NO. _____

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner Tree of Life Christian Schools is a private school that assists parents and the Church in educating and nurturing young lives in Christ. Hampered by multiple campuses in old buildings, Tree of Life purchased a large building in the City of Upper Arlington, Ohio. Though the City's zoning code allowed nonprofit daycares, hospitals, out-patient surgery centers, periodicals, and offices as-of-right, the City refused to allow Tree of Life to operate the property as a religious school. After unsuccessfully requesting a conditional use permit and rezoning, Tree of Life sued under the Religious Land Use and Institutionalized Persons Act's ("RLUIPA") equal-terms provision.

The circuits are in disarray on the proper test for a RLUIPA equal-terms claim. The Sixth Circuit departed from RLUIPA's text and the Second, Tenth, and Eleventh Circuit's standards by requiring Tree of Life to show that the City provided not just a nonreligious assembly or institution with more favorable zoning treatment, but also that Tree of Life would serve the City's zoning interest in generating tax revenue equally well as that secular comparator. In so doing, it sided with varying equal-terms tests developed by the Third, Fifth, Seventh, and Ninth Circuits. The questions presented are:

1. What is the proper test for a RLUIPA equal-terms claim.

2. Whether Tree of Life established a facial or as-applied equal-terms violation here.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE

There are no parties to the proceedings other than those listed in the caption. Petitioner is Tree of Life Christian Schools. Respondent is the City of Upper Arlington, Ohio.

Petitioner Tree of Life Christian Schools is an Ohio nonprofit corporation. Tree of Life has seven sponsoring churches. No other entity or person has any ownership interest in it.

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DECISIONS BELOW

Lower courts have entered seven opinions in this case. The district court's unreported opinion denying Petitioner's motion for a preliminary injunction is reprinted in the Appendix ("App.") at App.223a–62a.

The district court's ruling granting Respondent's first motion for summary judgment is reported at 888 F. Supp. 2d 883 (S.D. Ohio 2012) and reprinted at App.193a–222a. The Sixth Circuit's unpublished opinion reversing and remanding on the issue of ripeness is available at 536 Fed. App'x 580 (6th Cir. 2013) and reprinted at App.187a–92a.

The district court's subsequent ruling granting Respondent's motion for summary judgment is reported at 16 F. Supp. 3d 883 (S.D. Ohio 2014) and reprinted at App.145a–86a. The Sixth Circuit's opinion reversing the district court's summary-judgment order is reported at 823 F.3d 365 (6th Cir. 2016) and reprinted at App.105a–44a.

The district court's unreported ruling granting Respondent's motion for final judgment is available at No. 2:11-cv-09, 2017 WL 4563897 (S.D. Ohio Oct. 13, 2017) and reprinted at App.62a–104a. The Sixth Circuit's opinion affirming the district court's grant of final judgment is reported at 905 F.3d 357 (6th Cir. 2018) and reprinted at App.1a–61a.

STATEMENT OF JURISDICTION

On September 18, 2018, the Sixth Circuit issued its opinion affirming the grant of final judgment in Respondent's favor. On November 28, 2018, Justice Sotomayor extended the time to file a petition for a writ of certiorari to January 16, 2019. This Court has jurisdiction under 28 U.S.C. 1254(1).

PERTINENT STATUTORY AND CODE PROVISIONS

RLUIPA's equal-terms provision states that "[n]o government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution *on less than equal terms* with a nonreligious assembly or institution." 42 U.S.C. 2000cc(b)(1) (emphasis added).

Other relevant RLUIPA provisions are reproduced at App.310a–15a. Excerpts from the City of Upper Arlington's code are reproduced at App.266a–309a.

INTRODUCTION

For over eight years, Petitioner Tree of Life Christian Schools has been stuck with a building it cannot use. The City of Upper Arlington, Ohio is adamant that the school's building house commercial activity to generate tax revenue, even though the City's zoning code does not require that, and the City would readily allow other non-profit activity at the site. So Tree of Life has had to turn away new students because its facilities have been inadequate for its mission, and the City refuses to allow the school to occupy the campus it purchased.

This impasse is detrimental to Tree of Life's religious ministry. Four separate campuses in the Columbus area make transportation unwieldy and alienate families with children of differing grade levels. What's more, two of Tree of Life's campuses are in churches, one of which has old facilities with bad electrical. They are not up to the task of delivering a high-quality, Bible-based education, nor implementing the technological innovation Tree of Life desires for its students.

The City's actions are illegal. In RLUIPA, Congress enacted an equal-terms provision that guarantees religious assemblies or institutions are not treated "on less than equal [zoning] terms with a nonreligious assembly or institution." 42 U.S.C. 2000cc(b)(1). But that promise has never been fully realized. A majority of lower courts from coast to coast condemn RLUIPA's equal-terms provision and refuse to enforce its straightforward command. They have added requirements to water down RLUIPA and allow local governments to do as they like.

The Sixth Circuit panel majority sided with the City, concluding that RLUIPA's equal-terms provision allows the City to treat religious nonprofits differently than secular nonprofits. In so holding, the Sixth Circuit created the eighth distinct circuit test interpreting how to apply the equal-terms provision. No two circuits use identical tests, though broadly speaking their approaches fall into two camps: courts that adopt a text-based approach and those, like the Sixth Circuit, that create their own, non-textual test.

As Judge Thapar observed in dissent, there "comes a time with every law when the Supreme Court must revisit what the circuits are doing. That time has come" for RLUIPA. App.61a. "Every circuit to address the issue has given its own gloss to the Equal Terms provision." *Ibid.* As a result, whether "a religious plaintiff can succeed under the Equal Terms provision thus depends entirely on where it sues." *Ibid.*

Not "only have the circuits split on the issue," continued Judge Thapar, "but many of them have also neutralized the Equal Terms provision." *Ibid.* "By importing words into the text of the statute, the courts have usurped the legislative role and replaced their will for the will of the people." *Ibid.* (citation omitted).

This Court should grant review, resolve the circuit morass, enforce RLUIPA's plain text, and halt the widespread discrimination against religious land uses that Congress sought to remedy nearly 20 years ago.

STATEMENT OF THE CASE

A. RLUIPA's history and purpose

This Court's decision in *Employment Division, Department of Human Resources of Oregon* v. *Smith*, 494 U.S. 872 (1990), spurred Congress to pass RFRA, the Religious Freedom Restoration Act of 1993. After this Court struck down RFRA's application to the States in *City of Boerne* v. *Flores*, 521 U.S. 507 (1997), Congress looked for ways to protect religious liberty that fit within *Boerne*'s strictures. Congress held nine hearings on religious freedom over three years. Those hearings identified two areas in which greater free-exercise protection was indisputably needed: (1) religious land uses, and (2) institutionalized persons. U.S. Dep't of Justice, Report on the Tenth Anniversary of the RLUIPA (Sept. 22, 2010) at 3-4, https://bit.ly/2SavPpQ (hereinafter "DOJ RLUIPA Report").

The solution was RLUIPA. 146 Cong. Rec. S7774 (2000) (statement of Sen. Hatch); 146 Cong. Rec. H7190 (2000) (statement of Rep. Canady). Congressional hearings had unearthed "massive evidence" of widespread discrimination by local officials against religious organizations in land-use decisions. DOJ RLUIPA Report at 3. For instance, the House found that while some cities overtly exclude religious organizations, others "do so subtly. The motive is not always easily discernible, but the result is a consistent, widespread pattern of political and governmental resistance" to religious assemblies. H.R. Rep. No. 106-219, at 24 (1999), https://bit.ly/2Lr0ufT.

This proof of discrimination was so overwhelming that a broad spectrum of over 70 civil rights and religious groups supported the bill. DOJ RLUIPA Report at 4-5. Both the House and Senate passed RLUIPA by unanimous consent and President Clinton signed it into law to remedy—once and for all—a nationwide epidemic of discrimination against religious land uses. *Id.* at 2, 4.

1. Religious organizations are often unwelcome in any land-use zone and face numerous obstacles to using their property.

Religious organizations like Tree of Life do not fit comfortably into any land-use zone. Strictly speaking, they are not commercial, residential, or industrial. Municipalities often oppose them because they are tax-exempt, homeowners resist them for disrupting "community feel," and developers compete with them for land. When it comes to acquiring new property, religious organizations are often *persona non grata*.

This is true no matter where religious organizations locate. Municipalities ban them from commercial zones because they allegedly do not enhance tax revenue or economic development, put a damper on entertainment districts, or attract too little traffic. But if religious organizations turn to residential zones, localities accuse them of generating too much traffic, causing density and noise concerns, or even lowering property values. 146 Cong. Rec. 16698, 16698 (2000) (joint statement of Sen. Hatch and Sen. Kennedy); *River of Life Kingdom Ministries* v. *Vill. of Hazel Crest*, 611 F.3d 367, 386 (7th Cir. 2010) (en banc) (Sykes, J., dissenting).

Often, this discrimination against religious land uses (particularly new ones) is not overt but hidden. Localities may appear friendly to religious organizations by allowing them to locate in established residential neighborhoods. But in reality, all but the smallest religious institutions would need to buy several adjoining properties, knock down valuable homes, and erect new buildings. That is not practically or economically feasible, which is why Congress found that new or expanding religious organizations must search for property in commercial districts—just as Tree of Life did here. H.R. Rep. No. 106-219, at 18-19 (1999).

Even when codes facially allow secular nonprofits to locate in a zone, as the City's does here, municipalities have little trouble excluding religious organizations. Land-use determinations are notoriously case-by-case and based on easily manipulable criteria. All localities must do to keep a religious organization out of a zoning district is cite vague concerns like aesthetics, traffic, or not furthering the land-use plan. 146 Cong. Rec. 16698, 16698 (2000) (joint statement of Sen. Hatch and Sen. Kennedy).

That is why Congress decided concrete protections were necessary to stop pervasive discrimination against religious land uses. RLUIPA protects religious peoples' ability to assemble—a crucial aspect of their right to the free exercise of religion. *Ibid.*

2. RLUIPA's equal-terms provision is one of four ways that Congress protected religious organizations in zoning decisions.

Congress worked closely with the Department of Justice to draft four objective RLUIPA rules to protect religious organizations from land-use discrimination.

First, RLUIPA bars local government—in certain instances—from substantially burdening religious exercise through land-use regulations unless it satisfies RFRA's version of strict scrutiny. 42 U.S.C. 2000cc(a). Second, RLUIPA's equal-terms provision forbids localities from imposing or implementing land-use regulations in a manner that treats religious assemblies or institutions on less than equal terms with nonreligious assemblies or institutions. 42 U.S.C. 2000cc(b)(1). Third, RLUIPA bans localities from enacting or enforcing a land-use regulation that discriminates against assemblies or institutions based on their religion or denomination. 42 U.S.C. 2000cc(b)(2). Fourth, RLUIPA prohibits localities from totally excluding religious assemblies from their jurisdictions or unreasonably limiting religious assemblies, institutions, or structures within their bounds. 42 U.S.C. 2000cc(b)(3).

The equal-terms provision—over which lower courts are in such profound disagreement—requires localities to give religious assemblies or institutions (on paper and in practice) the same freedom as their best-treated nonreligious assemblies and institutions. This prophylactic rule makes sense given the record of systemic discrimination against religious organizations and because (1) the free exercise of religion is a

fundamental right, (2) government may not favor non-religion over religion, and (3) any law that treats religious organizations less well than their secular peers is not truly neutral or generally applicable. *Lighthouse Inst. for Evangelism, Inc.* v. *City of Long Beach*, 510 F.3d 253, 288 & n.36 (3d Cir. 2007) (Jordan, J., dissenting).[1] Once a religious organization shows a prima facie case of disparate treatment, the local government must show that its treatment of religious and nonreligious assemblies or institutions is—in fact—equal. 42 U.S.C. 2000cc-2(b).

These RLUIPA provisions are a vital means of enforcing free-exercise rules in the face of endemic discrimination against religious organizations. Local governments all too easily ascribe unequal treatment to nebulous zoning factors rather than faith. *Issues Relating to Religious Liberty Protection, and Focusing on the Constitutionality of a Religious Protection Measure: Hearing Before the S. Comm. on the Judiciary*, 106th Cong. 89-90 (1999) (prepared statement of Douglas Laycock), https://bit.ly/2Gt0a1r. So Congress directed the courts to construe RLUIPA in favor of "a broad protection of religious exercise" to the maximum extent permitted by its terms and the Constitution. 42 U.S.C. 2000cc-3(g). And Congress further clarified that RLUIPA provides for facial or

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[1] See Brian K. Mosley, Note, *Zoning Religion Out of the Public Square: Constitutional Avoidance and Conflicting Interpretations of RLUIPA's Equal Terms Provision*, 55 Ariz. L. Rev. 465, 494 (2013) (government cannot declare "the most prominent and desirable areas of town . . . wasted on religious uses" without unconstitutionally preferring "nonreligious assemblies").

as-applied claims by banning unequal treatment in the manner local governments "impose *or* implement a land use regulation." 42 U.S.C. 2000cc(b)(1) (emphasis added).[2]

B. The City's religious discrimination

The facts here are undisputed. Tree of Life is a private Christian school that ministers to students from pre-kindergarten through high school. The school opened in 1978, has grown from 47 to roughly 588 students, and now employs 136 people. For 40 years, it has assisted parents and the Church in educating and nurturing young lives in Christ.

Tree of Life's ability to carry out its religious mission has been hampered by campuses dispersed in multiple locations, including several churches. One church is eager for Tree of Life to vacate, and the other has an old building with facilities issues, including bad electrical. Limited space in both churches also bars the school from advancing its religious ministry by accepting more students or implementing needed technological upgrades. And families find it challenging to transport children of different grade levels to and from multiple campuses around the area.

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[2] RLUIPA broadly defines a "land use regulation" as "a zoning or landmarking law, or the application of such a law, that limits or restricts a claimant's use or development of land (including a structure affixed to land)." 42 U.S.C. 2000cc-5(5).

So Tree of Life decided to find a home of its own. The school considered over 20 sites in Franklin County, Ohio. After searching more than two years, Tree of Life settled on a property located at 5000 Arlington Centre Boulevard in the City of Upper Arlington, Ohio. This former AOL/Time Warner building provided roughly 254,000 square feet of space in a central location. Purchasing the property would allow Tree of Life to consolidate its programs in one place, reduce transportation hurdles, and expand its ministry to serve more students.

Only one thing stood in the way: 5000 Arlington Centre Boulevard is located in the City's ORC "office and research district." Despite its name, the ORC District was not earmarked solely for for-profit activities but welcomed nonprofit daycares, hospitals, out-patient surgery centers, publishers, and offices as-of-right, and even churches as a conditional use. App.266a–70a. Because Tree of Life operates in much the same way as these assemblies or institutions, the school believed that it could work with the City to resolve any zoning issues.

Tree of Life contracted to buy the property, contingent on the City granting zoning approval. But the City has done everything in its power to keep out the school, claiming that religious schools do not generate property taxes. The City was adamant that a for-profit entity occupy the property, even though the zoning code contains no such requirement, no for-profit business showed serious interest in locating there, and AOL/Time Warner could keep the property vacant in perpetuity without issue. App.107a ("The government refused to strike a deal with TOL Christian Schools in hopes, apparently unfounded,

that the property's former occupant, AOL/Time Warner (or its equivalent), would return."). The City denied Tree of Life's requests for a conditional use permit or two types of rezoning.

With time running out on its contract, Tree of Life purchased the property to retain standing to bring this suit. 42 U.S.C. 2000cc-5(5) (requiring RLUIPA plaintiffs to have a property interest in the regulated land or a contract or option to acquire such an interest). Over eight years later, the City continues to keep Tree of Life from using its building as a religious school. Tree of Life has been forced to turn students away because it lacked space, and it lost existing students due to its scattered campuses. App.316a–20a. Meanwhile, the school's building sits virtually vacant, and nominal personal-income tax flows to the City.

C. Proceedings

Tree of Life filed suit in the U.S. District Court for the Southern District of Ohio and brought a RLUIPA equal-terms claim. It sought a preliminary and permanent injunction, declaratory relief, compensatory and nominal damages, and attorney fees and costs. At first, the district court found that Tree of Life was likely to succeed on the merits of its RLUIPA claim because nonprofit daycares and hospitals were allowed in the ORC district and religious schools were not. App.247a–51a. But the district court still denied a preliminary injunction because it believed potential harm to the City outweighed the harm to the school. App.261a.

Based on this lawsuit, the City amended its zoning code to exclude daycares from the ORC District and argued the lawsuit was not ripe because the school had asked the City for a conditional use permit but not rezoning. App.266a–76a. The district court granted summary judgment to the City for lack of ripeness. App.221a–22a. Tree of Life appealed and requested rezoning. While the appeal was pending, the City denied Tree of Life's first rezoning request, so the Sixth Circuit reversed the ripeness holding and remanded. App.190–92a.

Tree of Life requested a second type of rezoning, which the City also denied. The parties then cross-moved for summary judgment. On Tree of Life's facial equal-terms claim, the district court granted judgment to the City because "Upper Arlington treats both religious schools and secular schools the same." App.168a. The court analyzed Tree of Life's as-applied claim under the Third and Seventh Circuits' equal-terms tests, which look to the City's "regulatory purpose and accepted zoning criteria." App.170a. Because "[s]chools are not offices or research facilities, nor are they ancillary uses to those, such as coffee shops and daycares," Tree of Life lost. App.172a.

On the second appeal, the Sixth Circuit declared the City's zoning code "facially neutral" without analysis. App.122a. But, without adopting a specific equal-terms test, the court concluded there were genuine issues of material fact on the as-applied RLUIPA claim. App.116–20a. The court reversed and remanded to the district court to determine "whether the government treats more favorably assemblies or

institutions similarly situated with respect to maximizing revenue," such as nonprofit hospitals, outpatient care centers, and daycare centers. App.118a.

On remand for the third time, the parties filed cross-motions for final judgment. The district court again rejected Tree of Life's facial claim because the City "treats both religious schools and secular schools the same." App.84a n.6. As for the as-applied claim, the court declined to consider nonprofit daycares as comparators and sua sponte enjoined the City from readmitting them in the ORC District to justify keeping the school out. App.87a–89a. Alternatively, the district court discounted Tree of Life's experts' testimony that a religious school would generate more tax revenue than a nonprofit daycare and credited a City expert who testified that a daycare would generate more tax revenue per square foot. App.91a–97a. But this holding was irrelevant in light of the court's holding that although daycares compliment commercial businesses as ancillary uses, religious schools do not. App.97a.

Tree of Life pointed out that AOL/Time Warner's actual commercial use of the property as office space generated little tax revenue while operations were winding down. App.97a–98a; 264a–65a. But the district court said that a partial office use of the property could not serve "as a valid comparator" because otherwise "a city with the goal of maximizing revenue could [n]ever prevail." App.98a.

A divided panel of the Sixth Circuit affirmed. Based solely on the Sixth Circuit's second opinion, which provided no analysis, the majority upheld the district court's facial equal-terms ruling. App.15a–

16a. It proceeded to address Tree of Life's as-applied claim by lamenting that RLUIPA "provides no guideposts for what Congress meant by the term 'equal.'" App.17a.

So the majority turned to lower-court precedent and joined the Third, Seventh, and Ninth Circuits' "majority view" of the equal-terms test, but altered its language to ask whether a secular comparator is similarly situated in regard to the "legitimate zoning criteria" set forth in the ordinance. App.21a. It rejected the Eleventh and Tenth Circuit's standards because they hewed too closely to RLUIPA's text and did not focus on the government's zoning purpose. App.21a–23a. Though the majority essentially admitted that it was adding words to what Congress wrote, it reasoned that "'similarly situated with regard to legitimate zoning criteria' is simply the most reasonable interpretation of the undefined statutory words 'equal terms.'" App.23a.

Like the district court, the majority credited one of the City's experts over Tree of Life's experts because she calculated tax "revenue per square foot." App.35a. The majority recognized that "the daycare on which [the expert] based her calculations was a for-profit entity" but did its own calculations based on multiple experts' testimony and concluded that even nonprofit "daycares generate far more revenue on a per-square-foot basis than Tree of Life would." App.35a–36a. Moreover, the majority rejected using AOL/Time Warner's partial office use of the property as a secular comparator because "if a partial use is accepted as a valid comparator, then there can never be a case in which a city with the goal of maximizing revenue could ever prevail." App.30a (cleaned up).

Judge Thapar dissented because the majority failed to "give RLUIPA the effect its written text demands." App.37a. Rather than asking whether a permitted nonreligious entity is an assembly or institution, the majority asked whether an assembly or institution is "similarly situated" with respect to the City's interests. App.43a. Judge Thapar regarded that heightened-pleading standard as inappropriate given that RLUIPA's text imposes no such standard. App.43a–45a.

The question RLUIPA's equal-terms provision asks is whether a nonreligious assembly or institution is allowed in the district on less than equal terms with Tree of Life via facial inequality, gerrymandering, or selective application. App.47a–49a. Judge Thapar viewed daycares and hospitals, at least, as assemblies or institutions the zoning code treats better than Tree of Life by allowing them as of right while completely barring religious schools. App.52a–58a.

Similarly, Judge Thapar would have held that the City violated RLUIPA as-applied by denying Tree of Life's attempts to locate in the district while allowing daycares and hospitals to operate there at will. App.58a. Noting that every circuit to address the issue "has given its own gloss to the Equal Terms provision," frequently "neutraliz[ing]" the provision's terms, Judge Thapar urged this Court to grant review, resolve the split, and restore the plain meaning of RLUIPA's text. App.61a.

REASONS FOR GRANTING THE WRIT

Following a three-year investigation, Congress uncovered vast evidence that local governments routinely discriminate against religious organizations in making zoning decisions, sometimes in overt but often in hidden ways. RLUIPA was the remedy to stop both kinds of discrimination and protect religious citizens' right to assemble and freely exercise their religion. Yet most lower courts are reluctant to enforce RLUIPA's protection for religious land uses.

This aversion has produced a deep and mature split regarding what RLUIPA's equal-terms provision means. That section forbids government from imposing or implementing "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). Focusing on RLUIPA's text, the Second, Tenth, and Eleventh Circuits ask whether (on paper and in practice) religious and nonreligious assemblies or institutions receive equal-zoning treatment. Conversely, the Third, Fifth, Sixth, Seventh, and Ninth Circuits center their RLUIPA inquiry on the government's zoning objectives by adding non-textual requirements. And they do so to excuse unequal treatment and deprive RLUIPA of the force Congress intended.

As Judge Thapar noted below, it is well past time for this Court to establish a uniform RLUIPA standard that actually shields religious organizations from unequal zoning treatment, the way Congress intended. Only a faithful application of RLUIPA's text is capable of doing that.

In RLUIPA, Congress intentionally required an objective comparison of the zoning treatment government accords religious and nonreligious assemblies or institutions because it knew that subjective zoning purposes are ripe for abuse. Any test that focuses on subjective zoning purposes neutralizes the equal-terms provision and condemns religious organizations to unequal zoning treatment.

I. Lower courts read RLUIPA's equal-terms provision in a multitude of flawed ways.

RLUIPA has been the law of the land for 18 years, but this Court has never addressed the equal-terms provision. Absent this Court's guidance, lower courts have read, and will continue to read, the equal-terms provision in flawed and conflicting ways. This Court should intervene. As Judge Thapar explained, it is untenable that whether "a religious plaintiff can succeed under the Equal Terms provision . . . depends entirely on where it sues." App.61a.

A. Eight circuits have construed RLUIPA's equal-terms provision in sharply conflicting ways.

Eight courts of appeals have rendered widely conflicting decisions on how to apply the equal-terms provision. No two circuits use identical tests, and none of them are completely consistent with the statutory text. But broadly speaking, their approaches fall into two camps: courts that adopt a text-based approach to RLUIPA's equal-terms provision, and courts that devise their own, non-textual versions of what "equal terms" means.

On the (mostly) text-based side are the Second, Tenth, and Eleventh Circuits. RLUIPA's text asks whether local governments (in theory or practice) treat religious assemblies or institutions on "equal terms" with nonreligious assemblies or institutions. 42 U.S.C. 2000cc(b)(1). To determine whether zoning terms are equal, the Second Circuit imports a similarly-situated concept and asks whether religious and nonreligious assemblies' or institutions' activities are "similarly situated with regard to their legality." *Third Church of Christ, Scientist, of N.Y.C.* v. *City of New York*, 626 F.3d 667, 670 (2d Cir. 2010).

The Tenth Circuit uses a similar test, but applies it using different nomenclature. The court inquires whether religious organizations are "treated less favorably than [a secular] similarly situated comparator." *Rocky Mountain Christian Church* v. *Bd. of Cty. Comm'rs*, 613 F.3d 1229, 1237 (10th Cir. 2010).

The Eleventh Circuit has developed the most comprehensive text-based approach. It uses the dictionary definitions of "assembly" and "institution" and—for facial claims—examines whether the zoning code "treats a religious assembly or institution differently than a nonreligious assembly or institution." *Midrash Sephardi, Inc.* v. *Town of Surfside*, 366 F.3d 1214, 1230 (11th Cir. 2004). For as-applied equal-terms claims, the Eleventh Circuit also imports a similarly-situated requirement: whether a municipality "differentially treats similarly situated religious and nonreligious assemblies" under a neutral zoning code. *Primera Iglesia Bautisa Hispana of Boca Raton, Inc.* v. *Broward Cty.*, 450 F.3d 1295, 1311 (11th Cir. 2006) (emphasis omitted).

None of these Circuits examine *why* the government treats comparable religious and nonreligious assemblies or institutions differently. All that matters is that disparate treatment occurs in the code or its application. But the Tenth and Eleventh Circuits have added the additional non-textual caveat that local governments may be able to justify an equal-terms violation under strict scrutiny. *Rocky Mountain*, 613 F.3d at 1237-38 ("[I]f an affirmative defense to the equal terms provision exists, only a strict scrutiny defense would apply here."); *Midrash Sephardi*, 366 F.3d at 1232 (a violation of the equal-terms provisions "must undergo strict scrutiny"). Tree of Life would likely prevail on its equal-terms claim in any of these jurisdictions, as the City cannot establish that barring the school from using its property serves a compelling interest in the least-restrictive manner available when secular nonprofits are allowed in the same zoning district.

In sharp contrast, the Third, Fifth, Sixth, Seventh, and Ninth Circuits do not view disparate treatment of religious and nonreligious assemblies or institutions as sufficient to establish an equal-terms violation. They tack on additional requirements that guard local governments' zoning objectives but have no foundation in RLUIPA's text.

The Third Circuit originated this trend by disagreeing with the Eleventh Circuit and sharply limiting what counts as a secular comparator. Not any nonreligious assembly or institution will do; the Third Circuit requires religious organizations to show "a secular comparator that is *similarly situated* as to the *regulatory purpose of the regulation* in question." *Lighthouse*, 510 F.3d at 264 (emphasis added).

Applying a similar but slightly different test, the Fifth Circuit clarified that the only relevant regulatory purposes are those in the zoning law's text. The court asks whether a nonreligious assembly or institution is "similarly situated with respect to the … purpose or criterion" that is "stated explicitly in the text of the ordinance." *Opulent Life Church* v. *City of Holly Springs*, 697 F.3d 279, 292-93 (5th Cir. 2012).

The Seventh Circuit considered the phrase "regulatory purpose" too vague and manipulable, so it modified the Third Circuit's standard to ask whether a nonreligious comparator is similarly situated as to the government's "accepted zoning criteria." *River of Life*, 611 F.3d at 371.

The Ninth Circuit then adopted both the Third and Seventh Circuits' tests, suggesting that courts apply them simultaneously. *Centro Familiar Cristiano Buenas Nuevas* v. *City of Yuma*, 651 F.3d 1163, 1172-73 (9th Cir. 2011) (considering whether religious and nonreligious assemblies or institutions are similarly situated as to the government's "regulatory purpose" and "with respect to accepted zoning criteria" as "necessary to prevent evasion of the statutory requirement") (cleaned up).

The Sixth Circuit rejected all seven tests and created its own, incorporating elements from the Third and Seventh Circuits' tests. App.19a–23a. The court substituted "legitimate zoning criteria" for "regulatory purpose" or "accepted zoning criteria" because, in the Sixth Circuit's view, the equal-terms test hinges on the government's purpose as stated in the "legitimate zoning criteria set forth in the municipal ordinance in question." App.21a.

The circuits also construe RLUIPA's burden-shifting requirement in sharply-conflicting ways. 42 U.S.C. 2000cc-2(b). Here, the Sixth Circuit required Tree of Life to produce expert testimony that "any other [permitted] land uses generate less revenue for the City than would Tree of Life" to even make out a prima facie case of discrimination. App.30a. But, as the Ninth Circuit has rightly explained, "[t]he burden is not on the [religious organization] to show a similarly situated secular assembly, but on the city to show that the treatment received by [a religious organization] should not be deemed unequal, where it appears to be unequal on the face of the ordinance." *Centro Familiar*, 651 F.3d at 1173.

In sum, most lower courts, like the Sixth Circuit, focus not on the different treatment religious assemblies or institutions receive—as RLUIPA's text requires—but on the government's reasons for that differential treatment. An equal-terms violation occurs in these jurisdictions only if religious and secular assemblies or institutions impact the government's zoning goals in the same manner and to the same degree.

This atextual approach to RLUIPA's interpretation gives local governments too much leeway to articulate their zoning goals in a way that evades an equal-terms violation and any meaningful judicial scrutiny, especially when the court also shifts the burden of proof. Using this non-textual methodology, the Sixth Circuit held that Tree of Life failed to establish even a prima facie case of an equal-terms violation. App.36a.

B. Lower courts like the Sixth Circuit depart from RLUIPA's text to excuse unequal treatment, contrary to RLUIPA.

The Sixth Circuit candidly admitted that lower courts have glossed RLUIPA's text to provide the government with a non-textual "safe harbor." App.114a. But "safe harbor" is just a euphemism for allowing the government to give religious organizations less-than-equal treatment. Congress fashioned RLUIPA as a straightforward command that localities must grant religious assemblies and institutions the same land-use treatment as their secular counterparts. 42 U.S.C. 2000cc(b)(1). Yet lower courts have steadfastly refused to implement that order and searched for ways to evade it.

The courts of appeals' distaste for RLUIPA's equal-terms provision is blatant. They have maligned RLUIPA's plain text as giving religion "a free pass to locate where any secular institution or assembly is allowed," *Lighthouse*, 510 F.3d at 268, vilified it as extending "preferential treatment to religious entities," *Tree of Life*, 905 F.3d at 368, and complained that it "unduly limit[s] municipal regulation," *River of Life*, 611 F.3d at 370. Citing vague and untenable Establishment Clause concerns, lower courts have intentionally tried to limit the equal-terms provision's reach, characterizing it as "*too* friendly to religious land uses." *Tree of Life*, 905 F.3d at 368 (quoting *River of Life*, 611 F.3d at 370). And they have done so in defiance of Congress's explicit instruction that courts construe RLUIPA "in favor of a broad protection of religious exercise." 42 U.S.C. 2000cc-3(g).

Other nondiscrimination provisions do not face such judicial backlash, even though Congress often institutes more stringent legal protection for politically vulnerable classes than the Constitution demands. For example, Congress' extension of Title VII to disparate impact based on race extends the Equal Protection Clause's prohibition on intentional discrimination in government employment. And the Pregnancy Discrimination Act expands the definition of sex discrimination to include pregnancy discrimination, although pregnancy discrimination does not violate the Equal Protection Clause. Yet courts do not rewrite the text of these statutes. Sarah Keeton Campbell, Note, *Restoring RLUIPA's Equal Terms Provision*, 58 Duke L.J. 1071, 1095-96 (2009).

But it is painfully evident that lower courts disagree with Congress's determination that RLUIPA is necessary to prevent widespread discrimination against religious organizations in zoning. For instance, the Sixth Circuit opined—despite Congress's well-documented contrary evidence—that mere "rational-basis review" is sufficient to prevent municipalities from "assert[ing] sham [zoning] purposes to justify religious discrimination." App.20a. This extreme deference to local government is the exact problem Congress enacted RLUIPA to solve. *River of Life*, 611 F.3d at 388 (Sykes, J., dissenting) (too much "deference toward land-use regulation . . . is fundamentally inconsistent with RLUIPA" and the First Amendment's Free Exercise Clause). But no progress will occur on that score unless this Court intervenes to resolve the circuit conflict and set lower courts back on track.

Lower courts regularly substitute their own subjective notions of "equality" for the objective "equal terms" that RLUIPA requires. App.18a (adhering to RLUIPA's plain text "would be inconsistent with any definition of the term 'equal'"); *River of Life*, 611 F.3d at 371 (equality means "not equivalence or identity but proper relation to relevant concerns"). And the result is to neutralize the equal-terms provision. App.61a. (Thapar, J., dissenting). RLUIPA's equal-terms provision is chronically under-enforced and has been for almost two decades. Douglas Laycock & Luke W. Goodrich, *RLUIPA: Necessary, Modest, and Under-Enforced*, 39 Fordham Urb. L.J. 1021, 1048–54, 1058–66 (2012).

This case is a perfect example. Lower courts should have quickly resolved this litigation in Tree of Life's favor. After all, the Sixth Circuit admitted that the City's "current zoning law allows (in fact, encourages) nonreligious assemblies or institutions to use 5000 Arlington Centre Boulevard: businesses most obviously, but also nonprofit organizations such as hospitals, outpatient care centers, and daycare centers." App.117a. That conclusion—that the City treats religious and non-religious entities on less-than-equal terms—shows a facial equal-terms violation. Yet the Sixth Circuit refused to say so, causing this lawsuit to drag on for over eight years while the school hemorrhages students and the City forgoes approximately $1 million in personal-income-tax revenue. App.34a (Tree of Life's employees would pay roughly "$125,000 annually in income taxes to the City"), App.316a–20a (Tree of Life has forfeited new students and lost existing students because it cannot occupy its own large, centrally located building).

This bizarre result was possible only because lower courts invented excuses for not granting Tree of Life equal-zoning treatment. The district court rewrote the City's zoning ordinance by injunction to keep Tree of Life from using nonprofit daycares as a nonreligious comparator. App.89a, 103a–04a. That maneuver nullified the equal-terms provision "by preventing plaintiffs from ever having valid comparators." App.53a. (Thapar, J., dissenting) And the district court labeled nonprofit daycares—but not Tree of Life—an "ancillary" use in the ORC District because they help "serve the working public" by providing a convenient drop-off point for parents with young children. App.88a; see also App.5a (the City supposedly allowed daycares in the ORC District so parents had a safe place to "drop off their children during work hours"). Of course, Tree of Life would serve as an equally convenient drop-off point for parents with older children. App.52a (Thapar, J., dissenting). So barring only a religious school from the District makes no sense.

On appeal, the Sixth Circuit refused to even address the City's facial equal-terms violation and remanded to give the City a chance to show that a nonprofit secular assembly or institution "would employ higher-income workers than" a religious school. App.119a. When the City failed to carry its burden, the Sixth Circuit tried to remedy the error by conducting its own tax-revenue-per-square-foot calculations. App.35a–36a. While the Sixth Circuit viewed the personal-income tax revenue generated by secular nonprofits as sufficient to justify including them in the ORC District, it allowed the City to exclude Tree of Life. App.28a–29a. But the school proved that it

would generate roughly the same range of personal-income-tax revenue (compared to a commercial entity) for the City as a secular nonprofit—if not more. App.32a–34a. The only difference is Tree of Life's religious identity.

In sum, even when religious assemblies or institutions like Tree of Life definitively prove they receive worse zoning treatment than nonreligious assemblies or institutions, they still lose. App.117a; *Opulent Life*, 697 F.3d at 293-94 (acknowledging that "other noncommercial, non tax-generating uses are permitted in the district" but remanding for the city "to come forward with the zoning criteria or regulatory objectives that it believes justify" banning a church). Some courts have even held that the remedy for barefaced equal-terms violations is not allowing religious assemblies or institutions into a zone but excluding any new secular comparators—even though existing secular assemblies and institutions presumably remain. *Petra Presbyterian Church* v. *Vill. of Northbrook*, 489 F.3d 846, 849 (7th Cir. 2007) (the village blatantly "discriminated in the industrial zone in favor of secular membership organizations" but the church "should have known" the village would amend its ordinance to "forbid[] all [new] membership organizations in the zone"); *Covenant Christian Ministries* v. *City of Marietta*, 654 F.3d 1231, 1242 (11th Cir. 2011) (same).

Absent this Court's review, lower courts will continue to rob the equal-terms provision of force. Seemingly even the most blatant unequal treatment of religious organizations in zoning meets with their approval. The "courts have forgotten this country's sacred vow and failed to give RLUIPA the effects its

written text demands." App.37a (Thapar, J., dissenting). This Court should resolve the circuit conflict regarding RLUIPA's equal-terms provision and give life to the text Congress actually wrote.

II. This Court should establish a uniform standard that follows RLUIPA's plain text and shields religious organizations from unequal treatment as Congress intended.

Congress wrote a straightforward equal-terms test that objectively compares the land-use treatment religious assemblies and institutions receive to that accorded nonreligious assemblies and institutions. 42 U.S.C. 2000cc(b)(1). But most lower courts complicate the RLUIPA analysis by focusing on the government's subjective zoning interests instead. Laycock & Goodrich, *supra*, at 1065. In so doing, they doom nearly all equal-terms claims to failure, as happened here.

Dissenting Court of Appeals judges have warned of this problem. *Lighthouse*, 510 F.3d at 293 (Jordan, J., dissenting) (centering the RLUIPA inquiry on municipalities' zoning objectives gives them "a ready tool for rendering RLUIPA section 2(b)(1) practically meaningless."); *River of Life*, 611 F.3d at 386 (Sykes, J., dissenting) (focusing on the government's regulatory zoning criteria "dooms most, if not all, equal-terms claims"); App.41a (Thapar, J. dissenting) (judicially-added-on RLUIPA requirements "prevent many religious groups from seeking the shelter that Congress sought to provide"). As Judge Sykes explained, the prevailing equal-terms test renders facial equal-terms violations unavailable and as-applied, equal-terms claims practically useless. *River of Life*, 611 F.3d at 387 (Sykes, J, dissenting).

Every zoning decision is at least nominally tied to the government's regulatory purpose or zoning interests. So that alleged hurdle is really no obstacle at all. Local governments have no trouble creating ways in which religious organizations do not serve their zoning objectives. *Id.* at 386. And courts have long given their justifications little scrutiny. That is why Congress enacted RLUIPA in the first place. Laycock & Goodrich, *supra*, at 1071 (RLUIPA was necessary to bring "the First Amendment to bear on the zoning process" because courts were slow to recognize discriminatory techniques applied to religious organizations); Terry M. Crist III, Comment, *Equally Confused: Construing RLUIPA's Equal Terms Provision*, 41 Ariz. St. L.J. 1139, 1160 (2009) (Congress believed that courts were not adequately seeing through pretexts for religious discrimination).

Lower courts have neutralized RLUIPA's equal-terms provision by employing a variety of non-textual techniques. The time is ripe for this Court to adopt a uniform equal-terms standard that comports with RLUIPA's text and shields religious organizations from unequal-zoning treatment.

A. RLUIPA's text asks a simple, objective question: are the land-use terms applicable to religious and nonreligious assemblies or institutions equal?

As the Eleventh Circuit explained and the Second and Tenth Circuits tacitly recognized, RLUIPA's equal-terms provision specifies a "direct and narrow focus." *Midrash Sephardi*, 366 F.3d at 1230. Congress intentionally avoided a subjective RLUIPA test by asking whether the enactment or implementation of

a zoning ordinance objectively results in a religious assembly or institution being treated on less than equal terms with a nonreligious assembly or institution. *Ibid.*; *Lighthouse*, 510 F.3d at 283 (Jordan, J., dissenting); *River of Life*, 611 F.3d at 382 (Sykes, J., dissenting), App.41a–42a (Thapar, J., dissenting).

RLUIPA's text thus directs a court to examine how a local government treats religious assemblies and institutions compared to secular assemblies and institutions. If the treatment is on "less than equal terms," this discriminatory treatment necessarily fails. Period. Nothing in the statute justifies taking the government's motives for treating religious organizations unequally into account. "Good reasons" do not unmake an equal-terms violation, nor does a lack of anti-religious animus. *Midrash Sephardi*, 366 F.3d at 1231 (focusing on the zoning ordinance's text); *Lighthouse*, 510 F.3d at 286 ("laudatory redevelopment aim[s]" do not forestall a RLUIPA violation) (Jordan, J., dissenting); *River of Life*, 611 F.3d at 382 ("reasons unrelated to religious discrimination" do not prevent unequal treatment).

Holding otherwise ignores Congress's explicit instruction that courts should interpret RLUIPA's free-exercise protections as broadly as possible. 42 U.S.C. 2000cc-3(g). Yet as explained in § I.A, above, the Third, Fifth, Sixth, Seventh, and Ninth Circuits make the equal-terms analysis turn on the government's zoning goals—a non-textual and irrelevant factor—and even the Second, Tenth, and Eleventh Circuits depart from the text by importing a similarly-situated requirement that Congress did not enact. This Court should grant review to end an enduring

circuit conflict and adopt a uniform equal-standard that gives "RLUIPA the effect its written text demands." App.37a (Thapar, J., dissenting).

RLUIPA itself identifies the comparison necessary to make an equal-terms claim: whether localities give nonreligious assemblies or institutions unequal zoning treatment compared to religious assemblies or institutions. *Midrash Sephardi*, 366 F.3d at 1230 ("the relevant 'natural perimeter' … is the category of 'assemblies or institutions'"); *Lighthouse*, 510 F.3d at 286 (Jordan, J., dissenting) ("churches are treated 'on less than equal terms' than the permitted nonreligious assemblies because churches are categorically prohibited"); *River of Life*, 611 F.3d at 389 (Sykes, J., dissenting) (asking whether the zoning code treats "a religious assembly or institution less well than a nonreligious assembly or institution"); App.42a (Thapar, J., dissenting) (equal terms claims compare the zoning treatment of religious and nonreligious entities "'assemblies' and 'institutions'").

If a code facially allows nonreligious assemblies or institutions in the zone but excludes religious assemblies or institutions, an equal-terms violation exists. The same is true if the code, as applied, welcomes a nonreligious assembly or institution in the zone but excludes a religious assembly or institution.

Localities may, of course, impose a wide variety of zoning regulations without running afoul of the equal-terms provision. They simply must do so in a truly neutral and generally applicable way: any zoning restriction that applies to religious assemblies or institutions must equally apply to nonreligious

assemblies or institutions. *Lighthouse*, 510 F.3d at 287 (Jordan, J., dissenting); Laycock & Goodrich, *supra*, at 1063.

So local governments are generally free to regulate based on maximum occupancy, traffic, parking, height, square footage, and other neutral zoning concerns. Congress merely required that localities refrain from imposing zoning restrictions on religious organizations they are not willing to impose on everyone else. *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 545 (1993) (government cannot pursue its interests only against conduct motivated by religious belief).

That constraint makes perfect sense. Zoning concerns like building size and traffic flow are not unique to religious entities. If municipalities truly want to address these issues, they must do so across the board. Otherwise, disfavoring religion is all that results. Anthony Lazzaro Minervini, Comment, *Freedom From Religion: RLUIPA, Religious Freedom, and Representative Democracy on Trial*, 158 U. Pa. L. Rev. 571, 600 (2010) ("[P]roblems associated with religious land use are in fact issues confronted wherever land is used by a sizeable assembly or institution."). That is what happened in the City of Upper Arlington, when the City freely allowed other nonprofits to locate in the ORC District but not Tree of Life. And where the City required Tree of Life to prove that it would maximize tax revenue when commercial holders of largely vacant buildings are not held to the same standard.

B. Subjective RLUIPA tests that focus on localities' zoning goals do more than allow unequal treatment, they invite it.

Under the Third, Fifth, Sixth, Seventh, and Ninth Circuits' subjective tests, religious organizations may still lose even after showing that a nonreligious assembly or institution enjoys better zoning treatment. That is because these courts deem all-important the government's zoning motivations—some explicitly stated, some not. Reframing the equal-terms analysis in this most government-friendly way invites municipalities to treat religious organizations unequally, contrary to RLUIPA's plain text and Congress's explicit intent. H.R. Rep. No. 106-219, at 18 (1999) ("Land use regulations frequently discriminate by design, other times by their neutral application, and sometimes by both.").

Zoning goals are local government's playground. Municipalities regularly employ them to achieve a desired result. They are vague, nebulous, and readily susceptible to manipulation. *Id.* at 24 (localities' zoning standards "are often vague, discretionary, and subjective"). Congress rightly viewed zoning objectives with suspicion because local governments use them to make individualized assessments ripe for religious discrimination. *Ibid.* ("Land use regulation is commonly administered through individualized processes not controlled by neutral and generally applicable rules."). For good reason, this Court concluded that such case-by-case decisions fall outside of *Smith*'s general free-exercise rule. 494 U.S. at 884; *Lukumi*, 508 U.S. at 537.

An equal-terms test based on subjective zoning considerations dooms religious organizations to unequal treatment. In fact, municipalities could exclude religious organizations altogether—even where secular assemblies or institutions are allowed—so long as the municipality says they do not further its zoning objectives as well as nonreligious assemblies or institutions. *River of Life*, 611 F.3d at 387 (Sykes, J., dissenting). This "eviscerates the equal-terms provision" by labeling equal what Congress deemed unequal and giving localities a ready tool to discriminate against religion. *Ibid.*

Again, this case is a prime example. Rather than inquiring into equal-zoning treatment, the Sixth Circuit demanded that Tree of Life produce expert testimony showing that a religious school would serve the City's tax-revenue-generating interests to the same degree as uses the code allows. App.117a–119a. Tree of Life carried that elaborate burden but lost its RLUIPA case nonetheless. App.32a–34a. The Sixth Circuit strained to remedy the obvious errors in the City's expert witness testimony regarding per-square-foot tax revenue to rule against the school. App.35a–36a. But nothing in RLUIPA's text justifies such a convoluted battle of experts, let alone the Sixth Circuit relieving the City of its burden of persuasion. Laycock & Goodrich, *supra*, at 1065 (criticizing lower courts for turning equal-terms cases "into a battle of expert witnesses" opining about whether a secular assembly better serves the city's "regulatory purpose"); 42 U.S.C. 2000cc-2(b) (placing the burden of persuasion on the government once a RLUIPA plaintiff makes out a prima facie case).

A subjective equal-terms test wrongly allows courts to deem religious and nonreligious assemblies or institutions incomparable based on matters of degree. For instance, the City supposedly excluded Tree of Life from the ORC District for failing to maximize tax revenue. App.271a–73a. Yet the City allowed many secular non-tax-revenue-maximizing assemblies or institutions to operate in the ORC District as of right, including nonprofit daycares, hospitals, out-patient surgery centers, periodicals, and offices. App.266a–70a. And the City imposed no tax-revenue-maximization requirement on commercial entities at all, so a commercial entity could, for example, hold onto a vacant building as a tax write-off. Yet the Sixth Circuit held that as long as nonprofit daycares generated more tax revenue than nonprofit religious schools, no equal-terms comparison is possible. App.36a. It consequently refused to acknowledge even that Tree of Life made out a prima facie case of discrimination. *Ibid.*

Equal-zoning treatment cannot depend on such creative distinctions. It makes no sense to say, as the Sixth Circuit did, that the City needs to maximize tax revenue when it comes to Tree of Life but not when it comes to nonreligious assemblies or institutions already welcomed in the ORC District. Compare App.29a ("Income taxes are an important source of Upper Arlington's revenues and every effort will be made . . . to increase these tax revenues."), with App.28a–29a ("But Upper Arlington need not tailor its zoning regulations to squeeze every last dollar out of the permitted uses within the office district"). Only one thing justifies such unequal treatment—religious discrimination.

This Court should reject any standard that justifies such inequality. Experience proves that subjective equal-terms tests invite localities to discriminate against religious organizations. Adhering to RLUIPA's plain text is the only way to ensure they receive equal zoning treatment.

III. This case is an ideal vehicle to resolve an entrenched circuit conflict that impacts religious organizations nationwide.

The numerous conflicting circuit decisions show that the issues presented are recurring and create unnecessarily long and convoluted RLUIPA litigation. The Court should grant the petition and resolve that conflict now.

First, the circuit split is deep and mature, with eight circuits having put their gloss on RLUIPA's equal-terms provision. It is implausible that subsequent circuit decisions or *en banc* proceedings will resolve the conflict.

Second, Tree of Life's case presents a clean vehicle for this Court to resolve the entrenched circuit conflict regarding what the equal-terms provision means. None of this case's facts are in dispute. The only disagreement is over the appropriate legal test. Tree of Life has now waited over eight years to use its property as a religious school while the City diligently did everything possible to deny every zoning remedy the school tried to pursue. The school's long-term survival depends on this Court giving RLUIPA's equal-terms provision the potency Congress intended. It should do so now to clarify the legal protection available to religious organizations nationwide.

Third, as things stand, whether a religious organization prevails under the equal-terms provision "depends entirely on where it sues." App.61a (Thapar, J., dissenting). Tree of Life lost simply because its property sits in Ohio, not Florida. Congress intended RLUIPA to establish a uniform rule for zoning decisions. But that effort has been stymied for almost two decades by lower courts second guessing its wisdom. In most of the country, the equal-terms provision currently offers religious organizations no meaningful protection.

Fourth, further delay in resolving the conflict harms local governments, religious organizations, and the justice system. If the Sixth Circuit is correct, then local governments in at least three circuits are being denied the fullest discretion the law allows in their zoning system. And if those three circuits are correct, then five circuits are undermining Congress's policy choices in enacting RLUIPA. Either way, the justice system is producing widely divergent results.

Finally, despite Congress's clear dictates, a shocking number of lower courts decline to apply RLUIPA's plain text. In so doing, those "courts have usurped the legislative role and replaced their will for the will of the people." *Ibid.* (citing The Federalist No. 47, at 325 (James Madison) (J. Cook ed., 1961)).

Certiorari is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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JANUARY 2019