NO. 13-6827

IN THE
Supreme Court of the United States

GREGORY HOUSTON HOLT
A/K/A ABDUL MAALIK MUHAMMAD,

Petitioner,

v.

RAY HOBBS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF *AMICUS CURIAE* ALLIANCE DEFENDING FREEDOM IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS[1]

Alliance Defending Freedom is a non-profit, public interest legal organization that provides strategic planning, training, funding, and direct litigation services to protect religious civil liberties and family values. Since its founding in 1994, Alliance Defending Freedom has played a role, either directly or indirectly, in dozens of cases before this Court, numerous cases before federal courts of appeals, and hundreds of cases before federal and state courts across the country, as well as in tribunals throughout the world.

Alliance Defending Freedom and its over 2,200 allied attorneys regularly litigate religious freedom cases. We rely not only on constitutional provisions, but also on statutes like the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA") and the Religious Freedom Restoration Act of 1993 ("RFRA") to protect individuals and churches whose religious exercise is burdened by neutral and generally applicable laws. Alliance Defending Freedom has strong interest in ensuring that these laws, which are designed to alleviate government-

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[1] The parties granted mutual consent to the filing of *amicus curiae* briefs in support of either or neither party pursuant to S. Ct. R. 37.3(a). Documentation reflecting the parties' mutual consent agreement has been filed with the Clerk. Pursuant to S. Ct. R. 37.6, *amicus* states that no counsel for any party authored this brief in whole or in part, and no person or entity, other than *amicus* and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

imposed burdens on religion, are preserved in a full and robust state.

SUMMARY OF ARGUMENT

Congress enacted RLUIPA and RFRA to heighten protection for religious liberty in the wake of *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990). *Smith* permits neutral laws of general applicability to evade Free Exercise scrutiny, even though these laws have a substantial capacity to burden religious exercise not only of prisoners like Mr. Holt, but also of the many churches and religious institutions that we frequently represent. Continuing to rigorously apply the "compelling interest test" found in these statutes is critical to maintaining robust religious liberty protections against laws that appear neutral but profoundly restrict religion.

ARGUMENT

I. Congress Enacted RLUIPA and RFRA Because Neutral Laws of General Applicability Still Substantially Burden Religious Exercise.

"RLUIPA is the latest of long-running congressional efforts to accord religious exercise heightened protection from government-imposed burdens, consistent with this Court's precedents." *Cutter v. Wilkinson*, 544 U.S. 709, 714 (2005). Congress first passed RFRA, 42 U.S.C. §2000bb *et seq*., and shortly thereafter enacted RLUIPA, 42 U.S.C. §2000cc *et seq*. Both laws apply rigorous

scrutiny to government action that substantially burdens religious exercise.

Congress recognized that neutral laws of general applicability have the same capacity to burden religious exercise as discriminatory laws targeting religious practice. But neutral, generally applicable laws receive vastly different scrutiny under First Amendment jurisprudence in the wake of *Smith*.

Laws targeting religious practices or beliefs must "undergo the most rigorous of scrutiny." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993) (striking down a law targeting the ritual slaughter of animals). To survive strict scrutiny, discriminatory laws "must advance [government] interests of the highest order and must be narrowly tailored in pursuit of those interests." *Id.*

But neutral and generally applicable laws not only bypass the compelling interest test, they bypass Free Exercise scrutiny altogether. Persons must comply with neutral and generally applicable laws without regard to the burden on their deeply-held religious beliefs, the coercion of their conscience, the significance of the government's interest, or even the law's breadth of application. *See Smith*, 494 U.S. at 879 ("the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'") (quoting *United States v. Lee*, 455 U.S. 255, 263 n.3 (1982)).

Naturally, government officials work hard to avoid enacting laws that facially discriminate against religion. Today's most pervasive threat to religious exercise stems from the very laws that evade Free Exercise scrutiny – laws that facially appear to be neutral and generally applicable. Examples of such religious liberty threats are not limited to those in prison like Mr. Holt, but abound in the community at large. This brief will highlight two.

A. **Facially Neutral Ordinances Often Have a Disproportionately Negative Effect on Churches.**

Neutral and generally applicable laws are what RLUIPA was designed to remedy. After *Smith*, municipalities invariably claim regulations adversely affecting religious organizations are neutral and generally applicable. This leaves churches and other religious institutions with no legal remedy, or they face the difficult and expensive task of proving the law is in reality not generally applicable. And when they seek an exception, citing the many benefits churches bring to communities,[2] they are invariably met with "the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make one for

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[2] For a summary of benefits churches provide society at large, see W. Bradford Wilcox, Andrew J. Cherlin, Jeremy E. Uecker, Matthew Messel, NO MONEY, NO HONEY, NO CHURCH: THE DEINSTITUTIONALIZATION OF RELIGIOUS LIFE AMONG THE WHITE WORKING CLASS, *reprinted in* RELIGION, WORK, AND INEQUALITY, 227 (Lisa A Keister, John McCarthy, Roger Finke, eds., Emerald Group, 2012).

everybody, so no exceptions." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 436 (2006).

1. ***St. Mark Roman Catholic Parish Phoenix v. City of Phoenix***

Noise ordinances, at first blush, seem innocuous and easily justified. Whether at home or work, no one wants the distraction and irritation that accompanies overly loud machinery, traffic, or amplified music. But even neutral restrictions on loud noise can have a discriminatory effect on religious use.

The City of Phoenix, for instance, prohibited "unreasonably loud," "disturbing," and "unnecessary" noise. *See* Order Denying Motion to Dismiss and Granting Preliminary Injunction, No. 09-1830 (D. Ariz. March 3, 2010). Neighbors complained that St. Mark's carillon bells, which had been used to call the faithful to worship and remind them to pray regularly for 20 years, were too loud and prohibited by the ordinance.

The noise ordinance had already been enforced against another church's bell ringing. It resulted in a criminal conviction of the pastor – substantially burdening the free exercise rights of the church.

St. Mark sought relief from this burden on its religious freedom in federal district court. Predictably, the City moved to dismiss, contending the noise ordinance was neutral and generally applicable since all churches and similar entities

were treated the same. But the court saw through this ruse and applied strict scrutiny (utilizing the standard for content based restrictions on speech, non-neutral prohibitions on religious exercise as protected by the First Amendment, and Arizona's state version of RFRA), and found the City had a compelling interest in enforcing the noise ordinance against the church's bell ringing. But the court found the ordinance was *not narrowly tailored* because it exempted, *inter alia*, ice cream trucks (so long as they played "a pleasing melody").

Of course, the "ice cream truck exception" demonstrates the noise ordinance was not neutral and generally applicable at all. But that did not keep the City from making that argument based on its view that the *Smith* test only requires neutrality towards similarly situated entities. Expensive and time consuming litigation was necessary to correct the City's misreading of the law.

2. ***Reed v. Town of Gilbert***

Another Arizona town (just outside of Phoenix) uses its religiously "neutral" sign code to treat churches less favorably than real estate agents and political organizations when it comes to temporary signs. *See* 707 F.3d 1057 (9th Cir. 2013) (affirming District Court's award of summary judgment to the Town) (writ of certiorari pending). Pastor Clyde Reed leads a small church that meets in facilities it rents from local schools. On weekends, he placed temporary signs on private property (with permission of the owner) inviting people to Good News Community Church and letting them know

where and when it holds services. Pastor Reed was cited by Code enforcement officials because he displayed signs longer than the few hours the Code allowed for non-profit signs announcing events.

The Church's signs were similar to those realtors put up on weekends to advertise open houses and the like. But realtors play by a much more lenient set of rules when posting their temporary signs. They can place 15 signs in the right of way along public roadways throughout the entire weekend. Pastor Reed was limited to just four signs per piece of private property, was unable to place signs in the right of way, and could only display signs in the few hours directly before and after services were held. Politicians' election signs enjoyed even more favorable treatment than those of real estate agents.

The City lumps churches in with other non-political charities advertising events, claiming its sign code ordinance is completely neutral because it treats most non-profits the same (studiously ignoring the fact that many political committees are non-profit). The district court and United States Court of Appeals for the Ninth Circuit have agreed with the City to date, holding that the church's signs are not treated less favorably than other similarly situated organizations. It matters not that politicians and those selling real estate are able to display more and larger signs for longer periods of time.

The Ninth Circuit relied heavily on its finding that the City had no discriminatory purpose in enacting the ordinance. But the City's purpose is

irrelevant when assessing whether free exercise and free speech rights are burdened. It was also a dubious finding on the facts. Once the litigation commenced, challenging an original law which singled out "religious assemblies" for discriminatory treatment, the City amended the ordinance. But instead of fixing the problem and treating churches fairly, it continued the discrimination by creating a new category of speakers comprised of churches and other non-profits – treating them all less favorably than politicians and real estate agents.[3]

Reed demonstrates that even a religiously "neutral" law can have a discriminatory effect on churches and other religious speakers. Strict enforcement of statutes like RLUIPA can help churches combat this ongoing unfair treatment.

B. **Government Officials Often Manipulate Ordinances to Appear Neutral While Intentionally Restricting Religious Uses.**

Undaunted by this Court's holding in *Lukumi*, municipal officials continue to purposely manipulate ordinances so that they discriminate against

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[3] Such "foxhole conversions" mid-litigation do nothing to mask government officials' intent in other contexts, such as cases involving the Establishment Clause, *see, e.g.*, *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 871-74 (1995) (finding county officials' initial religious intent in displaying the Ten Commandments could not be neutralized by the subsequent change in the display to comply with the law), but the city has prevailed so far. The topic of purposeful discrimination is addressed in the next section.

religious uses while appearing to be facially neutral and generally applicable. For example, this stratagem occurs at various stages in the zoning process, such as after a church applies for a special use permit, or as a litigation tactic after a suit for religious discrimination has been filed.

1. ***Woodridge Church v. City of Medina***

Woodridge Church in Medina, Minnesota began to outgrow its building, which occupied a small portion of the church's 27.6 acres of land. It developed plans for expansion and eventually submitted an application for approval of those plans to the zoning board in 2009. For various reasons, the City was opposed to the expansion but realized its hands were tied since other land owners were permitted to expand their facilities to accommodate growth. So the City placed a moratorium on the construction of all church buildings for one year, even though Woodridge's application was the only one pending before the board at that time.

While that moratorium was in place, the City purposely gerrymandered its zoning ordinance so as to prohibit the church's proposed building project. It then lifted the moratorium and the Church sued under RLUIPA and several constitutional provisions in federal district court. No. 11-275 (Dist. Minn. 2011).

The City eventually settled – but not without filing a motion to dismiss and the expenditure of significant attorney time and effort on behalf of the Church. Without the threat of liability under

RLUIPA, the case would very likely still be in litigation.

2. *Tree of Life Christian Schools v. City of Upper Arlington*

Tree of Life is a religious school established in 1978 by several churches in Columbus, Ohio. It has grown substantially over the years such that it now conducts its school in several different locations throughout the metropolitan area. When AOL/Time Warner shut down its operations in Upper Arlington in 2009, the building housing its worldwide headquarters became available. But there were no suitable buyers and the building sat empty for many months till Tree of Life came along.

The Christian school bought the building over the protests of the city, which hoped that another large company like AOL/Time Warner would purchase it. The City claimed that this would result in greater city revenue through the economic synergy that would come with it. So far the City has failed to explain why a similar effect would not occur with a Christian school that employs numerous teachers and administrators and attracts students and their family members – all of whom would frequent surrounding businesses on a regular basis.

The City refused to allow Tree of Life to use the facility as a religious school, and the school sued under RLUIPA, the First Amendment, and other constitutional provisions. 2014 WL 1576873 (S.D. Ohio, April 18, 2014) (granting summary judgment to the City). It quickly became evident that RLUIPA

precedent made the City's legal position untenable since it allowed daycares in the zoning district where Tree of Life's building is located. *See Midrash Sephardi v. Town of Surfside*, 366 F.3d 1214 (11th Cir. 2004) (holding RLUIPA requires a municipality to allow religious assemblies in zoning districts where daycares are permitted).

But instead of settling the case, the City elected to amend its zoning code in the midst of litigation so as to "neutrally" prohibit daycares in the zoning district where the newly bought building is located. The City's non-neutral motive for doing so could not be more evident. It wants to exclude Tree of Life's religious school. Nevertheless, the district court found there was no disparate treatment of the religious institution and awarded summary judgment to the City. The case is currently on appeal to the United States Court of Appeals for the Sixth Circuit.

II. Redefining the Least Restrictive Means Test to Allow the Government Wide Discretion in Narrow Tailoring Would Undermine Important Religious Liberty Protections That Congress Placed in Statutes Like RLUIPA and RFRA.

RLUIPA was designed to eliminate burdens on religious exercise that are "unnecessary." *Cutter*, 544 U.S. at 716 (quoting 146 Cong. Rec. 16698, 16699 (2000) (joint statement of Sen. Hatch and Sen. Kennedy on RLUIPA)). The primary means by which courts evaluate which government burdens are necessary and which burdens are not is the least

restrictive means test – the most rigorous standard in narrow tailoring. *See U.S. v. Hardman*, 297 F.3d 1116, 1130 (10th Cir. 2002) (calling the least restrictive means test a "severe form" of narrow tailoring).

Requiring the government "to demonstrate that no alternative forms of regulation would combat [the threatened] abuses without infringing First Amendment rights" avoids unnecessary intrusions upon religious exercise and strikes a sensible balance between conflicting interests of the highest order – sincerely held religious beliefs and compelling government interests. *Hardman,* 297 F.3d at 1130 (quoting *Sherbert v. Verner,* 374 U.S. 398, 407 (1963)).

In the prison context, the courts of appeals have consistently given effect to the plain language of RLUIPA and held that where potentially less restrictive measures exist, prison officials must demonstrate that they have considered and rejected these measures. Obviously this consideration must be in good faith and not merely a cursory formality. *See, e.g., Warsoldier v. Woodford*, 418 F.3d 989, 99 (9th Cir. 2005) (prison must consider and reject alternatives to demonstrate it has pursued the least restrictive means)*; Washington v. Klem*, 497 F.3d 272, 284 (3d Cir. 2007) (same). But Respondents assert that it is the *prisoner's* job to rebut the government's conclusory assertion that other alternatives are "unworkable." Br. Opposing Writ of Cert. at 17.

Respondents' argument shifts the narrow tailoring burden to the plaintiff while expanding the deference accorded government decisions. By this standard, RLUIPA would proscribe none but the most egregious and over-reaching burdens on religious exercise. This contravenes Congress' intent that RLUIPA "be construed in favor of broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution." 42 U.S.C. §2000cc-3(g).

Weakening scrutiny of government-imposed burdens in the prison context will, in turn, weaken religious liberty protections in other applications of RLUIPA, as well as other statutes. Many federal statutes employ the same strict scrutiny language and least restrictive means test contained in RLUIPA's section three on institutionalized persons. *See, e.g.*, 42 U.S.C. §2000cc(a)(1) (religious land use), 42 U.S.C. §2000bb-1 (federal RFRA). Many states have likewise passed their own versions of RFRA, copying language from the federal statute.[4]

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[4] These states include Alabama, Ala. Const. art. I, §3.01; Arizona, Ariz. Rev. Stat. Ann. §41-1493.01; Connecticut, Conn. Gen. Stat. §52-571b; Florida, Fla. Stat. §761.03; Idaho, Idaho Code Ann. §73-402; Illinois, 775 Ill. Comp. Stat. 35/15; Kansas, Kan. Stat. Ann. §60-5303; Kentucky, Ky. Rev. Stat. Ann. §446.350; Louisiana, La. Rev. Stat. Ann. §13:5233; Mississippi, MS LEGIS (2014), 2014 Miss. Laws WL No. 196 (S.B. 2681); Missouri, Mo. Rev. Stat. §1.302; New Mexico, N.M. Stat. Ann. §28-22-3; Oklahoma, Okla. Stat. tit 51, §253; Pennsylvania, 71 Pa. Stat. Ann. §2404; Rhode Island, R.I. Gen. Laws §42-80; South Carolina, S.C. Code Ann. §1-32-40; Tennessee, Tenn. Code Ann. §4-1-407; Texas, Tex. Gov't Code Ann. §110.003; and Virginia, Va. Code Ann. §57-2.02.

Reinterpreting the least restrictive means test to give the government wide discretion in narrow tailoring will trigger a ripple effect damaging to all religious freedom jurisprudence. Laws like RLUIPA and RFRA help relieve burdens on religious exercise that are substantial and unnecessary. They ensure that the government remains accountable even for the burdens imposed by neutral laws of general applicability. This Court should hold the State of Arkansas accountable by rigorously applying the least restrictive means test here.

CONCLUSION

RLUIPA should be broadly construed in favor of religious freedom. Congress designed RLUIPA, and laws like it, to alleviate substantial burdens on religious exercise from neutral laws of general applicability. Cases like *St. Mark v. City of Phoenix*, *Reed v. Town of Gilbert*, *Woodridge Church v. City of Medina*, and *Tree of Life Christian School v. City of Upper Arlington* demonstrate the need for heightened religious liberty protection in the wake of *Employment Division v. Smith*.

Strict scrutiny of government-imposed burdens on religious exercise plays a vital role in protecting religious freedom. Requiring government officials to articulate a narrowly tailored and compelling interest eliminates frivolous or arbitrary barriers to religious exercise. *Amicus* respectfully urges this Court to reaffirm the application of strict scrutiny in its full, robust state to ensure strong religious liberty protections for prisoners, churches, and other

religious institutions that find their religious liberty unnecessarily restricted.

Respectfully submitted,

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