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## Creating Confusion Rather than Clarity: The Sixth Circuit's (Lack of) Decision in *Tree of Life Christian Schools v. Upper Arlington*

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# CREATING CONFUSION RATHER THAN CLARITY: THE SIXTH CIRCUIT'S (LACK OF) DECISION IN *TREE OF LIFE CHRISTIAN SCHOOLS* v. *UPPER ARLINGTON*

**Abstract:** There is currently a split among five federal circuits as to what constitutes a secular comparator to a religious assembly or institution under the equal terms provision of the Religious Land Use and Institutionalized Persons Act. Stemming from this initial split, courts have further divided as to what is necessary to establish a prima facie case for an equal terms claim. On May 18, 2016, the U.S. Court of Appeals for the Sixth Circuit in *Tree of Life Christian Schools v. Upper Arlington* became the most recent circuit to address the equal terms provision. Rather than providing a clear articulation of the equal terms provision, however, the Sixth Circuit refused to officially adopt a position regarding the circuit split. This Comment argues that in abstaining from formally expressing a legal standard for determining violations of the equal terms provision, the Sixth Circuit shirked its appellate duty to create clarity and encourage uniformity.

## INTRODUCTION

The equal terms provision of the Religious Land Use and Institutionalized Persons Act (“RLUIPA”) prohibits state and local governments from executing or enforcing land use regulations in a way “that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.”<sup>1</sup> Given that the provision forbids the government from treating religious and secular organizations unequally, comparator evidence is necessary to determine whether a land use regulation or restriction violates the statute.<sup>2</sup> A comparator, for the purposes of illustrating disparate treatment, is an individual or entity that is similar to the plaintiff except that the comparator is not a member of the plaintiff’s protected class.<sup>3</sup> While the language of the provision

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<sup>1</sup> Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc(b)(1) (2012).

<sup>2</sup> See *id.* (stating that the unequal treatment of religious and secular institutions is unlawful in regards to a government’s application of land use regulation).

<sup>3</sup> *Comparator*, BLACK’S LAW DICTIONARY (10th ed. 2014) (“[s]omething with which something else is compared; esp., something or someone treated differently from something or someone else and used as evidence of unlawful treatment of the latter”); see Charles A. Sullivan, *The Phoenix from the Ash: Proving Discrimination by Comparators*, 60 ALA. L. REV. 191, 193–94 (2009) (explaining the general meaning of the term comparator and its origin in the discrimination context). Courts often use comparators to discern unlawful disparate treatment between parties in discrimination cases. See Suzanne B. Goldberg, *Discrimination by Comparison*, 120 YALE L.J. 728, 745 (2011) (discussing courts’ ubiquitous reliance upon evidence of disparate treatment from comparators to support findings of discrimination); Sullivan, *supra*, at 193 (discussing the growing trend of discrimination cases being

implicitly directs the use of comparator evidence, its general terms—specifically “nonreligious assembly or institution”—make it unclear as to what is a proper nonreligious comparator to a religious organization.<sup>4</sup> As a result of this ambiguity, many federal circuits have developed competing definitions and legal tests for what constitutes an appropriate secular comparator under RLUIPA’s equal terms provision.<sup>5</sup> To further complicate the construction of the equal terms provision, circuits have adopted conflicting standards of judicial scrutiny as well as frameworks for allocating the parties’ burden of proof.<sup>6</sup>

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determined by a plaintiff’s identification of a comparator that received better treatment). While scholarly commentary typically discusses comparators in the context of workplace discrimination, comparators used for the purposes of illustrating disparate treatment between religious and secular institutions to establish a Religious Land Use and Institutionalized Persons Act (“RLUIPA”) claim carry the same meaning. *See* Goldberg, *supra*, at 734 n.13 (explaining that while her argument is developed primarily through identity discrimination law within the employment context, her analysis could apply to other forms of discrimination that are beyond the scope of her article); Sullivan, *supra*, at 193, 198 (discussing first the use of comparators generally in discrimination claims, and then narrowing the article’s discussion to fit within the framework of individual disparate treatment under Title VII).

<sup>4</sup> *See* Sullivan, *supra* note 3, at 193. Because discrimination claimants must sometimes show that disparate treatment is motivated by their protected trait, difference in treatment between two otherwise similarly situated persons or groups tends to show that the less favorable treatment is because of the protected trait. *See* Int’l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977) (explaining the role that evidence of disparate treatment plays in proving a discriminatory motive); Goldberg, *supra* note 3, at 731 n.3 (explaining that when it is necessary for plaintiffs to show that the claimant’s status was the reason for the defendant’s discriminatory actions, comparators are useful for showing causation). Protected characteristics include race, religion, age, and ability. *Teamsters*, 431 U.S. at 335 n.15. *See generally* Peter J. Rubin, *Equal Rights, Special Rights, and the Nature of Antidiscrimination Law*, 97 MICH. L. REV. 564 (1998) (providing a general background on the nature of antidiscrimination law in the United States).

<sup>5</sup> *See* 42 U.S.C. § 2000cc(b)(1) (stating the equal terms provision); *Tree of Life Christian Sch. v. Upper Arlington (Tree of Life Christian Sch. IV)*, 823 F.3d 365, 370 (6th Cir. 2016) (discussing the circuit split); *see, e.g.,* *Centro Familiar Cristiano Buenas Nuevas v. City of Yuma (Centro Familiar)*, 651 F.3d 1163, 1173–74 (9th Cir. 2011) (comparing how an ordinance treated a church versus secular membership organizations); *Third Church of Christ, Scientist, of N.Y.C. v. City of New York*, 626 F.3d 667, 670–72 (2d Cir. 2010) (comparing a city’s treatment of a church with that of a group of hotels which allegedly violated a city’s zoning regulation); *Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward Cty. (Primera Iglesia)*, 450 F.3d 1295, 1311–13 (11th Cir. 2006) (analyzing whether the religious plaintiff identified a comparator that would sufficiently illustrate that a zoning ordinance violated RLUIPA’s equal terms provision). The Second Circuit Court of Appeals explained that despite the different circuits’ formulations of the test, they basically have the same outcome. *Third Church of Christ, Scientist*, 626 F.3d at 669.

<sup>6</sup> *See* Ryan M. Lore, Comment, *When Religion and Land Use Regulations Collide: Interpreting the Application of RLUIPA’s Equal Terms Provision*, 46 U.C. DAVIS L. REV. 1339, 1342 (2013) (stating how courts are divided on the burden of proof framework and the proper standard of judicial scrutiny); Thomas E. Raccuia, Note, *RLUIPA and Exclusionary Zoning: Government Defendants Should Have the Burden of Persuasion in Equal Terms Cases*, 80 FORDHAM L. REV. 1853, 1857 (2012) (discussing how circuits have split in regards to the allocation of the burden of persuasion in RLUIPA equal terms provision litigation). *Compare* *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 270 (3d Cir. 2007) (placing the burden of persuasion on the religious plaintiff to show that a regulation provides preferable treatment to the secular comparator, and making the government strictly liable if the plaintiff successfully demonstrates disparate treatment), *with* *Midrash Sefardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1232 (11th Cir. 2004) (requiring an application of

The complete lack of uniformity amongst the federal circuit courts has made it difficult for litigants and affected parties to know what is necessary to pursue or protect against a RLUIPA equal terms claim.<sup>7</sup>

Most recently, in 2016, the equal terms provision appeared before the U.S. Court of Appeals for the Sixth Circuit in *Tree of Life Christian Schools v. Upper Arlington* (“*Tree of Life Christian Schools IV*”), when a religious school asserted that nonreligious organizations such as daycares and ambulatory centers were proper secular comparators for the purposes of establishing an equal terms claim.<sup>8</sup> The Sixth Circuit, however, refrained from explicitly adopting a test for determining a proper nonreligious comparator under the equal terms provision, ultimately allowing the religious plaintiff to identify its own secular counterpart to present to the district court as a comparator on remand.<sup>9</sup> This Comment argues that the Sixth Circuit erred in choosing not to articulate a legal standard for an appropriate comparator.<sup>10</sup> Part I of this Comment reviews the statutory scheme and background of RLUIPA, the role of appellate courts in the judicial system, and discusses the factual and procedural history of *Tree of Life Christian Schools IV*.<sup>11</sup> Part II delves into the variety of tests and standards circuits have developed to address RLUIPA equal terms claims, and examines the Sixth Circuit’s decision not to formally choose sides amongst this split.<sup>12</sup> Finally, Part III concludes that in light of the many competing definitions and tests of a proper comparator under RLUIPA’s equal terms provision, the Sixth Circuit’s failure to adopt or assert its own definition or test will have the consequence of creating further confusion and uncertainty for the lower courts deciding RLUIPA claims.<sup>13</sup>

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strict scrutiny to regulations that treat religious organizations differently, and thus adopting a burden-shifting framework that requires the government to counter a demonstration of disparate treatment by showing that the disparate treatment is narrowly tailored to serve a compelling government interest).

<sup>7</sup> See Anthony Lazzaro Minervini, Comment, *Freedom from Religion: RLUIPA, Religious Freedom, and Representative Democracy on Trial*, 158 U. PA. L. REV. 571, 584 (2010) (explaining how the inability of the federal courts to reach a uniform interpretation of the equal terms provision has made it unclear for parties to know what is required to assert an equal terms claim, raising questions as to what qualifies as a nonreligious comparator, what is the effect of a facial versus an as-applied challenge to a regulation, and what standard of review is appropriate if there is disparate treatment).

<sup>8</sup> *Tree of Life Christian Sch. IV*, 823 F.3d at 367.

<sup>9</sup> *Id.* at 370, 372.

<sup>10</sup> See *infra* notes 107–117 and accompanying text.

<sup>11</sup> See *infra* notes 14–58 and accompanying text.

<sup>12</sup> See *infra* notes 59–106 and accompanying text.

<sup>13</sup> See *infra* notes 107–117 and accompanying text.

## I. RLUIPA'S CONSTITUTIONAL ORIGINS, THE BACKGROUND OF THE TREE OF LIFE CHRISTIAN SCHOOLS LITIGATION, AND THE ROLE OF APPELLATE COURTS

Congress enacted RLUIPA in 2000 to provide protections for the religious freedom of persons, places of worship, religious schools, and other religious assemblies and institutions.<sup>14</sup> RLUIPA protects religious persons and institutions by codifying the U.S. Supreme Court's free exercise jurisprudence, using an equal protection-like analysis to ensure that land use regulations and zoning laws do not discriminate against religious assemblies and institutions.<sup>15</sup> Section A provides an overview of RLUIPA and the historical context from which it emerged.<sup>16</sup> Section B reviews the facts and procedural posture of *Tree of Life Christian Schools IV*.<sup>17</sup> Section C discusses the role appellate courts play in the American judicial system and their obligation to provide clarity to muddled legal issues where individuals' constitutional rights are at stake.<sup>18</sup>

### A. RLUIPA's Constitutional Roots and Statutory Framework

The Free Exercise and Establishment Clauses of the First Amendment to the U.S. Constitution constrain the government's interaction with religion.<sup>19</sup> These two clauses exist in tension with one another, as the Free Exercise Clause was designed to prevent the state from interfering or burdening the practice of religion, while the Establishment Clause prohibits the state from creating or supporting a state religion.<sup>20</sup> Consequently, the government must ensure the religious autonomy of its citizens without appearing to endorse or favor any religion, or religion in general.<sup>21</sup> In the past half century, this inher-

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<sup>14</sup> See Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803 (2000) (codified at 42 U.S.C. § 2000cc) (“An Act To protect religious liberty . . .”); Lore, *supra* note 6, at 1342 (stating the purpose of RLUIPA's protections).

<sup>15</sup> See U.S. DEP'T OF JUSTICE, REPORT ON THE TENTH ANNIVERSARY OF THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT 3 (2010); Terry M. Crist III, Comment, *Equally Confused: Construing RLUIPA's Equal Terms Provision*, 41 ARIZ. ST. L.J. 1139, 1148 (2009) (stating how RLUIPA was intended to resolve Free Exercise issues regarding land use laws); Lore, *supra* note 6, at 1342 (outlining the history of Free Exercise jurisprudence).

<sup>16</sup> See *infra* notes 19–36 and accompanying text.

<sup>17</sup> See *infra* notes 37–50 and accompanying text.

<sup>18</sup> See *infra* notes 51–58 and accompanying text.

<sup>19</sup> U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .”); Sean Foley, Comment, *RLUIPA's Equal-Terms Provision's Troubling Definition of Equal: Why the Equal-Terms Provision Must Be Interpreted Narrowly*, 60 U. KAN. L. REV. 193, 195 (2010). The Supreme Court incorporated the Free Exercise Clause to the states in its 1940 decision *Cantwell v. State of Connecticut*. 310 U.S. 296, 303–04 (1940).

<sup>20</sup> Foley, *supra* note 19, at 195 (observing that the two religion clauses can press opposing policies).

<sup>21</sup> *Id.*; see *Cutter v. Wilkinson*, 544 U.S. 709, 719 (2005) (observing that the two religion clauses can press opposing policies); *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 708 (1985) (“[The]

ent tension has played out between the legislature and the courts, with Congress often seeking to bolster the protections of the Free Exercise Clause, and the Supreme Court, in turn, reigning in these efforts by enforcing the provisions of the Establishment Clause.<sup>22</sup>

Firmly rooted in the Free Exercise Clause, RLUIPA is illustrative of the momentum and will behind Congressional efforts to protect individual religious liberties from government infringement.<sup>23</sup> The statute itself is the product of a decade long tug-of-war between Congress and the Court regarding the degree to which religious liberties should be safeguarded from state and federal government regulation.<sup>24</sup> The struggle began in 1990, when the Supreme Court departed from its longstanding precedent of reviewing laws that allegedly infringed upon religious liberties under a “compelling state interest” or “strict scrutiny test.”<sup>25</sup> The Court stated that it would no longer apply the compelling interest test to a neutral and generally applicable law, even if the law prohibited conduct central to an individual’s religion.<sup>26</sup>

Unhappy with the Court’s ruling, Congress responded by enacting the Religious Freedom and Restoration Act (“RFRA”) in 1993, which restored the compelling interest test and overturned the Court’s decision.<sup>27</sup> In 1997, in *City*

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government must guard against activity that impinges on religious freedom, and must take pains not to compel people to act in the name of any religion.”)

<sup>22</sup> Foley, *supra* note 19, at 196; Lore, *supra* note 6, at 1344; see Sarah Keeton Campbell, Note, *Restoring RLUIPA’s Equal Terms Provision*, 58 DUKE L.J. 1071, 1076–79 (2009) (discussing the history of Congressional attempts to increase religious protections under the Free Exercise Clause and the Court’s repeated efforts to quell these efforts).

<sup>23</sup> See 146 CONG. REC. 16,702 (2000) (statement of Sen. Kennedy) (discussing the broad, bipartisan support for RLUIPA in the Senate, and the historical practice of the Senate’s endorsement of legislation that protects fundamental religious liberties); Campbell, *supra* note 22, at 1076–79 (discussing at length RLUIPA’s origins in Congressional intent to create legislation that would protect citizens’ religious autonomy); Foley, *supra* note 19, at 196–99 (discussing RLUIPA’s roots in Free Exercise jurisprudence).

<sup>24</sup> See 146 CONG. REC. 16,702 (2000) (statement of Sen. Reid) (stating that RLUIPA is the “most recent attempt by the Congress to protect the free exercise of religion”); see also *Tree of Life Christian Sch. IV*, 823 F.3d at 369 (explaining that RLUIPA is Congress’s latest endeavor to expand federal protections to religious liberties); Campbell, *supra* note 22, at 1076 (discussing how RLUIPA emerged from a ten-year-long battle between the courts and Congress); Lore, *supra* note 6, at 1344–45 (same); Minervini, *supra* note 7, at 573 (same).

<sup>25</sup> Emp’t Div., Dep’t of Human Res. of Or. v. Smith, 494 U.S. 872, 884–85 (1990). This “compelling state interest” test arose from the Supreme Court’s 1963 decision in *Sherbert v. Verner*, which held that government entities could not enforce a law in a manner that substantially burdened an individual’s religious liberty unless that law was justified by a compelling state interest. 374 U.S. 398, 403 (1963). The *Smith* Court justified overturning *Sherbert* by reasoning that it does not offend the tenets of the Free Exercise Clause if an “incidental effect” of an otherwise legitimate law burdens religious autonomy. *Smith*, 494 U.S. at 878.

<sup>26</sup> *Smith*, 494 U.S. at 886.

<sup>27</sup> Religious Freedom and Restoration Act of 1993, Pub. L. No. 103-141, § 2, 107 Stat. 1488, 1488 (1993) (codified at 42 U.S.C. §§ 2000bb–2000bb-4 (1994)) (declaring the significance of the Freedom of Exercise Clause and that neutral laws may burden religious autonomy as much as laws designed specifically to affect religious institutions); see Campbell, *supra* note 22, at 1077 (explaining

of *Boerne v. Flores*, however, the Court struck down RFRA, asserting that the statute was constitutionally invalid as applied against the states because it was beyond the limits of Congress's power under Section 5 of the Fourteenth Amendment.<sup>28</sup> Congress attempted to comply with the Court's comments in *Flores* in its drafting of the Religious Liberty and Protection Act ("RLPA"), but the RLPA ultimately failed when it was unable to pass in the Senate.<sup>29</sup> In 2006, however, Congress was able to pass RLUIPA, which, narrower in scope than either the RFRA or the RLPA, applied the compelling state interest test only to religious land use and the religious exercise of institutionalized persons.<sup>30</sup>

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how Congress immediately responded to *Smith*, intending to overturn its holding and restore the compelling state interest test).

<sup>28</sup> *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997); see also *Tree of Life Christian Sch. IV*, 823 F.3d at 369 (citing *Midrash Sephardi, Inc.*, 366 F.3d at 1236) (discussing the Court's decision in *City of Boerne*); Campbell, *supra* note 22, at 1078; Minervini, *supra* note 7, at 581. Section 1 of the Fourteenth Amendment forbids states from creating and enforcing laws that infringe upon the "privileges or immunities of citizens of the United States," that deprive citizens of their "life, liberty, or property, without due process of law," or that deny citizens "equal protection of the laws." U.S. CONST. amend. XIV, § 1. Section 5 of the Fourteenth Amendment empowers Congress to enforce the amendment "by appropriate legislation." *Id.* § 5. The Court in *Flores* explained that although the Fourteenth Amendment provides Congress with the power to enforce the amendment against states, it does not bestow on Congress the authority to interpret how the Fourteenth Amendment's restrictions apply to the States. 521 U.S. at 519. The Religious Freedom and Restoration Act ("RFRA"), however, still applies to the federal government because Congress's constitutional power to bind the federal government is not based on Section 5 of the Fourteenth Amendment. See Whitney Travis, Note, *The Religious Freedom Restoration Act and Smith: Dueling Levels of Constitutional Scrutiny*, 64 WASH. & LEE L. REV. 1701, 1710 (2007) (discussing how the Court in *City of Boerne* did not address the constitutionality of RFRA as applied to the federal government).

<sup>29</sup> 146 CONG. REC. 16,702 (2000) (statement of Sen. Reid) (explaining that even though the provisions of the RLPA were similar to those of the RFRA, in that it replicated the RFRA's strict scrutiny standard, Congress attempted to cure the constitutional defects of the RFRA by having the RLPA rely on Congress's Article I powers); Foley, *supra* note 19, at 199 (discussing the issues that the RLPA faced in the Senate).

<sup>30</sup> See 42 U.S.C. §§ 2000cc-2000cc-1 (addressing only religious land use and the religious exercise of institutionalized persons); Minervini, *supra* note 7, at 582 (discussing how RLUIPA's more tailored focus complied with the Court's holding in *Smith*). Following the Court's overruling of RFRA in *City of Boerne*, Congress held numerous hearings to investigate religious discrimination in order to create legislation that would effectively protect religious liberties while being within the bounds of Congressional authority. H.R. REP. NO. 106-219, at 23-24 (1999); U.S. DEP'T OF JUSTICE, *supra* note 15, at 3; Campbell, *supra* note 22, at 1081. These hearings produced evidence that demonstrated that state and local governments often treated religious institutions less favorably in zoning decisions than comparable secular institutions. H.R. REP. NO. 106-219, at 23-24 (1999). Senators Orrin Hatch and Edward Kennedy found that religious discrimination often "lurks behind such vague and universally applicable reasons as traffic, aesthetics, or 'not consistent with the city's land use plan.'" 146 CONG. REC. 16,698 (2000) (joint statement of Sen. Hatch and Sen. Kennedy on RLUIPA). The RLPA reached an impasse in the Senate when concerns were raised that the RLPA's provisions could have a negative impact on certain state and local civil rights. See *id.* at 16,702 (statement of Sen. Reid) (noting fears that the RLPA, as then drafted, might allow discrimination based on sexual orientation and disability).

RLUIPA's land use provision is organized into two parts: the "substantial burden" section and the "discrimination and exclusion" section.<sup>31</sup> Subsection 1 of the "discrimination and exclusion" section is popularly known as the "equal terms provision" and states "no government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution."<sup>32</sup>

The prima facie case for an equal terms RLUIPA claim requires that a religious plaintiff establish that it is a religious assembly or institution that is subject to a land use regulation which treats it on less than equal terms than a nonreligious assembly or institution.<sup>33</sup> Courts, however, have struggled with determining what qualifies as a nonreligious assembly or institution for the purposes of demonstrating disparate treatment, and consequently a circuit split has emerged regarding the proper interpretation and adjudication of the equal terms provision.<sup>34</sup>

Once a religious plaintiff establishes a prima facie case of a violation, the statute requires that the government carry the burden of persuasion as to each element of the claim.<sup>35</sup> Despite the statute's language, courts have developed various burden-shifting frameworks to equal terms claims, splitting on how to allocate the burden of persuasion on each party as well as what it means to meet a prima facie case.<sup>36</sup>

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<sup>31</sup> 42 U.S.C. § 2000cc(a)-(b); see Campbell, *supra* note 22, at 1084 (explaining the two-part structure of RLUIPA's land use provision).

<sup>32</sup> 42 U.S.C. § 2000cc(b)(1). The scope of this Comment focuses on the equal terms provision. See *infra* notes 33-117 and accompanying text (discussing the equal terms provision and the circuit split that has emerged regarding its proper interpretation).

<sup>33</sup> 42 U.S.C. § 2000cc(b)(1).

<sup>34</sup> See Lore, *supra* note 6, at 1350 (noting that the split arose because Congress did not clearly articulate the equal terms provision). See generally *Centro Familiar*, 651 F.3d at 1171 (adopting a fusion of the Third and Seventh Circuits' tests, except that it puts the burden of persuasion on the government to show that there were no valid comparators); *River of Life Kingdom Ministries v. Village of Hazel Crest*, 611 F.3d 367, 371 (7th Cir. 2010) (implementing a test similar to the Third Circuit, except that it substitutes "accepted zoning criteria" for regulatory purpose); *Lighthouse Inst. for Evangelism, Inc.*, 510 F.3d at 266 (asserting that the comparison must be to secular assemblies or institutions that are similarly situated as to the regulatory purpose); *Midrash Sephardi, Inc.*, 366 F.3d at 1230-32 (holding that a valid comparator could be any nonreligious assembly or institution, and that a land use regulation does not violate the equal terms provision if it is narrowly tailored to further a compelling government interest).

<sup>35</sup> 42 U.S.C. § 2000cc-2(b) ("If a plaintiff produces prima facie evidence to support a claim alleging a violation of . . . section 2000cc of this title, the government shall bear the burden of persuasion on any element of the claim . . ."). But see *Lighthouse Inst. for Evangelism, Inc.*, 510 F.3d at 270 (asserting that the burden falls on the plaintiff to show that the government treated it on less than equal terms than a secular institution that had the same impact on the goal of the land use regulation).

<sup>36</sup> See Raccuia, *supra* note 6, at 1857 (discussing how circuits have split in regards to the allocation of the burden of persuasion in RLUIPA equal terms provision litigation).



### B. Factual and Procedural History of Tree of Life Christian Schools IV

On January 5, 2011, Tree of Life Christian Schools (“TOL Christian Schools”) initiated a suit against the City of Upper Arlington, Ohio in the U.S. District Court for the Southern District of Ohio, alleging religious-based discrimination.<sup>37</sup> Among other claims, TOL Christian Schools asserted that the City’s land use ordinance, the Unified Development Ordinance (the “UDO”), violated RLUIPA’s equal terms and substantial burden provisions both facially and as-applied.<sup>38</sup> This suit represented the culmination of a two-year struggle between TOL Christian Schools and the government of Upper Arlington, which began when TOL Christian Schools purchased an office building that was unused at the time with the intention of turning the property into a religious school.<sup>39</sup>

The building was the largest office building in Upper Arlington and was part of the “ORC Office and Research District” zone (the “ORC District”) under the city’s UDO.<sup>40</sup> The UDO does not permit schools nor allow them condi-

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<sup>37</sup> *Tree of Life Christian Sch. v. City of Upper Arlington (Tree of Life Christian Sch. I)*, 888 F. Supp. 2d 883, 889 (S.D. Ohio 2012), *rev’d and remanded* 546 Fed. App’x 580 (6th Cir. 2013).

<sup>38</sup> *Tree of Life Christian Sch. v. City of Upper Arlington (Tree of Life Christian Sch. II)*, 536 Fed. App’x 580, 581 (6th Cir. 2013); UPPER ARLINGTON, OHIO, CODE OF ORDINANCES § 1.03 (2016) (explaining that the Unified Development Ordinance (“UDO”) regulates all land and development in Upper Arlington). A facial challenge to a law is when the plaintiff asserts that the law’s textual provisions are inherently unconstitutional. *United States v. Salerno*, 481 U.S. 739, 745 (1987) (describing a law to be facially invalid if under “no set of circumstances” would the law be constitutional); Alex Kreit, *Making Sense of Facial and As-Applied Challenges*, 18 WM. & MARY BILL RTS. J. 657, 657 (2010). Consequently, in the context of an equal-terms RLUIPA claim, a plaintiff may argue that a land use regulation is facially invalid if the provisions of the regulation themselves violate RLUIPA. *Primera Iglesia*, 450 F.3d at 1308–09. In contrast, a law may be unconstitutional under an “as-applied” challenge if the law as applied to a plaintiff violates the plaintiff’s constitutional rights. Kreit, *supra*, at 657; Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1321 (2000). Consequently, a land use regulation or ordinance that is on its face neutral may still be invalid under the equal terms provision of RLUIPA if in practice the law in question treats religious institutions or assemblies less favorably than its secular comparators. *See Primera Iglesia*, 450 F.3d at 1308 (describing how a facially neutral land ordinance can violate RLUIPA’s equal terms provision if the statute is either drafted in a way that places a burden almost exclusively on religious institutions or if a government selectively enforces an ordinance against religious institutions).

<sup>39</sup> *Tree of Life Christian Sch. IV*, 823 F.3d at 367. TOL Christian Schools purchased the office building from AOL/Time Warner, whose occupancy had ended several years prior. *Id.*

<sup>40</sup> *Tree of Life Christian Sch. v. City of Upper Arlington (Tree of Life Christian Sch. III)*, 16 F. Supp. 3d 883, 888 (S.D. Ohio 2014), *rev’d and remanded* 823 F.3d 365 (2016) (discussing that when AOL/Time Warner had previously occupied the office building, it brought in significant tax revenue for Upper Arlington, accounting for 29% of the city’s income tax revenue in 2001). The UDO specifically describes the purpose of the “ORC Office and Research District” zone (the “ORC District”) as:

[T]o allow offices and research facilities that will contribute to the City’s physical pattern of planned, healthy, safe, and attractive neighborhoods . . . [and] provide job opportunities and services to residents and contribute to the City’s economic stability. Permitted uses in

tional use permits in the ORC district.<sup>41</sup> Consequently, to operate a school in a commercial office building in the ORC district, the UDO requires parties to apply for site-specific rezoning.<sup>42</sup> The UDO outlines seven standards that must be met in order for a zoning map amendment to the UDO to be approved, one of which being that the proposed amendment must “generally conform with the master plan.”<sup>43</sup>

TOL Christian Schools engaged in lengthy negotiations with Upper Arlington to open its religious school in the empty office building before purchasing it, applying for a conditional use permit and then filing two separate appeals to the Board of Zoning and Planning to no avail.<sup>44</sup> After initiating the lawsuit against Upper Arlington, TOL Christian Schools submitted an application to Upper Arlington seeking to rezone the office building from ORC district to residential.<sup>45</sup> Upper Arlington denied TOL Christian Schools’ proposed zoning amendment after the city’s senior planning officer submitted a staff report to the city council stating that the proposal directly opposed essential

the ORC district are: business and professional offices, research and development, book and periodical publishing, insurance carriers, corporate data centers, survey research firms, bank finance and loan offices, outpatient surgery centers, hospitals . . . .

UPPER ARLINGTON, OHIO, CODE OF ORDINANCES § 5.03(A)(6) (2016).

<sup>41</sup> UPPER ARLINGTON, OHIO, CODE OF ORDINANCES § 5.03(A)–(B).

<sup>42</sup> See *Tree of Life Christian Sch. IV*, 823 F.3d at 374–75 (White, J., concurring in part and dissenting in part).

<sup>43</sup> UPPER ARLINGTON, OHIO, CODE OF ORDINANCES § 4.04(C), 4.04(C)(5). One of the primary objectives of the master plan is to increase Upper Arlington’s tax revenue by adopting economic development strategies that attract high-income professionals. CITY OF UPPER ARLINGTON, 2013 MASTER PLAN: CHAPTER 2 LAND USE 1 (2013); see *Tree of Life Christian Sch. IV*, 823 F.3d at 367 (discussing how Upper Arlington sought to increase tax revenue through its master plan).

<sup>44</sup> See *Tree of Life Christian Sch. III*, 16 F. Supp. 3d at 890–91 (discussing the negotiation and appeals process). TOL Christian Schools applied for a conditional use permit to house a school in the commercial office building, which was denied by the hearing officer because schools are not allowable conditional uses in the ORC District. *Id.* at 890. TOL Christian Schools subsequently requested that the hearing officer grant them the conditional use permit on the grounds that their application referred to their proposed use for the property as a place of worship, and the UDO permits churches and places of worship as conditional uses in the ORC District. *Id.* at 890–91. The hearing officer again denied this request, finding that their original conditional use application was not for a church but a “private school with ancillary uses.” *Id.* at 891. TOL Christian Schools appealed each of these decisions to the Board of Zoning and Planning (“BZAP”), which denied both appeals. *Id.* TOL Christian Schools then appealed to the City Council, which held public hearings on the two BZAP decisions, and voted to uphold BZAP’s findings on both occasions. *Id.* Despite the failure of its appeals to Upper Arlington’s city council and BZAP, TOL Christian Schools proceeded with buying the AOL/TIME Warner Building. *Id.* at 891.

<sup>45</sup> *Id.* at 892. Schools are permitted uses in residential zones. UPPER ARLINGTON, OHIO, CODE OF ORDINANCES § 5.06, tbl. 5-A. This was TOL Christian Schools’ second application to amend the UDO, as it had first applied to modify the UDO to allow private religious schools in the ORC. *Tree of Life Christian Sch. III*, 16 F. Supp. 3d at 892. Upper Arlington’s City Council denied this application because it determined that doing so would produce “a facial First Amendment problem.” *Id.*

goals of the master plan and that granting the zoning amendment would conflict with Upper Arlington's "long-term financial interest."<sup>46</sup>

Thereafter, both parties moved for summary judgment in the district court on the religious discrimination claims.<sup>47</sup> On April 18, 2014, the district court granted summary judgment for Upper Arlington, concluding that Upper Arlington's UDO did not violate the equal terms provision of RLUIPA.<sup>48</sup> Specifically, the district court found that a plaintiff bringing an as-applied equal terms challenge must produce evidence that a secular comparator received preferential treatment under the challenged ordinance.<sup>49</sup> In making this decision the district court rejected TOL Christian Schools' argument that other permitted uses such as daycare centers and hospitals were comparators to the school, and found that the school could only be compared to a nonreligious school.<sup>50</sup>

### *C. Appellate Courts and Their Judicial Obligations*

One of the fundamental functions of federal appellate courts is to provide clarification and guidance on contested and unsettled legal issues.<sup>51</sup> The judicial system operates on the theory that the higher courts will construct or describe the legal standards that the lower courts apply to the various fact patterns of their cases.<sup>52</sup> As a result, district courts will sometimes refrain from deciding first impression legal issues, choosing to wait for their appellate

<sup>46</sup> *Tree of Life Christian Sch. III*, 16 F. Supp. 3d at 892. Additionally the City Attorney told the city council that rezoning a commercially-zoned property to a residentially-zoned property would harm the aims of the master plan. *Tree of Life Christian Sch. IV*, 823 F.3d at 368.

<sup>47</sup> *Tree of Life Christian Sch. III*, 16 F. Supp. 3d at 894.

<sup>48</sup> *Id.* at 900. Upper Arlington argued that the proper comparator for a religious school is a nonreligious or secular school, whereas TOL Christian Schools argued that "community centers, hotels, private clubs, lodges, bars and nightclubs, daycare centers, hospitals, and charitable organizational offices" could be proper comparators. *Id.* at 894. The district court found that the analysis of TOL Christian Schools' as-applied equal terms RLUIPA claim depended on whether the UDO treated TOL Christian Schools on less than equal terms than a secular assembly or institution. *Id.* at 897. The district court analyzed the facts under the tests set forth by the Third and Seventh Circuits, which it found to be the most practical. *Id.*

<sup>49</sup> *Id.* at 899 (citing *Primera Iglesia*, 450 F.3d at 1311).

<sup>50</sup> *Id.* at 894, 899 (stating that the proper comparator for TOL Christian Schools is a secular school, using an "apples to apples" comparator approach). The court determined that the UDO treats religious and nonreligious schools the same, and that, therefore, there was no RLUIPA equal terms violation. *Id.* at 898, 899.

<sup>51</sup> See Chad M. Oldfather, *Error Correction*, 85 IND. L.J. 49, 63–64 (2010) (discussing how the creation and refinement of laws is perceived to be one of the fundamental duties of appellate courts).

<sup>52</sup> See Joan E. Steinman, *Appellate Courts as First Responders: The Constitutionality and Propriety of Appellate Courts' Resolving Issues in the First Instance*, 87 NOTRE DAME L. REV. 1521, 1524–25 (2012) (discussing the role of appellate courts in our judicial system and how they are better positioned within our federal legal system to maintain legal uniformity and predictability); Timothy J. Storm, *The Standard of Review Does Matter: Evidence of Judicial Self-Restraint in the Illinois Appellate Court*, 34 S. ILL. U. L.J. 73, 75 (2009) (stating that the primary role of appellate courts is to guide lower courts in sustaining a consistent and stable legal precedent).

courts to establish the circuit's position.<sup>53</sup> Thus, the significance of an appellate court's decision lies in its power to set legal precedent that directs the behavior within its circuit and influences that of other circuits.<sup>54</sup>

Consequently, circuit splits amongst federal courts are inherently problematic because it means federal laws are not being uniformly enforced or applied to litigants across the country.<sup>55</sup> As a result, the Supreme Court will often grant certiorari to resolve a circuit split and restore uniformity across the federal judicial system.<sup>56</sup> However, in instances where the Supreme Court does not step in, parties located in jurisdictions that have not yet addressed the issue subject to the split must bear the greatest cost, as it is their legal claims that remain uncertain until their circuit chooses a side.<sup>57</sup> Thus, appellate courts have a responsibility to adjudicate issues of first impression with clarity and consistency so that predictability and uniformity can at least be restored within the parameters of its jurisdiction.<sup>58</sup>

## II. THE CIRCUIT SPLIT & THE SIXTH CIRCUIT'S DECISION

Courts have been unable to reach a consensus on how to interpret RLUIPA's equal terms provision, and have consequently developed competing methodologies for determining what constitutes a proper nonreligious assembly or institution for the purposes of an equal terms claim.<sup>59</sup> Section A discuss-

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<sup>53</sup> See, e.g., *Alger Bible Baptist Church v. Twp. of Moffatt*, No. 13-13637, 2014 WL 462354, at \*9 (E.D. Mich. Feb. 5, 2014) (alluding to the notion that it was the position of the appellate court to choose among the comparator standards and not the duty of the district court); *Muslim Cmty. Ass'n of Ann Arbor & Vicinity v. Pittsfield Charter Twp.*, 947 F. Supp. 2d 752, 766 (E.D. Mich. 2013) (abstaining from choosing amongst the competing comparator tests, stating that the Sixth Circuit had not yet provided guidance on the matter).

<sup>54</sup> See 28 U.S.C. § 2106 (2012) (granting power to appellate courts to "affirm, modify, vacate, set aside or reverse any judgment . . . lawfully brought before it for review"); Oldfather, *supra* note 51, at 63–64 (discussing appellate courts rulemaking authority). Appellate court holdings carry the additional weight of often being the final review of a legal issue. See Mary Garvey Algero, *A Step in the Right Direction: Reducing Intercircuit Conflicts by Strengthening the Value of Federal Appellate Court Decisions*, 70 TENN. L. REV. 605, 613 (2003) (discussing how appellate courts have replaced the Supreme Court as the "court of last resort" given the Supreme Court's limited docket).

<sup>55</sup> See Algero, *supra* note 54, at 607–08 (explaining the negative consequences of circuit splits); Kem Thompson Frost, *Predictability in the Law, Prized Yet Not Promoted: A Study in Judicial Priorities*, 67 BAYLOR L. REV. 48, 56 (2015) (same).

<sup>56</sup> Eric Hansford, Note, *Measuring the Effects of Specialization with Circuit Split Resolutions*, 63 STAN. L. REV. 1145, 1152–53 (2011).

<sup>57</sup> See Algero, *supra* note 54, at 622–23 (explaining how a Commission on Revision of the Federal Court Appellate System found that "[t]he absence of definitive decision, equally binding on citizens wherever they may be, exacts a price whether or not a conflict ultimately develops").

<sup>58</sup> See *id.* at 620 (quoting then-Associate Justice Rehnquist discussing how litigants caught in a circuit split need a definite decision more so than a correct decision).

<sup>59</sup> See 42 U.S.C. § 2000cc(b)(1) (2012) (providing no specificity as to what comprises a nonreligious organization or assembly, nor what it means for a government to treat a religious organization

es the different tests that courts have developed to determine what is a proper comparator and which party bears the requisite burden of persuasion regarding this comparator evidence.<sup>60</sup> Section B considers the reasoning of the majority and dissenting opinions in the U.S. Court of Appeals for the Sixth Circuit's 2016 decision in *Tree of Life Christian Schools v. Upper Arlington* ("*Tree of Life Christian Schools IV*").<sup>61</sup>

### A. The Tests

Over RLUIPA's seventeen-year history, five circuits have explicitly articulated a test for determining a secular comparator under the equal terms provision.<sup>62</sup> Each of these tests generally follow the same two-pronged format: first, establishing, as the primary issue, the criteria for identifying a nonreligious comparator, and then, as backend concern, stating the appropriate level of judicial scrutiny for instances of disparate treatment.<sup>63</sup> Courts' methods for dis-

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on less than equal terms); Crist, *supra* note 15, at 1148 (commenting on how the equal terms provision's broad language has created ambiguity as to how to properly construe the provision's meaning).

<sup>60</sup> See *infra* notes 62–94 and accompanying text.

<sup>61</sup> *Tree of Life Christian Sch. v. Upper Arlington (Tree of Life Christian Sch. IV)*, 823 F.3d 365, 370 (6th Cir. 2016); see also *infra* notes 95–106 and accompanying text.

<sup>62</sup> See *Opulent Life Church v. City of Holly Springs*, 697 F.3d 279, 292–93 (5th Cir. 2012) (using the challenged regulation and the standards by which it treats religious and secular organizations dissimilarly as the basis for determining an equal terms violation); *Centro Familiar Cristiano Buenas Nuevas v. City of Yuma (Centro Familiar)*, 651 F.3d 1163, 1173 (9th Cir. 2011) (holding that a comparator to a religious plaintiff is generally a secular institution similarly situated as to the challenged regulation's purpose, except in instances where there are concerns as to the objectivity of the stated regulatory purpose, in which case a locality's accepted zoning criteria serve as the basis of comparison); *River of Life Kingdom Ministries v. Village of Hazel Crest*, 611 F.3d 367, 371 (7th Cir. 2010) (asserting that a secular comparator is one similarly situated as to the accepted zoning criteria); *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 266 (3d Cir. 2007) (adopting a standard that defines a secular comparator as being similarly situated to the religious plaintiff in regards to the stated regulatory purpose of the challenged regulation); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1230–31 (11th Cir. 2004) (interpreting the equal terms provision literally and holding a secular comparator to be any nonreligious assembly or institution); Brian K. Mosley, Note, *Zoning Religion Out of the Public Square: Constitutional Avoidance and Conflicting Interpretations of RLUIPA's Equal Terms Provision*, 55 ARIZ. L. REV. 465, 487 (2013) (discussing the number of circuits that have developed tests as to what constitutes a valid comparator). The equal terms provision has also appeared before the U.S. Court of Appeals for the Second and Tenth Circuits, however, neither circuit explicitly adopted or rejected any of the tests for determining a proper comparator. See *Third Church of Christ, Scientist, of N.Y.C. v. City of New York*, 626 F.3d 667, 669 (2d Cir. 2010) (explaining that the Second Circuit has not yet decided the standard for an appropriate secular comparator); *Rocky Mountain Christian Church v. Bd. of Cty. Comm'rs*, 613 F.3d 1229, 1236–37 (10th Cir. 2010) (affirming a jury verdict for the religious plaintiff, holding that there was plenty of evidence that the plaintiff and the secular institution were similar for the purposes of the equal terms provisions).

<sup>63</sup> See Foley, *supra* note 19, at 214 (explaining that all of the circuits' tests address the means of determining an instance of unequal treatment and what standard of judicial scrutiny must be applied); Mosley, *supra* note 62, at 477 (stating that each of the circuits address how to determine a secular comparator and what is the requisite level of judicial scrutiny mandated by the statute); see, e.g.,

cerning a secular comparator and disparate treatment can be divided into two general categories, the first looking to whether a land use regulation facially treats a religious assembly or institution on less than equal terms with *any* secular assembly or institution, and the second by looking to whether a religious institution is treated less favorably than a *similarly situated* nonreligious comparator.<sup>64</sup> The two notable levels of judicial scrutiny that courts have adopted have been either a strict scrutiny or strict liability standard.<sup>65</sup>

While there is a degree of overlap amongst the circuits' tests, with some circuits agreeing on the first or second prong, no two tests are the same.<sup>66</sup> Furthermore, within a circuit there can be variations as to the method for determining a nonreligious comparator or the requisite level of judicial scrutiny depending on whether or not the challenged regulation violates the equal terms provision on its face or as applied to the religious plaintiff.<sup>67</sup> Thus, jurisprudence regarding RLUIPA's equal terms provision has made it difficult for litigants to discern what is necessary to satisfy a *prima facie* case for an equal terms violation case.<sup>68</sup>

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*Lighthouse Inst. for Evangelism, Inc.*, 510 F.3d at 264–69 (first determining what constitutes a proper comparator and then analyzing the necessary level of judicial scrutiny); *Midrash Sephardi, Inc.*, 366 F.3d at 1230–32 (same).

<sup>64</sup> *Opulent Life Church*, 697 F.3d at 291 (quoting *Centro Familiar*, 651 F.3d at 1169 n.25); see *Lighthouse Inst. for Evangelism, Inc.*, 510 F.3d at 266 (articulating the first similarly situated standard in RLUIPA equal terms jurisprudence); *Midrash Sephardi, Inc.*, 366 F.3d at 1230–31 (adopting any secular assembly or institution as the appropriate standard).

<sup>65</sup> See *Lighthouse Inst. for Evangelism, Inc.*, 510 F.3d at 269 (rejecting the strict scrutiny standard in favor of a strict liability standard); *Midrash Sephardi, Inc.*, 366 F.3d at 1232 (adopting a strict scrutiny standard). Several circuits, however, have not explicitly stated the level of judicial scrutiny they intend to apply, and have instead only rejected the strict scrutiny standard. See, e.g., *Opulent Life Church*, 697 F.3d at 292 n.12 (rejecting a strict scrutiny standard, but failing to explicitly endorse the strict liability standard or any other scheme for judicial review); *River of Life Kingdom Ministries*, 611 F.3d at 370–73 (same). Courts have adopted differing levels of judicial scrutiny based on their interpretation of the equal term's statutory language and the extent RLUIPA codifies free exercise jurisprudence. See Campbell, *supra* note 22, at 1088–89, 1091 (discussing the rationale for adopting either a strict scrutiny or strict liability standard); Crist, *supra* note 15, at 1150, 1154 (same).

<sup>66</sup> See Mosley, *supra* note 62, at 468, 476–87 (providing a general overview of each circuit's interpretation of the equal terms provision, and noting that while several circuits have adopted a similarly situated standard for a secular comparator, each circuit expresses a different definition of similarly situated).

<sup>67</sup> See, e.g., *Centro Familiar*, 651 F.3d at 1173 (asserting that different burden-shifting frameworks apply based on whether an ordinance violates the equal terms provision on its face or as applied); *Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward County (Primera Iglesia)*, 450 F.3d 1295, 1311 n.11 (11th Cir. 2006) (explaining that there are different legal standards for determining a nonreligious comparator depending on how the challenged regulation is found to be in violation of the equal terms provision).

<sup>68</sup> See Minervini, *supra* note 7, at 584 (explaining how the inability of the federal courts to reach a uniform interpretation of the equal terms provision has made it unclear for parties to know what is required to assert an equal terms claim, raising questions as to not only what qualifies as a nonreligious comparator, but also what the effect is of a facial versus an as-applied challenge to a regulation, and what standard of review is appropriate if there is disparate treatment); Mosley, *supra* note 62, at

In 2004, in *Midrash Sephardi, Inc. v. Town of Surfside*, the Eleventh Circuit became the first U.S. Court of Appeals to develop a definition of an appropriate secular comparator for a religious assembly or institution in an equal terms provision claim.<sup>69</sup> Under this test, any secular institution or assembly can be a valid comparator to a religious institution.<sup>70</sup> The court refrained from incorporating the similarly situated standard utilized in Equal Protection analysis because Congress omitted that language from the statute.<sup>71</sup> Additionally, the court stated that it would employ a strict scrutiny standard of review, which prohibits unequal treatment unless the government can demonstrate that the land use regulation is narrowly tailored to achieve a compelling state interest.<sup>72</sup> The court reasoned that strict scrutiny review was most consistent with Free Exercise jurisprudence.<sup>73</sup>

The Eleventh Circuit, however, has since limited this test to instances where the challenged land use ordinance appears to facially violate the equal terms provision.<sup>74</sup> When religious plaintiffs bring as-applied equal terms challenges, they must produce evidence that a similarly situated secular comparator

468 (stating how the uncertainty created by circuits' competing interpretations of the equal terms provision negatively impacts religious organizations, government localities, and lower courts).

<sup>69</sup> Crist, *supra* note 15, at 1149; see *Midrash Sephardi, Inc.*, 366 F.3d at 1229–31 (conducting an analysis of the equal terms provision and what constitutes an appropriate nonreligious comparator).

<sup>70</sup> *Midrash Sephardi, Inc.*, 366 F.3d at 1230–31.

<sup>71</sup> See *id.* at 1229 (stating that the comparator need not be similarly situated under the statute). Under the Court's Equal Protection jurisprudence, comparators must be similarly situated to their protected class counterparts. See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) (asserting that the language of the Equal Protection Clause implicitly mandates that similarly situated individuals should receive equal treatment); Dawinder S. Sidhu, *Moneyball Sentencing*, 56 B.C. L. REV. 671, 695 (2015) (discussing how the Equal Protection Clause typically requires that similarly situated persons should receive equal treatment).

<sup>72</sup> *Midrash Sephardi, Inc.*, 366 F.3d at 1235; see Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1273–74 (2007) (stating that the modern iteration of the strict scrutiny standard requires that the government show that a law in question serves a compelling state interest that is narrowly tailored). The strict scrutiny standard of review is applied to statutes that are suspected by courts to infringe upon fundamental Constitutional liberties, such as laws or governmental actions that violate the Equal Protection or Free Exercise Clauses. Fallon, *supra*, at 1268–70, 1281–83 (providing background on the strict scrutiny formula, and discussing its history in Free Exercise and Equal Protection jurisprudence).

<sup>73</sup> See *Midrash Sephardi, Inc.*, 366 F.3d at 1232, 1235 (holding that because recent free exercise jurisprudence requires the application of strict scrutiny to laws that are not generally applicable or neutral, a finding that a regulation violates the equal terms provision means that it must undergo strict scrutiny because it is neither neutral nor generally applicable). The Eleventh Circuit arrived at this judgment after reviewing RLUIPA's legislative history, which states the equal terms provision was intended to codify Free Exercise precedent that implanted a standard of strict scrutiny. *Id.* at 1232; see *Lighthouse Inst. for Evangelism, Inc.*, 510 F.3d at 269 (addressing the Eleventh Circuit's reasoning for incorporating a strict scrutiny standard of review).

<sup>74</sup> See *Primera Iglesia*, 450 F.3d at 1311 n.11 (distinguishing between facial and as-applied equal terms challenges); Campbell, *supra* note 22, at 1092 (discussing how the Eleventh Circuit used *Primera Iglesia* to clarify its holding in *Midrash Sephardi, Inc.*); Foley, *supra* note 19, at 207 (explaining the Eleventh Circuit's expansion of its equal terms jurisprudence).

received preferential treatment.<sup>75</sup> Once a plaintiff meets the appropriate initial burden of proof, the burden shifts back to the government.<sup>76</sup>

The four other circuits that have officially expressed their interpretations of RLUIPA's equal terms provision, have all rejected the Eleventh Circuit's test, and have instead incorporated the Equal Protection Clause's similarly situated requirement into their analysis for identifying a secular comparator.<sup>77</sup> Under this similarly situated framework, courts assess disparate treatment by looking for a comparator that is similarly situated to the religious organization.<sup>78</sup>

The first test that arose out of this similarly situated analysis was the U.S. Court of Appeals for the Third Circuit's "regulatory purpose test," which defines a comparator as a secular institution that is similarly situated as to the regulatory purpose of the regulation in question.<sup>79</sup> The rationale underlying the regulatory purpose test was that it parallels Free Exercise jurisprudence, which compares how a law "treats entities or behavior that have the same effect on its objectives."<sup>80</sup> The Third Circuit rejected the Eleventh Circuit's application of strict scrutiny to regulations that violated the equal terms provision, opting instead to hold the government strictly liable in instances where the religious

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<sup>75</sup> *Primera Iglesia*, 450 F.3d at 1311; see Campbell, *supra* note 22, at 1092 (discussing how *Primera Iglesia* established that a plaintiff asserting an as-applied equal terms claim is required to produce evidence that it received less than equal treatment compared to a similarly situated secular comparator); Foley, *supra* note 19, at 208 (explaining how under *Primera Iglesia* the Eleventh Circuit requires the plaintiff to show that it was treated on less than equal terms compared to a similarly situated secular institution).

<sup>76</sup> *Primera Iglesia*, 450 F.3d at 1308; see also Raccuia, *supra* note 6, at 1876 (asserting that the Eleventh Circuit follows the burden-shifting framework articulated in 42 U.S.C. § 2000cc-2(b)). To satisfy a prima facie case for an equal terms claim, the statute requires that plaintiffs show that they are religious institutions treated less favorably than an applicable nonreligious comparator. 42 U.S.C. § 2000cc(b)(1).

<sup>77</sup> See Mosley, *supra* note 62, at 480–87 (providing an overview of the circuits that have adopted some formulation of the similarly situated test). The circuits that have officially adopted the similarly situated standard as the foundation for their comparator analysis are the U.S. Courts of Appeals for the Fifth, Ninth, Seventh, and Third Circuits. See, e.g., *Opulent Life Church*, 697 F.3d at 292–93 (utilizing the similarly situated language in its test); *Centro Familiar*, 651 F.3d at 1173 (same); *River of Life Kingdom Ministries*, 611 F.3d at 373 (same); *Lighthouse Inst. for Evangelism, Inc.*, 510 F.3d at 266 (same).

<sup>78</sup> See Mosley, *supra* note 62, at 480–87 (describing the various ways the circuits use the similarly situated analysis to establish a secular comparator and identify disparate treatment).

<sup>79</sup> *Lighthouse Inst. for Evangelism, Inc.*, 510 F.3d at 266. For example, if a regulation's purpose is to increase tax revenue, then religious and nonreligious institutions must equally promote or serve to increase tax revenue. See, e.g., *id.* at 270–72 (analyzing whether a government's redevelopment plan and land use ordinance treated religious assemblies on less than equal terms with nonreligious assemblies that would equally impact the government's regulatory objectives).

<sup>80</sup> *Id.* at 264 (emphasis omitted). Additionally, the Third Circuit found that the Eleventh Circuit's definition of a secular comparator—"any nonreligious assembly or institution"—to be too broad. See *id.* at 268 (explaining how the Eleventh's Circuit's interpretation would allow religious institutions to locate anywhere that a secular institution could locate under the city's plan).



plaintiff established disparate treatment.<sup>81</sup> To balance the government's strict liability, the Third Circuit placed the burden of persuasion on the religious institution to show that there was unequal treatment.<sup>82</sup>

The U.S. Court of Appeals for the Seventh Circuit has also defined a proper comparator as a similarly situated secular organization, but uses "accepted zoning criteria," in place of the Third Circuit's "governmental objectives in enacting the regulation," to assess similarity.<sup>83</sup> Under this formulation, even religious and secular institutions that vary in a multitude of ways are still similarly situated for the purposes of the equal terms provision if they are simi-

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<sup>81</sup> *Id.* at 269. Despite the fact that the strict liability standard is more consistent with free exercise jurisprudence, the Third Circuit concluded that Congress did not intend to create a standard of strict scrutiny for the equal terms provision because, unlike RLUIPA's substantial burden provision, the equal terms provision does not include any strict scrutiny language. *See* 42 U.S.C. § 2000cc(a)(1) (stating that the government is prohibited from implementing a land use law that creates a substantial burden on a religious organization's free exercise unless the government can show that the law in question "is in furtherance of a compelling governmental interest; and . . . is the least restrictive means of furthering that compelling governmental interest"); *Lighthouse Inst. for Evangelism, Inc.*, 510 F.3d at 268–69 (discussing the absence of the strict scrutiny language in the equal terms provision); Campbell, *supra* note 22, at 1086 (explaining the Third Circuit's rationale for rejecting the strict scrutiny standard). Thus, the Third Circuit does not allow for unequal treatment even if the government is able to demonstrate a compelling state interest. *See Lighthouse Inst. for Evangelism, Inc.*, 510 F.3d at 269 (discussing the impact of the strict liability standard). The Third Circuit explained its strict liability standard as giving "teeth" to the equal terms provision, ensuring that despite narrowing the scope of who qualifies as a secular comparator, government entities will be incentivized to comply with the RLUIPA and Free Exercise precedent. *Id.* at 269 n.14.

<sup>82</sup> *See Lighthouse Inst. for Evangelism, Inc.*, 510 F.3d at 270 (explaining that the equal terms provision requires the plaintiff to demonstrate that it received less than equal treatment in comparison to a secular institution that had the same impact on the goal of the land use regulation); *see also Centro Familiar*, 651 F.3d at 1173 n.47 (discussing the burden the Third Circuit places on the plaintiff); Raccuia, *supra* note 6, at 1877 (asserting that the Third Circuit allocates the burden of persuasion on the religious plaintiff and notes that the opinion fails to acknowledge the language of RLUIPA Section 2000cc-2(b)).

<sup>83</sup> *River of Life Kingdom Ministries*, 611 F.3d at 371. For example, in a commercial district that prohibits noncommercial uses, a church and a community center would be similarly situated for purposes of the equal terms provision, because both would be prohibited. *See id.* at 373 (providing examples of what it means for a religious institution to be similarly situated with respect to accepted zoning criteria to a secular institution). The reason for the Seventh Circuit's departure from regulatory purpose test was that it viewed zoning criteria as a more objective test. *Id.* at 371. The court explained that the difference between regulatory purpose and accepted zoning criteria is not "merely semantic," asserting that purpose, or the intent behind a regulation, is vulnerable to the subjective interpretation of local government authorities. *Id.* In contrast, the court felt that zoning criteria was an objective standard to compare secular and religious institutions, as federal courts can just apply a local government's pre-articulated zoning criteria to determine whether the institutions are similarly situated. *Id.*; *see* Tokufumi J. Noda, Comment, *Incommensurable Uses: RLUIPA's Equal Terms Provision and Exclusionary Zoning in River of Life Kingdom Ministries v. Village of Hazel Crest*, 52 B.C.L. REV. E, SUPP. 71, 76 (2011), <http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=3197&context=bcrl> [<https://perma.cc/G4TV-W3KC>] (explaining how the zoning criteria is a more objective approach). Some of the judges on the Seventh Circuit, however, found the difference from the majority's refinement of the Third Circuit's test to be negligible. *River of Life Kingdom Ministries*, 611 F.3d at 374–75 (Cudahy, J., concurring).

lar in respect to accepted zoning criteria.<sup>84</sup> While the Seventh Circuit rejects the Eleventh Circuit's application of strict scrutiny, the majority opinion does not explicitly state if it endorses the strict liability standard or any other level of judicial review.<sup>85</sup> Relatedly, in formulating its new test, the Seventh Circuit fails to articulate how it allocates the burdens of production and persuasion, making it unclear as to whether it is complying with the statute's burden-shifting framework, or, if like the Third Circuit, it is placing a greater burden on the religious plaintiff.<sup>86</sup>

A third variation of the similarly situated comparator analysis has been to fuse together the regulatory purpose and zoning criteria tests.<sup>87</sup> This approach was established by the U.S. Court of Appeals for the Ninth Circuit, and it generally applies the "regulatory purpose test" to identify disparate treatment, except in instances where the use of the "zoning criteria test" is necessary to avoid self-serving subjectivity.<sup>88</sup> The Ninth Circuit rejects the Eleventh Circuit's strict scrutiny requirement, stating that in order for a land use regulation that facially provides disparate treatment to religious institutions to stand, the regulation "must be reasonably well adapted to accepted zoning criteria."<sup>89</sup> The Ninth Circuit, however, departs from the standards of the Third and Seventh Circuits by explicitly adopting the burden-shifting framework articulated by Section 2000cc-2(b) of RLUIPA.<sup>90</sup>

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<sup>84</sup> *River of Life Kingdom Ministries*, 611 F.3d at 371. The court explained that the concept of equality under the equal terms provision was similar to the notion of equal pay for equal work, despite the differences in identity among the workers. *Id.*

<sup>85</sup> *See id.* at 370–73 (describing the Eleventh Circuit's decision to review claims under the equal terms provisions with strict scrutiny as lacking "textual basis," but providing no commentary as to the Third Circuit's strict liability standard). Judge Sykes in her dissent, however, seems to suggest that the majority adopted the Third Circuit's strict liability standard. *See id.* at 391 (Sykes, J., dissenting) (quoting the Third Circuit's explanation as to why the strict liability standard is not constitutionally problematic, and then stating that the majority "align[ed] themselves with the Third Circuit's view").

<sup>86</sup> *See id.* at 368–74 (majority opinion) (making no mention of the burden-shifting framework in RLUIPA Section 2000cc-2(b) or assertion of the requisite burdens of persuasion and production). *But see* Raccuia, *supra* note 6, at 1879 (asserting that like the Third Circuit, the Seventh Circuit allocates the burden of persuasion on the religious plaintiff without referencing 42 U.S.C. § 2000cc-2(b)).

<sup>87</sup> *See infra* notes 88–90 and accompanying text (describing the variation of the similarly situated comparator analysis established by the Ninth Circuit).

<sup>88</sup> *Centro Familiar*, 651 F.3d at 1173; *see Mosley supra* note 62, at 486 (describing how the Ninth Circuit relies on both the Third and Seventh Circuits' articulations of a test for a similarly situated comparator).

<sup>89</sup> *Centro Familiar*, 651 F.3d at 1175 (quotations omitted). Despite articulating a standard of review for a regulation that facially violates the equal terms provision, the Ninth Circuit does not discuss what is the appropriate standard of review for as-applied challenges, nor does it comment on the Third Circuit's strict liability standard. *See id.* at 1165–75 (rejecting the Eleventh Circuit's reasoning for employing the strict scrutiny standard, but failing to discuss the Third Circuit's strict liability standard).

<sup>90</sup> *See* 42 U.S.C. § 2000cc-2(b) (establishing that once a plaintiff meets its burden of production and establishes a prima facie case, the government bears the burden of proving each element of the case); *Centro Familiar*, 651 F.3d. at 1173 n.47 (stating that it would break from the Third Circuit's

The most recent approach to the similarly situated analysis emerged from the U.S. Court of Appeals for the Fifth Circuit, which compares religious and secular institutions on the basis of the criteria specifically stated in the ordinance.<sup>91</sup> This test can be distinguished from the regulatory purpose and zoning criteria tests to the extent that those tests use zoning criteria or regulatory objectives that do not arise from the language of the challenged land use law itself.<sup>92</sup> The Fifth Circuit did not officially adopt any standard of judicial review, but, like the Ninth Circuit, it formally adopted RLUIPA's statutory burden-shifting analysis.<sup>93</sup> Under this burden-shifting framework, once a religious assembly establishes the prima facie case, the government bears the burden of persuasion on the plaintiff's equal terms claim.<sup>94</sup>

### B. The Sixth Circuit's Decision

On May of 2016, a panel for the U.S. Court of Appeals for the Sixth Circuit reversed a judgment of the U.S. District Court for the Southern District of Ohio, holding that summary judgment was inappropriate because there was a genuine issue of material fact as to whether the application of the City of Upper Arlington's UDO violated RLUIPA's equal terms provision.<sup>95</sup> Specifically,

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analysis regarding the allocation of the burden of persuasion, because Section 2000cc-2(b) requires that the burden of persuasion fall on the government once a religious plaintiff has satisfied a prima facie case). In instances where a challenged regulation facially violates a land use provision, however, the Ninth Circuit seems to place the burden of production and persuasion on the government rather than the plaintiff. *See id.* at 1173 (asserting that in instances of facial violations, the burden falls on the government to show that it did not treat a religious organization on less than equal terms) Furthermore, the Ninth Circuit's analysis concentrates on what "equal means in the context," meaning an institution's relation to other concerns. *Id.* at 1172 (quotation marks omitted).

<sup>91</sup> *See Opulent Life Church*, 697 F.3d at 292–93 (establishing that its test measures the disparate treatment "by the ordinance itself and the criteria by which it treats institutions differently").

<sup>92</sup> *Id.* at 92 n.13.

<sup>93</sup> *See* 42 U.S.C. § 2000cc-2(b) (outlining the burden-shifting framework that applies to the equal terms provision); *Opulent Life Church*, 697 F.3d at 291–92 (stating that it finds the strict scrutiny standard an improper statutory interpretation and that it follows the RLUIPA's mandated burden-shifting framework). Additionally, the Fifth Circuit endorsed the Ninth Circuit's holding that a land use regulation that on its face treats religious institutions on less than equal terms compared to secular institutions meets the prima facie case for a facial violation claim. *Opulent Life Church*, 697 F.3d at 292.

<sup>94</sup> 42 U.S.C. § 2000cc-2(b); *Opulent Life Church*, 697 F.3d at 292.

<sup>95</sup> *Tree of Life Christian Sch. IV*, 823 F.3d at 371–72. Prior to *Tree of Life Christian Schools III*, the district courts in the Sixth Circuit had refrained from choosing or developing their own tests regarding what constitutes a proper comparator. *See* *Tree of Life Christian Sch. v. City of Upper Arlington (Tree of Life Christian Sch. III)*, 16 F. Supp. 3d 883, 895 (S.D. Ohio 2014), *rev'd and remanded* 823 F.3d 365 (2016) (stating how the Sixth Circuit had not yet adopted a test for determining a proper secular comparator, and choosing to analyze the equal terms claim under the Third and Seventh Circuits' tests because it found those to be the most rational); *see also* *Alger Bible Baptist Church v. Twp. of Moffatt*, No. 13-13637, 2014 WL 462354, at \*9 (E.D. Mich. Feb. 5, 2014) (abstaining from choosing among the competing comparator tests, stating that the Sixth Circuit had not yet provided guidance on the matter); *Muslim Cmty. Ass'n of Ann Arbor and Vicinity v. Pittsfield Charter Twp.*, 947 F. Supp. 2d 752, 766 (E.D. Mich. 2013) (same).

the majority found that TOL Christian Schools pled sufficient facts to allege that at least some of the assemblies or institutions permitted under the UDO in the ORC district, such as daycare centers and ambulatory care centers, were similarly situated relative to the UDO's regulatory purpose to TOL Christian Schools, in that these uses would not maximize income tax revenue.<sup>96</sup> In contrast, the majority explained that Upper Arlington failed to provide evidence that the secular uses it would prefer for the office building TOL Christian Schools purchased would employ higher-income workers than TOL Christian Schools.<sup>97</sup> As a result, the Sixth Circuit remanded the case for the district court to determine whether there were secular institutions allowed under the UDO that were comparable to TOL Christian Schools because they would not maximize income tax revenue.<sup>98</sup>

Despite stating that it would not adopt one of the comparator tests, the Sixth Circuit's majority's focus on the UDO's stated purpose to increase income tax revenue suggests that the majority preferred the Third Circuit's regulatory purpose comparator test.<sup>99</sup> Furthermore, the majority appeared to place

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<sup>96</sup> *Tree of Life Christian Sch. IV*, 823 F.3d at 371–72. In deciding that there was an issue of fact and reversing the district court's order for summary judgment, the majority cited three cases of which only one is from the Sixth Circuit, and the most recent being from 1984. *Id.* at 370–71 (citing *Hasan v. Clevetrust Realty Inv'rs*, 729 F.2d 372, 374 (6th Cir. 1984); *Hess v. Schlesinger*, 486 F.2d 1311, 1313 (D.C. Cir. 1973); *Windsurfing Int'l, Inc. v. Ostermann*, 534 F. Supp. 581, 589 (S.D.N.Y. 1982)).

<sup>97</sup> *Tree of Life Christian Sch. IV*, 823 F.3d at 372. The court also stated that Upper Arlington provided no evidence that these accepted secular uses under the UDO would cause less traffic or outdoor noise than the TOL Christian's proposed school. *Id.*

<sup>98</sup> *See id.* at 372. In its holding the court also seemed to hint that TOL Christian Schools should prevail on remand. *See id.* at 371 (explaining that the secular uses permitted by Upper Arlington appear to be similarly situated to the UDO's regulatory purpose of increasing tax revenue, and expressing skepticism that TOL Christian Schools would be harmful to this goal). The court stated that because the equal terms provision bars discrimination regardless of the "time, place, and manner," Upper Arlington's claim that TOL Christian Schools was permitted to locate in 95% of Upper Arlington was not a defense to discriminate against the school in the remaining 5% of its jurisdiction. *Id.* at 372.

<sup>99</sup> *See id.* at 370–71 (stating first that it would not choose among the various circuits' comparator tests, but then proceeding to frame the issue for review as whether TOL Christian Schools had pled sufficient facts to show that the UDO gave preferable treatment to secular organizations that would not fulfill the UDO's stated purpose of maximizing income tax revenue); *see also* Karla Chaffee et al., *Did the Sixth Circuit Unintentionally Adopt an RLUIPA Equal Terms Test?*, ROBINSON & COLE (May 23, 2016), <https://www.rluipa-defense.com/2016/05/did-the-sixth-circuit-unintentionally-adopt-an-rluipa-equal-terms-test/> [<https://perma.cc/BYF8-4NHC>] (discussing the possibility that the Sixth Circuit's decision unofficially adopted the Third Circuit's similarly situated in regulation test). The Sixth Circuit's language seems to implicitly reject the Eleventh Circuit's test in favor of the other circuits' "similarly situated" based tests. *See Tree of Life Christian Sch. IV*, 823 F.3d at 370–72 (using the similarly situated language throughout its analysis). Additionally, the fact that the court states that "TOL Christian Schools has pled facts sufficient to allege that at least some of these assemblies . . . are situated, relative to the government's regulatory purpose, similarly to TOL Christian Schools" suggests that the Sixth Circuit may be in support of the Third Circuit's test. *See id.* at 372 (explicitly utilizing the language of the Third Circuit's regulatory purpose test in its holding); *see also Light-house Inst. for Evangelism, Inc.*, 510 F.3d at 264 (establishing that "the Equal Terms provision . . .

the burden on Upper Arlington to refute TOL Christian Schools' allegations that permitted uses under the UDO were similarly situated to TOL Christian Schools.<sup>100</sup>

Judge Helene White, who wrote an opinion concurring in part and dissenting in part, argued that the majority's analysis of the as-applied equal terms RLUIPA challenge was in error.<sup>101</sup> Judge White asserted that TOL Christian Schools could not establish a prima facie case for a RLUIPA equal terms provision claim because it failed to identify a similarly situated nonreligious assembly or institution that received more favorable treatment under the UDO.<sup>102</sup> Specifically, Judge White argued that TOL Christian Schools failed to provide evidence that it could generate tax revenue comparable to the secular institutions it offered as comparators.<sup>103</sup> Consequently, unlike the majority, Judge White found TOL Christian Schools' allegations that daycares, hospitals, and non-profits were similarly situated to TOL Christian Schools to be insufficient to create an issue of genuine material fact, and that Upper Arlington was entitled to summary judgment.<sup>104</sup>

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require[s] . . . a secular comparator that is similarly situated as to the regulatory purpose of the regulation in question").

<sup>100</sup> See *Tree of Life Christian Sch. IV*, 823 F.3d at 371–72 (asserting that TOL Christian Schools “pled facts sufficient to allege” rather than produced sufficient evidence, as well as remarking on Upper Arlington’s failure to offer evidence that its permitted uses would employ higher-paid workers than TOL Christian Schools, suggests that the majority placed the burden of persuasion on the government); see also Edward Sullivan, *Divided Sixth Circuit Panel Reverses Summary Judgment to City in RLUIPA Case*, GARVEY SCHUBERT BARER (June 17, 2016), <http://www.gsblaw.com/northwest-land-law-forum/divided-sixth-circuit-panel-reverses-summary-judgment-city-rluipa-case/> [https://perma.cc/8EPD-SFNQ] (commenting on how the Sixth Circuit’s majority in *Tree of Life Christian Schools* seemed to place the burden of persuasion on the government whereas the dissent placed it on the TOL Christian Schools). Thus, despite using the Third Circuit’s comparator standard, the Sixth Circuit implicitly rejects the Third Circuit’s placement of the burden on the religious plaintiff. Compare *Tree of Life Christian Sch. IV*, 823 F.3d at 372 (stating that unless the government could show that no secular organizations could be similarly situated to TOL Christian Schools, TOL Christian Schools’ allegations were sufficient to survive summary judgment), with *Lighthouse Inst. for Evangelism, Inc.*, 510 F.3d at 270 (asserting that the religious plaintiff bears the burden). The Sixth Circuit’s seeming allocation of the burden of persuasion on the government, rather than the religious plaintiff, is similar to the Ninth Circuit’s application of RLUIPA’s statutory burden-shifting scheme. See *Tree of Life Christian Sch. IV*, 823 F.3d at 371–72 (using language that alludes to the government carrying the burden of persuasion); *Centro Familiar*, 651 F.3d at 1173 (stating that the government bears the burden of persuasion).

<sup>101</sup> *Tree of Life Christian Sch. IV*, 823 F.3d at 373 (White, J., concurring in part and dissenting in part).

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 381.

<sup>104</sup> *Id.* at 379–82. Judge White conducted a similarly situated analysis of daycares, hospitals, and charitable offices that used the Seventh Circuit’s similarly situated analysis with respect to the zoning criteria test, and held each of these comparators to be unavailing. *Id.*; see Sullivan, *supra* note 100 (discussing and supporting Judge White’s reasoning as to why the alleged comparators were insufficient to show disparate treatment). The majority, however, criticized her analysis, stating that Judge

Thus, at the root of her opinion, Judge White disagreed with the majority's apportionment of the burden of producing a proper comparator, advancing the notion that unless a plaintiff can identify a satisfactory secular comparator, a plaintiff cannot satisfy a prima facie case for a RLUIPA equal terms claim.<sup>105</sup> She concluded that the majority's holding provides TOL Christian Schools with "not equal treatment, but special treatment."<sup>106</sup>

### III. ADDING TO THE CONFUSION: THE RAMIFICATIONS OF THE SIXTH CIRCUIT'S DECISION NOT TO ARTICULATE A STANDARD FOR THE LOWER COURTS

The U.S. Court of Appeals for the Sixth Circuit erred in choosing not to articulate a legal standard for an appropriate comparator in its 2016 decision in *Tree of Life Christian Schools v. Upper Arlington* ("*Tree of Life Christian Schools IV*").<sup>107</sup> This Part discusses the negative ramifications of the Sixth Circuit's decision not to officially create or adopt a test for deciding what constitutes a proper comparator.<sup>108</sup> Additionally, this Part argues that this confusion is compounded by the fact that the Sixth Circuit majority utilized the language and analytical framework of the regulatory purpose test, but used a competing framework in allocating the burden of persuasion on Upper Arlington.<sup>109</sup>

The Sixth Circuit's failure to express a standard for determining an appropriate nonreligious comparator has imbued the equal terms provision with unnecessary uncertainty.<sup>110</sup> Given that the subtle variations in the competing equal terms tests can produce different results, it is unclear the extent to which the equal terms provision protects religious assemblies' constitutional rights within the Sixth Circuit.<sup>111</sup> Local governments are similarly affected, in that

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White's opinion engaged in a factual analysis that was inappropriate at this juncture in the litigation. See *Tree of Life Christian Sch. IV*, 823 F.3d at 372.

<sup>105</sup> See *Tree of Life Christian Sch. IV*, 823 F.3d at 377–78 (White, J., concurring in part and dissenting in part) (stating that it was TOL Christian Schools' responsibility to identify a similarly situated secular comparator that the UDO provided more favorable treatment); Sullivan, *supra* note 100 (asserting that the dissent would require the burden to be on the religious plaintiff to demonstrate that it was treated less favorably than a secular comparator).

<sup>106</sup> *Tree of Life Christian Sch. IV*, 823 F.3d at 382 (White, J., concurring in part and dissenting in part).

<sup>107</sup> See *Tree of Life Christian Sch. v. Upper Arlington (Tree of Life Christian Sch. IV)*, 823 F.3d 365, 370 (6th Cir. 2016) (stating that it would not decide among the various circuits tests in its holding).

<sup>108</sup> See *infra* notes 110–117 and accompanying text.

<sup>109</sup> See *infra* notes 114–117 and accompanying text.

<sup>110</sup> See Storm, *supra* note 52, at 75 (asserting that one of the fundamental functions of appellate courts is to provide lower courts with predictable and stable legal precedents).

<sup>111</sup> See generally *Tree of Life Christian Sch. IV*, 823 F.3d 365 (making no explicit endorsement of any of the other circuits' equal terms comparator tests, nor their corresponding levels of judicial scrutiny and burden-shifting framework). Compare *Opulent Life Church v. City of Holly Springs*, 697 F.3d 279, 292–93 (5th Cir. 2012) (requiring that disparate treatment be measured by the explicit language of the regulation), with *Centro Familiar Cristiano Buenas Nuevas v. City of Yuma (Centro Familiar)*,

the Sixth Circuit's decision has made it ambiguous as to what is required of them to comply or challenge an equal terms provision claim.<sup>112</sup> Finally, in choosing not to articulate a standard, the Sixth Circuit has deprived its district courts of a meaningful solution to a legal issue that is fraught with litigation and competing views.<sup>113</sup>

The Sixth Circuit's majority opinion's silence in *Tree of Life Christian Schools IV* further complicates RLUIPA equal terms provision litigation for the circuit's district courts because the majority seemed to implicitly adopt the regulatory purpose test, as well as the Ninth Circuit's version of RLUIPA's burden-shifting scheme.<sup>114</sup> Without providing an explanation or clear statement of their intent, it is unclear whether the Sixth Circuit actually endorses any of the articulated approaches or whether it intends to develop its own future test for analyzing RLUIPA equal terms provision claims.<sup>115</sup> This uncertainty is exacerbated by the fact that the *Tree of Life Christian Schools IV* decision was not unanimous, as Judge White's opinion concurring in part and dissenting in part took a position entirely contrary to the majority.<sup>116</sup> Consequently, the lower courts have no definite way to approach RLUIPA equal terms provision issues, and the confusion could produce contradictory or split results within the Sixth Circuit itself.<sup>117</sup>

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651 F.3d 1163, 1173 (9th Cir. 2011) (adopting both the zoning criteria and regulatory purpose tests, but diverging from their analytical framework by following the statutory burden-shifting analysis for as-applied challenges, but placing the burden of production and persuasion on the government in facial challenges), *with River of Life Kingdom Ministries v. Village of Hazel Crest*, 611 F.3d 367, 371 (7th Cir. 2010) (establishing the zoning criteria test), *with Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 266–70 (3d Cir. 2007) (utilizing the regulatory purpose test, and incorporating a standard of strict liability).

<sup>112</sup> *Compare Centro Familiar*, 651 F.3d at 1173–75 (holding that a regulation's prohibition of churches and schools on a commercial block violated the equal terms provision using the "accepted zoning criteria" test), *with River of Life Kingdom Ministries*, 611 F.3d at 371 (holding that a regulation's prohibition of churches and schools was permitted under the "accepted zoning criteria" test).

<sup>113</sup> See Sullivan, *supra* note 100 (discussing the extent of the conflict regarding how to interpret the equal terms provision clause, and stating that it will take the Supreme Court to settle the circuit split).

<sup>114</sup> See *Tree of Life Christian Sch. IV*, 823 F.3d at 371–72 (using the Third Circuit's similarly situated in regulation analysis, but seeming to adopt a similar burden-shifting framework utilized by the Ninth Circuit, which provides the religious plaintiff a lighter burden of production).

<sup>115</sup> See *id.* at 370–72 (explicitly stating that the court was not adopting a test for determining a proper comparator for an equal terms provision claim, but then using language that suggested the majority approved aspects of the Third and Ninth Circuits' tests); Chaffee et al., *supra* note 99 (illustrating how practitioners could easily think that the Sixth Circuit adopted the Third Circuit's test of what constitutes a valid secular comparator).

<sup>116</sup> See *Tree of Life Christian Sch. IV*, 823 F.3d at 382 (White, J., concurring in part and dissenting in part) (illustrating the stark differences between the majority's interpretation of the equal terms provision and Judge White's interpretation).

<sup>117</sup> See, e.g., *Tree of Life Christian Sch. v. City of Upper Arlington (Tree of Life Christian Sch. III)*, 16 F. Supp. 3d 883, 897 (S.D. Ohio 2014), *rev'd and remanded* 823 F.3d 365 (2016). The analysis at the district court level highlights the potential for inconsistent outcomes within the same circuit.

## CONCLUSION

In its 2016 decision, *Tree of Life Christian Schools v. City of Upper Arlington*, the U.S. Court of Appeals for the Sixth Circuit squandered an opportunity to articulate a clear standard for an appropriate comparator for its district courts and practitioners. Moreover, the Sixth Circuit's silent utilization, and seeming approval of different portions of competing circuits' tests, sends conflicting and confusing messages to its lower courts and RLUIPA litigants. Consequently, rather than acting as a light or sign amidst a pool of varying interpretations of a similarly situated comparator, the Sixth Circuit has muddied the waters not only for its own district, but the national circuit split.

LINDSEY EDINGER

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*See id.* (stating that despite the fact that a comparator test had not been developed in the Sixth Circuit, the court would use the Third and Seventh Circuits' tests because it found them "to be the most reasonable and pragmatic"); *see also* Alger Bible Baptist Church v. Twp. of Moffatt, No. 13-13637, 2014 WL 462354, at \*9 (E.D. Mich. Feb. 5, 2014) (abstaining from choosing amongst the competing comparator tests, stating that the Sixth Circuit had not yet provided guidance on the matter); Muslim Cmty. Ass'n of Ann Arbor & Vicinity v. Pittsfield Charter Twp., 947 F. Supp. 2d 752, 766 (E.D. Mich. 2013) (same).