Supreme Court, U.S.
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No. 10-521

# In The Supreme Court of the United States

BOARD OF COUNTY COMMISSIONERS
OF BOULDER COUNTY,

*Petitioner,*

v.

ROCKY MOUNTAIN CHRISTIAN CHURCH
and UNITED STATES OF AMERICA,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit**

## REPLY TO BRIEF IN OPPOSITION

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## REPLY TO BRIEF IN OPPOSITION

The Church's Brief in Opposition attempts to paint this case as one about religious discrimination when just the opposite is true. In every way it could, the Church asked the jury whether Boulder County discriminated against religion or violated the Constitution. Specifically, the Church asked the jury: (1) did Boulder County discriminate against the Church under RLUIPA; (2) did the County impose a substantial burden on the Church's religion under the United States or Colorado Constitutions; (3) did the County unconstitutionally discriminate based on religion; (4) did the County unconstitutionally discriminate based on viewpoint; and (5) did the County unconstitutionally discriminate based on association? Court of Appeals Appellant's Appendix ("A") 3108-11. In each case, the jury answered "no." *Id.*

The Church did not challenge these verdicts on appeal. As a result, Boulder County's Petition for Certiorari cannot be about a discriminatory land use decision. None of the judicially recognized methods of proving discrimination were present: the regulations were facially neutral and generally applicable; no governmental pattern of approving one class of applicant over another was established; no fact finder determined that a governmental decision was motivated by anti-religious bias; and no court made a legal determination that the government made an irrational decision. Therefore, the evidence the Church relied on at trial in an attempt to prove religious discrimination or bias, which is cited throughout the

Brief in Opposition, is irrelevant. The issue on appeal is not a fact-bound finding of religious discrimination, but rather whether RLUIPA's Equal Terms and Unreasonable Limitations provisions should reach beyond discrimination and create standards that establish a new and unprecedented level of governmental deference to religious uses.

The Church largely ignores the central issue of whether RLUIPA should be construed to expand the scope of legal protections granted to religious exercise. Instead, it focuses on technical issues that, as shown *infra*, fail to provide a reason to deny Boulder County's Petition.

## 1. The County properly preserved the issue raised in the Petition: the meaning of RLUIPA's Equal Terms and Unreasonable Limitations provisions.

The arguments articulated in the Petition are the same as those Boulder County presented to the Tenth Circuit. The Petition asks this Court to determine the appropriate interpretation of the Equal Terms and Unreasonable Limitations provisions of RLUIPA. If this Court grants the Petition, RLUIPA's constitutionality is at issue only if this Court determines that RLUIPA must be interpreted to exceed the scope of the Free Exercise Clause. Boulder County argues in its Petition, as it did below, that those provisions of RLUIPA should be interpreted consistently with the Free Exercise Clause to avoid constitutional infirmity.

With respect to the Equal Terms provision, Boulder County's opening brief in the Tenth Circuit stated: "Because Congress did not intend to expand free exercise rights by enacting this section, the Court should read this provision to enforce existing Free Exercise doctrine. Further, courts must avoid reading statutes in a manner that renders the provision unconstitutional." Appellant's Opening Br., Appendix to this Reply ("R. App.") at 3. In addition, Boulder County argued that "[a] more expansive reading of the equal terms provision would render it unconstitutional. . . ." *Id.*

Boulder County further argued to the Tenth Circuit that "since the equal terms provision codifies free exercise principles, rational basis review must be applied. . . ." *Id.* at 6 n.5; *see also id.* at 6 ("Thus, the rational basis test applies to the equal terms claim. . . ."). Two pages of its opening brief were devoted to the argument that "[t]he County's decision was rationally related to a legitimate governmental interest." *Id.* at 5-6. Boulder County's Reply Brief was more detailed, including a four-page argument entitled, "The Court must construe the equal terms provision as a codification of free exercise principles" and a seven-page argument applying this legal principle to the facts. Appellant's Reply Br., R. App. at 11-20.

Similarly, with respect to the unreasonable limitations provision, Boulder County stated that "Congress intended the 'unreasonable limitations' provision to mirror the settled doctrine that local

governments may not zone a category of constitutionally protected conduct out of a jurisdiction." Appellant's Opening Br., R. App. at 7. Boulder County further argued that "the unreasonable limitations provision requires that courts focus their attention on the land use regulation being imposed or implemented and not the *manner* in which the land use regulation is imposed or implemented." *Id.* at n.6.

The Tenth Circuit was wrong when, as a reason for refusing to address the constitutionality of its interpretation of the Equal Terms and Unreasonable Limitations provisions, it wrote that Boulder County waived its constitutional challenges because "mention of those arguments in its opening brief, Aplt. Br. at 38 n.7, is too cursory and undeveloped for review." Petition App. ("App.") 18. The portion of the opening brief cited by the circuit court stated: "if this Court were to conclude that either the equal terms or unreasonable limitations provision expands constitutional guarantees, the same arguments raised against the substantial burden provision would apply to those provisions as well." Appellant's Br. at 38 n.7. The Tenth Circuit found that Boulder County *had* preserved its constitutional challenges to the substantial burden provision. App. 18. In fact, Boulder County devoted eight pages of its brief to its argument related to the scope of Congress' enforcement power under Section 5 of the Fourteenth Amendment, Appellant's Br. at 38-44, and over three pages to

improper accommodation under the Establishment Clause, *id.* at 27-30.[1]

Thus, the record below demonstrates that the proper construction of the Equal Terms and Unreasonable Limitations provision of RLUIPA was litigated below and explicitly argued on appeal.

## 2. The County did not propose or accept the Equal Terms or Unreasonable Limitations construction adopted by the Tenth Circuit.

In deciding Boulder County's appeal under Fed. R. Civ. P. 50(a), the Tenth Circuit construed the Equal Terms and Unreasonable Limitations provisions *de novo*, but ultimately adopted as the controlling law the district court's jury instructions. App. 11, 15. The Church claims in its Opposition Brief that Boulder County conceded that the Tenth Circuit's interpretation of the law was correct by allegedly proposing jury instructions similar to those of the district court. The Church's argument has three major flaws. First, the district court instructions differed substantially from those proposed by Boulder County.[2] Second, Boulder

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[1] Boulder County also raised the issue of the as-applied constitutionality of the Equal Terms and Unreasonable Limitations provisions of RLUIPA at the district court level in its renewed Fed. R. Civ. P. 50(a) motion. A. 3145-55.

[2] Boulder County disputes the assertions in the Opposition Brief that the district court adopted a jury instruction it "requested" or that its proposed Equal Terms instruction was "virtually indistinguishable" from that adopted by the district

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County and the Church presented rational basis review (to the extent that it was applicable) as an issue for the court, not the jury.[3] Therefore, application of the rational basis test would not have appeared in the Equal Terms jury instructions. Third, the proposed instructions, final instructions, and the objections to those instructions are irrelevant to a Fed. R. Civ. P. 50(a) analysis regardless of what they stated.

It is well established that, when a party appeals a trial court's denial of a motion for judgment as a matter of law ("JMOL"), the court must review the sufficiency of the evidence under the controlling law, not the law read to the jury. This standard applies regardless of whether the appellant objected to or appealed the instructions. *See Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 600 n.26 (1985). Even if the same legal issue is raised by the JMOL motion and by the jury instructions, failure

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court. Over Boulder County's numerous objections, A. 5176-79, 5185-88, 5211-12, the district court included the phrase "processing, determining, and deciding" in the Equal Terms instructions. A. 3084-85. In addition, the district court refused to define "similarly situated," a critical issue to the Equal Terms appeal. *See* A. 2702. The Unreasonable Limitations instruction was substantially different than that proposed by Boulder County. *Compare* A. 2681-82 to A. 3090-91. As Boulder County explained at Oral Argument, it did not appeal the jury instructions because it believed they were correct, but rather because the issues should not have gone to the jury in the first place.

[3] *See* A. 2673, 2815, 2994, 3279. The district court also acknowledged that application of the rational basis test was an issue for the court and not the jury. *See* A. 4986:4-11.

to object to the jury instruction will not negate the appeal. *City of St. Louis v. Praprotnik*, 485 U.S. 112, 119-20 (1988) (plurality opinion of O'Connor, J., joined by Rehnquist, C.J., White & Scalia, JJ.); *see also Boyle v. United Technologies Corp.*, 487 U.S. 500, 513-14 (1988) (citing *Praprotnik*, 485 U.S. at 118-20). Therefore, even assuming Boulder County failed to adequately propose or object to the jury instructions, it did not waive its ability to argue that the Tenth Circuit misinterpreted RLUIPA.

### 3. The split in the circuits goes directly to how the Equal Terms provision should be interpreted.

The Church concedes that courts of appeals have adopted different approaches to the Equal Terms provision, but argues that those differences only arise in the context of facial challenges rather than the government's application of an otherwise valid regulation. Regardless of the specific factual allegations behind an Equal Terms claim, the central issue is whether the provision codifies Free Exercise protections. Specifically, local governments need to know what "similarly situated" means and what level of scrutiny, if any, their decisions and regulations will be subjected to if they are challenged.

The Tenth Circuit decided that a "similarly situated" determination should be included in an analysis of an Equal Terms claim, but refused to define "similarly situated." In contrast, the Third and

the Seventh Circuits found it necessary to further define "similarly situated" to provide guidance to local governments and to address Establishment Clause concerns that arise in the absence of a specific definition. *See Lighthouse Institute for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 264-66 (3d Cir. 2007) and *River of Life Kingdom Ministries v. Village of Hazel Crest,* 611 F.3d 367, 370-71 (7th Cir. 2010); *see also Griffin Industries, Inc. v. Irvin*, 496 F.3d 1189, 1203 (11th Cir. 2007) ("Too broad a definition of 'similarly situated' could subject nearly all state regulatory decisions to constitutional review in federal court and deny state regulators the critical discretion they need to effectively perform their duties.").

Neither the Third nor the Seventh Circuit limited their holdings to facial challenges or suggested that "similarly situated" should be defined in some circumstances but not others. Indeed, courts have applied the Third Circuit test in the context of as-applied claims. *See, e.g. Third Church of Christ, Scientist v. City of New York*, 617 F. Supp. 2d 201, 213-15 (S.D.N.Y. 2008) and *Adhi Parasakthi Charitable, Medical, Educational, and Cultural Soc. v. Twnsp. of West Pikeland*, ___ F. Supp. 2d ___, 2010 WL 2635979, *17 (E.D. Pa. June 25, 2010). The applicable definitions apply equally well in the as-applied context. For example, in this case, the question would be whether the Church's proposed expansion and the Dawson School were similarly situated

"as to the regulatory purpose" or "as to the accepted zoning criteria."

For as-applied challenges, the Eleventh Circuit found that a neutral statute's application may violate the Equal Terms provision if it differentially treats similarly situated religious and nonreligious assemblies. *Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward County*, 450 F.3d 1295, 1311 (11th Cir. 2006). This as-applied test does not define "similarly situated" or incorporate either strict scrutiny or rational basis review. *See, e.g., id.* and *Konikov v. Orange County*, 410 F.3d 1317, 1327-29 (11th Cir. 2005). The Eleventh Circuit attempted to reconcile its facial Equal Terms test, which incorporates a strict scrutiny analysis, with Supreme Court precedent, *see Midrash Sephardi, Inc. v. Town of Surfside,* 366 F.3d 1214, 1231-32 (11th Cir. 2004); but it has not provided a similar justification for its as-applied test, nor has it explained why it is appropriate for Equal Terms formulations to change based upon the underlying facts of the claim.

Beyond how to define "similarly situated" is the question of the rational basis test. If, as asserted by the Church, the Third and Seventh Circuits will need to formulate new tests to address as-applied equal terms, then the issue of application of the rational basis test could arise as it did in *Centro Familiar Christiano Buenas Neuvas v. City of Yuma*, 615 F. Supp. 2d 980 (D. Ariz. 2009). The district court in that case rejected a plain text reading of the Equal Terms provision similar to that used by the Tenth Circuit, stating that such a "sweeping interpretation"

of the Equal Terms provision "would far exceed religious organizations' rights under the Free Exercise Clause. . . ." *Centro Familiar*, 615 F. Supp. 2d at 994 n.3. To avoid these constitutional pitfalls, the district court found that governments could defeat an Equal Terms claim by "showing that any disparate treatment of a religious and a nonreligious assembly or institution stems from a neutral and generally applicable principle." *Id.* at 995. This is done through the application of the rational basis test. *Id.* at 1000.

The differing judicial opinions on how to interpret the Equal Terms provision show that, in the absence of Supreme Court intervention, courts will continue to struggle with how to apply the provision and local governments will be left with little guidance. The Church makes light of the issue by saying that if local governments "apply their standards equally, they need not fear litigation." Opp'n Br. at 21. However, as recently acknowledged by the Seventh Circuit, "'equality' is a complex concept." *River of Life,* 611 F.3d at 371; *see also Village of Willowbrook v. Olech,* 528 U.S. 562, 565 (2000) (Breyer, J., concurring) ("Zoning decisions . . . will often, perhaps almost always, treat one landowner differently than another. . . ."). The varied analysis of the Equal Terms provision among the circuits proves that point.[4]

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[4] Boulder County is relying on the arguments it raised in the Petition with respect to the Tenth Circuit's erroneous interpretation of the Unreasonable Limitations provision and the Tenth Circuit's split with the Seventh Circuit on that issue.

**4. This case squarely presents a substantial and important issue that should be reviewed by this Court.**

The tortured path this case has taken is indicative of what happens when there are no clear guidelines from this Court about how to apply the land use provisions of RLUIPA. As the three amicus briefs in support of this Petition demonstrate, the proper application of RLUIPA has reached a critical turning point for local governments and professional planners across the country. If broad, open-ended standards like those adopted by the Tenth Circuit remain in place, cities and counties will have little choice but to forfeit a portion of their long-standing authority to plan for the development of their communities, and religious institutions will be, as a practical matter, all but immune to commonplace zoning laws.

## CONCLUSION

For the reasons stated in the Petition and this Reply, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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