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 IN OPPOSITION

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## QUESTIONS PRESENTED

1. Does this case present a vehicle for settling a rule of law of general application for religious assemblies or institutions when the case turns on credibility assessments and weighing of evidence limited by a narrow record regarding a school, not a place of worship?

2. Does this case present a Circuit split warranting certiorari when every as-applied RLUIPA test the Court of Appeals could have used is functionally equivalent so that the result of the case would be the same under any of the tests?

3. Can a petitioner obtain certiorari by arguing that the lower courts applied the wrong tests when those courts applied the tests that the petitioner expressly asked the courts to apply?

4. Should the Court consider for certiorari a facial challenge when a prior remand involved only an as-applied claim, Petitioner subsequently litigated only an as-applied claim in the District Court, Petitioner's appellate briefing addressed only the as-applied claim, and the Court of Appeals found that Petitioner had abandoned any facial claim and had pursued only the as-applied claim?

## TABLE OF CONTENTS

*Table of Contents*

## TABLE OF CITED AUTHORITIES

*Page*

**CASES**

*Cited Authorities*



**STATUTES**



**OTHER AUTHORITIES**

## INTRODUCTION

**This case is not what Petitioner would like it to be: a case to resolve an actual conflict concerning the zoning of religious uses.** Therefore, in its Petition for a Writ of Certiorari, Tree of Life Christian Schools ("the School") strategically alters its theory of the case and selectively ignores dispositive facts to convince the Court that this matter is about the proper test to apply under the equal-terms provision of the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 42 U.S.C. § 2000cc-1 *et seq.* The Sixth Circuit below states that it used the same test as all other Circuits but one, and the School cannot say that even that one Circuit would come out differently in a case dealing with schools because there has been *no* similar RLUIPA school case at a Circuit Court of Appeals.

What the School's deft briefing and careful characterizations avoid conveying is that this case is a wholly unsuitable vehicle for the Court to settle any potential Circuit Split or resolve any overarching RLUIPA question for multiple reasons:

- **Failure to demonstrate a different outcome.** Using church cases, the School relies on an asserted Circuit split as grounds for certiorari. This case is about school comparators, not church comparators. The School has failed to show that the outcome of this case would have been different in any other Circuit.

- **Invited error.** The School asserts that both the District Court and the Sixth Circuit applied the

wrong test for RLUIPA, but those courts applied tests *for which the School argued*. Every time the School fails to prevail, it changes what test it argues should apply when it moves to the next court.

- **Incorrect characterization of claims.** The School misleadingly includes a facial challenge in its second Question Presented. The *only* challenge before the District Court and before the Sixth Circuit in the relevant decisions was an *as-applied* RLUIPA equal-terms claim.

- **Abandoned argument.** Multiple judges found that the School abandoned any argument that it is a place of worship. The School strains to resurrect that argument to tie its case into the *amici* brief concerns over discrimination. This case does not present such a widespread issue.

- **Circuit holding of limited application.** The holding the Petition targets is specific to the particular facts of this case because the Sixth Circuit panel was limited by doctrine and jurisprudential rules to applying a narrow analysis to facts limited by a prior panel decision. The Petition does not provide a clean vehicle for settling an issue of general application.

The School seeks to use RLUIPA not to prevent discrimination, but to achieve a zoning change it could not achieve through the available legislative and administrative processes. Such use of RLUIPA is baseless and not the intended or proper use of RLUIPA. Nowhere

in the enacted statutory scheme or in the legislative history is there any basis for accepting that Congress intended RLUIPA to function as a "disregard-all-zoning" card to be played when the law becomes inconvenient to an entity's growth plans. Rather, as many of the *amici* briefs correctly note, RLUIPA provides a necessary safeguard against all too real religious discrimination.[1] It is a means to ensure equal treatment, not preferential treatment, but the School's case asks the Court to say that, regardless of zoning law, a religious school entity has more rights than a non-religious school in zoning matters.

This is not a discrimination case, and it cannot serve as a proper vehicle through which the Court should seek to settle RLUIPA issues. This is because the facts and procedural posture of—and legal doctrines involved in—this case render it a poor vehicle for settling *any* issue of law, much less the overarching issues cited by the School to entice the Court. Thus, this is less a RLUIPA case and more an invited error case that serves as a prime example of when a case is too fact-specific and too replete with a petitioner's own errors to warrant certiorari.

## STATEMENT OF THE CASE

An account of the facts is necessary here because the School's often cursory account carefully omits nuance and

1. The *amici* briefs do little to inform the issue of whether to grant certiorari because they largely focus on perceived effects of the equal-terms tests or the merits of the tests and not on the threshold question of whether this case is even a good vehicle to present those substantive issues. It appears that the *amici* are unfamiliar with critical details of this case and the lower court proceedings and that they have elected to provide merits briefing.

detail in an effort to paint the school as an entity that inadvertently stumbled into a bureaucratic quagmire and suffered religious discrimination. A fuller account of the facts reveals that the School knew schools were not a permitted use at the time of purchase and attempted to change the zoning through legislative and administrative processes. When that failed, the School improperly sought to use RLUIPA to avoid receiving equal treatment in favor of receiving *preferential* treatment.

## I. The City's facially neutral zoning plan excludes all schools, both secular and religious, while permitting churches and places of worship.

The City's Unified Development Ordinance permits both churches and schools (whether religious or secular) in all residentially zoned territory: 95% of its land mass.[2] Notably, churches and places of worship are allowed as conditional uses in the Office and Research Center district ("ORC") where the School's property is located. The ORC constitutes only 1.1% of the City, so it is neither surprising nor oppressive to limit what is permitted there. Schools, public or private, religious or secular, are *not* permitted in the ORC. The property involved here has been zoned ORC since 1970 pursuant to Ordinance No. 124-70. Three points explain the context of the zoning plan the City enacted. Pet. App. 72a-79a.

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2. The City is not discriminatory to religion; churches and schools are permitted in over 95% of the City, and the City has two religious schools, as well as public and private. The School chose an office building zoned for no schools of *any* kind.

First, the City must maximize revenue derived from commercial use in order to serve its citizens. Income taxation generates the majority of the City's revenue. Therefore, the City's development plan, the Master Plan, creates development opportunities for high-paying jobs in order to maximize revenue. Pet. App. 72a.

Second, the City has limited opportunities for expansion or new development given its location and existing development. The City's commercial land-use base, including both office and retail uses, comprises 4.7% of the City's total land area. Only 1.1% of the total land area is zoned for commercial office uses, and just over 67 acres of the City's 6,336 acres is zoned for commercial use. Pet. App. 72a.

Third, in light of the Master Plan, the City adopted its zoning plan to maximize revenue and serve its goal of funding services. Pet. App. 72a. This plan, the Unified Development Ordinance, employs "non-cumulative" zoning, which means that uses that are not expressly allowed are prohibited.

Unified Development Ordinance § 5.03(A)(6) states the purpose of the ORC:

> The purpose of this district is to allow offices and research facilities that will contribute to the City's physical pattern of planned, healthy, safe, and attractive neighborhoods. The [Office and Research Center district] should also provide job opportunities and services to residents and contribute to the City's economic stability. Permitted uses generally including, but are not

> limited to, business and professional offices, research and development, book and periodical publishing, insurance carriers, corporate data centers, survey research firms, and out-patient surgery centers.

Pet. App. 290a; RE 86, Page ID # 2726. Unified Development Ordinance § 4.04(C), which governs rezoning, provides that "[t]he following criteria shall be followed in approving zoning map amendments to the Unified Development Ordinance":

1. That the zoning district classification and use of the land will not materially endanger the public health or safety;

2. That the proposed zoning district classification and use of the land is reasonably necessary for the public health or general welfare, such as by enhancing the successful operation of the surrounding area in its basic community function or by providing an essential service to the community or region;

3. That the proposed zoning district classification and use of the land will not substantially injure the value of the abutting property;

4. That the proposed zoning district classification and use of the land will be in harmony with the scale, bulk, coverage, density, and character of the area of the neighborhood in which it is located;

5. That the proposed zoning district classification and use of the land will generally conform with the Master Plan and other official plans of the City;

6. That the proposed zoning district classification and use of the land are appropriately located with respect to transportation facilities, utilities, fire and police protection, waste disposal, and similar characteristics; and

7. That the proposed zoning district classification and use of the land will not cause undue traffic congestion or create a traffic hazard.

RE 86, Page ID # 2727-2728. Both Unified Development Ordinance §§ 5.03(A)(6) and 4.04(C) matter, given what happened next on the way to this litigation.

## II. The School chose to ignore the prohibition on operating a school in the ORC when it bought an office building in which to operate.

The property involved in this case was previously occupied by AOL/Time Warner. During that occupancy, the property—the largest office building in the City—generated substantial tax revenue for the City. For example, it accounted for 29% of the City's 2001 income tax revenue. AOL/Time Warner pulled out in 2009 and dealt the City a painful financial blow. Under the Unified Development Ordinance, the ORC permitted uses provided the City with a chance to maximize revenue and recover from this financial blow. This chance for recovery was compromised when the School contracted to purchase the office building in October 2009. Pet. App. 76a.

Despite the fact that zoning prohibited *all* schools in the ORC, the School contracted to purchase the office building to open a school. Because it was aware that churches were permitted as conditional uses in the ORC, the School pursued a conditional use permit by arguing that *it was actually a church*. However, the City Council found that the School's primary proposed use was as a school. The School appealed that determination to the Franklin County Municipal Court, but later abandoned that administrative appeal and its argument that it was a church. Pet. App. 76a-78a. The School closed on the property in August 2010. Pet. App. 78a.

In January 2011, the School commenced litigation in the District Court. Following cross-motions for summary judgment, the District Court entered an Order granting the City summary judgment and holding that the School's case was not ripe because it had not even applied for rezoning *as a school* as the Unified Development Ordinance requires. Pet. App. 193a-222a. The School appealed to the Sixth Circuit.

During this first appeal, the School submitted an application to the City to amend the Unified Development Ordinance to allow "private religious schools" as a permitted use in the ORC. Pet. App. 78a. This application to limit permissible zoning to "private religious schools" would have treated the School *more* favorably than public or private non-religious schools instead of treating them all the same. The application was submitted to cure the District Court's finding that the case was not ripe for review. After the School notified the Sixth Circuit that it had sought amendment of the Unified Development Ordinance to cure the ripeness problem, the Circuit Court

remanded the case to the District Court to determine whether the School's case was ripe. Pet. App. 187a-92a. The School's application sought to amend the City's zoning code so that private religious schools—but not secular schools—would be allowed in the ORC. In March 2013, the City Council denied the proposed amendment. Pet. App. 78a.

After remand, the School requested that the City rezone only the office building from ORC to residential. Pet. App. 79a. Prior to the vote on this rezoning, the City Attorney offered the following analysis based on the seven points governing rezoning applications under Unified Development Ordinance § 4.04(C):

> First Standard: "Ms. Armstrong testified in her deposition that the City had a decline in income in 2007, 2008, and 2009. The income in 2010 was comparable to the 2009 income and there was an increase in income in 2011. The City had a balanced budget during those years because appropriations were not requested that would exceed estimated revenues. The elimination of the estate tax and reductions in state funding further reduce available revenues and place additional stress on a tight budget situation. In order to continue to provide necessary services to the residents, the City needs to maximize revenues. Rezoning the Tree of Life property to residential does not maximize the revenue potential of one of the City's largest commercial office sites. The rezoning would permit a future owner to demolish the office buildings/school and build single family houses which would further reduce revenues."

Second Standard: "The issue is not whether quality schools are necessary or if Tree of Life would be a good neighbor, but [whether] the City needs more residentially zoned land. Approximately ninety percent (90%) of the City of Upper Arlington is already zoned for residential uses, including schools. Tree of Life has failed to establish the necessity for more residentially zoned land."

Third Standard: "Tree of Life's arguments concerning St. Andrews and Wellington are 'apples to oranges' comparison[s]. Both St. Andrews [a private religious school] and Wellington [a secular private school] are located in purely residential districts that specifically contemplate schools. Tree of Life proposes to put a school in an office and retail [sic] district that does not contemplate such a use. Abutting commercial property owners could not have anticipated such a school use possible when they acquired their properties."

Fourth Standard: "The AOL office workers were in harmony with the commercial character of the Henderson Road corridor. Residential uses, including 600 students attending a K through 12 school, are not in harmony with a commercial character of the corridor."

Fifth Standard: "Rezoning to eliminate commercially zoned property is contrary to the Master Plan. The Master Plan seeks to 'enhance the City's revenue sources' and

> 'expand the amount of office space in the City.' Tree of Life is asking Council to eliminate over twenty percent (20%) of the City's existing ORC-zoned land. Commercial offices comprise only one point one percent (1.1%) of the City's total land area. Zoning should be based on a comprehensive plan taking into consideration [the] best interest of the entire community. It should not be done on a piecemeal basis based on the desires of an individual property owner."
>
> Sixth Standard: "The revised traffic study is still deficient in addressing the change in traffic conditions resulting from the school. Staff is also concerned whether adequate study has been made if the property were redeveloped for residential or other uses permitted in the R/S district."
>
> Seventh Standard: "It is questionable whether Tree of Life's promise that no athletic events or evening activities would be held at this site would be enforceable."

City Council Meeting Minutes, RE 81-11, Page ID # 2578-2579. Before the rezoning vote, the City Council President agreed with the foregoing evaluation. *Id.*, Page ID # 2580.

The City's Senior Planning Officer, Chad Gibson, also reported as follows:

> A K-12 school has inherent characteristics which can be intrusive and destructive to an office park. Traffic, including school bus

> circulation, loading and unloading, can be challenging for an area to accommodate. A large number of young drivers and parents arriving and departing at similar (peak) times can tax the roadways and related infrastructure, reducing the level of service for the signalized intersections. After-school activities such as band and theater productions can also bring large numbers of parents and students to the area, often necessitating overflow parking demands. Outdoor events, such as band practice, can create noise impact for office workers who are attempting to do business and/or serve clients. Furthermore, after reviewing the application, revised traffic study, and other materials, BZAP unanimously recommended against the proposed zoning map amendment.

Staff Report, RE 81-9, Page ID # 2490.

Multiple reasons therefore supported rejecting the School's rezoning application. First, a school use of the office building, the last jewel of commercial development opportunity in the City, would dramatically reduce its potential to generate maximized revenue. The School's school use would therefore be inconsistent with the stated purpose of the ORC to contribute to the City's economic stability. Second, rezoning of the School's property to allow for a school use would be inconsistent with the character of the area in which it is located. Over 600 children coming and going is not consistent with the surrounding office and commercial uses. Office workers do not expect marching band practice to be conducted outside their windows in the late afternoon. Third, a school at the property would

create traffic and parking issues that the School did not resolve in its presentations to the City Council.

The rezoning request was vetted through the City's BZAP and considered by the City Council in late 2013. The City Council denied the request to rezone the office building from Office and Research to residential. Pet. App. 79a. Following this denial, both parties moved for summary judgment. The District Court denied the School's motion and granted the City's motion on all claims. Pet. App. 145a-86a. The School then appealed to the Sixth Circuit for the second time.

### III. The second appeal turned on genuine issues of material fact and ended with a remand to develop a specific factual record to answer specific questions about schools.

The second appeal resulted in a 2-1 decision in which the Sixth Circuit held, based on factual allegations made in the School's verified complaint and notwithstanding contradictory depositions, that genuine issues of material fact existed so as to preclude summary judgment. *See* "*TOL II*," reprinted at Pet. App. 105a-44a. The precise nature of the remand that followed is absolutely critical to understanding why this matter is the wrong case for resolving the issues the School targets in its certiorari petition.

In framing its analysis, the *TOL II* majority specifically identified the permitted nonreligious assembly or institutional uses permitted under the Unified Development Ordinance as "businesses most obviously, but also nonprofit organizations such as hospitals,

outpatient care centers, and daycare centers." Pet. App. 117a. Correctly recognizing that the City would allow most of these uses at the property, the majority stated that "the remaining question is whether these other assemblies or institutions, treated more favorably, are similarly situated."[3] Pet. App. 118a.

The *TOL II* majority did *not* determine that any permitted uses were "similarly situated" to the School's excluded use. The majority only found that a genuine issue of material fact existed:

> TOL Christian Schools has pled facts sufficient to allege that at least some of these assemblies or institutions are situated, relative to the government's regulatory purpose, similarly to TOL Christian Schools, i.e., they would fail to maximize income-tax revenue. *See* Verified Compl. ¶¶ 60–65 (identifying permitted uses of child day care centers, hotels/motels, hospitals, outpatient surgery centers, and business and professional offices). These allegations create a genuine issue of fact as to whether the government treats more favorably assemblies or institutions similarly situated with respect to

3. The *TOL II* majority was wholly incorrect, however, when it *sua sponte* suggested that, "[u]sing eminent domain, Upper Arlington could force TOL Christian Schools to sell the land to the government, and sell the land to a buyer the government thinks offers superior economic benefits." Pet. App. 121a. Ohio law prohibits using eminent domain in these circumstances. *See* Ohio Rev. Code § 163.01(H)(1).

> maximizing revenue, unless the government can demonstrate that no assemblies or institutions could be similarly situated.

Pet. App. 118a. The majority assumed for purposes of argument that the School's use is deleterious to the purpose of the Unified Development Ordinance zoning regulation—increasing tax revenue—while noting that the allowed uses "seem to be similarly situated to the regulation." Pet. App. 119a. The majority then explained:

> [T]he government suggested at oral argument that it would prefer that 5000 Arlington Centre Boulevard be used for an ambulatory care center or outpatient surgery center. But we cannot assume as a fact, and the government certainly has offered no evidence to show, that an ambulatory care center (or an outpatient surgery center, or a data and call center, or office space for a not-for-profit organization, or a daycare) would employ higher-income workers than TOL Christian Schools would (or result in less traffic or even in less outdoor noise, each an alternative rationale at one point proffered by the government for refusing TOL Christian Schools's application). The dissent engages in a vigorous factual analysis of these factors, but they are genuine issues of material fact that cannot be resolved on summary judgment. As such, the district court's grant of summary judgment to the government was error.

Pet. App. 119a. Four takeaways from this decision informed the remand.

First, *TOL II* did *not* adopt a specific RLUIPA equal-terms test. The majority expressly stated that it "need not definitely choose among the various tests used by other circuits to resolve this case" because the grant of "summary judgment to the government is erroneous under any test" given the genuine issues of material fact the majority found existed. Pet. App. 116a.

Second, *TOL II* held that "similarly situated" means that (like the School's excluded use) the permitted secular uses would fail to maximize tax revenue. This definition reads out of the analysis the specific characteristics of permitted uses and non-permitted uses so that the relevant focus is simply *revenue to the City*. Thus, to present a valid comparator, the School had to establish in the District Court that a nonreligious assembly or institution permitted under the Unified Development Ordinance does not maximize revenue to the City *at the same level or worse* than the School's prohibited use. The School failed to do this, while the City presented evidence that every potential comparator maximized revenue to the City far *above* the School's prohibited use.

Third, *TOL II* turned on the majority necessarily crediting the School's *allegations* that permitted and non-permitted uses were similarly situated. That was because the majority was reviewing a grant of summary judgment in which it credited the verified complaint allegations. In contrast, on remand the District Court was faced with a bench trial on the briefs in which the District Court properly *weighed competing evidence* and *engaged in factfinding*. The mere allegations behind the decision in *TOL II* were irrelevant in the bench trial. Now outside the context of summary judgment, the actual evidence

eviscerated the School's unfounded complaint assertions and proved there has been no RLUIPA violation here.

Fourth, *TOL II* expressly left open that, on remand, the City could introduce evidence disproving that similarly situated comparators exist here, just as the School could introduce evidence to the contrary. The majority stated that it was an *unresolved question of fact* whether nonreligious assemblies or institutions permitted under the zoning plan should be compared to the School. In response, the City presented evidence that conclusively answers that question. The answer mandated the District Court's entry of final judgment for the City.

That result was dictated by the evidentiary record at trial. The parties stipulated to the record evidence and agreed the District Court would resolve the case by ruling on competing motions for final judgment without the need for an evidentiary hearing. Stipulations, RE 96, Page ID # 2796. The School then elected to modify its argument. As the District Court recognized, the School "abandoned all other reference to like comparators, such as hospitals or outpatient surgery centers and instead focuse[d] on daycare centers and partial office uses as similar comparators to Tree of Life Christian School." Pet. App. 86a-87a.

Faced with competing revenue experts, the District Court credited the City's revenue expert over the School's expert and found that neither of the School's alleged comparators—*only* "daycare centers" or "partial office use"—are similarly situated to the School's use. Because the School failed to meet its burden of presenting a *prima facie* case, the District Court entered final judgment for the City. Pet. App. 62a-104a.

The School appealed to the Sixth Circuit for the third time. Like the District Court, the new panel majority recognized that the City's evidence proved that there are no similarly situated comparators and that *any* of the permitted uses would be much better for the City and its citizens because the uses would potentially maximize tax revenue far above the revenue generated by a school, *regardless* of whether it is secular or religious. In a 2-1 decision, the Sixth Circuit affirmed the judgment for the City. *See* "*TOL III*," reprinted at Pet. App. 1a-61a.

## REASONS FOR DENYING THE PETITION

The school cannot plausibly say that there is a split in the Circuits when this is the only such case ever decided by a Circuit on how to apply RLUIPA to a school that also teaches religion. The School cannot demonstrate that this case, the only school case at the Circuit level, should be the case that this Court should use to instruct the Circuits on how to pick comparators to churches, which is the subject of every other case cited by the School. As well, the School cannot plausibly claim that this is the case to resolve a Circuit split concerning a different set of facts—comparing churches to other uses. The majority below used a test that it identified with every other Circuit but one.

The City took two very reasonable positions. First, it allowed no schools in an office building that had been a productive office building for years. Second, it examined and rejected the School's last rezoning request to zone the largest office building in the City to be *residential.* There can be religious discrimination in land use decisions, but not here.

Perhaps these stubborn facts are why the School argues broadly about so many *other* cases, claiming a wave of discrimination unabated by RLUIPA. Much of the School's briefing as to why this Court should grant certiorari is a diatribe about how various Circuit Courts have "improperly" applied RLUIPA tests for equal-terms cases. For example, the School argues that these apparently nefarious federal courts are intentionally acting "to excuse unequal treatment and deprive RLUIPA of the force Congress intended." Pet. at 17. Such hyperbole is grounded in overcooked speculation without citation to facts. It presents no persuasive force for accepting jurisdiction.

Two fact-based points constitute more compelling arguments for granting certiorari, at least at first blush. The first is the School's assertion that there is a Circuit split as to the correct RLUIPA test that federal courts should apply in equal-terms cases. The second is Judge Thapar's call for this Court to exercise jurisdiction in this case over specific issues. But these arguments rapidly lose momentum when examined, revealing that this case is a deficient vehicle to settle any issue of general application. The Court should therefore deny the Petition for the reasons that follow.

## I. The School cannot demonstrate that another Circuit with a materially different test would make this case come out differently.

In order to present a Circuit split worthy of consideration, the School must establish that the outcome of this case would have been different under another Circuit's articulation of the appropriate RLUIPA inquiry.

The School has failed to meet this predicate burden. Even the School conceded in its Sixth Circuit briefing below that it "may be true in some respects" that the Circuits' "test are functionally similar and may even lead to the same result." Brief of Plaintiff-Appellant at 18, 6th Cir. ECF No. 22 at 25.

*TOL III* well explained how the majority of Circuits apply RLUIPA tests in as-applied cases that, although varying in the language used, target the same fundamental inquiry: comparators that are similarly situated with regard to the regulation at issue. Pet. App. 21a-22a. Employing different words to reach the same substantive analysis, which would in turn produce the same outcome, does not present a certiorari-worthy Circuit split.

As the *TOL III* majority acknowledged, the Tenth Circuit appears to be an outlier. Pet. App. 22a. Like other Circuits, the Tenth Circuit compares religious assemblies with other land uses by employing a test that examines substantial similarities of land uses in order to determine whether the relevant entities were similarly situated. Pet. App. 23a.

This raises three points.

First, every Circuit to have addressed the equal-terms analysis applies a "similarly situated" inquiry. This is in stark contrast to the statutory reading advocated by the dissenting Judge Thapar, whose test does not represent the view of *any* Circuit and thus cannot form the basis for a Circuit split. As noted, *even the School* conceded in its Sixth Circuit briefing below that it "may be true in some respects" that the Circuits' "test are functionally

similar and may even lead to the same result." Brief of Plaintiff-Appellant at 18, 6th Cir. ECF No. 22 at 25. This was consistent with the School's concession to the District Court that "[t]he various tests function similarly." Tree of Life's Brief in Support of Motion for Final Judgment, RE 96-1, Page ID # 2810 (District Court brief in which the School states that "[t]he various tests function similarly, but the clearest test that is most faithful to RLUIPA is the Fifth Circuit test").

Second, the School has failed to present a persuasive argument that application of the Tenth Circuit test (or any Circuit's test) would have resulted in a different outcome than that reached by the Sixth Circuit. The School simply asserts in a conclusory manner that it "would likely prevail" under such a test based on its own subjective weighing of the evidence. Pet. at 20. The School is suggesting that any degree of subjectivity—any component necessitating factfinding, essentially—renders the approach held by a majority of Circuits prone to abuse by municipalities and therefore *per se* invalid. There was no such abuse here, where the City excluded both secular and non-secular schools, but permitted churches and places of worship.

Third, because it appears that *this is the first equal-terms case involving the opening of a religious school in search of a suitable comparator*, logic dictates that there can be no Circuit split.[4] There is no opposing Circuit case if the instant case is the first to address this specific issue.

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4. The Tenth Circuit held that an existing secular school that had engaged in an expansion project was a similarly situated comparator to an existing religious school seeking to engage in an

## II. The School seeks certiorari on an alleged "test error" that it *invited* both the District Court and the Court of Appeals to make.

The School's Petition presents this litigation as a "what test should apply" Circuit-split case. The dissenting judge in *TOL III*, Judge Thapar, also saw the case in this light. The problems with this perspective are the facts of this case and the procedural posture in which the "test" issue comes before this Court. Neither should be ignored because to do so would contravene well-settled certiorari principles.

In its briefing before the District Court on the second remand, the School argued that "the clearest test that is most faithful to RLUIPA is the Fifth Circuit's test . . . ." Tree of Life's Brief in Support of Motion for Final Judgment, RE 96-1, Page ID # 2810 (case citation omitted). The District Court applied the test the School requested, and the School did not prevail.

On appeal in *TOL III*, the School then argued in its opening merits brief that "Plaintiff believes that the Ninth Circuit's test is the soundest approach together with its decision to place the burden of persuasion on the government." Brief of Plaintiff-Appellant at 18, 6th Cir. ECF No. 22 at 25. The *TOL III* majority tracked Ninth Circuit decisions, noting that the Third, Seventh,

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expansion project in the distinguishable equal-terms case *Rocky Mountain Christian Church v. Board of County Commissioners*, 613 F.3d 1229, 1237 (10th Cir. 2010). If such a comparator were employed here, as the District Court originally did, the outcome of this litigation would be the same because *all* schools are prohibited in the ORC.

and Ninth Circuits' "respective tests [are] essentially the same." Pet. App. 21a. The majority therefore stated that "we adopt the majority approach, as discussed in the Third, Seventh, and Ninth Circuits' cases"—and the School again failed to prevail. Pet. App. 23a.

Now, in its petition briefing, the School repeatedly and brazenly criticizes the *TOL III* majority for "siding with" tests employed in various circuits, including *the Fifth Circuit* and *the Ninth Circuit*. Pet. at i, 17, 20, 30, 33. This continual changing of arguments and lack of candor on the part of the School makes this litigation far from the "clean" vehicle for settling an equal-terms test that the School suggests.

To the contrary, the invited error (if error at all) weighs against the Court granting certiorari. The "traditional rule" of this Court in regard to invited error "precludes a grant of certiorari only when the question presented was not pressed or passed upon below." *United States v. Williams*, 504 U.S. 36, 41 (1992) (internal quotation marks omitted). For example, in *Springfield v. Kibbe*, the Court dismissed a writ of certiorari as improvidently granted because (1) the petitioner failed to object to a jury instruction its petition targeted, (2) the petitioner had even proposed its own instruction with the same effect as the instruction given, and (3) the petitioner did not argue for a higher standard in the Court of Appeals. 480 U.S. 257, 258 (1987). Similar facts exist in this case, where (1) the School failed to object to the tests applied, (2) the School even invited application of the tests, and (3) the School did not argue for its current test standard in the Court of Appeals briefing. Thus, as in *Springfield*, the School did not present the merits of its newly reworked "test"

argument to the lower courts and cannot now benefit by attacking what it induced the lower courts to do.

It is telling that the School devotes a considerable portion of its briefing to discussing other circuit's tests and cases in detail rather than focusing on the Sixth Circuit's application of the nationwide majority view to the facts of this litigation. Understandably, the School ignores the application of the law to the facts because looking at the arguments and evidence presented to the lower courts in this litigation in detail proves problematic for the School. Regardless of whether the appellate decision in *TOL III* presents an additional case weighing in on a circuit split, the School is a complaining party that actively argued for the tests the lower courts applied and elected to present evidence deemed less credible and less persuasive than that provided by the City. Thus, prudential concerns favor resolving any circuit split by a better vehicle carrying a clean set of facts—not in a case in which *the petitioning party induced the alleged error*. The School should not be rewarded for its dubiously opportunistic litigation tactics with another bite at the apple.

## III. Because this case does not involve a facial challenge, the facial component of the School's second Question Presented cannot be a part of certiorari consideration.

The School also attempts to spin this case as facial challenge case, arguing that the Sixth Circuit's conclusion "shows a facial equal-terms violation." Pet. at 25. This sleight of hand begins with the Petition's second Question Presented, which is "[w]hether Tree of Life established a facial or as-applied equal-terms violation here." Pet. at

i. Such inclusion of a facial component in this question is impermissible because there was no facial challenge at issue in the lower courts in the relevant decisions.

In the second appeal, the *TOL II* majority expressly held that the Unified Development Ordinance, the zoning law under attack, was facially neutral. Pet. App. 122a. Thus, the parties litigated only the as-applied challenge on remand. The District Court recognized that only an as-applied RLUIPA challenge was before it on remand. Pet. App. 71a ("The Sixth Circuit found a genuine issue of material fact on the as-applied challenge of RLUIPA and reversed and remanded solely on that issue.") *See also* Pet. App. 84a ("As framed by the Sixth Circuit of remand, this Court is challenged with resolving Plaintiff's as-applied equal terms RLUIPA claim.").

The School attempted a facial-challenge comeback during oral argument in the third appeal, when in response to questioning, the School's counsel "contended that the school has not abandoned its position that the school constitutes a place of worship." Pet. App. 15a. But absolutely nowhere in its briefing in the third appeal did the School argue that anything *other* than an as-applied claim was at issue. The attempted pivot at oral argument is just another example of the School's whatever-it-takes litigation approach, which the *TOL III* majority rejected as follows:

> In response to our questioning at oral argument, counsel for Tree of Life contended that the school has not abandoned its position that the school constitutes a place of worship. This contention, however, will not be considered on

> appeal since it was not raised as an issue in Tree of Life's briefs. *See United States v. Johnson*, 440 F.3d 832, 845-46 (6th Cir. 2006) ("[A]n appellant abandons all issues not raised and argued in its initial brief on appeal." (citation omitted)).
>
> Moreover, the argument is pretermitted because this court has already held that the Development Ordinance is facially neutral and thus not subject to a facial challenge. Tree of Life II, 823 F.3d at 373. That determination was not simply an "off-hand comment" as characterized by the dissent, Dissenting Op. at 37 n.5, so the law-of-the-case doctrine controls. *See Moody v. Mich. Gaming Control Bd.*, 871 F.3d 420, 425-26 (6th Cir. 2017) (holding that, under the law-of-the-case doctrine, "we generally will not, for prudential reasons, consider issues addressed by a prior panel" absent "exceptional circumstances"). Because no such circumstances are present here, the dissent's "facial inequality" argument, Dissenting Op. at 35-38, is foreclosed.

Pet. App. 15a-16a. In other words: parties are accountable for what they argue and what they do not argue, and the law credits federal judges with knowing what they are doing when they make a dispositive holding.

Thus, two appellate panels in two different appeals held that the zoning ordinance involved here either overcame or was no longer subject to a facial challenge and that only an as-applied challenge was at issue. The facts

and the law of the case doctrine therefore puncture the School's suggestion in its certiorari petition that there is a facial challenge involved here. There is not, and the Court should not be so misled by the School. Nor should Tree of Life benefit from Judge Thapar's support for certiorari when that support is grounded in a facial claim not before the panel on which he served.

## IV. The limited nature of the Sixth Circuit's holding is tied to a specific analysis applied to specifically limited facts, which renders this case a flawed vehicle for settling any general-application issue of law.

Further complicating an already muddied certiorari petition is that the issues that were before the *TOL III* panel, the evidence that mattered in that appeal, and the analysis in which the panel could engage were limited by the prior remand. As a result, the Sixth Circuit's last decision is wholly tied to the specific facts of this specific litigation and provides a murky vehicle for stating any overarching holding of general application. The holding of *TOL III* is so limited by doctrine, abandonment, and prior-panel deference, it cannot be logically regarded as presenting an issue of widespread importance or application.

This Court has explained that "'the doctrine [of the law of the case] posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.'" *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 815-16 (1988) (quoting *Arizona v. California*, 460 U.S. 605, 618 (1983)). Additionally, under Sixth Circuit

precedent, "[a] published prior panel decision 'remains controlling authority unless an inconsistent decision of the United States Supreme Court requires modification of the decision or [the Sixth Circuit] sitting en banc overrules the prior decision.'" *Rutherford v. Columbia Gas*, 575 F.3d 616, 619 (6th Cir. 2009) (quoting *Salmi v. Sec'y of Health & Human Servs.*, 774 F.2d 685, 689 (6th Cir. 1985)).

The law of the case and panel deference apply to preclude the School's facial-challenge argument, discussed above. The issue was settled in the *TOL II* published panel decision, and the *TOL III* panel was not free to reject that decision.

Similarly, *TOL II* mandated that the School be regarded only as a school, not a church or a place of worship on remand to the District Court and during the third appeal in *TOL III*. In fact, as recounted above, the *TOL III* majority correctly recognized the prior determination that the School *wholly abandoned* any challenge to the City's determination that the School is neither a church nor a place of worship—a fact that led the *TOL III* majority to correctly reject the dissenting judge's reliance on that unavailable argument. Pet. App. 12a ("Among those abandoned claims is any challenge to the City's determination that Tree of Life is neither a church nor a place of worship, so the dissent's sua sponte resurrection of that argument strikes us as unwarranted. Dissenting Op. at 36-38. Accordingly, the only remaining claim in this lawsuit is the RLUIPA equal terms claim.").

The law of the case doctrine and panel deference also inform other components of this litigation: the available comparators and the related analysis. The *TOL II* majority remanded two core questions to the District Court:

(1) "Are there nonreligious assemblies or institutions to which the court should compare Tree of Life Christian Schools because they would fail to maximize income-tax revenue"?

(2) "[I]f so, would those assemblies or institutions be treated equally to TOL Christian Schools?"

Pet. App. 119a. These questions called for the evaluation of evidence by the District Court. *TOL II* held that through such evidence, the City could prove (1) a lack of similarly situated comparators and (2) that a school use at the building does not maximize revenue needed to pay for necessary services. The City did just that, while the School failed to present evidence of *any* proper comparators in this case.

The School's *TOL III* appellate merits brief was then replete with strategic pivots: new arguments and new citations to evidence that did not appear in its briefing before the District Court. As a general rule, however, a party must inform a trial court of its arguments, both factual and legal, as to why it should prevail or else that party is prohibited from raising these facts and arguments on appeal. *See Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 319 n.3 (1999) (declining to consider on appeal an argument "neither raised nor considered below"); *Alexander v. United States*, No. 95-6532, 1996 U.S. App. LEXIS 30282, at *4 (6th Cir. Nov. 19, 1996) ("Issues not litigated in the trial court are generally inappropriate for appellate consideration in the first instance.").

Both the *TOL III* panel and the School in its Petition must remain confined to the evidence introduced in the Record. The City's evidence, credited by the District Judge in his factfinding capacity, established that if a daycare were a permitted use, it would generate income per square foot to the City of $4.77. Armstrong Decl., RE 97-2, Page ID # 3178-3186. The permitted use of a daycare business' income per square foot of $4.77 exceeds the School's "aspirational" revenue yield of $.62 per square foot and "actual" revenue yield of $.31 per square foot. *Id.* Despite this math, the School disputes that daycares maximize income-tax revenue. But the District Court thoroughly evaluated the evidence, weighed credibility, and found that the School was incorrect. Because the School cannot escape that finding or now introduce and rely on other comparators not asserted below, the School changes the test to avoid what it deems unpleasant facts and law. But the law of the case established the record to be built, the available potential comparators involved, and the analysis to be employed. That record and the *TOL II* questions must remain with the School (and even Judge Thapar in dissent) because the *TOL III* panel was not free to cast aside the directives set by the *TOL II* panel.

The *TOL II* majority dictated that the parties' revenue numbers answer the core issue in this litigation. The *TOL III* panel was not free to ignore the revenue component/similarly situated component handed down by the prior panel in *TOL II*. Instead, the *TOL III* panel was doctrinally bound to track the *TOL II* analytic paradigm and not free—as Judge Thapar did—to advocate for or adopt an approach that ignores the remand factors and analysis. Stated simply, the revenue and similarly situated

considerations *had* to be necessary components of the *TOL III* analysis or else the *TOL II* remand makes no sense.

Based on these mandated considerations and the evidence credited by the District Court, the *TOL III* majority reached the correct conclusion. The City demonstrated that no nonreligious assemblies or institutions targeted by the School *could be* similarly situated to the School—that none *are* similarly situated to the School—because none of the nonreligious assemblies or institutions targeted by the School present tax revenue to the City at the same low levels (or less) as the School would. In this specific context, *"similarly situated" means a similar revenue generator*, and as the following chart summarizing the evidence the District Court credited shows, there was simply no $.62 or less nonreligious use permitted over a $.62 religious use:[5]

5. This chart was before the District Court and the Court of Appeals. Def.'s Combined Mot. for Final Judgment and Mem. in Opp. to Plf.'s Mot. for Final Judgment, RE 97, Page ID # 3133; Brief of Defendant-Appellee City of Upper Arlington, 6th Cir. ECF No. 23 at 33. "TOL Actual" is the revenue generated by the school as it exists in its current form. "TOL Aspired" is the projected revenue the School argued it would produce if it met its goals for massive growth. *See* Armstrong Decl., RE 97-2, Page ID # 3180 ¶ 12.

| Use | Income Tax Revenue | Property Tax Revenue | Hotel Tax | Square Footage | Income per Square Foot |
|---|---|---|---|---|---|
| Senior Housing Business | $850,000 | $132,642 | n/a | 48,119 | $20.42 |
| Insurance | $100,000 | - | n/a | - | $10.72 |
| Government | $330,000 | $211,572 | n/a | 51,086 | $10.60 |
| AOL/TW (average) | $1,578,000 | $476,189 | n/a | 203,710 | $10.08 |
| Outpatient Medical | $582,000 | $250,107 | n/a | 93,528 | $8.90 |
| Hotel | $11,400 | $301,247 | $274,499 | 83,715 | $7.01 |
| Daycare | $9,300 | $9,400 | n/a | 3,919 | $4.77 |
| TOL Aspired | $125,000 | - | n/a | 203,170 | $.62 |
| TOL Actual | $63,383 | - | n/a | 203,170 | $.31 |

The answer to the specific "Are there nonreligious assemblies or institutions to which the court should compare Tree of Life Christian Schools because they would fail to maximize income-tax revenue?" was *no*. The nonreligious assemblies or institutions involved here maximize tax revenue to the City far, far above the revenue that the School would under even the School's most optimistic projections.

The School continues to reject this reality. Instead, the School adheres to the failed premises that revenue maximization is an impermissible goal and that any nonreligious permitted use *must* present the *maximum* tax revenue to the City, as defined by its highest prior revenue generation, or else the nonreligious permitted use is similarly situated to the School. But a goal of maximizing tax revenue does not equate with achieving only *absolute* or *maximum* revenue. Instead, the City's permissible goal is to achieve as much tax revenue as possible with schools, religious or otherwise, falling well below the minimum threshold to be considered revenue maximizing. The School has suggested that the City cannot complain because it is not mandating the most revenue-maximizing uses everywhere. However, the City can only regulate where uses go; the City cannot choose how an entity uses the land or how much it is used. It cannot mandate a specific use of those who own land. If a landowner, such as the School, fails to maximize the revenue from an allowed use, it has no recourse, and thus no responsibility. The fact that the former world headquarters of AOL/Time Warner has been underused by the School does not result in the City losing its ability to apply neutral land use regulations to schools, religious or secular.

The key point is that this litigation turned on and presents a specific and narrow inquiry arising from specific and limited facts. The decision thus may be regarded as tied to the case-specific limitations involved, which is one of multiple reasons why the Petition presents an imperfect vehicle for settling any RLUIPA issue. What might conceivably lend the School's Petition a superficial boost is the call by the dissenting Judge Thapar in *TOL III* for this Court's review. A Court of Appeals judge giving such direction to this Court is unusual and therefore notable. In this context, however, it is also an incorrect catalyst for accepting jurisdiction because it ignores the effect that the law of the case and rules of appellate jurisprudence had on the litigation. Because no Circuit has ever adopted the reading of RLUIPA that Judge Thapar advocates, his novel construction of a RLUIPA test does not present a Circuit split in need of resolution.

This Court is not bound by the law of the case in reviewing the lower court decisions, and the *TOL III* majority's implicit adherence to the doctrine and panel deference do not insulate any issue from this Court's review. *See Christianson*, 486 U.S. at 817. But the operation of law of the case and panel deference below combine to muddy the clarity with which this litigation presents the issues targeted by the Petition or the *amici* briefs. This is a case specifically grounded in revenue considerations and revolving around the characteristics of a school. Such a narrow focus case does not provide the vehicle to give direction on comparators for churches. This point, combined with the critical points that the School waived multiple issues and arguments and induced any error in the test and analysis to be employed, all weigh against granting certiorari.

The ultimate question is not broadly whether the City is exercising good public policy; the question is limited to *whether there has been a RLUIPA equal-terms violation*. The School wholly failed to present evidence that any valid comparators exist, while the City introduced evidence establishing that there are no nonreligious assemblies or institutions that present similarly situated comparators. The City is not treating the School on less than equal terms with a nonreligious assembly or institution, regardless of what test is employed. Rather, the City is treating maximizing uses differently than the non-maximizing use of a school. This is a permissible action that does not violate RLUIPA.

If the City permitted secular schools but not religious schools in the ORC, the City would and should lose a RLUIPA case. *But that is not this case: here, all schools, both religious and secular, are prohibited.* The regulatory purpose of the Unified Development Ordinance is to seek to maximize revenue. The School is treated as well as every other nonreligious assembly or institution *that is similarly situated with respect to that purpose.* Those uses, such as secular schools, that do not have the potential for maximized revenue generation are also prohibited under the zoning code. Those uses that are permitted *do* have the potential for maximized revenue in comparison to excluded uses, are thus not similarly situated and cannot serve as comparators.

Because this case deals with schools and not with churches, it cannot provide what the School and *amici* want: an explanation for what comparators should be used with churches to determine an equal-terms claim. The overwhelming majority of the cases cited deal with

churches, and this case will provide no guidance for them. This matters because the current inquiry is even more limited than asking whether there has been a RLUIPA violation. At this stage, the only relevant question is whether there is a certiorari-worthy issue presented in a suitable vehicle. As discussed, this case is too flawed to satisfy that criteria.

## CONCLUSION

The School knowingly purchased property for a use not permitted by the applicable zoning, proceeded to conduct itself as if the zoning laws did not apply to it, and sought to circumvent those laws by using RLUIPA. Multiple years, multiple appeals, and multiple, shifting legal theories by the School later, the School now asks the Court to accept jurisdiction and apply a test for which it did not argue. This is a last-ditch effort to tweak RLUIPA into essentially preempting municipality zoning law to give a religious school preferred treatment as opposed to the equal treatment that the Sixth Circuit recognized the School received.

Moreover, this case does not present the clean vehicle for settling overarching issues of law that the School attempts to convey. The case is a deeply flawed vehicle through which to settle RLUIPA issues without ignoring facts, instances of waiver and invited error, and the procedural posture of multiple issues. Certiorari is not warranted and would only reward disfavored litigation tactics in contravention of disapproving jurisprudence.

The City respectfully requests that the Court deny the Petition.

Respectfully submitted,

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