes religious assemblies or institutions from a particular zone, *where some secular assemblies or institutions are allowed*." *Id*. at 257 (emphasis added). In order to fashion a decision adverse to the church, the Third Circuit's reasoning went beyond the four corners of the Equal Terms provision.

The Sixth Circuit provides a rationale for the explicit rejection of a plain meaning interpretation asserting that the language of the text of the Equal

Terms provision "provides no guideposts for what Congress meant by the term 'equal.'" *Tree of Life Christian Sch.*, 905 F.3d at 367. Hence, the courts will define the term. The Circuit also rejected a textual approach for fear of transgressing the religion clauses. "An interpretation of the equal terms provision that is '*too* friendly to religious land uses' might 'violate the First Amendment's prohibition in favor of religious land uses.'" *Id*. (quoting *River of Life Kingdom Ministries v. Vill. of Hazel Crest*, 611 F.3d 367, 371 (7th Cir. 2010) (en banc) (emphasis in original)). Instead of relying on the text, the panel ruled that "RLUIPA's equal terms provision is to be conducted with regard to the legitimate zoning criteria set forth in the municipal ordinance in question." *Tree of Life Christian Sch.'s*, 905 F.3d at 369.[15]

Also of note, the Third Circuit appears to only contemplate facial challenges to local land use laws under equal terms stating, "There is no need . . . for the religious institution to show that there exists a secular comparator that performs the same functions." *Id*. at 266. But the Fourth Circuit appears to require a plaintiff to present a comparator for both a facial and as-applied challenge. *Canaan Christian Church*, 29 F.4th at 196-97.[16]

---

[15] Of interest, if not a bit perplexing, the Sixth Circuit found the Third, Seventh, and Ninth Circuit tests are essentially the same. *Id*.

[16] Judge Richardson's concurring opinion diverges from the majority, explaining that in his view only an as-applied challenge requires a comparator. *Canaan Christian Church*, 29 F.4th at 200 (Richardson, J., concurring in the judgment) (citing *River of Life*

Applying "similarly situated as to the regulatory purpose" test to the present case, New Harvest—or any church—would find it challenging to prevail on an Equal Terms claim. Here, Salinas' regulatory purpose seeks to establish a pedestrian friendly, active, and vibrant Main Street. Despite these regulatory purposes, Salinas' ordinances allow government offices, funeral services, and laboratories on the ground floor. App. 24. These would work at cross purposes to the goals of the vibrancy plan. Thus, New Harvest may prevail in the Third Circuit, as well.

D. Seventh Circuit

The Seventh Circuit's test flows from *River of Life Kingdom Ministries* which purports to bring the objectivity lacking in the Third Circuit's "similarly situated as to the regulatory purpose" review of local land use restrictions. In *River of Life Kingdom Ministries*, a small urban church sought to relocate to another town. The building targeted for its ministries sat in a location designated by the town's zoning ordinance as a commercial district. The district lies in the town's oldest quarter that for years suffered economic decline. Seeking to revitalize the area, the town amended a zoning ordinance to exclude new noncommercial uses from the commercial district, including not only churches but also community centers, schools, and art galleries.

Kingdom Ministries v. Village of Hazel Crest, 611 F.3d 367, 387 (7th Cir. 2010) (Sykes, J., dissenting)).

The Seventh Circuit initially used a textual interpretation of the Equal Terms provision taken from the Eleventh Circuit. *Digrugilliers v. Consolidated City of Indianapolis*, 506 F.3d 612, 616-17 (7th Cir. 2007). But an en banc panel rejected the textual approach and instead looked with a critical eye to the Third Circuit. "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*." *River of Life Kingdom Ministries*, 611 F.3d at 371 (emphasis in original). According to the majority opinion, use of a "regulatory purpose" is "subjective and manipulable," potentially giving local officials "a free hand in answering the question 'equal with respect to what?'" *Id*.[17] But presumably "regulatory criteria" are "objective—and it is federal judges who will apply the criteria to resolve the issue." *Id*. In other words, the reason that the Seventh Circuit looks to "criteria" stems from a desire to hold local government to objective standards. In contrast, the manipulation that can come from claimed regulatory purposes skew towards the subjective. Thus, a land use regulation violates the Equal Terms provision only if the law treats religious assemblies or institutions less well than secular assemblies or

[17] This is reminiscent of John Steinbeck's comment regarding an "attempt to substitute government by men for government by law; we have always had this latent thing. All democracies have it." Hillel Italie, *Rare John Steinbeck column probes strength of US democracy*, ASSOCIATED PRESS (Oct. 27, 2022), https://apnews.com/article/democracy-john-steinbeck-government-and-politics-29cf93a3781f0c020df22f00fdb2bcfe.

institutions that are similarly situated as measured by "accepted zoning criteria."

In applying the Seventh Circuit's rule to New Harvest's Equal Terms claim, the Church could receive a favorable outcome. Consider that Salinas' vibrancy plan uses adjectival modifiers that lack measurables. "*Pedestrian friendly*, *active*, and *vibrant* Main Street"—all suggest subjective requirements. The infinitive "to *stimulate*," as in "to *stimulate* commercial activity," fairs no better. Due to the amorphous nature of those terms, New Harvest could prevail in the Seventh Circuit due to Salinas' failure to use objective zoning criteria.

II. The Ninth Circuit Did Not Rely on Evidence outside of the Record for Reviewing New Harvest's Facial Challenge

Salinas asserts that the Ninth Circuit brought in evidence from outside of the record by mentioning two famous churches, the National Cathedral and St. Patrick's Cathedral. In dicta, the panel observed the following:

> Churches, however, are not fairly characterized as private assemblies because they are commonly open to the public and can attract substantial foot traffic. Indeed, some of the country's largest houses of worship, like New York's St. Patrick's Cathedral and Washington's National Cathedral, host hundreds of thousands of visitors annually, only a small fraction of whom are members or guests of the

> church. And, although not directly relevant in this facial challenge, New Harvest itself explains that its own services "are held open to the public and no one has ever been denied entry."

App. 21. The Ninth Circuit did not bring in evidence outside of the record, but rather engaged in ordinary analysis, comparing commonly known situations and phenomena and using them merely as examples. Courts often refer to well-known landmarks or current events to illustrate a point. See, for example, the reference to the tragic fire in Paris which severely damaged the Notre Dame Cathedral in 2019. *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2084 (2019).

Finally, since the Ninth Circuit confined its analysis to a facial challenge, the record built by the parties lacks relevance. The comparator under the Ninth Circuit's test for facial challenges logically comes only from municipal regulations.

CONCLUSION

New Harvest recognizes the absence of uniformity among the circuits. Nonetheless, the Court can reasonably deny the Petition because the Church could potentially prevail under these facts in any circuit. That notwithstanding, if the Court is inclined to grant the Petition, New Harvest requests a change to the question presented as follows: What is the proper test for an Equal Terms claim under RLUIPA?

Dated: November 17, 2022

Respectfully submitted,

KEVIN T. SNIDER
Counsel of Record
MATTHEW B. MCREYNOLDS
PACIFIC JUSTICE INSTITUTE
P.O. Box 276600
Sacramento, CA 95827
Tel. (916) 857-6900
E-mail: ksnider@pji.org

Attorneys for Respondent