No. 22-309

In The
Supreme Court of the United States

CITY OF SALINAS, CALIFORNIA
Petitioner,
v.
NEW HARVEST CHRISTIAN FELLOWSHIP,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE*, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AND SALINAS VALLEY CHAMBER OF COMMERCE, IN SUPPORT OF PETITIONER

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INTERESTS OF *AMICI CURIAE*[1]

The International Municipal Lawyers Association ("IMLA") is a nonprofit, nonpartisan, professional organization consisting of more than 2,500 members. Membership is composed of local government entities, including cities, counties, and subdivisions thereof, as represented by their chief legal officers, state municipal leagues, and individual attorneys. IMLA's mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before the United States Supreme Court as well as state and federal appellate courts.

The Salinas Valley Chamber of Commerce ("Chamber") is a nonprofit chamber of commerce that represents 750 business members in the Salinas Valley, located in Monterey County, California, south of the Silicon Valley. The Chamber's mission is to build a strong local economy by promoting sound government and an informed membership and community. Its vision is to promote a thriving, welcoming Salinas Valley

[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. Counsel for all parties received more than ten days' notice of IMLA's intent in filing this brief and all have consented to its filing.

where people, families, and businesses succeed through economic opportunity and growth.

These *Amici* submit this brief in support of the petition for writ of certiorari of the City of Salinas ("City"). The petition concerns the application of a zoning ordinance that restricts assembly uses—secular and religious—from operating on the ground floor of the City's historic downtown. Below, in a published decision, the Ninth Circuit Court of Appeals reversed a grant of summary judgment for the City and held the respondent had met its initial burden in demonstrating application of the ordinance violates the equal-terms provision of the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc-2000cc-5 ("RLUIPA").

The *Amici* agree with the City that circuit courts of appeal have greatly splintered in interpreting this provision. The Amici offer this brief to detail the practical concerns this split of authority creates for city planners in administering municipal zoning ordinances, particularly as to their use of zoning as a tool to revitalize downtowns and city cores.

Downtown revitalization is of prime importance to cities throughout the nation. Once thriving and vibrant, many downtowns have become deteriorated or blighted as public life has shifted to suburban and exurban areas. In recent years, cities have made a strong push to restore their downtowns as places of public importance,

and they have often turned to zoning for this purpose.

Because the use of zoning is important to the success of downtown revitalization, the *Amici* would benefit from resolution of the split in authority at issue. A single, nationwide standard for interpreting the equal-terms provision would remove the uncertainty city planners face in drafting and administering zoning ordinances. Such a resolution would greatly assist cities in their efforts to revitalize downtowns.

SUMMARY OF ARGUMENT

The equal-terms provision of RLUIPA, 42 U.S.C. §2000cc(b)(1), prohibits governments from imposing or implementing land use regulations that treat religious assemblies "on less than equal terms" with nonreligious assemblies. This provision is the subject of a longstanding split in authority as to the burden for maintaining facial challenges. As the Ninth Circuit recognized below, this split has splintered into three branches. And as the City persuasively argues, the Ninth Circuit appears to have charted yet its own course on the subject.

Here, the City enacted provisions into its zoning ordinance to revitalize its historic downtown. Among other things, these prohibit assembly uses, including secular and religious assemblies, from operating on the ground floor of

buildings that front on the City's historic Main Street. Respondent New Harvest Christian Fellowship ("New Harvest") purchased a building on Main Street and sought to use its ground floor for worship services and other gatherings. It challenged the ordinance's application in the district court, which granted the City summary judgment. Below, the Ninth Circuit reversed, and held New Harvest had made out a prima facie equal-terms challenge.

Zoning provisions like the City's are common throughout the nation. As cities seek to reverse historical trends and bring back residents and businesses to downtowns, they have turned to zoning as a principal tool. Zoning offers local planners a myriad of options for incentivizing downtown development. It also provides the flexibility planners need to tailor regulations to cities' unique needs.

Cities' ability to enhance downtowns, however, has been made more difficult because of the split of authority concerning the equal-terms provision. Religious assembly uses often locate in downtowns, and they, like many other land uses, contribute meaningfully to the goal of downtown revival. But because of the split in circuit authority, local planners nationwide lack clear guidance on how to draft downtown zoning codes in ways that accommodate religious assemblies' unique interests under RLUIPA.

Thus, in some states, cities need only ensure their ordinances avoid express distinctions

between religious and non-religious uses. But in other states, cities must be concerned that unexpressed circumstances beyond the text of their ordinances may become a basis for RLUIPA liability. In the decision below, the Ninth Circuit appears to have adopted a hybrid of these two approaches, affecting local governments in nine states and 20% of the United States population.

Given the clear divergence in the circuit court interpretations, this Court should accept the opportunity this case presents to resolve the longstanding split of authority. The continuance of this split has real-world consequences for planners nationwide, who have long lacked a uniform and clear standard to guide their consideration of RLUIPA concerns when drafting ordinances. City planners would benefit greatly from a common interpretation of the equal-terms provision.

ARGUMENT

I. IN MODERN PLANNING PRACTICE, ZONING HAS BECOME AN ESSENTIAL TOOL FOR REVITALIZATION OF DOWNTOWN AREAS.

The regulation of land use is a central function of local government. Throughout the nation, cities and counties exercise a variety of powers under their state constitutions, state statutes, and "home rule" authorities to set the permissible use of land, buildings, and structures

within their municipal territories. Foundationally, this authority derives from the police power to separate land uses so that some uses do not create nuisances for others. *See Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926).

But land use regulation also serves broader purposes. Today, such regulation may be enacted to promote local economies, conserve natural resources, promote environmental values, or further social policies. Land use regulation allows city and county officials to respond to the unique—and often competing—needs of their communities. And it is surely for this reason that land use issues often generate significant public interest in local government affairs.

The principal tool by which cities and counties implement land use policy is through zoning. Zoning ordinances have been described as the "primary tool of land use, a mechanism by which local governments regulate the placement and distribution of the components of our built environment." Richard C. Schragger, *The Limits of Localism,* 100 Mich. L. Rev. 371, 374 (2001).

Broadly, zoning may be defined as the regulation of land use, the size of buildings, and the developable areas of legal parcels. Embodied in municipal ordinances, zoning prescribes specific standards for development and buildings within a municipality. Zoning also classifies the various permitted land uses by type or class, separating

them into discrete districts. 1 Rathkopf's The Law of Zoning and Planning § 10:1 (4th ed. 2022).

Zoning ordinances have undertaken a significant transformation since their advent in the early Twentieth Century. The earliest zoning ordinances were enacted to separate residential from industrial uses and to regulate building heights and sizes. 1 Am. Law of Zoning § 2:20 (5th ed. 2022). As zoning ordinances evolved, land within cities was more comprehensively divided into zones, and the number and nature of zoning districts increased to include commercial, retail, and other land uses. Such zoning came to be known as "Euclidean zoning," following this Court's *Euclid* decision, which upheld such ordinances as a valid exercise of the police power. *Village of Euclid*, at 397.

The scope of zoning regulations continued to expand following *Euclid* to meet the evolving complexities and concerns of modern society. 1 Law of Zoning and Planning § 1:13. Whereas the earliest zoning ordinances had three of four zones, it is common today for zoning ordinances to have 30 or 40 zones. *Id.* at § 1:14. And modern zoning ordinances often operate on a granular level, tailoring regulations to smaller areas, and providing for greater discretion and flexibility over land uses. *Ibid.*

As American society has evolved, so too have the uses for zoning. While the "Euclidean" foundation of zoning remains, zoning today also serves to implement a variety of social policies.

Among many others, these include "smart growth," "infill," and transit- and pedestrian-friendly development.

And—as relevant here—the modern uses of zoning include revitalization of downtowns and city cores. Mandelker et al., Planning and Control of Land Development: Cases and Materials (10 ed. Carolina Academic Press), at 782. In the post-World War II era, zoning schemes enabled American society's automobile-centric policies to prevail; and during this time, many Americans left downtowns to live in the suburbs, while businesses left to locate in strip or shopping malls.

As public life shifted away from downtowns, many once vibrant city cores lost populations and became underdeveloped and, in many cases, blighted. This led to many downtowns experiencing abandonment and deterioration, high crime rates, and other adverse secondary effects. Roger L. Kemp and Carl J. Stephani, Revitalizing America's Downtowns in the 21st Century, American Society for Public Administration (2014).[2]

As downtowns deteriorated, local populations also lost touch with their cities' historical roots. Downtowns often ceased serving as common places where communities engaged in cultural, social, and political gatherings. Donovan D. Rypkema, The Importance of Downtown in the

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[2] https://patimes.org/revitalizing-americas-downtowns-21st-century/ (last accessed Nov. 11, 2022).

21st Century, 69 Journal of the Am. Planning Ass'n, 9, 10 (2003).

In recent years, local officials have made concerted efforts to reverse these trends and breathe life back into their cities' downtowns and central cores. *See Berman v. Parker*, 348 U.S. 26, 34-5 (1954) (elimination of blight is a legitimate public purpose for exercise of the police power). But cities are, of course, subject to the demands of the private market. They can only rely on private businesses to build, improve, and occupy downtown buildings.

Business, in turn, generally desire to locate in stable, safe, and populated areas where they can justify the investments they must make to operate. For this reason, offering favorable zoning regulations is often the only realistic regulatory tool cities have to incentivize the development necessary to bring about revitalization. Zoning has thus become essential to the effectiveness of efforts to restore downtowns.

II. THE CITY'S ZONING ORDINANCE IS A COMMON TYPE OF REGULATION CITIES USE TO REVITALIZE DOWNTOWNS AND CITY CORES.

Through zoning, cities employ a myriad of approaches to revitalize their downtowns. Often, zoning ordinances employ the traditional, "Euclidian" approach of regulating downtown land uses by allowing only commercial or retail uses. In recent years, cities have also enacted "mixed-use" zoning, which may, for instance, allow bottom

floors to be used for businesses—such as restaurants, coffee shops, or retail—with higher-density residential uses—apartments, condominiums, or lofts—allowed on upper floors. Many zoning codes also offer a variety of development incentives—such as waivers of standards, fee reductions, or density transfers—to encourage downtown development.

Here, the City has enacted another common scheme to encourage development of its historic Main Street. Its ordinance declares an intention to promote pedestrian-friendly land uses in a three-block downtown area. (App. 52-55.) The ordinance seeks to achieve this goal, in part, by restricting "clubs, lodges, places of religious assembly, and similar uses" to at least the second stories of buildings that front on Main Street. (Salinas Municipal Code, § 37-40.310(2), App. 63.)

The ordinance implements commonly used planning practices and concepts to accomplish its objective. Its stated purpose is to promote the development of land uses that generate foot traffic throughout business hours, which in turn provide for a long-established urban planning concept, "eyes on the street." Priscila Pacheco, How "Eyes on the Street" Contribute to Public Safety, The City Fix (2015).[3] In enacting the ordinance, City planners believed that businesses regularly open to the public would best be able to monitor what goes on outside their windows, report crime when

[3] https://thecityfix.com/blog/how-eyes-on-the-street-contribute-public-safety-nossa-cidade-priscila-pacheco-kichler/ (last accessed Nov. 14, 2022).

it occurs, and make pedestrians feel safer when visiting downtown. In contrast, land uses that only sporadically use first-floor spaces on Main Street—such as the prohibited secular *and* religious assembly uses—were thought to hinder these objectives.

Overall, the City's ordinance intends to avoid Main Street continuing to serve as a "dead zone," where infrequent commercial activity perpetuates a sense of vacancy. In promoting this goal, the ordinance does not exclude religious assemblies from locating downtown. Rather, the ordinance, like many downtown zoning ordinances nationwide, leaves ample space for assembly uses, which are permitted on upper floors of Main Street buildings.

The City's method for achieving its objectives is not unique and is but one example of the types of zoning regulations cities have enacted to revitalize their downtowns. Although the methods cities choose to accomplish their objectives may vary, downtown zoning ordinances share the common goal of promoting land uses that encourage people and businesses to return to city centers.

III. THE SPLIT IN THE CIRCUIT COURTS' INTERPRETATIONS OF THE EQUAL-TERMS PROVISION HINDERS CITY EFFORTS TO REVITALIZE DOWNTOWNS.

Given zoning's importance to city efforts to revitalize downtowns, this Court should accept certiorari. Perpetuation of the split of authority

concerning the equal-terms provision would continue to hinder local planners from developing zoning regulations that accomplish the objectives of downtown revitalization in ways that honor RLUIPA's commands.

There is no dispute a split in authority exists. As the decision below recognized, this split has existed for more than a decade. (App. 18-19, n. 10.) And in the Ninth Circuit's view, the split has expanded to include three approaches to interpreting a plaintiff's burden in facially challenging a land use regulation. (*Ibid.*)

As the Ninth Circuit has recognized, the circuits split on whether a plaintiff need only demonstrate that the challenged land use regulation expressly distinguishes between religious and secular assemblies,[4] or whether the plaintiff must put forward evidence it was treated less favorably than similarly situated, secular assemblies.[5] (*Ibid.*) A third circuit follows the former approach but applies strict scrutiny whenever the government's burden is shifted.[6] (*Ibid.*)

Asserting it looks only to the express regulation language, the Ninth Circuit construed the

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[4] *See Opulent Life Church v. City of Holly Springs*, 697 F.3d 279, 291-93 (5th Cir. 2012).

[5] *See Tree of Life Christian Sch.'s v. City of Upper Arlington*, 905 F.3d 357, 373 (6th Cir. 2018); *Lighthouse Inst. For Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 270 (3d Cir. 2007).

[6] *See Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1231-32 (11th Cir. 2004).

City Zoning Code's prohibition on "clubs, lodges, places of religious assembly, and similar uses" as an express permission for at least some secular assembly uses—i.e., those that are not "clubs," "lodges," or "similar" secular uses. On this ground, the court found that New Harvest had made a prima facie case. (App. 16-17.)

In seeking certiorari, the City posits that the Ninth Circuit has effectively blurred the line separating facial from as-applied equal-terms challenges. (Petition, at 18.) The Ninth Circuit itself characterized New Harvest's facial and as-applied challenges as "not meaningfully distinct," and it proceeded to analyze evidence concerning the as-applied challenge in relation to the facial challenge. (App. 16, n. 8.) In this regard, the City appears to correctly argue the Ninth Circuit has charted yet an additional direction in interpreting RLUIPA requirements—one that conflates the rules and standards for facial and as-applied challenges. (App. 18-19.)

Because of the breadth and evolution of the split in authority, the Court has ample reason to grant certiorari. The uncertainty concerning the standard for interpreting the equal-terms provision presents practical obstacles for local planners across the nation.

Downtowns offer opportunities for a wide and diverse range of land uses, including religious assemblies, to locate. Yet here, the City ostensibly addressed the potential for dissimilar treatment of religious assembly uses by expressly treating them

the same as clubs, lodges, and "similar" uses. City planners could reasonably have believed this language addressed the universe of assembly uses, ensuring equal treatment of religious and secular assembly uses alike. The Ninth Circuit, however, read the ordinance to authorize other classes of secular assembly uses, citing a downtown theater as an example. The Ninth Circuit also relied on its own assumptions about stand-alone—and, in some cases, nationally historic—church buildings to describe the foot traffic a religious assembly might generate in relation other uses.

From a drafting standpoint, it is doubtful City planners could have reasonably anticipated this outcome at the time of drafting. In a circuit in which courts look only to express ordinance language in assessing equal-terms claims—which included the Ninth Circuit before this case[7]—planners could reasonably have believed their ordinance had navigated RLUIPA concerns. But in Ninth Circuit states, cities need now be concerned for liability from factors outside the text of zoning ordinances, some of which could not reasonably be known until well after enactment.

The same is true for states in other circuits. For planners, this can make ordinance drafting difficult. At the time drafting, planners may not have information about the owners or potential users of the buildings that will be subject to their ordinances. And even that information would not

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[7] *See Centro Familiar Cristiano Buenas Nuevas v. City of Yuma*, 651 F.3d 1163, 1175 (9th Cir. 2011).

assist planners in identifying all the future owners and users that may locate downtown. At the time of drafting, therefore, ascertaining whether ordinances may create RLUIPA liability can be, at best, a speculative endeavor.

Regardless of which interpretation prevails, the need for resolution should be clear. The multiple branches of interpretation of the equal-terms provision leave planners nationwide without clear and uniform guidance as to how to draft zoning ordinances that respect RLUIPA concerns. As cities continue to look for ways to revitalize their downtowns and city cores, they would greatly benefit in having an understandable and nationwide standard for interpreting the equal-terms provision.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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