No. 18-944

IN THE
Supreme Court of the United States

TREE OF LIFE CHRISTIAN SCHOOLS,

Petitioner,

v.

CITY OF UPPER ARLINGTON, OHIO,

Respondent.

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

Brief of the Islam & Religious Freedom Action Team of the Religious Freedom Institute as *amicus curiae* in support of Petitioner

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INTEREST OF *AMICUS CURIAE*[1]

The Islam and Religious Freedom Action Team ("IRF") of the Religious Freedom Institute explores and supports religious freedom from within the traditions of Islam. Its work includes researching the traditions of Islam, developing education programs about Islam and religious freedom, translating resources by Muslims about religious freedom, fostering inclusion of Muslims in religious freedom work both where Muslims are a majority and where they are a minority, and partnering with the Institute's other teams in advocacy.

Though the facts underlying the instant Petition for Certiorari do not involve Islamic expression or beliefs, the Sixth Circuit's misapplication of the Religious Land Use and Institutionalized Persons Act of 2000 is of great concern to all faith groups and to minority religions in particular. If not corrected by this Court, the Sixth Circuit's reasoning and holding—especially the judicially-fabricated barriers it places in the path of those seeking the protections RLUIPA is designed to afford—will prove especially harmful to minority religious faiths.

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[1] The parties' counsel were timely notified of and consented to the filing of this brief. Neither a party nor its counsel authored this brief in whole or in part. No person or entity, other than the *amicus curiae* or its counsel made a monetary contribution to the preparation and submission of this brief.

SUMMARY OF THE ARGUMENT

Our nation has long aspired to achieve its founding ideal of welcoming and accommodating diverse religious exercise. Unfortunately, religious groups, and religious minorities in particular, still face hostility from their government. The Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA") represents Congress's concerted and deliberate attempt to protect religious exercise from official discrimination.

Congress designed RLUIPA to afford broad protections to all faith groups, and especially to religious minorities, in the land use context. The breadth of RLUIPA's protections is evident from its capacious understanding of religious exercise; its mandated construction to maximize protection for religious exercise; its provision expressly contemplating the expenditure of government resources to accommodate religious exercise; and its equal-terms provision unrestrained by the limitations usually placed on anti-discrimination measures. In short, Congress provided deliberately broad protections with religious minorities specifically in mind, recognizing they have been and continue to be the primary targets of land use discrimination.

Robust enforcement of these protections is needed if RLUIPA's provisions are to achieve meaningful safeguards for religious minorities. Local zoning authorities tend to strongly disfavor religious land uses, and they have continued a widespread practice of discriminating against religious groups, especially against religious minorities, which is easily concealed by a system of highly discretionary individualized assessment. Although RLUIPA is

designed to combat this animus, some lower courts have allowed zoning authorities to continue their discriminatory practices by imposing extra-statutory impediments to relief provided through RLUIPA.

Over vehement dissent, the court below imposed a "similarly-situated" requirement on religious claimants seeking to obtain relief under RLUIPA's equal-terms provision. This additional hurdle—at odds with the statute's text, structure, and legislative history—eviscerates a key protection for religious minorities. The Court should grant the Petition for Certiorari to ensure that faithful enforcement of RLUIPA protects religious exercise as it was designed to do.

ARGUMENT

The American people have a long history of accommodating the religious expression and belief of their neighbors. See *Madison* v. *Riter*, 355 F.3d 310, 321 (4th Cir. 2003). Since the nation's founding, American government has often demonstrated this special solicitude for religious exercise through law and official policy. See *Tree of Life Christian Sch.* v. *City of Upper Arlington*, 905 F.3d 357, 376 (6th Cir. 2018) (Thapar, J., dissenting) (quoting Letter from George Washington to the Hebrew Congregation in Newport, R.I. (Aug. 18, 1790)); see generally Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990) (outlining history of religious exemptions from otherwise generally applicable laws).

This special solicitude is not surprising, considering the attention paid to religion at the nation's beginning. See Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 16. To the founders, accommodation not only preserved "the individual's ability to respond to divine obligations," Timothy L. Hall, *Religion and Civic Virtue: A Justification of Free Exercise*, 67 TUL. L. REV. 87, 88 (1992), but also fostered a public good with real value to a democratic society. Religious teaching inculcates civic virtues in ways government cannot, see Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1, 22–23 (2000), while religious pluralism and the acknowledgment of divine authority reduce the possibility of religious and political oppression, see McConnell, *Origins*, *supra*, at 1515–16. Thus, "[t]he Founders . . . assume[d] . . . that religion is the

'indispensable support' for republican government." Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685, 740 (1992) (cleaned up) (quoting George Washington, Washington's Farewell Address, (Sept. 17, 1796), in 1 *Documents of American History* 169, 173 (Henry S. Commager ed., 1973)).

American government consistently has extended legal protections embodying this special solicitude to religious minorities in particular. See *Doe ex rel. Doe.* v. *Elmbrook Sch. Dist.*, 687 F.3d 840, 869 (7th Cir. 2012) (Easterbrook, J., dissenting); Michael W. McConnell, *Religious Freedom, Separation of Powers, and the Reversal of Roles*, 2001 BYU L. REV. 611, 613 (2001). Framers at the founding could boast of statutes designed to protect the religious beliefs of "the Jew and Gentile, the Christian and Mahometan, the Hindoo, and infidel of every denomination." Thomas Jefferson, *Autobiography*, *in* 1 *The Works of Thomas Jefferson* 71 (Paul Leicester Ford ed., Federal ed. 1904) (discussing the Virginia Statute for Religious Freedom). Likewise, our more recent history has been marked by numerous legislative efforts to protect and accommodate religious minorities. See James E. Ryan, Note, Smith *and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1445–51 (1992).

Despite this history, the solicitude to which our nation aspires has not always been the reality experienced by religious minorities. Some Framers and other early leaders "were reluctant to extend religious liberty to Catholics and Jews, let alone to Muslims and Indians." John Witte, Jr., *The Essential Rights and Liberties of Religion in the American Constitutional Experiment*, 71 NOTRE DAME L. REV.

371, 388 (1996). Similarly, minority Protestant sects—especially Quakers, Presbyterians, and Baptists—"bor[e] the brunt of governmental hostility and indifference" in the nation's early days because it was "precisely those groups whose practices were out of keeping with the majoritarian culture." Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 136 (1992). Although perhaps it is now subtler than at the founding, religious minorities have continued to face governmental hostility and indifference in some corners. See Douglas Laycock, *The Religious Freedom Restoration Act*, 1993 BYU L. REV. 221, 222 (1993).

In response to religious discrimination by government, legislatures have continued to enact laws designed to protect religious exercise—especially that of religious minorities. The Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 42 U.S.C. § 2000cc, et seq., "is the latest of long-running congressional efforts to accord religious exercise heightened protection from government-imposed burdens." *Cutter* v. *Wilkinson*, 544 U.S. 709, 714 (2005). RLUIPA is designed to protect religion—and especially religious minorities—in the land use context. Its robust enforcement is crucial to effectuate that goal and to fulfill the First Amendment's promise to religious minorities that they may freely exercise their religion.

I. RLUIPA is designed especially to protect religious minorities in the land use context.

In enacting RLUIPA, Congress recognized that "[t]he right to build, buy, or rent . . . space is an indispensable adjunct of the core First Amendment right to assemble for religious purposes." 146 Cong.

Rec. 16698, 16698 (2000) (Joint Statement of Senators Hatch and Kennedy) (hereinafter Joint Statement). Unfortunately, Congress also acknowledged the governmental hostility religious groups often face when seeking to acquire the physical space needed to exercise their faiths. See *ibid.* (noting "massive evidence" of "frequent[] discriminat[ion]" in "zoning codes" and "the highly individualized and discretionary process of land use regulation"). This "very widespread," "nationwide" religious discrimination is aimed predominantly at "new, small, or unfamiliar" religious groups, such as "black churches and Jewish shuls and synagogues." *Id.* at 16698–99. In reaction to extensive religious discrimination in the land use context—especially prevalent against new, small, and unfamiliar groups—Congress designed RLUIPA to offer broad protections to all religious groups, and to religious minorities in particular.

A. RLUIPA is designed to afford broad protections to all faith groups.

Undoubtedly, "Congress enacted RLUIPA . . . 'in order to provide very broad protection for religious liberty,'" and this Court has noted several ways RLUIPA's text "underscore[s] [this] expansive protection." *Holt* v. *Hobbs*, 135 S. Ct. 853, 859–60 (2015) (quoting *Burwell* v. *Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2760 (2014)). First, RLUIPA defines the "'religious exercise'" it protects "capaciously to include 'any exercise of religion, whether or not compelled by, or central to, a system of religious belief,'" *ibid.* (quoting § 2000cc-5(7)(A)), and thus "bars [judicial] inquiry into whether a particular belief or practice is 'central' to a . . . religion," *Cutter*, 544 U.S. at 725 n.13. RLUIPA's protection of

religious exercise, capaciously defined, is appropriate in light of the well-documented history of "local governments stifl[ing] religious groups' religious exercise by denying [their] . . . ability to use property for religious purposes." *Guru Nanak Sikh Soc'y of Yuba City* v. *Cty. of Sutter*, 456 F.3d 978, 994 n.21 (9th Cir. 2006). "[I]t is clear that, in adopting this broad statutory definition of 'religious exercise' . . . and eliminating any centrality test, Congress necessarily contemplated that a broader range of governmental conduct could be prohibited" than the First Amendment alone requires. *Cambodian Buddhist Soc'y of Conn., Inc.* v. *Planning & Zoning Comm'n*, 941 A.2d 868, 889 (Conn. 2008).

Second, "Congress mandated that [RLUIPA] 'shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by [its] terms . . . and the Constitution,'" *Holt*, 135 S. Ct. at 860 (quoting § 2000cc-3(g)), in order "[t]o remove any remaining doubt regarding how broadly Congress aimed to [protect] religious exercise," *Westchester Day Sch.* v. *Village of Mamaroneck*, 504 F.3d 338, 347 (2d Cir. 2007). Statutes that include express rules for construing their terms are rare. See *Khatib* v. *Cty. of Orange*, 603 F.3d 713, 718 (9th Cir. 2010) (Kozinski, J., dissenting), *superseded on reh'g en banc*, 639 F.3d 838 (9th Cir. 2011). So, "when Congress goes to the trouble of telling [courts] how to construe a statute, and uses such phrases as 'broad protection' and 'the maximum extent permitted,' [courts] need to pay close attention and do as Congress commands." *Ibid.* This involves foregoing a routine interpretation and instead "[s]tretching [RLUIPA's] terms . . . to [their] maximum limit" and asking if "this is a permissible construction . . . so as

to achieve a 'broad protection of religious exercise.'" *Id.* at 718–19.

Third, "Congress stated that RLUIPA 'may require a government to incur expenses in its own operations to avoid imposing a substantial burden on religious exercise.'" *Holt*, 135 S. Ct. at 860 (quoting § 2000cc–3(c)). This provision precludes the argument that an accommodation otherwise mandated by RLUIPA might be impermissible on the sole ground that it causes the government to incur some expense. See *Hobby Lobby*, 134 S. Ct. at 2781 ("[The] view that [RLUIPA] can never require the Government to spend even a small amount reflects a judgment about the importance of religious liberty that was not shared by the Congress that enacted that law."). It also serves to reduce to some degree the importance of cost-avoidance as a compelling government interest justifying the imposition of substantial burdens on religious exercise. See Aaron K. Block, Note, *When Money Is Tight, Is Strict Scrutiny Loose?: Cost Sensitivity as a Compelling Government Interest Under the Religious Land Use and Institutionalized Persons Act of 2000*, 14 TEX. J. CIV. LIBERTIES & CIV. RTS. 237, 250–51 (2009). The provision thus makes it easier for RLUIPA claimants to clear a significant hurdle to relief.

On the whole, courts have had no difficulty concluding "Congress enacted . . . []RLUIPA[] to provide 'expansive protection for religious liberty' after that protection had receded in the wake of two U.S. Supreme Court decisions," *Tucker* v. *Collier*, 906 F.3d 295, 300 (5th Cir. 2018) (quoting *Holt*, 135 S. Ct. at 860), and after "the Supreme Court 'openly invited the political branches'" to do so, *Lovelace* v. *Lee*, 472 F.3d 174, 186 (4th Cir. 2006) (quoting

Madison, 355 F.3d at 315). Given the clarity of its design, courts have also consistently rejected interpretations that would restrict RLUIPA's protections, see *Hobby Lobby*, 134 S. Ct. at 2772 ("It is simply not possible to read these provisions as restricting the concept of the 'exercise of religion' to those practices specifically addressed in our pre-*Smith*[2] decisions."); *Sossamon* v. *Texas*, 563 U.S. 277, 302 (2011) (Sotomayor, J., dissenting) (finding "limited" reading of RLUIPA's relief provision "improbable" "in light of [its] express statutory purpose"); *Khatib* v. *Cty. of Orange*, 639 F.3d 898, 905 (9th Cir. 2011) (en banc) (refusing to "embrace . . . a restrictive interpretation in light of the plain language of the statute and the clearly expressed congressional intent"), or the relief it provides, see *Alvarez* v. *Hill*, 518 F.3d 1152, 1159 (9th Cir. 2008) (rejecting stringent pleading standard as especially inappropriate due to RLUIPA's purpose of extending broad protections to religious exercise). Indeed, courts have readily accepted interpretations of RLUIPA *because* they "result[] in a wider swath of religious-liberty protection." *Tucker*, 906 F.3d at 301.

It should come as no surprise that RLUIPA's equal-terms provision is also designed to provide broad protection to religious exercise. The equal-terms provision is not a traditional anti-discrimination provision, as RLUIPA provides one of those in a different land-use subsection. See *River of Life Kingdom Ministries* v. *Village of Hazel Crest*, 611 F.3d 367, 374 (7th Cir. 2010) (en banc) (Cudahy, J., concurring) ("[T]he equal-terms provision seems

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[2] *Emp't Div., Dep't of Human Res. of Or.* v. *Smith*, 494 U.S. 872 (1990).

to be a somewhat mysterious and unprecedented device for providing an anti-discrimination requirement, without incorporating the usual limiting characteristics of 'discrimination' as a traditional concept."); *Tree of Life*, 905 F.3d at 387 (Thapar, J., dissenting) ("Reading [a requirement from an Antidiscrimination provision] into the Equal Terms provision would make the separate Antidiscrimination provision superfluous.").

Thus, the broadly-worded equal-terms provision is not limited by restrictions that typically characterize anti-discrimination provisions. Cf. *River of Life*, 611 F.3d at 374 (Cudahy, J., concurring) (admitting "Congress may have intended to prescribe a standard more open-ended than traditional 'discrimination[]'"). It contains no substantial-burden test. See *Lighthouse Inst. for Evangelism, Inc.* v. *City of Long Branch*, 510 F.3d 253, 262 (3d Cir. 2007) (citing *Konikov* v. *Orange Cty.*, 410 F.3d 1317, 1327–29 (11th Cir. 2005)); *Digrugilliers* v. *Consol. City of Indianapolis*, 506 F.3d 612, 616 (7th Cir. 2007); *Civil Liberties for Urban Believers* v. *City of Chi.*, 342 F.3d 752, 762 (7th Cir. 2003). It does not make liability dependent on the government's intent. See *Tree of Life*, 905 F.3d at 387 (Thapar, J., dissenting); *River of Life*, 611 F.3d at 382 (Sykes, J., dissenting). It does not excuse liability if the policy at issue is facially neutral or generally applicable, see *Lighthouse*, 510 F.3d at 288 (Jordan, J., dissenting), or if it could survive a strict-scrutiny test, see *Tree of Life*, 905 F.3d at 387 (Thapar, J., dissenting); *River of Life*, 611 F.3d at 370–71; *Lighthouse*, 510 F.3d at 269.[3] And it

[3] But see *Midrash Sephardi, Inc.* v. *Town of Surfside*, 366 F.3d 1214, 1231–35 (11th Cir. 2004) (concluding that the equal-terms

has no similarly-situated requirement. See *Tree of Life*, 905 F.3d at 379 (Thapar, J., dissenting) ("Congress knew about 'similarly situated' standards from the Equal Protection context and chose *not* to incorporate them into RLUIPA."); *River of Life*, 611 F.3d at 377–92 (Sykes, J., dissenting) (rejecting similarly-situated gloss on equal-terms provision); *Lighthouse*, 510 F.3d at 293 (Jordan, J., dissenting) ("Congress did not intend for courts to employ a 'similarly situated' analysis when analyzing a[n] [equal-terms] claim . . . ."); *Konikov*, 410 F.3d at 1324 ("For purposes of a RLUIPA equal terms challenge, the standard for determining whether it is proper to compare a religious group to a nonreligious group is not whether one is 'similarly situated' to the other, as in our familiar equal protection jurisprudence." (citing *Midrash Sephardi*, 366 F.3d at 1230)).

RLUIPA is a "landmark statute on religious liberty," *Lovelace*, 472 F.3d at 210 (Wilkinson, J., concurring in the judgment in part and dissenting part), affording broad protections for religious exercise. As it has done with RLUIPA as a whole, Congress designed the equal-terms provision to broadly protect religious exercise in the land use context.

B. Congress drafted RLUIPA's land use protections with religious minorities specifically in mind.

RLUIPA's broad protections for religious land use were designed to protect religious minorities in particular. RLUIPA's legislative history amply

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provision codified a line of Supreme Court cases, incorporating a strict-scrutiny component).

demonstrates that Congress specifically sought to address widespread governmental discrimination against religious minorities in the land use context. In crafting RLUIPA, Congress relied heavily on scholarship and studies demonstrating that religious minorities are predominant targets of land use discrimination. See Douglas Laycock & Luke W. Goodrich, *RLUIPA: Necessary, Modest, and Under-Enforced*, 39 FORDHAM URB. L.J. 1021, 1022 (2012). For instance, the legislative history is replete with statistical analyses, see, *e.g.*, *Religious Liberty Protection Act: Hearings Before the Subcomm. on the Constitution of the Comm. on the Judiciary H.R. on H.R. 4019*, 105th Cong. 131–53 (1998) (statement of W. Cole Durham); *id.* at 202–07 (statement of Elenora Giddings Ivory), as well as representative anecdotal data showing extensive discrimination by local zoning authorities against religious groups, and especially against religious minorities, see, *e.g.*, *id.* at 91–130 (statement of John Mauck); *id.* at 199–202 (statement of Bruce D. Shoulson).

Summarizing this evidence, the House Committee on the Judiciary reported that "some land use regulations deliberately exclude all new churches from an entire city," that "[s]maller and less mainstream denominations are over-represented in reported land use disputes," and thus "[l]and use regulation has a disparate impact on churches and especially on small faiths and nondenominational churches." H.R. Rep. No. 106-219, at 19, 24 (1999). RLUIPA's Senate sponsors noted "the hearing record reveals a widespread pattern of discrimination against churches as compared to secular places of assembly, and of discrimination against small and unfamiliar denominations as compared to larger and

more familiar ones," concluding that "[c]hurches in general, and new, small, or unfamiliar churches in particular, are frequently discriminated against on the face of zoning codes and also in the highly individualized and discretionary processes of land use regulation." Joint Statement, at 16698–99. As the legislative history makes clear, then, rampant discrimination directed at religious minorities is precisely the problem Congress designed RLUIPA, with its broad protections, to address.

Courts have consistently recognized that RLUIPA's broad protections are designed to shield religious minorities in particular. Citing RLUIPA, members of this Court have acknowledged that "Congress has shown notable solicitude for the rights of religious minorities." *Salazar* v. *Buono*, 559 U.S. 700, 728–29 (2010) (Alito, J., concurring in part and concurring in the judgment); cf. *Cutter*, 544 U.S. at 712, 721 & n.10 (explaining "RLUIPA protects" religious exercise if it depends on "the government's permission and accommodation," such as when the government "already facilitates religious [exercise] for mainstream faiths" but not for "adherents of 'nonmainstream' religions"). Lower courts likewise recognize that "RLUIPA protects a broad spectrum of sincerely held religious beliefs, including practices that non-adherents might consider unorthodox, unreasonable or not 'central to' a recognized belief system." *Haight* v. *Thompson*, 763 F.3d 554, 566 (6th Cir. 2014); see also *Elmbrook Sch. Dist.*, 687 F.3d at 869 (Easterbrook, J., dissenting) (recognizing RLUIPA as a "recent example[]" of "legislatures . . . protect[ing] the rights of religious minorities"). Some judges have even emphasized that governmental refusal to accommodate minority religious exercise—

such as Islamic dietary and clothing practices—"is precisely the kind of 'mischief' RLUIPA was intended to remedy." *Khatib*, 639 F.3d at 906–07 (Gould, J., concurring); see also *Lovelace*, 472 F.3d at 204 (Wilkinson, J., concurring in the judgment in part and dissenting in part) (explaining that a policy aimed at accommodating Muslims observing Ramadan is "precisely the type of policy that RLUIPA seeks to foster"). Indeed, recognizing the "very real harm" of discrimination against religious minorities underscores the "prop[riety] [of] constru[ing] the statute broadly to give effect to the religious protection intended by Congress." *Khatib*, 639 F.3d at 907 (Gould, J., concurring).

Courts have also noted that Congress devised RLUIPA's broad protections especially for religious minorities in the land use context. See *Tree of Life Christian Sch.* v. *City of Upper Arlington*, 823 F.3d 365, 369 (6th Cir. 2016) ("By enacting RLUIPA, Congress directed federal courts to scrutinize municipal land-use regulations that function to exclude disfavored religious groups . . . ."); *Centro Familiar Cristiano Buenas Nuevas* v. *City of Yuma*, 651 F.3d 1163, 1170 (9th Cir. 2011) ("RLUIPA's purpose was to address what Congress perceived as inappropriate restrictions on religious land uses, especially by 'unwanted' and 'newcomer' religious groups.'" (quoting *Guru Nanak Sikh Soc'y*, 456 F.3d at 994)). Their conclusions are compelled not only by the broad protections in RLUIPA's text but also by its legislative history. See *Midrash Sephardi*, 366 F.3d at 1236 ("As indicated during nine hearings held before both houses of Congress, RLUIPA targets zoning codes which use individualized and discretionary processes to exclude churches,

especially 'new, small or unfamiliar churches . . . [like] black churches and Jewish shuls and synagogues.'" (quoting Joint Statement, at 16698)); *Lighthouse*, 510 F.3d at 288 n.36 (explaining that, "on the basis of th[e] record"—which included "massive evidence" that "new, small, or unfamiliar churches in particular, were frequently discriminated against"—"Congress enacted RLUIPA as prophylactic legislation to prevent discrimination against churches in the processes of land use regulation"). This thorough documentation further demonstrates that Congress designed RLUIPA to broadly protect religious minorities from land use discrimination. See *Tree of Life*, 905 F.3d at 378 (Thapar, J., dissenting) ("Congress extensively documented the discrimination that RLUIPA targeted.").

II. RLUIPA's land use provisions require robust enforcement to effectuate the protection of religious minorities for which it was designed.

A. Religious minorities are especially susceptible to discrimination in the land use context.

Despite Congress's persistent efforts, religious minorities have long endured hostility and discrimination from some governmental quarters. See generally *Religious Intolerance in America* (John Corrigan & Lynn S. Neal eds. 2010). Official discrimination against religious minorities has been especially pervasive in the land use context. See Douglas Laycock, *State RFRAs and Land Use Regulation*, 32 U.C. DAVIS L. REV. 755, 783 (1999); Roman Storzer & Anthony R. Picarello, Jr., *The*

Religious Land Use and Institutionalized Persons Act of 2000: A Constitutional Response to Unconstitutional Zoning Practices, 9 GEO. MASON L. REV. 929, 930 (2001).

Local zoning authorities tend to perceive religious land uses as inconsistent with the types of uses they say they prefer. Religious groups are excluded from commercial areas on the ground that they allegedly "do not attract enough traffic to generate retail and tax revenues." Storzer & Picarello, *supra*, at 930. At the same time, they are excluded from residential areas because they allegedly cause "too much traffic, noise, and congestion." Laycock & Goodrich, *supra*, at 1021. In order to keep religious groups out, zoning authorities can also offer "drainage, sewage, and the environment as plausible concerns, raise issues of compatibility with the surrounding neighborhood, change zoning, declare a structure a historic landmark, or impose prohibitively expensive design requirements." Von G. Keetch & Matthew K. Richards, *The Need for Legislation to Enshrine the Free Exercise Clause in the Land Use Context*, 32 U.C. DAVIS L. REV. 725, 728 (1999).

However, these putatively neutral reasons for exclusion can mask deep-seated hostility toward religion. See *id.* at 726 ("[I]gnorance and even hostility toward religion sometimes operate behind the facade of ostensibly neutral land use regulations."). And zoning schemes are rife with opportunities for local authorities to covertly discriminate against religious uses. Across the board, zoning ordinances impose vague, readily manipulated standards, "mak[ing] it easy for local officials to disguise regulation . . . that is arbitrary,

discriminatory, or both." Laycock & Goodrich, *supra*, at 1022. On top of this, zoning ordinances "characteristically involve permit schemes which grant local officials virtually unlimited discretion to restrict the use of property." Keetch & Richards, *supra*, at 727. With such wide discretion and fuzzy standards, "biased officials have little trouble finding seemingly plausible grounds for delaying or denying most any [religious use] project." *Id.* at 728. Worse, any indication of bias is easy to bury, as legislative histories and individualized assessments are rarely recorded. See *ibid.*; Ashira Pelman Ostrow, *Judicial Review of Local Land Use Decisions: Lessons from RLUIPA*, 31 HARV. J.L. & PUB. POL'Y 717, 727, 736 (2008). As a result, "land use decision making processes are particularly susceptible to religious discrimination," Ostrow, *supra*, at 741, and "give [hostile] attitudes ample opportunity for expression," Laycock, *State RFRAs*, *supra*, at 776.

Religious minorities are the primary targets of discriminatory land use regulation. See Richard F. Duncan, *Free Exercise and Individualized Exemptions: Herein of* Smith*,* Sherbert*, Hogwarts, and Religious Liberty*, 83 NEB. L. REV. 1178, 1202 (2005); Keetch & Richards, *supra*, at 730. Americans express more hostility toward minority religions and thus are likelier to oppose them as potential neighbors. See Laycock, *State RFRAs*, *supra*, at 760. Religious minorities are also "more likely to be unlawfully denied land use permits" and "are forced to litigate far more often" than religions with more political clout, despite bringing cases that have equal merit. *Id.* at 771; see Keetch & Richards, *supra*, at 729; Laycock & Goodrich, *supra*, at 1029; Robert W. Tuttle, *How Firm a Foundation? Protecting Religious*

Land Uses After Boerne, 68 GEO. WASH. L. REV. 861, 895 (2000).

Local authorities discriminate more against religious minorities for a number of reasons. The most evident reason is simple prejudice:

> [S]ome [religions] are unpopular because of religious or racial discrimination.
>
> The most obvious example is widespread hostility to Muslim mosques. In 2010, a proposal to build an Islamic community center near (not at or on) Ground Zero gained nationwide attention and significant opposition. . . . Often, the resistance is phrased in terms of concerns about traffic, parking, noise, or property values, but sometimes the resistance is overtly anti-Islamic.

Laycock & Goodrich, *supra*, at 1025–26. Similarly "[m]inority religions may have practices viewed as unfamiliar or distasteful by the general public," Storzer & Picarello, *supra*, at 941, which garner more opposition from the general public than more familiar modes of religious practice. Small and relatively homogenous, local decision-making bodies can be easily swayed by longstanding popular prejudice or unease with the unfamiliar. See Ostrow, *supra*, at 736–37; see also Keetch & Richards, *supra*, at 729.

Compounding the problem, religious minorities tend to lack sufficient political power to overcome official prejudice or complacency. While "majority religions can often marshal the public and political support needed to sway reluctant officials or

overcome the lobbying efforts of biased neighbors," minority religions—often poor, few in number, lacking constituents, and new to the area—are usually unable to do so. Keetch & Richards, *supra*, at 729–30; see also Laycock, *State RFRAs*, *supra*, at 759–60. In the same vein, religious minorities tend to lack the resources needed to fight city hall. See Keetch & Richards, *supra*, at 730; Laycock, *State RFRAs*, *supra*, at 765. Because they are the least able to resist anti-religious zoning practices, religious minorities present local authorities with a soft target.

Even when not facing prejudice from local authorities or the public, religious minorities are still the likeliest targets of discriminatory land use practices. Communities often "decide that [they have] 'enough' religious institutions and need[] to foster other land uses," like those that maximize tax revenue. Tuttle, *supra*, at 895. Majority religious groups likely already have established a presence in the community and thus are "grandfathered" in, while religious minorities would be excluded. See *ibid.*; see also Laycock & Goodrich, *supra*, at 1036 (observing that, if "tax revenue is a . . . compelling, land-use interest," then "[e]xisting churches would be grandfathered in, and no new church could ever form"). Even in the absence of outright prejudice, then, "[t]he zoning schemes . . . operate to exclude or limit only th[e] most vulnerable, . . . newer religious groups." Tuttle, *supra*, at 895.

Through either prejudice or apathy, religious minorities "face[] a disproportionate share of opposition in the zoning context." Laycock & Goodrich, *supra*, at 1026–27. And, if the opposition faced by prominent religious groups is any

indication, the land-use barriers religious minorities face are significant. See Laycock, *State RFRAs*, *supra*, at 777. Put bluntly, if local authorities can so easily bar a Christian school from operating in a vacant office building in central Ohio, what are the odds that Muslims could open a new mosque there?

B. Robust enforcement of RLUIPA's protections for all faith groups is needed to protect religious minorities that are most susceptible to governmental discrimination.

In enacting RLUIPA, Congress was keenly aware of religious minorities' heightened vulnerability to governmental land use discrimination. See *Tree of Life*, 905 F.3d at 377–78 (Thapar, J., dissenting) (noting evidence Congress compiled); *Guru Nanak Sikh Soc'y*, 456 F.3d at 987 n.9, 994–95 & n.21 (same); *Midrash Sephardi*, 336 F.3d at 1236, 1239 (same). Undoubtedly, religious groups continue to face hostility from local zoning authorities, see U.S. Dep't of Justice, *Report on the Tenth Anniversary of the Religious Land Use and Institutionalized Persons Act*, 12–13 (2010) ("[T]he Department still regularly learns of substantial burdens placed on religious land use for less-than-compelling reasons, such as generating extra tax revenue for a local jurisdiction or the personal preferences of officials."), especially if they are religious minorities, see *id.* at 13 ("Jewish synagogues and schools, African-American churches, and, increasingly, Muslim mosques and schools are particularly vulnerable to discriminatory zoning actions taken by local officials, often under community pressure."). Discrimination remains so pervasive and so covert that courts "can't be certain, or even confident, that a particular zoning decision

[i]s actually motivated by a land-use concern that is neutral from the standpoint of religion," *River of Life*, 611 F.3d at 373, and, in fact, the court below could not rule out the possibility of clandestine discrimination in the instant case, see *Tree of Life*, 823 F.3d at 373 (noting Respondent may have opted to oust Petitioner through zoning rather than eminent domain "perhaps to exclude an unfamiliar or disfavored religious assembly").

In the face of continued, extensive discrimination, Congress did not draft RLUIPA as empty mummery. "Congress . . . devoted . . . care and effort to establishing significant statutory protections for religious exercise," and provided "crucial tool[s] for securing the rights the statute guarantees." *Sossamon*, 563 U.S. at 303 (Sotomayor, J., dissenting). Each of RLUIPA's provisions—including the equal-terms provision—"represents an effort to protect religious liberties by statute—and to do so in a serious way." *Haight*, 763 F.3d at 566; see *Centro Familiar*, 651 F.3d at 1172 ("[T]he equal terms provision['s] . . . language . . . [does not] support the conclusion that Congress meant merely to meaninglessly say 'the Constitution applies to land use provisions.'").

RLUIPA is meant to have teeth, and, where Congress identifies a real harm and provides a real remedy, courts should not "erect[] . . . barrier[s] to the vindication of statutory rights deliberately provided for by Congress." *Sossamon*, 563 U.S. at 305 (Sotomayor, J., dissenting). Judicial modesty is especially appropriate when applying RLUIPA, in light of its deliberately broad protections for religious exercise. See *Khatib*, 639 F.3d at 903–04, 906; *Khatib*, 603 F.3d at 720 (Kozinski, J., dissenting).

This is no less true when courts interpret and apply the equal-terms provision. See *Tree of Life*, 905 F.3d at 380 (Thapar, J., dissenting).

As the Sixth Circuit's decision below illustrates, "Congress's attempt to address religious discrimination . . . has not been as effective" as intended because "courts . . . have added requirements into RLUIPA that prevent many religious groups from seeking the shelter that Congress sought to provide." *Id.* at 378. The "similarly-situated" requirement that the court below eisegetically introduced into RLUIPA's equal-terms provision robs religious groups of a key protection against land use discrimination. See *River of Life*, 611 F.3d at 386 (Sykes, J., dissenting) ("[U]nder [any] formulation, the [similarly-situated] test dooms most, if not all, equal-terms claims."); *Lighthouse*, 510 F.3d at 293 (Jordan, J., dissenting) ("If a 'similarly situated' requirement is read into the statute, local governments will have a ready tool for rendering RLUIPA section 2(b)(1) practically meaningless.").

If courts continue to inject similarly-situated requirements into the equal-terms provision, "[z]oning authorities will have little difficulty articulating their objectives in such a way as to prevent an excluded religious assembly from identifying a better-treated nonreligious comparator." *River of Life*, 611 F.3d at 386 (Sykes, J., dissenting); see *Lighthouse*, 510 F.3d at 293 (Jordan, J., dissenting). In residential areas, "religious land uses" will continue to be found "inconsistent with" concerns for "[t]raffic control, density management, and noise-reduction" "in ways that secular assembly uses are not." *River of Life*, 611 F.3d at 386 (Sykes,

J., dissenting). In commercial areas, discrimination against religious land use will be even easier: "[r]outine 'economic development' and 'tax-enhancement' objectives . . . will immunize the exclusion of religious land uses . . . because religious assemblies do not advance these objectives and for-profit secular assemblies do." *Ibid.* Indeed, because "religious . . . institutions are tax exempt," "the land would always generate more revenue if put to a commercial . . . use." *Int'l Church of Foursquare Gospel* v. *City of San Leandro*, 673 F.3d 1059, 1071 (9th Cir. 2011). Further, zoning officials, endowed with near standardless discretion, can easily invent new pretextual criteria to discriminate against religious land use. Cf. *River of Life*, 611 F.3d at 386 (Sykes, J., dissenting) (noting argument that "laws protecting churches from incompatible adjacent land uses" can be grounds to exclude churches from commercial area). Thus, in both residential and commercial areas, courts "hinder Congress's objective of enforcing the Free Exercise Clause to the fullest extent constitutionally permissible" "[b]y grafting additional elements" onto the equal-terms provision. *Lighthouse*, 510 F.3d at 294 (Jordan, J., dissenting).

The imposition of extra-statutory requirements is especially deleterious to the rights of religious minorities. For a host of reasons—prejudice from the general public distilled to zoning authorities, discomfort with unfamiliar religious practices, lack of political power, insufficient litigation resources, and having to disrupt the land-use status quo as a newcomer—religious minorities bear the brunt of religious land use discrimination. Thus, additional requirements to obtaining RLUIPA's relief weigh heaviest on religious minorities. See *Sts. Constantine*

& Helen Greek Orthodox Church, Inc. v. *City of New Berlin*, 396 F.3d 895, 900 (7th Cir. 2005) (explaining that, when "a state delegates essentially standardless discretion to nonprofessionals operating without procedural safeguards," "religious institutions—especially those that are not affiliated with the mainstream [religions]—" are "vulnerab[le] . . . to subtle forms of discrimination"). The similarly-situated requirement imposed by the court below denied Petitioner the relief Congress designed RLUIPA to afford. In the absence of intervention and correction by this Court, this judicially-concocted requirement—lacking any support in the statue or the legislative history—and others like it will be felt most keenly in the future by Muslims and other religious minorities.

CONCLUSION

For the foregoing reasons, *amicus curiae* respectfully requests this Court grant the Petition for Certiorari to ensure RLUIPA's enforcement protects religious minorities as designed.

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February 19, 2019