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

REPLY BRIEF FOR PETITIONER

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CORPORATE DISCLOSURE STATEMENT

The Corporate Disclosure Statement in the Petition for Writ of Certiorari remains unchanged.

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INTRODUCTION

For eight years, the City of Upper Arlington has said that it needs Tree of Life's building to generate more tax revenue. Opp.5–7, 12, 29. That is a false narrative. No one but Tree of Life wanted the building, and the City's scorched-earth litigation tactics have cost the City $1 million in tax revenue that Tree of Life itself would have generated. What's more, the City is one of Columbus' most affluent suburbs, with an overwhelmingly white population and a median income over twice the Ohio average. City of Upper Arlington, Adopted Budget for 2019-2020 at 5, 8–9, https://bit.ly/2I1W1AD. It has projected annual income-tax receipts of $28 million, *id.* at v, and a budget reserve approaching $11 million, *id.* at 43.

So why does the City insist on keeping Tree of Life out of the building it owns? Perhaps it harbors religious hostility. Or it fears racial and economic diversity, as many Tree of Life students are from minority or low-income families.

Whatever its actual reasons, the City has violated RLUIPA. The City's zoning does *not* require a property owner in the Office and Research District ("ORC District") to generate a certain amount of tax revenue per square foot. A for-profit or nonprofit daycare, office, or publisher could have moved into Tree of Life's building automatically—*even if generating the same or less tax revenue than Tree of Life*. That is the definition of unequal treatment, as Judge Thapar explained in dissent.

The City spends the bulk of its brief casting aspersions on Tree of Life and castigating this case as a vehicle to resolve the circuit split. These attacks reflect a deep misunderstanding of the record, appellate procedure, and circuit precedents. As explained below, none of the City's misguided attacks on this religious school eliminate the need to clarify the law.

ARGUMENT

I. The Sixth Circuit admitted it was deepening a circuit conflict, and the City's denial proves its abandonment of RLUIPA's text.

No doubt exists that the Sixth Circuit deepened a circuit conflict regarding the test for a RLUIPA equal-terms claim. Despite the City's characterization of the precedents, the panel majority explicitly said it was joining the Third, Seventh, and Ninth Circuits' "majority view," App.21a, dismissing the Tenth Circuit's inquiry as "an outlier," App.22a, and disagreeing with the Eleventh Circuit's "unique and problematic test," App.22a. The Sixth Circuit certainly recognized the conflict.

Tellingly, the City fails to mention the Eleventh Circuit's test. Opp.20. That omission is essential to justify the City's claim that there is no split. In fact, the Sixth Circuit condemned both the Tenth and Eleventh Circuits' equal-terms standards, App.22a, and its test is incompatible with the Second Circuit's focus on equal treatment, Pet.19–21. In addition, there is the discrete conflict on RLUIPA's burden-shifting provision, Pet.22, a split the City also ignores.

Avoidance does not make these conflicts disappear. And RLUIPA's text rejects the City's argument that only equal-terms cases involving religious schools count. Opp.1, 18, 21, 35. Congress did not mandate equal zoning treatment for "schools" or "churches." Opp.1. It forbid government from treating "*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). Because the words "religious assemblies or institutions" embrace religious schools and houses of worship, the RLUIPA analysis is the same either way.

In other words, any nonreligious assembly or institution that compares to religious schools will also compare to houses of worship. The City's failure to grasp that basic fact underscores its abandonment of RLUIPA's text. Lower courts will forfeit nothing if this Court establishes the proper equal-terms test here. But the bench and bar will lose sorely-needed clarity if this Court declines review.

The City is also wrong that Tree of Life would lose under any existing test, Opp.19–20, because the City ignores Tree of Life's facial claim, Opp.20 (discussing only "as-applied cases"). In the Eleventh Circuit, Tree of Life would prevail on its facial claim because the zoning code allows all manner of secular nonprofits to operate in the ORC District, no matter the tax revenue they generate. Yet Tree of Life is excluded. Pet.19, 25, 31. The Fifth, Sixth, Seventh, and Ninth Circuits do not even allow such facial claims. Pet.25–26, 28. And whether facial claims exist is crucial because Tree of Life's path to victory under that theory is clear-cut. Reversing the Sixth Circuit *will* change the outcome.

II. Tree of Life's facial claim is undeniably live, and the City admits the Sixth Circuit decided the issue.

The City maintains that "there was no facial challenge at issue in the lower courts in the *relevant decisions*," Opp.25 (emphasis added), by which it means Tree of Life's third trip through the lower courts. But Tree of Life did press a facial equal-terms claim below, 3/16/18 Appellant Br. 39–50 (No. 17-4190); 7/24/14 Appellant Br. 32–46 (No. 14-3469), and the City concedes the Sixth Circuit ruled on the issue. Opp.25 This petition challenges that interlocutory ruling. The City also admits that the Sixth Circuit reaffirmed its facial holding on the third appeal. Opp.26. Tree of Life's facial claim is undeniably live.

The interlocutory ruling on Tree of Life's facial claim is "not res judicata or conclusive here, as the [City] seems to suppose." *Diaz A.* v. *Patterson*, 263 U.S. 399, 402 (1923). Res judicata does not bar this Court from reviewing lower courts' earlier rulings. This Court "may consider questions raised on the [second] appeal, as well as those that were before the court of appeals upon the [third] appeal." *Mercer* v. *Theriot*, 377 U.S. 152, 153 (1964) (per curiam) (cleaned up). Accord, *e.g.*, *Lujan* v. *Nat'l Wildlife Fed'n*, 497 U.S. 871, 881 n.1 (1990).

The City misunderstands the cert. process. This Court typically does not review interlocutory decisions but waits for a final judgment. Once that judgment issues, this Court may "notice and rectify any error that may have occurred in the interlocutory proceedings." *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). Law-of-the-case

principles do not insulate the Sixth Circuit's interlocutory rulings from this Court's review, *Pennsylvania* v. *Ritchie*, 480 U.S. 39, 49 (1987), as the City reluctantly concedes. Opp.34 ("This Court is not bound by the law of the case in reviewing the lower court decisions . . . .").

In sum, Tree of Life pressed its facial claim below and the Sixth Circuit ruled on it. The issue is fully preserved for this Court's review, as the City itself ultimately admits. Opp.23 (citing *United States* v. *Williams*, 504 U.S. 36, 41 (1992)); see also *Verizon Commc'ns, Inc.* v. *F.C.C.*, 535 U.S. 467, 530 (2002).

III. Invited-error doctrine does not apply to Tree of Life's RLUIPA claims and could not hinder this Court's review in any event.

The City says that Tree of Life "invited" the errors below, and it argues that this invitation somehow nullifies the need to resolve the circuit split. Not true.

To begin, the invited-error doctrine does not apply here. This Court appropriately takes a cautious approach to the doctrine, applying it only to legal errors in a party's own jury instruction, *United States* v. *Wells*, 519 U.S. 482, 487–88 (1997), evidentiary errors based on a party's own objection, *F.W. Woolworth Co.* v. *Contemporary Arts, Inc.*, 344 U.S. 228, 230–31 (1952), or procedural errors grounded on a party's own arguments, such as not bifurcating the damages phase of a trial, *Tyson Foods, Inc.* v. *Bouaphakeo*, 136 S. Ct. 1036, 1050 (2016). Outside of those limited contexts, the doctrines of invited error and law of the case do not "oust this Court's traditional rule that [it] may address a question

properly presented in a petition for certiorari if it was pressed in or passed on by the Court of Appeals." *Wells*, 519 U.S. at 488 (cleaned up).

What's more, Tree of Life did not invite any error. The City's assertions focus on the briefs Tree of Life filed on its third and final trip before the lower courts. Opp.22–24. At that point, the Sixth Circuit had already rejected Tree of Life's facial claim and mandated an as-applied test that focused on whether secular assemblies or institutions are "similarly situated with respect to maximizing revenue." App.118a. That ruling established the City's zoning interests as controlling, not whether Tree of Life received equal treatment. And, the ruling foreclosed Tree of Life from advancing a more-textual alternative, such as the Second, Tenth, or Eleventh Circuits' tests. So when the City says Tree of Life "invited error," what the City means is that Tree of Life "followed the mandate."

Stuck with promoting the least-bad "majority" option, Tree of Life advocated (1) the Fifth Circuit's limitation of the equal-terms inquiry to interests written in the City's zoning code, Pl.'s Br. in Supp. of Mot. for Final J. at 8, and (2) the Ninth Circuit's assignment of the burden of persuasion to the government after the RLUIPA plaintiff establishes a prima facie case. 3/16/18 Br. of Pl.-Appellant at 18 (No. 17-4190). The Sixth Circuit barely analyzed the Fifth Circuit's test, App.20a, 83a, and it relieved the City of its burden of persuasion, Pet.22, 34. So any suggestion that Tree of Life invited error is wrong.

In sum, having already argued—incorrectly—that Tree of Life is barred from challenging the Sixth Circuit's two interlocutory rulings, the City then says that Tree of Life invited error in the Sixth Circuit's third opinion for abiding by the previous two decisions. That's not how this Court's review works. Because Tree of Life preserved its facial and as-applied RLUIPA claims below, it "can make any argument" that supports them in this Court. *Citizens United* v. *F.E.C.*, 558 U.S. 310, 331 (2010). Accord, *e.g.*, *Dewey* v. *City of Des Moines*, 173 U.S. 193, 198 (1899) ("[p]arties are not confined here to the same arguments which were advanced in the courts below upon a federal question there discussed.").

IV. The City's view of the equal-terms test confirms the real-world problems the petition highlights, problems that only this Court may resolve.

The petition raises many problems caused by lower courts' invention of non-textual equal-terms tests. The City's brief confirms them.

First, the City ignores RLUIPA's text, arguing that Tree of Life may prevail only by comparison to a secular entity that is "similarly situated," Opp.16, with regard to the City's zoning "purpose" Opp.35. But what RLUIPA actually asks is whether the City "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). Congress rejected a similarly-situated standard and spurned a test based on zoning purposes.

Nothing in the equal-terms provision's text "reads out of the analysis the specific characteristics of permitted uses and non-permitted uses [*i.e.*, whether they are assemblies or institutions] so that the relevant focus is simply *revenue to the City*." Opp.16. Rather, RLUIPA mandates equal treatment of religious and secular assemblies or institutions regardless of the City's zoning goals, here the "potential for maximized revenue generation." Opp.35. It is no answer for the City to argue that it is merely "treating [revenue] maximizing uses differently than . . . non-maximizing use[s]," *ibid.*, when the zoning code allows numerous uses without regard to the revenue they actually generate.

Second, the City's nebulous definition of revenue maximization shows that Congress was right to focus on objective equal treatment, not subjective zoning goals. Allowing secular nonprofits in the ORC District does not maximize the City's tax revenue. In fact, a nonprofit daycare, publisher, or office generating *less* tax revenue than Tree of Life would have been automatically allowed. But the lower courts refused to examine whether the City's zoning regulations *actually* served its stated goals. It was enough that the zoning code *alleged* maximizing revenue as its subjective purpose. App.29a, 72a–73a.

That is inconsistent with RLUIPA's text and makes no sense. In fact, the City later disclaims any interest in "achieving . . . *absolute* or *maximum* revenue." Opp.33. What the City wants is unbounded discretion to deem some nonprofit uses above its "minimum threshold to be considered revenue maximizing" and others "below" it. *Ibid.*

Such a hazy line is far different than a code that requires a minimum tax-revenue generation. And it authorizes the City to make case-by-case distinctions between nonprofits it wants to allow and those it does not. So, focusing on the City's subjective zoning purposes does not make the equal-terms analysis turn on simple "math." Contra Opp.30. It flips RLUIPA upside down and places the burden on Tree of Life to show not only that (1) secular assemblies or institutions are allowed in the ORC District but also that (2) they do "not maximize revenue to the City *at the same level or worse* than the School[ ]." Opp. 16.

Again, the amount of tax generation the City deems "acceptable" has nothing to do with maximizing funds. If that were really the City's concern, it would have excluded nonprofits from the ORC District altogether instead of welcoming numerous nonprofits as-of-right. Or, it would have enacted a zoning code that requires a minimum amount of revenue generation. What the City desires is a vague, manipulable zoning criteria that can justify its unequal treatment of religious and secular organizations. And that is the exact problem Congress designed RLUIPA's equal-terms provision to solve.

Third, the City embraces lower-court equal-terms tests that ignore RLUIPA's text. These tests nullify the equal-terms provision. Although RLUIPA speaks in terms of "a nonreligious assembly or institution," 42 U.S.C. 2000cc(b)(1), the City maintains that nothing but "secular schools" could serve as a valid comparator here, Opp.35. In other words, the equal-terms provision does nothing unless Tree of Life proves an *identical* secular counterpart receives better zoning treatment. Opp.18.

But limiting Tree of Life's secular comparators to private schools violates RLUIPA's text and is so plainly wrong that not even the Sixth Circuit adopted that test. App.18a–19a. Yet the City feels comfortable making that extreme argument. And the district court embraced it, viewing the City's zoning code as facially neutral because it "treats both religious schools and secular schools the same." App.84a n.6, 168a. That result denigrates RLUIPA's actual text. App.61a (Thapar, J., dissenting). And only this Court can resurrect what Congress actually enacted.

Fourth, the City touts its need to increase revenue, Opp.5, then admits that its zoning code does not serve that end, Opp.33. That is because the City "cannot choose how an entity uses the land or how much it is used," and if a property owner "fails to maximize the revenue from an allowed use, [the City] has no recourse." *Ibid*. Many uses allowed in the ORC District—including partial office uses—do not serve it. A real-life example is AOL/Time Warner's staffing of Tree of Life's large office building with just six employees, a situation it could maintain permanently under the City's code.

So why not let Tree of Life use the building it has owned for eight years as a religious school? That use would have promoted Tree of Life's and its families' religious interests and produced $1 million in personal-income-tax revenue for the City—far more than the property generates now. Pet.25. Although the City does not engage this basic question, religious discrimination is the only plausible answer, as the City openly favors nearly *any* use of the property other than a religious school. Opp.15, 18.

Still, it is not Tree of Life's burden to prove that the City acted with religious animus, only that the City treated Tree of Life on unequal terms with nonprofit daycares, publishers, and offices. Because those entities are allowed in the ORC District automatically, and Tree of Life is not, Tree of Life has established an equal-terms violation.

V. Enforcing RLUIPA's text will deter widespread zoning discrimination against religious organizations, not provide them with preferential treatment.

Congress passes many laws to remedy discrimination against the politically vulnerable. But only laws protecting people of faith lead to claims of favoritism. Pet.23–24. True to form, the City maintains that by asking this Court to enforce RLUIPA's text, Tree of Life requests not equal but preferential treatment. Opp.4. It is difficult to imagine the City making that argument in a race- or sex-discrimination lawsuit. Yet, as the City knows, lower courts treat religious-discrimination claims less favorably. Pet.24.

RLUIPA does not benefit people of faith any more than civil rights statutes always aid victims of widespread discrimination. More than three years of Congressional hearings uncovered a nationwide epidemic of discrimination against religious land uses. Congress instituted prophylactic rules to ferret out discrimination that is hard to detect and has a devastating impact on the right to assemble—a fundamental aspect of religious exercise. Pet.7.

The equal-terms provision is one of those rules. It targets a narrow arena of government action that is characterized by individualized assessments and vague zoning criteria, where the danger of religious discrimination is at its height. Pet. 33. Even in that context, RLUIPA gives local governments nearly free reign. They simply cannot impose zoning restrictions on religious assemblies or institutions they are not willing to impose on their secular counterparts. 42 U.S.C. 2000cc(b)(1). Mandating neutral and generally applicable zoning rules guarantees equal treatment.

What the City actually resists is RLUIPA's limited "preempti[on] [of] municipality zoning law." Opp.36. The City could make the same complaint against any federal civil rights statute. Its quarrel is with the Supremacy Clause, not RLUIPA itself.

* * *

There is a deep, mature circuit conflict regarding the meaning of RLUIPA's equal-terms provision. This case is an ideal vehicle to resolve it. Certiorari is warranted.

CONCLUSION

For the foregoing reasons, and those explained in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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