No. 22–309

In The
# Supreme Court of the United States

CITY OF SALINAS,

*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**

## REPLY BRIEF FOR PETITIONER


**HORVITZ & LEVY LLP**
DAVID M. AXELRAD
PEDER K. BATALDEN
*Counsel of Record*
SCOTT P. DIXLER
3601 WEST OLIVE AVENUE
8TH FLOOR
BURBANK, CALIFORNIA
91505-4681
(818) 995-0800
pbatalden@horvitzlevy.com

**BURKE, WILLIAMS & SORENSEN, LLP**
THOMAS B. BROWN
GREGORY R. AKER
1999 HARRISON STREET
SUITE 1650
OAKLAND, CALIFORNIA
94612-3520
(510) 273-8780
gaker@bwslaw.com

*Counsel for Petitioner*
*City of Salinas*

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## INTRODUCTION

The City of Salinas's petition explained that circuit courts have splintered in evaluating facial challenges under the "equal terms" provision of the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc(b)(1). Pet. 17–19.

Respondent New Harvest Christian Fellowship's brief in opposition all but joins in the City's petition. New Harvest does not deny that circuit courts are divided. Instead, New Harvest "concedes, as it must, that a division exists." Br. in Opp'n 2. New Harvest does not deny that the question presented is important, as the City's amici have confirmed. *See* IMLA & SVCC Amicus Br. 11–15. Nor does New Harvest deny that the different tests adopted by circuit courts will lead to different outcomes for similarly situated parties. New Harvest even offers an alternative question presented if this Court is inclined to grant the petition.

New Harvest's reed-thin basis for denying certiorari is that, *in this specific case*, New Harvest would have prevailed under competing tests adopted in other circuits. But New Harvest offers no assurance that is true. New Harvest guesses about what "might," Br. in Opp'n 16, or "may," Br. in Opp'n 17, or "could," Br. in Opp'n 18, or "would," Br. in Opp'n 12, 13, 17, have happened if other circuits' tests were applied to the controversy here. Speculation of that rank is not a reason to deny certiorari. The issue here is not

whether New Harvest *could* win or lose under other tests. The issue is whether the incontestable split of authority merits this Court's attention. It plainly does.

Finally, the Court should decline New Harvest's request to rewrite the City's question presented. New Harvest's alternative question would embrace issues not addressed by the Ninth Circuit below—primarily the as-applied challenge on which New Harvest did not succeed in the Ninth Circuit. But New Harvest forfeited its opportunity to file a cross-petition, so those issues are not before the Court now. Accordingly, there is no basis for expanding the question presented as New Harvest proposes.



## ARGUMENT

### I. The parties agree that circuit courts are divided on the important issue presented in the petition.

The City explained that circuit courts have applied three different standards to evaluate what a RLUIPA plaintiff must show in an "equal terms" facial challenge. Pet. 17–19. New Harvest "concedes, as it must, that a division exists among the circuits" on this issue. Br. in Opp'n 2. New Harvest goes one step further by suggesting that circuit courts have adopted *four* different approaches. Br. in Opp'n 8–19.

New Harvest's sole argument against certiorari is that it would have prevailed under any of these tests. But that argument is flawed in two respects.

First, whether any one party (such as New Harvest) might prevail under multiple tests is beside the point. It does not eliminate the existing conflicts among the circuit courts, nor does it diminish the need for this Court's review. If *all* potential RLUIPA plaintiffs would win or lose the same way under *every* competing test, that might show that the intercircuit split is more semantic than real, signaling that this Court's review is unneeded. But New Harvest does not attempt that more robust argument. It says nothing about other RLUIPA plaintiffs; it focuses solely on its own situation.

Second, New Harvest's focus on how it would fare in other circuit courts promises much, but winds up proving nothing. New Harvest catalogues the competing tests applied by four groups of circuits. Br. in Opp'n 8–19. It discusses leading decisions in those circuits. But when it comes time to apply those decisions to its own claim, New Harvest offers only speculation that its equal terms claim would have succeeded in every circuit. In New Harvest's words, "it stands to reason that New Harvest would also prevail in the Fifth Circuit"; it "would likely prevail" in the Eleventh Circuit"; it "may prevail in the Third Circuit, as well"; and it "could prevail in the Seventh Circuit." Br. in Opp'n 12, 13, 17, 19. That is conjecture—may, would, and could—not a persuasive argument that the circuit split identified by the City is illusory or unworthy of this Court's attention.

## II. This Court should not rewrite the question presented by the petition.

New Harvest's brief in opposition makes one request—it asks the Court to revise the City's question presented to state the following:

> 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))?

Br. in Opp'n i; *see id.* at 2, 21.

Respondents may *restate* the question presented in a brief in opposition, but they may not *expand* the question presented. *Timbs v. Indiana*, 139 S.Ct. 682, 690 (2019); *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 279 n.10 (1993). Here, the City specified an issue that is confined to facial challenges under the statute: "The question here is what a RLUIPA plaintiff must show in an 'equal terms' facial challenge." Pet. i. New Harvest's alternative question is not so confined. Its formulation imposes no limits on the analysis of equal terms issues. It would fairly include full-scale analysis of as-applied challenges and possibly other matters. New Harvest thereby invites consideration of issues that are beyond the question framed by the City's focus on facial challenges.

New Harvest's overly expansive framing of the question is problematic because it would take this Court beyond the issues actually addressed by the Ninth Circuit below. *See Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of

first view . . . ."). The Ninth Circuit characterized New Harvest's equal terms claim as a *facial* challenge and limited its analysis and holding to *facial* challenges. *See* Pet. App. 15 n.8, 16 ("As this is a facial challenge, we consider only the text of the zoning ordinance, not its application." (citation omitted)), 18 n.10, 25 ("Because the Assembly Uses Provision facially violates the equal terms provision of RLUIPA, we reverse."). Yet New Harvest's alternative framing of the question is not limited to facial challenges; its framing would encompass as-applied challenges, even though the Ninth Circuit did not address them here.

New Harvest may not expand the question presented in this Court after forfeiting its opportunity to file a cross-petition for certiorari. *NLRB v. Int'l Van Lines*, 409 U.S. 48, 52 n.4 (1972) (explaining that the "respondent disagrees" with the circuit court's interpretation of a statute, "[b]ut since no timely cross-petition for certiorari was filed by the respondents, this question is not before us"); *see Brennan v. Arnheim & Neely, Inc.*, 410 U.S. 512, 516 (1973) ("Since no cross-petition for certiorari was filed by the respondent, the important issues [it raises] are not before us." (footnote omitted)).

The district court rejected New Harvest's as-applied challenge. Pet. App. 53–60. And the Ninth Circuit declined to resurrect it, confining New Harvest to a facial challenge. Pet. App. 15–16. Because the Ninth Circuit issued a decision that did not rule in favor of New Harvest on its as-applied challenge, it was incumbent upon New Harvest to cross-petition for certiorari if it wanted this Court to review its as-applied challenge. But New Harvest neglected to do so.

Thus, this Court should not review that issue (or any other) that exceeds the facial challenge decision of the Ninth Circuit.



## CONCLUSION

The City of Salinas's petition for a writ of certiorari should be granted.

Respectfully submitted,

**HORVITZ & LEVY LLP**
DAVID M. AXELRAD
PEDER K. BATALDEN
*Counsel of Record*
SCOTT P. DIXLER
3601 WEST OLIVE AVENUE
8TH FLOOR
BURBANK, CALIFORNIA
91505-4681
(818) 995-0800
pbatalden@horvitzlevy.com

**BURKE, WILLIAMS & SORENSEN, LLP**
THOMAS B. BROWN
GREGORY R. AKER
1901 HARRISON STREET
SUITE 900
OAKLAND, CALIFORNIA
94612-3501
(510) 273-8780
gaker@bwslaw.com

*Counsel for Petitioner*
*City of Salinas*

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