Appeal No. 06-1319

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

THE LIGHTHOUSE INSTITUTE FOR EVANGELISM, INC.,
AND REVEREND KEVIN BROWN,
Plaintiffs/Appellants

v.

THE CITY OF LONG BRANCH,
Defendant/Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY, CIVIL ACTION NO. 00-03366
(HONORABLE WILLIAM H. WALLS, U.S.D.J.)

BRIEF OF PLAINTIFFS-APPELLANTS THE LIGHTHOUSE INSTITUTE FOR EVANGELISM, INC., AND REVEREND KEVIN BROWN

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United States Court of Appeals for the Third Circuit

Corporate Disclosure Statement and Statement of Financial Interest

No. 06-1319

Lighthouse Institute for Evangelism, Inc.

v.

City of Long Branch

Instructions

Pursuant to Rule 26.1, Federal Rules of Appellate Procedure any nongovernmental corporate party to a proceeding before this Court must file a statement identifying all of its parent corporations and listing any publicly held company that owns 10% or more of the party's stock.

Third Circuit LAR 26.1(b) requires that every party to an appeal must identify on the Corporate Disclosure Statement required by Rule 26.1, Federal Rules of Appellate Procedure, every publicly owned corporation not a party to the appeal, if any, that has a financial interest in the outcome of the litigation and the nature of that interest. This information need be provided only if a party has something to report under that section of the LAR.

In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate shall provide a list identifying: 1) the debtor if not named in the caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is an active participant in the bankruptcy proceedings. If the debtor or the bankruptcy estate is not a party to the proceedings before this Court, the appellant must file this list. LAR 26.1(c).

The purpose of collecting the information in the Corporate Disclosure and Financial Interest Statements is to provide the judges with information about any conflicts of interest which would prevent them from hearing the case.

The completed Corporate Disclosure Statement and Statement of Financial Interest Form must, if required, must be filed upon the filing of a motion, response, petition or answer in this Court, or upon the filing of the party's principal brief, whichever occurs first. An original and three copies must be filed. A copy of the statement must also be included in the party's principal brief before the table of contents regardless of whether the statement has previously been filed. Rule 26.1(b) and (c), Federal Rules of Appellate Procedure.

If additional space is needed, please attach a new page.

Pursuant to Rule 26.1 and Third Circuit LAR 26.1, Lighthouse Institute for Evangelism, Inc. makes the following disclosure:
(Name of Party)

1) For non-governmental corporate parties please list all parent corporations:

None.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock:

None.

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has as a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests:

None.

4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is active participant in the bankruptcy proceeding. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.

(Signature of Counsel or Party)

Dated: 5-31-2006

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Appellant believes that oral argument will significantly aid the Court in its decisional process in this case and respectfully requests that 15 minutes per side be allotted to this case.

STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. §§1331, 1343(a)(3), 1367, and 1441; and under 42 U.S.C. §§1983, 3601, *et seq.*, and 2000cc, *et seq.*

This appeal is taken from a final judgment entered on December 27, 2005. *See Lighthouse Institute for Evangelism* v. *City of Long Branch*, 406 F. Supp. 2d 507 (D.N.J. 2005). This Court has jurisdiction pursuant to 28 U.S.C. § 1291 and F.R.A.P. 3 and 4.

STATEMENT OF THE ISSUES

1. Does an Ordinance that prohibits churches while permitting numerous non-religious assembly or institutional uses such as theaters, cinemas, assembly halls, gyms, and municipal buildings as of right in a zoning district, treat a religious assembly on less than equal terms with a non-religious assembly in violation of the Equal Terms provision of the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. §§ 2000cc *et seq.* *See* Doc. No. 103 (raising issue); Apx. 3–17 (ruling on same).

2. Does an Ordinance that both categorically favors secular conduct over religious conduct and establishes a regime of individualized discretionary exemptions that creates the opportunity for discrimination against religious conduct violate the Free Exercise Clause of the First Amendment. *See* Doc. No. 100 (raising issue); Apx. 3–17 (ruling on same).

STATEMENT OF THE CASE

Plaintiffs-Appellants the Lighthouse Mission ("Lighthouse" or "the Church") and Reverend Kevin Brown filed suit against the City of Long Branch in the Monmouth County Law Division, Doc. No. MON-L-2729-00 on June 8, 2000, challenging Long Branch's zoning ordinance. On July 12, 2000, Long Branch filed a Notice of Removal pursuant to 28 U.S.C. § 1441. On October 23, 2000, Plaintiffs filed an Amended Complaint, adding claims under RLUIPA.

Discovery was stayed pursuant to a January 2001 order pending the outcome of anticipated motions and cross-motions for summary judgment and preliminary injunction. Doc. No. 24. The District Court ruled on those motions on April 7, 2003, denying Plaintiffs' motion for preliminary injunction. Doc. No. 56. Plaintiffs appealed only the portions of that order regarding the denial of a preliminary injunction based upon their facial challenges to Long Branch's zoning ordinance. *See Lighthouse Institute for Evangelism* v. *Long Branch*, 100 Fed. Appx. 70 (3d Cir. 2004). Stressing the preliminary nature of the proceedings, this Court affirmed. *Id.* at 73.

Proceedings and discovery then resumed in the lower court. In July 2004, Plaintiffs filed their second amended complaint. The parties filed cross-motions for summary judgment in November 2005. On December

27, 2005, Judge Walls issued an order denying the Church's motion for partial summary judgment and granting the City's motion for summary judgment. *See Lighthouse Institute for Evangelism* v. *Long Branch*, 406 F. Supp. 2d 507 (D.N.J. 2005). The Church timely appealed.

The only question now before this Court is whether the Defendants' zoning ordinances, new and old, violate RLUIPA §2(b)(1) and the First Amendment's Free Exercise Clause.

STATEMENT OF FACTS

The Lighthouse Mission ("Lighthouse" or "the Church") is a Christian church that seeks to minister to the poor and disadvantaged in downtown Long Branch, New Jersey. Apx. 27, ¶ 10.[1] Long Branch suffers from poverty, with nearly one-quarter of the households earning under $15,000 per year. *Id.* The Church first opened its doors in 1992 with the purpose of

[1] Because this is an appeal of a grant of summary judgment, all facts must be read in the light most favorable to the Church. *Curley* v. *Klem*, 298 F.3d 271, 276-77 (3d Cir. 2002). Moreover, all the facts in Plaintiff's L. Civ. R. 56.1 Statement of Uncontested Material Facts must be accepted as true, since the City did not come forward with any basis to dispute them. *Violette* v. *Ajilon Finance*, 2005 WL 2416986 at *10 (D.N.J. Sept. 30, 2005)("Under Rule 56.1 of the Local Civil Rules, 'facts submitted in a statement of material facts which remain uncontested by the opposing party are deemed admitted.'")(quotations omitted).

"providing Bible studies, public prayer meetings, evangelistic outreach, and community services to the people of Long Branch." Apx. 27, ¶10.

At that time, Lighthouse was operating at a temporary, rented location in the downtown area. *Id.* It rented a building where a small church had been operating as a pre-existing, non-conforming use. Docket Entry ("Doc. No.") 122, Ex. D ¶4. Because its renter status precluded it from undertaking the renovations necessary to adequately perform its ministry at this temporary location, the Church sought to purchase property that would allow it to establish a permanent home for its downtown ministry. Apx. 27–28, ¶¶12–13. On November 8, 1994, Lighthouse purchased the property known as 162 Broadway, Long Branch (the "Property"), which at the time was an abandoned building. Apx. 29, ¶19. Almost twelve years later, the Church has still been unable to establish this permanent home due to Long Branch's discriminatory zoning ordinances.

Lighthouse discussed its plans for the building with the City prior to purchase, and the City even gave Lighthouse a $1,500 "mini-grant" to help with the renovations and activities in the new building. Doc. No. 103, Ex. A The mayor wrote a congratulatory letter to the Church upon the receipt of the grant and purchase of the property. *Id.* Lighthouse proceeded with its plans for the building, believing that it had the support of the City in its

endeavors. Apx. 28, ¶¶14, 16. Among those plans was the renovation of the building, repairing what had been an eyesore for the neighborhood. *Id.* ¶14.

The Church wishes to use its property to assemble for worship services, to hold religious classes, and minister to the downtown community. Apx. 25 ¶ 1, 27 ¶ 10.

The Property is located in the City's C-1 Commercial District. Apx. 29–30, ¶ 23. Although a number of non-religious assembly uses are permitted in the C-1 District, churches are not permitted either by right or by Conditional Use Permit in this district. Long Branch Ordinance No. 20-6.13(a); Apx. 81–83. In fact, churches are not permitted by right in ***any*** district in the City. Apx. 106; Long Branch Ordinance 20-6 (1993).

In particular, Long Branch permits the following non-religious assembly or institutional uses as of right in the C-1 District:

- Motion-picture theater;
- Colleges;
- Assembly halls;
- Health spa/gyms;
- Municipal buildings.

Apx. 81–83.

Knowing that other public assemblies were permitted in the C-1 District, and that the City had expressed support for its plans to minister to the downtown area, Lighthouse applied for a variance to operate a church on

the Property. Apx. 30, ¶ 24. That application was deemed incomplete, delayed, and eventually withdrawn upon hearing the pronouncement from the City's Director of Community Development that the City "was never going to allow the Mission to use 162 Broadway." Apx. 30–31, ¶¶ 25–27. In 2000, the Church filed suit and sought a preliminary injunction motion to enjoin the application of its zoning ordinances to prohibit Lighthouse's proposed church use. The district court denied that motion and this Court affirmed the denial of the preliminary injunction pending further discovery.

After that decision, several vital facts came to light:

1. The City ***does not permit*** houses of worship to locate in the C-1 district, even as "assembly halls." Apx. 103.

2. The City ***does not contend*** that allowing Lighthouse to operate a church on the Property would threaten the public health, safety, or welfare. Apx. 99, 101 ¶¶ 42–44.

3. The City ***does not contend*** that its prohibition of houses of worship in Lighthouse's zoning district is rationally related to a legitimate governmental objective. *Id*., ¶ 45.

The City has also conceded that churches are not permitted as of right anywhere in the City. Apx. 105–06. They are not permitted even by conditional use permit in sixteen of the City's twenty-four zones. Long Branch Ordinance 20-6. The City Assistant Planning Director testified that the "the best [a church] can do is a conditional use." Apx. 106.

In addition, in 2002 the City enacted a "Long Branch Broadway Redevelopment Plan" ("LBBRP"), which amended the zoning regulations governing the uses permitted on Lighthouse's property. *See* Apx. 93 ¶ 17; Apx. 94–97; *see also* Apx. 84 § 5 (Long Branch Ordinance stating "[u]ses in the redevelopment area shall be limited to those permitted in the Redevelopment Plan."). Among other things, the LBBRP places Lighthouse's property in a newly created "Regional Entertainment Commercial land use area" and provides that the land uses permitted in this area are governed by the Design Guidelines for the Lower Broadway Redevelopment Zone ("Redevelopment Guidelines"). The Plan and its attendant guidelines have the force of law with respect to the Property. Apx. 84.

The Redevelopment Guidelines prohibit houses of worship in the Regional Entertainment Commercial land use area. But the Guidelines permit numerous non-religious assembly or institutional uses as of right, including:

- Theaters
- Cinemas
- Performance Art Venues
- Clubs showcasing local bands
- Art and Educational Institutions
- Culinary Schools
- Dance Studios

Apx. 97. Two theater uses—the New Jersey Repertory Theater and the Cornerstone Theater Company—have been approved for the redevelopment area. Apx. 79 ¶¶ 77–78, 80 ¶82.

The Redevelopment Guidelines prohibit churches, even though the City's Redevelopment Planner conceded that Long Branch had undertaken no studies to assess the impact of churches upon properties in the redevelopment area or within the City generally. Apx. 109–10.

The LBBRP replaces traditional land-use arrangements with a two-pronged, discretionary process. Anyone seeking to develop land in the "regional entertainment commercial" zone must first submit a Request for Qualifications ("RFQ"), detailing his or her qualifications and experience with land-use projects. Apx. 91 ¶ 11. If that person is certified as a developer, she may then proceed to the "RFP" stage, a detailed process in which the project is negotiated with and approved by the City Council. *Id.* A prospective developer need not own the land in question in order to be approved by the City: if a City-approved developer does not own the land he seeks to use, the City may acquire it for him through eminent domain. Apx. 89 ¶ 8; Doc. No. 100, Ex. D § 5.2.1. Uses prohibited in the zone (like churches) must also endure a third tier of requesting a waiver. Apx. 68 ¶34.

Still hoping to minister to the downtown community, Lighthouse filed an RFQ with the City in November 2003, once again requesting permission to develop its property for church use. Doc. No. 103, Ex. H. Lighthouse even sought to accommodate the City's interest in having increased retail activity in the area by indicating its willingness to include a religious gift shop in the storefront area of its proposed church building. *Id.* That request was denied. Doc. No. 100, Defs. 56.1 Statement of Contested and Uncontested Material Facts ¶ 40. Lighthouse then appealed this determination to the city council, which affirmed the denial in May 2004.

The City subsequently selected a separate developer for the lower Broadway corridor, and is proceeding with plans to seize Lighthouse's property by eminent domain. Doc. No. 100, Ex. D at 113; Doc. No. 103, Ex. J.

In July 2004, Lighthouse amended its complaint to include a challenge to the Redevelopment Guidelines.

STANDARD OF REVIEW

This Court "exercise[s] plenary review over a grant of summary judgment," and "likewise review[s] de novo the District Court's interpretation of the Constitution." *Blackhawk* v. *Commonwealth*, 381 F.3d 202, 206 (3d Cir. 2004) Grant of summary judgment is proper only where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Radich* v. *Goode*, 886 F.2d 1391, 1393-94 (3d Cir. 1989)(quotation omitted). The burden is on the moving party to show that no genuine issue of material fact exists. *See Celotex Corp.* v. *Catrett*, 477 U.S. 317, 323 (1986).

In reviewing a grant of summary judgment, this Court is "required…to view inferences to be drawn from the underlying facts in the light most favorable to the party opposing the motion." *Bartnicki* v. *Vopper*, 200 F.3d 109, 114 (3d Cir. 1999)(quotation omitted). The Court must "take the non-movant's allegations as true whenever these allegations conflict with those of the movant." *Id.*

SUMMARY OF ARGUMENT

The sole question addressed is whether RLUIPA's Equal Terms provision and the Free Exercise Clause permit a city to treat religious assembly land uses (*e.g.*, churches) worse than myriad secular assembly land uses (*e.g.*, theaters, cinemas, assembly halls, art and educational institutions, and schools). Although Congress drafted RLUIPA § 2(b)(1) to address discriminatory ordinances precisely like Long Branch's, the District Court answered "yes" by imposing additional elements not found in RLUIPA's text. This contrived interpretation of RLUIPA § 2(b)(1) is at odds with the plain meaning of the statute, its legislative history, the precedent of other circuits, and RLUIPA's own mandate that it be given broad construction to better protect religious exercise.

The City's zoning ordinances also violate the Free Exercise Clause by treating religiously motivated conduct worse than secular conduct, and by creating a scheme of individualized exemptions that opens the doors for discrimination. The City also failed to carry its burden under strict scrutiny, even conceding that it has no health, safety or welfare interest to justify its discriminatory treatment of churches.

ARGUMENT

I. LONG BRANCH'S ORDINANCES, WHICH TREAT CHURCHES LESS FAVORABLY THAN NONRELIGIOUS ASSEMBLIES AND INSTITUTIONS, VIOLATE RLUIPA § 2(b)(1).

A. The Record Demonstrates that the Church Has Satisfied All the Elements of a RLUIPA Equal Terms Claim.

RLUIPA's "Equal Terms" provision unambiguously sets forth what a plaintiff must show to make out a violation:

> 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***.

42 U.S.C. § 2000cc(b)(1) (emphasis added). Here, the application is straightforward and the violation is clear. As set forth below, Long Branch's land use regulations governing the assembly uses allowed in the zoning district where the Church's property is located treat houses of worship less favorably than several types of non-religious assembly uses. Whereas houses of worship are prohibited in Lighthouse's zoning district, several non-religious assembly uses—including theatres, cinemas, gyms, performance art venues, assembly halls, and municipal buildings—are permitted as of right.

1. *Long Branch's Zoning Ordinances Fall Within RLUIPA's Definition of a "**Land Use Regulation**."*

Lighthouse's Equal Terms claim primarily concerns two parts of Long Branch's zoning ordinance that governs what uses are permitted in the zoning district encompassing Lighthouse's property. The first is Long Branch Ordinance § 20-6.13, *see* Apx. 81–83, which defines the permitted uses in the C-1 District. This ordinance governed the permitted uses when Lighthouse first sought to establish a church on its property and was the ordinance in effect when Lighthouse originally filed this action.

The second is the Redevelopment Guidelines for the Regional Entertainment Commercial Land use area, *see* Apx. 94–97, which came into effect as part of the October 2002 Redevelopment Ordinance. The Redevelopment Guidelines amended the permitted uses in Lighthouse's zoning district.

RLUIPA defines "land use regulation" as "a zoning or landmarking law, or the application of such a law, that limits or restricts a claimant's use or development of land." 42 U.S.C. § 2000cc-5(5). There is no dispute that Long Branch's zoning ordinances—including Ordinance § 20-6.13 and the Redevelopment Guidelines—are "land use regulation[s]" within the meaning of RLUIPA.

2. *Long Branch's Land Use Regulations Do Not Permit Houses of Worship—a "**Religious Assembly or Institution**"—in the Zoning District Governing Lighthouse's Property.*

There is similarly no dispute that both Ordinance § 20-6.13 and the Redevelopment Guidelines exclude churches and other houses of worship from the list of permitted uses in Lighthouse's zoning district. Apx. 81–83, 97.[2]

Nor is there any dispute that churches and other houses of worship are an example of a "religious assembly or institution" under RLUIPA. Although there should be little doubt that churches and other houses of worship fall within the scope of RLUIPA's term "religious assembly or institution," the Act's legislative history confirms this common-sense interpretation. RLUIPA's Senate sponsors—Senators Kennedy and Hatch—explained the need for an Equal Terms provision: "Zoning codes frequently exclude ***churches*** in places where they permit theaters, meeting halls, and other places where large groups of people assemble for secular purposes." 146 CONG. REC. S7774, S7775 (daily ed. July 27, 2000)("Senate Sponsors' Statement")(emphasis added). They went on to explain that "the hearing

[2] The only arguable basis for construing the zoning ordinance as permitting churches is if the term "assembly hall," which is a permitted use under Ordinance § 20-6.13, includes churches. For this reason, this Court requested clarification on remand as to whether a church could be permitted in the C-1 District under the category of "assembly hall." In the discovery process, Long Branch made clear that the answer to this question is "no." Apx. 103. ("Interrogatory Request No. 7: Within the meaning of the Ordinance, specifically 20-6.13(a)(3), does the Permitted Use "Assembly hall" include Houses of Worship?. Interrogatory Response No. 7: NO.").

record reveals a widespread pattern of discrimination against ***churches*** as compared to ***secular places of assembly***." *Id.* (emphasis added).

Similar statements in the hearings leading up to the Act's passage likewise make clear that churches were an intended beneficiary of RLUIPA's mandate that "religious assemblies" be treated as well as secular assemblies. *See, e.g.*, H.R. REP. NO. 106-219 at 19 (1999)(explaining that Act is necessary to remedy situation where "***non-religious assemblies*** need not follow the same rules [as churches]. … [U]ses such as banquet halls, clubs, community centers, funeral parlors, fraternal organizations, health clubs, gyms, places of amusement, recreation centers, lodges, libraries, museums, municipal buildings, meeting halls, and theaters are often permitted as of right in zones where ***churches*** require a special use permit, or permitted on special use permit where ***churches*** are wholly excluded.")(emphasis added); *Protecting Religious Liberty: Hearings on H.R. 1691 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 106th Cong. at 214 (1999)(testimony of Prof. Douglas Laycock, University of Texas Law School)(explaining that the Act is designed to "appl[y] to land use regulation[s] that permit[] secular ***assemblies*** while excluding ***churches***.")(emphasis added); *Protecting Religious Freedom After* Boerne *v.* Flores*: Hearing Before the Subcomm.*

On the Constitution of the House Comm. on the Judiciary, 105th Cong. at 71 (1998)(testimony of Steven T. McFarland, Director, Center for Law and Religious Freedom) ("First, equal access should be assured. Wherever a community allows ***places of assembly***, like meeting halls, community centers, theaters, schools, or arenas, it must allow ***churches*** as a permitted use.")(emphasis added); *Religious Freedom, Hearing on the Religious Liberty Protection Act of 1998 H.R. 4019 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong. at 229 (1998)(testimony of Prof. W. Cole Durham, Jr., B.Y.U. Law School) ("a community may not … deprive religious assemblies of equal access to areas where non-religious assemblies are permitted.").

To be sure, churches often engage in additional activities beyond their core use of assembling people together for group worship, religious education, and corporate fellowship. For example, churches commonly use their property for offices, for religious counseling, selling religious books and devotional items, and serving meals to the poor. But nothing in the Act's text or legislative history suggests that churches that engage in such activities in addition to providing a place of religious assembly should no longer be considered a "religious assembly or institution" under RLUIPA. To the contrary, the legislative history consistently reveals that Congress'

concern was that that "churches" be treated the same as secular places of assembly, without attempting to distinguish churches that only engage in assembly from those that also engage in additional activities.

Thus, a church, like Lighthouse, is precisely the "religious assembly or institution" RLUIPA was designed to protect, and precisely the use that is not allowed in the zoning district governing Lighthouse's property.

3. *Long Branch's Land Use Regulations Permit Numerous "**Nonreligious Assemblies or Institutions**" in the Zoning District Governing Lighthouse's Property*.

RLUIPA does not expressly define the term "non-religious assembly or institution." Accordingly, the term should be given its ordinary meaning. *See Midrash Sephardi, Inc.* v. *Town of Surfside*, 366 F.3d 1214, 1230 (11th Cir. 2004)("[b]ecause RLUIPA does not define "assembly" or "institution" we construe these terms in accordance with their ordinary or natural meanings."). *Accord U.S.* v. *E.I. Dupont De Nemours*, 432 F.3d 161, 171 (3d Cir. 2005)("[w]e construe a term not defined in a statute in accordance with its ordinary and natural meaning."); *U.S.* v. *Alvarez-Sanchez*, 511 U.S. 350, 357 (1994)(relying upon dictionary definition of term not defined in the statute).

"An '***assembly***' is 'a company of persons collected together in one place and usually for some common purpose (as deliberation and legislation,

worship, or social entertainment.)'" *Midrash*, 366 F.3d at 1230 (quoting WEBSTER'S 3D NEW INT'L UNABRIDGED DICTIONARY 131 (1993)(emphasis added). An "'***institution***' is 'an established society or corporation: an establishment or foundation esp[ecially] of a public character.'" *Id*. (quoting WEBSTER'S 3D NEW INT'L UNABRIDGED DICTIONARY 1171 (1993))(emphasis added). *See also Dupont*, 432 F.3d at 171 (applying dictionary definition of statutory term)

Examining Long Branch's land use regulations in light of the ordinary meaning of "assembly" and "institution" reveals that the City allows numerous "non-religious assemblies or institutions" as a use permitted as of right in Lighthouse's zoning district. In particular, Long Branch Ordinance 20-6.13, which governed the permitted uses in the C-1 District when Lighthouse first sought to locate a church on its property, allows the following non-religious assemblies and institutions as of right:

- Motion Picture Theater[3]
- Assembly Hall[4]

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[3] A theater qualifies as an assembly: it brings a group of people together for the common purpose of social entertainment. The City's Assistant Planning Director conceded that theaters are places of assembly. Apx. 107–08.

[4] An assembly hall qualifies as an assembly: it brings a group of people together for a common purpose. Although this Court previously posited

- Health spa/Gym[5]
- Colleges[6]
- Municipal Buildings[7].

Apx. 81–83.

Although the Redevelopment Guidelines amended the uses permitted in Lighthouse's zoning district, it continues to exclude churches while permitting several non-religious assemblies and institutions as of right. Examples include the following:

- Theaters[8]
- Cinemas[9]

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that the term "Assembly Hall" could be broad enough to include churches and other houses of worship, Long Branch has made clear that churches and other houses of worship are excluded from the permitted use of "Assembly Halls." *See supra* at §I(B).

[5] A gym qualifies as an assembly: it brings a group of people together for the common purpose of exercise, especially through group classes (e.g., aerobics, pilates, yoga, etc).

[6] A college qualifies as an assembly: it brings a group of people together (*e.g.*, in classrooms) for the common purpose of education. A college likely also qualifies as an institution.

[7] A municipal building qualifies as an assembly: it brings a group of people together (*e.g.*, at city council meetings) for the common purpose of considering legislation or other governmental matters.

[8] As discussed above, a theater qualifies as an assembly: it brings a group of people together for the common purpose of social entertainment.

[9] Like a theatre, a cinema qualifies as an assembly: it brings a group of people together for the common purpose of social entertainment.

- Performance art venues[10]
- Clubs showcasing local bands[11]
- Art and educational institutions[12]
- Culinary school[13]
- Dance studio[14]

Apx. 97. In addition, the City has approved two performing art theaters, the New Jersey Repertory Company and the Cornerstone Theatre Company to operate in the Church's zoning district. Apx. 79, ¶ 77–78.

RLUIPA's legislative history confirms that Congress intended such land uses as theaters, cinemas, assembly halls, gyms, municipal buildings, and clubs to be included in the category of "non-religious assemblies and institutions" that the Act mandates may not be treated better than churches.

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[10] A performance art venue qualifies as an assembly: it brings a group of people together for the common purpose of appreciating art.

[11] A club qualifies as an assembly: it brings a group of people together for the common purpose of enjoying music.

[12] An art and educational institution: it brings a group of people together for the common purpose of instruction and education. It also qualifies as an institution. Moreover, the City's Redevelopment Planner confirmed that secular educational uses are permitted in this land use area, but religious educational uses are not. Doc. No. 103, Ex. F at 37–38.

[13] A culinary school qualifies as an assembly: it brings a group of people together for the common purpose of instruction.

[14] A dance studio qualifies as an assembly: it brings a group of people together for the common purpose of instruction or entertainment.

Indeed, the legislative history indicates that Congress designed the Equal Terms provision to cover ***precisely*** the type of land uses that Long Branch prefers over churches. *See, e.g.*, Senate Sponsors' Statement at S7775 ("Zoning codes frequently exclude churches in places where they permit ***theaters***, ***meeting halls***, and other places where large groups of people assemble for secular purposes.")(emphasis added); H.R. REP. NO. 106-219 at 19 (identifying "banquet halls, ***clubs***, community centers, funeral parlors, fraternal organizations, ***health clubs, gyms, places of amusement***, recreation centers, lodges, libraries, museums, ***municipal buildings***, ***meeting halls,*** and ***theaters***" as examples of "non-religious assemblies" that should not be preferred over churches).[15]

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[15] *See also Issues Relating to Religious Liberty Protection, and Focusing on the Constitutionality of a Religious Protection Measure: Hearing Before the Comm. on the Judiciary, United States Senate*, 106th Cong. (1999)(testimony of Prof. Douglas Laycock, U.T. Law School) (identifying "banquet halls, ***clubs***, community centers, funeral parlors, fraternal organizations, ***health clubs, gyms***, recreation centers, lodges, libraries, museums, ***municipal buildings, meeting halls, and theaters***" as non-religious assembly uses frequently preferred over churches in city zoning codes)(emphasis added); *Religious Freedom, Hearing on the Religious Liberty Protection Act of 1998 H.R. 4019 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong. at 405 (1998)(testimony of John Mauck)(testimony of expert zoning practitioner concluding that in 22 of 29 zoning codes surveyed in suburban Chicago, churches had a less favorable status in various zoning districts than non-religious meeting places, such as ***theaters, meeting halls***, lodges, clubs, and restaurants).

In sum, Long Branch's land use regulations permit as of right many different kinds of non-religious assemblies or institutions in Lighthouse's zoning district.

4. *Long Branch's Land Use Regulations Treat Churches on "**Less Than Equal Terms**" Than Numerous Non-Religious Assemblies or Institutions.*

RLUIPA's plain language dictates that a religious assembly may not be treated "on less than equal terms [than] ***a*** non-religious assembly or institution." 42 U.S.C. § 2000cc(b)(1)(emphasis added). Here, Lighthouse has more than satisfied that burden by demonstrating that Long Branch treats ***several*** non-religious assemblies and institutions better than houses of worship.

The treatment "on less than equal terms" in this case is not hard to grasp: Long Branch allows numerous non-religious assemblies and institutions to locate in Lighthouse's zoning district as of right, but denies churches that same benefit. Whereas churches are denied permitted use status in the C-1 district under Ordinance No. 20-6.13, the nonreligious assembly or institutional uses permitted as of right include: motion picture theatres, assembly halls, health clubs and gyms, municipal buildings, and colleges. *See* Apx. 81–83.

The Redevelopment Guidelines further entrench the unequal treatment of churches in Lighthouse's zoning district by permitting as of right such non-religious assemblies or institutions uses as theaters,[16] cinemas, performance art venues, art and educational institutions, culinary schools, dance studios, and clubs showcasing local bands. *See* Apx. 97. Thus, Long Branch permits people to assemble for all sorts of non-religious purposes, but not for religious ones:

- Long Branch permits people to assemble in a cinema (or motion picture theater) to watch the *Ten Commandments*, but prohibits the same number of people from assembling in a church or synagogue to hear religious teaching about and worship the God they believe authored the Ten Commandments.[17]
- The City permits people to assemble in an assembly hall for fellowship or education, but prohibits the same number of people from assembling in a house of worship for religious fellowship and education.[18]

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[16] In fact, Long Branch has approved two theaters to operate in Lighthouse's zoning district. Apx. 79, ¶¶ 77–78.

[17] And of course, the movie theater is free to sell souvenirs and food to their patrons, but the City doesn't allow churches (like Lighthouse), whose ministry may include selling religious books and feeding the homeless.

[18] A similar example was expressed in *Love Church* v. *City of Evanston*:

- The City permits people to assemble in a theatre to watch the staging of a religious wedding (*e.g.*, *Fiddler on the Roof*), but prohibits the same number of people from gathering in a church to participate in a religious wedding or other acts of worship. This example is far from hypothetical: one of the theaters Long Branch has approved to operate in Lighthouse's zoning district has a history of performing plays addressing religious themes. Apx. 80, ¶ 82.
- The city permits people to assemble in a health club for yoga and aerobic classes to improve physical and mental health, but prohibits the same number of people from assembling in a church to address their spiritual health.

> Suppose, for example, a group of people wished to assemble on a regular basis in Evanston to discuss and hear lectures on classical literature. This group might also wish to have seminars for young people after school or on weekends to expose them to "great books." These people could rent a building in any business or commercial zone and have their meetings. But if that same group of people wished to assemble for the purpose of religious worship and to hold classes for its young people to educate them about religion, they would have to get special permission from Evanston.

671 F. Supp. 515, 518-19 (N.D. Ill. 1987) *vacated on other grounds*, 896 F.2d 1082 (7th Cir. 1990)(zoning ordinance permitting meeting halls, but not churches, in commercial district impermissibly favored secular assemblies over religious ones).

- The city permits people to assemble in an art or educational institution to study art and music, but prohibits the same number of people from gathering in a church for Bible study or choir practice.
- The city permits people to gather in a municipal building to deliberate on matters of local government, but prohibits the same number of people from gathering to deliberate on matters of church polity.

The examples could go on, but the lack of treatment on equal terms is clear. Indeed, RLUIPA's legislative history confirms that Long Branch's preferential treatment of non-religious assemblies is exactly the situation the Equal Terms provision was meant for. *See, e.g.*, Senate Sponsors' Statement at S7775 ("Zoning codes frequently exclude churches in places where they permit theaters, meeting halls, and other places where large groups of people assemble for secular purposes.")

In sum, because Lighthouse has satisfied all of the elements of a RLUIPA Equal Terms claim, the district court erred in entering judgment against the Church on this claim.[19]

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[19] Notably the plain language of the Equal Terms provision provides no strict scrutiny escape hatch for its violation. Accordingly, failure to accord a religious assembly or institution equal treatment with a nonreligious assembly or institution must be judged on a strict liability standard. However, even if this Court were to read in a strict scrutiny escape hatch, Long Branch cannot meet that standard. *See infra* at §III.

B. The Additional Development of the Record Requested By This Court's Prior Opinion Confirms that the City's Ordinances Violate the Equal Terms Provision.

This Court's prior opinion was limited to denying the Church's motion for a preliminary injunction. *Lighthouse*, 100 Fed. Appx. at 73. Emphasizing the preliminary nature of its determination, it discussed the need for additional evidence in the record and noted that "discovery had been stayed since its early stages." *Id*. at 73. Accordingly, it was careful to cabin its unpublished decision, stating that "[b]ecause of the state of the record before the District Court in this case, we do not undertake in this opinion to clarify the state of the law in this area." *Id.* at 77, n.5.[20] The Court rendered its decision on the preliminary injunction only, allowing the case to proceed and the parties to continue discovery. They have since done so, and the record now reflects a serious violation of RLUIPA §(2)(b)(1).

The central sticking point for the Court in its prior opinion was its uncertainty as to whether the City's ordinance governing permitted uses in Lighthouse's zoning district actually treated churches less favorably than non-religious assemblies. The Court acknowledged that churches were not

[20] The preliminary nature of the Court's prior opinion was also emphasized by its refusal to "clarify the state of the law in this area" because "the caselaw interpreting this relatively new statute in this and other Circuits is scarce." *Id*. at 77, n.5. However, two published opinions issued by a sister circuit have since clarified the law. *See infra* at § I(C).

among the specified permitted assembly uses in the C-1 district. However, the Court noted that "assembly halls" were a specified permitted use in the C-1 district and reasoned that it was possible that the City might construe its ordinance to allow churches under the "assembly hall" category. *See id.* at 76 ("the [Church] did not establish…that it would be prohibited from operating in the C-1 district under the assembly hall category.")

Therefore, before ruling on the Church's Equal Terms claim, the Court wanted factual clarification on the question of whether churches were a permitted use in the C-1 district under the "assembly hall" category. *See id.* at 74 ("it is not clear whether the City would permit the [Church] to operate under the assembly hall category"). In the Court's view, if churches were in fact a permitted use under the assembly hall category, then they were not treated less favorably than permitted non-religious assembly uses such as theaters, secular assembly halls, colleges, and health clubs.

Further discovery has clarified the question raised by the Court. Specifically, the City has conceded that churches and other houses of worship are not a permitted use under the "assembly hall" category. *See* Apx. 103 ("Interrogatory Request No. 7: Within the meaning of the Ordinance, specifically 20-6.13(a)(3), does the Permitted Use "Assembly hall" include Houses of Worship? Interrogatory Response No. 7: NO.").

This concession removes all doubt that churches are not a permitted use in Lighthouse's district.[21] Accordingly, the lower court erred by entering judgment for the City, rather than the Church, on the RLUIPA Equal Terms claim.

In addition, this Court's prior opinion did not address the validity of the Redevelopment Guidelines because they had not been enacted when the Church first filed this action and sought a preliminary injunction. The Redevelopment Guidelines form an independent basis for this Court to find an Equal Terms violation. That is so because those guidelines, as discussed above, prohibit houses of worship but permit a number of nonreligious assemblies and institutions, including theatres, cinemas, and art and educational institutions. Indeed, the City has already approved the use of two theatres under the Design Guidelines, Apx. 79, ¶¶ 77–78, but continues to prohibit the Church.

C. The Lower Court Declined to Follow the Holdings of Indistinguishable Circuit Decisions Applying RLUIPA's Equal Terms Provision.

The lower court expressly declined to follow the leading circuit opinions—*Midrash Sephardi* v. *Town of Surfside*, 366 F.3d 1214 (11th Cir.

[21] At the very least, this concession raises a genuine issue of material fact that precludes judgment in favor of the City.

2004), and *Konikov* v. *Orange County*, 410 F.3d 1317 (11th Cir. 2005)—applying RLUIPA's Equal Terms provision. However, an examination of these decisions further highlights the City's violation of § 2(b)(1).

In *Midrash*, the Eleventh Circuit rejected a construction of RLUIPA similar to that employed by the district court here. A synagogue challenged the zoning ordinance for a commercial district that permitted (among other uses) clubs and lodge halls as of right, but required houses of worship to obtain a CUP. The Eleventh Circuit, in keeping with the canons of construction, adopted a plain-text reading of RLUIPA:

> Section (b)(1) makes it clear that the relevant "natural perimeter" for consideration with respect to RLUIPA's prohibition is the ***category*** of "assemblies or institutions." The district court erred by not considering RLUIPA's statutory categorization as the relevant "perimeter." By adopting Surfside's conditional use definition as the relevant "natural perimeter," the district court ***overlooked the express provisions of RLUIPA*** which require a direct and narrow focus. Under RLUIPA, we must first evaluate whether an entity qualifies as an "assembly or institution," as that term is used in RLUIPA, before considering whether the governmental authority treats a religious assembly or institution differently than a nonreligious assembly or institution.

Id. at 1230 (emphasis added). The court went on to conclude that the statutory category of "assembly," when given its ordinary and natural meaning, included clubs and lodge halls. *Id.* at 1230–31. Accordingly, the court held that the town's ordinance violated RLUIPA by treating religious

assemblies (synagogues and churches) on less than equal terms with non-religious assemblies (private clubs and lodge halls).[22] *Id.* at 1231.

In *Konikov*, the court applied § 2(b)(1) to a county ordinance that had been applied to prohibit a Jewish rabbi from holding religious meetings in his home. The ordinance, on its face, ostensibly prohibited any organization from assembling for meetings in residences. But the court found that in practice, the county applied the ordinance in such a way that meetings of non-religious social organizations like the Cub Scouts were permitted. *Konikov*, 410 F.3d at 1328. Because meetings of social organizations—like a Cub Scouts troop—fell into the category of an "assembly or institution," the court held that the county violated RLUIPA by treating religious assemblies on less than equal terms with non-religious assemblies. *Id*.

Long Branch's ordinances are indistinguishable from those the Eleventh Circuit held to constitute unequal treatment in *Midrash* and *Konikov*. Its zoning ordinances prohibit churches and other houses of worship from locating as of right in Lighthouse's district. But numerous

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[22] The court properly relied upon the plain text of the statute, and in doing so acted consistently with the categories of comparison listed in the legislative history. The court went on to note that RLUIPA's "legislative record contained statistical, anecdotal and testimonial evidence suggesting that discrimination is widespread and typically results in the exclusion of churches and synagogues *even in places where theaters, meeting halls and other secular assemblies are permitted*." *Id.* at 1236 (emphasis added).

land uses—*e.g.*, theaters, cinemas, assembly halls, art and educational institutions, gyms, and municipal buildings—that fall into the category of a non-religious assembly or institution are permitted as of right. Like the ordinances in *Midrash* and *Konikov*, this preferential treatment of non-religious assemblies and institutions violates RLUIPA's mandate of equal treatment.

D. The Lower Court Erred By Refusing to Give RLUIPA Its Plain Meaning.

1. *Giving RLUIPA Its Plain Meaning Does Not Allow Churches to Locate Anywhere They Please.*

The lower court did not dispute the Church's showing that churches are not permitted in Lighthouse's zoning district. Nor did it dispute that the City allowed numerous types of non-religious assemblies in that district. Nonetheless, the lower court declined to find that this preferential treatment of non-religious assemblies over churches and other houses of worship violated the Act.

Instead, the court asserted that giving RLUIPA its plain meaning—*i.e.*, that a city may not prohibit churches in a zone where some non-religious assemblies are allowed—would be reading the Act too "literally and expansively." 406 F.Supp.2d at 517. According to the lower court, "this reading would prohibit the zoning restrictions [sic] of churches in any

location." *Id*. at 517. Although the lower court correctly cites RLUIPA's legislative history for the proposition that the Act was not intended to give churches a free pass from zoning regulations,[23] it does not explain how the Act's mandate of equal treatment would result in such a blank check.

Nor can it. All RLUIPA requires is that where a city permits non-religious assemblies, it also permit religious assemblies. If non-religious assemblies are prohibited in a particular zone—as they frequently are in many residential, agricultural, and industrial zones—then religious assemblies need not be permitted either. Nothing in the statute exempts churches from such run-of-the-mill zoning restrictions, so long as non-religious assemblies face the same restrictions. In other words, prohibition of both secular and religious assemblies is perfectly permissible under RLUIPA. Thus, the district court's argument that churches would be free from any restrictions finds no support in the RLUIPA's text.

Equally unpersuasive is the district court's alternative argument, 406 F.Supp.2d at 519, that it would somehow impermissibly favor churches to

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[23] Curiously, the lower court cited this legislative history, but ignored all the relevant legislative history (discussed above) indicating that Congress intended the Equal Terms provision to cover exactly the types of non-religious assemblies that Long Branch treated better than churches. *See*, *e.g.*, Senate Sponsors' Statement at S7775 ("Zoning codes frequently exclude churches in places where they permit theaters, meeting halls, and other places where large groups of people assemble for secular purposes.")

give RLUIPA its plain meaning that churches must be treated as well as a non-religious assembly. This argument turns RLUIPA on its head. The text of the Act itself states that religious assemblies shall be treated on ***equal terms*** with non-religious assemblies. RLUIPA § 2(b)(1). This is not an unconstitutional preference for religion, but rather a remedy provided due to frequent discrimination. Congress enacted this measure specifically because "[c]hurches in general, and new, small, or unfamiliar churches in particular, are frequently discriminated against ***on the face*** of zoning codes" by "exclud[ing] churches in places where they permit theaters, meeting halls, and other places where large groups of people assemble for secular purposes." Senate Sponsors' Statement at S7774 (emphasis added).

Moreover, even if the Equal Terms provision does occasionally grant religious assemblies a remedy that a secular assembly that was also excluded from a zoning district would not have, this doesn't raise Establishment Clause problems. Just last term, the Supreme Court rejected an Establishment Clause challenge to RLUIPA's prisoner provisions that accommodate religious exceptions to generally applicable prison regulations without also providing accommodations for comparable secular conduct. *See Cutter* v. *Wilkinson*, 544 U.S. 709, 724–25 (2005). In addition, faithful application of this Court's Free Exercise precedent also results in instances

where exemptions are provided for religious conduct that are not also extended to comparable secular conduct. *See, e.g., Fraternal Order of Police* v. *City of Newark*, 170 F.3d 359, 366 (3d Cir.1999)(holding that Free Exercise Clause required an exemption to government's no-beard policy for religious reason where government allowed one exemption for medical reason, even though extending religious exemption would result in favoritism over other non-religious reasons for desiring to wear a beard).

2. *The District Court Erred By Reading Additional Requirements Into RLUIPA § 2(b)(1).*

To avoid giving RLUIPA's Equal Terms provision its plain reading (or in the words of the lower court, its "literal" meaning), the lower court imposed two additional elements: a "substantial burden" requirement and a "similarly situated" requirement. 406 F.Supp.2d at 518-19. Because neither of these requirements is found in the text and because they would alter the plain meaning of the Act, both should be rejected.

a. *The Text of RLUIPA's Equal Terms Provision Provides No Basis for a "Substantial Burden" Requirement.*

RLUIPA's Equal Terms provision provides in full as follows:

(b) Discrimination and exclusion

(1) Equal terms

> 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.

42 U.S.C. § 2000cc-(b)(1).[24] Nowhere do the words "substantial burden" appear in this subsection of the Act. The "Equal Terms" provision is section 2**(b)**, subpart (1) of the Act, found in the "Discrimination and Exclusion" section, 42 U.S.C. § 2000cc-**(b)**. In contrast, RLUIPA provides a ***separate*** cause of action for land use regulations that impose a "substantial burden" on religious exercise in § 2**(a)** of the Act, the separately entitled "Substantial burdens" section, 42 U.S.C. § 2000cc-**(a)**.

Moreover, incorporating the requirements of § 2(a) into § 2(b)(1) by requiring a plaintiff that has met all the requirements of a § 2(b)(1) unequal treatment claim to also show a "substantial burden" under § 2(a) violates basic canons of statutory construction. As this Court has mandated, "we must construe [a] statute so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void, or insignificant." *ErieNet, Inc.* v. *Velocity Net, Inc.*, 156 F.3d 513 (3rd Cir. 1998)(quotation omitted). But if a religious organization must prove substantial burden—and thus a violation of § 2(a)—in order to make a claim under § 2(b)(1), then § 2(b)(1) is superfluous. It adds nothing to the statute, providing no protection for

[24] *See also* APX 18-22 (providing RLUIPA's full text)

houses of worship that they cannot already obtain through application of § 2(a). This absurd construction would defeat Congress' intent and its deliberate attempt to structure the causes of action under the Act in separate sub-provisions.[25]

Circuit courts have recognized the distinction Congress drew between causes of action under § 2(a) and § 2(b). The Seventh Circuit held that "the substantial burden and nondiscrimination provisions are operatively independent of one another." *C.L.U.B.* v. *City of Chicago,* 342 F.3d 752, 762 (7th Cir. 2003). The Eleventh Circuit twice found violations of the Equal Terms provision after concluding that no substantial burden existed. *Midrash,* 366 F.3d at 1228–31; *Konikov,* 410 F.3d at 1323–29. In short, the

[25] Other absurd results also flow from the lower court's reasoning. For if the lower court is correct that the "substantial burden" requirement must be read into §2(b)(1), then presumably it also must be read into ***all*** the causes of action under §2(b) of the Act. So, for example, RLUIPA §2(b)(2) which prohibits a city from using its land use regulations to discriminate among religious denominations would also carry a "substantial burden" element. This would lead to the absurd result that a city could engage in petty discrimination among denominations—e.g., prohibiting Baptists, but not Catholics, from having flowers in front of their church—so long as that discrimination did not rise to the level of a substantial burden. *Cf. Brown* v. *Borough of Mahaffey,* 35 F.3d 846, 849-50 (3d Cir. 1994)(rejecting "substantial burden" requirement for Free Exercise discrimination claims, because they "have never limited liability to instances where a 'substantial burden'" was proven, and because it "would make petty harassment of religious institutions and exercise immune from the protections of the First Amendment.").

text provides no basis for the assertion that a "substantial burden" be shown to demonstrate an "Equal Terms" violation.

b. *The Text of RLUIPA's Equal Terms Provision Provides No Basis for a "Similarly Situated" Requirement.*

RLUIPA's text states that religious assemblies must be treated on "equal terms with a non-religious assembly or institution." Under this test, the court must ask whether a land use that is given better treatment than a religious assembly falls into the category of a non-religious assembly or institution. If the preferred use does fall into this category, the court's inquiry is at an end. Nothing in the text of RLUIPA states that the court should undertake the ***additional*** inquiry into whether the prohibited religious assembly is "similarly situated" to the non-religious assembly. Rather, Congress decided that the only criteria to examine when comparing the land use preferred over a religious assembly is whether that preferred use is encompassed within the ***category*** of an "assembly or institution."[26]

For this reason, the Eleventh Circuit expressly rejected imposition of an Equal Protection "similarly situated" requirement as contrary to the text of § 2(b)(1). The court explained that, for the "purposes of a RLUIPA equal

[26] Certainly Congress could have selected other comparators for houses of worship. For example, it could have mandated that they be permitted in any zone which permits residential uses. But it didn't. Instead, it chose "assembl[ies]" and "institution[s]" as the category of secular land uses to which religious land uses should be compared.

terms challenge, the standard for determining whether it is proper to compare a religious group to a nonreligious group is ***not*** whether one is 'similarly situated' to the other, as in our familiar equal protection jurisprudence." *Konikov*, 410 F.3d at 1324 (citing *Midrash*, 366 F.3d at 1230). Rather, "the relevant 'natural perimeter' for comparison is the ***category*** of 'assemblies and institutions' as set forth by RLUIPA." *Id.* (emphasis added). *See also Midrash*, 366 F.3d at 1230 (the "express provisions of RLUIPA … require a direct and narrow focus" on whether "an entity qualifies as an 'assembly or institution.'") Accordingly, the operative inquiry is whether the government permits an entity that falls within the category of a "non-religious assembly or institution" to locate in a zoning district while denying that same ability (or making it more difficult) to houses of worship. *Id*. The district court departed from both the plain text and legislative history of RLUIPA by reading in a "similarly situated" requirement.

Because the language of the Act is plain, the Court must follow that plain meaning unless doing so "would lead to a patently absurd result that no rational legislature could have intended." *Fogleman* v. *Mercy Hosp.*, 283 F.3d 561, 569 (3d Cir. 2002). *See also Abdul-Akbar* v. *McKelvie*, 239 F.3d 307, 313 (3d Cir. 2001)("If the language of the statute is plain, the sole

function of the court is to enforce the statute according to its terms."). Affording RLUIPA's text its plain meaning without adding a similarly situated requirement does not lead to an absurd result.

Far from it. To the contrary, evaluating whether the use preferred over a religious assembly falls within the category of a non-religious "assembly or institution" is a test that is that is objective and easy to apply. This inquiry can be performed by reference to the ordinary meaning of the terms "assembly" and "institution." As discussed above, an "assembly" is "a company of persons collected together in one place and usually for some common purpose (as deliberation and legislation, worship, or social entertainment." WEBSTER'S 3D NEW INT'L UNABRIDGED DICTIONARY 131 (1993)(emphasis added). Thus, whether any particular property will involve use as an "assembly" is something that can be measured ***objectively***: will use of the property involve "a company of persons collected together in one place and usually for some common purpose"? Although hard cases may occasionally arise at the margin, the test will be easy for land use officials (and courts) to administer in the vast majority of cases.

Moreover, Congress' choice to dispense with any additional requirement of showing that the preferred non-religious assembly use is "similarly situated" to the religious assembly has the advantage of avoiding

potentially entangling inquiries. For example, it avoids the necessity of land use officials probing into the precise nature of activities done by churches and other religious assemblies to determine how similar they are to the preferred non-religious assemblies. It also precludes the necessity of local land use officials making subjective judgments (which could lend themselves to discrimination) into how similar or different a church's activities are from permitted non-religious assemblies.

Finally, although a resort to legislative history is unnecessary where, as here, the statutory text is clear,[27] this history reveals that Congress was concerned with zoning codes that persistently favored non-religious assembly uses over churches and other religious assemblies. *See supra* at §I(A)(3). The diverse examples that Congress identified in the legislative history of favored non-religious assemblies and institutions—*e.g.*, theaters, meeting halls, gyms, municipal buildings, places of amusement—further confirms that Congress deliberately chose § 2(b)(1)'s language to ensure that religious assemblies would be treated as well as any use falling within the category of a "non-religious assembly or institution."[28]

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[27] *In re TMI*, 67 F.3d 1119, 1123 (3d Cir. 1995).

[28] RLUIPA's plain language also renders unnecessary an inquiry into the legislative history to determine whether, as the Eleventh Circuit concluded, § 2(b)(1) was intended to prophylatically enforce the *Smith-Lukumi* line of Free Exercise cases prohibiting discriminatory treatment of

In sum, Congress could have written § 2(b)(1) to instead provide "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 [*similarly situated*] nonreligious assembly or institution." But Congress did not. This Court should reject the lower court's invitation to graft additional language into the statute that would narrow its protections. *See* 42 U.S.C. § 2000cc-3(g)(instructing that RLUIPA "shall be construed in favor of a

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religiously motivated conduct. It is significant, though, that Free Exercise jurisprudence, unlike *Cleburne* Equal Protection analysis, does *not* apply a similarly situated test. Instead, the inquiry concerns whether a law is "neutral and generally applicable." *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah,* 508 U.S. 520, 532 (1993); *Employment Div.* v. *Smith*, 494 U.S. 872, 877-80 (1990) (describing bans on "assembling with others . . . only when they are engaged in [assembly] for religious reasons" as unconstitutional); *F.O.P.*, 170 F.3d at 365 ("categorical[ly]" favoring a secular reasons for engaging in conduct over a religious reason violates the Free Exercise Clause command of neutrality and general applicability). So, for example, this Court's recent decision in *Blackhawk* found that a law that allowed wild bears to be kept in captivity in zoos and circuses, but not for religious reasons, was not "neutral and generally applicable." 381 F.3d at 209-10 (3d Cir. 2004). In finding a Free Exercise violation, the Court did not inquire into whether the treatment of bears in zoos and circuses was "similarly situated" to the treatment of bears by the religious claimant. Thus, to the extent § 2(b)(1) prophylatically enforces Free Exercise Clause doctrine, this further supports the absence of a "similarly situated" requirement.

broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution.")[29]

II. LONG BRANCH'S ORDINANCES, WHICH INCLUDE CATEGORICAL EXEMPTIONS FOR SECULAR, BUT NOT RELIGIOUS, LAND USES, VIOLATE THIS COURT'S BINDING FIRST AMENDMENT PRECEDENT.

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[29] Even were the lower court correct to impose a similarly situated requirement, its two reasons for finding that the Church was not similarly situated to the permitted uses were both flawed. First, the court claimed that a state statute discouraging liquor licenses within 200 feet of churches distinguished churches from permitted non-religious assemblies in Lighthouse's district. 406 F.Supp.2d at 518. Even assuming this statute would be a relevant criteria in the similarly situated analysis, the statute is a non-issue in this case because Lighthouse expressly agreed to waive the licensing requirement in perpetuity. Apx. 77, ¶ 66. Such waivers in perpetuity are specifically contemplated by New Jersey law. For example, N.J.S.A. 33:1-76.1, provides that, after a waiver is granted by a church or school, no further waiver is necessary in order to obtain a liquor license renewal. N.J.S.A. 33:1-76.1 (1965)(specifically changing the standard applied in NJSA 33:1-76).

Second, the lower court claimed that a church (like Lighthouse) was not similarly situated to the permitted non-religious assemblies and institutions in Lighthouse's zoning district because its ministry (like most churches) involved more than just assembly for worship. The court asserted that Lighthouse's plans to stage religious plays, sell religious materials, and serve food to the homeless differentiated it from the permitted uses. 406 F.Supp.2ed at 518. But counterparts to these uses do exist in uses permitted as of right in the district. For example, theaters, in addition to assembling people for performances, also commonly serve food and sell souvenir items. Nothing in the City's zoning code precludes theaters from engaging in those activities. Moreover, the City's planner stated that including a bookstore selling religious items in the Church would make it "more compatible" with the other uses in the zoning district. Apx. 112. At a minimum, a genuine issue of material fact exists on this issue.

The lower court's decision must also be reversed because Long Branch's Ordinances violate the Free Exercise Clause by treating religiously motivated behavior worse than behavior motivated by secular concerns. This Court has made clear that strict scrutiny applies under the Free Exercise Clause in two situations. First, strict scrutiny applies to laws that violate the requirements of neutrality and general applicability by providing categorical exemptions for secular, but not religious, conduct. *Blackhawk*, 381 F.3d at 211. Second, strict scrutiny applies where the statute "permits individualized, discretionary exemptions" that "create[] the opportunity for … discriminat[ion] against religiously motivated conduct." *Id.* at 209. As discussed below, the City's zoning scheme creates categorical exemptions for secular, but not religious, land uses, and it subjects houses of worship to a regime of discretionary, individualized exemptions. Accordingly, it must face strict scrutiny under the Free Exercise clause.

A. The City's Ordinance Violates the Free Exercise Clause by Providing Categorical Exemptions for Secular, but Not Religious, Conduct.

1. *This Court's Decisions in FOP and Blackhawk Control This Case.*

Land use laws, like all other laws, must satisfy the Free Exercise Clause's fundamental requirements of "neutrality and general applicability."

Lukumi, 508 U.S. at 532 ("[T]he First Amendment forbids an official purpose to disapprove…of religion in general."); *Smith*, 494 U.S. at 877 (the "government may not…impose special disabilities on the basis of religious…status")(citations omitted). In *Lukumi*, the Supreme Court held that the Free Exercise Clause's requirement of neutrality mandates that religiously motivated conduct not be singled out for worse treatment than secular conduct. *See Lukumi*, 508 U.S. at 532 ("At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons."). *See also Smith*, 494 U.S. at 877 (describing bans on people "assembling with others . . . only when they are engaged in [such acts] for religious reasons" as unconstitutional). Here, Long Branch's zoning ordinance violates the Free Exercise Clause's mandate of neutrality and general applicability by treating assembly undertaken for religious reasons worse than assembly motivated by secular concerns.

This Court's decisions in *Blackhawk* v. *Commonwealth*, 381 F.3d 202 (3d Cir. 2004) and *Fraternal Order of Police v. City of Newark*, 170 F.3d 359 (3d Cir. 1999) ("*FOP*"), provide the controlling application of the *Lukumi /Smith* standard.

FOP presented the question of whether a government employer's rule permitting beards for medical reasons (but denying them for any other) triggered heightened scrutiny for failure to make exceptions for religious reasons. *FOP*, 170 F.3d at 365-66. The Court applied heightened scrutiny because it found the law to target conduct based on its religious motivation:

> "[I]t is clear from [*Smith* and *Lukumi*] that the Court's concern was the prospect of the government's deciding that ***secular motivations are more important than religious motivations***. If anything, this concern is only further implicated when the government does not merely create a mechanism for individualized exemptions, but instead, actually creates a ***categorical exemption*** for individuals with a secular objection but not for individuals with a religious objection.

Id. (emphasis added)(citation omitted).

The statute at issue in *Blackhawk* presented a nearly identical question. In *Blackhawk*, a Pennsylvania law required those who desire to keep wildlife in captivity to obtain a fee permit. The law made categorical exemptions from this policy for those wishing to keep wildlife for certain secular purposes—*e.g.*, for a circus or zoo—but refused to extend an exemption for those desiring to keep wildlife for religious reasons. Following *FOP*, this Court held that such categorical favoritism of secular conduct over religious conduct violated the Free Exercise Clause. 381 F.3d at 211.

Here, as in *Blackhawk* and *FOP*, groups of people are permitted to engage in conduct for secular reasons, but not for religious reasons. The City's ordinances governing permitted uses in Lighthouse's district ***categorically permit*** people to assemble for all sorts of non-religious reasons in theaters, cinemas, assembly halls, municipal buildings, and gyms, among other places. But the City categorically prohibits churches and other houses of worship.

Like the laws in *FOP* and *Blackhawk*, this categorical hostility to religious conduct fails the Free Exercise Clause requirements of neutrality and general applicability. This is especially so because the facts, read in the light most favorable to Lighthouse, do not establish that inclusion of churches in Lighthouse's zone would actually undermine the City's stated interest for the zone of "creating an artistic and 'dynamic commercial center' in place of…a deteriorating downtown." 406 F.Supp.2d at 516. Such an over-inclusive law that prohibits religious conduct (but not secular conduct) when the prohibition is not necessary to achieve the government's interest fails the Free Exercise Clause's neutrality requirement. *See Lukumi*, 508 U.S. at 538-39 (holding that overinclusive ordinance that "prohibit[s] [religious conduct] … even when it does not threaten the city's interest in the public health" lacks neutrality).

The record is replete with evidence demonstrating that inclusion of churches wouldn't undermine the City's stated interest of "creating an artistic and dynamic commercial center." For example, the City's redevelopment planner conceded that the City has not done ***any*** studies showing that churches would have a negative impact on the city's goals for the redevelopment area. Apx. 109–110. This same City planner also conceded that prayer gatherings, religious assemblies, and religious educational training would ***not*** have a negative impact on the district. R.103, Ex. F at 37. The City also disavowed any contention that its prohibition of houses of worship in the redevelopment zone was "rationally related to a legitimate governmental objective." Apx. 99, 101. This concession is fatal to any claim the City might make that prohibiting churches in the zone is consistent with its stated (legitimate) objective of creating an "artistic and dynamic commercial center."[30]

Moreover, evidence in the record demonstrates that the presence of a church like Lighthouse in the redevelopment area would positively advance the City's stated objective. For example, Rev. Brown testified that

[30] The City's claim about the effect of churches on liquor licensing laws is also a red herring in light of the Church's willingness to waive the 200-foot restriction in perpetuity, Apx. 77 ¶ 66, and the generous waiver mechanisms available under state law. *See* N.J.S.A. 33:1-76.1 (modifying N.J.S.A. 33:1-76).

Lighthouse's services with their Pentecostal style and upbeat contemporary music would attract the same young, active crowd for whom the City desires to create its artistic and dynamic commercial center. R.103, Ex. F at 49–50. The Church planned to have midnight worship services that would draw young people into the area and contribute to the vibrant atmosphere the City seeks to create there. *Id.* The Church would put to use a building that was abandoned and not being used for any commerce. Apx. 62, ¶ 6. The Church would also be an on-going purchaser and user of goods and an employer, further contributing to the commerce of the area.[31] The Church would serve food to the homeless, thereby generating commerce. Apx. 27, ¶¶ 10–11. And the Church was willing to operate a Christian bookshop in the front of its building that would further generate commerce and, in the words of the City's redevelopment planner, make the Church "more compatible" with the area. Apx. 69, ¶ 39; Apx. 112.

Taken together, and read in the light most favorable to Lighthouse, these facts demonstrate that the Church would advance, not hinder, the City's objective of creating an artistic and dynamic commercial center. Thus, the categorical prohibition on churches in Lighthouse's zone is an

[31] *See* Apx. 64, ¶ 13 (Lighthouse planned to renovate the building); R.103, Ex. A (letter from City acknowledging that Lighthouse would purchase "supplies, tools, [and] office equipment" and employ "personnel").

over-inclusive means of achieving the City's objective. Because *FOP* and *Blackhawk* make clear that such over-inclusive means and categorical favoritism of secular over religious conduct fails the Free Exercise Clause requirements of neutrality and general applicability, Long Branch's ordinances can only be sustained if they satisfy strict scrutiny.[32]

2. *The Lower Court Failed to Apply the Controlling Authority of FOP and Blackhawk.*

The lower court, however, ignored both *Blackhawk* and *FOP*, failing to cite these controlling decisions even once. As discussed below, this error is particularly conspicuous because the two grounds the court advanced in support of its holding that Long Branch's ordinances were neutral and generally applicable were rejected in both of those cases.

First, the lower court acknowledged that the City's ordinances categorically preferred secular reasons for assembly over religious reasons.

[32] In addition, the City's C-1 ordinance that applied to Lighthouse when it first sought to establish a church on its property is also underinclusive to achieving the City's asserted goal of creating a zone that generates commerce. The permitted use of assembly halls (which the City has made clear do not include houses of worship) has more potential to undermine the goal of generating commercial activity in the zone than churches. For example, assembly halls used for assembly by non-profit organizations like a local book club or the Boy Scouts will not contribute any more to generating commerce than a church. Such categorical favoritism of secular assemblies—which undermine the city's goals "to at least the same degree" as the prohibited religious assemblies—also violates the Free Exercise Clause requirements of neutrality and general applicability. *Blackhawk*, 381 F.3d at 209.

Nonetheless, the court held that this categorical disfavor of religious conduct was permissible because "churches are only one of numerous uses which are not permitted." *Lighthouse*, 406 F.Supp.2d at 519. But under that logic, any law would pass muster so long as it treated a few secular reasons for conduct as badly as religious reasons.

This non sequitur did not persuade this Court in either *FOP* or *Blackhawk*. In *FOP*, the challenged policy did not prohibit beards worn only for religious reasons. Instead, subject to the one exception of wearing a beard for a medical reason, it prohibited beards for any reason—including religious. 170 F.3d at 360. Likewise, the statute in *Blackhawk* did not prohibit only religious possession of wildlife, but placed blanket restrictions on possession for any reason, except those specifically listed in the statute for exemption. *Blackhawk*, 381 F.3d at 205. Religious uses were merely one of many that were not exempted and therefore subject to the permit requirement. *Id.*

Second, the lower court also erred by asserting that Long Branch's ordinance was neutral and generally applicable because "churches are not even specifically prohibited." *Lighthouse*, 406 F.Supp.2d at 519. This logic, too, is contrary to binding precedent. Tellingly, the statute in *Blackhawk* required permits for ***all*** wildlife possession not specifically listed, making no

specific mention of religious possession. *Blackhawk*, 381 F.3d at 305. Similarly, in *FOP* the challenged policy did not single out religious reasons for prohibition by name. Instead, religious reasons were included among all the prohibited reasons other than medical reasons. 170 F.3d at 360–61.

Long Branch's ordinance governing the permitted land uses in Lighthouse's zone is indistinguishable from the laws at issue in *FOP* and *Blackhawk*. It prohibits all uses—including churches—not specifically listed as permitted. Both *FOP* and *Blackhawk* make clear that a law ***fails*** neutrality and general applicability where it categorically favors some nonreligious entities over religious entities, ***even if*** other nonreligious entities are also treated as badly as the religious entities and ***even if*** religious reasons for conduct are not singled out by name for prohibition. *Cf. Vineyard Christian Fellowship of Evanston* v. *City of Evanston*, 250 F.Supp.2d 961, 976 (N.D. Ill. 2003) (noting that "just because other, non-religious uses were also prohibited from the district, does not mean the ordinance does not classify on the basis of religion."); *Love Church*, 671 F.Supp. at 517 (holding that "[w]hen legislation burdens members of a class entitled to protection under the Fourteenth Amendment, the fact that the legislation also burdens members of unprotected classes is irrelevant.").

B. The City's Ordinance Imposes a System of Individualized, Discretionary Exemptions that Trigger Strict Scrutiny.

Laws that fail the requirement of "neutrality and general applicability" are not the only ones subject to strict scrutiny review under the Free Exercise Clause. This Court's decision in *Blackhawk* emphasized that a law must also "satisfy strict scrutiny if it permits individualized, discretionary exemptions because such a regime creates the opportunity for a facially neutral and generally applicable standard to be applied in practice in a way that discriminates against religiously motivated conduct." 381 F.3d at 209.

In *Blackhawk*, this Court examined a statute which required state-issued permits to keep certain wildlife, but which also provided a discretionary "waiver mechanism" providing exemptions from the permit requirement. *Id.* The waiver criteria vested broad discretion in state decision-makers to decide whether an exemption would promote "sound game or wildlife management activities or the intent of [the Game and Wildlife Code]." *Id.* at 210. Blackhawk, who raised and kept bears for use in religious ceremonies, was denied a permit exemption. Based on the broad and discretionary nature of the waiver mechanism criteria, this Court held that the statute "create[d] a regime of individualized, discretionary exemptions that trigger[ed] strict scrutiny." *Id.* at 209–10.

Strict scrutiny likewise applies to Long Branch's zoning ordinances because they employ a "a system that permits individualized, discretionary

exemptions provid[ing] an opportunity for the decision maker to…give disparate treatment to cases that are otherwise comparable." 381 F.3d at 208 (internal citation omitted). This is true under both the C-1 district ordinance that applied when Lighthouse first sought to locate a church on its property, and under the more recent Redevelopment Guidelines.

With regard to the C-1 ordinance, all uses that are not permitted as of right or as a conditional use in that district must go through the City's variance procedure. In deciding upon variance applications, the zoning board has the discretion to first require "an opinion from the planning board as to whether or not the proposed use will be ***compatible*** with the master plan," as well as an opinion as to "whether or not the proposed use will ***adversely affect*** the overall zoning plan." Ordinance 20-5.6(c)(emphasis added). Such discretionary language, premising permits upon vague criteria such as compatibility and adverse effect, is indistinguishable from *Blackhawk*'s directive that uses comport with "sound game or wildlife management activities or the intent of [the Game and Wildlife Code]." *Blackhawk*, 381 F.3d at 209–10. Because such vague and discretionary

criteria provide an opportunity for decisionmakers to "discriminate[] against religiously motivated conduct," strict scrutiny applies. *Id.* at 209.[33]

The City has further entrenched a "regime of individualized, discretionary exemptions" in the Redevelopment Guidelines that apply to its redevelopment plan. That plan has supplanted the ordinary permit schemes with an intensive, highly discretionary inquiry into every conceivable use in the redevelopment zone encompassing Lighthouse's property. To develop any piece of property, a potential developer must first submit a "Request for Qualification" to the City, detailing his personal qualifications and "previous experience with development objectives for the sector." Def's 56.1 Statement ¶¶ 35–38; *see also* Apx. 91–92. If this person or group is approved as a developer, he must then proceed to the "very detailed process" of preparing an RFQ, which the City must also approve. Def's 56.1 Statement ¶¶33–36; *see also* Apx. 92. In addition to these two discretionary schemes, a church must also seek a "waiver of the prohibition on church use" in the zone. Def's 56.1 Statement ¶34. Each stage of this discretionary

[33] The discretionary nature of the City's zoning procedures are even more sweeping than the system of individualized exemptions in *Blackhawk*. Unlike myriad secular assembly uses, houses of worship must obtain a variance or conditional use permit before they are allowed to locate ***anywhere*** within Long Branch. Apx. 106. Like the variance procedure, Long Branch's CUP procedures also contain open-ended criteria, such as stating that "proper consideration" should be "given to existing conditions and character of the surrounding area." Long Branch Ordinance 20-9.1.

process leaves religious organization vulnerable to the whims of the City. It is unquestionably "a system that permits individualized, discretionary exemptions," and therefore subject to strict scrutiny. *Blackhawk*, 381 F.3d at 208.

III. THE LOWER COURT ERRED IN HOLDING THAT THE CITY HAD MET ITS ONEROUS BURDEN OF SATISFYING STRICT SCRUTINY.

As the Supreme Court reaffirmed just this term, "the burden [of satisfying strict scrutiny] is placed squarely on the Government." *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 126 S. Ct. 1211, 1220 (2006)(burden of proof under the strict scrutiny test is the same under the Free Exercise clause and statutes incorporating that test). To meet this burden, a "Government's mere invocation" of broadly defined interests "cannot carry the day." *Id.* at 1221. Rather, it must demonstrate both that an interest of the highest order is endangered ***in this particular case***, and that it has employed the least restrictive means necessary to further that interest. *Id.* at 1219–1221. The City has failed to meet this burden.

A. The City Has Failed to Assert a Paramount Interest of the Highest Order.

1. *Courts Construe the Compelling Interest Standard Narrowly.*

The Supreme Court has emphasized the stringency of its strict scrutiny analysis, calling it "the most rigorous of scrutiny…[A] law restrictive of religious practice must advance interests of the highest order and must be narrowly tailored in pursuit of those interests. The compelling interest standard that we apply once a law fails to meet the *Smith* requirements is not water[ed]…down but really means what it says." *Lukumi,* 508 U.S. at 546 (1993)(internal citations omitted); *Sherbert* v. *Verner,* 374 U.S. 398, 406 (1963) ("It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, 'only the gravest abuses [by religious adherents], endangering paramount interests, give occasion for permissible limitation [on the religious exercise].'").

Courts scrupulously follow the Supreme Court's instruction to classify only "paramount interests" of "the highest order" as worthy of burdening religious exercise. *See Sherbert,* 374 U.S. at 40 (protecting public safety and order); *Nat'l Treasury Employees Union* v. *Von Raab,* 489 U.S. 656, 677 (1989)(avoiding disclosure of sensitive governmental information); *Skinner* v. *Ry. Labor Executives' Ass'n,* 489 U.S. 602, 633 (1989)(railway safety)*; U.S.* v. *Lee,* 455 U.S. 252, 260 (1982)(compulsory participation in the Social Security system); *Warsoldier* v. *Woodford,* 418 F.3d 989, 998 (9th Cir.

2005)(prison security a compelling government interest under RLUIPA).

In the land use context, compelling interests have been described as those in preventing "a clear and present, grave and immediate danger to public health, peace and welfare," *First Covenant Church of Seattle* v. *Seattle*, 840 P.2d 174, 187 (Wash. 1992), such as fire safety and occupancy limits. *See, e.g.*, *Antrim Faith Baptist Church* v. *Commonwealth*, 460 A.2d 1228, 1230 (Pa.Cmwlth. 1983)("[J]ust as the state is entitled to prevent church buildings from being constructed too flimsily over the heads of the worshipers, the state is entitled to see to it that fire-safety precautions are taken").

2. *The City Failed to Assert a Paramount Interest of the Highest Order As a Matter of Law.*

Here, the City has conceded that the Mission ***does not*** endanger the health, safety or general welfare of Long Branch. When asked to provide documentation for any contention that Lighthouse's operation of a church on its property would endanger the health, safety, and general welfare, the City conceded that "There is no such contention." Apx. 99, 101 ¶¶ 42–44. Moreover, the City conceded that it made no contention that its prohibition of houses of worship in Lighthouse's zone under the Redevelopment Guidelines "protects the health, safety, and welfare." *Id.* at ¶ 46. Indeed, the City conceded that it made no contention that this prohibition of houses of

worship was even "rationally related to a legitimate governmental objective." *Id*. at ¶ 45. These concessions foreclose any argument that the City can satisfy strict scrutiny as a matter of law.[34]

Ignoring the City's concessions and the summary judgment standard requiring evidence to be construed in the Church's favor, the lower court simply declared that the City had satisfied strict scrutiny. In particular, the Court opined that the City had a compelling interest in "creating an artistic and dynamic commercial center in place of what has been a deteriorating downtown." 406 F.Supp.2d at 516. The lower court declared this interest compelling without a single citation to precedent—and for good reason. Courts routinely reject interests of this sort as non-compelling. Numerous courts have rejected commercial development, preservation of property values, and neighborhood character as non-compelling.[35] Courts have

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[34] At the very least, these concessions preclude summary judgment against the Church by creating a genuine issue of material fact as to whether the City has a compelling government interest.

[35] *See, e.g.*, *Love Church*, 671 F. Supp. at 519 ("The absence of commercial exchange in the case of a church does not threaten any compelling interest of Evanston."); *Westchester Day School* v. *Village of Mamaroneck*, 417 F.Supp.2d 477, 553 (S.D.N.Y. 2006)("Even assuming there were evidence supporting defendants' charge, there is reason to question whether the maintenance of property values constitutes a compelling governmental interest."); *XXL of Ohio* v. *Broadview Heights*, 341 F.Supp.2d 765, 789-90 (N.D. Ohio 2004)(rejecting protection of "neighborhood character" as a compelling government interest); *Keeler* v. *Mayor & City of Cumberland*, 940 F.Supp. 879, 886 (D. Md. 1996) (holding

similarly declined to find the aesthetic interest in addressing blight to satisfy strict scrutiny.[36] While some courts have held that aesthetic interests are "legitimate" or "important" interests, courts are unanimous in holding that they are ***not*** "compelling" as a matter of law.[37]

3. *The City Failed to Prove a Paramount Interest of the Highest Order As a Matter of Fact.*

Moreover, even assuming that an interest in aesthetics and commercial development might, in some hypothetical, never-before-seen set of circumstances, rise to the level of "compelling," the City did not carry its burden of proving the existence of a compelling interest in this case. Strict scrutiny jurisprudence assigns the government the burden of production and persuasion. *Burson* v. *Freeman*, 504 U.S. 191, 199 (1992) ("[t]o survive strict scrutiny...a State must do more than ***assert*** a compelling state interest,

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as ***not*** "compelling" the City's stated interests in: "safeguarding the heritage of the City…; stabilizing and improving property values…; …strengthening the local economy").

[36] *See Cottonwood Christian Center* v. *Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203, 1228 (C.D. Cal. 2002) (economic "'[b]light' can constitute an 'esthetic harm.')(citations omitted).

[37] *See, e.g., Dimmitt* v. *Clearwater*, 985 F.2d 1565, 1569-70 (11th Cir. 1993)("interest[] in aesthetics … is not a compelling government interest"); *Westchester Day School*, 417 F. Supp. 2d at 554 (same); *XXL of Ohio,* 341 F.Supp.2d at 789-90 (same); *Cottonwood*, 218 F.Supp.2d at 1227-28 (same); *King Enterprises* v. *Thomas Township,* 2002 WL 1677687, *18 (E.D.Mich. Jul. 24, 2002)(same); *Open Door Baptist Church* v. *Clark County*, 995 P.2d 33, 41 (Wash. 2000)(same); *Keeler,* 940 F. Supp. at 886 (D.Md. 1996)(same).

it must ***demonstrate*** that its law is necessary to serve the asserted interest."). In other words, "a court does not consider the [policy] in its general application, but rather considers whether there is a compelling government reason, advanced in the least restrictive means, to apply the [policy] to the individual claimant." *Kikumura* v. *Hurley*, 242 F.3d 950, 962 (10th Cir. 2001).

Here, the City offered wholly unsubstantiated assertions that having the Church in the commercial district would harm the City's interests. The lower court's statement that "[t]he presence of a church within th[e] [redevelopment] zone would ***most likely not*** contribute to" the development of an "artistic and dynamic commercial center" tellingly highlights that the City did not carry its burden of ***proving*** harm to its interest. 406 F.Supp.2d at 516.

The City's assertions of harm to its interest are belied by the City's concession that it made "***no*** contention" that prohibiting houses of worship in the redevelopment zone was "rationally related to a legitimate governmental interest." Apx. 99, 101 ¶45. Moreover, the City's Redevelopment Planner conceded that the City had not conducted any studies of the actual impact that churches would have on properties in the

redevelopment area. Apx. 109–10.[38] The City planner also conceded that such church activities as prayer gatherings, religious assemblies, religious training, and handing out food would ***not*** have a negative impact on the district. Doc. No. 103, Ex. F at 37, 39. In addition, that planner conceded that including a retail store on the first floor of the Church would make it "more compatible" with the district. Apx. 112.[39]

Nor, as discussed above, is there any foundation to the City's alleged concern about the impact of Lighthouse's presence on liquor licenses. Lighthouse is willing to perpetually waive its rights. Apx. 77 ¶ 66; *see also* N.J.S.A. 33:1-76.1 (modifying N.J.S.A. 33:1-76 to make waivers easier to obtain).

In sum, the City has utterly failed to bear its burden of proving that the inclusion of churches in Lighthouse's district would harm any alleged compelling government interest.

B. The City Failed to Prove That It Used the Least Restrictive Means of Serving Its Asserted (Non-compelling) Interest.

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[38] In light of the lack of studies, the planner was reduced to claiming that allowing a church in the redevelopment zone would harm, not the other property uses, but the ***church***. However, he could not identify any specific negative impact on the church, because that would be up to "the church to determine that." Doc. No. 103, Ex. F at 35.

[39] In addition, as discussed *supra* at § II(A)(1), the facts read in the light most favorable to Lighthouse indicate that the Church would serve the goals of the commercial district in several ways.

Under strict scrutiny, "it is the ***Government's obligation*** to prove that the [less restrictive] alternative will be ineffective to achieve its goals." *U.S.* v. *Playboy Entertainment Group,* 529 U.S. 803, 816 (2000)(emphasis added). "If a less restrictive alternative would serve the Government's purpose, the [government] ***must*** use that alternative." *Playboy,* 529 U.S. at 813 (emphasis added). To make this showing, the City must "demonstrate[] that it has actually considered and rejected the efficacy of less restrictive measures before adopting the challenged practice." *Warsoldier,* 418 F.3d at 999; *see also U.S.* v. *Hardman*, 297 F.3d 1116, 1130-31 (10th Cir. 2002)(ruling against government because "[t]he record is devoid of hard evidence" of narrow tailoring and "does not address the possibility of other, less restrictive means of achieving these interests."). The City has made no attempt to satisfy that burden here, and the lower court inexplicably concluded that the City had satisfied strict scrutiny without even considering the least restrictive means prong. *See Lighthouse*, 406 F. Supp. 2d at 516. For this reason alone, the decision should be vacated.

Moreover, courts weighing strict scrutiny must "look[] beyond broadly formulated interests justifying the general applicability of government mandates and scrutinize[] the asserted harm of granting specific exemptions to particular religious claimants." *O Centro*, 126 S. Ct. at 1220.

O Centro rejected government claims that its statutory scheme was "a 'closed' system that…'cannot function with its necessary rigor and comprehensiveness if subjected to judicial exemptions.'" *Id.* (internal citation omitted). This is strikingly similar to the City's claims that uses in its redevelopment area are "symbiotic" and that allowing the Church to locate there would "destroy" the neighborhood. *See* Doc. No. 103, Ex. F at 14-15. *O Centro* mandates that it is not sufficient for the City to merely invoke broad government interests; the City must prove that allowing Lighthouse to exercise its religion on its property would actually "destroy" the neighborhood. The City, however, has failed to marshal any competent evidence to support its burden of proof on this issue.

CONCLUSION

For the foregoing reasons, the lower court's judgment in favor of the City should be VACATED and judgment entered in favor of Lighthouse.

Respectfully submitted,

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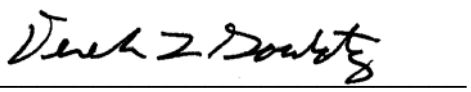
FOR RELIGIOUS LIBERTY



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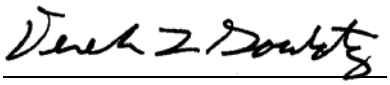
CERTIFICATE OF BAR MEMBERSHIP

I, DEREK L. GAUBATZ, hereby certify that I have been admitted before the bar of the United States Court of Appeals for the Third Circuit on November 15, 2002, and I am a member of good standing of the Court.

Date: May 31, 2006



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I hereby certify that pursuant to FED. R. APP. P. 32(a)(7)(C), the foregoing Appellant's Brief on Appeal is proportionally spaced, has a typeface of 14 points or more, and contains less than 14,000 words, as calculated by Microsoft Word.

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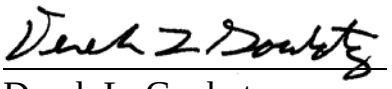

Derek L. Gaubatz

CERTIFICATE OF SERVICE

I, Derek L. Gaubatz, attorney for Plaintiffs-Appellants, hereby certify that I am duly authorized to make this certification - that on the 31st day of May, 2006, I did cause two (2) true and correct copies of Brief of Plaintiffs-Appellants and one (1) copy of the Appendix to be delivered by overnight delivery service to the following:

Howard B. Mankoff
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I also certify that on this 31st day of May, 2006, an electronic copy of the brief was sent via e-mail to Howard B. Mankoff at hbmankoff@mdwcg.com.

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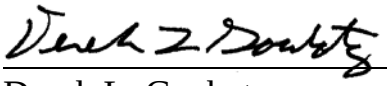

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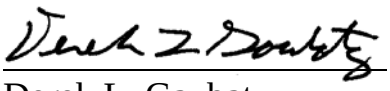

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