

United States Supreme Court asked to Resolve Circuit Split Over Meaning of Religious Land Use Protections

May 10, 2019

The United States Supreme Court was scheduled to consider a religious institution's petition for a writ of certiorari at the Justices' conference on May 9, 2019. The religious institution, Tree of Life Christian Schools ("Tree of Life"), asked the Court to resolve a deep split among the Circuit Courts of Appeals about the meaning of a federal law requiring that "no government shall impose . . . 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" ("Equal Terms"). 42 U.S.C. § 2000cc(b)(1).

The case in question, *Tree of Life Christian Schools v. City of Upper Arlington, Ohio*, 905 F.3d 357 (6th Cir. 2018), centered on whether the City of Upper Arlington, Ohio (the "City") violated the Religious Land Use and Institutionalized Persons Act ("RLUIPA") by refusing to permit Tree of Life to operate a religious school in an area that was zoned for commercial and office uses. The Sixth Circuit held that the City did not violate RLUIPA, reasoning that the zoning regulations did not treat Tree of Life differently than a non-religious institution and that the purpose of the regulations -- to maximize revenue within the City -- was a proper zoning prerogative and non-discriminatory exercise of governmental power.

Eight Circuit Courts have now interpreted RLUIPA's Equal Terms provision and not one has used an identical test to evaluate Equal Terms claims. According to Tree of Life's petition for certiorari, the Second, Tenth, and Eleventh Circuits require a claimant to only show unequal treatment in comparison to a non-religious entity in various ways; whereas the Sixth, Third, Fifth, Seventh, and Ninth Circuits require that a claimant additionally prove that a non-religious institution is "similarly situated with regard to legitimate zoning criteria."

Judge Amul Thapar penned a sharp dissent in *Tree of Life*, stating that the Sixth Circuit's requirement that a claimant prove a non-religious entity is "similarly situated" is inconsistent with RLUIPA's text and history. Judge Thapar offered a strong conclusion to his dissent: "There comes a time with every law when the [United States] Supreme Court must revisit what the circuits are doing. That time has come. Every circuit to address the issue has given its own gloss to the Equal Terms provision. Whether a religious plaintiff can succeed under the Equal Terms provision thus depends entirely on where it sues."

The Supreme Court could offer valuable clarity to religious land use applicants if the Justices decide to hear the case and resolve the split among the Circuit Courts. New Jersey, for example, is no stranger to disputes over RLUIPA's meaning and requirements. In 2017, the Islamic Society of Basking Ridge settled a RLUIPA lawsuit over the approval to build a mosque in Bernards Township. The mosque was originally denied due to parking and traffic concerns. As

a part of the settlement, the mosque was approved for construction and township leaders and other township employees were required to complete training on the requirements of RLUIPA.